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10/01 Memo Opinion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY; WESTLANDS WATER DISTRICT, Plaintiffs, PIXLEY IRRIGATION DISTRICT, et al., Plaintiffs-in-Intervention v. UNITED STATES OF AMERICA, et al., Defendants.	CIV F 97-6140 OWW DLB MEMORANDUM DECISION AND ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT
SAVE THE SAN FRANCISCO BAY ASSOCIATION, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	
IN RE CVPIA § 3406(B)(2) LITIGATION	

Before the court are cross-motions for summary judgment

regarding the legality of a federal administrative decision, dated October, 1999. These motions are brought by: (1) the federal defendants, as to claims raised by the San Luis & Delta-Mendota Water Authority ("San Luis") and Westlands Water District ("Westlands") (collectively "water-district plaintiffs") and the environmental plaintiffs,[1] see Doc. 423 at 2; (2) the water district plaintiffs, see Doc. 426 at 2-3; and (3) the environmental plaintiffs, see Doc. 430 at 2. Oral argument was held on Monday, August 13, 2001. See Doc. 464.

I. FACTUAL AND PROCEDURAL BACKGROUND

The underlying action involves the United States Department of Interior ("Interior") Bureau of Reclamation's ("Bureau") administration of the Central Valley Project ("CVP"), "the country's largest federal water reclamation project,"[2] and Interior's 1999 water year implementation of section 3406(b)(2)[3]

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[1] The group "environmental plaintiffs" is comprised of: the Bay Institute of San Francisco, the Pacific Coast Federation of Fishermen's Associations, the Institute for Fisheries Resources, Save San Francisco Bay Association, and the United Anglers of California.

[2] O'Neill v. United States, 50 F.3d 677, 680-83 (9th Cir. 1995); see also United States v. Westlands Water Dist., 134 F. Supp. 2d 1111, 1116 (E.D. Cal. 2001).

[3] CVPIA § 3406(b)(2) states:

The Secretary, immediately upon the enactment of this title, shall operate the Central Valley Project to meet all obligations under State and Federal law, including but not limited to the Federal Endangered Species Act, 16 U.S.C. 1531, et seq., and all decisions of the California State Water Resources Control Board

establishing conditions on applicable licenses and permits for the project. The Secretary, in consultation with other State and Federal agencies, Indian tribes, and affected interests, is further authorized and directed to:

(2) upon enactment of this title dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title; to assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and to help to meet such obligations as may be legally imposed upon the Central Valley Project under State or Federal law following the date of enactment of this title, including but not limited to additional obligations under the Federal Endangered Species Act. For the purpose of this section, the term "Central Valley Project yield" means the delivery capability of the Central Valley Project during the 1928-1934 drought period after fishery, water quality, and other flow and operational requirements imposed by terms and conditions existing in licenses, permits, and other agreements pertaining to the Central Valley Project under applicable State or Federal law existing at the time of enactment of this title have been met.

(A) Such quantity of water shall be in addition to the quantities needed to implement paragraph 3406(d)(1) of this title and in addition to all water allocated pursuant to paragraph (23) of this subsection for release to the Trinity River for the purposes of fishery restoration, propagation, and maintenance; and shall be supplemented by all water that comes under the Secretary's control pursuant to subsections 3406(b)(3), 3408(h)-(i), and through other measures consistent with subparagraph 3406(b)(1)(B) of this title.

(B) Such quantity of water shall be managed pursuant to conditions specified by the United States Fish and Wildlife Service after consultation with the Bureau of Reclamation and the California Department of Water Resources and in cooperation with the California Department of Fish and Game.

(C) The Secretary may temporarily reduce deliveries of the quantity of water dedicated under this paragraph up to 25 percent of such total whenever reductions due to hydrologic circumstances are imposed upon agricultural deliveries of Central Valley

of the Central Valley Project Improvement Act ("CVPIA")[4] in such a way as to allegedly misinterpret and misapply the definition of "CVP yield" to cause an incorrect amount of CVP water to be diverted from the water-districts and the environment.

The CVPIA took effect October 30, 1992 with the express primary purposes, inter alia, to: (1) protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River Basins; and (2) address the impact of the CVP on fish, wildlife, and their associated habitats. See Pub. L. No. 102-575, Title 34, §§ 3402, 3406(b)(2), 106 Stat. 4600, 4706,[5] 4715-16[6] (1992). Section 3406(b)(2) requires the

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Project water; Provided, That such reductions shall not exceed in percentage terms the reductions imposed on agricultural service contractors; Provided further, That nothing in this subsection or subsection 3406(e) shall require the Secretary to operate the project in a way that jeopardizes human health or safety.

(D) If the quantity of water dedicated under this paragraph, or any portion thereof, is not needed for the purposes of this section, based on a finding by the Secretary, the Secretary is authorized to make such water available for other project purposes.

[4] Pub. L. No. 102-575, § 3401-12, 106 Stat. 4600 (Oct. 30, 1992).

[5] "The purposes of [the CVPIA] shall be--
(a) to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins of California;
(b) to address impacts of the [CVP] on fish, wildlife and associated habitats;
(c) to improve the operational flexibility of the [CVP];
(d) to increase water-related benefits provided by the Central Valley Project to the State of California through expanded use of voluntary water transfers and improved water conservation;
(e) to contribute to the State of California's interim and

Bureau to dedicate and manage annually 800,000 acre-feet of CVP yield for fish and wildlife purposes. See id. at § 3406(b)(2) ("dedicate and manage annually eight hundred thousand acre-feet of [CVP] yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title; to assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and to help to meet such obligations as may be legally imposed upon the [CVP] under State or Federal law following the date of enactment of this title, including but not limited to additional obligations under the Federal [ESA]").

On November 20, 1997, Interior issued its final administrative proposal ("AP"), "CVPIA Administrative Proposal, Management Section 3406(b)(2) Water (800,000 acre feet)," which adopted a plan to simultaneously implement CVPIA Sections

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long-term efforts to protect the San Francisco Bay/Sacramento-San Joaquin Delta Estuary;
(f) to achieve a reasonable balance among competing demands for use of [CVP] water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors."

" "the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title; to assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and to help to meet such obligations as may be legally imposed upon the [CVP] under State or Federal law following the date of enactment of this title, including but not limited to additional obligations under the Federal Endangered Species Act."

3406(b)(1)-(3).

The next day, on November 21, 1997, San Luis filed this case in the Eastern District of California to challenge the method Interior's 1997 AP adopted to implement Section 3406(b)(2). The districts argue that Interior adopted the AP without considering whether its environmental actions (in Appendix A) would result in dedication of more than 800 TAF for (b)(2) purposes, in direct violation of Section 3602(b)(2). See Doc. 1.

The environmental plaintiffs separately challenged the same 1997 Interior AP on similar grounds in a February 4, 1998 suit filed in the Northern District of California, but argued insufficient water was to be dedicated to (b)(2) purposes. On May 7, 1998, the environmental plaintiffs' case was consolidated with this, the lead case. See Doc. 36.

A March 19, 1999, decision found Interior abused its discretion by: (1) "rewriting the water dedication provision of § 3406(b)(2) in merging (b)(1), (2) and (3) compliance and in failing to account for and dedicate annually 800,000 AF of CVP yield;" (2) "failing to comply with the (b)(1) three[-]year time limit for developing and implementing the anadromous fish doubling program;" (3) "making an unauthorized [and unjustified] five year 'no need' finding under 3406(b)(2)(D);" (4) "failing to comply with NEPA, for (b)(1) compliance, which reduces annual CVP contractor deliveries by more than 800,000 AF of CVP yield;" and (5) "relying on an Interior Solicitor's legal opinion that is a post hoc rationalization that rewrites section 3406(b)(2) and justifies agency action that ignores express water dedication requirements." Doc. 156 at 51. The issue of (b)(2) compliance

was remanded to Interior to formulate and adopt a proper method to calculate CVP yield. See id. at 28.

