UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SAN LUIS OBISPO COASTKEEPER and LOS PADRES FORESTWATCH,

Plaintiffs,

v.

SANTA MARIA VALLEY WATER CONSERVATION DISTRICT, et al.,

Defendants.

Case No. CV-19-08696-AB (JPRx)

ORDER DENYING MOTIONS TO DISMISS [DKT. NOS. 20, 38]

Before the Court are Motions to Dismiss ("Motions," Dkt. Nos. 20, 38) filed by the Santa Maria Valley Water Conservation District and its Board of Directors ("District"), and by the United States Department of Interior ("DOI"), the United States Bureau of Reclamation ("Bureau"), and the Bureau's Commissioner Brenda Burman ("Burman") in her official capacity (collectively, the "Federal Defendants"). Defendant-intervenors Golden State Water Company ("GSWC") and City of Santa Maria ("Santa Maria") ("Intervenors") filed a joinder in the District's Motion. Plaintiffs San Luis Obispo Waterkeeper and Los Padres Forestwatch ("Plaintiffs") filed oppositions and the Defendants filed replies. The Court heard oral argument on January 31, 2020. The Motions are **DENIED**.

I. BACKGROUND

Plaintiffs bring this action under the Endangered Species Act ("ESA"), 16

U.S.C. §§ 1531, *et seq*. Compl. ¶1. Plaintiffs allege that the manner in which the Defendants manage and operate Twitchell Dam in Santa Barbara County causes unlawful take of Southern California Steelhead ("Steelhead"), an ESA-listed endangered species. *Id.* ¶ 6.

DOI oversees the Bureau; the Bureau owns Twitchell Dam and has a right to use water diverted from Twitchell Dam; and the District maintains and operates Twitchell Dam and has the right to all water that becomes available from operation of the Dam. *Id.* ¶¶ 28, 48, 51, 52, 53. The Bureau issues Standard Operating Procedures ("SOP") that govern operation of the Dam, including the release regime by which water stored behind the Dam is released. The District must operate the Dam in accordance with the SOP.

The Twitchell Dam is situated on the Cuyama River about 6 miles upstream from the confluence of the Cuyama and Siquoc Rivers, which is where the Santa Maria River begins. *Id.* The SOP limits the timing and volume of releases from the Dam to permit maximum percolation into the groundwater basin and prevent river flows from reaching the Pacific Ocean. *Id*. ¶¶ 39, 40, 63. Specifically, the Bureau's SOP "prohibits releases from Twitchell Dam that would result in combined instream flows exceeding 300 cubic feet per second at Fugler Point," *id.* ¶¶ 61, 140, which is at the confluence of the rivers. As a result of this limitation, the downstream flows in the Santa Maria River are insufficient to connect the upper reaches of the river system to the ocean as needed to establish a pathway for migratory fish passage. *Id.* ¶ 141. This reduces the opportunities for Steelhead migration between the Pacific Ocean and their spawning habitat in the Sisquoc River, resulting in a decline in Steelhead from decreased spawning opportunities, the inability of smolts to migrate downstream to the ocean, and the entrapment of individual fish in drying channels. *Id.* ¶¶ 15, 112-117, 124, 142-147.

Plaintiffs seek declaratory and injunctive relief compelling the Defendants to modify their operation of Twitchell Dam, including by releasing water and modifying

the release regime established in the SOP sufficient to maintain water flows in the Santa Maria River system to provide for fish migration. *Id*. ¶¶ 131, 150, p. 30 (prayer for relief). Plaintiffs contend that this would take only about 4% of the total volume of water retained in the reservoir on an annual basis. *Id.*

Intervenors pump groundwater for municipal and industrial use by residents, businesses, and other customers. Their legal rights to groundwater produced by Twitchell Dam were adjudicated in state court proceedings the Court will refer to as the Santa Maria Basin Groundwater Adjudication, or Adjudication. As relevant, the Adjudication resulted in the Santa Maria Judgment, a comprehensive adjudication of rights to the yield of groundwater generated by the Dam (the "Twitchell Yield"). *See Santa Maria Valley Water Conservation District v. City of Santa Maria et al.*, Santa Clara Cnty Sup. Court Case No. 1-97-CV-770214, Stipulation (June 30, 2005 Version) ("Santa Maria Judgment")[1]. The Santa Maria Judgment's adjudication of water rights has been affirmed twice. *See City of Santa Maria v. Adam*, 211 Cal.App.4th 266 (2012) ("*Adam I*") and *City of Santa Maria v. Adam*, 248 Cal.App.4th 504 (2016) ("*Adam II*"). The Court permitted the Intervenors to intervene on the ground that the remedy Plaintiffs' seek could reduce the Twitchell Yield and impinge on their adjudicated water rights, and that the named Defendants might not adequately represent their interests.

