

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 YUOK 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-EPG

**CROSS-APPEAL REPLY BRIEF OF SAN LUIS & DELTA-MENDOTA
WATER AUTHORITY AND WESTLANDS WATER DISTRICT**

BROWNSTEIN HYATT FARBER
SCHRECK LLP

Steven O. Sims
Dulcinea Z. Hanuschak
410 17th Street, Suite 2200
Denver, CO 80202
Telephone: (303) 223-1100
Facsimile: (303) 223-1111

Attorneys for Westlands Water District

KRONICK, MOSKOVITZ, TIEDEMANN &
GIRARD

Daniel J. O'Hanlon, SBN 122380
Rebecca R. Akroyd, SBN 267305
Elizabeth L. Leeper, SBN 280451
400 Capitol Mall, 27th Floor
Sacramento, CA 95814
Telephone: (916) 321-4500
Facsimile: (916) 321-4555

Attorneys for San Luis & Delta-Mendota
Water Authority and Westlands Water District

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INTRODUCTION

The primary issue in this appeal is the statutory authority of the Secretary of the U.S. Department of the Interior (“Secretary”) and the U.S. Bureau of Reclamation (“Reclamation”) to make releases of water from the Central Valley Project’s (“CVP”) Trinity River Division (“TRD”) to benefit the downstream anadromous Trinity River fishery. Two federal statutes address this subject. Under well-established rules of statutory construction, the more recent and more specific statute governs any conflict.

The first statute, a proviso in section 2 of the authorizing legislation for the TRD, enacted in 1955, directed the Secretary to adopt “appropriate measures” for fish, including minimum flows. Act of August 12, 1955 (“1955 Act”), § 2, Pub. L. No. 84-386, 69 Stat. 719 (1955). The second statute, section 3406(b)(23) of the Central Valley Project Improvement Act (“CVPIA”), Pub. L. No. 102-575, Title 34, 106 Stat. 4706 (1992), enacted in 1992, directs the Secretary to establish and implement “permanent” fishery releases from the TRD for the “restoration and maintenance of the Trinity River fishery.” In 2000, in the Trinity River Record of Decision (“ROD”), the Secretary established “permanent” releases by specifying the volume of annual fishery releases. Interpreting the 1955 Act proviso to allow fishery releases in excess of the permanent annual volume limits set in the ROD pursuant to CVPIA section 3406(b)(23) brings the statutes into conflict. Therefore, the more recently enacted and specific provisions of CVPIA section 3406(b)(23) control.

In 2012 and 2013, Reclamation exceeded its statutory authority by making flow augmentation releases (“FARs”) from the TRD to benefit anadromous fish of Trinity River origin that were located in the lower Klamath River during their upstream migration. As releases from the TRD to benefit the Trinity River fishery, the FARs were subject to and governed by CVPIA section 3406(b)(23). The FARs exceeded the permanent annual volume limit for fishery releases established in the ROD pursuant to section 3406(b)(23). Reclamation could have, but did not, work within the ROD’s permanent annual volumes to provide water for the desired FARs. Instead, Reclamation exceeded its statutory authority in taking additional CVP water.

The FARs are also unlawful because Reclamation failed to consult under the Endangered Species Act (“ESA”), 16 U.S.C. section 1531 *et seq.*, regarding the potential impacts of the FARs on ESA-listed species, and failed to obtain the necessary changes to the applicable state water right permits, prior to making the FARs.

Reclamation has a lawful avenue available to make the desired TRD releases to the lower Klamath River for the benefit of anadromous fish species. That avenue is either purchasing additional CVP water from willing sellers, or working within the ROD’s permanent annual volume limits. Water Contractors ask this Court to steer Reclamation back on the course authorized by Congress, to a lawful avenue for making fishery releases from the TRD.

ARGUMENT

I. Reclamation Exceeded its Statutory Authority by Making Flow Augmentation Releases from the Trinity River Division in Excess of the Permanent Annual Volumes of Water Established Pursuant to Central Valley Project Improvement Act Section 3406(b)(23)

The district court erred in holding that the permanent annual fishery releases established pursuant to CVPIA section 3406(b)(23) do not govern the amount of water that Reclamation can release from the TRD to benefit the Trinity River anadromous fishery. ER 58-67. Defendants argue that section 3406(b)(23) is limited in purpose and scope to restoring the Trinity River fishery within the geographic confines of the Trinity River mainstem. Third Brief on Cross-Appeal by Appellant Yurok Tribe, Doc. 64 (“Yurok Reply”) at 4, 14-17; Reply and Response Brief for Federal Defendants, Doc. 59 (“Fed. Reply”) at 4, 11, 26-27; Response/Reply Brief of Appellant Hoopa Valley Tribe, Doc. 57 (“Hoopa Reply”) at 2, 16-17, 20, 22-23. Defendants want this Court to narrow section 3406(b)(23) to “restoration” purposes, and to the Trinity River mainstem. *Id.* However, there is no support for such a restrictive interpretation of section 3406(b)(23)’s express purpose: implementing permanent instream fishery flow requirements “for the restoration and maintenance of the Trinity River fishery” *See* Opening Brief and Response of San Luis & Delta-Mendota Water Auth. and Westlands Water District, Doc. 52 (“Contractors’ Br.”) at 30-48.

