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

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, *et al.*,

Plaintiffs/Appellees/Cross-Appellants,

v.

SALLY JEWELL, *et al.*,

Defendants/Appellants/Cross-Appellees,

HOOPA VALLEY TRIBE and YUROK TRIBE,

Intervenor-Defendants/Appellants/Cross-Appellees,

and

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, *et al.*,

Intervenor-Defendants/Appellees.

On Appeal From The United States District Court, For the Eastern District of California, Case No. 1:13-cv-01232-LJO-GSA

OPENING BRIEF AND RESPONSE OF SAN LUIS & DELTA-MENDOTA WATER AUTHORITY AND WESTLANDS WATER DISTRICT

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CORPORATE DISCLOSURE STATEMENT

Westlands Water District states that it is a governmental agency formed under California Water Code §§ 34000-38501. San Luis & Delta- Mendota Water Authority states that it is a joint powers authority whose members are local governmental entities. Neither Westlands Water District nor the San Luis & Delta-Mendota Water Authority issue stock, have a parent company, or have any stockholders.

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GLOSSARY

1955 Act	Act of August 12, 1955, Title XXXIV, Pub. L. No. 102-575, 106 Stat. 4700
1981 Decision	Secretary of Interior Decision, Alternatives For Increasing Releases To The Trinity (Jan. 14, 1981)
1981 SID	Secretarial Issue Document In Support of 1981 Decision
1984 Act	Trinity River Basin Fish and Wildlife Management Act, Pub. L. No. 98–541, 98 Stat. 2721
AF	Acre-Feet
APA	Administrative Procedure Act, 5 U.S.C. §§ 701-706
Department	California Department of Fish & Wildlife
CVP	Central Valley Project
CVPIA	Central Valley Project Improvement Act, Title XXXIV, Pub. L. No. 102-575, 106 Stat. 4700
EA	Environmental Assessment
ESA	Endangered Species Act, 16 U.S.C. §§ 1531-1544
FARs	Flow Augmentation Releases (from the Trinity River Division of the Central Valley Project)
FONSI	Finding of No Significant Impact
FWS	U.S. Fish and Wildlife Service

Hoopa	Hoopa Valley Tribe
Interior	United States Department of the Interior
NEPA	National Environmental Policy Act
Reclamation	United States Bureau of Reclamation
ROD	Trinity River Record of Decision (2000)
San Luis	San Luis & Delta-Mendota Water Authority
Secretary	Secretary of Interior
State Water Board	California State Water Resources Control Board
TRD	Trinity River Division of the Central Valley Project
TRFES	Trinity River Flow Evaluation Study
Water Contractors	Plaintiffs San Luis & Delta-Mendota Water Authority and Westlands Water District
Westlands	Westlands Water District
Yurok	Yurok Tribe

INTRODUCTION

This case is not about whether Federal Defendants can lawfully make supplemental releases of water for the benefit of anadromous fish located in the lower Klamath River in August and September. They can, if done according to law. The issue here is whether the way Federal Defendants have chosen to do so since 2012 is lawful. It is not. And their unlawful actions have imposed a steep cost upon the people and environment of California's Central Valley through substantial loss of Central Valley Project ("CVP") water supply in a time of record drought.

There is water available for fishery releases under a Record of Decision ("ROD") adopted by the Secretary of the Interior in 2000, pursuant to a statutory mandate in the Central Valley Project Improvement Act ("CVPIA"). Congress intended the ROD to end disputes over how much water from the Trinity River Division ("TRD") of the CVP should be dedicated to the anadromous Trinity River fishery, and how much should be available for uses in the Central Valley. The ROD set aside hundreds of thousands of acre feet of water each year for permanent releases from the TRD for the Trinity River fishery. Federal Defendants could have used a portion of the water set aside under the ROD for the releases at issue here. Alternatively, Federal Defendants could have purchased additional water supplies from willing sellers, as they did in 2003 and 2004.

In 2012, Federal Defendants began taking more water from the TRD for fishery releases than was set aside in the ROD, without securing substitute supplies from other sources to compensate for this additional use of water from the TRD. The releases were intended to augment low instream flows in the lower Klamath River caused by drought; the TRD did not cause or exacerbate the low flow conditions. To the contrary, under the ROD, the TRD already supplements natural flow during the months of August and September. Federal Defendants have no legal authority to make such flow augmentation releases ("FARs"). Federal Defendants have unlawfully reduced the amount of CVP water available for CVP purposes and harmed environmental, agricultural, and municipal uses in the Central Valley and have thus reopened a long-running dispute that Congress, and the ROD, sought to resolve permanently.

The district court correctly ruled that Federal Defendants lack statutory authority to make the FARs. This Court should affirm, but not based on the geographic limitation on fishery releases identified by the district court and challenged by Defendants. Rather, it should affirm because the FARs are releases of CVP water from the TRD that are intended to benefit the Trinity River fishery, and hence they are subject to the permanent annual volume limits established in the ROD pursuant to CVPIA section 3406(b)(23). The FARs are unlawful because they exceeded the ROD's permanent annual volume limit for fishery releases, and Federal Defendants

have not compensated the CVP for this extra demand on the TRD. Defendants' argument that the FARs are authorized by the original 1955 legislation authorizing the TRD fails, because the CVPIA is the later and more specific legislation regarding fishery releases from the TRD, and the permanent annual volume limits established in the ROD pursuant to CVPIA section 3406(b)(23) now govern Federal Defendants' authority to make TRD releases for the Trinity River fishery.

The legal defects with Federal Defendants' course of action go beyond lack of statutory authority. In their urgency to make the FARs, Federal Defendants have neglected a host of legal requirements. Federal Defendants have failed to consult regarding impacts to endangered species as required by the federal Endangered Species Act, and have failed to obtain necessary amendments to the approved place of use in state water rights permits applicable to the TRD. The district court's rulings excusing these failings based on standing, and a misreading of California water law, respectively, should be reversed, to ensure that future releases comply with the important protections provided by these laws.

Preserving the Trinity River fishery is a laudable goal, but it does not justify using illegal means. The goal can still be achieved lawfully, and this Court must require no less.

STATEMENT OF JURISDICTION

This action arises under the 1902 Reclamation Act, 32 Stat. 388, and its amendments, including the CVPIA, Title XXXIV, Pub. L. No. 102-575, 106 Stat. 4700 and the Act of August 12, 1955 ("1955 Act"), Pub. L. No. 84-386, 69 Stat. 719. It also arises under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544. Plaintiffs San Luis & Delta-Mendota Water Authority and Westlands Water District (together, "Water Contractors") sought review of federal agency action under the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and the citizen suit provision of the ESA, 16 U.S.C. § 1540(g). Consequently, the district court had jurisdiction over this action under 28 U.S.C. §§ 1331 and 1346, and 16 U.S.C. § 1540(g).

The district court entered Final Judgment on October 24, 2014. ER 84-86.[1] The Hoopa Valley Tribe filed its Notice of Appeal December 19, 2014. ER 182-83. The United States Department of the Interior ("Interior"), Sally Jewell, as Secretary of Interior, the United States Bureau of Reclamation ("Reclamation"), and David Murillo, as Regional Director, Mid-Pacific Region, of Reclamation (collectively, "Federal Defendants") and the Yurok Tribe filed Notices of Appeal December 22, 2014. ER 184-87. Water Contractors filed their Notice of Cross-Appeal December

[1] Cites to the Excerpts of Record jointly filed by Defendants are referred to herein as "ER __." Cites to the Water Contractors' Supplemental Excerpts of Record are referred to herein as "SER __."

23, 2014. ER 188-89. The appeals and cross-appeal were timely filed. Fed. R. App. P. Rule 4(a)(3). The Court's jurisdiction is based on 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. In section 3406(b)(23) of the CVPIA Congress authorized and directed the Secretary of Interior to implement "permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River fishery . . . ." Pursuant to section 3406(b)(23), the Secretary established permanent annual volumes of water to be released from the TRD for the restoration and maintenance of the Trinity River fishery, in the Record of Decision for the Trinity River fishery restoration. In 2012 and 2013, by making the FARs Reclamation exceeded the annual volume of water established for the Trinity River fishery under the ROD. Did Reclamation violate section 3406(b)(23)'s mandate by making releases to benefit the Trinity River fishery that exceeded the permanent annual volumes of water established in the ROD for the Trinity River fishery pursuant to CVPIA section 3406(b)(23)?

2. In the 1955 Act, Congress authorized the Trinity River Division of the Central Valley Project. The 1955 Act contains a proviso that the Secretary of Interior is "authorized and directed to adopt appropriate measures to insure the preservation and propagation of fish and wildlife" including the maintenance of 150 cubic feet per second of flow in the Trinity River. Congress later enacted CVPIA section

3406(b)(23), which mandated the establishment and implementation of increased permanent annual releases from the TRD for the restoration and maintenance of the Trinity River fishery. Federal Defendants claim authority under the proviso in the 1955 Act to make fishery releases in excess of the annual volume limits on fishery releases set in the ROD pursuant to CVPIA section 3406(b)(23). Does the later and more specific CVPIA section 3406(b)(23) abrogate the 1955 Act's grant of authority to make fishery releases from the TRD and now govern the volume of fishery releases the Secretary is authorized to make from the TRD?

3. To demonstrate standing to bring a procedural claim such as a violation of section 7 of the Endangered Species Act, a plaintiff must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing. Water Contractors have a concrete interest in the protection of species listed under the Endangered Species Act because the success or failure of those species affects their Central Valley Project water supply. The FARs presented a credible threat of harm to this interest because they threatened a significant reduction in the volume of Central Valley Project water available to maintain cold water temperatures for listed species. If Reclamation were ordered to engage in section 7 consultation, the consultation could result in better protection of Water Contractors' concrete interest in listed species. Did Water Contractors establish

standing to challenge Reclamation's failure to engage in section 7 consultation under the Endangered Species Act regarding the FARs?

4. Federal reclamation law requires Reclamation to operate the Central Valley Project in "conformity with" state law "relating to the control, appropriation, use or distribution of water . . . ." 43 U.S.C. § 383. Under California law, a water right permit "gives the right to take and use water only to the extent … allowed in the permit." Cal. Wat. Code § 1381. A permittee may change the place of use "only upon permission of the board." Cal. Wat. Code § 1701. The lower Klamath River is not an approved place of use under the TRD water right permits. In 2012 and 2013, Reclamation used water from the TRD to increase flows in the lower Klamath River without obtaining a change in the permitted place of use. Did Reclamation violate its obligation to comply with state law by failing to obtain a change in the approved place of use in the TRD water right permits prior to using water in the lower Klamath River for flow augmentation?

5. Section 3411(a) of the CVPIA mandates that the Secretary of Interior "obtain a modification" of Central Valley Project water rights permits and licenses, in a manner consistent with applicable State law, prior to reallocating Central Valley Project water to a place of use not specified in the water rights permits and licenses. The lower Klamath River is not within the authorized place of use for the TRD water right permits. In 2012 and 2013 Reclamation did not obtain a modification to the

approved place of use in the TRD water right permits prior to using water in the lower Klamath River. Did Reclamation violate section 3411(a)'s mandate to "obtain a modification" in the place of use, by using water in the lower Klamath River for flow augmentation without first obtaining a change in the place of use for the TRD water right permits?

STATEMENT REGARDING STATUTORY ADDENDUM

Pertinent statutes, rules, regulations, etc., are included in an addendum to this brief.

STATEMENT OF THE CASE

I. Statement of Facts

A. Plaintiffs San Luis & Delta-Mendota Water Authority and Westlands Water District

Plaintiff San Luis & Delta-Mendota Water Authority ("San Luis") is a joint powers agency formed by local public agencies that have contracted for water supply from the CVP. SER 110-11. San Luis's member agencies provide CVP water for municipal, industrial, agricultural, and environmental uses to water users located on the west side of the San Joaquin Valley and in the southern portion of the San Francisco Bay Area. *Id.* Plaintiff Westlands Water District ("Westlands") is a member agency of San Luis, serving primarily agricultural uses. SER 110-111; SER 94. The CVP's ability to deliver water to its contractors has diminished since the early 1990s as a result of increased regulation and reallocation of CVP supplies to

environmental purposes. SER 111-113; SER 340-345. In 2013, due to a combination of drought and regulatory restrictions, CVP agricultural water service contractors such as Westlands received an allocation of only 20% of total contract quantity. SER 113; SER 94; SER 340-345. The most recent year in which the CVP was able to make a 100% allocation to all its CVP contractors was 2006. SER 112-113; SER 340-345.

B. The Trinity River and the Trinity River Division

1. The Trinity River and Trinity River Fishery

The Trinity and Klamath River basins drain a large area of Northern California and Southern Oregon. The Trinity River originates in the Salmon-Trinity Mountains and the river flows southward until it is impounded by Trinity and Lewiston Dams. ER 581. From Lewiston Dam the Trinity River flows westward for 112 miles until entering the Klamath River. *Id*. The Trinity River is the largest Klamath River tributary, with their confluence at Weitchpec, approximately 44 miles upstream of the mouth of the Klamath River. *See Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 860–61 (9th Cir. 2004); *see also* ER 581-582; ER 647-648. The stretch of the Klamath River below the confluence with the Trinity River is referenced here as the "lower Klamath River." ER 41.

The Klamath and Trinity Rivers provide spawning and rearing habitat to substantial runs of anadromous fish, including Chinook and Coho salmon, and steelhead trout. *Westlands*, 376 F.3d at 860-62; ER 654-663. Anadromous fish

species are hatched in the rivers of their birth before migrating to the ocean to grow to their adult size. Adult salmonids return from the ocean to their natal rivers to spawn. ER 654. The Trinity River salmon swim through the lower 44 miles of the Klamath River on their return from the ocean to their natal streams in the Trinity River basin. *Id*.; ER 524; *see* Figure 2.1 at ER 647.

Anadromous salmonids will hold in the river until they are ready to spawn and some species "enter the river months prior to spawning" and hold in deep pools. ER 656. The holding and migration periods for fall-run Chinook salmon, Coho salmon, and fall-run steelhead of Trinity River origin largely overlap, during the months of August through September. Figure 3.1 at ER 655; ER 660-661.

2. The Trinity River Division

The TRD is a component of the CVP, which is one of the largest and most complex water distribution systems in the world, consisting of an extensive infrastructure to store and regulate water for California's Central Valley. *Westlands*, 376 F.3d at 861. The TRD primarily functions to store Trinity River water for diversion to the Central Valley for CVP purposes. *Westlands Water Dist. v. U.S. Dept of Interior*, 275 F. Supp. 2d 1157, 1168 (E.D. Cal. 2002).

"The TRD impounds the mainstem of the Trinity River initially at Trinity Dam, behind which water accumulates to form the . . . Trinity Reservoir." ER 41-42 (citing *Westlands*, 376 F.3d at 861; AR 00024 [ER 213]). A second reservoir and dam,

Lewiston, located downstream of Trinity Reservoir, regulates water releases to the Trinity River. ER 42. "Water can also be diverted into the Sacramento River Basin through a tunnel at Clear Creek." *Id*.

TRD water that is conveyed to the Central Valley is available for delivery to CVP contractors, including plaintiff San Luis's members, such as plaintiff Westlands. *See Westlands*, 376 F.3d at 860. In contrast, TRD water that is released to the Trinity River at Lewiston Dam flows to the Klamath River, and to the ocean, where it is irretrievably lost to any further CVP uses. *See* ER 647; *see also* SER 122.

Reclamation operates the TRD pursuant to state water rights permits issued by the State Water Resources Control Board ("State Water Board"). *See Westlands Water Dist. v. United States*, 153 F. Supp. 2d 1133, 1144 (E.D. Cal. 2001), *aff'd*, 337 F.3d 1092 (9th Cir. 2003). Condition 8 of the TRD permits defines Reclamation's obligation under California law to make TRD releases to the Trinity River to benefit fish. *See* SER 140-220 (TRD water right applications and permits).

C. Relevant Statutes and Secretary of Interior Decisions

1. 1955 Trinity River Division Central Valley Project Act

The 1955 Act authorized the Secretary of Interior ("Secretary") to construct and operate the Trinity River Division as part of the CVP for the principal purpose of increasing the supply of water available for the Central Valley of California. Section 2 of the 1955 Act states:

> Subject to the provisions of this Act, the operation of the Trinity River division shall be integrated and coordinated . . . with the operation of other features of the Central Valley project . . . in such manner as will effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available . . . .

1955 Act § 2. Section 2 of the 1955 Act contains a proviso that provides:

> the Secretary is authorized and directed to adopt appropriate measures to insure the preservation and propagation of fish and wildlife, including, but not limited to the maintenance of the flow of the Trinity River below the diversion point at not less than one hundred and fifty cubic feet per second for the months July through November . . . .

Id. Section 2 of the 1955 Act contains a second and separate proviso, which provides that "not less than 50,000 acre feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users." This second proviso is to provide water for consumptive uses, not instream flows for fish.

2. 1981 Secretarial Decision to Increase Trinity River Division Fishery Releases

In 1981, the Secretary issued a decision regarding alternatives for increasing water releases to the Trinity River from the TRD for fishery purposes, above the minimum releases required by the proviso in Section 2 of the 1955 Act. Secretarial Decision, Alternatives For Increasing Releases To The Trinity (Jan. 14, 1981) ("1981 Decision"), ER 738-753. The 1981 Decision is supported by a Secretarial Issue Document ("1981 SID") that describes the issue addressed by the 1981 Decision. *Id*. The 1981 SID states that:

> This SID concerns the operation of the Trinity River Division of the Central Valley Project in California. Since completion of the Division, over 80% of the mean runoff of the Trinity watershed above Lewiston Dam has been diverted to the Sacramento watershed for agricultural, hydroelectric, and other uses. This diversion has been accompanied by a severe decline in anadromous fish runs in the Trinity and Klamath Rivers. At issue are the quantity of water to be diverted and the quantity to be allowed to flow through its natural course for preservation and enhancement of anadromous fish runs on the Trinity and Klamath Rivers.

ER 740 (emphasis added). The 1981 SID constitutes the record of decision for an environmental impact statement prepared in 1980, which discussed eight alternatives for a "permanent commitment of water" for the Trinity River fishery. The 1981 SID describes these alternatives as water releases "to mitigate damage to the fishery." ER 749.

The 1981 SID discussed the 1955 Act and recognized that the "Secretary has authority under the [1955 Act] to mitigate losses of fish resources and habitat . . . ." ER 743. The 1981 SID identifies three "fundamental causes of the fishery decline [as] excessive streambed sedimentation, inadequately regulated harvest, and insufficient streamflow." ER 746.

To address insufficient streamflow, the 1981 Decision provided for increased releases of water from the TRD for fishery purposes, above those required by the 1955 Act. ER 738. Under the decision, Reclamation's predecessor, the Water and Power Resources Service, would release 340,000 acre-feet ("AF") annually from the TRD in all but dry and critically dry years, when the releases would be 220,000 and 140,000

AF, respectively. The 1981 Decision provided for a 12 year study period to implement and evaluate the efficacy of increased releases ("Trinity River Flow Evaluation Study" or "TRFES"), combined with habitat and watershed restoration activities. ER 738. The increased flows were to be done in conjunction with a fish and wildlife management plan, implemented by the Trinity River Basin Fish and Wildlife Task Force. ER 740. The expected effect of the increased releases, along with the habitat and watershed restoration activities, was "restoration of the anadromous fishery to levels approaching pre-[TRD] conditions." ER 750.

3. 1984 Trinity River Basin Fish and Wildlife Management Act

In 1984, Congress passed the Trinity River Basin Fish and Wildlife Management Act ("1984 Act"), Pub. L. No. 98–541, 98 Stat. 2721, which provided for the habitat and watershed restoration activities called for in the 1981 Decision as a complement to increased flows ordered by the 1981 Decision. The 1984 Act directed the Secretary to implement a management program to restore fish and wildlife populations in the Trinity River basin to levels approximating those which existed immediately before the start of construction of the TRD and to maintain such levels. *Id*. at § 2. The 1984 Act recognized the Secretary's existing authority, including under the 1955 Act, to "take certain actions to mitigate the impact on fish and wildlife of the construction and operation of the Trinity River division" but found that the "Secretary requires additional authority to implement a basin-wide fish and wildlife

management program" that can address "activities other than those related to the project . . . ." *Id*. at § 1(3), 1(5), 1(6). The 1984 Act required that the fish and wildlife management program include the "design, construction, operation, and maintenance of facilities to . . . rehabilitate fish habitats in the Trinity River between Lewiston Dam and Weitchpec," as well as "in tributaries of such river below Lewiston Dam and in the south fork of such river." *Id*. at § 2(a)(1).

4. 1992 Central Valley Project Improvement Act

In 1992, Congress enacted the CVPIA, in part to resolve an ongoing dispute over the amount of CVP water to be released from the TRD to restore and maintain the Trinity River fishery. CVPIA section 3406(b)(23) directed the Secretary to take specified actions "to meet Federal trust responsibilities to protect the fishery resources of the Hoopa, and to meet the fishery restoration goals of the Act of October 24, 1984, Pub. L. 98–541."

Section 3406(b)(23) directed the Secretary to provide through the Trinity River Division, for water years 1992 through 1996, an instream release to the Trinity River of not less than 340,000 acre-feet per year for "the purposes of fishery restoration, propagation, and maintenance . . . ." It further directed the Secretary to complete the Trinity River Flow Evaluation Study [TREFS] being conducted under the mandate of the 1981 Decision, "in a manner which insures the development of 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 . . . ." (Emphasis added.) Finally, section 3406(b)(23) directed that "[i]f the Secretary and the Hoopa Valley Tribe concur in these recommendations [regarding permanent instream fishery flow requirements], any increase to the minimum Trinity River instream fishery releases established under this paragraph . . . shall be implemented accordingly."