On April 9, 1999, the AP was found contrary to the CVPIA, and the issue was remanded to Interior to complete a proper (b)(2) accounting. See Doc. 159. A preliminary injunction issued May 14, 1999, to enjoin Interior from implementing the AP. See Doc. 209.[7]

In response, on July 14, 1999, Interior issued an "Interim Decision of Implementation of Section 3406(b)(2) of the Central Valley Project Improvement Act." See Doc. 376 ex. 1 at ex. A ("July, 1999, Interim Decision").[8] Interior also issued an "Accounting" of CVP yield that was, pursuant to CVPIA § 3406(b)(2), to be dedicated and used from March 1, 1999, through February 28, 2000. See Doc. 431 at ex. A. Interior's July, 1999, Interim Decision provided that "Interior will continue to credit up to 450,000 AF of CVP water used to meet the [Water Quality Control Plan] obligations toward the (b)(2) requirements." Doc. 376 ex. 1 ex. A at 8.

On October 5, 1999, Interior issued its Final Decision, "Decision on Implementation of Section 3406(b)(2) of the Central Valley Improvement Act," which defines the method Interior intended to employ to calculate CVP yield, to account for the use of the dedicated yield, and the procedures to manage the

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[7] Interior had been temporarily enjoined since April 16, 1999. See Doc. 174 (TRO).

[8] On August 16, 1999, San Luis submitted its comments on the Interim Decision to the Bureau. See Doc. 376 ex. 1 at ex. B.

dedicated (b)(2) yield. See Doc. 376 ex. 1 at ex. C. The Final Decision provides, inter alia, that: (1) Interior will credit water used to meet 1995 WQCP requirements against the 800 TAF (b)(2) mandate, up to a 450 TAF cap; and (2) Interior is not required to, but may, credit water used to meet post CVPIA-enacted ESA requirements against the 800 TAF (b)(2) mandate.

After evidentiary hearings on January 31, and February 3, 2001, see Docs. 310-11 (hearings); Doc. 284 (order maintaining preliminary injunction in effect), a memorandum and order issued March 13, 2000, that addressed the motions: (1) regarding the Interim Decision's definition of "CVP yield;" and (2) for a preliminary injunction. See Doc. 320. That order upheld "Interior's interpretation of the definition of CVP yield, except for the deduction for the modified D-1400 flows in calculating CVP yield, []as lawful, not arbitrary or capricious," id. at 31, but found Interior erred by using modified D-1400 flows to calculate CVP yield, because D-893 flows should have been used, see id. For WY 1999, the calculation of the Clear Creek (b)(2) action below Whiskeytown Dam was ordered reduced by 39,000 acre-feet, for a net use of 13,000, rather than 52,000, acre-feet. See id. at 32. The preliminary injunction was dissolved. See id.[9] Interior was ordered to recalculate the CVP yield by

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[9] On May 04, 2000, San Luis filed an interlocutory appeal of the order that vacated the preliminary injunction. See Doc. 324. On September 21, 2000, the Ninth Circuit affirmed the propriety of dissolving the preliminary injunction, but declined to rule on the underlying merits of the appeal. See Doc. 359; San Luis Delta-Mendota Water Auth. v. United States, 238 F.3d 430, 2000 WL 1367912 (9th Cir. 2000) (unpublished memorandum).

substituting the D-893 flows for the improperly-utilized modified D-1400 flows, and to submit such recalculation within ten (10) days following date of service of the decision. See id. at 32-33.

On March 17, 2000, the Bureau submitted its re-calculated figure for annual CVP "yield," which is 5,990,000 acre-feet of CVP water. See Doc. 424 at ¶ 34 (federal defendants' statement of undisputed facts in support of summary judgment).

On March 21, 2000, the Bureau submitted the declaration of Ann Lubas-Williams, which confirmed that Interior rectified the only error in the CVP yield calculation by revising the CVP yield study's PROSIM input files to use the D-893 flows at Nimbus, not the modified D-1400 flows. See Doc. 322 at 3.

On December 11, 2000, the government filed the declaration of Chester Bowling, which it claims complies with the order requiring the 1999 WY CVP accounting. See Doc. 364 (declarations of Alan R. Candlish, Maria A. Iizuka, and Chester Bowling). Mr. Candlish represented that "[t]he signing of the ROD[10] and

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On November 27, 2000, a scheduling conference was held. See Doc. 363. The federal defendants were ordered to submit a statement to the court and all parties concerning their intent to comply with the court order to implement the AFRP requirement of the CVPIA. See id. at 3. Any party was given leave to object to the government's position. See id. The government was also ordered to provide by December 11, 2000, its accounting for WY 1999, showing the various uses of the CVP yield in compliance with CVPIA § 3406(b)(2) and related laws. See id. Last, the parties were directed to file their motions for final judgment and interlocutory appeal. See id. at 3-4.

[10] The a Record of Decision ("ROD") is intended to document a decision by the Secretary.

finalization of the Anadromous Fish Restoration Program will occur no later than January 19, 2001." Id. at 2 (declaration of Alan R. Candlish).[11]

> At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A-95 (Revised) . . ., shall:
> (a) State what the decision was.
> (b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.
> (c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

40 C.F.R. § 1505.2 (2000).

[11] On December 20, 2000, the environmental plaintiffs objected to this date, arguing that the court should set a firm deadline of January 2, 2001, for the finalization of the AFRP, because "[i]n order to ensure no further slippage in the finalization of this important plan, it is necessary that this Court now enter an order establishing a specific performance date for compliance." Doc. 365 at 3.

On December 22, 2000, the government responded to this objection, arguing that the "performance date" of January 19, 2001, was set, and that "the Environmental Plaintiffs provide no legal basis for th[eir] extraordinary request." Doc. 368 at 2.

The Environmental Plaintiffs replied on January 3, 2001,

On December 22, 2000, San Luis objected to the WY 1999 accounting, claiming that Mr. Bowling's declaration was "incomplete," because "one cannot tell: (1) the acre[-]foot cost of each individual action, nor (2) the annual acre[-]foot contribution of each individual CVP facility." Doc. 367 at 2-3.

On December 22, 2000, the government responded, noting that at the informational meeting held on December 20, 2000, printed materials that contained the allegedly "missing" information were distributed. See Doc. 368 at 3-4 (citing ¶ 8 of its attached declaration of Derek Hilts: "The Printed Materials contain information pertaining to (a) the acre[-]foot cost of each individual action taken in compliance with section 3406(b)(2) of the Central Valley Project Improvement Act and (b) the annual acre[-]foot contribution of each individual Central Valley Project Facility."). [12] This moots this aspect of the challenge to the 1999 water year accounting.

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emphasizing that the legal basis for their request was the March 19, 1999 (Doc. 156), order that required the federal defendants to provide a firm estimate. See Doc. 369 at 2-3.

This dispute was rendered moot, because January 19, 2001, has passed. See, e.g., N.Y. Criminal Bar Ass'n v. Newton, 33 F. Supp. 2d 289, 292 (S.D.N.Y. 1999) (dismissing as moot challenge to judge's selection as the trial judge, because he had recused himself after the state appeal).

[12] On February 13, 2001, the federal defendants renewed their February 5, 2001, objection (Doc. 384) to the setting of oral argument on the objections to the WY 1999 accounting, because no provision was made in the November 28, 2000, scheduling conference order for such objections. See Doc. 389. In the alternative, they asked for time to respond to those objections. See id. at 2-3.

