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Central Delta Water Agency v. Bureau of Reclamation: How the Ninth Circuit Paved the Way for the Next Fish Kill

*Elisabeth Skillen**

In Central Delta Water Agency v. Bureau of Reclamation, the Ninth Circuit implicitly applied a narrowly-focused finality standard that hindered interested parties' access to judicial review in the policing of environmental laws. California Delta farmers sought an injunction against a water allocation plan because they feared that the Federal Bureau of Reclamation (Bureau) would reserve water for instream uses to maintain local fisheries at the expense of their water supply. To support their contentions, the farmers provided hydrological models demonstrating that a drought would likely challenge the Bureau's ability to meet both agricultural and instream uses of water under its current plan. The court held that the evidence provided by the plaintiffs was too speculative to prove that the farmers faced imminent injury. The Ninth Circuit implicitly premised its denial on the lack of finality of Bureau's current water distribution plan. In doing so, the Ninth Circuit accorded substantial deference to the Bureau's authority to revise its current water distribution plan as circumstances demanded.

This barrier to judicial review not only frustrates attempts of interested parties to encourage the Bureau to form an emergency water allocation plan for shortages in the California Delta, but it also frustrates California's interests in adjudicating potential public trust violations. Most striking, it can prevent judicial review of the Bureau's actions until an environmental harm is unavoidable. Such an ex post standard frustrates the goals of environmental law. If the court could check the Bureau's decisions when it becomes apparent that the Bureau's plans are

* J.D. Candidate, University of California, Berkeley, School of Law (Boalt Hall), 2008; B.A. University of California, Santa Barbara, 2002. Thanks to Professors Bob Infelise and Anne Joseph O'Connell for their guidance and encouragement, and to Jenna Musselman Yott, Corie Calfee, Stefanie Gitler, and Alice Bodnar for all of their support, suggestions, and patience.

essentially final, the court could encourage the Bureau to enact better emergency water distribution plans before the harm is unavoidable.

In contrast to the narrowly-focused finality standard implicitly applied by the Ninth Circuit, ripeness inquiries are broader in scope and consider environmental hardships resulting from the failure to grant review. Such an analysis provides a more comprehensive model that would address the potential harms faced by both the farmers and the fish if the Bureau's water distribution plan fails in an emergency.

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INTRODUCTION

If you could prevent a disaster, wouldn't you? Many environmental laws are predicated on doing just that. *Central Delta Water Agency v. Bureau of Reclamation (Central Delta III)* demonstrates how narrowly-focused finality standards can frustrate interested parties' access to

judicial review in the policing of environmental laws.¹ In *Central Delta III*, the Ninth Circuit refused to review whether the current water allocation plan in the New Melones unit of California's Central Valley Project would deliver enough water to meet the water entitlements of both regional fish and farmers during droughts.² Although the Ninth Circuit premised its ultimate holding on lack of evidence, to support its holding the court implicitly found that since the agency in charge of allocating water throughout the Central Valley Project could change its operations as conditions demanded, review of the current water allocation plan was immature.³ This case demonstrates how the narrow application of finality can prevent judicial review of important environmental cases.⁴

Rather than creating a model of judicial review that forces water agencies to create viable plans for water allocation during shortages, the Ninth Circuit's *Central Delta III* decision adopted a reactive standard for judicial review that narrowly focuses on the agency in determining whether the water distribution plan is finalized. This standard gives too much deference to agencies since it does not consider the other constraints that might hinder agencies' ability to act or the impact that agencies' actions have on other interested parties.⁵ However, another related justiciability doctrine, ripeness, provides a more comprehensive approach that considers the environmental hardships faced by the parties if review is denied in the court's analysis of whether to grant review.⁶ This Note asserts that adoption of a ripeness standard would be more conducive to environmental interests.

Tensions between competing agricultural and ecological water uses plague the arid West.⁷ The 2002 battle between fish and farmers on the Klamath River demonstrates the consequences of inadequate planning in this environment.⁸ Unfortunately, so far, fish have been the losers.

1. See *Cent. Delta Water Agency v. Bureau of Reclamation (Central Delta III)*, 452 F.3d 1021 (9th Cir. 2006).

2. *Id.* at 1027.

3. *Id.* at 1026–27.

4. Under the doctrine of finality an agency action is subject to judicial review when that action is a “final agency action for which there is no other adequate remedy in a court.” Administrative Procedure Act (APA), 5 U.S.C. § 704 (2006). “A preliminary [or] procedural . . . agency action . . . is subject to review on the review of the final agency action.” *Id.*

5. See *id.*

6. To determine whether an issue is ripe, the court addresses “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

7. See, e.g., *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001); *State Water Res. Control Bd. Cases*, 39 Cal. Rptr. 3d 189 (Ct. App. 2006); *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161 (Ct. App. 1986).

8. See, e.g., Michael Milstein, *Government Admits Role in Klamath Fish Die-off*, OREGONIAN, Nov. 19, 2003, at A1 (suggesting that inadequate planning for drought conditions was a factor in causing the 2002 fish kill).

Although water law is governed under state law, the Federal Bureau of Reclamation (Bureau), an agency of the Department of Interior (DOI), controls releases of water from federally funded and constructed dams and reservoirs.⁹ After a study under the Endangered Species Act (ESA) showed that Coho salmon, Lost River suckers, and shortnose suckers were at risk under the current Klamath Project water allocation plan, the Bureau adopted a new plan that granted priority to the preservation of instream flows.¹⁰ A 2002 drought tested whether these instream flow priorities would be honored. At the time, the Bureau did not have an emergency drought water allocation plan that satisfied all users.¹¹ Consequently, the Bureau was forced to pick a side, and it chose the fish—polarizing the farmers.¹² Vigilante farmers threatened to release water from the dams if the Bureau would not release it.¹³ In response, the DOI granted preference to the farmers and irrigators.¹⁴ As a result of the water diversion, between 33,000 and 70,000 fish died as the river dried up.¹⁵

The Klamath River fish kill demonstrates the need for comprehensive prospective planning of water allocations between competing uses. If the Bureau already had a plan that balanced the needs of all uses before the 2002 drought, the DOI would not have been forced to make a frantic decision between fish and farmers. Global warming further exacerbates the situation as it stresses the available fresh water supply.¹⁶ Yet, despite the warnings provided by the Klamath disaster and the impending problems created by global warming, the Ninth Circuit still failed to consider possible environmental harms in its analysis on whether to grant review in a potentially similar situation in *Central Delta III*.

This Note examines how the Ninth Circuit's implicit narrow application of finality in *Central Delta III* can hinder the development of comprehensive water allocation plans in the California Delta. In

9. See *California v. United States*, 438 U.S. 645, 650–52 (1978). “[T]he United States does not control the water. It controls only the reservoir sites in which the water may be collected. The water is under the control of the States.” *Id.* at 662 n.16; see also 29 CONG. REC. 1948–49 (1897).

10. Matthew G. McHenry, Comment, *The Worst of Times: A Tale of Two Fishes in the Klamath Basin*, 33 ENVTL. L. 1019, 1027 (2003).

11. Even though the Bureau strived to attain a long-term solution, a long-term solution had not been completed at that time. *Kandra*, 145 F. Supp. 2d at 1197–98.

12. See McHenry, *supra* note 10, at 1027.

13. *Id.* at 1028.

14. *Id.* For an interesting report on the political maneuvering behind this decision, see Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST, June 27, 2007, at A1.

15. CAL. DEP'T OF FISH & GAME, SEPTEMBER 2002 KLAMATH RIVER FISHKILL: FINAL ANALYSIS OF CONTRIBUTING FACTORS AND IMPACTS, at III (July 2004).

16. Matthew D. Zinn, *Adapting to Climate Change: Environmental Law in a Warmer World*, 34 ECOLOGY L.Q. 90 (2007); Mark Meo, *Sea Level Rise and Policy Change: Land Use Management in the Sacramento–San Joaquin and Mississippi River Deltas*, 19 POL'Y STUD. J. 83 (1991).

response, this Note urges the court to adopt a more comprehensive and prospective approach to determining whether a threatened harm exists in disputes over competing water rights. Part I sets the background of the ongoing battle between fish interests and farmers in California. It examines how the Klamath fish kill of 2002 directly resulted from insufficient planning for water shortages, and shows how the *Central Delta III* decision frustrated attempts of interested parties in the Northern California delta region (“California Delta”)¹⁷ to encourage the Bureau to create better emergency plans for water shortages within the Central Valley Project (CVP). It then presents the *Central Delta III* decision in the context of the water rights battle over New Melones water in the California Delta. Part II then argues that in the interest of preventing a repeat of the Klamath disaster in the California Delta, judicial review can provide the motivation for agencies to prospectively create water allocation plans for shortages. Part II also addresses California’s interest in preventing another Klamath-type disaster through its duty to protect the public trust. Part III demonstrates how the Ninth Circuit implicitly applied a narrowly-focused finality standard in *Central Delta III* and how this standard might hinder proactive water allocation planning. This Part also exposes how the application of a narrowly-focused finality standard might work to the detriment of fish. Finally, Part IV discusses another justiciability standard, ripeness, under which the Ninth Circuit could have considered other mitigating factors that constrain the Bureau from adapting to emergencies and the resulting hardships arising from the lack of judicial review.¹⁸

17. The California Delta is located in the Central Valley of California, which lies between the Sierra Nevada mountains and the Bay Area. UC DAVIS WILDLIFE HEALTH CENTER, CALIFORNIA WILDLIFE: CONSERVATION CHALLENGES 334 (2007) (California’s Wildlife Action Plan, prepared for the California Department of Fish and Game), available at <http://www.dfg.ca.gov/wildlife/WAP/docs/report/ch14-cvbd.pdf>. The Delta is roughly 1150 square miles. WILLIAM EISENSTEIN ET AL., REENVISIONING THE DELTA: ALTERNATIVE FUTURES FOR THE HEART OF CALIFORNIA 3 (2007), available at <http://landscape.ced.berkeley.edu/~delta/symp%20report/ReEnvisioning%20FINAL.pdf>. Two of California’s largest river systems, the Sacramento and the San Joaquin, converge in the California Delta. Cent. Valley Water Agency v. United States (*Central Delta II*), 327 F. Supp. 2d 1180, 1183 (E.D. Cal. 2004), *aff’d sub nom.* Cent. Delta Water Agency v. Bureau of Reclamation, 452 F.3d 1021 (9th Cir. 2006). Levees hold back mazes of water from flooding low-lying lands in the Delta. EISENSTEIN ET AL., *supra*, at 3. The intricate canal system transports water to local agricultural users and for municipal uses in Northern and Southern California. Recreational users and fish also rely on the water that flows through the intricate canal system. The excess water ultimately flows through the Cariquinez Strait into the saline San Francisco Bay. *Central Delta II*, 327 F. Supp. 2d at 1183.

