

Nos. 14-17493, 14-17506, 14-17515, 14-17539

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, *et al.*,
Plaintiffs/Appellees/Cross-Appellants
v.

SALLY JEWELL, SECRETARY OF THE INTERIOR, *et al.*,
Defendants/Appellants/Cross-Appellees
and
THE HOOPA VALLEY TRIBE; THE YUOK TRIBE,
Defendant-Intervenors/Appellants/
Cross-Appellees
PACIFIC COAST FEDERATON OF FISHERMEN'S ASSOCIATION, *et al.*,
Defendant-Intervenors/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

OPENING BRIEF FOR THE FEDERAL APPELLANTS

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GLOSSARY

BOR	Bureau of Reclamation
cfs	cubic feet per second
CVP	Central Valley Project
CVPIA	Central Valley Project Improvement Act
EA	Environmental Assessment
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act

STATEMENT OF JURISDICTION

Plaintiffs invoked district court jurisdiction under 28 U.S.C. §§ 1331 and 1346(a)(2). Appellants' Joint Excerpts of Record ("ER") at 143. The district court entered final judgment on October 24, 2014. ER 84-86. Federal Defendants¹ and Defendant-Intervenors Hoopa Valley Tribe and Yurok Tribe timely filed notices of appeal on December 22, December 19, and December 22, 2014, respectively. ER 182-87; Fed. R. App. P. 4(a)(1)(B). Plaintiffs timely filed a notice of cross-appeal on December 26, 2014. ER 188-89; Fed. R. App. P. 4(a)(3). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

In 1955, Congress authorized the Secretary of the Interior to construct and operate dams and associated reservoirs on the Trinity River, the largest tributary of the Klamath River. *See* Pub. L. No. 84-386, 69 Stat. 719 [hereinafter 1955 Act]. The 1955 Act broadly authorizes and directs the Secretary "to adopt appropriate measures to insure the preservation and propagation of fish and wildlife." Several times over the past fifteen years, including in 2013, the Bureau of Reclamation ("BOR") has relied on this authority to release water from the Trinity River dams to reduce the likelihood of a massive die-off of adult salmon migrating through the lower Klamath

¹ Federal Defendants are S.M.R. Jewell, Secretary of the Department of the Interior; the Department of the Interior; the Bureau of Reclamation; Michael Connor, Commissioner of the Bureau of Reclamation; and David Murillo, Regional Director of the Bureau of Reclamation.

River, including salmon returning to the Trinity River basin. Did the district court err in holding that the Secretary's authority "to adopt appropriate measures" was limited geographically to the Trinity River basin and therefore did not authorize BOR to release water in 2013 for the purpose of preventing a large-scale fish die-off in the lower Klamath River?

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

In late summer 2002, an outbreak of disease from deadly fish pathogens resulted in a massive die-off of pre-spawn adult salmon in the lower Klamath River, the segment of the Klamath River between the confluence of the Klamath and Trinity Rivers and the ocean. Biologists concluded that the only effective means to minimize the likelihood of another epizootic disease outbreak and associated massive fish die-off under similar conditions is to increase water volume and velocity in the lower Klamath River. Thus, when faced with conditions similar to those contributing to the 2002 fish die-off in 2003, 2004, 2012, and 2013, BOR decided to release water in late summer from dams on the Trinity River, the largest tributary of the Klamath River, as a preventative measure to reduce the likelihood of another large-scale fish die-off in the lower Klamath River. Releases for this purpose are herein referred to as flow-augmentation releases. The Trinity River dams and associated reservoirs are components of the Trinity River Division of the Central Valley Project ("CVP").

Entities with contracts for CVP water filed this action to challenge BOR's August 6, 2013, decision authorizing flow-augmentation releases during late August and September 2013. ER 38-39. The district court entered judgment in favor of Federal Defendants on the claims alleged in Plaintiffs' amended complaint. *See infra* at 22-26; ER 84-86. But the district court also entered judgment against Federal Defendants and Defendant-Intervenors declaring that the provision in the 1955 Act authorizing the Secretary "to adopt appropriate measures to insure the preservation and propagation of fish," *id.* § 2, is geographically "limited in scope to the Trinity River basin, and so does not provide authorization for Federal Defendants to implement the 2013 FARs [flow-augmentation releases] to benefit fish in the lower Klamath River," ER 85.

A. The Challenged Action Implementing Flow-Augmentation Releases in 2013

1. Geography and tribal interests in the Trinity-Klamath fisheries

The Trinity River is the largest tributary of the Klamath River. ER 41, 646. The confluence of the Klamath and Trinity Rivers is located at Weitchpec, California, about 44 miles upstream from where the Klamath River enters the Pacific Ocean. ER 41, 647. The section of the Klamath River between Weitchpec and the ocean is referred to as the lower Klamath River. ER 41. The Trinity River basin is geographically part of the larger Klamath River basin. ER 526, 647.

The Klamath River and its tributaries, including the Trinity River, historically provided spawning and rearing habitat to substantial runs of anadromous fish, including Chinook salmon, coho salmon, and steelhead. ER 41-43, 524, 526-27, 574. Anadromous fish hatch and rear in fresh water, migrate to the ocean, and complete their life cycles by returning to their freshwater places of origin to spawn. 1993 Solicitor's Opinion, ER 99, ER 631, 656-62. By geographic necessity, anadromous fish originating in the Trinity River basin must swim through the lower Klamath River on their way to, and on their return from, the ocean. ER 42, 524, 647.

The lower Klamath River bisects, and flows entirely within, the boundaries of the Yurok Indian Reservation. ER 43, 647. The Hoopa Valley Indian Reservation is situated on either side of the Trinity River in the lower 12 miles of the Trinity River near the River's confluence with the Klamath River. ER 42, 6467. The Hoopa Valley Reservation also borders a small stretch of the Klamath River.² *Id.* For generations, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life, culture, and economic livelihood of the Hoopa Valley and Yurok Indian Tribes.

See, e.g., ER 42-43; *Westlands Water Dist. v. U.S. Dep't. of Interior*, 376 F.3d 853, 860-61

² For nearly 100 years, there was a single Indian reservation on lands adjacent to the lower Trinity and lower Klamath Rivers. *See generally* Memorandum to the Secretary of the Interior from the Solicitor, *Fishing Rights of the Yurok and Hoopa Valley Tribes*, M-36979 (Oct. 4, 1993) [hereinafter, 1993 Solicitor's Opinion], ER 99-101, 121-31. In 1988, Congress enacted the Hoopa-Yurok Settlement Act, which partitioned that reservation to form the present-day Hoopa Valley Reservation and Yurok Reservation. Pub. L. No. 100-580, 102 Stat. 2924 (codified at 25 U.S.C. § 1300i-1300i-11).

(9th Cir. 2004); *Parravano v. Babbitt*, 70 F.3d 539, 542, 544-47 (9th Cir. 1995); 1993 Solicitor's Opinion, ER 101-03. A primary purpose for establishing the reservations adjacent to the Trinity and lower Klamath Rivers was to secure to these Indians access and rights to fishing without interference from others. 1993 Solicitor's Opinion, ER 104; ER 42-43. The Yurok and Hoopa Valley Tribes have federally-protected reserved fishing rights to take anadromous fish from rivers running through the reservations, and the United States is the trustee for the Tribes' reserved fishing rights. *See* 1993 Solicitor's Opinion, ER 98, 103-07, 111-12; ER 42-43, 92-94. The Department of the Interior has recognized a general trust responsibility to protect these rights. *See* 1993 Solicitor's Opinion, ER 98, 111-12; *Parravano*, 70 F.3d at 546.

2. The 1955 Act

The 1955 Act authorized the construction, operation, and maintenance of the Trinity River Division as a component of the Central Valley Project ("CVP"). Pub. L. No. 84-386, 69 Stat. 719. The CVP is an extensive system of dams, reservoirs, canals, and other infrastructure that distributes water throughout California. *See Westlands Water Dist.*, 376 F.3d at 861; ER 41. BOR is the agency within the Department of the Interior that operates the CVP. The Trinity River Division impounds and stores water in the upper Trinity River, initially at the Trinity Dam and associated storage reservoir. ER 41-42, 647-48. Shortly downstream, a second dam and reservoir at Lewiston regulates water releases to the Trinity River. At Lewiston, water can also be diverted and pumped southward to the Sacramento River basin via the Clear Creek

Tunnel. *Id.* Water exported through this trans-basin transfer is used for various CVP purposes. ER 42.

In Section 2 of the 1955 Act Congress conferred broad discretion on the Secretary of the Interior to operate the Trinity River Division to insure preservation of fish downstream from the Lewiston dam:

Subject to the provisions of this Act, the operation of the Trinity River division shall be integrated and coordinated, from both a financial and operational standpoint, with the operation of other features of the Central Valley project, as presently authorized and as may in the future be authorized by Act of Congress, in such manner as will effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available: *Provided, That the Secretary is authorized and directed 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 diversion point at not less than one hundred and fifty cubic feet per second for months July through November and the flow of Clear Creek below the diversion point at not less than fifteen cubic feet per second unless the Secretary and the California Fish and Game Commission determine and agree that lesser flows would be adequate for maintenance of fish life and propagation thereof; the Secretary shall also allocate to the preservation and propagation of fish and wildlife, as provided in the Act of August 14, 1946 (60 Stat. 1080), an appropriate share of the costs of constructing the Trinity River development and of operating and maintaining the same, such costs to be non-reimbursable; 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.*

69 Stat. 719-20 (emphasis added).

Section 2's fish-protection provision (italicized above) reflected Congress's recognition of the importance of fishery resources to the north coastal area of

California and Congress's intention that these fishery resources be maintained. For example, the House Report for the 1955 Act stated:

The fishery resources of the Trinity River are an asset to the Trinity River Basin as well as to the whole north coastal area. Accordingly, Trinity River development has been planned with a view to maintaining and improving fishery conditions.

H.R. Rep. No. 84-602, 84th Cong, 1st Sess., at 4-5 (1955); *see also* S. Rep. No. 84-1154, 84th Cong., 1st Sess., at 5 (1955). The Department of the Interior has long recognized that Congress intended in Section 2 of the 1955 Act to limit the Secretary's discretion in meeting other general CVP priorities and to limit integration of the Trinity River Division into the overall CVP by "specifically provid[ing] that in-basin flows (in excess of a statutorily prescribed minimum) determined by the Secretary to be necessary to meet in-basin needs take precedence over needs to be served by out-of-basin diversion." Memorandum to Assistant Secretary – Land and Water Resources from Solicitor, *Proposed Contract with Grasslands Water District* (Dec. 7, 1979) [hereinafter, 1979 Solicitor's Opinion], ER 135; *see also* ER 206.

3. The 2002 fish die-off

The genesis of the 2013 flow-augmentation decision challenged in this case was a large-scale fish die-off in the lower Klamath River in late summer 2002 due to an outbreak of disease from infections caused by two fish pathogens. ER 45-47, 192, 206-06, 490, 517-20. The Fish and Wildlife Service conservatively estimated that 34,000 fish died, including at least 33,000 returning adult salmonids that prematurely

died before they could reach and successfully spawn in natal streams and rivers in the upper reaches of the Trinity River and Klamath River basins. ER 45, 515-17.

Analyses by the California Department of Fish and Game suggested that actual losses may have been more than double that number. ER 45, 482, 499. Fall-run Chinook salmon was the primary species affected, but other fish species, including at least several hundred coho salmon listed as threatened under the Endangered Species Act, were also lost. ER 45, 483, 515-17. Although a larger number of Klamath River run of fall-run Chinook died, a greater proportion of the overall Trinity River run of fall-run Chinook was negatively impacted because the Trinity run is smaller than the Klamath run on an annual basis, and the peak of the Trinity run coincided with the height of the die-off. ER 43, 482, 501. The 2002 die-off adversely affected the opportunity for tribal and sport fishermen to harvest fall-run Chinook. ER 42-43, 482, 499. The California Department of Fish and Game concluded that the negative impacts on harvest were more pronounced in the Trinity River than in the Klamath River. ER 482, 499, 501.

Follow-up scientific studies concluded that the 2002 disease outbreak was associated with, and exacerbated by, low water flow, warm water temperatures, and high fish density (*i.e.*, crowding). ER 13-14, 192, 205, 521-23. Increasing water flow in the lower Klamath River was identified as the only effective means to minimize the

likelihood of another epizootic outbreak under similar conditions.³ ER 14-15, 205, 211, 418, 422-26, 482, 501. Since 2002, the presence of pathogens causing disease and other environmental conditions conducive to disease outbreak have been monitored. ER 389-90, 425.

4. The 2013 flow-augmentation decision

In 2003, 2004, 2012, and 2013, predicted and observed conditions similar to those in 2002 created concern that another large-scale die-off would occur. ER 45-47,205. Accordingly, in each of these years, BOR decided (in consultation with federal and state agencies with fishery expertise) to release water from the Trinity River dams to augment flow in the lower Klamath River as a preventative measure to decrease the likelihood, or severity, of another disease outbreak and associated die-off. ER 45-47, 192-93, 205. General observations revealed that despite conditions similar to those in 2002, no significant disease or adult mortalities occurred during the four years when BOR implemented flow-augmentation releases. ER 192, 205, 222, 225.

³ One of the pathogens of concern is the parasite *Ichthyophthirius* (Ich). Ich has a free-swimming infectious stage, when it must find, attach, and burrow into a host fish or die. In the free-swimming infectious stage, Ich are weak swimmers. Fish density is a factor in Ich transmission because the higher the density, the higher chance that individual parasites will connect with a host fish. Large runs of fall-run Chinook increase crowding when flows are low and therefore increase risk of epizootic disease outbreak. Higher temperature is a factor because Ich mature more quickly in warmer temperatures. Increased water volume and velocity decrease the risk of disease outbreak by making it more difficult for individual parasites to contact and attach to fish; by pushing Ich downriver to the estuary, where the parasite cannot survive; by diluting infectious stages of Ich; by reducing overall fish density; and potentially by lowering water temperature. *See generally* ER 13-15, 418-425, 518-19.

BOR's 2013 flow-augmentation decision provided that the Trinity and Lewiston Reservoirs would be operated to target a minimum flow of 2,800 cubic feet per second (cfs) in the lower Klamath River between August 15 and September 21, 2013 (or to September 30, depending on water temperatures and observed fish behavior). ER 193. The decision authorized flow-augmentation releases of up to 62,000 acre-feet, but the actual amount released would be determined by active monitoring of hydrology, temperatures, fish behavior, and pathogens. *Id.* Ultimately, 17,500 acre-feet of water was released to provide flow augmentation in 2013. ER 47. BOR relied on the fish-protection provision of the 1955 Act as the principal authorization for implementation of the 2013 late-summer flow-augmentation releases. ER 206, 234-35, 261; *see also* ER 337 (relying on the 1955 Act for 2012 releases).

Before authorizing the 2013 flow-augmentation releases, BOR prepared an environmental assessment ("EA") under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and made a finding of no significant impact in the decision authorizing the releases. ER 190-245. The 2013 EA explained that BOR had considered alternative sources of water to augment flows in the lower Klamath River and that supplemental water from the upper Klamath River was not available. ER 234-35. BOR also explained that flow-augmentation releases from the Trinity River Division would not affect 2013 CVP water-supply allocations, operations within the Central Valley, or the projected volume of water to be exported from the Trinity

River Division to the Sacramento River basin in 2013. ER 196, 216-17, 222-23, 227-28. Depending on fill patterns for the Trinity reservoir in 2014, safety releases, and other variables, some portion of water released for flow augmentation in 2013 may otherwise (but not necessarily) have been exported to the Central Valley at some time in the future. ER 196, 198, 216-17.

