

2018

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Recommended Citation

42 Wm. & Mary Envtl. L. & Pol'y Rev. 477 (2018).

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CALIFORNIA RUSHES IN—KEEPING WATER INSTREAM FOR FISHERIES WITHOUT FEDERAL LAW

PAUL STANTON KIBEL*

INTRODUCTION

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

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.³ All of these people whose jobs and livelihoods are involved in California's fishing sector have taken a financial hit as the state's salmon stocks have plummeted.⁴ As explained by the Golden Gate Salmon Association, an organization that works on behalf of commercial salmon

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¹ *San Luis & Delta-Medota Water Auth. v. Jewell*, 747 F.3d 581, 592–96 (9th Cir. 2014); *Pac. Coast Fed'n of Fishermen's Ass'n v. Guitierrez*, 606 F. Supp. 2d 1122, 1127–28 (E.D. Cal. 2008); *Nat. Res. Def. Council, Inc. v. Kempthorne*, 506 F. Supp. 2d 322, 328–31 (E.D. Cal. 2007).

² *San Luis & Delta-Medota Water Auth.*, 747 F.3d at 592–96; *Pac. Coast Fed'n of Fishermen's Ass'n*, 606 F. Supp. 2d at 1127–28; *Nat. Res. Def. Council*, 506 F. Supp. 2d at 328–31.

³ Mike Hudson, Hudson Fish Company, Remarks at the California Water Law Symposium at the University of San Francisco School of Law (Jan. 21, 2017) (notes on file with author).

⁴ *Id.*

fishermen in Northern California, “For many of us, salmon provides the income we use to keep a roof over our family’s head.”⁵

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.⁶ 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.⁷ Under these circumstances, commercial fishermen and other stakeholders focused on conserving California’s fisheries may increasingly turn their attention to state law and state agencies.⁸

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 it is part of a broader and more long-standing debate about the constitutional parameters and policy implications of federalism for natural resource regulation. There is a well-developed body of legal scholarship that addresses such federalism questions as the distinction between federal law floors and federal law ceilings 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.⁹ More recently, with the election of Donald 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

⁵ *Why We Work for Salmon?*, GOLDEN GATE SALMON ASS'N, <http://www.goldengatesalmon.org/why-we-work-for-salmon> [<https://perma.cc/2BWU-3NVF>] (last visited Jan. 21, 2018).

⁶ See text accompanying footnotes *infra* 22–77, discussing federal statutes and case law relied on to keep water instream for fisheries.

⁷ Rachel Zwillinger, Attorney for Defenders of Wildlife, & Cliff Lee, Attorney with Natural Resource Section of California Attorney General’s Office, Presentations at Bar Association of San Francisco panel on *Coming Changes in Water Law Practice: California Law Advances as Federal Law Recedes* (Apr. 13, 2017) [hereinafter Presentations of Zwillinger & Lee].

⁸ *Id.*

⁹ See generally William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, EMORY U. SCH. OF L. PUB. L. & LEGAL THEORY RES. PAPER SERIES (Res. Paper No. 07-9, 2007); Kristen H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L. J. 159 (2006); Jerome M. Organ, *Limitation on State Agency Authority to Adopt Environmental Standards More Stringent than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MD. L. REV. 1373 (1995).

of federal law to advance policies often associated with the political left.¹⁰ 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, Part I of the Article identifies the different ways that instream flow affects California fisheries. Part II then surveys federal laws and federal agencies that have traditionally supported efforts to keep water instream for California fisheries. In Part III, 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)¹¹ as a focal point, Part IV then assesses proposed Congressional legislation to limit the application of California water law, the response of the California Attorney General to this proposed legislation,¹² and a July 2017 California Supreme Court decision¹³ that may shed light on whether this proposed legislation, if enacted, is likely to survive a legal challenge. The last Part 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

¹⁰ See generally Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY J. 37 (2012) [hereinafter Gerken, *A New Progressive Federalism*]; Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HAR. L. REV. 85 (2014) [hereinafter Gerken, *Slipping the Bonds of Federalism*]; Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014).

¹¹ H.R. 23, 115th Cong. (2017).

¹² Letter from Xavier Becerra, Cal. Att'y Gen., to Paul Ryan, House Speaker, and Nancy Pelosi, House Minority Leader (July 11, 2017), https://oag.ca.gov/system/files/attachments/press_releases/Representatives%20Ryan%20and%20Pelosi_H.R.%2023%2020170711.pdf [<https://perma.cc/YKV3-QGJ5>] [hereinafter Letter from Xavier Becerra].

¹³ *Eel River v. N. Coast R.R. Auth.*, 399 P.3d 37 (Cal. 2017).

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.

I. 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.¹⁴ 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.¹⁵

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.¹⁶

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.¹⁷ With the reduction in freshwater flow due to upstream diversions

¹⁴ 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) at 3, 5 (July 15, 2014).

¹⁵ *Id.* at 4–5, 13, 16–17.

¹⁶ Paul Stanton Kibel, *The Public Trust Navigates California's Bay Delta*, 51 NAT. RES. J. 35, 35 (2011) [hereinafter Kibel, *The Public Trust Navigates California's Bay Delta*].

