No. __________

In The
Supreme Court Of The United States

GLENN-COLUSA IRRIGATION DISTRICT, et al.,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
SOMACH SIMMONS & DUNN, PC
500 CAPITOL MALL, SUITE 1000
SACRAMENTO, CA 95814
TELEPHONE: 916-446-7979
SSOMACH@SOMACHLAW.COM

ADDITIONAL COUNSEL ON FOLLOWING PAGE

* *Counsel of Record*

Kevin M. O'Brien, Esq.
Steven P. Saxton, Esq.
Meredith E. Nikkel, Esq.
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
Telephone: 916-444-1000
kobrien@downeybrand.com
ssaxton@downeybrand.com
mnikkel@downeybrand.com

QUESTION PRESENTED

Whether a federal agency has the requisite discretion to trigger application of Section 7(a)(2) of the Endangered Species Act where legal obligations imposed by state and federal law mandate the agency action; and where the agency action is predicated upon the agency reaching mutual agreement with a non-federal party.

PARTIES TO THE PROCEEDING

Petitioners, who were defendants or defendant-intervenors and appellees below, are Glenn-Colusa Irrigation District; Princeton-Codora-Glenn Irrigation District; Provident Irrigation District; Anderson-Cottonwood Irrigation District; City of Redding; Pacific Realty Associates, LP; Reclamation District No. 1004; Conaway Preservation Group, LLC; David and Alice Te Velde Trust; Reclamation District No. 108; Natomas Central Mutual Water Company; River Garden Farms Company; Pleasant-Grove-Verona Mutual Water Company; Pelger Mutual Water Company; Sutter Mutual Water Company; Meridian Farms Water Company; Henry D. Richter, et al.; Howald Farms, Inc.; Oji Family Partnership; Oji Brothers Farms, Inc.; Carter Mutual Water Company; Windswept Land and Livestock Company; Tisdale Irrigation and Drainage Company; and Maxwell Irrigation District.

Respondents, who were plaintiffs and appellants below, are the Natural Resources Defense Council; California Trout; San Francisco Baykeeper; Friends of the River; and the Bay Institute.

Respondents, who were defendants and appellees below, are Sally Jewell, in her official capacity as Secretary of the Interior; Dan Ashe, in his official capacity as Director of the U.S. Fish and Wildlife Service; Lowell Pimley, in his official capacity as acting Commissioner of the U.S. Bureau

of Reclamation; Beverly F. Andreotti; Banta-Carbona Irrigation District; Patterson Irrigation District; West Side Irrigation District; Byron Bethany Irrigation District; Coehlo Family Trust; Eagle Field Water District; Mercy Springs Water District; Oro Loma Water District; West Stanislaus Irrigation District; Fresno Slough Water District; James Irrigation District; Christo D. Bardis; Abdul Rauf; Tahmina Rauf; Fred Tenhunfeld; and Family Farm Alliance. During the litigation below, the Commissioner for the Bureau of Reclamation was replaced by Mr. Pimley, as acting Commissioner.

Respondents, who were defendant-intervenors and appellees below, are San Luis & Delta-Mendota Water Authority; Westlands Water District; California Farm Bureau Federation; State Water Contractors; and California Department of Water Resources.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners has a parent corporation, and no publicly held company owns 10% or more of any of these entities' stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT......... iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION......................... 2

STATUTORY PROVISIONS INVOLVED............... 2

STATEMENT OF THE CASE 3

I. FACTUAL BACKGROUND 7

II. PROCEDURAL BACKGROUND................ 12

REASONS FOR GRANTING RELIEF 15

I. THE NINTH CIRCUIT'S REFUSAL TO EVALUATE THE EXISTING LEGAL OBLIGATIONS THAT LIMIT RECLAMATION'S DISCRETION CONFLICTS WITH THIS COURT'S DECISION IN *HOME BUILDERS*............ 15

Page

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF THE D.C. CIRCUIT REGARDING THE APPLICATION OF SECTION 7(a)(2) TO MUTUAL AGREEMENTS 19