A. The Plain Statutory Language Shows that the Purpose and Scope of the Permanent Annual Releases Established Pursuant to Section 3406(b)(23) is the “Trinity River Fishery”

In CVPIA section 3406(b)(23), Congress chose to use the word “fishery” to describe the purpose of the permanent annual instream fishery releases authorized by that statutory provision. The statutory language shows that the intent of the permanent releases was to benefit the downstream fish, rather than to benefit a particular geographic place.

1. Section 3406(b)(23) Repeatedly and Exclusively Refers to the “Fishery” as the Purpose of the Permanent Annual Releases

The plain language of Section 3406(b)(23) shows that it authorized fishery releases for the purpose of benefitting the “fishery.” *See* Contractors’ Br. at 32-33. Section 3406(b)(23)’s statements of purpose demonstrate that the “instream fishery releases” that it authorizes serve the “fishery.” CVPIA § 3406(b)(23) (stating releases are for “purposes of fishery restoration, propagation, and maintenance” and “restoration and maintenance of the Trinity River fishery”). Consistent with this purpose, the statutory language provides that the permanent instream fishery releases established pursuant to section 3406(b)(23) are for the “restoration and maintenance of the Trinity River fishery.”

No party disputes that the “Trinity River fishery” that section 3406(b)(23) seeks to restore is the anadromous fish population that spawns in the Trinity River basin and

that travels through the Trinity River and lower Klamath River as part of its life cycle. *See* Yurok Reply at 3, 6; *see also* Fed. Reply at 27; Hoopa Reply at 5-7; ER 524; ER 647; ER 654-63. And both the 1981 Secretarial Decision and the 1984 Act, which are referenced in CVPIA section 3406(b)(23), refer to the Trinity River anadromous “fishery” as the object of the Secretarial and Congressional action. CVPIA § 3406(b)(23); ER 740; Trinity River Basin Fish and Wildlife Management Act (“1984 Act”), § 1(1), Pub. L. No. 98-541, 98 Stat. 2721 (1984). Therefore, the plain language interpretation of section 3406(b)(23) is that it authorizes and directs the Secretary to make permanent annual fishery releases from the TRD for the anadromous Trinity River fishery.

2. The Trinity River Anadromous Fishery is Not Geographically Confined to the Trinity River Mainstem

The anadromous Trinity River fish that section 3406(b)(23) seeks to restore and maintain are not geographically confined to the Trinity River mainstem. ER 524; ER 647; ER 654-63. Just as water released from the TRD to benefit the “Trinity River fishery” travels through the Trinity River and the lower Klamath River, so too do the Trinity River anadromous fish. ER 524; ER 581-82; ER 647-48; ER 654. That the fishery releases authorized by section 3406(b)(23), and the anadromous fish that the releases are intended to benefit, are not geographically confined to the Trinity River mainstem must be considered in interpreting section 3406(b)(23). *United States v. Petri*, 731 F.3d 833, 839 (9th Cir. 2013) (when interpreting a statute, words and

phrases must be read with an eye toward the “purpose and context of the statute”). Section 3406(b)(23)’s authorization for permanent fishery releases must be read to encompass the geographic range of the anadromous Trinity River fishery, and therefore include both the Trinity River mainstem *and* the lower Klamath River. *United States v. Nader*, 542 F.3d 713, 720 (9th Cir.2008) (“statutes should be interpreted harmoniously with their dominant legislative purpose”).

Defendants insist that the fishery releases authorized by and subject to section 3406(b)(23) are limited in scope to uses in the Trinity River mainstem. Yurok Reply at 4, 14-17; Fed. Reply at 4, 11, 26-27; Hoopa Reply at 2, 16-17, 20, 22-23. But that argument fails to account for the nature of the anadromous fishery that Congress sought to restore through section 3406(b)(23). Defendants’ argument creates an imaginary boundary at the confluence of the Trinity River and Klamath River that ignores the hydrological and biological realities. In reality, neither the fishery releases from the TRD nor the anadromous Trinity River fishery are geographically confined to the Trinity River mainstem.

3. Section 3406(b)(23)’s Reference to the “Fishery Restoration Goals” of the 1984 Act Does Not Geographically Limit the Fishery Purpose of the Releases

Section 3406(b)(23) directs and authorizes the Secretary to make permanent annual fishery releases from the TRD “to meet the fishery restoration goals of the [1984 Act].” CVPIA § 3406(b)(23). Defendants argue this reference to the 1984 Act

limits the purpose of the permanent releases established pursuant to section 3406(b)(23) to the Trinity River mainstem. Yurok Reply at 14-17; Fed. Reply at 22-25; Hoopa Reply at 20-22. However, neither CVPIA section 3406(b)(23), nor the 1984 Act, supports Defendants' restrictive interpretation of those statutes' fishery restoration goals. *See* Contractors' Br. at 42-45.

First, section 3406(b)(23) does not incorporate or refer to any geographic limit of the 1984 Act. Section 3406(b)(23) refers to "meet[ing]" the "fishery restoration goals" of the 1984 Act. Like section 3406(b)(23)'s other statements of purpose, the referenced goal concerns the "fishery."

