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8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE EASTERN DISTRICT OF CALIFORNIA

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 13 **SAN LUIS & DELTA-MENDOTA WATER**
AUTHORITY and WESTLANDS WATER
 14 **DISTRICT,**

15 Plaintiffs,

16 v.

17 **SALLY JEWELL, et al.,**

18 Defendants.
 19

20 **THE HOOPA VALLEY TRIBE; PACIFIC**
COAST FEDERATION OF FISHERMEN'S
 21 **ASSOCIATIONS; INSTITUTE FOR**
 22 **FISHERIES RESOURCES; and YUOK**
 23 **TRIBE,**

24 Defendant-Intervenors.
 25
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 27
 28

1:13-CV-01232-LJOI-GSA

**CALIFORNIA DEPARTMENT OF FISH
 AND WILDLIFE'S *AMICUS CURIAE*
 BRIEF IN OPPOSITION TO
 PLAINTIFF'S MOTION FOR
 SUMMARY JUDGMENT AND IN
 SUPPORT OF DEFENDANTS' CROSS-
 MOTION FOR SUMMARY JUDGMENT
 ON THE FIRST CLAIM FOR RELIEF**

Judge: The Hon. Lawrence J. O'Neill

Action Filed: 8/7/2013

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1 **INTRODUCTION**

2 The California Department of Fish and Wildlife (CDFW) respectfully seeks leave to
3 participate as an *amicus curiae* in opposition to the plaintiffs’ motion for summary judgment and
4 in support of the federal defendants’ cross-motion for summary judgment as to the plaintiffs’ first
5 claim for relief that the U.S. Bureau of Reclamation’s (Bureau) decision to provide supplemental
6 releases of water from Lewiston Dam in September of 2013 to protect salmon in the lower
7 Klamath River violated section 3406(b)(23) of the Central Valley Project Improvement Act
8 (CVPIA). See Doc. 95, Pls. First Am. Compl. at ¶¶ 77-83. Plaintiffs challenge the Bureau’s
9 authority for such supplemental releases. CDFW seeks leave to participate as an *amicus curiae* to
10 describe the clear and compelling state interest regarding state water law and authority for this
11 type of water management decision. Specifically, CDFW submits that federal reclamation law,
12 including section 3406 of the CVPIA, clearly requires the Bureau to operate the Trinity River
13 Division of the federal Central Valley Project (CVP) in compliance with California water law,
14 including California’s common law public trust doctrine and section 5937 of the California Fish
15 and Game Code.

16 These state laws require the Bureau to release sufficient flows from dams that it owns and
17 operates to keep the Trinity River and Klamath River fisheries in “good condition” whenever
18 feasible and necessary. The Bureau reasonably determined that conditions were likely to be
19 present in the fall of 2013, which could lead to a recurrence of the massive and unprecedented
20 fish kill that occurred in the lower Klamath River in September of 2002. Thus, the Bureau’s
21 decision to release supplemental fishery flows from Lewiston Dam in the fall of 2013 to protect
22 returning fall-run Chinook salmon in the lower Klamath River so as to prevent another
23 catastrophic fish kill is fully consistent with California water law and therefore was authorized by
24 the CVPIA.

25 CDFW appreciates and understands the severity of the state’s current drought situation and
26 the implications for all beneficial uses of water. CDFW is acutely aware that every drop of water
27 matters for each beneficial use of water in times of scarcity. CDFW is very closely collaborating
28 with federal, state and local water and wildlife agencies in these admittedly difficult water

1 management decisions. CDFW particularly notes the Court’s statement that “[b]oth sides of this
2 dispute represent significant public interests.” Doc. 91, Order Lifting Temporary Restraining
3 Order and Denying Motion for Prelim. Inj., Aug. 22, 2013, p. 19.

4 However, the plaintiffs’ challenge to basic legal authorities triggers this *amicus curiae*
5 brief. CDFW is responsible for administering and enforcing the California Fish and Game Code.
6 Cal. Fish & Game Code § 702. CDFW holds all the fish and wildlife resources of the state in
7 trust for the benefit of the people of the state. Cal. Fish & Game Code §§ 711.7(a), 1802. The
8 California Court of Appeal for the Third Appellate District has determined “that the requisite
9 administrative expertise of determining the streamflows necessary to establish and maintain
10 fisheries resides principally in the Department of Fish and Game.” *California Trout, Inc. v.*
11 *Superior Court*, 218 Cal. App. 3d 187, 211 (1990).¹ Therefore, in light of and based upon
12 CDFW’s clear interest in protecting the state’s fishery resources, CDFW respectfully submits this
13 *amicus curiae* brief in opposition to the plaintiffs’ motion for summary judgment and in support
14 of the federal defendants’ cross-motion for summary judgment regarding the first claim for relief.

15 **FACTUAL BACKGROUND**

16 It is undisputed that the CVP’s Trinity River Division has “severely detrimental impacts” to
17 the Trinity River fish population. Administrative Record (AR) 3007. The construction of the
18 Trinity and Lewiston Dams resulted in the loss of all upstream spawning and rearing habitat for
19 the Trinity River fisheries and the rapid degradation of the fish habitat below the dams on the
20 river. The U.S. Fish and Wildlife Service (USFWS) estimated that, by 1980, the Trinity River
21 fishery population had declined by 60 to 80 percent since completion of the Trinity River
22 Division. *Id.* In 1981, Secretary of the Interior Cecil Andrus issued a “Secretarial Issue
23 Document on Trinity River Fishery Mitigation” which concluded that the United States had an
24 obligation to restore the Trinity River anadromous fishery. AR 3008. Secretary Andrus then
25 directed the USFWS to complete a study to assess the effectiveness of flow and habitat

26 _____
27 ¹ Effective January 1, 2013, the California Department of Fish and Game was renamed the
28 California Department of Fish and Wildlife. Cal. Fish & Game Code § 700; Cal. Stats. of 2012,
Ch. 559, § 8.