5. 2000 Record of Decision for Trinity River Fishery Restoration

In 1999, the U.S. Fish and Wildlife Service ("FWS") and the Hoopa Valley Tribe ("Hoopa") released a Final Report on the TRFES, representing the completion of the flow evaluation study called for in the 1981 SID and in CVPIA section 3406(b)(23). ER 606–753. The "TRFES recommended varying inter-annual flows unique to each water year class, ranging from 368,800 AF in Critically Dry years to 815,200 AF in Extremely Wet years." ER 44 (citing AR 03739 [ER 635]). The TRFES also recommended implementation of an "Adaptive Environmental Assessment and Management Program" to guide future restoration activities and adjust efforts in light of "uncertainty over how the river and the fishery resources will react to the proposed recommendations." ER 640.

Following completion of the TRFES, Interior conducted an environmental review process to develop and assess alternatives for restoration of the Trinity River fishery. In this process, the Secretary issued a draft Environmental Impact Statement.

ER 45. Following public comment, the Secretary issued the Trinity River Record of Decision in December 2000. ER 524-566.

The ROD established the annual volume of instream flow releases from the TRD for the Trinity River fishery, as directed by CVPIA section 3406(b)(23). These volumes range from 369,000 AF in a critically dry year to 815,000 AF in an extremely wet year. ER 535. The ROD provides that while "the schedule for releasing water on a daily basis . . . may be adjusted . . . the annual flow volumes . . . may not be changed." *Id.*

The ROD increased the volume of long-term average annual releases from the TRD to the Trinity River by 75%. ER 543. Long-term average annual water exports to the Central Valley were predicted to decrease by 240,000 AF, resulting in approximately 52% of the flow coming into the TRD going to the Central Valley, compared to diversion of 74% of the flow going to the Central Valley since operations began in 1964. *Id.*

The ROD was intended to be the final decision on how much water would be released from the TRD for the Trinity River fishery, and hence how much would be available to the Central Valley. It explained that in "section 3406(b)(23) of the CVPIA, Congress sought the final resolution" of that issue. ER 540. The ROD chose levels of releases that "best meet the statutory and trust obligations of the Department [of Interior] to restore and maintain the Trinity River's anadromous fishery resources,

based on the best available scientific information, while also continuing to provide water supplies for beneficial uses and power generation as a function of Reclamation's Central Valley Project . . . ." ER 525. The ROD rejected an alternative requiring a higher volume of releases that may have benefited the Trinity River fishery even more, because that "would exclude or excessively limit the Department's ability to address the other recognized purposes of the TRD, including water diversions to the CVP and power production in the Trinity Basin." ER 548.

D. History of Flow Augmentation Releases from the Trinity River Division

In the late summer of 2002, a fish die-off occurred in the lower Klamath River during which approximately 34,000 adult fall-run Chinook salmon and a smaller number of other fish species died. ER 514; *see* ER 480-523. The fish die-off resulted from infection by two primary pathogens: Ich (*Icthhyophthirius multifiliis*) and Columnaris (*Flavobacterium columnare*). ER 514. Possible factors contributing to an increased risk of disease infection include "high density of fish, low discharges, warm water temperatures, and possible extended residence time of salmon." *Id*.

In 2003 and 2004, Reclamation made late summer fishery releases from the TRD that were in addition to the ROD annual volumes for those years, in an effort to avoid a repeat of 2002 low-flow conditions in the lower Klamath River. *See* SER 467; *see also* Exh. 1 to Akroyd Decl. in Support of Request for Judicial Notice ("Akroyd Decl."); Exh. 2 to Akroyd Decl. Before making the late summer releases of TRD

stored water, Reclamation took action to ensure that CVP contractors would not suffer water supply losses as a result of releases in excess of the ROD's annual volume limits. *Id*. In 2003, Reclamation completed a water exchange with the Metropolitan Water District of Southern California to provide water from the TRD for the additional late summer releases. Exh. 1 to Akroyd Decl., internal Exh. 2 at p. 15; Exh. 1 to Akroyd Decl., internal Exh. 2 at p. 6; Exh. 2 to Akroyd Decl., internal Exh. 1 at p. 1. In 2004 Reclamation used a portion of the water acquired by the 2003 exchange and also purchased water from Sacramento River Water Contractors Association, as "willing sellers in the CVP," to offset the additional late summer releases made for fishery purposes. Exh. 2 to Akroyd Decl., internal Exh. 1 at pp. 2-3. In 2004, Reclamation also explained how it could use a portion of the ROD volume for the late summer releases by "shift[ing] some of the flows from the normal spring-peak hydrograph for release later in the fall, as long as the total release in any water year [did] not exceed the total amount allowed under the ROD." Exh. 2 to Akroyd Decl., internal Exh. 1 at p. 2 n.2.

Reclamation did not make TRD releases for fishery purposes in excess of the ROD's annual volumes again until 2012. 2012 was a "normal" water year type, which meant that Federal Defendants were limited under the ROD to a total volume of releases for fishery purposes of 647,000 AF. ER 535. In early July 2012, Reclamation issued environmental documents for proposed late summer releases from

the TRD in excess of the ROD's annual limit. ER 359, ER 366. On July 27, 2012, then-Regional Director Donald Glaser sent a letter to Water Contractors stating that if Water Contractors did not dispute the proposed releases, Reclamation would not assert that Water Contractors had waived any claims that the action was illegal. SER 410-402. In addition, Reclamation committed to mitigate any loss of water supply to its CVP contractors resulting from the releases and to develop a "long-term strategy for addressing fall fish needs on the Lower Klamath River." *Id*.

In August and September 2012, Federal Defendants made flow augmentation releases from the TRD ("2012 FARs") of nearly 40,000 AF for the purpose of "reduc[ing] the likelihood, and potentially reduc[ing] the severity, of any fish die-off in 2012." ER 336. The 2012 FARs exceeded the 647,000 AF volume limit for "normal" water years set by the ROD by nearly 40,000 AF. SER 282 at ¶ 106.

In early April 2013, Federal Defendants confirmed that the volume of releases of CVP water from the TRD for fishery purposes in 2013 would be 453,000 AF, based on 2013's classification as a "dry" year under the ROD. *See* SER 390. The 2013 schedule for ROD flows did not provide for flow augmentation releases in August and September to address potential low-flow conditions in the lower Klamath River. In May 2013, after Reclamation indicated that it was considering flow augmentation releases in 2013 that would exceed the 453,000 AF volume set by the ROD, plaintiff San Luis contacted Reclamation to oppose the proposed releases. SER 387-398.

Reclamation developed a schedule for flow augmentation releases ("2013 FARs") anyway, and issued a Draft environmental assessment ("EA") and finding of no significant impact ("FONSI") on July 16, 2013. ER 256-286; ER 246-255. Water Contractors and others provided substantial comments on the draft environmental documents by July 31, 2013. SER 354-386. Reclamation issued the final 2013 EA and FONSI on August 6, 2013. ER 190. The 2013 EA estimated that the 2013 FARs would include the release of 62,000 AF, plus an additional 8,000 AF if Reclamation extended the release period to September 30. ER 209-210. In addition, the 2013 EA estimated the release of up to another 39,000 AF if the Yurok Tribe ("Yurok") detected an outbreak of disease, for a total of up to 109,000 AF in excess of the volume set by the ROD for a dry year. ER 209-210. Due to higher than projected flows in the Klamath River and a temporary restraining order issued by the district court, the 2013 FARs ultimately totaled approximately 17,500 AF. *See* SER 288.

The low-flow conditions in the lower Klamath River during 2012 and 2013 were not caused by TRD operations. In August and September of 2012 and 2013, the TRD was not depleting the natural flow in the Trinity River. To the contrary, the TRD was releasing six to seven times more water to the Trinity River than was flowing into Trinity Lake. SER 137-138, at ¶¶ 54-57; SER 294-296, at ¶¶ 4-5; SER 312, at ¶ 5; SER 318-326. In other words, in making the 2012 and 2013 FARs, Reclamation utilized CVP water stored in the TRD to supplement the natural flows of

the Trinity River, and in turn, the natural flows in the lower Klamath River. *See* ER 647-648.

Reclamation made the FARs during years in which south-of-Delta agricultural CVP contractors received little CVP water. *See* SER 340. In 2014, following the 2012 and 2013 FARs, these CVP contractors received zero CVP water and wildlife refuges experienced unprecedented reduced CVP allocations. *Id*. Defendants note there was no salmon die-off in the lower Klamath River in 2012 or 2013. Whether a die-off would have occurred absent the FARs is unknown. It is certain, however, that loss of the CVP water taken for the FARs caused harm to the Central Valley.

Reclamation has not mitigated the CVP water losses caused by the 2012 and 2013 FARs. The 2012 and 2013 FARs caused a hole in CVP storage, reduced the amount of CVP water available for allocation to CVP contractors, including wildlife refuge contractors in the Central Valley, and limited the amount of cold-water storage available for temperature management for salmonid species listed under the ESA. *See* SER 119-139 (describing relationship between 2013 FARs, TRD storage, CVP contract allocations, and cold water storage and temperature management for ESA-listed species); *see also* SER 242-245; SER 350-353. Reduced CVP water supplies and reduced CVP contract allocations result in environmental and socio-economic impacts. *See e.g.*, SER 93-108 (describing land fallowing, increased groundwater pumping, groundwater overdraft, land subsidence, and unemployment in agricultural

communities); SER 114-117 (describing consequences to San Luis member agencies); SER 346-349 (describing impacts to wildlife in wildlife refuges).

Reclamation made FARs again in 2014 and has indicated that it will make such releases in the future. *See* ER 175-181; *see also* Fed. Br., Doc. 25, at 28. To explain the 2014 FARs, Reclamation issued a 2-page decision memorandum. ER 175-176. The proposed 2014 FARs were described as using "about 25,000 acre-feet of water . . . from the Trinity Reservoir . . . ." *Id.* Ultimately, Reclamation used approximately 64,000 AF of water for the 2014 FARs. *See* 80 Fed. Reg. 41061, 41062 (July 14, 2015). Reclamation has announced that it will prepare a long-term plan for increased lower Klamath River flows, and that it expects to make FARs in the future. *See* Fed. Br., Doc. 25, at 28; *see also* 80 Fed. Reg. 41061 (July 14, 2015) (stating the proposed action for long-term increased lower Klamath River flows "would be provided primarily from releases of water stored in Trinity Reservoir").

II. Procedural History

Water Contractors filed suit against Federal Defendants on August 7, 2013. ER 39. Water Contractors challenged the Federal Defendants' decision to make the 2012 and 2013 FARs under various provisions of the CVPIA, the National Environmental Policy Act ("NEPA"), and the Reclamation Act of 1902, 43 U.S.C. § 383. *Id*. Water Contractors sought (1) an order setting aside Federal Defendants' decision; (2) a declaratory judgment that the FARs violated CVPIA section 3406(b)(23); (3) a

declaratory judgment that the lower Klamath River was not a permitted place of use under the water rights permits for the TRD, and that absent modification the FARs were prohibited by CVPIA section 3411(a) and 43 U.S.C. section 383; (4) a declaratory judgment that the FARs were major federal actions significantly affecting the human environment, and that Federal Defendants had not complied with NEPA with regard to the FARs; and (5) injunctive relief prohibiting Federal Defendants from making the planned 2013 FARs and from operating the TRD in violation of the CVPIA, the Reclamation Act, and NEPA. SER 30-31.

Water Contractors filed a First Amended Complaint on October 4, 2013, adding a claim that the Federal Defendants failed to comply with the ESA prior to making the FARs. ER 167-69.

In its October 1, 2014 ruling on cross-motions for summary judgment, the district court concluded that Federal Defendants lacked authority under the 1955 Act to implement the 2013 FARs. ER 83. The district court found the geographic scope of CVPIA section 3406(b)(23) is limited to the Trinity River basin, and accordingly found that neither section 3406(b)(23) nor the ROD precluded Reclamation from implementing the FARs, which were directed at the lower Klamath River. *Id*. The district court rejected Water Contractors' ESA and NEPA claims for lack of standing and mootness, respectively. ER 82. Finally, the district court found that the FARs did not violate 43 U.S.C. section 383 or CVPIA section 3411(a). ER 83.

The district court entered its final judgment on October 24, 2014. ER 84. This appeal ensued.

III. Rulings Presented for Review

Water Contractors appeal the district court's judgment and related ruling that Reclamation did not violate CVPIA section 3406(b)(23) in making the FARs and the ruling that "neither CVPIA § 3406(b)(23) nor the TRROD preclude Reclamation from implementing the 2013 FARs." ER 85; ER 59-67, 83. Water Contractors appeal the district court's ruling that the scope of CVPIA section 3406(b)(23)'s statutory mandate to establish and implement permanent instream fishery flow requirements and operating criteria for the restoration and maintenance of the Trinity River fishery is geographically "limited to the Trinity River basin." CVPIA § 3406(b)(23); ER 85; ER 59-67, 83. Water Contractors likewise appeal the district court's ruling that the flow measures in the ROD are limited in scope to the Trinity River mainstem. ER 85; ER 59-67, 83.

Water Contractors appeal the district court's judgment and related ruling rejecting their claim that the Federal Defendants violated the Endangered Species Act, 16 U.S.C. §§ 1531 et seq., due to lack of standing. ER 85; ER 54-56, 82.

Water Contractors appeal the district court's judgment and related ruling rejecting their claim that Federal Defendants violated section 3411(a) of the CVPIA. ER 85; ER 83, ER 81. Water Contractors appeal the district court's ruling that

"[b]ecause no change of place of use permit was required by state law prior to Reclamation's implementation of the FARs, Reclamation did not violate § 3411(a)." ER 81.

Water Contractors appeal the district court's judgment and related ruling rejecting their claim that Federal Defendants violated 43 U.S.C. § 383 and California water law. ER 85; ER 83; ER 78-81. Water Contractors appeal the district court's ruling that "Plaintiffs have failed to establish that Federal Defendants have failed [] 'to proceed in conformity with' state law 'relating to the control, appropriation, use or distribution of water used in irrigation.'" ER 80-81 (quoting 43 U.S.C. § 383).

SUMMARY OF ARGUMENTS

First, Reclamation violated CVPIA section 3406(b)(23)'s mandate to implement "permanent instream fishery flow requirements . . . for the restoration and maintenance of the Trinity River fishery" by making releases to benefit the Trinity River fishery that exceeded the permanent annual volumes of water established in the ROD for the Trinity River fishery pursuant to section 3406(b)(23). In 2012 and 2013, Reclamation made FARs from the TRD to benefit the Trinity River fishery that exceeded the annual volume limit for releases for the Trinity River fishery established in the ROD.

Second, contrary to the argument of Federal Defendants, the 1955 Act does not provide authority for the FARs. CVPIA section 3406(b)(23) is the later and more

specific provision, and it abrogated the Secretary's authority under the 1955 Act to make fishery releases from the TRD. The permanent annual volumes of water established under the ROD pursuant to section 3406(b)(23) now govern the volume of TRD water the Secretary is authorized to take from CVP supply for fishery releases.

Third, Water Contractors have standing to challenge Reclamation's failure to engage in section 7 consultation on the 2013 FARs under the Endangered Species Act. Water Contractors' economic interest in CVP water supplies supports a cognizable interest in the protection of endangered and threatened species. When Water Contractors filed this action, the 2013 FARs threatened to significantly reduce the volume of TRD water available to maintain cold water temperatures for endangered and threatened species. If Reclamation had engaged in section 7 consultation on the 2013 FARs, it could have altered the releases in a way that preserved cold water storage and avoided other adverse impacts to listed species. Because Water Contractors have established injury-in-fact, causation, and redressability sufficient to allege a procedural violation, Water Contractors have standing to challenge Reclamation's failure to engage in section 7 consultation.

Fourth, Reclamation violated its obligation under 43 U.S.C. section 383 to comply with state law by failing to obtain a change in the approved place of use under the TRD water right permits prior to using water in the lower Klamath River for the 2012 and 2013 FARs. Federal reclamation law requires Reclamation to operate the

CVP in "conformity with" state law "relating to the control, appropriation, use or distribution of water . . . ." 43 U.S.C. § 383. Under California law, a water right permit "gives the right to take and use water only to the extent and for the purpose allowed in the permit." Cal. Wat. Code § 1381. A permittee may change the authorized place of use for a water right "only upon permission of the board." Cal. Wat. Code § 1701. Reclamation holds California water right permits for the TRD. The lower Klamath River is not within the authorized place of use for the TRD water right permits, and Reclamation did not obtain a change in the place of use to include the lower Klamath River prior to making the 2012 and 2013 FARs. Therefore, in making the FARs, Reclamation violated its obligation to comply with state law.

Finally, Reclamation violated CVPIA section 3411(a)'s mandate to "obtain a modification" in the authorized place of use in the TRD water rights permits prior to making the FARs. California law imposes specific requirements and a procedure for changing the approved place of use. The lower Klamath River is not within the authorized place of use for the TRD water right permits. Reclamation did not obtain a change in the place of use for the TRD water right permits to include the lower Klamath River prior to making the FARs. Therefore, Reclamation violated section 3411(a).

ARGUMENT

I. Standard of Review

The APA governs Reclamation's administrative actions under the CVPIA and provisions of Reclamation law, including the 1955 Act and 43 U.S.C. section 383. *San Luis & Delta-Mendota Water Authority v. United States*, 672 F.3d 676, 699 (9th Cir. 2012); *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 796 (9th Cir. 2013). The APA requires a reviewing court to "decide all relevant questions of law [and] interpret constitutional and statutory provisions." 5 U.S.C. § 706; *Sauer v. U.S. Dep't of Educ.*, 668 F.3d 644, 650 (9th Cir. 2012). Under the APA, a reviewing court shall "hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). An agency's decision can be upheld "only on the basis of the reasoning articulated therein." *California Energy Comm'n v. Dep't of Energy*, 585 F.3d 1143, 1150 (9th Cir. 2009).

In determining whether an agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the reviewing court considers "'whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *San Luis & Delta-Mendota*

Water Authority v. Jewell, 747 F.3d 581, 601 (9th Cir. 2014) (en banc) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). In determining whether an agency acted in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, the Court's review is *de novo*. *John v. United States*, 720 F.3d 1214, 1228 (9th Cir. 2013).

This Court reviews the district court's application of the APA standard—and thus Water Contractors' claims regarding provisions of the CVPIA, the 1955 Act, and 43 U.S.C. section 383—*de novo*. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990); *Oregon Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1108 (9th Cir. 2010). This Court also reviews standing questions *de novo*, as well as the district court's grant of summary judgment. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011).

II. In Making the Flow Augmentation Releases, Reclamation Acted in Excess of Statutory Authority by Exceeding the Permanent Annual Volumes of Water Established Pursuant to Central Valley Project Improvement Act Section 3406(b)(23) for Trinity River Fishery Purposes

The district court erred in concluding that CVPIA section 3406(b)(23) is "limited in scope to the Trinity River basin." ER 64. This ruling should be reversed.

The plain text of section 3406(b)(23) shows Congress intended to establish permanent annual releases of water from the TRD for the Trinity River *fishery*, not for the Trinity River basin. Congress understood that just as water released from the TRD

to the Trinity River flows to the Klamath River and then to the ocean, the Trinity River anadromous fishery follows the same path. Therefore, the permanent annual volumes of water established under the ROD for purposes of restoring the Trinity River fishery, pursuant to section 3406(b)(23), now govern the volume of water Reclamation is authorized to release from the TRD to benefit the Trinity River fishery. In making the FARs, Reclamation exceeded the ROD's annual volume limits, and in turn, acted contrary to and in excess of its statutory authority under section 3406(b)(23) to implement the permanent annual volumes established for the Trinity River fishery.

A. Section 3406(b)(23) Authorizes and Directs the Secretary to Implement Permanent Annual Releases from the Trinity River Division for Purposes of Restoring and Maintaining the Trinity River Fishery

To determine whether section 3406(b)(23) governs Reclamation's authority to make releases from the TRD that benefit the Trinity River fishery, the Court applies the rules of statutory construction. In the task of statutory interpretation, the Court's objective "is always to discern the intent of Congress." *U.S. Aviation Underwriters Inc. v. Nabtesco Corp.*, 697 F.3d 1092, 1096 (9th Cir. 2012) (citations omitted). The Court begins with the plain language of the statute. *Id.* To determine the plain meaning of a statutory provision, the Court examines "not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 633 F.3d 1158,

1171 (9th Cir. 2011) (citations omitted). If the proper interpretation is not clear from this textual analysis, the legislative history offers valuable guidance and insight into [c]ongressional intent." *Arizona State Bd. For Charter Schools v. U.S. Dept. of Educ.*, 464 F.3d 1003, 1007 (9th Cir. 2006) (internal citation omitted).

1. The Plain Language of Section 3406(b)(23) Shows That Congress Wanted Permanent Annual Releases from the Trinity River Division for the Purpose of Restoring and Maintaining Fish of Trinity River Origin

The text of section 3406(b)(23) is the starting point for determining the scope of its mandate. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987); ER 60. Section 3406(b)(23) directs the Secretary to take several actions "in order to meet Federal trust responsibilities to protect the *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 . . . ." CVPIA § 3406(b)(23) (emphasis added). This statement of purpose is directed at the "fishery." It does not refer to the Trinity River basin nor any other particular geographic area.

To meet its "fishery" purposes, section 3406(b)(23) directs the Secretary to release established annual volumes of water from the TRD to the Trinity River. Congress directed the Secretary, for years 1992-1996, to provide "an instream release of water to the Trinity River" of not less than 340,000 acre-feet per year "for purposes of fishery restoration, propagation, and maintenance . . . ." CVPIA § 3406(b)(23)(A).

Further, section 3406(b)(23) mandated "permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River fishery" be established and implemented. *Id.*

The plain reading of the word "fishery" is that it refers to fish. Section 3406(b)(23) uses the word "fishery" seven times. Congress's objective is evident from the language of section 3406(b)(23), which consistently and exclusively refers to the "fishery" to show the purpose of the permanent annual volumes of water to be released from the TRD.

