

1 XAVIER BECERRA
 Attorney General of California
 2 ANNADEL A. ALMENDRAS
 MICHAEL P. CAYABAN
 3 Supervising Deputy Attorneys General
 MARK W. POOLE, CA State Bar No. 194520
 4 TAMARA T. ZAKIM, CA State Bar No. 288912
 KATHRYN M. MEGLI, CA State Bar No. 147532
 5 DYLAN K. JOHNSON, CA State Bar No. 280858
 Deputy Attorneys General
 6 1515 Clay Street, 20th Floor
 P.O. Box 70550
 7 Oakland, CA 94612-0550
 Telephone: (510) 879-0855
 8 Fax: (510) 622-2270
 E-mail: Mark.Poole@doj.ca.gov
 9 *Attorneys for Defendants California State Water
 Resources Control Board and State Water Resources
 10 Control Board Chair E. Joaquin Esquivel*

11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE EASTERN DISTRICT OF CALIFORNIA
 13 FRESNO DIVISION

15 **UNITED STATES OF AMERICA,**

16 Plaintiff,

17 v.

18 **STATE WATER RESOURCES CONTROL
 19 BOARD & STATE WATER RESOURCES
 20 CONTROL BOARD CHAIR E. JOAQUIN
 21 ESQUIVEL, in his official capacity,**

22 Defendants.

2:19-CV-00547-LJO-EPG

**DEFENDANTS' SUPPLEMENTAL
 BRIEF ON RIPENESS OF
 INTERGOVERNMENTAL IMMUNITY
 CLAIM IN SUPPORT OF MOTION TO
 DISMISS FIRST AMENDED
 COMPLAINT AND ABSTAIN FROM
 ADJUDICATING THIS ACTION**

Courtroom: 4
 Judge: The Honorable Lawrence J.
 O'Neill
 Trial Date: None set
 Action Filed: March 28, 2019

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INTRODUCTION

In its December 2, 2019 Order, the Court ordered further briefing on “remaining jurisdictional issues” regarding the United States’ (“U.S.”) intergovernmental immunity (“IGI”) claim, namely whether the cause of action is ripe. *See* ECF No. 28, at 28-36. The State Water Resources Control Board (“State Water Board” or “Board”) submits this supplemental brief further demonstrating that the U.S.’s IGI claim is unripe.

A state regulation violates the IGI doctrine if it “discriminates against the Federal Government or those with whom it deals.” *North Dakota v. U.S.*, 495 U.S. 423, 435 (1990). The U.S. claims that a single component of the amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (“Bay-Delta Plan Amendments” or “Amended Plan”) adopted by the State Water Board discriminates against the U.S. and those with whom it deals. ECF No. 14, at ¶ 84. Specifically, the U.S. alleges that the Amended Plan is discriminatory because it requires the U.S. Bureau of Reclamation (“Reclamation”) to comply with a salinity requirement at the Vernalis monitoring station that is not imposed on any other person and is lower than the salinity requirements established for three other monitoring locations downstream of Vernalis. *Id.* ¶ 85.

The IGI claim is premature under the three-factor test set forth in *Ohio Forestry Ass'n, Inc. v. Sierra Club* (“*Ohio Forestry*”) 523 U.S. 726, 733 (1998). First, there is no hardship from delayed review of the Amended Plan because Reclamation is not required to alter its operations to comply with the Amended Plan. Until the State Water Board takes action to implement the objectives through water right or water quality actions, such as an adjudicative water right hearing, water quality certification, or adoption of a regulations (hereinafter referred to as the “implementation phase”), all water users remain subject to the terms of their existing permits and licenses and other existing requirements. RJN Exh. 1, at 26. Adoption of the Amended Plan, by itself, does not create an enforceable obligation on water users and thus does not create any burden or impose any discriminatory effects. It is well established that a challenge to a regulation is not ripe until “its effects [are] felt in a concrete way by the challenging parties.” *Abbott*

1 *Laboratories v. Gardner*, 387 U.S. 136, 148–149 (1967), *abrogated on other grounds by Califano*
2 *v. Sanders*, 430 U.S. 99 (1977).

3 Second, judicial intervention would interfere with the State Water Board’s administrative
4 discretion in implementing the Amended Plan, considering the contributions of others, and
5 developing the factual record to inform and support its decision.

