

JOHN CORBETT, Senior Attorney, CSBN 56406
JohnC@yuroktribe.nsn.us
NATHAN VOEGELI, Staff Attorney, CSBN 279481
nvoegeli@yuroktribe.nsn.us
Yurok Tribe
190 Klamath Boulevard
PO Box 1027
Klamath, California 95548
Telephone: (707) 482-1350
Facsimile: (707) 482-1363
Attorneys for Defendant Yurok Tribe

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

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.: 13-cv-01232-LJO-GSA

**YUROK TRIBE'S OPPOSITION TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND CROSS-
MOTION FOR SUMMARY
JUDGMENT**

Hearing Date: TBD
Hearing Time: TBD
Courtroom: TBD
Judge: Hon. Lawrence J. O'Neill

Defendant-Intervenor Yurok Tribe ("Yurok") hereby opposes Plaintiffs' motion for summary judgment and cross-moves for summary judgment. Yurok joins and incorporates by reference the oppositions and cross-motions for summary judgment of the other Defendant-Intervenors.

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ARGUMENT	2
A. Section 2 of the 1955 Act Authorizes Reclamation To Release Supplemental Flows To Insure the Preservation of Fish in the Lower Klamath River	2
B. Supplemental Releases To Protect Fish in the Lower Klamath River Are Not Limited By CVPIA Section 3406(b)(23)	4
1. <i>Klamath River fishery flows are outside of the scope of the ROD</i>	4
2. <i>Significant variation in ROD flows to account for supplemental releases would violate ROD management targets and the CVPIA</i>	8
C. CVPIA Section 3406(b) Authorizes Reclamation to Release Additional Water To Satisfy Federal Obligations and For Additional Fish Purposes	10
D. Reclamation’s Tribal Trust Responsibilities In the Lower Klamath River Are Compatible With But Not Satisfied By the ROD.....	12
III. CONCLUSION.....	14

TABLE OF AUTHORITIES

CASES	Page
<i>Hellon & Assoc., Inc. v. Phoenix Resort Corp.</i> , 958 F.2d 295 (9th Cir. 1992)	3, 4
<i>Kandra v. United States</i> , 145 F. Supp. 2d 1192, 1201 (D. Or. 2001).....	1
<i>Klamath Water Users Protective Ass’n v. Patterson</i> , 204 F.3d 1206 (9th Cir. 1999)	11, 12, 13
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973).....	1
<i>Nat’l Ass’n of Home Builders v. Defenders of Wildlife</i> , 551 U.S. 644 (2007)	3
<i>Parravano v. Masten</i> , 70 F.3d 539, 541 (9th Cir. 1996), <i>cert. denied</i> , 518 U.S. 1016 (1996).....	1, 11, 12, 13
<i>San Luis & Delta-Mendota Water Auth. v. United States</i> , 672 F.3d 676 (9th Cir. 2012)	10, 11
<i>United States v. Adair</i> , 723 F.2d 1394, 1411 (9th Cir. 1984).....	1, 12
<i>Westlands Water Dist. v. Natural Resources Defense Council</i> , 43 F.3d 457 (9th Cir. 1994)	3
<i>Westlands Water Dist. v. U.S. Dep’t of the Interior</i> , 376 F.3d 853 (9th Cir. 2004)	2, 5, 6
<i>Westlands Water Dist. v. U.S. Dep’t of the Interior</i> , 275 F. Supp. 2d 1157 (E. Dist. Cal. 2002), <i>aff’d in part, rev’d in part</i> , 376 F.3d 853 (9th Cir. 2004).....	5

FEDERAL STATUTES

16 U.S.C. §§ 1851-1853 1

25 U.S.C. § 1300i-1(c)..... 1

Central Valley Project Improvement Act, Title XXXIV, Pub. L. 102-575, 106 Stat. 4700
(1992)..... *passim*

Trinity River Basin Fish and Wildlife Management Act, Pub. L. 98-541, 98 Stat. 2721
(1984)..... 6

