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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 REPLY IN
SUPPORT OF 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 replies in support of its Cross-Motion
2 for Summary Judgment (Dkt. #118). Hoopa joins and incorporates by reference the briefs filed
3 by Federal Defendants and Defendant-Intervenors (Dkt. ## 116, 119, 120-1) and their replies.

4 **I. ARGUMENT AND AUTHORITY**

5 **A. Plaintiffs Fail to Address the Purpose of the Trinity River Flow Study,**
6 **Which is Restoration of Fish Habitat in the Mainstem Trinity River, and**
7 **the Flow Study’s Direct Relationship to the ROD and the CVPIA.**

8 Plaintiffs argue that “[t]he CVPIA does not geographically confine the purpose of the
9 [ROD] releases to the Trinity River” Dkt. #125, p. 7. Thus, they contend that releases
10 from the TRD made in 2012 and 2013 for the purpose of preventing recurrence of a fish die-off
11 in the lower-Klamath River are subject to the ROD and its annual volume limits. *Id.* This
12 argument is wrong, because it fails to acknowledge that Congress’ mandate in CVPIA section
13 3406(b)(23) was completion of the Trinity River Flow Evaluation Study (“Trinity Flow Study”)
14 and the implementation of recommendations contained therein. AR4237-38. As discussed in
15 Hoopa’s opening brief (Dkt. #118, pp. 2-6), the Trinity Flow Study and its recommendations
16 (which are adopted in the ROD and implemented under authority of the CVPIA) are focused
17 solely on habitat restoration and temperature management in the mainstem Trinity River, and
18 primarily in the areas between the North Fork Trinity River and Lewiston Dam. AR3978-4034.

19 In CVPIA section 3406(b)(23)(A), Congress mandated completion of the Trinity Flow
20 Study. Then, in CVPIA section 3406(b)(23)(B), Congress directed:

21 [N]ot later than December 31, 1996, the Secretary shall forward *the recommendations*
22 *of the Trinity River Flow Evaluation Study*, referred to in subparagraph (A) of this
23 paragraph, to [Congress]. If the Secretary and the Hoopa Valley Tribe concur in
24 *these recommendations*, any increase to the minimum Trinity River instream fishery
25 releases established under this paragraph . . . shall be implemented accordingly.

26 (emphasis added). AR4237-38. The ROD “adopts the recommendations contained in the
[Trinity Flow Study].” AR3010. None of CVPIA section 3406(b)(23), the ROD, or the Flow
Study addresses conditions below the Trinity-Klamath confluence. Congress has never taken
any action, in the CVPIA or elsewhere, to limit the Secretary’s authority to take appropriate

1 measures (including flow releases) for preservation of fish migrating downstream of the TRD.

2 Plaintiffs fail to respond to Hoopa's discussion of the Trinity Flow Study and its inter-
3 relationship with CVPIA section 3406(b)(23) and the ROD. By ignoring the Flow Study, and its
4 inter-relationship with the ROD and the CVPIA, Plaintiffs are attempting to broaden the purpose
5 and intent of CVPIA section 3406(b)(23) and the ROD to include flow releases that are outside
6 the scope of the Trinity River Restoration Program (TRRP). The plain language of 3406(b)(23)
7 shows that Congress made very specific directives: complete the Trinity Flow Study; forward the
8 recommendations of the Flow Study to Congress; and implement the recommendations of the
9 Flow Study, subject to the concurrence of the Secretary and the Hoopa Valley Tribe. AR4237-
10 38. The ROD is also clear that the Secretary, through the ROD, is adopting and implementing
11 the recommendations of the Flow Study. AR3010. The Flow Study and its recommendations
12 solely address flows for the restoration of habitat above the Trinity-Klamath confluence.

13 AR3978-4034. Thus, Plaintiffs' argument that the CVPIA and ROD constrain the Secretary's
14 authority to release flows for preservation of fish migrating below the confluence must fail.