6 Third, the Court would benefit from facts that will be developed through the
7 implementation phase. The broader regulatory context demonstrates that the southern Delta
8 salinity objective, which includes the requirements at Vernalis and the southern Delta interior
9 locations, will be met through a variety of implementation mechanisms and not just by
10 Reclamation alone. As this Court found, in analyzing an IGI claim, “critically” “it is not
11 appropriate to look to the most narrow provision addressing the Government or those with whom
12 it deals.” ECF No. 28, at 32, quoting *North Dakota*, 495 U.S. at 438. “This is because ‘a state
13 provision that appears to treat the Government differently on the most specific level of analysis
14 may, in its broader regulatory context, not be discriminatory.’” *Id.* The “broader regulatory
15 context” in this case includes implementation of the water quality objectives by the State Water
16 Board, as well as other measures that have been included in the Bay-Delta Plan Amendments.
17 Further, the “significant differences” between Reclamation and other water right holders in the
18 San Joaquin River Basin necessitate further factual development. *Davis v. Michigan Dep’t of*
19 *Treasury*, 489 U.S. 803, 816 (1989). It would be premature for the Court to rule on the IGI claim
20 until the implementation phase has been completed and the Court has the opportunity to consider
21 all of the other measures taken to meet the objectives of the Amended Plan, including permit and
22 license terms and conditions that may be imposed on other parties. At this point, without further
23 factual development occurring during the implementation phase, the Court cannot evaluate
24 whether the Federal Government is being treated better or worse than any other party nor whether
25 there are significant differences between the Federal Government and others justifying
26 inconsistent burdens. For these reasons, the U.S.’s IGI claim is unripe and should be dismissed.

27
28

BACKGROUND

I. PHYSICAL SETTING

The Bay-Delta Plan Amendments establish water quality objectives for the protection of fish and wildlife beneficial uses on the lower San Joaquin River and its three main tributaries, the Merced, Tuolumne, and Stanislaus Rivers (“flow objectives”), and amend the southern Delta salinity objective for the protection of agricultural uses. Request for Judicial Notice in Support of Defendants’ Supplemental Brief on Ripeness of Intergovernmental Immunity Claim (“RJN”), Exh. 1, at 6, 10.

The headwaters of the San Joaquin River are in the Sierra Nevada, from which it runs southwest past Fresno before turning northwest. *See* ECF No. 18-1, Figure ES-1. As the river runs northwest it is joined first by the Merced, next by the Tuolumne, and finally by the Stanislaus Rivers. *See id.* The San Joaquin River then flows into Suisun Bay and the confluence with the Sacramento River, into San Francisco Bay and, finally, out to the Pacific Ocean. *See id.*

The flow of the San Joaquin River is impounded at Friant Dam, northeast of Fresno, and diverted 152 miles through the Friant-Kern Canal to the southern reaches of the San Joaquin Valley. *See id.*; *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th 674, 692 (2006). Due to this diversion, the river is mostly de-watered downstream of Friant Dam. *See Friant Water Authority v. Jewell*, 23 F. Supp. 3d 1130, 1136 (E.D. Cal. 2014). At the Mendota Pool, the natural flow of the San Joaquin River is replaced by water imported from the Sacramento River in the north. *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th at 692.

The Stanislaus River joins the San Joaquin River near Vernalis, which is also the point at which the San Joaquin River enters the Delta. *See* ECF No. 18-1, Figure ES-1. The New Melones Dam and Reservoir (“New Melones”) is located on the Stanislaus River. *See Id.*

The Central Valley Project (“CVP”), owned and operated by Reclamation, and the State Water Project (“SWP”), operated by the California Department of Water Resources (“DWR”) are the largest diverters in the Delta watershed. *See State Water Resources Control Bd. Cases*, 136 Cal. App. 4th at 687-688. There are no SWP facilities on the San Joaquin River or its three main

1 tributaries. *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 121 (1986).

2 Both Friant Dam and New Melones are CVP facilities. *Id.*

3 **II. HISTORY OF WATER RIGHT DECISIONS CONCERNING SALINITY, CAUSES OF**
4 **SALINITY, AND APPROACH TO CONTROLLING SALINITY**

5 **A. History of the Salinity Objectives**

6 The requirement to control salinity at Vernalis was first imposed in 1973 pursuant to Water
7 Right Decision 1422 (“D-1422”) to mitigate the impacts caused by New Melones Dam. In
8 imposing the requirement on Reclamation, the Board found “[t]he Stanislaus River is an
9 important source of dilution water required to reduce the TDS [total dissolved solids] in the lower
10 San Joaquin River to usable levels....” RJN Exh. 2, at 11, 31, ¶ 5.

