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

CENTER FOR BIOLOGICAL DIVERSITY, RESTORE THE DELTA and PLANNING AND CONSERVATION LEAGUE,

Plaintiffs,

v.

UNITED STATES BUREAU OF RECLAMATION, et al.

Defendants.

Case No. 1:20-cv-00706-DAD-EPG

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Noticed Date: October 19, 2021
Noticed Time: 9:30 a.m.
Courtroom: 5, 7th Floor-Fresno
Judge: Hon: Dale A. Drozd
Trial Date: None
Action Filed: May 20, 2020

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE THAT on October 19, 2021, at 9:30 a.m., in Courtroom 5, Seventh Floor of the Federal Courthouse, 2500 Tulare Street, Fresno, CA 93721, before the Honorable Dale A. Drozd, United States District Judge for the Eastern District of California, Plaintiffs will move and hereby do move for summary judgment on all claims pursuant to Federal Rule of Civil Procedure 56. This motion is based on the following Memorandum of Points and Authorities, the concurrently filed Statement of Undisputed Facts, declarations filed in this action, and other such documentary and oral evidence which may be supplied before or at the hearing. Plaintiffs seek declaratory and injunctive relief as detailed in their First Amended Complaint (Dkt. 25).

Counsel certify that meet and confer efforts have been exhausted. Plaintiffs gave notice to all parties in this case in their Opposition to Federal Defendants' Motion to Consolidate, filed by Plaintiffs on June 22, 2021, "Plaintiffs will shortly be filing a motion for summary judgment." (Opposition, ECF No. 69, p. 2:26-27, in essence repeated at pp. 3:12-14 and 6:6-7). Plaintiffs' counsel (Wright) emailed Federal Defendants' counsel David Gehlert on August 12, 2021, to initiate meet and confer discussion. Both counsel spoke by telephone on August 13, 2021. It was not possible to settle the case as Federal Defendants are not willing to rescind contracts already converted or to stop converting additional contracts. Counsel did reach an agreement to set the Hearing date for October 19, 2021, as attorney Gehlert wanted at least 45 days following Plaintiffs' filing to prepare his Opposition. Attorney Gehlert also indicated that Federal Defendants would file a cross motion for summary judgment. On August 15, 2021, Plaintiffs' counsel (Buse) emailed 45 attorneys representing the contractor Defendants, notifying them of Plaintiffs' intent to file this motion, stating Plaintiffs' intent to set the hearing date for October 19, 2021, and offering to further meet and confer telephonically.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND DISPOSITIVE FACTS

The U.S. Bureau of Reclamation ("Reclamation") manages the Central Valley Project ("CVP"), the massive water infrastructure system that diverts, stores, and exports water from watersheds in Northern California, including rivers that feed the San Francisco Bay-Delta Estuary ("Delta") and the Trinity River basin. Operation of the CVP results in significant adverse environmental impacts, including (a) degrading Delta water quality, (b) intensifying already reduced and worsening water supply shortages, (c) threatening and destroying critical habitats of fish species designated as endangered or threatened, (d) increasing pollution and harmful algal blooms, (e) harming Delta agriculture, and (f) damaging public health and safety.

As of June 14, 2021, Reclamation has converted 68 CVP contracts into permanent repayment contracts under the Water Infrastructure Improvements of the Nation ("WIIN") Act, Pub. L. No. 114-322, §§ 4011-4014, 130 Stat. 1628, 1878-1884 (2016). (Statement of Undisputed Facts ["**SUF"] 1**.) Pursuant to the 68 contracts, Reclamation is obligated to deliver to the contractors about 2,952,962 acre-feet of water each year, subject to availability. (**SUF 27**.) So long as the contractors make the required payments, the contracts will continue in perpetuity. (**SUF 3**.) Reclamation is now in the process of converting 23 additional CVP contracts into permanent repayment contracts. (**SUF 2**.) Pursuant to the 23 additional contracts, Reclamation will be obligated to deliver to those contractors about 450,924 acre-feet of water each year, subject to availability. (**SUF 28**.) The total obligation, including contracts already converted and contracts Reclamation is in the process of converting, would be more than 3,000,000 acre-feet of water per year. The CVP contracts that have been converted are identified in **SUF 25** and the contracts in process are identified in **SUF 26**.

In converting the prior short-term CVP contracts into *permanent* repayment contracts, potentially adverse water flows would be permanently designated without any analysis to assess their environmental impact or explore alternatives and mitigation strategies. Reclamation admits, "There are instances when diversions for the CVP contracts have adverse impacts" (**SUF 21**); "There are circumstances and instances where pumping for the CVP contracts entrains fish and

alters hydraulic flow patterns in the Delta" (**SUF 22**); and "In some instances, the CVP can have adverse environmental effects and can harm fish and/or reduce freshwater flows." (**SUF 23**.)