The "Trinity River fishery" is an anadromous fishery that travels through the Trinity River, the lower Klamath River, and the ocean. ER 524; ER 647; ER 654-663. It is common to refer to an anadromous fish population in terms of its natal stream, even if the fish are in another location as part of their life cycle.[2] Thus, the term "Trinity River fishery" refers to an anadromous population of fish that are not geographically confined to the Trinity River or to the Trinity River basin. Reclamation and fishery agencies have consistently referred to fish of Trinity River origin that are located in the lower Klamath River as "Trinity River" fish. For example, in making the 2004 supplemental releases Reclamation made it clear that it

[2] *See, e.g.*, ER 482 (report of California Department of Fish and Game describing fish involved in the 2002 lower Klamath River fish die-off as the "the Trinity River run" of fall-run Chinook salmon); *see also* ER 489; ER 494; ER 497 (describing impacts of 2002 fish die-off on the "fall salmon fishery on the Trinity River"); ER 522 (report of FWS describing fish involved in 2002 fish die-off as "Trinity sub-basin fish").

was making the releases "out of its commitment to restore the Trinity River fishery . . . ." Exh. 2 to Akroyd Decl., internal Exh. 1 at p. 1. The FONSI for the 2004 releases stated that Interior "is extremely concerned about maintaining healthy *Trinity River fish stocks* while the fish migrate through the Lower Klamath River." *Id*. (emphasis added).

The object of the permanent releases that Congress mandated be implemented in section 3406(b)(23) is therefore the fish, not the physical location of the Trinity River. The water is for the restoration and maintenance of the fish. Thus, section 3406(b)(23) must be read consistent with Congress's intent to have the Secretary and Reclamation implement the permanent annual releases established for fish purposes. The geographic scope of these permanent annual releases must be tied to the fish purposes, which in the case of the Trinity River fishery, follows the fish on their journey to and from the ocean, through the lower Klamath River.

2. The Legislative History Confirms that Congress Intended to Benefit the Trinity River Fishery With Releases that Reach Both the Trinity River and Lower Klamath River

If the Court finds ambiguity regarding the scope and purpose of the permanent annual instream releases mandated by section 3406(b)(23), it can look to legislative history to help discern Congress's intent. *Arizona State Bd. For Charter Schools*, 464 F.3d at 1007. The legislative history confirms that Congress understood, and intended, that the permanent annual instream releases established pursuant to section

3406(b)(23) would provide water for the Trinity River fishery while the fish were located in both the Trinity River and lower Klamath River.

The legislative history shows that Congress intended to complement existing physical restoration activities within the Trinity and Klamath River basins with permanent releases from the TRD, in an effort to restore and maintain the Trinity River fishery. The origins of the language that was ultimately enacted as section 3406(b)(23) can be traced back to a title introduced by Frank D. Riggs, U.S. Representative from California, into the House of Representatives in 1991. 102 Cong. Rec. H4844-46 (daily ed. June 20, 1991) (Title XXX – Trinity River Division Central Valley Project), reprinted in 1 LEGISLATIVE HISTORY, MISC. ARTICLES, AND BACKGROUND INFORMATION RELATED TO PUBLIC LAW 102-575 RECLAMATION PROJECTS AUTHORIZATION AND ADJUSTMENT ACT OF 1992, at 1222-1225 (1993) ("PL 102-575 Leg. History"). The title introduced by Riggs, and passed in the House of Representatives, is the source of the key language found in the enacted CVPIA section 3406(b)(23). 102 Cong. Rec. H4844 (daily ed. June 20, 1991) (Title XXX – Trinity River Division Central Valley Project), reprinted in 1 PL 102-575 Leg. History, at 1222-1225. In particular, the enacted CVPIA section 3406(b)(23) contains identical language to the original title, which mandated "permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River fishery." *Id*.

When introducing the original title that became CVPIA section 3406(b)(23), Representative Riggs explained that the mandatory "permanent" releases were intended for the "Klamath-Trinity fishery." 102 Cong. Rec. H4844 (daily ed. June 20, 1991) (statement of Rep. Riggs), reprinted in 1 PL 102-575 Leg. History, at 1223. Representative Riggs explained that Secretary Lujan on May 8, 1991 agreed that Interior's obligations under the "Act of August 12, 1955" authorizing the TRD required a "substantial increase in the water supply for the Trinity River fishery." *Id*. Representative Riggs went on to say that "[n]ow that the Secretary has done his part to stop the decline of the Trinity River fishery, it is time for Congress to step forward and confirm his decision." *Id*. Representative Riggs urged that "[i]f Congress does not act, then the Trinity River basin fish and wildlife 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*." *Id*. (emphasis added). These statements confirm that the intent and purpose of the permanent annual TRD releases mandated by section 3406(b)(23) was to benefit the Trinity River fishery by increasing flows in both the Trinity River and lower Klamath River.

In sum, both the plain language of and the legislative history for section 3406(b)(23) confirm Congress's intent that the anadromous fish themselves, not the physical place of the Trinity River, define the purpose and scope of the permanent annual releases established pursuant to section 3406(b)(23).

B. The Annual Volumes Established Under the Record of Decision Fulfill Section 3406(b)(23)'s Statutory Directive for Permanent Releases for the Trinity River Fishery

In CVPIA section 3406(b)(23), Congress provided for "permanent" flows for Trinity River fishery purposes to be achieved by one of two ways. Either, permanent instream fishery flow requirements could be established by the Secretary and the Hoopa concurring in the recommendations of the Trinity River Flow Evaluation Study, and those requirements could include increases to the minimum Trinity River instream fishery releases of 340,000 AF per year otherwise established under section 3406(b)(23). CVPIA § 3406(b)(23). Or, if the Hoopa and the Secretary did not concur, then the minimum release volume of 340,000 AF per year for fishery purposes, established by 3406(b)(23), would remain in effect. *Id*. The CVPIA's statutory directive to establish "permanent instream fishery flow requirements" for the Trinity River fishery was fulfilled through the former pathway, through the concurrence of the Secretary and the Hoopa in the ROD.

The ROD's annual volume limits represent a "permanent" cap on the amount of water to be released from the TRD each year for restoration and maintenance of the Trinity River fishery. The ROD "represents the culmination of over two decades of efforts aimed at understanding the necessary instream flow and physical habitat restoration requirements in order to restore the Trinity River anadromous fishery." ER 531; *see* ER 76. The ROD sets out different volumes of releases depending upon

water year type, from 369,000 AF in a critically dry year to 815,000 AF in an extremely wet year. ER 535. The ROD confirms that the annual flow volumes "may not be changed;" it prohibits variance from the annual volume limits. *Id*. This is what makes the ROD annual volumes "permanent" in nature, as mandated by CVPIA section 3406(b)(23). These annual volumes are set aside for the Trinity River fishery, and hence are not available for export to the Central Valley.

While the ROD's annual volume limits must be implemented to achieve section 3406(b)(23)'s "permanent" mandate, the ROD allows for adjustments to the release schedule within those annual volume limits to respond to changing conditions and evolving scientific understanding. The ROD specifically states that "the schedule for releasing water on a daily basis, according to that year's hydrology, may be adjusted . . . ." ER 535. The ROD established an Adaptive Environmental Assessment and Management Program, to "recommend possible adjustments to the annual flow schedule within the designated flow volumes provided for in [the] ROD or other measures in order to ensure that the restoration and maintenance of the Trinity River anadromous fishery continues based on the best available scientific information and analysis." ER 526.

If, for example, Reclamation wants to change the annual release schedule to provide more water for August and September releases, it may do so, so long as it operates within the ROD's annual limits. Reclamation acknowledged this option in its

environmental document for the 2004 supplemental releases: "the Department [of Interior] may shift some of the flows from the normal spring-peak hydrograph for release later in the fall [to make the releases], as long as the total release in any water year does not exceed the total amount allowed under the ROD." Exh. 2 to Akroyd Decl., internal Exh. 1 at p. 2 n.2.

Pursuant to section 3406(b)(23), the permanent fishery flows and TRD operating criteria and procedures established in the ROD must "be implemented accordingly." CVPIA § 3406(b)(23). Thus, fishery releases that exceed the ROD's annual volumes violate section 3406(b)(23)'s statutory mandate to establish and implement permanent instream flows.

C. Reclamation Exceeded the ROD's Annual Volume Limits and Violated Section 3406(b)(23)'s "Permanent" Directive by Making the Flow Augmentation Releases

The 2012 and 2013 FARs exceeded the ROD's annual volume limits, and in turn, exceeded Reclamation's statutory authority to make such releases pursuant to CVPIA section 3406(b)(23). Releases from the TRD intended to benefit the Trinity River fishery are subject to the ROD's annual volume limits regardless of the geographic location downstream where the flows benefit the Trinity River fishery. The FARs are subject to the ROD's permanent annual volume limits because the FARs were intended to restore and maintain the Trinity River fishery.

The FARs were intended to benefit the Trinity River fishery. The district court acknowledged that there "is no dispute that the FARs were designed to aid fish returning to *both* the Trinity River and the Klamath River basins." ER 64 (quoting AR 00016–17 [ER 205-206], emphasis in original); *see* Fed. Br., Doc. 25, at 34 ("the flow-augmentation releases necessarily preserve adult salmon returning to the Trinity River basin"). Further, record evidence proves the FARs were "for the restoration and maintenance of the Trinity River fishery." CVPIA § 3406(b)(23). The 2012 and 2013 EAs describe the releases as needed because "[t]he biological consequences of large-scale fish die-offs could substantially impact present efforts to restore the native Trinity River anadromous fish community and the fishery." ER 336; *see* ER 206; *see generally* ER 190-240, 320-330. The FARs were intended to benefit fish of both Trinity and Klamath River origin, while they were located in the lower Klamath River. *Id*.

Reclamation had discretion to establish a schedule for instream releases for the restoration and maintenance of the Trinity River fishery within the ROD's annual volume limits for 2012 and 2013. For a "dry" water year such as 2013, Reclamation's budget for water dedicated to Trinity River fishery purposes was 453,000 AF. ER 535.[3] However, instead of working within the ROD's permanent annual limits for the

[3] Water Contractors challenge both the 2012 and 2013 FARs. However, for brevity, Water Contractors only discuss the facts of the 2013 FARs to demonstrate violation of section 3406(b)(23).

Trinity River fishery, Reclamation proposed exceeding the ROD's annual limit for 2013 by up to 109,000 AF (or 24%) to make late-summer supplemental releases (the FARs). *See* ER 193. When Reclamation *made* the 2013 FARs, it exceeded the ROD's 453,000 AF annual volume limit for 2013. *See* SER 278, at ¶ 80 (admitting TRD releases for fishery purposes in 2013 were 453,000 AF, plus 17,500 AF in August and September).

Instead of taking water from the TRD above the levels set in the ROD, Reclamation could have changed its release schedule for the ROD water to save some for August and September, or could have purchased additional water to protect Central Valley uses. In 2003 and 2004, Reclamation acknowledged these two options. In both years it acquired water for the supplemental releases. Exh. 1 to Akroyd Decl., internal Exh. 2 at p. 13; Exh. 2 to Akroyd Decl., internal Exh. 1 at p. 2. However, in 2013, Reclamation failed to schedule or secure water for the FARs.

In sum, Reclamation acted contrary to law and in excess of statutory authority by making the 2012 and 2013 FARs because they were in excess of the ROD's permanent annual volume limits for Trinity River fishery releases and therefore violated section 3406(b)(23)'s mandate to implement the ROD's permanent instream releases.

D. Section 3406(b)(23)'s Scope is Not Geographically Limited to the Trinity River Basin

The district court's reading of CVPIA section 3406(b)(23) as geographically limited to the Trinity River basin is inconsistent with the statutory text, fails to account for the problem that Congress sought to address, and ignores the physical realities of both releases from the TRD and the Trinity River fishery. The permanent fishery releases required by section 3406(b)(23) are for the restoration and maintenance of the "Trinity River fishery." The Trinity River fishery that Congress sought to restore and maintain is not geographically limited to the Trinity River itself. ER 524; ER 647; ER 654-663. The anadromous fish travel through the Trinity River and lower Klamath River in their journey to and from the ocean. *Id*. It is unreasonable to interpret section 3406(b)(23)'s mandate of permanent releases for the Trinity River fishery as geographically limited to uses within the Trinity River basin, when neither the water released from the TRD nor the Trinity River fishery are geographically confined to the Trinity River.

1. The District Court Erred in Concluding that the 1984 Act's Reference to the Trinity River Basin Geographically Limited the Scope of Section 3406(b)(23) Fishery Releases

The district court looked to the 1984 Act to construe the fishery purpose in section 3406(b)(23) as geographically confined. The district court first focused on section 3406(b)(23)'s reference to the "fishery restoration goals" of the 1984 Act and

concluded that the CVPIA's "reference to the 1984 Act's goals is limited in scope to the Trinity River . . . ." ER 61-62. However, the district court failed to read section 3406(b)(23) and the 1984 Act in context. When read in context, it is clear that both the 1984 Act and section 3406(b)(23) were focused on restoring the Trinity River *fishery*, albeit by different means. The 1984 Act sought to achieve that purpose by authorizing physical non-flow restoration activities within the Trinity River basin. CVPIA section 3406(b)(23) sought to achieve that purpose by authorizing permanent annual releases of water from the TRD which would flow into the Trinity River, then to the Klamath River, and finally to the ocean. But the "fishery restoration goal" of both these statutory enactments is focused on the fish themselves.

The district court incorrectly read the 1984 Act's specific reference to the Trinity River basin as limiting the geographic scope of the permanent releases established under the CVPIA. The district court incorrectly focused on 1984's Act's authorization for "facilities" to "rehabilitate fish habitats in the Trinity River between Lewiston Dam and Weitchpec" as indicating a geographic limit that section 3406(b)(23) incorporated by reference. 1984 Act § 2(a)(1)(A); CVPIA § 3406(b)(23); ER 61-62. However, the 1984 Act says nothing about water releases or flows and is focused on non-flow measures necessary to implement a management program, in conjunction with the flows already provided for under the 1981 Secretarial Decision. *See* ER 738. The CVPIA references meeting the 1984 Act's "fishery restoration

goals" as a purpose of the releases. This reference does not justify any geographic limit to use of flow within the Trinity River basin, as the salmon that spawn in the Trinity River basin must migrate out of and back to the basin through the lower Klamath River.

One of the purposes of the releases required by section 3406(b)(23) was to meet the "fishery restoration goals" of the 1984 Act. CVPIA § 3406(b)(23). The "fishery restoration goals" of the 1984 Act are to restore "fish and wildlife populations" of the Trinity River basin to "a level approximating that which existed immediately before the start of the construction of the Trinity River division." 1984 Act § 1(6). While the 1984 Act does refer to the Trinity River basin, the restoration goal is directed at fish "populations" in the basin. Therefore, the CVPIA's reference to meeting the 1984 Act's "fishery restoration goals" is a reference to restoring the anadromous fish themselves, which originate in the Trinity River basin and travel to and from the ocean via the Trinity River and lower Klamath River as part of their life cycle.

The 1984 Act was intended to address non-flow measures needed to restore the Trinity River fishery. The "additional authority"[4] provided by the 1984 Act is for physical non-flow restoration activities to implement a restoration and management program that could address "activities other than those related to the [TRD]

[4] The 1984 Act did not address authority for flows, because authority to make TRD releases for the benefit of fish was already provided by the 1955 Act.

project…." 1984 Act § 1(4), (6). Thus, the 1984 Act authorized and 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 Trinity River between Lewiston Dam and Weitchpec [and] fish habitats in tributaries of such river . . . ." 1984 Act § 2(a)(1)(A), (B). The program was also to include measures to increase the effectiveness of the Trinity River Fish Hatchery. It is of no moment that the non-flow measures authorized under the 1984 Act were focused within the Trinity River basin; that does not redefine the purpose of the flow measures established under the CVPIA section 3406(b)(23).

In sum, section 3406(b)(23)'s reference to the "fishery restoration goals" of the 1984 Act does not limit its scope to the Trinity River basin.

2. The District Court Misread This Court's Decision in *Westlands Water District v. U.S. Department of Interior*

The district court wrongly concluded that reading CVPIA section 3406(b)(23) as directed at the Trinity River fishery and thus encompassing the lower Klamath River would be "inconsistent with the Ninth Circuit's analysis in *Westlands*, 376 F.3d at 866-67." ER 62. The district court mischaracterized this Court as previously finding that "CVPIA § 3406(b)(23) and the 1984 Act concerned the Trinity River Basin." ER 64-65. It also misconstrued the *Westlands'* decision in concluding that "the Ninth Circuit confirmed that CVPIA § 3406(b)(23) and the 1984 Act were limited in scope to the entirety (rather than just the mainstem) of the Trinity River

Basin." ER 65. *Westlands* involved a challenge to the ROD under NEPA. This Court held that defendants did not violate NEPA by focusing restoration activities on the mainstem of the Trinity River. This Court did not determine whether releases to benefit the Trinity River fishery while the fish are in the lower Klamath River are subject to the permanent annual volumes of water established for the Trinity River fishery pursuant to the CVPIA section 3406(b)(23), the issue currently before this Court.

3. The Additional Sources Relied Upon by the District Court Cannot Alter the Statutory Purpose of the Releases

The district court cited to a variety of sources and record documents that it concluded supported reading CVPIA section 3406(b)(23) as being "focused only on restoration of the mainstem of the Trinity River and fish and wildlife populations in the 'Trinity River Basin." ER 62-67. This reliance was misplaced.

Rather than focus on whether the FARs were subject to section 3406(b)(23), the district court focused its inquiry on whether the FARs were within the scope of the ROD. But as the Supreme Court has made clear, an executive agency or officer does not have the power to rewrite statutes. *See Util. Air Regulatory Grp. v. E.P.A.*, 134 S.Ct. 2427, 2445 (2014). Therefore, the ROD does not operate to rewrite or narrow the scope of CVPIA section 3406(b)(23). Thus, the district court's conclusion that the "FARs fall outside the scope of the limitations imposed *by the TRROD*" is of little

consequence because the ROD does not alter the purpose of the permanent releases mandated by Congress. ER 65 (emphasis added). Congress did not direct the Secretary to implement permanent releases for the main stem of the Trinity River; it directed the Secretary to establish and implement permanent annual volumes of water "for the restoration and maintenance of the Trinity River fishery." CVPIA § 3406(b)(23). The ROD defined the volume of the releases to be used to meet that purpose, but could not alter the statutorily defined purpose of the releases.

While the district court correctly observed that the focus of the specific release schedule adopted in the ROD in 2000 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" (ER 64), this focus is not immutable. The district court contrasted that focus with the FARs, which address conditions in the lower Klamath River. *Id.* But as the ROD explains, the release schedule can be altered, based on adaptive management. ER 535. The fish die-off in the lower Klamath River occurred in 2002, after the ROD was adopted. In response to the fish die-off, one available option was to plan for and use a portion of the volume annually available under the ROD to make supplemental releases in August and September, to benefit Trinity River fish coming up the lower Klamath River. The district court mistakenly relied on the Secretary's initial use of flow to improve Trinity River mainstem habitat conditions as defining the scope of releases subject to section

3406(b)(23). Rather, any CVP water taken from the TRD to further the purpose of restoring the Trinity River fishery is within the scope of section 3406(b)(23), and must come from within the annual volume limits established in the ROD pursuant to section 3406(b)(23), or from supplemental supplies purchased under other authority that thereby avoids impacts to other CVP uses.

In sum, section 3406(b)(23) directs the Secretary to implement permanent instream releases from the TRD for the purpose of restoration and maintenance of the Trinity River fishery. The ROD establishes the permanent annual volumes of water to be used for the Trinity River fishery, as mandated by section 3406(b)(23). TRD releases made to benefit the Trinity River fishery, such as the FARs, are subject to the ROD's annual volume limits and section 3406(b)(23)'s statutory mandate to implement these permanent instream releases.

III. The 1955 Act Does Not Provide Authorization for Flow Augmentation Releases that Benefit the Trinity River Fishery

A. The District Court Correctly Concluded that the 1955 Act Does Not Provide Authority for Fishery Releases Beyond that Set Forth in Central Valley Project Improvement Act Section 3406(b)(23)

The district court correctly concluded that the ROD is "the culmination and embodiment of the Secretary's responsibilities under the 1955 Act, the 1984 Act, and CVPIA § 3406(b)(23)." ER 76. As the district court properly recognized, "[t]here is simply no logical support for an alternative interpretation of the 1955 Act that affords

Federal Defendants authority beyond that set forth in the 1984 Act and CVPIA § 3406(b)(23)." ER 76.

However, in an effort to reconcile the 1955 Act with CVPIA section 3406(b)(23), the district court concluded that the 1955 Act must be geographically limited to the Trinity River basin because the district court had already concluded that section 3406(b)(23) is so geographically limited. Thus, the district court held: "that the 1955 Act is limited in geographical scope to the Trinity River basin and therefore does not provide Federal Defendants with authority to implement the FARs, which were designed to improve fisheries conditions in the lower Klamath River." ER 76. The district court's interpretation of the 1955 Act ultimately depended on its reading of CVPIA section 3406(b)(23) as geographically limited to the Trinity River.

If the district court had correctly concluded that the scope of CVPIA section 3406(b)(23) was for Trinity River fishery purposes, and included both the Trinity River and lower Klamath River within its allowed geographic scope, it presumably would have concluded that the 1955 Act cannot authorize releases section 3406(b)(23) does not, and that therefore the 1955 Act does not authorize the FARs.