On January 16, 2001, San Luis filed a motion seeking leave to file a second amended complaint ("SAC") and to require the government to supplement the administrative record to date. See Doc. 374; Doc. 376 at ex. 1 (proposed SAC). San Luis argued this amendment was necessary, because most of the additions relate to events that occurred after the November 16, 1999, filing of its first amended complaint ("FAC") (Doc. 263). The SAC proposed six specific changes: (1) add Westlands as a plaintiff (SAC ¶ 4); (2) allege that the August 28, 2000, programmatic ROD modifies the October 6, 1999, decision to implement CVPIA § 3406(b)(2) (SAC ¶ 19); (3) add two assertions to the first claim for relief, i.e., that all CVP yield that is used to meet the requirements of the 1995 Delta Water Quality Control Plan ("WQCP")[13] and the ESA must be counted against the 800,000 acre-foot maximum (SAC ¶¶ 25(d)-(e)); (4) amend the second claim for relief to be retrospective, rather than prospective, because WY 1999-2000 has passed (SAC ¶¶ 28-31); (5) add a third claim for relief, which alleges that the government will dedicate and manage more than 800,000 acre-feet of CVP yield under CVPIA § 3406(b)(2) during WY 2000-2001 (SAC ¶¶ 32-34); and (6) add a fourth claim for relief, which alleges that since October, 1999, the government has implemented its final decision CVPIA § 3406(b)(2) in a manner that is arbitrary, capricious, and an abuse of discretion, because it: creates substantial uncertainty concerning the extent and timing of water releases for particular (b)(2) actions; does not count all water being dedicated and managed for (b)(2)

[13] See Doc. 441 at ex. D.

purposes against the statutory limit; and allows Interior to carry-over stored (b)(2) water from one year to the next, which contravenes § 3406(b)(2)'s 800,000 acre-foot limit for (b)(2) purposes. (SAC ¶¶ 35-40). See Doc. 376 ex. 1 (proposed SAC); Doc. 395 (SAC). In order to "satisfy the concerns of the federal defendants and environmental plaintiffs," San Luis and Westlands agreed to: (1) "file joint briefs for all aspects of the case, including any appeals;" and (2) "to the extent that th[e] Court or any appellate court imposes time limits for oral argument, trial or other proceedings, the Authority and Westlands will be deemed to be a single party for time-allocation purposes and will share the time allocated to them." See Doc. 375 at 3 (memorandum in support of motion for leave to amend).[14]

On March 26, 2001, the parties appeared for oral argument on

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[14] On January 30, 2001, the government filed its opposition to San Luis' motion to amend, arguing that: (1) San Luis already represents its members, including Westlands; (2) San Luis is attempting to back-door a challenge to the CALFED ROD in this case; and (3) some of the claims could have been brought earlier. See Doc. 378 at 2-5. The environmental plaintiffs also opposed San Luis' proposed amendment, because it was "untimely, improper and prejudicial." See Doc. 381 at 2. They challenged San Luis' assertion that the parties have agreed to two conditions, emphasizing that they do not oppose allowing Westlands to be a plaintiff in order to allow Mr. Birmingham to continue to participate as counsel of record in this case, but that San Luis and Westlands should be treated as a single party for all proceedings, including all oral arguments, not simply those where time limits are imposed. See id. at 3-4; Doc. 382 ¶¶ 2-5 (declaration of Paul A. Peters). They also challenged the added allegation regarding the ROD as "an improper attempt to radically expend [sic] the scope of this proceeding to review the CALFED ROD." Doc. 381 at 5.

San Luis' motion to file its SAC and to require Interior to supplement the administrative record. See Doc. 393. The motions were granted orally during the hearing, and a confirming written order issued April 10, 2000. See Doc. 396.

On April 05, 2001, San Luis filed its SAC, see Doc. 395,[15] which the federal defendants answered on April 17, 2001, see Doc. 409.

On April 10, 2001, San Luis and Westlands moved for a preliminary injunction to prevent Interior from releasing in excess of the statutorily-capped 800,000 acre-feet of water under CVPIA § 3406(b)(2). See Doc. 397.

On April 16, 2001, oral argument was held on the motion for preliminary injunction. The parties agreed an evidentiary hearing was needed to determine how much (b)(2) water, if any, Interior had released in violation of the 800,000 acre-foot floor/cap. See Doc. 406.[16]

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[15] Water-district plaintiffs added a paragraph to the SAC that was not part of the proposed SAC, without notification to the other parties or the court. Compare Doc. 396 at ¶ 20 (SAC) with Doc. 376 at ¶ 20 (proposed SAC). Presumably, this was to account for actions by the federal government after the date the proposed SAC was lodged, January 16, 2001. Even though the order granting the water-districts' motion to file the SAC indicated that the SAC could "address the accounting methodology for an implementation of the CVPIA section 3406(b)(2) based on policies and decision made by Federal Defendants through January 31, 2001, Doc. 296 at 2, the water-districts did not raise the addition during oral argument on the SAC, at which time water-district plaintiffs were aware of the addition (late January, 2001, letter).

[16] Because of the time urgency of the availability of CVP water for fish restoration and the irrevocable loss of such water

A hearing on the motion for preliminary injunction was held on April 25, 2001, and evidence taken. See Doc. 419. On April 26, 2001, at approximately 12:15 PM PST, the parties appeared telephonically to determine what further action should be taken on plaintiffs' motion for a preliminary injunction. Plaintiffs withdrew their preliminary injunction motion, which defendants did not oppose. On May 14, 2001, plaintiffs' motion for preliminary injunction was vacated and ordered off calendar without prejudice. See Doc. 436.

On May 03, 2001, the environmental plaintiffs moved: (1) to sever under Rules 42(b) and 54(b) of the Federal Rules of Civil Procedure; and (2) to enter judgment and certify under Rule 54(b), as to: (a) paragraphs 55(a), (d)-(e) of their second cause of action; and (b) the first and second causes of action filed by San Luis, the Pixley Irrigation District ("Pixley"), and the Stockton East Water District ("SEWD"). See Doc. 422 at 2.[17]

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use once it is released, on April 19, 2001, the parties were ordered to submit declaration(s) that explain why it was impossible, not merely inconvenient, to produce any of their expert witness(es) by April 25, 2001, the scheduled preliminary injunction hearing date. See Doc. 411. No party submitted a declaration.

[17] On May 25, 2001, plaintiffs Westlands and San Benito filed opposition to the environmental plaintiffs' motion. See Doc. 439. They argued the preliminary injunction orders are not final judgments reviewable under interlocutory appeal, and should not be entered as final judgments, because such piecemeal litigation is not warranted in this case. See id. at 2-6.

On May 25, 2001, the federal defendants filed their "views" on the environmental plaintiffs' motion to sever, certify, and enter final judgment. See Doc. 400. "The concerns of the Federal Defendants as to the 54(b) certification now sought by

Oral argument was held Monday, June 18, 2001, where the parties agreed the ruling on that motion should await disposition of these pending cross-motions for summary judgment. This motion is addressed in an accompanying decision and order.

On May 4, 2001, the federal defendants moved for summary judgment against the environmental plaintiffs and water-district plaintiffs on all claims. See Doc. 423 at 2.

On May 7, 2001, the water-district plaintiffs moved for partial summary judgment that:

(1) Interior's calculation of CVP yield is not in accordance with law because it calculates the baseline using modified D-1400 flows instead of D-893 flows;

(2) the Final Decision is contrary to law because it does not calculate the amount of CVP yield, as defined by the statute, that is dedicated to (b)(2) purposes;

(3) the Final Decision is not in accordance with law because Interior does not count all water used to meet the requirements of the 1995 WQCP and other legal obligations imposed after enactment against the 800,000 acre-foot limit; and

(4) to the extent Interior uses "reset" and "offset" to avoid counting yield dedicated and managed pursuant to (b)(2), it is acting contrary to law.

Doc. 426 at 2.

On May 7, 2001, the environmental plaintiffs moved for partial summary judgment against the federal defendants on paragraphs 55(a), (c)-(e) of their second claim for relief. See Doc. 430 at 2.

On August 1, 2001, federal defendants moved to continue the scheduled August 13, 2001, hearing for sixty (60) days due to the

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the Environmental Plaintiffs are focused solely on the issue of timing." Id. at 3:15-17.

change in federal administration, e.g., a new Commissioner of Reclamation and new Secretary for Water and Science. See Doc. 457 at 2. Westlands and San Luis joined in that motion on August 2, 2001. See Doc. 460. The environmental plaintiffs refused to join the other parties, and argued that because the new water year begins in two months, the hearing should proceed as scheduled. See Doc. 462. On August 8, 2001, federal defendants' motion to continue this hearing was denied. See Doc. 461.

