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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

CALIFORNIA DEPARTMENT OF WATER RESOURCES,
Intervenor-Plaintiff-Appellee

v.

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

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

On Appeal from the United States District Court for the Eastern District of California, Case No. 1:09-cv-00407-LJO-DLB

BRIEF OF *AMICI CURIAE* ASSOCIATION OF CALIFORNIA WATER AGENCIES, FRIANT WATER AUTHORITY, SOUTHERN CALIFORNIA WATER COMMITTEE, NORTHERN CALIFORNIA WATER ASSOCIATION, CALIFORNIA BUILDING INDUSTRY ASSOCIATION AND CALIFORNIA FORESTRY ASSOCIATION IN SUPPORT OF PETITIONS FOR REHEARING EN BANC

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Rule 29(c)(1) of the Federal Rules of Appellate Procedure, the *Amici Curiae* hereby state as follows:

Amicus Curiae Southern California Water Committee ("SCWC"), through its undersigned counsel, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of stock in SCWC.

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TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY OF ARGUMENT.....1

II. SUMMARY OF AMICI ORGANIZATIONS' INTERESTS 6

III. LEGAL ARGUMENT 7

A. The Panel Majority Improperly Exempted The Service From The "Best Available Science" Requirement In Contravention of Well-Accepted Precedent.....7

B. The Panel Majority's Review Of The Biological Opinion Failed To Apply The Appropriate Amount Of Deference And Its Decision Conflicts With Settled Law On the Admissibility of Extra-Record Evidence To Review Agency Action 14

C. The Panel Decision Improperly Upheld The Application Of Section 7 Consultation To Non-Discretionary Agency Actions In Conflict With Applicable Precedent.....16

IV. CONCLUSION.....19

TABLE OF AUTHORITIES

FEDERAL COURT CASES

Arizona Cattle Growers' Ass'n v. United States FWS, BLM,
273 F.3d 1229 (9th Cir. 2001) 14

Asarco, Inc. v. U.S. EPA,
616 F.2d 1153 (9th Cir. 1980) 15, 16

Bennett v. Spear,
520 U.S. 154 (1997)..... 4, 10

Conner v. Burford,
848 F.2d 1441 (9th Cir. 1988) 11, 14

Defenders of Wildlife v. Jewell,
No. cv 14-1656-MWF(RZx), 2014 U.S. Dist. LEXIS 50614 (C.D. Cal. Apr. 2, 2014) 13

Envt'l Prot. Info. Ctr. v. Simpson Timber Co.,
255 F.3d 1073 (9th Cir. 2001) 18, 19

Heartwood, Inc. v. U.S. Forest Service,
380 F.3d 428 (8th Cir. 2004) 12

In re Consol. Salmonid Cases,
791 F. Supp. 2d 802 (E.D. Cal. 2011) 13

Inland Empire Pub. Lands Council v. U.S. Forest Serv.,
88 F.3d 754 (9th Cir. 1996) 16

Lands Council v. Powell,
395 F.3d 1019 (9th Cir. 2005) 14, 15

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
551 U.S. 644 (2007)..... 5, 17

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,
524 F.3d 917 (9th Cir. 2008) 18, 19

NRDC v. Rodgers,
381 F. Supp. 2d 1212 (E.D. Cal. 2005) 18

TABLE OF AUTHORITIES

Pac. Coast Fed'n of Fishermen's Ass'n v. Gutierrez,
606 F. Supp. 2d 1122 (E.D. Cal. 2008) 13

Pac. Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation,
426 F.3d 1082 (9th Cir. 2005) 10

San Luis & Delta-Mendota Water Auth. v. Jewell,
No. 11-15871, slip op. (9th Cir. Mar. 13, 2014).....2

San Luis & Delta-Mendota Water Auth. v. Salazar,
760 F. Supp. 2d 855 (E.D. Cal. 2010) 5, 9

Wild Fish Conservancy v. Salazar,
628 F.3d 513 (9th Cir. 2010) 10

FEDERAL STATUTORY AUTHORITIES

5 U.S.C. § 706(2)(A) 14

16 U.S.C. §1536(a) (2).....3

FEDERAL RULES AND REGULATIONS

50 C.F.R. § 402.03.....17

50 C.F.R. § 402.14(g) (8) 4

50 C.F.R. § 402.16.....17

Fed. R. App. P. 29(a) 1

Fed. R. App. P. 29(c)(5).....1

Appellate Ninth Circuit Rule 29-2(a) 1

OTHER AUTHORITIES

Congressional Research Service, *The Endangered Species Act And "Sound Science"* (Jan. 23, 2013) 3