1 restoration efforts on the Trinity River and to make recommendations regarding the same. *Id.* In
2 1984, Congress adopted the Trinity River Basin Fish and Wildlife Management Act, which
3 further directed the United States to develop a management program to restore the Trinity River
4 basin fisheries. 98 Stat. 2721. Finally, in 1992, Congress passed the CVPIA, which mandated
5 the United States to “complete the Trinity River Flow Evaluation Study” for the “restoration and
6 maintenance of the Trinity River fishery,” as required by the 1981 Secretarial Issue Document.
7 Section 3406(b)(23), 106 Stat. 4720.

8 In 1999, the USFWS completed the Trinity River Flow Evaluation Study (Flow Study).
9 Consistent with congressional mandates, the purpose of the study was limited to the development
10 of recommendations for restoring the Trinity River fisheries. AR 3734. The study included
11 recommendations for minimum instream flows and amounts varying by water year type, based on
12 habitat suitability modeling for segments of the Trinity River upstream of its confluence with the
13 Klamath River. AR 3866, 3986. Importantly, the study’s salmon population production model
14 only considered the impact of alternate flow and temperature regimes on the Trinity River fishery
15 and did not consider the fishery needs of the lower Klamath River downstream of the confluence
16 with the Trinity River. AR 3949, 3951. In December of 2000, the United States adopted the
17 Record of Decision (ROD) for the Trinity River Mainstem Fishery Restoration Program, which
18 incorporated the flow recommendations of the Trinity River Flow Study. Under the ROD, the
19 Bureau “will provide annual instream flows below Lewiston Dam according to the
20 recommendations provided in the [Trinity River Flow Study].” AR 3014.

21 In September of 2002, just two years after the ROD was signed, a catastrophic,
22 “unprecedented” and previously unforeseen event occurred: an estimated 34,000 fish died on the
23 lower Klamath River, below the confluence of the Trinity and Klamath Rivers, due to massive
24 infection from two pathogens, Ich (a protozoan pathogen) and columnaris (a bacterial pathogen).²
25 AR 2372-73, 2382, 2388-2389, 2501, 2506-2510; 2836-2837, 2839, 2872-2873, 2895-2898,

26 _____
27 ² This total fish kill estimate is “conservative,” and CDFW and USFWS analyses “indicate
28 that actual losses may have been more than double that number.” AR 2372; see also AR 2511,
2518-2519, 2537.

1 2925-2927. About 97% of the dead fish observed were fall-run Chinook salmon returning to the
2 Klamath or Trinity River watersheds. AR 2837, 2895-2898.

3 In 2004, CDFW conducted a comprehensive assessment of the causes of the 2002 fish kill
4 and determined that several factors led to the outbreak of the pathogens in the lower Klamath
5 River. AR 2370-2552. These included “atypically low” river flow and volume and an above-
6 average returning salmon run between the last week of August and the first week of September
7 2002. AR 2372. The resulting high densities of fish and warm water temperatures “created ideal
8 conditions for pathogens to infect salmon” and “caused rapid amplification” and transmission of
9 the pathogens Ich and columnaris. *Id.* In 2003 and 2004, the USFWS and the Yurok tribe also
10 prepared reports on the causes of the 2002 fish kill which reached similar conclusions. See AR
11 2833-3002.

12 The CDFW report found that flows within the lower Klamath River in September 2002
13 were within the lowest 10% of flows, and ranked between the second and sixth lowest flows, for
14 all United States Geological Survey gauging stations on the Klamath River. AR 2412; see also
15 AR 2502, 2919-2921. The report also concludes that water temperatures during the 2002 fish
16 kills were “at levels that stress fish, and thus were likely a factor in the fish kills,” although high
17 water temperatures were not the sole cause. AR 2449; see also AR 2503, 2928. Daily maximum
18 water temperatures exceeded the U.S. Environmental Protection Agency guidelines “for reduction
19 of high risk from disease pathogens for adult salmonids.” AR 2449. Thus, although water
20 temperatures were not “unusually high” when compared to other low-flow years when fish kills
21 did not occur, they nevertheless were at levels that “were conducive to rapid proliferation and
22 transmission” of Ich. AR 2450-2451, 2860, 2928.

23 The disease outbreak occurred because the low river flows and low river volume and
24 seasonally high temperatures coincided with a larger than average returning salmon run of
25 approximately 170,000 fish (the eighth largest since comprehensive recordkeeping began in
26 1978), which peaked approximately one week earlier than the 1988-2001 average. AR 561, 564,
27
28

1 2478, 2497, 2499-2500, 2846-2848, 2863-2865, 2921-2923, 2927-2929.³ This resulted in very
2 high densities of fish in the lower Klamath River below the confluence of the Trinity River,
3 which “entered the river under very low flow and low volume conditions, resulting in reduced
4 habitat space for a large number of salmon.” AR 2500, 2503-2504, 2923, 2928. This created
5 ideal conditions for proliferation and transmission of the pathogens. AR 1732, 2504, 2843-2844,
6 2874, 2929.