¹⁷ San Luis & Delta-Mendota Water Auth., 747 F.3d 581 at 595; Paul Stanton Kibel, *Sea Level Rise, Saltwater Intrusion and Endangered Fisheries—Shifting Baselines for the Bay Delta Conservation Plan*, 38 ENVIRONS: ENVTL. L. & POL'Y J. 259, 263–65 (2015) [hereinafter Kibel, *Sea Level Rise*].

and impoundment behind dams, ocean saltwater has pushed further into the Bay Delta.¹⁸ The delta smelt now faces the prospect of extinction as a result of rising salinity caused by seawater intrusion.¹⁹

In terms of temperature, Bay Delta cold-water 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.²⁰ 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.²¹ The scientific consensus is that the cause of this salmon die-off below Shasta Dam was high instream temperatures.²² What accounted for these higher instream temperatures? Reduced cold-water releases from Shasta Dam due to increased water demand during the drought.²³

In terms of slack-water conditions, low-flow stagnant rivers provide conditions for the spread of algae and aquatic parasites that can kill fish.²⁴ 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.²⁵

II. 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

¹⁸ San Luis & Delta-Mendota Water Auth., 747 F.3d at 595; Kibel, *Sea Level Rise*, *supra* note 17, at 263–66.

¹⁹ San Luis & Delta-Mendota Water Auth., 747 F.3d at 595–601, 637; Kibel, *Sea Level Rise*, *supra* note 17, at 263–66.

²⁰ *Healing Troubled Waters: Preparing Trout and Salmon Habitat for a Changing Climate*, TROUT UNLIMITED at 3 (2007), <https://www.tu.org/sites/default/files/science/pdfs/Healing-Troubled-Waters-Preparing-Trout-and-Salmon-Habitat-for-a-Changing-Climite.pdf> [<https://perma.cc/AKV9-HNUU>].

²¹ Bettina Boxall, *The drought's hidden victim: California native fish*, L.A. TIMES (Aug. 24, 2015), <http://www.latimes.com/local/california/la-me-drought-fish-20150824-story.html> [<https://perma.cc/E92M-MH5W>].

²² *Id.*

²³ *Id.*

²⁴ U.S. BUREAU OF RECLAMATION, DRAFT LONG-TERM PLAN FOR PROTECTING LATE SUMMER ADULT SALMON IN THE LOWER KLAMATH RIVER at 3 (Apr. 2015).

²⁵ *Id.* at 1–3.

California: the federal Clean Water Act;²⁶ federal Endangered Species Act;²⁷ federally recognized tribal fishing rights;²⁸ the National Environmental Policy Act;²⁹ the Federal Power Act;³⁰ and the federal Wild and Scenic Rivers Act.³¹ 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 (“EPA”).³²

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.³³ In recent years, the EPA 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.³⁴

More specifically, in 2014 the EPA sent a letter to its sister federal agency the United States Bureau of Reclamation commenting on a Reclamation proposal for changed operations for the Central Valley Project in California.³⁵ The EPA’s 2014 letter on the proposal for future Central Valley Project operations stated:

[W]e are concerned that the actions proposed . . . may result in violations of [the] Clean Water Act water quality standards and further degrade the ecosystem . . . [T]he primary premise of the [proposed action by United States Bureau of Reclamation] appears to be the hypothesis that

²⁶ 33 U.S.C. §§ 1251 et seq. (2012).

²⁷ 16 U.S.C. §§ 1531 et seq. (2012).

²⁸ *Parravano v. Babbitt*, 70 F.3d 539, 547 (9th Cir. 1995).

²⁹ 42 U.S.C. §§ 4321 et seq. (2012).

³⁰ 16 U.S.C. §§ 791a et seq. (2012).

³¹ Clean Water Act § 303, codified at 33 U.S.C. § 1313 (2012).

³² *Id.*

³³ Dan Bacher, *Tunnel opponents applaud EPA’s scathing comment letter*, DAILY KOS (Aug. 30, 2014), <https://www.dailykos.com/stories/2014/08/30/1325955/-Tunnel-opponents-applaud-EPA-s-scathing-comment-letter> [<https://perma.cc/J8D5-3FVZ>].

³⁴ *Id.*

³⁵ *Id.*

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 . . . The 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.³⁶

In response to issues raised in the 2014 EPA 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.³⁷ 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.³⁸ 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.³⁹

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.⁴⁰ 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.⁴¹

³⁶ Letter from the E.P.A. to Will Stelle, Reg'l Admin., West Coast Region Nat'l Marine Fisheries Serv. on Draft Environmental Impact Statement for the Bay Delta Conservation Plan (Aug. 26, 2014).

³⁷ Paul Stanton Kibel, *Truly a Watershed Event: California's Water Board Proposes Base Flows for the San Joaquin River Tributaries*, CAL. WATER L. J. (2016).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See generally *Coordinated Long-Term Operations of the Central Valley Project and State Water Project: Project Description*, BUREAU OF RECLAMATION & CAL. DEP'T OF WATER RES. (Aug. 2011) [hereinafter *Coordinated Long-Term Operations*].

⁴¹ See generally *id.*

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.⁴² 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.⁴³ 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).⁴⁴

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

[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.”⁴⁷

In January 2015, the United States Supreme Court denied certiorari to review the Ninth Circuit’s decision in *San Luis & Delta-Mendota Water Authority v. Jewell*.⁴⁸

⁴² Memorandum from the U.S. Fish and Wildlife Serv. on Transmittal of Formal Endangered Species Act Consultation on the Coordinated Operations of the Central Valley Project and State Water Project (Dec. 15, 2008), http://www.fws.gov/sfbaydelta/documents/SWP-CVP_OPs_BO_12-15_final_signed.pdf [<https://perma.cc/WE3U-HL7J>] [hereinafter Memorandum from the U.S. Fish and Wildlife Serv.].