The District and the Federal Defendants move to dismiss Plaintiffs' action on many grounds. First, both the District and the Federal Defendants argue that Plaintiffs' claimed injury is not traceable to their actions and is not redressable by them, so Plaintiffs lack standing. Second, they argue that Plaintiffs' theory of "take" under Section 9 of the ESA is not cognizable. Third, the District argues that the statute of limitations has run. Fourth, the District argues that Plaintiffs fail to plead essential

[1] The Court takes judicial notice of the Santa Maria Judgment, filed by the District as Exhibit L to the Juarez Declaration (Dkt. Nos. 21-7 and 21-8).

elements of their claim, and that their claim is speculative and contradicted by their own supporting papers. Finally, the District and the Federal Defendants argue that the action must be dismissed because Plaintiffs failed to join indispensable parties.[2] Intervenors joined the District's motion and did not independently brief the issues.

II. LEGAL STANDARDS

A. Rule 12(b)(1) Challenge to Subject Matter Jurisdiction

Under Federal Rule of Civil Procedure ("Rule") 12(b)(1), a party may move to dismiss a complaint for lack of subject matter jurisdiction. "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction." *Id.* In a facial attack, the court "assume[s] [plaintiff's factual] allegations to be true and draw[s] all reasonable inferences in his favor." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). But, as with a Rule 12(b)(6) motion, courts do not accept the truth of any legal conclusions contained in the complaint. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

"[I]n a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone*, 373 F.3d at 1039. In a factual attack on subject-matter jurisdiction, the court does not presume the truthfulness of the plaintiff's allegations. "The presumption of correctness that we accord to a complaint's allegations falls away on the jurisdictional issue once a defendant proffers evidence that calls the court's jurisdiction into question." *Commodity Trend Service, Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 685 (7th Cir. 1998). To resolve a factual attack, the court has discretion

---

[2] The District also moved to dismiss its Board of Directors. In their opposition, Plaintiffs argue the merits but nevertheless agreed to dismiss the Directors. In light of Plaintiffs' apparent agreement, the Court will not address this issue on the merits but instead **DISMISSES** the Directors.

to consider extrinsic evidence and, if disputed, weigh the evidence to determine whether the facts support subject-matter jurisdiction, without converting the motion to dismiss into a motion for summary judgment. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "When the defendant raises a factual attack, the plaintiff must support her jurisdictional allegations with competent proof…." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (internal quotes omitted). Generally, in response to a defendant's factual Rule 12(b)(1) motion, the plaintiff must prove each of the requirements for subject-matter jurisdiction by a preponderance of the evidence. *Id*. However, if the court decides the motion without an evidentiary hearing, "a plaintiff need only establish a prima facie case of jurisdiction." *Rancheria v. Bonham*, 872 F. Supp. 2d 964, 968 (N.D. Cal. 2012).

B. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim

Rule 8 requires a plaintiff to present a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), a defendant may move to dismiss a pleading for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

To defeat a Rule 12(b)(6) motion to dismiss, the complaint must provide enough factual detail to "give the defendant fair notice of what the. . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint must also be "plausible on its face," that is, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. Labels, conclusions, and "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

A complaint may be dismissed under Rule 12(b)(6) for the lack of a cognizable

legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). When ruling on a Rule 12(b)(6) motion, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (2009) (internal quotation marks omitted).

The court generally may not consider materials other than facts alleged in the complaint and documents that are made a part of the complaint. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996). However, a court may consider materials if (1) the authenticity of the materials is not disputed and (2) the plaintiff has alleged the existence of the materials in the complaint or the complaint "necessarily relies" on the materials. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation omitted). The court may also take judicial notice of matters of public record outside the pleadings and consider them for purposes of the motion to dismiss. *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *Lee*, 250 F.3d at 689-90).

III. DISCUSSION

The purpose of the Endangered Species Act is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of endangered species and threatened species." 16 U.S.C. § 1531(b). To help achieve this purpose the ESA authorizes citizen suits "to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof . . . ." 16 U.S.C. § 1540(g)(1)(A); *see also Ctr. For Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 804 (9th Cir. 2009) ("The ESA allows a citizen suit for the purpose of obtaining injunctive relief only.").

Plaintiffs' claims arise under Section 9 of the ESA. Section 9 makes it illegal for any person to "take" an endangered species. 16 U.S.C. § 1547(a)(1)(B). '"[T]ake' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to

attempt to engage in any such conduct." *Id.* § 1532(19). "Harm" means an act that actually kills or injures fish or wildlife and includes "significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102.

Plaintiffs allege that the District and the Federal Defendants commit unauthorized take of endangered Steelhead by the way they regulate and execute releases from the Twitchell Dam: the release limitations modify Steelhead habitat by reducing surface flows in the Santa Maria River, and as a result, during migration times, the River has insufficient flow to sustain Steelhead migration between the Pacific Ocean and their Sisquoc River spawning grounds, or to provide passage for Steelhead smelts to migrate from the spawning grounds to the ocean. This takes Steelhead within the meaning of the ESA because it harms them by impairing behavioral patterns including breeding, spawning, rearing, and migrating, and because it kills or injures individual fish who get stranded in low water during migration. *See e.g.* Compl. ¶¶ 111-115.

