

# CALIFORNIA RUSHES IN – KEEPING WATER INSTREAM FOR FISHERIES WITHOUT FEDERAL LAW

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## I. INTRODUCTION

Many of California’s anadromous and freshwater fisheries are now in sharp decline.<sup>1</sup> Salmon and steelhead trout runs throughout the state, as well as the delta smelt, are currently designated as endangered under federal law.<sup>2</sup>

In addition to the biodiversity loss associated with the decline of these fisheries, the collapse of California’s salmon stocks has had severe economic impacts on the state’s commercial fishery sector – from the fishermen who catch the salmon, to those who service salmon fishing boats, to those who ultimately sell salmon to customers in markets and restaurants.<sup>3</sup> All of these people whose jobs and

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<sup>1</sup> *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014); *Natural Resources Defense Council v. Kempthorne*, 506 F.Supp.2d 322 (E.D. Ca. 2007); *Pacific Coast Federation of Fishermen’s Associations v. Guitierrez*, 606 F. Supp.2d 1122 (E.D. Cal. 2008).

<sup>2</sup> *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014); *Natural Resources Defense Council v. Kempthorne*, 506 F.Supp.2d 322 (E.D. Ca. 2007); *Pacific Coast Federation of Fishermen’s Associations v. Guitierrez*, 606 F. Supp.2d 1122 (E.D. Cal. 2008).

<sup>3</sup> Remarks of Mike Hudson of Hudson Fish Company at the January 2017 California Water Law Symposium at University of San Francisco School of Law (notes on file with author).

livelihoods are involved in California's fishing sector have taken a financial hit as the state's salmon stocks have plummeted.<sup>4</sup> As explained by the Golden Gate Salmon Association, an organization that works on behalf of commercial salmon fishermen in Northern California, "For many of us, salmon provides the income we use to keep a roof over our family's head."<sup>5</sup>

In recent decades, commercial fishermen, Native American tribes, and other fishery conservation stakeholders have relied extensively on a set of federal laws and federal agencies to keep water instream for California fisheries.<sup>6</sup> However, following the results of the November 2016 federal election, with a Republican-controlled Congress and a new President that has pledged to reduce the scope of federal environmental protections, it is foreseeable that these federal laws and federal agencies may play a more limited role in this regard in the near-term.<sup>7</sup> Under these circumstances, commercial fishermen and other stakeholders focused on conserving California's fisheries may increasingly turning their attention to state law and state agencies.<sup>8</sup>

This shift in focus for fishery stakeholders in California, from the federal law to state law protections, may have been prompted by the November 2016 election but is part of a broader and more long-standing debate about the constitutional parameters and policy implications of federalism for nature resource regulation. There is a well-developed body of legal scholarship that address such federalism questions as the distinction between federal law floors and federal law ceiling in the natural resource regulatory arena, the ways that federal law floors can prevent a race-to-the-bottom in terms of state natural resource standards, and the ways that federal law floors can preserve a place for state law innovation in terms of natural resource management.<sup>9</sup> More recently, with the election of Donald

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<sup>4</sup> Remarks of Mike Hudson of Hudson Fish Company at the January 2017 California Water Law Symposium at University of San Francisco School of Law (notes on file with author).

<sup>5</sup> Golden Gate Salmon Association, *Why We Work for Salmon?*, <http://www.goldengatesalmon.org/why-we-work-for-salmon>.

<sup>6</sup> See text accompanying footnotes *infra* 22-76, discussing federal statutes and case law relied up to keep water instream for fisheries.

<sup>7</sup> Presentations of Rachel Zwillinger (Attorney for Defenders of Wildlife) and Cliff Lee (Attorney with Natural Resource Section of California Attorney General's Office) at April 13, 2017 Bar Association of San Francisco panel on *Coming Changes in Water Law Practice: California Law Advances as Federal Law Recedes*.

<sup>8</sup> Presentations of Rachel Zwillinger (Attorney for Defenders of Wildlife) and Cliff Lee (Attorney with Natural Resource Section of California Attorney General's Office) at April 13, 2017 Bar Association of San Francisco panel on *Coming Changes in Water Law Practice: California Law Advances as Federal Law Recedes*.

<sup>9</sup> William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption and the Floor/Ceiling Distinction*, Emory University School of Law Public Law & Legal Theory Research Paper Series (Research Paper No. 07-9, 2007); Jerome Organ,

Trump, there has been legal scholarship and policy debate about what has been called the “new progressive federalism” and the opportunities to use sources of state law and constitutional restraints on the scope of federal law to advance policies often associated with the political left.<sup>10</sup> Although this article posits that preventing the decline of fisheries (particularly commercial fisheries such as salmon) is an economic policy objective that cuts across traditional right/left political categories, the fisheries conservation and federalism questions considered in this article can be understood as part of the larger field of legal scholarship on the respective roles of state law and federal law when natural resources are involved.

This article examines the ways that federal law and federal agencies currently provide a legal basis to keep water instream for California fisheries, and the ways that California water law may be in a position to fill the regulatory gap that may be left if federal water law and federal agencies recede.

Following the introduction, Section Two of the article identifies the different ways that instream flow affects California fisheries. Section Three then surveys federal laws and federal agencies that have traditionally supported efforts to keep water instream for California fisheries. In Section Four, the article presents examples of how the scope of federal laws affecting instream flow may be reduced by the administration of Donald Trump and the new Congress, and discusses the California laws and California agencies that may be increasingly relied upon to secure instream flows for California fisheries in the event this reduced scope of federal law occurs. Using H.R. 23 (otherwise known as the Gaining Responsibility on Water Act of 2017)<sup>11</sup> as a focal point, Section Five then assesses proposed Congressional legislation to limit the application of California water law, the response of the California Attorney General to this proposed legislation<sup>12</sup>, and a July 2017 California Supreme Court decision<sup>13</sup> that may shed light on whether this proposed legislation, if enacted, is likely to survive a legal

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*Limitation on State Agency Authority to Adopt Environmental Standards More Stringent than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MARYLAND L. REVIEW 1373 (1995); Kristen H. Engel, *Harnessing the Benefits of Dynamics Federalism in Environmental Law*, 56 EMORY L. J. 159 (2006).

<sup>10</sup> Heather Gerken, *A New Progressive Federalism*, 24 DEMOCRACY JOURNAL 37 (2012); Heather Gerken, *Slipping the Bonds of Federalism*, 128 HARVARD LAW REVIEW 85 (2014); Heather Gerken and Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICHIGAN LAW REVIEW 57 (2014).

<sup>11</sup> H.R. 23, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (introduced into the United States House of Representatives on January 3, 2017).

<sup>12</sup> Letter from California Attorney General Xavier Becerra to House Speaker Paul Ryan and House Minority Leader Nancy Pelosi (July 11, 2017).

<sup>13</sup> July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472).

challenge. Section Six then notes how the federalism issues raised by H.R. 23 and the potential roles for California law to maintain instream flow for fisheries relate to the existing legal scholarship distinguishing federal ceilings and federal floors in the natural resource field, and to proposals for a new progressive federalism in response to the November 2016 election results.

Although the main focus of this article is on California fisheries, California water law and California water agencies, much of the analysis set forth may also be pertinent to other states considering their options for keeping water instream under the new President and new Congress. By studying California's response, other states may be able to develop their own strategies for effectively deploying state law and state agencies to maintain instream flow for fisheries regardless of what happens at the federal level in the coming years.

## **II. WAYS THAT INSTREAM FLOW AFFECTS CALIFORNIA FISHERIES**

There are multiple causes of anadromous and freshwater fisheries decline in California but the best available science confirms that reductions in instream flow is a critical driver.<sup>14</sup> There may be other non-flow improvements that might also benefit certain fisheries – such as reduced water pollution or reduced logging near salmon stream habitat – but the best available science indicates that without increased instream flow such non-flow improvements will do little to reverse the fisheries decline.<sup>15</sup>

In terms of maintaining healthy and biologically viable fish stocks in California, the scientific consensus therefore is that there is no go without the flow. The primary reasons are salinity, water temperature and slack-water conditions. To place these points in a more concrete geographic setting, and make them less abstract, we can consider how these factors operate in California's Bay Delta. The Bay Delta is where seawater pushing in from the Pacific Ocean and San Francisco Bay mixes with freshwater coming down from the Sacramento River and San Joaquin River.<sup>16</sup>

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<sup>14</sup> July 15, 2014 Comment Letter from Golden Gate University Center on Urban Environmental Law (CUEL) on December 2013 Draft EIR/EIS for Proposed Bay Delta Conservation Plan (BDCP).

<sup>15</sup> July 15, 2014 Comment Letter from Golden Gate University Center on Urban Environmental Law (CUEL) on December 2013 Draft EIR/EIS for Proposed Bay Delta Conservation Plan (BDCP).

<sup>16</sup> Paul Stanton Kibel, *The Public Trust Navigates California's Bay Delta*, 51 NATURAL RESOURCES JOURNAL 35 (2011).

In terms of salinity, Bay Delta fisheries such as delta smelt have evolved to survive in brackish waters but not in waters with high salinity levels.<sup>17</sup> With the reduction in freshwater flow due to upstream diversions and impoundment behind dams, ocean saltwater has pushed further into the Bay Delta.<sup>18</sup> The delta smelt now faces the prospect of extinction as result of rising salinity caused by seawater intrusion.<sup>19</sup>

In terms of temperature, Bay Delta coldwater fisheries such as salmon and steelhead trout cannot survive in waters above 60 degrees Fahrenheit and their numbers and health decline severely as water temperatures climb into the upper 50s.<sup>20</sup> In 2014 and 2015 during the recent California drought, it is estimated that a high percentage of juvenile salmon and steelhead trout died in the Sacramento River below Shasta Dam, operated by the United States Bureau of Reclamation.<sup>21</sup> The scientific consensus is that the cause of this salmon die-off below Shasta Dam was high instream instream temperatures.<sup>22</sup> What accounted for these higher instream temperatures? Reduced coldwater releases from Shasta Dam due to increased water demand during the drought.<sup>23</sup>

In terms of slack-water conditions, low-flow stagnant rivers provide conditions for the spread of algae and aquatic parasites that can kill fish.<sup>24</sup> For example, looking beyond the Bay Delta, on the Klamath River in northern California, low flows and stagnant instream waters during the summer (due to upstream diversions) led to an outbreak of the Ich parasite that decimated lower Klamath River salmon stocks.<sup>25</sup>

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<sup>17</sup> *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014); Paul Stanton Kibel, *Sea Level Rise, Saltwater Intrusion and Endangered Fisheries – Shifting Baselines for the Bay Delta Conservation Plan*, 38 ENVIRONS ENVIRONMENTAL LAW & POLICY JOURNAL 259, 263-265 (2015).

<sup>18</sup> *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014); Paul Stanton Kibel, *Sea Level Rise, Saltwater Intrusion and Endangered Fisheries – Shifting Baselines for the Bay Delta Conservation Plan*, 38 ENVIRONS ENVIRONMENTAL LAW & POLICY JOURNAL 259, 263-265 (2015).

<sup>19</sup> *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014); Paul Stanton Kibel, *Sea Level Rise, Saltwater Intrusion and Endangered Fisheries – Shifting Baselines for the Bay Delta Conservation Plan*, 38 ENVIRONS ENVIRONMENTAL LAW & POLICY JOURNAL 259, 263-265 (2015).

<sup>20</sup> Trout Unlimited, *HEALING TROUBLED WATERS: PREPARING TROUT AND SALMON HABITAT FOR A CHANGING CLIMATE 3* (2007).

<sup>21</sup> Bettina Boxall, *The Drought's Hidden Victim: California Native Fish*, LOS ANGELES TIMES (August 24, 2015).

<sup>22</sup> Bettina Boxall, *The Drought's Hidden Victim: California Native Fish*, LOS ANGELES TIMES (August 24, 2015).

<sup>23</sup> Bettina Boxall, *The Drought's Hidden Victim: California Native Fish*, LOS ANGELES TIMES (August 24, 2015).

<sup>24</sup> United States Bureau of Reclamation, *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* (April 2015).

<sup>25</sup> United States Bureau of Reclamation, *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* (April 2015).

### **III. FEDERAL LAW AND FEDERAL AGENCIES AFFECTING INSTREAM WATER FOR CALIFORNIA FISHERIES**

There are at least six sources of federal law that have traditionally provided a legal foundation to maintain instream flow for fisheries in California: the federal Clean Water Act<sup>26</sup>; federal Endangered Species Act<sup>27</sup>; federally-recognized tribal fishing rights<sup>28</sup>; the National Environmental Policy Act<sup>29</sup>; the Federal Power Act<sup>30</sup>; and the federal Wild and Scenic Rivers Act.<sup>31</sup> The pertinent provisions of these federal laws, and their effects on California fisheries, are discussed below.

#### **A. FEDERAL CLEAN WATER ACT § 303 – EPA REVIEW OF STATE WATER QUALITY STANDARDS**

Under §303 of the federal Clean Water Act, states have authority to propose “beneficial uses” for waterways and propose “water quality standards” subject to review and approval by the United States Environmental Protection Agency.<sup>32</sup>

Pursuant to §303, California’s State Water Resources Control Board has designated the “beneficial uses” for the Sacramento River, the San Joaquin River and the Bay Delta to include fish spawning, rearing and migration.<sup>33</sup> In recent years, the United States Environmental Protection Agency has pressed for enhanced compliance with California’s water quality standards, particularly as they relate to fisheries present in or that migrate through the Sacramento River, the San Joaquin River and the Bay Delta.<sup>34</sup>

More specifically, in 2014 United States Environmental Protection Agency sent a letter to its sister federal agency the United States Bureau of Reclamation commenting on a Reclamation proposal for

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<sup>26</sup> 33 U.S.C. §§ 1251-1388 (2012).

