FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO COASTKEEPER; LOS PADRES FORESTWATCH, *Plaintiffs-Appellants*, v. SANTA MARIA VALLEY WATER CONSERVATION DISTRICT; SANTA MARIA VALLEY WATER CONSERVATION DISTRICT BOARD OF DIRECTORS; U.S. DEPARTMENT OF THE INTERIOR; UNITED STATES BUREAU OF RECLAMATION; BRENDA BURMAN, Commissioner of the United States Bureau of Reclamation, *Defendants-Appellees*, and GOLDEN STATE WATER COMPANY; CITY OF SANTA MARIA, *Intervenor-Defendants-Appellees*.	No. 21-55479 D.C. No. 2:19-cv-08696-AB-JPR OPINION

Appeal from the United States District Court
for the Central District of California
André Birotte, Jr., District Judge, Presiding

Argued and Submitted April 4, 2022
Pasadena, California

Filed September 23, 2022

Before: Mary M. Schroeder, Sidney R. Thomas, and
Carlos T. Bea, Circuit Judges.

Opinion by Judge Sidney R. Thomas;
Dissent by Judge Bea

SUMMARY*

Environmental Law

The panel reversed the district court's summary judgment in favor of the Bureau of Reclamation and the Santa Maria Water District (collectively, the "Agencies") in an action brought by San Luis Obispo Coastkeeper and Los Padres ForestWatch ("Plaintiffs"), claiming that the Agencies' operation of Twitchell Dam interfered with Southern California Steelhead's reproductive migration, which constituted an unlawful take in violation of the Endangered Species Act ("ESA").

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Under the ESA, Southern California Steelhead are a "distinct population segment" (DPS) because they are substantially reproductively isolated from other populations and contribute significantly to ecological and genetic diversity of the biological species. Twitchell Dam, which was constructed in 1958 within the Santa Maria River watershed, has contributed to the endangerment of Southern California Steelhead populations. Public Law 774 ("PL 774") authorized the construction of the Twitchell Dam, pursuant to the laws of California relating to water rights, and in accordance with the recommendations of the Secretary of the Interior (the "Secretary's Report"). Statements from the U.S. Fish and Wildlife Service and the California Department of Fish and Game ("CFDG") are included in the Secretary's Report; the Service stated that the dam's impact on the steelhead fishery would be insignificant, and the CDFG recommended against providing water released to preserve the fishery. The Agencies are jointly responsible for the dam's operation. The Agencies moved for summary judgment, arguing that PL 774 afforded the Agencies no discretion to release any dam water to preserve endangered Southern California Steelhead, and thus they could not be liable for take under the ESA.

The panel held that under PL 774, the Agencies had discretion to release water from Twitchell Dam to avoid take of endangered Southern California Steelhead. The panel held that PL 774 expressly authorized Twitchell Dam to be operated for "other purposes" beyond the enumerated purposes. As a secondary priority, PL 774 also required the Agencies operate the dam substantially in accordance with the Secretary's Report. The statutory requirement of substantial compliance—rather than strict compliance—with

the Secretary's Report explicitly grants discretion to the Agencies to adjust the dam's flow rate.

The panel held that this interpretation is buttressed by the principles of statutory construction. Because PL 774 and the ESA can easily be read to work in harmony, it was the panel's duty to do so. Here, there is no clear Congressional intent to preclude the dam from being operated to avoid take of Southern California Steelhead. There is no implied conflict between PL 774 and the ESA. Twitchell Dam can readily be operated to provide modest releases at certain times of the year and during certain water years, while still satisfying the dam's primary purpose of conserving water for consumptive purposes. The panel rejected the dissent's reliance on the principle of *ejusdem generis* to argue that the preservation of endangered fish species was an impermissible "other purpose" for the dam.

The panel remanded for further proceedings. The panel did not reach the requirements under California water law or any other issues urged by the parties. The panel also did not reach the question of how the Agencies might be required to exercise their discretion in order to come into compliance with the requirements of the ESA. The panel left those issues for consideration by the district court in the first instance.

Judge Bea dissented. As he read the Secretary's Report, Twitchell Dam was meant to conserve all the water from the Cuyama River during the region's short rainy season for use during the long dry season by the residents, farms, and industries in the Santa Maria basin. All the water conserved by Twitchell Dam was to be released into the Santa Maria aquifer during the dry season. Release of water for the purpose of maintaining fish below Twitchell Dam and

adopting other measures to perpetuate the run of steelhead trout up the Santa Maria River were specifically considered and rejected, with full knowledge by Congress that steelhead trout would be prejudiced by the construction and planned operation of Twitchell Dam.

Judge Bea wrote that the majority's textual analysis of PL 774 fundamentally misreads PL 774 and the Secretary's Report. By disregarding the limiting principles that PL 774 and the Secretary's Report impose on the kinds of purposes for which Twitchell Dam can be reported, the majority adopts an interpretation of PL 774 that violates the non-delegation doctrine of constitutional law. As he read PL 774, the meaning of the phrase "other purposes" was constrained by the specific terms that precede it pursuant to the canon of *ejusdem generis*. In addition, the ESA's subsequent, but general, prohibition of "any person" from the "take" of a listed endangered species does not override PL 774. He would affirm the district court's order granting summary judgment to the Agencies and other defendants.

COUNSEL

Erica A. Maharg (argued) and Jason R. Flanders, Aqua Terra Aeris Law Group, Oakland, California; Daniel Cooper, Sycamore Law, San Francisco, California; Margaret Hall and Linda Krop, Environmental Defense Center, Santa Barbara, California; for Plaintiffs-Appellants.

Kevin W. McArdle (argued), Robert J. Lundman, and Bridget McNeil, Attorneys; Todd Kim, Assistant Attorney General; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; Amy L.

Aufdemberge, Attorney, United States Department of the Interior, Washington, D.C.; for Defendants-Appellees U.S. Department of the Interior, United States Bureau of Reclamation, and Brenda Burman.

Mario A. Juarez (argued) and Richard E. Adam Jr., Law Office of Juarez Adam & Farley, Santa Maria, California, for Defendants-Appellees Santa Maria Valley Water Conservation District and Santa Maria Valley Water Conservation District Board of Directors.

Jeffrey Dunn (argued) and Daniel Richards, Best Best & Krieger LLP, Irvine, California, California; for Intervenor-Defendants-Appellees.

Tara Mueller (argued), Courtney Covington, Colleen Flannery, Daniel Fuchs, and Jeffrey Reusch, Deputy Attorneys General; Tracy L. Winsor, Supervising Deputy Attorney; Robert W. Byrne, Senior Assistant Attorney General; Rob Bonta, Attorney General; Attorney General's Office, Sacramento, California; for Amicus Curiae State of California.

OPINION

S.R. THOMAS, Circuit Judge:

We consider in this case whether the Bureau of Reclamation and the Santa Maria Water District (collectively, the "Agencies") have discretion to manage and operate Twitchell Dam for the purpose of preventing take of Southern California Steelhead. We conclude that the relevant statute affords the Agencies discretion to operate the dam for this purpose, and reverse the judgment of this district court.

I

A

Congress enacted the Endangered Species Act of 1973 ("Endangered Species Act" or "ESA"), 16 U.S.C. §§ 1531–1544, "to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). The purpose of enacting the ESA was "to require agencies to afford first priority to the declared national policy of saving endangered species." *Id.* at 185.

Southern California Steelhead are an endangered salmonid with a habitat between the Santa Maria River and the border of Mexico. Since 1997, Southern California Steelhead have been identified as being "in danger of extinction throughout all or a significant portion of its range." 62 Fed. Reg. 43937-01 (Aug. 18, 1997); 16 U.S.C. § 1532(6). Under the ESA, Southern California Steelhead are a "distinct population segment" (DPS) because they are substantially reproductively isolated from other populations and contribute significantly to the ecological or genetic diversity of the

biological species. 62 Fed. Reg. 43937-01 (Aug. 18, 1997); 61 Fed. Reg. 4722-01 (Feb. 7, 1996). Southern California Steelhead's status as a DPS qualifies them for protection as a separate species from other populations of *Oncorhynchus mykiss* along the West Coast of North America. 62 Fed. Reg. 43937-01 (Aug. 18, 1997).