Despite the numerous significant and cumulative adverse environmental impacts that would result from making the water delivery contracts permanent, Reclamation has failed to engage in *any* of the analysis required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. (**SUF 4, 5, 6, 7, 8, 9.**) Under NEPA, a federal agency must prepare an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." An agency does not have to complete an Environmental Impact Statement (EIS) for a proposal if it determines on the basis of an Environmental Assessment ("EA") the action will not have a significant impact on the environment. *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 145 (2010). But Reclamation has not even prepared an EA on the contract conversions let alone an EIS. **(SUF 5, 7.)**

It is undisputed that Reclamation has not complied with NEPA during its process of converting CVP contracts. Reclamation stated in a status report in a related case, "Reclamation thus construes the conversion of the contracts under the direction of the WIIN Act as a non-discretionary action that is not subject to the requirements of NEPA." **(SUF 14.)**

Reclamation's wholesale failure to comply with NEPA has led to its unlawful failure to consider alternatives. Such consideration would have evaluated the trade-offs between contractual water deliveries as written and the ensuing environmental harm. Examples of alternatives would include reductions in water deliveries over time, facilitated by improvements in technology (such as water recycling, drip irrigation, and conservation) and required by impairments on agricultural lands. Reclamation also should have considered the obvious alternative of limiting the terms of the contract quantities and re-evaluating quantities delivered, thus integrating benefits from technological advances and mitigating conditions exacerbated by climate change and drainage impairment on contract lands. Reclamation's conversion of the CVP contracts without preparing an EA or EIS violated NEPA.

Further, Reclamation has neither initiated nor completed consultation with the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS") under the

Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 et seq. (**SUF 10**.) Reclamation has not prepared a Biological Assessment under the ESA on the contract conversions. (**SUF 11.**) These failures violate the mandatory terms of the ESA.

Reclamation declares it is converting the contracts under the WIIN Act. Reclamation contends it has no discretion in converting the contracts and therefore need not comply with NEPA or the ESA. (**SUF 14**.) For several reasons, Reclamation is wrong. First, the plain language of the WIIN Act directly contradicts Reclamation's denial of discretion. The agency has discretion over the terms and conditions of each contract. Section 4011(a)(1) of the WIIN Act provides:

> CONVERSION AND PREPAYMENT OF CONTRACTS—Upon request of the contractor, the Secretary of the Interior shall convert any water service contract in effect on the date of enactment of this subtitle and between the United States and a water users' Association to allow for prepayment of the repayment contract pursuant to paragraph (2) *under mutually agreeable terms and conditions.*

Pub. L. No. 114-322, § 4011, 130 Stat. 1628, 1878 (2016) (emphasis added). Since the terms and conditions of the contracts must be agreeable to the Secretary of the Interior as well as the contractor, the Secretary of the Interior has discretion to determine and negotiate the terms and conditions of the contracts. Reclamation can and must comply with NEPA and the ESA before finalizing terms to convert the contracts.

Second, NEPA compliance is required because the WIIN Act savings language mandates that it *not* be interpreted or implemented in a manner that would affect or modify Reclamation's obligation under the Central Valley Project Improvement Act of 1992. Pub. L. No. 114-322, § 4012(a), 130 Stat. 1628, 1882 (2016), which requires NEPA analysis for long-term CVP contract renewals. Reclamation accordingly must complete environmental review before renewing CVP contracts.

Third, the WIIN Act savings language expressly requires compliance with the ESA. The language requires that the WIIN Act "not be interpreted or implemented in a manner" that "overrides, modifies, or amends the applicability of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or the application of the smelt and salmonids biological opinions to the

operation of the Central Valley Project or the State Water Project." This Court has determined, "However, nothing in the WIIN Act modifies (or even bends) any of Federal Defendants' obligations under the ESA." *California Natural Resources Agency v. Ross,* 2020 WL 2404853 at *20 (E.D. Cal., May 11, 2020, No. 1:20-CV-00426 and 00431).

Reclamation's conversion of these contracts into permanent contracts without any ESA consultation is in violation of the ESA.

Reclamation never afforded any opportunity for public review and comment pursuant to NEPA or the ESA prior to or while converting the contracts. (**SUF 15**.) The only opportunity for public review and comment afforded by Reclamation was to make the incomplete draft contracts available for review. (**SUF 16**.) Reclamation provided no information to aid public review other than the contracts themselves. (**SUF 16**.)

Plaintiffs have adequately exhausted all applicable administrative remedies. (**SUF 17**.) Plaintiffs have standing. (**SUF 19;** *see also* concurrently filed declarations of Howard Penn and Roger Mammon). Plaintiffs were among the authors of twelve comment letters to Reclamation from January 6, 2020, to March 1, 2021. (**SUF 18**.) The letters explained to Reclamation that it must comply with NEPA and the ESA before converting the contracts. (**SUF 18**.)

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 permits summary judgment when "there is no genuine issue as to any material fact … and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993).