<sup>27</sup> 16 U.S.C. §§ 1531-1544 (2012).

<sup>28</sup> *Parravano v. Babbitt*, 70 F.3d 59 (9<sup>th</sup> Circ. 1995).

<sup>29</sup> 42 U.S.C. §§ 4321-4347 (2012).

<sup>30</sup> 16 U.S.C. §§791-793, 796-825 (2012).

<sup>31</sup> Clean Water Act Section 303.

<sup>32</sup> Clean Water Act Section 303.

<sup>33</sup> Dan Bacher, *Tunnel Opponents Applaud EPA’s Scathing Comment Letter*, DAILY KOS (August 30, 2014).

<https://www.dailykos.com/stories/2014/08/30/1325955/-Tunnel-opponents-applaud-EPA-s-scathing-comment-letter>.

<sup>34</sup> Dan Bacher, *Tunnel Opponents Applaud EPA’s Scathing Comment Letter*, DAILY KOS (August 30, 2014).

<https://www.dailykos.com/stories/2014/08/30/1325955/-Tunnel-opponents-applaud-EPA-s-scathing-comment-letter>.

changed operations for the Central Valley Project in California.<sup>35</sup> The United States Environmental Protection Agency's 2014 letter on the proposal for future Central Valley Project operations stated:

We are concerned that the actions proposed...may result in violations of the Clean Water Act water quality standards and further degrade the ecosystem... The primary premise of the [proposed action by United States Bureau of Reclamation] appears to be hypothesis that endangered and threatened fish population in the San Francisco estuary can be protected from further degradation by 'habitat restoration' without increasing freshwater flow to the Estuary. This habitat restoration-only premise is inconsistent with broad scientific agreement...that existing freshwater flow conditions in the San Francisco Estuary are insufficient to protect the aquatic ecosystem and multiple fish species, and that both increased freshwater flows and aquatic habitat restoration are needed to restore ecosystem processes in the Bay Delta and protect native and migratory fish populations.<sup>36</sup>

In response to issues raised in the 2014 United States Environmental Protection Agency letter regarding compliance with Clean Water Act §303, California's State Water Resources Control Board is now preparing an update to the Bay Delta Water Quality Plan.<sup>37</sup> As part of its update to the Bay Delta Water Quality Plan, in September 2016 California's State Water Resources Control Board proposed base instream flows for the three main tributaries to San Joaquin River – the Stanislaus, The Tuolumne and the Merced Rivers.<sup>38</sup> The proposed base flows for the San Joaquin River tributaries are designed to protect salmon by reducing the days when and locations where instream temperatures exceed 60 degrees Fahrenheit.<sup>39</sup>

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<sup>35</sup> Dan Bacher, *Tunnel Opponents Applaud EPA's Scathing Comment Letter*, DAILY KOS (August 30, 2014). <https://www.dailykos.com/stories/2014/08/30/1325955/-Tunnel-opponents-applaud-EPA-s-scathing-comment-letter>.

<sup>36</sup> Dan Bacher, *Tunnel Opponents Applaud EPA's Scathing Comment Letter*, DAILY KOS (August 30, 2014). <https://www.dailykos.com/stories/2014/08/30/1325955/-Tunnel-opponents-applaud-EPA-s-scathing-comment-letter>.

<sup>37</sup> Paul Stanton Kibel, *Truly a Watershed Event: California's Water Board Proposes Base Flows for the San Joaquin River Tributaries*, California Water Law Journal (October 2016).

<sup>38</sup> Paul Stanton Kibel, *Truly a Watershed Event: California's Water Board Proposes Base Flows for the San Joaquin River Tributaries*, California Water Law Journal (October 2016).

<sup>39</sup> Paul Stanton Kibel, *Truly a Watershed Event: California's Water Board Proposes Base Flows for the San Joaquin River Tributaries*, California Water Law Journal (October 2016).

## **B. ENDANGERED SPECIES ACT §7 –BIOLOGICAL OPINIONS FOR SALMON AND DELTA SMELT**

The United States Bureau of Reclamation operates the Central Valley Project and the California Department of Water Resources operates the State Water Project.<sup>40</sup> Both of these projects involve the operation of water diversion facilities and on-stream storage dams in the Sacramento River and San Joaquin River watersheds.<sup>41</sup>

Pursuant to §7 of the federal Endangered Species Act, in 2008 the United States Fish and Wildlife Service issued its delta smelt Biological Opinion for joint operations plan for the Central Valley Project and State Water Project.<sup>42</sup> Then, in 2009, the National Marine Fisheries Service issued its salmon Biological Opinion for joint operations plan for the Central Valley Project and State Water Project.<sup>43</sup> The 2008 and 2009 Biological Opinions for delta smelt and salmon, respectively, contained “jeopardy determinations” and included instream flow conditions to maintain salinity (for delta smelt) and water temperature (for salmon).<sup>44</sup>

Agricultural water users filed suit to challenge the instream flow/salinity provisions in the delta smelt Biological Opinion.<sup>45</sup> In 2014, this litigation concluded when the Ninth Circuit Court of Appeals upheld instream flow/salinity conditions in 2008 delta smelt Biological Opinion.<sup>46</sup> In *San Luis & Delta-Mendota Water Authority v. Jewell*, the Ninth Circuit held:

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<sup>40</sup>See generally *Coordinated Long-Term Operations of the Central Valley Project and State Water Project* (August 2011), Project Description, pp. 1-108.

<sup>41</sup> See generally *Coordinated Long-Term Operations of the Central Valley Project and State Water Project* (August 2011), Project Description, pp. 1-108.

<sup>42</sup> United States Fish and Wildlife Service, *FORMAT ENDANGERED SPECIES ACT CONSULTATION ON THE COORDINATED OPERATIONS OF THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT* (December 15, 2008), [http://www.fws.gov/sfbaydelta/documents/SWP-CVP\\_OPs\\_BO\\_12-15\\_final\\_signed.pdf](http://www.fws.gov/sfbaydelta/documents/SWP-CVP_OPs_BO_12-15_final_signed.pdf).

<sup>43</sup> National Marine Fisheries Service, *ESA BIOLOGICAL OPINION ON LONG-TERM OPERATIONS OF THE CENTRAL VALLEY PROJECT AND THE STATE WATER PROJECT* (June 4, 2009). [http://www.westcoast.fisheries.noaa.gov/publications/Central\\_Valley/Water%20Operations/Operations,%20Criteria%20and%20Plan/nmfs\\_biological\\_and\\_conference\\_opinion\\_on\\_the\\_long-term\\_operations\\_of\\_the\\_cvp\\_and\\_swp.pdf](http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water%20Operations/Operations,%20Criteria%20and%20Plan/nmfs_biological_and_conference_opinion_on_the_long-term_operations_of_the_cvp_and_swp.pdf)

<sup>44</sup> United States Fish and Wildlife Service, *FORMAT ENDANGERED SPECIES ACT CONSULTATION ON THE COORDINATED OPERATIONS OF THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT* (December 15, 2008), [http://www.fws.gov/sfbaydelta/documents/SWP-CVP\\_OPs\\_BO\\_12-15\\_final\\_signed.pdf](http://www.fws.gov/sfbaydelta/documents/SWP-CVP_OPs_BO_12-15_final_signed.pdf).

<sup>45</sup> *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014).

<sup>46</sup> *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014).



[A]s the combined pumping operations of the SWP [State Water Project]/CVP [Central Valley Project] remove hundreds of gallons of fresh water from the Bay Delta, X2 [the upper salinity level at which smelt can survive]...shifts eastward toward the Delta. The Bi-Op determined that the ‘long-term upstream shift in X2...has caused a long-term decrease in habitat area availability for the delta smelt.’<sup>47</sup>

In January 2015, the United States Supreme Court denied cert to review the Ninth Circuit Court of Appeal’s decision in *San Luis & Delta-Mendota Water Authority v. Jewell*.<sup>48</sup>

### **C. FEDERAL TRIBAL FISHING RIGHTS – FLOWS TO MAINTAIN SALMON**

The Trinity River is tributary to the Klamath River, and Lewiston and Trinity Dams on the Trinity River are part of the Trinity River Division of the federal Central Valley Project.<sup>49</sup> The water stored in the reservoirs behinds Lewiston and Trinity Dams is diverted by pipeline out of the Klamath-Trinity watershed, where it is deposited into the Sacramento River for use by cities and famers.<sup>50</sup> As mentioned earlier, in past years, slack water conditions on the lower Klamath River previously led to outbreak of Ich parasite that decimated salmon runs.<sup>51</sup> These slack water conditions were caused, in part, by minimal releases from Lewiston and Trinity Dams.<sup>52</sup>

The reservations of the Hoopa and Yurok Tribes are located along the Trinity River and Klamath River.<sup>53</sup> In its 1995 decision in *Parravano v. Babbitt*, the Ninth Circuit Court of Appeals recognized the Hoopa and Yurok’s tribes’ fishery rights under federal law to salmon on Trinity and Klamath Rivers.<sup>54</sup> In this case, the federal government, acting as trustee for the tribes, imposed restrictions on the ocean

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<sup>47</sup> *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 622 (9th Cir. 2014).

<sup>48</sup> *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014), cert denied sub nom, 135 S.Ct 948 (January 12, 2015)

<sup>49</sup> United States Bureau of Reclamation, *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* (April 2015).

<sup>50</sup> United States Bureau of Reclamation, *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* (April 2015).

<sup>51</sup> United States Bureau of Reclamation, *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* (April 2015).

<sup>52</sup> United States Bureau of Reclamation, *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* (April 2015).

<sup>53</sup> 70 F.3d 59 (9<sup>th</sup> Circ. 1995).

<sup>54</sup> 70 F.3d 59 (9<sup>th</sup> Circ. 1995).

catch of salmon to ensure enough fish returned to the areas along the reservation.<sup>55</sup> The court in *Parravano* upheld these ocean fishing restrictions, finding:

For generations, the Hoopa Valley and Yurok Indian tribes have depended on the Klamath chinook salmon for their nourishment and economic livelihood.<sup>56</sup>

...

We have noted, with great frequency, that the federal government is the trustee of the Indian tribes' rights, including fishing rights. See e.g. *Joint Board of Control v. United States*, 862 F.2d 195, 198 (9<sup>th</sup> Cir. 1988). This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole. *Eberhardt*, 789 F. 2d at 1363 (Beezer, J. concurring); see also *Pyramid Lake Paiute Tribe v. United States Department of Navy*, 98 F.2d 1410 (9<sup>th</sup> Circ. 1990); *Covelo Indian Community v. FERC*, 895 F. 2d 581, 586 (9<sup>th</sup> Circ. 1990). In particular, this court and the Interior Department have recognized a trust obligation to protect the Yurok and Hoopa Valley Tribes' rights to harvest Klamath chinook. See *Eberhardt*, 789 F. 2d at 1359-63; Interior Solicitor's Opinion, at 29.<sup>57</sup>

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The Klamath chinook is an anadromous species. As a result, successful preservation of the Tribes' on-reservation fishing rights must include regulation of ocean fishing of the same resource. Indeed, allowing ocean fishing to take all the chinook available for harvest before the salmon can migrate upstream to the Tribes' waters would offer no protection to the Indians' fishing rights.<sup>58</sup>

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<sup>55</sup> 70 F.3d 59 (9<sup>th</sup> Circ. 1995).

<sup>56</sup> 70 F.3d 59 (9<sup>th</sup> Circ. 1995).

<sup>57</sup> 70 F.3d 59 (9<sup>th</sup> Circ. 1995).

<sup>58</sup> 70 F.3d 59 (9<sup>th</sup> Circ. 1995).

In part to address the Yurok and Hoopa Valley Tribes' fishing rights recognized in the *Parravano* case, in 2015 the United States Bureau of Reclamation released its draft of *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* (and proposed enhanced releases from Lewiston and Trinity Dams to help prevent a re-occurrence of the Ich parasite breakout that earlier damaged salmon stocks in the Klamath River basin).<sup>59</sup> The draft plan notes that the current criteria require flow augmentation [additional releases from dams operated by the United States Bureau of Reclamation] in the lower Klamath River “to a minimum of 2,500-2,800 cfs [cubic feet per second] when the cumulative harvest of Chinook salmon in the Yurok Tribal fishery in the estuary areas meets or exceeds a total of 7,000 fish<sup>60</sup>, and then recommended increasing flow augmentation to a “minimum of 2,800 cfs” under these same circumstances.<sup>61</sup>

Much like the ocean fishing restrictions that were the subject of the *Parravano* decision, the *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* is based on the position that to meet its trustee obligations to the Yurok and Hoopa Valley Tribes the federal government must take appropriate actions to ensure a healthy salmon fishery in tribal waters. More specifically, section 5 of the 2015 draft *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* on “Statutory Authority” states that Reclamation’s actions pursuant to the plan are “consistent with Reclamation’s obligations to preserve tribal trust resources.”<sup>62</sup>

#### **D. NEPA – EVALUATION OF INCREASED FLOW ALTERNATIVES IN ENVIRONMENTAL IMPACT STATEMENTS**

The National Environmental Policy Act (“NEPA”) requires environmental impact statements (“EISs”) prepared by federal agencies to evaluate a range of alternatives to avoid significant adverse impacts.<sup>63</sup> More specifically, §4332(2)(E) of NEPA provides that the range of alternatives evaluated in an EIS

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<sup>59</sup> United States Bureau of Reclamation, *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* (April 2015).

<sup>60</sup> United States Bureau of Reclamation, *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* (April 2015), p. 17

<sup>61</sup> United States Bureau of Reclamation, *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* (April 2015), p. 9.