7 The CDFW report, and other evidence in record, concludes that low flows were a
8 substantial contributing factor to the fish kill. AR 2372, 2502, 2874, 2927-2928. Importantly,
9 flow is the only controllable factor, and also the most effective factor, for reducing the risk of
10 such outbreaks in the future. AR 2372; see also AR 493, 1726-1727, 1730, 1732, 2503, 2537,
11 2840, 2874. Thus, the key recommendation in the CDFW report for avoiding future fish kills was
12 to implement flows from the upper Klamath and/or Trinity Rivers of at least 2,200 cfs when adult
13 salmon are entering the Klamath River Estuary. AR 2538, and Fig. D19, AR 2445.⁴

14 In 2003, 2004, 2012 and most recently in 2013, the conditions that were present in 2002
15 threatened to recur. AR 3, 16. The forecast in 2013 was for 271,000-272,000 returning salmon,
16 which would have been the second largest return on record and approximately 1.6 times larger
17 than the estimated 2002 run of approximately 170,000 fish. AR 3, 16, 451, 561, 564-565. At the
18 same time, without flow augmentation, flows in the lower Klamath River would have been
19 around 2,060 to 2,080 cfs, similar to the 2,000 cfs flows in September of 2002. AR 3, 16, 20,
20 565. Accordingly, many parties, including the Trinity River Restoration Program, the Pacific
21 Fishery Management Council, and Klamath River fishery biologists, expressed concern that
22 conditions in the lower Klamath River in September of 2013 could mimic what occurred in
23 September of 2002 and potentially trigger another pathogen outbreak. AR 3, 15-16, 52, 561-562,

24 ³ Over 70% of the returning fish were Klamath River fall run Chinook (AR 2475, 2922),
25 which tend to hold longer and migrate more slowly through the lower Klamath River than other
Chinook salmon runs. AR 1729, 1732, 2840-2841, 2865, 2867, 2923, 2927-2928.

26 ⁴ As noted in the CDFW report and other evidence in the record, increased flows “can
27 improve water temperatures, increase water volume, increase water velocities, improve fish
28 passage, provide migration cues, decrease fish densities and decrease pathogen transmission
between fish.” AR 2372; see also AR 493, 1727, 1730, 1732, 2417, 2441, 2444-2446, 2503,
2537, 2840, 2851, 2874, 2898-2900, 2927-2929, 5188.

1 564-565.

2 In response, the Bureau decided, as it also had in 2003, 2004 and 2012, to release up to
3 approximately 62,000 acre feet of supplemental water from Lewiston Dam to increase flow in the
4 lower Klamath River to approximately 2,800 cfs between August 15 and September 21, 2013.
5 AR 4, 20-21, 52. This was a proactive and preventative effort “to arrange for late-summer flow
6 augmentation to increase water volumes and velocities in the lower Klamath River to reduce the
7 probability of a disease outbreak.” AR 3, 16. These supplemental releases have prevented any
8 significant disease or mortalities of adult fish due to pathogen outbreaks in years of low, late
9 summer/early fall flows and high projected returning salmon runs. AR 3, 16, 562, 564.

10 ARGUMENT

11 **I. THE PRINCIPLES OF COOPERATIVE FEDERALISM SET FORTH IN 12 FEDERAL RECLAMATION LAW REQUIRE THE BUREAU TO COMPLY 13 WITH STATE WATER LAWS, INCLUDING STATE LAWS FOR THE 14 PROTECTION OF FISHERY RESOURCES, UNLESS SUCH LAWS ARE 15 DIRECTLY INCONSISTENT WITH CONGRESSIONAL DIRECTIVES**

16 The plaintiffs contend that section 3406(b)(23) of the CVPIA bars the Bureau from
17 augmenting Trinity River flows in excess of the annual amounts designated in the 1999 Trinity
18 River Flow Study, as set forth in the 2000 Trinity River ROD. To reach this erroneous
19 conclusion, plaintiffs highlight language in the statute providing that the flows recommended in
20 the Trinity River Flow Study “shall be implemented accordingly,” once the Secretary of the
21 Interior and the Hoopa Valley Tribe concur in the recommended flows. Section 3406(b)(23)(B),
22 106 Stat. 4720. Therefore, according to the plaintiffs, “[r]eleases made for the benefit of the
23 Trinity River fishery that exceed the ROD’s annual volumes violate section 3406(b)(23)’s
24 statutory mandate to establish and implement permanent instream flows.” Doc. 113, Pls. Op.
25 Mem. at 16. However, as discussed immediately below, federal reclamation law, including
26 section 3406 of the CVPIA, requires the Bureau to comply with state law in operating the CVP,
27 including the common law public trust doctrine and section 5937 of the Fish and Game Code.
28 And as explained further in Section II below, the Bureau’s 2013 flow augmentation decision was
consistent with these state law requirements and therefore was authorized under federal
reclamation law.

1 **A. Congress’ Long-Standing Policy Has Been to Defer to State Water Law on**
2 **Reclamation Matters**

3 In the complicated field of federal-state relationships, Congress has spoken with a clear and
4 consistent voice on the issue of water resource allocation. As the U.S. Supreme Court has
5 observed, “[t]he history of the relationship between the Federal Government and the States in the
6 reclamation of the arid lands of the Western States is both long and involved, but through it runs
7 the consistent thread of purposeful and continued deference to state water law by Congress.”
8 *California v. United States*, 438 U.S. 645, 653 (1978).

