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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, et al.,

Defendants,

HOOPA VALLEY TRIBE; PACIFIC COAST
FEDERATION OF FISHERMEN'S
ASSOCIATIONS; INSTITUTE FOR
FISHERIES RESOURCES; and YUROK
TRIBE,

Defendant-Intervenors.

Case No.: 1:13-CV-01232-LJO-GSA

**HOOPA VALLEY TRIBE'S RESPONSE
AND CROSS-MOTION FOR SUMMARY
JUDGMENT**

Judge: Hon. Lawrence J. O'Neill

Date: No Hearing Set

Time: No Hearing Set

Crtrm.: No Hearing Set

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1 Defendant-Intervenor Hoopa Valley Tribe hereby responds in opposition to Plaintiffs'
2 motion for summary judgment and moves for summary judgment in its favor.

3 **I. INTRODUCTION**

4 The Hoopa Valley Tribe, a sovereign federally-recognized Indian tribe, is located on the
5 Hoopa Valley Reservation, which was established for the Tribe by the United States in 1864.
6 *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995). The lower twelve miles of the Trinity
7 River, and a stretch of the Klamath River near the Trinity confluence, flow through the
8 Reservation. The principal purpose of the Tribe's Reservation was to set aside sufficient
9 resources of these rivers for the Indians to be self-sufficient and achieve a moderate living
10 based on fish. Memorandum from John D. Leshy (M-36979), Solicitor of the Department of
11 the Interior to the Secretary of the Interior (Oct. 4, 1993), pp. 3, 15, 18, 21 (1993 Solicitor's
12 Opinion), *cited with approval*, *Parravano*, 70 F.3d at 542. *See* Dkt. #44, Exh. 1.

13 Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have
14 been the mainstay of the life, culture, and economic livelihood of the Tribe. *Parravano*, 70
15 F.3d at 542. When the Hoopa Valley Reservation was created, the fishery was "not much less
16 necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett*,
17 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).
18 The Tribe holds federally-reserved fishing rights in the Klamath and Trinity Rivers, and
19 federally-reserved water rights to support the fishery. *Parravano*, 70 F.3d at 544-46; *United*
20 *States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1984). The United States, as trustee for the Tribe,
21 has a responsibility to protect the Tribe's rights and resources. *Klamath Water Users Ass'n v.*
22 *Patterson*, 204 F.3d 1206, 1213 (9th Cir. 2000).

23 In September 2002, tens of thousands of fall-run Chinook salmon died in the lower-
24 Klamath River when unusually low flows allowed a severe disease outbreak. This effectively
25 halted tribal harvest of fish that year and affected harvests in subsequent years. AR2372. Since
26 2002, the Secretary has scheduled extra releases of water from Trinity Reservoir in four

1 separate years (2003, 2004, 2012, and 2013) when fishery managers and scientists concluded
2 that fish returns and low flow conditions were expected to duplicate the conditions present in
3 2002. AR16. In each of those years, salmon migrated through the lower-Klamath in late-
4 summer without significant disease or adult mortalities. AR16. Those flow releases were
5 lawful to protect and preserve the Tribe's fishery trust resources.

6 **II. ARGUMENT AND AUTHORITY**

7 **A. The Secretary's Action Did Not Violate CVPIA Section 3406(b)(23).**

8 Plaintiffs' primary argument is that the Secretary's releases of water from the TRD in
9 late summers 2012 and 2013, intended to prevent replication of fish-kill conditions in the lower
10 Klamath River, violate CVPIA section 3406(b)(23). Plaintiffs' focus on section 3406(b)(23) is
11 misplaced, because the releases are authorized by Section 2 of the TRD Central Valley Project
12 Act of 1955 (P.L. 84-386) (the "1955 Act"), discussed in Section II(C) below, which broadly
13 authorizes measures to preserve and propagate fish and wildlife. AR4249. Neither section
14 3406(b)(23) nor any other provision of law has repealed or amended the Secretary's authority
15 and trust responsibility to release TRD water for the "preservation and propagation" of fish
16 transiting the lower Klamath River. Congress has not limited the Secretary's authority and
17 trust responsibility to take measures to preserve fish, which are trust resources, in the lower-
18 Klamath. *Patterson*, 204 F.3d at 1213 (9th Cir. 2000); *Parravano*, 70 F.3d at 546-47 (9th Cir.
19 1995); *Joint Board of Control v. United States*, 832 F.2d 1127, 1131-32 (9th Cir. 1987).