11 In Water Right Decision 1641 (“D-1641”) the Board modified Reclamation’s permits to
12 include the agricultural salinity objective – which effectively took the place of the earlier TDS
13 objective – of 0.7 maximum 30-day running average of mean daily electrical conductivity
14 (mmhos/cm) for April-August and 1.0 mmhos/cm for September-March. *See* ECF No. 18-23, at
15 160, 162, 182, Table 2. The Vernalis compliance location on the San Joaquin River is the most
16 southerly of four compliance locations. *See id.*, at 73 (map). The other three compliance
17 locations are to the north, in the interior Delta, at river segments on the San Joaquin River,
18 Middle River, and Old River/Grant Line Canal. *See id.*

19 Vernalis is significant because it is the farthest downstream point on the San Joaquin River
20 unaffected by tidal influences. Therefore, it receives salt only from upstream. ECF No. 18-1, at
21 ES-48; *San Joaquin River Exchange Contractors Water Authority v. State Water Resources*
22 *Control Bd.*, 183 Cal. App. 4th 1110, 1118 (2010). Maintaining higher quality water at Vernalis
23 is necessary to provide the assimilative capacity downstream to achieve objectives in the interior
24 Delta where water quality is typically lower due to a number of factors such as tidal flows and
25 impacts from Project operations. ECF No. 18-1, at ES-48; No. 18-23, at 79-80, 83-89. Thus,
26 even when salinity objectives are met at Vernalis, the interior Delta objectives can be exceeded.
27 *See* ECF No. 18-23, at 87.

28

1 **B. Causes of Salinity Concentration and Responsibility for Controlling It**

2 In D-1641, the State Water Board found that salinity at Vernalis is affected by the salt load
3 and quantity of flow in the lower San Joaquin River. *See* ECF No. 18-23, at 80. “High salt loads
4 and low flows at Vernalis result from a combination of upstream water diversions, discharges of
5 saline drainage water to the San Joaquin River and subsurface accretions to the river from
6 groundwater.” *Id.* The actions of the CVP “are the principal cause of the salinity concentrations”
7 at Vernalis. *Id.* at 83. The source of much of the saline discharge to the San Joaquin River is
8 agricultural lands on the west side of the San Joaquin Valley. *Id.* At the time D-1641 was
9 adopted, the State Water Board estimated that over 70 percent of the salt load at Vernalis comes
10 from agricultural lands that receive about 70 percent of their water from the CVP. *Id.* at 82.
11 Further, the capacity of the lower San Joaquin River to assimilate the salt load from agricultural
12 lands is significantly impaired by Reclamation diverting high quality San Joaquin River water
13 flows at Friant Dam. *Id.* at 83. Therefore, “[Reclamation], through its activities associated with
14 operating the CVP in the San Joaquin River basin, is responsible for significant deterioration of
15 water quality in the southern Delta.” *Id.*

16 Due to the amount of San Joaquin River system flow it controls, the junior priority status of
17 its water rights, and its location upstream of Vernalis, Reclamation possesses a unique ability and
18 responsibility to control salinity at Vernalis. *See, e.g.*, RJN Exh. 2, at 8-10. Reclamation
19 typically meets the salinity objective at Vernalis by releasing water from New Melones to dilute
20 the salts in the San Joaquin River upstream of Vernalis. *See* ECF No. 18-1, at ES-48.

21 DWR shares responsibility with Reclamation for meeting the salinity objectives at the three
22 compliance locations downstream of Vernalis because its operations affect water quality in the
23 interior Delta, but not at Vernalis. *See* ECF No. 18-23, at 89. As part of the implementation of
24 the Plan Amendments, the State Water Board intends to amend the permits of both DWR and
25 Reclamation to continue their shared obligation for attaining the new objective in the interior
26 Delta. RJN Exh. 1, at 43, ¶ ii.

27 While Reclamation and DWR historically have had primary responsibility for
28 meeting the water quality objectives, the State Water Board has imposed obligations on other

1 water users to assist in meeting the objectives or to ensure that water released to meet the
 2 objectives is not diverted by other water users. For example, Standard Permit Term 91, which has
 3 been included in certain water rights permits since 1978, prohibits permittees from diverting
 4 water when stored water is being released by Reclamation and DWR to meet Delta water quality
 5 objectives. RJN Exh. 3, at 8; *El Dorado Irrigation Dist. v. State Water Resources Control Bd.*,
 6 142 Cal. App. 4th 937 (2006). Term 93, which has been included in certain permits in the San
 7 Joaquin River system since 1983, provides that diversions are prohibited when Reclamation is
 8 releasing water from New Melones to maintain water quality at Vernalis. *See* RJN Exh. 3, at 59-
 9 60. Terms 91 and 93 reflect the State Water Board’s determination that other junior water right
 10 holders must “share in the responsibility of meeting Delta water quality standards by curtailing
 11 diversions.” *Id.* at 9.