CONCLUSION... 22

APPENDIX

Court of Appeals En Banc Opinion (April 16, 2014). .... App. 1

Court of Appeals Order Granting En Banc Rehearing (March 5, 2013)............................ App. 22

Court of Appeals Panel Opinion (July 17, 2012) .... App. 25

District Court Final Judgment (Sept. 23, 2009) .... App. 57

District Court Order re Cross Motions for Summary Judgment (Sept. 1, 2009) .... App. 59

District Court Order re Motion for Reconsideration (Aug. 6, 2009) .... App. 65

District Court Order re Cross Motions for Summary Judgment (June 3, 2009) .... App. 81

Page

District Court Clarifying Memorandum
(June 3, 2009) .... App. 86

District Court Supplemental Memorandum
Decision re Cross Motions for Summary
Judgment (April 27, 2009) .... App. 94

District Court Memorandum Decision re
Cross Motions for Summary Judgment
(Nov. 19, 2008) .... App. 203

TABLE OF AUTHORITIES

Page(s)

CASES

California v. United States
438 U.S. 645 (1978) 8, 9, 17

In re Operation of the Missouri River System Litigation
421 F.3d 618 (8th Cir. 2005) 19

Nat'l Ass'n of Home Builders v. Defenders of Wildlife
551 U.S. 644 (2007) .... 4 *passim*

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.
524 F.3d 917 (9th Cir. 2008) 14, 15

Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Comm'n
962 F.2d 27 (D.C. Cir. 1992) .... 6 *passim*

San Luis & Delta Mendota Water Auth. v. Jewell
747 F.3d 581 (9th Cir. 2014) 13

United States v. Oregon
44 F.3d 758 (9th Cir. 1994) 9

Page(s)

United States v. Orr Water Ditch Co.
256 F.3d 935 (9th Cir. 2001) 9

United States v. State Water Resources Control Board
694 F.2d 1171 (9th Cir. 1982) 9

STATUTES

16 U.S.C. § 1536(a)(2)................................ 2 *passim*
28 U.S.C. § 1254(1) 2
43 U.S.C. § 372.. 8
43 U.S.C. § 383 [§8] 3, 4, 8, 17, 18

Cal. Water Code
§ 1375... 8
§ 1391... 17
§ 1450... 17
§§ 11128, 11460 17

LEGISLATION

Energy and Water Appropriation Act, Pub. L. No. 108-137, 117 Stat. 1827 (2003) 12

TREATISES AND OTHER AUTHORITIES

Engle Subcomm. Hearing House Interior and Insular Affairs Comm. (1951), *reprinted in* Engle, *Central Valley Project Documents*,

H.R. Doc. No. 416, 84th Cong., 2d Sess., pt. 1 at 681 (1956) 9

Page(s)

Random House Dictionary of the English Language 411 (unabridged ed. 1967)..................... 21

PETITION FOR WRIT OF CERTIORARI

Glenn-Colusa Irrigation District, et al. (collectively, "Settlement Contractors") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The en banc opinion of the Court of Appeals is reported at 749 F.3d 776 (9th Cir. 2014) and is included in the Appendix to the Petition for Writ of Certiorari (App.) at pages App. 1-21. The panel opinion of the Court of Appeals is reported at 686 F.3d 1092 (9th Cir. 2012) and is included in the Appendix at pages App. 25-56. The District Court's final judgment and final September 1, 2009 order on the cross-motions for summary judgment are unreported, and are reprinted in the Appendix at pages App. 57-58 and App. 59-64, respectively. The District Court's August 6, 2009 order on reconsideration is unreported and is reprinted in the Appendix at pages App. 65-80. The District Court's June 3, 2009 clarifying memorandum as reported at 627 F.Supp.2d 1212 (E.D. Cal. 2009), and a related unreported order, are included in the Appendix at pages App. 86-93 and App. 81-85, respectively. The District Court's April 27, 2009 supplemental memorandum decision is reported at 621 F. Supp. 2d 954 (E.D. Cal. 2009) and is included in the Appendix at pages App. 94-202. The District Court's November 19, 2008 memorandum decision is

unreported and is reprinted in the Appendix at pages App. 203-312.