15 The flows adopted by the ROD, as recommended by the Flow Study, were carefully
16 developed to achieve specific habitat-restoration purposes on the mainstem Trinity River. AR
17 3978-4034. Plaintiffs are wrong to state that "Defendants [n]ever analyzed the effect that
18 altering the release schedules would have on the objectives described in the ROD." Dkt. #125, p.
19 9. Analysis of varying flow regimes to best achieve habitat-restoration objectives was the central
20 purpose of the Flow Study. AR3737 ("[s]tudies were conducted to identify dam releases required
21 to re-establish the processes necessary to achieve many of these [fundamental alluvial river]
22 attributes"). Further analysis occurred in the EIS for the TRRP. AR3046. There is no ROD
23 water available to re-allocate. Nor is there any scientific justification or legal authority for
24 Plaintiffs' proposal to use ROD flows for other than their intended habitat-restoration purposes.

25 Plaintiffs' argument that the 2012 and 2013 releases were unlawful because they benefit
26 fish of Trinity River origin (in addition to many fish of Klamath River origin) is wrong

1 because: (a) the purpose of the ROD flows is limited to habitat restoration in the mainstem
2 Trinity River (AR3978; 3019-20); and (b) the Secretary has independent authority to release
3 flow for the purpose of preserving any fish through Section 2 of the TRD Act of 1955 (P.L. 84-
4 386) (the “1955 Act”). There is no plain language in the CVPIA or any other act of Congress
5 that precludes the Secretary from taking appropriate measures to preserve and protect fish in
6 the lower-Klamath river, whether the fish are of Trinity or Klamath-origin. Focusing their
7 arguments solely on the “Trinity River fishery,” Plaintiffs apparently concede that no law
8 restricts the Secretary from making releases to protect Klamath-origin fish when migrating
9 through the lower-Klamath river. Surely, the Secretary is not required to sit on her hands while
10 thousands of Klamath-origin fish die simply because some Trinity-origin fish may also benefit
11 from flow releases targeted below the confluence. Yet, that is the absurd result Plaintiffs’
12 argument could lead to. Plaintiffs’ argument is contravened by the 1955 Act, which provides
13 the Secretary with broad authority to take appropriate measures to preserve fish downstream of
14 the TRD. That is the principal statutory authority the Secretary relied on here. AR17.

15 **B. The 1955 Act Authorizes Releases From the TRD For Preservation of Fish.**

16 With regard to the 1955 Act, Plaintiffs first argue that it “mentions only the Trinity
17 River . . . not the Klamath River.” Dkt. #125, p. 11. This is a misleading argument. The first
18 proviso in Section 2 of the 1955 Act broadly states: “the Secretary is authorized and directed to
19 adopt appropriate measures to insure the preservation and propagation of fish and wildlife,
20 including, but not limited to, the maintenance of the flow of the Trinity River below the
21 diversion point at not less than [150 cfs]” AR4249. Congress did not place any
22 qualification or geographic limitation on the Secretary’s authority to preserve fish. Nothing in
23 the 1955 Act restricts the Secretary from taking appropriate measures to preserve fish
24 downstream of the diversion point of the TRD, including the Trinity-Klamath confluence.

25 Plaintiffs’ next argument, regarding the effect of the Klamath River Basin Conservation
26 Act of 1986 (P.L. 99-552) (the “1986 Act”), is also off the mark. In the 1986 Act, Congress

1 made a finding that the Secretary required “additional authority to implement a restoration
2 program . . . to restore anadromous fish populations to optimum levels in both the Klamath and
3 Trinity River Basins.” 16 U.S.C. § 460ss(9). This finding was nearly identical to a finding
4 made by Congress in the prior Trinity River Basin Fish and Wildlife Management Act of 1984
5 (P.L. 98-541) (the “1984 Act”). In Section 1 of the 1984 Act (and after expressly referencing
6 the 1955 Act), Congress found that “the Secretary requires additional authority to implement a
7 basin-wide fish and wildlife management program in order to achieve the long-term goal of
8 restoring fish and wildlife populations in the Trinity River Basin to a level approximating that
9 which existed immediately before the start of the construction of the Trinity River division.”
10 P.L. 98-541, Section 1(6). In other words, Congress had determined in 1984 that the Secretary
11 required additional authority to implement a fish “restoration” program in the Trinity River
12 Basin to restore fish to pre-TRD levels. Subsequently, in 1986, Congress found that additional
13 authority was required to implement a comparable “restoration program” in the Klamath Basin.
14 16 U.S.C. § 460ss(9).

