

1 THOMAS P. SCHLOSSER, WSBA No. 06276
2 THANE D. SOMERVILLE, WSBA No. 31468
3 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE
4 801 Second Avenue, Suite 1115
5 Seattle, Washington 98104-1509
6 Telephone: 206-386-5200
7 Facsimile: 206-386-7322
8 E-Mail: t.schlosser@msaj.com
9 t.somerville@msaj.com
10 *Attorneys for Defendant-Intervenor Hoopa Valley Tribe*

11 PATRICIA A. PROCHASKA, SBN 142161
12 Attorney at Law
13 577 9th Avenue
14 Menlo Park, CA 94025
15 Telephone: 650-562-7060
16 Facsimile: 866-560-1608
17 E-Mail: patprochaska@gmail.com
18 *Local Counsel for Defendant-Intervenor Hoopa Valley Tribe*

19 **IN THE UNITED STATES DISTRICT COURT**
20 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

21 SAN LUIS & DELTA-MENDOTA WATER
22 AUTHORITY and WESTLANDS WATER
23 DISTRICT,

24 Plaintiffs,

25 v.

26 SALLY JEWELL, as Secretary of the
U.S. Department of the Interior; U.S.
DEPARTMENT OF THE INTERIOR;
U.S. BUREAU OF RECLAMATION;
MICHAEL L. CONNOR, as Commissioner,
Bureau of Reclamation, U.S. Department of
the Interior; and DAVID MURILLO, as
Regional Director, Mid-Pacific Region,
Bureau of Reclamation, U.S. Department of
the Interior,

Defendants.

Case No. CV F 13-1232-LJO-GSA

HOOPA VALLEY TRIBE'S RESPONSE IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR TEMPORARY RESTRAINING
ORDER

Judge: Honorable Lawrence J. O'Neill
Hearing Date: TBD
Hearing Time: TBD
Courtroom 4
Action Filed: August 7, 2013

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I. STATEMENT OF FACTS..... 2

II. STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF 6

III. ARGUMENT AND AUTHORITY 7

 A. Plaintiffs Fail to Establish A Likelihood of Irreparable Injury Resulting From the Supplemental Flow Releases. 7

 B. The Balance of Equities/Hardships Tips Sharply In Favor of Reclamation and the Tribe and Sharply Against Plaintiffs and Their Request For Preliminary Injunctive Relief. 10

 C. An Injunction Would Not Be In The Public Interest..... 12

 D. Plaintiffs Fail to Show Likelihood of Success On the Merits. 13

 1. Reclamation Has Broad Authority to Make the Supplemental Releases Under Section 2 of the TRD Central Valley Project Act of 1955..... 13

 2. Plaintiffs’ Claims Regarding Place of Use are Meritless; the State Water Board Has Already Determined That No Amendment to Reclamation’s Water Right Permits Are Necessary..... 18

 3. A Full EIS Is Not Required Here, Especially Where Supplemental Releases Have Occurred Without Incident On Three Prior Occasions..... 19

IV. CONCLUSION. 19

TABLE OF AUTHORITIES

CASES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Alliance for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 7

Blake v. Arnett,
663 F.2d 906, 909 (9th Cir. 1981) 3

Caribbean Marine Servs. Co. v. Baldrige,
844 F.2d 668 (9th Cir. 1988) 7

Credit Bureau Connection, Inc. v. Pardini,
726 F. Supp. 2d 1107 (E.D. Cal. 2010) 7

Flynt Distributing Company, Inc. v. Harvey,
734 F.2d 1389 (9th Cir. 1984) 10

Kenai Peninsula Borough v. State of Alaska,
612 F.2d 1210 (9th Cir. 1980) 16

Parravano v. Babbitt,
70 F.3d 539, 542 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996) 2

Southern California Edison Company v. Lynch,
307 F.3d 794 (9th Cir. 2002) 16

Stop Youth Addition, Inc. v. Lucky Stores, Inc.
950 P.2d 1086 (Cal. 1998) 16

Stormans, Inc. v. Selecky,
586 F.3d 1109 (9th Cir. 2009) 12

United States v. Adair,
723 F.2d 1394 (1984) 3

United States v. Winans,
198 U.S. 371 (1905) 3

W. Watersheds Project v. Bureau of Land Mgmt.,
774 F. Supp. 2d 1089 (D. Nev. 2011) 12

Wayman v. Southard,
23 U.S. 1 (1825) 15

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982) 12

Westlands Water Dist. v. U.S. Department of the Interior,
376 F.3d 853, 867 (9th Cir. 2004) 17

Winter v. Natural Res. Def. Council,
555 U.S. 7 (2008) 1, 6, 7, 10, 19

STATUTES

1 16 U.S.C. §§ 1851-1853 (Oct. 4, 1993)..... 3

2 Pub. L. 84-386, 69 Stat. 719 (1955 Act) 13, 14, 15, 16, 18

OTHER AUTHORITIES

3
4 California Department of Fish and Game, *September 2002 Klamath River Fish-Kill:*
5 *Final Analysis of Contributing Factors and Impacts* (July 2004)..... 4

REGULATIONS

6 40 C.F.R. § 1508.13..... 19

7 40 C.F.R. § 1508.9..... 19

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1 The Hoopa Valley Tribe requests that the Court deny Plaintiffs' Motion for Temporary
2 Restraining Order (ECF Dkt. #14). The United States Bureau of Reclamation's
3 ("Reclamation") decision to gradually release up to 62 thousand acre feet (TAF) of water from
4 Trinity Reservoir to provide preventative flow augmentation nearly 150 miles downstream in
5 the lower Klamath River in August-September 2013 is a necessary and lawful measure to
6 prevent a large scale fish die-off, similar to what occurred in September 2002. The 2002 fish
7 kill, in which at least 60,000 fall-run Chinook salmon died, was devastating to the Hoopa
8 Valley Tribe, effectively halting tribal harvest of fish that year. Since 2002, Reclamation has
9 released supplemental flows from Trinity Reservoir in three separate years (2003, 2004, and
10 2012) where anticipated fish returns and low flow conditions were expected to mimic the
11 conditions present in 2002. In each of those years, salmon were able to migrate through the
12 lower Klamath in late-summer without significant disease or adult mortalities.