II. STANDARD

A. Summary Judgment

"Summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Westlands Water Dist., 134 F. Supp. 2d at 1128-29 (quoting 7-Up Bottling Co. of Jasper Inc. v. Varni Bros. Corp. (In re Citric Acid Litig.), 191 F.3d 1090, 1093 (9th Cir. 1999) (quoting FED. R. CIV. P. 56(c) and citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986))). A genuine issue of fact exists when the nonmoving party produces evidence on which a reasonable trier of fact could find in its favor, viewing the record as a whole in light of the evidentiary burden the law places on that party. See Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-56 (1986)) ("The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient.").

The non-moving party cannot simply rest on its allegation(s) without any significant probative evidence that supports the complaint. See U.A. Local 343 v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1995) ("As the Supreme Court has explained, '[i]f the evidence is merely colorable or is not significantly probative summary judgment may be granted.'") (citing Liberty Lobby, Inc., 477 U.S. at 249-50).

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp., 477 U.S. at 322-23.

The more implausible the claim or defense asserted by the opposing party, the more persuasive its evidence must be to avoid summary judgment. See United States ex rel. Anderson v. N. Telecom, Inc., 52 F.3d 810, 815 (9th Cir. 1996); see also Van Westrienen v. Americontinental Collection Corp., 94 F. Supp. 2d 1087, 1094 (D. Or. 2000) ("when the non-moving party's claims are factually implausible, that party must come forward with more persuasive evidence than would otherwise be required.") (citing Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics Inc., 818 F.2d 1466, 1470 (9th Cir. 1987)). Nevertheless, "the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in its favor." Murphy Exploration & Prod. Co. v. Oryx Energy Co., 101 F.3d 670, 673 (Fed. Cir. 1996) (quoting Liberty Lobby, Inc., 477 U.S. at 255; Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). At the summary judgment stage, a court may not weigh the evidence, i.e., issue resolution, but rather simply searches for genuine factual issues. See Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 410 (9th Cir. 1996).

B. Review Under Administrative Procedure Act ("APA")

Under the APA, federal courts can only review whether agency decisions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2001).

> A decision is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

O'Keeffe's, Inc. v. United States Consumer Prod. Safety Comm'n, 92 F.3d 940, 942 (9th Cir. 1996) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983), and citing Haw. Helicopter Operators Ass'n v. Fed. Aviation Admin., 51 F.3d 212, 214-15 (9th Cir. 1995) (quoting Beno v. Shalala, 30 F.3d 1057, 1073 (9th Cir. 1994) (quoting Motor Vehicle Mfrs. Ass'n, 463 U.S. at 44))). Put another way, "if the agency examines the relevant facts and reaches a conclusion that is rationally supported by the facts[,] then its decision is not arbitrary, even if the decision is a 'stupid' one." United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325, 1341 (E.D. Cal. 1995) (quoting Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1487 (9th Cir. 1992)

(Under APA review, "[s]o long as it explains its reasons, [an agency] may adopt a rule that all commentators think is stupid or unnecessary.")) (internal citation omitted).[18] "The court will let the agency's decision stand if the 'evidence before the agency provided a rational and ample basis for it.'" Christopher A. Goelz & Meredith J. Watts, California Practice Guide: Ninth Circuit Civil Appellate Practice ¶ 14:554 (quoting Systech Envtl. Corp. v. E.P.A., 55 F.3d 1466, 1469 (9th Cir. 1995)). "Most importantly, 'review under the arbitrary and capricious standard is narrow, and the reviewing court may not substitute its judgment for that of the agency.'" United States v. Snoring Relief Labs Inc., 210 F.3d 1081, 1085 (9th Cir. 2000) (quoting O'Keeffe's, Inc., 92 F.3d at 942 (citing Marsh v. Or. Natural Res. Council, 490 U.S. 360, 376 (1989))) (alteration marks omitted).

C. Chevron Deference

"Notably, with respect to statutory interpretation, Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), mandates that absent a clear expression of congressional intent to the contrary, courts should defer to reasonable agency

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[18] This is especially true with environmental decisions. See, e.g., Akiak Native Cmty. v. United States Postal Serv., 213 F.3d 1140, 1146 (9th Cir. 2000) ("[D]eference is accorded agency environmental determinations not because the agency possesses substantive expertise, but because the agency's decision-making process is accorded a 'presumption of regularity.'") (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971)).

interpretations of ambiguous statutory language." Friends of the Cowlitz & CPR-Fish v. Fed. Energy Regulatory Comm'n, 253 F.3d 1161, 1166 (9th Cir. 2001).[19] "Chevron deference is predicated on the assumption that a statute's ambiguity constitutes an 'implicit delegation' to the agency to interpret the statute." 222 F.3d 728, 749 (9th Cir. 2000) (citing Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (citing Chevron, 467 U.S. at 844)).[20]

Chevron analysis, which reviews an administrative agency's interpretation of a statute that it administers, consists of two steps. See, e.g., CHW W. Bay v. Thompson, 246 F.3d 1218, 1223 (9th Cir. 2001) ("The Chevron test has two steps.").[21] Under Chevron's first step, "traditional tools of statutory construction" are employed to determine whether Congress has expressed its intent unambiguously on the question before the

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[19] See also United States v. Mead Corp., __ U.S. __, 121 S. Ct. 2164, 2171 (June 18, 2001) ("administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.").

[20] See also Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 520.

[21] See also Bicycle Trails Council v. Babbitt, 82 F.3d 1445, 1452 (9th Cir. 1996) ("The Supreme Court has established a two-step process for reviewing an agency's construction of a statute it administers.").

court. See Chevron, 467 U.S. at 843 n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously[-]expressed intent of Congress." CHW W. Bay, 246 F.3d at 1223 (citing Chevron, 467 U.S. at 842-43 (footnote omitted)). If instead, however, Congress left a gap that the administrative agency should fill, step two of Chevron is employed, which "uphold[s] the administrative regulation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" Defenders of Wildlife v. Browner, 191 F.3d 1159, 1162 (9th Cir. 1999) (quoting Chevron, 467 U.S. at 844).[22] Chevron deference does not

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[22] See also Mead Corp., __ U.S. at __, 121 S. Ct. 2164, 2172 (2001):

> we have identified a category of interpretive choices distinguished by an additional reason for judicial deference. This Court in Chevron recognized that Congress not only engages in express delegation of specific interpretive authority, but that "sometimes the legislative delegation to an agency on a particular question is implicit." Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to

require a court to "conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached." 467 U.S. at 843 n.11.

III. DISCUSSION

A. Preliminary Matter: Violation of Local Court Rule

Rule 7-131 of the Eastern District of California Local Civil Rules, Counsel Identification and Signature, requires:

> [t]he name, address, telephone number, and the California State Bar membership number of all counsel (or, if in propria persona, of the party) and the specific identification of each party represented by name and interest in the litigation (e.g., plaintiff Smith, defendant Jones) shall appear in the upper left-hand corner of the first page of each document presented for filing, except that in the instance of multi-party representation reference may be made to the signature page for the complete list of parties represented.

E.D. Cal. Civ. L.R. 7-131 (Apr. 10, 2000). In apparent disregard for this Local Rule, counsel for the federal defendants have failed to identify their respective California State Bar Numbers[23] on most, if not all, documents they filed in this case. See, e.g., Doc. 424 at 1; Doc. 441 at 1; Doc. 448 at 1. Counsel must comply with this rule. Accord E.D. Cal. Civ. L.R. 11-110 (Aug. 1, 1997).

> the point at issue and the agency's interpretation is reasonable.

(citing Chevron, 467 U.S. at 842-45; 5 U.S.C. § 706(2)) (internal quotations and alteration marks omitted).

[23] Both government attorneys are members of the California bar. See Member Records Online - The State Bar of California, at http://www.calsb.org/mm/SBMBRSHP.HTM (last visited Aug. 9, 2001) (last modified July 7, 2001).