B. Background Related to Fishery Restoration Statutes

The Secretary's authority under the 1955 Act's fish-protection provision was never limited or supplanted by subsequent statutes and, as explained in the Argument Section below, this provision is sufficient in itself to authorize the 2013 flow-augmentation releases. However, because the district court's interpretation of the 1955 Act was influenced by subsequently-enacted statutes and administrative actions aimed at restoring fisheries to pre-project levels by rehabilitating fish habitat in the mainstem Trinity River, we provide here background on restoration statutes and related agency actions.

1. Fisheries precipitously declined after the Trinity River Division became fully operational

Construction and operation of the Trinity River Division resulted in unintended, yet severely detrimental, impacts to fishery resources. In addition to causing permanent loss of access to fish habitat upstream from the dams, fish habitat below the Lewiston dam rapidly became degraded from changes in river morphology resulting from the project's alterations to the timing, duration, and magnitude of flows

(as compared to pre-project natural flow patterns).⁴ See *Westlands Water Dist.*, 376 F.3d at 860-63. Releases to the Trinity River during the initial decades of operation proved inadequate to sustain the fishery resources of the Trinity River primarily because they failed to address the fluvial geomorphic processes needed to maintain fish habitat in the mainstem Trinity River. ER 575, 642-43, 675; see generally, *Westlands Water Dist.*, 376 F.3d at 861-62.

In the first ten-year period following commencement of full operations of the Trinity River Division in 1964, diversions to the Central Valley averaged 88% of the Trinity River's flow for an average annual volume of 1.2 million acre-feet, while the annual volume of releases to the river below Lewiston dam averaged 120,500 acre-feet (with flow rates in the Trinity River ranging from 150 to 250 cfs). ER 642; see *Westlands Water Dist.*, 376 F.3d at 861. Although the volume of releases increased somewhat in the 1980s and 1990s, the vast majority of Trinity River flow continued to

⁴ The project eliminated replenishment of gravel from the upper Trinity River, and project operations eliminated large flows that had moved gravels and cobbles (coarse sediment) through the river channel and maintained the broad floodplain and gravel bars of the alluvial river, which are necessary habitat elements for fish. ER 528, 575-76, 631-34. The absence of large flows also caused accumulation of fine sediment and prevented flushing of fine sediments from gravel areas used for spawning, rendering these areas unsuitable for spawning. *Id.* Deep pools essential for holding adults began to fill in with sediment. The altered flow regime also changed water temperatures, caused changes in river features and shape, and allowed encroachment of riparian vegetation onto the gravel bars. *Id.* The pre-dam river was a dynamic alluvial river with a meandering channel and gently-sloping gravel-bars within a broad floodplain. ER 575, 631. The post-dam river became a narrow channel confined between steep banks. ER 575-76, 595-99, 631.

be diverted to the Central Valley. *See Westlands Water Dist.*, 376 F.3d at 862. As a result, the Trinity River below Lewiston experienced “essentially extreme drought conditions for more than thirty years.” *Id.*; *see also* ER 595 (volume of releases to the Trinity River below Lewiston in the 20 years following project completion represented “extreme drought relative to pre-dam hydrology” and a recent increase of releases to 340,000 acre-feet per year “still represent[ed] drought levels”).

Within a decade of the Trinity River Division’s completion, populations of salmon and steelhead had noticeably and significantly declined. ER 528, 643; *Westlands Water Dist.*, 376 F.3d at 862. In 1980, the Fish and Wildlife Service estimated that the Trinity River fish had suffered a population reduction of 60% to 80%, and habitat loss of 80% to 90% since commencement of Trinity River Division operations. ER 528, 584, 744.

2. An intergovernmental Task Force, formed in the early 1970s, and the Department of the Interior began to address declines in Trinity River fisheries

In response to observed declines in fish and wildlife, the Trinity River Basin Fish and Wildlife Task Force, an intergovernmental group with members from Federal, State, Tribal, and local governmental agencies, was formed in the early 1970s. ER 583-84, 649, 746-47. The Task Force initiated studies and undertook activities, including watershed revegetation and sedimentation reduction, aimed at reducing the degradation of fish habitat in the Trinity River. ER 649, 746-47. The Task Force also worked on developing a long-term basin-management plan to restore fisheries. *Id.*

Concurrent with the Task Force's efforts, the Secretary of the Interior issued a decision in 1981 stating that the Trinity River Division had caused significant diminishment of fisheries and that "there are responsibilities arising from congressional enactments, which are augmented by the federal trust responsibilities to the Hupa and Yurok tribes, that compel restoration of the river's salmon and steelhead resources to pre-project levels." ER 753; *see also* ER 741-43. The 1981 Secretarial Decision explained that without increased flows to improve fishery habitat and production, the other actions (such as land use measures to reduce sedimentation and limits on fish harvest) would produce only limited improvements. ER 747. The Secretarial Decision initiated the Trinity River Flow Evaluation Study, intended to be a 12-year scientific evaluation to determine the effectiveness of flow alternatives to restore anadromous populations in the Trinity River basin. ER 650, 738, 740. The 1981 Secretarial Decision provided that during, and for purposes of, the study, minimum releases to the Trinity River would be incrementally increased to 340,000 acre-feet annually in normal years, 220,000 acre-feet annually in dry years, and 140,000 acre-feet annually in critically dry years. ER 650, 738, 750. A 1991 Secretarial Decision increased minimum releases for dry and critically-dry years to 340,000 acre-feet. ER 652.

3. Congress enacted statutes aimed at restoring Trinity and Klamath River fisheries

In response to the declines in fisheries and to administrative initiatives, Congress enacted a series of statutes authorizing actions and programs aimed at restoring fisheries in the Trinity and Klamath River basins. These statutes also provided funding authorizations to implement restoration actions and programs. Among these statutes are the following:

a. Trinity River Stream Rectification Act of 1980

In 1980, Congress enacted the Trinity River Stream Rectification Act authorizing the Secretary to construct a dam and to conduct dredging (or to contract for these activities) for the purpose of controlling sedimentation problems resulting from the degraded Grass Valley Creek watershed, a tributary of the Trinity River, and from the inability of the low annual flows in the mainstem, following the completion of the Trinity River Division, to flush sediments through the system. Pub. L. No. 96-335, 94 Stat. 1062.

b. Trinity River Basin Fish and Wildlife Management Act of 1984

In 1984, Congress enacted the Trinity River Basin Fish and Wildlife Management Act. Pub. L. No. 98-541, 98 Stat. 2721 [hereinafter, 1984 Act]. Congress found that construction of the Trinity River Division “has substantially reduced the streamflow in the Trinity River Basin thereby contributing to damage to pools, spawning gravels, and rearing areas and to a drastic reduction in anadromous

fish populations.” 1984 Act § 1(1). Congress affirmed the Task Force’s and Secretary’s restoration goals by (1) finding that the Task Force had developed a fish and wildlife management program, *id.* § 1(5), and that the Secretary required “additional authority to implement a basin-wide fish and wildlife management program in order to achieve the long-term goal of restoring fish and wildlife populations in the Trinity River Basin to a level approximately that which existed immediately before the start of the construction of the Trinity River division,” *id.*, § 1(6); and (2) directing the Secretary to “formulate and implement a fish and wildlife management program [based on the management program developed by the Task Force] for the Trinity River Basin designed to restore the fish and wildlife populations in such basin to the levels approximating those which existed immediately before the start of” the project’s construction and to maintain such levels, *id.*, § 2(a). The program was to include activities to “rehabilitate fish habitats in the Trinity River between Lewiston Dam and Weitchpec” and in tributaries of the Trinity River, and to increase effectiveness of the Trinity River Fish Hatchery. *Id.*, § 2(1)(A)-(C). The Act authorized \$35.4 million in funding through 1995 for implementation of this program and formally established the Trinity River Basin Fish and Wildlife Task Force to advise the Secretary. *Id.* §§ 3, 4.

c. Klamath River Basin Conservation Restoration Area Act

In 1986, Congress enacted a similar statute, the Klamath River Basin Conservation Restoration Area Act, making fisheries restoration a goal for the entire Klamath River Basin. Pub. L. No. 99-552, 102 Stat. 3830 (codified at 16 U.S.C. § 460ss *et seq.*). Congress found, *inter alia*, that “the Klamath and Trinity Rivers provide fishery resources necessary for Indian subsistence and ceremonial purposes,” *id.* § 460ss(2), that “Klamath–Trinity fall chinook salmon populations have declined by 80 percent from historic levels,” *id.* § 460ss(5), and that “the Secretary has the authority to implement a restoration program only in the Trinity River Basin and needs additional authority to implement a restoration program in cooperation with State and local governments to restore anadromous fish populations to optimum levels in both the Klamath and Trinity River Basins,” *id.* § 460ss(9). Congress directed the Secretary to formulate and implement a 20-year restoration program that includes improvement and restoration of habitats in the Klamath River Conservation Restoration Area, an area that includes the lower Klamath River. *Id.* § 460ss-1. The Act provided a 20-year funding authorization. *Id.* § 460ss-5.

d. Central Valley Project Improvement Act

In 1992, Congress enacted the Central Valley Project Improvement Act. Pub. L. No. 102-575 §§ 3401-3412, 106 Stat. 4600, 4706-4731 [hereinafter, “CVPIA”]. The Act’s purposes included: “to protect, restore, and enhance fish, wildlife, and

associated habitats in the Central Valley and Trinity River basins of California,” to “address impacts of the Central Valley Project on fish, wildlife and associated habitats,” and to achieve a reasonable balance among competing demands for CVP water, including the requirements of fish and wildlife. *Id.* § 3402. The CVPIA added “mitigation, protection, and restoration of fish and wildlife” to the CVP’s general purposes, *id.* § 3406(a)(1).

Although the CVPIA includes several provisions related to the Trinity River Division, the provision most relevant to this case is Section 3406(b)(23), which provided:

[T]o meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to meet the fishery restoration goals of the [1984] Act . . . , provide through the Trinity River Division, for water years 1992 through 1996, an instream release of water to the Trinity River of not less than three hundred and forty thousand acre-feet per year for the purposes of fishery restoration, propagation, and maintenance.

Id. Section 3406(b)(23) also directed the Secretary of the Interior to complete, in consultation with the Hoopa Valley Tribe, the Trinity River Flow Evaluation Study initiated by the 1981 Secretarial Decision “in a manner that insures the development of recommendations, based on the best available scientific data, regarding permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River fishery.” *Id.* § 3406(b)(23)(A). If the Secretary and the Tribe concurred in the recommendations, “any increase to the minimum Trinity River instream fishery releases established” by

this subsection were to be “implemented accordingly.” *Id.* § 3406(b)(23)(B). The subsection also provides that if the Secretary and Hoopa Valley Tribe do not so concur, releases may be increased “by an Act of Congress, [by an] appropriate judicial decree, or by agreement between the Secretary and the Hoopa Valley Tribe.” *Id.*

e. Trinity River Basin Fish and Wildlife Management Reauthorization Act

In 1996, Congress enacted the Trinity River Basin Fish and Wildlife Management Reauthorization Act, which reauthorized and amended the 1984 Act. Pub. L. No. 104-143, 110 Stat. 1338 [hereinafter, 1996 Reauthorization Act]. Congress added a finding that fisheries restoration is to be measured not only by returning adult spawners, “but by the ability of dependent tribal, commercial, and sport fisheries to participate fully, through enhanced in-river and ocean harvest opportunities, in the benefits of restoration.” *Id.* § 2(5). Congress also added language directing that the Secretary’s Trinity River restoration program include activities to rehabilitate fish habitats “in the Klamath River downstream of the confluence with the Trinity River.” *Id.* § 3(b). Congress directed that the Trinity River Fish and Wildlife Task Force be expanded to include persons appointed by the Yurok and Karuk Tribes and persons representing commercial and sport fishing interests. *Id.* § 4(a)

4. The Secretary of the Interior issued a Record of Decision in 2000 that selected an alternative designed to achieve a goal of restoring and maintaining a healthy Trinity River mainstem

Following the 1981 Secretarial Decision, the Fish and Wildlife Service developed a study plan and conducted flow evaluation studies between 1983 and 1994. ER 530-31. The Final Report for the Trinity River Flow Evaluation (“Report”), prepared by the Fish and Wildlife Service and the Hoopa Valley Tribe (in consultation with BOR and other federal or state agencies), was released in June 1999. ER 531, 606. The fundamental conclusion of the study was that the channel morphology that had resulted from the Trinity River construction and operation was inadequate to meet salmonid production objectives and that habitat in the mainstem Trinity River must be rehabilitated in order to restore naturally-produced salmonid populations. ER 634-35.

Thereafter, BOR, the Hoopa Valley Tribe, Fish and Wildlife Service, and Trinity County (lead agencies) issued draft and final Environmental Impact Statements (“EISs”) analyzing a range of alternatives “to restore and maintain the natural production of anadromous fish on the Trinity River mainstem downstream of Lewiston Dam.” ER 577. The goal was to “[r]estore and maintain a ‘healthy’ Trinity River mainstem downstream of Lewiston Dam,” that is, to “re-establish and maintain pre-dam habitats,” to “[m]obilize and transport a wide variety of sediment sizes,” and to “[r]estore dynamic riparian plant communities in the Trinity River channel and its

floodplain.” ER 577-78, *see also* ER 599.⁵ The analyses in the Report and final EIS were focused on habitat conditions in the mainstem Trinity River, especially a 40-mile segment of the Trinity River mainstem between Lewiston dam and the confluence of the mainstem with the North Fork of the Trinity River where habitat degradation had been most acute. ER 577, 581, 634-36, 672-79. The preferred alternative was based on the Report’s recommendations. ER 588.

Following the Hoopa Valley Tribe’s concurrence in the preferred alternative, in December 2000 the Secretary of the Interior issued a Record of Decision (“2000 ROD”) that approved the suite of actions that made up the preferred alternative. *See* ER 524-25, 533-39. Components of the preferred action included specified annual flow releases that varied by water year type, sediment management actions, mechanical channel rehabilitation, and watershed restoration activities. ER 534-39. These actions provided a comprehensive program designed to restore and maintain fishery habitat in the mainstem Trinity River pursuant to Congress’s direction in the 1984 Act and CVPIA by “rehabilitating the river itself, restoring attributes that produce a healthy, functioning alluvial river system.” ER 525; *see also* ER 534-539. The volumes for annual releases to the Trinity River for these purposes ranged from 369,000 acre-feet in critically dry years to 815,000 acre-feet in extremely wet years.

⁵ The final EIS identified line-specific changes to the text of the draft EIS, but otherwise adopted the draft EIS. *See* ER 567-572. Thus, citations herein to the document entitled draft EIS (ER 573) should be understood as citations to the final EIS.

ER 525-26, 535. The release pattern for each water year class was developed to address “the needs of life stages of the anadromous fish present in the Trinity River, including the ability of the river to move sediment and reshape itself (i.e., *fluvial geomorphic process*).” ER 589 (emphasis in original).