Second, the referenced "fishery restoration goal" of the 1984 Act is to restore the anadromous fish "populations" of the Trinity River Basin to pre-project levels. 1984 Act, § 1(1). This is the "fishery restoration goal" that section 3406(b)(23) is intended to help meet. As explained above, the anadromous fish of the Trinity River Basin travel up and down the lower Klamath River and are not confined to the Trinity River mainstem.

Third, the 1984 Act's mandate that the fish and wildlife program for the Trinity River Basin include the "design, construction, operation, and maintenance of facilities to . . . rehabilitate fish habitats in the Trinity River between Lewiston Dam and Weitchpec" does not support Defendants' argument that Congress intended to limit releases pursuant to section 3406(b)(23) to addressing conditions in the Trinity River

mainstem. Yurok Reply at 14-17; Fed. Reply at 22-25; Hoopa Reply at 20-22. Defendants merge and confuse the distinct concepts of: (1) the 1984 Act's stated goal of restoring the Trinity River anadromous fish; and (2) the physical restoration activities within the Trinity River Basin authorized by the 1984 Act to help achieve that goal. While it is true that the 1984 Act authorizes rehabilitation of fish habitat in a specific geographic area, those physical rehabilitation activities are means to achieving the broader goal of restoring the anadromous Trinity River fishery. Another means to achieving this broader goal was to increase releases of water from the TRD, as provided for under the 1981 Secretarial Decision and later, CVPIA section 3406(b)(23). *See* ER 740; *see also* Contractors' Br. at 12-14. The 1984 Act's provision for rehabilitating fish habitat does not limit or alter the purpose of the water releases established pursuant to CVPIA section 3406(b)(23).

Defendants also argue that a 1986 statute authorizing the Klamath River Basin restoration program supports their conclusion that the 1984 Act's fishery restoration goal, and hence the purpose of section 3406(b)(23), does not encompass the lower Klamath River. Yurok Reply at 15; Fed. Reply at 22-25; Hoopa Reply at 22; Klamath River Basin Fishery Resources Restoration Act ("1986 Act"), Pub. L. No. 99-552, 100 Stat. 3080 (1986). While it is true that the 1984 Act and the 1986 Act each authorize physical restoration to occur in specific geographic areas, the goal of each act is to restore the population of anadromous fish that travel through the lower Klamath River

to reach their spawning grounds in the Trinity River and upper Klamath River, respectively. Thus, the 1986 Act's authorization for additional restoration to occur in the Klamath River Basin does not support interpreting the 1984 Act's fishery restoration goal as limited to the Trinity River Basin. Instead, the purpose and intent of both acts is to restore the fish populations.

Defendants also argue that the 1996 amendment to the 1984 Act—which expanded the 1984 Act's authorization for restoration of fish habitats to include “the Klamath River downstream of the confluence with the Trinity River”—confirms that the original “fishery restoration goal” of the 1984 Act did not encompass the lower Klamath River. Yurok Reply at 15-16; Fed. Reply at 22-23; Hoopa Reply at 22; Trinity River Basin Fish & Wildlife Management Reauthorization Act of 1995, Pub. L. No. 104-143, 110 Stat. 1338 (1996). However, this amendment only establishes that the *physical restoration activities* originally authorized by the 1984 Act did not include the lower Klamath River; it does not establish that the 1984 Act's “*fishery restoration goal*” is geographically limited to fish while present in the Trinity River Basin. To the contrary, the 1996 amendment confirms that the 1984 Act's goal is to restore the fish themselves, and the 1996 amendment furthered that goal by extending the physical restoration program to include the lower Klamath River, which is part of the Trinity River anadromous fishery's migratory pathway. ER 524; ER 647; ER 654.

Finally, Defendants’ reliance on this Court’s prior decision in *Westlands Water District v. U.S. Department of Interior*, 376 F.3d 853 (9th Cir. 2004) is misplaced. Fed. Reply at 21, 23; Yurok Reply at 14, 16-17. *Westlands* involved a challenge to the ROD under the National Environmental Policy Act. *See* Contractors’ Br. at 45-46. In that appeal, the Court did not decide the current issue of whether the permanent annual fishery releases established in the ROD pursuant to CVPIA section 3406(b)(23) govern the amount of water the Secretary is authorized to release from the TRD to benefit the Trinity River anadromous fishery.

In summary, that the *activities* authorized under the 1984 Act were focused on physical rehabilitation of fish habitat in the Trinity River Basin does not support the conclusion that the 1984 Act’s *goal* of restoring the anadromous Trinity River fishery is geographically confined to the Trinity River Basin. The “fishery restoration goal” of the 1984 Act that section 3406(b)(23) seeks to meet is to restore the population of anadromous fish of Trinity River origin, and those fish indisputably travel beyond the Trinity River Basin.

4. Section 3406(b)(23)’s Reference to the “Trinity River Flow Evaluation Study” Does Not Geographically Limit the Fishery Purpose of the Releases

Section 3406(b)(23) directs and authorizes the Secretary to “complete the Trinity River Flow Evaluation Study . . . in a manner that insures the development of recommendations . . . regarding permanent instream fishery flow requirements . . . for

the restoration and maintenance of the Trinity River fishery” Section 3406(b)(23) also directs that if the Secretary and the Hoopa Valley Tribe (“Hoopa”) concur in the recommendations for permanent instream fishery flow requirements “for the restoration and maintenance of the Trinity River fishery,” any recommended increase in the annual instream fishery releases established in section 3406(b)(23) “shall be implemented.”