A. Plaintiffs Have Standing to Pursue Their Claims

The Court first addresses the jurisdictional question of whether Plaintiffs have standing to bring their claims.

1. Legal Standard For Standing

The "irreducible constitutional minimum" for standing require the plaintiff to show that (1) the plaintiff suffered a concrete injury in fact, (2) the injury is fairly traceable to the challenged conduct, and (3) the injury is likely to be redressed by a favorable decision. *Bates v. United Parcel Serv.*, 511 F.3d 974, 985 (9th Cir. 2007).

A plaintiff must demonstrate standing "for each claim he seeks to press" and for " 'each form of relief sought.' " *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, (2006) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 185 (2000)). The plaintiff bears the burden to establish standing "with the manner and

degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice," because we " 'presume that general allegations embrace those specific facts that are necessary to support the claim.' " *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

2. The Parties' Arguments on Whether Plaintiffs Have Standing.

Both the Federal Defendants and the District challenge the Plaintiffs' standing to bring their claims.[3] The Federal Defendants argue that the Plaintiffs' alleged injury is not traceable to the Bureau or redressable by the Bureau because the Santa Maria River was modified if at all by the construction of the Twitchell Dam in 1958—before the Endangered Species Act was passed—and not by any action of the Bureau. The Bureau further asserts that the SOP's release regime was dictated by the Congressional authorization for the Santa Maria Project, and the Bureau cannot depart from it. Thus, the Bureau argues that it has not engaged in any affirmative action to take Steelhead, and that it lacks the authority to adjust the release regime as Plaintiffs request. For its part, the District argues that it has no authority to operate the Dam inconsistent with Bureau's SOP and therefore is not responsible for any alleged take. At bottom, then, both the Bureau and the District contend that they are constrained (directly or indirectly) by release limitations established by Congress and have no authority to deviate from them, and therefore they are neither the cause of Plaintiffs' injury nor can they legally redress that injury. The Court interprets these as facial challenges to Plaintiffs' standing because they appear to accept the Plaintiffs' factual allegations as true but contend that as a matter of law, Defendants are either not responsible for the alleged take, and/or they cannot provide a remedy.

---

[3] The Federal Defendants characterize their argument expressly as a lack of standing, while the District simply asserts there is no case or controversy between it and the Plaintiffs so the District is not a proper party.

Plaintiffs argue that the Bureau is responsible for the alleged take because it implemented the current release regime through its SOP, and the District is liable for executing that release regime. Plaintiffs further argue the Congressional authorization for Twitchell Dam does not bar the Bureau from changing the release regime and that the Bureau could modify it, and the District would have to execute it as modified. Thus, Plaintiffs argue, the Bureau and the District are both responsible for take as joint operators of the Dam, and the remedy they seek is available, thereby establishing both causation and redressability.

3. Plaintiffs' Injury Is "Fairly Traceable" To the Defendants' Conduct And Is Redressable By Defendants.

The "fairly traceable" element requires a causal connection between the injury and the conduct complained of, that is, the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41–42 (1976). Redressability means that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" on the merits. *Lujan*, 504 U.S. at 561 (internal quotations omitted). In addition, an injury is not redressable where the "only apparent avenue of redress for plaintiffs' claimed injuries . . . is unavailable." *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010). Having carefully considered all of the parties' arguments, the Court finds that these requirements are satisfied.

Insofar as the Bureau and the District each disclaim responsibility for the effects of the Dam by suggesting the other is responsible for its operations, the Court rejects such arguments. The Complaint alleges take of Steelhead caused by modification of the Steelhead's Santa Maria River habitat by the construction and operation of Twitchell Dam. *See*, *e.g.*, Compl. ¶¶ 11, 114. The Bureau owns the Dam and established the SOP that dictates the release regime. The District operates the Dam on a day-to-day basis and executes the Bureau's release regime. Thus, both the

Bureau and the District are responsible for the Dam operations at the heart of this case.

Turning to the legal doctrine of standing, whether Plaintiffs have standing vis-à-vis the Bureau turns on whether the Bureau has control over the release regime at Twitchell Dam such that the take allegedly caused by the release regime is "fairly traceable" to the Bureau, such that the Bureau could redress this harm by adjusting the release regime in the manner Plaintiffs' seek.

This is a question of construing the authorizing statute, so the Court will start with that statute. The Dam was authorized by Congress in 1954 when it adopted Public Law 774. Public Law 774 "authorized [the Secretary of the Interior] to construct the project[4] for irrigation and conservation of water, flood control, and for other purposes . . . substantially in accordance with the recommendations of the Secretary of the Interior dated January 16, 1952, entitled 'Santa Maria project, Southern Pacific Basin, California' ['Report']. . ." Public Law 774 (Juarez Decl. Ex. B (Dkt. No. 21-1))[5]. Public Law 774 also provides that "in view of the special circumstances of the Santa Maria project," certain laws requiring a contract for repayment are not applicable "so long as the water utilized on project lands is acquired by pumping from the underground reservoir." *Id.*