<sup>62</sup> United States Bureau of Reclamation, *Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River* (April 2015), p. 23.

<sup>63</sup> 42 U.S.C. §4332(2)(E).

needs to address “unresolved conflicts” regarding significant environmental impacts (e.g. conflicts regarding the effects of reduced instream flows on fisheries).<sup>64</sup>

The Fourth Circuit Court of Appeals 2005 decision in *National Audubon Society v. Department of the Navy* is instructive on this question.<sup>65</sup> In this case, the Fourth Circuit reviewed a challenge to a NEPA EIS prepared in connection with a decision to construct an aircraft training facility adjacent to a National Wildlife Refuge.<sup>66</sup> The Court found that the EIS failed to comply with NEPA for, among other reasons, failing to substantively evaluate alternative locations other than one so close to protected wildlife resources:

We note at the outset that the proximity of the proposed [aircraft facility] to the Pocosin Lakes National Wildlife Refuge bears heavily on our inquiry in this case. We cannot divorce this fact from the sufficiency of the agency’s environmental analysis...The Navy’s “hard look” in this case must therefore take particular care to how its actions will affect the unique biological features of this congressionally protected area...The Navy did not meet this burden. The deficiencies in each of the Navy’s analysis would not, on their own, be sufficient to invalidate the EIS. But a review of the various components of the EIS taken together indicates that the Navy did not conduct the “hard look” that NEPA requires.<sup>67</sup>

The California WaterFix is proposed project to move main point of diversion for Central Valley Project and State Water Project to the north delta and to construct two underground tunnels to transport water from new diversion point to farms/cities south of delta.<sup>68</sup> Once new north delta point of diversion and tunnels are operational, California WaterFix does not include provisions to commit to reduced Central Valley Project/State Water Project diversions that would increase instream flow through the

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<sup>64</sup> 42 U.S.C. §4332(2)(E).

<sup>65</sup> 422 F.3d 174 (4<sup>th</sup> Cir. 2005).

<sup>66</sup> 422 F.3d 174, 186 (4<sup>th</sup> Cir. 2005).

<sup>67</sup> 422.F.3d 174, 186-187 (4<sup>th</sup> Cir. 2005).

<sup>68</sup> State Water Resources Control Board, *Fact Sheet for California WaterFix – Water Right Change Petition and Water Quality Certification Process* (updated July 21, 2016).

Bay Delta.<sup>69</sup> Because the California WaterFix will be undertaken in part by the United States Bureau of Reclamation that operates the Central Valley Project, a NEPA EIS is being prepared in connection in the proposed project.<sup>70</sup>

Fishery conservation groups have criticized the proposed California WaterFix, alleging a failure to evaluate an alternative that commits to increase flow/reduce diversions to avoid adverse impacts on salmon and delta smelt.<sup>71</sup> For instance, in a joint September 29, 2015 comment letter to the State Water Resources Control Board on the California Water Fix, Natural Resources Defense Council, Defenders of Wildlife, Pacific Coast Federation of Fishermen’s Association, The Bay Institute, Golden Gate Salmon Association and Friends of the Estuary stated:

[T]he existing flow and water quality standards have proven inadequate to achieve the salmon doubling objective in the existing water quality control plan, and the [State Water Resources Control Board] must ensure that the “appropriate flows” required pursuant to section 85086(b)(2) [of the California Water Code] will be sufficient to achieve this objective of the water quality plan. Alternative 4A in the California WaterFix fundamentally fails to meet...the salmon doubling objective of the existing Bay-Delta Water Quality Plan.<sup>72</sup>

In his August 23, 2016 article, titled *Why California WaterFix is a Path to Extinction for Native Fisheries*, Doug Obegi, attorney for the Natural Resources Defense Council, explained:

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<sup>69</sup> State Water Resources Control Board, *Fact Sheet for California WaterFix – Water Right Change Petition and Water Quality Certification Process* (updated July 21, 2016).

<sup>70</sup> State Water Resources Control Board, *Fact Sheet for California WaterFix – Water Right Change Petition and Water Quality Certification Process* (updated July 21, 2016).

<sup>71</sup> *Preliminary Comments Regarding the Notice, Fat Sheet and Petition for Change in Point of Diversion for the California WaterFix* (September 29, 2015 Letter to State Water Resources Control Board from Natural Resources Defense Council, Defenders of Wildlife, Pacific Coast Federation of Fishermen’s Association, The Bay Institute, Golden Gate Salmon Association, Friends of the Estuary).

<sup>72</sup> *Preliminary Comments Regarding the Notice, Fat Sheet and Petition for Change in Point of Diversion for the California WaterFix* (September 29, 2015 Letter to State Water Resources Control Board from Natural Resources Defense Council, Defenders of Wildlife, Pacific Coast Federation of Fishermen’s Association, The Bay Institute, Golden Gate Salmon Association, Friends of the Estuary).

[O]nce the tunnels are operational, water temperatures below Shasta dam will be so high that they will likely be lethal for endangered winter-run Chinook salmon during the critical spawning and egg incubation season more than 40 percent of the time in August, 50 percent of September and more than 90 percent of October, with the most adverse effects happening in drier years.<sup>73</sup>

...

[I]nstead of helping salmon migrate through the delta, the [ESA] biological assessment estimates that the tunnels are likely to reduce survival of juvenile winter-run salmon as they migrate downstream through the Delta and out to sea. Salmon are already threatened by low survival rates as they migrate through the Delta, yet the assessment shows that survival would worsen with the tunnels.<sup>74</sup>

...

[N]ew scientific data and analysis from state and federal agencies shows that more Delta outflow in the spring and summer is needed to protect the delta smelt. Yet the biological assessment completely ignores this data and the effects of reduced flows on delta smelt.<sup>75</sup>

At this point, with a new Secretary of the Interior in the administration of Donald Trump, it remains to be seen whether or not the United States Bureau of Reclamation will revise the NEPA EIS for the California WaterFix to include an alternative that would reduce diversions and increase instream flow to maintain fisheries.

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<sup>73</sup> Doug Obegi, *Why California WaterFix Is a Path to Extinction for Native Fisheries*, WATER DEEPLY (August 23, 2016). <https://www.newsdeeply.com/water/community/2016/08/23/why-california-water-fix-is-a-path-to-extinction-for-native-fisheries>.

<sup>74</sup> Doug Obegi, *Why California WaterFix Is a Path to Extinction for Native Fisheries*, WATER DEEPLY (August 23, 2016). <https://www.newsdeeply.com/water/community/2016/08/23/why-california-water-fix-is-a-path-to-extinction-for-native-fisheries>.

<sup>75</sup> Doug Obegi, *Why California WaterFix Is a Path to Extinction for Native Fisheries*, WATER DEEPLY (August 23, 2016). <https://www.newsdeeply.com/water/community/2016/08/23/why-california-water-fix-is-a-path-to-extinction-for-native-fisheries>.

## **E. FEDERAL POWER ACT §10 – PROTECTING FISHERIES WHEN DAMS ARE RELICENSED**

Under the Federal Power Act, non-federal dams on navigable rivers are relicensed by the Federal Energy Regulatory Commission.<sup>76</sup> Federal Energy Regulatory Commission relicensing proceedings are now underway for La Grange Dam in California, which is operated jointly by the Modesto Irrigation District and the Turlock Irrigation District on the Tuolumne River – a tributary to the San Joaquin River.<sup>77</sup>

Section 10(j)(1) of the Federal Power Act requires that a federal hydropower license “adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat) affected by the development, operation and management of the project.”<sup>78</sup> The National Marine Fisheries Service, United States Fish and Wildlife Service or a state fish and wildlife department may recommend such conditions, and if timely submitted, the Federal Power Act requires that the Federal Energy Regulatory Commission must generally include such conditions in the hydropower license.<sup>79</sup>

In terms of La Grange Dam on the Tuolumne River, this means that if the United States Fish and Wildlife Service or the National Marine Fisheries Service recommend additional downstream releases from the dam to protect salmon and smelt below the dam, §10 of the Federal Power Act provides that the Federal Energy Regulatory Commission must generally include these release conditions in the new license issued to the operators of La Grange Dam.<sup>80</sup>

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<sup>76</sup> 16 U.S.C. §§803(a), (j).

<sup>77</sup> Paul Stanton Kibel, *Passage and Flow Considered Anew: Wild Salmon Restoration Via Hydro Relicensing*, 37 PUBLIC LAND AND RESOURCES LAW REVIEW 65, 81-84 (2016). See also National Marine Fisheries Service, *Comments on Proposed Study Plan for the La Grange Hydroelectric Project*, P-14581-000 (December 4, 2015).

<sup>78</sup> 16 U.S.C. §§803(a), (j).

<sup>79</sup> 16 U.S.C. §§803(a), (j). See also Paul Stanton Kibel, *Passage and Flow Considered Anew: Wild Salmon Restoration Via Hydro Relicensing*, 37 PUBLIC LAND AND RESOURCES LAW REVIEW 65, 81-84 (2016).

<sup>80</sup> Paul Stanton Kibel, *Passage and Flow Considered Anew: Wild Salmon Restoration Via Hydro Relicensing*, 37 PUBLIC LAND AND RESOURCES LAW REVIEW 65, 81-84 (2016). See also National Marine Fisheries Service, *Comments on Proposed Study Plan for the La Grange Hydroelectric Project*, P-14581-000 (December 4, 2015).

## **F. FEDERAL WILD AND SCENIC RIVERS ACT – PRESERVING FREE-FLOWING RIVERS IN CALIFORNIA**

Under the federal Wild and Scenic Rivers Act, segments of rivers can be designated as “wild” or “scenic” or “recreational”.<sup>81</sup> Once designated as “wild” under the federal Wild and Scenic Rivers Act, a river segment is protected from such activities as additional diversions or the placement of new onstream dams that adversely affect its wilderness qualities (including maintenance of instream flows to support fisheries).<sup>82</sup>

Segments of the following rivers in California are designated and protected as “wild” under the federal Wild and Scenic Rivers Act: American River, Big Sur River, Black Butte River, Eel River, Feather River, Kern River, Kings River, Klamath River, Merced River, Sespe River, Sisquoc River, Smith River, Trinity River and Tuolumne River.<sup>83</sup>

In terms of the Eel River on California’s north coast, additional protections under the Wild and Scenic River Act have been proposed for segments of several creeks that are tributary to the Eel River, including Gilread Creek, Red Mountain Creek, Eden Creek, Deep Hole Creek, Indian Creek and Fish Creek.<sup>84</sup> Such designations would limit expanded diversions of segments on these creeks that are part of the Eel River watershed that supports one of the most robust salmon and steelhead trout fisheries in the California.<sup>85</sup>

## **IV. STATE LAW AND STATE AGENCIES AFFECTING INSTREAM WATER FOR CALIFORNIA FISHERIES**

As noted in the introduction to this article, following the November 2016 federal election, there are indications that the administration of Donald Trump and the new Congress may seek to reduce the role federal law and federal agencies play in managing water resources in general, and more specifically the

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<sup>81</sup> Federal Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287. See also *An Introduction to Wild and Scenic Rivers* (1998 Publication by National Park Service), <https://www.rivers.gov/documents/wsr-primer.pdf>.

<sup>82</sup> Federal Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287. See also *An Introduction to Wild and Scenic Rivers* (1998 Publication by National Park Service), <https://www.rivers.gov/documents/wsr-primer.pdf>.

<sup>83</sup> Wild and Scenic Rivers and Management Agencies (June 2007) pp. 1-2.

<sup>84</sup> California Wilderness Coalition, *Upper Eel River & Tributaries: Proposed Wild & Scenic Rivers* (on file with author).

<sup>85</sup> Federal Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287. See also *An Introduction to Wild and Scenic Rivers* (1998 Publication by National Park Service), <https://www.rivers.gov/documents/wsr-primer.pdf>.



role federal law and federal agencies play in ensuring instream flow to maintain fisheries.<sup>86</sup> Since it appears that federal law and federal agencies may play a diminished role in this regard in the near future, California is turning its attention to state laws and state agencies to ensure there are adequate instream flows in its rivers, streams and creeks.<sup>87</sup> That is, with the current political ebb and flow between the respective roles of the federal government and state government in water resource governance, California authority is advancing as federal authority recedes.

There are at least seven sources of California law and legal authority that provide a basis to maintain instream flow for fisheries: California's Porter Cologne Water Quality Act<sup>88</sup>; California public trust law<sup>89</sup>; California reasonable use law<sup>90</sup>; section 5937 of the California Fish and Game Code<sup>91</sup>; California water quality certification authority<sup>92</sup>; California's Wild and Scenic Rivers Act<sup>93</sup>; and California's Delta Reform Act.<sup>94</sup> These sources of California law and authority are well-positioned to serve as the legal foundation for efforts to keep water instream for California fisheries regardless of what the administration of Donald Trump and the new Congress may do.

#### **A. CALIFORNIA'S PORTER-COLOGNE WATER QUALITY ACT – ADVANCING IF CLEAN WATER ACT §303 RECEDES**

What if the United States Environmental Protection Agency stops pressing California to update and enforce its water quality standards for fisheries pursuant to Clean Water Act §303, or what if federal legislation is passed limiting application of Clean Water Act §303 to the Bay Delta watershed or Central Valley Project operations?

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<sup>86</sup> Presentations of Rachel Zwillinger (Attorney for Defenders of Wildlife) and Cliff Lee (Attorney with Natural Resource Section of California Attorney General's Office) at April 13, 2017 Bar Association of San Francisco panel on *Coming Changes in Water Law Practice: California Law Advances as Federal Law Recedes*.