Historically, the Santa Maria River system provided a migratory habitat for Southern California Steelhead. The Santa Maria River is formed by the confluence of the Cuyama and Sisquoc Rivers, and drains into the Pacific Ocean near Guadalupe in northwestern Santa Barbara County. Although the lower Santa Maria River remains dry most of the time, during sporadic periods of high precipitation, freshwater from the Cuyama and Sisquoc Rivers used to run directly through the Santa Maria into the ocean. Southern California Steelhead are an anadromous—or ocean-going—species with adults spawning in freshwater, and juveniles rearing in freshwater before migrating to the ocean to grow, mature, and then return to freshwater to reproduce as adults. Thus, during high precipitation periods, Southern California Steelhead were able to migrate to and from the ocean to mature and replenish their population.

Twitchell Dam, which was constructed in 1958 within the Santa Maria River watershed, has contributed to the endangerment of Southern California Steelhead populations. Twitchell is situated on the Cuyama River about six miles upstream from its convergence with the Sisquoc River. Following the dam's construction, Southern California Steelhead rarely migrated to the ocean, even in the highest precipitation years, because Twitchell Dam is presently operated to retain water during high precipitation periods. The water is then released from behind the dam during dry

periods at a rate designed to maximize percolation into the dry riverbed and recharge the groundwater basin. Thus, almost all of the freshwater flowing from the Cuyama and Sisquoc percolates into the riverbed instead of reaching the lower Santa Maria River. As a result, the Santa Maria River has insufficient flow to sustain Southern California Steelhead migration to the ocean, preventing them from completing their reproductive cycle.

B

Public Law 774 ("PL 774"), the legislation authorizing the construction of Twitchell Dam, is the primary basis of contention between the parties. In pertinent part, it provides:

> [T]he Secretary of the Interior is hereby authorized to construct the project for irrigation and the conservation of water, flood control, and for other purposes, on Santa Maria River, California, pursuant to the laws of California relating to water and water rights, and, otherwise substantially in accordance with the recommendations of the Secretary of the Interior dated January 16, 1953 [hereinafter, the "Secretary's Report" or the "Report"]. . . .

Act of Sept. 3, 1954, Pub. L. No. 83-774, 68 Stat. 1190.

The Secretary's Report includes detailed project plans for the dam and reservoir, including a recommended flow rate for water releases from the dam. The Report explains that the project's primary purpose is to recharge the Santa Maria River Valley's groundwater aquifer and to eliminate the

threat of extensive flood damage. The report identifies examples of other permissible uses, including municipal and industrial uses, of the dam water. Statements from the U.S. Fish and Wildlife Service ("FWS") and the California Department of Fish and Game ("CDFG"; now, the California Department of Fish & Wildlife) are included in the Report. The FWS stated that the dam's impacts on the steelhead fishery would be insignificant. The CDFG recommended against providing water releases to preserve the fishery.

The Bureau of Reclamation is responsible for establishing the operational rules for Twitchell Dam. The Santa Maria Water District handles the day-to-day operation of the dam, in accordance with the rules set by the Bureau. The Agencies are jointly responsible for the dam's operation.

II

San Luis Obispo Coastkeeper and Los Padres ForestWatch sued the Agencies, claiming that their operation of Twitchell Dam interferes with Southern California Steelhead's reproductive migration, which constitutes an unlawful take in violation of the ESA. They sought declaratory relief and an injunction requiring properly timed water releases of appropriate magnitude and duration to support Southern California Steelhead reproduction.

The Agencies, along with various intervenors, moved for summary judgment, arguing that PL 774 affords the Agencies no discretion to release any amount of dam water to preserve endangered Southern California Steelhead and, thus, that they could not be liable for take under the ESA. The district court agreed and granted summary judgment.

We have jurisdiction over the district court's entry of final judgment pursuant to 28 U.S.C. § 1291, and we review the district court's summary judgment order de novo. *L. F. v. Lake Wash. Sch. Dist. #414*, 947 F.3d 621, 625 (9th Cir. 2020).

III

Section 9 of the ESA makes it unlawful for all persons, including federal and state agencies, to "take" endangered species. 16 U.S.C. §§ 1532(13), 1538(a)(1)(B). The term "take" is defined broadly to include "kill" and "harm," 16 U.S.C. § 1532(19), which in turn includes significant habitat modification that results in injury or death by "impairing essential behavioral patterns," 50 C.F.R. § 222.102. The current operation of Twitchell Dam harms Southern California Steelhead by impairing their ability to migrate and reproduce.

An ESA § 9 claim cannot succeed unless the agency's conduct is the proximate cause of the alleged take. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 696 n.9, 700 n.13 (1995). Because the parties assume that agency discretion is required to establish proximate cause, we evaluate whether, under PL 774, the Agencies have any discretion to release any amount of water from Twitchell Dam to avoid take of endangered Southern California Steelhead.[1] We conclude that they do.

[1] We do not decide whether, in order to be liable for take under the ESA, an agency must have discretion to avoid take. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004) (holding that, under the National Environmental Policy Act, an agency cannot be considered the legal "cause" of an action that it has no statutory discretion to avoid); *see also*

A

Generally, "[i]f the statutory language is clear, that is the end of our inquiry." *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir. 2000). PL 774 expressly authorizes Twitchell Dam to be operated for "other purposes" in addition to the enumerated purposes of "irrigation and the conservation of water, [and] flood control." Act of Sept. 3, 1954, Pub. L. No. 83-774, 68 Stat. 1190. This expansive language reflects a congressional intent to grant the Agencies discretion to operate the dam for a variety of purposes, including to accommodate changed circumstances such as the enactment of new statutes.

If Congress had intended to limit the dam's operations solely to the enumerated purposes, it knew how to do so and would have used limiting rather than broad language. *See, e.g.*, *WildEarth Guardians v. U.S. Army Corps of Eng'rs*, 947 F.3d 635, 639–40 (10th Cir. 2020) (holding Army Corps of Engineers had no discretion to release water to protect endangered fish species because the authorizing legislation permitted the project to be operated "*solely for flood control* except as otherwise required by the Rio Grande Compact"). However, rather than limiting the dam's uses to an exhaustive list or to "solely" one purpose, Congress expressly provided that the dam could be used "for other purposes."

As a secondary priority, PL 774 also requires that the Agencies operate the dam "otherwise substantially in accordance with" the plans and recommendations in the

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Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 664, 667–68 (2007) (suggesting that *Public Citizen* might not apply in the ESA context).

Secretary's Report. Act of Sept. 3, 1954, Pub. L. No. 83-774, 68 Stat. 1190. The Secretary's Report contains budgetary plans, technical specifications, and a recommendation for a flow rate for water releases from the dam. In order to avoid take of Southern California Steelhead, Twitchell Dam's flow rate would need to deviate slightly from the recommended flow rate at a few points throughout the year. It is entirely consistent with the text of the statute for the Agencies to diverge from the Secretary's Recommendations. The statutory requirement of substantial compliance—rather than strict compliance—with the Report explicitly grants discretion to the Agencies to adjust the dam's flow rate. *See In re Operation of Mo. River Sys. Litig.*, 421 F.3d 618, 630–31 (8th Cir. 2005) (upholding the Army Corps of Engineers' decision to modify the Missouri River's water flow to comply with obligations under the ESA because "the [authorizing legislation] does not *mandate* a particular level of river flow or length of navigation season" (emphasis added)).

In sum, PL 774 broadly authorizes the dam to be operated for other purposes. Therefore, the Agencies have discretion to operate Twitchell Dam to avoid take of Southern California Steelhead.

B

This interpretation is buttressed by the principles of statutory construction. "When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

Because we can easily read PL 774 and the ESA to work in harmony, it is our duty to do so.

Under basic principles of statutory construction, "[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Id.* (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)). Here, there is no clear congressional intent to preclude the dam from being operated to avoid take of Southern California Steelhead. PL 774 explicitly authorizes the dam to be used for other purposes. While the Secretary's Report identifies some secondary purposes for which the dam may be operated, there is no language suggesting that it provides an exhaustive list of permissible purposes. Moreover, there is no implied conflict between PL 774 and the ESA. Twitchell Dam can readily be operated to provide modest releases at certain times of the year and during certain water years, while still satisfying the dam's primary purpose of conserving water for consumptive uses.