15 The additional authorities of the 1984 and 1986 Acts were necessary because the 1955
16 Act did not expressly authorize the Secretary to implement fishery restoration programs to
17 restore fish populations to pre-project levels. Such an authorization would have made little
18 sense in 1955, because the TRD was approved then with the expectation that the TRD would
19 *improve* fisheries.¹ In contrast to authorizing a restoration program, the 1955 Act gave the

20
21 ¹ In fact, when the TRD was authorized in 1955, Congress acted on information that the
TRD would not damage fish:

22 An asset to the Trinity River Basin, as well as to the whole north coastal area, are the
23 fishery resources of the Trinity River. The development of the Trinity River was
24 *planned with a view to maintaining and improving fishery conditions*. The legislation
25 sets out minimum flows to be maintained below the Trinity diversion point and below
the Clear Creek diversion point, and requires that the project be operated to insure the
preservation and propagation of fish and wildlife. . . .

26 The findings of both the State of California and the Bureau of Reclamation are that
water surpluses to the present and *future requirements of the Trinity and Klamath
Basins* are available for diversion in the volume proposed in the Trinity division plan.

1 Secretary authority and a directive to “adopt appropriate measures to insure the *preservation*
2 and propagation of fish. . .” (emphasis added). The concepts of “preservation” and
3 “restoration” are related, yet also distinct. As defined by Webster’s Dictionary, to “preserve,” is
4 “to keep safe from injury, harm, or destruction.” “Preserve” is synonymous with “protect.” In
5 contrast, “restoration” is “a bringing back to a former position or condition.” The 1955 Act
6 gave the Secretary broad authority to take appropriate measures to insure the preservation of
7 fish and wildlife, i.e., to keep them safe from harm. Subsequent acts of Congress in 1984, 1986,
8 and the CVPIA in 1992 provided authority to restore the fish and their habitat, i.e., to bring
9 populations and habitat conditions back to pre-project levels. None of these subsequent acts
10 repealed or altered the Secretary’s existing authority from the 1955 Act to take appropriate
11 measures to preserve fish. Here, the Secretary exercised her authority under the 1955 Act to
12 release flows for the purpose of preventing a fish-kill in the lower-Klamath river; a clearly
13 lawful exercise of her authority in the 1955 Act to “adopt appropriate measures to insure the
14 preservation . . . of fish.” AR17.

15 CVPIA section 3406(b)(23) references the 1984 Act (pertaining to restoration of fish
16 habitat in the Trinity Basin), but not the 1986 Act (pertaining to restoration of fish habitat in the
17 Klamath Basin). This supports Defendants’ position that in section 3406(b)(23), Congress did
18 not address, nor intend to address, conditions below the Trinity-Klamath confluence. Also, it

19
20 This water can be diverted from the Trinity River to the Central Valley without
21 detrimental effect on the fishery resources. While final studies have not been
22 completed to determine precisely the future *water requirements in the Klamath River*
23 *Basin*, the committee concurs in the view expressed on page 5 of the House
24 Committee Report No. 602 that it is not necessary to await conclusions in this respect
before authorizing construction of the Trinity division because of the relatively
limited diversions planned compared to the average volume of water wasting to the
Pacific Ocean from the basin each year. (Emphasis added.)

25 Senate Rept. No. 1154, 84 Cong., 1st Sess. 5 (July 27, 1955). Completion and operation of the
26 TRD demonstrated that Congress had been misinformed. No longer was there just a need to
preserve and propagate; restoration had to occur so the original mission of preservation and
propagation could continue. That mission included the Klamath as well as the Trinity River.