As this Court found, it is possible to determine that an agency must comply with NEPA as a matter of law in cases involving substantial federal water allocations without looking to the administrative record and prior to the record's finalization. *San Luis & Delta-Mendota Water Authority v. Salazar*, 686 F. Supp. 2d 1026, 1050 (E.D. Cal. 2009). Moreover, where a claim is brought under the citizen suit provisions of the ESA, 16 U.S.C. § 1540(g)(1)(A), the court "may consider evidence outside the administrative record for the limited purposes of reviewing Plaintiffs' ESA claim." *W. Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1211 (9th Cir. 2010), *as amended*, 632 F.3d 472 (9th Cir. 2011).

When an agency does not prepare an EA or EIS, it has not "made any NEPA-related decision to which deference is owed," so the issue can be reviewed de novo without deference to an explicit or implied prior decision. *Consol. Salmonid Cases,* 688 F. Supp. 2d 1013, 1020 (E.D. 2010). As the court explained in *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150-1151 (D.C. Cir. 2001),

> Because NEPA's mandate is addressed to all federal agencies, the Board's determination that NEPA is inapplicable to the Trails Act is not entitled to the deference that courts must accord to an agency's interpretation of its governing statute. [Citations omitted] Consequently, the issue of whether the Board erred in determining that its decision to issue a CITU under [the] Trails Act is not subject to NEPA is a question of law, subject to de novo review. *See* 5 U.S.C. § 706.

The court added,

> Several circuits to confront the same question have adopted a "reasonableness" standard of review. *See Northcoast Envtl. Ctr. v. Glickman,*136 F.3d 660, 667 (9th Cir.1998); *Sugarloaf Citizens Ass'n v. F.E.R.C.,* 959 F.2d 508, 511 (4th Cir.1992); *Goos v. I.C.C.*, 911 F.2d 1285, 1291 (8th Cir. 1990). We understand this to mean that the courts conducted de novo review.

267 F.3d at 1151, n.7.

In de novo review, an agency must use a "reasonable" standard of review to determine whether NEPA compliance is required. "In the Ninth Circuit, '[a]n agency's threshold decision that certain activities are not subject to NEPA is reviewed for reasonableness.'" *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011 (9th Cir. 2009). In the context of this case, it means Reclamation's claim that it does not have discretion over the terms and conditions of the contracts is not entitled to deference.

ESA citizen suits challenging substantive violations arise under Section 11 of the ESA, 16 U.S.C. § 1540(g)(1). An agency's interpretation of a statute outside its administration is reviewed de novo. *Karuk Tribe of California v. U.S. Forest* Service, 681 F.3d 1006, 1017 (9th Cir. 2012).

III. ARGUMENT

A. RECLAMATION VIOLATED NEPA BY CONVERTING THE CONTRACTS WITHOUT HAVING PREPARED AN EIS OR EA.

NEPA is "a procedural statute intended to secure environmentally informed decision-making by federal agencies." *California ex. rel. Lockyer*, 575 F.3d 999 at 1012 (holding unreasonable a Forest Service conclusion that a regulatory change would not affect the environment.) NEPA "provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." *Id*. Accordingly, "the Act requires that an environmental impact statement be prepared for all 'major Federal actions significantly affecting the quality of the human environment.'" *Id.* (quoting 42 U.S.C. § 4332(c)). The threshold that triggers the requirement for environmental analysis under NEPA is relatively low: "It is enough for the plaintiff to raise substantial questions whether a project may have a significant effect on the environment." *Id.; see Calif. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011) (rejecting agency's unsupported conclusion that its action would not have some environmental impact). A federal project thereby triggers NEPA when there are substantial questions about a significant effect on the environment.

Plaintiffs ask this Court to review the legal conclusion reached by Reclamation that it did not have to comply with NEPA before converting the contracts, as Reclamation continues to do. Because NEPA is procedural in nature, a court should "set aside agency actions that are adopted 'without observance of procedure required by law.'" *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 781 (9th Cir. 2006). Reclamation's decision to convert the contracts without complying with NEPA presents an agency legal conclusion that is reviewable by this Court.

1. Reclamation's Contract Conversions are Major Federal Actions with Significant Environmental Impacts that are Undertaken in Violation of NEPA's Requirements.

Federal agencies must prepare an EIS on "major federal actions" that are "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Yet Reclamation failed to prepare an EA or an EIS for the contract conversions. (**SUF 4, 5, 6, 7**.) According to the Council on Environmental Quality ("CEQ") regulations implementing NEPA, 40 C.F.R. § 1500

et seq.: "All agencies of the Federal Government shall comply with these regulations." *Id.* at § 1507.1 (the 2020 version substitutes "the regulations in this subchapter" for "these regulations.")[1] *See Sierra Nevada Forest Protection Campaign v. Weingart,* 376 F. Supp. 2d 984, 990 (E.D. Cal. 2005) (NEPA regulations "are mandatory, not hortatory").

