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**From:** Garwin Yip - NOAA Federal <garwin.yip@noaa.gov>  
**Sent:** Friday, February 1, 2019 5:50 PM  
**To:** Cathy Marcinkevage - NOAA Federal  
**Cc:** Barbara Byrne - NOAA Federal; Howard.Brown; Ellrott, Brian; Strange, Erin; Kristin McCleery - NOAA Affiliate  
**Subject:** Re: How to treat SR in the Stanislaus in ROConLTO

I agree...for the most part. Seems to me that from p. 79627 of the 10(j) rule, measures could be required or implemented, but they have to result in no more than de minimus effect on water supply reductions, additional storage releases, or bypass flows associated with the aforementioned third parties. Practically, it would be easier not to impose measures in addition to CCV steelhead, than argue (in court or otherwise) that they meet the de minimus requirement.

Sent from my iPad

On Jan 29, 2019, at 3:59 PM, Cathy Marcinkevage - NOAA Federal <[cathy.marcinkevage@noaa.gov](mailto:cathy.marcinkevage@noaa.gov)> wrote:

Hi Barb --

I haven't seen any traffic in response to this, but for what it's worth, I agree with your assessment.

Cathy

On Tue, Dec 18, 2018 at 3:01 PM Barbara Byrne - NOAA Federal <[barbara.byrne@noaa.gov](mailto:barbara.byrne@noaa.gov)> wrote:

Kristin and I are back-up and lead biologists for the Stanislaus effects in the ROConLTO BiOp. Today, we had some prelim discussion with Reclamation about their effects analysis and how spring-run should be treated. A follow-up was to review the 10(j) rule and the de minimus requirements of the Settlement Act.

My read of the 10(j) rule is that, unless we argue that at least some of the spring-running fish on the Stanislaus are not from the SJRRP (but are, e.g., strays from the Sac basin), we cannot require in the BiOp (or suggest that Reclamation provide in their BA) any measures that would affect water supply, reservoir releases, or hydropower generation. **Does anyone think differently?** See relevant excerpts below:

From Question 3 of the 10(j) FAQ  
at [https://www.westcoast.fisheries.noaa.gov/publications/Central\\_Valley/San%20Joaquin/sanjoaquin\\_10j\\_faq\\_123013.pdf](https://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/San%20Joaquin/sanjoaquin_10j_faq_123013.pdf):

"In the lower San Joaquin River and its tributaries, including the Merced River, downstream from its confluence with the Merced River to Mossdale County Park in San Joaquin County, take of spring-run Chinook salmon is allowed in certain cases that may cause water supply reductions, additional storage releases, or bypass flows on unwilling water diverters. This applies to spring-run Chinook salmon that may occur in the lower San Joaquin River and its tributaries, and is not specifically limited to reintroduced Central Valley spring-run Chinook salmon.

The operations of the Central Valley Project and State Water Project are also covered by the de minimus conditions of the Settlement Act. NOAA Fisheries will adjust the operational requirements of these projects to account for reintroduced spring-run Chinook salmon to insure de minimus: water supply reductions, additional storage releases, or unwilling bypass flows associated with the operations of the Central Valley Project and State Water Project."

From p. 79627 of the 10(j) rule

at: <https://www.westcoast.fisheries.noaa.gov/publications/frn/2013/78fr79622.pdf>

Therefore, ESA consultation and take avoidance requirements for CCV steelhead would apply whether or not CV spring-run Chinook salmon were present. Should NMFS decide to consult on CV spring-run Chinook salmon and avoidance measures were required over and above those required for CCV steelhead, then NMFS would not require or implement these measures, if such measures would result in more than a de minimus impact on water supply reductions, additional storage releases, or bypass flows, on unwilling third parties. This determination would be made on a case by case basis as part of the ESA section 7 or section 10 processes. Take avoidance or minimization measures that would have a de minimus or no effect on water supply reductions, additional storage releases, or bypass flows associated with the aforementioned third parties, could still be required through the ESA section 7 or section 10 processes. Such measures might include best management practices such as sediment containment, in-water work windows, or bank revegetation associated with stream construction activities.

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**Barb Byrne**

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