Nos. 14-17493, 14-17506, 14-17515, 14-17539

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, *et al.,*
Plaintiffs/Appellees/Cross-Appellants
v.

SALLY JEWELL, SECRETARY OF THE INTERIOR, *et al.,*
Defendants/Appellants/Cross-Appellees
and
THE HOOPA VALLEY TRIBE; THE YUROK TRIBE,
Defendant-Intervenors/Appellants/
Cross-Appellees
PACIFIC COAST FEDERATON OF FISHERMEN'S ASSOCIATION, *et al.*,
Defendant-Intervenors/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

REPLY AND RESPONSE BRIEF FOR FEDERAL DEFENDANTS/APPELLANTS/CROSS-APPELLEES

JOHN C. CRUDEN
Assistant Attorney General

ANNA K. STIMMEL
BRADLEY H. OLIPHANT
ELLEN J. DURKEE
Environment and Natural Resources Div.
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 514-4426
ellen.durkee@usdoj.gov

Of Counsel:
STEPHEN PALMER
Office of the Regional Solicitor
Department of the Interior
Sacramento, California

CARTER BROWN
Office of the Solicitor
Department of the Interior
Washington, D.C.

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GLOSSARY

1955 Act	Pub. L. No. 84-386, 69 Stat. 719 (1955)
1984 Act	Pub. L. No. 98-541, 98 Stat. 2721 (1984)
2000 ROD	Record of Decision issued December 2000
Board	State Water Resources Board
BOR	Bureau of Reclamation
Br.	Plaintiffs/Appellees/Cross-Appellants' brief, filed April 15, 2016
CVP	Central Valley Project
CVPIA	Central Valley Project Improvement Act
ER	Appellants' Joint Excerpts of Record, filed December 18, 2015
ESA	Endangered Species Act
Fed. Br.	Federal Defendants/Appellants/Cross-Appellees' brief, filed December 18, 2015
FER	Federal Defendants' and Yurok Tribe's Further Excerpts of Record, filed July 1, 2016
NMFS	National Marine Fisheries Service
RPA	Reasonable and Prudent Alternative
SER	Plaintiffs/Appellees/Cross-Appellants' Supplemental Excerpts of Record, filed February 26, 2016

INTRODUCTION

The agency action challenged in this case is the Bureau of Reclamation's ("BOR's") decision to make flow-augmentation releases from Lewiston dam during an approximately four- to six-week period in late August and September 2013 for the purpose of preventing a massive fish die-off in the lower Klamath River. As we explained in our opening brief, BOR's decision was a proper exercise of the Secretary of the Interior's authority under the 1955 Act "to adopt appropriate measures to insure preservation and propagation of fish," including releases from Lewiston dam, Pub. L. No. 84-386 § 2, 69 Stat. 719 [hereafter "1955 Act"]. *See* Fed. Br. at 31-53. The district court erred in holding that the Secretary's authority to adopt appropriate measures is "limited in geographical scope to the Trinity River basin" and therefore does not authorize BOR to implement flow-augmentation releases "to benefit fish in the lower Klamath River" (ER 85). *See* Fed. Br. 31-53.

In their answering brief, Plaintiffs offer a different rationale for affirming the judgment that BOR lacked authority under the 1955 Act. Plaintiffs contend that Section 3406(b)(23) of the Central Valley Project Improvement Act ("CVPIA") impliedly repealed the 1955 Act, terminating the Secretary's authority under the 1955 Act to release water from Lewiston dam to insure preservation of fish in the lower Klamath River. *See* CVPIA, Pub. L. No. 102-575 § 3406(b)(23), 106 Stat. 4600, 4720 (1992). There is, however, no irreconcilable conflict between the 1955 Act and CVPIA Section 3406(b)(23) that would warrant such conclusion.

In their cross-appeal, Plaintiffs pursue three claims on which the district court entered judgment in favor of Federal Defendants and against Plaintiffs. First, Plaintiffs argue that the district court incorrectly held that BOR's implementation of the 2013 flow-augmentation releases was not constrained by annual release volumes approved in a 2000 Record of Decision [2000 ROD] because the flow-augmentation releases were outside the scope of CVPIA Section 3406(b)(23) and the associated 2000 ROD. Second, Plaintiffs contend that the district court erred by holding that Plaintiffs failed to make the requisite showing at the summary judgment stage to establish standing to bring their claim alleging that BOR violated procedural requirements of the Endangered Species Act ("ESA"). Third, Plaintiffs claim that BOR was required to obtain a modification of state water permits from the State Water Resources Control Board ("Board") and that Board staff, BOR, and the district court wrongly determined that under state law, BOR did not need Board approval to implement the 2013 flow-augmentation releases.

JURISDICTIONAL STATEMENT FOR CROSS-APPEAL

Plaintiffs invoked district court jurisdiction under 28 U.S.C. §§ 1331 and 1346. ER 143. As explained in Argument Section IV, dismissal of Plaintiffs' ESA claim should be affirmed because Plaintiffs failed to carry their burden of establishing standing and because the claim is moot. On October 24, 2014, the district court entered final judgment and on December 23, 2014, Plaintiffs timely filed a notice of

cross-appeal. ER 84-86, 188-89; Fed. R. App. 4(a)(1)(B) & (a)(3). This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF ISSUES ON CROSS-APPEAL

1. Did the 2013 flow-augmentation releases violate CVPIA Section 3406(b)(23) by exceeding the annual volume of releases approved in the 2000 ROD?

2. Did Plaintiffs demonstrate standing for the claim alleging that BOR violated ESA procedural requirements? Is the ESA claim moot?

3. Should Plaintiffs' claim alleging that BOR was required to obtain approval from the State Water Resources Control Board for a modification of BOR's state water rights permits be dismissed when (1) this Court has declined to adjudicate similar claims because to do so would intrude on state sovereignty; and (2) the Board's staff correctly advised BOR that no Board approval was required to release water to improve instream conditions for the benefit of aquatic resources?

STATEMENT OF THE CASE

The Statement of the Case section of our opening brief (Fed. Br. 2-28) describes the agency action, proceedings below, and statutes pertaining to BOR's authority to implement the 2013 flow-augmentation releases. Additional statutory and factual background relevant to Plaintiffs' cross-appeal on their ESA and state water law claims are included within the respective arguments below.

SUMMARY OF ARGUMENT

BOR undertook the challenged 2013 flow-augmentation releases as a preventative measure to avert an epizootic disease outbreak and resulting large-scale fish die-off in the lower Klamath River. Studies of the massive fish die-off that occurred in 2002 identified increased water flow in the lower Klamath River as the only effective means to minimize the likelihood of another large-scale fish die-off under similar conditions.

BOR reasonably relied on the 1955 Act provision authorizing and directing the Secretary "to adopt appropriate measures to insure the preservation and propagation of fish," as the principal authority for implementation of the 2013 flow-augmentation releases. The Secretary's authority under this provision was not, as Plaintiffs' contend, impliedly repealed by CVPIA Section 3406(b)(23). Plaintiffs' argument fails in the face of the cardinal principles that (a) repeals by implication are disfavored and will be found only when there is an irreconcilable conflict and then only to the minimum extent necessary; and (b) statutes should be harmonized and each given effect to the fullest extent possible. The 1955 Act and CVPIA are properly given effect and harmonized by recognizing that the 2000 ROD release schedule governs releases for the purpose of restoring the Trinity River fishery by rehabilitating the mainstem Trinity River and that the Secretary retains her authority under the 1955 Act to release water to insure preservation of fish in the lower Klamath River. To the extent there is ambiguity, BOR's position should be accorded deference and upheld.

This Court should disregard Plaintiffs' alternative argument that the 1955 Act does not authorize the flow-augmentation releases because the releases allegedly do not address impacts on fish caused by the Trinity River Division. Plaintiffs did not make this argument in the trial court or in their comments in the administrative proceeding. If the Court nonetheless considers Plaintiffs' new argument, it should be rejected because it rests on an incorrect premise and because the 1955 Act contains no causation limitation on the Secretary's authority under the 1955 Act to adopt appropriate measures to insure preservation of fish.

* * * * *

This Court should affirm the district court's judgment rejecting Plaintiffs' claims. The district court correctly held that the 2013 flow-augmentation releases are outside the scope of, and therefore not constrained by, release volumes set forth in the 2000 ROD that BOR adopted pursuant to procedures set forth in CVPIA Section 3406(b)(23). The 2000 ROD releases provide flows designed to rehabilitate habitat in the mainstem Trinity River and thereby meet restoration goals of a 1984 Act referenced in CVPIA Section 3406(b)(23). The district court and BOR reasonably determined that flow-augmentation releases are outside the scope of CVPIA Section 3406(b)(23) and associated 2000 ROD given CVPIA Section 3406(b)(23)'s reference to the 1984 Act and the limited study area for the ongoing study that Section 3406(b)(23) directed the Secretary to complete and to implement recommendations to increase releases (under certain conditions). Plaintiffs' preferred result is not

compelled by the statute and its suggestion that 2000 ROD releases could be reduced in spring and early summer in order to reserve water for late-summer flow-augmentation releases would defeat the purposes of the ROD releases and would have been impractical in 2013.

The district court correctly dismissed Plaintiffs' claim alleging that BOR violated the ESA because Plaintiffs failed to carry their burden at the summary judgment stage to adduce specific evidence establishing the requisite injury traceable to BOR's alleged failure to follow ESA procedures. Furthermore, the ESA claim is moot and does not fall within the exception for claims capable of repetition yet evading review.

This Court should affirm the judgment dismissing Plaintiffs' claim that BOR was required by state law to obtain approval from the Board for a modification of water rights permits. The Board's staff correctly advised that BOR could release water without a change approval "to improve instream conditions for the benefit of aquatic resources." SER 399-400. In any event, consistent with this Court's precedent, this Court should not resolve the disputed issue of state law because doing so would intrude on state sovereignty and enforcement discretion.