The formation of contracts meets the standard for a major federal action under NEPA. The regulations define "major federal action" broadly to include "actions with effects that may be major and which are potentially subject to federal control and responsibility." 40 C.F.R. § 1508.1(q) ("an activity or decision subject to Federal control and responsibility"). Moreover, federal courts have specifically found that issuing long-term contracts constitutes major action. In *Forelaws on Board v. Johnson,* 743 F.2d 677, 681 (9th Cir. 1984), *cert. denied*, 478 U.S. 1004 (1986), the defendant agency did not deny, and the court accepted, that power delivery contracts of 20-year duration constituted major federal action. In *Pacific Coast Federation of Fishermen's Associations v. U.S. Dep't of the Interior,* 929 F.Supp.2d 1039, 1047 (E.D. Cal. 2013), *aff'd in part, rev'd in part on other grounds, remanded*, 655 Fed.Appx. 595 (9th Cir. 2016), Reclamation and the Department of Interior did not dispute that approval of even *two*-year CVP Interim Contracts constituted a "major federal action" under NEPA.[2] The converted contracts at issue here are *permanent*. (**SUF 3**); WIIN Act, Pub. L. No. 114-322, § 4011(a)(2)(D), 130 Stat. at 1879.

There is no room to dispute that Reclamation's WIIN Act contract conversions are major federal actions. Reclamation is a federal agency whose action constitutes major federal action if

[1] The NEPA Regulations are codified at 40 C.F.R. § 1500 et seq. The CEQ issued amended NEPA regulations on July 16, 2020. The effective date of the new regulations is September 14, 2020. Reclamation's actions here are all subject to the previous CEQ regulations as the actions were either completed prior to the effective date of the new regulations or are ongoing actions. Reclamation has not elected to apply the new regulations to such ongoing actions. *See* 40 C.F.R. § 1506.13 (2020). All other citations to the CEQ regulations herein are therefore to the governing regulations adopted in 1978 (and subject to a narrow amendment removing the requirement for a worst-case analysis in 1986). A parenthetical may follow the citation with a reference to the 2020 version for the information of the Court.

[2] Even routine contract extensions have been held to constitute major federal actions requiring the preparation of an EA. *See Minn. Pub. Interest Research Grp. v. Butz*, 498 F.2d 1314, 1322 (8th Cir. 1974) (enjoining further logging under extended and modified Forest Service contracts, particularly because of the ecological fragility of the area).

it "guides" the use of resources. *San Luis & Delta-Mendota Water Authority v. Salazar,* 686 F. Supp. 2d 1026, 1039 (E.D. Cal. 2009). This paradigmatic shift from short-term, only *potentially* renewable water contracts, to permanent, fixed-quantity guarantees to deliver more than 3 million acre-feet per year of CVP water, (**SUF 3, 27, 28**), is—on its face—the sort of "major" federal action that NEPA was plainly meant to encompass.

Reclamation's attempts to sidestep the requirement to complete an EA violate NEPA because Reclamation must prepare an EA to determine whether the contracts, which are major federal actions, *may* have a significant effect on the environment. *See Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). Reclamation *admits* diversions for the CVP contracts have adverse environmental impacts. (**SUF 21, 22, 23**.)

NEPA processes must be integrated with other planning "at the earliest reasonable time to insure that planning and decisions reflect environmental values," among other reasons. 40 C.F.R. § 1501.2. Reclamation, however, has not prepared an EIS on the contract conversions. (**SUF 4, 6**.) Reclamation *has not even made the required initial assessment of the level of NEPA review required,* to determine *whether* an EIS must be prepared and has not even prepared an EA. 40 C.F.R. § 1501.3. (**SUF 5, 7**.) Reclamation has not published a notice of intent in the Federal Register. 40 C.F.R. § 1501.9. (**SUF 8, 9**.) Reclamation has not prepared a categorical exclusion or notice thereof on the contracts. 40 C.F.R. § 1501.4. (**SUF 5, 7**.) Reclamation has not made a finding of no significant impact ("FONSI") on its actions. 40 C.F.R. § 1501.6. (**SUF 5, 7**.) The subject actions would not in any event qualify for a categorical exclusion or a finding of no significant impact.

Preparation of an EA is mandatory unless the agency has decided to prepare an EIS. 40 C.F.R. §§ 1501.3, 1501.5. In failing to prepare an EA for the contract conversions, Reclamation has not even reached the step of a preparing a FONSI—although any adequate EA would lead to the conclusion that an EIS is required.

2. Reclamation's Contract Conversion Terms and Conditions are Discretionary, Rendering the Conversions Unlawful in the Absence of NEPA Compliance.

Reclamation has violated and is continuing to violate NEPA because it has converted and is continuing to convert the CVP contracts without preparation of an EIS or even an EA. Reclamation contends that it has no discretion in converting the contracts and therefore need not comply with NEPA. (**SUF 14**.)[3] In its Reply Brief supporting its Motion to Consolidate Reclamation argued "the cases all involve the same core question of the extent of Federal Defendants' discretion under the [WIIN] Act, … ." (ECF No. 76 at p. 1:25-26. filed July 6, 2021). The argument that Reclamation lacks discretion with respect to the contract conversions is wrong as a matter of law.