Central Valley Project Act of August 12, 1955, Pub. L. 84-386, 69 Stat. 719 (1955) *passim*

OTHER STATUTES

Cal. Water Code § 1381 12

FEDERAL REGULATIONS

77 Fed. Reg. 47872 (Aug. 10, 2012)..... 1

OTHER AUTHORITIES

Memorandum from Solicitor Leo M. Krulitz to the Assistant Secretary, Land and
Resources (Dec. 7, 1979) 2

Yurok Constitution..... 1

I. INTRODUCTION

Yurok is a federally recognized Indian Tribe. 77 Fed. Reg. 47872 (Aug. 10, 2012). The Yurok people have relied on the Klamath River for their fisheries, cultural rites, and traditions since time immemorial. *Kandra v. United States*, 145 F. Supp. 2d 1192, 1201 (D. Or. 2001). For generations, Yurok has “depended on the Klamath [C]hinook salmon for their nourishment and economic livelihood.” *Parravano v. Masten*, 70 F.3d 539, 542 (9th Cir. 1996), cert. denied, 518 U.S. 1016 (1996). The Yurok Reservation “was ideally selected for the Yuroks.” *Mattz v. Arnett*, 412 U.S. 481, 487 (1973). It encompasses the lower 44 miles of the Klamath River, including the confluence of the Klamath and Trinity Rivers. 25 U.S.C. § 1300i-1(c). “The Yurok people have always lived on this land on the Klamath River . . . and prudently harvest and manage the great salmon runs.” Yurok Constitution, Preamble. Establishment of the Yurok Reservation vested Yurok with federally reserved fishing rights. *Parravano*, 70 F.3d at 541; 16 U.S.C. §§ 1851-1853 (authorizing harvest levels in ocean fisheries for Indian Tribes). These federally reserved fishing rights guarantee Yurok a corresponding water right. *United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir. 1984).

The 2002 fish kill of over 34,000 adult fish had a profound spiritual and economic effect on Yurok people. AR 3, 15-16, 2372, 2834, 2836-2837. Flows are the only controllable means in the Klamath and Trinity Rivers to manage risks against such massive fish kills. AR 1726, 2372. To prevent a subsequent mass die-off, the U.S. Bureau of Reclamation (“Reclamation” or “BOR”) released supplemental flows in 2003, 2004, 2012 and 2013 pursuant to congressional authorization under the Central Valley Project Act of August 12, 1955 (“1955 Act”), Pub. L. 84-386, 69 Stat. 719 (1955), and the Central Valley Project Improvement Act (“CVPIA”), Title XXXIV, Pub. L. 102-575, 106 Stat. 4700 (1992), and in accordance with its federal trust obligations to Yurok and the Hoopa Valley Tribe. AR 3, 8, 16.

II. ARGUMENT

Congress directed the Secretary of the Interior (“Secretary”) “to adopt appropriate measures to insure the preservation and propagation of fish and wildlife, including, but not limited to, the maintenance of the flow of the Trinity River below” the Trinity River Division (“TRD”). 1955 Act § 2. Under the 1955 Act, in-basin flows for in-basin needs have priority over out-of-basin needs. Memorandum from Solicitor Leo M. Krulitz to the Assistant Secretary, Land and Resources (Dec. 7, 1979), Doc. 44, Exhibit 8 at 3. Congress next directed the development and implementation of instream flow requirements and TRD operating criteria for the restoration and maintenance of the Trinity River fishery. CVPIA § 3406(b). These recommendations were adopted in the December 2000 Trinity River Record of Decision (“ROD”). AR 3004.

