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14 **UNITED STATES DISTRICT COURT**  
15 **EASTERN DISTRICT OF CALIFORNIA**

17 SAN LUIS & DELTA-MENDOTA WATER  
AUTHORITY and WESTLANDS WATER  
18 DISTRICT,

19 Plaintiffs,

20 v.

21 SALLY JEWELL, et al.,

22 Defendants.

23 THE HOOPA VALLEY TRIBE; PACIFIC  
COAST FEDERATION OF FISHERMEN'S  
24 ASSOCIATIONS; INSTITUTE FOR  
FISHERIES RESOURCES; and YUOK  
25 TRIBE,

26 Defendant-Intervenors.

Case No. 1:13-CV-01232-LJO-GSA

**MEMORANDUM IN SUPPORT OF  
PLAINTIFFS SAN LUIS & DELTA-  
MENDOTA WATER AUTHORITY AND  
WESTLANDS WATER DISTRICT'S  
MOTION FOR PRELIMINARY  
INJUNCTION AND TEMPORARY  
RESTRAINING ORDER**

Judge: Hon. Lawrence J. O'Neill

Date: TBD

Time: TBD

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1 **I. INTRODUCTION**

2 Thousands of farmers in the San Joaquin Valley have been told there is no Central Valley  
3 Project water available for them this year, just none. All spring and summer they have pleaded with  
4 the Bureau of Reclamation for any small allocation that could mean survival for their dying orchards.  
5 They have been told no, there is no water to spare, the drought is too severe, that what little water  
6 remains in storage in upstream CVP reservoirs must be held for the protection of endangered  
7 Sacramento River winter-run Chinook salmon. They have been told that it cannot be helped, that their  
8 trees and crops, their livelihoods, their communities, cannot be spared from the consequences of a  
9 terrible drought, that sending them even 10,000 acre-feet would be “irresponsible.” Even  
10 Reclamation’s mandatory obligations to exchange contractors and wildlife refuges are going  
11 unfulfilled. But it turns out there is stored CVP water available for release this year after all, just not  
12 for them. On Friday, August 22, in response to intense political lobbying, Reclamation reversed a  
13 decision it made three weeks earlier, and announced it will make a discretionary release of some  
14 30,000 acre-feet of stored water, and perhaps much more, to increase flows in the lower Klamath  
15 River. The releases are intended to protect against the possibility that a fish die-off that has occurred  
16 once in recorded history might, perhaps, occur again. The risk to endangered salmon in the  
17 Sacramento River that for months has been cited by Reclamation as the primary bar to using any more  
18 water from storage for farmers is somehow no impediment at all for this speculative use. This new  
19 decision is appalling, and an affront to the farmers and communities of the San Joaquin Valley.

20 The releases have already begun. Plaintiffs seek a temporary restraining order and preliminary  
21 injunction to stop them. While last year the Court ultimately allowed similar releases to proceed,  
22 there are key differences this year that weigh heavily against Reclamation’s action. First, the  
23 projected run size of salmon returning to the Klamath River, always cited by Reclamation as a key  
24 factor for past releases, is below average and about a third of what was projected last year. Second,  
25 new data collected within the last few weeks show that even without additional releases, water  
26 velocities and turnover rates in areas where fish are gathering in the lower Klamath River are well in  
27 excess of rates thought necessary to disrupt the spread of disease. Third, with the continued drought,  
28 CVP carryover storage will be even lower than it was last year, and loss of storage impairs

1 Reclamation’s ability to maintain cool water temperatures for listed salmon as well as serve other  
2 CVP purposes. Fourth, Reclamation has dropped even the pretense of NEPA compliance this year,  
3 and is now claiming the releases are an “emergency” that excuses NEPA compliance.

4 All the requirements for injunctive relief against the late summer and early fall releases in  
5 excess of 450 cubic feet per second (“cfs”) this year (“2014 Excess Releases”) are met. The 2014  
6 Excess Releases are unlawful for the same reasons the similar releases made in 2012 and 2013 were  
7 unlawful, reasons that have been extensively briefed on summary judgment. The 2014 Excess  
8 Releases violate sections 3406(b)(23) and 3411(a) of the Central Valley Project Improvement Act  
9 (“CVPIA”), Title XXXIV, Pub. L. No. 102-575, 106 Stat. 4700 (1992), and section 8 of the  
10 Reclamation Act, 43 U.S.C. section 383. The 2014 Excess Releases are unlawful because Federal  
11 Defendants have failed to comply with the National Environmental Policy Act (“NEPA”), 42 U.S.C.  
12 §§ 4321 et seq. and section 7 of the federal Endangered Species Act (“ESA”), 16 U.S.C. § 1536. The  
13 2014 Excess Releases will cause irreparable harm by denying water users 30,000 acre-feet or more of  
14 desperately needed water. The balance of hardships favors injunctive relief, especially given the  
15 certain harm from water shortages compared to the speculative necessity of releases to prevent disease  
16 in the lower Klamath River. And it is strongly in the public interest to enjoin an illegal federal agency  
17 action that will harm many for speculative benefit.

18 The Court should grant a temporary restraining order and preliminary injunction against the  
19 2014 Excess Releases.

## 20 **II. BACKGROUND FACTS**

### 21 **A. The Central Valley Is Currently Suffering A Critical Water Supply Shortage, 22 And The Shortage Will Likely Persist In 2015**

23 This Court has recently recognized the historic nature of drought conditions facing  
24 Californians in 2014. *See AquAlliance v. U.S. Bureau of Reclamation*, 2014 WL 3401390 at \*4-\*5  
25 (E.D. Cal. July 11, 2014); *Friant Water Auth. v. Jewell*, --- F. Supp. 2d ----, 2014 WL 2197993 at \*7  
26 (E.D. Cal. May 27, 2014). CVP water allocations are at an all-time low – agricultural water service  
27 contractors north and south of the Delta, including most of the San Luis & Delta-Mendota Water  
28 Authority’s (“Authority”) member agencies, have received no CVP water due to a contract allocation

1 of zero (0) percent. Azhderian Dec. at ¶ 3. Members of the San Joaquin River Exchange Contractors  
2 Water Authority (“Exchange Contractors”) and wildlife refuges south of the Delta – both whom are  
3 members of the Authority – have received a 65 percent allocation. *Id.* These 65 percent allocations  
4 comes in spite of statutory and contractual obligations for Reclamation to provide a minimum 75  
5 percent allocation to both groups of contractors. Ortega Dec. at ¶ 7; *Friant Water Authority*, 2014 WL  
6 2197993 at \*4, \*7.

7 The current storage total for Trinity Reservoir is 739,000 acre-feet (“AF”), 44% of the 15 year  
8 historical average. Snow Dec. at ¶ 17. According to Reclamation’s 90% forecast of operations, in  
9 October 2014 storage in Trinity Reservoir will reach the critically low level of 597,000 AF. *Id.* In  
10 light of the low projections, Trinity Reservoir is very unlikely to refill in 2015, and hence the water in  
11 storage in the reservoir next year will likely be lower by the full amount of the 2014 Excess Releases.  
12 Snow Dec. at ¶¶ 22-28. The hole in storage created by the 2014 Excess Releases presents a  
13 substantial risk that CVP contract allocations to south of Delta water service contractors in 2015 will  
14 be lower than they would be without the 2014 Excess Releases. Snow Dec. at ¶¶ 29-35.