REPLY ARGUMENT ON FEDERAL DEFENDANTS' APPEAL

I. The 1955 Act Authorizes BOR to Implement Flow-Augmentation Releases

Plaintiffs tacitly concede that the district court erred in holding that the 1955 Act "is limited in geographical scope to the Trinity River basin" (ER 76) by offering different rationales for upholding the judgment that BOR lacked authority under the 1955 Act to implement flow-augmentation releases. Specifically, Plaintiffs argue that (1) BOR's authority under the 1955 Act to release water from Lewiston dam to insure preservation and propagation of fish was impliedly repealed or amended (ER 48-65); and (2) even if the 1955 Act were not repealed, the Act would not authorize the flow-augmentation releases because they are not designed to address an adverse impact caused by the Trinity River Division (ER 65-69). Plaintiffs' arguments are meritless.

A. CVPIA Section 3406(b)(23) did not implicitly repeal the Secretary's authority under the 1955 Act to make releases to preserve fish in the lower Klamath River

CVPIA Section 3406(b)(23) clearly did not expressly repeal or amend the fish-protection provision of the 1955 Act. Plaintiffs contend that CVPIA Section 3406(b)(23) *impliedly* repealed or amended the 1955 Act such that the Secretary's authority under the 1955 Act to release water to preserve fish was terminated. Br. 56-65. Plaintiffs invoke the maxim that where two statutes conflict, the later-enacted, more specific statute controls. Br. 57. Plaintiffs' contention is incorrect.

As the Supreme Court explained in *Nat'l Ass'n of Home Builders v. Def. Of Wildlife*, 551 U.S. 644 (2007): "While a later enacted statute . . . can sometimes operate to amend or even repeal an earlier statutory provision . . . , repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Id.* at 662 (internal quotation marks and citations omitted); *see also id.* at 664 n.8 (implied amendments are no more favored than implied repeals). An implied repeal or amendment will only be found where provisions in two statutes are in irreconcilable conflict. *Id.* at 662; *Hellon & Assoc., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992). Likewise, the maxim that a later-enacted, more specific statute controls over an earlier and more general statute applies only when there is an irreconcilable conflict between the statutes. *International Ass'n of Machinists & Aerospace Workers, Lodge 751 v. Boeing Co.*, 833 F.2d 165, 169 (9th Cir. 1987); *see also Blanchette v. Connecticut General Ins. Corporations,* 419 U.S. 102, 134 (1974) (new statute will not be read as wholly or partially amending prior one unless there exists a positive repugnancy that cannot be reconciled). A corollary principle is that when two statutes

> are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. When there are two acts upon the same subject, the rule is to give effect to both if possible.

Morton v. Mancari, 417 U.S. 535, 551 (1974) (internal quotation marks omitted); *see also National Ass'n of Home Builders*, 551 U.S. at 678 ("no statute must yield unless it is truly

incapable of coexistence"); *Hellon & Assoc. Inc.*, 958 F.2d at 297 ("to the extent that statutes can be harmonized, they should be").

There is no irreconcilable conflict between the 1955 Act and CVPIA Section 3406(b)(23) that would justify holding that the Secretary's 1955 Act authority to make releases to prevent a massive fish die-off in the lower Klamath River was impliedly repealed. The two statutes address similar, but different issues, and have differing scopes. While the 1955 Act confers authority to insure the "preservation" of fish, CVPIA Section 3406(b)(23) addresses the distinct issue of "restoration." Plaintiffs suggest that the restoration goal of CVPIA Section 3406(b)(23) repealed and displaced the preservation directive of the 1955 Act because it is no longer sufficient to simply preserve the dwindling populations of anadromous fish. Br. 60-63. But as we explained in our opening brief, "restoration" and "preservation" of fish are related, but distinct concepts and the authorizations to make releases for both purposes can and should be given effect. *See* Fed. Br. 42. Moreover, the 1955 Act authority is not limited to preservation of salmon of Trinity River origin, nor is it geographically limited to the mainstem Trinity River. *See* Fed. Br. 31-46.

Plaintiffs suggest that a specific directive in Section 3406(b)(23) to implement permanent instream fishery flow requirements for the restoration of the Trinity River fishery governs over the more general directive in the 1955 Act to adopt appropriate measures to insure preservation and propagation of fish. Br. 57. In fact, Section 3406(b)(23) directs implementation (subject to the concurrence of the Hoopa Valley

Tribe and Secretary) of Trinity River Flow Evaluation Study recommendations to increase a minimum annual release of 340,000 acre-feet for the purpose of restoration of the Trinity River fishery. The Study was focused on the mainstem Trinity River and the recommended releases based on the Study, adopted in the 2000 ROD, were designed to rehabilitate the mainstem Trinity River itself so as to develop suitable habitat for fish present in the mainstem and thereby eventually to restore fish populations in the Trinity River basin. *See* ER 62-67; *infra* at 19-21. The flow-augmentation releases were for the purpose of preventing a massive die-off of fish present in the lower Klamath River, including fish that were not of Trinity River origin. *Id.*

Plaintiffs also suggest that it would be untenable to claim that the 1955 Act's authorization for fishery releases is "untouched" by Section 3406(b)(23).[1] Br. 58. But no such claim is necessary to hold that the Secretary retains authority under the 1955 Act to release water to preserve fish in the lower Klamath River. *See, e.g., In re Glacier Bay,* 944 F.2d 577, 582 (9th Cir. 1991) (when two statutes are partially in conflict,

[1] Plaintiffs suggest that is so because Section 3406(b)(23) provided that a minimum of 340,000 acre-feet of water shall be released annually, whereas the 1955 Act stated that appropriate measures include, but are not limited to, the maintenance of the flow of the Trinity River at not less than 150 cubic feet per second (cfs) from July through November. Br. 58. These provisions do not, however, conflict because both identify minimum, not maximum, releases and the provisions use different time periods and different measurements (volume v. flow velocity). Both remained applicable: there had to be a minimum annual release of 340,000 acre-feet and releases for the months of July through November could not drop below 150 cfs.

repeal is to be regarded as implied only if necessary and *only to the minimum extent necessary*). Section 3406(b)(23) and the 1955 Act are appropriately harmonized and given the fullest possible effect by recognizing that the 2000 ROD schedule governs releases for the purpose of restoring the Trinity River fishery by rehabilitating habitat in the mainstem Trinity River and providing suitable water quality and quantity for fish present there, and that the Secretary retains her authority under the 1955 Act to take measures to insure preservation and propagation of fish, including releases, for the purpose of preserving a broader category of fish present in a different geographic area, *i.e.*, the lower Klamath River.

B. BOR's position should be accorded deference

To the extent there is ambiguity in whether Section 3406(b)(23) repealed the Secretary's 1955 Act authority, the rules governing implied repeals dictate that the ambiguity be resolved against finding a repeal. This conclusion is reinforced by the deference that should be accorded to BOR's position. Plaintiffs incorrectly contend that BOR's position that the 1955 Act authorized the flow-augmentation releases is not entitled to either *Chevron* or *Skidmore* deference. *See* Br. 49-56. Although the challenged action was not undertaken by a formal rulemaking process, *Chevron* deference is not limited to formal notice and comment rulemaking. *See, e.g.*, *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995); *United States v. Mead*, 533 U.S. 218, 227 (2001); *cf. South Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003) (Corps of Engineers' manual on water operations

(which is not promulgated as a rule) is binding). Here, BOR's position resulted from a public process – the 2012 and 2013 Environmental Assessments went through a notice and comment period and received extensive comments from Plaintiffs regarding BOR's legal authority. Moreover, the 1955 Act accords the Secretary broad discretion to determine "appropriate measures" that should be taken to insure preservation and propagation of fish.[2]

Even if *Chevron* deference is inapplicable, BOR's position should be accorded *Skidmore* deference. *See* Fed. Br. 46-48. Plaintiffs suggest that *Skidmore* deference should not be accorded because BOR's position is supposedly inconsistent with extra-record documents indicating that in 2003 and 2004 BOR exchanged or purchased water to provide late-summer flow-augmentation releases (pursuant to authority conferred by CVPIA Section 3406(b)(3) and 16 U.S.C. § 742f)). Br. 55. But nowhere

[2] *Wilderness Society v. U.S. Fish and Wildlife Serv.*, 353 F.3d 1051 (9th Cir. 2003), cited by Plaintiffs (Br. 50-51), is distinguishable. The Court declined to accord *Chevron* deference to a position in an opinion letter prepared by the Department of the Interior Regional Solicitor's office that addressed a specific project in Alaska, but did not make broader conclusions respecting the permissibility of the type of enterprise under a provision of the Wilderness Act administered by multiple agencies and Departmental Secretaries. *Id* at 1068. By contrast, BOR's water-management decision here was made pursuant to statutory authority that is applicable only to a single, but highly complex, water-management project. This Court has recognized BOR's considerable discretion to determine how to operate the CVP in a manner so as to meet many competing obligations. *See Central Delta Water Agency v. Bureau of Reclamation*, 452 F.3d 1021, 1027 (9th Cir. 2006). Furthermore, in *Wilderness Society*, the Court stated that the agency's permitting decision went beyond the limits of what was ambiguous in the statute and contradicted what was "quite clear." 353 F.3d at 1068. BOR's position here does not contradict anything that is quite clear in the 1955 Act.

do the documents on which Plaintiffs rely state that BOR lacked authority under the 1955 Act to make the flow-augmentation releases or that BOR's discretionary authority to purchase or exchange was the only means by which BOR could undertake the action. BOR also did not assert in its 2013 decision or in district court that the 1955 Act fish-protection provision is the only source of authority. *See* Fed. Br. 28 n.9. Rather, the 1955 Act is a proper source of authority and the one on which BOR principally relied in 2012 and 2013. Furthermore, Plaintiffs fail to mention that from 2001 to 2004, the 2000 ROD releases were largely enjoined and releases from the Trinity River Division were governed by preliminary and permanent injunctions entered by the district court in *Westlands*. Following the massive fish die-off in 2002, the district court granted relief from its earlier injunction to allow BOR to release up to 50,000 acre-feet of water to avert a recurrence. ER 336; *see infra* at 21. Thus, ultimately court orders authorized the 2003 and 2004 flow-augmentation releases. For all these reasons, there is no merit to Plaintiffs' claim that deference is not owed because of agency inconsistency.