⁴³ Biological Opinion and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project, NAT’L MARINE FISHERIES SERVICE SW. REGION (June 4, 2009), http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water_20Operations/Operations,%20Criteria%20and%20Plan/nmfs_biological_and_conferenceopinion_on_the_long-term_operations_of_the_cvp_and_swp.pdf [<https://perma.cc/T8ED-P4LA>].

⁴⁴ See Memorandum from the U.S. Fish and Wildlife Serv., *supra* note 42.

⁴⁵ See *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 599–601.

⁴⁶ *Id.* at 616–17.

⁴⁷ *Id.* at 622.

⁴⁸ *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 948 (Jan. 12, 2015).

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.⁴⁹ The water stored in the reservoirs behind 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 farmers.⁵⁰ As mentioned earlier, in past years, slack water conditions on the lower Klamath River previously led to outbreak of the Ich parasite that decimated salmon runs.⁵¹ These slack water conditions were caused, in part, by minimal releases from Lewiston and Trinity Dams.⁵²

The reservations of the Hoopa and Yurok Tribes are located along the Trinity River and Klamath River.⁵³ In its 1995 decision in *Parravano v. Babbitt*, the Ninth Circuit recognized the Hoopa and Yurok tribes's fishery rights under federal law to salmon on the Trinity and Klamath Rivers.⁵⁴ In this case, the federal government, acting as trustee for the tribes, imposed restrictions on the ocean catch of salmon to ensure enough fish returned to the areas along the reservation.⁵⁵ 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.⁵⁶

....

We have noted, with great frequency, that the federal government is the trustee of the Indian tribes' rights, including fishing rights. (Citation omitted). This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole. (Citations omitted). In particular, this court and the Interior Department have

⁴⁹ U.S. BUREAU OF RECLAMATION, *supra* note 24, at 3.

⁵⁰ *Id.* at 26.

⁵¹ *Id.* at 1–3.

⁵² *Id.* at 15.

⁵³ *Parravano v. Masten*, 70 F.3d 539, 542 (9th Cir. 1995).

⁵⁴ *Id.* at 547–48.

⁵⁵ *Id.* at 547.

⁵⁶ *Id.* at 542.

recognized a trust obligation to protect the Yurok and Hoopa Valley Tribes' rights to harvest Klamath chinook. (Citation omitted).⁵⁷

....

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.⁵⁸

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 reoccurrence of the Ich parasite breakout that earlier damaged salmon stocks in the Klamath River basin).⁵⁹ 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 hinook salmon in the Yurok Tribal fishery in the estuary areas meets or exceeds a total of 7,000 fish,⁶⁰ and then recommended increasing flow augmentation to a "minimum of 2,800 cfs" under these same circumstances.⁶¹

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.⁶² More specifically, § 5 of the 2015 draft

⁵⁷ *Id.* at 546.

⁵⁸ *Id.* at 547.

⁵⁹ See generally U.S. BUREAU OF RECLAMATION, *supra* note 24.

⁶⁰ *Id.* at 17.

⁶¹ *Id.* at 9.

⁶² *Id.* at 23.

Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River on “Statutory Authority” states that the Bureau of Reclamation’s actions pursuant to the plan are “consistent with Reclamation’s obligations to preserve tribal trust resources.”⁶³

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.⁶⁴ More specifically, § 4332(2)(E) of NEPA provides that the range of alternatives evaluated in an EIS needs to address “unresolved conflicts” regarding significant environmental impacts (e.g., conflicts regarding the effects of reduced instream flows on fisheries).⁶⁵

The 2005 Fourth Circuit Court of Appeals decision in *National Audubon Society v. Department of the Navy* is instructive on this question.⁶⁶ 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.⁶⁷ 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

⁶³ *Id.*

⁶⁴ 42 U.S.C. § 4332(2)(C).

⁶⁵ 42 U.S.C. § 4332(2)(E).

⁶⁶ *Nat’l Audubon Soc’y v. Dep’t of the Navy*, 422 F.3d 174 (4th Cir. 2005).

⁶⁷ *Id.* at 180–81.

indicates that the Navy did not conduct the “hard look” that NEPA requires.⁶⁸

The California WaterFix is a proposed project to move the main point of diversion for the Central Valley Project and State Water Project to the north delta and to construct two underground tunnels to transport water from the new diversion point to farms and cities south of the delta.⁶⁹ Once the new north delta point of diversion and tunnels are operational, California WaterFix does not include provisions to commit to reduced Central Valley Project and State Water Project diversions that would increase instream flow through the Bay Delta.⁷⁰ 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 with the proposed project.⁷¹

Fishery conservation groups have criticized the proposed California WaterFix, alleging a failure to evaluate an alternative that commits to increase flow and reduce diversions to avoid adverse impacts on salmon and delta smelt.⁷² For instance, in a joint September 29, 2015 comment letter to the State Water Resources Control Board on the California WaterFix, 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

⁶⁸ *Id.* at 186–87.

⁶⁹ *Fact Sheet: California WaterFix—Water Right Change Petition and Water Quality Certification Process (updated July 21, 2016)*, CAL. WATER BOARDS at 1, https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/ca_waterfix_factsheet.pdf [<https://perma.cc/8BDL-PQH4>] (last visited Jan. 21, 2018).

⁷⁰ *Id.* at 4.

⁷¹ *Id.* at 2.

⁷² Letter from Nat. Res. Def. Council et al., to Tom Howard, Exec. Dir., State Water Res. Control Board on Preliminary Comments Regarding the Notice, Fact Sheet and Petition for Change in Point of Diversion for the California WaterFix (Sept. 29, 2015).

the California WaterFix fundamentally fails to meet . . . the salmon doubling objective of the existing Bay-Delta Water Quality Plan.⁷³

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:

[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.⁷⁴

....