20 **B. The Trinity River ROD, Which Adopts Recommendations of the Trinity**
21 **River Flow Study, Does Not Apply to, or Alter the Secretary's Authority to**
22 **Preserve and Protect Trust Resources in, the Lower Klamath River.**

23 In 1984, Congress enacted Public Law 98-541, directing the Secretary to formulate and
24 implement a program to restore the Trinity River Basin's fish and wildlife populations to pre-
25 TRD levels. P.L. 98-541, Section 2(a) (Oct. 24, 1984) (the "1984 Act"). Congress directed the
26 program to "(A) rehabilitate fish habitats in the Trinity River between Lewiston Dam and

1 Weitchpec; [and] (B) rehabilitate fish habitats in tributaries of such river below Lewiston Dam
2 and in the south fork of such river.” *Id.* The subsequent mandates in CVPIA section
3 3406(b)(23) were enacted “to meet the fishery restoration goals of the [1984 Act].” AR4237.

4 The Trinity River ROD (“ROD”), executed in 2000, adopted recommendations found in
5 the Trinity Flow Study, which were designed to restore physical fishery habitat in the mainstem
6 Trinity River pursuant to Congress’ direction in the 1984 Act and the CVPIA. AR3010. The
7 Flow Study, jointly authored by the United States Fish and Wildlife Service and the Hoopa
8 Valley Tribe, was plainly focused on habitat restoration in the mainstem Trinity River, and
9 primarily in the areas between the North Fork Trinity River and Lewiston Dam. AR3978
10 (summarizing recommendations for “rehabilitation of the mainstem Trinity River and
11 “restoration and maintenance of its fishery resources”); AR3979 (describing flow release that
12 provides the “greatest amount of microhabitat in the mainstem Trinity River from Lewiston
13 Dam to Weitchpec”); AR3980 (explaining that “recommended releases focus on this segment
14 [above the North Fork Trinity River] because it is most affected by releases from Lewiston
15 Dam”); AR3986-3995 (describing flow releases that provide optimal temperatures “throughout
16 the mainstem”); AR4016 (recommendations for sediment management between Lewiston Dam
17 and North Fork Trinity River confluence); AR4019-4023 (recommendations for channel
18 rehabilitation between Lewiston Dam and North Fork Trinity confluence). Recommendations
19 developed in the Flow Study pursuant to Congressional direction in the CVPIA, and adopted in
20 the ROD, do not address conditions in the lower Klamath River.¹ AR3017. The Flow Study
21 and the ROD “focus on the Trinity River mainstem and Trinity Basin.” *Id.*

22 Prior to construction of the TRD, the Trinity River was a “dynamic alluvial river,” in
23 which plentiful salmon spawning and rearing habitat existed. AR3735. Regulation of flows,
24

25 ¹ Similarly, the DEIS for the Trinity River Restoration Program (TRRP) did not address
26 impacts to fish in the mainstem Klamath River, because the TRRP and ROD were not designed
to address those issues.

1 resulting from the TRD, destroyed the alluvial features and limited both the quantity and
2 quality of salmon habitat in the mainstem Trinity. *Id.* Through the Trinity Flow Study,
3 scientists analyzed the fundamental attributes of an alluvial river and how those attributes could
4 be restored (at least, in part) through carefully managed flow releases. AR3737. The ultimate
5 goal was to replicate flow patterns which would help recover the alluvial river channel
6 morphology and restore fish habitat in the mainstem Trinity. *Id.*²

7 The Trinity Flow Study explains: “Rehabilitation of the mainstem Trinity River can best
8 be achieved by restoring processes that provided abundant complex instream habitat prior to
9 construction and operation of the TRD.” AR3738. Scientists recommended flows to achieve
10 three primary flow-related management objectives: (1) releases to provide suitable salmonid
11 spawning and rearing habitat; (2) releases to mimic the spring snowmelt hydrograph; and (3)
12 releases to meet appropriate water-temperature objectives for holding/spawning adult
13 salmonids and outmigrating salmonid smolts. AR3738-39. The study recommended releases
14 from the TRD “that would achieve these management objectives.” AR3979. “Together, these
15 recommended actions will rehabilitate the mainstem channel below Lewiston and provide the
16 habitats necessary to restore and maintain the fishery resources of the Trinity River.” *Id.*

17 The “Recommendations” chapter concludes: “Rehabilitation of the mainstem Trinity
18 River and restoration and maintenance of its fishery resources requires (1) increased annual
19 instream volumes and variable reservoir release schedules, (2) fine and coarse sediment
20 management; and (3) mainstem channel rehabilitation.” AR3978. The “Recommendations”
21 chapter provides specific detail about the habitat-restorative purposes of the recommended flow
22 regimes. AR3979-3981; 3986-4002; 4016-4023. The areas primarily targeted for restoration
23 were the upper reaches of the mainstem Trinity below Lewiston. *Id.* The Flow Study also

24
25 ² The Trinity Flow Study explains the “dynamic, alluvial” characteristics of the pre-
26 TRD Trinity River in detail at AR3786-3804. The effects of dam construction and resulting
loss of habitat in the mainstem Trinity are explained at AR3804-3832.