<sup>87</sup> Presentations of Rachel Zwillinger (Attorney for Defenders of Wildlife) and Cliff Lee (Attorney with Natural Resource Section of California Attorney General's Office) at April 13, 2017 Bar Association of San Francisco panel on *Coming Changes in Water Law Practice: California Law Advances as Federal Law Recedes*.

<sup>88</sup> 1969 Porter-Cologne Water Quality Act, California Water Code, Section 7.

<sup>89</sup> 33 Cal.3d 419 (1983). See also Paul Stanton Kibel, *The Public Trust Navigates California's Bay Delta*, 51 NATURAL RESOURCES JOURNAL 35 (2011).

<sup>90</sup> Article XI of the California Constitution; Section 100 of the California Water Code.

<sup>91</sup> Section 5973 of California Water Code.

<sup>92</sup> 33 U.S.C. § 1341.

<sup>93</sup> California Wild and Scenic Rivers Act, California Public Resources Code, Chapter 14.

<sup>94</sup> Section 85001 et seq, California Water Code.

California's 1969 Porter Cologne Water Quality Act predates the federal Clean Water Act and provides California's Water Board with independent authority to establish and enforce water quality standards to protect use of watercourses for fish spawning, rearing and migration.<sup>95</sup>

This means that the State Water Resources Control Board has authority under state law to proceed with its update to the Bay Delta Water Quality Plan, and the State Water Resources Control Board has authority under state law to adopt base instream flows for the tributaries to the tributaries to the San Joaquin River – regardless of whether the United States Environmental Protection Agency exercises its reviewing authority under §303 of the Clean Water Act, and regardless of whether the new Congress and the administration of Donald Trump may try to limit the application of §303 of the Clean Water Act.

## **B. CALIFORNIA PUBLIC TRUST LAW – ADVANCING IF ENDANGERED SPECIES ACT §7 RECEDES**

What if revised ESA §7 salmon and delta smelt Biological Opinions are issued by Donald Trump's administration that reach "no jeopardy" determinations, or what if federal legislation is enacted by the new Congress that limits application of ESA §7 to Central Valley Project and State Water Project operations?

In the landmark 1983 *National Audubon* case, the California Supreme Court held that under California law the public trust requires the State of California to fully protect instream public trust resources (such as fisheries) whenever feasible.<sup>96</sup> In *National Audubon*, the California Supreme Court clarified:

Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.<sup>97</sup>

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<sup>95</sup> 1969 Porter-Cologne Water Quality Act, California Water Code, Section 7.

<sup>96</sup> 33 Cal.3d 419 (1983).

<sup>97</sup> 33 Cal.3d 419 (1983).

In the 2014 case of *Environmental Law Foundation v. State Water Resources Control Board*, the Sacramento County Superior Court affirmed that public trust law applies to diversions that harm fisheries in navigable waters.<sup>98</sup> This case involved pumping that reduced instream flow on the Scott River along California’s north coast.<sup>99</sup> In *Environmental Law Foundation v. State Water Resources Control Board*, the court stated:

The Scott River located in Siskiyou County is a navigable waterway used for boating and fishing. In the past two decades the Scott River experienced decreased flows caused in part by groundwater pumping...As a result of these decreased flows, the Scott River is often “dewatered” in the summer and early fall. The river is then reduced to a series of pool. This, in turn, has injured the river’s fish populations.<sup>100</sup>

...

The public trust doctrine would prevent pumping directly out of the Scott River harming public trust uses. So too under *National Audubon*, the public trust doctrine would prevent pumping a non-navigable tributary of the Scott River harming public trust uses of the river. The court finds no reason why the analysis of *National Audubon* would not apply to the facts alleged here. The court thus finds that public trust doctrine protects navigable waters from harm caused by the extraction of groundwater, where the groundwater is so connected to the navigable water that its extraction adversely affects public trust uses.<sup>101</sup>

Therefore, pursuant to state public trust law, regardless of what happens at the federal level regarding the application of §7 of the Endangered Species Act, California state agencies and California courts

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<sup>98</sup> *Environmental Law Foundation v. State Water Resources Control Board* (Case No. 34-2010-80000538, Sacramento County Superior Court).

<sup>99</sup> *Environmental Law Foundation v. State Water Resources Control Board* (Case No. 34-2010-80000538, Sacramento County Superior Court).

<sup>100</sup> *Environmental Law Foundation v. State Water Resources Control Board* (Case No. 34-2010-80000538, Sacramento County Superior Court).

<sup>101</sup> *Environmental Law Foundation v. State Water Resources Control Board* (Case No. 34-2010-80000538, Sacramento County Superior Court).

have independent public trust authority to modify existing water rights to protect salmon and smelt by requiring adequate instream flow for these fisheries.

### **C. CALIFORNIA REASONABLE USE LAW – ADVANCING IF FEDERAL TRIBAL FISHING RIGHTS RECEDE**

What if the administration of Donald Trump orders the United States Bureau of Reclamation to discontinue or delay work with the Hoopa and Yurok Valley Tribes on the salmon plan for the lower Klamath River, or what if the new President’s administration otherwise decides not to increase releases from Trinity and Lewiston Dams to give effect to the Hoopa and Yurok’s tribal fishing rights?

California Constitution Article XI and California Water Code §100 both provide the following: “The right to water or to use the flow of water in or from any natural stream or watercourse...shall be limited to such water as shall be reasonably required...and such right does not and shall not extend to the waste or unreasonable use or unreasonable method or use or unreasonable method of diversion of water.”<sup>102</sup>

In 2014, in its decision in *Light v. State Water Resources Control Board* (“*Light*”) the California Court of Appeal affirmed that the State Water Resources Control Board may rely on its reasonable use authority to implement regulatory program to ensure diversions in Russian River watershed do not reduce instream flow so as to imperil salmon.<sup>103</sup> In its 2014 decision in *Light*, the Court rejected plaintiff’s argument that reasonable use law only allowed for “post-event” judicial enforcement and did not support “pre-event” preventative administrative regulation, holding:

“Restricting the [State Water Resources Control Board] to post-event litigation deprives it of any effective regulatory remedy, since the damage will have been done and the critical circumstances may not arise again for many months or years. It is difficult to imagine what effective relief a court grant, other than a broad and inflexible injunction against future diversions...a ruling that would in the interest of either the enjoined growers or the public. Effective regulation of the state’s water resources in these

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<sup>102</sup> Article XI of the California Constitution; Section 100 of the California Water Code.

<sup>103</sup> 226. Cal.App.4d 1463.

circumstances demands that the [State Water Resources Control Board] has authority to enact tailored regulations.”<sup>104</sup>

In 1986, in what became known as the “Racanelli Decision” (after Judge Racanelli who authored the opinion), the California Court of Appeal affirmed that California’s Water Board could rely on its reasonable use authority to modify the Central Valley Project and State Water Project water rights to ensure sufficient freshwater flow to prevent seawater intrusion.<sup>105</sup> The Racanelli Decision held:

“...the [Water] Board had the authority to modify the projects’ permit to curtail their use of water on the ground that the projects’ use and diversions of water had become unreasonable... We perceive no legal obstacles to the [Water] Board’s determination that particular methods of use have become unreasonable by their deleterious effects upon water quality.”<sup>106</sup>

So, in the event the administration of Donald Trump does not seek to increase releases from Lewiston and Trinity Dams to give effect to the Hoopa and Yurok Valley Tribes’ fishing rights, the State Water Resources Control Board can rely on its state reasonable use law authority to compel such releases from Lewiston and Trinity Dams.

#### **G. SECTION 5973 OF CALIFORNIA FISH AND GAME CODE – ADVANCING IF NEPA ALTERNATIVES ANALYSIS RECEDES**

What if the administration of Donald Trump does not require the United States Bureau of Reclamation to revise the NEPA EIS for the California WaterFix to evaluate an increased flow alternative, or what if federal legislation is enacted by the new Congress that exempts the California WaterFix from NEPA’s requirements?

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<sup>104</sup> 226 Cal.App.4d 1463, at 1486-87.

<sup>105</sup> 182 Cal.App.3d 82 (1986).

<sup>106</sup> 182 Cal.App.3d 82, 130 (1986).

The administration of Donald Trump has already taken steps that signal a narrow rather than a broad interpretation of federal agency environmental impact assessment obligations under NEPA. On August 15, 2017, Donald Trump signed Executive Order 13807, titled *Establishing Discipline and Accountability in the Environmental Review Process for Infrastructure Projects*.<sup>107</sup> Among other things, Executive Order 13807 calls upon the Council on Environmental Quality (“CEC”) to identify actions that will “ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, including by using CEC’s authority to interpret NEPA to simplify and accelerate the NEPA review process.”<sup>108</sup> Narrowing the scope of alternatives considered in NEPA environmental documents might be a way to achieve Executive Order 13807’s objective of simplifying and accelerating the NEPA review process.

As explained above, the California WaterFix would alter the federal Central Valley Project, the largest water diversion project in California.<sup>109</sup> The federal Central Valley Project operates in a coordinated fashion with the State Water Project which is operated by the California Department of Water Resources.<sup>110</sup> For instance, these federal and state water projects share diversion facilities near the city of Tracy, California that diver water from the Sacramento-San Joaquin Delta into the two projects’ water delivery system.<sup>111</sup>

Section 5937 of the California Fish and Game Code requires that “[t]he owner of any dam shall allow sufficient water at all time to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.”<sup>112</sup> In the 2004 case of *NRDC v. Patterson*, the federal district court in Sacramento considered whether §5937 requirements applied to the United States Bureau of Reclamation’s operation of Friant Dam on the San Joaquin River, which is a key piece of water storage

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<sup>107</sup> Executive Order 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects* (signed on August 15, 2017, published in Federal Register on August 24, 2017).

<sup>108</sup> Executive Order 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects* (signed on August 15, 2017, published in Federal Register on August 24, 2017).

<sup>109</sup> See generally *Coordinated Long-Term Operations of the Central Valley Project and State Water Project* (August 2011), Project Description, pp. 1-108.

<sup>110</sup> See generally *Coordinated Long-Term Operations of the Central Valley Project and State Water Project* (August 2011), Project Description, pp. 1-108.

<sup>111</sup> See generally *Coordinated Long-Term Operations of the Central Valley Project and State Water Project* (August 2011), Project Description, pp. 1-108.

<sup>112</sup> Section 5937, California Fish and Game Code.

infrastructure for the federal Central Valley Project.<sup>113</sup> Writing for the court, Judge Lawrence Karlton explained:

The Bureau built Friant Dam across the upper San Joaquin River, northwest of Fresno, in the early 1940s as part of the Central Valley Project. Construction began in 1939 and was largely completed by the mid-1940s<sup>114</sup>. . . Friant Dam blocked upstream access to a portion of the San Joaquin River’s spawning habitat for salmon and steelhead; however, it was not the construction of the Dam that terminated the salmon runs. For several years after Friant Dam was in place, the Bureau released sufficient water to sustain the salmon fishery.<sup>115</sup>

...

By the late 1940s, however, the Bureau’s operation of Friant Dam had caused long stretches of the River to dry up [citation omitted]. In the spring of 1948, the California Division of Fish and Game responded with a dramatic fish rescue in an attempt to save the River’s spring-run Chinook salmon. About 2,000 up-migrating Chinook were trapped in the lower portion of the River, hauled by truck around the dewatered stretch of the River, and released at a point from which they would migrate upstream to deep pools just below Friant Dam. The salmon were able to hold over the summer in these pools, and to spawn successful below Friant Dam in the fall, but their offspring perished in early 1949 when they attempted to out-migrate through the dried-up River bed.

With the completion of the Friant-Kern Canal, the Bureau in 1949 further increased diversions, leaving even less water for the San Joaquin River [citation omitted]. The last of the upper San Joaquin River’s fall-run Chinook salmon were reported in a pool below Mendota Dam in 1949 [citations omitted]. Spring-run Chinook salmon disappeared from the San Joaquin River after unsuccessful salmon rescue attempts in 1949 and 1950 [citations omitted]. For most of the last 50 years, the Bureau has diverted virtually all of the River’s flows [citations omitted]. While salmon continue to return and spawn until

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<sup>113</sup> 333 F.Supp.2d 906 (E.D.Cal. 2004).

<sup>114</sup> 333 F.Supp.2d 909.

<sup>115</sup> 333 F.Supp.2d 909-910.

1949, after that, “the San Joaquin chinook was extirpated in its southernmost range.”  
[citation omitted]

Some sixty miles of the River upstream of its confluence with the Merced [River] now lie continuously dry, except during rare flood event [citation omitted]. The spring-run Chinook – once the most abundant race of salmon in the Central Valley – appear to have been extirpated from the length of the River. [citation omitted].<sup>116</sup>

In his decision, Judge Karlton also noted how the lack of releases from Friant Dam was also adversely affecting salmon in the lower portions of the San Joaquin River (below the confluence with the Merced River) by reducing the instream flows need to maintain water temperatures at which coldwater fish such as salmon can survive, observing that “Reduced flows in the San Joaquin River below Friant Dam have...increased the temperature of the water that is available.”<sup>117</sup>

Judge Karlton continued:

In *California v. United States*, 438 U.S. 645 (1978), the Supreme Court explained that the “cooperative federalism” mandated by §8 [of the federal Reclamation Act] required the United States to comply with state water laws unless that law was directly inconsistent with clear congressional directives regarding the project. *Id.* at 650 (“The history of the relationship between the Federal Government and the States in the reclamation of arid lands of the Western States is both long and involved, but through it run the consistent thread of purposeful and continued deference to state water law by Congress.”).<sup>118</sup>

In *NRDC v. Patterson*, Judge Karlton then went on conclude that the United States Bureau of Reclamation’s operation of Friant Dam violated §5937 of the California Fish and Game Code:

There is no genuine dispute, however, as to whether the Bureau has released sufficient water to maintain historic fisheries, and the record, in any event, is clear that the Bureau has not.<sup>119</sup>

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<sup>116</sup> 333 F.Supp.2d 910.