15 **B. Reclamation Has Denied Requests For Additional CVP Supplies In 2014,**  
16 **Citing A Need To Retain Cold Water Storage Supplies For ESA-Listed Species**

17 The Authority and its member agencies have worked diligently in the past year to identify  
18 options for efficient and equitable use of the limited CVP water supply. In the summer of 2013, when  
19 forecasts indicated that CVP agricultural service contractors south of the Delta were likely to receive  
20 zero percent initial allocations in 2014, the Authority and its members began working with  
21 Reclamation on 2014 operations planning. Azhderian Dec. at ¶ 4. In early 2014, the Authority,  
22 working with the Exchange Contractors, Friant Water Authority, and the State Water Contractors,  
23 began developing the Federal and State Contractors Proposal for Enhanced Drought Emergency  
24 Response. Azhderian Dec. at ¶ 5. In a series of discussions that took place in mid-March,  
25 Reclamation dismissed use of the proposed Emergency Consultation Process, citing an absence of  
26 “imminent loss of life.” Azhderian Dec. at ¶ 6.

27 In mid-April, Reclamation released new end-of-year (September) storage carryover forecasts,  
28 which projected 448,000 AF greater carryover storage in Trinity and Shasta Reservoirs than

1 previously forecasted. Azhderian Dec. at ¶ 7. In response to the improved water supply forecast, the  
2 Authority and CVP contractors sent a letter urgently requesting 300,000 AF of the additional supply  
3 be made available to the San Joaquin Valley. Azhderian Dec. at ¶ 8. Reclamation did not formally  
4 respond to the letter, but, in subsequent conversations Reclamation consistently refused the request.  
5 Azhderian Dec. at ¶ 9. Reclamation’s cited reasons for denying CVP contractors any additional water  
6 were commitments to the National Marine Fisheries Service (“NMFS”) and SWRCB, and  
7 Reclamation identified preserving cold water for the protection of winter-run salmon as a “primary  
8 concern” and “the highest priority” for upstream operations. *Id.* Rather than make some portion of  
9 the additional water supply available for human needs, Reclamation held the water in storage for the  
10 express purpose of conserving as much cold water as possible for winter-run Chinook salmon  
11 protection and 2015 water supply. *Id.*

12 The Authority was again rebuffed by Reclamation during June and July, when the Authority  
13 requested that *any* increment of water be made available for 2014 emergency drought relief.  
14 Azhderian Dec. at ¶¶ 12-13. Reclamation asserted that any water that accrues to storage must be  
15 reserved for cold water management, salinity management, and as a buffer against another dry winter.  
16 Azhderian Dec. at ¶ 13. Reclamation’s representatives stated that there were already too many  
17 obligations to allow for any water to be provided to CVP agricultural service contractors and to  
18 commit even 10,000 AF to emergency relief for water users would be “irresponsible.” Azhderian  
19 Dec. at ¶ 13.

20 C. **Reclamation Has Changed Positions Regarding The Triggering Conditions**  
21 **And Criteria For Making Additional Fishery Releases From The Trinity River**  
22 **Division**

23 In 2012 and 2013, Reclamation relied on two triggers for making additional late summer  
24 releases from Trinity Reservoir: a large fall-run Chinook salmon run and low flow conditions. *See* AR  
25 1178; AR 16. The 2013 Environmental Assessment (“2013 EA”), for example, notes an estimated  
26 escapement of approximately 272,000 fall-run to the Klamath Basin for 2013. AR 16. In contrast, the  
27 projected escapement for 2014 is approximately 93,000. Hanson Dec. ¶ 17; Exh. 3 to Hanson Dec., p.  
28 37. This escapement is well below the trigger of 170,000 considered in 2012 and 2013. AR 1345.

Yet, on July 8, 2014, Reclamation indicated to representatives of the Authority that it was

1 considering making additional late-summer releases from Trinity Reservoir. Azhderian Dec. at ¶ 14.  
2 On July 10, 2014, the Pacific Fishery Management Council (“PFMC”) requested Reclamation weigh  
3 allocations of water and pursue all necessary measures to set aside water for fall-run Chinook salmon.  
4 Azhderian Dec. at ¶ 15. On July 22, 2014, the Authority and several CVP contractors sent a letter to  
5 Reclamation’s Regional Director David Murillo and Western Area Power Administration’s Acting  
6 Regional Director Subhash Paluru urging them to deny PFMC’s request for late summer releases.  
7 Azhderian Dec. at ¶ 16; Exh. 3 to Azhderian Dec.

8 In a July 30, 2014, conference call with CVP water and power customers, Reclamation  
9 representatives announced that they would not make “preventative” releases in 2014 due to the low  
10 estimate of returning Chinook salmon and the importance of preserving cold water. Azhderian Dec. at  
11 ¶ 17. Reclamation also stated that they would continue to monitor conditions and, if the 2013 criterion  
12 for emergency releases based on an actual outbreak of Ich disease were triggered, they would be  
13 prepared to provide emergency releases. *Id.* Those criterion were described as: (1) confirmed  
14 diagnosis of severe Ich infection of the gills in 5% or greater in a sample size of 30 to 60 fish, or (2)  
15 observed mortality of > 50 adult salmonids in a 20 km reach within a 24 hour time period coupled  
16 with confirmed presence of Ich by the U.S. Fish and Wildlife Service Fish Health Center. *Id.* If the  
17 criterion were triggered, Reclamation committed to augmenting flows in the lower Klamath River to  
18 double the preexisting flow for 7 consecutive days. *Id.*

19 On Friday, August 22, at 9:30 a.m., Reclamation officials held a conference call with CVP  
20 water and power customers, in which they announced that they would be making releases even though  
21 the prior criteria for preventative or emergency releases had not been met. Azhderian Dec. at ¶ 20.  
22 Reclamation officials indicated an expected 25,000 acre-feet water cost for the planned releases.  
23 Azhderian Dec. at ¶ 21.

24 Shortly after the conference call, Reclamation issued a press release regarding the 2014 Excess  
25 Releases. Exh. 2 to Hanson Dec. The press release describes the 2014 Excess Releases as follows:

26 Reclamation will increase releases from Lewiston Dam beginning at 7  
27 a.m. on Saturday, Aug. 23, from approximately 450 cubic feet per  
28 second to approximately 950 cfs to achieve a flow rate of 2,500 cfs in  
the lower Klamath River.

1 At 7 a.m. on Monday, Aug. 25, releases from Lewiston Dam will begin  
2 increasing to approximately 2,450 cfs to achieve a flow rate of  
3 approximately 4,000 cfs in the lower Klamath River. This release from  
4 Lewiston Dam will be maintained for approximately 24 hours before  
5 returning to approximately 950 cfs and will be regulated at  
approximately that level as necessary to maintain lower Klamath River  
flows at 2,500 cfs until approximately Sunday, Sept. 14. River and  
fishery conditions will be continuously monitored, and those  
conditions will determine the duration.

6 Exh. 2 to Hanson Dec. The volume of releases associated with the 2014 Excess Releases is  
7 approximately 30,000 AF. Snow Dec. at ¶ 18. In addition to the current releases, Reclamation has  
8 indicated that if there is evidence of a disease outbreak, it will increase releases from Lewiston  
9 Reservoir to double flow in the lower Klamath River for one week. Azhderian Dec. at ¶ 17. If  
10 doubling occurred for one week, emergency releases would consume about 35,000 additional acre-feet  
11 of Trinity River Division (“TRD”) storage. Snow Dec. at ¶ 19.