12 **C. Bay-Delta Plan Amendments and Multi-Pronged Approach to Controlling**
 13 **Salinity**

14 Water quality objectives are effectuated through a two-step process. First, the Board adopts
 15 the objectives through a quasi-legislative process.¹ Second, the Board assigns responsibilities for
 16 meeting the objectives, primarily through quasi-adjudicative actions to amend water right permits.
 17 *See* RJN Exh. 1, at 26-27. When implementing the Bay-Delta Plan, the State Water Board
 18 considers the extent of responsibility of water right holders and water users to mitigate for the
 19 effects of their diversion and use of water on designated beneficial uses. *See* RJN Exh. 1, at 4.

20 As demonstrated by D-1641, implementing the Bay-Delta Plan through a water right
 21 adjudication is a complex process involving formal procedures and the presentation of evidence.
 22 *See* 23 Cal. Code Regs. § 648 et seq. (West). The Board assigns responsibilities for meeting the

23 _____
 24 ¹ In adopting the Bay-Delta Plan Amendments on December 12, 2018, the Board did not
 25 amend every provision of the Plan. To clarify for the Court which provisions of the Bay-Delta
 26 Plan were amended, the Board is attaching to its RJN a redline version of the Plan with changes
 27 reflected in underline and strikethrough. For example, a provision quoted in the Court’s Order at
 28 page 31 concerning the Delta Outflow Objective is a pre-existing provision that was not amended
 by the Board’s December 12 action. *See* RJN Exh. 1, at 27. The provision is not at issue in
 Reclamation’s IGI claim and is unrelated to the salinity objective. While Reclamation is required
 to continue to comply with its existing permit terms and conditions, the 2018 amendments to the
 Bay-Delta Plan do not impose any “interim” obligations on Reclamation that did not already
 exist.

1 objectives after considering the evidence in the record, which will likely include evidence about
2 water diversion and use, impacts, and water right priority status. *El Dorado Irrigation Dist.*, 142
3 Cal. App. 4th at 972 (water quality objectives must be implemented in accordance with water
4 rights priorities with junior rights holders being held responsible before senior rights holders).
5 Such a proceeding can be lengthy and complex.

6 The State Water Board has yet to commence proceedings to implement the flow and
7 salinity objectives established and amended by the Amended Plan. In the meantime, all water
8 right holders remain subject to their existing permit and license terms and conditions.

9 Furthermore, the salinity objectives are primarily met by providing sufficient fresh water to
10 dilute upstream discharges of saline water or by controlling the discharge of saline water to the
11 river upstream of Vernalis. *See* ECF No. 18-23, at 83. In addition to elements of the Plan
12 involving Reclamation, the Amended Plan accounts for the positive effects on salinity through the
13 complementary contribution of additional water to meet the flow objectives that will be imposed
14 on upstream water users. The Plan states, “[i]n addition to the above requirements, the salinity
15 water quality objective for the southern Delta will be implemented through the Lower San
16 Joaquin River flow objectives, which will increase inflow of low salinity water into the southern
17 Delta during February through June.... This will assist in achieving the southern Delta water
18 quality objective.” RJN Exh. 1, at 46, ¶ vi.

19 The Amended Plan also requires monitoring, reporting, and the development of the
20 Comprehensive Operations Plan, which will assist the CVP and SWP with addressing the impacts
21 of their operations on interior southern Delta salinity levels and provide additional information
22 regarding their operations on water levels and flow conditions that that may affect salinity
23 conditions in the southern Delta and future assignment of responsibility at these locations. RJN
24 Exh. 1, at 43-45, ¶¶ iii, iv.