The Secretary of the Interior's Report in turn references the water conservation, irrigation, and flood control purposes of Twitchell Dam throughout. *See* Report (Jackson Decl. Ex. E (Dkt. No. 38-4)).[6] The Report also makes clear that Public Law 774's reference to "project lands" means "land suitable for irrigation." *See* Report pp. 56 (ECF #2405). Thus, the condition requiring that water used on public lands must be pumped as groundwater refers only to irrigation use. The Report provides that to

---

[4] The project was initially called Vaquero Dam, but is now called Twitchell Dam.
[5] The Court takes judicial notice of Public Law 774. (Juarez Decl. Ex. B (Dkt. No. 21-1.)
[6] The Court takes judicial notice of the Report. (Jackson Decl. Ex. E (Dkt. No. 38-4.)

achieve these purposes, water conserved behind the Dam should be released at rates equal to or less than the percolation capacity of the river channel, which it states is 300 cubic feet per second ("cfs") at Fugler Point. *Id.* p. 54 (ECF #2404). This was the basis of the Bureau's SOP establishing a release regime[7] of 300 cfs maximum combined flow at Fugler Point.

The question before the Court is whether Public Law 774 permits the Bureau to use any water from Twitchell Dam for the purpose sought herein—wildlife conservation—or whether it does not invest the Bureau with such authority. Plaintiffs argue that because Congress authorized the Dam to be used for unspecified "other purposes," the Bureau retains sufficient control of the Dam to adjust the release regime to accommodate Steelhead. The Bureau argues, however, that "other purposes" are permissible only if they do not conflict with Public Law 774's enumerated purposes of "irrigation and conservation of water, [and] flood control." The Bureau contends that because the release regime Plaintiffs seek would exceed the river channel's percolation capacity and would necessarily result in water flowing into the ocean instead of being conserved, it would conflict with Public Law 774's express irrigation and conservation purposes, and it is therefore not a permissible "other purpose" and is beyond the Bureau's authority to implement.

By authorizing the Dam to be used for "other purposes," Congress vested the Bureau with *some* authority to operate the Dam for purposes other than those specifically enumerated in Public Law 774, and at this stage, the Court cannot find that the other purpose Plaintiffs propose is so contrary to the enumerated purposes that

---

[7] The SOP's Release Procedures state, as relevant: "Water conservation releases [from Twitchell Dam] are coordinated with the unregulated flow of the Sisquoc River such that combined flows at Fugler Point do not exceed 300ft 3/s, which is the percolation capacity of the Santa Maria River aquifer. Any flow in excess of 300 ft 3/s remains surface flow and is wasted (for purposes of conservation) to the Pacific Ocean. If the Sisquoc River flows alone exceed 300ft 3/s at Fugler Point, no releases are made from Twitchell Reservoir." Juarez Decl. Ex. I (Dkt. No. 21-3). This document and its contents are not disputed so the Court takes judicial notice of it.

it is impermissible. Importantly, the goal of maximizing groundwater recharge by ensuring that releases do not exceed the riverbed's percolation capacity is set forth only in the Report, *not* in Public Law 774 itself, and Public Law 774 only requires the project to be "substantially in accordance" with the Report's recommendations.

None of the parties cite a case squarely on point, but both sides rely on *Britt v. U.S. Army Corps of Engineers*, 769 F.2d 84 (2nd Cir. 1985). The facts of *Britt* are not all that instructive. There, the Army Corps was authorized to proceed with a channel-widening project as long as local authorities agreed to replace a certain bridge. But, the local authorities preferred to build the replacement bridge 1.25 miles away from the existing bridge, a decision that the Corps accepted in its final plans for the project. The legal question was whether building the replacement bridge 1.25 miles away from the existing bridge was consistent with the Congressional authorization. The Court found that it was consistent, noting that " 'it has long been the custom of Congress to approve projects of this nature on the basis of such preliminary plans and to authorize the Chief of Engineers to make such modifications as later studies indicate are necessary.' " *Britt*, 769 F.2d at 89 (citing *United States v. 2,606.84 Acres of Land*, 432 F.2d 1286, 1292 (5th Cir.1970), cert. denied, 402 U.S. 916, 91 S.Ct. 1368, 28 L.Ed.2d 658 (1971)). The Court also articulated the rule that both sides here rely upon: "that modifications by the Chief of Engineers in a project such as this are within the scope of his authority *unless they are so foreign to the original purpose of the project as to be arbitrary and capricious*." *Britt*, 769 F.2d at 89 (emphasis added). Applying this rule, the Court held that relocating the bridge 1.25 miles away was not foreign to the original purpose of the project because it would sufficiently serve the same travelers who needed to cross essentially the same part of the bay. *Id.*

The parties cite several other cases addressing whether modifications to a project, or deviations from preliminary plans, are permissible. *See, e.g., 2,606.84 Acres*, 432 F.2d at 1293 (rejecting claim that agency action was arbitrary and capricious, stating "the fact that Benbrook Dam and Reservoir as actually built was

approximately three miles away from the site suggested in H.D. 403, was considerably larger, and was significantly more costly did not deprive the Secretary of the Army of the authority to build the dam [because] the Congressional authorization was for a flood control project on the Clear Fork of the Trinity River. This is what the Corps of Engineers built. The area served and the project purposes were not changed."). But *Britt, 2,606.84 Acres,* and other cases the parties cite are not very instructive here: they concern whether the Corps can modify *plans* for a project to account for changed circumstances, whereas this case concerns whether an agency can operate a completed project for a *purpose* different from—and arguably conflicting with—the purposes Congress enumerated. These are different questions.