A. Section 2 of the 1955 Act Authorizes Reclamation To Release Supplemental Flows To Insure the Preservation of Fish in the Lower Klamath River

Plaintiffs argue that the 1955 Act does not provide Reclamation with the statutory authority necessary to implement supplemental flows. Doc. 113 at 16:17-17:2. The language of the 1955 Act, however, is clear. The 1955 Act section 2 specifically authorizes federal Defendants to adopt appropriate measures to preserve and propagate fish in the Klamath and Trinity Rivers. Legislative history of the 1955 Act shows Congressional concern for TRD impacts to both the Trinity River and Klamath River fisheries. *Westlands Water Dist. v. U.S. Dept. of the Interior* (“*Westlands v. DOI*”), 376 F.3d 853, 861 (9th Cir. 2004); AR 3226. BOR cited the 1955 Act as its foremost authority for implementing the supplemental flows, noting that section 2 of the TRD Act gives precedence to in-basin needs and authorizes the Secretary “to adopt appropriate measures to insure preservation and propagation of fish and wildlife. . . .” AR17 (quoting the 1955 Act section 2). The supplemental flows were designed to preserve the Klamath River fishery by reducing the likelihood of a mass die-off of adult salmonids. AR 3. This is precisely the type of action authorized by the 1955 Act.

Plaintiffs further suggest that the 1955 Act conflicts with CVPIA section 3406(b)(23), limiting Reclamation to fish protection measures authorized under section 3406(b)(23). Doc. 113 at 18:9-19:12. This is contrary to the plain language of the 1955 Act and the CVPIA.

Repeals by implication require clear legislative intent and either an express contradiction between the original act and a later statute, or absolute necessity in order to give the later statute any meaning at all. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007). A court must give effect to every part of a statute, if possible, by minimizing any conflict between the general and the specific. *Westlands Water Dist. v. Natural Resources Defense Council*, 43 F.3d 457, 462 (9th Cir. 1994). To the extent two statutes can be harmonized, they should be. *Hellon & Assoc., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992).

There is no conflict between the 1955 Act and CVPIA section 3406(b)(23). The 1955 Act authorizes federal Defendants to adopt measures to insure the preservation and propagation of fish. 1955 Act § 2. As further described below, CVPIA section 3406(b)(23) directed federal Defendants to develop and implement flow recommendations for “Trinity River instream fishery releases.” The ROD and 1999 Trinity River Flow Evaluation Study (“TRFES”) developed under CVPIA section 3406(b)(23) are designed “to fulfill fish and wildlife protection mandates of the 1955 Act . . . to restore and maintain the Trinity River fishery resources.” AR 3747, 3734. The ROD and TRFES also meet “the goals of prior legislation,” such as the 1955 Act, regarding flow requirements for the Trinity River fishery. AR 3019, 3034.

Reclamation’s authority to implement the supplemental releases for fish purposes under the 1955 Act is broader than, and not limited by, ROD flows for the Trinity River fishery. Rather than a disfavored repeal by implication, the natural reading of the 1955 Act and the CVPIA is that Congress granted federal Defendants broad authority to implement fish protection measures in the 1955 Act and specifically identified in CVPIA section 3406(b)(23) the method by which federal Defendants were to develop a flow regime for the Trinity River fishery. The CVPIA did

not limit federal Defendants' authority or Congressional intent under the 1955 Act to protect the larger Klamath River fishery. The 1955 Act and the CVPIA can and should be interpreted in harmony. *Hellon & Assoc.*, 958 F.2d at 297.

B. Supplemental Releases To Protect Fish in the Lower Klamath River Are Not Limited By CVPIA Section 3406(b)(23)

The ROD established a flow regime and TRD operating criteria and procedures for Trinity River fishery flows pursuant to CVPIA section 3406(b)(23). Reclamation must implement the selected alternative as detailed in the ROD and accompanying Trinity River Mainstem Fishery Restoration Final Environmental Impact Statement/Report ("ROD FEIS/EIR").¹ AR 3028.