1 provides specific detail about temperature-related objectives of the recommended flows.
2 AR3982. Notably, the locations at which temperature would be monitored for management
3 purposes are all located at or above the Trinity-Klamath confluence. *Id.*

4 The recommendations described above are the same recommendations that Congress
5 mandated development of in CVPIA section 3406(b)(23). AR4237. Those recommendations
6 relate solely to habitat restoration in the mainstem Trinity River and not to preservation and
7 propagation of fish migrating through the lower-Klamath. AR3978-4034; 3010. The ROD is
8 not intended to address disease problems that were not known in 2000 or to prescribe
9 management measures on the lower-Klamath River. *Id.*; AR3017. Nor does the ROD constrain
10 the Secretary's authority to take appropriate and reasonable measures to prevent recurrence of
11 fish-kill conditions on the lower-Klamath.

12 The detailed flow recommendations, based on extensive study, also show why
13 Plaintiffs' suggestion that the Secretary simply reserve some arbitrary amount out of the ROD
14 flows at the beginning of the water year, for potential use as late-summer flows, is not possible
15 nor supported by best available science. The ROD flows were carefully developed to achieve
16 specific habitat-restorative purposes on the mainstem Trinity. They contain no surplus water
17 that could be repurposed without compromising the ROD's intended objectives. The Secretary
18 lacks scientific justification or legal authority to short the ROD-mandated flows for the purpose
19 of mitigating adverse conditions that may arise on the lower-Klamath. Nor is it apparent at the
20 start of the water year whether late-summer releases will be necessary, nor in what amounts.

21 Affirming the Secretary's authority to use TRD-water for late-summer flows in the
22 lower Klamath River to prevent recurrence of fish-kill conditions does not, as Plaintiffs'
23 suggest, mean that "nothing was resolved by the process and decision required by CVPIA
24 section 3406(b)(23)." Plaintiffs' Brief, at 18. The Trinity Flow Study and the resulting ROD
25 resolved nothing more, and nothing less, than what they were intended to resolve – that is, the
26 setting of permanent instream flow releases for the "rehabilitation of the mainstem Trinity

1 River and restoration and maintenance of its fishery resources.” AR3978 (explaining purpose
2 of the Flow Study’s flow recommendations, which were adopted in the ROD).

3 The Secretary has broad authority to make the specific releases challenged here. These
4 science-based flow releases fulfill the 1955 Act’s mandate to preserve and propagate fish and
5 wildlife. A recurrence of the massive fish kill in the lower Klamath River (of both Trinity and
6 non-Trinity origin stocks), would devastate tribal trust resources that the Secretary has an
7 affirmative statutory and trust obligation to protect. Plaintiffs fail to establish that any law
8 prohibits the Secretary from making these science-based flow releases for the purpose of
9 preserving fish by preventing replication of fish-kill conditions on the lower Klamath River.

10 **C. The Secretary Has Broad Authority to Make Flow Releases to Preserve**
11 **Fish Under Section 2 of the TRD Central Valley Project Act of 1955.**

12 The Secretary’s release of late-summer flows to preserve the fishery in the lower
13 Klamath River is authorized by Section 2 of the 1955 Act, which provides, in relevant part,
14 that, “the Secretary is authorized and directed to adopt appropriate measures to insure the
15 preservation and propagation of fish and wildlife” Section 2 provides broad discretionary
16 authority to take appropriate measures to preserve and propagate the fishery. *See Trinity County*
17 *v. Andrus*, 438 F. Supp. 1368, 1376 (1977) (discussing Secretary’s discretion to determine
18 appropriate measures to insure preservation and propagation of fish and wildlife). Reclamation
19 cited the 1955 Act as the statutory basis of authority for the flow releases at issue here. AR17.³

20 Plaintiffs contend that the 1955 Act and CVPIA section 3406(b)(23) are in conflict and
21 thus section 3406(b)(23) should control because, Plaintiffs allege, it is more specific. The 1955
22 Act and CVPIA section 3406(b)(23) are not in conflict; rather, they address different issues and
23 have differing scopes. The 1955 Act, Section 2, provides broad authority “to insure the
24 preservation and propagation of fish. . . .” The first proviso of Section 2 limits the integration

25 _____
26 ³ The Secretary similarly relied on the 1955 Act in making additional releases in 1981
and 1991. *See* AR3008-09.