A recent case, *WildEarth Guardians v. United States Army Corps of Engineers,* 947 F.3d 635 (10th Cir. 2020), considered an analogous "purpose" question, but it is distinguishable on its facts. *WildEarth* concerned whether the Corps had discretion (for purposes of consultation with the Fish and Wildlife Service under ESA § 7) to operate a reclamation project for a purpose not authorized by Congress. The new purpose was to protect the Southwestern Willow Flycatcher and the Rio Grande Silvery Minnow, two endangered species that live along the Rio Grande. However, there, Congress mandated that the " 'project shall be operated *solely for flood control* except as otherwise required by the Rio Grande Compact. . .' " *WildEarth*, 947 F.3d at 639 (emphasis added). Given this "categorical statutory language" limiting the operations of the project, the Court readily held that the Corps did not have discretion to adjust its operations to benefit the minnow or the flycatcher. Here, by contrast, Public Law 774 is not categorical, does not limit operations, and instead authorizes unspecified "other purposes." Thus, *WildEarth* is not on point with this case.

As regards modifying a project's purpose and not just its engineering plan, the *Britt* Court approved as "eminently sound," *Britt*, 769 F.2d at 79, the Fifth Circuit's rule that "[e]ven when a project's purpose is authorized by Congress, the executive officer charged with responsibility for the project may modify its purpose unless this

action is so foreign to the original purpose as to be arbitrary or capricious." *Creppel v. U.S. Army Corps of Engineers*, 670 F.2d 564, 572 (5th Cir. 1982). Applying this standard to the proposed use here, the Court cannot say at this stage that the additional releases that the Plaintiffs propose to accommodate Steelhead are foreign to the original express purposes of Twitchell Dam as to be arbitrary and capricious.

Defendants' argument that releasing *any* water that will necessarily flow into the ocean—as Plaintiff's seek—is necessarily foreign to the express conservation purpose of Twitchell Dam and is therefore not permissible is not conclusive at this stage. It is true that the Report contrasts water conservation with the concept of "waste," which means, as relevant, water discharging into the ocean. *See* Report ECF #2373 ("These conditions [lack of adequate water supply and the threat of floods] which hamper the continuation of stable development of the valley economy can be removed by conversation of floodwaters presently wasted to the ocean and by construction of works to control the floods."); *see also Adam I*, 211 Cal. App. 4th at 280–81 (observing that "[i]f [high river flows are] not collected behind dams and stored in reservoirs, most of [them] would waste to the sea in the winter and the rivers would run low or dry in the summer months," and that the Project salvaged water that would otherwise be wasted). But there is a difference between water "wasting" into the ocean in an uncontrolled manner for no purpose, and water incidentally reaching the ocean in order to serve a useful purpose. And, as even the Federal Defendants acknowledged at oral argument, the view that such water is "wasted" when it is used for wildlife conservation is antiquated and perhaps obsolete. The Court also notes that Public Law 774's express conservation purpose was not merely academic, that is, Congress did not authorize retaining water in Twitchell Dam for the sake of retaining it. Rather, the purpose was to conserve water so that it can be used. Although Public Law 774 specified irrigation and flood control as such uses, it also, of course, authorized unspecified "other purposes."

In fact, in one of its opinions in the Santa Maria Water Rights Adjudication, the

California Court of Appeal considered Public Law 774's "other purposes" language and rejected an argument made by farmers that allocating 80% of the Twitchell Yield to municipal and industrial purposes was not permissible because those purposes were not irrigation. *See Adam I*, 211 Cal. App. 4th at 307-309. Rather, the Court found that municipal and industrial uses were permissible "other purposes." The Court also observed that, consistent with California water law and the contract between the Bureau and the SBCWA[8], the Bureau applied for and secured from the state a permit to appropriate water for "irrigation, domestic, salinity control, and incidental recreation" uses and for "municipal and industrial" uses. *Adam I*, at 309. As such, the Court concluded, because "Congress explicitly authorized multiple uses for Twitchell water and the Bureau of Reclamation implicitly approved municipal and industrial uses by requesting and receiving the right to appropriate water for those purposes, allocation of a portion of the Twitchell Yield to municipal and industrial users does not represent a change in use for which federal law requires concurrence of the Secretary." *Id.*

Although this reasoning is not binding on this Court, and although it concerned use of the Twitchell Yield and not use of the surface water retained behind Twitchell Dam, it reinforces this Court's view that "other uses" may include the wildlife conservation use Plaintiffs here seek. Plaintiffs seek releases not simply to have water flow—or waste—into the ocean for no reason; rather, Plaintiffs seek additional releases for wildlife conservation purposes, which incidentally requires that some of that released water flows into the ocean. It is also ironic that it is the construction and operation of Twitchell Dam itself that has damaged the Steelhead habitat, raising the question of whether its retained water can be used to mitigate the harm the Dam causes to that population. In other words, Plaintiffs propose adjusting Dam operations to mitigate the impact of its operations on an endangered species. The Court cannot

---

[8] SBWCA—the Santa Barbara County Water Agency—was the District's predecessor.

find *at this juncture* that the mere fact that some of the additional released water will reach the ocean necessarily renders this "other purpose" too foreign to the enumerated purposes as to be impermissible.