1. *Klamath River fishery flows are outside of the scope of the ROD*

The 1955 Act is concerned with the Klamath and Trinity River fisheries. The CVPIA's purpose is to protect and restore fish and associated habitats "in the Central Valley and Trinity River basins." § 3402(a). CVPIA section 3406(b)(23) is narrower than the 1955 Act and focuses on the Trinity River fishery. Consequently, ROD flows are intended to meet specific physical and biological management targets in the Trinity River mainstem, not the lower Klamath River. AR 3004 ("This decision recognizes that restoration and perpetual maintenance of the Trinity River's fishery resources require rehabilitating the river itself, restoring the attributes that produce a healthy, functioning alluvial river system."); AR 3978 ("Rehabilitation of the mainstem Trinity River and restoration and maintenance of its fisher resources requires (1)

¹ The ROD FEIS/EIR amends the Draft Environmental Impact Statement/Report ("DEIS/EIR") and "incorporates the DEIS/EIR by reference." AR 3051, 3057. The DEIS/EIR "is based on the recommendations in the TRFES and includes increased releases from Lewiston Dam, mechanical restoration, and implementation of an adaptive environmental assessment and management [] program." AR 3052.

increased annual instream volumes and variable reservoir release schedules, (2) fine and course sediment management, and (3) [Trinity River] mainstem channel rehabilitation.”).

The ROD guides federal decisions for the restoration and maintenance of “the anadromous fishery resources of the Trinity River” and “the Trinity River fishery.” AR 3004. The ROD FEIS/EIR addressed only those issues and impacts associated with “restoration of the *natural production of anadromous* fish on the Trinity River *mainstem*.” AR 3217 (emphasis in original). The evaluated alternatives of the ROD FEIS/EIR “focus on the 40 miles of Trinity River mainstem below Lewiston Dam.” AR 3224, 3241; AR 3949-51 (describing TRFES fishery model for Chinook salmon “in the Trinity River reach from Lewiston Dam downstream 25 miles”). The ROD FEIS/EIR preferred alternative is directed to federal Defendants’ statutory and trust obligations for Trinity River fishery resources. AR 3004, 3220. The stated goal driving the ROD FEIS/EIR was restoration and maintenance of a healthy Trinity River mainstem. AR 3220.

This view of the ROD as limited to Trinity River mainstem restoration is not new. In fact, Plaintiffs in prior litigation argued this very point—that the ROD FEIS/EIR alternatives were improperly “directed at restoring the mainstem Trinity River fish habitat below Lewiston Dam.” *Westlands Water Dist. v. U.S. Dep’t of the Interior*, 275 F. Supp. 2d 1157, 1214 (E. Dist. Cal. 2002), *aff’d in part, rev’d in part*, 376 F.3d 853 (9th Cir. 2004). The Ninth Circuit Court of Appeals recognized that the ROD FEIS/EIR specifically limited “its goals to the Trinity River mainstem,” but that this narrow geographic scope was within the federal agencies’ discretion. *Westlands v. DOI*, 376 F.3d at 867. The ROD does not address instream flows for Klamath River fishery purposes.

Plaintiffs argue that the statutory directive in section 3406(b)(23) is not limited to a specific geographical area, but then acknowledge that it is concerned with the Trinity River fishery. Doc. 113 at 15:6-9. CVPIA section 3406(b)(23) specifically states that it is directed at “restoration and maintenance of the Trinity River fishery.” The idea of a fishery is inseparably

ted to the place or area where a fish is caught.² The Klamath River fishery does contain Trinity River stock (Doc. 103 at ¶ 79), but such fish are, at that location, solely a part of the Klamath River fishery. Until a fish is in the Trinity River basin, it is not part of the Trinity River fishery. The Trinity River fishery cannot exist in the lower Klamath River. The plain language of CVPIA section 3406(b)(23) does, in fact, limit it to the Trinity River basin. This is in contrast to the 1955 Act, which authorized and Congress understood to include protection of fish in the Klamath and Trinity Rivers as discussed above.