C. There is no merit to Plaintiffs' contention that even absent the CVPIA, the 1955 Act would not authorize the 2013 flow-augmentation releases

Plaintiffs argue for the first time on appeal that even in the absence of CVPIA Section 3406(b)(23) and the 2000 ROD, the 1955 Act would not authorize the flow-augmentation releases because, in Plaintiffs' view, the 1955 Act only authorizes the Secretary to adopt measures that address impacts to fish and wildlife caused by the

Trinity River Division. Br. 65-69. Plaintiffs further contend that the 2013 flow-augmentation releases were not such measures because during August and September 2013 outflows from Lewiston dam exceeded inflows to Trinity reservoir. Br. 21-22, 66.

This Court should not consider this argument because Plaintiffs failed to raise it in district court.[3] *See, e.g., Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1186 (9th Cir. 1997). There are no exceptional circumstances that could excuse Plaintiffs' failure to raise this argument in district court. *See id.* And the issue is not purely one of law – Plaintiffs rely on factual materials that were not in the administrative record and its argument assumes a factual premise that BOR had no reason to address below. *See supra* n.3. Plaintiffs also did not raise this issue in their comments on the proposed 2013 flow-augmentation and for that reason too this argument should not be considered. *See* SER 387-397; *Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 764-65 (2004).)

If the Court nonetheless considers Plaintiffs' argument, it should be rejected. Plaintiffs' claim that the flow-augmentation releases provided higher flows than would exist in the absence of the Trinity River Division is a function of the time frame that

[3] In briefing on cross-motions for summary judgment, Plaintiffs responded to the Tribes' argument that tribal trust responsibilities provided independent authority for the flow-augmentation releases by arguing that the Tribes' fishing rights only pertain to natural flows. *See* FER 2-3; ER 77-78. Plaintiffs' contention that the 1955 Act does not authorize releases that produce higher flows than would have occurred in the absence of the dams is a different and entirely new argument.

they chose to make a comparison – Plaintiffs compare inflows to Trinity Reservoir to outflows from Lewiston dam in August and September 2013. *See* Br. 65-66. But if a comparison were made over a different period of time, the result could be different. Since construction of the Trinity River Division, the majority of Trinity River water has been diverted south to the Sacramento River basin and thus flows are generally much lower than they would have been in the absence of the dams. *See* Fed. Br. 11-13. Furthermore, reliance on inflows and outflows during a limited time period to claim that conditions in the lower Klamath River were not caused by the Trinity River Division is overly simplistic given the radical changes to the natural functioning of rivers that have resulted from the Trinity River Division and other causes. For example, Trinity River Division operations eliminated deeper pools with cold water so that releases comparatively greater than those that historically occurred in summer have to be made to manage water temperatures. ER 706.

Plaintiffs also err in relying on a sentence in a 1974 memorandum written by an Assistant Regional Solicitor in a Regional Solicitor's office stating that "'the purpose of the [TRD] is to provide as much water as possible to the Central Valley.'" Br. 66, quoting SER 317. The question addressed in that memorandum was "whether operations of the Trinity River Division might legally be altered to provide flood control benefits downstream from Trinity and Lewiston dams." SER 314. The memorandum concludes that the 1955 Act does not authorize releases for flood control, but recognizes that releases to fulfill other in-basin needs are treated

differently. SER 316; *see also* SER 314-15 ("[u]tilizations of water benefitting the Trinity Basin . . . are set forth as exceptions to full integration [in the CVP]"). More importantly, a 1979 opinion by the Solicitor of the Interior makes clear that the 1955 Act integrated the Trinity River Division into the CVP subject to directions in section 2 of the Act, including the fish-protection provision, which provide that "in-basin needs take precedence over needs to be served by out-of-basin diversion." ER 135-136; *see* Fed. Br. 7.

Third, Plaintiffs assert that the word "preserve" is synonymous with "protect" and then *ipse dixit* proclaim that the 1955 Act only protects fish from impacts caused by the Trinity River Division. Br. 68. Contrary to Plaintiffs' suggestion, the plain language of the 1955 Act broadly charges the Secretary with taking "appropriate measures to insure the preservation and propagation of fish" and the statute nowhere limits the Secretary's authority to only those measures that protect against injury or destruction caused by the Trinity River Division. Plaintiffs incorrectly suggest that a 1981 Secretarial Decision that initiated the Trinity River Flow Evaluation Study supports its argument because it states that the 1955 Act provides authority "'to mitigate losses of fish resources.'" Br. 68, quoting ER 744 [sic: ER 743]. But the Secretarial Decision does not attribute losses of fish resources solely to operations of the Trinity River Division (*see* ER 744-46). Read in context, the Secretarial Decision states that the 1955 Act provides the Secretary with authority to mitigate (*i.e.*, lessen the severity of) losses of fish resources caused by multiple factors. This

understanding is fully consistent with the ordinary usage of "preserve" to mean "keep alive" or "maintain" or "protect from injury or harm." *See* Merriam-Webster online dictionary (http://www.merriam-webster.com/dictionary/preservation) (last visited June 30, 2016).

Plaintiffs suggest that the 1955 Act must be interpreted to only allow measures that mitigate impacts caused by construction and operation of the Trinity River Division because any other interpretation would be absurd as it would allow the Secretary "to dedicate an unlimited portion of the yield of the TRD to fishery and wildlife uses." Br. 67. But this case presents no occasion to claim an absurd result because the volume of water released for flow-augmentation in 2013 was modest (approximately 17,500 acre-feet (ER 47)) compared to the volume of Trinity River water diverted to the Central Valley (over 850,000 acre-feet (*see* http://www.trrp.net/restore/flows/water-year-summaries/ (last visited June 30, 2016)). And, as the district court found, the risk to the fishery of doing nothing was enormous. ER 15.

ARGUMENT ON CROSS-APPEAL ISSUES

II. Standard of Review for Cross-Appeal Issues

This Court reviews *de novo* questions of statutory interpretation and a district court's grant of summary judgment. *See Levine v. Vilsack*, 587 F.3d 986, 991 (9th Cir. 2009); *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005); Fed. Br. 30-31. This Court reviews BOR's 2013 decision

to undertake flow-augmentation releases under the deferential Administrative Procedure Act standard, which provides that an agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or contrary to law." 5 U.S.C. § 706(2). *See* Fed. Br. 30-31.

III. The 2013 Flow-Augmentation Releases Did Not Violate Section 3406(b)(23) of the Central Valley Improvement Act

Plaintiffs contend that BOR violated CVPIA Section 3406(b)(23) because the 2013 flow-augmentation releases were in addition to releases approved in the 2000 ROD. The district court rejected Plaintiffs' contention, holding that the 2013 flow-augmentation releases were outside the scope of Section 3406(b)(23) and associated 2000 ROD releases, and therefore the upper limits for releases under the 2000 ROD schedule did not constrain BOR's implementation of the 2013 flow-augmentation releases. This Court should likewise reject Plaintiffs' claim.

In order "to meet Federal trust responsibilities to protect fishery resources of the Hoopa Valley Tribe, and to meet the fishery restoration goals of the Act of October 24, 1984, Public Law 98-541," 98 Stat. 2721 [hereafter "1984 Act"], Section 3406(b)(23) directed the Secretary to release a minimum of 340,000 acre-feet per year from Lewiston dam into the Trinity River for water years 1992-1996, and by 1996 to complete the Trinity River Flow Evaluation Study, an ongoing study being conducted by the U.S. Fish and Wildlife Service, an agency within the Department of the Interior, so as to develop "recommendations regarding permanent instream fishery

flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River fishery." *Id.* § 3406(b)(23)(A). If the Study recommended increased releases and the Secretary and the Tribe concurred, the increases were to be "implemented accordingly." *Id.* § 3406(b)(23)(B). If the Secretary and Tribe did not concur, the 340,000 acre-feet minimum would remain in effect until increased by Congress, appropriate judicial decree, or an agreement between the Secretary and Hoopa Valley Tribe.

The study area for the ongoing Trinity River Flow Evaluation Study was limited to the mainstem Trinity River. *See* FER 11. The Study focused in particular on the 40-mile segment directly downstream from the Lewiston dam where degradation of habitat had been especially severe. ER 577, 581, 634-35, 672-79. The Study evaluated the effect of various release levels on the fluvial geomorphic processes of the mainstem Trinity River as these processes are important to restoring and maintaining habitat. Evaluation tools used in the Study were consistent with the limited geographic scope of the study area. For example, the Study relied on fish observations and habitat-use data collected for over a decade at 14 study sites, all of which were located on the mainstem Trinity River. FER 10-11. The Study included a temperature model calibrated specifically for the mainstem Trinity River and sites used to monitor water temperatures were located only on the mainstem Trinity River. FER 12-13. Another model used in the Study, SALMOD, was used "to evaluate the effect of varying environmental conditions (flows, water temperature, habitat

availability) on the number of naturally produced young-of-the-year chinook salmon in the Trinity River from Lewiston Dam downstream 25 miles." ER 633-634.