18. See *Central Delta III*, 452 F.3d 1021, 1026–27 (9th Cir. 2006).

I. NINTH CIRCUIT FAILS TO HEED THE LESSONS OF THE
2002 KLAMATH RIVER FISH KILL

The water battles of the West existed long before the Central Delta III litigation. The Klamath River fish kill grabbed national headlines, but for farmers and fish, the crises of limited rainfall are much more local. Part A recounts the battle between fish interests and farmers in the Klamath River fish kill and reminds the reader of the need for comprehensive planning for water allocation during droughts. Part B describes the ongoing war for water waged by environmental and agricultural interests in the California Delta and how the Ninth Circuit failed to heed the lessons of the 2002 Klamath River fish kill. The standards encapsulated in the Ninth Circuit's Central Delta III holding aggravate these *ex ante* objectives by narrowing the opportunity for judicial review of the Bureau's decisions.

*A. Insufficient Planning for Water Shortages Led
to the Klamath River Fish Kill of 2002*

The tragedy in the Klamath River Basin demonstrates the need for an *ex ante* approach to planning for water shortages. As demonstrated by the massive fish kill in the Klamath River in 2002, water disputes can result in severe consequences for fish. In the Klamath Basin, farmers, fish interests, and Native Americans all claim priority of water rights in an area with limited water resources.¹⁹ In 1957, Congress passed the Klamath River Basin Compact to "facilitate and promote orderly development, use, conservation, and control [of water resources]."²⁰ But after the Lost River sucker, shortnose sucker, and Coho salmon were listed as endangered under the ESA, farmers realized that they might lose their senior priority.²¹ Although the interested parties acknowledged the potential for conflicts, regulators did little to resolve them because enough water existed in the Basin to satisfy everyone's needs.²²

When drought struck, the Bureau tried and failed to prevent a disaster because it acted too late. The Bureau's original management plan for allocating Klamath Basin water focused on the short term.²³ The management plan relied on monthly forecasts by the National Resources

19. McHenry, *supra* note 10, at 1022–27.

20. Dow A. Davidson, Comment, *Who Wants Some Water: The Ongoing Battle for the Klamath River Basin and the Need for Moderate Institutional Change to End the War*, 34 CUMB. L. REV. 531, 536 (2004) (citing Klamath River Basin Compact of 1957, Pub. L. No. 85-222, 71 Stat. 497).

21. McHenry, *supra* note 10, at 1027.

22. Davidson, *supra* note 20, at 543.

23. Even though the Bureau strived to attain a long-term solution, a long-term solution had not been completed at that time. *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197–98 (D. Or. 2001).

Conservation Service's streamflow forecast for the Upper Klamath Basin.²⁴ In January 2001, the Service predicted a drought for the spring of 2001.²⁵ In response, the Bureau frantically requested a formal consultation by the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) on the impacts that such a drought would have on the endangered species.²⁶ The NMFS and FWS followed by issuing biological opinions.²⁷ On April 6, 2001 the Bureau released its proposed plan, based on the biological opinions, to address the drought conditions.²⁸ The plan gave priority to the endangered fish over agricultural uses.²⁹ Agricultural constituents quickly sought a preliminary injunction, which was denied.³⁰ Consequently, over one thousand farmers lost all or most of their crops during 2001.³¹ To alleviate the situation, Gale Norton, Secretary of the DOI, eventually authorized the release of some water for agricultural purposes.³²

In 2002, with the controversy fresh in their memories, farmers continued to exert pressure to overrule to previous year's water plan. Norton ordered the National Academy of Sciences to review the NMFS and FWS findings from the prior year.³³ The National Research Council, a subagency of the Academy, speculated that the findings by NMFS and FWS might not be accurate.³⁴ Based upon the Council's findings, the Klamath River Basin Federal Working Group³⁵ rejected the 2001 biological opinion recommendations and released water to the agricultural users.³⁶ Between 33,000 through 70,000 fish died as a result.³⁷

The Bureau could have avoided the fish kill by planning ahead for drought conditions. Although no easy solution existed for the problems facing the Klamath region due to incompatible water priorities,³⁸ the

24. *Id.* at 1197.

25. *Id.* at 1198.

26. *Id.*

27. *Id.*

28. McHenry, *supra* note 10, at 1027.

29. *Id.*

30. *Id.*

31. Davidson, *supra* note 20, at 544.

32. McHenry, *supra* note 10, at 1028.

33. Davidson, *supra* note 20, at 546-47.

34. *Id.* at 547.

35. The Group was established by the President and charged with balancing the concerns in the Klamath Basin. It was composed of the Secretary of Interior, the Agriculture Secretary, the Secretary of Commerce, and the Chairman of the White House Council on Environmental Quality. See Press Release, The White House, Klamath River Basin Federal Working Group (Mar. 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/03/20020301-10.html>.

36. Davidson, *supra* note 20, at 547.

37. CAL. DEP'T OF FISH & GAME, *supra* note 15, at III.

38. Davidson, *supra* note 20, at 551; Holly Doremus & A. Dan Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 *ECOLOGY L.Q.* 279, 336-40 (2003).

Bureau should have had an emergency plan prior to the eleventh hour.³⁹ Delaying the resolution of an emergency water allocation plans leads to the reality that the needs of some users will eventually be sacrificed to the benefit of others. The Bureau should have learned from its mistake in the Klamath River Basin and adopted a more proactive approach to emergency allocation planning, yet the Bureau seems to have not learned anything, as *Central Delta III* shows.

B. Battle between Fish and Farmers Ensues in the California Delta.

The geography and arid climate of California complicate the delivery of water within the state. In California, most of the precipitation falls during winter. During the dry spring and summer months, water users in the arid regions of California rely on runoff from the prior winter's accumulation of snow from the Sierra Nevada Mountains. California's diverse landscape—ranging from the Sierra Nevadas to the arid deserts and valleys—calls for a complex water appropriation system.

The Sacramento and San Joaquin Rivers meet in California's Central Valley, providing a large fresh water system that farmers utilize to their advantage.⁴⁰ Water from these rivers and their tributaries, including the Stanislaus River, are diverted to provide fresh water for the many competing agricultural and municipal uses in California.⁴¹ These diversions deplete the amount of water that ultimately reaches the California Delta and the amount left for fish.

The location of landowners' land in relation to water determines what type of water right they have. Riparian right holders (those who own property adjacent to a river), automatically derive a right to use a reasonable amount of the flow as a direct benefit of their land ownership.⁴² Those who do not own property along the river must obtain a permit to divert the water to their properties. Such a diversion from the Sacramento, San Joaquin, and Stanislaus Rivers to agricultural and municipal end users occurs through the Central Valley Project.⁴³ Before an appropriative user can divert water through the CVP, the California

39. See Davidson, *supra* note 20, at 551. Prior to 2001, interested parties in the Klamath River Basin attempted to force the Bureau to adopt a long-term plan that balanced the uses of the fish, Native Americans, and farmers by seeking a declaratory judgment. Declaratory judgment was issued solidifying the Native American's priority; however, the priority relationship between fish and farmers was never resolved. *Id.* at 550–56.

40. *Central Delta II*, 327 F. Supp. 2d 1180, 1183–84 (E.D. Cal. 2004), *aff'd sub nom.* Cent. Delta Water Agency v. Bureau of Reclamation, 452 F.3d 1021 (9th Cir. 2006).

41. *Id.*

42. JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 27 (4th ed. 2006).

43. *Central Delta II*, 327 F. Supp. 2d at 1183.

State Water Resources Control Board (SWRCB) must first grant a permit.⁴⁴

The federal or a state government can directly obtain water permits for the maintenance of instream flows to support fisheries.⁴⁵ Until recently, California water law did not recognize a water right for instream flows.⁴⁶ Consequently, most private water rights, previously established under the long-standing doctrines of riparianism and prior appropriation, are often superior to newly established instream rights.⁴⁷ This means that in times of extreme shortages, the higher priority of private water rights holders allows them to obtain water at the expense of the maintenance of instream flows. In order to address this problem, states have passed laws allowing environmentally conscious private rights holders to transfer their rights with the original priority date to instream uses.⁴⁸ Yet this method still proves ineffective as state funding and enforcement of instream programs lags.⁴⁹ Consequently, protection of fisheries and ecology along rivers often occurs outside of the private water allocation system through the public trust and Endangered Species Act protections.

Shared responsibility for the CVP between the federal and California governments creates federalism issues. After the SWRCB issues water permits, the Bureau manages the actual distribution of water between riparian, appropriative, and instream uses within the CVP.⁵⁰ This splitting of responsibility between the SWRCB and the Bureau creates an environment in which the two governments jockey for power over the CVP. Federalism issues arise when the plans of the federal Bureau differ from those of the SWRCB, and each agency struggles to have the ultimate say in how the water appropriation system runs in the CVP.

The Bureau constructed the New Melones Dam, located in the Sierra Nevada foothills along the Stanislaus River, to control flooding, generate power, and provide irrigation.⁵¹ Downstream, the Stanislaus River converges with the San Joaquin River, which in turn converges with the Sacramento River at the Sacramento–San Joaquin Delta. This water ultimately flows into the San Francisco Bay and the Pacific

44. *Id.*

45. SAX ET AL., *supra* note 42, at 143 (citing Jack Sterne, *Instream Rights and Invisible Hands: Prospects for Private Water Rights in the Northwest*, 27 ENVTL. L. 203, 203–30 (1997)).

46. *Id.* at 143–44.

47. *Id.*

48. *Id.* at 143; *see also* CAL. WATER CODE § 1707 (2007).

49. SAX ET AL., *supra* note 42, at 144 (citing Sterne, *supra* note 45, at 203–30).

50. *Central Delta II*, 327 F. Supp. 2d 1180, 1184 (E.D. Cal. 2004), *aff'd sub nom.* Cent. Delta Water Agency v. Bureau of Reclamation, 452 F.3d 1021 (9th Cir. 2006).

51. U.S. Department of Interior–New Melones Unit, <http://www.usbr.gov/dataweb/html/newmelones.html> (last visited Oct. 6, 2007).