B. General Statutory Background: CVPIA Sections at Issue

The "CVPIA marks a shift in reclamation law modifying the priority of water uses." O'Neill v. United States, 50 F.3d 677, 686 (9th Cir. 1995). No party disputes that CVPIA § 3406(b)(2) directs Interior to calculate, dedicate, and manage a non-discretionary amount, 800,000 acre-feet of CVP "yield" for fish and wildlife habitat restoration. (The CVP expressly delegates to Interior the calculation, dedication, and management of CVP yield. See 106 Stat. 4600, 4714 (Oct. 30, 1992)).

> For the purpose of this section, the term "Central Valley Project yield" means the delivery capability of the Central Valley Project during the 1928-1934 drought period after fishery, water quality, and other flow and operational requirements imposed by terms and conditions existing in licenses, permits, and other agreements pertaining to the [CVP] under applicable State or Federal law existing at the time of enactment of this title have been met.

CVPIA § 3406(b)(2). The parties disagree as to what counts as an "allowable" (b)(2) purpose; how to "account" for or "measure" (b)(2) water; and whether the Bureau properly annually allocates the "full" 800,000 acre-feet of water from the CVP to (b)(2) purposes.

Interior's October, 1999, Final Decision: (1) describes the calculation of CVP "yield;" (2) defines the accounting methods and procedures to ensure Interior complies with Section 3406(b)(2)'s required annual 800,000 acre-foot water dedication; (3) addresses Section 3408(d)'s "banking" provisions;[24]

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[24] See CVPIA § 3408(d), 106 Stat. 4600, 4728-29 (Oct. 30, 1992) ("The Secretary, in consultation with the State of California, is authorized to enter into agreements to allow project contracting entities to use project facilities, where such facilities are not otherwise committed or required to

(4) credits CVP water used to meet the 1995 WQCP against the 800,000 (b)(2) obligation, up to a 450,000 acre-foot cap (which may be surpassed if the USFWS determines doing so is "the highest biological priority for use of the remaining (b)(2) water.");[25] and (5) establishes water-shortage provisions and coordination with CALFED.

C. Environmental Plaintiffs' Motion for Summary Judgment

The environmental plaintiffs challenge Interior's interpretation of the CVPIA in the October, 1999, Final Decision. They contend "[t]he Final Decision and DOI's implementation of the CVPIA misinterpret[] the requirements of Section 3406(b)(2) of the CVPIA in several important respects," including:

> (1) DOI improperly elevates the secondary purposes of the (b)(2) water over and above the primary purposes for which Congress directed the water to be dedicated and managed;
>
> (2) DOI improperly appropriates to itself unlimited discretion in charging the water used to fulfill obligations under the Endangered Species Act, 16 U.S.C. § 1531 et seq., ("ESA") against the 800,000 acre-feet of water that is to be dedicated under Section 3406(b)(2);
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> (3) the Final Decision fails to properly implement the banking provisions of Section 3408(d);
>
> (4) the Final Decision improperly purports to provide

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fulfill project purposes or other Federal obligations, for supplying carry-over storage of irrigation and other water for drought protection, multiple-benefit credit-storage operations, and other purposes. The use of such water shall be consistent with and subject to State law. All or a portion of the water provided for fish and wildlife under this title may be banked for fish and wildlife purposes in accordance with this subsection.").

[25] See Doc. 376 ex. 1 ex. C at 9 ("Water to Meet WQCP Requirements.").

> Interior with discretion to provide (b)(2) water for other CVP purposes, including irrigated agriculture, in the absence of the required finding that the (b)(2) water is not necessary for the fish, wildlife and habitat restoration purposes of the CVPIA, and
>
> (5) the Final Decision contains several errors in technical methodology that are likely to result in a dedication of less then [sic] the full 800,000 acre-feet of water required to be dedicated to the CVPIA's fish, wildlife and habitat restoration purposes and measures.

Doc. 431 at 2:12-3:4.

D. Water-districts' Motion for Summary Judgment

In their SAC, the water-districts allege that Interior's implementation of the Final Decision is arbitrary and capricious, and in violation of law. The water-districts disagree with the method Interior uses to credit water used to meet the 1995 WQCP's requirements against the 800,000 AF of (b)(2) water. They argue that all such water, not simply up to a 450 TAF maximum, used to satisfy the: (1) 1995 WQCP, and (2) post-CVPIA-enactment ESA requirements, should be credited against (b)(2)'s 800,000 AF mandate.

They contend the "calculation of CVP yield attached to the Final Decision [continues to] rel[y] upon modified D-1440 flows." Doc. 428 at 16.

Last, the water-districts advance the previously rejected argument (March 13, 2000, order (Doc. 320)), that Interior's decision erroneously measure the impact of (b)(2) releases on the delivery capability of the CVP under the current water-year conditions, rather than under simulated conditions as if the 1928-34 drought conditions existed in the current water-year, in violation of the plain CVPIA language defining "CVP yield." The

practical effect of the district's proposed regime is that the impact on water-users would be lessened in almost all years. In every "wet" year that simulates extreme drought conditions to measure the use of (b)(2) water, more water will be credited to (b)(2) uses than is actually used for those purposes, because more water is necessary to accomplish (b)(2) purposes under the extreme drought conditions.

E. Federal Defendants' Motion for Summary Judgment

Federal defendants' motion for summary judgment is straightforward: (1) "reaffirm" the ruling at the preliminary injunction stage that Interior acted within its discretion in defining CVP "yield;" (2) find that Interior acts reasonably and within its discretion by crediting a maximum 450 TAF of water used for ESA or WQCP purposes against (b)(2)'s mandatory 800 TAF releases; and (3) verify Interior complied with the March 13, 2000, order's (Doc. 320) direction to properly recalculate the CVP "yield" using D-893, not D-1400, flows.

F. Analysis

1. Calculation of CVP "Yield"

The March 13, 2000, order conclusively decided this issue. See Doc. 320 at 21-25. It held:

> Interior did not act unlawfully, arbitrarily, or capriciously in modeling the proposed 1999 (b)(2) actions on 1999 hydrologic conditions. It was not required to use a comparative 1928-34 period analysis to measure the impact of each (b)(2) action in quantifying CVP yield used for (b)(2) purposes from the reliable supply of "CVP yield," as it expressly and knowingly defined that term. This appropriation of CVP water is a practical consequence of the CVPIA's purpose in reallocating CVP water among the

competing demands for its use.

Id. at 32:2-11. The water-districts do not submit new or different authority, arguments, or facts to justify altering this reasoned determination.[26] If Congress intended to use a water allocation metric to calculate the annual effect of each (b)(2) dedication and use of CVP water applying hypothetical 1928-34 drought conditions it would have so said. It did not.

> CVP yield is defined to provide a reliable supply of CVP water for dedication and management annually for (b)(2) purposes. If Congress had intended that an historic firm yield methodology, no longer used by Interior, be used so that less than 800,000 AF of actual CVP water be dedicated and managed each year for (b)(2) purposes, it could have easily said so. Other provisions of the CVPIA evidence Congress knew how to provide express protections for water users when it so intended. . . . These sections, and the others within the CVPIA that expressly protect contractors, militate against a finding that Congress' silence in (b)(2) expresses intent that a comparative measurement methodology be used that would significantly reduce 800,000 AF of the actual amount of CVP water that could be devoted in most years to (b)(2) purposes.
>
> The language of (b)(2) makes no reference as to how to measure the (b)(2) 800,000 AF annual dedication and use of CVP yield. CVP yield, as defined, is a reliable water supply, approximately 6 million AF of CVP water. Of this total supply, 800,000 AF are to be annually applied for (b)(2) purposes. How and for what (b)(2) purposes the water is to be used is committed to Interior's discretion.
>
> . . . Interior's Interim Decision methodology for measuring annual (b)(2) uses of CVP yield is not unlawful, arbitrary or capricious.