The Study ultimately recommended a combination of increased releases that varied by five water-year types, sediment management efforts (*e.g.*, gravel supplementation and dredging of pools), and mechanical channel rehabilitation (*e.g.*, building point bars and revegetation). ER 618-737. The premise of the recommendation was that this combination of actions would redirect geomorphic processes so that a more complex mainstem Trinity River will evolve, creating the mosaic of aquatic habitats necessary to enhance salmonid production. ER 726-28. Thus, the releases were "designed to restore, as much as possible, the natural alluvial nature of the Trinity River mainstem so that the river itself can provide suitable habitat for the fish returning to it" (ER 64) and to provide water quantity and quality, *e.g.*, water temperature, in the mainstem Trinity River for fish present there (ER 589, 687-88).

Interior prepared an Environmental Impact Statement ("EIS") to analyze the impacts of the Study's recommendations and of alternatives to the recommendations. The EIS stated that the goal of the action was to [r]estore and maintain a 'healthy' Trinity River mainstem downstream of Lewiston Dam." ER 577. Following the Tribe's concurrence, the Secretary adopted in the 2000 ROD the Study's recommendations for variable annual releases and mechanical actions. ER 534-39.

The 2013 flow-augmentation releases here are separate and distinct from the releases approved in the 2000 ROD. The purpose and targeted area for the flow-augmentation releases were outside the geographic scope of the Trinity River Flow Evaluation Study. In prior litigation involving the 2000 ROD brought by these same Plaintiffs, this Court rejected assertions that Interior improperly limited the geographic scope of the EIS and underlying Study to the Trinity River mainstem. *See Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866-67 (9th Cir. 2004). In that appeal, Plaintiffs also asserted that supplemental releases from the Trinity River Division to prevent a fish die-off in the Klamath River "are not part of the [2000] ROD" and are "beyond any provisions of the ROD, and beyond the scope of the process set forth in CVPIA section 3406(b)(23)" to support their argument that the district court erred by modifying an earlier injunctive order to allow BOR to make releases in 2003 to prevent a recurrence of the 2002 die-off in the lower Klamath River. [4] *See supra* at 13. (This Court dismissed as moot Plaintiffs' appeal from the district court's 2003 order authorizing flow-augmentation releases. *See Westlands*, 376 F.3d at 877.)

Consistent with Section 3406(b)(23) and the 2000 ROD, BOR reasonably concluded that the flow-augmentation releases were not subject to the annual volume

[4] *See* Federal Defendants' Motion to Take Judicial Notice, filed July 1, 2016, Ex. 3 & 4.

limitations in the 2000 ROD release schedule. The plain text of Section 3406(b)(23) does not preclude BOR's permissible interpretation of the statute.

A. The district court correctly held that the flow-augmentation releases were outside the scope of the 2000 ROD releases and were not precluded by CVPIA Section 3406(b)(23)

BOR and the district court had sound reason to conclude that the scope of Section 3406(b)(23) and associated 2000 ROD are limited to the mainstem Trinity River. Section 3406(b)(23) expressly references the restoration goal of the 1984 Act. The long-term goal of the 1984 Act was to "restor[e] fish and wildlife populations in the Trinity River Basin to a level approximating that which existed immediately before the start of the construction of the Trinity River division," Pub. L. No. 98-541 § 1(6), by formulating and implementing a fish and wildlife management program to "rehabilitate fish habitats in the Trinity River between Lewiston Dam and Weitchpec," and in "tributaries of [the Trinity River] below Lewiston Dam and in the south fork of such river," and to improve the Trinity River fish hatchery (located immediately downstream from Lewiston dam). Pub. L. No. 98-541, § 2, 98 Stat. 2721. Under general principles of statutory construction, this specification of geographic scope indicates that other areas, including the lower Klamath River, were excluded from the restoration program. *See Silvers v. Sony Pictures Ent.*, 402 F.3d 881, 885 (9th Cir. 2005) (when a statute designates certain things, omissions should be understood as exclusions). Strongly reinforcing that general principle here is the fact that in 1996 Congress expanded the reach of the 1984 Act to include in the restoration program

the rehabilitation of habitat in "the Klamath River downstream of the confluence with the Trinity River." *See* Trinity River Basin Fish and Wildlife Management Reauthorization Act, Pub. L. No. 104-143 § 3(b), 110 Stat. 1338 (1996). The addition of this language shows that Congress recognized that prior to 1996, the goals of the 1984 Act did not involve restoration in the lower Klamath River. Congress enacted CVPIA Section 3406(b)(23) prior to 1996 and by referencing the goals of the original 1984 Act, Congress incorporated the scope of the 1984 Act, which is limited to the Trinity River basin.[5] In *Westlands*, 376 F.3d at 867, this Court recognized that CVPIA Section 3406(b)(23) explicitly incorporates the 1984 Act directive to restore anadromous fish populations in the Trinity River basin and contemplates that implementation of the releases would benefit the mainstem Trinity River.

Plaintiffs suggest (Br. 44-45) that Section 3406(b)(23)'s reference to the fishery restoration goals of the 1984 Act only serves to incorporate the goal of increasing salmon populations in the Trinity River basin, but not the limited geographic scope of the habitat rehabilitation program to achieve this goal because, Plaintiffs contend, the 1984 Act was intended to address only non-flow measures and to authorize activities

[5] As the district court explained, the Reauthorization Act's expansion of the scope of restoration program did not serve to expand the scope of the earlier-enacted CVPIA Section 3406(b)(23). ER 61-62. Besides, the Trinity River Flow Evaluation Study was conducted between 1984 and 1997 (FER 9) and throughout the Study, the study area was limited to the mainstem Trinity River consistent with the limited scope of the 1984 Act (FER 11). *See also* ER 538 (2000 ROD does not preclude restoration in the lower Klamath River).

other than those related to operation of the Trinity River Division. Br. 44-45, citing 1984 Act §§ 1(4) & 1(6). Their supposition is incorrect. Section 1(4) of the 1984 Act recognized that inadequate erosion control and fishery practices had contributed to declines in fish populations. That recognition does not, however, signify that the restoration program that Congress directed be developed and implemented was therefore limited to actions that addressed the adverse impacts from these or other factors unrelated to the construction and operation of the Trinity River dams. Indeed, the 1984 Act begins with the finding that the Trinity River Division "substantially reduced the stream flow in the Trinity River Basin thereby contributing to damage to pools, spawning gravels, and rearing areas and to a drastic reduction in the anadromous fish populations," 1984 Act § 1(1), and then prescribes a restoration program to rehabilitate habitat in the mainstem Trinity River and its tributaries, *id.* § 2(a). Thus, the Act indicates that operation of the Trinity River Division is the major cause of habitat and fish-population declines in the Trinity River basin, and the key element to the solution.

Nor does Section 1(6) establish that the 1984 Act was concerned only with non-flow measures to rehabilitate habitat. It states that "the Secretary requires additional authority to implement a basin-wide fish and wildlife management program in order to achieve the long-term goal of restoring fish and wildlife populations in the Trinity River." *Id.* Plaintiffs incorrectly reason that because the Secretary already had authority under the 1955 Act to make releases from Lewiston dam for the benefit of

fish, releases were therefore excluded from the scope of the 1984 Act and restoration program. But the fact that the 1984 Act conferred additional authority does not signify an intent to exclude from the restoration program releases or other activities for which the Secretary had pre-existing authority. And contrary to Plaintiffs' suggestion (Br. 45), the description of activities to be included in the restoration program does not support their theory that the 1984 Act pertains only to non-flow activities. Plaintiffs assert that Section 2 "directed the Secretary to implement a fish and wildlife management program that would include the 'design, construction and maintenance of *facilities* to rehabilitate fish habitats'" in the mainstem Trinity and its tributaries. Br. 45, quoting with emphasis added, 1984 Act § 2(a)(1)(A)-(B). But Plaintiffs simply omit from their quotation the most relevant word – Section 2(a)(1) directs that the restoration program include "*operation*" of facilities to rehabilitate fish habitat. 1984 Act § 2(a)(1) (emphasis added). Releases are an "operation" of a facility (Lewiston dam) and the principal purpose for the 2000 ROD releases is to rehabilitate fish habitat in the mainstem Trinity River.

Section 3406(b)(23)'s directive to complete the ongoing Flow Evaluation Study and to implement Study recommendations to increase releases (subject to the concurrence of the Hoopa Valley Tribe and Secretary) reinforces BOR's and the district court's conclusion respecting the scope of Section 3406(b)(23). Because Congress directed completion of a particular ongoing Study, the limited scope of that Study is indicative of the scope of the statute. The Flow Evaluation Study was never

designed to, and did not in fact, study flow needs beyond the mainstem Trinity River. And the Study's release recommendations adopted in the 2000 ROD did not take into account flows needed to prevent a massive fish die-off in the lower Klamath River. The district court correctly held that the flow-augmentation releases were outside the scope of Section 3406(b)(23) and the 2000 ROD.

B. Plaintiffs' preferred result is not compelled by the plain language of Section 3406(b)(23)

Plaintiffs assert that the district court erred in concluding that CVPIA Section 3406(b)(23) is limited in scope to the Trinity River basin because "Congress intended to establish permanent annual releases of water from the TRD [Trinity River Division] for the Trinity River *fishery*, not for the Trinity River basin" Br. 30. Plaintiffs assert that "Trinity River fishery" means anadromous fish of Trinity River origin and reason that the scope of Section 3406(b)(23) was therefore as broad as the migratory range of these fish, *i.e.*, the Trinity River basin, lower Klamath River, and ocean. Br. 33. Plaintiffs contend that BOR thus has authority under Section 3406(b)(23) to release water from the Trinity River Division for the purpose of benefiting anadromous fish of Trinity River origin when they are present in the lower Klamath River, but only if the applicable annual release volume in the 2000 ROD is not exceeded by doing so.