Reclamation has discretion in determining what the terms and conditions of the contracts will be. The terms and conditions of the contracts are discretionary because they are *not* mandated by statute. Section 4011(a)(1) of the WIIN Act provides:

> CONVERSION AND PREPAYMENT OF CONTRACTS.—Upon request of the contractor, the Secretary of the Interior shall convert any water service contract in effect on the date of enactment of this subtitle and between the United States and a water users' Association to allow for prepayment of the repayment contract pursuant to paragraph (2) *under mutually agreeable terms and conditions.*

Pub. L. No. 114-322, § 4011, 130 Stat. 1628, 1878 (2016) (emphasis added). Under the plain language of the WIIN Act—"under mutually agreeable terms and conditions"—Reclamation, an agency within the Department of the Interior, has discretion to determine and negotiate the terms and conditions of the contracts.

Reclamation itself implicitly acknowledges that it possesses discretion to alter the terms of the contracts. Each of the contracts at issue in this case includes language stating that "this amended Contract ha[s] been drafted, *negotiated*, and reviewed by the parties." (**SUF 12**) (Emphasis added). The title Reclamation uses on its website listing the contracts is, "*Negotiated* Draft Conversion Contracts." (**SUF 13**) (Emphasis added).

[3] There is no benefit from NEPA compliance if the subject agency has no ability to modify or halt an action. *Sierra Club v. Babbitt,* 65 F.3d 1502, 1512 (9th Cir. 1995).

In *Natural Resources Defense Council v. Houston*, the Ninth Circuit held that statutory language, *virtually identical to that at issue here*, gave Reclamation sufficient discretion to trigger application of the ESA. 146 F.3d 1118, 1123-1126 (9th Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999).

Prior decisions have reinforced that federal agencies retain discretion in how they negotiate and finalize contracts. In *Aluminum Company of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380, 398 (1984), the Supreme Court held, because the applicable statute did not "comprehensively establish the terms on which power is to be supplied" under new contracts made by a federal agency marketing hydroelectric power, the agency's administrator had "broad discretion" with respect to negotiating the contracts. *Accord, Forelaws on Board v. Johnson*, 743 F.2d 677, 681-83 (9th Cir. 1998). This was true even where the statute *required* the agency to offer new contracts to its several customers. *See Aluminum Company of America*, 467 U.S. at 383. Ninth Circuit precedents have demanded a much clearer showing to find removal of discretion by statute, holding that specific language, such as an express statutory directive that an official "*shall* … approve any plan that meets the requirements," could remove discretion from an agency. *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1224 (9th Cir. 2015). In *Westlands Water District v. U.S. Department of Interior,* 275 F. Supp. 2d 1157 (E.D. Cal. 2002), *aff'd in part, rev'd in part on other grounds*, *remanded*, 376 F.3d 853 (9th Cir. 2004), this Court found that an agency had discretion, such that NEPA applied, even where a statute mandated a timeframe in which the agency was to implement a required action. 275 F. Supp. 2d at 1180. Accordingly, "[t]he lack of discretion exception to NEPA compliance does not apply." *Id.*

As the Ninth Circuit explained in *Forelaws on Board*, 743 F.2d 677, 683, "NEPA's legislative history reflects Congress's concern that agencies might attempt to avoid any compliance with NEPA by narrowly construing other statutory directives to create a conflict with NEPA. Section 102(2) of NEPA therefore requires government agencies to comply 'to the fullest extent possible.'" *Accord, Center for Biological Diversity v. National Highway Traffic Safety Admin*., 538 F.3d 1172, 1213 (9th Cir. 2008). Reclamation's claim that it does not have discretion in this matter is legally untenable and undermines the intent of NEPA. Accordingly,

Reclamation has violated and is continuing to violate NEPA by converting the CVP contracts without performing any NEPA analyses whatsoever.

3. The Savings Language in the WIIN Act Reinforces the Necessity of Environmental Review Before Converting the Contracts.

The language of the WIIN Act specifically underscores that compliance with environmental statutes is not preempted but rather required. The Central Valley Project Improvement Act of 1992 ("CVPIA") requires that agencies conduct environmental review for the renewal of any existing "long-term" CVP contracts for 25 years. *See* Pub. L. No. 102-575, § 3404(c)(1), 106 Stat. 4600, 4708-09. Section 3404(c)(1) states, in pertinent part, "[n]o such [long-term CVP contract] renewal shall be authorized until appropriate environmental review, including the preparation of the environmental impact statement required in section 3409 of this title, has been completed." Showing clear legislative intent to preserve environmental review, the savings language in the WIIN Act requires:

> This subtitle shall not be interpreted or implemented in a manner that … affects or modifies any obligation under the Central Valley Project Improvement Act (Pub. L. No. 102-575; 106 Stat. 4706), except for the savings provisions for the Stanislaus River predator management program expressly established by section 11(d) and provisions in section 11(g) … .

