

Nos. 11-15871, 11-16617, 11-16621, 11-16623, 11-16624, 11-16660,  
and 11-16662

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, *et al.*,  
Plaintiffs-Appellees,

CALIFORNIA DEPARTMENT OF WATER RESOURCES,  
Plaintiff-Intervenor-Appellee,

v.

KENNETH LEE SALAZAR, *et al.*,  
Defendants-Appellants, and

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,  
Defendants-Intervenors-Appellants,

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On Appeal from the United States District Court for the Eastern District of  
California, 1:09-cv-00407-LJO-DLB

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**BRIEF OF *AMICUS CURIAE* CONAWAY PRESERVATION GROUP, LLC  
IN SUPPORT OF PETITIONS FOR REHEARING (EN BANC)**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1, Conaway Preservation Group, LLC states that it does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

SOMACH SIMMONS & DUNN

Dated: May 22, 2014

/s/ Alexis K. Stevens  
STUART L. SOMACH  
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## INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Federal Rules of Appellate Procedure 29(a) and Ninth Circuit Rule 29-2(a), Conaway Preservation Group, LLC, (Conaway),<sup>1</sup> respectfully submits this amicus curiae brief in support of the Petitions for Rehearing En Banc filed by Plaintiff-Appellees Kern County Water Agency, the Coalition for a Sustainable Delta, State Water Contractors, and Metropolitan Water District of Southern California (collectively, “State Water Contractors”), San Luis & Delta-Mendota Water Authority and Westlands Water District (collectively, “Federal Water Contractors”), and Plaintiff-Intervenor Appellee the Department of Water Resources on May 12, 2014.

The Court should grant rehearing of the divided panel opinion in this case because the opinion conflicts with the United States Supreme Court’s decision in *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (hereinafter “*Home Builders*”) and this Court’s recent en banc decision in *Natural Resources Defense Council, et al. v. Jewell*, No. 09-17661, 2014 U.S. App. LEXIS 7063 (9th Cir. Apr. 16, 2014) (hereinafter “*NRDC*”) with respect to the identification of non-discretionary actions exempt from the consultation requirement of Section 7 of the Federal Endangered Species Act (ESA), 16 U.S.C.

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<sup>1</sup> Pursuant to Federal Rules of Appellate Procedure 29(c)(5), Conaway states that its counsel was the sole author of this brief and that it bore all costs of this brief, with no financial contributions from any party, party’s counsel, or any other person not affiliated with Conaway and its counsel.

§ 1531 et seq. Further, given the Court's ruling in *NRDC*, to which Conaway is a party, the implications of the Smelt Biological Opinion (BiOp) are even more far-reaching than previously believed, making it vitally important that the BiOp be based on sound science, reasoned judgment, and conform to the requirements of the law. As a result, rehearing is necessary to not only maintain uniformity of the Court's decisions, but also to resolve questions of exceptional importance regarding the quality of the science used to support Section 7 consultations and the proper amount of deference to be afforded to the consulting agency.

#### **IDENTITY AND INTEREST OF *AMICUS CURIAE***

Conaway owns the 17,300-acre Conaway Ranch located in Yolo County, California east of the Sacramento River. Conaway has diverted water from the Sacramento River since at least 1919 for irrigation of its lands. Conaway is a Sacramento River Settlement (SRS) Contractor. The principal purpose of the long-term SRS Contracts between individual SRS Contractors and the U.S. Bureau of Reclamation (Reclamation) is to recognize and quantify the SRS Contractors' pre-existing water rights so that the nature and extent of Reclamation's residual Sacramento River water rights can be determined by the State of California. SRS Contracts also enable the Central Valley Project (CVP) to operate more efficiently by confirming the limit and timing of the SRS Contractors' diversions. Accordingly, SRS Contracts benefit not only Reclamation and the SRS

Contractors, but they also benefit all other CVP beneficiaries including CVP water service contractors, fish, wildlife, and other environmental resources.

SRS Contractors, like Conaway, own and operate their own diversion facilities, and their water rights are not dependent in any way upon CVP facilities, operations, or deliveries.

Conaway has a significant interest in the outcome of this litigation given the Court's en banc ruling in *NRDC*, to which Conaway and other SRS Contractors are parties. *NRDC* references the application of the BiOp to the SRS Contracts and any renewal of those contracts. The implications of the BiOp will thus directly affect Conaway and its fellow SRS Contractors. Given the Panel decision's conflict with Supreme Court precedent and other decisions of this Court, en banc review is essential to ensuring the validity of a decision which could affect more than half the population of the State of California.