[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.⁷⁵

....

[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.⁷⁶

⁷³ *Id.*

⁷⁴ Doug Obegi, *Why California WaterFix Is a Path to Extinction for Native Fisheries*, WATER DEEPLY (Aug. 23, 2016), <https://www.newsdeeply.com/water/community/2016/08/23/why-california-water-fix-is-a-path-to-extinction-for-native-fisheries> [<https://perma.cc/2TXT-KRJL>].

⁷⁵ *Id.*

⁷⁶ *Id.*

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.

E. Federal Power Act § 10—Protecting Fisheries When Dams Are Relicensed

Under the Federal Power Act, nonfederal dams on navigable rivers are relicensed by the Federal Energy Regulatory Commission.⁷⁷ 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.⁷⁸

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.”⁷⁹ 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.⁸⁰

In terms of the 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.⁸¹

⁷⁷ 16 U.S.C. §§ 803(a), (j).

⁷⁸ Paul Stanton Kibel, *Passage and Flow Considered Anew: Wild Salmon Restoration Via Hydro Relicensing*, 37 PUB. LAND & RES. L. REV. 65, 81–84 (2016) [hereinafter Kibel, *Passage and Flow Considered Anew*]. See also NAT'L MARINE FISHERIES SERV., *Comments of NOAA's National Marine Fisheries Service on the Proposed Study Plan for the La Grange Hydroelectric Project*, P-14581-000 at 1 (Dec. 4, 2014).

⁷⁹ 16 U.S.C. §§ 803 (j)(1).

⁸⁰ 16 U.S.C. §§ 803(a)(3), (j). See also Kibel, *Passage and Flow Considered Anew*, *supra* note 78, at 73.

⁸¹ Kibel, *Passage and Flow Considered Anew*, *supra* note 78, at 82–84. See also NAT'L MARINE FISHERIES SERV., *supra* note 78, at 9–10.

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,” “scenic,” or “recreational.”⁸² Once designated as “wild” under the federal Wild and Scenic Rivers Act, a river segment is protected from activities such as additional diversions or the placement of new onstream dams that adversely affect its wilderness qualities (including maintenance of instream flows to support fisheries).⁸³

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.⁸⁴

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.⁸⁵ 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 California.⁸⁶

III. 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,

⁸² 16 U.S.C. § 1271 et seq. (1968). See also *An Introduction to Wild and Scenic Rivers*, INTERAGENCY WILD AND SCENIC RIVERS COORDINATING COUNCIL at 3 (1998), <https://www.rivers.gov/documents/wsr-primer.pdf> [<https://perma.cc/T9PG-SYHY>].

⁸³ 16 U.S.C. § 1271 et. seq. See also *An Introduction to Wild and Scenic Rivers*, *supra* note 82, at 3–4.

⁸⁴ *California*, NAT’L WILD AND SCENIC RIVERS SYSTEM, <https://www.rivers.gov/california.php> [<https://perma.cc/TQ95-FRRN>] (last visited Jan. 21, 2018).

⁸⁵ *Upper Eel River Proposed WSRs*, CAL. WILDERNESS COALITION, <http://www.calwild.org/portfolio/uppereel-wsrs/> [<https://perma.cc/FG6D-9NJJ>].

⁸⁶ 16 U.S.C. § 1271 et seq. See also *An Introduction to Wild and Scenic Rivers*, *supra* note 82, at 3–4.

and more specifically the role federal law and federal agencies play in ensuring instream flow to maintain fisheries.⁸⁷ 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.⁸⁸ 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;⁸⁹ California public trust law;⁹⁰ California reasonable use law;⁹¹ § 5937 of the California Fish and Game Code;⁹² California water quality certification authority;⁹³ California's Wild and Scenic Rivers Act;⁹⁴ and California's Delta Reform Act.⁹⁵ 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 EPA 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?

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.⁹⁶

⁸⁷ Presentations of Zwillinger & Lee, *supra* note 7.

⁸⁸ *Id.*

⁸⁹ Cal. Water Code §§ 13000 et seq. (Deering 2017).

⁹⁰ Nat'l Audubon Soc'y v. Super. Ct., 33 Cal. 3d 419, 452 (1983). *See also* Kibel, *The Public Trust Navigates California's Bay Delta*, *supra* note 16, at 36.

⁹¹ CAL. CONST. art. XI § 7.; Cal. Water Code § 100.

⁹² Cal. Fish & Game Code § 5937 (Deering 2017).

⁹³ 33 U.S.C. § 1341(a)(1).

⁹⁴ Cal. Pub. Res. Code § 5093.50 (Deering 2017).

⁹⁵ Cal. Water Code § 85001 et seq. (Deering 2017).

⁹⁶ Cal. Water Code § 13000.

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 San Joaquin River—regardless of whether the EPA 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.⁹⁷ 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.⁹⁸

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.⁹⁹ This case involved pumping that reduced instream flow on

⁹⁷ *Nat’l Audubon Soc’y*, 33 Cal. 3d at 452.

⁹⁸ *Id.* at 447.

⁹⁹ Order After Hearing on Cross Motions for Judgment on the Pleadings, *Env’tl. Law Found. v. State Water Res. Control Bd.*, Case No. 34-2010-80000583, at 2 (Cal. Super. Ct. July 15, 2014).

the Scott River along California's north coast.¹⁰⁰ 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 pools. This, in turn, has injured the river's fish populations.¹⁰¹

. . . .

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 the 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.¹⁰²

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 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

¹⁰⁰ *Id.* at 3.

¹⁰¹ *Id.*

¹⁰² *Id.* at 8.