This plain reading of CVPIA section 3406(b)(23) tying its fishery restoration goals to the Trinity River basin comports with the Ninth Circuit’s decision in Plaintiffs’ prior litigation. The CVPIA incorporates the directives of the Trinity River Basin Fish and Wildlife Management Act, Pub. L. 98-541 (1984), “to restore anadromous fish populations of the entire Trinity River basin” to “benefit all parts of the Trinity River below Lewiston Dam.” *Westlands v. DOI*, 376 F.3d at 866-67. Restoration of the Trinity River mainstem fishery is a key component to restoring the Trinity River basin fishery as a whole. *Id.* at 867. Only in the context of the 1955 Act does the Ninth Circuit even mention the Klamath River fishery. *Id.* at 861. While the fishery restoration goals of CVPIA section 3406(b)(23) encompass the entire Trinity River basin, its statutory reach does not extend to the lower Klamath River.

The primary purpose of the flows was to improve conditions in the lower Klamath River while optimizing use of stored water, not to benefit the Trinity River fishery. AR 2, 561, 1170; AR 450 (“We have determined that it is prudent to help protect the large run by releasing additional water to augment flows in the lower Klamath River. While protecting the fall run, our

² See, for example, the Merriam-Webster and the Oxford English Online Dictionaries, which variously define fishery as “a place for catching fish or taking other sea animals,” “the legal right to take fish at a particular place or in particular waters,” or “a fishing ground where fish are caught.”

parallel objective is to optimize the use of stored water . . .”). If the purpose was to restore or maintain the Trinity River fishery, there would be no reason for Reclamation to even consider Upper Klamath Basin sources, which do not flow through the Trinity River. *But these sources were an option.* Various stakeholders suggested and BOR considered water releases from both the TRD and the Upper Klamath Basin, including Reclamation’s Klamath Project, to achieve the necessary flows in the lower Klamath River. *See, e.g.,* AR 403 (“ . . . the upper [Klamath] basin does not provide viable option here . . . I can see adding a general statement regarding actions taken to reduce demand on the [Klamath] Project, etc. but even with those measures, flows are not available”); AR 448, 455 (“Use Klamath Project-based authority to provide fall flows”); AR 450 (“Reclamation has carefully considered all the information concerning augmentation provided” by various stakeholders); AR 488 (“I again expressed that Reclamation’s objective is to protect the fall run from a disease outbreak while optimizing the use of augmentation flows in recognition of the poor hydrology in both [the Klamath and Trinity River] basins . . .”); AR 505 (summarizing hydrologic conditions in the Klamath Basin to compare sacrifices there to the impacts of releasing additional water from TRD); AR 508-45 (hydrographs for analyzing potential releases from the Klamath Project); AR 560 (stating sensitivity of CVP water and power stakeholders to the challenges for the Klamath Project and expressing concern about the use of “CVP water and power supply to meet the needs of other projects”); AR 562 (“[T]he [Trinity Management Council] unanimously approved a motion recommending that the Department of the Interior ensure that water be made available, if necessary, from the Klamath and/or Trinity Basins.”); AR 567 (“We recommend that you do what is necessary to ensure an adequate amount of supplemental water for release from the Trinity and/or Upper Klamath basins . . .”); AR 1719 (“Water source – is considered unimportant for successfully preventing an Ich outbreak. Water may be provided from the Bureau of Reclamation facilities on the Klamath or Trinity Rivers . . .”). BOR reasonably selected TRD releases not to benefit the Trinity River

fishery, but because TRD was best positioned to provide the requisite water to the lower Klamath River given the dire hydrologic conditions in the Upper Klamath Basin.

Plaintiffs claim that because the supplemental flows were for fishery purposes and Trinity River fish benefitted from the releases, the releases were “made for the purpose of restoring and maintaining the Trinity River fishery” and are subject to ROD volumes. Doc. 113 at 14:17-24. This confuses purpose with effects. To illustrate this point, assume that the same massive run of Chinook salmon was projected for the lower Klamath River, but that none of those fish returned to the Trinity River. The supplemental releases *would still be needed* to reduce the risk of a massive die-off, but there would be almost *no benefit* to the Trinity River fishery. The purpose of the releases was to protect fish in the lower Klamath River and benefits to Trinity River fish are ancillary. Simply because an effect of the supplemental releases may benefit Trinity River fish does not mean that the releases were made to benefit the Trinity River fishery.