The dissent contends that the Secretary's Report considered and rejected the conservation of endangered steelhead as a permissible purpose. However, a close reading belies this assertion. The CDFG provided a comment, attached to the Secretary's Report, stating that it decided against requesting water releases from the dam for the maintenance of steelhead fisheries. But CDFG's comment and all references to Southern California Steelhead in the Secretary's Report focus on their value for *recreational* fishery—not on the survival of the *species*. At the time the Report was drafted, Southern California Steelhead were not identified as an endangered species. Thus, neither Congress

nor any of the agencies involved with producing the Report considered or rejected the possibility of operating the dam to protect them from extinction.[2]

Our "duty to interpret Congress's statutes as a harmonious whole rather than at war with one another" is reflected in a long line of environmental cases. *Epic Sys. Corp.*, 138 S. Ct. at 1619. For example, in *Stand Up for California! v. U.S. Dep't of the Interior*, 959 F.3d 1154 (9th Cir. 2020), this Court reconciled two allegedly competing Congressional directives to give effect to an environmental statute. The court considered whether the Indian Gaming Regulatory Act ("IGRA") denies the Secretary of Interior discretion to comply with obligations under the National Environmental Policy Act ("NEPA"). *Id.* at 1163. The Ninth Circuit determined that the Secretary had the requisite discretion, reasoning that the statute "does not by its terms *preclude* the Secretary from considering other federal law." *Id.* at 1164. Thus, "there is no 'irreconcilable and fundamental conflict' between IGRA and NEPA," and the court gave effect to both statutes. *Id.* at 1166 (quoting *Jamul Action Comm. v. Chaudhuri*, 837 F.3d 958, 963 (9th Cir. 2016)).

The Fifth Circuit has applied similar logic to avoid conflicts between congressionally approved infrastructure

[2] CDFG's decision against requesting water releases was also predicated on the expectation that Twitchell Dam would cause "some losses to the steelhead fishery" but that "such losses will not be of significant proportions." In fact, the operation of Twitchell Dam has significantly reduced migration opportunities on the Santa Maria River for Southern California Steelhead populations, which are now facing extinction. Indeed, the National Marine Fisheries Service has placed the Santa Maria River population in the "highest priority" category for recovery actions for the Southern California Steelhead.

projects and subsequent congressional actions. Its reasoning is instructive. For example, *Creppel v. U.S. Army Corps of Engineers*, 670 F.2d 564 (5th Cir. 1982), dealt with changes in a flood control project to comply with new environmental legislation. Congress had enacted the Clean Water Act during the middle of the construction of a Louisiana flood control project that was developed pursuant to the Flood Control Act of 1936. *Id.* at 566–67. To comply with the newly enacted statute, the Army Corps of Engineers issued a directive modifying the remainder of the project's specifications to mitigate its environmental impact. *Id.* at 568–71. Local landowners brought suit, claiming that the modifications did not advance the project's dual purposes of (1) drainage and land reclamation and (2) flood control. *Id.* at 570–71, 573.

The court held that the Corps reasonably determined that the purposes of the project could be achieved with the modifications. *Id.* at 573–74. In reconciling the project plans with the Clean Water Act, the court explained that there had been a "profound change in congressional environmental policy" in the years the project had been underway. *Id.* at 571. The court further opined that "[i]t imparts both stupidity and impracticality to Congress to conclude that the statute impliedly forbids any change in a project once approved, and thus prevents the agency official from providing for the unforeseen or the unforeseeable, from accommodating newly discovered facts, or from adjusting for changes in physical or legal conditions." *Id.* at 572–73.

By contrast, only where two statutes are mutually prohibitive does an irreconcilable conflict exist, such that we may enforce one over the other. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), provides an example of such a

situation. *Id.* at 156. This case involved a federal dam, which, if operated in any capacity, would indisputably eradicate the snail darter, an endangered species. *Id.* at 172. Congress enacted the ESA after the dam had been authorized, received appropriations, and its construction was virtually complete. *Id.* at 157. Despite the fact that the dam's construction cost millions of dollars, the Court prohibited its completion. *Id.* at 156, 194–95. The Court reasoned, "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the [ESA], but in literally every section of the statute." *Id.* 184. Allowing the dam to be completed, and an endangered species to be entirely eradicated, was irreconcilable with the ESA. *Id.* at 193.

In the present case, there is no such irreconcilable conflict between PL 774 and the ESA. PL 774 does not by its express terms preclude the operators of Twitchell Dam from providing water releases to preserve endangered fish species. *See Stand Up for Cal.!*, 959 F.3d at 1164. PL 774 can be read to allow the Agencies to comply with their obligations under the ESA. Therefore, there is no irreconcilable conflict between PL 774 and the ESA. *See id.* at 1166; *see also Tenn. Valley Auth.*, 437 U.S. at 193. "Respect for Congress as drafter" and "respect for the separation of powers" counsel this Court to give effect to both statutes. *Epic Sys. Corp.*, 138 S. Ct. at 1624.

C

The dissent relies heavily on the principle of *ejusdem generis* to argue that the preservation of endangered fish species is an impermissible "other purpose" for the dam.

According to the dissent, because the phrase "other purposes" follows the phrases "irrigation and the conservation of water, [and] flood control," the dam may only be operated for "human use," and preserving endangered species is not a human use. This argument fails for several reasons.

First, Congress enacted the Endangered Species Act in order to "to minimize the losses of genetic variations" because "they are potential resources" for human use. *Tenn. Valley Auth.*, 437 U.S. at 178 (emphasis omitted). "Congress was concerned about the *unknown* uses that endangered species might have"—for instance, "potential cures for cancer or other scourges, present or future." *Id.* at 178–79. Thus, the preservation of endangered species falls within the scope of "human use" and is a permissible use even within the dissent's interpretation of the phrase.

Second, "[t]he rule of *ejusdem generis* . . . comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute." *United States v. Turkette*, 452 U.S. 576, 581 (1981); *see also United States v. Tobeler*, 311 F.3d 1201, 1206 (9th Cir. 2002). Here, the statute's plain meaning is apparent. The Agencies are granted discretion to operate the dam for "other purposes" in addition to its primary purposes. The Agencies' discretion is constrained by the requirement to comply with California water law and to substantially comply with the recommendations in the

Secretary's Report.[3] We reject the dissent's attempt to create ambiguity where the statute's text suggests none.

IV

Under the express terms of PL 774, the Agencies have discretion to operate Twitchell Dam for other purposes besides irrigation, conservation, and flood control—including, potentially, adjusting water discharges to support the migration and reproduction of Southern California Steelhead. The judgment below is reversed, and this case is remanded for further proceedings consistent with this opinion. We need not, and do not, reach the requirements under California water law or any other issues urged by the parties. We also need not, and do not, reach the question of how the Agencies might be required to exercise their discretion in order to come into compliance with the requirements of the Endangered Species Act. We instead

[3] The dissent mistakenly argues that this interpretation of PL 774 violates the non-delegation doctrine. The Supreme Court has consistently upheld Congress's ability to delegate power under broad standards, recognizing that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). For instance, the Court has upheld various agencies' discretion to enforce fair and equitable commodities prices, to determine just and reasonable utility rates, to regulate broadcast licenses as "public interest, convenience, or necessity" require, and to establish mandatory sentencing guidelines. *Id.* at 372–74 (collecting cases). In light of the Supreme Court's approval of these broad delegations of authority, Congress clearly provided sufficient guidance to the Agencies in PL 774.

leave those issues for consideration by the district court in the first instance.

REVERSED.

BEA, Senior Circuit Judge, dissenting:

I respectfully dissent. In 1954, Congress authorized the construction of a dam, now called the Twitchell Dam (the "Dam"), on the Cuyama River

> for irrigation and the conservation of water, flood control, and for other purposes, . . . pursuant to the laws of California relating to water and water rights, and, otherwise substantially in accordance with the recommendations of the Secretary of the Interior dated January 16, 1953, entitled 'Santa Maria project, Southern Pacific Basin, California' [the 'Secretary's Report']."

Pub. L. No. 83-774, 68 Stat. 1190 (Sept. 3, 1954) ("PL 774"). The Secretary's Report, H.D. 83-217 (1953), which is specifically incorporated by reference into PL 774 by the very text of PL 774, was developed jointly by the Bureau of Reclamation ("Reclamation") and the Army Corps of Engineers ("Army Corps") and describes the need for the Dam and its intended operation.

As I read the Secretary's Report, the Dam was meant to conserve all the water from the Cuyama River during the region's short rainy season for use during the long dry season

by the residents, farms, and industries in the Santa Maria Basin. All the water conserved by the Dam was to be released into the Santa Maria aquifer during the dry season. None of it was to flow into the ocean. The Dam was also meant to prevent floods and to serve the other purposes similar or incidental to irrigation, water conservation, and flood control, described in the Secretary's Report. Release of water for the purpose of maintaining fish below the Dam and adopting other measures to perpetuate the run of steelhead trout up the Santa Maria River were specifically considered and rejected, with full knowledge by Congress that the steelhead trout would be prejudiced by the construction and planned operation of the Dam.