25 Finally, the Amended Plan recommends a range of additional actions to address salinity
26 problems in the southern Delta, including the regulation of discharges of salts. These actions
27 include implementation of the Central Valley Basin Regional Water Quality Control Board’s Salt
28 and Boron Total Maximum Daily Load (TMDL) at Vernalis, progress on the Central Valley

1 Salinity Alternatives for Long-Term Sustainability (CV-SALTS) initiative, and measures to
2 reduce high salinity drainage such as the Grasslands Bypass Project. *Id.* at 46-53. Thus, the Bay-
3 Delta Plan effectuates a comprehensive, multi-faceted approach to addressing salinity issues in
4 the southern Delta, and not solely the continuation of a decades-old requirement on Reclamation
5 to meet the Vernalis objective.

6 ARGUMENT

7 I. THE U.S.’S INTERGOVERNMENTAL IMMUNITY CHALLENGE IS NOT RIPE

8 A. Constitutional Issues Should Only Be Addressed When Strictly Necessary

9 Both the Supreme Court and the Ninth Circuit have repeatedly cautioned that
10 “constitutional issues should be addressed only when strictly necessary.” *Hospital & Service*
11 *Employees Union, Local 399, Service Employees Intern. Union, AFL-CIO v. N.L.R.B.*, 743 F.2d
12 1417, 1427 (9th Cir. 1984), citing *Minnick v. California Department of Corrections*, 452 U.S.
13 105, 122–23 (1981). “Merely *potential* impairment of constitutional rights” does not create a
14 justiciable controversy. *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S.
15 1, 71 (1961) (emphasis added). This doctrine derives from the “time-honored practice of judicial
16 restraint.” *U.S. v. Cisneros*, 169 F.3d 763, 768 (D.C. Cir. 1999).

17 Furthermore, “[p]rinciples of federalism lend this doctrine additional force when a federal
18 court is reviewing a state agency decision at an interim stage in an evolving process.” *US West*
19 *Communications v. MFS Intelenet, Inc.* 193 F.3d 1112, 1118 (9th Cir. 1999); *see also Public*
20 *Service Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 247 (1952).

21 If there is any modicum of doubt about the ripeness of the IGI claim, the doctrine of
22 avoiding constitutional questions unless strictly necessary, particularly when reviewing state
23 agency decisions, dictates that the Court should find the claim unripe and dismiss it. Under the
24 test set forth in *Ohio Forestry*, the IGI claim is not ripe at this time.

25 B. The IGI Claim Is Unripe Under the Supreme Court’s Three-Factor Test in 26 *Ohio Forestry*

27 There are two prongs to the ripeness inquiry, one constitutional and one prudential. The
28 constitutional prong focuses on whether there is a sufficient injury and the prudential prong

1 focuses on whether there is an adequate record upon which to base effective review. ECF No. 28,
2 at 28-29 (citing *Portman v. Cty. of Santa Clara*, 995 F.2d 898, 902-03 (9th Cir. 1993)). The
3 plaintiff bears the burden of proving the case is ripe. *See* ECF No. 28, at 29 (citing *In re Ford*
4 *Motor Co./Citibank (S.D.), N.A.*, 264 F.3d 952, 957 (9th Cir. 2001); *Colwell v. Department of*
5 *Health and Human Services*, 558 F.3d 1112, 1121 (9th Cir. 2009)). The U.S. cannot meet its
6 burden in this case.

7 In *Ohio Forestry*, the Supreme Court set forth three factors to use in determining whether a
8 challenge to an agency decision is ripe under the two-prong ripeness standard. The court must
9 consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial
10 intervention would inappropriately interfere with further administrative action; and (3) whether
11 the courts would benefit from further factual development of the issues presented. *Ohio Forestry*
12 *Ass'n*, 523 U.S. at 733.

13 *Ohio Forestry* is particularly instructive here. Just as the land resources management plan
14 in that case granted no rights and imposed no burdens until implemented for a specific project, the
15 Bay-Delta Plan Amendments do not impose burdens until implemented through further
16 administrative proceedings. *See Ohio Forestry*, 523 U.S. at 733-734. In both cases judicial
17 intervention would hinder the agency's ability to refine its policies through application to specific
18 facts and, potentially, further revisions to the plan itself. *See id.* at 735. And, like in *Ohio*
19 *Forestry*, adjudication of the IGI claim now "would require time-consuming judicial
20 consideration of the details of an elaborate, technically based plan, which predicts consequences
21 that may affect many different [water users] in a variety of ways...." *Id.* at 736. "That review
22 would have to take place without benefit of the focus" that application to specific facts would
23 provide. *Id.* Therefore, *Ohio Forestry* dictates the result in this case and the IGI claim should be
24 dismissed as unripe.