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Association of California Water Agencies, Friant Water Authority, Southern California Water Committee, Northern California Water Association, California Building Industry Association and California Forestry Association (collectively "*Amici* Organizations") hereby file this *amici curiae* brief[1] in support of three Petitions for Rehearing En Banc filed on May 12, 2014 in this matter. The *Amici* Organizations are authorized to file this brief under Rule 29(a) of the Federal Rules of Appellate Procedure and Appellate Ninth Circuit Rule 29-2(a).[2]

The six *Amici* Organizations include: (1) the largest coalition of public water agencies in the United States; (2) a prominent Central Valley water authority with 21 members who deliver water to over one million acres of farmland and to municipal water users; (3) a nonprofit water committee consisting of approximately 200 organizations focusing on the health and reliability of Southern California's water supply; (4) a leading Northern California water organization

[1] Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel certifies that: counsel for *Amici* Organizations authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *Amici* Organizations, their members and their counsel – contributed monetarily to this brief's preparation or submission.

[2] These Petitions were filed by: (1) Plaintiffs/Appellees Kern County Water Agency, Coalition for a Sustainable Delta, State Water Contractors, and Metropolitan Water District of Southern California; (2) Appellees/Cross Appellants San Luis & Delta Mendota Water Authority and Westlands Water District; and (3) Plaintiff/Intervenor/Appellee California Department of Water Resources.

formed to ensure reliable and affordable water supplies for this region; (5) a nonprofit trade association with approximately 3,000 member companies responsible for the production of approximately seventy percent of California's new homes built annually; and (6) an association whose members comprise approximately ninety percent of the primary manufacturers of forest products in California. Although these *Amici* have a diversity of missions and viewpoints and focus on varied California geographic areas, they share a vital interest in California water supply and management issues and they collectively urge the Court to grant the Petitions.

This rehearing request is amply justified for two compelling reasons. First, the Panel majority opinion in *San Luis & Delta-Mendota Water Auth. v. Jewell*, No. 11-15871, slip op. (9th Cir. Mar. 13, 2014) ("Op."), presents questions of "exceptional importance." Not only does the divided Panel ruling address the pivotal "Section 7 consultation" process in the federal Endangered Species Act ("ESA") that is often the focus of major water supply decisions affecting the *Amici* Organizations, but it adjudicates legal issues that resulted in a severe curtailment of water deliveries to more than 20 million California water users served by the Central Valley Project and State Water Project ("perhaps the two largest and most important water projects in the United States"). *Id*. at 23. Second, as explained below, the ruling conflicts with U.S. Supreme Court, Ninth Circuit and other

precedent applicable to Section 7 decisions.

This case is of paramount public importance because it addresses the critical intersection of scientific principles and the ESA in the context of major California water supply decisions.[3] If the Section 7 consultation process, with its explicit scientific standards, is not correctly implemented or not judicially reviewed in accordance with law (as occurred here), these flaws will undermine the integrity of the process and will result in bad agency decisions with potentially devastating consequences for California's water agencies, citizens, agricultural crops, building industry, economy and natural resources.

The scientific heart of the Section 7 process is the ESA mandate that each federal agency (in this case, the U.S. Fish and Wildlife Service ("Service")) must "use the best scientific and commercial data available." 16 U.S.C. § 1536(a) (2). It is essential that the Service apply this "best available science" requirement in a consistent, transparent and predictable manner to ensure that the resulting ESA decisions are scientifically and legally credible. This requirement forms the basis for both the "jeopardy" determination and the "reasonable and prudent alternatives" to avoid jeopardy (often the key conditions and operating restrictions governing project water availability) in a Biological Opinion ("BiOp") in major

[3] Concerns regarding the adequacy of the science utilized in ESA decision-making by federal agencies continue to be a centerpiece of Congressional debates and the subject of repeated judicial decisions. Congressional Research Service, *The Endangered Species Act And "Sound Science"* (Jan. 23, 2013).

water project cases. *See* 50 C.F.R. § 402.14(g) (8).

Although it is sometimes asserted that the Service BiOps are merely advisory for the federal action agency, they actually have a substantial, if not conclusive, effect on the federal action agency decision. *See Bennett v. Spear*, 520 U.S. 154, 169 (1997) (reciting the "powerful coercive effect on the action agency" of a wildlife agency biological opinion). A federal action agency defies the "recommendations" in a BiOp "at its own peril." *Id.* at 169-70.