Westlands Water District and San Luis & Delta-Mendota Water Authority (the same Plaintiffs as in this case) challenged the 2000 ROD. This Court held that the EIS complied with NEPA, reversing a district court holding that the scope of the EIS was too narrow because it focused only on the mainstem Trinity River, to the exclusion of tributaries of the Trinity River. *See Westlands Water Dist.*, 376 F.3d at 866-67. This Court held that the federal agencies acted within their discretion by focusing the EIS on rehabilitation of the mainstem Trinity River. *Id.*

The releases authorized by the 2013 flow-augmentation decision at issue in this case (for the purpose of reducing the likelihood of a massive fish die-off in the lower Klamath River) are separate from, and in addition to, the volume of releases authorized by the 2000 ROD (for the purpose of restoring fisheries by rehabilitating and maintaining habitat conditions in the mainstem Trinity River). ER 60.

C. The District Court Proceedings

On August 7, 2013, Plaintiffs filed this case to challenge BOR’s August 6, 2013, decision to implement flow-augmentation releases. ER 39. Plaintiff San Luis & Delta-Mendota Water Authority is an entity with members (including Plaintiff Westlands Water District) that contract for water from the CVP. ER 143-44.

Plaintiffs claimed that the flow-augmentation releases diminished the amount of water potentially available for diversion from the Trinity River to the Sacramento River basin. Plaintiffs' amended complaint alleged that BOR's implementation of the 2013 flow-augmentation releases violated: (1) CVPIA § 3406(b)(23) because the releases for this purpose were in addition to the releases authorized by the 2000 ROD; (2) CVPIA § 3411(a) and 43 U.S.C. § 383 because BOR failed to comply with state-law requirements respecting modification of state water-rights permits; (3) NEPA; and (4) the Endangered Species Act.⁶ ER 39, 164-69.

The Hoopa Valley Tribe, the Yurok Tribe, the Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources intervened as defendants. ER 39. The California Department of Fish and Game participated in the district court as *amicus curiae* in support of defendants. ER 39-40, 81-82.

Based on a balancing of harm, the district court denied Plaintiffs' motions for preliminary injunctions seeking to enjoin BOR from making flow-augmentation releases in 2013 and in 2014.⁷ ER 13-15, 24-31. The court found that harm to

⁶ Plaintiffs' amended complaint also purported to challenge BOR's 2012 flow-augmentation decision. However, the 2012 flow-augmentation releases had been completed long before Plaintiffs filed their initial complaint and Plaintiffs largely ignored the 2012 flow-augmentation releases in briefing the case, as did the district court in its orders and judgment.

⁷ While motions for summary judgment respecting the 2013 releases were pending before the district court, BOR issued a decision in August 2014 authorizing emergency flow-augmentation releases. (Based on forecasting, BOR had initially

Cont.

Plaintiffs from reduction in water storage in the Trinity reservoir was far from certain, particularly because there was no guarantee that any additional water supply in the Trinity River reservoirs would ever end up in Plaintiffs' hands. ER 24. Weighing against preliminary injunctions was the potential for catastrophic damage to the Trinity-Klamath salmon fishery if the releases were not implemented. ER 13-15, 24-31.

On October 1, 2014, the district court issued a Memorandum Decision and Order (published at 52 F. Supp. 3d 1020) resolving cross-motions for summary judgment. ER 33-83. The district court granted summary judgment for Defendants and against Plaintiffs on the claims alleged in Plaintiffs' amended complaint. The court held that Plaintiffs lacked standing to bring the Endangered Species Act claim and that the NEPA claim was moot. ER 54-58. The court held that even though the challenged 2013 flow-augmentation releases were completed, the substantive claims challenging BOR's authority (the first and second claims in the amended complaint) to make flow-augmentation releases were reviewable. ER 56-58. The court reasoned that these claims were not moot under a continuing-action theory or, in the

expected that flow-augmentation releases would not be necessary in 2014, but in the first half of August, hydrologic conditions and observed fish health worsened, leading BOR to determine, in consultation with fish agencies, that emergency releases in August and September were necessary to avert a potentially significant fish die-off. ER 27-30, 178-81.) Plaintiffs did not seek to amend their complaint to challenge the 2014 decision, but they did file a motion for preliminary injunction seeking to enjoin 2014 releases. ER 17-32.

alternative, were reviewable under the exception to mootness for conduct that is capable of repetition yet evading review.⁸ *Id.* The district court entered judgment on the merits of these claims in favor of Federal Defendants and against Plaintiffs. ER 58-67, 78-81, 85.

With respect to Plaintiffs' first claim alleging that CVPIA § 3406(b)(23) precluded BOR from implementing flow-augmentation releases in excess of the minimum annual releases authorized by the 2000 ROD, the court held that the 2013 flow-augmentation releases were outside the scope of § 3406(b)(23) and of the 2000 ROD. ER 58-67. The court explained that the CVPIA defined the purposes of flows implementing § 3406(b)(23) as meeting the fishery-restoration goals of the 1984 Act, which in turn were limited to restoration of habitat and fish populations within the Trinity River basin. ER 60-62, 85. Furthermore, the Report,

⁸ We concur in the district court's holding that the 2013 decision was reviewable under the exception for conduct that is capable of repetition yet evading review. However, if BOR issues a long-term plan (*see infra* at 28), the evading review criterion for this exception may no longer be met. *See, e.g., Aluminum Co. of Am. v. Bonneville Power Admin.*, 56 F.3d 1075, 1077-78 (9th Cir. 1995). The district court's continuing-action theory for avoiding mootness is incorrect. There is no continuing action as the 2013 flow-augmentation decision authorized releases only for a limited period of short duration, as did separate decisions authorizing releases in 2012, 2014, and 2015. The case on which the district court relied for its continuing-action theory (ER 56-57) – *Forest Guardians v. Johanns*, 450 F.3d 455 (9th Cir. 2006) – is readily distinguishable. That case involved a challenge to a ten-year grazing permit and allegations that the Forest Service had failed to adhere adequately with annual obligations to obtain concurrence from the Fish and Wildlife Service that certain criteria were being met. *Id.*, at 461-63. Here, there is no challenge to an underlying action with a remaining period comparable to a ten-year grazing permit.

the EIS, and the 2000 ROD were in fact lawfully limited in scope to the Trinity River mainstem. ER 62-67, 85. Accordingly, the court held, the scope of CVPIA § 3406(b)(23) was limited to the Trinity River basin; the flow measures in the 2000 ROD were lawfully limited in scope to the Trinity River mainstem; and neither CVPIA § 3406(b)(23) nor the 2000 ROD “preclude[d] BOR from “implementing the 2013 FARs [flow-augmentation releases], which were designed to improve fisheries conditions on the lower Klamath River.” ER 85; *see also* ER 59-67.

After ruling against Plaintiffs on the claims alleged in their amended complaint, the court then proceeded to hold that the fish-protection provision of the 1955 Act – the legal authority on which BOR had expressly relied for the 2013 flow-augmentation releases – was, like the 1984 Act and CVPIA, “limited in geographical scope to the Trinity River basin and therefore [did] not provide Federal Defendants with authority to implement” the 2013 flow-augmentation releases. ER 76 *see also* ER 83. In so ruling, the court declined to accord any deference to BOR’s position that the 2013 flow-augmentation releases were authorized by the 1955 Act’s fish-protection provision (ER 68-72), notwithstanding that the court found that the plain language of the 1955 Act did not directly address the geographic scope of the Secretary’s authority (ER 72-73), that “[a]t best, the statutory text is ambiguous as to Federal Defendants’ asserted authority” (ER 73), and that neither the statutory purpose nor legislative history of the 1955 Act clarified congressional intent on this issue. ER 73-74.

In its independent analysis of the 1955 Act, the court reasoned that an explicit reference to the Trinity River in the statutory text and the absence of mention of the Klamath River suggested that the 1955 Act did not authorize BOR to release water for the purpose of augmenting flows in the lower Klamath River to prevent recurrence of a massive salmon die-off. ER 72-73. The court further suggested that the legislative history indicated that Congress had reason to believe that the project would not have any significant impact on Klamath River flows and thus Congress had no need to authorize BOR to protect fish there. ER 74. The court primarily relied, however, on its perception of two sentences in the scientific Report on the Trinity River Flow Evaluation, both of which stated that the Report “*provides recommendations to the Secretary to fulfill fish and wildlife protection mandates of the 1955 Act,*” 1984 Act, CVPIA, 1981 and 1991 Secretarial Decisions, and federal trust responsibilities. ER 71 (quoting AR 3733 [sic: AR 3734] [ER 630]) (emphasis to Report added by the court); *see also* ER 72 (quoting AR 3747 [ER 643]) (emphasis to Report added by the court). The court regarded these sentences as being at odds with BOR’s position that the 1955 Act authorized the 2013 flow-augmentation releases and thus provided reason not to defer to BOR’s position. ER 72. The court also viewed these sentences in the 1999 Report as providing “a cogent and logical way to reconcile all of the statutory commands.” ER 76. The court entered judgment in favor of Plaintiffs and against Defendants declaring that the fish-protection provision of the 1955 Act was “limited in scope to the Trinity River basin and so [did] not provide authorization for Federal

Defendants to implement the 2013 FARs [flow-augmentation releases] to benefit fish in the lower Klamath River.” ER 84-85; *see also* ER 76, 83.⁹

D. Ongoing Preparation of a Long-term Plan

The Department of the Interior is in the process of preparing a long-term plan addressing increased lower Klamath River flow to prevent the likelihood, and potentially to reduce the severity of, fish die-off in future years. BOR has announced its intention to prepare an EIS as part of the process for developing a long-term plan. 80 Fed. Reg. 41061 (July 14, 2015). BOR expects to complete the EIS in the summer of 2016.

SUMMARY OF ARGUMENT

Releasing water from the Trinity River dams for the purpose of reducing the likelihood of another massive fish die-off is an action that falls squarely within the

⁹ The court noted that the Tribes and the California Department of Fish and Game had argued that alternative sources of legal authority allowed BOR to implement the flow-augmentation releases, including the provision in Section 2 of the 1955 Act guaranteeing water for Humboldt County and downstream users, tribal trust obligations, CVPIA § 3406(b)(2), and state water law. ER 76-82. The court declined, however, to decide whether BOR could implement the releases under these alternative theories because BOR had not expressly identified them in its 2013 decision. ER 73 n.23, 76-78, 81-82. Accordingly, these alternative theories are not presented by this appeal and are not addressed herein. Some of these alternative theories may be at issue in a new lawsuit brought by Plaintiffs – *San Luis & Delta Mendota v. Jewell*, No. 1:15-CV-01290-LJO-GSA (E.D. Calif.) – to challenge an August 2015 decision authorizing late-summer flow-augmentation releases. In that decision BOR reiterated that the 1955 Act’s fish-protection provision authorized the flow-augmentation releases, but additionally relied on other statutory provisions. The case challenging 2015 flow-augmentation releases is still pending before the district court.

plain language and purpose of the 1955 Act's provision authorizing the Secretary "to adopt appropriate measures to insure the preservation and propagation of fish."

BOR's interpretation of the 1955 Act as affording it discretion to implement the 2013 flow-augmentation releases is also consistent with the legislative history of the 1955 Act, which indicates that Congress intended that only water that was surplus to the present and future needs of the Trinity and Klamath River basins be diverted to the Central Valley and that the pre-project fishery resources be preserved.

The district court incorrectly suggested that its cramped interpretation of the scope of the 1955 Act logically reconciles all of the various statutory commands. The district court's reasoning is contrary to the principle that when, as here, statutes are capable of co-existence, they each must be given full effect. Thus, the fact that the 1984 Act, CVPIA, and associated 2000 ROD sought to restore Trinity River fisheries by rehabilitating and maintaining habitat within the Trinity River basin provides no reason to construe the scope of the 1955 Act's fish-protection provision as likewise geographically limited to the Trinity River basin. The 1984 Act and CVPIA facilitated implementation of administrative initiatives to restore habitat conditions within the mainstem Trinity River that had become severely degraded following construction and operation of the Trinity River Division. Those statutes do not demonstrate that in 1955 Congress intended to restrict geographically the scope of the 1955 Act's broad authorization to the Secretary to adopt measures "to insure preservation and propagation of fish" and thereby to exclude releases designed to prevent a massive

die-off of salmon in the lower Klamath River, including salmon destined for the Trinity River basin.

To the extent the 1955 Act is ambiguous on the question of BOR's authority to release water from the Trinity River dams to reduce the likelihood of a large-scale fish die-off in the lower Klamath River, this Court should defer to BOR's permissible interpretation of the 1955 Act. Congress delegated broad authority to BOR to operate dynamic and complex water systems and to determine appropriate measures to insure preservation of fish. BOR's decision to implement flow-augmentation releases in 2013 was the culmination of a process that included notice and opportunity for public comment and BOR's interpretation of the 1955 Act reflected in its 2013 flow-augmentation decision is reasonable. Accordingly, BOR's position should be accorded *Chevron* deference or, at the very least, *Skidmore* deference. The technical and scientific complexities of managing the CVP to balance competing demands and to comply with an extensive regime of legal requirements provide further reason to defer to BOR's 2013 flow-augmentation decision. Deference to BOR's position is further bolstered by the fact that these releases protect reserved tribal fishing rights.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* a district court's grant of summary judgment, as well as its legal interpretation of a statute. See *Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007). This Court reviews the agency

action under the same standard of review applied by the district court. BOR's 2013 decision to undertake flow-augmentation releases is reviewed under the Administrative Procedure Act standard under which an agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). A court's review under the arbitrary-and-capricious standard is narrow; the reviewing court cannot substitute its judgment for that of the agency. *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1110 (9th Cir. 2015).

II. The 1955 Act's Fish-Protection Provision Authorizes BOR to Implement the Flow-Augmentation Releases

A. BOR's Interpretation of the 1955 Act as Allowing It to Release Water from the Trinity River Dams to Prevent a Massive Die-off of Adult Salmon in the Lower Klamath River Is Consistent with the Plain Language, Purpose, and Legislative History of the 1955 Act

Judicial review of an agency's interpretation of a statute it administers is reviewed under the familiar framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Under step one of the *Chevron* framework, if a statute speaks clearly "to the precise question at issue," a reviewing court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. However, if the statute "is silent or ambiguous with respect to the specific issue," under *Chevron* step two a court must sustain the agency's interpretation of the statute if it is "based on a permissible construction" of the Act. *Id.*, at 843. Where an agency interpretation is not expressed in a form that warrants

deference under *Chevron* step two, the agency's interpretation may still be entitled to deference under principles set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See McMaster v. United States*, 731 F.3d 881, 892 (9th Cir. 2013); *see also Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 284 (2009).

BOR's position that the 1955 Act affords it authority to undertake the flow-augmentation releases should be upheld under *Chevron* step one because BOR's interpretation is consistent with the plain language, purpose, and legislative history of the Act. Section 2 of the 1955 Act states that

the Secretary is authorized and directed 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 diversion point [at specified levels between July and November].

This provision confers on the Secretary considerable discretion to determine what "appropriate measures" are needed to "insure preservation and propagation of fish." *See Trinity County v. Andrus*, 438 F. Supp. 1368, 1376 (E.D. Cal. 1977). Broad language is not necessarily ambiguous where congressional objectives require broad terms. *See Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980). Here, releasing water from the Trinity River dams for the purpose of providing flow that reduces the risk of a massive salmon die-off downstream from the diversion point [at Lewiston] falls squarely within the broad language of the fish-protection provision. The plain-language reading is consistent with the provision's purpose of insuring that preservation of fisheries downstream from Lewiston takes precedence over trans-

basin diversions to the Central Valley. *See* 1979 Solicitor’s Opinion, ER 135-36; ER 206.