13 Plaintiffs have failed to satisfy the onerous burden necessary to obtain preliminary
14 injunctive relief. First, their claims of harm are either speculative or non-existent. No water
15 allocations to Plaintiffs for 2013 will be changed as a result of Reclamation's decision here.
16 Plaintiffs will not "lose" any water that they would have otherwise received in 2013. Their
17 claims of possible harm in a future water year are far too remote and speculative to justify
18 injunctive relief under the standards set forth by the United States Supreme Court in *Winter v.*
19 *Natural Res. Def. Council*, 555 U.S. 7 (2008). Preliminary water allocations for the 2014 water
20 year will not be made for another six months, and those water allocations will be based largely
21 upon conditions that are unknown at the present time, such as winter precipitation, snowpack,
22 and reservoir re-fill, as well as Reclamation's prospective assessment of the needs of various
23 water users and uses for the 2014 water year. Reclamation has determined that its decision to
24 release supplemental flows from available carryover storage is not likely to affect next year's
25 water allocations. *See* Reclamation 2013 Final EA, p. 13. Any claim to the contrary by
26 Plaintiffs is pure speculation and insufficient to justify injunctive relief.

1 Plaintiffs' speculative claims of injury must fail when compared and balanced against
2 the government's legal duty to prevent the possible recurrence of a massive fish die-off in the
3 lower Klamath River. The government has a fiduciary responsibility to protect the fishery
4 resources held in trust for the Hoopa Valley Tribe. Federal, state, and tribal biologists estimate
5 that 272,000 fall-run Chinook salmon are going to return to the lower Klamath river, primarily
6 in August and September 2013. The projected fall Chinook run is the second largest run
7 forecasted for the Trinity River since 1978. This forecast of returning fish is 1.6 times larger
8 than the estimated 2002 run, meaning that 102,000 more fish (than were present in 2002) will
9 be returning to a stressed ecological system caused by extremely dry hydrologic conditions in
10 the Klamath River Basin. Dry hydrologic conditions have produced flow conditions that would
11 be comparable to 2002. An order halting the release of the supplemental flows, which begin
12 August 13, 2013, could result in an environmental tragedy for the Klamath River fish stocks
13 and the members of the Hoopa Valley Tribe who justifiably rely on these fish for their
14 livelihood and sustenance.

15 **I. STATEMENT OF FACTS**

16 The Hoopa Valley Tribe, a sovereign federally-recognized Indian tribe, is located on the
17 Hoopa Valley Reservation, which was set aside and reserved as a permanent homeland for the
18 Tribe by the United States in 1864. Vigil-Masten Declaration ¶ 2. The lower twelve miles of
19 the Trinity River, as well as a stretch of the Klamath River near the confluence with the Trinity
20 River flow through the Hoopa Valley Reservation. *See* Memorandum from John D. Lesly,
21 Solicitor of the Department of the Interior to the Secretary of the Interior, pp. 3-4 (October 4,
22 1993) (hereinafter 1993 Solicitor Opinion). Schlosser Declaration Exh. 1. The principal
23 purpose of the Tribe's Reservation was to set aside sufficient resources of these rivers for the
24 Indians to be self-sufficient and achieve a moderate living based on fish. *See* 1993 Solicitor
25 Opinion 3, 15, 18, 21, *cited with approval*, *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir.
26 1995), *cert. denied*, 518 U.S. 1016 (1996).

1 Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have
2 been the mainstay of the life and culture of the Hoopa Valley Tribe and other Klamath Basin
3 tribes. When the Hoopa Valley Reservation was created, the fishery was “not much less
4 necessary to the existence of the Indians than the atmosphere they breathed.” *Blake v. Arnett*,
5 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).
6 Today, the salmon fishery holds significant commercial and economic value in the Hoopa
7 culture and economies. Tribal subsistence, culture, and economy is dependent upon the
8 continued health of the fishery. The Tribe holds federally-reserved fishing rights in the
9 Klamath and Trinity Rivers, and a federal reserved water right to support the fishery.
10 *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995); *United States v. Adair*, 723 F.2d 1394, 1411
11 (1984). Well-settled law provides that the Indian tribes of the Klamath River Basin (including
12 the Hoopa Valley Tribe) are entitled to 50% of the total available salmon fishery harvest. *See*
13 16 U.S.C. §§ 1851-1853 (delegating to the Secretary of Commerce the authority to set harvest
14 levels in ocean fisheries between the states of Washington, Oregon, and California and the
15 Indian tribes); 1993 Solicitor Opinion at 3, 27 (clarifying that the Indian tribes of the Klamath
16 Basin have a right to 50% of the harvestable surplus, absent interception, of each Klamath
17 River fish run). Adverse impacts to the Klamath and Trinity Rivers and the fishery resource
18 that result from the upstream operations of Reclamation-managed facilities directly impair and
19 injure the Tribe and its sovereign, legal, economic, and cultural interests. As the Solicitor has
20 ruled:

21 The executive orders setting aside what are now the Yurok and Hoopa Valley
22 Reservations also reserved rights to an instream flow of water sufficient to
23 protect the Tribes’ rights to take fish within their reservations. As with the
24 Klamath Tribes, the Yurok and Hoopa Tribes’ water rights include the right to
25 prevent other appropriators from depleting the streams’ waters below a protected
26 level. The Tribes’ rights include the right to certain conditions of water quality
and flow to support all life stages of fish. The Tribes’ fishing right also supports
a water right in off-Reservation areas to the extent necessary to support the
Tribe’s on-Reservation fisheries. . . . The United States has a trust responsibility
to protect tribal trust resources. . . . Reclamation is obligated to ensure that
project operations not interfere with the Tribes’ senior water rights.