It is equally important that judicial review of the Service's Section 7 decisions proceed according to accepted judicial review standards. The reviewing courts must apply the proper amount of deference (no more and no less than required by law). This judicial review must recognize the key role of extra-record evidence in determining whether the "best available science" standard has been met.

In this case, the Panel majority opinion takes an unprecedented and unwarranted view of the "best available science" standard and upholds a BiOp that contains pervasive scientific data deficiencies, fails to utilize best available statistical approaches, and reflects a prohibited "pick and choose" approach to data and methodologies regardless of their scientific validity. After the District Court invalidated this BiOp, the Panel majority reversed by applying a new, low-bar deference standard inconsistent with established law. This case is particularly

noteworthy for the exceptionally poor quality of the BiOp and the unprecedented deference the Panel was willing to give it, particularly given the far-reaching societal and economic consequences.[4]

Finally, the majority incorrectly interpreted the Supreme Court's opinion in *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) and applicable Ninth Circuit precedent regarding the appropriate scope of Section 7 consultation. In particular, rather than limiting the scope to discretionary agency actions, and assigning non-discretionary actions to the BiOp environmental baseline, the Panel took the incorrect position that only statutory obligations imposed by Congress can constitute non-discretionary actions for purposes of the BiOp scope.

The *Amici* Organizations believe that, if not reviewed en banc, the Panel majority decision will significantly undermine the scientific basis for, and scope of, future Section 7 consultations, thereby leading to agency adoption of scientifically suspect and legally insufficient BiOps for critical water project decisions.

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[4] Both the Panel majority and District Court opinions criticize the many patent deficiencies in this BiOp. The Panel majority opinion found the BiOp to be "a big bit of a mess," "a jumble of disjointed facts and analyses," and a "ponderous, chaotic document, overwhelming in size…" Op. at 50, 52. In invalidating the opinion, the District Court concluded that "the public cannot afford sloppy science and uni-directional prescriptions that ignore California's water needs." *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 968 (E.D. Cal. 2010) ("*San Luis*").

II. SUMMARY OF *AMICI* ORGANIZATIONS' INTERESTS

The Association of California Water Agencies ("ACWA") is a non-profit public benefit corporation organized and existing under California law since 1910. It is the largest coalition of public water agencies in the United States and includes 450 water providers, including cities, municipal water districts, irrigation districts, and county water districts in California, which provide water supplies for urban and agricultural use. These agencies develop water supply projects of all magnitudes, and manage, treat, and distribute water to rural communities, farms, industries, and cities.

Friant Water Authority ("Friant") is a public agency formed by its members under California law to operate and maintain the Friant-Kern Canal, and to serve the information and representation needs of its members. Membership is composed of twenty-one irrigation, water, water storage and public utility districts and California's fifth largest city (the City of Fresno). Friant's members are part of the Friant Division of the Central Valley Project, which delivers water, pursuant to perpetual water service contracts with the United States Bureau of Reclamation, to over one million acres of irrigable farm land on the east side of the southern San Joaquin Valley. Friant's members depend on features of the Central Valley Project for their surface water supplies.

Southern California Water Committee ("SCWC") is a nonprofit, nonpartisan

public education partnership established in 1984 and is dedicated to informing Southern Californians about their water needs and California's water resources. Through measured advocacy, SCWC works to ensure the health and reliability of Southern California's water supply. Spanning Los Angeles, Orange, San Diego, San Bernardino, Riverside, Ventura, Kern and Imperial Counties, SCWC's approximately 200 member organizations include leaders from business, regional and local government, agricultural groups, labor unions, environmental organizations, water agencies, and the general public.

Northern California Water Association ("NCWA") was formed in 1992 to present a unified voice to ensure that the Northern California region has reliable and affordable water supplies, both now and into the future. NCWA's membership is comprised of water districts, water companies, small towns, rural communities and landowners that beneficially use both surface and groundwater water resources in the Sacramento Valley. As a result, NCWA is the recognized voice of Northern California water. NCWA represents the entire Sacramento Valley, which extends from Sacramento to north of Redding, and between the crests of the Sierra Nevada and the Coast Range.

The California Building Industry Association ("CBIA") is a non-profit trade association comprised of approximately 3,000 member companies responsible for the production of approximately 70% of California's new homes built annually.

CBIA's members are engaged in every aspect of planning, designing, financing, constructing, selling, and maintaining new residential communities throughout California. CBIA's membership includes environmental consultants, engineers, architects, lenders, land planners, subcontractors, general contractors, material suppliers, interior designers, sales professionals, risk managers, insurers, and lawyers.