Accordingly, the district court erred by concluding that the scope of the Secretary’s discretion under the 1955 Act’s fish-protection provision is geographically limited to the Trinity River basin and therefore does not authorize BOR to release water from the Trinity River dams to preserve migrating adult salmon when they are farther downstream than the confluence of the Trinity and Klamath Rivers. Indeed, the plain language of the 1955 Act imposes no such geographic limitation. Contrary to the district court’s suggestion, the reference to the Trinity River in the phrase providing that appropriate measures “includ[e],but [are] not limited to, the maintenance of the flow of the Trinity River below the [Lewiston] diversion point [at a specified minimum level]” does not explicitly or implicitly impose a geographic limitation that would preclude BOR from taking appropriate action to address adverse conditions that threaten fish survival farther downstream of the Trinity-Klamath confluence. The phrase “including, but not limited to,” indicates that maintenance of the specified minimum flow rate in the Trinity River is not the sole action that BOR may undertake to benefit fish. And the specified flow rate is the *minimum* level, not an upper limit on releases. More fundamentally, releases from the Trinity River Division facilities as well as the flow conditions and the water temperature and quality within the Trinity River necessarily affect flow conditions in the lower Klamath River because the Trinity River is the largest tributary of the Klamath River and water

released into the Trinity River “below the [Lewiston] diversion point,” 1955 Act § 2, ultimately flows into the lower Klamath River. *See supra* at 4-5. The Trinity reservoir provides substantial cold water storage, and releases from the deep portions of the Trinity reservoir to the Trinity River can lower water temperatures in the lower Klamath River during warm-weather months (depending on the magnitude of the releases, among other factors), which is generally beneficial to anadromous fish. ER 213-14, 222, 299, 603-04. Anadromous fish originating in the Trinity River basin necessarily must swim through the lower Klamath River during migratory phases of their life cycles. For all these reasons, the statutory reference to “flow of the Trinity River below the diversion point” and the absence of express reference to the Klamath River do not provide an adequate textual basis for the district court’s conclusion that the 1955 Act was geographically limited to the Trinity River basin and therefore BOR lacked authority under the 1955 Act to release water for the purpose of reducing the risk of another massive fish die-off in the lower Klamath River.

Yet even if the 1955 Act were intended to preserve only salmonids of Trinity River basin origin, the challenged action served this purpose. A portion of adults that died in the 2002 event were fall Chinook of Trinity River basin origin. *See supra* at 7-8. Thus, the flow-augmentation releases necessarily preserve adult salmon returning to the Trinity River basin, not just salmon migrating to other watersheds within the Klamath River basin. Given the migratory life cycle of salmon and the geography, common sense dictates that the Act be read to allow BOR to operate the Trinity River

dams to preserve adult salmon of Trinity River origin while they migrate up the lower Klamath River. If the direction to the Secretary in the 1955 Act to insure the preservation and propagation of fish were limited only to the Trinity River, rather than extending downstream to protect the adult spawners before they reach the Trinity-Klamath confluence, then the protections afforded by the 1955 Act would be unduly limited and ineffective.

BOR's position is also consistent with the 1955 Act's legislative history. Resort to legislative history is generally unnecessary where a statute is unambiguous. *E.g.*, *James v. City of Costa Mesa*, 700 F.3d 394, 399 (9th Cir. 2012). However, if statutory language is ambiguous, the Court may refer to legislative history to discern congressional intent. *E.g.*, *Tides v. Boeing Co.*, 644 F.3d 809, 814 (9th Cir. 2011). Legislative history for the 1955 Act reveals that Congress understood that salmonids of Trinity River origin necessarily pass through the lower Klamath River when migrating to and from the ocean and that "[t]he fishery resources of the Trinity River are an asset to the Trinity River Basin *as well as to the whole north coastal area.*" H.R. Rep. No. 84-602, at 4 (emphasis added). Furthermore, Congress intended that only water that was surplus "to the present and *future needs of the Trinity and Klamath River Basins*" would be diverted to the Central Valley and that fishery resources would be maintained or improved. *Id.*

Citing testimony by the BOR Regional Director in a legislative hearing, the district court suggested that Congress had reason to believe that there would not be

any significant impact to the lower Klamath River from diversions to the Central Valley and therefore Congress would not have seen a need to authorize the Secretary to protect fish and wildlife in the lower Klamath River. ER 74 (citing Hearings on H.R. 123 Before the Subcomm. on Irrigation and Reclamation of the Comm. on Interior and Insular Affairs, 83d Cong. 5 (1954) (statement of Clyde H. Spencer, Regional Director of U.S. Bureau of Reclamation for Region 2)). The court's reasoning is flawed. Congress thought that there would not be any significant impact to flows in either the lower Klamath River or the Trinity River from operation of the Trinity River Division because diversions to CVP would only occur during periods of high flows and because only water that was surplus to the present and future needs of the Trinity and Klamath River Basins would be diverted. *Id.*; *see also* Hearings on H.R. 4663 Before the Subcomm. on Irrigation and Reclamation of the H. Comm. on Interior and Insular Affairs, 84th Cong. 10 (1955) (statement of Clyde H. Spencer, Regional Director of U.S. Bureau of Reclamation for Region 2)). Under the district court's reasoning, Congress therefore would not have seen a need to authorize the Secretary to protect fish in either the Trinity River or lower Klamath River. Yet Congress did include language authorizing the Secretary to undertake action to insure preservation and propagation of fish. And Congress identified maintenance of specified minimum flows in the Trinity River during a particular time period as but one example of an appropriate action that the Secretary could take.

Furthermore, a letter from Assistant Secretary of the Interior Fred Aandahl stated with respect to minimum water flows for fishery resources: “Room should also be left in any legislation that is enacted for modification in the light of experience.” H.R. Rep. No. 84-602, at 9. The language of the statute does just that – it provides the Secretary discretionary authority to adjust flow levels. *See County of Trinity*, 438 F. Supp. at 1375-76.

Finally, Congress was made aware of opposition to the project from Indians on reservations in the Klamath River basin and from residents in Humboldt and Del Norte Counties, the two counties through which the lower Klamath River flows. *See, e.g.*, Hearings on H.R. 4663 Before the Subcomm. on Irrigation and Reclamation of the H. Comm. on Interior and Insular Affairs, 84th Cong. 4 (1955) (statement of Fred Aandahl, Assistant Secretary of the Interior) (opponents of the project “reside downstream in the Klamath River Basin”); *id.*, at 27 (statement of Clyde H. Spencer, Regional Director of U.S. Bureau of Reclamation for Region 2); *id.*, at 104-08 (statement of Herbert Scudder, U.S. Representative in Congress from California). Congress responded to opposition from downstream users by adding the statutory language providing 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.” 1955 Act, § 2; *see* 101 Cong. Rec. 8880-81 (June 21, 1955) (Rep. Scudder); 101 Cong. Rec. 7962 (June 9, 1955) (Rep. Ellsworth). Humboldt County lies west of the county where the Trinity River dams and reservoirs are located. The lower section of

the Trinity River and most of the lower Klamath River lie within Humboldt County, as do the Hoopa Valley and Yurok Indian Reservations. The Tribes and their members are “downstream water users.” This provision bolsters BOR’s position that Congress intended to authorize releases from the Trinity River Division to meet water needs farther downstream than the confluence of the Trinity and Klamath Rivers.¹⁰

In sum, the plain language of the 1955 Act’s fish-protection provision confers authority for BOR to release water from the Trinity River dams to reduce the likelihood of another massive fish die-off in the lower Klamath River. Releasing water from the Trinity River dams for this purpose is consistent with the statutory language, purpose, and legislative history of the 1955 Act.

B. The District Court Erroneously Reasoned that the 1955 Act Confers No Authority to Protect Fish Beyond the Geographic Scope of the 1984 Act and CVPIA

As explained *supra* at 15-19, Congress enacted statutes directing the Secretary to develop and implement restoration programs in the Trinity and Klamath River Basins

¹⁰ The district court dismissed this argument because the lower segment of the Trinity River mainstem lies within Humboldt County and therefore, the court reasoned, the requirement to make water available to Humboldt County and downstream water users “does not necessarily mean the geographic scope of the 1955 Act extends beyond the Trinity River Basin.” ER 73 n.23. The district court did not, however, consider legislative history pertaining to this provision and the district court’s opinion predated a December 2014 Solicitor’s Opinion analyzing this provision, including its legislative history. Memorandum to the Secretary of the Interior from the Solicitor, Trinity River Division Authorization’s 50,000 Acre-Foot Proviso and the 1959 Contract between the Bureau of Reclamation and Humboldt County, M-36979 (December 23, 2014), available at <https://www.doi.gov/solicitor-dev/opinions> (last visited December 18, 2015).

and authorized funding to implement these programs. None of these statutes expressly or implicitly repealed or circumscribed the Secretary's pre-existing authority under the 1955 Act. Furthermore, when, as here, statutes "are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. When there are two acts upon the same subject, the rule is to give effect to both if possible." *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (internal quotation marks omitted). A corollary principle is that "repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981); see also *Branch v. Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute'").

The district court effectively ignored these principles when suggesting that its narrow interpretation of the 1955 Act harmonized the 1955 Act with related statutes, ER 74, and logically "reconcile[d] all of the statutory commands" of various statutes. Contrary to the district court's suggestion (ER 76), there is nothing illogical about interpreting the 1955 Act as affording BOR discretionary authority to make releases to reduce the likelihood of a large-scale fish die-off in the lower Klamath River and, at the same time, recognizing that the 1984 Act (and the CVPIA because it incorporated

the 1984 Act's restoration goals) directed implementation of a restoration program within the Trinity River basin based on rehabilitation of habitat within the basin. The various statutes can all be given effect and harmonized by interpreting the 1955 Act's conferral of broad authority to insure preservation of fish as allowing BOR to release water from the Trinity River dams to reduce the likelihood of another massive fish die-off in the lower Klamath River.

To be sure, the district court correctly held that the scope of the 1984 Act, CVPIA, and associated 2000 ROD were limited to restoration of fisheries by rehabilitation of habitat in the Trinity River basin and that the 2013 flow-augmentation releases fell outside their scope. *See* ER 65. The 2000 ROD and underlying analyses were in fact focused on conditions within the mainstem Trinity River. As the EIS supporting the 2000 ROD stated: “[T]he proposed alternatives focus on the 40 miles of Trinity River mainstem below Lewiston Dam (i.e. the portion of the river upstream of the confluence with the North Fork”), where the detrimental impacts of the dams were particularly severe. ER 581; *see also* ER 63-67; *Westlands Water Auth.*, 376 F.3d at 866-67. The variable annual release volumes set forth in the 2000 ROD were designed to rehabilitate fish habitat in the mainstem Trinity River by mimicking more closely the natural hydrograph patterns that existed prior to construction of the Trinity River Division and by achieving water-temperatures within the mainstem Trinity River required for spawning and survival of eggs, smolts, and juvenile salmon. ER 535, 588-93; 675, 677. By adopting a flow schedule in the 2000

ROD for these purposes, the Secretary did not foreclose making releases for other purposes nor set an absolute ceiling on the volume of releases from Trinity River dams. Indeed, the 2000 ROD stated:

Nothing in this ROD is intended to preclude watershed restoration . . . below the confluence of the Trinity and Klamath River. Because the TRFES [Trinity River Flow Evaluation Study] and ROD focus on the Trinity River mainstem and Trinity Basin, watershed restoration and monitoring that benefit Trinity River fisheries below the confluence of the Trinity and Klamath Rivers may be considered by the Trinity Management Council.

ER 538. The district court thus correctly concluded that the 1984 Act, CVPIA, and associated 2000 ROD were limited in scope to the Trinity River basin and that because the 2013 flow-augmentation releases fell outside their scope, the releases did not violate CVPIA § 3406(b)(23) by exceeding release volumes in the 2000 ROD schedule.

The district court erred, however, by holding in effect that Congress intended in 1955 for the geographic scope of the 1955 Act's fish-protection provision to be co-extensive with the subsequently-enacted 1984 Act and CVPIA. ER 76. The district court suggested that it would be illogical to interpret the 1955 Act as affording the Secretary authority beyond the geographic scope of the 1984 Act, CVPIA, and 2000 ROD. To the contrary, while the authorities and directives in the 1955 Act overlap with the authorities and directives in the 1984 Act and CVPIA, they are not fully co-extensive and there is nothing illogical about this result.

To begin with, the 1984 Act and CVPIA addressed the highly-degraded habitat conditions resulting from Trinity River Division construction and operation and from other factors (*e.g.*, inadequate erosion control in the watershed). These statutes confirmed and sought to effectuate Congress’s long-term goals of restoring fish populations to levels approximating that which existed immediately before construction of the Trinity River Division. *See, e.g.*, 1984 Act § (1). As the district court recognized, the concepts of preservation and restoration are related, but distinct. ER 72. “Preserve” is synonymous with “protect” and connotes keeping existing fish safe from injury, harm, or destruction. *Id.* “Restore” connotes bringing something back to a former condition. *Id.* (Or, as stated in the 1999 EIS, “restore” means “reviving the well-being, vitality, and use thereof.” ER 577).

In the 1984 Act, Congress confirmed the restoration goals of the Trinity River Task Force and to that end directed the Secretary to develop a restoration program based on a plan that the Task Force had already developed that included actions to rehabilitate habitat in the mainstem Trinity River (and its tributaries). 1984 Act § 2. As explained by the Department of the Interior’s Assistant Secretary for Fish and Wildlife, “the heart of the management program [developed by the Task Force] – *the habitat restoration efforts* – would be difficult to undertake without Congressional directive.” Hearings on Trinity River Restoration (H.R. 1438) Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries, 98th Cong., 2d Sess. 23 (1984)(statement of J. Craig

Potter) (emphasis added); *see also* S. Rep. No. 98-647, 98th Cong., 2d Sess. 2-3 (1984). The 1984 Act did not, however, in any way limit the Secretary's pre-existing and distinct authority under the 1955 Act to adopt appropriate measures, including releases, to insure preservation and propagation of existing fish.

Second, as a general matter it is hardly unusual or illogical for Congress to task an agency with, and authorize funding for, implementation of an action or program to address particular problems and proposals that have been brought to Congress's attention even though a federal agency may have pre-existing discretionary authority (perhaps not exercised to Congress's satisfaction, *see infra* at 45 n.11) to address aspects of the problem. In the 1984 Act, Congress specifically addressed the severe degradation of fish habitat in the Trinity River basin and resultant decline in fish populations that Congress in 1955 had not anticipated would occur. Congress provided funding authorization to facilitate development and implementation of a restoration program based on the Task Force's plan and formally established the Task Force to advise the Secretary. 1984 Act §§ 2-4. Congress understood that the Task Force's management program was focused on actions to rehabilitate habitat within the Trinity River basin, such as "actions designed to control sediment influx from Grass Valley Creek; rehabilitate spawning areas in the main stem of the Trinity River and its tributaries; provide watershed rehabilitation within the Basin; improve production from the Trinity River Hatchery; monitor the effects of rehabilitation efforts; and conduct a wildlife habitat improvement program within the Basin." In this context,

Congress's decision in 1984 to require, and to facilitate implementation of, a restoration program in the Trinity River basin based on the Task Force's plan provides no logical reason to limit the 1955 Act's fish-protection provision to the same scope. No conflict is created by interpreting the 1955 Act to authorize releases to protect fish in the lower Klamath River while at the same time interpreting the 1984 Act to direct implementation of a restoration program to rehabilitate habitat within the Trinity River basin. The statutes can co-exist with different scopes and are complementary, not conflicting. Accordingly, the terms of each can, and must, be given full effect.