2. *Significant variation in ROD flows to account for supplemental releases would violate ROD management targets and the CVPIA*

Reclamation is obligated to implement ROD flows in accordance with the ROD and the ROD FEIS/EIR. AR 3028. ROD flow releases within the total water-year volume were carefully analyzed and modeled to establish physical and biological management targets for fish needs and to promote restoration of geomorphic, riparian, and physical processes to improve fish habitat. AR 3086-87, 3255; AR 3979 (“Flow releases must satisfy desired fluvial processes and habitat conditions for each water-year class.”); AR 3986-4002 (assigning TRD releases to water-year classes to meet specific management objectives). The TRFES analyses were the basis for the water-year specific volumes and the daily release schedule depicted by the ROD. AR 3035-38, 3052. While the ROD contemplates adaptive management of the daily releases, such variations are governed by the Adaptive Environmental Assessment and Management Program (“AEAMP”). AR 3005, 3014, 3086-87. The AEAMP requires a technical design and review of

any proposed change and allows for only “minor modifications” to the ROD flow schedules. AR 3087, 4030-32. Further, the AEAMP is to be consistent with the underlying flow requirement recommendations for fish and sediment movement. AR 3087, 4030.

Plaintiffs state that Reclamation has discretion in scheduling instream releases and “could have, but did not, budget sufficient water” from the total volume established by the ROD for 2013. Doc. 113 at 14:6-9. Federal Defendants do not have discretion to simply alter ROD flow volumes to account for the additional supplemental releases. Flow adjustments within the annual total volume must be based on scientific analyses under the AEAMP. AR 4027-30. Further, Reclamation must ensure that the total annual volume under the ROD is used to satisfy ROD and ROD FEIS/EIR management targets to maintain and restore the Trinity River fishery resources. AR 3014; AR 3079 (“Targeted fluvial processes and desired habitat conditions were assigned to each water-year class [].”); AR 3986 (“Annual hydrographs were assembled for each water class on the basis of the targeted microhabitat, fluvial processes, and desired temperature conditions.”); AR 4034 (“[A]n AEAMP is recommended that is tailored to refine actions consistent with the flow requirement recommendations.”). The 2002 fish kill had not happened when the ROD was adopted in 2000, and so the ROD and ROD FEIS/EIR did not even have reason to analyze fall releases to prevent mass mortality of Klamath River fish. *See* AR 2372 (“September 2002 fish-kill was unprecedented”). If Reclamation were to significantly reduce daily spring releases depicted in the ROD in order to release additional water in the fall, this would ignore the extensive scientific review and public comment that informed selection of the preferred alternative and associated release schedule. *See* AR 3051-53 (describing ROD FEIS/EIR analysis of alternatives and amendments in response to public comments). It would compromise objectives analyzed in the ROD FEIS/EIR and jeopardize the ability of ROD flows to meet annual management targets, such as spring water temperatures for rearing salmonids, riparian seedling initiation, and sediment transport. *See* AR 3986-4002 (describing the

recommended daily releases from TRD for each water-year class in relation to specific management targets). Such a massive shift in flows would deviate from the ROD, risking violation of the CVPIA and leaving ROD purposes unfulfilled.

C. CVPIA Section 3406(b) Authorizes Reclamation to Release Additional Water To Satisfy Federal Obligations and For Additional Fish Purposes

The CVPIA was designed to address CVP impacts on fish and achieve a reasonable balance among competing demands for CVP water. CVPIA § 3402. CVPIA section 3406 states:

“(b) Fish and Wildlife Restoration Activities.--The Secretary, immediately upon the enactment of this title, shall operate the Central Valley Project to meet all obligations under state and federal law, . . . The Secretary, in consultation with other State and Federal agencies, Indian tribes, and affected interests, is further authorized and directed to: . . . (2) upon enactment of this title dedicate and manage annually 800,000 acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title; . . . (A) Such quantity of water shall be . . . in addition to all water allocated pursuant to paragraph (23) of this subsection for release to the Trinity River for the purposes of fishery restoration, propagation, and maintenance; . . .”