12 **D. The 2014 Excess Releases Exceed the CVP Water Releases The ROD Provides**  
13 **To Restore And Maintain Fall-run Chinook Salmon**

14 In early April 2014, Federal Defendants established a schedule of releases of 369,000 AF of  
15 CVP water from the TRD’s Trinity Reservoir for fishery purposes, based on 2014’s classification as a  
16 “critically dry” year under the ROD. AR 3014; Exh. 1 to Snow Dec. The release schedule for 2014  
17 uses the entire volume of 369,000 AF for fishery purposes specified for a “critically dry” year under  
18 the ROD. Under the release schedule for 2014, Trinity Reservoir’s fishery releases were set at 450 cfs  
19 between June 26 and October 14. Exh. 1 to Snow Dec. Neither the ROD nor the 2014 release  
20 schedule provide for additional releases in August and September that would go beyond the 369,000  
21 AF of CVP water dedicated for fall-run Chinook salmon restoration and maintenance purposes under  
22 the ROD.

23 The 2014 Excess Releases include approximately 30,000 AF of TRD storage, plus an  
24 additional 35,000 AF of TRD storage if Reclamation makes additional releases in response to a  
25 disease outbreak. Snow Dec. at ¶¶ 18-19. The 2014 Excess Releases therefore involve up to 65,000  
26 AF above and beyond the 369,000 AF specified in the ROD and accounted for in the 2014 release  
27 schedule.

28 Federal Defendants assert that “unprecedented conditions over the past few weeks in the lower

1 Klamath River require us to take emergency measures to help reduce the potential for a large-scale  
2 fish die-off.” Exh. 2 to Hanson Dec. But, the factors Federal Defendants cite as creating that  
3 potential were evident in early 2014, when Federal Defendants were scheduling release of the 369,000  
4 AF of ROD flows for 2014. Hanson Dec. ¶¶ 23, 25-26. Federal Defendants could have, but did not,  
5 schedule use of the 369,000 AF of ROD flows to address the risk they cite to justify the 2014 Excess  
6 Releases.

7 **E. Reclamation Has Not Prepared An EA Or EIS In Satisfaction Of NEPA**  
8 **Requirements Or Evidence Of ESA Consultation Regarding The 2014 Excess**  
9 **Releases**

10 In the August 22, 2014, conference call, Reclamation indicated that it had not prepared an EA  
11 or EIS to comply with NEPA regarding the 2014 Excess Releases. Azhderian Dec. at ¶ 21. Instead,  
12 Reclamation indicated that it would be proceeding pursuant to emergency NEPA procedures. *Id.*

13 Following the August 22, 2014, conference call, Reclamation released a memorandum  
14 regarding “Endangered Species Act Section 7 Compliance for the Lower Klamath River Late Summer  
15 Flow Augmentation from Lewiston Reservoir in 2014” (“2014 ESA Memo”). Exh. 6 to Hanson Dec.  
16 The 2014 ESA Memo states: “[t]he proposed action would affect water temperatures in the Trinity and  
17 Klamath Rivers, and potentially in Clear Creek below Whiskeytown Reservoir and the upper  
18 Sacramento River. In turn, listed fish in the Klamath Basin and the Central Valley may be affected.”  
19 Exh. 6 to Hanson Dec. at 1. The 2014 ESA Memo asserts that Reclamation has considered the effects  
20 of the proposed action on ESA-listed species under NMFS’s jurisdiction, and that “Reclamation has  
21 determined that implementing the proposed flow augmentation action in 2014 prior to receiving the  
22 above mentioned new Opinion on CVP/SWP operations will not violate section 7(d) of the ESA...”  
23 Exh. 6 to Hanson Dec. at 3.

24 **F. The 2014 Excess Releases Will Cause Significant And Irreparable Harm**

25 **1. Harm To CVP Water Users**

26 On August 23, 2014, Reclamation began making the 2014 Excess Releases from Trinity  
27 Reservoir for the Trinity River fishery. Exh. 2 to Hanson Dec. The 2014 Excess Releases will result  
28 in approximately 30,000 AF of water being irretrievably lost for export to the Sacramento watershed  
and other CVP uses, including water supply and generation of hydropower. Snow Dec. at ¶ 2. Instead

1 of releasing that water to the Trinity River, Federal Defendants could export it to the Sacramento  
2 watershed, and use it to help satisfy its 2014 contractual and statutory obligations to the Exchange  
3 Contractors and the CVP wildlife refuges. Snow Dec. at ¶ 21; Ortega Dec. at ¶ 10. Additional  
4 deliveries are sorely needed in 2014 by both groups of Authority members. Alternatively, instead of  
5 releasing water to the Trinity River, Federal Defendants could keep that water in storage for delivery  
6 in 2015. Operational forecasts indicate that a zero percent initial allocation for south-of-Delta  
7 agricultural water service contractors next year is likely. Snow Dec. at ¶ 30.

8 If Federal Defendants proceed in making the 2014 Excess Releases, Plaintiffs will be  
9 irreparably harmed. First, precious stored CVP water will be gone to the ocean; that water cannot be  
10 recovered. If it is available for use, Reclamation should use it to meet unfulfilled obligations to water  
11 users. The Exchange Contractor and CVP wildlife refuge members suffer the immediate loss of the  
12 potential increased allocation and use of that water in 2014. *See* Snow Dec. at ¶ 21; Ortega Dec. at ¶¶  
13 8-9. This lost water supply will also harm the species that inhabit and utilize the wildlife refuges, such  
14 as migratory bird species. Ortega Dec. at ¶ 9. The current 65% Level 2 water allocation to the CVP  
15 wildlife refuges will not provide enough water to keep waterfowl and other species, including  
16 threatened and endangered species such as the giant garter snake, healthy and alive this years. Ortega  
17 Dec. at ¶ 12.

18 Second, the 2014 Excess Releases will harm Plaintiffs by impacting contract allocations and  
19 water deliveries in 2015. By further draining Trinity Reservoir in August and September this year,  
20 Federal Defendants will impair the ability of the CVP to provide for Plaintiffs' water supply, and for  
21 environmental needs, in 2015. It is extremely unlikely that Trinity Reservoir will refill in 2015. Snow  
22 Dec. at ¶¶ 22-28. In light of the dry conditions in 2014, south-of-Delta agricultural water service  
23 contractors are facing a significant risk that they will receive a zero percent or other very low initial  
24 contract allocation in February 2015. Snow Dec. at ¶¶ 29-35. The additional August and September  
25 releases may make the difference between increasing or lowering subsequent allocations in 2015.  
26 Snow Dec. at ¶ 35.

27 **2. Harm To Fish And Other Aquatic Species In The Trinity River And**  
28 **Sacramento Rievr**

1           Although it is uncertain whether the release of approximately 30,000 AF from Trinity  
2 Reservoir will benefit fall-run Chinook salmon in the lower Klamath River, it is certain to threaten  
3 significant adverse impacts on a number of fish and aquatic species in the Trinity and Sacramento  
4 rivers. The unnaturally high, cold flows from the 2014 Excess Releases will harm aquatic resources in  
5 the mainstem of the Trinity River, including western pond turtles, yellow-legged frog, and lamprey.  
6 The 2014 Excess Releases will increase water velocities within the river as well as seasonally reduce  
7 water temperatures, both of which would likely adversely impact the already compromised habitat  
8 conditions of western pond turtle (*Actinemys marmorata*) and yellow legged frog (*Rana boylei*).  
9 Hanson Dec. at ¶ 48. Increasing instream flows on the Trinity River as part of the 2014 Excess  
10 Releases would increase water velocities in the river, which harms lamprey through a dislodging  
11 impact. Hanson Dec. at ¶ 47.

