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20 UNITED STATES DISTRICT COURT  
21 EASTERN DISTRICT OF CALIFORNIA

22 SAN LUIS & DELTA-MENDOTA  
23 WATER AUTHORITY and  
24 WESTLANDS WATER DISTRICT

25 Plaintiffs,

26 v.

27 SALLY JEWELL, et al.,

28 Defendants,

and

THE HOOPA VALLEY TRIBE; THE  
YUROK TRIBE; PACIFIC COAST  
FEDERATION OF FISHERMEN'S  
ASSOCIATIONS; and INSTITUTE FOR  
FISHERIES RESOURCES,

Defendant-Intervenors.

CASE NO. 1:13-CV-01232-LJO-GSA

**FEDERAL DEFENDANTS'  
SUPPLEMENTAL BRIEF  
REGARDING REMEDY**

Judge: Honorable Lawrence J. O'Neill  
Date: No Hearing Set  
Time: No Hearing Set  
Courtroom: No Hearing Set

1 Pursuant to this Court's August 26, 2014 Order, ECF NO. 152, Federal Defendants  
2 respectfully submit this supplemental brief on the issue of remedy. Regardless of how the Court  
3 rules on the merits,<sup>1</sup> injunctive relief would not be in the public interest and the Court should  
4 decline to award this "drastic and extraordinary remedy, which should not be granted as a matter  
5 of course." See Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165 (2010); Weinberger v.  
6 Romero-Barcelo, 456 U.S. 305, 311-12 (1982). Even where a plaintiff has prevailed on the  
7 merits, injunctive relief should not automatically issue. Monsanto, 561 U.S. at 165. Plaintiffs  
8 seeking injunctive relief bear the burden of showing the following:

9 (1) that [they have] suffered an irreparable injury; (2) that remedies available at law, such  
10 as monetary damages, are inadequate to compensate for that injury; (3) that, considering  
11 the balance of hardships between the plaintiff and defendant, a remedy in equity is  
12 warranted; and (4) that the public interest would not be disserved by a permanent  
injunction.

13 eBay Inc. v. MercExchange, L. L. C., 547 U.S. 388, 391 (2006); Monsanto, 561 U.S. at 156-57.

14 Courts sitting in equity "should pay particular regard for the public consequences in employing  
15 the extraordinary remedy of injunction." Weinberger, 456 U.S. at 312; Winter v. Natural Res.  
16 Def. Council, Inc., 555 U.S. 7, 24 (2008). "The traditional four-factor test applies when a  
17 plaintiff seeks a permanent injunction to remedy a NEPA violation." 561 U.S. at 156-57.

18 As the Declarations of Brian Person, Donald Reck, Michael Belchik, and Dr. Joshua  
19 Strange, ECF Nos. 161, 162, 168 and 167, clearly show, in August 2014 Reclamation was  
20 confronted with unforeseen conditions in the lower Klamath River that presented a significant  
21 risk of a major fish die-off similar to the fish die-off that occurred in 2002. Balancing multiple  
22 factors, Reclamation initially determined that it could respond to conditions by monitoring and  
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25 <sup>1</sup> If the Court determines that NEPA analysis is required, it bears emphasizing as an initial matter that Reclamation's  
26 NEPA analysis with respect to the impacts of the 2014 emergency initiation of preventative flows is ongoing.  
27 Reclamation is preparing a "focused, concise EA" as contemplated by CEQ Guidance, although this preparation has  
28 been delayed due to the need to respond to Plaintiffs' motions. Reck Decl., ¶¶22-23. Although Reclamation has not  
yet determined whether the 2014 releases will have a "significant environmental impact," it has commenced  
consultation with the CEQ. Id., ¶23; See also August 26, 2014 Letter Exhibit A hereto.

1 releasing flows only if an *Ich* outbreak became apparent, but conditions deteriorated quickly,  
2 necessitating an emergency release of preventative flows. The Court has already recognized the  
3 devastating environmental and economic consequences of the 2002 die off. ECF No. 91 (citing  
4 ECF Nos. 46 and 48). The flow augmentation action already improved conditions in the lower  
5 Klamath River and reduced the risk of a fish die-off. Reck Decl., ¶ 24; Strange Decl., p. 13  
6 (stating that as a result of the 2014 preventative releases he “anticipate[s], with a moderate to  
7 high level of confidence, that no *Ich* outbreak will be able to initiate and thus no additional  
8 emergency flow release will be needed either”). However, if the 2014 releases are enjoined, the  
9 conditions on the lower Klamath River will again deteriorate, significantly increasing the chance  
10 of an *Ich* outbreak. Reck Decl., ¶ 25; Strange Decl., p. 13. As explained by Dr. Strange  
11 “[s]topping these protective flows now that they have started would be very risky and would  
12 result in an unacceptably high level of risk as fish will be drawn out of the estuary to begin there  
13 [*sic*] holding period in the lower Klamath River.” Strange Decl., p. 13; See also Belchick Decl.,  
14 ¶¶ 18-23.

15         When issuance of an injunction would result in greater environmental harm than if the  
16 injunction were denied, the court should deny the injunction. Am. Motorcyclist Ass’n v. Watt,  
17 714 F.2d 962, 965 (9th Cir. 1983); Alpine Lakes Prot. Soc’y v. Schlapfer, 518 F.2d 1089, 1090  
18 (9th Cir. 1975). Moreover, as this Court has already recognized, injunctive relief pending  
19 NEPA compliance is inappropriate if the injunction would further jeopardize the species or  
20 adversely modify their critical habitat. Consol. Salmonid Cases, 713 F. Supp. 2d at 1116, 1171  
21 (E.D. Cal.). (“Injunctive relief cannot be imposed without up-to-date evidence of the status of  
22 the species to assure that altered operations will not deepen jeopardy to the affected species or  
23 otherwise violate other laws”).