STATEMENT OF JURISDICTION

The Court of Appeals issued the en banc opinion on April 16, 2014. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7(a)(2) of the Endangered Species Act (16 U.S.C. § 1536(a)(2)) provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each

> agency shall use the best scientific and commercial data available.

Section 8 of the Reclamation Act (43 U.S.C. § 383) provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

STATEMENT OF THE CASE

The Ninth Circuit Court of Appeals has not followed the direction of this Court in its evaluation of whether an action agency, in this case the United States Bureau of Reclamation (Reclamation), has the requisite discretion to trigger the requirements of Section 7(a)(2) of the Endangered Species Act (ESA). This Court resolved the fundamental tension between the Section 7(a)(2) consultation requirement

and the many other legal obligations imposed upon federal agencies in *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (*Home Builders*). The Court found that Section 7(a)(2) only applies to those agency actions that are discretionary because "when an agency is *required* to do something by statute," it cannot insure that the action will not jeopardize endangered species. *Id.* at 667 (emphasis in original). In the present case, the Ninth Circuit decided an important federal question regarding the reach of ESA Section 7(a)(2) in a manner that conflicts with *Home Builders* as well as the law of the D.C. Circuit Court of Appeals.

Both state and federal law controls Reclamation in its operation of the Central Valley Project (Project or CVP), the largest federal reclamation project in the nation. In approving Reclamation's water rights for the CVP nearly 50 years ago, the State of California directed Reclamation to enter into settlement agreements with holders of senior water rights on the Sacramento River. This requirement is a condition of Reclamation's water right permits for the CVP. Following the dictates of State water law is mandated by Section 8 of the 1902 Reclamation Act. These combined state and federal law mandates were satisfied in 1964 when Reclamation executed the Sacramento River Settlement Contracts (Settlement Contracts). The Settlement Contracts are long-term water right settlement contracts that had an initial term of 40 years and provided for renewals thereafter for additional 40-year terms.

The initial term of the Settlement Contracts and any subsequent renewals were for fixed quantities of water. Consistent with the provisions of the Settlement Contracts, in 2005, Reclamation renewed the Settlement Contracts in order to ensure continued compliance with state-imposed conditions on its water right permits.

Notwithstanding these state and federal legal obligations, the Ninth Circuit found that Reclamation had sufficient discretion in renewing the Settlement Contracts to trigger the requirements of Section 7(a)(2) on two alternative grounds. First, it determined that nothing within the Settlement Contracts limited Reclamation's discretion to not renew the Settlement Contracts. App. 21. Second, it determined that even assuming *arguendo* that Reclamation was obligated to renew the Settlement Contracts, Reclamation could have benefitted delta smelt by "renegotiating" at least some terms of the Settlement Contracts. App. 21. In essence, the court determined that Reclamation could exercise its discretion and not renew the Settlement Contracts if it did not obtain the Settlement Contractors' assent on those hypothetically proposed terms.

In finding that Section 7(a)(2) was triggered because Reclamation had discretion not to renew the Settlement Contracts the Ninth Circuit ignored entirely the central tenet of *Home Builders*—namely, that when an agency is required to do something by statute it cannot also insure that the action will not jeopardize endangered species, and therefore,

Section 7(a)(2) does not apply. Moreover, in finding, in the alternative, that Section 7(a)(2) was triggered because Reclamation could have benefitted the delta smelt by "renegotiating" certain terms of the Settlement Contracts, App. 21, the Ninth Circuit put itself directly at odds with *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992). There the D.C. Circuit Court of Appeals held that when a federal agency lacks authority to impose unilateral terms to benefit a protected species, it also lacks discretion under Section 7(a)(2) of the ESA.