1 Memorandum to Regional Director, Bureau of Reclamation from Regional Solicitor, Pacific
2 Southwest Region (July 25, 1995) (citations omitted), Schlosser Declaration Exh. 2 at 6-8.

3 Adult fall-run Chinook salmon migrate into the lower Klamath River and up to the
4 Trinity River and beyond to other streams and tributaries from early August to early November
5 to spawn, with peak migration activity generally occurring in the first half of September.¹ See
6 Final EA², p. 16. In September of 2002, adult Chinook and Coho salmon began dying by the
7 thousands between the mouth of the Klamath River and Blue Creek as they returned to the
8 Klamath River and encountered low river flows. More than 60,000 fall Chinook salmon died.
9 Orcutt Declaration, ¶ 4; Spain Declaration, Dkt. #13-2, ¶ 15. The catastrophic events of
10 September 2002 have been characterized as the largest adult “fish kill” in United States history.
11 Spain Declaration, Dkt. #13-2, ¶ 15. The fish kill devastated the mainstem Klamath and Trinity
12 fall Chinook salmon runs prior to their arrival to the Hoopa Valley Reservation and essentially
13 halted the Hoopa tribal harvests of fish that year. Orcutt Declaration, ¶ 4.

14 The California Department of Fish and Game (“CDFG”) subsequently investigated the
15 causes of the 2002 fish kill in a comprehensive scientific study, entitled *September 2002*
16 *Klamath River Fish-Kill: Final Analysis of Contributing Factors and Impacts* (July 2004)
17 which is available in its entirety at www.pcffa.org/KlamFishKillFactorsDFGReport.pdf. Spain
18 Declaration, Dkt. #13-2, ¶ 16. CDFG’s analysis of the 2002 fish kill concluded that the
19 combination of relatively large fish runs and relatively low flows resulted in the spread of fatal
20 disease. CDFG Report, p. III. Specifically, CDFG found:

21
22 The primary cause of the fish-kill was a disease epizootic from the ubiquitous
23 pathogens ich and columnaris. However, several factors contributed to stressful
24 conditions for fish, which ultimately led to the epizootic. An above average

25 ¹ Peak migration activity may occur earlier in the season this year, due to the
26 predominance of non-Trinity origin fall Chinook salmon, which typically enter the Klamath
River estuary earlier than the Trinity-origin fish. Orcutt Declaration, ¶ 6.

² The 2013 Final EA is attached to the Declaration of Rebecca R. Akroyd, Dkt. 25-3.

1 number of Chinook salmon entered the Klamath River between the last week of
2 August and the first week in September 2002. River flow and the volume of
3 water in the fish-kill area, were atypically low. Combined with the above average
4 run of salmon, these low-flows and river volumes, resulted in high fish densities.
5 Fish passage may have been impeded by low-flow depths over certain riffles or a
6 lack of cues for fish to migrate upstream. Warm water temperatures, which are
7 not unusual in the Klamath River during September, created ideal conditions for
8 pathogens to infect salmon. Presence of a high density of hosts and warm
9 temperatures caused rapid amplification of the pathogens ich and columnaris,
10 which resulted in a fish-kill of over 33,000 adult salmon and steelhead.³

11 Flow is the only controllable factor and tool available in the Klamath Basin
12 (Klamath and Trinity rivers) to manage risks against future epizootics and major
13 adult fish-kills. Increased flows when adult salmon are entering the Klamath
14 River (particularly during low-flow years such as 2002) can improve water
15 temperatures, increase water volume, increase water velocities, improve fish
16 passage, provide migration cues, decrease fish densities and decrease pathogen
17 transmission between fish.

18 *Id.* The United States Fish and Wildlife Service and biologists of the Hoopa Valley and Yurok
19 Tribes also attributed the fish kill to low flows.

20 The death of tens of thousands of adult spawners in 2002 impacted fish runs and
21 harvests in subsequent years. Adult Chinook salmon typically return to spawn in their natal
22 streams at four years of age, with some returning at three years, and some at five years. Spain
23 Declaration, Dkt. #13-2, ¶ 17, fn. 4. Thus, in 2006, record low returns of Klamath fall-run
24 Chinook salmon prompted coast-wide commercial fishing closures, leading the U.S. Secretary
25 of Commerce to formally declare a Commercial Fishery Failure due to a Fishery Resource
26 Disaster. Spain Declaration, Dkt. #13-2, ¶ 17. Ocean salmon seasons in 2005 and 2007 were
also partially restricted for the same Klamath-driven reasons. Spain Declaration, Dkt. #13-2,
¶ 17. Economic damages resulting from the fishing closures in 2005-2007 were estimated at
between \$100 million and \$200 million. Spain Declaration, Dkt. #13-2, ¶ 19.

The Hoopa Valley Tribe has periodically urged supplemental flows from Reclamation
facilities to protect salmon in the Lower Klamath River since the devastating die-off of adult
salmon in 2002. The Tribe presently supports the release of supplemental flows in 2013 as was

³ The CDFG Report noted that the total fish-kill estimate of 34,056 fish, was conservative and DFG analyses indicate actual losses may have been more than double that number. CDFG Report, p. III.

1 previously done by Reclamation in August-September of 2003, 2004, and 2012. Orcutt
2 Declaration, ¶ 4; Kautsky Declaration, ¶ 22.