9 This policy first appeared in the so-called “equal footing” doctrine and has been re-affirmed
10 in a long line of Congressional enactments and Supreme Court decisions since then. In 1850,
11 Congress admitted California to the Union as a state “on an equal footing with the original states
12 in all respects whatever.” 9 Stat. 452. Under this doctrine, Congress granted to the western
13 states, upon their admission into the Union, exclusive sovereignty over the unappropriated waters
14 in their streams. *Kansas v. Colorado*, 206 U.S. 46, 95 (1907); *Fox River Paper Co. v. Railroad*
15 *Commission of Wisconsin*, 274 U.S. 651, 655 (1926); *Shively v. Bowlby*, 152 U.S. 1, 49-50
16 (1894); *Pollard v. Hagan*, 44 U.S. 212, 223-23 (1845). In *Kansas v. Colorado*, a case involving a
17 dispute over the flow of the Arkansas River, Kansas argued that Congress had expressly applied
18 English common law to both states and that the common law included the riparian system of
19 water rights.

20 The U.S. Supreme Court rejected this view and held that:

21 [Each state] may determine itself whether the common law rule in respect to riparian
22 rights of that doctrine which obtains in the arid regions of the West of appropriation
23 of water for the purposes of irrigation shall control. Congress cannot enforce either
24 rule upon any State.

24 *Kansas v. Colorado*, 206 U.S. at 94. Thus the “equal footing” doctrine represents a
25 Congressional recognition of each state’s right to set its own water allocation rules.

26 Congress reaffirmed its policy of deference to state water law in the Desert Land Act of
27 1877. The Desert Land Act, which followed numerous other mining and homestead acts
28 designed to reclaim and settle public domain land, authorized the entry onto and cultivation of

1 public land. *California v. United States*, 438 U.S. at 655-57. Upon compliance with certain
2 conditions, a settler would receive a land patent. With regard to water, the Act authorized settlers
3 to appropriate water for irrigation and reclamation, and specifically provided that all sources of
4 water on public lands were to “be held free for appropriation and use of the public.” 19 Stat. 377.

5 In *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935),
6 the U.S. Supreme Court, in interpreting the 1877 Desert Land Act, again affirmed the policy of
7 Congressional deference to state water law through the “severance doctrine.” At issue in
8 *California Oregon Power* was whether a federal land patent carried with it a common law
9 riparian water right. After reviewing the Act’s language concerning the appropriation of water on
10 federal lands, the Court held that:

11 If this language is to be given its natural meaning, and we see no reason why it should
12 not, it effected a severance of all waters upon the public domain, not theretofore
13 appropriated, from the land itself. From that premise it follows that a patent issued
14 thereafter for lands in a desert-land state or territory, under any of the land laws of the
United States, carried with it of its own force, no common law right to water flowing
through or bordering upon the lands conveyed.

15 *Id.* The Supreme Court then held that the Desert Land Act severed the right to water from public
16 domain land and delegated to the states the power to allocate their water resources. *Id.* at 164.

17 Congress re-iterated and reaffirmed this deference to state authority in the Federal
18 Reclamation Act of 1902. The 1902 Act authorized the federal government to construct water
19 resource development projects, known as reclamation projects, and to initially finance these
20 projects through the sale of public land. 43 U.S.C. § 391. Section 8 of the Act expressly deferred
21 to state water law by providing that:

22 Nothing in this act shall be construed as affecting or intended to affect or to in any
23 way interfere with the laws of any State or Territory relating to the control,
24 appropriation, use, or distribution of waters used in irrigation, or any vested right
acquired thereunder, and the Secretary of the Interior, in carrying out the provisions
of this act, shall proceed in conformity with such laws.

25 43 U.S.C. § 383.

26 In 1978, the U.S. Supreme Court harmonized the separate doctrines reflecting
27 Congressional deference to state water law in *California v. United States*, 438 U.S. at 653-663. In
28 that decision, the United States challenged the California State Water Resources Control Board’s

1 (State Water Board) authority to impose water right conditions on the operation of the New
2 Melones Project, a federal reclamation facility located on the Stanislaus River. The United States
3 argued that the State Water Board could not impose conditions on the operation of a federal
4 reclamation project. However, the Supreme Court rejected this argument and held that the
5 “cooperative federalism” of section 8 of the 1902 Reclamation Act required the United States to
6 comply with state water laws unless such laws were directly inconsistent with specific
7 congressional directives regarding the project. *California v. United States*, 438 U.S. at 650, 678.
8 On remand, the Ninth Circuit Court of Appeals confirmed that a “conflicting congressional
9 directive” referred to an expressly conflicting federal statute. *United States v. State Water*
10 *Resources Control Board*, 694 F.2d 1171, 1176 (9th Cir. 1982).

11 **B. The 1992 CVPIA Re-Affirmed Congress’ Long-Standing Deference to**
12 **State Law**

13 Consistent with this long-standing history of congressional deference to state water law, a
14 central theme of the CVPIA is the affirmation of the federal CVP’s obligation to comply with
15 state law. From the 1992 Act’s introductory sections to its discussion of fish and wildlife
16 protection, Congress repeatedly stated the CVP’s duty to comply with state law. In fact, for
17 several reasons, this duty to comply with state law is a first order priority for the CVP.