The settlement embodied in the Settlement Contracts is absolutely essential to the operation of the CVP, including the substantial fishery benefits provided by current CVP operations. This is so because defining the extent of water diversions by those who possess senior water rights is a necessary prerequisite to determining the available water supply for CVP operations. The settlement allowed California to avoid decades-long water rights litigation on the Sacramento River that has embroiled other watersheds in the West. Future water resources planning and infrastructure construction on the Sacramento River (the largest river in California) and elsewhere in the State, including the currently proposed Bay-Delta Conservation Plan, will not be possible absent the water supply and allocation certainties provided by the Settlement Contracts. The CVP simply cannot operate without the Settlement Contracts in place.

Petitioners respectfully request that the Court grant the petition and decide the important federal issue that the Ninth Circuit's decision deliberately avoided in contravention of this Court's direction in *Home Builders*, and the holding of the D.C. Circuit in *Platte River*.

I. FACTUAL BACKGROUND

The CVP is a federal reclamation project operated by Reclamation. It is one of the world's largest water distribution and storage systems, and delivers approximately seven million acre-feet of water to northern and central California. Shasta Dam on the upper Sacramento River is the primary storage facility and source of water supply for the Project. The Sacramento River flows into Shasta Reservoir and then south into the Sacramento-San Joaquin Delta (Delta), where CVP facilities are located that convey and export water for water supply south of the Delta, and to urban coastal areas.

The Settlement Contractors are agricultural and municipal entities situated in the Sacramento Valley. They divert up to approximately 2.2 million acre-feet of water annually directly from the Sacramento River below Shasta Dam, many miles upstream from the Delta. The Settlement Contractors (or their predecessors-in-interest) have diverted water pursuant to their own water rights that vested, under California law, well before authorization of the Project and construction of

Shasta Dam. *See* SRSER[1] 15-18, 27-29; ER[2] 1786, 1816. The Settlement Contractors own and operate their own diversion and water conveyance facilities, and their senior water rights are not dependent, in any way, upon CVP facilities, operations, or deliveries.

Like any other water user in the state, Reclamation must possess state water rights to operate the CVP. Reclamation Act § 8, 43 U.S.C. §§ 372, 383; *California v. United States*, 438 U.S. 645, 677-79 (1978). The United States was required to apply to the California State Water Rights Board (predecessor to the present State Water Resources Control Board, hereafter "SWRCB") for permits to divert and store water from the Sacramento River. In response to the United States' applications to appropriate water, the Settlement Contractors filed multiple protests in order to protect their senior water rights from injury resulting from the diversions proposed for the CVP. To resolve these protests, the SWRCB had to first determine whether there was sufficient water available in the stream system to satisfy both senior water rights and the granting of the United States' application to store water behind Shasta Dam. Cal. Water Code § 1375.

---

1 Joint Supplemental Excerpts of Record of Appellees/ Defendant-Intervenors Glenn-Colusa Irrigation District, et al. and Reclamation District No. 108, et al. (SRSER), lodged with the 9th Circuit Court of Appeals on December 10, 2010.

2 Appellants' Excerpts of Record, Volumes I – IX (ER), lodged with the 9th Circuit Court of Appeals on July 23, 2010.

In order to facilitate this determination, the United States was urged to settle the protests of senior water rights holders on the Sacramento River, which would also avoid an adjudication that would impair the operation of the CVP for decades. A full adjudication of the Sacramento River would have involved a "monstrous lawsuit" that would take "decades" to resolve. Engle Subcomm. Hearing, House Interior and Insular Affairs Comm. (1951), *reprinted in* Engle, *Central Valley Project Documents*, H.R. Doc. No. 416, 84th Cong., 2d Sess., pt. 1 at 681 (1956). *See also United States v. Orr Water Ditch Co.*, 256 F.3d 935 (9th Cir. 2001) (describing the lengthy adjudications of the Truckee and Carson Divisions of the Newlands Project); *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994) (describing the mass adjudication of the Klamath River Basin initiated in 1975 involving 25,000 potential claimants).