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 the use or flow of water in or from any natural stream or water course . . . 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 of use or unreasonable method of diversion of water.¹⁰³

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 programs to ensure diversions in the Russian River watershed do not reduce instream flow so as to imperil salmon.¹⁰⁴ 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 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 be in the interests neither of the enjoined growers nor the public. Efficient regulation of the state's water resources in these circumstances demands that the [State Water Resources Control Board] have the authority to enact tailored regulations.¹⁰⁵

In 1986, in what became known as the “Racanelli Decision” (after Judge Racanelli who authored the opinion), the California Court of Appeals

¹⁰³ CAL. CONST. art. X, § 2; Cal. Water Code § 100.

¹⁰⁴ *Light v. State Water Res. Control*, 226 Cal. App. 4th 1463, 1472–73 (Cal. Ct. App. 2014).

¹⁰⁵ *Id.* at 1486–87.

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.¹⁰⁶ The Racanelli Decision held:

[T]he [Water] Board had the authority to modify the projects' permits to curtail their use of water on the ground that the projects' use and diversion of the water had become unreasonable . . . We perceive no legal obstacle to the [Water] Board's determination that particular methods of use have become unreasonable by their deleterious effects upon water quality.¹⁰⁷

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's 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.

D. Section 5937 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?

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*.¹⁰⁸ Among other things, Executive Order 13807 calls upon the Council on Environmental Quality ("CEQ") 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 CEQ's authority to interpret NEPA to simplify and accelerate

¹⁰⁶ US v. State Water Res. Control Bd., 182 Cal. App. 3d 82, 98 (1986).

¹⁰⁷ *Id.* at 130.

¹⁰⁸ Exec. Order No. 13807, 82 Fed. Reg. 40,463 (Aug. 15, 2017).

the NEPA review process.”¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ For instance, these federal and state water projects share diversion facilities near the city of Tracy, California that divert water from the Sacramento–San Joaquin Delta into the two projects’ water delivery system.¹¹²

Section 5937 of the California Fish and Game Code requires that “[t]he owner of any dam shall allow sufficient water at all times 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.”¹¹³ 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 infrastructure for the federal Central Valley Project.¹¹⁴ 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-1940s¹¹⁵ . . . 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.¹¹⁶

¹⁰⁹ *Id.* at 40,468.

¹¹⁰ See generally *Coordinated Long-Term Operations*, *supra* note 40.

¹¹¹ See generally *id.*

¹¹² See generally *id.*

¹¹³ Cal. Fish and Game Code § 5937.

¹¹⁴ Nat. Res. Def. Council v. Patterson, 333 F. Supp. 2d 906, 913–14 (E.D. Cal. 2004).

¹¹⁵ *Id.* at 909.

¹¹⁶ *Id.* at 909–10.

....

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 successfully 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 (citation 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 (citation omitted). While salmon continue to return and spawn until 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 events (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).¹¹⁷

¹¹⁷ *Id.* at 910.

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 needed to maintain water temperatures at which cold-water fish such as salmon can survive, observing that “[r]educed flows in the San Joaquin River below Friant Dam have . . . increased the temperature of the water that is available.”¹¹⁸

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.”).¹¹⁹

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.¹²⁰

. . . .

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.¹²¹

¹¹⁸ *Id.* at 911.

¹¹⁹ *Id.* at 914.

¹²⁰ *Nat. Res. Def. Council*, 333 F. Supp. at 924.

¹²¹ *Id.* at 925.

....

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.¹²²

....

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 had been dried up.¹²³

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 increased 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 releases from Shasta Dam to help maintain water temperatures below the dam at 60 degrees Fahrenheit or lower to protect salmon and steelhead trout cold-water fisheries.¹²⁴ 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."

E. 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?

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Cal. Fish & Game Code § 5937.

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.¹²⁵ 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).¹²⁶

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.¹²⁷ 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.¹²⁸ In her opinion in *Washington Department of Ecology*, Justice O’Connor wrote:

Petitioners also assert more generally that the Clean Water Act 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.¹²⁹

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 § 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.¹³⁰

¹²⁵ 33 U.S.C. § 1341.

¹²⁶ Kibel, *Passage and Flow Considered Anew*, *supra* note 78, at 76–77, 81–84. *See generally* NAT’L MARINE FISHERIES SERV., *supra* note 78.

¹²⁷ *Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 723 (1994).

¹²⁸ *Id.* at 709.

¹²⁹ *Id.* at 719.

¹³⁰ Kibel, *Passage and Flow Considered Anew*, *supra* note 78, at 81–84. *See generally* NAT’L MARINE FISHERIES SERV., *supra* note 78.

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.¹³¹

F. California Wild and Scenic River Protections—Advancing If Federal Wild and Scenic River Protections Recede

What if the administration of Donald Trump or the new Congress weaken the protections afforded river 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 1971.¹³²

Similar to the federal Wild and Scenic Rivers Act, once a river is designated as “wild” under the California Wild and Scenic Rivers Act, a river segment is protected from activities such as additional diversions or the placement of new onstream dams that adversely affect its wilderness qualities (including maintenance of instream flows to support fisheries).¹³³ Several segments of the Eel River in California are designated and protected as wild pursuant to the California Wild and Scenic Rivers Act,¹³⁴ and additional segments in the Eel River watershed are now being considered for “wild” designations under the California Wild and Scenic Rivers Act.¹³⁵

¹³¹ *Id.*

¹³² Cal. Pub. Res. Code, §§ 5093.50–.70 (Deering 2017). *See also* Robert Crabbe, ‘Wild, Scenic’ Status for Rivers Sought, L.A. TIMES (Nov. 10, 1985), http://articles.latimes.com/1985-11-10/news/mn-3362_1_wild-river [<https://perma.cc/WA3Q-55US>].