Ocean.⁵² Reduced Stanislaus River flow below the New Melones Reservoir affects the salinity of downstream water. Since the Stanislaus River ultimately connects to the ocean and the saline San Francisco Bay, salt water can readily fill the void of fresh water if there is not enough water released from the New Melones Reservoir.⁵³ This increase in salinity affects farmers who rely on fresh water in order to successfully irrigate their crops. In response to the farmers' concerns, the SWRCB established the Vernalis Salinity Standard (VSS).⁵⁴ Under the VSS, when the SWRCB grants water permits in the New Melones region, it conditions these diversionary permits on capping salinity to a certain level in the Central and Southern Delta regions.⁵⁵

Meanwhile, the federal government enacted legislation that ran counter to the interests protected by the state-enacted VSS. In response to environmentalist lobbying efforts, Congress enacted the Central Valley Project Improvement Act (CVPIA) to ensure that the CVP "implement[s] a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long term basis."⁵⁶ Under the CVPIA, the Bureau is required to reserve 800,000 acre feet of water "for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures."⁵⁷ "In short, the Act demands that the [CVP] implement a significant fish habitat protection program... in accordance with applicable state water use permits."⁵⁸

Agricultural constituents worried as the Bureau began implementing the CVPIA and the state VSS seemed forgotten.⁵⁹ In order to help restore fish habitats in the Stanislaus and San Joaquin Rivers, the Bureau adopted an "Interim Plan" to release water from the New Melones Reservoir during certain months to comply with the CVPIA mandate.⁶⁰ As a result of these releases, less water is available in other parts of the year to comply with the VSS.⁶¹ But the CVPIA does not require the Bureau to release the water from the New Melones Reservoir—rather,

52. *Id.*; Cent. Delta Water Agency v. United States (*Central Delta I*), 306 F.3d 938, 943 (9th Cir. 2002).

53. *Central Delta I*, 306 F.3d at 944.

54. *Central Delta II*, 327 F. Supp. 2d at 1184.

55. *Central Delta III*, 452 F.3d 1021, 1024 (9th Cir. 2006).

56. Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, § 3406(b)(1), 106 Stat. 4706, 4714 (1992).

57. *Central Delta II*, 327 F. Supp. 2d 1180, 1185 (E.D. Cal. 2004) (citing CVPIA § 3406(b)(2)), *aff'd sub nom.* Cent. Delta Water Agency v. Bureau of Reclamation, 452 F.3d 1021 (9th Cir. 2006). An acre foot of water is the amount of water it would take to cover one acre at one foot depth.

58. *Central Delta I*, 306 F.3d at 945.

59. *Central Delta III*, 452 F.3d at 1025.

60. *Central Delta II*, 327 F. Supp. 2d at 1185.

61. *Central Delta III*, 452 F.3d at 1025.

Congress granted the Bureau discretion to release water from whatever sources it chooses as long as the releases provide enough water for instream flows protected by the CVPIA and for water rights (like the VSS) previously granted by the state.⁶² The Bureau claimed that the release of water from the New Melones Reservoir was just as its name implies—an Interim Plan—and that it could be changed at any time.⁶³ A cause for concern is that the Interim Plan does not cover plans for operations during drought conditions.⁶⁴ Although the CVPIA-mandated releases of water from the New Melones Reservoir did not currently affect local farmers, they became concerned that if the Bureau *continued* to release reservoir water according to the Interim Plan, salinity in the California Delta could spike during drought years, jeopardizing their soil and crops.⁶⁵

Customary diversions (rather than a one-time occurrence) under the Interim Plan further magnified their concerns.⁶⁶ The Interim Plan has remained substantively unchanged since its creation in 1996, and even remains in operation as of 2007.⁶⁷ The Bureau's Central Valley Operations Manager, Robert Milligan, noted that although the Bureau is trying to update the current plan, such update is contingent on a compromise between the interested parties.⁶⁸ Milligan noted that if a consensus cannot be achieved, then the Interim Plan might become final.⁶⁹

In 1999, four plaintiffs (collectively, the “Delta Plaintiffs”) filed suit against the DOI and requested a temporary restraining order to prevent another release from the New Melones Reservoir according to the Interim Plan.⁷⁰ The plaintiffs included two farmers who held riparian rights to Stanislaus River water and two California state water agencies, the Central Delta Water Agency and the Southern Delta Water Agency. The federal court in the Eastern District of California held that the Delta Plaintiffs lacked standing since a breach of their VSS rights under the

62. See CVPIA, Pub. L. No. 102-575, §3406(b)(1), 106 Stat. 4706, 4714 (1992).

63. *Central Delta III*, 452 F.3d 1021, 1026 (9th Cir. 2006).

64. See U.S. Bureau of Reclamation, Central Valley Project: New Melones Unit, <http://www.usbr.gov/dataweb/html/newmelones.html> (“The Interim Agreement was not developed to cover drought conditions because the stakeholders could not reach agreement on how to manage the facility during periods of extended drought.”) (last visited Nov. 12, 2007).

65. *Id.*

66. *Id.*

67. The Interim Plan was created in 1996. According to the Bureau's website, the Bureau is still operating the New Melones unit according to the Interim Plan. *Id.*

68. William Lutz, *Melones reservoir redefined: Officials discuss dam's balance of water and fish*, RECORD (Stockton, Cal.), Dec. 17, 2005, available at http://www.watershedportal.org/news/news_html?ID=475.

69. *Id.*

70. *Central Delta I*, 306 F.3d 938, 945–46 (9th Cir. 2002).

Interim Plan was not imminent.⁷¹ In other words, the court held that it would not grant the injunction unless the farmers faced an imminent threat of receiving excessively saline water under their permits.

On appeal, the Ninth Circuit granted the Delta Plaintiffs standing with a more liberal view of what constitutes an “injury in fact” in an environmental context (*Central Delta I*).⁷² The court recognized that an injury in fact does not require an actual injury, but that a threatened injury of environmental harm is sufficient.⁷³ Under this standard,

[A] necessary showing for standing purposes is not that the [VSS] has already been exceeded . . . but that plaintiffs face significant risk that the crops that they have already planted will not survive as a result of the Bureau’s decisions to discharge water from the New Melones Reservoir [into sources other than the Stanislaus River].⁷⁴

After the Ninth Circuit found that the plaintiffs had standing, it remanded the issue to the district court to determine whether an injunction against the Interim Plan was warranted.⁷⁵ On remand (*Central Delta II*), the Eastern District of California granted summary judgment to the DOI, citing the fact that the Delta Plaintiffs had failed to present sufficient evidence of the actual or threatened injury needed to establish a genuine issue of material fact.⁷⁶ This holding was not based on lack of standing; rather the court found that the Delta Plaintiffs did not offer sufficient *evidence* to support their theory of “hypothetical future harm.”⁷⁷ Even though the Delta Plaintiffs offered calculations showing how current releases from the New Melones Reservoir could dangerously deplete the amount of water stored for droughts, the district court dismissed such evidence as mere theory rather than as actual evidence that a breach was imminent.⁷⁸ It supported the holding on the assumption that the Bureau would be able to adapt to emergency circumstances and adopt an emergency water distribution plan during droughts even if such a plan was not currently in place. The Bureau had the authority to allocate water throughout the CVP and had successfully performed its duties in the past.⁷⁹ The district court in effect reasoned that having the

71. *Id.* at 945.

72. *Id.* at 948.

73. *Id.* at 947–48; *see also, e.g.*, *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180–81 (2000); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000); *Friends of the Earth v. Gatsos Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000).

74. *Central Delta I*, 306 F.3d at 948.

75. *Central Delta II*, 327 F. Supp. 2d 1180, 1186 (E.D. Cal. 2004), *aff’d sub nom.* *Cent. Delta Water Agency v. Bureau of Reclamation*, 449 F.3d 965 (9th Cir. 2006).

76. *Id.* at 1212.

77. *Id.*

78. *Id.*

79. *Id.* at 1210.

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authority to do something is equivalent to actually being able to do something.

The Delta Plaintiffs then appealed *Central Delta II* on the issue of sufficiency of evidence. In this most recent decision, *Central Delta III*, the Ninth Circuit affirmed the district court holding that the evidence did not support an impending breach of the VSS due to the Bureau's operation of the Interim Plan.⁸⁰

In arriving at this decision, the Ninth Circuit dismissed all of the Delta Plaintiffs' evidence as too speculative.⁸¹ They had presented a model, based on expected hydrological conditions, which showed that if the Bureau blindly adhered to the Interim Plan, the Bureau would be forced to either violate the VSS or the CVPIA goals for instream flows during thirty-seven out of the seventy-one years covered by the study.⁸² Since this model used hypothetical hydrological conditions rather than actual conditions, the court found the evidence too speculative.⁸³

Yet, the court noted that it would not even accept a model based on actual hydrological conditions since the Delta Plaintiffs' claims assumed that the Bureau would not stray from the Interim Plan.⁸⁴ The Ninth Circuit, just like the Eastern District of California, deferred to the Bureau's authority to choose how to allocate water throughout the CVP. The Bureau promised to abandon the Interim Plan if a breach of the VSS became apparent.⁸⁵ In finding no evidence of imminent harm, the court deferred to the Bureau's promise not to violate the VSS.⁸⁶ In fact, the Ninth Circuit found this factor especially conclusive since the entire decision hinged on the Bureau's promise not to breach the VSS.⁸⁷ As a result, the court held there was "no genuine issue of material fact as to the Bureau's future compliance with the [VSS]."⁸⁸

II. JUDICIAL INTERVENTION IN SITUATIONS LIKE *CENTRAL DELTA III* CAN PREVENT ANOTHER FISH KILL

The court in *Central Delta III* should have learned from the example of the Klamath River fish kill that ex ante measures for planning for water shortages should be adopted. Although the Bureau has a duty to manage 800,000 acre feet of water "for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and

80. *Central Delta III*, 452 F.3d at 1027.

81. *Id.* at 1026.

82. *Id.* at 1025.

83. *Id.* at 1026.

84. *Id.* at 1026–27.

85. *Id.*

86. *Id.*

87. *See id.* at 1027.

88. *Id.*

measures,⁸⁹ the court can serve as a checking mechanism to ensure that the Bureau is fulfilling its duty. Part A explains how judicial intervention can ensure that the Bureau performs ex ante planning for water shortages. Part B then discusses how the state of California, which was represented by the Central and Southern Delta Water Agencies in *Central Delta III*, actually has a right to seek judicial intervention in these matters.