Even assuming that "Trinity River fishery" refers to stocks of anadromous fish of Trinity River origin, the fact remains that the recommended releases, adopted in

the 2000 ROD, were only designed to restore the Trinity River fishery by rehabilitating the mainstem Trinity River below Lewiston in order to provide improved habitat for fish propagation and survival in this segment of River, which in turn would eventually lead to increased populations of fish in the Trinity River. ER 726-28. For reasons explained above, when Section 3406(b)(23) is properly read as a whole and in the context of the 1984 Act and Trinity River Flow Evaluation Study, it compels the district court's conclusion that the 2000 ROD releases implementing Section 3406(b)(23) had a limited scope and that the flow-augmentation releases were outside this scope. At the very least, the district court's interpretation is the better reading of CVPIA Section 3406(b)(23).

The district court's conclusion is not precluded by the language in Section 3406(b)(23) calling for the Study to develop recommendations "regarding permanent instream fishery flow requirements" and to implement recommendations to increase releases (subject to Hoopa Valley Tribe and Secretarial concurrence). The 2000 ROD adopted recommendations for increased releases for the purpose of rehabilitating the mainstem Trinity River, but the ROD does not preclude releases for other purposes or releases that target other areas.

While anadromous fish of Trinity River origin were among the fish that benefited from the 2013 flow-augmentation releases, the releases were for the benefit of a broader category of fish that also included anadromous fish of Klamath River

origin. In the 2002 die-off, a larger number of Klamath River Chinook died than fish of Trinity River basin origin. ER 482; FER 6.

Plaintiffs acknowledge that the district court "correctly observed that the focus of the releases adopted in the 2000 ROD was 'to restore, as much as possible, the natural alluvial nature of the Trinity River mainstem so that the river itself can provide suitable habitat for the fish returning to it.'" Br. 47 (quoting ER 64). Plaintiffs suggest, however, that it is of "little consequence" that the flow-augmentation releases fall outside the scope of the Trinity River Flow Evaluation Study, EIS, and 2000 ROD because the 2000 ROD cannot alter the CVPIA's purpose to establish and implement permanent annual volumes of water "for the restoration and maintenance of the Trinity River fishery." Br. 45, quoting CVPIA Section 3406(b)(23). Contrary to Plaintiffs' suggestion, the limited scope of the Study, EIS, and ROD is properly considered and relevant, especially because Section 3406(b)(23) directs completion of the ongoing Study and implementation of the Study's recommendations to increase releases (subject to the concurrence of the Tribe and Secretary). Section 3406(b)(23) is reasonably interpreted as having incorporated the scope of the Study and recommendations.[6] And to the extent that Section 3406(b)(23) is ambiguous,

[6] Plaintiffs' interpretation of CVPIA Section 3406(b)(23) implies that Section 3406(b)(23) required Interior to expand the scope of the Flow Evaluation Study to evaluate flow needs for fish in the lower Klamath River. Expansion of the scope of the Study did not occur because Interior did not interpret Section 3406(b)(23) to require it. But if Plaintiffs' interpretation were adopted instead of BOR's, then BOR

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deference is owed to BOR's interpretation of its scope as reflected in the Study, EIS, 2000 ROD, and 2013 decision.

C. Contrary to Plaintiffs' contention, the legislative history does not confirm that Congress intended that releases to prevent a massive fish die-off in the lower Klamath River be constrained by the 2000 ROD release schedule

Plaintiffs contend (Br. 34-36) that legislative history relevant to Section 3406(b)(23) supports their position. To the contrary, the legislative history is very limited and is equivocal at best. Plaintiffs emphasize Rep. Riggs' statement that "'if Congress did not act then the Trinity River basin fish task force *and the Klamath River basin fisheries task force* could very well fail in their congressional mandate to restore and preserve the *Klamath-Trinity fishery*.'" Br. 36, quoting with emphasis added, 102 Cong. Rec. H4844 (daily ed. June 20, 1991). The Klamath River basin fisheries task force was established in a 1986 Act that called for restoration of anadromous fish populations to optimal levels in the Klamath River Basin Conservation Area, an area that includes the lower Klamath River, but not the Trinity River basin. *See* Pub. L. No. 99-552, 100 Stat. 3080 (1986) (codified at 16 U.S.C. § 460ss *et seq.*); H.R. Rep. No. 99-894, 99th Cong., 2d Sess. 10 (1986); *see also id.* at 7-8 (1984 Act concentrates on habitat restoration for fish in Trinity River basin, but there are broader fishery

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should be permitted to comply with Section 3406(b)(23) by conducting an expanded study and implementing any resulting recommendations respecting flow needs in the lower Klamath River in accordance with the process set forth in Section 3406(b)(23).

concerns in Klamath Basin). But Congress did not reference the 1986 statute in the text of CVPIA Section 3406(b)(23), nor does the statutory text provide that releases established under the Section 3406(b)(23) process are for the purpose of restoring the Klamath fishery. Furthermore, Rep. Riggs stated that Section 3406(b)(23) will ensure completion of the Trinity River Flow Evaluation Study and "will maintain the schedule and pace of the Trinity River restoration program." 102 Cong. Rec. H4844. This suggests that releases under Section 3406(b)(23) were understood to be part of the 1984 Act restoration program and this understanding is consistent with the statutory language.

Furthermore, strikingly absent from the legislative history pertaining to Section 3406(b)(23) is any support for Plaintiffs' suggestion that a central purpose of Section 3406(b)(23) was to limit permanently the volume of releases for the benefit of fish. Instead the legislative history confirms that the purpose of Section 3406(b)(23) was to benefit fisheries and the Hoopa Valley Tribe, whose reservation encompasses the lower mainstem Trinity River to the confluence with the Klamath River, but not the lower Klamath River itself, which runs through the Yurok Reservation until it reaches the Pacific ocean. It serves neither the fishery restoration purpose of Section 3406(b)(23) nor the fish preservation purpose of the 1955 Act to preclude BOR from making releases to prevent a massive fish die-off in the lower Klamath River.

D. Plaintiffs' suggestion that BOR could forego making ROD releases in spring and early summer in order to reserve water for late-summer flow-augmentation releases is meritless

Plaintiffs suggest (Br. 47) that their preferred interpretation would still allow BOR to implement late-summer flow-augmentation releases to prevent massive fish die-offs in the lower Klamath River because BOR could alter the seasonal or daily release schedule for 2000 ROD releases within a given water year in order to reserve sufficient water for late summer flow-augmentation releases for those occasions when conditions warrant them. This suggestion is flawed because (1) it would be inconsistent with, and defeat the purposes of, the 2000 ROD releases and thus of Section 3406(b)(23); and (2) it would have been impractical and imprudent in 2013.

The seasonal release pattern set forth in the 2000 ROD is designed not only to provide water of sufficient quantity and quality (including temperature) for appropriate salmonid spawning and rearing habitat and passage within the mainstem Trinity River, but also to flush fine sediments and provide other geomorphic benefits in the mainstem Trinity River that combined with other actions would restore a healthy alluvial river, which is the key to restoring fish populations in the basin. The 2000 ROD calls for different release volumes depending on the water-year type and the difference in releases among water-year types occurs only in spring and early summer. For all water-year types the highest magnitude releases occur during this time period. The pattern and volumes were developed to provide fluvial geomorphic processes and suitable temperature and flow conditions in the mainstem Trinity River

for outmigrating salmonid smolts. ER 590. Reducing flows in spring and early summer, as Plaintiffs implicitly propose, would defeat the specific purposes for which the ROD flows were developed and which were based on decades of detailed scientific study. Furthermore, the expertise agencies' scientific and technical determinations and predictive estimates respecting the pattern of flows and project operations to achieve desired conditions are entitled to substantial deference. *See, e.g.*, *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375-77 (1984).

Second, it would have been impractical and imprudent for BOR to have substantially altered the pattern of 2000 ROD releases during spring and early-summer 2013 for the purpose of reserving water for late-summer flow-augmentation releases. As a practical matter, Reclamation could not determine the need for the 2013 flow-augmentation releases when the decision regarding the spring and early-summer ROD releases was made and implemented because it was not clear how dry 2013 would become, particularly in light of very wet conditions in December 2012. *See* ER 589 (adaptive management program typically convenes in winter to make decisions concerning coming year's releases). The need for late-summer flow-augmentation did not become apparent until later in the water year.

The need for flow-augmentation releases arises from heightened risk of a massive fish die-off posed by a confluence of conditions within the lower Klamath River in late summer that sometimes, but not annually, occurs. In most years, diminishment of spring and early-summer downstream flows to reserve water would

be unnecessary, as well as detrimental. Routinely reducing spring or early summer releases in order to reserve water just in case conditions later develop that warrant late-summer flow-augmentation releases would imprudently diminish downstream flows at the very times that the Flow Evaluation Study recommended that heightened or pulse flows be made. Moreover, water years run from October 1 and thus the need for flow-augmentation releases in late August and September arises at the very end of the water year when the 2000 ROD annual release volume is nearly depleted, which further reduces flexibility to make adjustments.

Although adaptive management may in the future allow for certain within-year alterations to the ROD's flow schedule based on Restoration Program results and objectives, Interior reasonably concluded that such changes to the hydrographs should not occur prior to full implementation of the restoration program adopted in the ROD. That program has yet to be fully implemented, due in part to delays caused by litigation challenges brought by Plaintiffs. For all these reasons, in 2013 it would not have been prudent or practical to reduce 2000 ROD releases earlier in the water year in order to reserve water for late-summer flow-augmentation releases.

IV. This Court Should Affirm Dismissal of Plaintiffs' ESA Claim

Plaintiffs' amended complaint alleged that BOR violated Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, by failing to conduct any ESA consultation on the effects of the 2013 flow-augmentation releases on listed species. ER 160. Plaintiffs' allegations are factually and legally incorrect, but as an initial

matter, there are obstacles to review of the merits. The district court correctly dismissed Plaintiffs' ESA claim because Plaintiffs failed to make the requisite evidentiary showing at the summary judgment phase to establish standing. In addition, the claim is moot.