1 of the TRD into the CVP and requires the Secretary to exercise a priority for use of all TRD
2 water necessary to protect fish and wildlife.⁴ Memorandum from Solicitor to Assistant
3 Secretary, Land and Water Resources, Dec. 7. 1979 (1979 Opinion), pp. 3-4. Dkt. 44, Exh. 8.

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

10 *Id.* The 1955 Act provides broad authority to take measures for preservation of fish.

11 No subsequent legislation has amended or limited the scope of the 1955 Act. The
12 requirements of CVPIA section 3406(b)(23) were designed to meet the "fishery restoration
13 goals of the [1984 Act]" – goals that are limited to the rehabilitation of fish habitat on the
14 mainstem Trinity River. AR4237. Section 3406(b)(23) required instream flows to restore fish
15 habitat in the mainstem Trinity, completion of the Flow Study, and implementation of its
16 recommendations subject to the concurrence of the Secretary and Tribe. *Id.*

17 Nothing in section 3406(b)(23), the Flow Study, or the ROD address conditions in the
18 lower Klamath, or the Secretary's authority to preserve or propagate fish transiting the lower
19 Klamath. Nor does 3406(b)(23) repeal, or purport to repeal, the broad authority to preserve fish
20 provided by the 1955 Act.⁵ *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 639, 656

21 ⁴ Plaintiffs' Brief at 16, n. 3, mischaracterizes the second proviso of Section 2 but
22 correctly notes that the Secretary did not rely upon that proviso in this action. As a result, the
beneficial uses of second proviso water need not be addressed.

23 ⁵ Finding no express repeal of the 1955 Act, Plaintiffs are left to contend that the
24 authority of the 1955 Act was repealed by implication. Repeals by implication are "heavily
25 disfavored." *Southern Cal. Edison Co. v. Lynch*, 307 F.3d 794, 810 (9th Cir. 2002). "A finding
26 of implied repeal must be based on a finding that the legislative body actually formulated the
intent to repeal the earlier enactment but somehow failed to carry out that intent." *Kenai
Peninsula Borough v. Alaska*, 612 F.2d 1210, 1214 (9th Cir. 1980). Congress has not
constrained Reclamation's broad authority to protect fish in the Lower Klamath River.

1 (1974) (statutes addressing tribal resources “are to be read to reserve Congress’ powers in the
2 absence of a clear expression by Congress to the contrary”). The Secretary acted well within
3 her authority in taking action to preserve fish, which are trust resources, in the lower Klamath.

4 **D. The Secretary’s Obligation to Protect and Preserve Tribal Trust Resources**
5 **Provides Authority For the Late-Summer Flow Releases.**

6 Hoopa Valley Tribe has federally protected fishing rights in the Trinity and Klamath
7 Rivers. *Parravano*, 70 F.3d at 544-546; *Blake v. Arnett*, 663 F.2d 906 (9th Cir. 1981). The Tribe
8 also has federal reserved water rights to ensure conditions of water quality and flow to support
9 all life stages of fish. *Adair*, 723 F.2d at 1411; *United States v. Anderson*, 591 F. Supp. 1, 5-6
10 (E.D. Wash. 1982), *aff’d in part, rev’d in part, on other grounds*, 736 F.2d 1358 (9th Cir. 1984).

11 The Supreme Court has long recognized “the distinctive obligation of trust” that binds
12 the government in its dealings with Indian people. *Seminole Nation v. United States*, 316 U.S.
13 286 (1942). The Ninth Circuit has “read the [trust] obligation to extend to any federal
14 government action.” *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 992-93 (9th Cir. 2005).
15 The Ninth Circuit has also held, in cases relating to the Klamath River, that “the United States,
16 as a trustee for the Tribes, has a responsibility to protect their rights and resources.” *Patterson*,
17 204 F.3d at 1213-14. In *Patterson*, a dispute between the Klamath Basin tribes and Klamath
18 Basin irrigators regarding flows in the Klamath River, the 9th Circuit Court of Appeals held:

19 Because Reclamation maintains control of the Dam, it has a responsibility to
20 divert the water and resources needed to fulfill the Tribes’ rights, rights that take
21 precedence over any alleged rights of the Irrigators. Accordingly, we hold that
the district court did not err in concluding that Reclamation has the authority to
direct operation of the Dam to comply with Tribal water requirements.