Nor did the CVPIA limit the Secretary's pre-existing discretionary authority under the 1955 Act to adopt appropriate measures to insure preservation and propagation of fish and wildlife. In CVPIA Section 3406(b)(23), Congress sought to spur along action needed to meet the restoration goals of the 1984 Act. Section 3406(b)(23) was prompted by congressional awareness that despite the enactment of the 1984 Act, the Trinity fishery had declined to an all-time low; the Department of the Interior had not yet completed the flow evaluation study initiated by the 1981 Secretarial Decision; the diversions to the Central Valley and drought had hampered completion of the flow evaluation study; and the restoration goals of the 1984 Act could not be met without adequate flow. *See, e.g.*, Hearings on Miscellaneous Bureau of Reclamation Legislation Before the Subcomm. on Water and Power of the S. Comm. on Energy and Natural Resources, 102d Cong. 143-45 (1991) (statement of

Hon. Frank D. Riggs, U.S. Representative from California).¹¹ Congress thus required in Section 3406(b)(23) a *minimum* instream release to the Trinity River of not less than 340,000 acre feet per year, thereby codifying a recent (1991) Secretarial Decision that had increased the minimum release volume for all water year types to this amount. Congress further required Interior to complete the flow evaluation study initiated by the 1981 Secretarial Decision and directed that with concurrence of the Secretary and Hoopa Valley Tribe, recommendations from the study to “*increase*” the “*minimum* Trinity River instream fishery releases” be implemented. CVPIA § 3406(b)(23)(A)-(B) (emphasis added). Thus, while CVPIA Section 3406(b)(23) required a minimum annual release of 340,000 acre-feet of water to meet restoration goals of the 1984 Act and to meet trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe, it did not limit the Secretary’s authority to make releases for other purposes or pursuant to other statutory authorities, including the 1955 Act.

Third, the statutes that authorize the Secretary to implement actions to restore fish habitat and fish populations in the lower Klamath River, such as the 1996 Reauthorization Act, undermine the notion that limiting the scope of the 1955 Act to

¹¹ See also H.R. Rep. No. 101-726, 101st Cong., 2d Sess., at 22-23 (1990) (stating the Department of the Interior had fallen short of undertaking measures that are both necessary to protect fish resources and within the Secretary’s authority; stating that the water exports to the Central Valley from the Trinity River Division were hampering the ability to conduct the flow studies; and expressing “deep[] concern[]” that the Secretary was subordinating trust obligations to the Tribes to that of delivering water to the Central Valley).

the Trinity River basin somehow harmonizes or reconciles various statutory commands. The district court suggested that the 1996 Reauthorization Act does not demonstrate Congress's intent in 1955. ER 75. Yet the same logic applies to the 1984 Act and the CVPIA. That is, the fact that Congress limited the scope of the restoration activities authorized by the 1984 Act and CVPIA Section 3406(b)(23) to the Trinity River basin does not demonstrate Congress's intent in 1955 respecting the scope of authority conferred by the 1955 Act.

In short, none of the restoration statutes altered the Secretary's broad authority under the 1955 Act to take appropriate measures to insure the preservation of fish. And there is no logical reason or legal principle that would dictate that the geographic scope of the 1955 Act be the same as the scope of the 1984 Act and CVPIA Section 3406(b)(23).

C. BOR's Position Should Be Accorded Deference

Should this Court regard the scope of authority conferred by the 1955 Act fish-protection provision as ambiguous, it should defer to BOR's interpretation. The district court erred by refusing to accord BOR's position any deference. The district court held that BOR's position was not entitled to *Chevron* deference because the position was not expressed in a rulemaking, a formal adjudication, or some other precedential manner. 52 F. Supp. 3d at 1055; ER 68. However, formal notice-and-comment rulemaking is not a prerequisite to granting *Chevron* deference to an agency decision. *See United States v. Mead*, 533 U.S. 218, 227 (2001). Congress delegated

broad authority to the Secretary, acting through BOR, to implement the 1955 Act and to operate the Trinity River Division. BOR provided notice of its proposed action and elicited public comment on a draft EA which stated that BOR had authority under the 1955 Act's fish-preservation provision to implement the proposed flow-augmentation releases. ER 228, 234-35, 256, 261. BOR considered a comment asserting that BOR did not have legal authority to undertake the releases. ER 234-35. Thus, BOR's position that the 1955 Act authorized the challenged flow-augmentation releases was the culmination of a considered decision-making process and exercise of its delegated authority. Accordingly, BOR's position should be accorded *Chevron* deference.

Even if *Chevron* deference does not apply, an agency decision is entitled to deference in accordance with principles set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under *Skidmore*, the weight given to "an administrative interpretation not intended by an agency to carry the general force of law is a function of that interpretation's thoroughness, rational validity, and consistency with prior and subsequent pronouncements." *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1068 (9th Cir. 2003) (en banc). Here, these factors support deferring to BOR. As discussed above, BOR has reasonably interpreted the 1955 Act's fish-preservation provision to allow the adoption of measures to prevent a massive fish die-off in the lower Klamath River. And BOR's flow-augmentation decisions in 2012, 2013, and 2014 expressly relied on Section 2 of the 1955 Act as the "principle authorization for

implementing” each of the releases. ER 175, 206, 337. Furthermore, Interior has long been of the view that the 1955 Act established that “in-basin needs take precedence over needs to be served by out-of-basin diversion” to the Central Valley. *See* 1979 Solicitor’s Opinion, ER 135; ER 206.

1. The district court erroneously declined to defer to BOR’s legal position based on ambiguous sentences in the 1999 scientific Report on the Trinity River Flow Evaluation Study

The district court’s refusal to accord *Skidmore* deference to BOR’s legal position and the court’s interpretation of the 1955 Act were based primarily on the court’s misperception of two nearly-identical sentences in the Report on the Trinity River Flow Evaluation Study, both of which contained the following italicized language:

[This Report] *provides recommendations to the Secretary to fulfill fish and wildlife protection mandates of the 1955 Act* of Congress that authorized the construction of the Trinity River Division of the Central Valley Project, the 1981 Secretarial Decision that directed the U.S. Fish and Wildlife Service to conduct the TRFE [Trinity River Flow Evaluation], the 1984 Trinity River Basin Fish and Wildlife Management Act, the 1991 Secretarial Decision on Trinity River Flows, the 1992 Central Valley Project CVPIA, and Federal tribal trust responsibilities.

ER 71 (quoting AR 3733 [sic: AR 3734 [ER 630]] (emphasis to the Report added by the district court); *see also* ER 72 (quoting AR 3747 [ER 643]) (emphasis to the Report added by the district court). The district court stated that these sentences were “strong indicators” that the authors of the Report believed that the recommendations in (and by analogy the 2000 ROD) in fact fulfilled the fish-protection mandate of the 1955 Act. ER 72. The court further stated that “[*t*]his is “*totally at odds with Federal*

Defendants' current position, and counsels against applying *Skidmore* deference to Federal Defendants' determination of its own legal authority.” *Id.* (emphasis in original). The district court suggested that the 2000 ROD therefore represented the “culmination and embodiment” of all of the Secretary’s responsibilities under the 1955 Act and that this was the only “cogent and logical way to reconcile all of the statutory commands.” ER 76. The district court’s analysis is incorrect.

To begin with, the Trinity River Flow Evaluation was a scientific evaluation that was principally authored by Fish and Wildlife Service biologists and the Hoopa Valley Tribe. The Report is not properly treated as a legal interpretation or formal statement by BOR or the Secretary respecting BOR’s legal authority under the 1955 Act to operate the Trinity River Division. The views of the Fish and Wildlife Service biologists and the Hoopa Valley Tribe respecting BOR’s legal authority under the 1955 Act do not trump the deference that is appropriately owed to BOR, the agency charged with operating the Trinity River Division, as to the scope of its legal authority to operate the project under the 1955 Act. *See Coeur Alaska, Inc.*, 557 U.S. at 284. In short, the Trinity Flow Evaluation Study did not, as the district court suggested, “represent the culmination and embodiment,” ER 76, of all of the Secretary’s responsibilities or the outer limit of her legal authority under the 1955 Act. Although the Report and 2000 ROD addressed the need to re-establish habitat in the mainstem Trinity River to restore Trinity River fisheries, neither the Report nor the ROD purported to resolve needs within the lower Klamath River or for other purposes.

Second, as used in the context of the scientific Report, the word “fulfill” does not necessarily mean, as the district court assumed, that the Secretary’s responsibilities under the 1955 Act would be fully completed and discharged by adoption of the recommendations in the Report such that the Secretary lacked authority under the 1955 Act to do anything additional than what was recommended in the Report. The word “fulfill” has multiple ordinary meanings, including “to carry out,” Websters Third New International Dictionary (1993), or “to put into effect: Execute,” Merriam-Webster Online Dictionary <http://www.merriam-webster.com/dictionary/fulfill> (last visited December 18, 2015). Reading the sentences to mean that the recommendations in the Report “carry out” or “put into effect” listed statutes and federal trust responsibilities is more reasonable than assuming that the authors intended to say that the recommendations in the Report are the exclusive and complete array of actions that the Secretary can legally take under the listed statutes or as trustee of tribal fishing rights. At the very least, the sentences are ambiguous in this regard and as such, they should not be treated as having staked out a definitive position that the BOR’s authority under the 1955 Act was geographically limited to the Trinity River basin. Accordingly, the sentences in the scientific Report provide insufficient reason to deny deference to BOR’s view that the fish-protection provision of the 1955 Act authorized the 2013 flow-augmentation releases. Nor do these sentences provide reason to hold that Congress intended in 1955 to withhold from BOR the authority to release water from the Trinity River

dams for the purpose of reducing the likelihood of a massive fish-die off downstream from those dams in the lower Klamath River.

2. The complexities involved in managing the Central Valley Project provide further reason to defer to BOR

The technical and scientific complexities of managing the Central Valley Project to achieve a balance among the project purposes and to comply with an extensive regime of legal requirements relevant to project operations, while responding in real-time to water and fish-health conditions during an historic drought, provide further reason to defer to BOR's position regarding the scope of its authority under the 1955 Act to operate the Trinity River Division. In addition to the statutes and considerations discussed in this brief, BOR has to take into account numerous other statutory and regulatory requirements and considerations that may affect Central Valley Project operations. These requirements and considerations include, for example, safety releases, project maintenance, water quality regulatory requirements, applicable state-law requirements, and the Endangered Species Act. Deference to BOR's decisions respecting project operations is therefore especially warranted. *Cf. Central Delta Water Agency v. Bureau of Reclamation*, 452 F.3d 1021, 1027 (9th Cir.2006) ("It is equally clear that the Bureau's is an extremely difficult task: to operate the country's largest federal water management project in a manner so as to meet the Bureau's many obligations. Recognizing this difficulty, Congress granted the Bureau considerable discretion in determining how to meet those obligations.").

3. The Tribes' reserved fishing rights in the Klamath and Trinity Rivers bolster BOR's position.

The 1993 Solicitor's Opinion recognized that the Hoopa Valley and Yurok Indian Tribes have reserved fishing rights and that the United States is the trustee of these rights. *See* 1993 Solicitor's Opinion, ER 109-111. The 1993 Solicitor's Opinion explained that protection of the fishery itself, in addition to proper allocation of harvest, is necessary to make tribal fishing rights meaningful and that the Secretary of the Interior had in the past increased flow by releasing water from the Trinity River Division in part to improve the fishery for the benefit of the Tribes. ER 111. Consistent with the 1993 Solicitor's Opinion, BOR explained that one of the purposes of reducing risk of a massive fish-die-off by augmenting flow in the lower Klamath River was to protect tribal fishery resources and tribal fishery harvest opportunities. ER 198, 206, 224-25. The Tribes' reserved fishing rights provide important context and further bolster BOR's position that it had legal authority under the 1955 Act to release water from the Trinity River dams to reduce likelihood of a fish die-off in the lower Klamath River. *Cf. Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000) (stating in the context of contract-based objections by Irrigators to operations of the Klamath Project, "[b]ecause Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators").

* * * * *

BOR acted well within the authority conferred by the plain language of the 1955 Act when it decided to implement flow-augmentation releases in 2013. Releasing water from the Trinity River dams for the purpose of reducing the likelihood of another massive fish die-off in the lower Klamath River falls comfortably within the statutory authorization “to adopt appropriate measures to insure the preservation and propagation of fish.” To the extent the 1955 Act is ambiguous on this question, the Court should defer to BOR’s permissible interpretation that it had authority to release water from the Trinity River dams for this purpose.

CONCLUSION

For the foregoing reasons, the district court's judgment declaring that the 1955 Act's fish-protection provision does not authorize Federal Defendants to implement the 2013 flow-augmentation releases should be reversed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,804 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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STATEMENT OF RELATED CASES

A pending case filed by Plaintiffs in the United States District Court for the Eastern District of California, *San Luis & Delta-Mendota Water Authority v. Jewell*, No. 1:15-CV-01290-LJP-GSA, to challenge 2015 flow-augmentation releases involves the same or closely-related issues. *See supra* at 28 n.9.

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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STATUTORY ADDENDUM

Addendum Contents

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Public Law 386

CHAPTER 872

AN ACT

To authorize the Secretary of the Interior to construct, operate, and maintain the Trinity River division, Central Valley project, California, under Federal reclamation laws.

August 12, 1955
[H. R. 4663]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the principal purpose of increasing the supply of water available for irrigation and other beneficial uses in the Central Valley of California, the Secretary of the Interior, acting pursuant to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), is authorized to construct, operate, and maintain, as an addition to and an integral part of the Central Valley project, California, the Trinity River division consisting of a major storage reservoir on the Trinity River with a capacity of two million five hundred thousand acre-feet, a conveyance system consisting of tunnels, dams, and appurtenant works to transport Trinity River water to the Sacramento River and provide, by means of storage as necessary, such control and conservation of Clear Creek flows as the Secretary determines proper to carry out the purposes of this Act, hydroelectric powerplants with a total generating capacity of approximately two hundred thirty-three thousand kilowatts, and such electric transmission facilities as may be required to deliver the output of said powerplants to other facilities of the Central Valley project and to furnish energy in Trinity County: *Provided,* That the Secretary is authorized and directed to continue to a conclusion the engineering studies and negotiations with any non-Federal agency with respect to proposals to purchase falling water and, not later than eighteen months from the date of enactment of this Act, report the results of such negotiations, including the terms of a proposed agreement, if any, that may be reached, together with his recommendations thereon, which agreement, if any, shall not become effective until approved by Congress. The works authorized to be constructed shall also include a conduit or canal extending from the most practicable point on the Sacramento River near Redding in an easterly direction to intersect with Cow Creek, with such pumping plants, regulatory reservoirs, and other appurtenant works as may be necessary to bring about maximum beneficial use of project water supplies in the area.

Central Valley
project, Calif.
Trinity River
division.