B. Reclamation's Interpretation of the 1955 Act is Not Entitled to Deference Under *Chevron* or *Skidmore*

Reclamation's interpretation of the 1955 Act is not entitled to deference under either *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Defendants argue that the

district court erred by refusing to accord Reclamation's "interpretation" of the 1955 Act *Chevron* deference. Fed. Br., Doc. 25, at 46-47; Hoopa Br., Doc. 24, at 46-48. In the alternative, Defendants argue that Reclamation's interpretation is entitled to *Skidmore* deference. Fed. Br., Doc. 25, at 47-51; Hoopa Br., Doc. 24, at 46-48; Yurok Br., Doc. 27, at 21-29. These arguments fail.

Chevron deference applies only when: (1) "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law" and (2) "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead*, 533 U.S. 218, 226-27 (2001). Whether an agency's statutory interpretation satisfies the second requirement "depends on the form and context of that interpretation." *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 826 (9th Cir. 2012). "The precedential value of an agency action [is] *the* essential factor in determining whether *Chevron* deference is appropriate." *Miranda Alvarado v. Gonzalez*, 449 F.3d 915, 922 (9th Cir. 2006) (italics in original).

The Ninth Circuit has consistently ruled that statutory interpretations in documents that do not bind third parties are non-precedential, and are not entitled to *Chevron* deference.[5] For example, in *Wilderness Society v. U.S. Fish and Wildlife*

[5] *See, e.g., Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1012 (9th Cir. 2006); *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 922 (9th Cir. 2006); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 648 (9th Cir. 2004); *Hall v. U.S. E.P.A.*, 273 F.3d 1146, 1156 (9th Cir. 2001).

Service, 353 F.3d 1051, 1067 (9th Cir. 2003) (en banc), this Court declined to give *Chevron* deference to an agency determination regarding the permissibility of a specific project under the Wilderness Act. "[A]n agency's application of law in a particular permitting context," as compared to "an interpretation of a statute that will have the force of law generally for others in similar circumstances," was not entitled to *Chevron* deference. *Wilderness Soc'y*, 353 F.3d at 1067. The underlying NEPA documents for the permit, including an EA, FONSI, Consistency Review, and Compatibility Determination, spoke in terms specific to the project at issue, and did "not address general principles of law." *Id*. at 1068. Therefore, "[n]othing in the review documents or the Solicitor's opinion would bind the USFWS to permit a similar activity in another wilderness." *Id*.

In this case, the non-precedential 2012 and 2013 EAs are the only documents in the administrative record asserting that the 1955 Act provides legal authority for the FARs. *See* ER 206; ER 337. The EAs state only that the 1955 Act "provides the principal authorization for implementing the Proposed Action[s]." *Id*. As in *Wilderness Society*, the documents speak in terms specific to the projects at issue. *Wilderness Soc'y*, 353 F.3d at 1068. Reclamation's identification of the 1955 Act as authority for the FARs is non-binding. The statements of legal authority in the EAs lack precedential value, and therefore do not carry the force of law.

Contrary to Defendants' arguments otherwise, the fact that the EAs were preceded by brief periods of notice and comment does not mean the identification of the 1955 Act as authority for the FARs therein carries the force of law. ER 206; ER 337. The relative formality of the proceedings is secondary to consideration of whether the EAs have precedential effect, and here, the identification of purported authority for the FARs is not precedential. *Garcia-Quintero*, 455 F.3d at 1012.

The sheer number of environmental assessments that are issued every year further bolsters the conclusion that they do not carry the force of law. *See Mead*, 533 U.S. at 233; *Miranda Alvarado*, 449 F.3d at 922. Environmental assessments are commonplace and prolific. The suggestion that the identification of legal authority in the multitude of environmental assessments issued every year is precedential "is simply self-refuting." *Mead*, 533 U.S. at 233. Thus, as the district court found, "Federal Defendants have completely failed to point to any interpretation of the 1955 Act that has been promulgated in a precedential manner and therefore have provided no justification for the application of *Chevron* deference here." ER 69.

Reclamation's interpretation of the 1955 Act is not entitled to any weight under *Skidmore*, 323 U.S. at 140, either. Under *Skidmore*, the weight given to an informal agency statutory interpretation "in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if

lacking power to control." *Id*. Here, there is no evidence of a thorough consideration of the 1955 Act; neither the EAs nor any other record documents explain *why* the 1955 Act authorizes the FARs. Federal Defendants' litigating positions regarding the meaning of the 1955 Act are not entitled to deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988); *Price*, 697 F.3d at 830-831.

Moreover, Reclamation's "interpretation" is inconsistent with earlier pronouncements. When Reclamation first made supplemental releases in 2003 and 2004, it did not identify the 1955 Act as authority for those releases. Exh. 1 to Akroyd Decl., Exh. 2 to Akroyd Decl. Instead, Reclamation relied on its "statutory authority to purchase the water" for the supplemental releases, pursuant to "3406(b)(3) of the Central Valley Project Improvement Act and 16 U.S.C. § 742f." Exh. 2 to Akroyd Decl., internal Exh. 1 at p. 2. In those early years, Reclamation arranged water exchanges or purchased water to make releases from the TRD that were in addition to the ROD's annual volumes limits for fishery purposes. *Id*. In the 2004 FONSI for the supplemental releases, Reclamation also concluded that water for the Trinity River Restoration Program under the ROD could be used for late summer releases directed at the lower Klamath River and stated that "ROD water is made available pursuant to the adaptive management provisions in the ROD." *Id*. It was not until 2012, after previously relying on authority to purchase water and concluding that ROD water could be used for the supplemental releases, that Reclamation first took the position

that the 1955 Act justifies releases to reduce the likelihood and severity of a fish die-off. And even then, Reclamation indicated it would "identify and implement mitigation measures to ensure [the FARs] [did] not have a water supply impact to [CVP] water contractors . . . ." SER 401.

Defendants' citations to a 1979 memorandum from the Solicitor's Office, the 1981 Secretarial Issue Document, and legislative history of the 1955 Act are not evidence of prior consistent interpretations of the 1955 Act. Fed. Br., Doc. 25, at 48 (citing 1979 Opinion, ER 135); Hoopa Br., Doc. 24, at 49-50 (citing 1979 Opinion, ER 135-136; 1981 Secretarial Decision, ER 738-753); Yurok Br., Doc. 27, at 23 (citing Report of the Secretary of the Interior, H.R. Doc. No. 281, 84th Cong., 2d Sess. (1955)). The 1979 Opinion focused on whether a CVP contract for supplies to a wildlife refuge could be amended to have equal priority with agricultural contractors during shortages of water. ER 133. The statement in the opinion that the TRD's integration into the CVP was "made subject to the provisos that follow giving specific direction to the Secretary regarding in-basin needs" was incidental to the primary question answered in the opinion. ER 135. The 1981 SID actually supports reading the 1955 Act as authorizing only water releases that "mitigate damage to the fishery." ER 749; *see* section I.C.2 of Statement of Facts, above. And the report in the legislative history for the 1955 Act also confirms that the TRD was "urgently needed to supply additional water to the Central Valley project of the Bureau of Reclamation

for use in both the Sacramento and San Joaquin River Basins." Report of the Secretary of the Interior, H.R. Doc. No. 281, 84th Cong., 2d Sess. (1955), at p. 3. This stated purpose was confirmed in a 1974 Solicitor's Opinion that described the purpose of the TRD as "to provide as much water as possible to the Central Valley." SER 317. None of the documents cited by Defendants actually analyze whether releases may be made to prevent a fish die-off that is not caused by TRD operations, let alone whether the 1955 Act authorizes additional releases after flows authorized by section 3406(b)(23) have been exhausted. In contrast, the 2003 and 2004 EAs expressly considered authority for supplemental releases and did not reference the 1955 Act. Exh. 1 to Akroyd Decl., internal Exh. 2; Exh. 2 to Akroyd Decl., internal Exh. 1.

Defendants' arguments regarding whether the district court properly considered the interpretation of the 1955 Act in a 1999 scientific report on the Trinity River Flow evaluation study are likewise of no consequence. *See* Fed. Br., Doc. 25, at 48-49. Federal Defendants' current interpretation of the 1955 Act as authority for the FARs is inconsistent with its prior position regarding the 2003 and 2004 releases.

Finally, this Court is not required to defer to Reclamation's interpretation of the 1955 Act based on any "specialized expertise" regarding TRD operations. Fed. Br., Doc. 25, at 51; Yurok Br., Doc. 27, at 25-26. Reclamation's experience operating the

CVP has no bearing on the persuasiveness of its legal interpretation of the 1955 Act in this litigation. *See Bowen*, 488 U.S. at 212-213; *Price*, 697 F.3d at 830-31.

For these reasons, Reclamation's interpretation of the 1955 Act is not entitled to *Chevron* deference, and because it lacks the power to persuade, is not entitled to deference under *Skidmore*.

C. Central Valley Project Improvement Act Section 3406(b)(23) Abrogated the 1955 Act Regarding Fishery Releases from the Trinity River Division to Benefit the Trinity River Fishery

1. The Later and More Specific Central Valley Project Improvement Act Section 3406(b)(23) Governs the Amount of Water to be Released from the Trinity River Division for the Trinity River Fishery

In this case, the Court should apply the rule of statutory construction that where "two statutes conflict, the later-enacted, more specific provision generally governs." *United States v. Juvenile Male*, 670 F.3d 999, 1008 (9th Cir. 2012). Here, there is a conflict between the 1955 Act directive for the Secretary to "take appropriate measures to insure preservation and propagation of fish . . . including . . . the maintenance of the flow of the Trinity River below [the TRD] at not less than one hundred and fifty cubic feet per second for the months of July through November" and the later and more specific mandate in CVPIA section 3406(b)(23) to establish and implement "permanent instream fishery flow requirements . . . for the restoration and maintenance of the Trinity River fishery . . . ." 1955 Act §; CVPIA § 3046(b)(23).

Congress intended to amend and replace the minimum fishery flow requirements contained in the 1955 Act with the increased flow requirements established pursuant to section 3406(b)(23). The later and more specific section 3406(b)(23) now governs the amount of water that is released from the TRD for the downstream Trinity River fishery. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) ("a later enacted statute . . . can sometimes operate to amend or even repeal an earlier statutory provision"); *see also Acosta v. Gonzales*, 439 F.3d 550, 555 (9th Cir. 2006) *abrogated on other grounds by Garfias–Rodriguez v. Holder*, 649 F.3d 942, 948 (9th Cir. 2011). Any other reading would conflict with Congress's directive to establish and implement "permanent instream flow requirements" for the TRD. CVPIA § 3406(b)(23).

The Court should conclude that the specific directive in section 3406(b)(23) to implement "permanent" instream fishery requirements governs over the more general directive in the 1955 Act to take "appropriate measures" for fish. This Court previously reached a similar conclusion in another case regarding the CVPIA. *Westlands Water Dist. v. Nat. Res. Def. Council*, 43 F.3d 457, 461 (9th Cir. 1994) (concluding more "specific directive calling for immediate implementation" in sections of the CVPIA governed over the more "general directive to abide by all laws when implementing the CVPIA"); *see also In re Padilla*, 222 F.3d 1184, 1192 (9th

Cir. 2000). Here, the authorization in the 1955 Act to make releases from the TRD to protect fish was supplanted by the later and more specific CVPIA section 3406(b)(23).

Defendants argue section 3406(b)(23) did not impliedly repeal the fishery releases proviso in the 1955 Act. Hoopa Br., Doc. 24, at 37-43; *see* Fed. Br., Doc. 25, at 44-45. It makes no difference whether the effect of the section 3406(b)(23) on the 1955 Act's fishery release authorization is characterized as an implied amendment or an implied repeal. *Nat'l Ass'n of Home Builders*, 551 U.S. at 664 n.8. What is of import is that no party to this litigation suggests that the 1955 Act's directive to maintain 150 cubic feet per second during July to November in the Trinity River below the TRD remains the applicable statutory directive for fishery releases from the TRD. Nor does any party argue that the Secretary is free to reduce releases to the minimum levels set in the 1955 Act. Thus, any insistence that the 1955 Act's authorization for fishery releases remains untouched by section 3406(b)(23) is untenable.

Yet, Defendants argue the 1955 Act authorizes additional fishery releases beyond the permanent releases established under section 3406(b)(23). For additional releases, Defendants would have this Court read the 1955 Act in isolation from a subsequent Congressional enactment on precisely the same subject – the amount of water to be released from the TRD for to benefit the downstream Trinity River fishery. The Supreme Court has instructed that "a reviewing court should not confine

itself to examining a particular statutory provision in isolation" and confirmed that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000).

When read in the context of the later CVPIA section 3406(b)(23), it is evident that the 1955 Act's directive to take "appropriate measures" including providing minimum instream releases for fish, has been displaced. Congress was not satisfied with what Defendants argue is the "broad" authorization[6] contained in the 1955 Act to insure the preservation of downstream fish, and in 1992 Congress enacted a more specific directive for increased "permanent instream fishery flow requirements" for the purposes of "fishery restoration, propagation, and maintenance . . . ." CVPIA § 3406(b)(23). Thus, while arguably prior to enactment of the CVPIA the Secretary had "considerable discretion to determine what 'appropriate measures' are needed to 'insure preservation and propagation of fish'" (Fed. Br., Doc. 25, at 32), that discretion has been foreclosed by the permanent annual releases established pursuant to section 3406(b)(23) of the CVPIA. This is no longer the pre-1992 world in which the *Secretary* was authorized to determine what releases are necessary for downstream

[6] Fed. Br., Doc. 25, at 38-46; Hoopa Br., Doc. 24, at 22-27; Yurok Br., Doc. 27, at 11-13.

anadromous fish; that issue was finally resolved by *Congress* providing for permanent fishery releases from the TRD in the CVPIA.

In sum, the 1955 Act cannot be read to provide broad authorization for additional fishery releases because such a reading would conflict with the later and more specific statutory mandate in CVPIA section 3406(b)(23) to implement permanent fishery releases. Such a reading "would effectively write [the 'permanent' mandate] out of the" the CVPIA. *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 513 (1981). Therefore, the only reasonable construction of the two statutory enactments that both address the issue of fishery releases from the TRD is that the later and more specific CVPIA section 3406(b)(23), and the ROD annual volumes established pursuant to section 3406(b)(23), now govern the annual amount of water to be released for the benefit of downstream fish.

2. The "Restoration" Goal Incorporated Into Central Valley Project Improvement Act Section 3406(b)(23) is an Update to the 1955 Act's "Preservation" Directive

Defendants mistakenly argue that the 1955 Act provides authority for fish "preservation" that is somehow independent and distinct from the CVPIA's authority for fish "restoration."[7] While Federal Defendants concede that at a minimum, "the

[7] *See*, *e.g.*, Hoopa Br., Doc. 24, at 40 (arguing that the 1984 Act and CVPIA section 3406(b)(23) address "restoration" and do not restrict the 1955 Act's mandate to "preserve and propagate fish"), at 54 (arguing that "subsequent acts including the

authorities and directives in the 1955 Act overlap with the authorities and directives in the 1984 Act and CVPIA," they insist that releases from the TRD pursuant to the CVPIA directive for permanent fishery releases are for distinct "restoration" purposes. Fed. Br., Doc. 25, at 41-42. However, Defendants' belabored efforts to read the "preservation" directive as separate and apart from the later "restoration" goal ignore what occurred between 1955 and 1992 and fail to acknowledge that both statutory enactments address the same issue - how much water should be dedicated from the TRD for anadromous fish below the TRD?

There is a simple explanation for why Congress first had a "preservation" directive in the 1955 Act and later had a "restoration" goal in the 1984 Act and in CVPIA section 3406(b)(23). As the district court observed, "Congress and all involved learned from experience that the minimum instream flow authorized in the 1955 Act was not enough; restoration was necessary." ER 76.

The change from the "preservation" directive of the 1955 Act to the "restoration" goal of the CVPIA reflects the decline in the abundance of the anadromous fish after 1955. In 1955 Congress sought to ensure "*preservation*" of the existing anadromous fish population by providing minimum releases from the TRD,

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1984 Act and the CVPIA address topics of restoration distinct from the fish preservation mandate of the 1955 Act"); *see also* Fed. Br., Doc. 25, at 41-45 (seeking to distinguish the 1955 Act from the 1984 Act and CVPIA section 3406(b)(23) and arguing that "the concepts of preservation and restoration are related, but distinct").

while in 1992, in response to the subsequent decline in the Trinity River fishery, Congress sought to ensure the "*restoration* and maintenance of the Trinity River fishery" population by providing increased permanent releases. CVPIA § 3406(b)(23) (emphasis added). The "restoration" goal of the CVPIA reflected the change in conditions since the 1955 Act, in that "preservation" in 1992 of the then-existing populations of the Trinity River fishery would equate to accepting the significant decline in the fishery in the 1960s. However, the basic objective of providing sufficient releases from the TRD for the Trinity River fishery is shared by the 1955 Act and the CVPIA.

Contrary to arguments made by certain Defendants, Congress did not enact either the 1984 Act or the CVPIA based on the need for additional authority to provide "restoration" fishery flows. Hoopa Br., Doc. 24, at 37-40. The 1955 Act already provided authority for fishery releases. As explained above in section II.D.1 of the Argument, the "additional authority" provided by the 1984 Act was to authorize a management program that could address non-TRD impacts and provide restoration of habitat through non-flow measures, such as gravel augmentation. Indeed, prior to the 1984 Act, the Secretary had already relied on the 1955 Act to provide "restoration" fishery flows to increase salmon populations to pre-TRD levels, so neither the 1984 Act nor the CVPIA were necessary to authorize restoration fishery

flows. *See* ER 738. Thus, the "restoration" goal of the CVPIA and 1984 Act is an update to the "preservation" directive of the 1955 Act.

3. In Enacting Both the 1955 Act and the Central Valley Project Improvement Act, Congress Understood that Water Released from the Trinity River Division Would Reach the Lower Klamath River

All parties to this litigation agree that Congress must have understood that water released from the TRD necessarily must travel through the Trinity River, then to the lower Klamath River, and then to the ocean. Defendants rely on the real-world considerations of the physical relationship between the Trinity River and the lower Klamath River to argue that the 1955 Act's grant of authority to make fishery releases is not geographically limited. *See, e.g.*, Hoopa Br., Doc. 24, at 24, 29; *see also* Fed. Br., Doc. 25, at 33, 34; Yurok Br., Doc. 27, at 14, 15. But that same physical relationship remained when Congress later enacted CVPIA section 3406(b)(23) and directed the Secretary to implement permanent fishery releases from the TRD for the Trinity River fishery. If, as Defendants argue, it would be "arbitrary" to interpret the 1955 Act as only allowing releases to the confluence of the Trinity River and Klamath River, it must also be arbitrary to interpret CVPIA section 3406(b)(23) in the same manner. Hoopa Br., Doc. 24, at 25-26.

There is a logical reason that neither the fishery release provisions of the 1955 Act nor the CVPIA are confined to the Trinity River basin-water released from the TRD for fishery purposes necessarily flows to the lower Klamath River, and the

anadromous fish that such releases are directed at also necessarily follow this same path. Federal Defendants are wrong to argue that "there is no logical reason or legal principle that would dictate that the geographic scope of the 1955 Act be the same as the scope of the 1984 Act and CVPIA Section 3406(b)(23)." Fed. Br., Doc. 25, at 46. It is unreasonable to interpret CVPIA section 3406(b)(23)'s mandate to establish and implement permanent releases for the Trinity River fishery in a manner that confines those fishery flows to the Trinity River basin.

4. The Central Valley Project Improvement Act Was the Final Culmination of Congressional Action Regarding Fishery Releases from the Trinity River Division

Allowing additional fishery releases under the 1955 Act would defeat an important purpose of CVPIA section 3406(b)(23) – to finally and permanently resolve how much TRD water would be dedicated to fishery releases. Both the 1999 Flow Report and the ROD acknowledged that CVPIA section 3406(b)(23) was intended to be "the final resolution . . . regarding permanent instream fishery flow requirements and TRD operating criteria and procedures necessary for the restoration and maintenance of the Trinity River anadromous fishery." ER 540; *see also* ER 555; ER 643; ER 630; ER 72.[8] This permanent allocation of TRD water must not be eviscerated by an unreasonable reading of the 1955 Act.

[8] The Flow Report states that the report: "provides recommendations to the Secretary *to fulfill fish and wildlife protection mandates of the 1955 Act of Congress that authorized the construction of the Trinity River Division of the Central Valley Project*,

The consequence of interpreting the 1955 Act as authorizing additional fishery releases is that even more water is taken from the TRD, and thus unavailable for CVP water deliveries. The ROD took CVP water away from other CVP uses by allocating more TRD water to fishery releases. Additional and variable releases pursuant to the 1955 Act, in addition to the annual volumes determined in the ROD, would impose additional losses on other CVP uses. That would be contrary to the direction in CVPIA section 3406(b)(23) to establish and implement "permanent" fishery flows.

D. Even Absent the Central Valley Project Improvement Act, the 1955 Act Would Not Authorize the Flow Augmentation Releases Because the Flow Augmentation Releases Do Not Address an Impact of the Trinity River Division

Even if Congress had never enacted CVPIA section 3406(b)(23), the proviso in the 1955 Act would still not authorize the FARs. In context the proviso authorized the Secretary to take measures to address impacts on fish and wildlife caused by the TRD. The FARs are not such a measure.

TRD operations do not cause the low-flow conditions in the lower Klamath River addressed by the FARs. In dry years such as 2012 and 2013, TRD operations under the ROD-prescribed releases for August and September actually result in *higher* flow in the Trinity River, and hence in the lower Klamath River, than typically would

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the 1981 Secretarial Decision that directed the U.S. Fish and Wildlife Service to conduct the TRFES, the 1984 Trinity River Basin Fish and Wildlife Management Act, the 1991 Secretarial Decision on Trinity River Flows, the 1992 Central Valley Project Improvement Act, and Federal Tribal trust responsibilities." ER 629 (emphasis added).

be present absent the TRD. *See* SER 137-138; SER 307-308, at ¶¶ 4-5; SER 312, at ¶5; SER 318-326. During August and September in dry years, the ROD supplements natural flow with releases of stored water from the reservoir. *Id.* In 2012 and 2013, for the FARs, Reclamation made additional releases of stored water that increased Trinity River flow far above naturally present flow. *Id.* In sum, the FARs addressed the effects of drought on the lower Klamath River, not an impact of TRD operations.