A. In 2013 BOR properly considered the effect of flow-augmentation on listed salmonid species

ESA Section § 7(a)(2) provides that each federal agency shall, in consultation and with the assistance of the Secretary of the Interior or Commerce, depending on the species, "insure that any action authorized, funded, or carried out by such [action] agency . . . is not likely to jeopardize the continued existence of any endangered . . . or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). Section 7(b), 16 U.S.C. § 1536(b), and implementing regulations, *see* 50 C.F.R. pt. 402, address the consultation process. If an action agency determines that its proposed action will have no effect on listed species, ESA consultation requirements are not triggered. If the action agency determines that an action "may affect" a listed species or critical habitat, it is required to consult with the relevant consulting agency. 50 C.F.R. § 402.14(a). Consultation may be either informal or formal. Informal consultation "includes all discussions, correspondence, etc.," between the consulting agency and the Federal action agency "designed to assist the Federal [action] agency in determining whether formal consultation or a conference is required." 50 C.F.R. § 402.13(a). If, as a result of

informal consultation, the action agency determines, with the written concurrence of the consulting agency, that the proposed action is not likely to adversely affect any listed species or critical habitat, formal consultation is not required. *See* 50 C.F.R. § 402.14(b)(1); *see also id.* § 402.13(a). Formal consultation culminates in the consulting agency's preparation of a biological opinion. *See* 50 C.F.R. § 402.14(a) & (g); *see also* 16 U.S.C. § 1536(b). A biological opinion addressing an agency's long-term management plan may fulfill the requirements of ESA § 7 for future actions consistent with the opinion. *See* ER 50; *Buckeye Forest Council v. U.S. Forest Service*, 378 F. Supp. 2d 835, 842-43 (S.D. Ohio 2005). If an action agency and consulting agency have initiated or reinitiated consultation, ESA Section 7(d) provides additional guidance regarding the activities the action agency may undertake while consultation is ongoing. Section 7(d) provides that the action agency "shall not make any irreversible or irretrievable commitment of resources" during consultation "which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures" that would avoid jeopardy. 16 U.S.C. § 1536(d).

In 2009 the National Marine Fisheries Service ("NMFS"), the consulting agency for anadromous fish, issued a biological opinion concluding that proposed CVP operations (and coordinated operations of the State Water Project) would jeopardize the continued existence of four listed salmonids that use Central Valley waterways. *See San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971 (9th Cir. 2014). As contemplated by 16 U.S.C. § 1536(b)(3)(A), NMFS developed a

reasonable and prudent alternative ("RPA") that, if implemented, would avoid jeopardy to these species and BOR provisionally decided to implement the RPA. *Id.* at 988. Water users challenged the 2009 biological opinion/RPA and in 2011, a district court adjudged the biological opinion/RPA to be arbitrary and capricious and remanded (without vacatur of the biological opinion/RPA) to the agencies for further consultation. Ultimately this Court upheld the validity of the 2009 biological opinion/RPA. *Id.*, 776 F.3d at 1010. However, because of the district court's remand order, when BOR was considering the 2013 flow-augmentation releases, BOR and NMFS were engaged in consultation on CVP operations for the Central Valley listed salmon. ER 242.

Reclamation and NMFS biologists worked closely together to develop the recommendations that formed the basis for the 2013 decision to implement flow-augmentation releases and in this process considered the action's potential effects to listed salmon. ER 229. BOR determined that implementation of the proposed 2013 flow-augmentation releases prior to receiving a new biological opinion on CVP operations would not violate ESA section 7(d) of the ESA because, *inter alia*, in 2013 (a) the flow-augmentation releases would not diminish planned diversions from the Trinity River Division to the Sacramento River basin; (b) BOR retained sufficient operational flexibility to satisfy all temperature and flow requirements for the Central Valley listed salmon; and (c) flow-augmentation releases would not prevent implementation of the 2009 RPA that NMFS had concluded would avoid jeopardy to

those species. *See* ER 49, 196, 222-223, 229, 242-43. BOR stated that the effect of flow-augmentation releases on available cold water resources used to meet temperature objectives in 2014, if any, would be minor. ER 195-96, 222-223.[7]

B. Plaintiffs failed to adduce sufficient specific facts to establish standing

To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) a causal connection between the injury and the conduct complained of, that is the injury must be "fairly traceable to the challenged action of the defendant"; and (3) "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). The party asserting federal jurisdiction bears the burden of demonstrating standing as to each of these three elements "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted); *Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1149 n. 4 (2013). On a summary judgment motion, a plaintiff cannot rest on mere allegations, but must set

[7] Consultation on CVP operations on Southern Oregon/Northern California Coast coho salmon (SONCC coho salmon), a listed species that uses the Trinity and Klamath Rivers, was also ongoing in 2013. ER 229. (NMFS elected not to address this species in the 2009 biological opinion and instead to issue a separate opinion. ER 229.) The group involved in development of the 2013 flow-augmentation recommendations, including NMFS representatives, concluded that the flow-augmentation releases may have minor benefits to SONCC coho salmon. ER 229.

forth by affidavit or other evidence specific facts establishing each element of standing. *See Lujan*, 504 U.S. at 561; *Clapper*, 133 S. Ct. at 1149 n. 4. "A plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth*, 528 U.S. at 185.

Plaintiffs failed to carry their burden of establishing an injury-in-fact that is fairly traceable to the alleged failure to consult on the 2013 flow-augmentation releases. A concrete injury-in-fact is an irreducible minimum for standing, including claims alleging a procedural violation. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016); *Summers v. Earth Island Institute*, 555 U.S.488, 497-98 (2009). Plaintiffs' concrete and direct interest is in delivery of CVP water to their members. ER 54. The flow-augmentation decision did not change allocations or water deliveries to Plaintiffs in 2013 and thus Plaintiffs suffered no actual injury. Accordingly, Plaintiffs rely on a threat of future injury. But to constitute injury-in-fact, a "'threatened injury must be *certainly impending*'" and "'[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 133 S. Ct. at 1147 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphasis in original).

For its ESA claim, Plaintiffs alleged injury based on the theory that (1) flow-augmentation releases threaten to impair the status and recovery of listed Central Valley salmon by reducing cold water storage in the Trinity Reservoir and thereby could limit Reclamation's ability to comply with temperature criteria in the Sacramento River basin; and (2) a deterioration in the status or condition of these

species may in turn result in more stringent regulation of water supply by third-party agencies in the future that will harm Plaintiffs' economic interest in water deliveries. *See* ER 54-55.

For standing, Plaintiffs principally relied on declarations from Daniel G. Nelson, then Executive Director of the San Luis & Delta-Mendota Water Authority. Nelson states that the Authority's member agencies are located south of the Sacramento-San Joaquin Bay Delta and are reliant on water pumped from the south Bay Delta. SER 111-12. Nelson states that in the past "members have experienced substantial losses of water supply due to measures intended to protect" listed fish and cites as an example restrictions on pumping in the south Bay Delta that are not at issue here. SER 111-112, 302. Nelson asserts that "[e]xperience from living under the biological opinions for CVP operations . . . teaches that when ESA-listed species affected by CVP operations do poorly, the CVP water supply for Authority members will do poorly too." SER 303. Nelson states that "[t]here is concern" that the flow-augmentation releases "may adversely affect" listed Central Valley salmon by depleting cold water storage in the Trinity Reservoir and thereby limiting Reclamation's ability to maintain environmental conditions, including water temperatures, to benefit ESA-listed species in the Sacramento River basin.[8] SER 303.

[8] Nelson also states that "there is a concern" that increased flows in the Trinity River "may adversely affect listed [SNOCC] coho salmon in the Trinity River." SER 303. But Plaintiffs fail to explain or specify the supposed adverse effect to this species or

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Nelson acknowledged that he is "not a biologist" and offered no opinion on the severity of alleged impacts to listed species or what measures may be taken to limit or avoid them. SER 303.

Nelson's declaration is inadequate to establish standing. BOR concluded that it retained sufficient discretion and flexibility to meet temperature criteria in the Sacramento basin. *See supra* at 36. As the district court found (ER 55-56), the record does not support Plaintiffs' assertion that the flow-augmentation releases threaten to impair the status and recovery of Central Valley listed salmon by reducing the total volume of Trinity River Division water available to be diverted to the Sacramento River basin to maintain cold water temperatures for listed Central Valley salmon.

And Plaintiffs' assertion that potential future deterioration in the status of listed species attributable to the flow-augmentation releases could in turn lead to more regulatory restrictions imposed by third party agencies that will injure Plaintiffs' interest in water deliveries is based on a speculative chain of possibilities and on generalized assertions that are insufficient at the summary judgment stage of the case. *Cf. Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 13 (D.C. Cir. 2011) (allegation of increased risk of regulation was not sufficient to confer standing).

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how such adverse effect would injure their water deliveries south of the Bay Delta. Plaintiffs' passing mention of SONCC coho salmon in their opening brief (*e.g.*, Br. 82) fails to show error in the district court's ruling with respect to this species.

Thus, the district court rightly concluded that Plaintiffs lacked standing because they had not met their burden to establish that the flow-augmentation releases were likely to harm their interests "*to any degree of probability*, let alone to a 'reasonably probable' degree." ER 55-56 (emphasis added). Plaintiffs suggest (Br. 83) that this ruling is incorrect because under this Court's precedent, a "'credible threat' of harm is sufficient." Br. 83. Plaintiffs' argument is meritless. This Court has in some cases looked for a "reasonable probability" that the challenged action threatens a plaintiff's concrete interest. *E.g.*, *Center for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011); *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961, 970 (9th Cir. 2003). And the cases cited by Plaintiffs (Br. 83) illustrate that in order to establish a "credible threat," a plaintiff must adduce specific evidence showing probability or likelihood that the alleged threatened harm will ensue.