<sup>117</sup> 333 F.Supp.2d 911.

<sup>118</sup> 333 F.Supp.2d 914.

<sup>119</sup> 333 F.Supp.2d 924.



...

The Bureau, by its own admission, releases no water for this purpose and long-stretches of the River downstream are dry most of the time.<sup>120</sup>

...

Historically, the upper San Joaquin River supported a large spring-run of chinook salmon. The annual spawning run of these fish numbered in the tens of thousands as late as the mid-1940s.<sup>121</sup>

...

The extinction of these San Joaquin stocks can be directly attributed to inadequate instream flows, specifically those which enable adult salmon to migrate upstream. The [Friant Dam] project diverted nearly the entire river and a long reach of the waterway has been dried up.<sup>122</sup>

Therefore, in the event that the United States Bureau of Reclamation does not consider an increased flow alternative as part of its evaluation of the California WaterFix – either because the administration of Donald Trump does not require the agency to consider the increase flow alternative or because the new Congress exempts the California WaterFix from NEPA – §5937 may provide the State Water Resources Control Board with authority to require, for example, additional release releases from Shasta Dam to help maintain water temperatures below the dam at 60 degrees Fahrenheit or lower to protect salmon and steelhead trout coldwater fisheries.<sup>123</sup> Reliance on §5937 in this instance would presumably be premised on evidence establishing that releases from Shasta Dam to prevent water temperatures from rising above 60 degrees Fahrenheit are consistent with the United States Bureau of Reclamation’s obligation to release sufficient water to maintain salmon and steelhead trout fisheries below Shasta Dam in “good condition.”

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<sup>120</sup> 333 F.Supp.2d 925.

<sup>121</sup> 333 F.Supp.2d 925.

<sup>122</sup> 333 F.Supp.2d 925.

<sup>123</sup> Section 5937, California Fish and Game Code.

#### **D. CALIFORNIA WATER QUALITY CERTIFICATION AUTHORITY – ADVANCING IF FEDERAL POWER ACT §10 RECEDES**

What if under the administration of Donald Trump, the United States Fish and Wildlife Service and National Marine Fisheries Service do not propose dam licensing terms to the Federal Energy Regulatory Commission to ensure additional downstream releases for California fisheries?

Clean Water Act §401 provides that “states” are responsible for certifying that projects approved by federal agencies (such as the Federal Energy Regulatory Commission) do not violate state water quality standards.<sup>124</sup> For example, pursuant to Clean Water Act §401, water quality certification by the State Water Resources Control Board is required for federal relicensing of La Grange Dam on the Tuolumne River (tributary to the San Joaquin River).<sup>125</sup>

In its 1994 decision in the case of *City of Tacoma v. Washington Department of Ecology*, the United States Supreme Court held – in a decision authored by Justice O’Connor and joined by Chief Justice William Rehnquist – that state water quality certification may include relicensing terms to maintain instream flow for fisheries, 511 U.S. 700.<sup>126</sup> In this case, pursuant to its water quality certification authority, the State of Washington imposed instream flow conditions to protect salmon on a municipal dam being relicensed by the Federal Energy Regulatory Commission.<sup>127</sup> In her opinion in *Washington Department of Ecology*, Justice O’Connor wrote:

Petitioners assert that [state water quality certification] is only concerned with water ‘quality’ and does not allow the regulation of water ‘quantity.’ This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery.<sup>128</sup>

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<sup>124</sup> 33 U.S.C. § 1341.

<sup>125</sup> Paul Stanton Kibel, *Passage and Flow Considered Anew: Wild Salmon Restoration Via Hydro Relicensing*, 37 PUBLIC LAND AND RESOURCES LAW REVIEW 65, 81-84 (2016). See also National Marine Fisheries Service, *Comments on Proposed Study Plan for the La Grange Hydroelectric Project*, P-14581-000 (December 4, 2015).

<sup>126</sup> 511 U.S. 700 (1994).

<sup>127</sup> 511 U.S. 700 (1994).

<sup>128</sup> 511 U.S. 700, 732 (1994).

Under the administration of Donald Trump, it is foreseeable that the United States Fish and Wildlife Service and the National Marine Fisheries Service may not use their authority under Section 10 of the Federal Power Act to require the inclusion of downstream releases for fish in federal hydropower licenses, such as the license now being considered for La Grange Dam on the Tuolumne River in California.<sup>129</sup>

Under this scenario, however, the State Water Resources Control Board can still rely on its state water quality certification authority to require the Federal Energy Regulatory Commission to include fishery conservation measures related to instream flow when relicensing non-federal dams in California such as La Grange Dam.<sup>130</sup>

#### **E. CALIFORNIA WILD AND SCENIC RIVER PROTECTIONS – ADVANCING IF FEDERAL WILD AND SCENIC RIVER PROTECTIONS RECEDE**

What if the administration on Donald Trump or the new Congress weaken the protections afforded rivers segments (such as those on the Eel River) designated as “wild” under the federal Wild and Scenic River Act, or what if the administration of Donald Trump or the new Congress reject pending proposals to extend “wild” designations to segments of several creeks that are tributary to the Eel River?

In addition to the federal Wild and Scenic Rivers Act, the State of California has enacted the California Wild and Scenic Rivers Act, signed into law by Republican Governor Ronald Reagan in 1971.<sup>131</sup>

Similar to the federal Wild and Scenic Rivers Act, the California Wild and Scenic Rivers Act, once designated as “wild” under the California Wild and Scenic Rivers Act, a river segment is protected from such activities as additional diversions or the placement of new onstream dams that adversely

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<sup>129</sup> Paul Stanton Kibel, *Passage and Flow Considered Anew: Wild Salmon Restoration Via Hydro Relicensing*, 37 PUBLIC LAND AND RESOURCES LAW REVIEW 65, 81-84 (2016). See also National Marine Fisheries Service, *Comments on Proposed Study Plan for the La Grange Hydroelectric Project*, P-14581-000 (December 4, 2015).

<sup>130</sup> Paul Stanton Kibel, *Passage and Flow Considered Anew: Wild Salmon Restoration Via Hydro Relicensing*, 37 PUBLIC LAND AND RESOURCES LAW REVIEW 65, 81-84 (2016). See also National Marine Fisheries Service, *Comments on Proposed Study Plan for the La Grange Hydroelectric Project*, P-14581-000 (December 4, 2015).

<sup>131</sup> California Wild and Scenic Rivers Act, California Public Resources Code, Chapter 14. See also *Overview of California Wild and Scenic Rivers Act* (in November 2011 Guide to Regulatory Context for Implementing CALFED Actions).

affect its wilderness qualities (including maintenance of instream flows to support fisheries).<sup>132</sup> Several segments of the Eel River in California are designated and protected as wild pursuant to the California Wild and Scenic Rivers Act,<sup>133</sup> and additional segments in the Eel River watershed are now being considered for “wild” designations under the California Wild and Scenic Rivers Act.<sup>134</sup>

Therefore, regardless of whether the administration of Donald Trump or the new Congress take actions to reduce or limit wild designations of Eel River watershed segments under the federal Wild and Scenic Rivers Act, the State of California can maintain and pursue such wild designations under the California Wild and Scenic Rivers Act.

#### **F. INSTREAM FLOW REQUIREMENTS UNDER CALIFORNIA’S DELTA REFORM ACT – ADVANCING IF FEDERAL INSTREAM FLOW REQUIREMENTS RECEDE**

As discussed above in Section III of this article, there are several sources of federal law and federal authority that have traditionally been used to help maintain adequate instream flows for fisheries in California. These sources of federal law and federal authority include § 303 of the Clean Water Act<sup>135</sup>, § 7 of the Endangered Species Act<sup>136</sup> and § 10 of the Federal Power Act.<sup>137</sup> As also noted above, the federal Central Valley Project and California’s State Water Project are operated in a coordinated fashion and share certain critical infrastructure.<sup>138</sup>

What if, under the administration of Donald Trump and the new Congress, there are statutory changes to the Clean Water Act, Endangered Species Act or Federal Power Act, or changes in federal policies implementing these laws, that reduce the role that these federal laws play maintaining instream flows into and through the Sacramento-San Joaquin Delta?

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<sup>132</sup> California Wild and Scenic Rivers Act, California Public Resources Code, Chapter 14. See also *Overview of California Wild and Scenic Rivers Act* (in November 2011 Guide to Regulatory Context for Implementing CALFED Actions).

<sup>133</sup> Wild and Scenic Rivers and Management Agencies (June 2007) pp. 1-2.

<sup>134</sup> California Wilderness Coalition, *Upper Eel River & Tributaries: Proposed Wild & Scenic Rivers* (on file with author).

<sup>135</sup> Clean Water Act Section 303.

<sup>136</sup> Section 7, Endangered Species Act.

<sup>137</sup> 16 U.S.C. §§803(a), (j).

<sup>138</sup> See generally *Coordinated Long-Term Operations of the Central Valley Project and State Water Project* (August 2011), Project Description, pp. 1-108.

In 2009, the California Legislature declared, “[t]he Sacramento-San Joaquin Delta watershed and California’s water infrastructure are in crisis and exist policies are not sustainable. Resolving the crisis required fundamental reorganization of the state’s management of Delta Watershed resources.”<sup>139</sup> Accordingly, the California Legislature enacted the Sacramento-San Joaquin Delta Reform Act of 2009 (“Delta Reform Act”) and created a new state agency, the Delta Stewardship Council.<sup>140</sup> Pursuant to Delta Reform Act, the Delta Stewardship Council was directed to prepare and adopt a “legally enforceable Delta Plan” that must further the “co-equal” goals of (1) providing a more reliable water supply for California and (2) protecting, restoring and enhancing the Delta ecosystem.<sup>141</sup>

In 2013, the Delta Stewardship Council approved its Delta Plan. Several lawsuits were then filed against the Delta Stewardship Council by commercial fishing, recreational fishing and conservation groups alleging that the approved Delta Plan did not comply with the requirements of the Delta Reform Act in several critical aspects, including the alleged absence of plan elements to provide adequate instream flows to support fisheries.<sup>142</sup> On May 18, 2016, Sacramento County Superior Court Judge Michael P. Kinney issued his ruling in these cases, finding that the Delta Reform Act required that the Delta Plan include detailed and enforceable provisions to ensure adequate instream flows in the Sacramento-San Joaquin delta and that the Delta Plan initially approved failed to do so. In his 2016 opinion, Judge Kinney held:

Section 85301, subdivision (e)(4) [of the Delta Reform Act] provides: “[t]he following subgoals and strategies for restoring a healthy ecosystem shall be included in the Delta Plan...(4) Restore Delta flows and channels to support a health estuary and other systems.’ Petitioners argue that the Delta Plan only sets a vague goal of “[p]rogress toward restoring in-Delta flows to more natural functional flow patterns to support a healthy estuary...” Petitioners maintain this goal is not a ‘quantified or other measurable target’ for any kind of “natural functional flow patterns” and fails to identify any criteria for measurement.<sup>143</sup>

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<sup>139</sup> Section 85001 et seq, California Water Code.

<sup>140</sup> Section 85001(a), California Water Code.

<sup>141</sup> Section 85059, California Water Code.

<sup>142</sup> Section 85054, California Water Code.

<sup>143</sup> May 18, 2016 Ruling on Submitted Matter: Petitions for Writ of Mandate, Bifurcated Proceedings on Statutory Challenges (*Delta Stewardship Council Case*, Judicial Council Coordination Proceeding 4758, Superior Court of California County of Sacramento) p. 14.

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Respondent argues the goal of ER P1 provides a generalized measurement and that the [Delta Stewardship] Council ‘intends to refine its performance measures’ (Opposition, p. 104.) Again, “progress” is not defined. It does not provide a quantifiable or otherwise measurable target upon which the Delta Plan can be gauged. While Respondent may intend to refine its performance measurements, the Delta Reform Act requires such measurable targets to be included in the Delta Plan. As Respondent has certified that it has completed the Delta Plan, any future modifications are not relevant to a determination of whether the Delta Plan currently complies with the Delta Reform Act.

The Court finds that the Delta Plan fails to ‘include quantified or otherwise measurable targets associated with” restoring more natural flows as required by the Delta Reform Act.<sup>144</sup>

Pursuant to Judge Kinney’s 2016 ruling on California’s Delta Reform Act, the Delta Plan prepared by the Delta Stewardship Council must include quantified measurable targets for instream flows to support a healthy estuary and ecosystem in the Sacramento-San Joaquin Delta regardless of whether such quantified measurable targets for instream flows are imposed pursuant to § 303 of the Clean Water Act, § 7 of the Endangered Species Act or § 10 of the Federal Power Act.

## **V. PREEMPTION COMETH? H.R. 23 AND STATE SELF-GOVERNANCE**

As discussed above, there is an extensive body of California water law that is well situated to maintain instream flows for fisheries if federal law and federal agencies play a reduced role in this area. This scenario, however, raises the question as to whether the administration of Donald Trump and the new Congress will take steps to try to pre-empt California water law or limit the applicability of California water law that might otherwise be relied upon to maintain such instream flows.