43 USC 371 note.

Sec. 2. Subject to the provisions of this Act, the operation of the Trinity River division shall be integrated and coordinated, from both a financial and an operational standpoint, with the operation of other features of the Central Valley project, as presently authorized and as may in the future be authorized by Act of Congress, in such manner as will effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available: *Provided,* That the Secretary is authorized and directed 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 diversion point at not less than one hundred and fifty cubic feet per second for the months July through November and the flow of Clear Creek below the diversion point at not less than fifteen cubic feet per second unless the Secretary and the California Fish and Game Commission determine and agree that lesser flows would be adequate for maintenance of fish life and propagation thereof; the Secretary shall also allocate to the preservation and propagation of fish and wildlife, as provided in the Act of August 14, 1946 (60 Stat. 1080), an appropriate share of the

16 USC 661-666c.

costs of constructing the Trinity River development and of operating and maintaining the same, such costs to be non-reimbursable: *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.

SEC. 3. The Secretary is authorized to investigate, plan, construct, operate, and maintain minimum basic facilities for access to, and for the maintenance of public health and safety and the protection of public property on, lands withdrawn or acquired for the development of the Trinity River division, to conserve the scenery and the natural, historic, and archeologic objects, and to provide for public use and enjoyment of the same and of the water areas created by these developments by such means as are consistent with their primary purposes. The Secretary is authorized to withdraw from entry or other disposition under the public land laws such public lands as are necessary for the construction, operation, and maintenance of said minimum basic facilities and for the other purposes specified in this section and to dispose of such lands to Federal, State, and local governmental agencies by lease, transfer, exchange, or conveyance upon such terms and conditions as will best promote their development and operation in the public interest. The Secretary is further authorized to investigate the need for acquiring other lands for said purposes and to report thereon to the Committees on Interior and Insular Affairs of the Senate and House of Representatives, but no lands shall be acquired solely for any of these purposes other than access to project lands and the maintenance of public health and safety and the protection of public property thereon without further authorization by the Congress. All costs incurred pursuant to this section shall be nonreimbursable and nonreturnable.

Report to Congress.

SEC. 4. Contracts for the sale and delivery of the additional electric energy available from the Central Valley project power system as a result of the construction of the plants herein authorized and their integration with that system shall be made in accordance with preferences expressed in the Federal reclamation laws: *Provided*, That a first preference, to the extent of 25 per centum of such additional energy, shall be given, under reclamation law, to preference customers in Trinity County, California, for use in that county, who are ready, able and willing, within twelve months after notice of availability by the Secretary, to enter into contracts for the energy: *Provided further*, That Trinity County preference customers may exercise their option on the same date in each successive fifth year providing written notice of their intention to use the energy is given to the Secretary not less than eighteen months prior to said date.

Payments to Trinity County, Calif.

SEC. 5. The Secretary is authorized to make payments, from construction appropriations, to Trinity County, California, of such additional costs of repairing, maintaining, and constructing county roads as are incurred by it during the period of actual construction of the Trinity River division and as are found by the Secretary to be properly attributable to and occasioned by said construction. The Secretary is further authorized and directed to pay to Trinity County annually an in-lieu tax payment out of the appropriations during construction and from the gross revenues of the project during operation an amount equal to the annual tax rate of the county applied to the value of the real property and improvements taken for project purposes in Trinity County, said value being determined as of the date such property and improvements are taken off the tax rolls. Payments to the public-school districts in the project area affected by construction activities shall be made pursuant to existing law.

Payments to public-school districts.

69 STAT.]

PUBLIC LAW 388—AUG. 12, 1955

721

SEC. 6. There are hereby authorized to be appropriated for construction of the Trinity River division \$225,000,000, plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering cost indexes applicable to the type of construction involved herein, and, in addition thereto, such sums as may be required to carry out the provisions of section 5 of this Act and to operate and maintain the said development.

Approved August 12, 1955.

Appropriation.

Public Law 387

CHAPTER 873

AN ACT

To reemphasize trade development as the primary purpose of title I of the Agricultural Trade Development and Assistance Act of 1954.

August 12, 1955
[S. 2253]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That section 103 (b) of the Agricultural Trade Development and Assistance Act of 1954 is amended by striking out "\$700,000,000" and inserting in lieu thereof "\$1,500,000,000. This limitation shall not be apportioned by year or by country, but shall be considered as an objective as well as a limitation, to be reached as rapidly as possible so long as the purposes of this Act can be achieved within the safeguards established."

Agricultural
trade development.
68 Stat. 456.
7 USC 1703 (b).

SEC. 2. Section 106 of such Act is amended by adding the following: "The Secretary of Agriculture is also authorized to determine the nations with whom agreements shall be negotiated, and to determine the commodities and quantities thereof which may be included in the negotiations with each country after advising with other agencies of Government affected and within broad policies laid down by the President for implementing this Act."

68 Stat. 457.
7 USC 1706.

Approved August 12, 1955.

Public Law 388

CHAPTER 874

AN ACT

To amend the Federal Property and Administrative Services Act of 1949 to make temporary provision for making payments in lieu of taxes with respect to certain real property transferred by the Reconstruction Finance Corporation and its subsidiaries to other Government departments.

August 12, 1955
[H. R. 6182]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the table of contents contained in the first section of the Federal Property and Administrative Services Act of 1949 is hereby amended by inserting immediately below "Sec. 605. Effective date." the following:

Federal property
transferred from
RFC.
63 Stat. 377; 64
Stat. 583.
40 USC 471 note.

"TITLE VII—PROPERTY TRANSFERRED FROM THE RECONSTRUCTION
FINANCE CORPORATION

"Sec. 701. Declaration of Policy.

"Sec. 702. Definitions.

"Sec. 703. Property transferred by the Reconstruction Finance Corporation.

"Sec. 704. Limitations.

"Sec. 705. Effective date."

94 STAT. 1062

PUBLIC LAW 96-335—SEPT. 4, 1980

Public Law 96-335
96th Congress

An Act

Sept. 4, 1980
[H.R. 507]

To authorize Federal participation in stream rectification, Trinity River Division, Central Valley project, California, and for other purposes.

Trinity River
Division, Central
Valley project.
Stream
rectification.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior, acting through the Commissioner of Reclamation, is authorized to design, construct, operate, and maintain, or to contract with the State of California for the design, construction, operation, or maintenance of, a sand dredging system on the Trinity River immediately downstream from Grass Valley Creek, a tributary of the Trinity River, and a debris dam and associated facilities on Grass Valley Creek, in Trinity County, California, in general conformity to the plan of development described and set forth in the Grass Valley Creek Sediment Control Study, April 1978, prepared for the Trinity River Basin Fish and Wildlife Task Force: *Provided,* That any such contract entered into pursuant to this section shall be effective only to such extent or in such amounts as are provided in advance in appropriation Acts.

Matching funds.

SEC. 2. The contract authorized by section 1 of this Act shall provide that the State of California, on a dollar-for-dollar basis, will match the funds provided by the Water and Power Resources Service for constructing, operating, and maintaining the sand dredging system.

Appropriation
authorization.

SEC. 3. There is authorized to be appropriated for fiscal year 1982 and thereafter, to remain available until expended the sum of \$3,500,000 (April 1978 price levels), plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs indexes applicable to the type of construction involved herein. There are also authorized to be appropriated such sums as may be required for the Federal share of operation and maintenance. All costs incurred pursuant to this Act shall be non-reimbursable and nonreturnable. No funds shall be expended hereunder until the Board of Supervisors of Trinity County adopts adequate timber road and subdivision standards to protect the Grass Valley Creek watershed, and until an agreement has been executed with the State of California which shall provide that the State of California, on a dollar-for-dollar basis, will match the funds provided by the Water and Power Resources Service for constructing, operating, and maintaining the sand dredging system.

Funding
conditions.

Approved September 4, 1980.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 96-514 (Comm. on Interior and Insular Affairs).
SENATE REPORT No. 96-893 (Comm. on Energy and Natural Resources).
CONGRESSIONAL RECORD:

Vol. 125 (1979): Oct. 22, considered and passed House.
Vol. 126 (1980): Aug. 18, considered and passed Senate, amended.
Aug. 21, House concurred in Senate amendments.

Public Law 98-541
98th Congress

An Act

To provide for the restoration of the fish and wildlife in the Trinity River Basin, California, and for other purposes.

Oct. 24, 1984
[H.R. 1438]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Conservation.
Fish and fishing.
Wildlife.

FINDINGS

SECTION 1. The Congress finds that—

(1) the construction of the Trinity River division of the Central Valley project in California, authorized by the Act of August 12, 1955 (69 Stat. 719), has substantially reduced the streamflow in the Trinity River Basin thereby contributing to damage to pools, spawning gravels, and rearing areas and to a drastic reduction in the anadromous fish populations and a decline in the scenic and recreational qualities of such river system;

(2) the loss of land areas inundated by two reservoirs constructed in connection with such project has contributed to reductions in the populations of deer and other wildlife historically found in the Trinity River Basin;

(3) the Act referred to in paragraph (1) of this section directed the Secretary of the Interior (hereinafter in this Act referred to as the “Secretary”) to take appropriate actions to ensure the preservation and propagation of such fish and wildlife and additional authority was conferred on the Secretary under the Act approved September 4, 1980 (94 Stat. 1062), to take certain actions to mitigate the impact on fish and wildlife of the construction and operation of the Trinity River division;

(4) activities other than those related to the project including, but not limited to, inadequate erosion control and fishery harvest management practices, have also had significant adverse effects on fish and wildlife populations in the Trinity River Basin and are of such a nature that the cause of any detrimental impact on such populations cannot be attributed solely to such activities or to the project;

(5) a fish and wildlife management program has been developed by an existing interagency advisory group called the Trinity River Basin Fish and Wildlife Task Force; and

(6) the Secretary requires additional authority to implement a basin-wide fish and wildlife management program in order to achieve the long-term goal of restoring fish and wildlife populations in the Trinity River Basin to a level approximating that which existed immediately before the start of the construction of the Trinity River division.

98 STAT. 2722

PUBLIC LAW 98-541—OCT. 24, 1984

TRINITY RIVER BASIN FISH AND WILDLIFE MANAGEMENT PROGRAM

SEC. 2. (a) Subject to subsection (b), the Secretary shall formulate and implement a fish and wildlife management program for the Trinity River Basin designed to restore the fish and wildlife populations in such basin to the levels approximating those which existed immediately before the start of the construction referred to in section 1(1) and to maintain such levels. The program shall include the following activities:

(1) The design, construction, operation, and maintenance of facilities to—

(A) rehabilitate fish habitats in the Trinity River between Lewiston Dam and Weitchpec;

(B) rehabilitate fish habitats in tributaries of such river below Lewiston Dam and in the south fork of such river; and

(C) modernize and otherwise increase the effectiveness of the Trinity River Fish Hatchery.

(2) The establishment of a procedure to monitor (A) the fish and wildlife stock on a continuing basis, and (B) the effectiveness of the rehabilitation work.

(3) Such other activities as the Secretary determines to be necessary to achieve the long-term goal of the program.

(b)(1) The Secretary shall use the program described in section 1(5) of this Act as a basis for the management program to be formulated under subsection (a) of this section. In formulating and implementing such management program, the Secretary shall be assisted by an advisory group called the Trinity River Basin Fish and Wildlife Task Force established under section 3.

(2) In order to facilitate the implementation of those activities under the management program over which the Secretary does not have jurisdiction, the Secretary shall undertake to enter into a memorandum of agreement with those Federal, State, and local agencies, and the Indian tribe, represented on the Task Force established under section 3. The memorandum of agreement should specify those management program activities for which the respective signatories to the agreement are primarily responsible and should contain such commitments and arrangements between and among the signatories as may be necessary or appropriate to ensure the coordinated implementation of the program.

(3) To the extent not provided for under a memorandum of agreement entered into under paragraph (2), the Secretary shall coordinate the activities undertaken under such management program with the activities of State and local agencies, and the activities of other Federal agencies, which have responsibilities for managing public lands and natural resources within the Trinity River Basin.

Establishment.

TRINITY RIVER BASIN FISH AND WILDLIFE TASK FORCE

SEC. 3. (a) There is established the Trinity River Basin Fish and Wildlife Task Force (hereinafter in this Act referred to as the "Task Force") which shall be composed of fourteen members as follows:

(1) One officer or employee of the California Department of Fish and Game to be appointed by the administrative head of such department.

(2) One officer or employee of the California Department of Water Resources to be appointed by the administrative head of such department.

(3) One member or employee of the California Water Resources Control Board to be appointed by such board.

(4) One officer or employee of the California Department of Forestry to be appointed by the administrative head of such department.

(5) One officer or employee of the United States Fish and Wildlife Service to be appointed by the Secretary.

(6) One officer or employee of the United States Bureau of Reclamation to be appointed by the Secretary.

(7) One officer or employee of the United States Bureau of Land Management to be appointed by the Secretary.

(8) One officer or employee of the United States Bureau of Indian Affairs to be appointed by the Secretary.

(9) One officer or employee of the United States Forest Service to be appointed by the Secretary of Agriculture.

(10) One officer or employee of the United States Soil Conservation Service to be appointed by the Secretary of Agriculture.

(11) One officer or employee of the United States National Marine Fisheries Service to be appointed by the Secretary of Commerce.

(12) One individual to be appointed by the board of supervisors of Humboldt County, California.

(13) One individual to be appointed by the board of supervisors of Trinity County, California.

(14) One individual to be appointed by the Hoopa Tribe of the Hoopa Valley Indian Reservation, California.

Any vacancy on the Task Force shall be filled in the manner in which the original appointment was made.

(b) If any member of the Task Force who was appointed to the Task Force as an officer or employee of a United States department or agency or as an officer or employee of a California State department or board leaves such office or employment, he may continue as a member of the Task Force for not longer than the end of the fourteen-day period beginning on the date he leaves such office or employment.

(c)(1) Members of the Task Force who are full-time officers or employees of the United States shall receive no additional pay, allowances, or benefits by reason of their service on the Task Force.

(2) No moneys authorized to be appropriated under this Act may be used to pay any member of the Task Force for service on the Task Force or to reimburse any agency or governmental unit for the pay of any such member for such service.

AUTHORIZATION OF APPROPRIATIONS

SEC. 4. (a) Subject to subsection (b), there are authorized to be appropriated—

(1) after fiscal year 1985, and to remain available until October 1, 1995, for design and construction under the management program formulated under section 2(a), \$33,000,000, adjusted appropriately to reflect any increase or decrease in the engineering cost indexes applicable to the types of construction involved between (A) the month of May 1982, and (B) the date of enactment of any appropriation for such construction; and

(2) for the cost of operations, maintenance, and monitoring under that management program, \$2,400,000 for each of the fiscal years in the ten-year period beginning on October 1, 1985.

(b) No moneys appropriated under subsection (a) may be expended, and no moneys may be expended for carrying out Grass Valley Creek activities, after September 30, 1984, until the Secretary receives assurances satisfactory to him that—

(1) the State of California and the counties of Humboldt and Trinity in California will pay during each fiscal year (on the basis of such shares as the State and the counties mutually agree upon) to the Treasury of the United States an amount equal to 15 per centum of the total amount of money that is expended during that year (A) from appropriations made under subsection (a), and (B) for carrying out Grass Valley Creek activities; and

(2) the public utilities, water districts, and other direct purchasers of water and power from the Trinity River division of the Central Valley project referred to in section 1(1) will pay (on the basis of such shares as are determined by the Secretary) to the Treasury of the United States, within such period of time and in such increments as are satisfactory to the Secretary, an amount equal to 50 per centum of the total amount of money that is expended (A) from appropriations made under subsection (a), and (B) for carrying out Grass Valley Creek activities.