On February 9, 1961, the SWRCB issued its Decision 990, or "D-990," granting Reclamation's applications subject to certain conditions.[3] In D-990, the SWRCB relied on information generated in a

---

[3] Conditions imposed by the SWRCB pursuant to D-990 are of the same nature as those dealt with by the Court in *California v. United States*. On remand from the Supreme Court, the Ninth Circuit, in an opinion authored by Justice Kennedy, found that the United States must comply with area of origin protections imposed under state law in operating the New Melones Dam. *United States v. State Water Resources Control Bd.*, 694 F.2d 1171, 1180-81 (9th Cir. 1982).

cooperative study commonly referred to as the "1956 Cooperative Studies," which was a mutual effort among Reclamation, the State of California, and Sacramento Valley water users that involved years of water rights research and technical studies to determine the amount of water available under existing water rights. D-990, SRSER 142-80.

The 1956 Cooperative Studies and related information demonstrated that the combined water rights of the Settlement Contractors authorized the diversion of greater quantities of water than the amounts ultimately provided for by the Settlement Contracts. SRSER 17-18. The 1956 Cooperative Studies also showed that Reclamation's operation of the CVP depended on shifting the timing of diversions and limiting the Settlement Contractors' monthly diversions to maximize storage behind Shasta Dam, which could only be accomplished by entering into settlement agreements with the Settlement Contractors. D-990, SRSER 149-55; *see also* SRSER 16.

Based on this information and along with the Settlement Contractors' dismissal of their protests, the SWRCB approved and conditioned Reclamation's water right permits for diversion of water from the Sacramento River. In granting Reclamation water rights on the Sacramento River, the SWRCB expressly subordinated those rights to vested senior rights and required the execution of settlement

agreements with those senior water rights holders.[4] Reclamation satisfied this state law requirement when it executed the original Settlement Contracts in 1964. Reclamation's execution of the renewed Settlement Contracts was a perpetuation of the original Settlement Contracts and, therefore, a nondiscretionary requirement for operation of the CVP.

The original Settlement Contracts fixed, for the forty-year term, the total and monthly quantities of water to be diverted, the allocation between "Base Supply" and "Project Water," which are defined terms in the contracts, and the place of use. The purpose for limiting contract periods to 40-year terms was based upon updating pricing aspects of the contracts to ensure compliance with federal law. *See, e.g.*, ER 374.

---

[4] The water rights were issued "subject to vested rights" and subject to D-990, including its Condition 23: "The export of stored water under permits issued pursuant to Applications 5626, 9363 and 9364 outside the watershed of Sacramento River Basin or beyond the Sacramento-San Joaquin Delta shall be subject to the reasonable beneficial use of said stored water within said watershed and Delta, both present and prospective, provided, however, that agreements for the use of said stored water are entered into with the United States prior to March 1, 1964, by parties currently diverting water from Sacramento River and/or Sacramento-San Joaquin Delta and prior to March 1, 1971, by parties not currently using water from Sacramento River and/or Sacramento-San Joaquin Delta." D-990, SRSER 169, 174-75.

Under Article 9(a) of the original Settlement Contracts, any renewal of the original contract must be for the same quantity of water, the same allocation between Base Supply and Project Water, and the same place of use as set forth in the original contract. The parties renewed the Settlement Contracts through mutual agreement in 2005, and thus have been operating pursuant to the Settlement Contracts for more than 50 years.

II. PROCEDURAL BACKGROUND

The forty-year term of the original Settlement Contracts was set to expire in 2004.[5] The Settlement Contractors and the United States entered into negotiations for the renewal of the contracts in the early 2000s. When the renewal Settlement Contracts were executed in 2005, Reclamation was involved in a formal consultation with the United States Fish and Wildlife Service (FWS) under Section 7(a)(2) of the ESA concerning all CVP operations. FWS issued its biological opinion in 2005, determining that CVP operations were not likely to adversely affect the delta smelt. In 2005, FWS also concurred with Reclamation's determination that renewing the Settlement

---

[5] Congress recognized the importance of keeping the Settlement Contracts in place while their renewals were being negotiated by passing special legislation in 2003 that extended the terms of the original Settlement Contracts for a period of up to two years. Energy and Water Development Appropriation Act, Pub. L. No. 108-137, 117 Stat. 1827 (2003).

Contracts was not likely to adversely affect the delta smelt. ER 864; ER 1078; ER 1784.