Defendants argue that because section 3406(b)(23) refers to the Trinity River Flow Evaluation Study (“TRFES”), the scope and purpose of the fishery releases authorized by section 3406(b)(23) must necessarily be limited by the geographic focus of the TRFES recommendations. Fed. Reply at 5, 9-10, 22-25; Hoopa Reply at 2-3, 14-15, 23-32; *see* ER 606-753. This argument fails for at least two reasons. First, the TRFES was completed in 1999, seven years after Congress enacted CVPIA section 3406(b)(23), so Congress could not have incorporated the geographic scope of the TRFES into the fishery releases that section 3406(b)(23) authorized. *See Rouse v. Wachovia Mortgage, FSB*, 747 F.3d 707, 714 (9th Cir. 2014); ER 606-753. Second, Congress did not defer to the TRFES to establish the purpose and scope of the permanent fishery releases that section 3406(b)(23) authorized; section 3406(b)(23) expressly provides that the purpose and scope of the permanent releases is “for the restoration and maintenance of the Trinity River fishery.” Therefore, the Secretary had no discretion or authority to narrow the purpose and scope of the fishery releases

to the Trinity River mainstem. *See Util. Air Regulatory Grp. v. E.P.A.*, 134 S.Ct. 2427, 2445 (2014).

In sum, the purpose and scope of the permanent annual fishery releases authorized and directed by section 3406(b)(23) is for the restoration and maintenance of the Trinity River anadromous fishery.

B. Section 3406(b)(23) Impliedly Amended the 1955 Act Regarding Trinity River Division Releases to Benefit the Trinity River Fishery

The most recent statutory enactment to address releases of water from the TRD for fishery purposes—CVPIA section 3406(b)(23)—is the statute that governs the Secretary’s authority to make such releases. Defendants contend that a statute enacted thirty-seven years prior to the CVPIA—the 1955 Act—still provides the Secretary with broad authority to make unlimited fishery releases from the TRD. But it is undisputable that section 3406(b)(23) is the later and more specific statute regarding the Secretary’s statutory authority to make fishery releases from the TRD to benefit downstream fish. And because section 3406(b)(23) authorizes and mandates “permanent” annual releases for the Trinity River fishery, section 3406(b)(23) governs the Secretary’s authority to make releases from the TRD to benefit the downstream anadromous Trinity River fishery. *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (later enacted statute can operate “to amend or even repeal an earlier statutory provision”).

1. Section 3406(b)(23) is the Later and More Specific Statute Regarding the Amount of Water the Secretary is Authorized to Release from the Trinity River Division for Fishery Purposes

Defendants rely on the principle that implied repeals and amendments are disfavored and insist that section 3406(b)(23) does not supplant the 1955 Act's authorization for the Secretary to "adopt appropriate measures to insure the preservation and propagation of fish and wildlife" Yurok Reply at 18-19; Fed. Reply at 1, 4, 8-9; Hoopa Reply at 2, 8-13. However, both CVPIA section 3406(b)(23) and the 1955 Act address the issue of the amount of water to be released from the TRD for downstream fish. Defendants' argument that the 1955 Act authorizes fishery releases from the TRD in excess of the "permanent" annual volume limits established pursuant to CVPIA section 3406(b)(23) brings the statutes into conflict. As the more recent and specific statute, section 3406(b)(23) controls the Secretary's authority to make such releases. *Branch v. Smith*, 538 U.S. 254, 273 (2003).

The Court can avoid conflict between the two statutes in this case by finding that the 1955 Act's authorization for fishery releases is limited to mitigating the impacts of the TRD, and therefore does not authorize the FARs.¹ The 1955 Act has

¹ It is appropriate for this Court to consider Water Contractors' argument that the 1955 Act's authorization for fishery releases is limited to mitigating the impacts of the TRD, because the argument was "raised sufficiently for the trial court to rule on it." *Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir.1996); see Fed. Reply at 14; see

been consistently interpreted as authorizing the Secretary to make fishery releases from the TRD in order to mitigate impacts of the TRD (*see, e.g.*, ER 743 (1981 Secretarial Decision); 1984 Act, § 1(3)), and the FARs do not fall within that scope. *See* Contractors’ Br. at 21-22, 65-69.

2. Section 3406(b)(23)’s “Restoration and Maintenance” Purpose Replaced the 1955 Act’s “Preservation” Purpose

Defendants argue that there is a meaningful distinction between the “preservation and propagation” purposes of the releases authorized by the 1955 Act and the “restoration and maintenance” purposes of the releases authorized by section 3406(b)(23) and that therefore, the two statutes’ authorizations for fishery releases from the TRD are distinct. Yurok Reply at 17-19; Fed. Reply at 9, 26-27; Hoopa Reply at 13-16, 20. However, as explained in Water Contractors’ opening brief (at 60-63), section 3406(b)(23)’s “restoration” purpose is a response to the deterioration of the Trinity River anadromous fishery in the decades that followed enactment of the 1955 Act. The “restoration” goal replaced the “preservation” goal to address the changed conditions of the fishery. But the ultimate purpose of the fishery releases from the TRD continued to be to benefit the downstream fish. Thus, both the releases authorized by section 3406(b)(23) and the 1955 Act are for “fishery” purposes. There is no support for interpreting the 1955 Act’s “preservation” purpose as continuing to

also ER 76 (district court interpreting fishery releases authorized by the 1955 Act as limited to mitigating impacts of the TRD).