¹³³ Cal. Pub. Res. Code, §§ 5093.50–.70.

¹³⁴ *Wild and Scenic Rivers and Management Agencies*, CAL. DEP’T OF TRANSPORTATION (June 2007) at 1–2, available at http://www.dot.ca.gov/ser/vol1/sec3/special/ch19wsrivers/wild_and_scenic_designation_and_agencies.doc [<https://perma.cc/GH6R-SMMY>].

¹³⁵ *Upper Eel River & Tributaries: Proposed Wild & Scenic Rivers*, CAL. WILDERNESS COALITION, <https://www.calwild.org/wp-content/uploads/2017/08/Upper-Eel-Basin-Rivers-Cal-Wild-2.pdf> [<https://perma.cc/6FUK-JYE9>] (last visited Jan. 21, 2018).

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.

G. *Instream Flow Requirements Under California's Delta Reform Act—Advancing If Federal Instream Flow Requirements Recede*

As discussed above in Part II 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,¹³⁶ § 7 of the Endangered Species Act,¹³⁷ and § 10 of the Federal Power Act.¹³⁸ 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.¹³⁹

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?

In 2009, the California Legislature declared, “The Sacramento–San Joaquin Delta watershed and California's water infrastructure are in crisis and existing policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources.”¹⁴⁰ 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.¹⁴¹ Pursuant to the 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

¹³⁶ 33 U.S.C. § 1313 (2000).

¹³⁷ Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973).

¹³⁸ 16 U.S.C. §§ 803(a), (j) (1992).

¹³⁹ See generally *Coordinated Long-Term Operations*, *supra* note 40.

¹⁴⁰ Cal. Water Code § 85001(a) (Deering 2017).

¹⁴¹ *Id.* § 85001.

supply for California and (2) protecting, restoring, and enhancing the Delta ecosystem.¹⁴²

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.¹⁴³ 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 ecosystems.” 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 . . .” (citation omitted). 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.¹⁴⁴

. . . .

Respondent argues the goal of ER P1 provides a generalized measurement, and that the [Delta Stewardship] Council “intends to refine its performance measures.” (citation omitted). Again, “progress” is not defined. It does not provide a quantified or otherwise measurable target upon which the Delta Plan can be gauged. While Respondent may intend

¹⁴² *Id.* § 85059.

¹⁴³ *Id.* § 85054.

¹⁴⁴ Ruling on Submitted Matter: Petitions for Writ of Mandate, Bifurcated Proceedings on Statutory Challenges, Delta Stewardship Council Cases, Judicial Council Coordination Proceeding No. 4758, at 14 (Super. Ct. of Cal., May 18, 2016).

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.¹⁴⁵

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.

IV. 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 preempt 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 positions of Scott Pruitt, President Trump’s Secretary of the EPA and the former Attorney General for the State of Oklahoma.¹⁴⁶ In his capacity as Oklahoma’s Attorney General, Pruitt advocated for an expansive view of rights

¹⁴⁵ *Id.* at 15.

¹⁴⁶ Chris Mooney et al., *Trump names Scott Pruitt Oklahoma attorney general suing EPA on climate change, to head the EPA*, WASH. POST (Dec. 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://perma.cc/Z7Y6-SLLM>].

reserved to the states and a limited view of the authority of the federal government to displace such state authority.¹⁴⁷

More specifically, in July 2015, in his capacity as Oklahoma's Attorney General, Scott Pruitt filed a complaint in federal district court against the EPA on behalf of the State of Oklahoma.¹⁴⁸ 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.¹⁴⁹

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." (citation omitted).¹⁵⁰

In paragraph 45 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 regulatory authority. Accordingly, the EPA Power Plan will require states to exercise such regulatory authority, whether or not they submit state plans.¹⁵¹

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

¹⁴⁷ Complaint at ¶ 1, *Oklahoma v. EPA*, No. 15-CV-369-CVE-FHM (N.D. Okla. July 1, 2015) [hereinafter *Oklahoma v. EPA Complaint*].

¹⁴⁸ *Id.* ¶ 3.

¹⁴⁹ *Id.* ¶¶ 1–3, 5.

¹⁵⁰ *Id.* ¶ 12.

¹⁵¹ *Id.* ¶ 45.

plan to meet EPA's goals or EPA promulgates a federal implementation plan, the EPA Power Plan forces the State of Oklahoma to undertake substantial legislative, regulatory, planning, and other activities."¹⁵²

In paragraph 71 of the Complaint in *State of Oklahoma v. United States Environmental Protection Agency*, former Oklahoma Attorney General Pruitt alleged: "[T]he EPA Power Plan unlawfully commandeers the states, in excess of Congress's Article I authority and in violation of the Tenth Amendment to the U.S. Constitution."¹⁵³

In paragraph 72 of the Complaint in *State of Oklahoma v. United States Environmental Protection Agency*, former Oklahoma Attorney General Pruitt alleged: "[T]he 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] states' exercise of their police powers if they do not comply with EPA's demands."¹⁵⁴

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.

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.¹⁵⁵ 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.¹⁵⁶ 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.

¹⁵² *Id.* ¶ 55.

¹⁵³ *Oklahoma v. EPA Complaint*, *supra* note 147, at ¶ 71.

¹⁵⁴ *Id.* ¶ 72.

¹⁵⁵ H.R. 23, 115th Cong. (2017).

¹⁵⁶ *Id.* § 108(a)–(b).