24         The requested injunction would also harm Reclamation’s ability to comply with the  
25 mandate in the 1955 Act to “construct, operate, and maintain . . . the Trinity River division . . .  
26 *Provided*, That the Secretary . . . adopts appropriate measures to insure the preservation and  
27

1 propagation of fish and wildlife.”<sup>2</sup> Trinity River Division Central Valley Project Act of 1955, Pub. L.  
2 No. 84-386, 69 Stat. 719 (1955). A 2014 fish die-off would affect the overall efforts to preserve the  
3 fishery, necessitated by previous management which imposed near drought conditions on the  
4 river. See Westlands Water Dist. v. U.S. Dep’t of Interior, 376 F.3d 853, 860-61 (9th Cir. 2004)  
5 (recognizing that the TRD, imposed “what was essentially extreme drought conditions” on the  
6 Trinity River’s fish and wildlife populations). Thus, the requested injunction is not in the public  
7 interest because it renders Reclamation unable to comply with its statutory charge to protect the  
8 fishery resources that the 2014 flow augmentation is designed to protect.  
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11 Moreover, the requested injunction and a potential fish die-off would also significantly  
12 impact the user groups that rely on the fishery, including tribal fishery harvest opportunities,  
13 ocean harvest levels, and recreational fishing. The public interest at issue here goes beyond the  
14 commercial interest in the fishery resource, because the requested injunction would cause  
15 significant harm to interests of the Hoopa Valley and Yurok Tribes that the United States has a trust  
16 responsibility to protect. See ECF No. 120-1 at 14. As recognized by the Ninth Circuit, the Hoopa  
17 Valley and Yurok Tribes’ federally protected fishing rights in the Trinity and Klamath Rivers are  
18 “not much less necessary to the existence of the Indians than the atmosphere they breathed.”  
19 Blake v. Arnett, 663 F.2d 906, 909 (9th Cir. 1981) (quoting United States v. Winans, 198 U.S.  
20 371, 381 (1905)).  
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23 The broad and sweeping permanent injunctive relief sought by Plaintiffs in their  
24 Amended Complaint, would further compound the harm to the public interest. Plaintiffs seek “a  
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26 <sup>2</sup> To assess the “public interest,” a court must first look to the Acts of Congress and the purposes of the relevant  
27 statutes. See Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542-44 (1987). “A court sitting in equity cannot  
28 ‘ignore the judgment of Congress, deliberately expressed in legislation.’” United States v. Oakland Cannabis  
Buyers’ Co-op., 532 U.S. 483, 497 (2001) (quoting Virginian Ry. Co. v. Sys. Fed’n No. 40, 300 U.S. 515 (1937)).  
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1 permanent injunction prohibiting Defendants from operating the TRD in violation of CVPIA  
2 section 3406(b)(23) and the ROD, CVPIA section 3411(a), 43 U.S.C. section 383, NEPA, and  
3 the ESA.” Amended Complaint, ECF No. 95, Prayer for Relief, ¶ 7. The relief sought is vague  
4 and not narrowly tailored, as required by the Supreme Court. See Friends of the Earth, Inc. v.  
5 Laidlaw Env'tl. Serv. (TOC), Inc., 528 U.S. 167, 193 (2000) (“[F]ederal courts should aim to  
6 ensure ‘the framing of relief no broader than required by the precise facts.’”); ALPO Petfoods,  
7 Inc. v. Ralston Purina Co., 913 F.2d 958, 972 (D.C. Cir. 1990) (“The law requires that courts  
8 closely tailor injunctions to the harm that they address.”). It is precisely the same type of  
9 programmatic relief found unlawful by the Supreme Court in Lujan v. National Wildlife  
10 Federation, 497 U.S. 871, 891 (1990) and Norton v. S. Utah Wilderness Alliance (SUWA), 542  
11 U.S. 55, 64 (2004).<sup>3</sup> Permanent injunctive relief could not only significantly increase the  
12 likelihood of a fish die-off in 2014, but could harm Reclamation’s ability to respond to future  
13 conditions and act to protect important natural and cultural resources from future harm. Thus, if  
14 the Court determines that a remedy is warranted, Federal Defendants respectfully request an  
15 opportunity to submit further briefing to ensure that relief is appropriately tailored to the precise  
16 ruling.

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18 Accordingly, even if the Court finds against Federal Defendants on the merits, Plaintiffs’  
19 motions for injunctive relief should be denied.

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21 Respectfully submitted this 27th day of August, 2014.

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24 SAM HIRSCH

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26 <sup>3</sup> The Supreme Court in held in Lujan that the Administrative Procedure Act does not supply jurisdiction to award  
27 sweeping programmatic injunctive relief. 497 U.S. at 892-93 (“But it is at least entirely certain that the flaws in the  
28 entire ‘program’-consisting principally of the many individual actions referenced in the complaint, and presumably  
actions yet to be taken as well-cannot be laid before the courts for wholesale correction under the APA, simply  
because one of them that is ripe for review adversely affects one of respondent's members”).

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**CERTIFICATE OF SERVICE**

I hereby certify that on this August 27, 2014, I filed a copy of this document electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means as reflected on the Notice of Electronic Filing.

/s/ Sara C. Porsia  
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