be a distinct and independent basis for the Secretary to make fishery releases from the TRD.²

3. To Give Meaning and Effect to CVPIA Section 3406(b)(23)’s Directive for “Permanent” Fishery Releases, the Record of Decision’s Annual Volumes Limits for Releases Cannot be Exceeded

To give meaning and effect to the Congressional directive in section 3406(b)(23) to establish and implement “permanent” annual releases from the TRD for the anadromous Trinity River fishery, the 1955 Act cannot be interpreted as allowing the Secretary to exceed the permanent annual volume limits established in the ROD pursuant to section 3406(b)(23). *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (statute should be construed so that effect is given to all its provisions); *Home Builders*, 551 U.S. at 662 (courts will find implied repeal if necessary in order that the words of the later statute shall have any meaning at all). Defendants’ asserted interpretation of the 1955 as providing broad and unlimited authority to decide upon and make fishery releases from the TRD in any amount the Secretary chooses cannot be reconciled with Congress’s mandate in CVPIA section 3406(b)(23) to establish and implement “permanent” instream fishery releases from the TRD.

What makes the releases authorized by section 3406(b)(23) “permanent” is the *annual volume limit* for fishery releases, as established in the ROD pursuant to section

² For the reasons explained in Water Contractors’ opening brief (at 49-56), Reclamation’s interpretation of the 1955 Act is not entitled to any deference.

3406(b)(23). Defendants' argument that section 3406(b)(23) releases are "permanent" with respect to fishery releases directed at the Trinity River mainstem, and that releases directed at the lower Klamath River are distinct from those releases, ignores the physical realities of releases from the TRD. *See, e.g.,* Hoopa Reply at 17. All fishery releases made from the TRD to the Trinity River flow through the Trinity River mainstem, and then to the lower Klamath River. ER 581-82, ER 647-48. The attempted distinction is therefore meaningless and impractical. Necessarily, what makes the annual fishery releases "permanent" is the defined and limited annual volume of water that the Secretary is authorized to release from the TRD for fishery purposes. If Reclamation is allowed to exceed, or fall short of, that annual volume limit, then the Congressional directive to establish and implement "permanent" TRD fishery releases will be eviscerated.

As the district court recognized, there is no support for interpreting the 1955 Act as authorizing fishery releases that CVPIA section 3406(b)(23) does not. ER 76. And as both the TRFES and ROD recognized, Congress intended section 3406(b)(23) to be the culmination of Congressional and Secretarial action regarding fishery releases from the TRD. ER 629; ER 540; *see* ER 531.

C. The Flow Augmentation Releases Were Subject to the Permanent Annual Volumes of Water Established Pursuant to Section 3406(b)(23) Because They Benefitted the Trinity River Fishery

The ROD's permanent annual volumes of water are for the statutory purpose established by CVPIA section 3406(b)(23), which is for the "restoration and maintenance of the Trinity River fishery." Therefore, releases made from the TRD to benefit the Trinity River anadromous fishery—such as the FARs—fall within the scope of the ROD and are subject to the ROD's annual volume limits established pursuant to section 3406(b)(23). ER 64; ER 205-06; ER 336; *see* Contractors' Br. at 40; *see also* Fed. Reply at 27; Hoopa Reply at 5.

Although Federal Defendants now argue that FARs are not subject to the ROD's annual volume limits, Reclamation previously reached the opposite conclusion. Reclamation's environmental documents for the 2004 FARs state that Reclamation can and will utilize the ROD water to make the FARs, so long as Reclamation does not exceed the ROD's total annual volume of water for that water year type. Contractors' Request for Judicial Notice ("RJN"), Doc. 47 at 54; *see* Contractors' Br. at 19, 38-39. Reclamation also made clear that the FARs are "[r]eleases from the TRD for the Trinity fishery" made to "restore the Trinity River fishery[.]" RJN, Doc. 47 at 53, 59. Federal Defendants' reply ignores these statements. Reclamation got it right in 2004 when it concluded that such flow augmentation releases from the TRD are subject to the ROD's annual volume limits.

D. The Schedule of Permanent Annual Releases Established Pursuant to Section 3406(b)(23) Can Be Adjusted within the Annual Limits to Provide Water for the Flow Augmentation Releases

As Water Contractors explained in their opening brief (at 38-39), the ROD includes an adaptive management program that allows the schedule for fishery releases to be adjusted, within the annual volume limits, to respond to changing conditions. ER 526; ER 535 (ROD states schedule for releasing water “may be adjusted” but the “annual flow volumes . . . may not be changed”). And as Reclamation recognized in 2004, the ROD’s adaptive management program allows Reclamation to make the FARs by adjusting the release schedule, within the annual limit, to provide for additional late-summer fishery releases. RJN, Doc. 47 at 54-55.