Plaintiffs, however, argue that approximately 1,500 acre-feet of conserved freshwater—or, about four percent of the average volume of water stored annually behind the Dam—should be released from the Dam each year to spill into the ocean, to facilitate the occasional migration of steelhead trout up the Santa Maria River, instead of the water being conserved for use by the Santa Maria Basin's human community.[1] Plaintiffs argue that such releases are permitted by PL 774, even though the Secretary's Report both planned that the Dam would be operated to release water at the "percolation rate of the channel downstream" so that the water would drain into underground storage, instead of

[1] Plaintiffs' complaint seeks "[a]n [i]njunction requiring [Defendant agencies] to modify operations, including modification of the current flow regime at Twitchell Dam," to benefit steelhead trout. Plaintiffs' complaint alleges that "[a]n order compelling water releases of sufficient size and with appropriate timing to provide flows for fish migration" would result in an "approximately four percent (4%) of the total volume of water retained in the reservoir on an annual basis" being released from the Dam for the fish.

reaching the ocean, to secure the "maximum yield" of conserved water for the Santa Maria Valley Basin's human community, and also expressly considered and rejected adopting measures "in an attempt to perpetuate the steelhead runs," *see* H.D. 83-217 at 47, 54, 88, 111–112 (1953).

This is not the more common case in which a federal agency claims that it has broader-than-recognized statutory authority to take a disputed action.[2] Rather, here, the Defendant federal and local agencies reject Plaintiffs' proposed interpretation of PL 774. They argue that their own discretion, as defined by PL 774, is not as broad as Plaintiffs contend it is, and that they cannot release extra water from the Dam to benefit steelhead trout.

In my view, the district court's careful opinion correctly concluded that "operating the Twitchell Dam in the manner that the Plaintiffs propose is so foreign to the original express purposes of [the] Twitchell Dam as to be arbitrary and capricious." The majority opinion fails to offer persuasive reasons for reversing the district court.[3]

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[2] Thus, this case differs from cases in which a federal agency itself argues for a more expansive view of its own statutory discretion. *E.g.*, *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587 (2022); *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021).

[3] The majority opinion correctly declines to consider Plaintiffs' arguments, raised for the first time on appeal, concerning the requirements of California state law. Plaintiffs argue that California law and caselaw require Defendant agencies to operate the Dam "in a way that protects fish populations." Defendants argue that PL 774's reference to "the laws of California relating to water and water rights" merely required the United States to *acquire* water rights from California pursuant to California law, and Defendant agencies assert that they satisfied that requirement by securing a water permit and license from the California State Water

I.

I believe the proper outcome of this case turns on interpreting PL 774 as written and as read alongside the Secretary's Report because PL 774 specifically incorporates the Secretary's Report by reference. Accordingly, I describe the contents of the Secretary's Report in some detail.

The Secretary's Report explained that "[t]he climate in the Santa Maria Basin is characterized by a short rainy season in the winter and a long dry season the remainder of the year." H.D. 83-217 at 24–25 (1953). This created two problems for the Basin's residents. First, in especially wet winters, the Santa Maria Valley experienced "serious flood[s]," which became more dire as the population and economic value of the valley was increasing, while the capacity of the river basin to absorb flood waters was "decreasing perceptibly with each year of runoff as a result of sedimentation." *See id.* at 25–26.

Second, water was becoming scarce. Irrigation was introduced in the region in 1897 by the Union Sugar Company of San Francisco for growing sugar beets. *Id.* at 35. Gradually, a vegetable industry was established that practiced "intensive irrigated agriculture" to grow vegetables, sugar beets, beans, alfalfa, and dry-farmed crops, and large tracts of land were devoted to growing flower and vegetable seed. *Id.*

Resources Control Board. Because the merits of these arguments "could . . . possibly be affected by deference to a trial court's factfinding or fact application, or a litigant's further development of the factual record," the "purely legal" exception to the ordinary rule that "an appellate court does not decide issues that the trial court did not decide" does not apply here. *Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep't of Health & Hum. Servs.*, 946 F.3d 1100, 1110–11 (9th Cir. 2020).

"The growth of urban centers based on agricultural development [was] fairly rapid since 1920." *Id.* "Population expanded markedly . . . during World War II" because the region hosted military training bases. *Id.* at 25. The "permanent population . . . continued to expand during the postwar period" as agriculture and industry grew, such that population increased "from 7,260 in 1910 . . . to an estimated 25,800 in 1950." *Id.* at 25, 29. By the 1950s, the basin was host to a sugar beet refinery, vegetable-packing plants, ice-manufacturing plants, and several major oilfields. *Id.* at 36. In 1953, further municipal and industrial growth was anticipated. *Id.* at 29.

"[E]ssentially all the irrigated acreage, the major industries, and all public and private water-supply systems [in the Santa Maria Valley] depend upon water from wells which tap the ground-water reservoir." *Id.* at 37; *see also id.* at 26 ("All water used in the basin is pumped from the ground-water reserve."). But, by 1951, "the total pumping draft [was] exceeding the perennial yield of 50,000 acre-feet [of water] by about 14,000 acre-feet per year" and "[a]griculture ha[d] reached its peak of development under [the then-present] conditions of water supply." *Id.* at 26. Reclamation estimated that "[c]ontinually increasing pumping costs [would] impair the economic structure of the entire area" and that "in the near future at least 8,000 acres of presently irrigated land"—about 17% of all "irrigable land" in the Basin (*see id.* at 25)—"will revert to dry farm status because of inadequate water supply." *Id.* at 26. To make matters worse, water use before 1945 had "effected a permanent lowering of the water table in the ground-water intake area" and further increased water use was expected to "rapidly accelerate the historical decline of the ground-water levels

near the coast, and thereby increase the probability of salt-water intrusion within the next few decades." *Id.* at 38.

By the early 1950s, the State of California concluded that "the water-supply situation in the Santa Maria Basin [was] critical," "steps should be taken immediately to relieve the water shortage," and supplemental water was "urgently needed." *Id.* at 13, 113. Reclamation and the Army Corps, with recommendations from the California Department of Public Works and several other state and federal agencies, developed a plan for water conservation and flood control in the region centered around the construction and operation of a dam on the Cuyama River. *See id.* at iii, 93. The "dual purpose" of the project was "to provide adequate recharge of the now critically depleted ground water reservoir underlying the Santa Maria Valley, and to eliminate the threat of extensive flood damages to cities, industries, and agriculture in of the valley." *Id.* at 23; *see also id.* at 13, 15, 47. Central to the project was that "water held in the conservation-storage space [behind the Dam] would be used to recharge the underlying ground-water basin from which the entire valley obtains its water supply." *Id.* at 42. "The Board of Supervisors of Santa Barbara County and the Santa Maria Valley Water Conservation District . . . worked unremittingly for the development of [the] project." *Id.* at 25. The regional director of Reclamation found that "[t]here [was] a unified desire for [the project] throughout Santa Barbara County." *Id.* at 26.

The Report states that the project would achieve its purposes by constructing a dam and reservoir that would "detain Cuyama River flows during periods of waste flow to the ocean, and subsequently release the conserved water at rates equal to or less than the percolation capacity of the

Santa Maria River Channel." *Id.* at 23; *see also id.* at 15, 47. Before construction of the Dam, the strong flow of the Cuyama River during the rainy season had been "waste[d] . . . to the ocean." *See id.* at 15, 23, 54. Reclamation found that a weaker flow of water—specifically, a maximum rate of 300 second-feet—would seep through the porous Santa Maria riverbed into the ground-water basin, where it could be used for agricultural, residential, or industrial purposes, rather than ever reaching the ocean. *See id.* at 54, 88. Accordingly, Reclamation planned that releases from the Dam would be coordinated with flows from the Sisquoc River so that the combined flow of the Cuyama and Sisquoc Rivers into the Santa Maria River at Fugler Point would be approximately 300 second-feet because "[t]his is the estimated maximum rate at which water can percolate through the pervious Santa Maria River channel into underground storage" while avoiding any "waste to the ocean." *See id.* at 54, 88. In short, the "purpose of [the] project . . . [was] to control the amount of water which flows into the area in streams—holding it to the amount which would fill but not overflow the underground natural reservoir, so as to save water which [before the Dam was constructed went] to the sea during overflow periods." 100 Cong. Rec. 15019 (1954) (statement of Sen. Wayne Morse).