The California Forestry Association ("CFA") was formed in 1991 as a trade association for California's forest industry. CFA represents forestry professionals committed to the conservation of California's forest resources, sustainable use of renewable resources, environmentally and economically sound forest policies and responsible forestry. CFA's members include biomass energy producers, environmental consultants, financial institutions, forest landowners, forest products producers, loggers, registered professional foresters, wholesalers and retailers, wood products manufacturers, and others who are interested in responsible forest policies.

The *Amici* Organizations are uniquely situated to provide the Court with a broad-based water user, building industry, forest policy and stakeholder perspective. They have a strong interest in orderly and efficient water resource management and planning to ensure that a long-term, reliable water supply is available to meet California's ever-increasing water demands. The *Amici*

Organizations have each identified this case as being of critical importance to its members.

III. LEGAL ARGUMENT

A. The Panel Majority Improperly Exempted The Service From The "Best Available Science" Requirement In Contravention of Well-Accepted Precedent.

In this case, the Panel majority reversed the District Court's invalidation of the Service BiOp which determined that the threatened delta smelt would be put in "jeopardy" by the proposed operational plan for the water projects. Op. at 25. The Service instead prescribed a Reasonable and Prudent Alternative ("RPA") designed to avoid jeopardy to the delta smelt, but significantly reduced water deliveries for other users. *Id.* at 36-38.

The District Court invalidated key portions of the BiOp because the Service had not utilized the "best available science" in formulating the BiOp. *San Luis*, 760 F. Supp. 2d at 968-70. Among other things, the District Court held that the Service: (1) improperly utilized "raw salvage figures" rather than "normalized salvage data" (which scales the raw numbers of salvaged fish to the relative overall size of the species population each year) in making flow decisions; and (2) incorrectly failed to synthesize two different and inconsistent models for comparing baseline and future conditions in setting the "X2" salinity point. *Id*. at 968. The Panel majority, over a strong dissent, reversed both decisions. Op. at 64-

71 and 74-91.

The leading case interpreting the ESA's "best available science" requirement for Section 7 BiOps is the Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154, which involved a challenge to a biological opinion for operation of the Klamath Irrigation Project. The Court's unanimously found:

> *The obvious purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise*. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to *avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives*. . . . We believe the "best scientific and commercial data" provision is similarly intended, at least in part, to prevent uneconomic (because erroneous) jeopardy determinations.

Id. at 176-77 (emphasis added).

Ninth Circuit cases repeatedly emphasize this "best available science" mandate for BiOps and they invalidate wildlife agency opinions that do not conform to this standard. *E.g., Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 525 (9th Cir. 2010) ("it was incumbent on the Service 'to use the best information available to prepare [a] comprehensive biological opinion considering all stages of the agency action…'"); *Pac. Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation*, 426 F.3d 1082, 1094 (9th Cir. 2005) (rejecting wildlife

agency argument that it is not required to provide quantitative data analysis and invalidating biological opinion for failure to explain the jeopardy determination); *Conner v. Burford*, 848 F.2d 1441, 1453-54 (9th Cir. 1988) ("incomplete information about post-leasing activities does not excuse the failure to comply with the statutory requirement of a comprehensive biological opinion using the best information available").

In this case, the majority excused the Service from meeting the best available science requirement – rather, it essentially allowed the agency to "cherry pick" the data that best served its purposes. Thus, on the "raw vs. normalized salvage data" issue, the Panel recognized the Service's failure to utilize normalized data (two court-appointed experts "believed the BiOp to have fallen short in this analysis") and it conceded that the resulting flow limits were flawed ("[t]hat the FWS could have done more in determining OMR flow limits is uncontroverted"), but it nonetheless upheld the BiOp on the basis that a lack of information "make[s] precision virtually impossible" and the Service therefore "properly chose a conservative model." Op. at 56, 60, 63. However, as the dissent stated: "Because FWS based its flow prescription solely on the unexplained use of raw salvage data, I believe that its expertise in methodological matters is not entitled to deference, since that use was not rationally connected to the best available science." *Id*. at 157.

Similarly, the majority excused the Service's failure to utilize one consistent model in determining the X2 point. Although the majority recognized that the Service's decision to use two inconsistent models for a comparison is "not without its limitations" (*id.* at 77) and "was not perfect – as everyone has acknowledged" (*id.* at 82-83), it held that this approach was not arbitrary and capricious in part because "[t]he fact that the FWS chose one flawed model over another flawed model is the kind of judgment to which we must defer." *Id*. at 83.