Based on the foregoing, at this stage, the Court finds that Plaintiffs have alleged sufficient facts to show that the "other purposes" referenced in Public Law 774 *may* give the Bureau discretion to adjust the SOP to require the District to operate the Dam for wildlife conservation in the manner Plaintiffs seek. It likewise follows that, because the District operates the Dam, it is an appropriate defendant.

The Court also rejects at this juncture Defendants' remaining argument that Plaintiffs' injury is not redressable because the Santa Maria Judgment constrains their conduct such that they cannot provide Plaintiffs a remedy. First, the Santa Maria Judgment did not address the Endangered Species Act. Furthermore, it is axiomatic that the supremacy clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, invalidates state laws that interfere with, or are contrary to, federal law, and the ESA expressly preempts conflicting state law. *See* 16 U.S.C. § 1535(f). Last, although the Defendants contend that the salient point about the Santa Maria Judgment is that it quantifies and allocates the Twitchell Yield, Defendants do not explain why this is dispositive. Although the Santa Maria Judgment does quantify the Twitchell Yield as 32,000 acre-feet per year and allocates it by percentage (Judgment V(A)(3)(b)(i), ECF #774), the Court cannot determine whether the releases Plaintiffs seek will meaningfully impact the Twitchell Yield. In sum, the Court cannot find at this stage that the Santa Maria Judgment forecloses the remedy Plaintiffs seek.

The Court therefore finds that Plaintiffs have standing to bring their claims.[9]

---

[9] The Court is aware that contractual obligations and complex issues of California water law may be germane to this case and may constrain movants' conduct. But these complex matters are not sufficiently covered by the briefs, nor does it appear that they jeopardize Plaintiffs' prima facie showing of standing. The Court therefore declines to delve into these issues at this juncture, but nevertheless notes their existence.

B. The Complaint Adequately Alleges Take

The Court next addresses the District's argument that Plaintiffs' theory of take is not cognizable, and the District and Bureau's argument that Plaintiffs fail to allege that Steelhead are present as required to plead that they will be harmed.[10]

1. The Complaint Alleges a Cognizable Theory of Take

The District contends that Plaintiffs fail to allege a cognizable take because the Steelhead habitat was changed more than 70 years ago when Twitchell Dam was built, and no actions have since modified this baseline. But the District's argument is based on cases under the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*, ("NEPA"). NEPA requires the agency to analyze the environmental impact of a project, which in turn requires the agency to establish a pre-project "baseline" environmental condition. *See* District Mot. pp.11-14 (relying on *Am. Rivers v. F.E.R.C.*, 201 F.3d 1186, 1190 (9th Cir. 1999) and *LaFlamme v. F.E.R.C.*, 852 F.2d 389 (9th Cir. 1988), both of which concern allegation that FERC acted without conducting the requisite environmental analysis under the Federal Power Act ("FPA"), 16 U.S.C. § 791a, *et seq.*, and NEPA). There is no similar "baseline" element to a take claim under the ESA, so the District's argument is inapt. And, the District has not pointed to any case holding that a defendant is exempt from the ESA's take prohibition simply because the facility it maintains or operates is long-standing.

As noted above, '"take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Because the statute is silent on the issue of whether a take can be caused by the maintenance or operation of a facility, the Court turns to the relevant regulations.

---

[10] The District and the Bureau also argue that the Plaintiffs fail to allege facts establishing they are the proximate cause of the alleged take. But these arguments are redundant to their arguments that Plaintiffs lack standing and to the argument that Plaintiffs' theory of take is not cognizable. The Court will not repeat its analysis but rejects these proximate cause arguments on the same basis.

See Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 277-78 (2009) (Because "the statute alone does not resolve the case . . . [w]e look first to the agency regulations, which are entitled to deference if they resolve the ambiguity in a reasonable manner.").

The primary kind of take in issue here is "harm." Adapting a definition previously issued by the Fish and Wildlife Service ("FWS") in 50 C.F.R. § 17.3 and upheld by the Supreme Court in *Babbitt v. Sweet Home*, the National Marine Fisheries Service ("NMFS") has defined "harm" to mean an act that actually kills or injures fish or wildlife and includes "significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102; *see Babbitt v. Sweet Home Chapter of Communities for a Great Oregon ("Sweet Home")*, 515 U.S. 687, 708 (1995) (upholding the analogous definition of "harm" previously promulgated by FWS in 50 C.F.R. § 17.3).[11] In upholding this broad definition of "harm," the Supreme Court considered the ESA's legislative history, noting that the "Senate Report stressed that " '[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." [citation] The House Report stated that 'the broadest possible terms' were used to define restrictions on takings. [citation]." *Sweet Home*, 515 U.S. at 704 (legislative history citations omitted).