1 was not until 1996, in the Trinity River Basin Fish and Wildlife Management Reauthorization
2 Act, (P. L. 104-143), that Congress included rehabilitation of lower-Klamath habitat as part of
3 the restoration program authorized by the 1984 Act. This further shows that when the CVPIA
4 was passed in 1992, Congress was not addressing measures in the lower-Klamath. Rather, the
5 focus of CVPIA 3406(b)(23) and the ROD was solely on restoration of Trinity habitat.

6 The legislative history submitted with Plaintiffs' briefing fails to support their argument
7 that Congress intended only "minimal fishery releases" from the TRD. Dkt. #125, p. 12. The
8 Bureau of Reclamation's testimony at the April 16, 1954 Hearing on H.R. 123, p. 5 states:

9 In proposing a project which would take water from one of the coastal basins and
10 bring it into the Central Valley Basin we have been acutely aware of the
11 importance of not depriving the basin of origin of water which it needs now or
will ever need. The principal water need in the Trinity River Basin is for an
adequate supply of water of favorable temperature for fish. (Emphasis added.)

12 Dkt. #128-1. The stated premise of "not depriving the basin of origin of water which it needs
13 now or will ever need" is consistent with the 1979 Opinion of Solicitor Krulitz, which states
14 that "in authorizing the Trinity River Division . . . in 1955, Congress specifically provided that
15 in-basin flows (in excess of a statutorily prescribed minimum) determined by the Secretary to be
16 necessary to meet in-basin needs take precedence over needs to be served by out-of-basin
17 diversion." Dkt. #44, Ex. 8, p. 3. While Congress clearly underestimated the impacts that would
18 result from the TRD, and the amount of flow that would be necessary to preserve fish, Congress
19 provided the Secretary with open-ended authority and direction in the 1955 Act to take
20 appropriate measures to insure the preservation of fish. AR4249. While the statutory grant of
21 authority to preserve fish is broad, exercise of that authority by the Secretary remains subject to
22 the requirements of the Administrative Procedures Act (APA). The Secretary's actions in this
23 case were consistent with both the authority of the 1955 Act and the constraints of the APA.

24 Plaintiffs cite statements in a 1974 Assistant Regional Solicitor Opinion which were
25 superseded by the 1979 Solicitor's Opinion and the 1981 and 1991 Secretarial Decisions.
26 AR4056; 4078. These subsequent authorities confirm that the first proviso of Section 2 of the

1 1955 Act expressly limits the integration of the TRD into the CVP and requires the Secretary to
 2 exercise a priority for use of all TRD water that is necessary to protect fish and wildlife. 1979
 3 Opinion, Dkt. #44, Exh. 8, pp. 3-4; AR4060. If TRD water is necessary for preservation of fish
 4 downstream of the TRD, it is not possible (or lawful) to divert and transport that water out-of-
 5 basin to the Central Valley. *Id.* None of the subsequent steps that Congress took to restore the
 6 fishery to pre-project levels (e.g., the 1984 and 1986 Acts, and CVPIA) withdrew the
 7 Secretary’s authority to take appropriate measures to preserve fish.

8 Plaintiffs acknowledge that there has been no express repeal of the authority provided in
 9 the 1955 Act and thus they are left with the heavily disfavored argument that CVPIA section
 10 3406(b)(23) impliedly repealed the preservation authority of the 1955 Act. *Southern Cal.*
 11 *Edison Co. v. Lynch*, 307 F.3d 794, 810 (9th Cir. 2002) (repeals by implication are “heavily
 12 disfavored”). Plaintiffs argue that CVPIA section 3406(b)(23) and the first proviso in Section 2
 13 of the 1955 Act are in “irreconcilable conflict.”² Mere existence of tension between two
 14 statutes does not create an irreconcilable conflict. *Akiachak Native Community v. Salazar*, 935
 15 F. Supp. 2d 195, 206-07 (D.D.C. 2013) (declining to find Alaska Native Claims Settlement Act
 16 impliedly repealed Secretary’s authority to take land into trust for Alaska Natives). The
 17 disfavored doctrine of implied repeal must be rejected where two statutes are “capable of co-
 18 existence.” *Id.*; see *Traynor v. Turnage*, 485 U.S. 535, 548 (1988).