At the outset, it should be noted that efforts by the administration of Donald Trump and the new Congress to limit the ability of a state to regulate water resources would be at odds with the previous

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<sup>144</sup> May 18, 2016 Ruling on Submitted Matter: Petitions for Writ of Mandate, Bifurcated Proceedings on Statutory Challenges (*Delta Stewardship Council Case*, Judicial Council Coordination Proceeding 4758, Superior Court of California County of Sacramento) p. 15.

positions of Scott Pruitt, President Trump’s Secretary of the United States Environmental Protection Agency and the former Attorney General for the State of Oklahoma.<sup>145</sup> In his capacity as Oklahoma’s Attorney General, Pruitt advocated for an expansive view of rights reserved to the states and a limited view of the authority of the federal government to displace such state authority.<sup>146</sup>

More specifically, in July 2015, in his capacity as Oklahoma’s Attorney General, Scott Pruitt filed a Complaint in federal district court against the United States Environmental Protection Agency on behalf of the State of Oklahoma.<sup>147</sup> In the Complaint in *State of Oklahoma v. United States Environmental Protection Agency*, which was filed under Scott Pruitt’s signature, the State of Oklahoma challenged the constitutionality of the federal government’s regulation of coal-fired power plants (part of the EPA Power Plan) under the federal Clean Air Act.<sup>148</sup>

In paragraph 12 of the Complaint in *State of Oklahoma v. United States Environmental Protection Agency*, former Oklahoma Attorney General Pruitt alleged:

The Clean Air Act is founded on the principle of cooperative federalism, with states retaining the primary authority to regulate emissions from sources in their territories. The Act specifically recognizes that “air pollution control at its source is the primary responsibility of States and local governments.”<sup>149</sup>

In paragraph 46 of the Complaint in *State of Oklahoma v. United States Environmental Protection Agency*, former Oklahoma Attorney General Pruitt alleged:

EPA lacks the authority to undertake regulation of state power systems, transmission, and utilities, even though carrying out its Power Plan will require the exercise of such

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<sup>145</sup> Chris Mooney, Bradley Dennis and Steven Mufson, *Trump Names Scott Pruitt Oklahoma Attorney General Suing EPA on Climate Change to Head the EPA*, THE WASHINGTON POST (December 8, 2016).

[https://www.washingtonpost.com/news/energy-environment/wp/2016/12/07/trump-names-scott-pruitt-oklahoma-attorney-general-suing-epa-on-climate-change-to-head-the-epa/?utm\\_term=.fc956a243666](https://www.washingtonpost.com/news/energy-environment/wp/2016/12/07/trump-names-scott-pruitt-oklahoma-attorney-general-suing-epa-on-climate-change-to-head-the-epa/?utm_term=.fc956a243666)

<sup>146</sup> *State of Oklahoma v. United States Environmental Protection Agency* (Case No. 15-CV-369-CVE-FHM, United States District Court for the Northern District of Oklahoma).

<sup>147</sup> *State of Oklahoma v. United States Environmental Protection Agency* (Case No. 15-CV-369-CVE-FHM, United States District Court for the Northern District of Oklahoma).

<sup>148</sup> *State of Oklahoma v. United States Environmental Protection Agency* (Case No. 15-CV-369-CVE-FHM, United States District Court for the Northern District of Oklahoma).

<sup>149</sup> *State of Oklahoma v. United States Environmental Protection Agency* (Case No. 15-CV-369-CVE-FHM, United States District Court for the Northern District of Oklahoma), para. 12,

regulatory authority. Accordingly, the EPA Power Plan will require state to exercise such regulatory authority, whether or not they submit state plans.<sup>150</sup>

In paragraph 55 of the Complaint in *State of Oklahoma v. United States Environmental Protection Agency*, former Oklahoma Attorney General Pruitt alleged:

Whether the State of Oklahoma adopts a state plan to meet EPA’s goals or EPA promulgates a federal implementation plan, the EPA Power Plan forces the State or Oklahoma to undertake substantial legislative, regulatory, planning, and other activities.<sup>151</sup>

In paragraph 71 of the Complaint in *State of Oklahoma v. United States Environmental Protection Agency*, former Oklahoma Attorney General Pruitt alleged:

The EPA Power Plan unlawfully commandeers the states, in excess of Congress’s Article I authority and in violation of the Tenth Amendment for the U.S. Constitution.<sup>152</sup>

In paragraph 72 of the Complaint in *State of Oklahoma v. United States Environmental Protection Agency*, former Oklahoma Attorney General Pruitt alleged:

The EPA Power Plan unlawfully coerces the states, in excess of Congress’ Article I authority and in violation of the Tenth Amendment to the U.S. Constitution...by severely impair[ing] state’s exercise of their police powers if they do not comply with EPA’s demands.<sup>153</sup>

As discussed below, the positions advanced by former Oklahoma Attorney General Pruitt in the *State of Oklahoma v. United States Environmental Protection Agency* litigation cannot be easily reconciled with the expansive approach to federal environmental regulation reflected in H.R. 23.

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<sup>150</sup> *State of Oklahoma v. United States Environmental Protection Agency* (Case No. 15-CV-369-CVE-FHM, United States District Court for the Northern District of Oklahoma), para. 46.

<sup>151</sup> *State of Oklahoma v. United States Environmental Protection Agency* (Case No. 15-CV-369-CVE-FHM, United States District Court for the Northern District of Oklahoma), para. 55.

<sup>152</sup> *State of Oklahoma v. United States Environmental Protection Agency* (Case No. 15-CV-369-CVE-FHM, United States District Court for the Northern District of Oklahoma), para. 71.

<sup>153</sup> *State of Oklahoma v. United States Environmental Protection Agency* (Case No. 15-CV-369-CVE-FHM, United States District Court for the Northern District of Oklahoma), para. 72.



## A. H.R. 23'S ATTEMPT TO DISPLACE CALIFORNIA WATER LAW

In January 2017, H.R. 23, otherwise known as the “Gaining Responsibility on Water Act of 2017,” was introduced in the United States House of Representatives.<sup>154</sup> A complete review and analysis of H.R. 23 is beyond the scope of this article. However, there are provisions in H.R. 23 which purport to displace California water law that may otherwise provide a basis to keep water instream for fisheries, and purport to direct how the California Department of Water Resources, the California State Water Resource Control Board and the California Department of Fish and Wildlife shall operate the State Water Project.<sup>155</sup> As discussed below, if H.R. 23 is enacted, and these provisions survive legal challenge, such provisions may curtail the ability of California agencies to rely on sources of California water law to keep water instream for fisheries.

In considering the provisions in H.R. 23, it is again important note the ways that the operation of the federal Central Valley Project (operated by the United States Bureau of Reclamation) and the State Water Project (operated by the California Department of Water Resources) are intertwined.<sup>156</sup> Both projects operate in the Sacramento River watershed and San Joaquin River watershed, both projects affect the timing and volume of instream flows into the Bay Delta, and two projects share and jointly operate water diversion structures in the South delta.<sup>157</sup>

Section 108(a) of H.R. 23 is titled “Bay-Delta Accord/ Congressional Direction Regarding Central Valley Project and California State Water Project Operations” and provides in pertinent part:

The Central Valley Project and the State Water Project shall be operated pursuant to the water quality standards and operational constraints described in the “Principles for Agreement on the Bay-Delta Standards Between the State of California and the Federal Government” dated December 15, 1994, and such operations shall proceed without regard to the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or any other law pertaining to the operation of the Central Valley Project and the California State Water

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<sup>154</sup> H.R. 23, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (introduced into the United States House of Representatives on January 3, 2017).

<sup>155</sup> Sections 108(a) and 108(b) of H.R. 23, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (introduced into the United States House of Representatives on January 3, 2017).

<sup>156</sup> See generally *Coordinated Long-Term Operations of the Central Valley Project and State Water Project* (August 2011), Project Description, pp. 1-108.

<sup>157</sup> See generally *Coordinated Long-Term Operations of the Central Valley Project and State Water Project* (August 2011), Project Description, pp. 1-108.

Project. Implementation of this section shall be in strict conformance with the “Principles for Agreement on the on the Bay-Delta Standards Between the State of California and the Federal Government” date December 15, 1994.<sup>158</sup>

Significantly, the “any other law” language in Section 108(a) of H.R. 23 is not limited to federal law so presumably could also apply to the California sources of water law (e.g California public trust law, California reasonable use law, §5973 of the California Fish and Game Code, the California Wild and Scenic Rivers Act and California’s Delta Reform Act) discussed in this article.

Additionally, in regard to the application of federal laws to the operations of the Central Valley Project and the State Water Project, Section 108(a) of H.R.23 could limit such application in at least two respects. First, Section 108(a) of H.R.23 expressly provides that the operation of these two water projects “shall proceed without regard to the Endangered Species Act” suggesting that such operations would potentially be exempt from compliance with §7 of the federal Endangered Species Act and the salmon and delta smelt Biological Opinions (discussed above) issued pursuant to this provision.<sup>159</sup>

Second, Section 108(a)’s provision that the operation of these two water projects “shall proceed without regard to...any other law” could potentially displace or limit the application of several federal laws that currently preserve a substantive role for the State of California in activities affecting the Sacramento River-San Joaquin River watersheds where the Central Valley Project and State Water Project operate.<sup>160</sup> Such federal laws include: §401 of the federal Clean Water Act (discussed above), which allows the State of California to impose instream flow conditions on federal projects in California that impact water quality<sup>161</sup>; §10 of the Federal Power Act (discussed above) which generally requires that the Federal Energy Regulatory Commission include fishery protection measures proposed by the State of California Department of Fish and Wildlife in federal hydropower licenses for non-federal dams in California<sup>162</sup>; and §8 of the federal Reclamation Act (discussed above) which requires that dams in California operated by the United States Bureau of Reclamation comply with

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<sup>158</sup> Section 108(a) of H.R. 23, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (introduced into the United States House of Representatives on January 3, 2017).

<sup>159</sup> Section 108(a) of H.R. 23, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (introduced into the United States House of Representatives on January 3, 2017).

<sup>160</sup> Section 108(a) of H.R. 23, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (introduced into the United States House of Representatives on January 3, 2017).

<sup>161</sup> 33 U.S.C. § 1341.

<sup>162</sup> 16 U.S.C. §§803(a), (j).

California water laws.<sup>163</sup> All of these provisions of federal law, which currently help guide how the Central Valley Project and State Water Project operate and how instream flows and fisheries throughout California are managed, could potentially be altered by §108(a) of H.R. 23.

Section 108(b) of H.R. 23 is titled “Bay-Delta Accord/Application of Laws to Others” and provides in pertinent part:

Neither a Federal department nor the State of California, including any agency or board of the State of California, shall impose on any water right obtained pursuant to State law, including a pre-194 appropriative right, any condition that restricts the exercise of that water right in order to conserve, enhance, recover or otherwise protect any species that is affected by the operations of the Central Valley Project or California State Water Project. Nor shall the State of California, including any agency or board of the State of California, restrict the exercise of any water right obtained pursuant to State law, including a pre-1914 appropriative right, any condition that restricts the exercise of that water right in order to conserve, enhance, or restore under the Public Trust Doctrine any public trust value.<sup>164</sup>

Significantly, the “any species that is affected by the Central Valley Project or California State Water Project” language in section 108(b) of H.R. 23 could potentially be interpreted broadly to apply to fisheries that are not themselves affected by the Central Valley Project and the State Water Project. For instance, there are salmon and steelhead trout runs in many California coastal rivers and watersheds that are not affected directly by the operations of the Central Valley Project and the State Water Project.<sup>165</sup> However, because salmon and steelhead trout are species affected by the operations of the Central Valley Project and the State Water Project, section 108(b) of H.R. 23 could be interpreted to apply to salmon and steelhead trout located in coastal rivers and watershed unaffected by the federal and state water projects. If interpreted in this way, section 108(b) could potentially displace California

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<sup>163</sup> *California v. United States*, 438 U.S. 645, 654 (1978).

<sup>164</sup> Section 108(b) of H.R. 23, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (introduced into the United States House of Representatives on January 3, 2017).

<sup>165</sup> Section 108(b) of H.R. 23, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (introduced into the United States House of Representatives on January 3, 2017).

water law protections (including but not limited to protections under California public trust law) for salmon and steelhead trout fisheries throughout the state.

Predictably, H.R. 23 has provoked a powerful response from California’s commercial fishermen, who view the proposed legislation as a direct threat to their economic livelihood. John McManus, Executive Director of the Golden Gate Salmon Association, put these concerns bluntly: “In this bill, they’re just saying, ‘Let’s turn the rivers into canals and forget about keeping fish alive.’”<sup>166</sup>

In response to H.R. 23, on July 11, 2017 the Attorney General of California, Xavier Becerra, sent a letter to Speaker Paul Ryan of the United States House of Representatives.<sup>167</sup> In this letter, California Attorney General Becerra asserted that H.R. 23 would “transgress state sovereignty,”<sup>168</sup> explaining:

First, the legislation would mandate that the federal Central Valley Project (CVP) and the California State Water Project (SWP), the largest water projects in the State, operate to outdated water quality standards for the Sacramento-San Joaquin Delta developed over twenty-two years ago, and would preclude state authorities from altering such standards notwithstanding the cumulative scientific evidence that these standards are insufficient to protect the State’s fisheries. Second, the legislation would prohibit the California State Water Resources Control Board (SWRCB) and the California Department of Fish and Wildlife (DFW) from exercising their state law duties to protect fishery resources and public trust values, not only as to CVP and SWP operations, but as to all water right holders in California...the legislation would overturn settled principles of cooperative federalism...<sup>169</sup>

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These proposed constraints on California’s ability to manage its natural resources conflict with historic principles of western water law. In *California v. United States* (1978 438 U.S. 645, 654, the U.S Supreme Court affirmed California’s ability to impose state law

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<sup>166</sup> <https://www.newsdeeply.com/water/articles/2017/08/02/house-bill-redirects-river-flows-from-fish-to-farms>.

<sup>167</sup> Letter from California Attorney General Xavier Becerra to House Speaker Paul Ryan and House Minority Leader Nancy Pelosi (July 11, 2017).