Defendants’ arguments regarding why ROD flows cannot be used for the FARs are unsupported and contrary to Reclamation’s express findings and conclusions regarding past FARs. Defendants argue that using ROD water for the FARs would undermine the ROD. Fed. Reply at 6, 31-33; Hoopa Reply at 26, 29. However, Reclamation previously concluded that it could and would use ROD water for the 2004 FARs and would do so under the ROD’s adaptive management program by shifting spring-peak flows to later in the fall. RJN, Doc. 47 at 54-55. The ROD contemplated that changes to the annual release schedule may be necessary and provided for such changes. There are no legal or practical barriers to Reclamation

working within the ROD's "permanent" annual volume limits to provide water for the FARs.

In summary, because the FARs were made from the TRD to benefit the Trinity River anadromous fishery, they were subject to the permanent annual volume of fishery releases adopted in the ROD pursuant to CVPIA section 3406(b)(23). In making the 2012 and 2013 FARs, Reclamation exceeded its statutory authority by exceeding the ROD's permanent annual volume limit of water that the Secretary is authorized to release from the TRD for fishery purposes. 5 U.S.C. § 706(2); *see* Contractors' Br. at 20-21, 39-41.

II. Tribal Interests in the Fishery Resources Are Not a Source of Authority for the Flow Augmentation Releases

Defendants Yurok Tribe ("Yurok") and the Hoopa assert that principles of the tribal trust somehow "support" the FARs. Hoopa Reply at 36-45; Yurok Reply at 20-26. However, none of the Defendants argue that the tribal trust provides the Secretary with *authority* to make the challenged FARs. To the contrary, the Hoopa argue that the issue of whether the tribal trust provides authority for the FARs "is not before this Court on appeal." Hoopa Reply at 36. Therefore, the principles of tribal law briefed by the Yurok and Hoopa need not be addressed by this Court. 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. Contractors' Br. at 69-73. In CVPIA section 3406(b)(23) Congress authorized permanent annual releases from the TRD, and

releases in the volumes set by the ROD fulfilled the trust responsibility to the Hoopa and Yurok.

III. Water Contractors Have Standing to Pursue Their Claim that Reclamation Violated Section 7(a)(2) of the Endangered Species Act

The district court erred in holding that Water Contractors lack standing to challenge Reclamation's failure to consult under ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2). ER 54-56. Water Contractors demonstrated a concrete interest in the protection of ESA-listed species as well as a credible threat of harm sufficient to establish injury-in-fact, and satisfied the causation and redressability requirements for procedural standing. *See* Contractors' Br. at 78-86.

Federal Defendants³ do not dispute that Water Contractors have a concrete interest in the protection of ESA-listed species. *See* Fed. Reply at 38. Nor do Federal Defendants directly challenge Water Contractors' satisfaction of the causation and redressability requirements. *See id.* at 43. Federal Defendants' sole argument regarding standing is that Water Contractors have failed to establish the credible threat of harm necessary to satisfy the injury-in-fact prong of a procedural standing analysis. *Id.* at 37-45. This argument fails.

In *Natural Resources Defense Council v. U.S. E.P.A.*, 735 F.3d 873, 878 (9th Cir. 2013), this Court confirmed that "an injury is 'actual or imminent' where there is

³ This reply brief responds to the standing arguments made by Federal Defendants, as Federal Defendants are the only defendants that briefed this issue.

a ‘credible threat’ that a probabilistic harm will materialize.” When Water Contractors initiated the present lawsuit, the FARs credibly threatened adverse impacts to ESA-listed species via a reduction in the total volume of TRD water available to maintain cold water temperatures for ESA-listed species. *See* Contractors’ Br. at 83-84. This threat of harm is evidenced by the declarations of James Snow (SER 122-24), Charles Hanson (SER 242-45), and Federal Defendants’ witness Ronald Milligan (SER 350-53). Water Contractors have also submitted additional declarations and record documents explaining how the success or failure of ESA-listed species affects Water Contractors’ water supply. SER 111-12; SER 302-03; SER 94, 99, 105; ER 394-95. At the summary judgment stage, this evidence is adequate to establish “that there is a genuine question of material fact as to the standing elements.” *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

Federal Defendants argue that this Court should focus its inquiry on whether there is a “‘reasonable probability’ that the challenged action threatens a plaintiff’s concrete interest” or alternatively, whether the plaintiff has “adduce[d] specific evidence showing probability or likelihood that the alleged threatened harm will ensue” to establish a “credible threat.” Fed. Reply at 41. The “reasonable probability” test is inconsistently applied to the injury-in-fact prong in the Ninth Circuit. *See Hall v. Norton*, 266 F.3d 969, 976-77 (9th Cir. 2001) (discussing

“reasonable probability” in context of causation prong of standing analysis). Nevertheless, Water Contractors submit that the above-cited evidence establishes both a reasonable probability that the FARs threatened Water Contractors’ interest in the protection of listed species and a probability or likelihood that the threatened harm would ensue.