25 **1. Delayed Review Would Not Cause Hardship to Reclamation Because**
26 **Obligations for Meeting the Salinity Objectives Remain Unchanged**
27 **Until Implementation**

28 Since 1973, the U.S. has been required to meet a salinity requirement at Vernalis. In 1978
the State Water Board adopted the current salinity objective for the protection of agricultural uses

1 and Reclamation has been required to comply with the specific salinity requirement at Vernalis it
2 is challenging in this lawsuit since 1995. *See* RJN Exh. 4, at 5-6, 52. Nevertheless, the U.S.
3 claims it is adversely impacted by “new flow objectives” in the Amended Plan. ECF No. 14, at ¶
4 10. The U.S. fails to explain how continuing the salinity requirement in its current permits will
5 “reduce” the amount of water available for delivery to its customers and contractors. *See id.*

6 As explained, adoption of the Amended Plan, by itself, does not impose any burdens. Until
7 implementation, all water users remain subject to the terms and conditions in their existing
8 permits and licenses—no obligations will change until implementation. Maintaining the status
9 quo does not “create adverse effects of a strictly legal kind” because, in strictly legal terms, the
10 Amended Plan does not “modify” Reclamation’s “legal [permits or] licenses,” nor does it “create
11 legal rights or obligations.” *See Ohio Forestry Ass’n, Inc.*, 523 U.S. at 733. The Board cannot
12 enforce the water quality objectives established or amended by the Amended Plan until they are
13 assigned through the implementation phase.

14 Neither can the U.S. claim that the Amended Plan inflicts “significant practical harm.” *See*
15 *Ohio Forestry Ass’n, Inc.*, 523 U.S. at 733. The Amended Plan does not “force” Reclamation to
16 “modify its behavior” in any way. *See id.* at 734. Moreover, nothing prevents the U.S. from
17 bringing this same challenge to the salinity requirement after the Board has taken final action to
18 assign responsibilities in the implementation phase. *See id.* [no practical harm because plaintiff
19 would have ample time to bring challenge after implementation of plan.]²

20 “To meet the hardship requirement, a litigant must show that withholding review would
21 result in direct and immediate hardship and would entail more than possible financial loss.” *US*
22 *West Communications*, 193 F.3d at 1118 (quoting *Winter v. California Med. Review, Inc.*, 900
23 F.2d 1322, 1325 (9th Cir.1990)). Mere delay is an inadequate showing of hardship, absent
24 showing that delay will result in irreparable losses, intrusion into daily business decision-making,
25 or the imposition of a Hobson's choice of whether to comply with a possibly invalid regulation or

26 ² The U.S. may argue that under the Clean Water Act the amended salinity objective could
27 become effective under federal law once U.S. EPA approves it. *See* 40 C.F.R. § 131.20 (2019);
28 33 U.S.C.A. § 1323 (West). Whether or not this is true, it is undisputed that U.S. EPA has not
taken any action on the amended salinity objective. Consequently, the Bay-Delta Plan
Amendments are not effective or enforceable under federal law.

1 to violate it in order to challenge it. *US West Communications*, 193 F.3d at 1119 (citing *Pennzoil*
2 *Co. v. FERC*, 645 F.2d 394, 399-400 (5th Cir. 1981)). Adoption of the Amended Plan does none
3 of these things because it does not require Reclamation to change its operations. The U.S. cannot
4 satisfy the hardship factor.

5 **2. Judicial Intervention at this Time Has the Potential to Interfere with**
6 **Implementation and the State Water Board’s Ability to Refine Its**
7 **Policies**

8 Under the second factor, the Court must consider whether judicial intervention at this point
9 would interfere with the State Water Board’s administrative process. Judicial intervention is
10 inappropriate if it would hinder the Board’s ability to refine its policies through application of the
11 Amended Plan or further revision of the Bay-Delta Plan. *See Ohio Forestry Ass’n, Inc.*, 523 U.S.
12 at 735. “[P]remature review ‘denies the agency an opportunity to correct its own mistakes and to
13 apply its expertise’ [].” *Id.* at 735 (quoting *F.T.C. v. Standard Oil Co. of California*, 449 U.S.
14 232, 242 (1980).) “Intervention also leads to piecemeal review which at the least is inefficient
15 and upon completion of the agency process might prove to have been unnecessary. [Citation].”
16 *F.T.C.*, 449 U.S. at 242.