The majority's deference to the Service's determinations on these two key issues was unwarranted. The Service did not need to create new models, undertake new studies, or choose among equally valid data. Instead it merely needed to utilize generally accepted scientific methodologies (on the salvage calculation) and consistent models for comparison (on the X2 determination). The majority abandoned its proper judicial role because it prematurely concluded that there was an imprecision or lack of perfection in each area and therefore simply endorsed the Service position, regardless of whether it complied with the "best available science" standard.

These holdings defy the case law, both within and outside this Circuit, regarding the need to utilize *all* available data, rather than ignoring some data and choosing other data that supports a desired conclusion, even if it is not the best available science. *See, e.g.*, *Heartwood, Inc. v. U.S. Forest Service*, 380 F.3d 428,

436 (8th Cir. 2004) (federal agencies must "seek out and consider all existing scientific evidence relevant to the decision at hand . . . . They cannot ignore existing data"); *In re Consol. Salmonid Cases*, 791 F. Supp. 2d 802, 827 (E.D. Cal. 2011) (the Service must "apply generally recognized and accepted biostatistical principles, which constitute best available science, in reaching its decisions") *Pac. Coast Fed'n of Fishermen's Ass'n v. Gutierrez*, 606 F. Supp. 2d 1122, 1183-84 (E.D. Cal. 2008) ("an agency may not entirely fail to develop appropriate projections where data 'was available but [was] simply not analyzed'").

Unfortunately, this flawed analysis of the "best available science" requirement appears to be emerging as a new legal paradigm for how even an exceptionally bad biological opinion can be sustained under an extremely deferential judicial review standard. Thus, one court recently stated: "Even where the decision under review is 'fairly vague,' 'unpolished,' 'largely unintelligible,' 'a jumble of disjointed facts and analyses,' and overall 'a bit of a mess,' it should be upheld if it is 'adequately supported by the record' and the Court can 'discern the agency's reasoning.'" *Defenders of Wildlife v. Jewell*, No. cv 14-1656-MWF (RZx), 2014 U.S. Dist. LEXIS 50614, at * 9-10 (C.D. Cal. Apr. 2, 2014).

Accordingly, the *Amici* Organizations urge the Court to grant en banc review to restore a legally defensible interpretation and accepted judicial deference principles for this "best available science" standard.

B. The Panel Majority's Review Of The Biological Opinion Failed To Apply The Appropriate Amount Of Deference And Its Decision Conflicts With Settled Law On the Admissibility of Extra-Record Evidence To Review Agency Action.

Section 706(2) of the Administrative Procedure Act ("APA") provides that an agency action will be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A BiOp will be overturned if it fails to meet this standard. *E.g.*, *Conner*, 848 F.2d at 1453-54 (biological opinion invalidated because "incomplete information about post-leasing activities does not excuse the failure to comply with the statutory requirement of a comprehensive biological opinion using the best information available").

The District Court properly reviewed the Service's BiOp using this APA standard. In general, APA review of a BiOp is "based upon the evidence contained in the administrative record." *Arizona Cattle Growers' Ass'n v. United States FWS, BLM*, 273 F.3d 1229, 1245 (9th Cir. 2001). However, extra-record evidence is admissible when necessary to explain technical terms or complex subject matter. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). The District Court admitted testimony from four court-appointed experts and from expert declarations based on this exception. Op. at 39 n.13.

The Panel majority, however, took a very different view. Although the majority accepted the court-appointed expert testimony, it refused to consider the

expert declarations because "we cannot see what the parties' experts added that the court-appointed experts could not have reasonably provided to the district court" and the effect was "to create a battle of the experts." Op. at 47. Rather than reviewing the admission of this extra-record evidence under the applicable "abuse of discretion" standard (*see Lands Council*, 395 F.3d at 1030 n.11), the majority disregarded the party expert declarations and undertook *de novo* review based on the remaining evidence. Op. at 49-50.

Introduction of extra-record evidence to explain whether the best available science has been used for a BiOp is often essential for proper judicial review. A BiOp often will not explain what data was not utilized or why certain data, methodologies or models represent better science than others. Extra-record expert testimony is frequently necessary to explain that scientific data not considered by the agency or not included in the administrative record is best available science. It "will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not." *Asarco, Inc. v. U.S. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

Judge Arnold's dissenting opinion soundly explained why the District Court appropriately admitted extra-record evidence:

> Because highly technical matters were involved, it was difficult to determine if FWS considered all relevant factors without looking outside the record to see what matters should have considered, but were not. *See Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 760 n.5 (9th Cir. 1996). The district court could not properly discharge its duty to engage in "'substantial inquiry'" by simply taking FWS' word that it had considered all relevant matters. *See Asarco*, 616 F.2d at 1160.