12           The 2014 Excess Releases will also harm the winter-run Chinook salmon and Central Valley  
13 spring-run Chinook salmon in the Sacramento River, which are listed as endangered and threatened  
14 under the ESA. For months, Reclamation has told water users there is no water to spare, because it is  
15 needed to provide cool temperatures for the Sacramento winter-run Chinook. Azhderian Dec. at ¶¶ 9,  
16 13. The loss of stored water associated with the 2014 Excess Releases reduces the pool of cold water  
17 available to maintain cooler temperatures in the upper Trinity River and the upper Sacramento River,  
18 which will impact winter-run and /or spring-run salmon egg incubation in 2014 and 2015 if the winter  
19 of 2015 does not result in sufficient flows to refill the reservoirs. Hanson Dec. at ¶¶ 49-50.

20 **III. ARGUMENT**

21 **A. The Court Should Issue A Temporary Restraining Order And Preliminary**  
22 **Injunction To Prevent Irreparable Harm From The Unlawful Release Of**  
**CVP Water From The Trinity River Division**

23           This Court should issue an injunction against the 2014 Excess Releases. “A plaintiff seeking a  
24 preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to  
25 suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his  
26 favor, and that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council*,  
27 555 U.S. 7, 20 (2008). The legal standard for a temporary restraining order (“TRO”) parallels the four  
28 requirements for a preliminary injunction. *Bronco Wine Co. v. United States Dep’t of Treasury*, 997

1 F. Supp. 1309, 1313 (E.D. Cal. 1996) (citing *Lockheed Missile & Space Co. v. Hughes Aircraft Co.*,  
2 887 F. Supp. 1320, 1323 (N.D. Cal. 1995)). Here, each of the four requirements is met.

3 **B. Plaintiffs Are Likely To Prevail On The Merits Of Their Claims**

4 **1. The 2014 Excess Releases Violate CVPIA Section 3406(b)(23) By**  
5 **Exceeding The Permanent Annual Volumes Of Water Established For**  
6 **Trinity River Fishery Purposes**

7 For the reasons explained in prior briefing in this case, Reclamation's release of water from the  
8 TRD for fishery purposes in excess of the volumes of water established for such purposes under the  
9 ROD violates the statutory mandate of CVPIA section 3406(b)(23). *See* Doc. 113 at 12-21, Doc. 125  
10 at 7-20. The 2014 Excess Releases are fishery releases intended to benefit the Trinity River fishery  
11 and are therefore subject to the ROD's permanent annual volumes. Exh. 2 to Hanson Dec. (stating  
12 purpose of releases is "to help protect the returning run of adult Chinook salmon"). The 2014 Excess  
13 Releases will exceed the ROD's annual volume of water dedicated to fishery purposes by  
14 approximately 30,000 AF and will therefore violate section 3406(b)(23)'s mandate to implement the  
15 ROD's permanent instream releases. Snow Dec. at ¶ 18; Exh. 1 to Snow Dec. (showing ROD flows  
16 of 450 cfs).

17 The 2014 water year is a "critically dry" water year and in such years the ROD dedicates  
18 369,000 AF of CVP water for the Trinity River fishery. AR 3014. In April of 2014, the Trinity  
19 Management Council and Reclamation established a flow release schedule for Lewiston Dam releases  
20 to the Trinity River to utilize this 369,000 AF of water. *See* Exh. 1 to Snow Dec. (showing ROD flow  
21 release schedule for 2014 water year). Under the flow release schedule, releases are set at 450 cfs  
22 from June 26, 2014 to October 14, 2014. *Id.* Because the release schedule uses all of the 369,000 AF  
23 of water authorized under the ROD, any releases above 450 cfs during this late-summer period will be  
24 in excess of the ROD limits. Under the planned schedule of releases through September 14, the 2014  
25 Excess Releases will exceed the ROD's annual allocation of 369,000 AF by approximately 30,000  
26 AF. Snow Dec. at ¶ 18.

26 **2. The 2014 Excess Releases Violate CVPIA Section 3411(a) And 43**  
27 **U.S.C. Section 383 By Using CVP Water Outside The Authorized Place**  
28 **Of Use**

The 2014 Excess Releases violate CVPIA section 3411(a) by using CVP water outside the

1 geographic place of use approved by the state water right permits applicable to the TRD. Pub. L. No.  
 2 102-575, Title 34, 106 Stat. 4706 (1992), § 3411(a); *see* Doc. 113 at 21-22; Doc. 125 at 20-22. The  
 3 2014 Excess Releases will use CVP water in the lower Klamath River for fishery purposes. Exh. 2 to  
 4 Hanson Dec. (stating Reclamation “will release additional water from Trinity Reservoir to supplement  
 5 flows in the lower Klamath River to help protect the returning run of adult Chinook salmon”).  
 6 However, the lower Klamath River is not an approved place of use in the TRD water right permits and  
 7 to comply with CVPIA section 3411(a), Federal Defendants were required to seek and obtain changes  
 8 to the water right permits for the TRD before reallocating water for use in the lower Klamath River.  
 9 Federal Defendants failed to do so prior to making the 2014 Excess Releases.

10 In addition, because the 2014 Excess Releases violate California water law, they also violate  
 11 43 U.S.C. section 383. *See* Doc. 113 at 23-25; Doc. 125 at 22-23.<sup>1</sup> Reclamation’s state water right  
 12 permits do not authorize use of TRD water in the lower Klamath River, so the 2014 Excess Releases  
 13 were not in accordance with the terms and conditions of Reclamation’s permits. Consequently, the  
 14 Excess Releases violate California water law and 43 U.S.C. section 383. Cal. Wat. Code §§ 1381,  
 15 1052(a), 1700 *et seq.*

### 16 3. The 2014 Excess Releases Violate Federal Defendants’ NEPA 17 Obligations Because Reclamation Failed To Conduct The Required 18 Environmental Review

18 Reclamation failed to comply with NEPA and conduct the required environmental review for

19 \_\_\_\_\_  
 20 <sup>1</sup> In their Reply Memorandum Of Points And Authorities In Support Of Their Motion For Summary  
 21 Judgment, Federal Defendants for the first time rely on the case of *Wild Fish Conservancy v. Jewell*,  
 22 730 F.3d 791 (9th Cir. 2013) to argue Plaintiffs’ 43 U.S.C. section 383 claim should be dismissed.  
 23 Doc. 135 at 13-15. Although not apparent from the Federal Defendants’ presentation of the case, the  
 24 relevant holding in *Wild Fish Conservancy* was that the plaintiffs in that case lacked prudential  
 25 standing because they lacked rights to the water at issue and had no mechanism under state law to  
 26 enforce state water law requirements. 730 F.3d at 797-798. That case is distinguishable because here,  
 27 Plaintiffs and their member agencies have property rights to the CVP water at issue and have a  
 28 mechanism to protect those interests and enforce state law requirements, including requirements  
 regarding changes to water rights and the “no injury” rule. *See* Cal. Wat. Code §§ 1700-1705  
 (providing requirements for change of place of use, “no injury” rule, and protest procedures), § 1851  
 (recognizing private right of action for harm caused by unauthorized diversion or violation of a water  
 right permit or license); *see also* Doc. 113 at 23:24-24:10 (describing the state law requirement of “no  
 injury” to any legal users of water); *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 801-  
 804 (2006) (concluding that the “no injury” rule of California Water Code section 1702 applies to all  
 legal users of the water involved, including those who lawfully use water under contract with the  
 appropriator who seeks the change).