In 2005, Plaintiffs filed a complaint against the FWS, challenging the validity of the 2005 biological opinion and the potential effects of CVP operations on the delta smelt. The District Court and the Ninth Circuit invalidated the 2005 biological opinion.[6] In 2008, Plaintiffs filed a third supplemental complaint and, for the first time, challenged the renewal of the Settlement Contracts, as well as a separate group of water service contracts,[7] for an alleged failure to conduct an adequate consultation prior to execution of the renewal contracts pursuant to Section 7(a)(2) of the ESA.

After this litigation commenced, this Court issued its decision in *Home Builders*. The focus of

---

[6] FWS subsequently issued a revised biological opinion in 2008, which has recently been upheld by the Ninth Circuit in a separate case. *See San Luis & Delta Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014) (petition for rehearing en banc pending).

[7] The other challenged contracts are CVP water service contracts with water users, who do not have independent water rights, for delivery of water from the Delta Mendota Canal (DMC Contracts). These contracts are quite different from the Settlement Contracts. The District Court found that Plaintiffs lack standing to challenge the validity of the DMC Contracts. Plaintiffs appealed this decision to the Ninth Circuit as well. The issue is unrelated to the question presented to this Court regarding the Settlement Contracts.

the instant litigation, as it related to the Settlement Contracts, then shifted to the question of whether Section 7(a)(2) applies to the renewal of the Settlement Contracts. App. 98-100

In its April 27, 2009 Memorandum Decision, the District Court held that Reclamation lacked the requisite discretion to trigger the application of the Section 7(a)(2) consultation requirements when it executed the Settlement Contract renewals. App. 200-02. Plaintiffs appealed the District Court's order granting the Settlement Contractor's motion for summary judgment, and a three-judge panel of the Ninth Circuit affirmed the District Court's decision, in part based upon legal obligations under state and federal law that limited Reclamation's discretion with respect to renewal of the Settlement Contracts. App. 38-42. Plaintiffs then filed a petition for rehearing or rehearing en banc, which the Ninth Circuit granted. App. 22-24.

An 11-judge en banc panel of the Ninth Circuit issued its decision on April 16, 2014, reversing the District Court and holding that Reclamation was required to engage in Section 7(a)(2) consultation because in renewing the Settlement Contracts, it retained "some discretion" to act in a manner that would benefit delta smelt. App. 5-6. In so holding, the Ninth Circuit acknowledged that an agency lacks discretion if another legal obligation makes it impossible for the agency to exercise discretion for the protected species' benefit. App. 7-8 (citing *Nat'l Wildlife Fed'n*

v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 927-28 (9th Cir. 2008) (citing *Home Builders*, 551 U.S. at 669)). In spite of this recognition, the Ninth Circuit avoided any consideration of the legal obligations under federal and state law that restrain Reclamation's discretion with respect to renewal of the Settlement Contracts. The Ninth Circuit relegated to a one-sentence footnote its discussion of the "complicated set of federal and state laws" governing the operation of the CVP, and the court "express[ed] no view" on these legal obligations. App. 20 n.1. Instead, the Ninth Circuit speculated as to hypothetical contract terms (involving pricing and timing of water distribution) that Reclamation could "renegotiate" in a manner that "could benefit" the delta smelt. App. 20-21. In so doing, the Ninth Circuit ignored the fact that none of these hypothetical contract terms or arguments had ever been made to the District Court, and that there were no factual determinations that would support them.

REASONS FOR GRANTING RELIEF

I. THE NINTH CIRCUIT'S REFUSAL TO EVALUATE THE EXISTING LEGAL OBLIGATIONS THAT LIMIT RECLAMATION'S DISCRETION CONFLICTS WITH THIS COURT'S DECISION IN *HOME BUILDERS*

In finding that Reclamation retained "some discretion" to act in a manner that could benefit the delta smelt, the Ninth Circuit presumed that

Reclamation is not required to execute renewal contracts. Although the Ninth Circuit observed that "nothing in the original Settlement Contracts requires the Bureau to renew the Settlement Contracts," it declined to consider other state and federal legal obligations that might compel renewal of the Settlement Contracts. App. 20 & n.1. Notwithstanding that this issue was directly before it on appeal, the Ninth Circuit merely "recognize[d] that the Central Valley Project is governed by a complicated set of federal and state laws" and "express[ed] no view as to whether other legal obligations may compel the Bureau to execute renewal contracts with holders of senior water rights." App. 20 n.1.