Op. at 158.

The unfortunate result of the majority's twin decisions to dramatically weaken judicial review of the "best available science" requirement and to exclude properly-admitted expert testimony has been to create a new and unjustifiably relaxed Ninth Circuit rule of judicial deference for Section 7 BiOps, necessitating this en banc review.

C. The Panel Decision Improperly Upheld The Application Of Section 7 Consultation To Non-Discretionary Agency Actions In Conflict With Applicable Precedent.

The Panel also incorrectly affirmed the District Court's decision regarding the scope of this Section 7 consultation in contravention of Supreme Court and Ninth Circuit precedent. The Panel determined that, once consultation was triggered, it should cover both discretionary and non-discretionary actions, unless the non-discretionary actions were compelled by statutory mandate. Op. at 123. This determination fundamentally undermined the environmental baseline for the BiOp's jeopardy decision and RPA.

Section 7 consultation requirements are only triggered when there is discretionary Federal involvement or control over the proposed action. *See* 50 C.F.R. § 402.03; 50 C.F.R. § 402.16 (initiation or reinitiation of consultation under the ESA can only happen where "discretionary Federal involvement . . . *over the action* has been retained or is authorized by law") (emphasis added). Pursuant to this regulation, "the ESA's requirements would come into play only when *an action* results from the exercise of agency discretion." *Home Builders*, 551 U.S. at 665 (emphasis added).

The Panel incorrectly conflated the *action* at issue with the *agency* itself, dismissing the *Home Builders* analysis by adopting the narrow view of the District Court, which held that "*Home Builders* addressed whether the section 7 consultation obligation attaches to a particular agency at all." Op. at 121 (internal citations and quotations omitted).

The Panel's refusal to distinguish between discretionary and non-discretionary agency actions because the non-discretionary actions here supposedly are not derived from statutory mandates is not legally supported. The Panel held that "*Home Builders* does not require the agency to segregate discretionary from non-discretionary actions when it considers the environmental baseline," and the key question is "what counts as a non-discretionary action" once Section 7 consultation is triggered. Op. at 121. To answer this question, the Panel focused

only on whether a statutory mandate or obligation was in existence that would give rise to a non-discretionary agency action. Op. at 121-122.

However, statutes are not the only means of constraining agency discretion. Rather, the terms of executed and operative contracts may divest an agency of its discretion. *See Envt'l Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1082 (9th Cir. 2001) ("once the renewed contracts were executed, [Reclamation lost its] discretion to amend them at any time to address the needs of endangered or threatened species."); *NRDC v. Rodgers*, 381 F. Supp. 2d 1212, 1249 (E.D. Cal. 2005). Absent very specific contract language explicitly retaining discretionary control to benefit protected species and their critical habitat, compliance with the contracts is deemed mandatory and thus non-discretionary. *Id.*

The Panel's interpretation of *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008) ("*NWF*") is likewise flawed. In *NWF*, the Court distinguished *Home Builders* "on the basis of the specificity of the mandate in question." Op. at 122-123. In *NWF*, the Court held that "Congress has imposed broad mandates which do not direct agencies to perform any specific non-discretionary actions, but rather, are better characterized as directing the agencies to achieve particular goals." *NWF*, 524 F.3d at 928. Here, the U.S. Bureau of Reclamation has not been given "particular goals" to achieve with broad discretion to decide how to achieve them. Rather, Reclamation is required to perform its

obligations under the applicable contracts and, once executed, the contracts divest Reclamation of discretion to alter its obligations thereunder. *See Simpson Timber Co.*, 255 F.3d 1073. The Panel's reading of *NWF* resulted in its improper approval of a BiOp whose scope included non-discretionary actions. Accordingly, en banc review is necessary.

IV. CONCLUSION

For all of these reasons, the *Amici* Organizations request that the Court grant a rehearing en banc of the Panel decision.

Respectfully submitted,

Dated: May 22, 2014

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Circuit Rule 29-2(c)(2), the attached Brief of *Amici Curiae* In Support of Petitions for Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more, and contains 4,169 words.

Dated: May 22, 2014

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CERTIFICATE OF SERVICE

I hereby certify that, on May 22, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF System.

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