(c) No moneys appropriated under subsection (a) may be expended for any construction described in section 2(a)(1)(A) below the confluence of Grass Valley Creek and the Trinity River until the construction of the debris dam referred to in subsection (d)(1) is completed.

(d) For purposes of this section, the term “Grass Valley Creek activities” means the following activities authorized by the Act of September 4, 1980 (94 Stat. 1062):

(1) The construction of the Grass Valley Creek debris dam.

(2) The construction, operation, and maintenance of the sand dredging system in Grass Valley Creek.

Approved October 24, 1984.

LEGISLATIVE HISTORY—H.R. 1438:

HOUSE REPORT No. 98-1035, Pt. 1 (Comm. on Merchant Marine and Fisheries).

SENATE REPORT No. 98-647 (Comm. on Environment and Public Works).

CONGRESSIONAL RECORD, Vol. 130 (1984):

Sept. 24, considered and passed House.

Oct. 4, considered and passed Senate.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 20, No. 43 (1984):

Oct. 24, Presidential statement.

100 STAT. 3080

PUBLIC LAW 99-552—OCT. 27, 1986

Public Law 99-552
99th Congress

An Act

Oct. 27, 1986
[H.R. 4712]

To provide for the restoration of the fishery resources in the Klamath River Basin, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

16 USC 460ss.

SECTION 1. FINDINGS.

The Congress finds that—

(1) the Klamath and Trinity Rivers have been placed under the California and National Wild and Scenic Rivers Systems to protect their outstanding anadromous fishery values;

(2) the Klamath and Trinity Rivers provide fishery resources necessary for Indian subsistence and ceremonial purposes, ocean commercial harvest, recreational fishing, and the economic health of many local communities;

(3) floods, the construction and operation of dams, diversions and hydroelectric projects, past mining, timber harvest practices, and roadbuilding have all contributed to sedimentation, reduced flows, and degraded water quality which has significantly reduced the anadromous fish habitat in the Klamath-Trinity River System;

(4) overlapping Federal, State, and local jurisdictions, inadequate enforcement of fishery harvest regulations, and ineffective fishery management have historically hampered fishery conservation efforts and prevented the Federal Government and the State of California from fulfilling their responsibilities to protect the rivers' anadromous fishery values;

(5) the Klamath-Trinity fall chinook salmon populations have declined by 80 percent from historic levels and steelhead trout have also undergone significant reductions;

(6) Klamath River Basin Fisheries Resource Plan has been developed by the Secretary acting through the Bureau of Indian Affairs;

(7) the Klamath Salmon Management Group, a group of agencies with fishery management responsibility, has established, in cooperation with the users of the Klamath-Trinity River Basin fishery resources, a sound framework for the future coordination of fishery harvest management;

(8) a new Klamath-Trinity River Basin Management authority, composed of the Klamath Salmon Management Group and representatives of users of the fishery resources of the Klamath-Trinity River Basin, is needed to ensure more effective long-term coordination of the Klamath-Trinity River fisheries under sound conservation and management principles that ensure adequate spawning escapement; and

(9) the Secretary has the authority to implement a restoration program only in the Trinity River Basin and needs additional authority to implement a restoration program in cooperation with State and local governments to restore anadromous fish

populations to optimum levels in both the Klamath and Trinity River Basins;

SEC. 2. KLAMATH RIVER BASIN CONSERVATION AREA; FISHERY RESOURCES RESTORATION PROGRAM. 16 USC 460ss-1.

(a) ESTABLISHMENT OF KLAMATH RIVER BASIN CONSERVATION AREA.—The Secretary shall designate the anadromous fish habitats and resources of the Klamath River basin as the Klamath River Basin Conservation Area (hereafter in this Act referred to as the "Area").

(b) KLAMATH RIVER BASIN CONSERVATION AREA RESTORATION PROGRAM.—

(1) ESTABLISHMENT.—The Secretary shall, in consultation with the task force established under section 4, formulate, establish, and implement a 20-year program to restore the anadromous fish populations of the Area to optimum levels and to maintain such levels. The program shall be based on the Klamath River Basin Fisheries Resource Plan referred to in section 1(6) and shall be known as the Klamath River Basin Conservation Area Restoration Program.

(2) PROGRAM ACTIVITIES.—In carrying out the objectives of the program, the Secretary, in cooperation with the task force established under section 4, shall—

(A) monitor and coordinate research evaluating the Area anadromous fish populations and administer and evaluate the success of activities described in subparagraph (B); and

Research and development.

(B) take such actions as are necessary to—

(i) improve and restore Area habitats, and to promote access to blocked Area habitats, to support increased run sizes;

(ii) rehabilitate problem watersheds in the Area to reduce negative impacts on fish and fish habitats;

(iii) improve existing Area hatcheries and rearing ponds to assist in rebuilding the natural populations;

(iv) implement an intensive, short-term stocking program to rebuild run sizes while maintaining the genetic integrity and diversity of Area subbasin stocks; and

(v) improve upstream and downstream migration by removal of obstacles to fish passage and the provision of facilities for avoiding obstacles.

(3) RESTORATION WORK.—To the extent practicable, any restoration work performed under paragraph (2)(B) shall be performed by unemployed—

Indians.

(A) commercial fishermen;

(B) Indians; and

(C) other persons whose livelihood depends upon Area fishery resources.

(4) MEMORANDUM OF AGREEMENT.—In order to facilitate the implementation of any activity described in paragraph (2) over which the Secretary does not have jurisdiction, the Secretary shall enter into a memorandum of agreement with the Federal, State, and local agencies having jurisdiction over such activities, and the Area Indian tribes. The memorandum of agreement shall specify the program activities for which the respective signatories to the agreement are responsible and shall contain such provisions as are necessary to ensure the coordinated implementation of the program.

Contracts. State and local governments. Indians.

100 STAT. 3084

PUBLIC LAW 99-552—OCT. 27, 1986

Government service are allowed travel expenses under section 5703 of title 5 of the United States Code.

(2) **LIMITATION ON SPENDING AUTHORITY.**—No money authorized to be appropriated under section 6 may be used to reimburse any agency or governmental unit (whose employees are Council members) for time spent by any such employee performing Council duties.

16 USC 460ss-3.

SEC. 4. KLAMATH RIVER BASIN FISHERIES TASK FORCE.

(a) **ESTABLISHMENT.**—There is established a Klamath River Basin Fisheries Task Force (hereafter in this Act referred to as the “Task Force”).

(b) **FUNCTIONS.**—The Task Force—

(1) shall assist the Secretary in the formulation, coordination, and implementation of the program;

(2) shall assist, and coordinate its activities with, Federal, State, and local governmental or private anadromous fish restoration projects within the Area;

(3) shall conduct any other activity that is necessary to accomplish the objectives of the program; and

(4) may act as an advisor to the Council.

(c) **MEMBERSHIP AND APPOINTMENT.**—The Task Force is composed of 12 members as follows:

(1) A representative, who shall be appointed by the Governor of California, of each of the following:

(A) The commercial salmon fishing industry.

(B) The in-river sport fishing community.

(C) The California Department of Fish and Game.

(2) A representative of the Hoopa Indian Tribe who shall be appointed by the Hoopa Valley Business Council.

(3) A representative of the Department of the Interior who shall be appointed by the Secretary.

(4) A representative of the National Marine Fisheries Service who shall be appointed by the Secretary of Commerce.

(5) A representative of the Department of Agriculture who shall be appointed by the Secretary of Agriculture.

(6) A representative of the Oregon Department of Fish and Wildlife who shall be appointed by the Governor of Oregon.

(7) One individual who shall be appointed by the Board of Supervisors of Del Norte County, California.

(8) One individual who shall be appointed by the Board of Supervisors of Siskiyou County, California.

(9) One individual who shall be appointed by the Board of Supervisors of Humboldt County, California.

(10) One individual who shall be appointed by the Board of Supervisors of Trinity County, California.

(d) **COUNCIL MEMBERSHIP NOT A BAR TO TASK FORCE APPOINTMENT.**—An individual who is a member of the Council is not ineligible for appointment as a member of the Task Force.

(e) **TERMS.**—

(1) **IN GENERAL.**—The term of a member of the Task Force is 4 years.

(2) **SERVICE.**—Members of the Task Force serve at the pleasure of the appointing authorities.

(3) **VACANCIES.**—Any vacancy on the Task Force shall be filled in the manner in which the original appointment was made. Any member appointed to fill a vacancy occurring before the

PUBLIC LAW 99-552—OCT. 27, 1986

100 STAT. 3085

expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A member may serve after the expiration of his term until his successor has taken office.

(f) TRANSACTION OF BUSINESS.—

(1) DECISIONS OF TASK FORCE.—All decisions of the Task Force must be by unanimous vote of all the members.

(2) CHAIRMAN.—The members of the Task Force shall select a Chairman from among its members.

(3) MEETINGS.—The Task Force shall meet at the call of the Chairman or upon the request of a majority of its members.

(g) STAFF AND ADMINISTRATION.—

(1) ADMINISTRATIVE SUPPORT.—The Secretary and the Director of the California Department of Fish and Game shall provide the Task Force with the administrative and technical support services necessary for the effective functioning of the Task Force.

(2) INFORMATION.—The Secretary and the Director of the California Department of Fish and Game shall furnish the members of the Task Force with relevant information concerning the Area.

(3) ORGANIZATION.—The Task Force shall determine its organization, and prescribe the practices and procedures for carrying out its functions under subsection (b).

(h) MEMBERS WHO ARE FEDERAL OR STATE EMPLOYEES.—Any Task Force member who is an officer or employee of the United States or the State of California at the time of appointment to the Task Force shall cease to be a member of the Task Force within 14 days of the date on which he ceases to be so employed.

(i) LIMITATION ON SPENDING AUTHORITY.—No money authorized to be appropriated under section 6 may be used to reimburse any Task Force member or agency or governmental unit (whose employees are Task Force members) for time spent by any such employee performing Task Force duties.

SEC. 5. ENFORCEMENT.

(a) MEMORANDUM OF AGREEMENT.—In order to strengthen and facilitate the enforcement of Area fishery harvesting regulations, the Secretary shall enter into a memorandum of agreement with the California Department of Fish and Game. Such agreement shall specify the enforcement activities within the Area for which the respective agencies of the Department of Interior and the California Department of Fish and Game are responsible and shall contain such provisions as are necessary to ensure the coordinated implementation of Federal and State enforcement activities.

Contracts.
California.
State and local
governments.
16 USC 460ss-4.

SEC. 6. APPROPRIATIONS.

16 USC 460ss-5.

(a) AUTHORIZATION.—There are authorized to be appropriated to the Department of the Interior during the period beginning October 1, 1986, and ending on September 30, 2006, \$21,000,000 for the design, construction, operation, and maintenance of the program. Monies appropriated under this subsection shall remain available until expended or October 1, 2006, whichever first occurs.

(b) COST-SHARING.—

(1) 50 percent of the cost of the development and implementation of the program must be provided by one or more non-Federal sources on a basis considered by the Secretary to be

100 STAT. 3086

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timely and appropriate. For purposes of this subsection, the term "non-Federal source" includes a State or local government, any private entity, and any individual.

Gifts and property.
Real property.

(2) In addition to cash outlays, the Secretary shall consider as financial contributions by a non-Federal source the value of in kind contributions and real and personal property provided by the source for purposes of implementing the program. Valuations made by the Secretary under this paragraph are final and not subject to judicial review.

Voluntarism.

(3) For purposes of paragraph (2), in kind contributions may be in the form of, but are not limited to, personal services rendered by volunteers in carrying out surveys, censuses, and other scientific studies.

Regulations.

(4) The Secretary shall by regulation establish—

(A) the training, experience, and other qualifications which such volunteers must have in order for their services to be considered as in kind contributions; and

(B) the standards under which the Secretary will determine the value of in kind contributions and real and personal property for purposes of paragraph (2).

State and local governments.

(5) The Secretary may not consider the expenditure, either directly or indirectly, with respect to the program of Federal moneys received by a State or local government to be a financial contribution by a non-Federal source to carry out the program.

16 USC 460ss-6.

SEC. 7. DEFINITIONS.

As used in this Act—

(1) The term "program" means the Klamath River Basin Conservation Area Restoration Program established under section 2(b).

(2) The term "Secretary" means the Secretary of the Interior.

Approved October 27, 1986.

LEGISLATIVE HISTORY—H.R. 4712:

HOUSE REPORTS: No. 99-894, Pt. 1 (Comm. on Merchant Marine and Fisheries).

CONGRESSIONAL RECORD, Vol. 132 (1986):

Sept. 30, considered and passed House.

Oct. 3, considered and passed Senate.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 22 (1986):

Oct. 27, Presidential statement.

the project, that are used solely for the purpose of serving the respective district's lands and which the Secretary determines are necessary to enable the respective district to carry out operation and maintenance with respect to that portion of the Rio Grande project to be transferred. The transfer of the title to such easements, ditches, laterals, canals, drains, and other rights-of-way located in New Mexico, which the Secretary has, that are used for the purpose of jointly serving Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1, may be transferred to Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1, jointly, upon agreement by the Secretary and both districts. Any transfer under this section shall be subject to the condition that the respective district assume responsibility for operating and maintaining their portion of the project.

SEC. 3302. LIMITATION.

Title to and responsibility for operation and maintenance of Elephant Butte and Caballo dams, and Percha, Leasburg, and Mesilla diversion dams and the works necessary for their protection and operation shall be unaffected by this title.

SEC. 3303. EFFECT OF ACT ON OTHER LAWS.

Nothing in this title shall affect any right, title, interest or claim to land or water, if any, of the Ysleta del Sur Pueblo, a federally recognized Indian Tribe.

Central Valley
Project
Improvement
Act.
Water supply.
California.

**TITLE XXXIV—CENTRAL VALLEY PROJECT
IMPROVEMENT ACT**

SEC. 3401. SHORT TITLE.

This title may be cited as the "Central Valley Project Improvement Act".

SEC. 3402. PURPOSES.

The purposes of this title shall be—

(a) to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins of California;

(b) to address impacts of the Central Valley Project on fish, wildlife and associated habitats;

(c) to improve the operational flexibility of the Central Valley Project;

(d) to increase water-related benefits provided by the Central Valley Project to the State of California through expanded use of voluntary water transfers and improved water conservation;

(e) to contribute to the State of California's interim and long-term efforts to protect the San Francisco Bay/Sacramento-San Joaquin Delta Estuary;

(f) to achieve a reasonable balance among competing demands for use of Central Valley Project water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors.

SEC. 3403. DEFINITIONS.

As used in this title—

San Joaquin Valley Drainage Program, entitled A Management Plan for Agricultural Subsurface Drainage and Related Problems on the Westside San Joaquin Valley (September 1990).

(f) INCREASED REVENUES.—All revenues received by the Secretary as a result of the increased repayment rates applicable to water transferred from irrigation use to municipal and industrial use under subsection 3405(a) of this section, and all increased revenues received by the Secretary as a result of the increased water prices established under subsection 3405(d) of this section, shall be covered to the Restoration Fund.

SEC. 3406. FISH, WILDLIFE AND HABITAT RESTORATION.