Federal Defendants argue that *Natural Resources Defense Council v. U.S. E.P.A.* and *Central Delta Water Agency v. United States* required a greater showing of probable harm than Water Contractors have shown (Fed. Reply at 41-43), but the contrary is true. Neither requires a “high probability of harm,” as Federal Defendants suggest. Fed Reply at 43. Instead, both cases focus on increased *risk* of harm. In *Natural Resources Defense Council v. U.S. E.P.A.*, 735 F.3d at 878-79, the Natural Resources Defense Council (“NRDC”) challenged the EPA’s conditional registration of two pesticides. Absent EPA approval of the conditional registration, there was “roughly no chance that the children of NRDC members [would] be exposed” to the pesticide at issue. *NRDC*, 735 F.3d at 878. EPA approval, however, would “increase[] the odds of exposure.” *Id.* The Court therefore found a “‘credible threat’ that [NRDC’s] members’ children [would] be exposed as a consequence of the EPA’s decision to conditionally register the product.” *Id.* Although the Court characterized the risk of exposure to harm as “quite high” in comparison to the risk of exposure to harm in *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983), the Court did not

discuss the actual likelihood of *harm* from exposure at all.⁴ *NRDC*, 735 F.3d at 879. The Court based its “credible threat” conclusion on NRDC’s increased risk of harm rather than any high probability of harm. *Id.*

In *Central Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002), the plaintiffs challenged Reclamation’s method of operating the New Melones Unit of the CVP, alleging that it was likely to cause violations of a salinity standard, which in turn, would hamper plaintiffs’ ability to grow their crops. As in *NRDC*, the Court focused on the increased risk of harm to plaintiffs associated with violations of the salinity standard. *Central Delta*, 306 F.3d at 948-50. The Court rejected an argument that plaintiffs did not face a “credible threat of injury” because a series of contingencies were necessary to occur for the salinity standard to be exceeded, and concluded “that the risk of harm to plaintiffs’ crops created by the Bureau’s water management procedures [was] not so speculative or diffuse as to render the controversy a hypothetical one.” *Id.* at 950.

In this case, Water Contractors cited evidence that the FARs *would result* in reduced TRD storage and the depletion of cold water reserves available to help maintain sufficiently cold temperatures in the Sacramento River for ESA-listed

⁴ The *NRDC* Court explained that in *Lyons* “the probability that the plaintiff would be exposed to the risk of harm at issue was low because he was unlikely to have another encounter with a member of the Los Angeles Police Department that would lead to an officer administering an allegedly injurious chokehold.” *NRDC*, 735 F.3d at 878-79.

salmonids. *See* SER 124; SER 243-44; SER 352-53. Water Contractors also cited evidence regarding likely adverse impacts to listed species from elevated temperatures on the Sacramento River. Together, this evidence establishes a “credible threat of harm” consistent with *Natural Resources Defense Council* and *Central Delta Water Agency*, because the FARs increase the risk of harm to listed species. This conclusion is further supported by additional Ninth Circuit precedent. *See, e.g., Covington v. Jefferson Cnty.*, 358 F.3d 626, 638-39 (9th Cir. 2004) (concrete risk of harm from increased risks to loss of enjoyment of property); *Harris v. Board of Supervisors, Los Angeles Cnty.*, 366 F.3d 754, 762 (9th Cir. 2004) (threatened harm to plaintiffs’ health from hospital closure and reduced number of hospital beds sufficiently imminent to establish injury-in-fact); *see also Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010).

In sum, because Water Contractors have established that the FARs raised a credible threat of harm to Water Contractors’ concrete interest in listed species, and have satisfied the causation and redressability requirements for procedural standing, the district court erred in holding that Water Contractors lack standing to challenge Reclamation’s failure to consult under ESA section 7(a)(2).

IV. The Flow Augmentation Releases Violated Reclamation’s Obligation to Comply with 43 U.S.C. Section 383 Regarding Authorized Place of Use

Under Section 8 of the Reclamation Act, Reclamation is required to operate the CVP in “conformity with” state law regarding water use. 43 U.S.C. § 383. The

district court erred in holding that the FARs do not violate California law, which requires Reclamation “to take and use water only to the extent and for the purpose allowed” in its water rights permits. *See* ER 79-80; Cal. Wat. Code §§ 1381, 1052(a). Defendants do not contend that the lower Klamath River is an approved place of use under the state water rights permits for the TRD. Fed. Reply at 47; Hoopa Reply at 45-50. Nor do they dispute that Reclamation used the FARs to improve conditions for fish in the lower Klamath River. Federal Defendants’ use of TRD water for the FARs outside of the authorized place of use therefore necessarily violated California water law, and hence Section 8 of the Reclamation Act, 43 U.S.C. section 383.

Federal Defendants nonetheless contend that “State law does not require the natural river course to be designated as a place of use when a dam operator releases water through the dam.” Fed. Reply at 47 (citing SER 399-400). Federal Defendants rely on a State Water Resources Control Board (“State Water Board”) staff letter which states that “[a]s the operator of Trinity Dam, Reclamation may bypass water without a change approval, and may release water for various purposes that do not require State Water Board approval.” SER 399.⁵ There is a fiction indulged in the staff letter – that Reclamation is letting the water go without making a use of the water, which does not describe the FARs. The staff letter still warns though, that

⁵ As explained in Water Contractors’ opening brief (at 88), the staff letter is not the official opinion of the State Water Board, and has no precedential or binding effect.

“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. Without a permit change, releases for FARs may expose Reclamation to revocation of a portion of its water right.⁶ *Id.* Thus, the staff letter confirms that “use” of TRD water within the lower Klamath River will not be recognized as a lawful, beneficial use of water under Reclamation’s existing state water right permits. As Water Contractors’ opening brief explains (at 88), Reclamation has no statutory authority to abandon stored CVP water by releasing it for non-beneficial uses, something Federal Defendants cannot and do not dispute.