1 the 2014 Excess Releases. In its news release regarding the 2014 Excess Releases, Reclamation  
2 claimed that it “will continue to work with NOAA Fisheries and other federal agencies to comply with  
3 applicable provisions of the Endangered Species Act and the National Environmental Policy Act.”  
4 Exh. 2 to Hanson Dec. In a teleconference between Reclamation and CVP water and power  
5 contractors, Reclamation stated that it relied on NEPA’s emergency regulation to comply with  
6 NEPA’s requirements for the 2014 Excess Releases. Azhderian Dec. at ¶ 21. Although  
7 Reclamation’s representatives asserted that the existing hydrologic conditions in the lower Klamath  
8 constituted an “emergency,” Reclamation could easily have anticipated both the possibility of making  
9 excess late-summer releases and the existing dry hydrologic conditions.

10 **(a) Reclamation Unlawfully Relied On NEPA’s Emergency**  
11 **Regulations**

12 In its August 22, 2014 Decision Memorandum to Support Emergency Activities for:  
13 Emergency Lower Klamath River Flow Augmentation During Late Summer 2014 (“Memorandum”),  
14 Reclamation stated that, while NEPA applies to its excess releases to the lower Klamath River,  
15 Reclamation would release the excess flows without preparing the required NEPA analyses because  
16 so-called “emergency” circumstances require it. Exh. 5 to Hanson Dec. Specifically, the  
17 Memorandum contends that the 2014 Excess Releases comply with NEPA because they are “an  
18 emergency action” in accordance with 43 C.F.R. § 46.150 and 516 DM 2.8. Exh. 5 to Hanson Dec. at  
19 2.

20 The emergency exception is set forth in the CEQ regulations in 40 C.F.R. § 1506.11:

21 Where emergency circumstances make it necessary to take an action  
22 with significant environmental impact without observing the provisions  
23 of these regulations, the Federal agency taking the action should  
24 consult with the Council about alternative arrangements. Agencies and  
25 the Council will limit such arrangements to actions necessary to control  
26 the immediate impacts of the emergency. Other actions remain subject  
27 to NEPA review.

28 40 C.F.R. § 1506.11. The Department of the Interior’s procedural rules provide additional detail,  
explaining that if “an emergency exists that makes it necessary to take urgently needed actions before  
preparing a NEPA analysis and documentation,” then the responsible official may take only “those  
actions necessary to control the immediate impacts of the emergency that are urgently needed to

1 mitigate harm to life, property, or important natural, cultural, or historic resources.” 43 C.F.R. §  
2 46.150(a). Reclamation’s NEPA Handbook defines an “emergency” as “unexpected events that occur  
3 suddenly—not events that develop over weeks or months.” Reclamation’s NEPA Handbook (Feb.  
4 2012) at 3-17, available at <http://www.usbr.gov/nepa/> (emphasis added).

5 In *Natural Res. Def. Council, Inc. v. Winter*, 527 F. Supp. 2d 1216 (C.D. Cal. 2008), *aff’d* 518  
6 F.3d 658 (9th Cir. 2008), *rev’d on other grounds*, 555 U.S. 7 (2008), the court interpreted the meaning  
7 of the “emergency” exception. In that case, the issue was whether the CEQ properly applied the  
8 emergency exception to the U.S. Navy’s long-planned, routine sonar training exercise. The plaintiffs  
9 claimed the Navy violated NEPA by failing to prepare an EIS for its training exercises that used sonar  
10 technology that plaintiffs alleged caused significant adverse impacts on marine mammals. In that  
11 case, plaintiffs obtained a preliminary injunction to prevent the Navy from conducting any further  
12 training activities pending the Navy’s adoption of mitigation measures. Subsequently, CEQ approved  
13 “alternative arrangements” for the Navy to comply with NEPA because CEQ found that “emergency”  
14 circumstances (per 40 C.F.R. § 1506.11) prevented normal compliance with NEPA. Thus, the court  
15 evaluated whether the CEQ properly applied the emergency exception to the Navy’s long-planned,  
16 routine sonar training exercises.

17 To determine if the emergency exception applied, the court examined dictionary and California  
18 Environmental Quality Act (“CEQA”) definitions of “emergency,” the drafting history of the  
19 regulation, and cases where the agency’s “emergency” action was upheld. First, the court determined  
20 that dictionary definitions of “emergency” as well as the language of the regulation itself supported  
21 plaintiff’s position that emergency circumstances existed where the government needed to take  
22 “immediate remedial measures in response to urgent and unforeseen circumstances not of the agency’s  
23 own making.” 527 F. Supp. 2d at 1227. Second, the court noted that CEQA, which is modeled on  
24 NEPA, defines “emergency” as significant, unanticipated occurrences, such as natural disasters. *Id.*  
25 Further, the court found that the drafting history of 40 C.F.R. § 1506.11 demonstrated that the  
26 regulation should be narrowly interpreted to refer to urgent, unanticipated situations. Finally, looking  
27 at other cases, the court noted that emergency circumstances were found to exist in *Valley Citizens for*  
28 *a Safe Environment v. Vest*, 1991 WL 330963 (D. Mass. 1991) because the U.S. Air Force needed to

1 alter its flight patterns to supply military efforts in Operation Desert Storm; in *Nat'l Audubon Soc'y v.*  
2 *Hester*, 801 F.2d 405 (D.C. Cir. 1986), in which the FWS deviated from the action analyzed in an EA  
3 in order to take into captivity the last 6 wild California Condors in existence, respond to unanticipated  
4 behavior and death of some condors; and in *Crosby v. Young*, 512 F. Supp. 1363 (E.D. Mich. 1981)  
5 where the court found that emergency circumstances warranted the release of HUD funds without  
6 completing an EIS, where an immediate action was required to meet a federal funding deadline for an  
7 economic development project that could counteract potentially dire economic effects of the closure of  
8 a General Motors plant in Detroit.

9 In evaluating whether the emergency exception to NEPA could apply to the Navy's sonar  
10 training activities, the court reasoned that:

11 [O]ther than this Court's issuance of its injunction, the Navy and CEQ  
12 do not identify any changed circumstances (much less the presence of  
13 increased hostilities in a specific region) that would justify invocation  
14 of [the emergency exception] . . . . In addition, the Court's issuance of  
15 an injunction in this case was not a sudden or unanticipated event; the  
16 Navy has been litigating this case for over ten months and has been  
17 involved in parallel litigation for even longer. The Navy's current  
"emergency" is simply a creature of its own making, i.e., its failure to  
prepare adequate environmental documentation in a timely fashion, via  
the traditional EIS process or otherwise. . . . These legitimate crises [in  
*Crosby* and *Hester*] stand in stark contrast to the Navy's routine  
training exercises and are consistent with an ordinary understanding of  
what constitutes an "emergency."