The Department of Interior consulted with the United States Fish and Wildlife Service ("FWS") and the California Department of Fish and Game ("CDFG") in 1951 and 1952 to give those agencies an opportunity to assess the project's potential effects on fish and wildlife and to determine "the possible damage to wildlife resources and . . . the means and measures that should be adopted to prevent loss of and damage to wildlife resources," Pub. L. No. 79-732, § 2, 60 Stat. 1080–82, 1080 (August 14, 1946). *See* H.D. 83-217

at iii, 13, 16, 100 (1953). It was plain to FWS that the Dam would be operated to prevent water from the Cuyama River from reaching the ocean except to avoid a flood:

> [w]ith the project in operation and the flows controlled, water of the Cuyama River seldom will reach the ocean. The Santa Maria River will be dependent for the most part on the uncontrolled floods of the Sisquoc River for flows large enough to reach the ocean, and these will be for even shorter periods than now prevail with both tributaries supplying floodwater. Only during unusual floods will Vaquero [now, Twitchell[4]] Reservoir spill and permit the Cuyama River to supplement the flows of the Sisquoc River. *Id.* at 89.

FWS considered the effect the project would have on steelhead trout in detail (*id.* at 88–89) and concluded that "Steelhead trout will not be able to enter the river as often as without the project and, as a result, the project will cause a fishery loss." *Id.* at 92. FWS, nevertheless, did not recommend that additional water be released to facilitate steelhead migration. *See id.*

CDFG also declined to request that additional water be released to facilitate steelhead migration. CDFG recognized that, unless more rapid releases were necessary for flood-control, it was planned that water would be released "at the rate of percolation of the waters (estimated at 300 cubic feet per second or 600 acre-feet per day)." *Id.* at 111. CDFG

[4] Previously, the Twitchell Dam and Twitchell Reservoir were called the Vaquero Dam and Vaquero Reservoir.

stated that, in considering its "recommend[ation] [for] water uses for fish life," the agency "tried to be cognizant" of the fact that "the present and future demands for water in the Santa Maria Valley considerably exceed the present supply." *Id.* at 110. The agency concluded:

> [W]e do not feel justified in requesting extensive requirements in an attempt to perpetuate the steelhead runs. For example, we will not require a fish ladder at Vaquero [now, Twitchell] Dam for passage of migratory fishes. Also, because of the great width and pervious character of the riverbed below the proposed dam, we do not believe that it would be feasible to request a regular schedule of water releases for maintenance of a stream fishery. *Id.* at 112.[5]

[5] In light of the fishery losses CDFG knew the Dam would cause, CDFG sought "compensation for losses to recreational fishing resulting from the project." H.D. 83-217 at 112. To this end, on March 9, 1951, CDFG suggested that the Army Corps "assume the major responsibility in conducting" "studies" to (1) investigate "the feasibility" of using the reservoir behind the Dam "for public fishing," (2) investigate "the possibilities of creating . . . a fishing lake . . . in the Guadalupe area for public warm-water fishing," (3) investigate "the creation of . . . impoundments for fishing purposes, either on the Cuyama River tributaries above Vaquero Dam or within the main impoundment itself," and (4) "[i]nvestigate the amount of water that would be required to provide access to the ocean for steelhead for sustaining the Sisquoc River fishery only." *Id.* CDFG recommended that the Army Corps carry out the studies "*with emphasis on the first three* [options]." *Id.* (emphasis added). By November 12, 1952, it appears that CDFG decided to focus primarily on the first potential avenue for compensatory fishing: CDFG specifically requested that a "recreational pool" of water be maintained behind the Dam to allow for "fresh-water fishing . . . by people living in the southwestern portion of the San Joaquin Valley." *Id.* at 100, 111; *see also*

In sum, Congress authorized construction of a dam that, in absence of an unusual flood, would conserve all of the water from the Cuyama River and then release it slowly enough that it would drain into the Santa Maria Basin aquifer for human use instead of ever reaching—or being "wasted" into—the ocean.[6] State and federal agencies concerned with preserving the stock of steelhead trout in the river system recognized that the Dam would prevent water from the Cuyama River from reaching the ocean and that this would result in loss of steelhead trout (i.e. "fishery loss"), but nevertheless approved of the plan and declined to recommend that the Dam be operated to release water to support steelhead migration. Congress adopted the decisions of the federal and state agencies that the Dam should be built and operated in a manner that foreseeably would cause steelhead trout loss.

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id. at 70. At some point, following a conference among CDFG, the Army Corps, Reclamation, and the Board of Supervisors of the Santa Maria Water Conservation District, the Board of Supervisors passed a resolution favoring the establishment of a minimum pool water in the Dam's reservoir to allow for fishing, "*so long as the maintenance of the pool would not interfere with the primary purposes of the proposed project*." *Id.* at 70 (emphasis added). However, FWS had previously concluded that "[t]he absence of carryover storage in the reservoir, and the complete lack of water in some years, prevent[ed] the development of a reservoir fishery to help mitigate the steelhead trout losses." *Id.* at 92; *see also id.* at 89. Ultimately, the Secretary of the Interior determined that "no modification of the proposed plan of development [was] necessary" and Congress authorized the Dam without a plan to maintain a minimum pool of water behind it for fishing. *See id.* at 3; *see also id.* at 27 (explaining that "no recreational facilities are contemplated" because of "the intermittent nature of the streamflows and the plan to store all water underground").

[6] The Secretary's Report referred to water from the Cuyama River that entered the ocean as "waste" multiple times. *E.g.*, *id.* at 15, 23, 54.

II.

The majority holds that Defendant agencies have discretion, i.e., power, to operate Twitchell Dam to facilitate the migration of steelhead trout by releasing conserved freshwater from the Dam at a rate greater than planned in the Secretary's Report, such that water would flow into the ocean, instead of draining into the Santa Maria Basin aquifer. The majority's textual argument in support of this holding relies on the phrases "other purposes" and "substantially in accordance with" in PL 774. The majority argues that, because PL 774 authorized the Dam to be built for "irrigation and the conservation of water, flood control, and for *other purposes," instead of prescribing that the Dam be built "solely" or exclusively for the specific enumerated purposes, the Defendant agencies have discretion to operate the Dam to avoid take of steelhead trout. Op. 9–12 (emphasis added). The majority also argues that, even if releasing water into the ocean to benefit fish is inconsistent with the planned operation of the Dam in the Secretary's Report, "it is entirely consistent with the text of the statute for the Agencies to diverge from the Secretary's Recommendations" because PL 774 requires that the Dam be operated (only) "substantially* in accordance with" the Secretary's Report, rather than mandating strict compliance with it. Op. 12–13 (emphasis added).

For the reasons stated below, the majority's argument offers little support for its holding. Moreover, the majority's textual analysis fundamentally misreads PL 774 and the Secretary's Report. And, by disregarding the limiting principles that PL 774 and the Secretary's Report impose on the kinds of purposes for which the Dam can be operated, the

majority adopts an interpretation of PL 774 that violates the non-delegation doctrine of constitutional law.

A.

Although the majority's textual argument offers some reasons to conclude that Defendants have some discretion over how they operate the Dam for the purposes identified in PL 774 and the Secretary's Report, it offers no basis upon which to conclude that PL 774 grants Defendants discretion to operate the Dam in a manner that wastes water into the ocean for the preservation of endangered steelhead trout. Nowhere in the text of PL 774 or the Secretary's Report can the majority find any basis for concluding that Congress expressed an intention that the Dam to be operated to promote fish migration; indeed, the text of the statute and the Secretary's Report is all to the contrary. Thus, considered as a matter of logic independently of the Secretary's Report, the majority's interpretation of the phrases "other purposes" and "substantially in accordance with" provides no more reason to conclude that Defendants may operate the Dam for any one conceivable purpose rather than another, say for water skiing rather than trout migration. However, considering the majority's logic in the context of the Secretary's Report, the majority's argument provides *less* support for its conclusion that the Dam can be operated to benefit steelhead trout than it does, for example, for the proposition that Defendants can release extra water from the Dam to facilitate water skiing on the Santa Maria River. The Secretary's Report considered and rejected adopting measures "in an attempt to perpetuate the steelhead runs," H.D. 83-217 at 112 (1953). But it never considered and rejected adopting measures to promote water skiing below the Dam as an "other purpose."

B.