Pub. L. No. 114-322, § 4011, 130 Stat. 1628, 1882 (2016). Accordingly, the WIIN Act does not supersede the CVPIA requirements. Interpreting or implementing the WIIN Act to eliminate NEPA environmental review would certainly "affect[] or modif[y]" the CVPIA obligation to complete "appropriate environmental review" of CVP contracts before renewal. Consequently, such an interpretation of the WIIN Act is squarely at odds with the Act's own text. The fact that Reclamation's *permanent* contract conversions would be even more impactful than the 25-year contract renewals contemplated by the CVPIA further emphasizes the necessity of environmental review for the conversions at issue.

Other portions of the WIIN Act savings language further reinforce the necessity of NEPA compliance. Section 4012(a)(1) prohibits the subtitle from being interpreted or implemented in a manner that "preempts or modifies any obligation of the United States to act in conformance with applicable State law, including applicable State water law." It is preparation of an EIS that

affords the analytical and interactive process to determine whether contract terms and conditions conform with State law, including State water law.

As just one example of applicable State law, Article X of the California Constitution states:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water … .

Cal. Const. art. X, § 2. The state Water Code reaffirms this policy in substantially the same language. Cal. Water Code § 100. An EIS provides the necessary analysis of whether those state-mandated, constitutional requirements are met by contract terms and conditions. Such analysis would include such foundational alternatives as conditioning the contracts to provide for reducing deliveries as current methods of use become unreasonable due to innovations and/or worsening of adverse impacts of water diversions due to climate change caused reduced freshwater runoff and increased salinity intrusion.

Section 4012(a)(4) of the WIIN Act also prohibits the subtitle applicable to the CVP from being interpreted or implemented in a manner that:

> would cause additional adverse effects on listed fish species beyond the range of effects anticipated to occur to the listed fish species for the duration of the applicable biological opinion, using the best scientific and commercial data available … .

Pub. L. No. 114-322, § 4012, 130 Stat. 1628, 1882 (2016). Again, it is preparation of an EIS under NEPA as well as a biological opinion under the ESA that provides the informed analysis enabling determination of whether contract terms and conditions would cause additional adverse effects and whether alternatives could avoid those effects.

The savings language in the WIIN Act and the CVPIA thereby establish that environmental review under NEPA is required before the contracts can be lawfully converted.

4. Reclamation's Failure to Perform Any NEPA Analysis Forecloses Consideration of Environmental Impacts and Alternatives.

Permanently locking in export quantities in the absence of any NEPA analysis whatsoever, in the face of ever worsening environmental conditions caused largely by climate change, is an astonishing failure to proceed in a manner consistent with common sense as well as in the manner required by law.

As a result of avoiding any NEPA process, there has been no analysis of environmental impacts of the terms and conditions of the contracts. That includes the impacts of increasing demand for CVP water diversions as results of relief from acreage limitations and full cost pricing. (**SUF 29**); WIIN Act, Pub.L. No. 114-322 § 4011(c)(1), 130 Stat. at 187880. *See* Dkt. No. 23 at 10 (Order Granting Motion to Compel Joinder).

Achieving the aims of NEPA requires consideration not only of possible impacts, based on the major federal action as proposed, but also of feasible alternatives. An EIS will have to include discussion of "[p]ossible conflicts between the proposed action and the objectives of federal, regional, state, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned." 40 C.F.R. § 1502.16(a)(5). The declared policy of the State of California is "to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in regional supplies, conservation, and water use efficiency … ." Delta Reform Act, Cal. Water Code § 85021. Another critically important policy established by California's Delta Reform Act, is the policy to, "[r]estore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem." Cal. Water Code § 85020(c).

NEPA expressly requires an EIS to include "alternatives to the proposed action." 42 U.S.C. § 4332(C)(iii). Moreover, NEPA expressly requires Federal agencies to, "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E). The NEPA Regulations require the alternatives section of an EIS to present environmental impacts and alternatives "in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public." 40

C.F.R. § 1502.14. The alternatives section "should present the environmental impacts of the proposed action and the alternatives in comparative form," based on the information and analysis presented in the sections on the affected environment (40 C.F.R. § 1502.15) and the environmental consequences (40 C.F.R. § 1502.16). *Id.*

The Ninth Circuit Court of Appeals accordingly reversed a district court's denial of summary judgment to environmental plaintiffs where Reclamation had failed to sufficiently analyze alternatives. *Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Dep't of the Interior*, 655 Fed.Appx. 595 (9th Cir., No. 14-15514, July 25, 2016) (not selected for publication). The challenged environmental document in *Pacific Coast*, issued by Reclamation under NEPA for eight interim CVP contracts, included Westlands Water District's interim contract for two-year interim contract renewals. *Id.* This document, and the analysis it reflected, "did not give full and meaningful consideration to the alternative of a reduction in maximum water quantities." *Id.* "Reclamation's decision not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities was an abuse of discretion and the agency did not adequately explain why it eliminated this alternative from detailed study." *Id.* at 599. Reclamation's "reasoning in large part reflects a policy decision to promote the economic security of agricultural users, rather than an explanation of why reducing maximum contract quantities was so infeasible as to preclude study of its environmental impacts." *Id.* at 600.