*A. Judicial Intervention Can Compel the Proactive Adoption of
Emergency Plans*

The resolution of environmental issues demands a preventative model. Monetary damages often do not provide adequate remedies for environmental injuries.⁹⁰ In addition, environmental injuries tend to be permanent or of an extended duration.⁹¹ Richard Lazarus notes that these features make environmental law distinctive from other areas of law.⁹² In fact, some environmental laws, such as the Clean Water Act (CWA), the Endangered Species Act, and National Environmental Policy Act of 1969 (NEPA) are tailored to this unique aspect of environmental injuries.⁹³ These laws recognize that environmental laws should focus on preventing the environmental injury rather than remedying it retroactively.⁹⁴

Unlike NEPA, ESA, and CWA, water rights laws generally do not contain provisions providing for ex ante relief.⁹⁵ While water priorities establish the order that water should be allocated, water rights laws do not contain measures deterring a violation prior to breach. Instead, water rights laws partially rely upon the ESA and CWA to implement environmental precautions. Yet, in order to trigger the ESA, a species

89. *Central Delta II*, 327 F. Supp. 2d 1180, 1185 (E.D. Cal. 2004) (citing CVPIA § 3406(b)(2)), *aff'd sub nom.* Cent. Delta Water Agency v. Bureau of Reclamation, 452 F.3d 1021 (9th Cir. 2006).

90. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124 (9th Cir. 2003).

91. *Id.*

92. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 744–48 (2000).

93. See Jay D. Wexler, *The (Non)Uniqueness of Environmental Law*, 74 GEO. WASH. L. REV. 260, 294–95 (2006).

94. See Endangered Species Act, 16 U.S.C. § 1531 (2006); Clean Water Act, 33 U.S.C. § 1251(a) (2006); National Environmental Policy Act, 42 U.S.C. § 4321 (2006).

95. California's water rights laws adopt the common law provisions of both riparian and prior appropriation doctrines. SAX ET AL., *supra* note 42, at 340. Riparian and appropriative rules concern whether a user can derive a right for water, and if they can, what the priority of that right is relative to other rights holders. Statutes like the Endangered Species Act, Clean Water Act, and National Environmental Protection Act impose limits on those riparian and appropriative rights to provide protections against species degradation, pollution, and development that hurts the environment, respectively. *Id.* at 639, 652, 668–69; see also 16 U.S.C. §§ 1533(f), 1536(a); 33 U.S.C. § 1344(a); 42 U.S.C. § 4332(2)(C).

needs to be already listed as endangered.⁹⁶ Imagine a situation where a species of fish is not yet endangered. Under that scenario, the ESA does not protect this fish. Therefore, instream flows for this species of fish do not receive special priority. Even though the fish is not currently endangered, one dry year could significantly affect the population of fish through reductions in instream flows. State and federal laws governing the priority of instream uses, like the CVPIA, attempt to prevent this exact scenario. The CVPIA charges the Bureau with the management of 800,000 acre feet of water for the primary purpose of providing instream flows, thus establishing a high priority for the benefit of fish.⁹⁷ Such a precautionary measure is only effective if it is consistently followed, since the neglect of the 800,000 acre feet mandate means the fish will die. The problem with the CVPIA provision is that by the time the mandate is violated, it is too late—thus defeating the purpose of the provision all together.

Reserving water for instream flows helps ensure that fish habitats will not be eradicated by water shortages. However, such precautionary measures are only effective if consistently followed. Under the current Interim Plan for the operation of the New Melones unit, the Delta Plaintiffs asserted that under the Bureau's current operations, there will not be enough water to comply with the VSS in thirty-seven of the next seventy-one years.⁹⁸ Although the Bureau claimed that the Interim Plan was "merely a starting point" and that it would modify its operations in the event of a drought, the Bureau also promised to fulfill the needs of the VSS.⁹⁹ Does this mean that if the Bureau fails to adopt an emergency plan in drought years the Bureau will provide flows for the VSS at the expense of the instream flows? If the instream flow mandate is neglected, the fish will die. There needs to be a mechanism to ensure that agencies like the Bureau are planning as proactively as possible for these emergency scenarios. A court can serve as such checking mechanism on the agency.

If the Ninth Circuit had granted review in *Central Delta III*, the court could have addressed whether in times of water shortages, the Bureau could substitute water that would otherwise be used for instream flows to satisfy VSS needs. Under the CVPIA Congress instructed the Bureau to apply "reasonable" efforts to ensure instream flows at the level prescribed by the CVPIA.¹⁰⁰ The meaning of the term "reasonable" in the statute is vague. Under review, the court could decide whether the

96. 16 U.S.C. §1536(a); SAX ET AL., *supra* note 42, at 651.

97. See CVPIA, Pub. L. No. 102-575, §3406(b)(2), 106 Stat. 4706, 4715–16 (1992); *Central Delta III*, 452 F.3d 1021, 1024 (9th Cir. 2006).

98. *Central Delta III*, 452 F.3d at 1025.

99. *Id.* at 1026.

100. See CVPIA, Pub. L. No. 102-575, §3406(b)(1), 106 Stat. 4706, 4714 (1992).

Bureau's interpretation of a "reasonable" effort, as demonstrated by its current operations under the Interim Plan, constitutes a permissible interpretation of the CVPIA. Such a decision would inform the Bureau on whether its current operations are likely to lead to legal problems in the future, which could consequently coerce it into creating emergency plans.

B. The Ninth Circuit's Denial of Review Frustrated California's Right to Protect the Public Trust

California has an interest in ensuring that the Bureau comprehensively plans for water shortages in the CVP. California also has an affirmative interest in maintaining instream flows for fish under the public trust doctrine.¹⁰¹ In *Central Delta III*, two of the plaintiffs, the Central Delta and Southern Delta Water Agencies, sought to prevent the Bureau from violating existing state water permits in the future through the Bureau's current operation of the CVP.¹⁰² Although the Agencies can partially control how the Bureau allocates water through issuing permits¹⁰³ and providing recommendations in how the Bureau operates the CVP,¹⁰⁴ the Bureau, acting under the Secretary of Interior, makes the final decision.¹⁰⁵ Thus the only mechanism to ensure that the Bureau

101. Discussed *infra* Part II.B.

102. See *Central Delta III*, 452 F.3d at 1023.

103. *United States v. State Water Res. Control Bd. (SWRCB)*, 227 Cal. Rptr. 161, 171 (Ct. App. 1986).

104. Under section 3406(b) of the CVPIA, the Secretary of Interior should consult with the state before implementing any actions that promote the CVPIA's fish and habitat restoration goals. CVPIA, Pub. L. No. 102-575, § 3406(b), 106 Stat. 4706, 4714 (1992). However, the enacted statute is vague on the degree of California's involvement, merely stating that the Secretary of Interior acts "in consultation with other State and Federal agencies." *Id.* A prior draft of the CVPIA more explicitly provided the terms of California's involvement. S. REP. NO. 102-267, at 72-73, 79-80 (1992), as reprinted in 1992 U.S.C.C.A.N. 4041, 4041. The original draft provided for the creation of the Central Valley Project Fish and Wildlife Advisory Committee which would make "strictly advisory" recommendations to the Secretary of Interior regarding actions that would advance the goals of the CVPIA, "develop the technical information needed to evaluate these actions, determine the economic and biological feasibility of these actions . . . and report the findings to Congress for implementation authorization." *Id.* at 72-73, 79. The draft required the Committee to include representatives from the SWRCB, Department of Water Resources, Department of Fish and Game, and other agricultural, environmental, and urban interests. *Id.* at 79-80. The omission of these provisions related to the creation of the Advisory Committee from the final draft of the CVPIA demonstrates how California might find it more difficult to influence operations in the CVP than originally intended by Congress under prior drafts of the CVPIA.

105. The plain language of the statute orders the Secretary of Interior to carry out the fish and habitat restoration goals of the CVPIA. CVPIA § 3406(b). The CVPIA only directs the Secretary of Interior to consult with other state and federal agencies. *Id.* The CVPIA does not order the other state and federal agencies to have a definitive voice in the final decision. *Id.* Additionally, the congressional debate surrounding the Conference report on section 3406 of the CVPIA notes that "[t]he Secretary, not the Director of the Fish and Wildlife Service, makes the final decision. That decision will be based on the recommendation of the Fish and Wildlife

abides by the permits is to judicially check the Bureau when a breach is imminent.

Water law traditionally falls under the domain of state law.¹⁰⁶ This deference to the state is demonstrated by the interplay of the State Water Resources Control Board and the Bureau in implementing the CVPIA. In order to implement the CVPIA, the Bureau must obtain permits from the SWRCB. In addition, the SWRCB has the duty to make sure that all water uses are reasonable.¹⁰⁷ In this light, the SWRCB retains the power to “institute necessary judicial, legislative, or administrative proceedings to prevent waste or unreasonable use.”¹⁰⁸ This includes an ongoing authority to invoke review.¹⁰⁹

The U.S. Supreme Court reinforced the importance of California law in the realm of water law in *California v. United States*.¹¹⁰ The legislative history of the CVPIA even notes that Congress intended to legislate consistently with the holding of *California v. United States*.¹¹¹ In *California v. United States*, before the Bureau could obtain water permits to fill the New Melones reservoir, California sought to impose twenty-five conditions on the Bureau’s use of that water.¹¹² Some of the conditions even required releases of stored water for the preservation of fish and wildlife along the San Joaquin River.¹¹³ In order to circumvent these restrictions, the Bureau sought declaratory judgment of its right to impound water for its uses without abiding by state law.¹¹⁴ The Court cemented deference to state water law when it noted that the “Bureau must follow state law in all respects not directly inconsistent with congressional directives, because ‘the legislative history of the Reclamation Act of 1902 makes is abundantly clear that Congress intended to defer to the substance, as well as the form, of state water

Service, but will reflect other recommendations and considerations.” 138 CONG. REC. S17,645 (daily ed. Oct. 8, 1992) (statement of Sen. Johnston).

106. The language of the original form of section 8 of the Reclamation Act of 1902 shows that the federal power under the Reclamation Act should not interfere with the right of any state to “control, appropriat[e], use, or distribut[e] . . . water.” *California v. United States*, 438 U.S. 645, 665 (1978); see also Davidson, *supra* note 20, at 533–34.

107. CAL. CONST., art. X, sec. 2, § 100; *SWRCB*, 227 Cal. Rptr. at 187.

108. *SWRCB*, 227 Cal. Rptr. at 187.

109. *Id.*; *State Water Res. Control Bd. v. Forni*, 126 Cal. Rptr. 851, 857 (Ct. App. 1976).

110. 438 U.S. at 645 (1978).

111. “Nothing in this bill is intended to diminish or expand any authority that California presently has. The State’s authority remains unchanged consistent with the law as interpreted in *California v. United States*, 483 U.S. 645 (1978).” 138 CONG. REC. S17,645 (daily ed. Oct. 8, 1992) (statement of Sen. Johnston).

112. 438 U.S. at 652.

113. *Id.* at 652 n.8.