3 Conditions in the Lower Klamath River have been poor this summer and they continue
4 to degrade. At this time, the USGS gauge labeled “Lower Klamath near Klamath” (KNK) has
5 fallen to 2,460 cfs. Consistent with the pattern for this time of year, flows will continue to
6 decline over the coming weeks. Water temperatures cooler than 22.5° Celsius are suitable for
7 fall Chinook salmon migration in the Klamath River. However, water temperatures in the
8 Lower Klamath have already risen above that level this summer, ranging to 24° Celsius and
9 above. Kautsky Declaration, ¶ 16-17.

10 Of additional concern this year is the predominance of non-Trinity River origin fall
11 Chinook salmon, which typically enter the Klamath River estuary earlier than the Trinity-origin
12 fish. Escapement of both Trinity and non-Trinity River origin fish from the Pacific Ocean to
13 the Klamath River is forecast at 272,000 adults, with a predominance of age 4 (brood year
14 2009) fish. Disease transmission transcends species, sub-basin of origin, or stage of
15 development among the migrating fish of the Klamath Basin. Irrespective of which sub-basin
16 run is stronger, disease may be passed from the more abundant Klamath River fall Chinook
17 (this year) to those of Trinity origin. Orcutt Declaration, ¶ 6. Together, the factors of low
18 water velocity, increased temperatures, high fish populations (far more than were present in
19 2002), early migration, and slower passage through the Lower Klamath River, create conditions
20 for epidemic disease in the migrating fish in August-September 2013. Orcutt Declaration, ¶ 7.

21 **II. STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF**

22 Preliminary injunctive relief is “an extraordinary and drastic remedy that may only be
23 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural*
24 *Res. Def. Council*, 555 U.S. 7, 22 (2008). A preliminary injunction is “never awarded as of
25 right.” *Id.* at 24. In order to obtain preliminary injunctive relief a plaintiff “must establish that
26 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence

1 of preliminary injunctive relief, that the balance of equities tips in his favor, and that an
2 injunction is in the public interest.” *Winter*, 555 U.S. at 20. In *Winter*, the Supreme Court
3 clarified that a “possibility of irreparable harm” is not sufficient to obtain preliminary
4 injunctive relief. *Id.* at 21-22. “[A] preliminary injunction will not be issued simply to prevent
5 the possibility of some remote future injury.” *Id.* at 22. Rather, “under *Winter*, plaintiffs must
6 establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary
7 injunction.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)
8 (emphasis in the original). Provided the other *Winter* factors are met, preliminary injunctive
9 relief also may be issued if the balance of hardships tips sharply in plaintiffs’ favor, and they
10 have raised serious questions going to the merits. The same standards apply to temporary
11 restraining orders and to preliminary injunctions. *Credit Bureau Connection, Inc. v. Pardini*,
12 726 F. Supp. 2d 1107, 1114 (E.D. Cal. 2010).

13 **III. ARGUMENT AND AUTHORITY**

14 A. Plaintiffs Fail to Establish A Likelihood of Irreparable Injury Resulting From
15 the Supplemental Flow Releases.

16 To establish that a TRO is warranted, Plaintiffs’ burden is onerous: Plaintiffs must
17 show that they will likely suffer irreparable injury if a TRO does not issue and “must
18 demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief.”
19 *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). But Plaintiffs
20 have not shown – and cannot show – that they will suffer irreparable harm in the absence of a
21 temporary restraining order. Plaintiffs’ assertions of harm are highly speculative and grossly
22 overstate any effect that the supplemental flow releases could possibly have on their current
23 and future water deliveries. “Speculative injury does not constitute irreparable injury sufficient
24 to warrant granting a preliminary injunction.” *Baldrige*, 844 F.2d at 674.

25 Reclamation’s Final EA (August 2013) makes clear that the flow releases will have no
26 effect whatsoever on ongoing water deliveries to plaintiffs during the 2013 water year. As

1 stated in the Final EA, “providing up to 62 TAF of supplemental water in the lower Klamath
2 River as a preventative measure in the late summer of 2013 would not affect water supply
3 allocations managed as part of the CVP in 2013, or water operations within the Central Valley.
4 Water allocations for irrigation and M&I deliveries have already been determined for 2013, and
5 the supplemental water would not affect the projected volume of water to be exported to the
6 Sacramento Basin in 2013.” Final EA, at 13. Regardless of these planned flows, plaintiffs will
7 continue to receive all the water from their 2013 allocation. Thus, plaintiffs cannot establish
8 the required showing of immediate injury.

9 Plaintiffs contend that “their constituents will suffer the immediate loss of the increased
10 contract allocation” if “Defendants make the Excess Releases to the Trinity River instead of
11 restoring the south-of-Delta CVP agricultural water service allocation to 25%.” Dkt. 28, p. 8.⁴
12 But this is a fallacy. There is no basis for Plaintiffs to expect that Reclamation would alter the
13 established 2013 water allocations at this late date for the purpose of providing excess water to
14 Plaintiffs, above and beyond the previously established allocations. While Plaintiffs might
15 want additional water this year, they have no legal entitlement to, nor reasonable hope of
16 obtaining, such a result. Reclamation’s final 2013 water year allocations for Plaintiffs’
17 deliveries were made in March 2013, well before Reclamation’s decision to release the
18 supplemental flows. The choice now being made by Reclamation is not between releasing
19 water for fish and releasing water for irrigation. If Reclamation does not release the
20 supplemental flows, that water would simply remain in Trinity Reservoir as additional
21 carryover storage and be reallocated among the panoply of various water users and uses in
22 2014 and beyond. In other words, Plaintiffs’ allocation of water for 2013 would remain

23
24 ⁴ Plaintiffs’ characterization of their water allocation as a 25% or 20% allocation is
25 misleading. A “20% allocation” means that Plaintiffs’ constituents, as a whole, are receiving
26 20% of the maximum amount that they could possibly receive under their contracts. The Tribe
has previously argued to Reclamation that the maximum contract amounts are set absurdly
high, so as to create unrealistic expectations among the irrigators about their entitlement to
water each year.