18 *Id.* at 1228 (emphasis added). The court found that the emergency exception applied to urgent,  
19 unforeseen circumstances, not the Navy's routine training activities. *Id.*

20 Rather than being based on urgent and unforeseen circumstances, Reclamation's decision  
21 Memorandum acknowledges that the "purpose and need" of the so-called emergency releases is  
22 premised on "extensive monitoring" of fish health and river conditions since 2002 and "extreme  
23 drought conditions" that have been developing throughout the year. *See* Exh. 5 to Hanson Dec. at 1.  
24 The Memorandum also demonstrates that Reclamation has made no attempt to confer with CEQ about  
25 making alternative arrangements for NEPA compliance pursuant to 40 C.F.R. § 1506.11.

26 Any assertion that the releases are based on "emergency" unprecedented or unforeseeable  
27 conditions is not supportable. Reclamation has made late-summer releases for fish purposes in August  
28 and September three years in a row: in 2012, 2013, and now in 2014. Reclamation also made late-

1 summer fish releases in 2003 and 2004, making this fifth time in twelve years that Reclamation has  
2 issued such releases. The 2014 Excess Releases represent a pattern of conduct by Reclamation and  
3 are not based on unforeseeable conditions.

4 This year's releases are also entirely foreseeable because the alleged "need" for the releases are  
5 river conditions that have been developing all year. Reclamation considers the releases for months in  
6 advance as the releases are based on projected run size and dry conditions. As early as February of  
7 each year, the Pacific Fishery Management Council issues stock abundance analyses that identify  
8 preliminary estimates of abundance. *See* AR 1463 (February 2012 Preseason Report); AR 645  
9 (February 2013 Preseason Report).

10 Pursuant to the applicable regulations and case law, a federal action must be based on urgent  
11 and unforeseen circumstances, in order to qualify for the emergency exception to NEPA. Here,  
12 Reclamation has improperly attempted to invoke the emergency exception to NEPA because the  
13 excess releases were not only foreseeable, but aligned with Reclamation's established pattern of  
14 conduct. As the court proscribed in *Winter*, the so-called "emergency" is simply one of Reclamation's  
15 own making.

16 **(b) The 2014 Excess Releases Will Likely Have Significant**  
17 **Environmental Impacts And Are Subject To NEPA's EIS**  
**Requirement**

18 The 2014 Excess Releases are similar in magnitude and duration to the 2012 and 2013 Excess  
19 Releases and will therefore have similar potential environmental impacts. *See* Doc. 113 at 28-36;  
20 Doc. 125 at 23-32; Doc. 28 13-15. Such impacts include but are not limited to impacts to: water  
21 supply; hydropower generation; temperature/cold water pool management for fish species; and  
22 biological resources.

23 Impacts To CVP Water Supply And Associated Impacts: The estimated amount of water that  
24 will be used for the 2014 Excess Releases is approximately 30,000 AF. Snow Dec. at ¶ 18. If  
25 additional "emergency" releases are made to double flows in the lower Klamath River, the water  
26 supply impacts would be substantially more – about 35,000 additional AF of TRD storage. Snow  
27 Dec. at ¶ 19. The CVP water used for the 2014 Excess Releases is water that could be used to satisfy  
28 the contractual water rights of the Exchange Contractors and the wildlife refuges and to increase their

1 allocation to the required 75%. Snow Dec. at ¶ 21; Ortega Dec. at ¶ 10. In addition, the 2014 Excess  
2 Releases will create a hole in Trinity storage that is likely to remain in water year 2015 because it is  
3 very unlikely Trinity Reservoir will refill in 2015. Snow Dec. at ¶¶ 22-28. This hole in storage would  
4 likely affect initial allocations for CVP contractors and ultimately affect the amount of water available  
5 for the cities and farms that rely on the CVP water supply. By reducing the available CVP water  
6 supply, the 2014 Excess Releases will potentially cause secondary environmental impacts, including  
7 damage to orchards and soil from use of poor quality groundwater, subsidence from greater  
8 groundwater overdraft and resulting damage to water conveyance facilities, fallowing of land and  
9 related dust emissions, and regional socioeconomic impacts from a depressed farm economy.

10 Impacts To Hydropower Generation: The 2014 Excess Releases will result in approximately  
11 33,000 megawattt-hours of lost power generation at Trinity Dam, due to the release of 30,000 AF of  
12 water from Lewiston Dam. Azhderian Dec. at ¶ 21; Snow Dec. at ¶ 18. Reclamation failed to  
13 consider the 2014 Excess Releases' impacts to hydropower generation and the additional impacts of  
14 using alternative carbon-based energy resources that might be used to replace the lost carbon-free  
15 hydropower.

16 Impacts To Cold Water Pool Management For Fish Species: As described above, CVP storage  
17 in upstream reservoirs is critically low and Reclamation has consistently been taking efforts to  
18 conserve upstream storage and cold water pool. Azhderian Dec. at ¶¶ 9, 13; *see* Doc. 113 at 33-34  
19 (describing Reclamation's request for relief from water quality requirements to conserve upstream  
20 storage and protect the cold water pool). In fact, Reclamation cited the need to conserve the cold  
21 water pool in denying CVP contractors repeated requests for any amount of water to ameliorate the  
22 impacts of zero-percent allocations for many contractors. Azhderian Dec. at ¶¶ 9, 13. Yet,  
23 Reclamation now plans to release approximately 30,000 AF from upstream storage.

24 Impacts To Biological Resources: The 2014 Excess Releases may have significant impacts on  
25 several species, including increased hybridization of spring-run and fall-run Chinook, redd  
26 dewatering, premature migration of juvenile lamprey, and negative effects to amphibians and reptiles.  
27 Hanson Dec. at ¶¶ 43-52. The 2014 Excess Releases have the potential to have even greater impacts  
28 to biological releases than the 2012 and 2013 Excess Releases, because the 2014 Excess Releases

1 include a one-day “pulse” release of approximately 2,450 cfs, which will more than double the excess  
2 releases of 950 cfs and is over five times the normal late-summer release of 450 cfs under the ROD.  
3 See Exh. 2 to Snow Dec. (showing difference between ROD flow of 450 cfs and 2014 Excess  
4 Releases ranging from 950 cfs to 2450 cfs). Reclamation failed to identify or address the potential  
5 impacts of such significant increases in late-summer flows.

6 **4. The 2014 Excess Releases Violate Federal Defendants’ ESA Section 7**  
7 **Obligations Because Reclamation Failed To Consult With NMFS**

8 Reclamation failed to satisfy its ESA section 7 obligations because it did not consult with  
9 NMFS regarding the 2014 Excess Releases’ potential effects on species listed as threatened or  
10 endangered under the ESA. 16 U.S.C. § 1536(a)(2); see Doc. 113 at 37-42; Doc 125 at 32-37. A  
11 Reclamation memo dated August 22, 2014 regarding “Endangered Species Act Section 7 Compliance  
12 for the Lower Klamath River Late Summer Flow Augmentation from Lewiston Reservoir in 2014”  
13 (“ESA Memo”) acknowledges that the 2014 Excess Releases “would affect water temperatures in the  
14 Trinity and Klamath Rivers, and potentially in Clear Creek below Whiskeytown Reservoir and the  
15 upper Sacramento River” and “listed fish in the Klamath Basin and the Central Valley may be  
16 affected.” Exh. 6 to Hanson Dec. at 1. In addition, the ESA Memo recognizes that “some amount of  
17 water used for [the 2014 Excess Releases] *may not* be available for other purposes (*e.g.*, water  
18 temperature control) in future years”<sup>2</sup> and therefore, it is necessary “to consider the effects to listed  
19 fish species and designated critical habitats in the context of ESA section 7(a)(2) consultation.” Exh.  
20 6 to Hanson Dec. at 2 (emphasis added).