18 First, Congress recognized the CVP’s duty to comply with state law in the very definition
19 of the term “Central Valley Project water.” Section 3403(f) of the CVPIA states that:

20 The term “Central Valley Project water” means all water that is developed, diverted,
21 stored, or delivered by the Secretary in accordance with the statutes authorizing the
22 Central Valley Project and *in accordance with the terms and conditions of water*
rights acquired pursuant to California law.

23 Section 3403(f), 106 Stat. 4707, emphasis added. Thus, in determining the amount of water
24 available for purchase by third parties, water transfers and fish and wildlife restoration, Congress
25 expressly defined “Central Valley Project water” as water that is developed, diverted, stored and
26 delivered consistent with the requirements of California law. Section 3404(c), 106 Stat. 4708;
27 Section 3405(a), 106 Stat. 4710; Section 3406(b)(1)(B), 106 Stat. 4715.

1 Second, the CVPIA provisions pertaining to fish, wildlife, and habitat restoration
2 unequivocally establish the CVP's duty to comply with state law. Section 3406(a) of the Act
3 amended the statutes that authorized the CVP to include fishery and wildlife protection as an
4 authorized project purpose. The last of these amendments declares that "nothing in this title shall
5 affect the State's authority to condition water right permits for the Central Valley Project."
6 Section 3406(a)(4), 106 Stat. 4706. Section 3406(b) then sets forth the primacy of state law as a
7 fundamental principle underlying the CVP's fishery protection obligations:

8 The Secretary, immediately upon the enactment of this title, shall operate the Central
9 Valley Project to meet *all obligations under state and federal law*, including but not
10 limited to the federal Endangered Species Act, 16 U.S.C. 1531 *et seq.*, and all
11 decisions of the California State Water Resources Control Board establishing
12 conditions on the applicable licenses and permits for the project.

13 Section 3406(b), 106 Stat. 4714, emphasis added. Only after *first* meeting state law requirements
14 for fishery protection is the project then "further authorized and directed to" meet the section's
15 separately enumerated requirements, such as those set forth in section 3406(b)(23). Thus, both
16 the sequencing and plain language of section 3406(b) strongly suggest that compliance with state
17 law is a first order priority imposed on the CVP, a requirement that the project must meet *prior* to
18 compliance with any of the other, subsequently enumerated requirements in section 3406(b),
19 including section 3406(b)(23).

20 Third, Congress plainly anticipated that California law might impose new obligations upon
21 the CVP in addition to those set forth in the CVPIA. Section 3406(b)(2) requires the Secretary of
22 the Interior annually to dedicate 800,000 acre-feet of project yield to fish, wildlife, and habitat
23 restoration purposes. Section 3406(b)(2), 106 Stat. 4715. Section 3406(b)(1)(C) describes how
24 this water is to be distributed as follows:

25 The Secretary shall cooperate with the State of California to ensure that, to the
26 greatest degree practicable, the specific quantities of yield dedicated to and managed
27 for fish and wildlife purpose under this title are credited against any *additional*
28 *obligations of the Central Valley Project which may be imposed by the State of*
California following enactment of this title.

29 Section 3406(b)(1)(C), 106 Stat. 4715, emphasis added. Thus, the CVPIA fully anticipated that
30 California could impose new fishery obligations on the CVP after the statute's enactment in 1992.
31 Section 3406(b)(2)(A) underscores the project's "additional obligations" by stressing that the

1 section's 800,000 acre-feet of CVP yield dedicated to fishery restoration is "*in addition* to all
2 water allocated pursuant to paragraph (23)." Section 3406(b)(2)(A), 106 Stat. 4716, emphasis
3 added.

4 Section 3406(b)(23) of the CVPIA does not constitute a contrary conflicting congressional
5 directive. Even under a reading most favorable to the plaintiffs, section 3406(b)(23) is at best
6 ambiguous as to its applicability to the lower Klamath River, for two reasons. First, the section
7 on its face is limited to Trinity River fishery flows and does not address lower Klamath River
8 flows below the confluence of the Trinity River. As the plaintiffs concede, the primary purpose
9 of the Bureau's 2013 flow augmentation decision was to provide sufficient fishery flows in the
10 lower Klamath River to prevent a recurrence of the 2002 fish kill there. Doc. 113, Pls. Op. Mem.
11 at 4; AR 3, 16-17, 22, 52.⁵ Even assuming the validity of the plaintiffs' claim that section
12 3406(b)(23) limits flows for the Trinity River fisheries to those in the 1999 Trinity River Flow
13 Study and 2000 ROD, nothing in that section prohibits the Bureau from operating its facilities to
14 provide additional protection for *other* fisheries in the Klamath River basin. Second, the Trinity
15 River Flow Study, the key study identified in section 3406(b)(23), itself confirms that the
16 recommended fishery flows were only intended to improve fish habitat in the Trinity River, and
17 not the Klamath River. See AR 3865-3875.