1 unchanged even if these challenged flows were not released. While there is no dispute that
2 Plaintiffs and their constituents would like more water, there is absolutely no evidence to
3 suggest that Plaintiffs would actually receive more water in 2013 absent the supplemental
4 fishery releases challenged here. In fact, Reclamation has affirmatively stated that Plaintiffs
5 would not receive more water. *See* Final EA, p. 13 (stating “water allocations for irrigation and
6 M&I deliveries have already been determined for 2013, and the supplemental water would not
7 affect the projected volume of water to be exported to the Sacramento River Basin in 2013”).
8 Plaintiffs’ claim of injury fails.

9 Plaintiffs’ claims of remote, future harm, e.g., the possibility that future water year
10 allocations might be affected due to the challenged supplemental flows, are entirely speculative
11 and insufficient to support the drastic remedy of preliminary injunctive relief. In fact, plaintiffs
12 cannot establish that implementation of the supplemental flows will result in any impacts on
13 future water deliveries. Water allocations are dependent on a number of factors including,
14 significantly here, the amount of precipitation, snowpack, and reservoir refill that occurs during
15 winter months. 2014 water year allocations will also depend on Reclamation’s prospective
16 assessment of the needs of various water users and uses for the 2014 water year. Due to the
17 uncertainty inherent in predicting the weather, rainfall, snowpack, and re-fill in future months,
18 as well as the anticipated needs of water users and uses in the system, it is impossible for
19 plaintiffs to establish that they will suffer any harm in future water years as a result of the
20 planned releases in late summer 2013.⁵ Nor is it certain that, if the reservoir does not re-fill
21 completely for 2014, Reclamation would reduce plaintiffs’ allocations to a level below that
22 which would have occurred absent the supplemental flows. Plaintiffs have no idea what their
23 allocations will be in 2014, and no evidence that they will be less as a result of the
24 supplemental releases challenged here. Reclamation determined that the “water allocations are

25 ⁵ Plaintiffs’ expressed concern with creating a “hole” in the Trinity Reservoir due to the
26 supplemental flow releases rings hollow when Plaintiffs in the same breath suggest that the
water at issue should simply be reallocated and delivered to Plaintiffs’ constituents this year.

1 not likely to be affected by implementation of the proposed action.” Final EA, p. 13. Plaintiffs
2 fail to produce sufficient evidence to contradict this assessment or to warrant judicial
3 interference with Reclamation’s determination at this stage.

4 Equitable injunctive relief is further inappropriate where plaintiffs have an adequate
5 remedy at law. *Flynt Distributing Company, Inc. v. Harvey*, 734 F.2d 1389, 1396 (9th Cir.
6 1984). Here, plaintiffs complain that Reclamation’s allocation of flows has or will breach
7 contractual obligations owed to plaintiffs. If that is the case, plaintiffs have an available and
8 adequate remedy arising under their contracts, which preclude the availability of equitable
9 injunctive relief here.

10 B. The Balance of Equities/Hardships Tips Sharply In Favor of Reclamation and
11 the Tribe and Sharply Against Plaintiffs and Their Request For Preliminary
12 Injunctive Relief.

13 In deciding whether to grant a TRO, the Court “must balance the competing claims of
14 injury and must consider the effect on each party of the granting or withholding of the
15 requested relief.” *Winter*, 555 U.S. at 24. As noted above, Plaintiffs will suffer no harm now
16 as a result of Reclamation’s decision. Nor can plaintiffs establish that they will suffer any harm
17 in 2014 as a result of Reclamation’s decision. In contrast, the consequences of replicating the
18 conditions associated with the massive 2002 fish kill would be catastrophic to the Hoopa
19 Valley Tribe and the fishery upon which it depends. Vigil-Masten Declaration, ¶ 5.

20 As discussed in Section I above, scientific analysis of the 2002 fish kill concluded that
21 the combination of relatively large fish runs and relatively low flows resulted in the spread of
22 fatal disease. Reclamation’s August 2013 Finding of No Significant Impact (FONSI) reports
23 that 102,000 more fall-run Chinook are expected to return to the Klamath River in late summer
24 2013 than estimated in 2002. FONSI, p. 1. Low flows and rising water temperatures are
25 creating conditions that could easily replicate or exceed the adverse conditions that resulted in
26 the 2002 fish kill. Orcutt Declaration, ¶ 5-7; Final EA, at 1 (“Fish biologists who work in the
basin are again concerned that dry hydrologic conditions in the basin, and the above average

1 expected run size, could be conducive to a disease problem similar to the one experienced in
2 2002”). Letters of the Pacific Fisheries Management Council and the Trinity Management
3 Council corroborate those experts’ concerns. Schlosser Declaration, Exhs. 3, 4.

4 Since 2002, based on the scientific analysis of conditions that caused the fish-kill and
5 scientific recommendations resulting from the analysis, Reclamation has on three separate
6 occasions released supplemental flows for the express purpose of avoiding replication of the
7 conditions in the lower Klamath River that caused the 2002 fish-kill. In all three years, 2003,
8 2004, and 2012, “the sustained higher releases from mid-August to mid-September . . .
9 coincided with no significant disease or adult mortalities.” Final EA, p. 18. Kautsky
10 Declaration, ¶ 19-21. Although plaintiffs did not challenge the supplemental releases in any of
11 those prior years, they now claim that Reclamation must withhold the needed water in the
12 Trinity Reservoir, placing the fishery at risk of another massive die-off. The Court should
13 refuse Plaintiffs’ request.