21 Despite Reclamation’s acknowledgement of potential impacts to ESA-listed species and its  
22 section 7(a)(2) consultation obligation, Reclamation failed to conduct consultation with NMFS  
23 regarding the 2014 Excess Releases. Just as it has done throughout this litigation, Reclamation  
24 continues to claim that it is “in consultation” with NMFS regarding excess late-summer releases,  
25 despite the absence of any documentation evidencing such consultation. Exh. 6 to Hanson Dec. at 2-3

26 <sup>2</sup> Although the ESA Memo asserts that potential impacts on CVP water supply and storage depend on  
27 “future meteorological and hydrologic conditions and Central Valley Project (CVP) operational  
28 objectives,” it is undisputed that the 2014 Excess Releases will reduce TRD storage and there is little  
doubt that this hole in storage will persist in water year 2015. Snow Dec. at ¶¶ 22-28.

1 (claiming “consultation continues” with NMFS regarding effects of CVP and State Water Project  
 2 operations on Southern Oregon/Northern California Coasts (SONCC) coho salmon and relying on  
 3 remand process for the 2009 Biological Opinion and alleged “ongoing consultation” as to other listed  
 4 species); *see* Doc. 120-1 at 34-43; *see also* Doc. 135 at 18-25.

5 Reclamation’s conclusion that it could proceed with the 2014 Excess Releases because the  
 6 releases would not constitute an irreversible or irretrievable commitment of resources in violation of  
 7 ESA section 7(d) does not comport with the ESA regulatory process. Exh. 6 to Hanson Dec. at 3.  
 8 Section 7(d) of the ESA provides: “*After initiation of consultation* required under [section 7(a)(2)],  
 9 the Federal agency...shall not make any irreversible or irretrievable commitment of resources with  
 10 respect to the agency action which has the effect of foreclosing the formulation or implementation of  
 11 any reasonable and prudent alternative measures.” 16 U.S.C. § 1536(d) (italics added). Here,  
 12 Reclamation has not initiated consultation with NMFS regarding the 2014 Excess Releases. *See* Exh.  
 13 6 to Hanson Dec. at 2 (admitting that “Reclamation *plans to submit a consultation package* that  
 14 includes a supplemental/updated BA describing proposed operation of the CVP/SWP to NMFS”) (emphasis added).<sup>3</sup> Therefore, section 7(d) does not provide a basis for Reclamation to proceed with  
 15 the 2014 Excess Releases or to avoid its section 7(a)(2) consultation obligations.  
 16

17 **C. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief**

18 **1. The Loss Of CVP Water Deliveries To The Exchange Contractors And  
 19 Wildlife Refuges In 2014 Will Irreparably Harm Plaintiffs**

20 For details regarding irreparable harm to the Exchange Contractors and Wildlife Refuges in  
 21 2014, *see* Section II.F above. *See also* Azhderian Dec. at ¶ 22; Ortega Dec. at ¶¶ 8-12.

22 <sup>3</sup> In their last brief in this litigation, Federal Defendants appear to argue that they are in on-going  
 23 consultation with NMFS by suggesting that Reclamation’s prior consultation was somehow revived  
 24 by this Court’s remand of the 2009 Salmonid Biological Opinion. Doc. 135 at 21:16-22:9. But as  
 25 this Court has previously recognized “[c]onsultation is not an ever-lasting and indefinite process; it  
 26 has triggering actions and must end at some point when [the expert agency] determines that the federal  
 27 agency's proposed action either will or will not jeopardize or adversely modify the critical habitat of a  
 28 listed species. Upon the issuance of a no jeopardy biological opinion, [the expert agency] has  
 completed its duties and the consultation process ends.” *Natural Res. Def. Council v. Kempthorne*,  
 539 F. Supp. 2d 1155, 1174 (E.D. Cal. 2008). Regardless, the 2008 Biological Assessment that  
 Reclamation now relies on as the initiator of its alleged on-going consultation identifies the ROD as  
 the operating criteria for the TRD, and the 2014 Excess Releases were not addressed in the 2008  
 Biological Assessment.

1                                   **2.       The Reduction In Initial Allocations And Delay To Any Increases In**  
2                                   **Allocation In 2015 Will Irreparably Harm Plaintiffs**

3                                   Mr. Snow explains that because Trinity Reservoir is very unlikely to refill in 2015, the water  
4 storage in the reservoir will likely be lower by the full amount of the 2014 Excess Releases. Snow  
5 Dec. at ¶ 22. “The hole in storage created by the 2014 Excess Releases will likely impact CVP water  
6 supply allocations in 2015, by causing the initial allocation for south of Delta agricultural water  
7 service contractors to be lower than it would be if the volume of water released were still in storage in  
8 Trinity Reservoir.” Snow Dec. at ¶ 29. Mr. Snow also explains that the impact of 2014 Excess  
9 Releases will likely continue to be felt in the allocations after the initial allocation in February 2015.  
10 Snow Dec. at ¶ 33.

11                                   The size of the initial allocation in February 2015 is important, because February is a critical  
12 time for determining what crops and how much farmland can be planted. Doc. 21 at ¶ 10. When  
13 initial allocations are low, farmers plant fewer acres and choose crops that use less water, such as  
14 safflower or sudan grass, but also produce less revenue and profit. Doc. 21 at ¶ 11. Crops such as  
15 safflower and sudan grass require less labor and other inputs, meaning fewer hours for farm workers  
16 and lower sales for farm vendors. Doc. 21 at ¶ 11. Low initial allocations also result in farms initially  
17 planting too few acres, preventing them from maximizing their crop yield. Doc. 24 at ¶ 14. Lower  
18 than necessary initial allocations can also result in farms unnecessarily arranging to purchase more  
19 expensive supplemental water supplies that may not be needed, or not receiving a line of credit or  
20 bank loan, or one for less value or at a higher interest rate than they could have otherwise obtained had  
21 the initial CVP allocations been higher. Doc. 24 at ¶ 14. In contrast, as is the case for 2014, even a  
22 small increase in contract allocations would help offset the use of groundwater and help dilute poor  
23 quality groundwater. *See* Doc. 20 at ¶ 9. It would also give farmers the opportunity to maintain their  
24 workforces and reduce the cost of purchasing supplemental water. Doc. 20 at ¶ 9.

25                                   **D.       The Balance Of Hardships Favors Injunctive Relief**

26                                   Plaintiffs’ member agencies, the Exchange Contractors and south-of-Delta wildlife refuges,  
27 will suffer the immediate loss of an increased contract allocation and use of increased CVP water  
28 deliveries south of the Delta in 2014. In addition, the 2014 Excess Releases will impair the ability of

1 the CVP to provide for Plaintiffs' water supply, and for environmental needs, in 2015. The farms,  
2 cities, and wildlife refuges that depend on CVP water supply are already facing a water shortage  
3 catastrophe and that shortage will likely persist in 2015. The 2014 Excess Releases will exacerbate  
4 these impacts by further reducing CVP water supply. If Defendants proceed in making the releases,  
5 they will be adding insult to injury. Moreover, Defendants will be flouting their contractual obligation  
6 to optimize deliveries to CVP contractors and to provide a minimum 75% allocation to the Exchange  
7 Contractors and the wildlife refuges.