18 Moreover, a reading of the CVPIA that treats the federal fishery protections contained in
19 section 3406(b)(23) as the project's exclusive Trinity River fishery obligation would conflict with
20 the "additional [state law] obligations" language contained in section 3406(b)(1)(C). Importantly,
21 such a reading of the CVPIA also would preclude the Bureau from considering material new
22 information and changed circumstances, such as occurred in 2002 when the "unprecedented" fish
23 kill occurred in the lower Klamath River; these previously unforeseen circumstances by definition
24 were not and could not have been accounted for in the flow levels set forth in the 1999 Trinity

25 ⁵ CDFW's 2004 report on the causes of the 2002 fish kill revealed that the overwhelming
26 majority of the returning salmon that were killed were from the Klamath River, not the Trinity
27 River. According to the CDFW estimate, 70.2% of the salmon lost were from the Klamath River
28 fishery and only 29.8% were from the Trinity River. AR 2475. The USFWS report contains an
even higher estimate that 82% of the returning fish that died were destined for the upper Klamath
River. AR 2922.

1 River Flow Study and 2000 ROD. AR 2372-73.

2 Finally, federal case law has interpreted and applied the CVPIA to require the Bureau to
3 comply with state law, including section 5937 of the Fish and Game Code.⁶ In *Natural*
4 *Resources Defense Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998), the Ninth Circuit rejected
5 an argument by federal water contractors from the CVP's Friant Unit that a CVPIA section
6 requiring the Bureau to develop a San Joaquin River fish protection plan to re-establish the
7 fishery below Friant Dam preempted state law and precluded the application of section 5937 of
8 the Fish and Game Code to the Friant Dam. *Id.* at 1132. Because the CVPIA does not contain
9 any "clear directive" that "preempts the application of § 5937," the Ninth Circuit rejected the
10 water contractors' facial preemption challenge to section 5937. *Id.* On remand, the district court
11 confirmed that the CVPIA does not on its face preempt the application of section 5937 to the
12 Friant Unit of the CVP, notwithstanding the Act's inclusion of a special provision requiring the
13 development of a plan to address fishery needs below Friant Dam. *Natural Resources Defense*
14 *Council v. Patterson*, 333 F.Supp.2d 906, 919-921 (E.D. Cal. 2004). The same reasoning applies
15 here: the provisions for protection of the Trinity River in CVPIA section 3406(b)(23) do not
16 preempt the application of section 5937 to the Trinity River Division of the CVP.

17 The federal court holdings discussed above that state law is not preempted by specific
18 provisions of the CVPIA comport with the U.S. Supreme Court's admonition that interpretation
19 of federal statutes resulting in the "encroachment upon a traditional state power," such as the
20 states' "power over land and water use," should be avoided unless Congress clearly conveys such
21 a preemptive purpose. *Solid Waste Agency of Northern Cook County v. Army Corps of*
22 *Engineers*, 531 U.S. 159, 173-174 (2001); see also *Gregory v. Ashcroft*, 501 U.S. 452, 460-461
23 (1991).

24 ⁶ As discussed further below, the public trust doctrine requires the protection of public
25 trust resources, values and uses, including fishery resources, unless such protection is either
26 infeasible or manifestly unreasonable. *National Audubon Society v. Superior Court*, 33 Cal.3d
27 419, 443, 446 (1983). Section 5937 of the California Fish and Game Code is a "legislative
28 expression of the public trust protecting fish as trust resources," which further requires dam
owners and operators to provide sufficient flow to keep fish in good condition below their dams.
Cal. Fish & Game Code § 5937; *California Trout, Inc. v. State Water Resources Control Board*,
207 Cal.App.3d 585, 626 (1989).

1 Thus, federal reclamation law in general and the CVPIA in particular confirm the principles
2 of cooperative federalism, and these principles require the Bureau to operate all units of the CVP,
3 including the Trinity River Division, in compliance with California water law, including the
4 common law public trust doctrine and section 5937 of the California Fish and Game Code. As
5 discussed below, these state law requirements fully support the Bureau's decision to provide
6 Trinity River augmentation flows during the fall of 2013.

7 **II. THE COMMON LAW PUBLIC TRUST DOCTRINE AND SECTION 5937 OF**
8 **THE CALIFORNIA FISH AND GAME CODE SUPPORT THE BUREAU'S**
9 **2013 FLOW AUGMENTATION DECISION**

10 The public trust doctrine imposes a "significant limitation on water rights" in California.
11 *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 106 (1986). The
12 public trust doctrine is a longstanding California common law doctrine which holds that the
13 state's navigable waterways are owned and held in trust by the state for the benefit of the people
14 of the state. *Marks v. Whitney*, 6 Cal.3d 251, 259-260 (1971). The doctrine, which has existed in
15 California since 1854, originally applied to protect the public's right to use the state's tidelands
16 and navigable waterways for purposes of commerce, navigation and fishing. *Eldridge v. Cowell*,
17 4 Cal. 80, 87 (1854); *Colberg, Inc. v. State ex rel. Dep't of Pub. Works*, 67 Cal.2d 408, 417
18 (1967). However, the California courts subsequently expanded the doctrine to include, inter alia,
19 the preservation of trust lands and waters in their natural state, "so that they may serve as
20 ecological units for scientific study, as open space, and as environments which provide food and
21 habitat for birds and marine life . . ." *Marks*, 6 Cal. 3d at 259-260.