14 Replication of the 2002 fish kill would be devastating to the Hoopa Valley Tribe. In
15 2002, the fish kill essentially halted the Hoopa tribal harvest of fish that year. Orcutt
16 Declaration, at ¶ 4. The CDFG Report confirmed that the salmon die-off had a direct and
17 significant impact on the sport and tribal fish harvest. CDFG Report, at p. 156. According to
18 the CDFG Report, in 2002, “[h]arvest of adult Chinook in the Hoopa Tribal net fishery was
19 only 11.6% (1,168/10,080) of the allotted quota. *Id.* In addition, a massive die-off of adult
20 salmon not only affects the fishery in the year of the die-off, but also in subsequent years, due
21 to the loss of adult spawners. *See* Final EA, p. 18 (“A fish die-off of the magnitude
22 experienced in 2002 has obvious effects to the returning fish run, but also can affect the age
23 class structure of salmon populations for a number of years. Also, the consequences of a fish
24 die-off would include potentially preventing the TRRP from meeting natural fall-run Chinook
25 salmon escapement goals.”). *See also* Spain Declaration, Dkt. #13-2, ¶ 17.

1 Plaintiffs argue that preliminary injunctive relief is necessary, because the supplemental
2 flow releases will be completed by the end of September 2013, and before this case can be
3 adjudicated on the merits. But likewise, the supplemental flow releases cannot withstand any
4 delays resulting from the grant of temporary injunctive relief. The flow releases are set for
5 mid-August through September in order to coincide with the peak return of fall-run Chinook.
6 Any delays in the flow regime caused by a grant of temporary injunctive relief would
7 effectively preclude the proposed flow augmentation program for this year, placing the fate of
8 tens of thousands of Chinook salmon at risk of death. This result would not only be an
9 environmental tragedy, but also a tragedy for the Hoopa Valley Tribe and its members who rely
10 on the fishery. The balance of equities strongly favors the Tribe and Reclamation.

11 C. An Injunction Would Not Be In The Public Interest

12 The public interest favors denial of Plaintiffs' motion. "In exercising their sound
13 discretion, courts of equity should pay particular regard for the public consequences in
14 employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S.
15 305, 312 (1982). The public interest is an important factor to weigh in deciding whether courts
16 should grant preliminary injunctions. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th
17 Cir. 2009) ("If, however, the impact of an injunction reaches beyond the parties, carrying with
18 it a potential for public consequences, the public interest will be relevant to whether the district
19 court grants the preliminary injunction"). In this case, the public interest will not be served if
20 the proposed flow augmentation is enjoined. In fact, the injunctive relief requested by
21 Plaintiffs would place the public's interest in protection of the Klamath fishery at great peril.

22 The public, including the federal government, the States of California and Oregon, the
23 Hoopa Valley and Yurok Tribes and tribal fishermen, sport and recreational fishermen, as well
24 as citizens interested in the preservation and propagation of fish stocks, have a strong interest in
25 the government taking necessary precautions to ensure fish-kill conditions are not replicated in
26 the Klamath River. The federal, state, and tribal governments have invested many millions of

1 dollars and countless resources in an effort to preserve this imperiled fishery. *W. Watersheds*
2 *Project v. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089, 1103-04 (D. Nev. 2011) (denying
3 preliminary injunction, in part, because it would be contrary to federal and state policy). Tribal
4 fishermen rely on these fish for their basic livelihood and sustenance. Non-Indian fishermen
5 also rely on Klamath stocks for their economic livelihood. The 2002 fish kill resulted in wide-
6 spread economic losses not only in 2002, but also in 2005, 2006, and 2007. Spain Declaration,
7 Dkt. #13-2, ¶¶ 17-19. These losses prompted fishery disaster declarations in the States of
8 Oregon and California *Id.* Taking action to prevent a recurrence of this environmental and
9 economic disaster far outweighs the unsupported and speculative claims of harm put forward
10 by Plaintiffs. The public interest supports protection of the fishery.

11 D. Plaintiffs Fail to Show Likelihood of Success On the Merits

12 1. Reclamation Has Broad Authority to Make the Supplemental Releases
13 Under Section 2 of the TRD Central Valley Project Act of 1955.

14 Reclamation's release of supplemental flows to protect the fishery in the Lower
15 Klamath River is authorized by Section 2 of the TRD Central Valley Project Act of 1955 (P.L.
16 84-386). The 1955 Act authorized the Secretary of the Interior to construct, operate, and
17 maintain the Trinity River division. Section 2 of the 1955 Act states, in relevant part, "the
18 Secretary is authorized and directed to adopt appropriate measures to insure the preservation
19 and propagation of fish and wildlife" Section 2, which has never been repealed by any
20 subsequent Act of Congress, provides Reclamation with broad discretionary authority to take
21 appropriate measures to preserve and propagate the fishery. Reclamation cited the 1955 Act in
22 its Final EA as the statutory basis of authority for its action here. Final EA, at p. 2.

23 The Act of August 12, 1955, Public Law 84-386, 69 Stat. 719 (1955 Act) authorized
24 construction and operation of the CVP's Trinity River Division (TRD). In its natural course,
25 the Trinity River is a tributary of the Klamath River, which empties into the Pacific Ocean.
26 Because the TRD is a trans-basin diversion facility, Congress was specially attentive to the

1 interests of the Klamath-Trinity basin. Accordingly, although section 2 of the 1955 Act
2 requires integration of the TRD with existing and future units of the CVP to “effectuate the
3 fullest, most beneficial, and most economic utilization of the water resources hereby made
4 available,” that instruction is subject to two distinct provisos.

5 *Provided* That the Secretary is authorized and directed to adopt
6 appropriate measures to insure the preservation and propagation of fish
7 and wildlife, including, but not limited to, the maintenance of the flow of
8 the Trinity River below the diversion point at not less than one hundred
9 and fifty cubic feet per second for the months of July through November
10 . . . unless the Secretary and the California Fish and Game Commission
determine and agree that lesser flows would be adequate for maintenance
of fish and wildlife and propagation thereof . . . : *Provided further*, That
not less than 50,000 acre-feet shall be released annually from the Trinity
Reservoir and made available to Humboldt County and downstream
water users.