17 During the implementation phase the State Water Board will have the opportunity to refine
18 and modify its policies through application in individual permits, licenses, and other regulatory
19 actions and, potentially, consider further refinements to the Bay-Delta Plan itself. Before taking
20 formal action to amend permits and licenses to assign responsibilities through an adjudicative
21 water rights hearing, the Board will hold public hearings at which evidence will be received. The
22 evidence will form the basis for the Board’s decision assigning responsibility for the objectives.
23 *See State Water Resources Control Bd. Cases*, 136 Cal. App. 4th at 749.

24 Furthermore, it is possible that the State Water Board would initiate a quasi-legislative
25 proceeding to amend the Bay-Delta Plan in response to evidence received during an adjudicative
26 hearing. *See State Water Res. Control Bd. Cases*, 136 Cal. App. 4th at 729 & fn. 21. The Board
27 should be given the opportunity to allocate responsibilities and possibly revise the Plan itself prior
28 to Court intervention.

1 **3. The Court Would Benefit from Further Factual Development**
2 **Because the Court Cannot Consider the Complete Regulatory**
3 **Context and Any Basis for Distinguishing Between Water Users Until**
4 **the Plan has been Implemented**

5 State regulatory action violates the IGI doctrine when: (1) it treats others better than it treats
6 the Federal Government, and (2) there are no significant differences between the two classes
7 justifying inconsistent burdens. *See* ECF No. 28, at 32-33. The Court must consider these two
8 factors within the “broader regulatory context” because a state provision that appears to treat the
9 Federal Government differently on the most specific level of analysis may not be discriminatory
10 in the broader context. *Id.* at 32. The facts developed during the implementation phase will be
11 critical to the Court’s analysis, within the broader regulatory context, of whether others are being
12 treated better than Reclamation and, if so, whether there are significant differences between
13 Reclamation and others justifying inconsistent burdens.

14 **a. Implementation of the Amended Plan Will Inform the Broader**
15 **Regulatory Context**

16 Implementation is necessary to understanding the “broader regulatory context” because
17 only then will the Court be informed of the Board’s final decision regarding the assignment of
18 responsibility to meet the objectives. Responsibilities for meeting each objective can be imposed
19 in various ways. As it has done in the past with Terms 91 and 93, the Board could impose a
20 permit term on junior water right holders to curtail diversions when Reclamation is releasing
21 water to meet the objective, thereby recognizing that water users aside from Reclamation have
22 responsibility to assist in meeting the salinity objective. *See* RJN Exh. 3, at 8-9. Furthermore, as
23 described, the Amended Plan addresses water quality issues through a multi-pronged approach.
24 RJN Exh. 1, at 45, ¶ vi . This includes assignment of the complementary flow objectives on the
25 tributaries upstream of Vernalis which the Board has found will improve water quality
26 downstream, and targeted actions to address salinity by the Central Valley Regional Water
27 Quality Control Board and other entities. These actions demonstrate the breadth of actions
28 incorporated by the Bay-Delta Plan Amendments, and the Board’s intention to spread the
 obligation to comply with the salinity objective across multiple parties.

1 It is the permit and license terms and conditions, and other implementing measures, that
2 impose burdens on water users, not the objectives. *See Fireman's Fund Ins. Co. v. Quackenbush*,
3 87 F.3d 290, 294 (9th Cir. 1996) (“[I]t is only the result and not the rules themselves that is put to
4 a constitutional test.”) (quotation marks omitted). The salinity objective at Vernalis cannot be
5 considered in isolation. It is one component of a regulatory structure of shared responsibility
6 designed to improve water quality in the southern Delta. Therefore, prior to implementation, the
7 Court is unable to consider the Bay-Delta Plan Amendments and the burdens imposed on
8 Reclamation in comparison to other water users in their “broader regulatory context.”

9 **b. Further Factual Development Occurring Through the**
10 **Implementation Phase Is Required to Assess the Comparative**
11 **Burdens and Reclamation’s Responsibility for the Salinity**
12 **Problem**

12 The facts developed during the implementation phase will be necessary to the Court’s
13 adjudication of the IGI claim. During the public hearings to consider the adoption and
14 amendment of permits and licenses, the State Water Board will receive evidence regarding water
15 use, water quality impacts, water right priority status, and other issues pertinent to determining
16 responsibilities for meeting the objectives. The evidence would inform both the Court’s findings
17 regarding any burdens Reclamation faces in comparison to others, and any significant differences
18 between Reclamation and others justifying any inconsistent treatment. Such evidence is
19 particularly critical due to the significant differences between Reclamation and other water users
20 in the San Joaquin River watershed.