22 The holding in *Patterson*, affirming the Secretary’s authority to operate water projects
23 to satisfy tribal rights, is not unique. *Joint Board of Control v. United States*, 832 F.2d 1127,
24 1131-32 (9th Cir. 1987) (affirming BIA’s authority and responsibility, as trustee for the affected
25 Indian tribe, to operate federal water project in manner that established stream flow and pool
26 levels necessary to protect tribal fishery); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354

1 F. Supp. 252, 256-57 (D.D.C. 1972) (Secretary had trust obligation “to assert his statutory and
2 contractual authority to the fullest extent possible” in order to preserve water for Indian tribe).

3 These opinions are also consistent with Defendants’ own interpretations of their trust
4 responsibility to Indian tribes of the Klamath Basin. Memorandum to Regional Director,
5 Bureau of Reclamation from Regional Solicitor, Pacific Southwest Region (July 25, 1995),
6 p. 10 (stating, “Reclamation must exercise its statutory and contractual authority to the fullest
7 extent to protect the tribal fisheries and tribal water rights”) (Dkt. #44, Exh. 2); 1993 Solicitor
8 Op. M-36979, p. 29 (“Interior . . . must ensure that their actions are consistent with the trust
9 obligations of the United States to the [Klamath Basin] Tribes”) (Dkt. #44, Exh. 1); 1981 Sec.
10 Decision (AR4070) (“there are responsibilities arising from congressional enactments, which
11 are augmented by the federal trust responsibility to the Hupa and Yurok tribes, that compel
12 restoration of the river’s salmon and steelhead resources to pre-project levels”).

13 Plaintiffs’ argument, that the Secretary is barred from using Trinity River water as a
14 means to prevent recurrence of fish-kill conditions on the Lower Klamath, is in direct conflict
15 with the Secretary’s fiduciary obligation to preserve and protect trust fishery resources. When
16 presented with scientific evidence of conditions that could likely result in a fish-kill recurrence,
17 the Secretary is obligated to assert her authority to the fullest extent possible to protect tribal
18 rights. *Patterson*, 204 F.3d at 1213-14; *Joint Board of Control*, 832 F. 2d at 1131-32. Failure
19 to provide water in amounts necessary to preserve and protect the fishery effectively results in
20 the abrogation of tribal rights. *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968)
21 (absent explicit congressional command, a court should be reluctant to abrogate tribal rights).

22 Plaintiffs’ remaining arguments regarding the tribal trust obligation are meritless. First,
23 reliance on the trust obligation as authorization for the flow releases is not a post hoc
24 rationalization for the action. The FONSI expressly discusses Indian Trust Assets and notes
25 that “Under the Proposed Action . . . the risk to the tribal trust fishery would be expected to
26 decrease.” AR9. The EA also cites protection of the tribal fishery as a basis for the action.

1 AR17. In any event, whether or not cited in the FONSI or EA, the fiduciary trust obligation
2 exists as a matter of law and compels the Secretary to take action to preserve the trust fishery.

3 Plaintiffs' argument that Reclamation cannot use stored water to benefit the trust fishery
4 is also flawed. The TRD has dramatically altered the natural flow regime of the Trinity River.
5 Plaintiffs suggest that the tribes are limited to the natural flow of the river in late summer, but
6 must remain subject to impoundment of flow behind TRD facilities at all other times of the
7 year to the detriment of the river and fishery. Plaintiffs cite no authority for the proposition that
8 the Secretary cannot use stored water to benefit the tribal fishery. The 1955 Act refutes the
9 proposition; plaintiffs' argument is inconsistent with *Patterson, Joint Board of Control*, and
10 *Pyramid Lake*, which broadly authorize the Secretary to allocate water resources in the manner
11 best suited to protect and preserve tribal rights.

12 **III. CONCLUSION**

13 Pursuant to the 1955 Act, the Secretary has broad authority to take necessary measures
14 for the preservation and propagation of fish. Plaintiffs fail to establish that any authority of the
15 1955 Act has been repealed or limited. They fail to establish that any statute bars the Secretary
16 from taking action to prevent replication of fish-kill conditions on the lower Klamath River.
17 Plaintiffs' reliance on the ROD, which implements recommendations of the Trinity Flow Study
18 for the purpose of restoring and rehabilitating habitat on the mainstem Trinity, and which does
19 not constrain the Secretary's authority to preserve fish in the lower Klamath, is misplaced.
20 Plaintiffs also improperly minimize the Secretary's affirmative obligation to take action to
21 protect trust resources. Summary judgment should be granted in favor of the Tribe.

22 Respectfully submitted this 21st day of March, 2014.

23 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

24 /s/ Thomas P. Schlosser
25 Thomas P. Schlosser
26 Attorneys for Defendant-Intervenor Hoopa Valley Tribe