## ARGUMENT

### 1. **The En Banc Court Should Review the Panel's Holding with Respect to Nondiscretionary Actions**

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In the District Court and on appeal Plaintiff-Appellees, relying on *Home Builders*, argued that the United States Fish and Wildlife Service violated the ESA by not separating discretionary actions from non-discretionary actions in setting the environmental baseline. *San Luis & Delta-Mendota Water Authority, et al. v.*

*Jewell*, No. 11-15871, etc., 2014 U.S. App. LEXIS 4781 at \*152 (9th Cir. March 13, 2014) (hereinafter “*Panel Opinion*”). This argument was rejected by the District Court based on its conclusion that *Home Builders* did not address this issue, but rather, addressed “whether the Section 7 consultation obligation attaches to a particular agency action at all.” *Id.* On appeal, the Panel agreed with the District Court’s analysis, which should have disposed of the issue. *Id.*

However, the Panel went on to discuss what it referred to as “the real question” that remained after *Home Builders* – what counts as a non-discretionary action. *Panel Opinion*, 2014 U.S. App. LEXIS 4781 at \*152-153. Without any analysis or explanation, it appears that the Panel concluded that only a “statutory obligation” can “count” as a non-discretionary action to which Section 7(a)(2) does not apply. Instead, the Panel merely stated that Plaintiff-Appellees had not pointed the Panel to any “statutory obligation” imposed on Reclamation that was “both mandatory and inconsistent with its obligations under the ESA.” *Id.* at \*155. In a footnote, the Panel dismissed the various water contracts and a decision of the California State Water Resources Control Board, which Plaintiff-Appellees brought to the Panel’s attention as limiting Reclamation’s discretion, concluding that these obligations “do not approach the statutory mandate the Court found EPA was under in *Home Builders*.” *Id.* at \*155 n. 45. This conclusion, however,

directly conflicts with the Supreme Court's holding in *Home Builders*, as well as this Court's most recent decision in *NRDC*.

In *Home Builders*, the Supreme Court held that Section 7(a)(2) applies only "to 'actions in which there is discretionary Federal involvement or control.' 50 C.F.R. 402.03." *Home Builders*, 551 U.S. at 673. In *NRDC*, this court sitting en banc, considered whether Reclamation's renewal of SRS Contracts, like the one held by Conaway, were exempt from Section 7(a)(2)'s consultation requirement. The Court, relying on the Supreme Court's holding in *Home Builders* concluded that an action is non-discretionary "only if another *legal obligation* makes it impossible for the agency to exercise discretion for the protected species' benefit." *NRDC*, 2014 U.S. App. LEXIS 7063 at \*20 (emphasis added). The Court found that Reclamation, in renewing the contracts, retained "some discretion" to act for the benefit of the species. *Id.* at \*22-23. As a result, consultation under the ESA was required prior to Reclamation renewing the contracts. *Id.*

Under the rulings in *Home Builders* and *NRDC*, consultation is required whenever the agency has "some discretion" to take action for the benefit of the species. *NRDC*, 2014 U.S. App. LEXIS 7063 at \*19; *Home Builders*, 551 U.S. at 673. There is no requirement in either case that the "legal obligation" be statutorily mandated. *NRDC* at \*19-23; *Home Builders* at \*673. Given the conflict

between the opinions in *Home Builders* and *NRDC* and the Panel's holding in this case, the Panel's decision must be reconsidered by this Court.

**2. The En Banc Court Should Review the Panel's Holdings with Respect to Judicial Review Standards Applicable to Section 7 Consultations and the Best Available Science Requirement**

Conway joins in Part II of the State Water Contractors' Petition for Rehearing En Banc with respect to review of the Panel's holdings regarding the judicial review standards applicable to Section 7 consultations and the best available science requirement. In this case, the Panel Majority Opinion takes an inappropriate view of the "best available science" standard upholding a BiOp of exceptionally poor quality. If not reviewed en banc, the Majority Panel decision will undermine the scientific basis for future consultations impacting a multitude of water users and uses, including SRS Contractors like Conaway.