Under *Home Builders*, Section 7(a)(2) discretion does not exist "when an agency is *required* to do something by statute." 551 U.S. at 667 (emphasis in original). The Ninth Circuit recognized this rule of law in holding that an agency lacks discretion "if another legal obligation makes it impossible for the agency to exercise discretion for the protected species' benefit," App. 18, but it simply refused to consider Reclamation's legal obligations under federal and state laws. Nonetheless, it is under this "complicated set of federal and state laws" that Reclamation is required to renew the Settlement Contracts in order to continue operating the CVP in compliance with its junior water rights. The Ninth Circuit's refusal to consider Reclamation's legal obligations, a question that was clearly before it, leaves unresolved the substantial federal question

of whether an agency has discretion for purposes of Section 7(a)(2) when state and federal law require it to reach mutual agreement with another party. Here, Reclamation did not have "discretion," as that term is understood and interpreted for purposes of Section 7(a)(2) of the ESA, to not renew the Settlement Contracts.

Section 8 of the Reclamation Act requires Reclamation to comply with state law in securing the necessary water rights to operate federal reclamation projects, 43 U.S.C. § 383, and Reclamation must adhere to the conditions that state water law places on its water rights. *California v. United States*, 438 U.S. at 674-75, 679; *see* Cal. Water Code § 1391 ("Every permit shall include . . . the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed."). As a holder of junior water rights on the Sacramento River, Reclamation may not operate the CVP in a manner that interferes with senior water rights. Cal. Water Code § 1450; D-990 at 80, SRSER 169. In addition, the export of Reclamation's stored water is conditioned on the satisfaction of reasonable and beneficial uses in the Sacramento River watershed. Cal. Water Code §§ 11128, 11460. The SWRCB explicitly included these so-called "area of origin" protections in D-990 in Condition 23. D-990 at 85-86, SRSER 174-75.

Based upon its permits and D-990, Reclamation entered into the Settlement Contracts in 1964. At the expiration of the term of the 1964

Settlement Contracts, Reclamation had no option but to renew the Settlement Contracts if it was to remain in compliance with its state water right permits and, in turn, Section 8 of the Reclamation Act. Without the Settlement Contracts, Reclamation's diversion and storage of water behind Shasta Dam would unlawfully interfere with the Settlement Contractors' vested, senior water rights.

By refusing to evaluate the legal obligations imposed by federal and state law, the Ninth Circuit failed to properly determine whether Reclamation retains the requisite discretion under this Court's interpretation of Section 7(a)(2) of the ESA in renewing the Settlement Contracts. The Ninth Circuit's disregard for this important federal question, despite the fact that it was directly before it on appeal, conflicts with this Court's decision in *Home Builders*.

Significantly, the operation of the CVP, and any future water resources planning and development in California are predicated upon the compromise effectuated by the Settlement Contracts. Without these agreements in place, the Settlement Contractors can and will lawfully divert the same amounts of water as provided for in their Settlement Contracts, or more in the case of many Contractors, under their vested senior water rights. These water rights have priority over those of the United States. Without the controls afforded by the Settlement Contracts, Reclamation would not be in compliance with its water right permits, and the lengthy and

expensive adjudication that was avoided in the 1950s and 1960s, due to the compromise contained in the Settlement Contracts, will inevitably occur. Accordingly, Supreme Court review is warranted.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF THE D.C. CIRCUIT REGARDING THE APPLICATION OF SECTION 7(a)(2) TO MUTUAL AGREEMENTS

The Ninth Circuit's decision is at odds with the D.C. Circuit's decision in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992) (*Platte River*). In *Platte River*, the D.C. Circuit held that a federal statute limiting an agency's authority to amend an annual license only "upon mutual agreement" does not authorize an agency to go beyond the limited authority of Section 7(a)(2) in implementing the ESA. 962 F.2d at 33-34. In other words, an agency cannot take action to benefit a protected species under the ESA when the agency does not have power to impose protective conditions on a license in the first place. *See also In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 630 (8th Cir. 2005) (describing *Platte River* as involving a statute that "forbade alteration of the terms of an annual license without agreement").