<sup>168</sup> Letter from California Attorney General Xavier Becerra to House Speaker Paul Ryan and House Minority Leader Nancy Pelosi (July 11, 2017), p. 1.

<sup>169</sup> Letter from California Attorney General Xavier Becerra to House Speaker Paul Ryan and House Minority Leader Nancy Pelosi (July 11, 2017), pp. 1-2

terms and conditions on federal reclamation projects, and declared that, “[t]he history of the relationship between the Federal government and the States in the reclamation of arid lands of the Western States is both long and involved, but through it run the consistent thread of purposeful and continue deference to state water law by Congress.”<sup>170</sup>

California law grants the SWRCB the continuing authority to review and reconsider all water rights for the purpose of determining whether their exercise would violate the reasonable use requirement of Article X, Section 2 of the California constitution and California common law doctrine of the public trust. According to the California Supreme Court, “[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 319, 446.). The California Legislature has adopted these principles as the “foundation of state water management policy.” (Cal. Wat. Code, §85023.). H.R. 23 would abrogate California’s ability to apply its water resource laws...<sup>171</sup>

In his July 11, 2017 letter, California Attorney General Becerra continues:

In addition, H.R. 23 takes these steps in violation of settled constitutional principles of state sovereignty. Relying upon separation of powers principles set forth in the Tenth Amendment and elsewhere in the U.S. Constitution, the U.S. Supreme Court in *New York v. United States* has held that “even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts.” (*New York v. United States* (1992) 505 U.S. 144, 166-167.) In *Printz v. United States*, the U.S. Supreme Court expanded its ruling in *New York* and held that “[t]oday we hold that Congress cannot circumvent that prohibition by conscripting the States’ officers directly.” (*Printz v. United States* (1997) 521 U.S. 898, 935.)

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<sup>170</sup> Letter from California Attorney General Xavier Becerra to House Speaker Paul Ryan and House Minority Leader Nancy Pelosi (July 11, 2017), p. 2.

<sup>171</sup> Letter from California Attorney General Xavier Becerra to House Speaker Paul Ryan and House Minority Leader Nancy Pelosi (July 11, 2017), p. 2.

By compelling the SWP, a state-funded and managed water project to operate based on congressionally-mandated Delta water quality standards, rather than allowing California to develop standards that reflect the most recent scientific information regarding the Delta, H.R. 23 is “requiring” a state agency to comply with a federal policy. By preventing the SWRCB, the DFW, and other state agencies from taking actions to protect fishery and other public trust values, H.R. 23 is “prohibiting” the State from enforcing state law. These provisions of H.R. 23 violate settled state sovereignty principles. Congressional passage of H.R. 23 would have, in effect, unconstitutionally “dragooned” state agencies and state officials “into administering federal law.” (*Printz, supra*, 521 U.S. at p. 928.)<sup>172</sup>

It remains to be seen whether H.R. 23 will be passed by Congress and signed into law by President Donald Trump. Should H.R. 23 be enacted, the expectation is that it will be aggressively challenged in court by the State of California.<sup>173</sup> In fact, anticipating the potential for such a challenge, the State of California has retained Eric Holder (former Attorney General of the United States) to advise and represent the state in connection with potential efforts by the administration of Donald Trump and the new Congress to pre-empt, displace or otherwise limit the applicability and enforceability of California law.<sup>174</sup>

Somewhat ironically, and as noted above, the legal grounds the State of California and former Attorney General Eric Holder would likely rely upon in such a legal challenge would be based on the federalism and reserved states’ rights positions previously advocated for by Scott Pruitt, the current Secretary of the United States Environmental Protection in the administration of Donald Trump who previously served as Attorney General for the State of Oklahoma.<sup>175</sup> In particular, California Attorney General Becerra’s position regarding H.R. 23’s unconstitutional commandeering of state agencies by

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<sup>172</sup> Letter from California Attorney General Xavier Becerra to House Speaker Paul Ryan and House Minority Leader Nancy Pelosi (July 11, 2017), pp. 2-3.

<sup>173</sup> Presentations of Rachel Zwilling (Attorney for Defenders of Wildlife) and Cliff Lee (Attorney with Natural Resource Section of California Attorney General’s Office) at April 13, 2017 Bar Association of San Francisco panel on *Coming Changes in Water Law Practice: California Law Advances as Federal Law Recedes*.

<sup>174</sup> Adam Nagourney, *California Hires Eric Holder as Legal Bulwark Against Donald Trump*, THE NEW YORK TIMES (January 4, 2017). <https://www.nytimes.com/2017/01/04/us/california-eric-holder-donald-trump.html>

<sup>175</sup> *State of Oklahoma v. United States Environmental Protection Agency* (Case No. 15-CV-369-CVE-FHM, United States District Court for the Northern District of Oklahoma).

the federal government<sup>176</sup> aligns closely with former Oklahoma Attorney General Pruitt's unconstitutional commandeering position in the July 2015 Complaint filed in *State of Oklahoma v. United States Environmental Protection Agency*.<sup>177</sup>

## **B. STATE SELF GOVERNANCE**

In connection with the commandeering argument advanced against H.R. 23 in California Attorney General Becerra's July 11, 2017 letter, and in connection with the commandeering argument advanced by former Oklahoma Attorney General Scott Pruitt in his July 2015 Complaint in *State of Oklahoma v. United States Environmental Protection Agency*, on July 27, 2017 the California Supreme Court issued a decision in *Friends of the Eel River v. North Coast Railroad Authority* that may also bear on this legal question.<sup>178</sup>

The *Friends of the Eel River* case did not involve water law or fisheries, but rather involved the relationship between the federal Interstate Commerce Commission Termination Act ("ICCTA") and the California Environmental Quality Act ("CEQA").<sup>179</sup> The North Coast Railroad Authority ("NCRA"), a California state agency created in 1989, proposed to rehabilitate a dilapidated and dormant railroad line that ran along the banks of the Eel River in Northern California and to enter into a contract with a private company, Northwestern Pacific Railroad Company, to operate the rehabilitated state-owned railroad line.<sup>180</sup>

CEQA requires that state and local agencies in California, such as the NRCA, undertake an environmental impact assessment before approving agency projects that may have a significant adverse effects on the environment.<sup>181</sup> Pursuant to CEQA, NRCA prepared an environmental impact report ("EIR") in connection with the rehabilitation and renewed operation of the railroad line along the Eel

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<sup>176</sup> Letter from California Attorney General Xavier Becerra to House Speaker Paul Ryan and House Minority Leader Nancy Pelosi (July 11, 2017).

<sup>177</sup> *State of Oklahoma v. United States Environmental Protection Agency* (Case No. 15-CV-369-CVE-FHM, United States District Court for the Northern District of Oklahoma), para. 71.

<sup>178</sup> July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472).

<sup>179</sup> July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472).

<sup>180</sup> July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472).

<sup>181</sup> July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472).

River, and several nonprofit organizations (including Friends of the Eel River) sued NRCA on the grounds that EIS did not comply with CEQA's requirements.<sup>182</sup> NRCA and the Northwestern Pacific Railroad Company responded to this CEQA claim by alleging that the federal ICCTA pre-empted CEQA's application to the railroad line's rehabilitation and renewed operation.<sup>183</sup>

In considering this question in its decision in *Friends of the Eel River*, the California Supreme Court noted:

True, the ICCTA contemplated a uniform national system of railroad lines subject to federal, and not state, regulation...[I]n this case we must explore the application of the ICCTA preemption clause to the state's decisions with respects to it is own subsidiary government entity in connection with a railroad project owned by the state.

When a project is owned by the state, the question arises whether an act of self-governance on the part of the state actually constitutes regulation at all within the terms of the ICCTA. Even though the ICCTA applies to state-owned rail line, in the sense that states as owners cannot violated provisions of the ICCTA or invade the regulatory province of the federal regulatory agency, this is not the end of the question. In our view, the application of state law to govern the functioning of subdivision of the state does not necessarily constitute regulation. To determine the reach of the federal law preempting state regulation of a state-owned railroad we must consider a presumption that, in the absence of unmistakably clear language, Congress does not intend to deprive the state of sovereignty over its own subdivisions to the point of upsetting the usual constitutional balance of state and federal powers.<sup>184</sup>

In its decision in *Friends of the Eel River*, California Supreme Court elaborated:

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<sup>182</sup> July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472).

<sup>183</sup> July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472).

<sup>184</sup> July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472), p. 2.



To understand whether application of CEQA to the rail carriers in this case would constitute regulation of rail transportation within the terms of the ICCTA, we must review some essential features of CEQA.

CEQA embodies a central state policy to require state and local government entities to perform their duties “so that major consideration is given to preventing environmental damage.” (citations omitted)

CEQA prescribes how governmental decisions will be made when public entities, including the state itself, are charged with approving, funding – *or themselves undertaking* – a project with significant effects on the environment. (italics in original, citations omitted)

The Legislature, in enacting CEQA, imposed certain principles of self-government on public entities. In other words, CEQA is a legislatively imposed directive governing how state and local agencies will go about exercising the governmental discretion that is vested in them over land use decisions. (citations omitted).<sup>185</sup>

The California Supreme Court then went on to hold that the ICCTA does not pre-empt CEQA’s application to the NCRA’s rehabilitation and renewed operation of the railroad line along the Eel River, explaining:

CEQA embodies a state policy adopted by the Legislature to govern how the state itself and the state’s own subdivisions will exercise their responsibility. When CEQA conditions the issuance of a permit for private development on CEQA compliance, and thereby restrict the ability of the private citizens and companies to develop their property, this seems plainly regulatory. But CEQA also operates as a form of self-government when the state or a subdivision of the state is itself the owner of the property and proposes to develop it. Application of CEQA to the public entity charged with developing state property is not classic regulatory behavior...Rather, application of CEQA in this context constitutes self-governance on the part of a sovereign state and at the same time on the part of an owner. It appears to us extremely unlikely that Congress, in enacting the

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<sup>185</sup> July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472), pp. 30-31.

ICCTA, intended to pre-empt a state's adoption and use of the tools of self-governance in this situation, or to leave the state, as owner, without any means of establishing the basic principles under which it will undertake significant capital expenditures.<sup>186</sup>

The self-government/self-governance holding in the California Supreme Court's decision in *Friends of the Eel River* is pertinent to an evaluation of H.R. 23 preemption issues in two respects.

First, sections 108(a) and 108(b) of H.R. 23 propose to prohibit the California Department of Water Resources from operating California's State Water Project in accordance with California water law, such as California public trust law, California reasonable use law, section 5973 of the California Fish and Game Code, the California Wild and Scenic Rivers Act and California's Delta Reform Act.<sup>187</sup>

Much like the way the California Supreme Court found that CEQA operated as a form of self-government for the NCRA's ownership and operation of a state owned railroad line, so these sources of California water law operate as a form of self-government for the California Department of Water Resources' ownership and operation of the State Water Project. In this respect, allowing H.R. 23 to displace the application of California water law to the State of California's operation of the State Water Project would intrude on the same state sovereignty concerns that led the California Supreme Court to find that the federal ICCTA did not displace the application of CEQA to the State of California's operation of the state-owned railroad along the Eel River.<sup>188</sup>

Second, under California law, surface waters in the state are not owned by the parties that divert, store or use such waters.<sup>189</sup> Rather, the surface waters are the property of the State of California, who then provides parties with conditional permission to divert, store and use such surface waters through appropriative water right permits issued by the California State Water Resources Control Board

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<sup>186</sup> July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472), pp. 45-46.

<sup>187</sup> Sections 108(a) and 108(b) of H.R. 23, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (introduced into the United States House of Representatives on January 3, 2017).

<sup>188</sup> July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472).

<sup>189</sup> Gary W. Sawyer, *A Primer on California Water Rights*, p. 10.  
[http://aic.ucdavis.edu/events/outlook05/Sawyer\\_primer.pdf](http://aic.ucdavis.edu/events/outlook05/Sawyer_primer.pdf).

Division of Water Rights in accordance with California water law.<sup>190</sup> As California water lawyer Gary Sawyer explain in his guide *A Primer on California Water Rights*:

No water user in the State “owns” any water. Instead, a water right grants the holder thereof only the right to use the water (called a “usufructuary right”). The owner of “legal title” to all waters is the State in its capacity as trustee for the benefit of the public.<sup>191</sup>

For example, the United States Bureau of Reclamation does not own the surface water that it stores, diverts and distributes as part of the federal Central Valley Project. Rather, the United States Bureau of Reclamation applied to the California State Water Resources Control Board for appropriative water right permits for the diversion and storage operations associated with the Central Valley Project.<sup>192</sup> But for the issuance of the appropriative water right permits by the State Water Resources Control Board, the United States Bureau of Reclamation would have no entitlement to store, divert or distribute surface waters as part of the federal Central Valley Project.<sup>193</sup>

H.R. 23 attempts to prohibit the State Water Resources Control Board from ensuring that the United States Bureau of Reclamation’s exercise of its appropriative surface water permits for the Central Valley Project complies with California water law.<sup>194</sup> Yet the surface waters in question are not owned by the United States Bureau of Reclamation, they are owned by the State of California which has adopted a comprehensive body of state water law to govern the terms and conditions under which such state-owned surface waters may be used.<sup>195</sup>

In *Friends of the Eel River*, the California Supreme Court held that when a state is managing property that the state itself owns pursuant to state law, this is not regulation at all but rather constitutes “self-

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<sup>190</sup> Gary W. Sawyer, *A Primer on California Water Rights*, p. 10.  
[http://aic.ucdavis.edu/events/outlook05/Sawyer\\_primer.pdf](http://aic.ucdavis.edu/events/outlook05/Sawyer_primer.pdf).