Furthermore, as a matter of standard statutory interpretation, the majority's opinion clearly misreads the law. To begin, PL 774 cannot be read to allow use of the Dam's waters for just *any* "other purpose," such as releasing extra water for water skiing or rapidly emptying the reservoir to host a rock music festival on its floor. The general phrase "other purposes" follows a list of more specific words or phrases ("irrigation and the conservation of water, [and] flood control, . . ."), and so should be interpreted according to the *ejusdem generis* canon of statutory interpretation*:* "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (citation omitted)); *see also* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199–213 (2012).[7] Thus,

[7] The majority opinion claims that the principle of *ejusdem generis* "comes into play only when there is some uncertainty as to the meaning of the particular clause in a statute." Op. at 18 (citing *United States v. Turkette*, 452 U.S. 576, 581 (1981); *United States v. Tobeler*, 311 F.3d 1201, 1206 (9th Cir. 2002)). In *Tobeler*, we explained that the rule of *ejusdem generis* is unhelpful "when its application leads to a result undermining the statutory purpose." 311 F.3d at 1201. As an example, we cited to *Harrison v. PPG Industries*, which examined the phrase, "any other final action," found in the Clean Air Act. 446 U.S. 578, 588–89 (1980). We explained that, because the phrase read "*any* other final action"—as opposed to "other final action"—*Harrison* correctly concluded that *ejusdem generis* did not apply. *Id.* Relying on *Harrison*, we observed that the clause at issue in *Tobeler* similarly referred to "*any* other self-propelled vehicles," and thus declined to apply the doctrine. *Id.* (cleaned up). *Turkette* similarly relied on *Harrison*'s analysis. *See Turkette*, 452 U.S. at 581 (citing *Harrison*, 446 U.S. at 588).

"other purposes" as used in PL 774 identifies only "other purposes" that are similar in nature to "irrigation," "the conservation of water," and "flood control." In my view, it does violence to language to suggest that releasing conserved freshwater into the ocean to facilitate the migration of endangered fish is a purpose "similar in nature" to irrigation, water conservation, and flood control. Sending water out to the ocean to benefit fish seems quite different from sending it into underground storage for use by the human community farming, working and residing in the Santa Maria Basin.

"It is [also] a fundamental canon of statutory construction that the words of a statute must be read in their context." *W. Virginia*, 142 S. Ct. at 2607 (citation omitted). Here, PL 774 authorized the Secretary of the Interior "to construct the project for irrigation and the conservation of water, flood control, and for other purposes," and also "otherwise substantially in accordance with [the Secretary's Report]."[8]

The majority's reliance on this caselaw is misplaced. The statutory language at issue here does not say the Dam may be used for "*any* other purposes." The plain language itself suggests that some purposes are permissible and others are not.

Otherwise, what principle, in the majority's view, would explain why "other purposes" includes spilling conserved freshwater into the ocean to benefit fish, but does not include spilling conserved freshwater into the ocean to benefit water-skiers? In my view, *ejusdem generis* explains why neither purpose was authorized by Congress. It is the majority's reading, lacking any such limiting principle, that creates uncertainty about the meaning of the statute. *Cf.* Op. at 19.

[8] The majority argues that PL 774's requirement of "substantial compliance" with the Secretary's report means that "[i]t is entirely consistent with the text of the statute for the Agencies to diverge from the Secretary's Recommendations." Op. at 12–15. Yet the Secretary

The Secretary's Report specifically identifies other purposes that the Dam was meant to serve that are similar in nature or incidental to irrigation, water conservation, and flood control. For example, the Secretary's Report explains that the Dam's slow release of the Cuyama River's flow was meant to conserve water such that it could be later pumped from the Santa Maria aquifer and put to not only agricultural but also residential and industrial use by the Basin's human residents. *See, e.g.*, H.D. 83-217 at 15 ("Construction and operation of the [Dam] as herein proposed would provide adequate recharge of the now critically depleted groundwater reservoir underlying the Santa Maria Valley, [and] provide municipal water for anticipated municipal and industrial growth."). Raising the water-level in the aquifer would also ward off the threat of sea water intrusion into the lower end of the basin. *See, e.g.*, *id.* at 26, 29. The Secretary's Report also identifies "silt detention" as one of the "purposes of the project"; the Dam was designed to include a silt storage pool with piping that could be raised when necessary as silt accumulated behind the dam. *Id.* at 87–88; *see also id.* at 26, 67–68, 106.

Because the Secretary's Report identifies other purposes of the Dam that are similar in nature or incidental to the purposes explicitly identified in PL 774, our interpretation of PL 774's reference to "other purposes" should be constrained not only by the specific terms preceding "other purposes," but also by the Secretary's Report. But nowhere does the Secretary's Report countenance operating the Dam to facilitate the migration of steelhead trout. Quite the opposite: the Secretary's Report specifically considered and rejected

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recommended no adjustment in the flow rate to favor steelhead trout migration. Requiring such flow adjustment flips "substantial compliance" into "not at all compliant."

the notion that the project should include measures "in an attempt to perpetuate the steelhead runs." *Id.* at 112.

C.

Plaintiffs' proposal to send conserved freshwater into the ocean to benefit steelhead trout does not "substantially" accord with the Secretary's Report; it is specifically in *disaccord* with the Report. An action cannot substantially accord with a plan when the action both undermines the objectives specifically identified in the plan and, also, was considered and specifically rejected in the plan; that, again, would do violence to language. Here, Plaintiffs' proposed operation of the Dam impedes the statutory goals of "irrigation and the conservation of water" and was explicitly considered and rejected by the Secretary's Report.

First, the Secretary's Report makes clear that one of the primary purposes of the Dam was to ensure that—unless necessary to prevent a cataclysmic flood—*all* the water from the Cuyama River would be directed towards the Santa Maria aquifer instead of being "wasted" into the ocean, as the district court correctly found. The Secretary's Report stated that "[w]ater held in the conservation-storage space would be used to recharge the underlying ground-water basin from which the entire valley obtains its water supply." *Id.* at 42; *see also id*. at 47 ("The operation of this reservoir for conservation storage would be such that water impounded in the silt and conservation space would be detained for later release in underground storage *at the percolation rate of the channel downstream*." (emphasis added)). The Dam's water conservation purpose was not merely to "add sufficient water to the ground-water reservoir to overcome the [then] present

average annual overdraft[9] of 14,000 acre-feet" of water; the project was designed also to "provide for anticipated municipal and industrial growth, and provide enough additional yield to irrigate 3,000 acres of presently nonirrigated land for 50 years." *Id.* at 29. In advocating for a large water conservation storage behind the Dam, the California Division of Water Resources was adamant that "[i]n view of the possibility of overdraft in the Santa Maria Valley, substantially in excess of that estimated in the report, it is imperative that every effort should be made to develop and preserve as much conservation storage as practicable within the Santa Maria watershed." *Id.* at 106. The Secretary's Report predicted that "overdraft of the ground-water basin" could result "even under project conditions," and identified additional modifications of the natural environment that, at that time, could provide supplemental water to the Santa Maria Basin aquifer. *Id.* at 43, 55. In short, the plan was to *maximize* the conservation of water for the residents, farms, and business of the Santa Maria Valley because every gallon of conserved water was valuable. This is why the Secretary's Report referred to water from the Cuyama River that entered the ocean instead of the Santa Maria aquifer as "waste," *e.g.*, *id.* at 15, 23, 54, and planned for a coordinated release of 300 cubic feet per second because "[t]his is the estimated *maximum* rate at which water can percolate through the pervious Santa Maria River channel into underground storage" to secure the "*maximum* yield from [the project's] reservoir operation." *See id.* at 47, 54, 88 (emphasis added); *see also City of Santa Maria v. Adam*, 149 Cal. Rptr. 3d 491, 503–04 (Ct. App. 2012) (The Twitchell Dam was designed "to save floodwater during the

[9] That is, more water was being drawn from the ground-water reservoir each year than percolated into it.

rainy season and release it in such manner and at such times *as will provide maximum contributions to the ground water supplies*." (emphasis added and internal quotation marks omitted)); 100 Cong. Rec. 14249 (1954) (statement of Sen. Wayne Morse) (The "intention of the project" was to "make possible the retention of waste water during flood periods, and the later release of this water during the dry season . . . at a rate not greater than the percolation capacity, thus providing for the *entire* stored flow to seep into the underground storage basin (i.e. [the] ground-water reservoir). Thus, floodwater which would otherwise be wasted will be conserved and placed in the underground storage basin." (emphasis added)).[10] Spilling conserved freshwater into the ocean to benefit fish plainly frustrates the goal of conserving *all* of the Cuyama River's water for irrigation and other uses by the human community residing below the Dam.