Cent. Delta Water Agency v. United States, 306 F.3d 938, 950 (9th Cir. 2002) is instructive of the burden that must be met. In that case, farmers challenged a BOR decision to make releases from the New Melones dam in the spring for fishery purposes that the farmers charged would leave inadequate water in storage to meet salinity requirements for water delivered to them later in the summer, with resultant harm to their crops. This Court stated that the necessary showing for standing purposes was not for plaintiffs to show that their crops had already been damaged, but instead that "plaintiffs face[d] *significant risk*" that their crops would not survive as a result of the BOR water-management decision. *Id.*, 306 F.3d at 950 (emphasis

added). In considering whether plaintiffs had provided sufficient evidence of a "credible threat" of injury, the Court recognized that this inquiry entailed an analysis of the likelihood of future harm, including consideration of whether a chain of contingencies would have to occur before the future harm would be realized. *Id.* The evidence that the Court found sufficient to show that the spring releases posed a credible threat of damage to plaintiffs' crops included modeling prepared by BOR itself that forecasted violations of the salinity standard during 16% of the months that comprised plaintiffs' growing season. *Id.* at 948, 950. Based on this and other evidence, including evidence that excess salinity would damage crops, the Court concluded that plaintiffs had established that the risk of future injury was a sufficiently credible threat to suffice as injury-in-fact for standing purposes.

Here, in contrast, BOR retained sufficient flexibility and discretion to meet temperature requirements in the Sacramento basin and Plaintiffs failed to adduce specific evidence showing otherwise. Contrary to Plaintiffs' suggestion (Br. 83-84), they do not carry their evidentiary burden to establish a credible threat of harm simply by pointing out that releases reduce the total quantity of cold water storage and citing evidence that "inadequate" cold water storage would adversely impact listed species Br. 84. These assertions do not establish a significant risk that cold water storage would be inadequate as a result of the flow-augmentation releases. Plaintiffs' evidentiary support falls far short of evidence found sufficient in *Central Delta Water Agency*.

In *Nat. Res. Def. Council v. U.S. E.P.A.,* 735 F.3d 873, 878 (9th Cir. 2013), another case cited by Plaintiffs, this Court held that plaintiffs established a credible threat sufficient to establish standing because the challenged pesticide registration increased the probability of their children's exposure to the pesticide from "roughly no chance" to "quite high." *Id.*, 735 F.3d at 879. Here Plaintiffs made no comparable showing of high probability of harm.[9]

In sum, the cases cited by Plaintiffs (Br. 83) dispel the notion that the credible threat inquiry does not entail consideration of the probability that threatened harm will ensue. Because Plaintiffs here failed to adduce specific facts on summary judgment to show "any degree of probability" of injury (ER 56), they necessarily failed to show a "credible threat" of injury to their economic interests that suffices for injury-in-fact. The requirement of particularized and concrete injury-in-fact is a hard floor and this requirement cannot be satisfied by alleging a bare procedural violation. *Summers*, 555 U.S. at 497; *Spokeo*, 136 S. Ct. at 1549-50. Accordingly Plaintiffs' argument (Br. 84-86) that the causation and redressability elements for standing are relaxed for claims alleging a procedural violation is unavailing.

[9] Neither the facts nor claims here are analogous to those in *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1140 (9th Cir. 2010). Plaintiffs in *Krottner* alleged negligence and breach-of-contract claims against their employer for failure to protect their personal data. *Id.*, 628 F.3d at 1142. The Court held that under the factual circumstances – in particular, the fact that the employer's laptop containing their unencrypted personal data was stolen – the risk of identity theft resulting from the employers' negligence was sufficiently real and immediate to satisfy the injury-in-fact element for standing.

Plaintiffs' reliance (Br. 79) on *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997), is also misplaced. Plaintiffs in *Bennett* were ranchers and irrigation districts seeking review of the Fish and Wildlife Service's biological opinion concerning operation of the Klamath Irrigation Project. *Id.* 520 U.S. at 157. The biological opinion concluded that proposed operations were likely to jeopardize the continued existence of listed fish species and identified an RPA to avoid jeopardy, which included maintenance of minimum water levels in reservoirs. Plaintiffs alleged that this RPA measure would reduce the amount of available water for irrigation and thereby adversely affect their economic interests. Thus, Plaintiffs relied on their economic interest in water deliveries to oppose measures to protect listed species. The Supreme Court held that plaintiffs' economic injury from over-enforcement of ESA Section 7 fell within the ESA's zone of interest. *Bennett*, 520 U.S. at 164. Contrary to Plaintiffs' suggestion (Br. 80), the district court here did not dismiss the ESA claim based on a zone-of-interests test. Rather, the court assumed that consultation procedures were designed to protect Plaintiffs' interests, and held that Plaintiffs failed to adduce sufficient evidence at the summary judgment to establish Article III standing. ER 55. Notably, with respect to Article III standing, *Bennett* held that plaintiffs' general allegations of harm were sufficient at the pleading stage to survive a motion to dismiss for lack of standing, but to survive subsequently at the summary judgment stage, they would

have to set forth specific facts to establish standing and to support contested facts with evidence. 520 U.S. at 168.[10]

C. The ESA challenge to the 2013 flow-augmentation releases is moot

The district court's dismissal of the ESA claim may be affirmed on the alternative ground that the claim is moot. The challenged BOR decision authorized flow-augmentation releases only in August and September 2013 and the releases were completed in mid-September 2013. Those releases cannot be undone and further ESA consultation on this short-term action completed nearly three years ago would serve no practical purpose.

Moreover, Plaintiffs' ESA claim does not fit within the "capable of repetition, yet evading review" exception to mootness. Although in 2014 and 2015, BOR again implemented short-term flow-augmentation releases, in 2015 BOR followed different procedures for the Central Valley listed salmon. When BOR made its decisions on 2013 and 2014 flow-augmentation releases, BOR and NMFS were actively engaged in formal consultation on CVP operations for these species. *See supra* at 35-36. Because consultation on CVP operations for these species was already ongoing, BOR made a Section 7(d) determination. But when BOR decided to implement flow-augmentation releases in 2015, the agencies were no longer in consultation on CVP operations for

[10] *Pacific Northwest Generating Cooperative v. Brown*, 38 F.3d 1058 (9th Cir. 1994), also does not compel the conclusion that Plaintiffs carried their burden of adducing sufficient evidence establishing injury-in-fact at the summary judgment stage because that case addressed causation, redressability, and zone-of-interest standing.

these species and instead were operating the CVP in accordance with a valid biological opinion/RPA. In 2015, BOR sought and obtained NMFS's written concurrence that proposed 2015 flow-augmentation releases were consistent with the biological opinion/RPA and that formal consultation was therefore not required.[11]

And, while the duration of past decisions to implement flow-augmentation releases was sufficiently short to evade review, BOR is currently in the process of developing a long-term plan to protect adult salmon in the lower Klamath River. *See* 80 Fed. Reg. 41061 (July 14, 2015). A long-term plan is expected to be of sufficient duration to allow judicial review. For all these reasons, Plaintiffs' ESA claim is moot.

V. This Court Should Affirm Dismissal of Plaintiffs' Claim Alleging that BOR Violated State Water Law

The Reclamation Act of 1902 (which is codified as amended in various sections within 43 U.S.C. §§ 372-498) established a "massive program" administered by BOR, for the federal government "to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States." *California v. United States*, 438 U.S. 645, 650 (1978). Section 8 of the Act provides that the Secretary of the Interior, "in carrying out the provisions of this Act, shall proceed in conformity" with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation," 43 U.S.C. § 383, as long as the laws are consistent with federal law. *See California*, 438 U.S. at 645; *San Luis Unit Food Producers v. United States*, 709 F.3d 798,

[11] *See* Federal Defendants' Motion for Judicial Notice, filed July 1, 2016, Ex. 2.

806 (9th Cir. 2013). "[T]he purpose of section 8 is to protect the State's sovereign authority to regulate the appropriation and use of state waters." *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 797 (9th Cir. 2013).

Plaintiffs contend (Br. 87) that BOR violated California water law and thus Section 8 of the Reclamation Act by failing to obtain permit modification approval from the State Water Resources Control Board for the flow-augmentation releases. Plaintiffs specifically allege (Br. 87) that BOR violated Cal. Water Code § 1381, which provides that "'[t]he issuance of a [State] permit gives the right to take and use water only to the extent and for the purpose allowed in the permit'" and Cal. Water Code § 1701, which provides that a permittee may change a purpose of use or a place of use "only upon permission" of the Board. BOR holds permits for the CVP and the purpose of use for BOR's permits includes fish and wildlife propagation, fish and wildlife enhancement, and fishing. *E.g.*, SER 189, 201, 205, 405. But BOR's permits do not include within the "place of use" either the mainstem Trinity River below Lewiston or the lower Klamath River. SER 412. This is because State law does not require the natural river course to be designated as a place of use when a dam operator releases water through the dam. SER 399-400. And even though BOR has released water from Lewiston dam into the lower Trinity River to provide instream flow for fish for over 50 years without complaint from the Board, Plaintiffs claim that BOR had to obtain a permit modification changing the place of use in order to implement the flow-augmentation releases.

BOR determined that State law did not require a permit modification in order to make the flow-augmentation releases. SER 412; FER 1. But to be sure, BOR sought confirmation from the Board in 2012 using an established Board procedure (a temporary change petition) that was the best-suited process for obtaining confirmation. SER 403-418; FER 1. An August 2012 letter from State Water Board staff responding to BOR's petition made clear that approval from the Board for the flow-augmentation releases was not needed:

> As the operator of Trinity Dam, Reclamation may bypass water without a change approval, and may release water for various purposes that do not require [Board] approval. Examples of these purposes include releases for dam safety or maintenance, releases made to satisfy nonconsumptive cultural resource needs, or releases made to improve instream conditions for the benefit of aquatic resources.