The TRD was not built for the purpose of enhancing conditions for fish and wildlife. In section 1 of the 1955 Act, Congress authorized the Secretary to "construct, operate, and maintain" the TRD "for the principal purpose of increasing the supply of water available for irrigation and other beneficial uses in the Central Valley of California." 1955 Act § 1. In section 2 of the 1955 Act, Congress directed:

> Subject to the provisions of this Act, operation of the Trinity River division shall be integrated and coordinated, from both a financial and an operational standpoint, with the operation of other features of the Central Valley project, . . . in such manner as will effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available.

1955 Act § 2. In 1974, the Solicitor's Office concluded that "the purpose of the [TRD] is to provide as much water as possible to the Central Valley." SER 317. Any interpretation of the 1955 Act's fish proviso must be harmonized with the TRD's "principal purpose." The TRD serves its principal purpose by storing water that would otherwise flow to the ocean during the wet season, and redirecting it to the Central Valley for use there. Fishery releases to the Trinity River detract from this

principal purpose, because water released to the Trinity River is unavailable for water supply for the Central Valley.

To be sure, the proviso directs the Secretary to take "appropriate measures" for "the preservation and propagation of fish and wildlife," including flows, but this must be read in context. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133. In light of the TRD's principal purpose, the proviso cannot reasonably be construed as a grant of unbounded discretion to use water stored by TRD facilities for fishery purposes. Yet under Defendants' approach to construing the proviso, the Secretary is free to dedicate an unlimited portion of the yield of the TRD to fishery and wildlife uses, because if read in isolation the text of the proviso does not expressly prohibit such use. As the district court appropriately observed, reading the 1955 Act as providing "unlimited authority to take actions to preserve and propagate fish and wildlife . . . would be absurd . . . ." ER 73 n.25. Statutory interpretations that would produce absurd results are to be avoided. *Arizona State Bd. for Charter Sch. v. U.S. Dept. of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006).

The most reasonable construction of the proviso is that it authorized and directed the Secretary to take measures necessary to mitigate impacts to fish and wildlife caused by building and operating the TRD for its water supply purpose. As

the district court found: "An examination of the purpose of the 1955 Act reveals that its primary purpose is to integrate the TRD into the CVP. Logically, then, the proviso in question was to address any impacts to fish and wildlife from that integration." ER 76; *see* ER 73 n.25. In his 1981 SID, the Secretary likewise interpreted the proviso as providing authority to "mitigate losses of fish resources and habitat," and described increased flows as intended to "mitigate damage to the fishery" and a "loss-compensation measure, which is a feature of the Trinity River Division." ER 744, 749, 753. Any fishery measure taken under authority of the proviso, then, must be a measure that addresses an impact caused by the TRD. This construction gives effect to the proviso, while harmonizing it with the TRD's principal water supply purpose by recognizing a limit on the fishery release obligation imposed on the TRD.

The text of the proviso further supports this interpretation. The proviso uses the term "preservation." As the district court explained: "As defined by Webster's Dictionary, to 'preserve' is 'to keep safe from injury, harm, or destruction.' 'Preserve' is synonymous with 'protect.'" ER 75. Protect fish and wildlife from what? In the context of the 1955 Act, this must mean protect fish from impacts caused by the construction and operation of the TRD as newly authorized by the 1955 Act. The proviso's express mention of Trinity River and Clear Creek flows further suggests Congress adopted the proviso to address impacts expected to be caused by the TRD. The 1955 Act directed Reclamation to build and operate dams on the

Trinity River and on Clear Creek. The proviso expressly required flow in those two streams, flow which would provide habitat for fish blocked by the new dams from continuing their upstream migration in those streams.

In sum, even if Congress had stopped legislating regarding fishery releases from the TRD after adopting the 1955 Act, the FARs would still be in excess of the Secretary's authority under the proviso in section 2. The proviso was intended to require the Secretary to take appropriate measures to address impacts of the TRD on fish and wildlife. The proviso would not authorize the FARs, because the FARs do not address an impact caused by the TRD.

IV. The Tribal Interests in the Fishery Resources of the Trinity River and Klamath River are Not a Source of Authority for Flow Augmentation Releases

Defendants urge that the federal tribal trust responsibility somehow supports the FARs. Fed. Br., Doc. 25, at 52; Hoopa Br., Doc. 24, at 54-56; Yurok Br., Doc. 27, at 28-29. But the issue here is authority to make the FARs, and the law is clear that the trust responsibility is not a source of additional agency authority. A basic principle of the separation of powers doctrine is that "[t]he Founders of this Nation entrusted the law making power to the Congress alone . . . ." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952). Consequently, the executive branch's authority to take a particular action "must stem either from an act of Congress or from the Constitution itself." *Id*. at 585. "An agency may not confer power upon itself" and

"an agency's power is no greater than that delegated to it by Congress." *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986); *Lyng v. Payne*, 476 U.S. 926, 937 (1986).

"The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law." *United States v. Jicarillo Apache Nation*, 131 S.Ct. 2313, 2318 (2011). "The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id.* at 2325. As this Court has explained, "'unless there is a specific duty that has been placed on the government with respect to Indians, [the government's general trust obligation] is discharged by [the government's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.'" *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir.1998)).

In CVPIA section 3406(b)(23) Congress authorized and required specific agency action to fulfill the trust responsibility. It directed the Secretary "to meet Federal trust responsibilities" by developing instream flow releases for the Trinity River fishery. The Secretary fulfilled that obligation through the flows established under the ROD. The FARs are contrary to the authority granted in section

3406(b)(23), because they exceed the annual volume limits for fishery releases set in the ROD.

Nor can the FARs be based on an implied right to instream flow necessary to support Hoopa or Yurok fishing rights. No such water rights for the Hoopa and Yurok have ever been adjudicated or quantified. Nor would they support the FARs in any event. Tribal rights to water to support fishing rights are not traditional, consumptive water rights based on diversion of water from a stream. Rather, the tribal "entitlement consists of the right to prevent other appropriators from depleting the streams (sic) waters below a protected level in any area where the non-consumptive right applies." *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *Joint Bd. of Control of Flathead, Mission and Jocko Irr. Districts v. United States*, 832 F.2d. 1127, 1132 (9th Cir. 1987). When Reclamation made the 2012 and 2013 FARs, the TRD was not depleting the natural flow in the Trinity River. The FARs instead used stored water from the TRD to augment instream flows to levels far above natural instream flows. *See* SER 137-138; SER 307-308, at ¶¶ 4-5; SER 312, at ¶ 5; SER 318-325. Implied tribal water rights to protect instream flow from depletion by water users therefore cannot be relied upon to support the FARs.

Finally, the Hoopa's argument that the Court must construe the 1955 Act "in the light most favorable to the Tribe" has no application in this case. Hoopa Br., Doc. 24, at 43. The canon that "statutes are to be construed liberally in favor of the Indians,

with ambiguous provisions interpreted to their benefit" applies only to "federal statutes that are 'passed for the benefit of dependent Indian tribes.'" *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003) (quoting *Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223, 1228-29 (9th Cir. 1999)). The 1955 Act is not such a statute. The first proviso in section 2 of the 1955 Act was included by Congress not "for the benefit of dependent Indian tribes," but to insure the preservation of fish and wildlife.

That the Hoopa and Yurok would benefit from the protection of fish under the proviso does not make it legislation specific to them as tribes. *Hoonah Indian Ass'n*, 170 F.3d at 1228 is illustrative. There, the Ninth Circuit concluded that because the statute at issue was "for the benefit of rural subsistence users, regardless of whether they are members of tribes," Congress was "not passing Indian legislation." *Id*. at 1228-1229. The Court explained:

> That the legislation may benefit Natives more than others does not make it Indian legislation, any more than legislation affecting snow mobiles and river boats is Indian legislation because of the greater importance of snowmachines and boats than automobiles in the many villages unconnected with the highway system. Disparate impact on Natives does not make legislation "Indian legislation" for purposes of the doctrine that "statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan*, 426 U.S. at 392, 96 S.Ct. 2012 (quoting *Alaska Pacific Fisheries*, 248 U.S. at 89, 39 S.Ct. 40).

Id. at 1229. The same result is warranted here. The proviso in the 1955 Act expressly references fish and wildlife; this reference belies any argument that Congress intended

to benefit only the tribes. This Court is not required to liberally construe the 1955 Act in favor of the Hoopa and Yurok.

V. The Arguments of Proposed Amicus Curiae California Department of Fish and Wildlife are Inapposite and Unsupported

Proposed amicus the California Department of Fish and Wildlife ("Department"), in support of Federal Defendants, argues that

> . . . regardless of whether the 1955 Act authorizes the supplemental flows, federal reclamation law (which includes the CVPIA), independently requires the Bureau to comply with state law, including the state common law public trust doctrine and section 5937 of the Fish and Game Code, in operating the TRD. As explained . . . below, the Bureau's 2013 supplemental flow decision was consistent with and responsive to these state law requirements and therefore was fully authorized by federal reclamation law.

Amicus Curiae Br., Doc. 28 at 10-11.

As the district court observed, "no party has provided any authority to explain how this duty [to comply with state law] can be automatically (i.e., without formal action from any branch of the California government) transformed into an affirmative authorization for Federal Defendants to take an action that would otherwise not be authorized." ER 82. The Department still has not provided any such authority. There are multiple problems with the Department's argument.

A. The Department's Argument is an Impermissible Post Hoc Rationalization for the Flow Augmentation Releases

Under the APA, a court must review an agency's action based on the rationale for the action expressed by the agency in the administrative record, and not a new

rationale provided later during litigation. *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539-540 (1981) (the "*post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action"). Nothing in the administrative record indicates that Reclamation considered what the public trust doctrine or Fish and Game Code section 5937 requires of it when operating the TRD, let alone that Reclamation decided that these state law doctrines required it to make the FARs. Hence, the rationale newly offered by the Department cannot be a basis for sustaining Reclamation's action.

B. Neither the State Water Board nor Any Court Has Determined that the Public Trust Doctrine Requires the Flow Augmentation Releases

Water Contractors agree with the Department that federal reclamation law requires Reclamation to comply with state law regarding the "'control, appropriation, use or distribution of waters'" in operating and managing the TRD, unless such laws are directly inconsistent with a federal statute. *See* Amicus Curiae Br., Doc. 28 at 14-15 (quoting 43 U.S.C. § 383 and citing *California v. United States* 438 U.S. 645, 650, 678 (1978)). The public trust doctrine and Fish and Game Code section 5937 are part of the body of California law relating to water. But these laws do not themselves dictate how a water project must be operated in any particular case.

The public trust doctrine does not prohibit all avoidable harm to fish. The California Supreme Court has made clear that "[t]he state must have the power to

grant . . . rights to appropriate water *even if diversions harm the public trust uses.*" *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 426 (1983) (emphasis added). As the court explained:

> The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to instream trust values . . . . [I]t would be disingenuous to hold that such appropriations are and always have been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance or estoppel.

Id. at 446.

Application of the public trust doctrine involves a balancing of interests by the State Water Board, or alternatively a court, something that requires a case by case evaluation. In *State Water Resources Control Board Cases*, 136 Cal.App.4th 674, 778 (2006), the court rejected an argument that the State Water Board had violated the public trust doctrine by not implementing additional measures that were feasible. It explained:

> [I]n determining whether it is "feasible" to protect public trust values like fish and wildlife in a particular instance, the [State Water] Board must determine whether protection of those values, or what level of protection, is "consistent with the public interest." . . . While the Board had a duty to adopt objectives to protect fish and wildlife uses and a program of implementation for achieving those objectives, in doing so the Board also had a duty to consider and protect all of the other beneficial uses to be made of water in the Bay-Delta, including municipal, industrial, and agricultural uses.

As the Department acknowledges, Fish and Game Code section 5937 "codifies one aspect of the public trust doctrine." Amicus Curiae Br., Doc. 28 at 26. Therefore,

the same balancing principles apply. Section 5937 requires the owner of a dam to pass sufficient water to the stream below the dam "to keep in good condition any fish that may be planted or exist below the dam." Cal. Fish & Game Code § 5937. Section 5937 does not further define the term "good condition," nor specify which "fish" are protected or how far "below the dam" fish must be protected.

Section 5937 cannot reasonably be construed to mandate FARs. The purpose of section 5937 is to prevent a dam owner or operator from diverting too much water and thereby causing harm to fish below the dam by drying up the stream. Federal Defendants made the FARs to address conditions in a location more than 100 miles downstream from the dam, below the confluence of the Klamath and Trinity Rivers. ER 212; ER 201-240; ER 320-330. And the TRD did not cause the low flow conditions in the lower Klamath River that led Federal Defendants to make the FARs.

The State Water Board has not required FARs. The State Water Board defined Reclamation's obligation to make fishery releases in Condition 8 of the water rights permits it issued for the TRD. SER 140-220 (TRD water right applications and permits). Condition 8 requires minimum releases ranging from 150 cfs to 250 cfs, depending on the month. *Id*. Reclamation more than meets the permit release requirements by complying with the ROD. In particular, during the months of August and September, the ROD requires minimum releases of 450 cfs, 300 cfs more than the required minimum releases for those months under the permits. ER 559. The State

Water Board could revisit the TRD water right permit terms to determine if they are consistent with the public trust doctrine. But if it did so, there is no assurance it would conclude the public trust doctrine requires the FARs. It might well decide that using TRD water for FARs is *not* in the public interest, considering all competing needs for that water. In any event, no such reconsideration has occurred.

The Department's observation that courts, including federal courts, have concurrent original jurisdiction with the State Water Board to enforce the public trust doctrine and Fish and Game Code section 5937 is unavailing. Amicus Curiae Br., Doc. 28 at 22-23. No court has addressed whether the public trust doctrine or Fish and Game Code section 5937 require any change to TRD operations, let alone require the FARs. The district court could not decide that issue in this case. None of the pleadings in this action allege a claim that Reclamation was required by the public trust doctrine or Fish and Game Code section 5937 to make the FARs. Only the Department, and only as amicus, has claimed that these state laws somehow required Reclamation to make the FARs.

Lacking a determination by the State Water Board or by a court that the public trust doctrine or Fish and Game Code section 5937 required the FARs, the Department offers up Reclamation as the arbiter of the public trust. It argues: "[h]ere, the Bureau's 2013 supplemental flow decision was entirely consistent with and implemented the foregoing requirements of California law." Amicus Curiae Br., Doc.

28 at 27. This is a remarkable assertion—that the water rights permit holder itself, here Reclamation, can define what the public trust doctrine or section 5937 requires for its water diversion. The Department cites no authority for this proposition, and Water Contractors are aware of none. Given the obvious inherent conflict that a permit holder would have in deciding what water supply it should be required to forgo to benefit the environment, the Department's position is unlikely to be adopted as California law any time soon. In reality, Reclamation has no authority to determine and declare for itself what these state laws require. And, Federal Defendants never attempted to justify the FARs as being required by state law.

In sum, the Department's argument is fatally flawed. There has been no determination consistent with California law that the FARs are required by, or even consistent with, the public trust doctrine or Fish and Game Code section 5937. Hence there is no basis for the Department's argument that Reclamation was required and hence authorized by these state laws to make the FARs.

VI. The District Court Erred in Concluding Water Contractors Lacked Standing to Pursue Their Claim that Reclamation Violated Section 7(a)(2) of the Endangered Species Act

The district court held that Water Contractors lacked standing to challenge Reclamation's failure to consult under section 7(a)(2) of the ESA because Water Contractors could not establish adequate injury or causation. ER 54-56; 16 U.S.C. §1536. However, Water Contractors amply demonstrated their concrete economic

interest in the protection of listed species, and showed that compliance with section 7(a)(2) could protect that interest. The district court erred.

A. Water Contractors Have a Concrete Interest in the Protection of Listed Species in the Trinity River and the Delta

"To satisfy the injury in fact requirement, a plaintiff asserting a procedural injury must show that 'the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992)). The district court deemed Water Contractors' interests "in ensuring the continued delivery of water to their members" as necessarily unrelated to "species protection." ER 54. The district court thereby failed to follow Supreme Court and Ninth Circuit precedent establishing that economic interests can be served by promoting species preservation, and hence support standing for ESA claims.

In *Bennett v. Spear*, 520 U.S. 154, 176-177 (1997), the Supreme Court held that petitioners with economic interests in Klamath Project water had standing to seek judicial review of an agency's biological opinion issued under section 7(a)(2) of the ESA. In a footnote, the district court acknowledged that *Bennett* supports the proposition that section 7's "best available science" standard "encompasses a range of interests, including an impacted litigant's interest in avoiding additional ESA

regulatory burdens," but stated that the district court "could not locate any similar authority related to ESA § 7's consultation requirement." ER 55 n.11. This is a false distinction. If a challenge to an agency's compliance with section 7's "best available science" standard in a consultation encompasses Water Contractors' interests, then necessarily, a challenge to an agency's complete failure to consult, including the failure to utilize the best available science, also encompasses Water Contractors' interests. *Bennett* establishes that economic interests in water are cognizable under section 7.

Bennett also establishes that a plaintiff raising a claim under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), is not subject to a separate "zone-of-interests" test to prove standing. *Bennett*, 520 U.S. at 166. Here, Water Contractors' ESA claim is under the citizen suit provision. ER 167-169. The district court erred by holding that "Plaintiffs must establish that their interests 'fall within the zone of interests protected by the statute at issue.'" ER 53 (quoting *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 783 (9th Cir. 2014)).

In *Pacific Northwest Generating Cooperative v. Brown*, 38 F.3d 1058 (9th Cir. 1994), this Court concluded that purchasers of hydropower had standing to challenge biological opinions and consultation under section 7 of the ESA because the plaintiffs had a "genuine economic interest in preserving the salmon." *Pac. Nw.*, 38 F.3d at 1065. The Court rejected the same reasoning employed by the district court here, that

because "the legally protected interest of the plaintiffs 'relates to the *water* resource, not the fish,'" the plaintiffs lacked standing to bring an ESA claim. *Id*. at 1063 (emphasis in original). The Court explained that plaintiffs were "entities whose way of conducting business may be affected by the alleged failures of the federal agencies under the Endangered Species Act . . . [and] there is the possibility that successful challenges to the consultation process would have an impact upon the preservation of the salmon." *Id*. at 1065. The Court further stated:

> A manufacturer of mink coats has an interest in the preservation of mink, even though his interest is solely economic and he is consuming the mink. The interest of these plaintiffs in the salmon is not as closely tied to the fish as the mink manufacturer's tie to the animal; but nonetheless the plaintiffs do have a genuine economic interest in preserving the salmon and therefore an interest protected by the Endangered Species Act.

Id. at 1065-66. Thus, because plaintiffs had "an interest in the restoration" of the fish, they could be "partners in the preservation of the species." *Id*.; *see also Stout v. U.S. Forest Service*, 2011 WL 867775 at *5 (D. Or. Mar. 10, 2011) (finding economic interest paired with species preservation interest sufficient for standing to bring ESA Section 7 claim).

Water Contractors have a concrete interest in the protection of ESA-listed species in the Trinity River and the Central Valley, because the success or failure of those species affects their water supply. Plaintiff San Luis's members, including plaintiff Westlands, hold water service contracts with Reclamation for CVP water

supply, and rely on CVP water supply for irrigating their farms, employing farm workers and other agricultural workers, and sustaining their communities. SER 111-112, at ¶¶ 6-7; SER 94, 99, 105 (at ¶¶ 2, 11, 25). Water Contractors thus have a "direct interest . . . in ensuring the continued delivery of water to their members." ER 54. The listing of the Southern Oregon/Northern Sacramento California Coasts coho salmon in the Trinity River, and the winter-run Chinook salmon, spring-run Chinook salmon, Central Valley steelhead, green sturgeon, and Delta Smelt in the Central Valley (together, the "listed species"), has resulted in standards being incorporated into biological opinions and incidental take statements that are designed to protect the listed species. SER 112, at ¶ 9; SER 302-303, at ¶¶ 3-4. Deterioration in the condition of the listed species has resulted—and continues to result—in more stringent regulation of CVP operations and reduction in CVP water deliveries to Water Contractors' members. SER 302-303, at ¶¶ 3-4. Because Water Contractors' ability to deliver water to their members is dependent on the status and recovery of the listed species, Water Contractors have become "partners in the preservation of the species." *Pacific Northwest*, 38 F.3d at 1065.

B. Harm to Listed Species from the Flow Augmentation Releases Poses a Credible Threat of Harm to Water Contractors

A "credible threat" of harm is sufficient to establish injury-in-fact. *Nat. Res. Def. Council v. U.S. E.P.A.*, 735 F.3d 873, 878 (9th Cir. 2013); *Cent. Delta Water*

Agency v. United States, 306 F.3d 938, 950 (9th Cir. 2002). Mixing the analysis of injury and causation, the district court found that Water Contractors failed to establish "that the FARs were likely to harm their protected interests to any degree of probability, let alone to a 'reasonably probable' degree." ER 55-56 (citing *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001)). This ruling is inconsistent with Ninth Circuit precedent, which supports finding the threat of injury to Water Contractors' interests sufficient to meet the "credible threat" of harm standard for injury-in-fact.

For example, in *Krottner v. Starbucks Corporation*, 628 F.3d 1139, 1140 (9th Cir. 2010), the plaintiffs were two Starbucks employees who sued Starbucks for negligence and breach of contract after a laptop containing their names, addresses, and social security numbers was stolen from Starbucks. The Ninth Circuit held that the plaintiffs' increased risk of future identity theft constituted an injury-in-fact for standing purposes. Plaintiffs had "alleged a credible threat of real and immediate harm stemming from the theft of a laptop containing their unencrypted personal data." *Id*. at 1143.