Second, the Secretary's Report made plain that the project's water conservation goals would come at some costs, including the cost of fewer steelhead trout. It was known by California and the federal government that building the Twitchell Dam and operating it to maximize the water conserved for the human residents downriver would ensure that "water of the Cuyama River [would] seldom . . . reach

[10] Even in recent times, water rights in the region remain fiercely contested because of the limited supply of water. *See, e.g.*, *Adam*, 149 Cal. Rptr. 3d at 491 (considering a challenge to a stipulated judgment regarding water rights in the Santa Maria Basin). The California Court of Appeal explained that recent "concern[] about future [water] supplies" arose in part because "[u]rban population was growing," "[o]verpumping had continued in the Nipomo area where there is no reclamation project," and "the Twitchell Reservoir has been accumulating silt, which reduces its capacity and threatens to diminish its ability to augment natural recharge." *Id.* at 504.

the ocean" such that that "Steelhead trout [would] not be able to enter the river as often as without the project and, as a result, the project [would] cause a fishery loss." H.D. 83-217 at 89, 92; *see also id.* at 70. But California and federal wildlife agencies, aware of this consequence, but also "cognizant" of the fact that "the [then] present and future demands for water in the Santa Maria Valley considerably exceed[ed] the present supply," approved the water conservation plan without requesting measures "in an attempt to perpetuate the steelhead runs." *See id.* at 92, 110, 112. In authorizing the Dam "substantially in accordance" with the Secretary's Report, Congress adopted a plan to change the natural habitat of the Santa Maria Basin for the benefit of its human residents, at the expense of the steelhead.[11]

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[11] The majority opinion faults the Secretary's Report for "focus[ing] on" the steelhead trout's "value for *recreational* fishery—not on the survival of the *species*." Op. 14–15. The majority opinion also argues that the Secretary's Report underestimated the extent to which steelhead populations would decrease because it anticipated only "*some* losses to the steelhead fishery" and explained that "losses will not be of significant proportions." Op. 15 n.2 (emphasis added).

First, both of these considerations are irrelevant. Congress's policy choice to conserve the Cuyama River's water for human use may not have been informed by the value of the existence of steelhead trout above and beyond the fish's value for recreation and as food, or by perfect predictions about the Dam's effect on fish. But even so, Congress made a judgment about the best uses of freshwater conserved from the Cuyama River based on its view of the facts and we lack authority in this case to second-guess Congress's policy decision.

Second, importantly, FWS *expressly acknowledged* the potential for a decline in population: It knew that the planned operation of the Dam would cause "steelhead trout losses." H.D. 83-217 at 92 (1953); *see also id.* at 89. And FWS explained that the "fishery values" of the Santa Maria River and its tributaries were already "small" before construction of the

dam, in part because during the twenty-one years from 1930 through 1950 (inclusive) it is likely that steelhead trout entered the river during only six years (and that during two of those years "only a few trout entered during the limited period of breakthrough to the ocean") because the river had weak flow, water use had already lowered the water table of the Santa Maria Basin, and "the possibility exists that the sugar-refinery waste liquors, the domestic sewage, and the oilfield wastes which are discharged into the river would have deterred part, and perhaps all, of the [fish] run." *See id.* at 88–89; *see also id.* at 69.

To be sure, while CDFG was seeking to secure a "recreational pool" behind the Dam in compensation for the expected loss of opportunities for fishing caused by the Dam, CDFG criticized FWS for minimizing or disregarding the "fisheries value of the river system on the basis of a lack of a steelhead run since 1942." *Id.* at 110. CDFG argued that 1942 was not the proper benchmark because, since the region had been experiencing dry conditions for some years, the runoff record from that date would not justify the Dam's stated flood-control benefits, and CDFG instead examined the previous 100 years of hydrological records. *See id.* at 110–111. But FWS appears to have relied on records from at least 1930, not 1942. *See id.* at 88–89. And, even on the basis of the 100-year hydrological records CDFG examined, CDFG could conclude only that "at least the possibility that anadromous fishes would enter the system exists." *Id.* at 111. CDFG did not address FWS's concerns about pollution or the already lowered water table. *See id.*

Further record evidence supports FWS's conclusion that the fishery loss would be small. The Santa Maria River is at the northernmost edge of the natural habitat of the Southern California Steelhead distinct population segment, which extends south to the Mexican border, and was not among the "four watersheds [that] historically exhibit[ed] the largest annual anadromous runs" of *O. Mykiss* (*viz.* the Santa Ynez, Ventura, and Santa Clara Rivers, and Malibu Creek, which are all south of the Santa Maria River). The Stillwater Sciences report in the record concluded that, "[b]ased on 21 years of gaged flows on the mainstem Santa Maria River prior to operation of Twitchell Dam, conditions suitable for fish passage through the critical reach have never been common." Although Plaintiffs' experts assert that "Steelhead stocks were in good condition" before the Dam was constructed, they appear to rely on substantially the same

I cannot agree that a proposal to send approximately four percent of a community's primary source of fresh water into the ocean, on purpose, to benefit steelhead trout, substantially accords with a plan that was designed to conserve all the water from that source and to waste none of it into the ocean, especially when it was plain to all who read the Secretary's Report that the water conservation plan would result in the loss of some steelhead trout.

D.

As I read PL 774, the meaning of the phrase "other purposes" is constrained by the specific terms that precede it pursuant to the canon of *ejusdem generis.* The Secretary's Report further limits my interpretation of "other purposes" by describing the planned operation of the Dam, explaining the needs of the human community for flood control, water conservation and irrigation purposes, below it that the Dam was meant to serve, and accepting certain costs—including the loss of steelhead trout— that the Dam's operation would incur.

By contrast, the majority's textual analysis fails to constrain its interpretation of "other purposes" by any

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historical records that FWS studied, with the addition of "report[s]" from a "roam[ing]" reverend in 1879 and more recent studies reporting "small numbers of adult Steelhead, in the Sisquoc River watershed."

The majority opinion pays little heed to this thoughtful analysis, which took into consideration the information available at the time. Instead, the majority wishes to recast congressional priorities of the 1950's with the information and sensibilities *now* available to us in 2022. Of course, this can be done. But it should be done by Congress, not by a court.

limiting principle whatsoever. The majority appears to argue that Congress delegated authority to Defendant agencies to operate the Dam for "other purposes" including assisting the migration of steelhead trout, even though operating the Dam to benefit the steelhead would lessen the achievement of the purpose of water conservation, which was explicitly identified in PL 774, and also was considered and specifically rejected in the Secretary's Report. On this interpretation, the phrase "other purposes" apparently means any purpose whatsoever, and that the phrase "substantially in accordance with [the Secretary's Report]" apparently means that Defendant agencies may operate the Dam in a manner that the Secretary's Report has considered and rejected.[12] But can we say, with a straight face, that Congress intended to grant the Defendant agencies unfettered discretion as to the purposes and rates of Dam water releases? If so, where does it say so in the statute or the Secretary's Report?

The majority's reading obliterates from the text any "intelligible principle" that would make PL 774 a permissible delegation of authority from Congress to the Defendant agencies[13] concerning the Dam's operation by articulating "the general policy [Defendant agencies] must pursue and the

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[12] Thus, the majority's unelaborated assertion that its interpretation of "other purposes" is constrained by the statute's requirement to comply substantially with the Secretary's Report is implausible. Op. at 18–19. The majority is likewise ill-advised to claim that its interpretation is constrained by the requirement in PL 774 to comply with "California water law," *id.*, a gloss on a phrase in PL 774 that the majority correctly declines to interpret. *See supra* footnote 3.

[13] As I have noted, Defendant federal and local agencies expressly deny that Congress has delegated to them discretion to operate the Dam as Plaintiffs propose. *See infra* Section IV.

boundaries of [their] authority." *Gundy v. United States*, 139 S. Ct. 2116, 2123, 2129 (2019); *United States v. Melgar-Diaz*, 2 F.4th 1263, 1267 (9th Cir. 2021); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–42 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 420–30 (1935); *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 462 (5th Cir. 2022) ("If the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution."). What, on the majority's interpretation, is the "intelligible principle" from PL 774 and the Secretary's Report that informs us how the Defendant agencies' discretion to operate the Dam is limited, if at all? What language in the law, if not the specific terms preceding "other purposes" and the expressed intention of the Secretary's Report, defines "the general policy" that the Dam operators must follow and the "boundaries of [their] authority"? Alas, the majority opinion does not tell us.