The Ninth Circuit's unpublished decision is consistent with *California v. Block,* 690 F.2d 753, 765-769 (9th Cir. 1982), where the project at issue involved allocating to wilderness, non-wilderness or future planning, remaining roadless areas in national forests throughout the United States. Like the situation here where a trade-off is involved between water exports and Delta restoration, the Forest Service program involved "a trade-off between wilderness use and development. This trade-off, however, cannot be intelligently made without examining whether it can be softened or eliminated by increasing resource extraction and use from already developed areas." 690 F.2d at 767. Here, likewise, trade-offs cannot be intelligently analyzed without examining whether the impacts of alternatives reducing exports can be softened or

eliminated by increasing water conservation and recycling, and eventually retiring drainage-impaired agricultural lands in the areas of the exporters from production. *Accord, Oregon Natural Desert Assn. v. Bureau of Land Management*, 625 F.3d 1092, 1122-1124 (9th Cir. 2010) (uncritical alternatives analysis in EIS privileging one form of use over another violated NEPA).

By ignoring the requirements to carry out the NEPA process before converting the contracts, Reclamation has evaded the requirement to consider alternatives to the terms and conditions of the contracts. This case involves dozens of permanent contracts with no end date. The requisite NEPA alternatives analysis would facilitate meaningful consideration of the trade-offs between water deliveries and environmental harm. It would examine opportunities to reduce deliveries over time due to future developments, such as agricultural lands becoming drainage-impaired, and innovations in technology, such as conservation, water recycling, and drip irrigation. One obvious alternative would be to limit the term of contract quantities and require periodic reevaluation to reduce quantities over time, considering worsening conditions caused by climate change as well as reduction in needs for exports thanks to continued innovation. Other alternatives include retiring drainage-impaired lands and basing contractual water quantities on real water availability and the impacts of providing this water, instead of basing contractual quantities on "paper water" that does not reflect the true amount of water that is physically available.

B. RECLAMATION VIOLATED THE ESA BY CONVERTING THE CONTRACTS WITHOUT CONSULTING WITH THE FWS OR NMFS AND WITHOUT PREPARING A BIOLOGICAL ASSESSMENT.

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The ESA provides a means to conserve endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The ESA defines an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). The listing of a species by the Secretary of the Interior or Commerce as

"endangered" or "threatened" pursuant to ESA Section 4 enables the species to receive the full protections of the ESA. *Id.* § 1533.

Section 7(a)(1) of the ESA provides an affirmative duty for federal agencies to conserve listed species. The agencies "shall utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species … ." *Id.* § 15369(a)(1). As Reclamation's contract conversions affect listed species and critical habitats and exhibit negotiating discretion, Reclamation must comply with the ESA.

1. Reclamation's Actions Necessitate ESA Compliance Because They Affect Listed Species and Their Critical Habitats.

The statutory language of the ESA confirms its broad applicability to federal actions. Section 7(a)(2) of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species … determined … to be critical … ." 16 U.S.C. §1536(a)(2). Section 7 consultation is required for "any action of [that] may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Agency "action" is defined in the ESA's implementing regulations to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.02. The extension of a contract fits comfortably within this definition. *See Nat. Res. Def. Council v. Houston*, 146 F.3d at 1125 (confirming that the ESA applied to renewals of water service contracts, which constituted "agency action"). Even where an agency action previously has been analyzed, the duty to consult under the ESA is broad, requiring new consultation if information reveals that the action may affect listed species or critical habitat in a manner not previously considered. *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075, 1086 (9th Cir. 2015).

Given the potentially irreversible impact of agency actions on threatened species or habitats, the ESA emphasizes the importance of conducting appropriate analysis *before* completing the major act(s) in question. Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates consultation on an action under the ESA, the agency "shall

not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." The purpose of Section 7(d) is to maintain the status quo pending the completion of interagency consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until a federal agency has satisfied its obligation under Section 7(a)(2) that the action will not result in jeopardy to the species or destruction or adverse modification of its critical habitat. 50 C.F.R. § 402.09; *see All. for Wild Rockies v. Marten*, 253 F. Supp. 3d 1108, 1113 (D. Mont. 2017) (granting preliminary injunction against U.S. Forest Service approval of a logging project pending satisfaction of requirements under Section 7(a)(2)).