The increased risk of future harm to Water Contractors' interest in species protection likewise presented a "credible threat" of real and immediate harm stemming from the FARs. When Water Contractors filed this action, the ultimate size and duration of the 2013 FARs was unknown, but as planned would exceed 100,000

acre-feet.[9] ER 12-13; ER 209-10. The FARs threatened a reduction in the total volume of TRD water available to maintain cold water temperatures for listed species in the Sacramento River. *See* SER 122-124, 136-137; SER 242-245. Reclamation acknowledged that the FARs would result in a reduction in the quantity of cold water storage available to the listed species (ER 223), and record evidence confirms that inadequate cold water storage adversely impacts listed species (SER 122-124; SER 242-245; SER 350-353; *see also* ER 394-395). Thus, when Water Contractors filed this action, the FARs posed a "credible threat" to listed species—and Water Contractors' interest in protecting the same—sufficient to afford Water Contractors standing.

C. Water Contractors Satisfy the Causation and Redressability Requirements for Procedural Standing

"Plaintiffs alleging procedural injury 'must show only that they have a procedural right that, if exercised, could protect their concrete interests." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008) (citing *Defs. of Wildlife v. U.S. Envtl. Prot. Agency*, 420 F.3d 946, 957 (9th Cir. 2005) *rev'd and remanded sub nom. Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007)). Here, if Reclamation engaged in section 7(a)(2) consultation, the

[9] When evaluating whether the elements of standing are satisfied, courts look at the facts "*as they exist at the time the complaint was filed*." *Lujan*, 504 U.S. 555 at 598 n.4 (emphasis in original) (internal quotation marks omitted); *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001).

FARs *could* be modified to better protect Water Contractors' concrete interest in the listed species. Water Contractors therefore satisfy causation and redressability requirements.

The application of the lessened causation and redressability analysis for procedural standing is well-established in the Ninth Circuit. In *Natural Resources Defense Council*, 749 F.3d at 783-84, an *en banc* panel of the Ninth Circuit applied the standard to find the Natural Resources Defense Council had standing to allege a procedural violation under section 7(a)(2) because it demonstrated that "if the Bureau engage[d] in adequate consultation, the DMC [water service] Contracts *could* better protect Plaintiffs' concrete interest in the delta smelt than the contracts [did] currently." More recently, in *Alliance for the Wild Rockies v. U.S. Department of Agriculture*, 772 F.3d 592, 599 (9th Cir. 2014), this Court found standing when ESA consultation on a management plan governing helicopter flights *could* redress the Alliance's interest in the protection of Yellowstone grizzly bears.

Here, the proper inquiry is whether, if Reclamation engaged in adequate consultation regarding the FARs, there is a possibility such consultations would result in modifications that are more protective of Water Contractors' interest in the listed species. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007). The answer is yes. If Reclamation engaged in consultation on the FARs, the resultant biological opinion *could* have modified the releases to protect Water Contractors' concrete interest in the

listed species. Consultation would require Reclamation to analyze adverse impacts to the listed species and could require reasonable and prudent measures or alternatives to address those impacts in a way that improves the status of the species. For example, Reclamation could be required to limit the quantity of the releases in order to keep more water in cold water storage, which would better protect listed salmonids in the Sacramento River. *See* SER 119-139; SER 242-245. Or, the timing of the FARs could be modified to avoid adverse effects to the location and availability of micro habitat for coho salmon rearing in the Trinity River. *See* SER 227-228, 236-238. Any of these changes would make the FARs more protective of the listed species, and as a result, Water Contractors' interests. Water Contractors therefore satisfy the causation and redressability requirements for procedural standing, and thus this Court should reverse the district court's finding that Water Contractors lacked standing to challenge Reclamation's failure to consult under section 7(a)(2).

VII. The Flow Augmentation Releases Violated Reclamation's Obligation to Comply with State Water Law Regarding Authorized Place of Use

The district court held that the FARs do not violate 43 U.S.C. § 383, which requires Reclamation to operate the CVP in "conformity with" state law "relating to the control, appropriation, use or distribution of water used in irrigation." ER 78-81 (quoting *California v. United States*, 438 U.S. at 669, 678). This ruling should be reversed, because the lower Klamath River, the location targeted by the FARs, is not

an approved place of use under the state water rights permits for the TRD. *See* SER 140-220 (TRD water right applications and permits); *see also* SER 403-418 (petition for 2012 FARs seeking to temporarily include the lower Klamath River in the authorized place of use). Federal Defendants' use of TRD water in the lower Klamath River for the FARs therefore violated state water law.

Under California law, "[t]he issuance of a [water right] permit gives the right to take and use water only to the extent and for the purpose allowed in the permit." Cal. Wat. Code § 1381. A permittee may change the place of use "only upon permission of the board." Cal. Wat. Code § 1701. The diversion or use of water "other than as authorized . . . is a trespass." Cal. Wat. Code § 1052(a). The State Water Board has concluded that "the use of water inconsistent with the terms and conditions of a permit or license constitutes a trespass against the State of California . . . ." *See, e.g.*, State Water Resources Control Board Order WR 99-001, 1999 WL 166226 (Mar. 3, 1999) at *5 (citing Cal. Wat. Code, § 1052); State Water Resources Control Board Order No. WR 2008-0015, 2008 WL 904658 (Mar. 18, 2008) at *7.

Despite these provisions of the Water Code, and without explanation why they do not govern here, the district court concluded that the FARs did not violate California water law. For its conclusion, the district court relied on a letter by State Water Board staff regarding the FARs for 2012. ER 79-80; SER [399-400]. The staff

letter is non-precedential,[10] and like the district court's opinion does not address the provisions of the Water Code cited above. Nor does the staff letter reflect the facts. Implicit in the staff letter is the notion that a permittee may abandon water it has diverted to storage by releasing it from a dam if it so chooses, without violating state water law. But that is not what Federal Defendants did here. Federal Defendants made a use of the water subject to the TRD permits that was targeted at a specific, unpermitted place of use, the lower Klamath River. That use was contrary to the Water Code.

Furthermore, Reclamation has no statutory authority to abandon water developed by the CVP. The authorized purposes of the CVP are:

> improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and mitigation, protection, and restoration of fish and wildlife and other beneficial uses, and for the generation and sale of electric energy. . . .

50 Stat. 844, 850 (Aug. 26, 1937) (as amended); *see San Luis Unit Food Producers v. United States*, 772 F. Supp. 2d 1210, 1238 (E.D. Cal. 2011). Abandoning water developed by the CVP at significant expense, and that is desperately needed for multiple uses in the Central Valley, is nowhere in this list.

[10] The staff letter is not the official opinion of the State Water Board itself, and has no precedential or binding effect. *See* SWRCB Order WR 96-1, 1996 WL 82542 at *8, n. 11 (1996); SWRCB Order WQ 2001-05-CWP, 2001 WL 293726 at *7 (Mar. 7, 2001).

Nor can the FARs be justified under California Fish and Game Code section 5937, also cited by the district court. ER 79. As explained previously, section 5937 addresses the effects of dams on fish. It requires the owner of a dam to make some level of releases for the benefit of fish "below the dam." Here, Federal Defendants used the FARs to greatly increase natural Trinity River flows to address a condition in another river over one hundred miles away that had nothing to do with the presence of the TRD. *See California Trout, Inc. v. Superior Court*, 218 Cal.App.3d 187, 206 (1990) (describing Fish & Game Code sections 5946 and 5937 as bringing the "natural flows" of streams within the "statutory recognition of public trust values"). Reclamation has never claimed it was required by section 5937 to make the FARs. Nor did the district court explain how Fish and Game Code section 5937 could excuse Reclamation from the limitations of its water rights permits and the requirements of the Water Code.

The Court should reverse the district court, and hold that the FARs were in violation of California water law and hence in violation of 43 U.S.C. section 383.

VIII. Reclamation Violated its Duty Under Central Valley Project Improvement Act Section 3411(a) to Obtain a Change in the Permitted Place of Use Before Making the Flow Augmentation Releases

The district court held that the FARs do not violate CVPIA section 3411(a). ER 81. This ruling should be reversed.

CVPIA section 3411(a) imposes a mandatory duty on the Secretary to obtain a modification of the state water rights permits for the CVP prior to reallocating CVP water to a new place of use. Section 3411(a) provides in relevant part:

> the Secretary shall, prior to the reallocation of water from any . . . place of use specified within applicable Central Valley Project water rights permits and licenses to a . . . place of use not specified within said permits and licenses, obtain a modification in those permits and licenses, in a manner consistent with provisions of applicable State law, to allow such change in . . . place of use.

Pub. L. No. 102-575, Title 34, 106 Stat. 4706 (1992), § 3411(a). This Court interpreted section 3411(a) in *Westlands Water District v. Natural Resources Defense Council*, 43 F.3d 457 (9th Cir. 1994). It explained the import of section 3411(a):

> Because the federal government owns the Central Valley Project, the federal government holds water rights to California water. Under California water law, every water right permit restricts the location and use of that water. *If a water user wishes to change either the location or use of that water, he must file a change application with the California Water Resources Control Board*. Cal. Water Code §§ 1700–1707 (West 1971 & Supp. 1994). In short, section 3411(a) restates the requirements of California water law.

Id. at 461 (emphasis added.) In *Westlands* this Court recognized that California water law imposes specific requirements and a procedure for changing the approved place of use in a water rights permit. *See* Cal. Water Code §§ 1700–1707. Section 3411(a) specifically directs the Secretary to follow this state law process and obtain a permit modification before reallocating CVP water to a new place of use.

The lower Klamath River is not an approved place of use in the water right permits for the TRD. *See* SER 140-220; *see also* SER 403-418 (petition for 2012 FARs seeking to temporarily include the lower Klamath River in the authorized place of use). To comply with section 3411(a), Federal Defendants were required to seek and obtain changes to the water right permits for the TRD before reallocating water for use in the lower Klamath River. Federal Defendants did not do so and therefore violated section 3411(a).

The district court based its conclusion that Reclamation did not violate section 3411(a) on its reading of California law, concluding that "[b]ecause no change of place of use permit was required by state law prior to Reclamation's implementation of the FARs, Reclamation did not violate § 3411(a)." ER 81. However, section 3411(a) does not say "do not violate California law." Rather, section 3411(a) specifically directs Reclamation to obtain a permit modification before reallocating CVP water to a new place of use. It specifically directs Reclamation to obtain such permit modification "in a manner consistent with the provisions of applicable State law," i.e., California Water Code sections 1700 to 1707. Thus, even assuming state law did not require Reclamation to obtain a permit modification prior to making the FARs, section 3411(a) did.

The district court misread *Westlands* as supporting its conclusion to the contrary, quoting the statement in *Westlands* that "[i]n short, section 3411(a) restates

the requirements of California water law." ER 81. But, in the sentence immediately preceding that quote, the *Westlands* court explained that California law *requires* a water user to obtain a permit modification if he "wishes to change either the location or use of that water." *Westlands Water Dist.*, 43 F.3d at 461. The *Westlands* court described section 3411(a) as restating California law, because it understood that California law requires a permit modification prior to putting water to a new place of use. That is the opposite of the district court's reading of California law. *Westlands* thus contradicts, rather than supports, the district court's conclusion.

Congress had good reason for directing Federal Defendants in section 3411(a) to obtain a permit change before reallocating CVP water to a new place of use; a failure to do so exposes the CVP to a risk of diminishing its water rights. As the State Water Board's staff letter explained about the FARs: "absent a transfer or other change approved by the State Water Board, the [Division of Water Rights] cannot consider the bypass and/or release of water for such purposes as a beneficial use unless Reclamation's permitted place of use includes the streams where the water is bypassed and/or released." SER 400. The staff letter warned: "failure to put water to beneficial use for a period of five years may result in reversion of the water to the public and result in partial or total revocation of the water right. (Wat. Code, § 1241.)" *Id.* The requirement of section 3411(a) to seek a permit modification before

reallocating water to an unpermitted place of use thus protects against loss of CVP water rights.

Federal Defendants' failure to obtain a permit modification has another significant substantive consequence. A permit holder seeking an amendment must establish "that the change will not operate to the injury of any legal user of the water involved." Cal. Wat. Code § 1702. This is commonly known as the "no injury" rule. This rule protects CVP contractors, including Water Contractors, from injury due to a change in CVP water rights permits. *State Water Res. Control Bd. Cases*, 136 Cal.App.4th at 804. Both Reclamation and the State Water Board recognized that the FARs could injure CVP contractors such as Water Contractors. SER 412-413; SER 399. To obtain a permit modification for the FARs, therefore, Reclamation will be required to avoid or mitigate water supply losses to Water Contractors. *Id*. But under the district court's ruling, Reclamation is allowed to evade the "no injury" rule for permit modifications, and to deplete CVP water supplies without any mitigation.

In sum, section 3411(a) required Federal Defendants to obtain a modification to the state water rights permits for the TRD before making the FARs. They did not do so. The FARs therefore violated section 3411(a).

CONCLUSION

Water Contractors request that this Court rule as follows:

First, reverse the district court's judgment regarding Water Contractors' CVPIA section 3406(b)(23) claim and rule that releases of CVP water from the TRD made to benefit the Trinity River fishery located in either the Trinity River or lower Klamath River are governed by the permanent annual volumes of water established in the ROD pursuant to section 3406(b)(23). Rule that Reclamation violated section 3406(b)(23) by making the FARs, because the releases exceeded the annual volume limits established by the ROD.

Second, affirm the district court's judgment that Federal Defendants lacked authority under the 1955 Act to make the FARs and rule that Federal Defendants' reading of the 1955 Act conflicts with CVPIA section 3406(b)(23), which as the later and more specific statute abrogated authority under the 1955 Act to make additional releases from the TRD for the benefit of downstream fish populations, including the Trinity River fishery.

Third, reverse the district court's judgment regarding Water Contractors' Endangered Species Act claim and rule that Water Contractors established standing to challenge Reclamation's failure to engage in section 7 consultation under the ESA.

Fourth, reverse the district court's judgment regarding Water Contractors' claim under 43 U.S.C. section 383 and rule that Reclamation violated its obligation under 43 U.S.C. section 383 to comply with California water law by failing to follow the

procedures for obtaining a change in the authorized place of use for the TRD water right permits prior to using water in the lower Klamath River for the FARs.

Finally, reverse the district court's judgment regarding Water Contractors' claim under CVPIA section 3411(a) and rule that Reclamation violated section 3411(a) by failing to obtain a modification to the authorized place of use for the TRD water right permits prior to allocating water to the lower Klamath River for the FARs.

Respectfully submitted this 15th day of April, 2016.

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CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 32-3 FOR CASE NUMBERS 14-17493, 14-17506, 14-17515 AND 14-17539

The undersigned certifies that this brief complies with the enlargement of brief size granted by court order dated March 28, 2016. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is 23,836 words, excluding the portions exempted by Fed .R. App. P. 32(a)(7)(B)(iii), if applicable.

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STATEMENT OF RELATED CASES

In addition to the Water Contractors, other parties to the District Court proceeding have filed appeals to this Court of the District Court's Final Judgment and Memorandum Decision. Those appeals are: (1) Ninth Circuit Case No. 14-17506 (filed by Federal Defendants on December 22, 2014); (2) Ninth Circuit Case No. 14-17515 (filed by Yurok Tribe on December 22, 2014); and (3) Ninth Circuit Case No. 14-17493 (filed by Hoopa Valley Tribe on December 19, 2014). These appeals have been consolidated.

Respectfully submitted this 15th day of April, 2016.

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CERTIFICATE OF SERVICE

I am employed in the City and County of Sacramento, California. I am over the age of 18 years and not a party to the within action. My business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814. I hereby certify that I electronically filed the following with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 15, 2016:

OPENING BRIEF AND RESPONSE OF SAN LUIS & DELTA-MENDOTA WATER AUTHORITY AND WESTLANDS WATER DISTRICT

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 15, 2016, at Sacramento, California.

/s/Terri Whitman
Terri Whitman

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STATUTORY ADDENDUM

CIRCUIT RULE 28-2.7 STATEMENT: Except for the following, all applicable statutes, etc., are contained in the addendum of Opening Brief of Appellant Hoopa Valley Tribe (Doc. 24).

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§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be-
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393 .)

Historical and Revision Notes

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243 .

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941 , which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

16 USC 1536: Interagency cooperation
Text contains those laws in effect on February 17, 2016

From Title 16-CONSERVATION
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§1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)-

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth-

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's

opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2), the Secretary concludes that-

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that-

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.
(B) The Secretary of the Army.
(C) The Chairman of the Council of Economic Advisors.
(D) The Administrator of the Environmental Protection Agency.
(E) The Secretary of the Interior.
(F) The Administrator of the National Oceanic and Atmospheric Administration.
(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)

(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5.

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C. 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to-

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after

consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary-

(A) determine that the Federal agency concerned and the exemption applicant have-

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing-

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the

public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person-

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) and on such other testimony or evidence as it may receive, that-

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action-

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless-

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section-

(1) any action for which an exemption is granted under subsection (h) shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

(Pub. L. 93–205, §7, Dec. 28, 1973, 87 Stat. 892 ; Pub. L. 95–632, §3, Nov. 10, 1978, 92 Stat. 3752 ; Pub. L. 96–159, §4, Dec. 28, 1979, 93 Stat. 1226 ; Pub. L. 97–304, §§4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417 , 1426; Pub. L. 99–659, title IV, §411(b), (c), Nov. 14, 1986, 100 Stat. 3741 , 3742; Pub. L. 100–707, title I, §109(g), Nov. 23, 1988, 102 Stat. 4709 .)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(1), (i), and (j), was in the original "this Act", meaning Pub. L. 93–205, Dec. 28, 1973, 81 Stat. 884 , known as the Endangered Species Act of 1973, which is classified principally to this chapter. For complete classification of this Act to the Code,

43 USC 383: Vested rights and State laws unaffected
Text contains those laws in effect on February 17, 2016

From Title 43-PUBLIC LANDS
CHAPTER 12-RECLAMATION AND IRRIGATION OF LANDS BY FEDERAL GOVERNMENT
SUBCHAPTER I-GENERAL PROVISIONS
Jump To:

§383. Vested rights and State laws unaffected

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

(June 17, 1902, ch. 1093, §8, 32 Stat. 390 .)

REFERENCES IN TEXT

This Act, referred to in text, is act June 17, 1902, popularly known as the Reclamation Act, which is classified generally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 371 of this title and Tables.

CODIFICATION

Section is comprised of section 8 (less proviso) of act June 17, 1902. The remainder of section 8 is classified to section 372 of this title.

SECTION AS UNAFFECTED BY SUBMERGED LANDS ACT

Provisions of this section as not amended, modified or repealed by the Submerged Lands Act, see section 1303 of this title.

State of California
WATER CODE
DIVISION 2. WATER
PART 1. GENERAL PROVISIONS
CHAPTER 2. ADMINISTRATIVE PROVISIONS GENERALLY
§ 1052

1052. (a) The diversion or use of water subject to this division other than as authorized in this division is a trespass.

(b) The Attorney General, upon request of the board, shall institute in the superior court in and for any county where the diversion or use is threatened, is occurring, or has occurred an action for the issuance of injunctive relief as may be warranted by way of temporary restraining order, preliminary injunction, or permanent injunction.

(c) Any person or entity committing a trespass as defined in this section may be liable in an amount not to exceed the following:

(1) If the unauthorized diversion or use occurs in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years or during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act (Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code) based on drought conditions, the sum of the following:

(A) One thousand dollars ($1,000) for each day in which the trespass occurs.

(B) Two thousand five hundred dollars ($2,500) for each acre-foot of water diverted or used in excess of that diverter's water rights.

(2) If the unauthorized diversion or use is not described by paragraph (1), five hundred dollars ($500) for each day in which the unauthorized diversion or use occurs.

(d) Civil liability for a violation of this section may be imposed by the superior court or the board as follows:

(1) The superior court may impose civil liability in an action brought by the Attorney General, upon request of the board, to impose, assess, and recover any sums pursuant to subdivision (c). In determining the appropriate amount, the court shall take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator.

(2) The board may impose civil liability in accordance with Section 1055.

(e) All funds recovered pursuant to this section shall be deposited in the Water Rights Fund established pursuant to Section 1550.

(f) The remedies prescribed in this section are cumulative and not alternative.

(Amended by Stats. 2014, Ch. 3, Sec. 9. (SB 104) Effective March 1, 2014.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 1. GENERAL PROVISIONS
Article 4. Beneficial Use
§ 1241

1241. If the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him or her, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of five years, that unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water. That reversion shall occur upon a finding by the board following notice to the permittee, licensee, or person holding a livestock stockpond certificate or small domestic use, small irrigation use, or livestock stockpond use registration under this part and a public hearing if requested by the permittee, licensee, certificate holder, or registration holder.

(Amended by Stats. 2011, Ch. 579, Sec. 8. (AB 964) Effective January 1, 2012.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 6. PERMITS
Article 2. Issuance of Permit
§ 1380

1380. Upon the approval of an application the board shall issue a permit.

(Amended by Stats. 1957, Ch. 1932.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 6. PERMITS
Article 2. Issuance of Permit
§ 1381

1381. The issuance of a permit gives the right to take and use water only to the extent and for the purpose allowed in the permit.

(Enacted by Stats. 1943, Ch. 368.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 6. PERMITS
Article 2. Issuance of Permit
§ 1382

1382. All permits shall be under the terms and conditions of this division.

(Enacted by Stats. 1943, Ch. 368.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1700

1700. Water appropriated under the Water Commission Act or this code for one specific purpose shall not be deemed to be appropriated for any other or different purpose, but the purpose of the use of such water may be changed as provided in this code.