Id. at 23-24. "CVP yield" means the 5.99 million AF of water calculated by the Bureau. This is an immutable figure that does not change from year to year. It represents the failsafe

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[26] This statement does not intimate that this is a motion for reconsideration. Extensive analysis was performed during the Preliminary Injunction stage. No significant factual or legal information has been submitted to alter that conclusion.

quantity of water that will be in the CVP year-in and year-out from which (b)(2) purposes are to be satisfied. Nor does the 800,000 AF of CVP water that must be devoted to (b)(2) purposes change from year to year; except in a year of extreme water shortage, up to a twenty-five (25%) reduction on the 800 TAF in Interior's discretion. CVPIA § 3406(b)(2)(C). Congress mandated this result in its compromise over the annual amount of water that shall be appropriated from the CVP to annually be used for (b)(2) purposes.

The March 13, 2000, order's (Doc. 230) conclusion of law on this issue IS ADOPTED AND INCORPORATED as part of this final decision on summary judgment. Federal defendants' motion for summary judgment is GRANTED: (1) Interior has correctly calculated CVP "yield" at 5.99 MAF; and (2) Interior need not, each year, recalculate the effect of every (b)(2) use under hypothetical conditions modeling each (b)(2) use under the 1928-34 conditions; but rather may account for the amounts of CVP yield actually dedicated and used each water year for (b)(2) purposes. The (b)(2) calculation must be made under actual conditions in the current water year.

2. Improper Use of Modified D-1400 Flows

The March 13, 2000, order determined "the use of modified D-1400 flows was not authorized by a license, permit, or other agreement pertaining to the CVPIA," and that Interior should have used the D-893 flows in its place to calculate yield. Doc. 320 at 31. Interior was directed to recalculate CVP yield using D-893 flows. See id. at 32-33.

Interior followed this direction and rectified its error by submitting new yield figures that were obtained using D-893 flows. See Doc. 322 at 3. The new results are:

New Model Calculation	
Area	Ave. Annual Delivery (1928-34) In thousand acre-feet ("TAF")
American River Basin	673
Delta Division	2315
Friant Division	940
Sacramento River Basin	2059
Stanislaus River Basin	3
TOTAL	5990

See id. at 4. The water-districts argue that the "calculation of CVP yield attached to the Final Decision relies upon modified D-1400 flows." Doc. 428 at 16. They contend that Interior's re-submission purportedly using the D-893 flows does not alter the fact that the Bureau still uses flows higher than those D-893 requires. See Doc. 452 at 8; Doc. 454 at ¶ 6 (declaration of James Snow). Federal defendants directly refute this argument with Ms. Lubas-Williams' declaration, see Doc. 322 at 3 ("The Bureau of Reclamation revised the Yield Study's PROSIM input files to use the D-893 flows at Nimbus, on the American River."). D-893 calls for lower American River flows of 250-350 ft. 3/sec. If the American River Basin represents the total of those flows, the calculation made by Ms. Lubas-Williams' of D-893 corresponds. Plaintiffs' expert's conclusion, without explanation, does not rebut the government's calculations to show that flows greater

than specified by D-893 are used. Plaintiffs have not met their evidentiary burden. Federal defendants' motion for partial summary judgment on this issue is GRANTED.

3. Crediting Water Used to Meet ESA and WQCP Requirements Against 800 TAF (b)(2) Requirement

No party disputes that Interior has no discretion to annually provide less or more than 800 TAF of CVP yield for (b)(2) purposes.

The environmental plaintiffs argue that using up to 450 TAF of (b)(2) water to satisfy ESA and WQCP requirements, see Doc. 376 ex. 1 ex. C at 9 ("Water to Meet WQCP Requirements."): (1) is contrary to the plain language of CVPIA § 3406(b)(2); (2) contravenes the CVPIA as a whole; and (3) results in an "absurdity." See Doc. 431 at 13-22.[27]

The water-district plaintiffs, in paragraphs 26d and e of their SAC, maintain the converse, asserting that Interior should credit all water annually used for ESA and WQCP requirements against the 800 TAF (b)(2) mandate, because by not doing so, Interior in effect improperly dedicates more than the non-discretionary 800 TAF of (b)(2) water to (b)(2) purposes. See

[27] In their reply and at oral argument, the environmental plaintiffs withdraw from their previous stance that no water used for ESA or WQCP requirements can be charged against the 800 TAF (b)(2) dedication, and only argue "Interior's use of the dedicated yield must prioritize the identified primary purposes in the law and cannot relegate the CVPIa's restoration measures, such as the salmon doubling mandate, to the last priority of use under this dedication." Doc. 449 at 1. This remains a challenge to Interior's choice, i.e., discretion.

Doc. 428 at 27-29.

Federal defendants rejoin that the "primary" purpose of Section 3406(b)(2) is to benefit fish, not satisfy the ESA or WQCP, and that it is within Interior's discretion to decide how much ESA or WQCP water, if any, is annually charged against the 800 TAF (b)(2) obligation. See Doc. 425 at 15-22.

Under the Chevron analysis, CVPIA § 3406(b)(2) must first be interpreted to determine whether Congress has unambiguously expressed its intent on the question presented: should water annually used to meet WQCP or post-CVPIA-enactment ESA requirements also be charged against the mandatory 800 TAF release for (b)(2) purposes? See Chevron, 467 U.S. at 843 n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously[-] expressed intent of Congress." CHW W. Bay, 246 F.3d at 1223 (citing Chevron, 467 U.S. at 842-43 (footnote omitted)). "When the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms." One 1997 Toyota Land Cruiser, 248 F.3d at 903 (quoting Hartford Underwriters Ins. Co., 530 U.S. at 1 (citations and quotation marks omitted)) (alteration marks omitted).

Section 3406(b)(2) unambiguously directs Interior to "dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title." CVPIA § 3406(b)(2), 106 Stat. 4600, 4715 (1992). Interior has no discretion whether to

annually provide more or less than 800 TAF of CVP yield (approximately 5.99 MAF) for (b)(2) purposes, unless it makes certain findings under CVPIA § 3406(b)(2)(C). See Doc. 156 at 32. If Congress had stopped at "primary purpose," the environmental plaintiffs' position could be plausible. (As noted in a previous order, Congress chose "primary," not "sole," to modify purpose.) However, Congress did not stop there. Under Section 3406(b)(2), Interior is also directed to annually dedicate and manage the mandatory 800 TAF of CVP yield "to assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary [i.e., the WQCP]; and to help to meet such obligations as may be legally imposed upon the [CVP] under State or Federal law following the date of enactment of this title, including but not limited to additional obligations under the Federal Endangered Species Act." Id. at 4715-16. As a matter of law, this language is not ambiguous -- water used to meet WQCP or post-CVPIA ESA requirements is an additional (b)(2) purpose and must be charged against the 800 TAF (b)(2) mandate if so used.[28] (Emphasis

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[28] Resort to legislative history is improper and unnecessary where the statutory language unambiguously speaks for itself. See, e.g., Janas v. McCracken (In re Silicon Graphics Inc. Sec. Litig.), 183 F.3d 970, 975 (9th Cir. 1999) ("If the language is plain and its meaning clear, that is the end of our inquiry.") (citing N.W. Forest Res. v. Glickman, 82 F.3d 825, 831 (9th Cir. 1996).; see also Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear.") (citing cases); United States v. Kentz, 251 F.3d 835, 840 (9th Cir. 2001) ("this rationale reads too much into what was not said by the legislative history and reads too little of what was said by the

added.)

The CVPIA is not silent on what amount of water used for these so-called "secondary" purposes is to be credited against the 800 TAF (b)(2) mandate. (E.g., could all 800 TAF of (b)(2) water be used to meet post-CVPIA-enactment ESA requirements?).

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statute itself.") (quoting United States v. DiPasquale, 864 F.2d 271, 281 (3d Cir. 1988)) (emphasis in original).

Plaintiffs argue that the legislative history of CVPIA § 3406(b)(2) expresses an intent that all water used to meet Bay-Delta or ESA requirements (enacted post-CVPIA) be credited against the 800 TAF (b)(2) mandate. See Doc. 428 at 29. In support, they cite the floor debate of the Bill that became the CVPIA, see id. at 29-31, and Senator Wallop's letter to the President that urged him to sign it, see id. app. A at 2 (October 20, 1992, letter by Senator Malcolm Wallop to President of the United States) ("The Conference agreed to 800,000 af, but provided that all requirements of the Endangered Species Act (330,000 af last year) and any Delta requirements would be charged against that 800,000 af.").