21 As explained, historically the Board has held Reclamation primarily responsible for
22 meeting the salinity requirement at Vernalis due to the salinity impacts of New Melones, and the
23 CVP generally, as well as the junior nature of Reclamation’s water rights. Reclamation’s
24 impoundment and diversion of the river flows at Friant Dam and New Melones has substantially
25 reduced the amount and quality of water available for dilution of salinity concentrations
26 downstream. ECF No. 18-23, at 83. Reclamation also exports water from the Sacramento River
27 in the Delta to irrigate land in the western San Joaquin Valley. *State Water Resources Control*
28 *Bd. Cases*, 136 Cal. App. 4th at 692. These agricultural operations contribute high saline return

1 flows to the San Joaquin River system. ECF No. 18-23, at 82. As the Court observed in its
2 Order, “significant differences between [] two classes [can] justify the inconsistent burdens.”
3 ECF No. 28, at 32-33 (citing *Davis*, 489 U.S. at 816).

4 Despite Reclamation’s causal connection to salinity issues in the Delta, the Board has also
5 imposed obligations on other users to assist in meeting the objectives. *See* RJN Exh. 3, at 8-9.
6 And, where there are not significant differences between the impacts of two classes—such as
7 impacts caused by DWR at the interior Delta compliance locations—the Amended Plan treats
8 Reclamation the same as others. Until the Board balances the competing responsibilities and
9 burdens in the implementation phase, the record will not be adequately developed for the Court to
10 determine whether the IGI doctrine has been violated. If the Court were to rule that the IGI claim
11 is ripe now, the State Water Board would be deprived of its right to use the factual information
12 developed during implementation in merits briefing. The development of additional factual
13 information is reason enough to find the claim unripe now. *See US West Communication*, 193
14 F.3d at 1119.

15 The Court questions how this case can become riper than it is now if the Bay-Delta Plan
16 Amendments have already assigned responsibility to the Reclamation for meeting the salinity
17 objective at Vernalis. *See* ECF No. 28, at 33. The Ninth Circuit has held when a legislative
18 action pre-determines the agency’s future action to the exclusion of other options the action is
19 ripe for review. *See, e.g., Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1091 (9th Cir. 2003).
20 But, because an IGI claim is determined by comparing treatment of the Federal Government to
21 treatment of others, it hinges on a factual inquiry, a comparison that cannot be made until it can
22 be determined how both the Federal Government *and* other similarly situated parties will be
23 treated. And even if the treatment of other parties appears to be inconsistent, again, it is
24 permissible to treat others better than the Federal Government when there are significant
25 differences justifying the inconsistent burdens. An IGI claim is not the kind of purely legal claim,
26 such as a procedural violation of a statute, that the Ninth Circuit has held can be decided without
27 further factual development and application. *Cf. Laub*, 342 F.3d at 1090; *Sayles Hydro*
28 *Associates v. Maughan*, 985 F.2d 451, 454 (9th Cir. 1993); *Citizens for Better Forestry v. U.S.*

1 *Dept. of Agriculture*, 341 F.3d 961, 977-978 (9th Cir. 2003). The facts regarding the burdens
2 imposed on Reclamation and any basis for inconsistent treatment will not be fully developed until
3 the Board has received evidence about the characteristics and impacts of the various water users
4 in the watershed and assigned responsibilities for meeting the objectives. It is premature to
5 adjudicate the IGI claim before these facts are developed for the record.

6 **CONCLUSION**

7 “A claim is not ripe for adjudication if it rests upon contingent future events that may not
8 occur as anticipated....” *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (internal quotation marks and
9 citations omitted). The IGI claim is contingent on the outcome of the implementation phase. The
10 U.S. cannot meet its burden to demonstrate ripeness under any of the three factors in *Ohio*
11 *Forestry*. Therefore, the State Water Board respectfully requests that the Court dismiss the
12 Fourth Cause of Action in the FAC as unripe.

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Respectfully Submitted,

14 XAVIER BECERRA
15 Attorney General of California
16 ANNADEL A. ALMENDRAS
17 MICHAEL P. CAYABAN
18 Supervising Deputy Attorneys General

19 /s/ Dylan K. Johnson

20 MARK W. POOLE
21 DYLAN K. JOHNSON
22 Deputy Attorneys General
23 *Attorneys for State Water Resources*
24 *Control Board and State Water Resources*
25 *Control Board Chair E. Joaquin Esquivel*

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