114. *Id.* at 647.

law.”¹¹⁵ Consequently, the Bureau had to yield to the conditions imposed by the SWRCB.

One such condition imposed on the operation of the New Melones unit was California’s ability to protect the public trust. The public trust doctrine protects the public’s right to use rivers and streams for navigation, recreation, and preservation of ecology.¹¹⁶ It recognizes that certain resources should be preserved for the public, and the state has a duty to ensure that private interests do not interfere with the usage of those resources.¹¹⁷ In *National Audubon Society v. Superior Court of Alpine County (Mono Lake Case)* the California Supreme Court held that in cases where public trust interests conflict with established water rights “the *state* has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”¹¹⁸ Under *Mono Lake*, California is compelled to protect the instream flows of fish whenever reasonable. In fact, on the heels of the reinforcement of the importance of the state in the realm of water law in *California v. United States*, the state of California,

reasserted its ongoing authority to “reserve jurisdiction” to review future Bureau water deliveries [from the New Melones unit] . . . [since] the Board must protect the “public trust” in the granting and administering of water rights The Board strongly hinted that . . . future conditions could lead to imposition of new requirements for releases from the [New Melones] reservoir to maintain water quality and protect fish and wildlife.¹¹⁹

California retains an interest in ensuring minimum instream flows in the CVP even though the CVPIA directs the federal government—not the state of California—to maintain such flows.¹²⁰ Even though the CVPIA directs the Bureau to consult with the state of California before acting under the CVPIA,¹²¹ the Bureau does not have to follow the recommendations of the California agencies. Rather, the Bureau, through authority granted by the Secretary of Interior, has power to make the definitive decision, even if it is contrary to the recommendations of the

115. Jeanne M. Zolezzi, *The Battle Between Sovereign Immunity and State Law*, 15 NAT. RESOURCES & ENV’T 36, 38 (2000) (quoting *California v. United States*, 438 U.S. 645, 674 (1978)).

116. SAX ET AL., *supra* note 42, at 591–92.

117. Nat’l Audubon Soc’y v. Superior Court of Alpine County (*Mono Lake Case*), 658 P.2d 709, 719 (Cal. 1983); *see* *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 201 (Ct. App. 1986).

118. *Mono Lake Case*, 658 P.2d at 728 (emphasis added).

119. SAX ET AL., *supra* note 42, at 760 (quoting BARBARA ANDREWS & MARIE SANSONE, WHO RUNS THE RIVERS? DAMS AND DECISIONS IN THE NEW WEST 431–32 (1983)).

120. *See* CVPIA, Pub. L. No. 102-575, §3402, 106 Stat. 4706, 4706 (1992).

121. *Id.* § 3406(b).

California agencies.¹²² Yet, California's duty to maintain the public trust creates an interest beyond a mere advisory role since without a judicial checking mechanism, California cannot ensure that the Bureau will follow its recommendations.¹²³ Some might argue that California's interest in preserving the public trust in the California Delta is protected by the CVPIA's directive that the Bureau maintain instream flows.¹²⁴ After all, under *California v. United States*, the Bureau must "follow state law in all respects not directly inconsistent with congressional directives."¹²⁵ But simply because Congress charges the Bureau with the duty to preserve instream flows does not mean that the Bureau will preserve them effectively. Rather, the Central Delta and Southern Delta Water Agencies have an interest in ensuring that the Interim Plan will meet the interests of both the agricultural users and the fish. The Agencies should be allowed to challenge the Bureau's decisions in court; otherwise the state might be found out of compliance with the public trust doctrine.¹²⁶

122. See *supra* note 105.

123. By 1995, two years after enactment of the CVPIA, the Secretary of Interior was supposed to consult with the state of California to generate a report for the Senate and House outlining the effects of the Bureau's operation of the CVP on "anadromous fish populations and the fisheries, communities, tribes, businesses and other interests and entities that have now or in the past had significant economic, social or cultural association with those fishery resources." CVPIA § 3406(f). Additionally, section 3408(f) directs the Secretary to prepare an annual report for Congress describing "all significant actions taken by the Secretary . . . and progress toward achievement of the intent, purposes, and provisions of [the CVPIA]." *Id.* § 3408(f). Most notably, Congress—a part of the federal government—has oversight over issues that affect the public trust of California. Again, California only has an advisory role over the content of the congressional reports. The inadequacy of this congressional checking mechanism is evidenced by the lack of a finalized CVP emergency drought plan despite these congressional oversight provisions. Finally, under the CVPIA, the Secretary should have prepared an environmental impact statement "analyzing the direct and indirect impacts and benefits of implementing [the CVPIA], including all fish, wildlife, and habitat restoration actions" by 1995. *Id.* § 3409. The inadequacy of this checking mechanism is evidenced by the current lack of a finalized CVP emergency drought plan. California has an even greater interest in ensuring the maintenance of the public trust within the CVP in light of the failures of the other agency checking mechanisms provided for in the CVPIA.

124. See CVPIA § 3402.

125. *California v. United States*, 438 U.S. 645, 678 (1978).

126. The Senate debate on the Conference Committee report notes that one purpose of enacting the CVPIA was to "eliminate frequent citizen suits." 138 CONG. REC. S17,645 (daily ed. Oct. 8, 1992) (statement of Sen. Wallop). Yet there is a difference between eliminating *frequent* citizen suits and completely eliminating *all* citizen suits. As noted above, California has a right to protect the public trust when it is in jeopardy. Therefore, it is not inappropriate to allow a citizen suit when the public trust is truly in jeopardy when the Bureau has lagged in creating a water allocation policy for the CVP that accomplishes the goals of the CVPIA during emergency droughts.

III. NARROWLY-FOCUSED FINALITY STANDARDS HINDER THE FORMATION OF AN EX ANTE FRAMEWORK FOR THE PLANNING FOR WATER SHORTAGES

The Ninth Circuit's excessive deference to the Bureau's right to allocate water in the CVP frustrates attempts at providing a judicial checking mechanism on the decisions made by the Bureau.¹²⁷ The court in *Central Delta III* noted that Congress granted the Bureau discretion in *how* to operate the CVP in order to balance the mandates of the previous water rights holders, including the requirements of the VSS, and the needs of the fish, wildlife, and habitat.¹²⁸ Under the Administrative Procedure Act, courts are instructed to respect agency discretion when it is granted by Congress.¹²⁹ *Central Delta III* demonstrates how this deference to agency discretion is taken to an extreme when judicial review is refused for agency actions that are longstanding, but not quite final.¹³⁰ Since agency action is not fit for judicial review until the action taken by the agency is final,¹³¹ the Interim Plan will never be fit for judicial review unless the Bureau explicitly states that the plan is final.

This rigid standard prevents tentative plans that have been in operation for a significant period of time and that appear final, like the Interim Plan, from being reviewed. Since, as noted previously in Part II, judicial review can compel agencies to adopt comprehensive water allocation plans that plan for water shortages, this hindrance to judicial review can hurt environmental objectives in creating an *ex ante*

127. In the case of *Central Delta III*, the Delta Plaintiffs based their cause of action on the Bureau's choice to adopt the Interim Plan. Section 702 of the APA provides a cause of action for "[a] person suffering legal wrong because of an agency action." 5 U.S.C. § 702 (2006). It is important to note that the Delta Plaintiffs did not base their cause of action on the Bureau's inaction in failing to adopt a water allocation plan beyond the Interim Plan. This is significant since the threshold for bringing a cause of action for inaction under the APA is more stringent than for bringing a cause of action for an agency action. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (in order to bring a cause of action for inaction a plaintiff must show that the agency failed to perform a discrete action that it was legally required to perform). The Delta Plaintiffs were merely challenging the Bureau's adoption of the Interim Plan, claiming that "the Bureau was violating the [CVPIA] because it was operating the [CVP] in a manner that would at some point in the future violate the [VSS]." *Central Delta III*, 452 F.3d 1021, 1023 (9th Cir. 2006).

128. 452 F.3d at 1026.

129. 5 U.S.C. § 701(a)(2).

130. *Central Delta III*, 452 F.3d at 1026–27. *See* Christopher M. Buell, *Norton v. Southern Utah Wilderness Alliance: The U.S. Supreme Court Fails to Act on Agency Inaction*, 67 U. PITT. L. REV. 641 (2006), for a discussion on how recognizing unfettered discretion towards agency decisions leads to inaction in preventing environmental harms.

131. Under the doctrine of finality, an agency action is subject to judicial review when that action is a "final agency action for which there is no other adequate remedy in a court." APA, 5 U.S.C. § 704. "A preliminary [or] procedural . . . agency action . . . is subject to review on the review of the final agency action." *Id.*; *see also* *Puget Sound Energy, Inc. v. United States*, 310 F.3d 613, 624–25 (9th Cir. 2002) (citing *Ma v. Reno*, 114 F.3d 128, 130 (9th Cir. 1997)); *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.").

framework. Part A explains how narrowly-focused finality standards, as implicitly applied in *Central Delta III*, can narrow the opportunity for judicial review. Part B then discusses how the rigid application of finality standards can hinder the development of ex ante planning for water shortages in the California Delta.

*A. Implicit Application of Finality Standards in Central Delta III
Narrowed the Opportunity for Judicial Review*

The Ninth Circuit denied review in *Central Delta III* because the Bureau could change its water delivery plans within the CVP to avoid violations in the VSS, therefore eliminating any genuine issue of material fact about the Bureau's likelihood of violating the VSS.¹³² Central to this summary judgment holding is a finding that the Bureau is not required to follow the Interim Plan. This finding is essentially similar to the court finding that the Bureau's decision to implement the Interim Plan was not final, and therefore operations under the Interim Plan are not subject to judicial review under the doctrine of finality.¹³³ Therefore, even if the Ninth Circuit did not explicitly premise its holding on lack of finality in *Central Delta III*, in making its decision, the Ninth Circuit implicitly considered the finality of the Interim Plan.

Section 704 of the Administrative Procedure Act (APA) requires that in order for an agency action to be reviewable, it must be final.¹³⁴ Since the finality requirement is codified in the APA,¹³⁵ some courts believe that a finding of finality is a jurisdictional prerequisite for review of the agency action.¹³⁶ The court addresses two factors when determining whether an agency action is final. First, the court considers whether the

132. "That strict adherence to the Plan might result in violations of the [VSS] establishes neither a factual issue nor a right to injunctive relief, *because the Bureau admits that it must violate [the Interim Plan] rather than violate the [VSS].*" *Central Delta III*, 452 F.3d at 1027 (emphasis added).