11 The first proviso qualifies the integration of the TRD into the CVP with a direction to
12 the Secretary to determine needed releases from the TRD to the Trinity River for the
13 preservation and propagation of Trinity River basin fish and wildlife, subject to a statutory
14 minimum release. The second proviso provides that “not less than 50,000 acre-feet shall be
15 released annually from the Trinity Reservoir and made available to Humboldt County and
16 downstream water users.” The State of California issued a number of permits associated with
17 the TRD in 1959.⁶ Among the conditions established by the state in the permits was Condition
18 8 that applied to the first proviso and Condition 9 that applied to the second proviso of the 1955
19 Act.

20 The Solicitor explained the significance of the 1955 Act’s provisos in a memorandum
21 opinion from the Solicitor to the Assistant Secretary, Land and Water Resources (1979
22 Opinion). Schlosser Declaration, Exh. 8. In that opinion, the Solicitor explained that the
23 TRD’s authorization in the 1955 Act created an exception to the general integration of CVP
24 functions:

25 _____
26 ⁶ State Water Permits under Application Nos. 5627, 15374, 15376, 16767 and 16768
(September 16, 1959).

1 On occasion the Congress has specifically limited the Secretary's
2 discretion in meeting the general CVP priorities. For example, in
3 authorizing the Trinity River Division of the CVP in 1955, Congress
4 specifically provided that in-basin flows (in excess of a statutorily
5 prescribed minimum) determined by the Secretary to be necessary to
6 meet in-basin needs take precedence over needs to be served by out-of-
7 basin diversion. See Pub. L. No. 84-386, §2. In that case, Congress'
8 usual direction that the Trinity River Division be integrated into the
9 overall CVP, set forth at the beginning of section 2, is expressly
10 modified by and made subject to the provisos that follow giving specific
11 direction to the Secretary regarding in-basin needs.

12 1979 Opinion at 3-4. Thus, the 1979 Opinion clarifies that the 1955 Act does not require
13 management of the TRD to maximize benefits to the Central Valley. Rather, it states that the
14 provisos in section 2 establish a priority for in-basin uses of TRD water over diversions to the
15 Central Valley.

16 The substantive enactment in section 2 of the 1955 Act is the instruction that the TRD
17 be integrated into the CVP. The provisos except from that instruction the water that Congress
18 allocated in the two provisos for the instream fishery needs of the Trinity River fishery and the
19 mandate to release water from the TRD and make it available to Humboldt County and
20 downstream water users.

21 The second proviso is not an exception, limitation, or some other qualification on the
22 first proviso in section 2 of the 1955 Act. The case law uniformly concludes that provisos are
23 "generally intended to restrain the enacting clause, and to except something which would
24 otherwise have been within it, or, in some measure, to modify the enacting clause." *Wayman v.*
25 *Southard*, 23 U.S. 1, 30 (1825). The object of the two provisos in the 1955 Act is to except
26 from the integration instruction in the "enacting clause" any use of water for the Trinity River
mainstem fishery and water made available to Humboldt County and downstream water users.

Plaintiffs discuss the 1955 Act only briefly in their memorandum. Dkt. #28, p. 12.
Their discussion provides nothing but their own unsupported interpretation that section
3406(b)(23) of the CVPIA and the 2000 ROD repealed the broad authority provided by the
1955 Act. Plaintiffs cite no text from the CVPIA, any other statute, or the 2000 ROD that

1 supports their interpretation, as none exists. Plaintiffs cite no legislative history or other
2 document that indicates the authority of the 1955 Act has been abrogated, as none exists.

3 Well established canons of statutory construction reject Plaintiffs' argument of "repeal
4 by implication." Repeals by implication are "heavily disfavored." *Southern California Edison*
5 *Company v. Lynch*, 307 F.3d 794, 810 (9th Cir. 2002). "A finding of implied repeal must be
6 based on a finding that the legislative body actually formulated the intent to repeal the earlier
7 enactment but somehow failed to carry out that intent." *Kenai Peninsula Borough v. State of*
8 *Alaska*, 612 F.2d 1210, 1214 (9th Cir. 1980) ("There can be no implied repeal unless the
9 intention of the legislative body to repeal is clear.").⁷ In *Lynch*, the Court found that "the
10 legislative history here demonstrates no such intent." 307 F.3d at 810. The same is true here.
11 Congress has taken no action to alter or constrain Reclamation's broad authority to protect fish
12 in the lower Klamath River. Plaintiffs offer no authority to support their position that Congress
13 abrogated the authority of the 1955 Act. Thus, Plaintiffs claim is unlikely to succeed.

14 Plaintiffs' contention that the releases are inconsistent with section 3406(b)(23) of the
15 CVPIA and the 2000 ROD is misguided. The 2000 ROD was crafted pursuant to section
16 3406(b)(23) of the CVPIA to mitigate impacts on the Trinity River fishery. The ROD was not
17 designed to address impacts to fish arising in the lower Klamath River. The ROD itself makes
18 clear that its purpose was to "require rehabilitating the [Trinity] river itself, restoring the
19 attributes that produce a healthy, functioning alluvial river system." ROD at 2. This included
20 "characteristics modeled based on pre-dam Trinity River channel morphology
21 characteristics[,] . . . removal of riparian berms at 44 project areas, the establishment of side
22 channel habitat at 3 sites and the use of increased flow releases to maintain habitat and promote

23 ⁷ The Supreme Court of California provided its view on repeals by implication in *Stop*
24 *Youth Addition, Inc. v. Lucky Stores, Inc.* 950 P.2d 1086, 1096 (Cal. 1998) ("The law shuns
25 repeals by implication. In fact, the presumption against implied repeal is so strong that, to
26 overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so
inconsistent that the two cannot have concurrent operation. The courts are bound, if possible,
to maintain the integrity of both statutes if the two may stand together." (internal citations,
brackets and quotation marks omitted)).