22 In 1983, in *National Audubon*, 33 Cal. 3d 419, the California Supreme Court expressly
23 applied the public trust doctrine to appropriative rights in flowing waters. In that case, the Court
24 held that all entities holding appropriative state water rights (as does the Bureau) "generally hold
25 those rights subject to the trust, and can assert no vested right to use those rights in a manner
26 harmful to the trust." *Id.* at 437; see also *id.* at 440, 445, 452, *State Water Resources Control*
27 *Board Cases*, 136 Cal.App.4th 674, 806 n. 54 (2006) (noting that "the rights of an appropriator
28 are always subject to the public trust doctrine"). The Court held that, under the public trust
doctrine as applied to water rights, the state has an affirmative duty "to protect the people's

1 common heritage” of streams and lakes, “to take the public trust into account” in its decision
2 making, “and to protect trust uses whenever feasible.” *Id.* at 441, 446. The state “retains
3 continuing supervisory control over its navigable waters and the lands beneath those waters” and
4 has a continuing duty to seek an accommodation between competing interests and “to preserve, so
5 far as is consistent with the public interest, the uses protected by the trust.” *Id.* at 445-447.

6 In addition to the common law public trust doctrine that applies directly to the diversion
7 and use of navigable waters, there is a separate, but related, branch of the public trust doctrine
8 that protects wild fish as trust resources in and of themselves, independent of navigable waters.
9 See *California Trout*, 207 Cal.App.3d at 630 (“[w]ild fish have . . . been recognized as a species
10 of property the general right and ownership of which is in the people of the state”); *People v.*
11 *Murrison*, 101 Cal.App.4th 349, 360 (2002) (“the State owns the fish in its streams in trust for the
12 public”). “[T]he right and power to protect and preserve” fisheries “for the common use and
13 benefit is one of the recognized prerogatives of the sovereign.” *People v. Truckee Lumber Co.*,
14 116 Cal. 397, 400 (1897). As early as 1932, a California Court of Appeal held that a water right
15 holder has no authority to divert and use the waters of the state “regardless of its duty in so doing
16 to protect the fish therein” and that “the grant of the right to erect a dam” must “be construed to
17 be under the implied condition to keep open the fishways.” *People v. Glenn-Colusa Irrigation*
18 *District*, 127 Cal. App. 30, 36-37 (1932).

19 Section 5937 of the California Fish and Game Code is a legislative codification of the
20 common law public trust doctrine which provides: “[t]he owner of any dam shall allow sufficient
21 water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water
22 to pass over, around or through the dam, to keep in good condition any fish that may be planted or
23 exist below the dam.” Cal. Fish & Game Code § 5937; *California Trout*, 207 Cal.App.3d at 626.⁷

24 Here, the Bureau’s 2013 flow augmentation decision was entirely consistent with and
25 implemented these public trust requirements of California law. The supplemental releases were
26 specifically designed as a preventative measure “to reduce the likelihood of a disease outbreak

27 _____
28 ⁷ Fish and Game Code section 5900(c) clarifies that the term “owner” includes “operator.”

1 among returning adult fall-run Chinook salmon that could result in a large-scale fish die-off” in
2 the lower Klamath River in late summer/early fall of 2013. AR 3; see also AR 8, 16. At the time,
3 fish biologists and others were “again concerned that dry hydrologic conditions in the basin, and
4 the above-average expected run size, could be conducive to a disease problem similar to the one
5 experienced in 2002.” AR 3, 16. The forecast in 2013 was for 271,000-272,000 returning
6 salmon, which would have been the second largest return on record and approximately 1.6 times
7 larger than the estimated 2002 run of approximately 170,000 fish. AR 3, 16, 451, 561, 564-565.
8 At the same time, absent flow augmentation, flows in the lower Klamath River would have been
9 around 2,060 to 2,080 cfs, similar to the 2,000 cfs flows in September of 2002. AR 3, 16, 20.

10 As the CDFW, USFWS and Yurok tribe fish kill reports indicate, conditions favorable to
11 wild epizootics occur when one or more of four factors exists: 1) low flow; 2) warm water
12 temperatures; 3) high densities of fish; and 4) restricted fish passage, which can act “individually
13 or in concert.” AR 2389. Ich and columnaris are always present in the Klamath River. *Id.*
14 However, disease does not occur until “environmental conditions degrade, such as with increased
15 water temperature, decreased flow, and increased fish density,” making conditions ideal for
16 proliferation and transmission of the pathogens. *Id.*; see also AR1726-1727, 2840-2841, 2843,
17 2897-2900. “Poor environmental conditions are stressful to fish and result in compromised
18 immune function, making fish more susceptible to the disease.” AR 2839.

19 As discussed above, CDFW’s 2004 report on the causes of the 2002 fish kill concludes that
20 “[a] combination of factors came together to create conditions stressful to salmonids and
21 conducive to a disease outbreak,” including “atypically low flows and low river volume coupled
22 with an above-average run of salmon, which peaked one week earlier than average, and
23 seasonally warm water temperatures.” AR 2502. This resulted in high densities of fish crowded
24 into a reduced habitat area, which created ideal conditions for proliferation and transmission of
25 the pathogens. *Id.* at 1732, 2503-2504, 2843-2844, 2874, 2929.