Under CVPIA section 3406(b), BOR is authorized 1) to release water beyond the 800,000 af of CVP yield to meet federal obligations, and 2) to allocate a portion of the 800,000 af for Trinity River fish restoration beyond the section 3406(b)(23) allocation. The primary purpose of the 800,000 af under section 3406(b)(2) is to satisfy the various programs listed in sections (b)(1) through (b)(23). *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 706, 709 (9th Cir. 2012). Water releases to meet obligations under federal law do not necessarily fall under this primary purpose, but the CVPIA authorization is broader than just actions for the primary purpose. *Id.* at 706-07. BOR maintains discretion under the CVPIA to release water to satisfy legal obligations and benefit fish. *Id.* at 707, 712. Such water is available beyond the 800,000 af specified in section 3406(b)(2). *Id.* at 711-13 (upholding BOR’s discretion not to deduct releases outside of section 3406(b)(2)’s primary purpose from the 800,000 af CVP yield).

As explained above, supplemental flows for the lower Klamath River are beyond the scope of the ROD. Consequently, they do not contribute to CVPIA section 3406(b)(23) or the other specified (b)(2) primary purpose measures. *San Luis*, 672 F.3d at 706. While outside of section 3406(b)(2)'s primary purpose, the supplemental releases are authorized under sections 3402 and 3406(b). They meet section 3406(b) purposes of satisfying obligations under federal law. *Id.* at 707. Federally reserved fishing rights of Yurok and the Hoopa Valley Tribe constitute such federal obligations. These Tribal rights are "applicable law" and must be preserved by the Department of the Interior. *Parravano*, 70 F. 3d at 547. Reclamation must "divert the water and resources needed to fulfill the Tribes' rights" in the Klamath River, which hold priority over any rights of irrigators. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 1999). The CVPIA authorizes BOR to make the supplemental releases to satisfy federal obligations, which are separate from section 3406(b)(2)'s primary fish restoration purposes.

Even assuming arguendo that CVPIA section 3406(b)(23) and the ROD limit releases that benefit Trinity River fish, section 3406(b)(2)(A) specifically authorizes 800,000 af *in addition to all water allocated* under section 3406(b)(23). Congress recognized that the ROD volumes may not be sufficient for fish restoration. The Secretary is authorized under CVPIA section 3406(b)(2)(A) to divert water from the TRD beyond that annual allocation dictated by the ROD for Trinity River fishery restoration. Under this scenario, water released to the lower Klamath River to protect and restore the lower Klamath River fishery would be used to satisfy section 3406(b)(23). This falls under the primary purpose for the 800,000 af set aside by section 3406(b)(2) and may be charged against that mandate. *San Luis*, 672 F.3d at 706, 709. However, the supplemental releases also overlap with BOR federal Tribal trust obligations and in order to effectuate section 3406(b)(2)'s hierarchy of primary and secondary purposes, Reclamation is not required to credit the flows to the 800,000 af of CVP yield. *Id.* at 712.

D. Reclamation's Tribal Trust Responsibilities In the Lower Klamath River Are Compatible With But Not Satisfied By the ROD

Yurok's federally reserved fishing rights in the Klamath and Trinity River fisheries create a corresponding duty on the part of the United States, including Reclamation, to preserve those rights. *Parravano*, 70 F.3d at 547. Yurok also maintains implied water rights to support its fishing rights. *Klamath Water Users*, 204 F.3d at 1213-14. Reclamation is authorized to divert water from a federal project in order to satisfy these Tribal water rights. *Id.* at 1214.