SER 399-400. The district court thus correctly concluded that the flow-augmentation releases did not run afoul of California water law. ER 79-80.

A. Consistent with Circuit precedent, this Court should decline to adjudicate disputed issues of state water law

Plaintiffs assert that the Board's staff was wrong in advising BOR that state law did not require BOR to obtain Board approval for a permit modification to the place of use to release water to benefit fish. But this Court need not resolve this disputed issue of state law. Under circumstances similar to here, this Court declined to adjudicate the merits of a claim seeking to enforce state water law through the vehicle of a Section 8 claim. In *Wild Fish Conservancy v. Jewell*, 730 F.3d 791 (9th Cir. 2013), the Conservancy alleged that BOR violated state law and thus Section 8 of the

Reclamation Act by diverting water for use in a fish hatchery without modification of a state permit. Rather than determining whether Washington law required a permit modification, the Court held that the Conservancy could not invoke Section 8 to compel enforcement of state law, explaining that under the circumstances "adjudicating the Conservancy's water code claim would be 'more likely to frustrate than further [the] statutory objectives' of section 8." *Id.*, 730 F.3d at 799 (quoting *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993)). The Court noted that the state agency with authority over water rights had notice of the federal operations at issue and had neither determined that the federal agency was violating state law nor directed the federal agency to apply for a permit. The Court stated it therefore "must deduce" that the state agency "either deem[ed] a permit unnecessary as a matter of state law" or had "elected to address the underlying instream flow and fish passage issues by alternative means." *Id.* at 799. The Court stated that plaintiffs' claim effectively sought to override the state agency's interpretation of state law and exercise of enforcement discretion.

Similarly, in *City of Lompoc v. U.S. Bureau of Reclamation*, 172 F.3d 55, 1999 WL 97260 (9th Cir. 1999), an unpublished memorandum decision, this Court abstained from deciding a claim alleging that BOR violated a state-issued water permit. The Court held that it would be inappropriate to adjudicate the claim where BOR's alleged violation appeared to be with the acquiescence of the Board and the Board had

discretion under state law to decide whether to enforce its own permit. *Id.*, 1999 WL 97290 at *1.[12]

Consistent with *Wild Fish Conservancy* and *City of Lompoc*, this Court should not resolve the disputed issue of state water law. Here not only did the Board have notice of BOR's proposed flow-augmentation releases and take no enforcement action, the Board's staff affirmatively advised BOR that Board approval was not needed. SER 399-400.[13] Furthermore, the state law cited by Plaintiffs authorizes discretionary enforcement by the State, but does not expressly authorize other parties to independently enforce these provisions. *E.g.*, Cal. Water Code § 1052(b) ("The [State] Attorney General, *upon request of the board*," may institute suit to seek injunctive relief) (emphasis added); Cal. Water Code § 1055(a)("The executive director of the board may issue a complaint"); 23 Cal. Code of Reg.§ 822 (if the Board finds a violation of a permit, "it may" revoke the permit or take other appropriate action); Cal. Water Code § 179 (vesting Board with responsibilities pertaining to issuance of permits).

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[12] *Cf. San Luis Unit Food Producers v. United States,* 772 F. Supp. 2d 1210, 1250 (E.D. Calif. 2011) (rejecting claim that BOR violated Cal. Water Code § 1702 because the State Board has primary jurisdiction over questions pertaining to the lawfulness of state permits), *aff'd* 709 F.3d 798, 807 (9th Cir. 2013) (rejecting the claim because §1702 does not require BOR to do anything).

[13] In addition, here the State Attorney General filed *amicus curiae* briefs on behalf of the California Department of Fish and Wildlife in the district court and in this Court contending that the flow-augmentation releases were *required* by state law. Because BOR did not expressly rely on state law as authority for the flow-augmentation releases, the district court appropriately declined to decide whether state law by itself required the releases. ER 81-82.

Moreover, the Board has enforcement discretion and may elect not to take an enforcement action against a violator. *Id.*; Cal. Water Code §§ 1052(b), 1055(a).[14]

State sovereignty over water rights would be undermined by allowing Plaintiffs to pursue their claim that state law required BOR to obtain a permit modification particularly given that (1) the Board had notice of BOR's proposed action and the Board's staff affirmatively advised BOR that no Board approval was required; (2) the Board has not taken any action against BOR to enforce the provisions cited by Plaintiffs; and (3) Plaintiffs fail to demonstrate that state law accords them independent authority to enforce these provisions. Accordingly, this Court should affirm the judgment dismissing this claim.

B. BOR was not required to obtain Board approval for the flow-augmentation releases

Even if Plaintiffs could pursue their claim, Plaintiffs have not carried their burden of demonstrating that a modification of BOR's water rights permit was required. As the district court concluded, no Board approval is needed to release water that remains in the water source for the benefit of fish, ER 79, and "[n]othing in

[14] Plaintiffs assert that use of water inconsistent with the terms and conditions of a permit "'constitutes a trespass against the State of California.'" Br. 98, quoting State Water Resources Control Board Order WR 99-001, 1999 WL 166226 (Mar. 3, 1999). But the cited Board order only states that the Board can enjoin such trespass. *Id.*, 1999 WL 166226 at *5. It does not state that other parties may independently seek relief for such trespass.

the record suggests the FARs [flow-augmentation releases] violate California law." ER 80.

Plaintiffs suggest (Br. 88) that Board staff misapprehended the facts and purpose for the releases when it advised BOR that no Board approval was required for the flow-augmentation releases. This suggestion is unpersuasive. BOR provided notice to the Board of the purpose and scope of the 2012 proposed flow-augmentation releases. *See* SER 403, 415. In response, the Board staff's letter unequivocally states that no Board approval is required for BOR to release water "to improve instream conditions for the benefit of aquatic resources." SER 399-400. Plaintiffs assert that the letter is not the official opinion of the Board itself, but they point to nothing that demonstrates the Board holds a different view than its staff and the Board has taken no enforcement action against BOR. In short, there is no merit to Plaintiffs' contention that BOR violated Section 8 of the Reclamation Act and CVPIA Section 3411(b) of the Reclamation Act by failing to obtain a state permit modification.

C. Plaintiffs' claim that CVPIA Section 3411(a) imposes an independent federal requirement to obtain a permit modification is meritless

CVPIA Section 3411(b) provides that "[n]otwithstanding any other provision of this title, the Secretary shall, prior to the reallocation of water from any . . . place of use specified within applicable" CVP water rights permits to a place of use not so specified obtain a modification of those permits "in a manner consistent with the

provisions of applicable State law." Because Section 3411(b) only requires that a permit change in place of use be made "in a manner consistent with State law," it simply reiterates Section 8's requirement that BOR conform to state law. As explained above, the flow-augmentation releases were undertaken in a manner consistent with the provisions of applicable state law under which no permit modification was necessary.

Plaintiffs suggest (Br. 91-92) that even if state law did not require BOR to obtain a permit modification to implement the flow-augmentation releases, Section 3411(a) imposes an independent federal requirement to obtain a state permit modification to ensure that CVP state water rights would not be diminished by abandonment. But as the district court explained (ER 80), the temporary flow-augmentation releases at issue here would not effectuate an abandonment under state law. At a minimum, under California law, abandonment requires nonuse for a period of five years and a finding by the Board following notice to the permittee. *See* Cal. Water Code § 1241.

Plaintiffs suggest (Br. 93) that by failing to obtain a permit modification, BOR is impermissibly avoiding a requirement under Cal. Water Code § 1702 that a change not operate to the injury of any legal user of the water involved. But Section 1702 imposes no requirement on BOR to seek a permit change or to deliver water to Plaintiffs. *Cf. San Luis Unit Food Producers*, 709 F.3d at 807 (§ 1702 does not require BOR to do anything). And when a permit change is not required, the so-called "no

injury" rule is inapplicable. Even if it did apply, Plaintiffs are wrong in asserting that the rule means that BOR was required to mitigate or avoid water supply losses to contractors when the water allocated to contractors in 2013 was unchanged by the releases.

Stated differently, Section 3411(a) is inapplicable here because the flow-augmentation releases do not constitute a "reallocation" of water from one place of use to another place of use. Allocations are made for each water year. The determination respecting the volume of water to be exported from the Trinity River Division to the Central Valley and allocations to particular contractors had already been made prior to the August 2013 decision to undertake the flow-augmentation releases. These water allocations were unchanged by implementation of the flow-augmentation releases. ER 196. The water released for flow-augmentation releases was never allocated and there is no reallocation of water that has not been allocated in the first instance.

In sum, neither Section 8 of the Reclamation Act nor CVPIA Section 3411(a) provide an appropriate vehicle for Plaintiffs to enforce a putative state requirement to obtain a permit modification for the flow-augmentation releases. In any event, Plaintiffs fail to demonstrate that Board staff wrongly advised BOR that it did not need Board approval in order to release water from Lewiston dam "to improve instream conditions for the benefit of aquatic resources." SER 400.

CONCLUSION

For the foregoing reasons and reasons stated in our opening brief, the district court's judgment declaring that the 1955 Act fish-protection provision does not authorize Federal defendants to implement the 2013 flow-augmentation releases should be reversed. In all other respects, the judgment should be affirmed.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

ANNA K. STIMMEL
BRADLEY H. OLIPHANT
ELLEN J. DURKEE
Environment and Natural Resources Div.
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 514-4426
ellen.durkee@usdoj.gov

Of Counsel:
STEPHEN PALMER
Office of the Regional Solicitor
Department of the Interior
Sacramento, California

CARTER BROWN
Office of the Solicitor
Department of the Interior
Washington, D.C.

JUNE 2016
90-1-4-14033

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **13,991 words**, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/
ELLEN J. DURKEE

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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