(Enacted by Stats. 1943, Ch. 368.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1701

1701. At any time after notice of an application is given, an applicant, permittee, or licensee may change the point of diversion, place of use, or purpose of use from that specified in the application, permit, or license; but such change may be made only upon permission of the board.

(Amended by Stats. 1957, Ch. 1932.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1701

1701.1. A petition for change filed after notice of an application shall meet all of the following requirements:

(a) State the name and address of the petitioner.

(b) Be signed by the petitioner, or the petitioner's agent or attorney.

(c) Set forth amendments to the application or an amended application reflecting the proposed change, including any information necessary for the amended application to comply with Section 1260.

(d) Include sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water.

(e) Contain other appropriate information and be in the form required by applicable regulations.

(Added by Stats. 2001, Ch. 315, Sec. 6. Effective January 1, 2002.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1701

1701.2. A petition for change in a permit or license shall meet all of the following requirements:

(a) State the name and address of the petitioner.

(b) Be signed by the petitioner, or the petitioner's agent or attorney.

(c) Include all information reasonably available to the petitioner, or that can be obtained from the Department of Fish and Wildlife, concerning the extent, if any, to which fish and wildlife would be affected by the change, and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the change.

(d) Include sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water.

(e) Contain other appropriate information and be in the form required by applicable regulations.

(Amended by Stats. 2015, Ch. 683, Sec. 57. (SB 798) Effective January 1, 2016.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1701

1701.3. (a) After a petition is filed, the board may request additional information reasonably necessary to clarify, amplify, correct, or otherwise supplement the information required to be submitted under this chapter. The board shall provide a reasonable period for submitting the information.

(b) The additional information may include, but need not be limited to, any of the following:

(1) Information needed to demonstrate that the change will not injure any other legal user of water.

(2) Information needed to demonstrate that the change will comply with any applicable requirements of the Fish and Game Code or the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.).

(3) Information needed to comply with Division 13 (commencing with Section 21000) of the Public Resources Code.

(Amended by Stats. 2010, Ch. 288, Sec. 15. (SB 1169) Effective January 1, 2011.)

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DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1701

1701.4. If, within the period provided, the petitioner does not provide the information requested pursuant to Section 1701.3, the board shall cancel the petition, unless, for good cause shown, the board allows additional time to submit the requested information.

(Added by Stats. 2001, Ch. 315, Sec. 9. Effective January 1, 2002.)

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WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1702

1702. Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved.

(Amended by Stats. 1957, Ch. 1932.)

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WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1703

1703. After filing a petition for permission to make a change, the petitioner, in case the board so requires, shall cause notice thereof to be given or published in the manner prescribed by the board. In all cases the petitioner shall notify the Department of Fish and Wildlife in writing of the proposed change.

(Amended by Stats. 2015, Ch. 683, Sec. 58. (SB 798) Effective January 1, 2016.)

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WATER CODE
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PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1703

1703.1. Any interested person, within the time allowed in the notice of petition, or within the time the board may allow for good cause shown, may file with the board a written protest against approval of the petition.

(Added by Stats. 2001, Ch. 315, Sec. 10. Effective January 1, 2002.)

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WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1703

1703.2. The protest shall meet all of the following requirements:

(a) State the name and address of the protestant.

(b) Be signed by the protestant, or the protestant's agent or attorney.

(c) Clearly and specifically set forth the protestant's objections to the approval of the petition, and state the bases for these objections.

(d) Contain other appropriate information and be in the form required by applicable regulations.

(e) Be served on the petitioner by the protestant by mailing a duplicate copy of the protest to the petitioner or through service undertaken in another manner determined to be adequate by the board.

(Added by Stats. 2001, Ch. 315, Sec. 11. Effective January 1, 2002.)

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DIVISION 2. WATER
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CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1703

1703.3. The board may request from the protestant additional information reasonably necessary to clarify, amplify, correct, or otherwise supplement the information required to be submitted pursuant to Section 1703.2. The board shall provide a reasonable period for submitting the information, and may allow additional time for good cause shown.

(Added by Stats. 2001, Ch. 315, Sec. 12. Effective January 1, 2002.)

State of California
WATER CODE
DIVISION 2. WATER
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CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1703

1703.4. The protestant and the petitioner shall make a good faith effort to resolve the protest not later than 180 days from the date the period provided pursuant to Section 1703.1 expires. For good cause, the board may allow additional time for the protestant and the petitioner to attempt to resolve the protest.

(Added by Stats. 2001, Ch. 315, Sec. 13. Effective January 1, 2002.)

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CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1703

1703.5. The board may request from the protestant or the petitioner additional information that the board determines is reasonably necessary to attempt to resolve the protest. The board shall provide a reasonable period for submitting the information, and may allow additional time for good cause shown.

(Added by Stats. 2001, Ch. 315, Sec. 14. Effective January 1, 2002.)

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WATER CODE
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§ 1703

1703.6. (a) The board may cancel a protest or petition for failure to provide information requested by the board under this chapter within the period provided.

(b) Except as provided in subdivisions (c) and (d), the board shall not cancel a protest for failure to submit information not in the possession or under the control of the protestant if the protest meets the requirements of Section 1703.2 and the petitioner is or could be required to submit the information under Section 1701.1, 1701.2, or 1701.3.

(c) If a protest is based on injury to a legal user of water, the board may cancel the protest if the protestant fails to submit any of the following information requested by the board:

(1) Information that the protestant is required to submit to the board to comply with Part 5.1 (commencing with Section 5100) during any period after the protest is filed.

(2) Information that is reasonably necessary to determine if the protestant is a legal user of water.

(3) Information concerning the protestant's historical, current, or proposed future diversion and use of water that is reasonably necessary to determine if the proposed change will result in injury to the protestant's exercise of its water right or other legal use of water.

(d) If the protest is based on an allegation other than injury to a legal user of water, the board may cancel the protest for failure to submit information requested by the board if the board determines both of the following:

(1) The public review period has expired for any draft environmental document or negative declaration required to be circulated for public review and comment pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code.

(2) In the absence of the requested information, there is no substantial evidence in light of the whole record to support the allegation.

(e) If a protest is subject to both subdivisions (c) and (d), the part of the protest subject to subdivision (c) may be canceled pursuant to subdivision (c) and the part of the protest subject to subdivision (d) may be canceled pursuant to subdivision (d).

(Amended by Stats. 2010, Ch. 288, Sec. 16. (SB 1169) Effective January 1, 2011.)

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§ 1704

1704. (a) The board, after a hearing, may approve with conditions, or deny, a petition.

(b) Notice of hearing shall be given by mailing the notice not less than 20 days before the date of hearing to the petitioner and to any protestant by registered mail.

(c) (1) The board may, but is not required to, hold a hearing prior to approving an unprotested petition.

(2) The board may, but is not required to, hold a hearing if the board determines that undisputed facts support the approval of the petition and there is no disputed issue of material fact.

(3) The board may, but is not required to, hold a hearing prior to denying a petition, if, after notice, the board determines that the petition is defective, the petition fails to provide information requested by the board, or undisputed facts support the denial of the petition and there is no disputed issue of material fact.

(Amended by Stats. 2001, Ch. 315, Sec. 16. Effective January 1, 2002.)

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PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1704

1704.1. The Division of Water Rights shall conduct a field investigation of all minor protested petitions for change. The board shall notify the parties of the field investigation not less than 20 days prior to conducting the field investigation, to enable the parties to attend and present information to the board.

(Amended by Stats. 1997, Ch. 323, Sec. 17. Effective January 1, 1998.)

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CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1704

1704.2. The Division of Water Rights may request the parties to submit information in support of their positions. The Division of Water Rights may request information before, during, or after the field investigation. After the field investigation, the Division of Water Rights may conduct additional proceedings in accordance with Article 10 (commencing with Section 11445.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code.

(Repealed and added by Stats. 1997, Ch. 323, Sec. 19. Effective January 1, 1998.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1704

1704.3. Based upon the field investigation and any other information obtained under this chapter, the Division of Water Rights shall issue an order acting on the minor petition for change unless the board in its discretion determines that additional proceedings should be conducted under Section 183. An order of the Division of Water Rights is subject to review as provided in Chapter 4 (commencing with Section 1120) of Part 1.

(Repealed and added by Stats. 1997, Ch. 323, Sec. 21. Effective January 1, 1998.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1704

1704.4. For purposes of this chapter, a minor petition for change shall mean any petition which does not involve direct diversions in excess of three cubic-feet per second or storage in excess of 200 acre-feet per year.

(Added by Stats. 1980, Ch. 933, Sec. 11.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1705

1705. After the hearing the board shall grant or refuse, as the facts warrant, permission to change the point of diversion, place of use, or purpose of use.

(Amended by Stats. 1957, Ch. 1932.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1706

1706. The person entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or this code may change the point of diversion, place of use, or purpose of use if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.

(Enacted by Stats. 1943, Ch. 368.)

State of California
WATER CODE
DIVISION 2. WATER
PART 2. APPROPRIATION OF WATER
CHAPTER 10. CHANGE OF POINT OF DIVERSION, PLACE OF USE, OR PURPOSE OF USE
§ 1707

1707. (a) (1) Any person entitled to the use of water, whether based upon an appropriative, riparian, or other right, may petition the board pursuant to this chapter, Chapter 6.6 (commencing with Section 1435) or Chapter 10.5 (commencing with Section 1725) for a change for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water.

(2) The petition may be submitted for any of the purposes described in paragraph (1) and may, but is not required to, be submitted in combination with a petition to make any other change authorized pursuant to this part. The petition shall specify the time, location, and scope of the requested change, and other relevant information relating thereto.

(b) The board may approve the petition filed pursuant to subdivision (a), subject to any terms and conditions which, in the board's judgment, will best develop, conserve, and utilize, in the public interest, the water proposed to be used as part of the change, whether or not the proposed use involves a diversion of water, if the board determines that the proposed change meets all of the following requirements:

(1) Will not increase the amount of water the person is entitled to use.

(2) Will not unreasonably affect any legal user of water.

(3) Otherwise meets the requirements of this division.

(c) (1) Upon the request of the petitioner, the board may specify, as part of its approval of the petition, that the water that is subject to the approval pursuant to this section shall be in addition to water that is required, if any, to be used for instream purposes to satisfy any applicable federal, state, or local regulatory requirements governing water quantity, water quality, instream flows, fish and wildlife, wetlands, recreation, and other instream beneficial uses. If the request is approved by the board, state and local agencies, as well as the courts, shall not credit the water subject to that petition towards compliance with any of the regulatory requirements described in this subdivision. A federal agency shall comply with the requirement imposed by this paragraph to the extent required by federal law, or to the extent that it chooses to comply.

(2) For the purposes of this subdivision, "requirements" includes requirements or obligations that have not been formally established or allocated at the time of the petition, and obligations under any agreement entered into to meet those requirements. Neither any petition filed pursuant to this section nor any documents or statements made in connection therewith shall be construed or used as an admission, evidence,

or indication of any obligation to meet any of the requirements described in this subdivision.

(d) Except as provided in subdivision (c), water that is subject to a petition granted pursuant to this section shall be used to meet, in whole or in part, any requirement described in subdivision (c) if any of these requirements exist. The water shall be credited to the petitioner, or to any other person or entity designated by the petitioner, whenever that person or entity has, or may have, obligations to meet one or more of the requirements described in subdivision (c). The water shall be credited towards compliance with any requirements described in subdivision (c), by state and local agencies, as well as the courts. A federal agency shall comply with the requirement imposed by this subdivision to the extent required by federal law, or to the extent that it chooses to comply.

(Amended by Stats. 1999, Ch. 938, Sec. 7. Effective January 1, 2000.)

State of California
FISH AND GAME CODE
DIVISION 6. FISH
PART 1. GENERALLY
CHAPTER 3. DAMS, CONDUITS, AND SCREENS
Article 2. Dams and Obstructions
§ 5937

5937. The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway.

(Enacted by Stats. 1957, Ch. 456.)

103D CONGRESS
1st Session

COMMITTEE PRINT NO. 4

PART 1

LEGISLATIVE HISTORY, MISCELLANEOUS ARTICLES, AND BACKGROUND INFORMATION RELATED TO PUBLIC LAW 102–575 RECLAMATION PROJECTS AUTHORIZATION AND ADJUSTMENT ACT OF 1992

PREPARED BY THE
MAJORITY STAFF

OF THE

COMMITTEE ON NATURAL RESOURCES

OF THE

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

NOVEMBER 1993

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George Miller, Chairman

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LETTER OF TRANSMITTAL

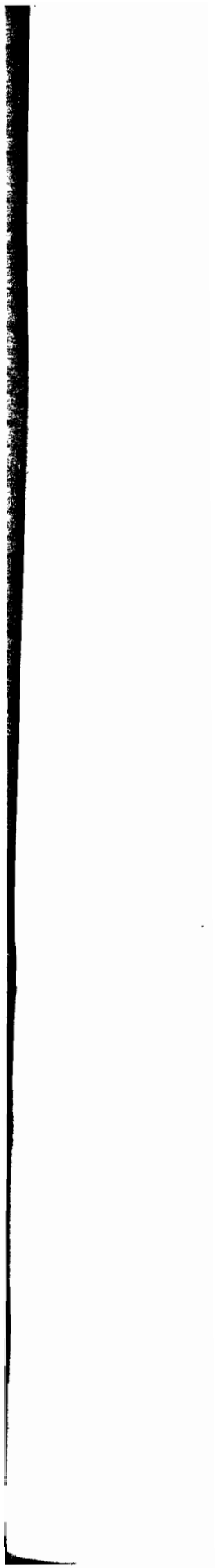
HOUSE OF REPRESENTATIVES,
COMMITTEE ON NATURAL RESOURCES,
Washington, DC, November 3, 1993.

Members of the Committee on Natural Resources,
House of Representatives, Washington, DC.

DEAR COLLEAGUES: I believe the compilation of documents concerning Public Law 102–575, transmitted with this letter, will be of interest to those who took part in the development of the Reclamation Projects and Reauthorization Act of 1992 as well as to the Committee members of the future; and I know the compilation will be a useful aid to administrators and scholars in the years to come.

Sincerely,

GEORGE MILLER, *Chairman.*



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Legislative History of H.R. 429 and H.R. 5099

and wildlife or instream flow requirements, or any right of the State of California or any landowner, appropriator, or user of surface water or ground water in, to, from or connected with Putah Creek or its tributaries.

TITLE XXVIII—DESALINATION

SEC. 2801. TECHNICAL ASSISTANCE.

The Secretary is authorized to provide technical assistance to States and local government entities to assist in the development, construction, and operation of water desalination projects, including technical assistance for purposes of assessing the technical and economic feasibility of such projects.

TITLE XXIX—SAN JUAN SUBURBAN WATER DISTRICT

SEC. 2901. REPAYMENT OF WATER PUMPS, SAN JUAN SUBURBAN WATER DISTRICT, CENTRAL VALLEY PROJECT, CALIFORNIA.

(a) WATER PUMP REPAYMENT.—The Secretary shall credit to the unpaid capital obligation of the San Juan Suburban Water District (District), as calculated in accordance with the Central Valley Project rate-setting policy, an amount equal to the documented price paid by the District for pumps provided by the District to the Bureau of Reclamation, in 1991, for installation at Folsom Dam, Central Valley Project, California.

(b) CONDITIONS.—(1) The amount credited shall not include any indirect or overhead costs associated with the acquisition of the pumps, such as those associated with the negotiation of a sales price or procurement contract, inspection, and delivery of the pumps from the seller to the Bureau of Reclamation.

(2) The credit is effective on the date the pumps were delivered to the Bureau of Reclamation for installation at Folsom Dam.

AMENDMENTS OFFERED BY MR. GEJDENSON

Mr. GEJDENSON. Mr. Chairman, I offer amendments, and I ask unanimous consent that they be considered en bloc.

The CHAIRMAN. Is there objection to the request of the gentleman from Connecticut?

There was no objection.

The CHAIRMAN. The Clerk will report the amendments.

The Clerk read as follows:

Amendments offered by Mr. GEJDENSON: In subparagraphs (A) and (B) of subsection (g)(1) of the amendment made by section 2501 of the bill—

(1) strike out "Commodity Credit Corporation storage" each place it appears and insert in lieu thereof "domestic storage"; and

(2) strike out "drought, natural disaster, or other disruption" each place it appears and insert in lieu thereof "foreseeable disruptions".

In the amendment made by section 2501, redesignate paragraphs (3) and (4) as paragraphs (4) and (5), respectively, and insert after paragraph (2) the following new paragraph (3):

"(3)(A) The Secretary shall credit against any additional payment obligation established by this subsection 70 percent of the costs incurred by individuals or districts subject to the provisions of this subsection during the period beginning on the date of enactment of this subsection and ending on December 31, 1996, up to a maximum cost of $100 per irrigated acre, for the installation of water conservation measures approved by the Secretary. The Secretary shall grant such credit only upon finding that installation of such credit only upon finding that installation of such measures, and any mitigation pursuant to subparagraph (B), have been completed. Credit that exceeds such repayment obligation in any 1 year shall be applied in each succeeding year until fully utilized. Within 1 year from the date of enactment of this subsection, the Secretary shall promulgate rules to carry out the provisions of this paragraph.

"(B) Mitigation for fish and wildlife habitat losses, if any, incurred as a result of the installation and operation of such water conservation measures shall be on an acre-for-acre basis, based on ecological equivalency, concurrent with installation of such conservation measures, and shall be the responsibility of the individual or district served by such measures.

Mr. GEJDENSON (during the reading). Mr. Chairman, I ask unanimous consent that the amendments be considered as read and printed in the RECORD.

The CHAIRMAN. Is there objection to the request of the gentleman from Connecticut?

There was no objection.

Mr. GEJDENSON. Mr. Chairman, I would just simply say that these amendments, one is a technical amendment to make sure the language accomplishes what we have all worked out, and I give great credit to the gentleman from California [Mr. MILLER] for his leadership on this issue, which is something that deals with not just economics, but national environmental policy, and for all the participants for making a good-faith effort to bring this to resolution.

Additionally, we provide some incentives in the second amendment for farmers to institute conservation measures.

Mr. Chairman, I believe there is support on both sides of the aisle for both these amendments.

Mr. MILLER of California. Mr. Chairman, will the gentleman yield?

Mr. GEJDENSON. I yield to the gentleman from California.

Mr. MILLER of California. Mr. Chairman, I just want to commend the gentleman for his effort on this legislation. He has obviously discovered a problem that exists within the reclamation program where in fact we have this situation, where not only in some instances are we providing subsidized water to farmers, but in some cases we are providing subsidized waters to grow crops that are in surplus and then incurring other costs in other parts of the agriculture program.

This is an effort that was started by the gentleman from Connecticut [Mr. GEJDENSON] to rectify this problem. He worked very hard on it in last year's bill, and I believe these technical amendments are quite correct and make the legislation even better.

Mr. HANSEN. Mr. Chairman, will the gentleman yield?

Mr. GEJDENSON. I yield to the gentleman from Utah.

Mr. HANSEN. Mr. Chairman, I appreciate the gentleman yielding to me.

Mr. Chairman, we have had an opportunity to look at the amendments. I feel we can accept them on this side of the aisle.

The CHAIRMAN. The question is on the amendments offerd by the gentleman from Connecticut [Mr. GEJDENSON].

The amendments were agreed to.

AMENDMENT OFFERED BY MR. RIGGS

Mr. RIGGS. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. RIGGS: At the end of the bill (page , after line), add the following new title:

TITLE XXX—TRINITY RIVER DIVISION, CENTRAL VALLEY PROJECT

SEC. 3001. INSTREAM RELEASES FROM THE TRINITY RIVER DIVISION, CENTRAL VALLEY PROJECT, FOR FISHERY RESTORATION AND FULFILLMENT OF FEDERAL TRUST RESPONSIBILITIES.

(a) INSTREAM RELEASES.—In order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to achieve the fishery restoration goals of the Act of October 24, 1984 (98 Stat. 2721, Public Law 98-541), for water years 1992 through 1996, the Secretary of the Interior, through the Trinity River Division of the Central Valley Project, shall provide an instream release of water to the Trinity River for the purposes of fishery restoration, propagation, and maintenance of not less than 340,000 acre feet per year. For any water year during this period for which the forecasted inflow to the Central Valley Project's Shasta Reservoir equals or exceeds 3,200,000 acre feet, based on hydrologic conditions as of June 1 and an exceedance factor of 50 percent, the Secretary shall provide an additional instream fishery release to the Trinity River of not less than 10 percent of the amount by which forecasted Shasta Reservoir inflow for that year exceeds 3,200,000 acre feet.

(b) COMPLETION OF STUDY.—By September 30, 1996, the Secretary, with the full participation of the Hoopa Valley Tribe, shall complete the Trinity River Flow Evaluation Study currently being conducted by the United States Fish and Wildlife Service under the mandate of the Secretarial Decision of January 14, 1981, in a manner which insures the development of recommendations, based on the best available scientific data, regarding permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River fishery.

(c) STUDY RECOMMENDATIONS.—Not later than December 31, 1996, the Secretary shall forward the recommendations of the Trinity River Flow Evaluation Study, referred to in subsection (b) of this section, to the Committee on Interior and Insular Affairs of the House of Representatives and to the Committee on Energy and Natural Resources and the Select Committee on Indian Affairs of the Senate. If the Secretary and the Hoopa Valley Tribe concur in these recommendations, any increase to the minimum Trinity River instream fishery releases established in subsection (a) and the operating criteria and procedures referred to in subsection (b) shall be implemented accordingly. If the Hoopa Valley Tribe and the Secretary do not concur, the minimum Trinity River instream fishery releases established in subsection (a) shall remain in effect unless increased by an Act of Congress, appropriate judicial decree, or agreement between the Secretary and the Hoopa Valley Tribe.

Mr. RIGGS (during the reading). Mr. Chairman, I ask unanimous consent that the amendment be considered as read and printed in the Record.