(a) AMENDMENTS TO CENTRAL VALLEY PROJECT AUTHORIZATIONS.—Act of August 26, 1937.—Section 2 of the Act of August 26, 1937 (chapter 832; 50 Stat. 850), as amended, is amended—

(1) in the second proviso of subsection (a), by inserting “and mitigation, protection, and restoration of fish and wildlife after “Indian reservations,”;

(2) in the last proviso of subsection (a), by striking “domestic uses;” and inserting “domestic uses and fish and wildlife mitigation, protection and restoration purposes;” and by striking “power” and inserting “power and fish and wildlife enhancement”;

(3) by adding at the end the following: “The mitigation for fish and wildlife losses incurred as a result of construction, operation, or maintenance of the Central Valley Project shall be based on the replacement of ecologically equivalent habitat and shall take place in accordance with the provisions of this title and concurrent with any future actions which adversely affect fish and wildlife populations or their habitat but shall have no priority over them.”; and

(4) by adding at the end the following: “(e) Nothing in this title shall affect the State’s authority to condition water rights permits for the Central Valley Project.”

California.

(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, including but not limited to the Federal Endangered Species Act, 16 U.S.C. 1531, et seq., and all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project. The Secretary, in consultation with other State and Federal agencies, Indian tribes, and affected interests, is further authorized and directed to:

(1) develop within three years of enactment and implement a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967–1991; *Provided*, That this goal shall not apply to the San Joaquin River between Friant Dam and the Mendota Pool, for which a separate program is authorized under subsection 3406(c) of this title; *Provided further*, That the programs and activities authorized by this section shall, when fully implemented, be deemed to meet the mitigation, protection, restoration, and enhancement purposes established by subsection 3406(a) of this title; *And provided further*, That in the course of developing and implementing

ated with the Hamilton City Pumping Plant. This authorization shall not be deemed to supersede or alter existing authorizations for the participation of other Federal agencies in the mitigation program. Seventy-five percent shall be considered a nonreimbursable Federal expenditure, and 25 percent shall be paid by the State of California.

(21) assist the State of California in efforts to develop and implement measures to avoid losses of juvenile anadromous fish resulting from unscreened or inadequately screened diversions on the Sacramento and San Joaquin rivers, their tributaries, the Sacramento-San Joaquin Delta, and the Suisun Marsh. Such measures shall include but shall not be limited to construction of screens on unscreened diversions, rehabilitation of existing screens, replacement of existing non-functioning screens, and relocation of diversions to less fishery-sensitive areas. The Secretary's share of costs associated with activities authorized under this paragraph shall not exceed 50 percent of the total cost of any such activity.

(22) provide such incentives as the Secretary determines to be appropriate or necessary, consistent with the goals and objectives of this title, to encourage farmers to participate in a program, which the Secretary shall develop, under which such farmers will keep fields flooded during appropriate time periods for the purposes of waterfowl habitat creation and maintenance and for Central Valley Project yield enhancement; *Provided*, That such incentives shall not exceed \$2,000,000 annually, either directly or through credits against other contractual payment obligations, including the pricing waivers authorized under subsection 3405(d) of this title; *Provided further*, That the holder of the water contract shall pass such incentives through to farmers participating in the program, less reasonable contractor costs, if any; *And provided further*, That such water may be transferred subject to section 3405(a) of this title only if the farmer waives all rights to such incentives. This provision shall terminate by the year 2002.

(23) in order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to meet the fishery restoration goals of the Act of October 24, 1984, Public Law 98-541, provide through the Trinity River Division, for water years 1992 through 1996, an instream release of water to the Trinity River of not less than three hundred and forty thousand acre-feet per year for the purposes of fishery restoration, propagation, and maintenance and,

(A) by September 30, 1996, the Secretary, after consultation with the Hoopa Valley Tribe, shall complete the Trinity River Flow Evaluation Study currently being conducted by the United States Fish and Wildlife Service under the mandate of the Secretarial Decision of January 14, 1981, in a manner which insures the development of recommendations, based on the best available scientific data, regarding permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River fishery; and

(B) not later than December 31, 1996, the Secretary shall forward the recommendations of the Trinity River Flow Evaluation Study, referred to in subparagraph (A)

of this paragraph, to the Committee on Energy and Natural Resources and the Select Committee on Indian Affairs of the Senate and the Committee on Interior and Insular Affairs and the Committee on Merchant Marine and Fisheries of the House of Representatives. If the Secretary and the Hoopa Valley Tribe concur in these recommendations, any increase to the minimum Trinity River instream fishery releases established under this paragraph and the operating criteria and procedures referred to in subparagraph (A) shall be implemented accordingly. If the Hoopa Valley Tribe and the Secretary do not concur, the minimum Trinity River instream fishery releases established under this paragraph shall remain in effect unless increased by an Act of Congress, appropriate judicial decree, or agreement between the Secretary and the Hoopa Valley Tribe. Costs associated with implementation of this paragraph shall be reimbursable as operation and maintenance expenditures pursuant to existing law.

If the Secretary and the State of California determine that long-term natural fishery productivity in all Central Valley Project controlled rivers and streams resulting from implementation of this section exceeds that which existed in the absence of Central Valley Project facilities, the costs of implementing those measures which are determined to provide such enhancement shall become credits to offset reimbursable costs associated with implementation of this subsection.

(c) **SAN JOAQUIN AND STANISLAUS RIVERS.**—The Secretary shall, by not later than September 30, 1996:

(1) develop a comprehensive plan, which is reasonable, prudent, and feasible, to address fish, wildlife, and habitat concerns on the San Joaquin River, including but not limited to the streamflow, channel, riparian habitat, and water quality improvements that would be needed to reestablish where necessary and to sustain naturally reproducing anadromous fisheries from Friant Dam to its confluence with the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. Such plan shall be developed in cooperation with the California Department of Fish and Game and in coordination with the San Joaquin River Management Program under development by the State of California; shall comply with and contain any documents required by the National Environmental Policy Act and contain findings setting forth the basis for the Secretary's decision to adopt and implement the plan as well as recommendations concerning the need for subsequent Congressional action, if any; and shall incorporate, among other relevant factors, the potential contributions of tributary streams as well as the alternatives to be investigated under paragraph (2) of this subsection. During the time that the Secretary is developing the plan provided for in this subsection, and until such time as Congress has authorized the Secretary to implement such plan, with or without modifications, the Secretary shall not, as a measure to implement this title, make releases for the restoration of flows between Gravelly Ford and the Mendota Pool and shall not thereafter make such releases as a measure to implement this title without a specific Act of Congress authorizing such releases. In lieu of such requirement, and until such time as flows of sufficient quantity, quality and

Public Law 104-143
104th Congress

An Act

May 15, 1996
[H.R. 2243]

To amend the Trinity River Basin Fish and Wildlife Management Act of 1984, to extend for three years the availability of moneys for the restoration of fish and wildlife in the Trinity River, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Trinity River
Basin Fish and
Wildlife
Management
Reauthorization
Act of 1995.
California.

SECTION 1. SHORT TITLE.

This Act may be cited as the “Trinity River Basin Fish and Wildlife Management Reauthorization Act of 1995”.

SEC. 2. CLARIFICATION OF FINDINGS.

Section 1 of the Act entitled “An Act to provide for the restoration of the fish and wildlife in the Trinity River Basin, California, and for other purposes”, approved October 24, 1984 (98 Stat. 2721), as amended, is amended—

(1) by redesignating paragraphs (5) and (6) as paragraphs (6) and (7), respectively;

(2) by adding after paragraph (4) the following:

“(5) Trinity Basin fisheries restoration is to be measured not only by returning adult anadromous fish spawners, but by the ability of dependent tribal, commercial, and sport fisheries to participate fully, through enhanced in-river and ocean harvest opportunities, in the benefits of restoration;” and

(3) by amending paragraph (7), as so redesignated, to read as follows:

“(7) the Secretary requires additional authority to implement a management program, in conjunction with other appropriate agencies, to achieve the long-term goals of restoring fish and wildlife populations in the Trinity River Basin, and, to the extent these restored populations will contribute to ocean populations of adult salmon, steelhead, and other anadromous fish, such management program will aid in the resumption of commercial, including ocean harvest, and recreational fishing activities.”.

SEC. 3. CHANGES TO MANAGEMENT PROGRAM.

(a) OCEAN FISH LEVELS.—Section 2(a) of the Act entitled “An Act to provide for the restoration of the fish and wildlife in the Trinity River Basin, California, and for other purposes”, approved October 24, 1984 (98 Stat. 2722), as amended, is amended—

(1) in the matter preceding paragraph (1)—

(A) by inserting “, in consultation with the Secretary of Commerce where appropriate,” after “Secretary”; and

(B) by adding the following after “such levels.”: “To the extent these restored fish and wildlife populations will contribute to ocean populations of adult salmon, steelhead, and other anadromous fish, such management program is intended to aid in the resumption of commercial, including ocean harvest, and recreational fishing activities.”

(b) FISH HABITATS IN THE KLAMATH RIVER.—Paragraph (1)(A) of such section (98 Stat. 2722) is amended by striking “Weitchpec,” and inserting “Weitchpec and in the Klamath River downstream of the confluence with the Trinity River;”

(c) TRINITY RIVER FISH HATCHERY.—Paragraph (1)(C) of such section (98 Stat. 2722) is amended by inserting before the period the following: “, so that it can best serve its purpose of mitigation of fish habitat loss above Lewiston Dam while not impairing efforts to restore and maintain naturally reproducing anadromous fish stocks within the basin”.

(d) ADDITION OF INDIAN TRIBES.—Section 2(b)(2) of such Act (98 Stat. 2722) is amended by striking “tribe” and inserting “tribes”.

SEC. 4. ADDITIONS TO TASK FORCE.

(a) IN GENERAL.—Section 3(a) of the Act entitled “An Act to provide for the restoration of the fish and wildlife in the Trinity River Basin, California, and for other purposes”, approved October 24, 1984 (98 Stat. 2722), as amended, is amended—

(1) by striking “fourteen” and inserting “nineteen”;

(2) by striking “United States Soil Conservation Service” in paragraph (10) and inserting “Natural Resources Soil and Conservation Service”; and

(3) by inserting after paragraph (14) the following:

“(15) One individual to be appointed by the Yurok Tribe.

“(16) One individual to be appointed by the Karuk Tribe.

“(17) One individual to represent commercial fishing interests, to be appointed by the Secretary after consultation with the Board of Directors of the Pacific Coast Federation of Fishermen’s Associations.

“(18) One individual to represent sport fishing interests, to be appointed by the Secretary after consultation with the Board of Directors of the California Advisory Committee on Salmon and Steelhead Trout.

“(19) One individual to be appointed by the Secretary, in consultation with the Secretary of Agriculture, to represent the timber industry.”

(b) COORDINATION.—Section 3 of such Act (98 Stat. 2722) is further amended by adding at the end thereof the following new subsection:

“(d) Task Force actions or management on the Klamath River from Weitchpec downstream to the Pacific Ocean shall be coordinated with, and conducted with the full knowledge of, the Klamath River Basin Fisheries Task Force and the Klamath Fishery Management Council, as established under Public Law 99-552. The Secretary shall appoint a designated representative to ensure such coordination and the exchange of information between the Trinity River Task Force and these two entities.”

(c) REIMBURSEMENT.—Section 3(c)(2) of such Act (98 Stat. 2723) is amended by adding at the end the following: “Members of the Task Force who are not full-time officers or employees of the United States, the State of California (or a political subdivision thereof),

or an Indian tribe, may be reimbursed for such expenses as may be incurred by reason of their service on the Task Force, as consistent with applicable laws and regulations.”

(d) **EFFECTIVE DATE.**—The amendments made by subsection (a) shall apply with respect to actions taken by the Trinity River Basin Fish and Wildlife Task Force on and after 120 days after the date of the enactment of this Act.

SEC. 5. APPROPRIATIONS.

(a) **EXTENSION OF AUTHORIZATION.**—Section 4(a) of the Act entitled “An Act to provide for the restoration of the fish and wildlife in the Trinity River Basin, California, and for other purposes”, approved October 24, 1984 (98 Stat. 2723), as amended, is amended—

(1) in paragraph (1), by striking “October 1, 1995” and inserting in lieu thereof “October 1, 1998”; and

(2) in paragraph (2), by striking “ten-year” and inserting in lieu thereof “13-year”.

(b) **IN-KIND SERVICES; OVERHEAD; AND FINANCIAL AND AUDIT REPORTS.**—Section 4 of such Act (98 Stat. 2724) is amended—

(1) by designating subsection (d) as subsection (h); and

(2) by inserting after subsection (c) the following new subsections:

“(d) The Secretary is authorized to accept in-kind services as payment for obligations incurred under subsection (b)(1).

“(e) Not more than 20 percent of the amounts appropriated under subsection (a) may be used for overhead and indirect costs. For the purposes of this subsection, the term ‘overhead and indirect costs’ means costs incurred in support of accomplishing specific work activities and jobs. Such costs are primarily administrative in nature and are such that they cannot be practically identified and charged directly to a project or activity and must be distributed to all jobs on an equitable basis. Such costs include compensation for administrative staff, general staff training, rent, travel expenses, communications, utility charges, miscellaneous materials and supplies, janitorial services, depreciation and replacement expenses on capitalized equipment. Such costs do not include inspection and design of construction projects and environmental compliance activities, including (but not limited to) preparation of documents in compliance with the National Environmental Policy Act of 1969.

“(f) Not later than December 31 of each year, the Secretary shall prepare reports documenting and detailing all expenditures incurred under this Act for the fiscal year ending on September 30 of that same year. Such reports shall contain information adequate for the public to determine how such funds were used to carry out the purposes of this Act. Copies of such reports shall be submitted to the Committee on Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate.

“(g) The Secretary shall periodically conduct a programmatic audit of the in-river fishery monitoring and enforcement programs under this Act and submit a report concerning such audit to the Committee on Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate.”

(c) **AUTHORITY TO SEEK APPROPRIATIONS.**—Section 4 of such Act, as amended by subsection (b) of this section, is further amended by inserting after subsection (h) the following new subsection:

“(i) Beginning in the fiscal year immediately following the year the restoration effort is completed and annually thereafter, the Secretary is authorized to seek appropriations as necessary to monitor, evaluate, and maintain program investments and fish and wildlife populations in the Trinity River Basin for the purpose of achieving long-term fish and wildlife restoration goals.”.

SEC. 6. NO RIGHTS AFFECTED.

The Act entitled “An Act to provide for the restoration of the fish and wildlife in the Trinity River Basin, California, and for other purposes”, approved October 24, 1984 (98 Stat. 2721), as amended, is further amended by inserting at the end thereof the following:

“PRESERVATION OF RIGHTS

“SEC. 5. Nothing in this Act shall be construed as establishing or affecting any past, present, or future rights of any Indian or Indian tribe or any other individual or entity.”.

SEC. 7. SHORT TITLE OF 1984 ACT.

The Act entitled “An Act to provide for the restoration of the fish and wildlife in the Trinity River Basin, California, and for other purposes”, approved October 24, 1984 (98 Stat. 2721), as amended by section 6 of this Act, is further amended by adding at the end the following:

“SHORT TITLE

“SEC. 6. This Act may be cited as the “Trinity River Basin Fish and Wildlife Management Act of 1984’.”.

Trinity River
Basin Fish and
Wildlife
Management Act
of 1984.

Approved May 15, 1996.

LEGISLATIVE HISTORY—H.R. 2243:

HOUSE REPORTS: No. 104-395 (Comm. on Resources).

SENATE REPORTS: No. 104-253 (Comm. on Environment and Public Works).

CONGRESSIONAL RECORD:

Vol. 141 (1995): Dec. 12, considered and passed House.

Vol. 142 (1996): May 3, considered and passed Senate.