133. *Compare id.* at 1026–27 ("[T]he [Interim Plan] is merely a starting point, and the Bureau modifies its operation of the CVP as conditions on the river system change. . . . Congress granted the Bureau considerable discretion in determining how to meet [the] obligations [of the VSS]. The Bureau admits that it is required to violate its own Plan if necessary to provide flows sufficient to lower the salinity of the water to levels required by the [VSS]. . . . There is no genuine issue of material fact as to the Bureau's future compliance with the [VSS]."), *with Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) ("[T]he action must mark the 'consummation' of the agency's decisionmaking process . . . , it must not be of a merely tentative or interlocutory nature.").

134. APA, 5 U.S.C. § 704 (2006); *Bennett*, 520 U.S. at 177–78.

135. APA § 704.

136. The Ninth Circuit believes that "a finding of finality, or an applicable exception, is essential when the court's reviewing authority depends on one of the many statutes permitting appeal only of "final" agency action, such as . . . 5 U.S.C. § 704." *Ukiah Valley Med. Ctr. v. Fed. Trade Comm'n*, 911 F.2d 261, 264 n.1 (9th Cir. 1990) (dictum, citing *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 799 (D.C. Cir. 1987) (Williams, J., concurring)). However, other circuits believe otherwise. *See, e.g., Ticor*, 814 F.2d at 745 (plurality opinion).

agency action at issue is “merely tentative or interlocutory” rather than final.¹³⁷ Second, the court considers whether “‘rights and obligations have been determined’ by [or] ‘legal consequences will flow’” from the challenged agency action.¹³⁸ These requirements constrain courts to deny review of agency actions that are tentative, interlocutory, or temporary. Often, this standard is applied strictly by looking to whether the agency decision is subject to change.¹³⁹ However, courts are sometimes willing to find that unsettled agency actions are “final.”¹⁴⁰ What is most important to notice about the finality standard is that it focuses on the agency’s stage in the deliberative process rather than on other mitigating factors that might affect whether the agency decision is in fact final or the effects that the denial of judicial review will have on interested parties. In fact, when the court determines whether legal consequences will flow from the agency’s action, the court looks to whether the agency will be bound to follow the action.¹⁴¹ Similarly, when the court considers whether rights and obligations have been determined by the agency action, this inquiry

137. *Bennett*, 520 U.S. at 178.

138. *Id.* (citing *Port of Boston Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

139. It is important to note that the widely accepted test for finality, as promulgated in *Bennett v. Spear*, requires that *both* the agency action at issue is final (rather than “merely tentative or interlocutory”) *and* that the “‘rights and obligations have been determined [by] or . . . ‘legal consequences will flow’” from the challenged agency action. 520 U.S. 154, 178 (1997). The fact that the test requires both of these factors shows that the latter factor is not just a means to determine whether an action is tentative. Rather, the latter requirement is an independent requirement in itself. Additionally, district courts have noted that “[w]here . . . agency action is subject to modification, recall, abandonment or reconsideration, judicial review is premature.” *Bellarno Intern. Ltd. v. Food & Drug Admin.*, 678 F. Supp. 410, 416 (E.D.N.Y. 1988); *see also Dow Chem. U.S.A. v. Consumer Prod. Safety Comm’n*, 459 F. Supp. 378, 387 (W.D. La. 1978) (“The interest in postponing review is strong if the agency action that is at issue is not in fact the agency’s final position. If the agency’s stance is likely to be abandoned or modified before it is actually put into effect, then judicial review squanders the court’s time and interferes with the process by which the agency is attempting to reach a final decision.”). Finally, the D.C. Circuit has noted in dictum that even though a temporary restraining order obliges compliance by third parties, it is not final because it does not “‘finally decide the case.” *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000).

140. *Fid. Television, Inc. v. FCC*, 502 F.2d 443, 448 (D.C. Cir. 1974) (“The principle of finality in administrative law is not, however, governed by the administrative agency’s characterization of its action, but rather by a realistic assessment of the nature and effect of the [action] sought to be reviewed Hence, ‘a final [action] need not necessarily be the very last [action]’ in an agency proceeding.” (quoting *Isbrandtsen Co. v. United States*, 211 F.2d 51, 55 (D.C. Cir. 1954))).

141. In determining that the agency action of issuing a biological opinion in *Bennett* represented a “final agency action,” the court imputed finality from the legal liability that flowed from the issuance of a biological opinion. *Bennett*, 520 U.S. at 177–78. In analyzing whether legal liability flowed from the issuance of the biological opinion, the court looked to whether the ESA’s statutory scheme, which controls agency action, compelled legal consequences for departures from the biological opinions’ suggestions. *Id.*

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again focuses on whether the agency is bound to follow its decision.¹⁴² These inquiries are like looking at the problem in a vacuum since they mainly focus on the agency itself rather than looking to outside factors.

In *Central Delta III*, the Ninth Circuit's implicit deliberation on finality focused on the Bureau's promises to devise emergency measures if needed—a standard that primarily focused on the agency rather than other factors that might affect the agency's ability to devise emergency plans.¹⁴³ In making this determination, the Ninth Circuit noted that the Bureau acknowledged that it must alter its operations if necessary to meet VSS mandates—the Bureau “ha[d] done so in the past, and nothing in the record suggests that it will not continue to do so in the future.”¹⁴⁴ Here the court acknowledged some other factors outside of the mere fact that the Interim Plan is tentative; however, these factors focused on the Bureau's actions rather than on other factors that might affect whether the Bureau will have time, given projected hydrological conditions, to devise a sufficient emergency plan. The court even rejected the Delta Plaintiff's asserted projected hydrological models—factors that help demonstrate the imminence of the problem in the California Delta—as too speculative.¹⁴⁵ Thus, the Ninth Circuit effectively followed a finality standard whereby its review focused on the agency and was limited to determining whether the Bureau was likely to modify its operations away from the Interim Plan.¹⁴⁶

Application of a narrowly-focused finality standard allowed the Ninth Circuit to cursorily rely on the Bureau's promise to adopt emergency measures to support its findings rather than looking to other factors concerning whether the Bureau could realistically adopt emergency plans in the face of a drought.¹⁴⁷ The Ninth Circuit's analysis leaves the reader unsatisfied since the Bureau's ability to meet both the VSS and the instream flow goals under the CVPIA during drought conditions is merely speculative. In fact, the Ninth Circuit even noted that the Plan was “initially intended to be temporary, but, for lack of a better

142. The D.C. Circuit noted that “rights and obligations” are determined when an agency action has a binding effect. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020, 1023 n.15 (D.C. Cir. 2000). The court looks to whether the agency bases its conduct on an agency decision and whether that conduct affects private parties. *Id.* at 1021 (“If an agency acts as if a document issued is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes ‘binding.’”).

143. *Central Delta III*, 452 F.3d 1021, 1026–27 (9th Cir. 2006).

144. *Id.* at 1027.

145. *See id.* at 1026–27.

146. *See id.* at 1027.

147. *Id.* at 1026–27.

program, the Bureau has continued to operate [under it].¹⁴⁸ Does this mean that the Bureau does not have any other emergency plan in mind for dealing with drought? If the court imputed other factors outside the Bureau's ability to alter the plan, the court may have found that the Interim Plan is in fact final. Factors that should have been considered include: (1) whether the Bureau is currently considering any other alternatives to the Interim Plan; (2) whether these alternatives are viable; and (3) whether the Bureau can implement alternative plans before a drought strikes. By straying from a strict application of finality and considering the above factors, the burden would shift from the Delta Plaintiffs to the Bureau to prove that alternatives actually exist. Under this suggested approach, the Bureau cannot hide behind promises. The court could have taken a closer look at the evidence concerning the Bureau's ability to adapt the Interim Plan to meet the requirements of both the VSS and instream requirements during droughts.

B. The Application of Rigid Finality Standards in Central Delta III Can Lead to Ex Post Planning for Water Shortages

The narrow finality standard used in *Central Delta III* can create an ex post judiciary scheme. Generally, courts grant injunctive relief when an irreparable injury is threatened and all other legal remedies are inadequate.¹⁴⁹ Since "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often . . . irreparable,"¹⁵⁰ the Delta Plaintiffs in *Central Delta III* only needed to prove that the Bureau's actions would likely breach the VSS in order to obtain an injunction. In order to prove this, the Ninth Circuit required the Delta Plaintiffs to support their assertions with actual evidence.¹⁵¹ The court essentially required the plaintiffs to show that in the event of a water shortage the Bureau would continue operating under the Interim Plan rather than adopting a substitute plan.¹⁵² The Ninth Circuit thus denied review since the Bureau had discretion to adjust its operations of the CVP.¹⁵³ This approach ignores whether it is even possible for the Bureau to adopt alternative plans before it is too late.

If the Ninth Circuit had looked to a wider array of factors in determining the finality of the Interim Plan, the court might have found sufficient evidence that a breach of either the VSS or the CVPIA was imminent. Did the Bureau have any other emergency plans that could

148. *See id.* at 1025.

149. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987).

150. *Id.* at 545.

151. *Central Delta III*, 452 F.3d 1021, 1026 (9th Cir. 2006).

152. *Id.* at 1026–27.

153. *Id.* at 1027.

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feasibly be adopted to supplement the Interim Plan in the event of a dry winter? Would the Bureau have sufficient time to implement such alternatives when it becomes clear, by way of a below average snowpack, that there will be a drought year? Would those alternatives cause a breach of the salinity requirements of the VSS or the instream flow requirements of the CVPIA? The Ninth Circuit did not incorporate such questions in its analysis.¹⁵⁴ Instead, the court based its decision on the mere fact that the Bureau promised to stray from the Interim Plan, if necessary, to abide by the VSS.¹⁵⁵ By constricting its focus merely on the Bureau's discretion, the court ignored whether the Bureau had any other viable emergency plans or whether the Interim Plan is in fact the final and only plan that the Bureau has.

Additionally, as noted in Part II.A., if the Ninth Circuit had granted review in *Central Delta III*, the court could have considered whether the Bureau's operations under the Interim Plan fall within the mandates of the CVPIA. As noted earlier, Congress was vague when it instructed the Bureau to apply "reasonable" efforts to ensure instream flows at the level prescribed by the CVPIA.¹⁵⁶ Under review, the court could decide whether the Bureau's interpretation of a "reasonable" effort, as demonstrated by its current operations under the Interim Plan, constitutes a permissible interpretation of the CVPIA. This could address whether in times of water shortages, the Bureau could substitute water that would otherwise be used for instream flows to satisfy VSS needs. Such a decision would inform the Bureau on whether its current operations are likely to lead to legal problems in the future, which could consequently coerce it into creating emergency plans.