19 Here, there is no conflict at all - and certainly no irreconcilable conflict - that would
 20 support implied repeal. The 1955 Act provides the Secretary with broad authority to take
 21 measures to insure the “preservation” of fish. The subsequent acts of Congress, including the
 22 1984 Act, 1986 Act, as well as the CVPIA section 3406(b)(23) address the distinct issue of
 23 “restoring” fish and habitat to pre-project levels and “maintaining” them at those levels. More

24
 25 ² The canons of statutory construction relied on by Plaintiffs that “recent enactments
 26 should be favored over older ones[,] and specific statutory provisions should prevail over
 general ones . . . apply only in the face of ‘irreconcilably conflicting statutes.’” *Detwiler v.*
Pena, 38 F.3d 591, 594 (D.C. Cir. 1994) (quoting *Watt v. Alaska*, 451 U.S. 259, 266 (1981)).

1 specifically, section 3406(b)(23) mandates implementation of recommendations in the Trinity
2 Flow Study, which solely addresses restoration of the mainstem Trinity River.³ Nothing in
3 these restoration-focused statutes suggests Congress intended to repeal the Secretary’s pre-
4 existing authority to take appropriate action to preserve fish.

5 **C. The Secretary’s Obligation to Protect Tribal Trust Resources Further**
6 **Supports the Late-Summer Flow Releases.**

7 Plaintiffs’ contention that the Secretary cannot use stored water for the purpose of
8 fulfilling tribal water rights or protecting tribal fishing rights is irrelevant because, here, the
9 Secretary’s actions are authorized by the 1955 Act, a reclamation statute that governs how the
10 Secretary is to administer the TRD. The actions taken by the Secretary to preserve fish
11 resources under the 1955 Act are consistent with her fiduciary duties to the Tribe. AR4070
12 (stating, in 1981 decision, that federal trust responsibilities augment the Secretary’s statutory
13 authority). Her actions are not in conflict with the reclamation program; they implement it.
14 1995 Opinion, Dkt. #44, Exh. 2, p. 10 (stating: “Reclamation must exercise its statutory and
15 contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights”).

16 Regardless, Plaintiffs’ argument is also contradicted by *United States v. Adair*, 723 F.2d
17 1394 (9th Cir. 1983), *Joint Board of Control v. United States*, 832 F.2d 1127 (9th Cir. 1987), and
18 *Klamath Water Users Ass’n v. Patterson*, 204 F.3d 1206 (9th Cir. 2000). The language Plaintiffs
19 quote from *Adair* about preventing appropriators from depleting stream flow below a “protected
20 level” does not state the protected level is limited to inflow on a given day. In *Adair*, the Tribe

21 ³ Plaintiff’s argument that Congress intended the restoration flows implemented
22 pursuant to the CVPIA to be permanent is not wrong, but does not lead to Plaintiffs’ conclusion
23 that Congress impliedly repealed the Secretary’s separate authority to take other appropriate
24 measures to preserve fish. Also, while ROD flows are permanent for purposes of implementing
25 the Trinity River Restoration Program (TRRP), the Secretary regularly releases other flows
26 from the TRD for other purposes such as releases for the ceremonial boat dance and safety of
dams releases. AR20, 28, 120, 129. The mandate that ROD flows be permanent for the
purposes of implementing the TRRP also shows that the Secretary would lack the authority to
use the ROD flows, which are specifically required for mainstem Trinity River restoration, for
the purpose of preventing a fish die-off downstream in the lower-Klamath river.

1 was “entitled to as much water on the Reservation lands as they need to protect their hunting
2 and fishing rights . . . as currently exercised to maintain the livelihood of Tribe members.” *Id.*
3 at 1414. Relying on *Adair, Joint Board*, and other cases, the Solicitor affirmed that the Hoopa
4 and Yurok “Tribes’ rights include the right to certain conditions of water quality and flow to
5 support all life stages of fish.” 1995 Op., Dkt. #44, Exh. 2, pp. 6-7.