1 the creation of alternate bar sequences.” *Id.* at 13. These actions were focused on the Trinity
2 River just below Lewiston Dam and not the lower Klamath River conditions, approximately
3 150 miles downstream. For example, the Draft Environmental Impact Statement for the ROD
4 stated:

5 The Preferred Alternative would provide additional flows that would contribute
6 to dilution of Klamath River water that can be of poor quality. During the late
7 summer and early fall when flows are equal to 1995 conditions, there would be
no significant differences in water quality.

8 Environmental Impact Statement/Environmental Impact Report: Trinity River Fishery
9 Restoration (Oct. 1999) at 3-147. Schlosser Declaration, Exh. 5.

10 Significantly, the DEIS for the Trinity River Restoration Program (TRRP) did not
11 address impacts to fish arising in the mainstem Klamath River, which result largely from
12 upstream diversions, including Reclamation’s Klamath Irrigation Project. The TRRP and the
13 ROD were not expected or designed to address those issues. Ironically, in earlier litigation,
14 these same plaintiffs criticized the Trinity ROD EIS as unreasonably narrow in geographic
15 scope. The Court rejected that contention and approved the scope:

16 In specifically limiting its goals to the Trinity River mainstem, the Statement of
17 Purpose and Need does not follow the letter of the statute. However, this does
18 not make the Statement of Purpose and Need “arbitrary or capricious” so as to
19 invalidate it under NEPA. Restoring the fishery in the mainstem is a central,
20 primary part of restoring the fishery in the basin as a whole. The federal
agencies were within their discretion in focusing the EIS on mainstem
rehabilitation as a part of promoting fishery basin-wide.

21 *Westlands Water Dist. v. U.S. Department of the Interior*, 376 F.3d 853, 867 (9th Cir. 2004)
22 (citations omitted).

23 The flow releases at issue here are intended to improve conditions in the lower Klamath
24 River. While some fish entering the Klamath River will migrate to, and spawn in, the Trinity
25 River, non-Trinity origin fish are expected to predominate this year. Orcutt Declaration, ¶ 6.
26 By focusing attention on the ROD, which was developed to mitigate impacts on the mainstem

1 Trinity River, particularly in the area above the confluence of the North Fork of the Trinity
2 River,⁸ Plaintiffs conveniently ignore the broader authority to protect fish, including fish in the
3 Lower Klamath River, which Reclamation retains under the 1955 Act. Plaintiffs also ignore
4 Reclamation's trust obligation under federal law to protect the Klamath Basin tribes' rights to a
5 moderate livelihood based upon taking fish.

6 2. Plaintiffs' Claims Regarding Place of Use are Meritless; the State Water
7 Board Has Already Determined That No Amendment to Reclamation's
8 Water Right Permits Are Necessary.

9 In the 2012 water year, Reclamation released supplemental flows to protect the late-
10 summer fish migration in the Lower Klamath River. Prior to doing so, Reclamation applied to
11 the State of California's Water Resources Control Board (State Water Board) for permission to
12 "add the lower Trinity and Klamath Rivers to the permitted place of use and dedicate any
13 released water to instream uses." See Schlosser Declaration, Exh. 6 (August 10, 2012 Water
14 Board letter). The State Water Board responded by letter dated August 10, 2012 and informed
15 Reclamation that:

16 [The State Water Board Division of Water Rights] staff does not believe approval
17 of the subject petitions is required in order for Reclamation to bypass and/or
18 release water this summer.

19 As the operator of Trinity Dam, Reclamation may bypass water without a change
20 approval, and may release water for various purposes that do not require State
21 Water Board approval. Examples of these purposes include releases for dam
22 safety or maintenance, releases made to satisfy nonconsumptive cultural resource
23 needs, or releases made to improve instream conditions for the benefit of aquatic
24 resources.

25 Schlosser Declaration, Exh. 6.

26 On October 4, 2012, Reclamation responded to the State Water Board, withdrawing its
27 petitions to temporarily modify the fish and wildlife enhancement place of use for Trinity
28 Reservoir water and stating: "Your letter dated August 10, 2012 has confirmed Reclamation's

⁸ Approximately Trinity River at river miles 72-111.

1 position that a change in place of use is not required for Reclamation to release water stored in
2 Trinity Reservoir for fish and wildlife enhancement purposes downstream of Trinity Dam.”
3 Schlosser Declaration, Exh. 7 (October 4, 2012 Reclamation letter). Plaintiffs fail to mention
4 this prior determination in their memorandum. Their claims are not likely to succeed.

5 3. A Full EIS Is Not Required Here, Especially Where Supplemental
6 Releases Have Occurred Without Incident On Three Prior Occasions.

7 Under NEPA, an agency is not required to prepare a full environmental impact
8 statement (EIS) if the agency determines – based on a shorter environmental assessment (EA) –
9 that the proposed action will not have a significant impact on the environment. *Winter v.*
10 *Natural Resources Defense Council, Inc.*, 555 U.S. 7, 16 (2008); 40 C.F.R. § 1508.9(a),
11 1508.13. Here, Reclamation prepared an EA in conformance with NEPA and issued a FONSI,
12 which determined that the supplemental releases would not have a significant impact on the
13 environment. Plaintiffs argue a full EIS is required. They are wrong.

14 Because this issue is fully addressed by other parties, we omit it here.

15 **IV. CONCLUSION.**

16 The Hoopa Valley Tribe respectfully requests that the Court deny Plaintiffs’ motion for
17 a temporary restraining order.

18 Respectfully submitted this 13th day of August, 2013.

19 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

20
21 /s/ Thomas P. Schlosser
22 Thomas P. Schlosser
23 Attorneys for Defendant-Intervenor Hoopa Valley Tribe
24