Plaintiffs claim that at the time of the supplemental releases, the TRD was not diverting water from the Trinity River but augmenting the natural flow. Doc. 113 at 20:6-9. This assertion ignores the fact that construction of the TRD ended any semblance of what could be considered natural flow and replaced it with a highly artificial, carefully controlled system of dams, reservoirs, and supporting infrastructure that substantially altered the natural processes of the Trinity River. AR 4034 ("A shift in the [Trinity River] mainstem's ecological role occurred in the first year of TRD operations to the detriment of the fishery resources of the river."). In such a system, all upstream Trinity River water is diverted into the TRD and managed for in-basin needs and out-of-basin export. 1955 Act § 2. Water "diverted, stored, or delivered" by the TRD is CVP water, not natural flow. CVPIA § 3403(f). Further, Reclamation retains California water permits to store and divert waters of the Trinity River. AR 1252-59. Such permits authorize Reclamation to take and use water as described in the permit. Cal. Water Code § 1381. Yurok's fishing rights and implied water rights for instream flow are sufficient to prevent Reclamation as the appropriator of Trinity River water from diverting stream flows below that necessary to protect the Klamath River fishery. *Adair*, 723 F.2d at 1411. Yurok would gladly see the removal of the TRD and the return of the Trinity River to natural flows, but until such time, Reclamation is obligated to operate TRD to preserve Yurok's fishing rights and satisfy its corresponding

water rights. *Parravano*, 70 F.3d at 547; *Klamath Water Users*, 204 F.3d at 1214. This includes water releases to guard against a mass die-off of adult salmon in the lower Klamath River.

Plaintiffs state that the annual ROD volumes satisfy federal Defendants' Tribal trust responsibilities to Yurok and the Hoopa Valley Tribe. Doc. 113 at 20:14-21. As explained above, ROD flows are designed to address restoration of the Trinity River mainstem fishery, not the Klamath River fishery. It does not limit federal Defendants' trust responsibilities. The supplemental releases, which pertain to the Klamath River and are outside of ROD flows, do not go beyond federal Defendants' trust responsibilities. Rather, supplemental releases advance Reclamation's Tribal trust obligations by reducing risk to the Tribal trust fishery in the lower Klamath River. AR 9, 36.

The ROD was developed "in order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe." CVPIA § 340b(b)(23). Only the concurrence of the Hoopa Valley Tribe, not Yurok, was required for the ROD. CVPIA § 3406(b)(23)(A); AR 3028. The ROD and ROD FEIS/EIR do not wholly satisfy federal Defendants' responsibilities to Yurok in the lower Klamath River, but they are compatible with federal Defendants' Tribal trust responsibilities. *See* AR 3004 ("The necessity for these actions results from . . . the federal trust responsibility to the Hoopa Valley and Yurok Indian Tribes."); AR 3020, 3027 (" . . . the Preferred Alternative represents the appropriate action necessary to restore and maintain the Trinity River's anadromous fishery in accordance with the Department's statutory and trust responsibilities."); AR 3027 ("For all of these considerations, particularly the Department's statutory and trust obligations, implementing the Preferred Alternative represents the necessary and appropriate action in order to restore and maintain the Trinity River's anadromous fishery."). Reclamations' Tribal trust responsibilities to Yurok extend beyond the Trinity River mainstem. The Trinity River fishery is only one part of the Klamath River fishery as a whole.

III. CONCLUSION

Reclamation maintained sufficient authority to make supplemental releases for fishery purposes in the lower Klamath River under the 1955 Act. Such action is not prohibited by the CVPIA section 3406(b)(23) and the ROD, which are directed to the Trinity River fishery rather than the Klamath River fishery. The CVPIA provides additional authority, in accordance with federal Tribal trust obligations, to implement the releases. For the reasons stated above, Yurok's cross-motion for summary judgment should be granted and Plaintiffs' motion for summary judgment should be denied.

Dated: March 21, 2014

Respectfully submitted,

JOHN CORBETT
Senior Attorney, Office of the Tribal Attorney

/s/ Nathan Voegeli
NATHAN VOEGELI
Staff Attorney, Office of the Tribal Attorney
Attorneys for the Yurok Tribe