The CHAIRMAN. Is there objection to the request of the gentleman from California?

There was no objection.

□ 1450

Mr. RIGGS. Mr. Chairman, today I rise to offer an amendment to H.R. 2884 that would restore desperately needed water flows to the Trinity River. This amendment will confirm the Secretary of Interiors commitment to the fisheries of northern California.

The maintenance and preservation of the Trinity River fishery is critical to the economy and environment of California's north coast communities. In recent months, I have worked with Secretary Lujan and the Interior Department to protect tribal fishing rights and the commercial and recreational fishing industry in northern California from the severe losses that have resulted from development and diversion of water from the Trinity River.

The Act of August 12, 1955, authorized construction of works to divert the Trinity River on the condition that fish and wildlife resoruces in the Trinity basin be fully protected. on May 8, 1991, Secretary Lujan agreed that the department's obligations under that act and his trust responsibility to the Hoopa Valley Indian Tribe required the Department to make a substantial increase in the water supply for the Trinity River fishery. The Secretary's decision reflects an extraordinary consensus among reclamation, fish and wildlife, and Indian affairs officials in the Department of the Interior.

Now that the Secretary has done his part to try to stop the decline of the Trinity River fishery, it is time for Congress to step forward and confirm his decision. If Congress does not act, then the Trinity River basin fish and wildlife 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.

H.R. 2269 is the authority needed to ensure that the Federal trust responsibility will be met and that the communities that rely on the fisheries have a reasonable expectation that the fishery is on course for restoration. The bill requires provision of a minimum of 340,000 acre-feet of water annually to the Trinity River fishery through 1996 when the task force studies on the need of the fishery will be complete. Thereafter, adjustment of the flows will be based on the study results.

Finally, one reason why H.R. 2269 is especially deserving of your support is that it is a constructive initiative for the environment and the regional economy that will not require any expenditure of appropriated funds to implement. Thank you for your anticipated support on this issue.

In summary, Mr. Chairman, my amendment is obsolutely compatible with:

First, the consensus recommendations of the congressionally created Trinity River basin and Klamath River basin task forces;

Second, Interior Committee's report language related to the Emergency Drought Relief Act (H.R. 355) adopted earlier this year in this House; and

Thrid, Secretary Lujan's administrative directive of May 8, 1991.

Finally, Mr. Chairman, this amendment will ensure completion of the congressionally mandated 12-year study of the Trinity River salmon fishery, which is presently in its 6th year or if you'll pardon the pun at midstream.. It will maintain the schedule and pace of the congressionally mandated Trinity River restoration program, and most seriously and fittingly, fulfill the Federal Government's trust responsibility to the Hoopa Valley Indian Tribe of northwest California.

Mr. Chairman, over the past 10 years Congress has authorized $57 million to restore the Trinity River fishery. That money will be wasted without water. We can continue to build dams and fisheries for another decade, but you cannot have fish if you do not have water.

I thank the Chairman, and again I thank the distinguished chairman and ranking member of the Committee on Interior and Insular Affairs for their exhaustive effort on this legislation and urge favorable consideration of my amendment.

Mr. HERGER. Mr. Chairman, I move to strike the last word, and I rise in opposition to the amendment.

Mr. Chairman, I rise in strong opposition to this amendment offered by my good friend and colleague, the gentleman from California [Mr. Riggs].

Mr. Chairman, this amendment is far more complicated than it appears.

Mr. Chairman, unfortunately, having only been informed of the potential for this amendment yesterday, I regret that it has been impossible to obtain a full review of the potential effects of this amendment on the Sacramento River basin. However, in conversations with a number of my constituents, I must note that the potential harm to the Sacramento fishery, to agriculture, and to municipal water users posed by this amendment has not been sufficiently explored for the House to adopt this amendment at this time.

I only regret that we did not have more of an opportunity to work together to determine if a more amicable solution to this problem could have been arrived at before we reached this point in the process.

This is more than a battle between saving fish and protecting agriculture. Indeed, it is a battle between two threatened fish populations, and a battle over whether flexibility in allocating scarce water resources should be jettisoned in favor of concrete allocations that will not reflect changing conditions.

Mr. Chairman, I am well aware of the serious problems of the Trinity River, and the need to restore the Trinity River fishery, of which I am supportive. At the same time, however, the Sacramento River fishery is itself threatened, and this proposal would further undermine fish populations dependent on the Sacramento River for their survival.

The winter run of Chinook salmon in the Sacramento River has been declared threatened by the U.S. Fish and Wildlife Service, and endangered by the California Department of Fish and Game. This population has declined in fish counts made at Red Bluff Diversion Dam, from 118,000 fish in 1969 to 441 fish last year.

As a result of this serious problem, the Central Valley project has earmarked providing water to protect the fishery as its first priority for water delivery this year, despite the continued severe drought, which threatens California agricultural and municipal water users with cutoffs of up to 75 percent of their expected water deliveries.

The Sacramento River basin is the largest fishery habitat in the State of California, and is responsible for at least 70 percent of all salmon caught off the California coast. Salmon populations have declined up to 90 percent over the last 10 years.

The amendment before us today would write in stone a water allocation decision of the Secretary of the Interior, removing the ability to respond to changing conditions between the two fisheries. I trust the Secretary to take into consideration the various needs of the Sacramento and Trinity Rivers and to respond accordingly. I urge support for greater flexibility and the defeat of the Riggs amendment.

Mr. PANETTA. Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, I rise in support of H.R. 429, the Reclamation Projects Authorization and Adjustment Act of 1991. This measure authorizes the Bureau of Reclamation to study, design, construct, sell, or modify a variety of water and power projects and to modify certain water repayment agreements.

I want to especially thank Chairman MILLER and his staff for their cooperation in resolving some pay-as-you-go issues contained in an earlier version of the bill. The Interior and Budget Committee staffs worked together at some length to address a variety of budget process concerns. As a result of their efforts and the Interior Committee's cooperation I am pleased to report that the CBO cost estimate of the bill shows no deficit impact in fiscal year 1991 and deficit reduction

in fiscal years 1992-95. Specifically the bill reduces Federal spending in fiscal year 1992 by $7 million, by $9 million in fiscal year 1993, by $8 million in fiscal year 1994 and by $8 million in fiscal year 1995.

As members know, it is critical that we keep track of legislation raising pay as you go issues to avoid end of the year sequestration in programs like Medicare, student loans, and foster care, to name a few.

I again thank the gentleman from California and I urge members to support this legislation.

Mr. MILLER of California. Mr. Chairman, I move to strike the requisite number of words, and I rise in support of the Riggs amendment to deal with the flows on the Trinity River.

Mr. Chairman, I think this is a very important amendment. It fulfills a long-time obligation that the Congress has to restore those flows. It is very important that these flows be maintained so that not only can we restore the fisheries but also the river, recognizing that this fulfills the trust obligation we have to the Indian tribe in that area and also, I believe, we have to the commercial fisheries offshore from the Trinity River.

□ 1500

Mr. Chairman, even with this amendment it is going to take many years to restore the damage that has been brought upon the Trinity River, and I would hope that the House would accept the amendment of the gentleman from California [Mr. Riggs].

Mr. RIGGS. Mr. Chairman, will the gentleman yield?

Mr. MILLER of California. I yield to the gentleman from California.

Mr. RIGGS. Mr. Chairman, I thank the distinguished chairman, the gentleman from California [Mr. Miller], for his support of this legislation and the sensitivity and appreciation he has demonstrated throughout his legislative career for the sort of environmental resource issues we are discussing here within the context of my amendment.

I would also like to mention to my good friend and colleague, the gentleman from California [Mr. Herger], that I am very much in favor of a comprehensive approach or a comprehensive look and comprehensive approach with respect to attempting to restore all of the fisheries out in northern California, but I will hasten to point out that I truly feel this particular amendment is compatible with and not conflicting or competing with his stated goal of wanting to increase flows and help with the restoration of the Sacramento fishery.

Mr. Chairman, I thank the gentleman from California [Mr. Miller].

Mr. LEHMAN of California. Mr. Chairman, I move to strike the last word.

Very, very briefly, Mr. Chairman, based upon the presentation by the gentleman from California [Mr. Herger] I am going to vote against this. It is correct that this is putting into law, statute law, what a judge has already ruled, but it would take away all flexibility.

Mr. Chairman, there are an awful lot of situations in California like this. Indeed the gentleman from California [Mr. Miller] has a bill coming down the pike, and Mr. Bradley has one in the Senate, that take comprehensive looks at the entire water system of the State and attempt to reorder some of the priorities. I just think it is a mistake at this time to take one particular circumstance and say we are going to contain it right now out of the context of everything else that is going on. This problem should be addressed, but I do not think it is appropriate to take it off the table at this time.

Mr. Chairman, I urge a "no" vote.

The CHAIRMAN. The question is on the amendment offered by the gentleman from California [Mr. Riggs].

The question was taken; and the Chairman announced that the ayes appeared to have it.

RECORDED VOTE

Mr. HERGER. Mr. Chairman, I demand a recorded vote.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 300, noes 95, not voting 37, as follows:

[Roll No. 188]

AYES—300

Abercrombie	Cunningham	Hamilton	Long	Payne (VA)	Slattery
Ackerman	Darden	Harris	Lowery (CA)	Pease	Slaughter (NY)
Alexander	Davis	Hayes (IL)	Lowey (NY)	Pelosi	Slaughter (VA)
Anderson	DeFazio	Hayes (LA)	Machtley	Peterson (FL)	Smith (FL)
Andrews (ME)	DeLauro	Hefner	Manton	Peterson (MN)	Smith (IA)
Andrews (NJ)	Dellums	Henry	Markey	Petri	Smith (NJ)
Andrews (TX)	Dicks	Hertel	Martinez	Pickett	Snowe
Annunzio	Dingell	Hoagland	Matsui	Pickle	Solarz
Anthony	Donnelly	Hobson	McCloskey	Porter	Spratt
Applegate	Dorgan (ND)	Hochbrueckner	McCollum	Poshard	Staggers
Armey	Downey	Horn	McCurdy	Price	Stark
Aspin	Duncan	Horton	McDade	Rahall	Stearns
Atkins	Durbin	Houghton	McDermott	Ramstad	Stokes
AuCoin	Dwyer	Hoyer	McGrath	Rangel	Studds
Barnard	Dymally	Hubbard	McHugh	Ravenel	Swift
Bennett	Early	Hughes	McMillan (NC)	Ray	Synar
Bentley	Eckart	Hutto	McMillen (MD)	Reed	Tallon
Berman	Edwards (CA)	Ireland	McNulty	Regula	Tauzin
Bevill	Edwards (OK)	Jacobs	Meyers	Richardson	Taylor (MS)
Billrey	Edwards (TX)	James	Mfume	Ridge	Thomas (GA)
Bilirakis	Engel	Jenkins	Miller (CA)	Riggs	Thornton
Bonior	English	Johnson (CT)	Miller (WA)	Rinaldo	Torres
Borski	Erdreich	Johnson (SD)	Mineta	Ritter	Torricelli
Boucher	Evans	Johnson (TX)	Mink	Roe	Towns
Boxer	Fascell	Johnston	Moakley	Roemer	Traficant
Brennfield	Fazio	Jones (GA)	Mollohan	Rose	Trazler
Brewster	Feighan	Jones (NC)	Montgomery	Rostenkowski	Unsoeld
Brown	Fields	Jontz	Moody	Roukema	Upton
Bruce	Flake	Kanjorski	Moorhead	Rowland	Valentine
Bryant	Foglietta	Kaptur	Moran	Roybal	Vander Jagt
Buchanan	Ford (MI)	Kennedy	Morella	Russo	Vento
Byron	Ford (TN)	Kennelly	Mrazek	Sabo	Visclosky
Campbell (CA)	Frank (MA)	Kildee	Murphy	Sanders	Volkmer
Campbell (CO)	Franks (CT)	Kleczka	Murtha	Sangmeister	Walgren
Cardin	Frost	Klug	Nagle	Santorum	Watkins
Carper	Gallegly	Kolbe	Natcher	Sarpalius	Waxman
Chapman	Gallo	Kopetski	Neal (MA)	Savage	Weber
Clement	Gejdenson	Kostmayer	Neal (NC)	Sawyer	Weiss
Coleman (TX)	Gephardt	LaFalce	Nowak	Saxton	Weldon
Collins (IL)	Gibbons	Lagomarsino	Oakar	Schaefer	Wheat
Collins (MI)	Gilchrest	Lancaster	Oberstar	Scheuer	Whitten
Conyers	Gillmor	Lantos	Obey	Schiff	Williams
Cooper	Gilman	Laughlin	Olin	Schroeder	Wise
Costello	Glickman	Leach	Olver	Schuette	Wolf
Coyne	Gonzalez	Lehman (CA)	Ortiz	Schulze	Wolpe
Cox (IL)	Gordon	Lehman (FL)	Owens (NY)	Sensenbrenner	Wyden
Coyne	Goss	Levin (MI)	Pallone	Sharp	Wylie
	Gradison	Levine (CA)	Panetta	Shaw	Yates
	Green	Lewis (FL)	Parker	Shays	Yatron
	Guarini	Lewis (GA)	Patterson	Shumway	Young (FL)
	Gunderson	Lipinski	Pease	Shuster	Zeliff
			Payne (NJ)	Sisisky	Zimmer
				Skaggs	
				Skelton	

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Allard	Fields	Morrison
Archer	Gekas	Myers
Bacchus	Geren	Nichols
Baker	Gillmor	Nussle
Ballenger	Gingrich	Orley
Barrett	Grandy	Packard
Bateman	Hall (TX)	Penny
Bliley	Hancock	Perkins
Broomfield	Hansen	Rhodes
Burton	Hastert	Roberts
Callahan	Hefley	Rogers
Camp	Herger	Schaefer
Chandler	Hunter	Shaw
Clinger	Hyde	Shuster
Cable	Inhofe	Slaughter
Coble	Kasich	Smith (OR)
Coleman (MO)	Kolbe	Solomon
Combest	Kyl	Stallings
Cox (CA)	LaRocco	Stenholm
Cramer	Lagomarsino	Stump
Crane	Leach	Sundquist
Dannemeyer	Lightfoot	Swett
Dickinson	Livingston	Tanner
Dixon	Lukens	Taylor (NC)
Dooley	Marlenee	Thomas (CA)
Doolittle	Matsui	Thomas (WY)
Duncan (CA)	McCandless	Vucanovich
Dreier	McCrery	Walker
Emerson	McEwen	Young (AK)
Espy	Michel	
Fawle	Miller (OH)	

NOT VOTING—37

Barton	Hall (OH)	Ortiz
Bellenson	Hammerschmidt	Owens (UT)
Brooks	Hatcher	Purcell
Carr	Hopkins	Quillen
Clay	Hutchinson	Richardson
Coleman (MO)	Jefferson	Serrano
de la Garza	Lehman (FL)	Smith (TX)
DeLay	Levine (CA)	Spence
Derrick	Lloyd	Walsh
Fawell	Martin	Washington
Fish	Martinez	Wilson
Gaydos	Morrison	
Gray	Oberstar	

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The Clerk announced the following pairs:

On this vote:

Mr. Ortiz for, with Mr. DeLay against.

Mr. Serrano for, with Mr. Quillen against.

Mrs. VUCANOVICH, Mr. INHOFE, and Mr. COX of California changed their vote from "aye" to "no."

Messrs. McDADE, JOHNSON of Texas, LEACH, and RAMSTAD changed their vote from "no" to "aye."

So the amendment was agreed to.

The result of the vote was announced as above recorded.

Mr. MILLER of California. Mr. Chairman, I move to strike the last word.

Mr. Chairman, if I might just explain to Members, it is our intention at this time to take an amendment from the gentleman from Ohio [Mr. TRAFICANT] that will be dealt with very quickly, and then an amendment by the gentleman from Pennsylvania [Mr. WALKER] which will require a vote, but which also will be dealt with very quickly. So if Members will just stay on the floor a moment longer, there will be a vote. Then I expect it might be 30 minutes until the next vote, which I hope will be final passage.

AMENDMENT OFFERED BY MR. TRAFICANT

Mr. TRAFICANT. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. TRAFICANT: at the end of the bill, insert the following new section:

SEC. . BUY AMERICAN PROVISIONS.

(A) The Secretary shall insure that the requirements of the Buy American Act of 1933 as amended apply to all procurements made under this Act.

(B) DETERMINATION BY THE SECRETARY.—(1) If the Secretary, after consultation with the United States Trade Representative, determines that a foreign country which is party to an agreement described in paragraph (2) has violated the terms of the agreement by discriminating against certain types of products produced in the United States that are covered by the agreement, the Secretary shall rescind the waiver of the Buy American Act with respect to such types of products produced in that foreign country.

(2) An agreement referred to in paragraph (1) is any agreement, between the United States and a foreign country pursuant to which the head of an agency of the United States Government has waived the requirements of the Buy American Act with respect to certain products produced in the foreign country.

(3) REPORT TO CONGRESS.—The Secretary shall submit to Congress a report on the amount of purchases from foreign entities under this Act from foreign entities in fiscal years 1992 and 1993. Such report shall separately indicate the dollar value of items for which the Buy American Act was waived pursuant to any agreement described in subsection (a)(2), the Trade Agreement Act of 1979 (19 U.S.C. 2501 et seq.), or any international agreement to which the United States is a party.

(4) BUY AMERICAN ACT DEFINED.—For purposes of this section, the term "Buy American Act" means the title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved March 3, 1933 (41 U.S.C. 10a et seq).

(C) RESTRICTIONS ON CONTRACT AWARDS.—No contract or subcontract made with funds authorized under this title may be awarded for the procurement of an article, material, or supply produced or manufactured in a foreign country whose government unfairly maintains in government procurement a significant and persistent pattern or practice of discrimination against United States products or services which results in identifiable harm to United States businesses, as identified by the President pursuant to (g)(1)(A) of section 305 of the Trade Agreements Act of 1979 (19 U.S.C. 2515(g)(1)(A)). Any such determination shall be made in accordance with section 305.

(D) PROHIBITION AGAINST FRAUDULENT USE OF "MADE IN AMERICA" LABELS.—If it has been finally determined by a court or Federal agency that any person intentionally affixed a label bearing a "Made in America" inscription, or any inscription with the same meaning, to any product sold in or shipped to the United States that is not made in the United States, that person shall be ineligible to receive any contract or subcontract made with funds authorized under this title pursuant to the debarment, suspension, and ineligibility procedures in subpart 9.4 of chapter 1 of title 48, Code of Federal Regulations.

Mr. TRAFICANT (during the reading). Mr. Chairman, I ask unanimous consent that the amendment be considered as read and printed in the RECORD.

The CHAIRMAN. Is there objection to the request of the gentleman from Ohio?

There was no objection.

Mr. TRAFICANT. Mr. Chairman, the amendment states the Secretary shall ensure that the requirements of the Buy American Act of 1933, as amended, apply to all procurements made under this act.

Mr. Chairman, I appreciate the gentleman from California [Mr. MILLER] accepting this amendment. I want to commend the gentleman for the bill and for providing water to an area of our country that needs it the most.

Mr. MILLER of California. Mr. Chairman, will the gentleman yield?

Mr. TRAFICANT. I yield to the gentleman from California.

Mr. MILLER of California. Mr. Chairman, we have had a chance to look at this amendment, and accept this amendment. The gentleman from Ohio [Mr. TRAFICANT] offered this amendment when the bill was under consideration last year before the Congress, and we have no opposition.

Mr. HANSEN. Mr. Chairman, will the gentleman yield?

Mr. TRAFICANT. I yield to the gentleman from Utah [Mr. HANSEN], the ranking vice chairman.

Mr. HANSEN. Mr. Chairman, the minority has had an opportunity to review the amendment, and accepts the amendment also.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Ohio [Mr. TRAFICANT].

The amendment was agreed to.

AMENDMENT OFFERED BY MR. WALKER

Mr. WALKER. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. WALKER: At the end of the bill, add the following new title:

TITLE XXX—LIMITATION ON AUTHORIZATIONS OF APPROPRIATIONS

SEC. 3001. LIMITATION.

Notwithstanding any other provision of law, amounts expended, or otherwise made available, pursuant to this Act when aggregated with all other amounts expended, or otherwise made available, for projects of the Bureau of Reclamation for fiscal year 1992 may not exceed 102.4 percent of the total amounts expended, or otherwise made available, for projects of the Bureau of Reclamation in fiscal year 1992.

Mr. WALKER (during the reading). Mr. Chairman, I ask unanimous consent that the amendment be considered as read and printed in the RECORD.

The CHAIRMAN. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

Mr. WALKER. Mr. Chairman, this particular amendment is a balanced budget amendment. It goes to what we have discussed a number of times on the floor before, in trying to hold the spending in any given fiscal year to a 2.4-percent increase. It does it in this amendment by suggesting that none of the spending of the Bureau of Reclamation can exceed 102.4 percent of the total amount expended this year, and, if there would be figures that go above that, it would have to come out of the projects within this bill.

Mr. Chairman, this is an attempt to make certain none of the projects in this bill take us over the level required for a balanced budget. I would hope that Members would vote for it. I understand many Members have priorities that may not include the balanced budget. That is up to them. But the effort here is to make certain that all the bills that are coming through the House in fact comply with this.

Mr. Chairman, I offer the amendment in that regard.

Mr. MILLER of California. Mr. Chairman, we have no objection to the amendment, and we accept the amendment.

Mr. HANSEN. Mr. Chairman, we accept the amendment.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Pennsylvania [Mr. WALKER].

The amendment was agreed to.

AMENDMENT OFFERED BY MR. MILLER OF CALIFORNIA

Mr. MILLER of California. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. MILLER of California: In section 1702 (page , line), amend clause (iii) of paragraph (3)(B) to read as follows:

"(iii) Entering into financial transactions involving land or crop loans, in which the lender has no interest in providing farm