Federal defendants respond with a June, 1994, letter written by Representative Miller and Senator Bradley, which responded to a letter written by Representatives Dooley, Lehman, and Condit that stated "Congress intended that all of the CVP water used for endangered species and Delta water quality standards, together with water for CVPIA programs and projects, should be credited against the 800,000 AF obligations:"

> [the] argu[ment] that "Congress intended that all of the CVP water used for endangered species and Delta water quality standards, together with water for CVPIA programs and projects, should be credited against the 800,000 AF obligation . . . files in the face of the plain language of the statute.

Doc. 425 at 18.

Environmental plaintiffs add the legislative history analysis that compares the House and Senate versions of the CVPIA bill, alleging that such comparison shows that the 800,000 AF (b)(2) water should not be reduced by ESA and WQCP releases. See Doc. 431 at 20-22.

Congress mandates that exactly 800 TAF of CVP yield (= 5.99 MAF) be dedicated for (b)(2) purposes, whether "primary" or "secondary." To hold otherwise would render the 800 TAF figure superfluous. This leaves to Interior, the discretion to annually determine how much CVP yield to devote to WQCP or post-CVPIA ESA requirements. However, if it were left to Interior's "discretion" whether or not to count CVP yield used for such (b)(2) purposes, the annual 800 TAF cap would be illusory. The 800,000 TAF is intended by Congress as an immutable floor and ceiling on annual reallocation of water from CVP yield for (b)(2) purposes. If Interior uses more than 800 TAF for (b)(2) purposes in any year, but does not count all CVP yield used for such purposes, it violates CVPIA § 3406(b)(2).[29] Water-districts' motion for summary judgment on whether Interior has the discretion to limit credits against (b)(2) for water used for

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[29] It is not necessary to reach step two of the Chevron analysis, which directs a court to "uphold the administrative regulation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" Defenders of Wildlife, 191 F.3d at 1162 (quoting Chevron, 467 U.S. at 844). Interior chose to cap the ESA/WQCP credits at 450 TAF based on the 1994 Bay/Delta Accord's calculation that the CVP's share of the Accord's fishery measures would be a maximum of 450 TAF. See Doc. 376 ex. 1 ex. C at 9; Doc. 395 (same). Under the extremely-deferential "arbitrary and capricious" standard of review, Interior's choice to limit credits against (b)(2) water used for ESA or WQCP purposes at 450 TAF, cannot be said to be "stupid," much less totally devoid of reason or justification. However, because Congress has unambiguously expressed its intent that exactly 800 TAF of CVP yield (approximately 5.99 MAF) be dedicated for (b)(2) purposes, including "secondary" ones, Interior has no discretion to do otherwise and its 450 TAF credit-limit is arbitrary and contrary to law.

WQCP or post-CVPIA ESA purposes to 450 TAF is GRANTED, Interior has no such discretion. Any amount of CVP yield water annually used for a (b)(2) purpose must be counted as part of the 800 TAF. The environmental plaintiffs' motion for summary judgment on this issue is denied.

4. Banking Provisions: Section 3408(d)

The CVPIA permits (b)(2) water to be "banked" (i.e., stored) for fish and wildlife purposes:

> The Secretary, in consultation with the State of California, is authorized to enter into agreements to allow project contracting entities to use project facilities, where such facilities are not otherwise committed or required to fulfill project purposes or other Federal obligations, for supplying carry-over storage of irrigation and other water for drought protection, multiple-benefit credit-storage operations, and other purposes. The use of such water shall be consistent with and subject to State law. All or a portion of the water provided for fish and wildlife under this title may be banked for fish and wildlife purposes in accordance with this subsection.

CVPIA § 3408(d), 106 Stat. 4600, 4728-29 (emphasis added).

Environmental plaintiffs argue Interior's Final Decision violates the "Congressional intent" of the CVPIA banking provision by proscribing (b)(2) banking if it interferes with other CVP purposes. See Doc. 431 at 23; see also Doc. 376 ex. 1 ex. C at 8-9 (Final Decision) ("The transfer, exchange, and/or banking of (b)(2) water cannot interfere with the storage, diversion, or delivery of water for other purposes of the CVP."). They do not refer to statutory language or legislative history that specifically shows Congress intended to elevate the priority of (b)(2) banking for fish purposes over the other purposes listed in CVPIA § 3408(d). The express language of Section

3408(d) is to the contrary.

The Final Decision provides that (b)(2) water will be banked. See Doc. 441 ex. C at ¶ 3 (declaration of Wayne White) (citing section III.A. of Final Decision); see also Doc. 376 ex. C at 8 ("Subject to section III.C. below, the FWS may bank (b)(2) water in CVP or non-CVP facilities for fish and wildlife purposes."). Section 3408(d), the CVPIA banking section, does not require that any (b)(2) water be banked. It is within Interior's discretion whether to bank (b)(2) water. If Interior chooses to bank (b)(2) water, the CVPIA vests it with discretion over how to bank such extra (b)(2) water. Environmental plaintiffs nevertheless argue that the Final Decision relegates "banking for (b)(2) purposes [to] the lowest priority in the CVP system and effectively precludes banking of the dedicated yield in a reliable manner." Doc. 431 at 23. This is not the case, but even assuming, arguendo, the truth of this statement, the CVPIA is not violated, because CVPIA § 3408(d) does not prioritize (b)(2) water for banking. Cf. CVPIA § 3406(b)(2) (deducting 800 TAF before water for other uses, such as meeting existing water-service contracts with various water-districts). Rather, this section simply extends discretion to, but does not require, Interior to bank (b)(2) water, consistent with State law, if CVP project facilities are not otherwise committed or needed to meet CVP project purposes or other federal obligations. It is for Interior, in its reasonable discretion, to annually determine what "priority" water-banking for fish or wildlife purposes shall have, if project facilities are available.

Section 3408(d) lists at least three other purposes for

water-banking. Placing (b)(2) banking lowest in the hierarchy of other (b)(2) uses, if and when such water is banked, is not proscribed by Section 3408(d)'s explicit language. What is required is that any of the 800 TAF "banked" for (b)(2) purposes in any water year must be accounted for as a (b)(2) use in the year it is banked. Banked (b)(2) water is counted in the year of dedication, Interior is reasonable in not double-counting the banked water as a (b)(2) use at the time it is released, even if such use occurs in another water year, subject always to a non-arbitrary and non-capricious banking program. Federal defendants' motion for summary judgment on the issue of (b)(2) banking is GRANTED. Interior has discretion to determine (b)(2) banking in any year. No evidence was submitted to establish that its discretion has been abused.

5. Re-use of (b)(2) Water for Non-(b)(2) Purposes Without the Allegedly "Required" Section 3406(b)(2)(D) Finding

Environmental plaintiffs argue that because the dedication of exactly 800 TAF of water to (b)(2) purposes is non-discretionary, the Final Decision's observation that "[a]fter water released for upstream actions in this period has served the purpose for which its release was prescribed, it is available for recapture and reuse by the [CVP], including for export south of the Delta," Doc. 376 ex. 1 ex. C at 5; means that (b)(2) water is really being diverted for "non-(b)(2) purposes" in violation of Section 3406(b)(2)(D), because Interior has not made specific findings to justify such use. See Doc. 431 at 23-24.

This argument was addressed and rejected on March 19, 1999,

after extensive discussion of California water-law and the CVPIA's statutory language and legislative history. Summary judgment was granted in favor of the water-districts and federal defendants:

> Fish and wildlife measures under the CVPIA must conform to non-conflicting California law, 3411(a), which permits re-use of water to achieve its most beneficial use. The COA between the United States and the California DWR for coordinated operation of the CVP with the State Water Project recognizes the State's right to divert water from the CVP that cannot be used or diverted after it fulfills (b)(2) purposes. AR 4193. The statute does not prevent Interior from exercising its discretion to manage (b)(2) water for multiple uses, so long as the environmental requirements of (b)(2) are achieved.