On the other hand, the court should not waste time and resources contemplating issues that might not materialize. What if the Bureau subsequently changes the Interim Plan? Under the APA, courts are instructed to often defer to agency decisionmaking.¹⁵⁷ Congress effectively granted agencies discretion in carrying out their duties by limiting the judiciary's ability to review agency decisions under the APA.

154. *Id.*

155. *Id.* at 1027.

156. See CVPIA, Pub. L. No. 102-575, §3406(b)(1), 106 Stat. 4706, 4714 (1992).

157. When reviewing an agency decision on a question of fact, a court is restricted to reviewing whether the agency decision is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or is unsupported by substantial evidence. 5 U.S.C. §§ 701(a)(2), 706 (2006). See generally *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359 (1998), for a discussion on the arbitrary and capricious standard. See *NLRB v. Universal Camera Corp.*, 190 F.2d 429 (2d Cir. 1951), for a discussion of the substantial evidence standard. When reviewing agency determinations of law, the court defers to the agency's "reasonable" interpretation of an ambiguous statute, *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984), as long as Congress delegated authority to the agency to act, and the agency interpreted the statute under that authority. *United States v. Mead Corp.*, 533 U.S. 218, 228-29 (2001).

Agency decisions are afforded discretion because the agency decisionmaking process has a “presumption of regularity”¹⁵⁸ and the agency has an interest in “crystallizing its policy before that policy is subjected to review.”¹⁵⁹ These policy reasons support why courts should not thoughtlessly grant review for tentative agency actions. But this does not mean that courts should narrowly focus their inquiry on whether an agency has discretion to change its plans, since such a model could lead to an ex post adjudication.

This Note urges courts to adopt a more comprehensive and prospective approach to determining whether a threatened harm exists in disputes over competing water rights. The point of this Note is not to argue that the Ninth Circuit should have decided *Central Delta III* differently; rather, this Note maintains that the narrowly-focused finality standard applied by the Ninth Circuit in *Central Delta III* hinders encouragement of ex ante planning for water emergencies. As demonstrated by the massive fish kill in the Klamath River Basin, water disputes can result in severe consequences for fish. Judicial oversight over water planning could encourage prospective planning, and thereby avoid the disastrous effects of ex post “planning.” Without taking into account a variety of factors in determining whether an injury is imminent enough to allow judicial review, complex water rights battles, like that in the California Delta, will instead be decided on an ex post basis—when it is too late to reverse the environmental harm. The narrowly-focused finality analysis encapsulated in the Ninth Circuit’s holding in *Central Delta III* aggravates these ex ante objectives by narrowing the opportunity for judicial review. The doctrine of ripeness, as discussed in Part IV provides an alternative model that the court could have followed in balancing other practical factors against the likelihood that the agency might change its operations.

IV. FLEXIBLE RIPENESS STANDARDS ACKNOWLEDGE A WIDER VARIETY OF FACTORS, INCLUDING ENVIRONMENTAL INTERESTS

Finality is derived from the judicially created doctrine of ripeness.¹⁶⁰ Like finality, ripeness is a justiciability concern that focuses on whether an issue is ready for judicial review.¹⁶¹ These doctrines represent the court’s aversion to advisory opinions on insufficiently developed issues.

158. *Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F. Supp. 2d 1224, 1232 n.3 (E.D. Cal. 2003) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)).

159. *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 735 (D.C. Cir. 1987).

160. STEPHEN BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 915 (Vicki Been et al. eds., 6th ed. 2006). Although the underlying policies for ripeness and finality are similar, ripeness and finality are in fact distinct. *Id.*

161. *Id.* at 887.

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Although the underlying policies for ripeness and finality are similar, ripeness and finality are in fact different.¹⁶² Under finality, the court focuses on the whether the agency action is tentative or interlocutory.¹⁶³ Unlike finality, the court will look to more factors beyond whether the agency decision is final in determining ripeness.¹⁶⁴ In fact, when determining whether an issue is ripe, the court considers whether the issue is fit for adjudication along with the hardships that the parties would face if judgment is withheld.¹⁶⁵

Ripeness is a common law doctrine derived from prudential concerns and Article III of the Constitution. “[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”¹⁶⁶ Article III, section 2 of the U.S. Constitution encapsulates such aversion in limiting federal jurisdiction to “Cases . . . [or] Controversies.”¹⁶⁷ The constitutional undertones of ripeness reflect the judiciary’s deference to other branches of government, including administrative agencies, which might be better suited to resolve certain issues.¹⁶⁸

Prudential concerns also motivate ripeness standards. Justiciability requirements “ha[ve] traditionally been understood to include the power to resolve abstract legal issues . . . but only as a necessary byproduct of the resolution of particular disputes between individuals.”¹⁶⁹

The basic prudential rationale of the ripeness doctrine “is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”¹⁷⁰

Courts do not favor issuing judgments on incomplete sets of facts since the judgment might be improper.¹⁷¹ William Landes and Judge Richard

162. *Id.* at 915. “Despite [overlap with ripeness in that some cases confuse the finality doctrine with the fitness of the issues requirement under the ripeness doctrine,] finality is a separate requirement.” *Ticor*, 814 F.2d at 749 n.7 (Williams, J., concurring).

163. *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

164. As noted in Part III.A of this paper, finality focuses on whether the agency action at issue is “merely tentative or interlocutory,” rather than final, and whether “‘rights and obligations have been determined’ by [or] ‘legal consequences will flow’” from the challenged agency action. *Bennett*, 520 U.S. at 178.

165. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

166. *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation omitted).

167. U.S. CONST. art. III, § 2, cl. 1.

168. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 501 (1975).

169. Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 300 (1979).

170. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 201 (1983) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)).

171. *See Calderon v. Ashmus*, 523 U.S. 740, 746 (1998); *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977).

Posner believe unripe lawsuits are those in which “the social benefit from waiting [for a more complete set of facts] probably exceeds the increase in cost . . . of deferring adjudication until more information is available.”¹⁷² The court’s preference for actual conditions over hypothetical theories reflects this view.¹⁷³ As Landes and Posner have noted, anticipatory adjudication is most valuable when “it can prevent acts that prospectively have a negative expected value” on society in comparison to “the full social cost of the ex post litigation.”¹⁷⁴ This means that the court is more likely to grant review as the potential harms from the failure to adjudicate increase. Under this analysis, the court could weigh the potential injuries to the fish, the farmers, and the state of California into its analysis. Courts do not favor issuing judgments on incomplete sets of facts since the judgment might be improper.¹⁷⁵ Landes and Posner believe unripe lawsuits are those in which “the social benefit from waiting [for a more complete set of facts] probably exceeds the increase in cost . . . of deferring adjudication until more information is available.”¹⁷⁶ The court’s preference for actual conditions over hypothetical theories reflects this view.¹⁷⁷

To determine whether an issue is ripe, the court addresses “the fitness of the issues for judicial decision” and “the hardship to the parties of withholding court consideration.”¹⁷⁸ As there is no set weight accorded to each factor, the court approaches each issue on a case-by-case basis.¹⁷⁹

If the Ninth Circuit had addressed the ripeness of the Delta Plaintiffs issues instead, the court would have considered “the hardships to the parties of withholding court consideration.”¹⁸⁰ What is missing from the *Central Delta III* opinion is a discussion of whether, in times of water shortage, the Bureau might provide water to meet the VSS at the expense of instream flows for fish.¹⁸¹ Although the CVPIA demands that the Bureau manage CVP yield in accordance with existing water use permits, such as the VSS, the primary purpose of the CVPIA is to implement a

172. William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 716 (1994).

173. See *Central Delta III*, 452 F.3d 1021, 1026–27 (9th Cir. 2006).

174. Landes & Posner, *supra* note 172, at 697.

175. See Calderon, 523 U.S. at 746; Mattis, 431 U.S. at 172.

176. Landes & Posner, *supra* note 172, at 716.

177. See *Central Delta III*, 452 F.3d at 1026–27.

178. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

179. *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 735 (1998); *Fed. Trade Comm’n v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980); *Sierra Club v. Yeutter*, 911 F.2d 1405, 1417 (10th Cir. 1990) (“caution[ing] against a rigid or mechanical application of a flexible and often content-specific doctrine” of ripeness).

180. *Abbott Laboratories*, 387 U.S. at 149.

181. See *Central Delta III*, 452 F.3d 1021 (9th Cir. 2006).

plan for “fish, wildlife, and habitat restoration.”¹⁸² Under a ripeness standard, the court also could have reviewed whether the Bureau’s actions were likely to result in a dangerous dip in instream flows in times of drought. Before placing too much reliance on the Bureau’s ability to adjust operations to avert disaster, the court should have considered whether the Bureau could realistically derive an emergency alternative plan that serves the interests of both the fish and farmers, in a short seasonal timeframe. The court failed to weigh the hardships faced by both the fish and the farmers that could result if the Bureau is forced to choose sides.

A. *The Fitness of the Issues for Adjudication*

When determining the fitness of issues for adjudication, courts look to whether an issue is fully developed or whether it could transform with changed circumstances. If the court believes that an issue does not have fully materialized facts it will not want to waste judicial resources on the hypothetical situation. Specifically, the court looks to two factors: (1) whether the “disputed claims raise purely legal questions,” and (2) whether “the court or the agency would benefit from the postponement of review until the agency action . . . has assumed either a final or more concrete form.”¹⁸³ It is important to note that the latter factor is similar to addressing finality. Yet, this is just one factor in the court’s analysis rather than the deciding factor.¹⁸⁴

Under ripeness, questions of law are more fit for judicial review than questions of fact.¹⁸⁵ Unlike questions of fact, questions of law do not depend on a specific factual context for their resolution. On the other hand, in ruling on a question of fact under which the precise factual scheme is not settled, the court opens itself to delivering an improper judgment.¹⁸⁶ *Central Delta III* involved both questions of law and fact. The question of fact concerned whether it was likely that the Bureau’s operation of the CVP would lead to a breach of the VSS or the CVPIA.

182. See CVPIA, Pub. L. No. 102-575, §3406(b)(1)(A), 106 Stat. 4706, 4714 (1992); *Central Delta III*, 452 F.3d at 1024.

183. *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 736 (D.C. Cir. 1987).

184. There is no weight assigned to each factor of a ripeness analysis; instead, courts decide issues on a case-by-case basis. *Ohio Forestry*, 523 U.S. at 735; *Standard Oil*, 449 U.S. at 244; *Yeutter*, 911 F.2d at 1417.

185. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n (PG&E)*, 461 U.S. 190, 200–03 (1983). Compare *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (upon finding the issue a question of law, court immediately finds the issues fit for adjudication), and *PG&E*, 461 U.S. at 201 (when issues are “predominantly legal” court does not need to wait for further factual development to declare issue ripe), with *PG&E*, 461 U.S. at 203 (when further development of facts will determine whether an issue will ever occur, the court takes a closer look to determine whether the issue is justiciable).