This Court in *Home Builders*, citing *Platte River* with approval and noting its conflict with the

Ninth Circuit's interpretation of Section 7(a)(2), held that "[r]eading the provision broadly would thus partially override *every* federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species." *Home Builders*, 551 U.S. at 664 (emphasis added). With approval of the Supreme Court, *Platte River* therefore stands for the proposition that when a federal agency lacks authority to impose unilateral terms to benefit a protected species, it also lacks discretion under Section 7(a)(2) of the ESA. 962 F.2d at 32-34.

The Ninth Circuit's alternative holding that discretion exists where Reclamation "could benefit the delta smelt by renegotiating the Settlement Contracts' terms," App. 20-21, is directly at odds with the holding in *Platte River* because Reclamation could not accomplish such benefit unilaterally. The ability to "renegotiate" certain contract terms "on mutually agreeable terms" as is provided for in the Settlement Contracts is equivalent to the agency's ability in *Platte River* to alter a license only "upon mutual agreement." The applicability of the ESA cannot vary as it does between the Ninth Circuit's decision in this case and the D.C. Circuit's decision in *Platte River*.

The Ninth Circuit failed to acknowledge the nature of the Settlement Contracts as bilateral settlement agreements that effectuate a historical compromise between senior water right holders and the United States. Unlike an agency's authority to

issue a permit or license, Reclamation's contracting authority does not include the ability to unilaterally impose terms in the Settlement Contracts that could benefit delta smelt. And unlike water service contracts for water developed by a federal reclamation project, the Settlement Contracts are not buy-sell agreements where the right of the buyer is limited by what the seller decides to make available for sale. Instead, all terms of the Settlement Contracts must be mutually agreeable, reflecting the Settlement Contractors' position as senior water right holders under California law.

This Court recognized in *Home Builders* that "not every action authorized, funded, or carried out by a federal agency is a product of that agency's exercise of discretion." 551 U.S. at 668. Agency "discretion" presumes the ability or power "to decide or act according to one's own judgment" or a "freedom of judgment or choice." *Id.* (quoting Random House Dictionary of the English Language 411 (unabridged ed. 1967)). The bilateral nature of the Settlement Contracts, and their legal and practical indispensability, eliminates Reclamation's ability to impose any unilateral terms to benefit the delta smelt. Reclamation therefore lacks discretion under Section 7(a)(2) as interpreted by *Platte River*. The Ninth Circuit's decision creates a conflict with the D.C. Circuit's interpretation of Section 7(a)(2), and warrants review by this Court.

CONCLUSION

Based on the foregoing, the Settlement Contractors respectfully request that the Court grant this petition for writ of certiorari and conduct plenary review of the Ninth Circuit's en banc decision.

Respectfully submitted,

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
SOMACH SIMMONS & DUNN, PC
500 CAPITOL MALL, SUITE 1000
SACRAMENTO, CA 95814
TELEPHONE: 916-446-7979
SSOMACH@SOMACHLAW.COM
AHITCHINGS@SOMACHLAW.COM

KEVIN M. O'BRIEN, ESQ.
STEVEN P. SAXTON, ESQ.
MEREDITH E. NIKKEL, ESQ.
DOWNEY BRAND LLP
621 CAPITOL MALL, 18TH FLOOR
SACRAMENTO, CA 95814
TELEPHONE: 916-444-1000
KOBRIEN@DOWNEYBRAND.COM
SSAXTON@DOWNEYBRAND.COM
MNIKKEL@DOWNEYBRAND.COM

* *Counsel of Record*

July 2014