Reclamation admits diversions and other activities for the CVP contracts have adverse impacts. (**SUF 21, 22, 23**.) Aquatic species listed under the ESA that may be affected by the conversions of the contracts to permanent contracts include endangered Sacramento River winter-run Chinook salmon, and threatened Central Valley spring-run Chinook salmon, Central Valley steelhead, green sturgeon, and Delta smelt. (**SUF 24**.) These species also occupy designated critical habitats that may be destroyed or adversely modified by the contract conversions. (**SUF 24**.) The California State Water Resources Control Board explained to Reclamation in another process in 2019 that "fish and wildlife species are already in poor condition, some of which are on the verge of functional extinction or extirpation" and the body of scientific evidence shows "increased freshwater flows through the Delta and aquatic habitat restoration are needed to protect Bay-Delta ecosystem processes and native and migratory fish." (**SUF 20**.) Furthermore, modifying the duration of water delivery contract quantities into perpetuity while failing to consider the effects of climate change or population shifts on water resources constitutes an agency action that may jeopardize both listed species and critical habitats.

2. Reclamation's Contract Conversion Terms and Conditions are Discretionary, Requiring Compliance with the ESA.

As under NEPA, Reclamation also retains discretion under the ESA: the contract conversions are required to be completed according to "mutually agreeable terms and conditions

… .” Reclamation has violated and is violating the ESA because it has converted, and is continuing to convert, the CVP contracts without complying with the ESA at all. Reclamation neither initiated nor completed the required consultation with the U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS). (**SUF 10**); 50 C.F.R. § 402.01. Nor did Reclamation prepare a Biological Assessment under the ESA on the contract conversions. (**SUF 11**).

Ninth Circuit precedent shows that the threshold for finding that an agency retains sufficient discretion may be even lower under the ESA than under NEPA. In *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969 (9th Cir. 2003), the Ninth Circuit held that the ESA’s consultation requirements were triggered because the High Seas Fishing Compliance Act gave NMFS ample discretion to protect species listed as endangered or threatened. The court cited both the statute’s plain language, granting the agency discretion to impose conditions on permits as “necessary and appropriate,” and the legislative intent to promote compliance with “international conservation measures.” *Id.* at 976. The situation at hand is no different. Reclamation has ample discretion to protect listed species in determining the terms and conditions of their contract conversions.

Further, the Ninth Circuit has specifically held that ESA consultation is required for CVP contract renewals if Reclamation has “some discretion” or “any discretion” to take action for the benefit of a protected species. *Natural Resources Defense Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014) (en banc), *cert. denied,* 547 U.S. 1011 (2014).

In *Natural Resources Defense Council v. Houston*, the Ninth Circuit held that statutory language, *virtually identical to that at issue here*, gave Reclamation sufficient discretion to trigger application of the ESA. 146 F.3d 1118, 1123-1126 (9th Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999). The court explained, “in 1956, Congress mandated that contract holders had a right to renewal ‘under stated terms and conditions mutually agreeable to the parties.’” 146 F.3d at 1123 citing 43 U.S.C. § 485h-1(1). This “mutually agreeable” language was sufficient to confer discretion on the agency. The court held that, in the absence of ESA compliance, “all of these [CVP] contracts were subject to rescission.” *Id.* at 1127. Reclamation therefore has violated and

is continuing to violate the ESA by converting the CVP contracts without fulfilling ESA procedural requirements.

3. The Savings Language in the WIIN Act also Mandates ESA Compliance Before Converting the Contracts.

The WIIN Act savings language expressly provides that it "shall not be interpreted or implemented in a manner that … overrides, modifies, or amends the applicability of the Endangered Species Act of 1973 … to the operation of the Central Valley Project." Pub. L. 114-322, § 4012(a)(3), 130 Stat. 1628, 1882. This language cannot be any clearer; the contract conversions must comply with the ESA. This Court has determined, "[h]owever, nothing in the WIIN Act modifies (or even bends) any of Federal Defendants' obligations under the ESA." *California Natural Resources Agency v. Ross,* 2020 WL 2404853 at *20 (E.D. Cal., May 11, 2020, No. 1:20-CV-00426 and 00431.

Moreover, even if the WIIN Act savings language did not exist, repeals by implication are not favored. *Tennessee Valley Authority v. Hill*, 437 U.S. at 189-90. Reclamation must comply with the ESA before converting the CVP contracts. Given the clarity of the Act's language, Reclamation cannot credibly argue that the WIIN Act allows it to permanently lock in the way water moves through the state of California without considering the impacts of such a decision on endangered and threatened species and their critical habitat.

IV. CONCLUSION

Based on the foregoing, summary judgment should be granted in favor of Plaintiffs, confirming that Reclamation's conversions of the CVP contracts violated NEPA and that the continuing conversions violate NEPA. Reclamation's CVP contract conversions likewise violated and continue to violate the ESA. Plaintiffs respectfully request that the Court grant the declaratory and injunctive relief requested, including rescission of the contracts that have already been converted.

Respectfully submitted,

DATED: August 17, 2021

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DATED: August 17, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I electronically filed PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT; STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; DECLARATION OF E. ROBERT WRIGHT IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; DECLARATION OF RON STORK IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; DECLARATION OF HOWARD PENN IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; and the DECLARATION OF ROGER MAMMON IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT with the Clerk of Court using the ECF system, such that email notification will automatically be sent to the attorneys of record.

/s/ John Buse
John Buse