In considering the provisions in H.R. 23, it is again important to 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.¹⁵⁷ 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 the two projects share and jointly operate water diversion structures in the South delta.¹⁵⁸

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 Project. Implementation of this section shall be in strict conformance with the "Principles for Agreement on the Bay-Delta Standards Between the State of California and the Federal Government" dated December 15, 1994.¹⁵⁹

Significantly, the "any other law" language in Section 108(a) of H.R. 23 is not limited to federal law, so it presumably could also apply to the California sources of water law (e.g., California public trust law, California reasonable use law, § 5937 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

¹⁵⁷ See generally *Coordinated Long-Term Operations*, *supra* note 40.

¹⁵⁸ See generally *id.*

¹⁵⁹ H.R. 23 § 108(a).

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.¹⁶⁰

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.¹⁶¹ 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;¹⁶² § 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 nonfederal dams in California;¹⁶³ 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 California water laws.¹⁶⁴ 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-1914 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

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 33 U.S.C. § 1341 (2001).

¹⁶³ 16 U.S.C. §§ 803(a), (j) (1992).

¹⁶⁴ *California v. United States*, 438 U.S. 645, 674–79 (1978).

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, in order to protect, enhance, or restore under the Public Trust Doctrine any public trust value.¹⁶⁵

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.¹⁶⁶ 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 watersheds unaffected by the federal and state water projects. If interpreted in this way, Section 108(b) could potentially displace California 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’”¹⁶⁷

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.¹⁶⁸ In this letter, California Attorney General Becerra asserted that H.R. 23 would “transgress state sovereignty,”¹⁶⁹ explaining:

¹⁶⁵ H.R. 23, § 108(b).

¹⁶⁶ *See id.*

¹⁶⁷ Alastair Bland, *House Bill Redirects River Flows From Fish to Farms*, WATERDEEPLY (Aug. 2, 2017), <https://www.newsdeeply.com/water/articles/2017/08/02/house-bill-redirects-river-flows-from-fish-to-farms> [<https://perma.cc/RW8W-RWBP>].

¹⁶⁸ Letter from Xavier Becerra, *supra* note 12.

¹⁶⁹ *Id.* at 1.

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 federalism¹⁷⁰

. . . .

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 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 the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.”¹⁷¹

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 the Article X, Section 2 of the California constitution and California’s common law doctrine of the public trust. According to the California

¹⁷⁰ *Id.* at 1–2.

¹⁷¹ *Id.* at 2.

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 laws¹⁷²

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.)

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

¹⁷² *Id.*

agencies and state officials “into administering federal law.”
(*Printz, supra*, 521 U.S. at 928.)¹⁷³

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.¹⁷⁴ 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 preempt, displace or otherwise limit the applicability and enforceability of California law.¹⁷⁵

Somewhat ironically, and as noted above, the legal grounds the State of California and former Attorney General Eric Holder may rely upon in such a legal challenge could be based on the federalism and reserved states’s rights positions previously advocated for by Scott Pruitt, the current Secretary of the EPA in the administration of Donald Trump who previously served as Attorney General for the State of Oklahoma.¹⁷⁶ In particular, California Attorney General Becerra’s position regarding H.R. 23’s unconstitutional commandeering of state agencies by the federal government¹⁷⁷ 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*.¹⁷⁸

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

¹⁷³ *Id.* at 2–3.

¹⁷⁴ Presentations of Zwillinger & Lee, *supra* note 7.

¹⁷⁵ Adam Nagourney, *California Hires Eric Holder as Legal Bulwark Against Donald Trump*, N.Y. TIMES (Jan. 4, 2017), <https://www.nytimes.com/2017/01/04/us/california-eric-holder-donald-trump.html> [https://web.archive.org/web/*/https://www.nytimes.com/2017/01/04/us/california-eric-holder-donald-trump.html].

¹⁷⁶ See *Oklahoma v. EPA Complaint*, *supra* note 147, at ¶ 1.

¹⁷⁷ Letter from Xavier Becerra, *supra* note 12, at 3.

¹⁷⁸ *Oklahoma v. EPA Complaint*, *supra* note 147, at ¶ 71.

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.¹⁷⁹

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”).¹⁸⁰ 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.¹⁸¹

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 significant adverse effects on the environment.¹⁸² 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 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.¹⁸³ 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.¹⁸⁴

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.

¹⁷⁹ *Friends of the Eel River v. N. Coast R.R. Auth.*, 399 P.3d 37, 52 (Cal. 2017).

¹⁸⁰ *Id.* at 43.

¹⁸¹ *Id.* at 45.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 43.

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 lines, in the sense that states as owners cannot violate 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 subdivisions 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.¹⁸⁵

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

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.” (citation 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. (citation omitted).

The Legislature, in enacting CEQA, imposed certain principles of self-government on public entities. In other words,

¹⁸⁵ *Friends of the Eel River*, 399 P.3d at 43.

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).¹⁸⁶

The California Supreme Court then went on to hold that the ICCTA does not preempt 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 restricts 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 ICCTA, intended to preempt 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.¹⁸⁷

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, § 5937 of the

¹⁸⁶ *Id.* at 57–58.

¹⁸⁷ *Id.* at 65.

California Fish and Game Code, the California Wild and Scenic Rivers Act, and California's Delta Reform Act.¹⁸⁸ 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's 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.¹⁸⁹

Second, under California law, surface waters in the state are not owned by the parties that divert, store, or use such waters.¹⁹⁰ 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 Division of Water Rights in accordance with California water law.¹⁹¹ As California water lawyer Gary Sawyers explains in his guide *A Primer on California Water Rights*:

[N]o water user in the State "owns" any water. Instead, a water right grants the holder thereof only the right to use water (called a "usufructuary right"). The owner of "legal title" to all water is the State in its capacity as trustee for the benefit of the public.¹⁹²

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.¹⁹³ But for the issuance

¹⁸⁸ H.R. 23 § 108(a)–(b).