In issuing its Final Rule adopting its definition of "harm," the NMFS explained that a take can be caused by "constructing or maintaining barriers that eliminate or impede a listed species' access to habitat or ability to migrate." Final Rule: *Endangered and Threatened Wildlife and Plants; Definition of "Harm,"* 64 Fed. Reg.

---

[11] In adopting 50 C.F.R. § 222.102, the NMFS expressly explained that it was promulgating a definition of "harm" consistent with the FWS definition upheld in *Sweet Home*. *See* Final Rule: *Endangered and Threatened Wildlife and Plants; Definition of "Harm,"* 64 FR 60727-01 (1999)

60727-01 (1999) (first example in list of "Activities That May Constitute a Take"). The relevant commentary to this rule states:

> Comment 14: One commenter suggested that the first example of "take" in the proposed rule was ambiguous because it states that activities modifying habitat include those "constructing or maintaining barriers that eliminate or impede a listed species access to habitat essential for its survival or recovery". The commenter stated that existing facilities that prevent or impede access to potential habitat that could be used for the recovery of the species do not cause a "take". Several other commenters stated that the current owner of a dam lawfully installed before a species is listed should not be liable for take based on subsequent listing. In the view of these commenters liability for take must be based upon some action occurring after the effective date of listing.
>
> Response: See response to comment 8 where the word recovery was stricken from the example in this final rule. NMFS agrees that simply holding title to a barrier that affects access to the habitat of listed species is not necessarily a take under the ESA. *However, maintaining or improving an existing facility may actually injure or kill members of a listed species if it significantly impairs essential behavioral patterns such as spawning, rearing or migrating. Maintaining an existing barrier that prevents or impedes access to habitat may cause take of listed species, if adequate comparable habitat is not otherwise available to the listed population.* In addition, any person who engages in diverting water may be engaged in a take if the diversion of water injures or kills listed species by significantly impairing essential behavioral patterns.

64 Fed. Reg. 60727-01 (emphasis added).

NMFS's regulation indicates that the maintenance of an existing barrier that injures, kills, or impairs a listed species may constitute a take under the ESA. Here, the Complaint alleges that the Defendants continue to maintain and operate Twitchell Dam in a manner that results in insufficient downstream flow to support Steelhead

migration and spawning, thereby impairing essential behavioral patterns, and killing or injuring individuals. In light of the purposes of the ESA, Congress's expansive definition of "take" as acknowledged by the Supreme Court in *Sweet Home*, and NMFS's regulation 50 C.F.R. § 222.102, the Court finds that Plaintiffs allegations are sufficient to plead take even though Twitchell Dam predates the ESA. *Accord, Our Children's Earth v. Leland Stanford Junior Univ.*, No. 13-CV-00402-EDL, 2015 WL 12745786, at *8 (N.D. Cal. Dec. 11, 2015) (on summary judgment, relying on 64 Fed. Reg. 60727-01 to find that defendants' continued operation and maintenance of a dam built in 1894 could cause "take" and therefore Section 9 applied).

2. The Complaint Adequately Alleges Presence of Steelhead.

The Bureau and the District also argue that Plaintiffs do not allege an imminent take of Steelhead because they do not allege that facts showing that Steelhead are or were recently present such that they are likely to be impacted by the operation of Twitchell Dam or actually injured or killed by habitat modification.[12] The focus of the "take" inquiry in a habitat modification case is whether harm *will* occur as a result of the habitat modification. *See* 64 Fed. Reg 60727 (Final Rule clarifying that "habitat modification or degradation may harm listed species and, therefore, constitutes a take under the ESA . . . This final rule defines the term 'harm' to include any act *which actually kills or injures fish* or wildlife, and emphasizes that *such acts may include significant habitat modification or degradation that significantly impairs essential behavioral patterns of fish or wildlife*.") (emphasis added). "[W]hat we require is a definitive threat of future harm to protected species, not mere speculation." *Nat'l Wildlife Fed'n v. Burlington N.R.R.*, 23 F.3d 1508, 1512 n.8 (9th Cir. 1994).