<sup>191</sup> Gary W. Sawyer, *A Primer on California Water Rights*, p. 10.  
[http://aic.ucdavis.edu/events/outlook05/Sawyer\\_primer.pdf](http://aic.ucdavis.edu/events/outlook05/Sawyer_primer.pdf).

<sup>192</sup> *California v. United States*, 438 U.S. 654 (1978).

<sup>193</sup> *California v. United States*, 438 U.S. 654 (1978).

<sup>194</sup> Section 108(b) of H.R. 23, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (introduced into the United States House of Representatives on January 3, 2017).

<sup>195</sup> Gary W. Sawyer, *A Primer on California Water Rights*, p. 10.  
[http://aic.ucdavis.edu/events/outlook05/Sawyer\\_primer.pdf](http://aic.ucdavis.edu/events/outlook05/Sawyer_primer.pdf).

governance.”<sup>196</sup> H.R. 23’s proposal to prevent the State of California from complying with state water law in determining the usage of surface waters does not take account of the fact that such surface waters are owned by the State of California.<sup>197</sup>

## VI. A BROADER LEGAL SCHOLARSHIP AND POLICY CONTEXT: FLOORS, CEILINGS AND NEW PROGRESSIVE FEDERALISM

As suggested in the July 2017 letter from California Attorney General Xavier Becerra on H.R. 23,<sup>198</sup> and the recent opinion of the California Supreme Court in *Friends of the Eel River*<sup>199</sup>, the prospect of increased reliance on California law to keep water instream for fisheries raises federalism concerns that arise in a broader context, both in terms of legal scholarship and public policy. Although a comprehensive discussion of this broader context is beyond the scope of this article, there are two points that may help to better situate the article’s preceding analysis and discussion.

First, going back several decades, there is a body of federalism and environmental law scholarship that focuses on the distinction between federal laws that create “floors” but allow state law standards with more stringent standards for environmental and natural resource protection, and federal laws that create “ceilings” which prohibit state law from adopting standards for environmental and natural resource protection that are more stringent than federal standards.<sup>200</sup> There is an aspect of federal pre-emption with both federal floors and federal ceilings, but this pre-emption works quite differently depending on whether a floor or a ceiling is involved. As Emory Law School Professor William Buzbee explained in his 2007 paper titled *Asymmetrical Regulation: Risk, Preemption and the Floor/Ceiling Distinction*:

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<sup>196</sup> July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472).

<sup>197</sup> Section 108(b) of H.R. 23, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (introduced into the United States House of Representatives on January 3, 2017).

<sup>198</sup> Letter from California Attorney General Xavier Becerra to House Speaker Paul Ryan and House Minority Leader Nancy Pelosi (July 11, 2017).

<sup>199</sup> July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472).

<sup>200</sup> William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption and the Floor/Ceiling Distinction*, Emory University School of Law Public Law & Legal Theory Research Paper Series (Research Paper No. 07-9, 2007); Jerome Organ, *Limitation on State Agency Authority to Adopt Environmental Standards More Stringent than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MARYLAND L. REVIEW 1373 (1995); Kristen H. Engel, *Harnessing the Benefits of Dynamics Federalism in Environmental Law*, 56 EMORY L. J. 159 (2006).

Typically the debate focused on the federal standards setting where federal law allows states to increase the stringency of regulation, but prohibits state from more lenient regulation.<sup>201</sup>

...

Elimination of state and local authority to regulate risks may have been a rarity, but several recent legislative and regulatory actions purport or propose to impose a federal “ceiling,” where the federal action would displace any additional potential by other actors, be they states or even common law regimes.<sup>202</sup>

Professor Buzbee continues:

[I]s there a principled rationale for distinguishing federal standard setting that set a federal floor or a ceiling? At first blush, the two appear to be mere flip sides of the same federal power, only distinguished by their different regulatory preferences for a world a minimized risk (with floors) or higher levels of risk (with ceilings)... However, these two central regulatory choices are fundamentally different. Floors embrace additional and more stringent state and common law actions, while ceilings actually are better labeled a “unitary federal choice.”<sup>203</sup>

...

Unitary federal choice ceiling preemption is an institutional arrangement that threatens to produce poorly tailored regulation and public choice distortions of the political process, whether it is be before the legislature or a federal agency. Floor preemption, in contrast, constitutes a partial displacement of state choice in setting a minimum level of protection,

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<sup>201</sup> William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption and the Floor/Ceiling Distinction*, Emory University School of Law Public Law & Legal Theory Research Paper Series (Research Paper No. 07-9, 2007) at p. 5.

<sup>202</sup> William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption and the Floor/Ceiling Distinction*, Emory University School of Law Public Law & Legal Theory Research Paper Series (Research Paper No. 07-9, 2007) at p. 6.

<sup>203</sup> William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption and the Floor/Ceiling Distinction*, Emory University School of Law Public Law & Legal Theory Research Paper Series (Research Paper No. 07-9, 2007) at p. 1.

but leaves room for other actors and additional regulatory action. Floors anticipate and benefit from the institutional diversity they permit.<sup>204</sup>

With §108 of H.R. 23, we have an example of what Professor Buzbee and other legal scholars of federalism and environmental regulation would refer to as federal “ceiling” preemption. That is, H.R. 23 proposes to prohibit California from relying on sources of California statutory and common law to impose instream flow and fishery habitat measures more stringent and protective than federal standards. The standards set forth in §108 of H.R. 23 would constitute, in the words of Professor Buzbee, a “unitary federal choice” in regards to instream flow and fisheries protection in California.

This “unitary federal choice” approach to California water resources and fisheries would represent a significant departure from the cooperative federalism approach reflected in §8 of the Reclamation Act<sup>205</sup>, §10 of the Federal Power Act<sup>206</sup> and §401 of the Clean Water Act<sup>207</sup>, in which states have traditionally be given latitude to adopt standards for instream flow and fisheries protection that are more stringent than federal standards.

Second, since the November 2016 election that resulted in Republican control of the White House, the United States Senate and the United States House of Representatives, there has been increasing policy discussion of the prospect of a new progressive federalism. In a February 2017 article in THE NEW REPUBLIC, titled *From California, A Progressive Cry for State’s Rights*, Daniela Blei reported:

It might seem predictable that California, land of liberals, is leading the charge against the new administration. But the Golden State is also the birthplace of the modern conservative movement and was once an enduring source of anti-government populism. Decades before California launched the political careers of Richard Nixon and Ronald Reagan, its business conservatives—agriculture barons and utility executives—organized in opposition to the New Deal, purporting to defend citizens from the tyranny of the federal government... In a twist of history, California’s leftist leaders are now embracing state’s rights, decrying Washington as a threat to a local way of life.<sup>208</sup>

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<sup>204</sup> William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption and the Floor/Ceiling Distinction*, Emory University School of Law Public Law & Legal Theory Research Paper Series (Research Paper No. 07-9, 2007) at p. 1.

<sup>205</sup> Federal Reclamation Act, §8.

<sup>206</sup> 16 U.S.C. §§803(a), (j).

<sup>207</sup> 33 U.S.C. § 1341

<sup>208</sup> Daniela Blei, *From California, A Progressive Cry for State’s Rights*, THE NEW REPUBLIC (February 14, 2017).

A leading legal scholar on the concept of new progressive federalism is Professor Heather Gerken who was recently appointed Dean of Yale Law School.<sup>209</sup> In a January 2017 article, Gerken observed:

Progressives have long thought of federalism as a tool for entrenching the worst in our politics. But it is also a tool for changing our politics. Social movements have long used state and local policymaking as an organizing tool, a rallying cry, a testing ground for their ideas.<sup>210</sup>

Similarly, an August 2017 article in *New York Magazine*, titled *A New Romance: Trump Has Made Progressives Fall in Love with Federalism*, noted:

In the aftermath of the [November 2016] election, [Gerken] co-authored a user's guide in the journal *Democracy* on how localities can best harness the power of federalism to serve progressive ends. That's not to say that Democratic enclaves will necessarily carry this flag for the long haul. In an interview, she told me that people on both sides of the political spectrum tend to opportunistically wield federalism for their partisan ends – and not because of some high-minded constitutional commitment. “Both sides are fair-weather federalists. Both sides use it instrumentally to achieve their goals,” she said.<sup>211</sup>

Proposals to use California law to keep water instream for fisheries in the face of receding federal law protection are taking place within the larger policy discussion around new progressive federalism, where there is a recognition that federalism positions have previously been used by the political right to undermine efforts to better protect natural resources, and a recognition that if and when political circumstances change (e.g. when Democrats are in control of Congress and the White House) they may well be used in this manner again. This recognition, understandably, creates some apprehension and caution among progressives about the precedent they may be establishing in relying on federalism arguments to resist the policy agenda of the administration of Donald Trump.

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<sup>209</sup> Heather Gerken, *A New Progressive Federalism*, 24 *DEMOCRACY JOURNAL* 37 (2012); Heather Gerken, *Slipping the Bonds of Federalism*, 128 *HARVARD LAW REVIEW* 85 (2014); Heather Gerken and Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 *MICHIGAN LAW REVIEW* 57 (2014).

<sup>210</sup> Heather Gerken, *We're About to See State's Rights Used Defensively Against Trump*, *VOX* (January 20, 2017).

<sup>211</sup> Christian Farias, *A New Romance: Trump Has Made Progressives Fall in Love with Federalism*, *NEW YORK MAGAZINE* (August 24, 2017).

## VII. CONCLUSION: STATE WATER LAW ADVANCING

With the prospect of federal law and federal agencies potentially receding from their traditional role in keeping water instream for fisheries, California law and California agencies are well positioned to step in to fill the void. There is ample state law and ample state government authority to maintain instream flow for California's fisheries regardless of what the administration of Donald Trump and the new Congress may do. This explains why fishery conservation stakeholders, including commercial fishermen and other whose jobs and income are tied to the health of California's salmon fishery, may increasingly focus on how to effectively bolster and deploy California water law to maintain California's fisheries.<sup>212</sup>

Increased reliance on California law to keep water instream for this purpose can perhaps be understood as an example of the new progressive federalism discussed by Yale Law School Dean Heather Gerken, although many of the commercial fishermen whose interests are involved might in fact view such state regulation as more conservative than progressive.<sup>213</sup> Again, as suggested in the introduction to this article, regulation to preserve jobs in the commercial fishery sector through instream flow standards does not fit neatly into the right/left political and public policy categories that often seem to underlie writings on new progressive federalism.

H.R. 23 proposes to limit and displace sources of California water law that could be used to maintain instream flow for fisheries.<sup>214</sup> As such, H.R. 23 proposes what the legal scholarship on federalism and environmental regulation would categorize as a federal "ceiling" or "unitary federal choice" which prohibits a state from adopting natural resource protection standards that are more stringent than federal standards.<sup>215</sup> At this point it is uncertain whether H.R. 23 will be enacted into law, but even if

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<sup>212</sup> Presentations of Rachel Zwilling (Attorney for Defenders of Wildlife) and Cliff Lee (Attorney with Natural Resource Section of California Attorney General's Office) at April 13, 2017 Bar Association of San Francisco panel on *Coming Changes in Water Law Practice: California Law Advances as Federal Law Recedes*.

<sup>213</sup> Heather Gerken, *A New Progressive Federalism*, 24 DEMOCRACY JOURNAL 37 (2012).

<sup>214</sup> Sections 108(a) and 108(b) of H.R. 23, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (introduced into the United States House of Representatives on January 3, 2017).

<sup>215</sup> William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption and the Floor/Ceiling Distinction*, Emory University School of Law Public Law & Legal Theory Research Paper Series (Research Paper No. 07-9, 2007); Kristen H. Engel, *Harnessing the Benefits of Dynamics Federalism in Environmental Law*, 56 EMORY L. J. 159 (2006).



enacted there are indications that H.R. 23 may not survive a legal challenge.<sup>216</sup> In particular, sections 108(a) and 108(b) of H.R. 23 seek to prevent the California Department of Water Resources from applying California water law to the operation of the State Water Project, and seek to prevent the State Water Resources Control Board from applying California water law to the exercise of entitlements to divert, store and use surface waters owned by the State of California.<sup>217</sup> In this regard, H.R. 23 is venturing into areas of state sovereignty and state self-governance in which federal preemption claims have not fared well in the courts.<sup>218</sup>

The experience in California suggests that, in the era of the administration of Donald Trump and the new Congress, stakeholders interested in keeping water instream for fisheries need to pay as much attention to opportunities at the state level as obstacles at the federal level. That is, in addition to resisting efforts to reduce the role of federal law and federal agencies in maintaining instream flow, such stakeholders must also work to strengthen state water law and state water agencies to maintain instream flow.

The strong assertion and deployment of state water law to maintain instream flows for fisheries may in itself be an effective political strategy to counter efforts to reduce the role of federal law and federal agencies in ensuring such flows. This assertion and deployment highlight that, when state water law and state water agencies are available and ready to plug the holes left when federal water law and federal water agencies retreat, a reduced role for federal law and federal agencies may not in fact translate into additional water actually becoming available for out-of-stream diversion and usage. And if that is the case, what is the point of reducing the role of federal law and federal agencies in the first place?

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<sup>216</sup> Letter from California Attorney General Xavier Becerra to House Speaker Paul Ryan and House Minority Leader Nancy Pelosi (July 11, 2017), pp. 2-3.

<sup>217</sup> Sections 108(a) and 108(b) of H.R. 23, 115<sup>th</sup> Congress, 1<sup>st</sup> Session (introduced into the United States House of Representatives on January 3, 2017).

<sup>218</sup> Letter from California Attorney General Xavier Becerra to House Speaker Paul Ryan and House Minority Leader Nancy Pelosi (July 11, 2017), pp. 2-3; July 27, 2017 decision of California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (Case No. S222472), pp. 45-46.