¹⁸⁹ *Friends of the Eel River*, 399 P.3d at 66.

¹⁹⁰ Gary W. Sawyers, *A Primer on California Water Rights* at 10, http://aic.ucdavis.edu/events/outlook05/Sawyer_primer.pdf [<https://perma.cc/LDZ4-QAFU>].

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *California v. United States*, 438 U.S. at 654.

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.¹⁹⁴

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.¹⁹⁵ 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.¹⁹⁶

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-governance."¹⁹⁷ 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.¹⁹⁸

C. *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. 23,¹⁹⁹ and the recent opinion of the California Supreme Court in *Friends of the Eel River*,²⁰⁰ 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

¹⁹⁴ *Id.*

¹⁹⁵ H.R. 23 § 108(a)–(b).

¹⁹⁶ Sawyers, *supra* note 190, at 1, 10.

¹⁹⁷ *Friends of the Eel River*, 399 P.3d at 37, 43–44.

¹⁹⁸ H.R. 23 § 108(a)–(b).

¹⁹⁹ Letter from Xavier Becerra, *supra* note 12, at 2–3.

²⁰⁰ *Friends of the Eel River*, 399 P.3d at 53.

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.²⁰¹ There is an aspect of federal preemption for both federal floors and federal ceilings, but this preemption works quite differently depending on whether a floor or a ceiling is involved. As Georgetown Law School Professor William Buzbee explained in his 2007 article titled *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*:

Typically the debate focused on the federal standard setting where federal law allows states to increase the stringency of regulation, but prohibits states from more lenient regulation.²⁰²

. . . .

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 sometimes even common law regimes.²⁰³

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 of minimized risk (with floors) or higher levels of risk (with ceilings) . . . these two central regulatory choices are fundamentally different. Floors embrace additional and more stringent state and common law action, while ceilings actually are better labeled a “unitary federal choice.”²⁰⁴

²⁰¹ See generally Buzbee, *supra* note 9; Organ, *supra* note 9; Engel, *supra* note 9.

²⁰² Buzbee, *supra* note 9, at 5.

²⁰³ *Id.* at 6.

²⁰⁴ *Id.* at 1.

....

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 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, but leaves room for other actors and additional regulatory action. Floors anticipate and benefit from the institutional diversity they permit.²⁰⁵

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,²⁰⁶ § 10 of the Federal Power Act,²⁰⁷ and § 401 of the Clean Water Act,²⁰⁸ 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:

²⁰⁵ *Id.*

²⁰⁶ Federal Reclamation Act, § 8.

²⁰⁷ 16 U.S.C. §§ 803(a), (j).

²⁰⁸ 33 U.S.C. § 1341.

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.²⁰⁹

A leading legal scholar on the concept of new progressive federalism is Professor Heather Gerken who was recently appointed Dean of Yale Law School.²¹⁰ 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’s 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.”²¹¹

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 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

²⁰⁹ Daniela Blei, *From California, a Progressive Cry for State’s Rights*, THE NEW REPUBLIC (Feb. 14, 2017), <https://newrepublic.com/article/140606/california-progressive-cry-states-rights> [https://web.archive.org/web/*/https://newrepublic.com/article/140606/california-progressive-cry-states-rights].

²¹⁰ See generally Gerken, *A New Progressive Federalism*, *supra* note 10; Gerken, *Slipping the Bonds of Federalism*, *supra* note 10; Gerken & Holtzblatt, *supra* note 10.

²¹¹ Heather Gerken, *We’re About to See State’s Rights Used Defensively Against Trump*, VOX (Jan. 20, 2017), <https://www.vox.com/the-big-idea/2016/12/12/13915990/federalism-trump-progressive-uncooperative> [<https://perma.cc/74LT-FPVF>].

fair-weather federalists. Both sides use it instrumentally to achieve their goals,” she said.²¹²

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 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.

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 others 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.²¹³

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.²¹⁴ 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.

²¹² Cristian Farias, *A New Romance: Trump Has Made Progressives Fall in Love with Federalism*, N.Y. MAG. (Aug. 24, 2017), <http://nymag.com/daily/intelligencer/2017/08/trump-has-made-progressives-fall-in-love-with-federalism.html> [https://perma.cc/3F57-W2MQ].

²¹³ Presentations of Zwillinger & Lee, *supra* note 7.

²¹⁴ Gerken, *A New Progressive Federalism*, *supra* note 10, at 1.

H.R. 23 proposes to limit and displace sources of California water law that could be used to maintain instream flow for fisheries.²¹⁵ 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.²¹⁶ At this point it is uncertain whether H.R. 23 will be enacted into law, but even if enacted there are indications that H.R. 23 may not survive a legal challenge.²¹⁷ 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.²¹⁸ 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.²¹⁹

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?

²¹⁵ H.R. 23 § 108(a)–(b).

²¹⁶ Buzbee, *supra* note 9, at 8–9. See also Engel, *supra* note 9, at 185.

²¹⁷ Letter from Xavier Becerra, *supra* note 12, at 2–3.

²¹⁸ H.R. 23 § 108(a)–(b).

²¹⁹ Letter from Xavier Becerra, *supra* note 12, at 2–3; *Friends of the Eel River*, 399 P.3d at 45–46.