8       There is no convincing evidence that the additional flows are necessary to prevent, or will  
9 prevent, a repeat of the 2002 die-off. Although it has been hypothesized that increasing late summer  
10 and early fall releases of water from the Trinity River would reduce the risk of a die-off, no definitive  
11 cause and effect relationship has been identified. Hanson Dec. ¶¶ 21, 24, 28-31. In the last thirty-five  
12 years there has been only one disease outbreak that resulted in substantial adult salmon mortality, and  
13 therefore there is high uncertainty in the contribution of various environmental and biological factors  
14 resulting in a disease outbreak and the potential frequency of re-occurrence. *Id.* Although increased  
15 flows have been provided during the fall months in recent years there is no proof that these flows  
16 precluded a disease outbreak just as there have been no outbreaks or mortality in past years when  
17 these supplemental flows were not made. Hanson Dec. ¶¶ 28-29. In addition, the magnitude of  
18 beneficial flow remains unknown, assuming that increased flows provide any contribution to the  
19 health of adult salmon in the lower Klamath River. Hanson Dec. ¶¶ 28-31. In 2003, 2004, 2012, and  
20 2013 supplemental releases of 17-40,000 AF were made from the Trinity River during the fall with no  
21 observed salmon mortality. Results of these earlier years provide no scientific basis to suggest that  
22 higher releases would be necessary in 2014 to avoid disease outbreak. Hanson Dec. ¶ 29. Further,  
23 there is no assurance that if the 2014 Excess Releases are implemented in the late summer of 2014  
24 there will be no disease outbreak. As Dr. Hanson summarized, “[t]he primary mechanisms  
25 contributing to the risk of fish die off include large escapement, low flows and evidence of Ich  
26 infections. Two of these factors, presence of Ich and large escapement have not been observed this  
27 year. Over the past 35 years of observations there has never been an Ich infection and fish die off in  
28 the Klamath River without the co-occurrence of all three factors.” Hanson Dec. at ¶ 27.

1 In sum, Plaintiffs will suffer significant hardship if the 2014 Excess Releases are implemented.  
2 There is no proof that the releases will make the fall-run Chinook salmon less susceptible to disease  
3 outbreak. The balance of hardships therefore favors injunctive relief.

4 **E. It Is In The Public Interest To Grant Injunctive Relief**

5 Finally, requiring Defendants to comply with federal law is strongly in the public interest. *See*  
6 *American Signature, Inc. v. U.S.*, 598 F.3d 816, 830 (Fed. Cir. 2010) (“The public interest is served by  
7 ensuring that governmental bodies comply with the law”). The 2014 Excess Releases violate CVPIA  
8 sections 3406(b)(23) and 3411(a), as well as 43 U.S.C. section 383. As this Court has previously  
9 recognized, “[t]he public certainly has an interest in seeing that the CVPIA . . . [is] implemented and  
10 that Plaintiffs’ interests under their water service contracts[] are protected.” *San Luis & Delta-*  
11 *Mendota Water Authority et al. v. U.S. Dept. of Interior*, 2011 WL 3915770 (E.D. Cal. 2011).

12 Defendants’ decision to make the releases without conducting the required environmental  
13 review violates NEPA. In *Flint Ridge Development Co. v. Scenic Rivers Ass’n of Oklahoma*, 426 U.S.  
14 776, 787 (1976), the Supreme Court stated:

15 NEPA’s instruction that all federal agencies comply with the impact  
16 statement requirement and with all the other requirements of section  
17 102 ‘to the fullest extent possible,’[] is neither accidental nor  
18 hyperbolic. Rather, the phrase is a deliberate command that the duty  
NEPA imposes upon the agencies to consider environmental factors  
not be shunted aside in the bureaucratic shuffle.

19 It is in the public interest to restrain Defendants from forging ahead with releases of CVP  
20 water that may have significant adverse impacts before all the impacts have been considered by  
21 Defendants, as required by NEPA. The public interest here requires that Defendants be restrained  
22 from causing these impacts before NEPA has been satisfied. The public interest requires that the  
23 federal decisionmakers here understand the impacts of their actions before those actions occur.

24 In addition, the public interest will be served by requiring Defendants to satisfy their ESA  
25 section 7 consultation obligations. The threshold for consultation is set low so that federal agencies  
26 may satisfy their duty to insure that their actions do not jeopardize listed species or adversely modify  
27 critical habitat. *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012).  
28 Protection of listed species and enforcement of the section 7 consultation requirements is in the public

1 interest.

2 Drought affects the public interest. It affects cities, farms, families, the economy and the  
3 environment. During a drought, it is manifestly in the public interest to ensure that as much water as  
4 possible is available for critical human needs and human beneficial uses while at the same time providing  
5 protection to environmental resources. To achieve this goal, a balance between human water needs and  
6 environmental needs must be achieved in order to maximize the human beneficial uses of available  
7 freshwater supplies.

8 Requiring Defendants to operate the CVP in accordance with federal law, including provisions  
9 of the CVPIA, will make additional CVP water supply available for use south of the Delta. These  
10 communities have suffered tremendous water losses from ongoing ESA and other restrictions on  
11 operations that have already impacted public health and safety through loss of jobs, hunger,  
12 displacement of housing, undermining of local communities and services, and lending. *Consolidated*  
13 *Salmonid Cases*, 713 F. Supp. 2d 1116, 1155 (E.D. Cal. 2010), *appeal docketed*, No. 12-15289 (9th  
14 Cir. Feb. 10, 2012); *see Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011)  
15 (finding “[t]he effect on the health of the local economy” to be “a proper consideration in the public  
16 interest analysis”). Thus, requiring Defendants to operate the CVP in accordance with federal law, in  
17 a manner that makes more water available for CVP uses, is strongly in the public interest.

18 **IV. CONCLUSION**

19 Plaintiffs have established that the 2014 Excess Releases violate CVPIA sections 3406(b)(23)  
20 and 3411(a), 43 U.S.C. section 383, NEPA, and ESA section 7. The 2014 Excess Releases will result  
21 in irreparable harm in a variety of ways. The loss of CVP water supply to satisfy the contractual  
22 rights of the Exchange Contractors and the wildlife refuges in 2014, along with lost opportunity to  
23 support CVP contract allocations in 2015, will likely cause irreparable environmental harm through  
24 damage to orchards and soil from use of poor quality groundwater, subsidence from greater  
25 groundwater overdraft, fallowing of land and related dust emissions, and regional socioeconomic  
26 impacts from a depressed farm economy. Defendants have failed to take a hard look at many more  
27 potentially significant impacts from the 2014 Excess Releases, and hence the total actual impacts will  
28 likely be even greater. The likely irreparable harm known today, however, amply supports injunctive

1 relief. The need for and benefit of the 2014 Excess Releases to reduce the risk of disease is highly  
2 uncertain. The primary mechanisms contributing to the risk of fish die off include large escapement,  
3 low flows and evidence of Ich infections. Two of these factors, presence of Ich and large escapement  
4 have not been observed this year. Over the past 35 years of observations there has never been an Ich  
5 infection and fish die off in the Klamath River without the co-occurrence of all three factors. Hence,  
6 the balance weighs in favor of enjoining the 2014 Excess Releases, in the public interest. Thus, this  
7 Court should enjoin implementation of the 2014 Excess Releases.

8 Dated: August 25, 2014

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
A Professional Corporation

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