6 Contrary to Plaintiffs’ argument, neither *Joint Board* nor *Patterson* limits tribal rights to
7 inflow. In *Patterson*, which involved Reclamation’s operation of the Klamath Irrigation Project,
8 the Court cited *Adair* to find the Tribes had water rights to support hunting and fishing and that
9 Reclamation “has a responsibility to divert the water and resources needed to fulfill the Tribes’
10 rights, rights that take precedence over any alleged rights of the Irrigators.” *Patterson*, 204 F.3d
11 at 1214. In *Patterson*, the releases were not legally dependent on the natural flow on a given
12 day. *Id.* at 1212 (framing argument about which party had right to “control the storage and
13 release of water”). Nor did the Court in *Joint Board* limit the water available to the Secretary
14 for protection of tribal rights to inflow. Rather, “any aboriginal fishing rights secured by treaty
15 are prior to all irrigation rights” and “only after fishery waters are protected does the BIA . . .
16 have a duty to distribute fairly and equitably the remaining waters among irrigators of equal
17 priority.” *Joint Board*, 832 F.2d at 1132. These opinions affirm the Secretary’s fiduciary
18 responsibility to exercise her authority to provide adequate water from available sources to
19 preserve and protect the tribal fishery, which is consistent with what the Secretary did here.

20 Plaintiffs’ reliance on *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006)
21 and the unreported *PCFFA* case attached as Exhibit 5 to the Leeper Declaration is also
22 misplaced. In *Gros Ventre*, the Court affirmed dismissal of the tribal plaintiffs’ claims on
23 grounds that there was no federal common law cause of action against the United States for
24 breach of trust and there was no final agency action to support a claim against the United States
25 under the APA. *Gros Ventre*, 469 F.3d at 809-10. The tribal claims in the *PCFFA* case were
26 dismissed on similar grounds. Here, the question is not whether Hoopa has a cause of action

1 against the United States, but rather whether the trust duty to Hoopa supports the action taken
2 by the Secretary pursuant to the 1955 Act. It does. *See Parravano v. Babbitt*, 70 F.3d 539, 544
3 (9th Cir. 1995) (holding federal reserved fishing rights of Indian tribes constitute applicable law
4 that the Secretary may rely on when promulgating emergency fishing regulations).

5 Moreover, unlike in *Gros Ventre*, the Interior Department has repeatedly acknowledged
6 that it has an affirmative obligation to operate the TRD under reclamation law in a manner that
7 protects tribal rights. The 1981 Secretarial Decision on Trinity River Fishery Mitigation affirms:

8 the Hupa and Yurok Indians have rights to fish from the Trinity and Klamath
9 Rivers and to adequate water to make their fishing rights meaningful. These
10 rights are tribal assets which the Secretary, as trustee, has an obligation to manage
11 for the benefit of the tribes. The Secretary may not abrogate these rights even if
the benefit to a portion of the public from such an abrogation would be greater
than the loss to the Indians.

12 AR4059. The Secretarial Decision concluded that “there are responsibilities arising from
13 congressional enactments, which are augmented by the federal trust responsibility to the Hupa
14 and Yurok tribes, that compel restoration of the river’s salmon and steelhead resources to pre-
15 project levels.” AR4070. The 1993 and 1995 Solicitor’s Opinions, cited in Hoopa’s opening
16 brief, at Dkt. #118, p. 9, also recognize Interior’s affirmative trust obligation to “exercise its
17 statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal
18 water rights.” 1995 Opinion, Dkt. #44, Exh. 2, p. 10.

19 **II. CONCLUSION**

20 Congress neither repealed nor limited the Secretary’s broad authority, provided by the
21 1955 Act, to take appropriate measures for the preservation of fish. The Secretary’s releases of
22 flow for the purpose of preventing replication of fish-kill conditions on the lower-Klamath
23 river in 2012 and 2013 were lawful under the authority of the 1955 Act and were further
24 supported by the Secretary’s fiduciary obligation to protect Hoopa’s trust resources. The Court
25 should grant summary judgment in favor of the Tribe.

1 Respectfully submitted this 15th day of May, 2014.

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3 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

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