Doc. 156 at 33-38 ("Reuse of (b)(2) Water"). Environmental plaintiffs raise no new arguments.[30] The March 19, 1999, decision (Doc. 156) and its reasoning on the re-use of (b)(2) water ARE ADOPTED AND INCORPORATED by this reference. Environmental plaintiffs' motion for summary judgment on this issue is DENIED.

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[30] Environmental plaintiffs discuss CVPIA § 3406(b)(2)(D), which provides:

> If the quantity of water dedicated under this paragraph, or any portion thereof, is not needed for the purposes of this section, based on a finding by the Secretary, the Secretary is authorized to make such water available for other project purposes.

106 Stat. 4600, 4716 (1992). It is not necessary to interpret this section here, because subsequent, e.g., downstream, use of former (b)(2) water does not qualify as (b)(2) water used "for other project purposes." Even if it did, this section cannot be read to require the Secretary to make specific findings (plural), but rather, the Secretary need only find, i.e., determine, that the water is not necessary for (b)(2) purposes.

6. Technical Errors

Environmental plaintiffs request "a ruling that as a matter of law, Interior has no discretion to employ modeling methodologies or assumptions in the accounting for the (b)(2) dedicated yield that are likely to result in an under-allocation of the (b)(2) water in any given year." Doc. 431 at 24.

It is established law of this case that (b)(2) unambiguously requires Interior to annually dedicate and use not one drop more or less than 800 TAF water for (b)(2) purposes. CVPIA § 3406(b)(2) requires Interior to annually calculate, dedicate, and manage exactly (i.e., not one iota less or greater than) 800,000 acre-feet of CVP "yield," as defined by the CVPIA, for fish and wildlife habitat restoration. Accord Westinghouse Elec. Corp. v. Gen. Circuit Breaker & Elec. Supply Inc., 106 F.3d 894, 901 (9th Cir. 1997) (citing Clark v. Bear Stearns & Co., 966 F.2d 1318, 1320 (9th Cir. 1992)) ("Under the doctrine of issue preclusion, a court can enter judgment as to issues that were actually litigated and determined in a prior adjudication, so long as the determination was a necessary part of the judgment in the earlier action."). This is a request for an advisory opinion. The determination on water-district and environmental plaintiffs' motions that only 800 TAF of CVP yield, no more, no less, can be annually dedicated and used for (b)(2) purposes, has already been made and summary adjudication granted.

7. Offset/Reset

The water-district plaintiffs argue Interior undercounts much water actually, annually dedicated for (b)(2) purposes by

using the separate offset and reset methods when accounting for (b)(2) water. See Doc. 452 at 18. None of the parties disputes factually that Interior utilizes the offset and reset methods. "Reset" uses the storage metric, Metric 1,[31] which measures changes in CVP reservoir storage from October to January. During this period, Interior continues to release water from the reservoirs for (b)(2) fishery purposes, which are then counted/charged against the 800 TAF (b)(2) limit. If subsequent precipitation refills the reservoirs to their pre-(b)(2) release levels, Interior then credits (or "resets") the same amount of water previously released for (b)(2) purposes, which it then re-uses for (b)(2) purposes. Water-district plaintiffs argue this method violates Section 3406(b)(2) by allowing (b)(2) water releases that total more than 800 TAF.

"Sometimes when Interior reduces Delta exports as a (b)(2) action, there is an opportunity to decrease reservoir releases. If Interior elects to reduce reservoir releases during those times, crediting under Interior's release metric can occur to offset increased reservoir releases at another time of year." Doc. 331 ex. C at ¶ 9 (White declaration). Water-district plaintiffs allege that Interior will in reality release over 1,100,000 AF for (b)(2) purposes, but that 250 TAF will be "credited" against that total, 200 TAF of which is from offset. See Doc. 452 at 20-21; Doc. 454 ¶ 3 & ex. 1 (Snow declaration and attached graph). They contend that the offset method violates

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[31] Interior uses at least three different Metrics to account for (b)(2) water.

(b)(2)'s 800 TAF cap, because actual (b)(2) releases are not counted by "offsetting" them using credits for reduced reservoir releases under (b)(2).

If Interior actually releases more than 800 TAF water for (b)(2) purposes, and then "credits" against that greater-than-800 TAF total, previous reductions in Delta releases as "offsets" (i.e., more storage in the reservoir) to come to a less-than-800 TAF net, section 3406(b)(2)'s 800 TAF (b)(2) cap appears to be violated. Federal defendants' response to the water-district plaintiffs' experts is sufficiently ambiguous as to require an EVIDENTIARY HEARING to determine the exact volume of CVP yield released for (b)(2) purposes and how it is in fact counted under the offset and reset metrics. Summary adjudication cannot be granted on this issue. All such motions are DENIED.

CONCLUSION

Interior has no discretion whether to annually provide more or less than 800 TAF of CVP yield (approximately 5.99 MAF) for (b)(2) purposes, unless it makes certain findings under CVPIA § 3406(b)(2)(C). The CVPIA does vest Interior with reasonable discretion over how to calculate, manage, and dedicate such mandatory 800 TAF acre-feet of water for fishery purposes. This latest round of partial summary judgment motions addresses the legality of Interior's October, 1999, Final Decision that implements (b)(2). The March 13, 2000 (Doc. 320) order, and this conclude that Interior cannot be required to use a comparative 1928-34 period analysis to measure the impact of each (b)(2) action in quantifying CVP yield annually used for (b)(2) purposes

from the reliable supply of "CVP yield," as Interior expressly and knowingly defined that term. It "did not act unlawfully, arbitrarily, or capriciously in modeling the proposed 1999 (b)(2) actions on 1999 hydrologic[al] conditions." Doc. 320 at 32.

No evidence establishes that Interior's recalculation of CVP "yield" using D-893 flows, submitted on March 17, 2000, see Doc. 322, violates the CVPIA. Interior's decision to credit a maximum 450 TAF of water that is used to satisfy WQCP and post-CVPIA-enactment ESA requirements against (b)(2)'s 800 TAF mandate is arbitrary and violates Section (b)(2), because all water used for those purposes must be credited against the 800 TAF mandate.[32] The Final Decision's treatment of (b)(2) banking is not arbitrary, capricious, or unlawful, because Interior has complete discretion whether to bank (b)(2) water. The CVPIA does not accord a priority to (b)(2) banking. The CVPIA only requires that banked (b)(2) water be counted in the year it was banked, not necessarily when such banked water is later used. The reasonable downstream re-use of former (b)(2) water does not constitute a non-(b)(2) use of (b)(2) water, because under California water law (and common sense), that water is no longer "(b)(2) water," having already been fully used for its (b)(2) purpose. Last, Interior's use of reset and offset metrics appears to violate the 800 TAF cap on (b)(2) releases. An evidentiary hearing SHALL BE HELD to address whether more than 800 TAF water is released for (b)(2) purposes by use of the

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[32] No party argues that water releases for the ESA and WQCP do not, at least tangentially, benefit fish.

reset/offset methods. For the forgoing reasons,

1. Federal defendants' motion for partial summary judgment IS GRANTED IN PART, as described above;[33]
2. Water-districts' motion for partial summary judgment is GRANTED IN PART, and DENIED IN PART, as described above;
3. Environmental plaintiffs' motion for partial summary judgment is GRANTED IN PART; and DENIED IN PART, as described above; and
4. An EVIDENTIARY HEARING SHALL BE HELD, within thirty (30) days following date of service of this decision, to address the sole, discrete issue whether under the reset and offset methods, Interior releases more than 800 TAF CVP yield.

SO ORDERED.

DATED: October 19, 2001.

Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

[33] Theses partial summary judgment motions do not address Interior's implementation of the Final Decision, because the administrative record is incomplete. To the extent that the federal defendants' motion for summary judgment can be construed to include such issues, it is denied without prejudice.