Respectfully submitted,

SOMACH SIMMONS & DUNN

/s/ Alexis K. Stevens

STUART L. SOMACH

ALEXIS K. STEVENS

*Attorneys for Amicus Curiae Conaway*

*Preservation Group, LLC*

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Signature /s/ ALEXIS K. STEVENS

Attorney for Conaway Preservation Group, LLC

Date May 22, 2014

9th Circuit Case Number(s) 11-15871, 11-16617, 11-16621, 11-16623, 11-16624, 11-16660, and 11-16662

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Charles R. Shockey, U.S. Department of Justice, Environmental & Natural Resources Division, 501 I Street, Sacramento, CA 95814-2322  
Ethan C. Eddy, U.S. Department of Justice, Wildlife & Marine Resources Section, P.O. Box 7369, Washington, DC 20044-7369

Signature (use "s/" format) [ /s/ Michelle Bracha ]

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On Appeal from the United States District Court for the Eastern District of  
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**CONAWAY PRESERVATION GROUP, LLC'S MOTION FOR LEAVE TO  
FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONS FOR  
REHEARING (EN BANC)**

---

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*Attorneys for Amicus Curiae Conaway  
Preservation Group, LLC*

Pursuant to Federal Rule of Appellate Procedure 29(b), Conaway Preservation Group, LLC (Conaway) respectfully requests leave to file the accompanying *amicus curiae* brief in support of the Petitions for Rehearing En Banc filed by Plaintiff-Appellees Kern County Water Agency, the Coalition for a Sustainable Delta, State Water Contractors, and Metropolitan Water District of Southern California (collectively, “State Water Contractors”), San Luis & Delta-Mendota Water Authority and Westlands Water District (collectively, “Federal Water Contractors”), and Plaintiff-Intervenor Appellee the Department of Water Resources.

All parties were provided with notice of Conaway’s intent to file this *amicus curiae* brief via electronic mail on May 19, 2014. All parties except for the Natural Resources Defense Council (NRDC) and the Bay Institute have consented to its filing. Accordingly, pursuant to Federal Rule of Appellate Procedure 29(a), Conaway seeks leave of Court to file the brief.

The interest of Conaway in this matter arises from Conaway’s position as a Sacramento River Settlement (SRS) Contractor, which distinguishes Conaway from the State Water Contractors and Federal Water Contractors. The principal purpose of the long-term SRS Contracts between individual SRS Contractors and the U.S. Bureau of Reclamation (Reclamation) is to recognize and quantify the SRS Contractor’s pre-existing water rights so that the nature and extent of

Reclamation's residual Sacramento River water rights can be determined by the State of California. SRS Contracts also enable the Central Valley Project (CVP) to operate more efficiently by confirming the limit and timing of the SRS Contractors' diversions. Accordingly, SRS Contracts benefit not only Reclamation and the SRS Contractors, but they also benefit all other CVP beneficiaries including CVP water service contractors, fish, wildlife, and other environmental resources. SRS Contractors, like Conaway, own and operate their own diversion facilities, and their water rights are not dependent in any way upon CVP facilities, operations, or deliveries.

Conaway has a significant interest in the outcome of this litigation given this Court's recent en banc decision in *Natural Resources Defense Council, et al. v. Jewell*, No. 09-17661, 2014 U.S. App. LEXIS 7063 (9th Cir. Apr. 16, 2014) (hereinafter "*NRDC*"), to which Conaway and other SRS Contractors are parties. *NRDC* references the application of the Smelt Biological Opinion (BiOp) to Conaway's SRS Contract and any renewal of that contract. The implications of the BiOp will thus directly affect Conaway and its fellow SRS Contractors.

In the accompanying brief, Conaway urges review because the Panel opinion conflicts with United States Supreme Court precedent and other decisions of this Court. Additionally, review is necessary to resolve questions of exceptional importance regarding the consultation process under Section 7 of the Endangered

Species Act and the science that can be used to support it. Conaway's attached brief is relevant and desirable because it brings to the attention of the Court the position of a SRS Contractor with respect to the implications of the BiOp and this Court's decision in *NRDC*.

For the foregoing reasons, Conaway respectfully requests that it be allowed to participate in the case by filing the attached brief.

Respectfully submitted,

SOMACH SIMMONS & DUNN

/s/ Alexis K. Stevens

STUART L. SOMACH

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*Attorneys for Amicus Curiae Conaway  
Preservation Group, LLC*

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Attorney for Conaway Preservation Group, LLC

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/s/ Michelle Bracha

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