Neither *Wild Fish Conservancy v. Jewell* nor *City of Lompoc v. U.S. Bureau of Reclamation* suggest the Court should decline to decide this issue. *Cf.* Fed. Reply at 48-50; Hoopa Reply at 47. In *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 794, 799 (9th Cir. 2013), the Court’s comments on the plaintiff’s state water law claim were dicta; the Court’s holding in the case was that the plaintiff lacked prudential

⁶ That Water Contractors have “point[ed] to nothing that demonstrates the Board holds a different view than its staff and the Board has taken no enforcement action” (Fed. Reply at 52) is irrelevant. First, the staff letter does not state that the releases would be consistent with Section 8 of the Reclamation Act. Second, the State Water Board staff itself stated that regardless of whether permission is required for certain releases, there are adverse consequences of making such releases without first obtaining a change in the place of use of Reclamation’s water rights permits. SER 400.

standing, not that the Court should decline to decide state law issues for policy reasons. And *City of Lompoc v. U.S. Bureau of Reclamation*, 172 F.3d 55, 1999 WL 97260 (9th Cir. 1999), should not be considered by this Court at all, in accordance with Circuit Rule 36-3(c). The Ninth Circuit has decided issues of state water law in considering alleged violations of Section 8 of the Reclamation Act in the past (*see, e.g., Westlands Water Dist. v. U.S.*, 337 F.3d 1092, 1101 (9th Cir. 2003); *Citizens Legal Enforcement & Restoration v. Connor*, 540 Fed. Appx. 587, 589 (9th Cir. 2013)), and should do so now.

In sum, because Reclamation released water for use in the lower Klamath River in making the FARs, which was not an authorized place of use under Reclamation's water rights permits, Reclamation violated its obligation to comply with Section 8 of the Reclamation Act, 43 U.S.C. section 383.

V. The Flow Augmentation Releases Violated Reclamation's Obligation to Comply with Central Valley Project Improvement Act Section 3411(a) Regarding Authorized Place of Use

The district court also erred in holding that Reclamation did not violate the requirement in CVPIA section 3411(a) "to obtain a modification" in Reclamation's water rights permits, "in a manner consistent with the provisions of applicable State law, to allow such change in purpose of use or place of use." *See* ER 81. Under the plain language of section 3411(a), Reclamation was required to "obtain" changes to the water rights permits for the TRD, in the "manner" provided by state law, before

releasing the FARs for uses in the lower Klamath River. *Westlands Water District v. Natural Resources Defense Council*, 43 F.3d 457, 461 (9th Cir. 1994). Instead, Reclamation started the change procedure (SER 412-18), but abandoned it and has never obtained the required permit changes.

Federal Defendants repeat an argument regarding section 3411(a) that was rejected by the district court, that section 3411(a) is inapplicable because the FARs “do not constitute a ‘reallocation’ of water from one place of use to another place of use.” Fed. Reply at 54. The district court jettisoned this argument because it found no “support for the proposition that the approved place/purpose of use set forth in the TRD water rights permits is not implicated at all because the water utilized for the FARs ‘had not yet been delivered for CVP consumptive uses or other purposes.’” ER 81.

In sum, because CVPIA section 3411(a) imposes an independent federal requirement to modify water rights permits to allow changes in places of use, and Reclamation made the FARs to the lower Klamath River knowing it was not an authorized place of use under Reclamation’s water rights permits, Reclamation violated CVPIA section 3411(a).

CONCLUSION

Water Contractors request this Court rule that:

(1) CVPIA section 3406(b)(23) governs the Secretary's authority to make releases of water from the TRD to benefit the Trinity River anadromous fishery; (2) the Secretary must comply with the ROD's permanent annual volume limits, established pursuant to section 3406(b)(23), in making releases from the TRD that benefit fish of Trinity River origin; (3) the Secretary acted in excess of statutory authority by making the 2012 and 2013 FARs; and (4) the district court's judgment that neither section 3406(b)(23) nor the ROD preclude the Secretary's implementation of the FARs is reversed.

The district court's judgment that the Secretary lacked statutory authority under the 1955 Act to implement the FARs is affirmed, based on the alternative grounds that CVPIA section 3046(b)(23) is the governing statute, and that the FARs do not address an impact of the TRD. The district court's judgments regarding 43 U.S.C. section 383, CVPIA section 3411(a), and the ESA are reversed.

/s/ Steven O. Sims

Steven O. Sims

**ATTORNEYS FOR
WESTLANDS WATER DISTRICT**

/s/ Daniel J. O'Hanlon

Daniel J. O'Hanlon

**ATTORNEYS FOR SAN LUIS &
DELTA-MENDOTA WATER
AUTHORITY AND WESTLANDS
WATER DISTRICT**

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/Daniel J. O'Hanlon

Daniel J. O'Hanlon

Attorney for San Luis & Delta-Mendota
Water Authority and Westlands Water
District

Date: July 29, 2016

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing CROSS-APPEAL REPLY BRIEF OF SAN LUIS & DELTA-MENDOTA WATER AUTHORITY AND WESTLANDS WATER DISTRICT with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 29, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Terri Whitman