186. *PG&E*, 461 U.S. at 203; see also Landes & Posner, *supra* note 172, at 690–91.

The answer depends on future hydrological conditions and the Bureau's ability to adapt to emergencies.¹⁸⁷ The questions of law concern interpretation of the CVPIA itself— first, whether the failure to provide 800,000 acre feet of water in a drought year constitutes a breach of the CVPIA, and secondly, whether adoption of the Interim Plan is a “reasonable” effort under the CVPIA to ensure instream flows.¹⁸⁸ Therefore, the court might have at least found the questions of law ripe for judicial review. This grant of review would be more than what the court did in *Central Delta III* when it refused review under a narrow finality standard.¹⁸⁹

B. The Hardship of the Parties in Withholding Court Consideration

In analyzing ripeness, the court would also consider “the hardships to the parties of withholding court consideration.”¹⁹⁰ In order to establish hardship, parties must establish that they will incur substantial hardship if the court refuses review.¹⁹¹ In addition, the hardship alleged must be imminent and result from the refusal of judicial review.¹⁹²

Courts often consider environmental hardship sufficient to justify review. As noted earlier, courts have recognized that monetary damages do not sufficiently remedy environmental injuries.¹⁹³ In addition, environmental injuries tend to be permanent or of an extended duration.¹⁹⁴ A breach of the VSS will cause damage to the farmers' soil. A breach of the CVPIA's instream flow goals will cause damage to fish. If the Ninth Circuit had assessed ripeness in *Central Delta III*, it could have reviewed whether the Bureau's actions would likely result in a dangerous dip in instream flows in times of drought.¹⁹⁵

This is not to say that if the court had considered environmental hardships in *Central Delta III*, review would have definitely been granted. Rather a ripeness standard preserves some restrictions that limit the relevancy of harms that are not pressing. When the environmental harm lacks immediacy when a plaintiff files the claim, courts are reluctant

187. *Central Delta III*, 452 F.3d 1026–27 (9th Cir. 2006).

188. See CVPIA, Pub. L. No. 102-575, §3406(b)(1), 106 Stat. 4706, 4714 (1992).

189. *Id.* at 1027.

190. *Abbott Laboratories*, 387 U.S. at 149.

191. See *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733–34 (1998).

192. *Central Delta III*, 452 at 1025.

193. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124 (9th Cir. 2003).

194. *Id.*

195. The CVPIA demands that the Bureau manage the CVP yield in accordance with existing water use rights, such as those rights under the VSS, yet the primary purpose of the CVPIA is to implement a plan for “fish, wildlife, and habitat restoration.” See CVPIA, Pub. L. No. 102-575, §3406(b)(1)(A), 106 Stat. 4706, 4714 (1992); *Central Delta III*, 452 F.3d 1024 (9th Cir. 2006).

to grant review to mitigate the potential harm.¹⁹⁶ For instance, in *Ohio Forestry Ass'n v. Sierra Club*,¹⁹⁷ plaintiffs challenged a National Forest Service management plan which allowed logging but did “not itself authorize the cutting of any trees.”¹⁹⁸ Since the forest plans lacked specificity as to the exact areas that would be logged, and the Forest Service was required to follow elaborate procedures prior to logging, the forest plans could not be challenged.¹⁹⁹ The *Ohio Forestry* court held that the plaintiffs would have ample time to file a new action to protect the affected areas after the designation of specific areas for logging.²⁰⁰

Yet, the hardships faced by the parties in the California Delta are more immediate than the hardships alleged in *Ohio Forestry*.²⁰¹ Under the facts of *Central Delta III*, the Bureau might be forced to choose between meeting the mandates of the VSS or the instream flow goals of the CVPIA in a drought year. This problem could potentially lead to another fish kill like the one along the Klamath River in 2002. If the global warming projections for the California Delta are correct, this possibility comes ever closer to certainty. Scientists predict that global warming will greatly test the ability of the Bureau to meet the needs of all water users within the California Delta.²⁰² Specifically, decreases in the relative amount of precipitation along with an earlier snowmelt will result in a decrease in overall water availability during the summer and fall.²⁰³ This scenario creates an even greater risk of a water shortage in the Delta, which makes the potential for a fish kill or a breach of the VSS less conjectural and more imminent.

State agencies, like the Central Delta and Southern Delta Agencies, have an even stronger case for the immediacy of substantial hardship. As discussed in Part II.B, by denying review, the Ninth Circuit thwarted California’s right to protect the public trust—the interest in the

196. See *Ohio Forestry*, 523 U.S. at 733–34. A lack of recognition of environmental hardship in ripeness issues has been criticized by some scholars. Instead they argue that there should be a lower threshold for hardship in environmental matters. See Wexler, *supra* note 93, at 274.

197. 523 U.S. 726 (1998).

198. *Id.* at 729–30.

199. *Id.* at 734.

200. *Id.*

201. See *id.*; *Central Delta III*, 452 F.3d 1021, 1025 (9th Cir. 2006).

202. Zinn, *supra* note 16, at 90; Meo, *supra* note 16, at 83.

203. Zinn, *supra* note 16, at 67–68. During the dry spring, summer, and autumn months, California relies on water stored from the previous winter’s precipitation. That water is accumulated in man-made reservoirs, like the New Melones, and in natural reservoirs, like the Sierra snowpack in the winter. When the snow melts earlier, the water that would otherwise be stored in the Sierra snowpack through the spring is now dumped into the man-made reservoirs earlier. When the snow melts earlier, the water from earlier snowmelt passes through the man-made reservoirs since the man-made reservoirs are already filled with the natural precipitation during the winter months. Therefore, the excess water from the early snowmelt, which would otherwise be available during the summer, is now released during the winter. The net effect will be a decrease in overall water available during the summer and fall.

maintenance of instream flows for fish.²⁰⁴ By refusing review, the court created a substantial hardship for the state by denying the state a forum for expressing its concerns.²⁰⁵ However, if the courts responded to the state's inability to exert pressure on the Bureau, it might create a slippery slope. State agencies could question every decision by the Bureau, no matter how preliminary the decision is. Yet ripeness balances "finality" with hardship—a built-in preventative measure against such a slippery slope.

The outcome of the ripeness analysis of the *Central Delta III* issue would depend on many factors. First of all, it is not clear what significance the court would place on the provisional nature of the Interim Plan. Additionally, it is unclear whether the substantial hardship faced by the Delta Plaintiffs would be enough to overcome the imminence requirement. Since a court's ripeness determination balances competing factors, the ultimate outcome of a ripeness analysis in *Central Delta III* is indeterminate. This flexibility is in stark contrast to the narrow finality standard, implicitly adopted in *Central Delta III*, which focuses on the status of the agency action without considering the effects that the agency action has on affected parties. Although the Ninth Circuit might not have ultimately granted review after a ripeness analysis, such an analysis would have at least acknowledged the pending environmental harms. This contrast between a narrowly-focused finality standard and ripeness shows how the court is constrained when it applies a finality analysis, as it did implicitly in *Central Delta III*.

204. Under the public trust doctrine, the state water agencies of California have an interest in deriving a long-term solution that provides for both the water necessary to support the VSS for farmers and the CVPIA-mandated instream flows for fish. See Nat'l Audubon Soc'y v. Superior Court (*Mono Lake Case*), 658 P.2d 709, 728 (Cal. 1983). The public trust protects the public's right to use rivers and streams for navigation, recreation, and preservation of ecology. SAXET AL., *supra* note 42, at 591–92. It recognizes that certain resources should be preserved for the public, and the state has a duty to ensure that private interests do not interfere with the usage of those resources. *Mono Lake Case*, 658 P.2d at 719; *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 201 (Ct. App. 1986).

205. It should be noted that the court was not the only forum for the state to express its discontent with the Bureau's inaction. The CVPIA directs the Bureau to consult with the state of California before acting under the CVPIA. CVPIA, Pub. L. No. 102-575, §3406(b), 106 Stat. 4706, 4714 (1992). However, state agencies do not have a definitive voice in the final decision since the Secretary of Interior is directed to make the final decision, even if it is contrary to the state agencies' recommendations. The plain language of the CVPIA orders the Secretary of Interior to make the decision on how to carry out the fish and habitat restoration goals of the CVPIA. *Id.*; 138 CONG. REC. S17,645 (daily ed. Oct. 8, 1992) (“[t]he Secretary, not the Director of the Fish and Wildlife Service, makes the final decision”) (statement of Sen. Johnston). Additionally, under the CVPIA California assists the Secretary of Interior with a report to Congress outlining the effects of the Bureau's operations of the CVP. CVPIA §§ 3406(f), 3408(f); see also *supra* note 123.

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CONCLUSION: RIPENESS OFFERS A MORE FLEXIBLE AND COMPREHENSIVE
STANDARD FOR THE REVIEW OF TIMING OF ENVIRONMENTAL HARMS THAN RIGID
FINALITY STANDARDS

Judicial review can provide an impetus for agencies to adopt comprehensive Western water policies that plan for emergency droughts. Although water agencies, like the U.S. Bureau of Reclamation, are granted discretion to determine their own policies, time may be running out. Global warming threatens to drastically alter the agency's already questionable ability to provide water to all competing needs. Agency bureaucracy challenges the prompt adoption of responses to such changing conditions. Interested parties should have a voice in challenging provisions when it appears the agency plans will not work. Being subject to judicial review will force agencies to bring innovative alternatives to the table earlier. Controversial decisions will less likely be made when it is too late to avoid the environmental harm.

The narrowly-focused doctrine of finality, as implicitly applied by the court in *Central Delta III*, frustrates attempts at judicial review. Finality standards focus on the agency. In contrast, ripeness standards take into account additional factors that might affect the agency in its decisionmaking process. Ripeness standards account for potential environmental harms in the consideration of the hardships facing the parties if judicial review is denied. By implicitly applying a strict finality standard rather than looking to the ripeness of the issues, the Ninth Circuit avoided considering these relevant factors.

The application of narrowly-focused finality standards to agency decisions concerning the development of comprehensive water allocation policies frustrates ex ante planning for water shortages. Not only does such a model frustrate parties, including the state of California, who have a right to exert pressure on the Bureau, but more importantly such a model runs contrary to the purposes of environmental law. The Ninth Circuit has not learned the lessons from the Klamath River disaster; maybe the next time a water emergency strikes the court will realize there is a pattern and will take a more proactive role in preventing the pattern's repetition.

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