But "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). Thus, the "cardinal principle" of constitutional avoidance, *id.*, also demonstrates that the majority opinion misreads the law. *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) ("A construction of [a] statute that avoids" a "'sweeping delegation of legislative power' that . . . might be unconstitutional under [the non-delegation doctrine] . . . should certainly be favored." (citation omitted)); *Reynolds v. United States*, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting) (arguing that one reason in favor of a construction of a statute is that it avoids "sailing close to the wind with

regard to the principle that legislative powers are nondelegable").

III.

The majority opinion also relies on the notion that, in considering whether PL 774 grants Defendants discretion to operate the Dam to preserve the steelhead, the court has a "duty" to read PL 774 (passed in 1954) and the Endangered Species Act ("ESA") (passed in 1973) "as a harmonious whole rather than [as statutes] at war with one another." Op. 13–17 (citation omitted). The majority opinion appears to reason that because PL 774 evidences (notwithstanding its adoption of the Secretary's Report) "no clear congressional intent to preclude the dam from being operated to avoid take of Southern California Steelhead," and because the ESA prohibits any person from "take" of steelhead trout, the court has a "duty" to read PL 774 to permit Defendant agencies to release water into the ocean to facilitate the migration of steelhead trout to avoid any conflict with the ESA's prohibition of "take." Op. at 14.

However, as the majority opinion correctly observes, the parties agree that if Defendants lack discretion under PL 774 to release water into the ocean to benefit steelhead trout, then Defendants are not the proximate cause of any "take" under the ESA. Op. 11; *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004) (If an agency "has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."); *Nat. Res. Def. Council v. Norton*, 236 F. Supp. 3d 1198, 1239 (E.D. Cal. 2017) (applying *Public Citizen* to an ESA § 9 claim and finding it inappropriate "to impose Section 9 liability on a

government agency for take caused by an action over which it has no control"). This means that, whether PL 774 grants or denies Defendants discretion to release water into the ocean for the fish, this case presents us with no apparent inconsistency between federal laws to "harmonize": either Defendants have discretion under PL 774 to operate the Dam to avoid "take" under the ESA, or they lack such discretion under PL 774 and therefore do not "take" under the ESA.[14]

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[14] The majority opinion discusses *Stand Up for California! v. U.S. Dep't of the Interior*, 959 F.3d 1154 (9th Cir. 2020), and *Creppel v. United States Army 7 Corps of Engineers*, 670 F.2d 564 (5th Cir. 1982). Neither case concerned any of the federal statutes at issue in this case. *Stand Up* turned on the particular language of a provision of the Indian Gaming Regulatory Act.

Creppel concerned whether the Army Corps' decision to modify a flood control project was arbitrary and capricious. The project was originally designed for two purposes: drainage or land reclamation, and flood control. After the passage of the Clean Water Act, which granted the Administrator of the Environmental Protection Agency authority to prohibit the issuance of a permit that was required to complete the project as planned, the Army Corps decided to abandon building a pumping station for drainage and land reclamation.

The Fifth Circuit explained, "[e]ven when a project's purpose is authorized by Congress"—unlike here, the project in *Crepple* did not itself require Congressional approval, 670 F.2d at 572 n.12—"the executive officer charged with responsibility for the project may modify its purpose unless this action is so foreign to the original purpose as to be arbitrary or capricious," but "[a]ny change must . . . serve the original purpose of the project" and "must not disregard or seek to evade the substantive statutory requirements." *Id.* at 57–73. While reversing the district court's grant of summary judgment in favor of the Army Corps on other grounds, the Fifth Circuit held that the Army Corps' revision of the plan was not arbitrary and capricious because the statute that authorized funding for the project permitted the Secretary of the Army to complete "small projects for flood control and related purposes not specifically authorized by Congress,"

For the reasons stated in detail above, I also disagree with the majority opinion's premise that PL 774 does not clearly preclude Defendant agencies from releasing conserved freshwater into the ocean to benefit steelhead. By incorporating the Secretary's Report into PL 774, Congress adopted a plan that considered and specifically rejected adopting measures in the water conservation and flood control project that would "attempt to perpetuate the steelhead runs," H.D. 83-217 at 112 (1953).

PL 774 thus addresses the specific question raised in this case: whether the Dam may be operated in an attempt to perpetuate the steelhead runs. The ESA's subsequent, but general, prohibition of "any person" from the "take" of a listed endangered species does not override PL 774. *See Morton v. Mancari*, 417 U.S. 535, 550–51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (same); *California Trout, Inc. v. FERC*, 313 F.3d 1131, 1137 (9th Cir. 2002) (rejecting the argument that two statutes must be "harmonized": a "general

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33 U.S.C. § 701s, and the Army Corps concluded that the revised project would still achieve the flood control purpose. 670 F.2d at 573–74.

Crepple does not support the majority opinion's holding. In *Crepple*, the revised project would still achieve the purpose identified in the authorizing statute, and a purpose not identified in that statute would be (at least, partially) abandoned. But, here, Plaintiffs seek to require Defendants to operate the Dam for a new purpose, which is not only not identified in the authorizing statute, but which also counters one of the purposes that *was* identified in the authorizing statute: conserving the Cuyama River's water for identified uses by the residents of the Santa Maria Basin, notwithstanding that such conservation would deleteriously affect steelhead trout.

statute having broad application" did not partially repeal by implication a "specific provision applying to a specific situation"); *see also Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1156 (9th Cir. 2020) ("An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." (citation omitted)). For the reasons stated above, the two statutes are consistent. The clear text, and thus clear expressed Congressional intent, of PL 774 should determine the outcome in this case.

IV.

Plaintiffs seek to force Defendants to spill freshwater from a community's limited, primary water source into the ocean to benefit steelhead trout. The Defendant agencies, including the U.S. Department of the Interior and the Santa Maria Valley Water Conservation District, reject Plaintiffs' reading of the law and argue that PL 774 unambiguously requires the Dam to be operated to maximize the percolation of water conserved from the Cuyama River into the Santa Maria groundwater basin, notwithstanding the foreseen and accepted harm this intended operation would cause the steelhead trout.[15] As I read the law, the Defendant agencies

[15] In September 2020, an Area Manager of Reclamation issued a ten-page, single-spaced memorandum that interprets PL 774 as prohibiting Reclamation from modifying the operations of the Dam to adopt the purpose of fishery releases. Reclamation sits within the U.S. Department of Interior, which was charged with implementing PL 774 and which also supervises in part the administration of the relevant provisions of the ESA, *see* 16 U.S.C. § 1532(15). The district court found it "unnecessary to [defer] formally" to the memorandum's interpretation of PL 774 under the doctrines of either *Chevron v. Natural Resources Defense Council*,

(and the district court) are correct: operating the Dam in the manner Plaintiffs propose is flatly inconsistent with Congress's stated intention in PL 774 and the Secretary's Report.

It may be that today our political community is more concerned with the welfare of endangered species, and the effect of such welfare on the human species, than was Congress in 1954. But even if our society has changed by adopting new values and an understanding of the natural world less centered on certain human needs, and especially if such new perspectives bring into disfavor the expressed aims of old laws, our commitment to the separation of powers must not falter. Congress has the authority to revise the specific and clear policy choice it made in enacting PL 774: that the Cuyama River's water should be conserved for human agricultural, water conservation, and industrial use, even at the loss of some steelhead trout.[16] This court does not have

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467 U.S. 837 (1984), or *Skidmore v. Swift & Company*, 323 U.S. 134 (1944), because after considering "the entire record" the district court "f[ound] no significant support for Plaintiffs' interpretation of the statute." On appeal, the federal Defendants assert that the panel need not decide whether the memorandum is entitled to *Chevron* deference because Congress's expressed intent can be ascertained using traditional tools of statutory construction. I quite agree. But if the phrase "other purposes" creates an ambiguity as to which "purposes" the freshwater can be applied, *Chevron* deference would require assent to the Agencies position so as to require affirmance of the district court judgment.

[16] Again, the majority opinion correctly declines to consider Plaintiffs' state law arguments, raised for the first time on appeal. Accordingly, we express no opinion about whether California state, regional, or local governments have any authority to influence the operation of the Dam, were such entities to determine that the value of conserving water for the human residents of the Santa Maria River Basin

that authority—by design. *See W. Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) ("[B]y vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure . . . that all power [w]ould be derived from the people, . . . that those [e]ntrusted with it should be kept in dependence on the people[,] . . . that those who make our laws would better reflect the diversity of the people they represent . . . and have . . . an intimate sympathy with, the people." (internal quotation marks and citations omitted)). I would have affirmed the district court's order granting summary judgment to Defendants.

should be balanced against the value of facilitating the migration of steelhead trout up the Santa Maria River.