26 Flows are the most effective means of abating such stressful environmental conditions and
27
28

1 disrupting the life cycle of these pathogens, particularly Ich. AR 493, 1727, 1730-1732, 2732.⁸
2 Among other benefits, increased flows increase water velocity and turnover rates in fish holding
3 areas, disrupting the pathogen's "ability to find and attach to a host fish during its free-swimming
4 infectious stage" and also decreasing water temperature, making conditions less favorable for
5 reproduction and transmission of the pathogen. AR 1727, 1730, 1732; see also AR 8, 493, 2417,
6 2441, 2444-2446, 2503, 2840, 2851, 2874, 2898-2900, 2927-2929, 5188. As CDFW explains in
7 its 2004 report:

8 Flow is the only controllable factor and tool available in the Klamath Basin (Klamath
9 and Trinity rivers) to manage risks against future epizootics and major adult fish-kills.
10 Increased flows when adult salmon are entering the Klamath River (particularly
11 during low-flow years such as 2002) can improve water temperatures, increase water
12 volume, increase water velocities, improve fish passage, provide migration cues,
13 decrease fish densities and decrease pathogen transmission between fish.

12 AR 2372; see also 493, 2503, 2537, 2840, 2874. Accordingly, CDFW recommended that base
13 flows in the lower Klamath river be a minimum of 2,200 cfs when adult salmon are entering the
14 Klamath River estuary. AR 2538.

15 In a 2010 study, Yurok tribal fisheries biologist Joshua Strange concurred that "proactive
16 river flows" are the most readily available and effective management tool for "reducing the risk
17 of catastrophic Ich outbreaks." AR 1726. Indeed, Strange concluded that higher river flows are
18 "of *paramount* importance in controlling and preventing Ich outbreaks." AR 1730, emphasis
19 added. Strange also noted that "a proactive, preventative approach is necessary because the time
20 lag between detection of an impending epizootic and arrival of a reactive, emergency flow release
21 could result in no benefit to salmon survival." AR 1727; see also AR1733.⁹

22 _____
23 ⁸ Disrupting the life cycle of Ich is the most important, as the bacterial columnaris
24 infection is usually secondary to, and results from, Ich or other types of skin infections caused by
25 environmental stress. AR 1727, 2899.

24 ⁹ Strange recommends that minimum base flows in the lower Klamath River range
25 between 2,500 cfs in most years, and 2,800 cfs in years of projected run sizes of 170,000 or more
26 fish (the number that was estimated to have returned in 2002). AR 1727, 1730. Strange
27 concludes that flows below 2,500 cfs will result in a "substantial risk" of a disease outbreak,
28 "with risk increasing as flows further decrease." AR 1730. The source of these base flows in the
lower Klamath River is unimportant, and may come from the upper Klamath River or the Trinity
River, as both flow into the lower Klamath River and Klamath River Estuary. AR 1734; see also
AR1722.

1 The Bureau's 2013 flow augmentation decision was consistent with the wildlife agencies'
2 and experts' views that providing additional flows is the most efficient and effective means of
3 preventing or mitigating the risk of a future outbreak of Ich and columnaris. The Bureau has
4 previously determined it necessary to release additional flows when the triggering circumstances
5 (low river flows and volume and a projected returning fish run of 170,000 or more) are present.
6 AR 3, 16-17, 451, 561, 564-565. Such circumstances indicate that another large-scale fish kill
7 could occur on the lower Klamath River. *Id.* As discussed, such circumstances were present in
8 2013. The 2013 releases were specifically designed "to increase water volumes and velocities in
9 the lower Klamath River to reduce the probability of a disease outbreak." AR 3, 16. As the
10 Bureau's environmental assessment states:

11 The biological consequences of large-scale fish die-offs could substantially impact
12 present efforts to restore the Klamath Basin anadromous fish communities and the
13 many user groups that rely upon the fishery. Reductions in the Klamath and Trinity
14 River fish populations would affect tribal fishery harvest opportunities, ocean harvest
15 levels, recreational fishing, as well as public perception and recovery mandates. Loss
16 of 3 year-old fish and a potential loss of 4 year-old fish from a given brood year can
17 affect the population structure and may impede recovery goals as identified in the
18 Central Valley Project Improvement Act of 1992 (P.L. 102-575), for naturally
19 produced fall-run Chinook salmon.

20 AR 17. Consequently, the Bureau's decision to allow supplemental releases from Lewiston Dam
21 on the Trinity River to protect returning salmon on the lower Klamath River directly furthered its
22 duties under state law to comply with the requirements of the common law public trust doctrine
23 and section 5937 of the Fish and Game Code to maintain fish below the dam in good condition.

24 Notably, the Bureau's flow augmentation decisions have succeeded in preventing the
25 recurrence of a major fish kill event on the lower Klamath River. The Bureau also authorized
26 supplemental releases in 2003, 2004 and 2012 when low flow and low volume conditions,
27 combined with a higher than average projected returning salmon run, similarly threatened to re-
28 create the same conditions that led to the 2002 fish kill. AR 3, 16. All supplemental releases
29 have prevented the recurrence of any significant disease or mortality of adult fish in such years.
30 AR 3, 8, 16, 562, 564. Thus, when faced with the triggering conditions of low flow and high
31 projected salmon returns again in 2013, the Bureau once again made an appropriately "risk averse
32 decision in the face of uncertainty" about whether another fish kill might occur, and acted

1 proactively to prevent or mitigate this risk. AR 3, 8, 16, 1726-27, 1732-33. Such an approach is
2 not only consistent with, but is required by, California law, as incorporated by federal reclamation
3 law, including the CVPIA.

4 **CONCLUSION**

5 For the foregoing reasons, amicus CDFW respectfully requests that the plaintiffs' motion
6 for summary judgment be denied, and that the United States' cross-motion for summary judgment
7 be granted, as to the CVPIA claim.

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9 Respectfully Submitted,

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