Plaintiffs' Complaint, read as a whole, includes sufficient allegations of Steelhead presence to survive the motion. While it is true that the Complaint alleges

[12] Defendants don't dispute that impaired breeding and migration behaviors, or stranded individual fish, constitute to take.

that the large historic runs of Steelhead never recovered, it also alleges "they still occasionally migrate to spawning areas in the Siquoc River and its tributaries," and that the "Sisqoc River and its tributaries have hosted . . . sporadic runs of anadromous Steelhead since records have been kept." Compl. ¶¶ 98, 99. The Court also notes the NMFS's "particular concern[] with addressing harm caused by significant habitat modification or degradation *to anadromous and migratory species*. *Habitat destruction may occur at times when migratory species are not present, but may nonetheless impair essential behavioral patterns when the animals return*, resulting in sub-lethal or chronic injury or mortality." 64 FR 60727-01 (emphasis added). Given the migratory nature of Steelhead, they will not always be present in the Santa Maria River system but instead may return to spawn. Whether they actually do return to the Santa Maria is a factual question that must be resolved upon an evidentiary record. For now, reading the Complaint as a whole and drawing reasonable inferences therefrom, Plaintiffs adequately plead Steelhead presence such that they are harmed by the habitat modification caused by operation of Twitchell Dam.

C. Plaintiffs' Action Is Not Barred By The Statute Of Limitations

The District also contends that Plaintiffs' claim is barred by the statute of limitations. Plaintiffs and the District disagree over whether the statute of limitations is 5 or 6 years. The difference is immaterial, so the Court assumes for purposes of this motion that it is 6 years. "Under federal law a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action." *Acri v. Intl. Ass'n of Machinists*, 781 F.2d 1393, 1396 (9th Cir.1986).

The District argues that Plaintiffs were aware of the alleged "take" no later than April 13, 2012, when the Stillwater Report was published, and could have sued then. The Complaint derives many of its factual allegations concerning Steelhead take from the Stillwater Report and explains the provenance of the Report. *See* Compl. ¶¶ 103-106. Briefly, the Stillwater Report was commissioned by California state agencies pursuant to a settlement requiring compliance with Public Resources Code § 10000, *et*

eq., which requires the state to develop instream flow standards sufficient to support anadromous fish passage. The District argues that because Plaintiffs filed this action more than six years after the Stillwater Report was published, the action is time-barred.

Plaintiffs do not deny that they had knowledge of take as of the Stillwater Report or could have sued then, but they argue that they allege an ongoing violation in that Steelhead habitat is modified, causing take in violation of Section 9 of the ESA, every time the District operates the Dam to restrain the natural flow of the Cuyama River. Plaintiffs rely on an inapt criminal case concerning the unlawful possession of a cheetah trophy in violation of the ESA. *See United States v. Winnie*, 97 F.3d 975 (7th Cir. 1996). In *Winnie*, the Seventh Circuit rejected the defendant's argument that the statute of limitations began to run when she acquired the contraband cheetah trophy, and instead held that the offense was defined as a "possession" offense, so the statute of limitations did not begin to run until Winnie ceased possessing the cheetah. *Winnie*, 97 F.3d at 976.

Despite *Winnie* being inapt, the Court is nevertheless satisfied that Plaintiffs' Complaint survives the statute of limitations argument at this juncture. The Complaint alleges that the District's ongoing operation of Twitchell Dam to retain water to decrease flows in the Santa Maria River results in ongoing take. *Cf. Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 597 (9th Cir. 1990) (claim for continuing wrongs accrues at last wrongful act where " '[c]ontinuing wrongs,' . . . are repeated instances or continuing acts of the same nature, as for instance, repeated acts of sexual harassment or repeated discriminatory employment practices."). Whether this in fact occurs is intertwined with the merits of Plaintiffs' claims and cannot be adjudicated on a motion to dismiss.

D. The Complaint Will Not Be Dismissed for Failure to Join Indispensable Parties.

Both the District and the Federal Defendants argue that the Complaint fails

because Plaintiffs failed to name all necessary and indispensable parties under Rule 19. They contend that all of the entities who have been allocated water under the Santa Maria Basin Groundwater Adjudication must be joined as defendants. The Court has considered the standard set forth in Rule 19, that is, whether the absent parties are necessary, and if they cannot be joined, "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19.

After the motions to dismiss were filed, the Court granted a motion allowing GSWC and Santa Maria to intervene as a matter of right as defendants. *See* Order Granting Motion to Intervene (Dkt. No. 57). GSWC and Santa Maria were allocated about 75% of the Twitchell Yield. Neither Defendant has described who the absent groundwater users are, but the Court understands that they are mostly farmers and other landowners, and that they are numerous: the District suggests there are hundreds (*see* Dkt. No. 20, 21:1-7 (stating water rights were adjudicated as to hundreds of parties) and Plaintiffs suggest there are thousands. *See* Dkt. No. 27, 24:4-5 (referring to "the thousands of groundwater users" whose rights were adjudicated). The Court has no reason to think that joining all of these parties would be practicable. Furthermore, the Court finds that their interests vis-a-via Plaintiffs would be adequately represented by GSWC and Santa Maria which together claim 75% of the allocated water. The Complaint will not be dismissed on this basis.

IV. CONCLUSION

Defendants raise numerous difficult challenges to Plaintiffs' claims, but the Complaint is adequate and Defendants' arguments must be resolved on a more fully developed legal and evidentiary record. The Motions to Dismiss are **DENIED**.

IT IS SO ORDERED.

Dated: April 17, 2020

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE