

**14-17493, 14-17506, 14-17515, 14-17539**

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**United States Court of Appeals  
for the Ninth Circuit**

SAN LUIS & DELTA MENDOTA WATER AUTHORITY and  
WESTLANDS WATER DISTRICT,  
*Plaintiffs/Appellees/Cross-Appellants,*

v.

SALLY JEWELL, ET AL.,  
*Defendants/Appellants/Cross-Appellees,*

and

HOOPA VALLEY TRIBE (*Defendant-Intervenor/Appellant/Cross-Appellee*),  
YUROK TRIBE (*Defendant-Intervenor/Appellant/Cross-Appellee*),  
PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS and  
INSTITUTE FOR FISHERIES RESOURCES (*Defendant-Intervenors/Appellees*),

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA (No. 13-cv-1232 LJO/GSA)

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**RESPONSE/REPLY BRIEF OF APPELLANT HOOPA VALLEY TRIBE**

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**I. SUMMARY OF RESPONSE/REPLY ARGUMENT<sup>1</sup>**

The District Court erred by judicially imposing an arbitrary geographic limitation on the Secretary of the Interior’s authority to “adopt appropriate measures to insure the preservation and propagation of fish . . .” as provided in the first proviso of Section 2 of the 1955 Trinity River Division Central Valley Project Act, Pub. L. No. 84-386, 69 Stat. 719 (“1955 Act”). The District Court erroneously found that the Secretary’s authority to preserve fish under the 1955 Act is geographically confined to the Trinity River Basin, ending at the confluence of the Trinity and Klamath Rivers. The District Court’s conclusion is unsupported by the text of the 1955 Act, its purpose or context, or its legislative history.

Plaintiffs in their opening/response brief agree that the District Court’s imposition of the geographic limitation on the 1955 Act was erroneous. Thus, no party to this appeal contends that the District Court’s interpretation of the 1955 Act was correct. This Court should reverse the District Court’s interpretation of the 1955 Act and hold that the Secretary does have statutory authority, pursuant to the first proviso of Section 2 of the 1955 Act, to release water from the Trinity River Division (TRD) into the Trinity River for the purpose of preserving fish from harm or death during their upstream migration through the lower-Klamath River.

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<sup>1</sup> The Hoopa Valley Tribe adopts and incorporates by reference herein the Statement of Jurisdiction, Statement of the Issues, Statement of the Case, and Statement of the Standard of Review contained in its opening brief to this Court, found at ECF Dkt. #24.

Congress has never abrogated or limited the Secretary's authority to preserve fish under the 1955 Act. Plaintiffs' argument of implied repeal must be rejected because there is no "irreconcilable conflict" between the preservation authority provided to the Secretary in the first proviso of Section 2 of the 1955 Act and the distinct restoration mandate found in Section 3406(b)(23) of the Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, §§ 3401-3412, 106 Stat. 4600, 4706-31 (1992). Those two statutes have different purposes and scopes. Specifically, the 1955 Act provides the Secretary with broad authority to take measures to insure the preservation of fish. Subsequent acts of Congress including CVPIA Section 3406(b)(23) address the distinct issue of restoring fish and habitat in the Trinity River to pre-project levels as a result of the unanticipated impacts of the TRD. Nothing in the subsequent restoration-focused enactments evidences any intent of Congress to repeal the Secretary's pre-existing authority to take appropriate actions to preserve fish from harm or death.

The Secretary's action to implement flow augmentation releases ("FARs") under the authority of the 1955 Act to preserve fish from the risk of a massive fish-kill in the lower-Klamath River does not conflict with or violate Section 3406(b)(23) of the CVPIA because that latter law addresses restoration of fish and habitat in the Trinity River. The recommendations that were developed by federal and tribal scientists in the Trinity River Flow Evaluation Study (TRFES) and



adopted in the Trinity River Record of Decision (TRROD) pursuant to the CVPIA focus exclusively on measures to restore habitat in the mainstem Trinity River and do not address conditions in the lower-Klamath River. The flow releases authorized by the Secretary in this case address a different issue, have a different purpose, and fall outside the scope of Section 3406(b)(23) and the TRROD.

Plaintiffs' argument that the FARs do not directly address impacts of the TRD and are thus unlawful under the 1955 Act lacks merit because there is neither a factual basis for the claim nor any such restriction placed on the Secretary's authority in the 1955 Act. The first proviso of Section 2 limits the integration of the TRD into the Central Valley Project and requires the Secretary to exercise a priority for use of TRD water as necessary to protect and preserve fish and wildlife. Under the first proviso, in-basin flows required for preservation of fish take precedence over out-of-basin diversion. As stated by the sponsor of the 1955 Act, Congressman Clair Engle, the Secretary must "take all necessary steps for the maintenance and propagation of fish life in the Trinity River." Plaintiffs are again improperly attempting to craft limitations on the Secretary's authority that are not present in the text of the statute itself.

While directly authorized by the 1955 Act, the Secretary's act of releasing flows to preserve fish is also supported by her fiduciary trust obligation to protect tribal trust resources. Plaintiffs respond by making wide-ranging arguments that

were not addressed in the District Court and are not properly before this Court on appeal. Plaintiffs argue that the Secretary's tribal trust obligation does not provide independent authorization for the FARs that is separate from the authority provided by the 1955 Act, but the District Court did not address that issue. Nor did the District Court consider whether tribal reserved water rights provide separate authority for the FARs. Thus, neither of those issues are properly before this Court on appeal. The only authorization relied upon by Federal Defendants and the only authority analyzed by the District Court was that contained in the first proviso of Section 2 of the 1955 Act. While the Secretary's action was consistent with her fiduciary trust obligations to the Hoopa Valley Tribe, the question of whether the trust obligation independently authorized the FARs is not before this Court.

Plaintiffs' arguments that the Federal Defendants failed to comply with California state water law when making the FARs are also meritless. Upon inquiry by the Federal Defendants, the State responded that the FARs would not require any new permit or other action under state law. Federal Defendants conservatively applied for a state permit to implement the FARs under state law and were told by the State's officials that no such permit was necessary.

This Court should reject all of Plaintiffs' arguments and hold that the Secretary has statutory authority, pursuant to the first proviso of Section 2 of the 1955 Act, to release water from the TRD into the Trinity River for the purpose of

preserving fish from harm or death during their upstream migration through the lower-Klamath River to their natal spawning grounds. The Court should also hold that those releases did not violate CVPIA Section 3406(b)(23), CVPIA Section 3411, or 43 U.S.C. § 383.

## II. ARGUMENT AND AUTHORITY

### A. The District Court Erred By Placing an Arbitrary Geographic Limitation on the Secretary's Authority to Preserve Fish Under the 1955 Act.

In the first proviso of Section 2 of the 1955 Act, Congress vested the Secretary of the Interior with broad authority and the directive to “adopt appropriate measures to insure the preservation and propagation of fish . . . .” 1955 Act, Sec. 2. The fish that the Secretary was directed to protect include, but are not limited to, the anadromous fish originating in the Trinity River whose life cycle requires migration through the mainstem Trinity and lower-Klamath River, which flows into the Pacific Ocean. ER 654-663. In this case, the Secretary directed water releases from the TRD into the Trinity River for the purpose of preserving and protecting anadromous fish from harm and possible death as they migrated from the Pacific Ocean through the lower-Klamath River to spawning grounds in both the Trinity and Klamath Rivers. ER 205-206. The purpose of these releases was to preserve fish by preventing replication of a massive fish kill similar to what occurred in 2002. *Id.*

The District Court incorrectly found that the Secretary's authority to preserve fish under the first proviso of Section 2 of the 1955 Act was geographically confined to the Trinity River Basin, ending at the confluence of the Trinity and Klamath rivers. ER 76. Based on this supposed geographic limitation, the District Court found that the first proviso of Section 2 of the 1955 Act did not provide the Secretary with authority to act to preserve fish, including fish of the Trinity River, during their migration through the lower-Klamath River. *Id.* The Court, in its judgment dated October 24, 2014 declared that: "the provision of section 2 of the 1955 Act cited by Defendants is limited in scope to the Trinity River basin, and so does not provide authorization for Federal Defendants to implement the 2013 FARs to benefit fish in the lower Klamath River." ER 85. The Court's interpretation finds no support in the statute itself.

The Tribe's opening brief to this Court argued that the District Court's arbitrary geographic limitation on the Secretary's authority is inconsistent with the plain language of the 1955 Act, which contains no geographic limitation. Dkt. #24, pp. 22-27. The geographic limitation imposed by the District Court fails to account for the anadromy of Trinity River salmon and steelhead whose life cycle requires transit through the lower-Klamath River to reach and return from the Pacific Ocean. Legislative history of the 1955 Act shows that Congress was aware of the inter-relation of the Trinity and Klamath Rivers and their fish runs as well as

the concern of both tribal and non-tribal interests in the lower-Klamath region about impacts to the fishery. Dkt. #24, pp. 31-37. Neither the language of the 1955 Act, nor its legislative history support the District Court's erroneous ruling that the Secretary's authority to preserve fish arbitrarily ends at the Trinity-Klamath confluence.

In their opening/response brief, Plaintiffs now agree with the Tribe and the Federal Defendants that the District Court erred by judicially imposing a geographic limitation on the authority provided to the Secretary in the 1955 Act. Plaintiffs' Brief, Dkt. # 52, pp. 2, 49, 63-64. Plaintiffs urge this Court to not accept the geographic limitation adopted by the District Court, which was the lynchpin of that Court's judgment that the 1955 Act failed to provide the Secretary with authority to implement the FARs here. Dkt. #52, p. 2. Plaintiffs agree that the geographic scope of the preservation authority within the 1955 Act should correctly be interpreted to include both the Trinity River and the lower-Klamath River. Dkt. #52, p. 49. Plaintiffs also acknowledge that Congress understood the inter-relationship of the Trinity and Klamath Rivers and their fishery resources and that there is no logical reason why the authority to preserve anadromous fish provided by the 1955 Act should be geographically confined to the Trinity River basin and thus arbitrarily exclude the lower-Klamath River. Dkt. #52, pp. 63-64.

No party to this proceeding contends that the District Court's interpretation of the 1955 Act, and its insertion of an arbitrary geographic limitation on the Secretary's preservation authority at the Trinity-Klamath confluence, was correct. This Court should reject and reverse the District Court's interpretation of the 1955 Act and find that the 1955 Act provides authorization to the Secretary to implement the FARs in this case, which were implemented to preserve fish from harm while they were located in and migrating through the lower-Klamath River to their natal spawning grounds.

**B. Congress Has Not Expressly or Impliedly Abrogated, Repealed, or Limited the Secretary's Authority to Preserve Fish in the 1955 Act.**

Plaintiffs argue that, in Section 3406(b)(23) of the CVPIA, Congress abrogated the Secretary's 1955 Act authority to release water from the TRD for the purpose of preserving Trinity and Klamath River fish runs from the risk of a massive fish kill. Plaintiffs' Brief, Dkt. #52, pp. 56-60. Since Congress did not expressly state in the CVPIA any intent to abrogate the Secretary's pre-existing authority to preserve fish as provided by the 1955 Act, Plaintiffs are left with the "heavily disfavored" argument that Congress implicitly repealed or amended the Secretary's broad authority to preserve fish provided in the first proviso of Section 2 of the 1955 Act. *Southern Cal. Edison Co. v. Lynch*, 307 F.3d 794, 810 (9<sup>th</sup> Cir. 2002). The canons of statutory construction relied on by Plaintiffs that more "recent enactments should be favored over older ones[,] and specific statutory

provisions should prevail over general ones . . . apply only in the face of ‘irreconcilably conflicting statutes.’” *Detwiler v. Pena*, 38 F.3d 591, 594 (D.C. Cir. 1994) (quoting *Watt v. Alaska*, 451 U.S. 259, 266 (1981)).

Plaintiffs’ argument of implied repeal is meritless here, because the Secretary’s broad preservation authority provided by the 1955 Act is not “irreconcilable conflict” and can be read in harmony with the provisions for restoration-based flow releases found in Section 3406(b)(23) of the CVPIA. *See Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007). Without any express statement of repeal by Congress, nor any legislative history evidencing a “clear and manifest” intent to repeal the Secretary’s authority in the 1955 Act, this Court has a duty to preserve the purpose and effect of both statutes and affirm that the Secretary retains her broad authority to take appropriate measures to preserve fish as provided in the 1955 Act. *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936).

CVPIA Section 3406(b)(23) does not contradict or impliedly, let alone expressly, repeal the 1955 Act or its provision of authority to the Secretary to take appropriate measures to insure the preservation and propagation of fish. *Posadas*, 296 U.S. at 503 (finding no express words of repeal in the subsequent enactment at issue). Nor does the plain language of CVPIA Section 3406(b)(23) express any “clear or manifest” intent to abrogate or exhaust the preservation and propagation

authority of the 1955 Act. *Watt*, 451 U.S. at 267 (intent to repeal must be “clear and manifest”). Nor is there any legislative history on Section 3406(b)(23) to that effect.<sup>2</sup> *Id.* at 267 (noting and finding significant the lack of any legislative history evidencing a Congressional intent to repeal prior statute). Thus, this Court must find that the authority provided by Congress in the first proviso of Section 2 of the 1955 Act has not been abrogated by subsequent enactments.

1. There Is No Conflict, And No Irreconcilable Conflict, Between Section 2 of the 1955 Act and CVPIA Section 3406(b)(23).

Repeal or amendment by implication is heavily disfavored and can be found only where there is an “irreconcilable conflict” between the two statutory provisions and where Congress’ intent to repeal are clear or manifest. *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) (finding the only permissible justification for repeal by implication is where the statutes are irreconcilable); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664, fn. 8 (stating “implied amendments are no more favored than implied repeals”). Examples of such “irreconcilable conflicts” involve situations where one statutory provision requires

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<sup>2</sup> On page 36 of their brief, Plaintiffs cite legislative history of the CVPIA consisting of remarks from one legislator, which offer no support to their argument that Congress intended to repeal the Secretary’s authority found in the 1955 Act. *See also Hoonah Indian Ass’n v. Morrison*, 170 F.3d 1223, 1228 (9<sup>th</sup> Cir. 1999) (“the remarks of an individual legislator on the floor are not part of the statute passed by both houses and signed by the President, so they lack the force of law”).



or permits a specific action while another statutory provision prohibits that same action. *United States v. Juvenile Male*, 670 F.3d 999, 1007 (9<sup>th</sup> Cir. 2012) (finding conflict where one statute required making information public where another statute required keeping that same information confidential). Given their disfavored nature, and the very limited circumstances in which they can be found, repeals by implication are very rarely found. *Branch v. Smith*, 538 U.S. 254, 293 (2003) (O'Connor, J., concurring in part, dissenting in part) (noting in 2003 that the Supreme Court had not found any implied repeal of a statute since 1975 and, outside the antitrust context, had not found implied repeal of a statute since 1917).

The plain language of Section 3406(b)(23) shows no conflict, and certainly no “irreconcilable conflict,” between it and the preservation authority provided in the first proviso of Section 2 of the 1955 Act. The 1955 Act gave the Secretary authority and a directive to “adopt appropriate measures to insure the preservation and propagation of fish . . . .” Completion and decades of operation of the TRD demonstrated that Congress had been misinformed about its effect on the fishery and its habitat in the mainstem Trinity River. Dkt. #24, pp. 7-8; *Westlands Water District v. U.S. Dep’t of the Interior*, 376 F.3d 853, 862 (9<sup>th</sup> Cir. 2004). No longer was there just a need to preserve and propagate; restoration had to occur because of the “drastic reduction” (Pub. L. 98-541, section 1(1)) in Trinity River anadromous fish populations brought about by the construction and operation of the TRD, so

that the original mission of preservation and propagation, as expressed in the 1955 Act, could continue. Dkt. #24, pp. 7-11.

Congress expressly refers to the restoration purpose in Section 3406(b)(23), stating that the overall purpose of Section 3406(b)(23) was to “meet the fishery restoration goals of the [1984 Act].” In Section 3406(b)(23)(A), Congress states that the purpose of the Trinity River Flow Evaluation Study (“TRFES”) and the recommendations developed therein for flows and TRD operating criteria are for the “restoration and maintenance of the Trinity River fishery.” Section 3406(b)(23) and the restoration program authorized therein has the express remedial purpose of restoring the fishery to pre-project levels. *Id.*; 1984 Act, Section 1(6). The means of restoration, which are found in the TRFES’ recommendations, and which were implemented in the TRROD focus exclusively on restoration of habitat in the mainstem Trinity River through flow and non-flow measures. ER 681-83; 689-705; 722-726.

The additional restoration-based authorities provided to the Secretary by Congress in the 1984 Act, the 1986 Act,<sup>3</sup> and the CVPIA in 1992 were enacted because the 1955 Act did not expressly authorize the Secretary to implement fishery restoration programs to restore fish populations to pre-project levels. Such

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<sup>3</sup> In 1986, Congress found additional authority was required to implement a comparable “restoration program” in the Klamath Basin. 16 U.S.C. 460ss(9).

an express authorization for restoration would have made little sense in 1955, because the TRD was approved with the expectation that the TRD would *improve* fisheries, not destroy them.<sup>4</sup> While the subsequent enactments provide more specific direction and authorization for the Secretary to restore the fishery from damage caused by the TRD, none of these enactments abrogate the Secretary's pre-existing and continuing authority to preserve and propagate fish and wildlife.

2. Section 2 of the 1955 Act and CVPIA Section 3406(b)(23) Do Not Address the Same Subject; Rather, They Each Have A Different Purpose and Scope.

Plaintiffs' contention that Section 3406(b)(23) and the first proviso of Section 2 of the 1955 Act cover the "same subject" is incorrect. Dkt. #52, pp. 58-59. The 1955 Act gave the Secretary broad authority to take appropriate measures

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<sup>4</sup> When the TRD was authorized in 1955, Congress acted on information that the TRD would not damage fish:

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

The findings of both the State of California and the Bureau of Reclamation are that water surpluses to the present and future requirements of the Trinity and Klamath Basins are available for diversion in the volume proposed in the Trinity division plan. This water can be diverted from the Trinity River to the Central Valley without detrimental effect on the fishery resources. (emphasis added)

S. Rep. No. 1154, 84 Cong., 1<sup>st</sup> Sess., at 5 (July 27, 1955).

to insure the preservation of fish and wildlife, i.e., to keep them safe from harm. Based on the unanticipated damage to the Trinity River, subsequent acts of Congress in 1984, 1986, and the CVPIA in 1992 expressly provided specific remedial authority and a direction to the Secretary to restore the fish and their habitat, i.e., to bring populations and habitat conditions back to pre-project levels. *See* 1984 Act, Section 1(6); 1986 Act, Section 1.

Congress was well aware of the 1955 Act and the existing authority provided to the Secretary therein when it enacted CVPIA Section 3406(b)(23). Section 3406(b)(23) expressly references and incorporates the goals of the 1984 Act, which makes express reference to the 1955 Act in its findings. 1984 Act, Section 1. Also, as a matter of statutory interpretation, Congress is presumed to be aware of the relevant existing body of law when passing new legislation.

1A Sutherland, *Statutory Construction*, Section 23.10, at p. 346 (4<sup>th</sup> ed. 1985). Despite its knowledge of the authority provided to the Secretary in the 1955 Act, Congress made no statement in CVPIA section 3406(b)(23) that the authority provided by the 1955 Act would be abrogated, amended, or limited in any way.

In CVPIA section 3406(b)(23)(A), Congress expressly incorporates the TRFES and directs the Secretary to complete that study “in a manner which insures the development of recommendations, based on the best available scientific data, regarding permanent instream fishery flow requirements . . . for the restoration and

maintenance of the Trinity River fishery.” The recommendations contained in the TRFES, including the flow recommendations, are focused on restoration of habitat in the mainstem Trinity River. ER 633-636; 681-683; 689-705; 722-726. The TRFES and its recommendations, which were subsequently approved and incorporated into the TRROD in 2000 pursuant to Congress’ direction in Section 3406(b)(23), are limited to the issue of restoring the Trinity fishery through restoration of habitat in the mainstem Trinity River. *Id.*; ER 530-533; 556-57; 681-718.

There is no indication in the text of Section 3406(b)(23) that Congress intended to abrogate the Secretary’s authority to release additional flows to preserve fish under the 1955 Act if future (post-CVPIA) circumstances warranted the Secretary’s exercise of that authority. The flows addressed in Section 3406(b)(23) are described as minimum flows. The first paragraph of Section 3406(b)(23) demands “an instream release of water to the Trinity River of not less than [340,000] acre-feet per year for the purposes of fishery restoration, propagation, and maintenance . . .” Section 3406(b)(23)(B) describes the flows established under that section as the “minimum Trinity River instream fishery releases.” The Tribe agrees with Plaintiffs that the Secretary may not reduce the releases called for in Section 3406(b)(23) and the TRROD. Dkt. #52, p. 58. But Plaintiffs fail to establish that Congress, in Section 3406(b)(23) intended to forever

bar the Secretary from exercising her authority under the 1955 Act to release additional flow from the TRD under circumstances necessary to preserve fish migrating through the lower-Klamath River from harm or death. Neither the text nor legislative history of Section 3406(b)(23) support Plaintiffs' interpretation.

3. The Permanence of the Restoration-Based Flows Implemented Through the TRROD Does Not Undermine or Limit the Secretary's Separate Authority to Act to Preserve Fish.

Plaintiffs incorrectly argue that the reference to “permanent instream fishery flow requirements” in Section 3406(b)(23) conflicts with and undermines the Secretary's broad authority to release additional flows to preserve fish under the 1955 Act. The “permanent” flow language in Section 3406(b)(23) is tied directly to the purposes of “restoration and maintenance of the Trinity River fishery” and intended to protect the integrity of the flows ultimately adopted in the TRROD. Section 3406(b)(23)(A). The express purpose of those “permanent” flows was to repair the unanticipated damage already done to the fishery by the TRD and to restore the fishery and its habitat in the mainstem Trinity River back to pre-project levels. Section 3406(b)(23); 1984 Act, Section 1.

The TRROD makes clear that the outcome sought by Congress was directly related to the TRFES and the issue of restoring the fishery back to pre-project levels. ER 540. The TRROD brought about the culmination of two decades (i.e., approx. 1980-2000) of effort to develop a permanent restoration program for the

Trinity River habitat and fishery, which was targeted to address specific harms caused by the TRD. Neither the TRROD nor Section 3406(b)(23) place any limitation on: (1) the Secretary's pre-existing and continuing authority to "adopt appropriate measures" to preserve fish from harm or death where necessary in the Secretary's discretion; or (2) the priority of flow releases for that purpose over diversions to the Central Valley.

Giving effect to the Secretary's broader authority to preserve fish in the 1955 Act does not "effectively write [the 'permanent' mandate] out of the CVPIA" as Plaintiffs suggest. Dkt. #52, p. 60. Those minimum flows called for by Section 3406(b)(23) remain permanent for their restoration-based purposes as described in the TRROD. There is no conflict at all between the restoration-based flows called for in Section 3406(b)(23) and the Secretary's pre-existing authority to take appropriate measures to preserve fish under the 1955 Act.

"Where two 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." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017-1018 (1984). This rule of interpretation serves the "superior values of harmonizing different statutes and constraining judicial discretion in the interpretation of laws." *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991); see also *Nat'l Ass'n of Home Builders*, 551 U.S. at 661-68 (deferring to Secretary's regulatory

interpretation that harmonized arguably conflicting provisions of the Endangered Species Act and Clean Water Act).

Here, the provision for specific and targeted restoration-based flows in Section 3406(b)(23) can plainly co-exist with the broader authority to preserve fish vested in the Secretary by the first proviso of Section 2 of the 1955 Act. Plaintiffs fail to establish that Congress abrogated that latter authority in CVPIA section 3406(b)(23). Because the Secretary's authority to preserve fish under the 1955 Act was not abrogated by CVPIA Section 3406(b)(23) or any other law, and because (as all parties agree) that authority is not geographically confined to the area above the Trinity-Klamath confluence, the Secretary had statutory authority to implement the FARs in this case for the purpose of preserving fish from possible harm or death during their migration through the lower-Klamath River.

**C. The FARs Do Not Violate Section 3406(b)(23) of the CVPIA Because The Purpose of Those Releases Is To Preserve Fish From Harm or Death During Their Migration Through the Lower-Klamath River: In Contrast, Section 3406(b)(23) and the ROD Address Flows to Restore the Fishery and to Repair Damage to Habitat in the Trinity River Resulting From Development and Operation of the TRD.**

Plaintiffs argue that the Secretary's decision to implement FARs (i.e., to release water from the TRD in late-summer, based on the scientific analysis and recommendations of fishery managers and biologists, for the purpose of preserving fish from harm or possible death during their migration up the lower-Klamath River) violates CVPIA Section 3406(b)(23). Dkt. #52, pp. 30-48. Plaintiffs



contend that any release of water from the TRD by the Secretary for the “benefit” of the Trinity River fishery that exceeds the annual volume limits in the TRROD is unlawful because the flows at issue in Section 3406(b)(23) and set forth in the TRROD are described as “permanent.” *Id.* at 37-42.

Plaintiff’s argument that Congress intended the restoration-based flows implemented through the TRROD pursuant to the CVPIA to be permanent for their restorative purposes is not wrong, but does not support Plaintiff’s conclusion that Congress, in the CVPIA, impliedly repealed the Secretary’s separate authority under the 1955 Act to take additional appropriate measures to preserve fish. Because the FARs here were intended to preserve fish and prevent replication of a massive fish kill by increasing flow during their migration through the lower-Klamath River they are not subject to Section 3406(b)(23) or the TRROD, which has a different scope and different purpose.

1. Section 3406(b)(23) and the TRROD Address Restoration of Fish and Fish Habitat in the Trinity River to Pre-Project Levels and Conditions: The FARs Fall Outside That Purpose And Are Thus Not Subject to the Annual Volume Limits Found in the TRROD.

The plain language of Section 3406(b)(23) supports the Tribe’s position that the flows provided for in Section 3406(b)(23) are for the purpose of restoring the Trinity River fishery and its habitat and do not displace the broader preservation authority granted to the Secretary in the 1955 Act. In Section 3406(b)(23), Congress refers directly to the restoration purposes of that statutory section and the

flows provided thereunder. And as discussed in more detail below, the geographic area in which such restoration activities are targeted by the TRFES and TRROD is the mainstem Trinity River. Nothing in Section 3406(b)(23), the TRFES, or the TRROD address conditions below the Trinity-Klamath confluence.

Plaintiffs' argument that Section 3406(b)(23) makes the FARs unlawful is wrong for at least two reasons. First, Section 3406(b)(23) is focused solely on restoration (as opposed to preservation) and second, the geographic scope of the restoration actions occurring thereunder is limited to the mainstem Trinity River. Section 3406(b)(23) does not restrict or limit the Secretary's authority under the 1955 Act to release flows for the purpose of preserving any fish from harm or death during their migration through the lower-Klamath River.

In Section 3406(b)(23), Congress expressly referenced the fishery restoration goals of the 1984 Act and explained that the purpose of Section 3406(b)(23) was to meet those goals. In the findings of the 1984 Act, after expressly referring to the Secretary's pre-existing authority in the 1955 Act to preserve and propagate fish, Congress found that:

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.

1984 Act, Section 1(6). In Section 2(a) of the 1984 Act, Congress directed the restoration program to: “(A) rehabilitate fish habitats in the Trinity River between Lewiston Dam and Weitchpec; [and] (B) rehabilitate fish habitats in tributaries of such river below Lewiston Dam and in the south fork of such river.” CVPIA section 3406(b)(23) is a continuation of Congress’ direction to restore fish habitats in the mainstem Trinity River from unanticipated impacts caused by the TRD.

That the Secretary exercised his authority under the 1955 Act to increase and study the effect of such increased flows in the 1981 Secretarial Decision does not support Plaintiffs’ argument that the FARs are subject to the annual volume limits in the TRROD that was adopted two decades later. The 1981 Secretarial Decision was the first official recognition by the Secretary that the fishery and its habitat had been significantly damaged by the TRD and was in need of comprehensive restoration. ER 746, 753. In 1984, Congress affirmed the Secretary’s finding that restoration was needed and authorized a basin-wide restoration program. Later, in CVPIA section 3406(b)(23), Congress continued the Trinity River restoration effort by mandating completion of the study effort initiated in 1981 and implementation of the recommendations through the TRROD. At no time did Congress state or suggest that these necessary restoration-based programs and authorizations abrogated or impaired the Secretary’s broader continuing authority to preserve fish under the 1955 Act.

In 1986, two years after authorizing a restoration program for the Trinity River Basin, Congress also found that “additional authority” was required to implement a comparable “restoration program” in the Klamath Basin. 16 U.S.C. 460ss(9). CVPIA section 3406(b)(23) references the 1984 Act (pertaining to restoration of fish habitat in the Trinity Basin), but makes no reference to the 1986 Act (pertaining to restoration of fish habitat in the Klamath Basin). This further supports the Tribe’s position that in section 3406(b)(23) Congress did not address, nor intend to address, conditions or actions in the lower-Klamath River. It was not until 1996, in the Trinity River Basin Fish and Wildlife Management Reauthorization Act, (P.L. 104-143), that Congress included rehabilitation of lower-Klamath habitat as part of the restoration program authorized by the 1984 Act. As the District Court found, “[t]his indicates that Congress believed the mandate in the original version of the 1984 Act did not extend below the confluence to include the Klamath River.” ER 61.

As the District Court correctly found, Congress was not addressing measures in the lower-Klamath when it enacted the CVPIA in 1992; nor did Congress intend to abrogate the Secretary’s continuing authority in the 1955 Act to preserve fish from harm, including harms that were not known at the time that Congress enacted the CVPIA. ER 64. Rather, the focus of CVPIA section 3406(b)(23) and the TRROD was on restoration of habitat in the mainstem Trinity River from the

known impacts of the TRD. *Id.* “[B]y adopting the TRROD flow regime, Federal Defendants did not impose an absolute ceiling on all activities to support the Trinity River fishery, but rather imposed a ceiling on flows designed to restore conditions on the mainstem Trinity River, and, relatedly, on flows designed to meet the goals of the 1984 Act. The FARs fall outside the scope of the limitations imposed by the TRROD.” ER 65. The District Court’s ruling that the FARs have a different purpose and scope than the flows provided in the TRROD and thus are not subject to the annual volume limits in the TRROD is correct and should be affirmed.

2. The Recommendations of the TRFES, Which Are Implemented in the TRROD, Pursuant to Congressional Direction in Section 3406(b)(23) Focus Exclusively on Restoration of Habitat in the Mainstem Trinity River and Do Not Address Conditions or Actions in the Lower Klamath River.

Plaintiffs fail to acknowledge that the specific restoration-based mandate of Congress in section 3406(b)(23) was completion of the TRFES and implementation of recommendations contained therein. The TRFES and its recommendations (adopted in the TRROD in 2000) are focused solely on habitat restoration and temperature management in the mainstem Trinity River, and primarily in the areas between the North Fork Trinity River and Lewiston Dam, which were the areas most affected by development and operation of the TRD. ER 681-737.

In CVPIA section 3406(b)(23)(A), Congress mandated completion of the TRFES. Then, in CVPIA section 3406(b)(23)(B), Congress directed:

[N]ot 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 [Congress]. 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 . . . shall be implemented accordingly.

(emphasis added). Plaintiffs' argument fails to meaningfully address the TRFES, its purpose of restoring fish habitat in the mainstem Trinity River, and its recommendations for achieving habitat restoration in the mainstem Trinity River through flow releases. It is impossible to understand the purpose, intent, or scope of Section 3406(b)(23) without a full understanding of the TRFES and the recommendations made therein, because the flows directed by Section 3406(b)(23) are intended per Congressional mandate to be based on the TRFES' recommendations. CVPIA Section 3406(b)(23)(B). The TRFES and its recommendations, implemented in the TRROD, are focused on restoration, and are also geographically limited to restoration activities in the mainstem Trinity River. The FARs have a different purpose and scope and fall outside the TRROD's annual volume limits.

The TRROD, executed in 2000, adopted the recommendations found in the TRFES. ER 531. Review of the TRFES, jointly authored by the United States Fish and Wildlife Service and the Hoopa Valley Tribe, shows that it was plainly

focused on habitat restoration in the mainstem Trinity River, and primarily in the areas between the North Fork Trinity River and Lewiston Dam. ER 681 (summarizing recommendations for “rehabilitation of the mainstem Trinity River and restoration and maintenance of its fishery resources”); ER 682 (describing flow release that provides the “greatest amount of microhabitat in the mainstem Trinity River from Lewiston Dam to Weitchpec”); ER 683 (explaining that “recommended releases focus on this segment [above the North Fork Trinity River] because it is most affected by releases from Lewiston Dam”); ER 689-698 (describing flow releases that provide optimal temperatures “throughout the mainstem”); ER 719 (recommendations for sediment management between Lewiston Dam and North Fork Trinity River confluence); ER 722-726 (recommendations for channel rehabilitation between Lewiston Dam and North Fork Trinity confluence).

Recommendations developed in the TRFES pursuant to Congressional direction in the CVPIA, and adopted in the TRROD, do not address conditions in the lower-Klamath River. ER 538. Similarly, the EIS for the Trinity River Restoration Program (TRRP) did not address impacts to fish in the mainstem Klamath River, because the TRRP and TRROD were not designed to address those issues. *Westlands*, 376 F.3d at 866-67. The TRFES and the TRROD focus on restoration actions for “the Trinity River mainstem and Trinity Basin.” ER 538.

Prior to construction of the TRD, the Trinity River was a “dynamic alluvial river,” in which plentiful salmon spawning and rearing habitat existed. ER 631. Regulation of flows, resulting from the TRD, destroyed the alluvial features and limited both the quantity and quality of salmon habitat in the mainstem Trinity. *Id.* Through the TRFES, scientists analyzed the fundamental attributes of an alluvial river and how those attributes could be restored (at least, in part) through carefully managed flow releases. ER 633. The ultimate goal was to replicate flow patterns which would help recover the alluvial river channel morphology and restore fish habitat in the mainstem Trinity. *Id.* In other words, the flows implemented through the TRROD were carefully designed through years of study to achieve the specific purpose of improving the habitat in a specific area, which is the mainstem Trinity River. The TRROD flows are not intended or available to address temperature management or disease prevention in the lower-Klamath River. Instead, reserving TRROD water volumes for that purpose would mean reducing water releases during known critical times, such as the Spring run-off period, and hurt the likelihood of the TRROD’s success in restoration.

The TRFES explains: “Rehabilitation of the mainstem Trinity River can best be achieved by restoring processes that provided abundant complex instream habitat prior to construction and operation of TRD.” ER 634. Scientists recommended flows to achieve three primary flow-related management objectives:



(1) releases to provide suitable salmonid spawning and rearing habitat; (2) releases to mimic the spring snowmelt hydrograph; and (3) releases to meet appropriate water-temperature objectives for holding/spawning adult salmonids and outmigrating salmonid smolts. ER 634-635. The study recommended releases from the TRD “that would achieve these management objectives.” ER 682. “Together, these recommended actions will rehabilitate the mainstem channel below Lewiston Dam, and provide the habitats necessary to restore and maintain the fishery resources of the Trinity River.” ER 635.

The “Recommendations” chapter concludes: “Rehabilitation of the mainstem Trinity River and restoration and maintenance of its fishery resources requires (1) increased annual instream volumes and variable reservoir release schedules, (2) fine and coarse sediment management; and (3) mainstem channel rehabilitation.” ER 681. That chapter provides specific detail about the habitat-restorative purposes of the recommended flow regimes. ER 682-684; 689-705; 719-726. The areas primarily targeted for restoration were the upper reaches of the mainstem Trinity below Lewiston Dam. *Id.* The TRFES also provides specific detail about temperature-related objectives of the recommended flows. ER 685. Notably, the locations at which temperature would be monitored for management purposes are all located at or above the Trinity-Klamath confluence. *Id.*

The recommendations from the TRFES described above are the same recommendations that Congress mandated development and implementation of in CVPIA section 3406(b)(23). Those recommendations relate solely to habitat restoration in the mainstem Trinity River and not to preservation of fish migrating through the lower-Klamath. ER 681-737; 531. Thus, unlike the preservation authority in the 1955 Act, the restoration program authorized by Congress in Section 3406(b)(23) is geographically targeted to repair habitat in the mainstem Trinity River upstream of the confluence with the Klamath.

The fact that fish of the Trinity River fishery will migrate through the lower-Klamath and will reside in the Pacific Ocean for much of their lives does not broaden the scope of the TRROD to cover those areas. The flow and non-flow measures implemented in the TRROD under the authority of Section 3406(b)(23) are targeted to repair habitat in a specific area – the mainstem Trinity River. Neither Section 3406(b)(23) nor the TRROD were intended to address disease problems that were not known in 2000 (or 1992) or to prescribe measures to restore habitat or address fishery conditions on the lower-Klamath River. *Id.*; ER 538, 607 (no significant differences in lower Klamath River late summer water quality. Nor does Section 3406(b)(23) (or the TRROD) abrogate or constrain the Secretary's authority to preserve fish by taking appropriate and reasonable measures to prevent recurrence of fish-kill conditions in the lower-Klamath River.

The detailed flow recommendations in the TRFES, based on years of extensive study, also show why Plaintiffs' suggestion that the Secretary simply reserve some arbitrary amount out of the TRROD flows at the beginning of the water year, for potential use as late-summer flows, is not lawful nor supported by best available science. The TRROD flows were carefully developed by federal and tribal scientists at Congress' direction to achieve specific habitat-restorative purposes on the mainstem Trinity. They contain no surplus water that could be repurposed without compromising the TRROD's intended objectives. The Secretary lacks scientific justification or legal authority to short the TRROD-mandated flows for the purpose of mitigating adverse conditions that may arise on the lower-Klamath. The TRROD, which was concurred in by the Hoopa Valley Tribe pursuant to CVPIA 3406(b)(23) creates a binding contractual commitment that cannot be altered without the consent of the Tribe. Nor is it apparent at the start of the water year whether late-summer releases will be necessary, nor in what amounts. Amounts required for the FARs to date have varied significantly. The TRROD flows are "permanent" for the purposes for which they were designed and they cannot be used or repurposed to aid fish migration through the lower-Klamath River.

The District Court was not wrong to conclude that "CVPIA 3406(b)(23) as well as the TRROD and TRFES are limited in scope to the Trinity River Basin."

ER 64. Section 3406(b)(23), the TRFES, and the TRROD were derived from Congress' and the Secretary's belated recognition of the need to repair unanticipated damage to habitat in the mainstem Trinity River resulting from the TRD in order to achieve the goal of restoring the fishery to its pre-TRD status. The TRFES carefully analyzes and discusses how flows released under that restoration program would be managed to restore and repair habitat in the mainstem Trinity River and primarily in the reaches of the free-flowing river located just below Lewiston Dam. The flows authorized by the TRROD are not intended to address conditions or habitat located below the Trinity-Klamath confluence.

Affirming the Secretary's authority to use TRD-water for late-summer flows in the lower Klamath River to prevent recurrence of fish-kill conditions does not, as Plaintiffs' suggest, mean that the TRROD flows are not permanent or that "nothing was resolved" by the process and decision required by CVPIA section 3406(b)(23). The TRFES and the resulting TRROD resolved nothing more, and nothing less, than what they were intended to resolve – that is, the setting of permanent instream flow releases for the "rehabilitation of the mainstem Trinity River and restoration and maintenance of its fishery resources," to address and repair unanticipated damage caused by the TRD. ER 681 (explaining purpose of the TRFES' flow recommendations, which were adopted in the TRROD). The

FARs have a different purpose and are targeted to a different geographic area; thus, they are not subject to the TRROD's volume limits.

The undisputed fact that the flows under the TRROD and Section 3406(b)(23) benefit the Trinity River fishery is not dispositive of the question at issue here, which is whether the Secretary retained authority under the 1955 Act to implement the FARs for the purpose of preserving fish from harm during their migration through the lower-Klamath River. The District Court properly recognized that the FARs implemented in this case pursuant to the 1955 Act have a different purpose and function than the restoration-program flows implemented pursuant to the TRROD and are not subject to its limits. ER 65.

Plaintiffs focus exclusively on the fact that Congress desired to restore the "Trinity River fishery" but ignore the means by which Congress directed that restoration to occur. By ignoring the TRFES, and its inter-relationship with the TRROD and the CVPIA, Plaintiffs are attempting to broaden the purpose and intent of CVPIA section 3406(b)(23) and the TRROD to include flow releases that are outside the scope of the Trinity River Restoration Program (TRRP). The plain language of 3406(b)(23) shows that Congress made very specific directives: complete the TRFES; forward the recommendations of the TRFES to Congress; and implement the recommendations of the TRFES, subject to the concurrence of the Secretary and the Hoopa Valley Tribe. The TRROD is also clear that the

Secretary, through the TRROD, is adopting and implementing the recommendations of the TRFES. ER 531, 533. The TRFES and its recommendations solely address restoration of habitat above the Trinity-Klamath confluence. ER 681-737. For the reasons discussed above, Plaintiffs' argument that the CVPIA and TRROD constrain the Secretary's authority to release additional flows under the authority of the 1955 Act for the purpose of preserving fish migrating through the lower-Klamath River must fail.

**D. Plaintiffs' Argument That The FARs Are Unlawful Because They Do Not Address Impacts of the TRD Lacks Merit Because the 1955 Act Does Not Place Any Such Limitation on the Secretary's Authority to Preserve Fish.**

Plaintiffs final argument against the FARs is that are unlawful because "they do not address an impact of the [TRD]." Dkt. #52, at pp. 65-69. This argument lacks a basis in fact and other merit because there is no such limitation placed on the Secretary's authority in the 1955 Act. The TRD drastically affected the major tributary of the Klamath River and resulted in wide-ranging, unintended negative effects. *See e.g.*, ER 530. Section 2 of the 1955 Act provides in relevant part:

Subject to the provisions of this Act, the operation of the [TRD] shall be integrated and coordinated, from both a financial and an operational standpoint, with the operation of other features of the [CVP], . . . 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 [150 cfs] . . . 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; . . . (emphasis added)

The first proviso of Section 2 of the 1955 Act does not state that the Secretary's authority is limited only to measures designed to preserve fish from impacts of the TRD. Instead, it gives broad and open-ended authority to "adopt appropriate measures to insure the preservation and propagation of fish and wildlife." 1955 Act, Section 2. This Court may not judicially impose a limitation on the Secretary's authority that is not found in the statute itself.

The purpose and context of the statutory authority granted by the first proviso of Section 2 of the 1955 Act supports the Secretary's authority to implement the FARs and contradicts Plaintiffs' narrow interpretation. The first proviso of Section 2 explicitly limits the integration of the TRD into the Central Valley Project (CVP) and requires the Secretary to exercise a priority for use of all TRD water necessary to preserve and protect fish and wildlife. Memorandum from Solicitor to Assistant Secretary, Land and Water Resources, Dec. 7, 1979 (1979 Opinion) ER 135-136.

On occasion the Congress has specifically limited the Secretary's discretion in meeting the general CVP priorities. For example, in authorizing the Trinity River Division of the CVP in 1955, Congress specifically provided 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. See Pub. L. No. 84-386, § 2. In that case, Congress' usual direction that the Trinity River Division be integrated into the overall CVP, set forth at the beginning of section 2, is expressly modified by and made subject to the provisos that follow giving specific direction to the Secretary regarding in-basin needs.

*Id.* First priority for use of TRD water supply was given to protection of the fishery that depended on the water to be diverted out-of-basin to the CVP. The 1955 Act provides broad authority to take measures for preservation of fish – and not just measures related to impacts directly caused by the TRD.

Legislative history also fails to support Plaintiffs' argument that Congress intended only “minimal fishery releases” from the TRD or that the Secretary's preservation authority is limited to mitigation of impacts to the fishery directly caused by the TRD. The Bureau of Reclamation Director testified:

In proposing a project which would take water from one of the coastal basins and bring it into the Central Valley Basin we have been acutely aware of the importance of not depriving the basin of origin of water which it needs now or will ever need.

Hearing on H.R. 4663, *H. Subcomm. On Irrigation and Reclamation of the Comm. on Interior and Insular Affairs*, 84th Cong., at 10 (April 13, 1955). The purpose of “not depriving the basin of origin of water which it needs now or will ever need” is consistent with the 1979 Opinion of Solicitor Krulitz and the priority granted to water for in-basin needs. Other legislative history supports a broad interpretation of the Secretary's discretion and authority to preserve anadromous fish. The



sponsor of the 1955 Act, Congressman Clair Engle, testified that the bill gave broad authority to the Secretary to do “whatever is necessary” to preserve fish:

Just one observation: The language of the present bill . . . provides that the Secretary of the Interior is instructed to take all necessary steps for the maintenance and propagation of fish life in the Trinity River. It doesn't specifically tell the Secretary to build a hatchery, but whatever is necessary to maintain and propagate the fish life in the Trinity River, he is, by the legislation, if it is enacted, instructed to do.

Hearing on H.R. 123, *H. Subcomm. On Irrigation and Reclamation of the Comm. on Interior and Insular Affairs*, 83<sup>rd</sup> Cong., at 11 (April 16, 1954). See also HVT Opening Brief, at pp. 31-37 (regarding legislative history of 1955 Act).

Congress provided the Secretary with open-ended authority and direction in the 1955 Act to take appropriate measures to insure the preservation of fish. This is not to say that the Secretary's authority to act under the 1955 Act is “unlimited,” as Plaintiffs' suggest. While the statutory grant of authority to preserve fish is broad, exercise of that authority by the Secretary remains subject to requirements, standards and limitations of the Administrative Procedure Act (APA).

The Secretary's actions in this case were consistent with both the authority of the 1955 Act and the constraints of the APA. The need for the FARs here was supported by scientific evidence and analysis of multi-agency fishery managers and scientists. ER 317-479. Releases from the TRD were necessary for the purpose of preserving fish from likely harm or death. Plaintiffs do not challenge the evidentiary or scientific basis/rationale for the releases. That is because the

Secretary's action in releasing the FARs was clearly necessary and a reasonable exercise of her authority to take appropriate measures to insure preservation of fish under the 1955 Act. The Court should affirm the Secretary's authority to implement the FARs pursuant to the first proviso of Section 2 of the 1955 Act.

**E. The Question of Whether the Secretary's Fiduciary Trust Obligation to the Tribes Independently Authorizes the Secretary's Action Was Not Decided by the District Court And Is Not Properly Before this Court on Appeal; Nevertheless, the Secretary's Trust Obligation Supports the Secretary's Interpretation of Her Authority to Act to Preserve Fish In This Case.**

Federal Defendants did not rely on the Secretary's trust obligation to the Hoopa Valley and Yurok Tribes as an independent, stand-alone, source of authority for the FARs. ER 77. Thus, the District Court declined to address whether the Secretary's trust obligation would authorize the FARs separate and apart from the authority of the 1955 Act. ER 78. That question of the independent force of the trust duty is not before this Court on appeal. Nevertheless, the Secretary's trust obligation to protect the fishing rights of the Hoopa Valley Tribe and Yurok Tribe is relevant and strongly supports the Secretary's interpretation of her authority to release FARs for the protection of the fish upon which the Hoopa and Yurok Tribes rely for subsistence, economic, and ceremonial purposes.

1. The Secretary's Interpretation of Her Authority to Act Under the 1955 Act to Preserve Fish Is Supported by the Statute And Is Consistent With Her Fiduciary Trust Duties to the Tribe.

The Secretary relied on, and her action is authorized by, the plain language of the first proviso of Section 2 of the 1955 Act. To the extent the Court finds that authority ambiguous, the Court should defer to the Secretary and her interpretation of the statute in a manner that supports her fiduciary obligation to protect and preserve the trust fishery resource. *Parravano v. Babbitt*, 70 F.3d 539, 544 (9<sup>th</sup> Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996) (“we must give substantial deference to his interpretation of the applicable statutes and executive actions that give rise to tribal rights”).

This Court has previously confirmed that the Hoopa Valley Tribe holds federally reserved fishing rights, which “were granted by Congress when it authorized the President to create the [Hoopa Valley] Reservation for Indian purposes.” *United States v. Eberhardt*, 789 F.2d 1354, 1360 (9<sup>th</sup> Cir. 1986). This Court has also “noted, with great frequency, that the federal government is the trustee of the Indian tribes’ rights, including fishing rights.” *Parravano*, 70 F.3d at 546. “In particular, this court and the Interior Department have recognized a trust obligation to protect the Yurok and Hoopa Valley Tribes’ rights to harvest Klamath chinook.” *Id.*

The trust obligation at issue here does not derive solely from the “common law” as Plaintiffs’ contend. In *Eberhardt*, this Court recognized a statutory basis in the “general trust statutes” found at 25 U.S.C. Sections 2 and 9 for the Secretary’s

overarching authority and trust obligation to protect, manage, and conserve Indian fish resources. *Eberhardt*, 789 F.2d at 1359-1361, and n. 8. Interpreting Interior’s authority to protect the tribal fishery broadly, this Court held that Congress has vested the Secretary with “broad authority to supervise and manage Indian affairs and property commensurate with the trust obligations of the United States.” *Id.* at 1360. The statutory authorities of the 1955 Act and the subsequent restoration-based statutes at issue in this case were enacted in part to protect tribal trust resources. ER 753 (noting in 1981 Secretarial Decision that “there are responsibilities arising from congressional enactments, which are augmented by the federal trust responsibility to the Hupa and Yurok tribes, that compel restoration of the river’s salmon and steelhead resources to pre-project levels”). In CVPIA Section 3406(b)(23), Congress explicitly states that the actions thereunder are authorized “in order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe . . . .” CVPIA Section 3406(b)(23). The Court’s analysis of the Secretary’s action and her interpretation of her statutory authority must be analyzed in light of her affirmative fiduciary obligations to protect tribal trust resources from harm.

The role that the trust obligation plays when analyzing action taken by the Secretary under general statutory authority is exemplified in *Parravano*. In *Parravano*, this Court reviewed a challenge to federal regulations implemented

pursuant to the Magnuson Act, which were designed in part to protect the Indian fishery. This Court affirmed the Secretary's action under the Magnuson Act and further found that: "Secretary Brown is a trustee of tribal interests as well as the administrator of the Magnuson Act; he properly considered the Tribes' federally reserved fishing rights in issuing emergency regulations reducing ocean harvest limits of the Klamath chinook." *Parravano*, 739 F.3d at 547.<sup>5</sup> Reviewing the matter under the APA, this Court found:

As for Indian affairs, we must assume the Department of the Interior has been given reasonable power to discharge effectively its broad responsibilities in this area. . . . Thus, although we review questions of statutory interpretation *de novo*, in reviewing the Secretary's actions, we give substantial deference to his interpretation of the applicable statutes and executive actions that give rise to tribal rights.

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<sup>5</sup> Reclamation's Regional Solicitor cited to the District Court's opinion in *Parravano*, 861 F. Supp. 914, 924 (N.D. Cal. 1994), appeal pending, in his 1995 opinion, stating:

With respect to the Tribes' fishing rights, Reclamation must, pursuant to its trust responsibility and consistent with its other legal obligations, prevent activities under its control that would adversely affect those rights, even though those activities take place off-reservation [citations omitted]. Thus, Reclamation must use any operational discretion it may have to ensure that those rights are not diminished.

ER 95. Later in the opinion, the Regional Solicitor stated: "Reclamation must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights." ER 97.

*Id.* at 544; *Wash. Dep't of Ecology v. U.S. EPA*, 752 F.2d 1465, 1469-70 (9<sup>th</sup> Cir. 1985) (conclusion that agency construction of statute is reasonable “is buttressed by well-settled principles of federal Indian law”). As in *Parravano*, to the extent the Court finds any ambiguity in the 1955 Act or other statutes here, the Court should give substantial deference to the Secretary’s interpretation of her authority as it relates to and furthers the protection of the fishery trust resources. *Parravano*, 739 F.3d at 544.<sup>6</sup>

Providing substantial deference to the Secretary’s interpretation is also consistent with the canon of construction deeply rooted in the Supreme Court’s jurisprudence that “[s]tatutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit.” *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767-68 (1985)). This canon applies more broadly than Plaintiffs suggest and is not limited to only those statutes enacted for the sole benefit of Indians. *Id.* As the Supreme Court stated in *Ramah Navajo School Board v. Bur. of Revenue*, 458 U.S. 832, 846 (1982), “we

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<sup>6</sup> The Tribe further maintains that deference is owed either under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Tribe relies on the arguments in its opening brief at Dkt. #24, pp. 45-51 and further incorporates the arguments of the Federal Defendants on this issue. The Tribe disagrees that Reclamation or the Secretary have taken relevant official actions that are inconsistent with the Secretary’s interpretation of her authority under the 1955 Act in this case.

have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be construed generously in order to comport with [the Indian interests].” This Court applied the canon narrowly in *Hoonah*, but has applied it more broadly in other cases involving statutes not passed entirely for the benefit of Indian tribes. *Covelo Indian Comm. v. FERC*, 895 F.2d 581, 586 (9<sup>th</sup> Cir. 1990) (liberally construing Section 4(e) of the Federal Power Act [FPA] in favor of Indian tribe, although FPA as a whole was not enacted to benefit Indian tribes); *see also Parravano*, 739 F.3d 539; *Nance v. EPA*, 645 F.2d 701, 706 (9<sup>th</sup> Cir. 1981). Here, the canon of construction bolsters the Secretary’s actions, which are independently supported and authorized by the plain language of the 1955 Act.

As argued in the Tribe’s opening brief, the first proviso of Section 2 of the 1955 Act was enacted in part to protect tribal trust resources. Moreover, the Secretary has interpreted that provision as imposing an obligation to protect tribal resources. ER 753. To the extent there is any ambiguity regarding the Secretary’s authority to preserve fish pursuant to the first proviso of Section 2 of the 1955 Act, the Court should defer to the Secretary’s resolution of that ambiguity in favor of the Tribe and protection of fishery trust resources.

2. Plaintiffs’ Arguments Regarding Reserved Water Rights Are Not Properly Before the Court And Are Meritless.

Plaintiffs also offer argument on other issues not addressed by the District Court and not within the scope of this appeal, including whether tribal reserved

water rights provide a basis to authorize the FARs and whether the Secretary may use stored water from the TRD to augment instream flow above levels of natural flow. The Secretary did not rely on the Tribe's reserved, but currently unquantified, water rights as a basis for the FARs and the District Court did not consider this issue. Nor has the Tribe presented or briefed this issue on appeal. Thus, the question of whether reserved tribal water rights could support the FARs is not properly before the Court nor relevant.

Plaintiffs' contention that the Secretary cannot use stored water from the TRD for the purpose of protecting tribal fishing rights is also irrelevant because, here, the Secretary's actions are required by the 1955 Act, a reclamation statute that governs how the Secretary is to administer the TRD. The actions taken by the Secretary to preserve fish resources under the 1955 Act are also consistent with her fiduciary duties to the Tribe. ER 753 (stating, in 1981 decision, that federal trust responsibilities augment the Secretary's statutory authority). Her actions are not in conflict with the reclamation program; they implement it. ER 97 (stating: "Reclamation must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights").

Plaintiffs' argument regarding use of stored water to augment flows for fishery purposes is also contradicted by *United States v. Adair*, 723 F.2d 1394 (9<sup>th</sup> Cir. 1983), *Joint Board of Control v. United States*, 832 F.2d 1127 (9<sup>th</sup> Cir. 1987),



*Kittitas*, 763 F.2d 1032 (9<sup>th</sup> Cir. 1985) and *Klamath Water Users Ass’n v. Patterson*, 204 F.3d 1206 (9<sup>th</sup> Cir. 2000). The language Plaintiffs quote from *Adair* about preventing appropriators from depleting stream flow below a “protected level” does not state that the protected level is limited to inflow on a given day. In *Adair*, the Tribe was “entitled to as much water on the Reservation lands as they need to protect their hunting and fishing rights . . . as currently exercised to maintain the livelihood of Tribe members.” *Id.* at 1414.

In *Patterson*, which involved Reclamation’s operation of the Klamath Irrigation Project, the Court cited *Adair* to find the Tribes had water rights to support hunting and fishing and that Reclamation “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.” *Patterson*, 204 F.3d at 1214. In *Patterson*, the releases were not legally dependent on the natural flow on a given day. *Id.* at 1212 (framing argument about which party had right to “control the storage and release of water”). Nor did the Court in *Joint Board* limit the water available to the Secretary for protection of the unquantified tribal rights at issue in that case to inflow. Rather, “any aboriginal fishing rights secured by treaty are prior to all irrigation rights” and “only after fishery waters are protected does the BIA . . . have a duty to distribute fairly and equitably the remaining waters among irrigators of equal priority.” *Joint Board*, 832 F.2d at 1132. These opinions

support and affirm the Secretary's fiduciary responsibility to exercise her authority to provide adequate water from available sources to preserve and protect the tribal fishery from harm, which is consistent with what the Secretary did here.

3. Plaintiffs' Reliance on Cases Involving Common Law Causes of Action Against the United States Is Misplaced And Irrelevant.

Plaintiffs' reliance on *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9<sup>th</sup> Cir. 2006) is also misplaced. In *Gros Ventre*, the Court affirmed dismissal of the tribal plaintiffs' suit on grounds that there was no federal common law cause of action against the United States for breach of trust and there was no final agency action to support a claim against the United States under the APA. *Gros Ventre*, 469 F.3d at 809-10. Here, the question is not whether the Tribe has a cause of action against the United States, but whether the Secretary's trust duty to the Tribe supports the action that she took pursuant to the 1955 Act. It does. *Parravano*, 70 F.3d at 544 (federal reserved fishing rights of Indian tribes constitute applicable law that the Secretary may rely on when promulgating emergency fishing regulations).

Unlike in *Gros Ventre*, the Interior Department has repeatedly acknowledged that it has an affirmative obligation to operate the TRD under reclamation law in a manner that protects tribal rights. The 1981 Secretarial Decision affirms:

the Hupa and Yurok Indians have rights to fish from the Trinity and Klamath Rivers and to adequate water to make their fishing rights meaningful. These rights are tribal assets which the Secretary, as trustee, has an obligation to manage for the benefit of the tribes.

ER 742. The Secretarial Decision concluded that “there are responsibilities arising from congressional enactments, which are augmented by the federal trust responsibility to the Hupa and Yurok tribes, that compel restoration of the river’s salmon and steelhead resources to pre-project levels.” ER 753. The 1993 and 1995 Solicitor’s Opinions also recognize Interior’s affirmative trust obligation to “exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights.” 1995 Opinion, ER 97.

In sum, the Secretary’s action in this proceeding is authorized by the first proviso of Section 2 of the 1955 Act and her action is consistent with and supported by her fiduciary obligation to protect tribal trust resources from harm. The Court should affirm the Secretary’s interpretation of her authority and affirm that the FARs were authorized under the first proviso of Section 2 of the 1955 Act.

**F. Plaintiffs’ Argument That Reclamation’s Action Violated California State Water Law Lacks Merit Because State Law Did Not Require Any Modification to Reclamation’s Water Right Permits for the Flow Augmentation Releases.**

The District Court properly rejected Plaintiffs’ argument that Reclamation’s action of making flow augmentation releases violated Section 8 of the Reclamation Act, 43 U.S.C. § 383. ER 78-81. Specifically, Plaintiffs argue that Reclamation was required to obtain authorization for a change in the place of use under its state water rights permits relating to the TRD prior to implementing the FARs. Dkt. #52, pp. 86-89. This argument is meritless because Reclamation’s action did not

violate its permits or state law and thus did not violate federal law. Prior to Reclamation's implementation of the FARs in 2012, the State of California's Division of Water Rights confirmed to Reclamation that no change in place of use was required and that the FARs would not violate state law. SER 399-400.

Section 8 preserves state authority over "the control, appropriation, use or distribution of water used in irrigation." 43 U.S.C. § 383. And here, the State of California, acting through the Division of Water Rights of the State Water Resources Control Board (SWRCB), determined on August 10, 2012 that:

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

SER 399-400. This determination was in direct response to a petition filed by Reclamation on July 13, 2012 with the SWRCB Division of Water Rights asking for a temporary modification in the place of use for its permits to implement the FARs. SER 403. Although Reclamation sought a permit modification with the state agency in conformance with state law, Reclamation's application stated that:

Reclamation is of the opinion that the TRD permits do not need to be amended to include these stream reaches [i.e., the Trinity River below Lewiston Dam and the lower Klamath River] in order for these releases to comply with these permits; however Reclamation is requesting this amendment in order to resolve any disputes that these releases are authorized by the terms of these permits, as well as for

protection of these releases from diversion so that they may serve fish and wildlife enhancement purposes.

SER 412. Following the letter from the state indicating that no change in place of use was required to implement the FARs, Reclamation withdrew its petitions.

Given that the purpose of Section 8 is to preserve state authority and control over use of water and water rights within its jurisdiction, it is not clear what more Reclamation could have done in this case to act consistently with Section 8. *Wild Fish Conservancy v. Jewell*, 730 F.3d 791 (9<sup>th</sup> Cir. 2013) (rejecting plaintiff's claims against Reclamation under Section 8 where state agency with authority had notice of challenged operations and had taken no action); *San Luis Unit Food Prods. v. United States*, 709 F.3d 798, 806 (9<sup>th</sup> Cir. 2013) (rejecting section 8 claim seeking to enforce California Water Code). Acting conservatively, Reclamation made a protective application for a change in place of use under state law to implement the FARs and was told by the state agency with jurisdiction that no such approval was necessary under state law for the proposed action. Reclamation did not violate California state law or Section 8 of the Reclamation Act.

Plaintiffs argue, as they did in the District Court, that the letter from the State Deputy Director, Division of Water Rights, is "non-precedential." Dkt. #52, p. 88. They also assert that releasing water from the TRD for fish preservation purposes in the lower-Klamath River would not be lawful under state law. But, as the District Court found, Plaintiffs "cite no authority to undermine the Staff

Letter's finding to the contrary, a finding that is supported by at least one provision in the [California Water Code]." ER 79 (citing Cal. Fish & Game Code 5937). "In sum, Plaintiffs have failed to establish that Federal Defendants have failed 'to proceed in conformity with' state law 'relating to the control, appropriation, use or distribution of water used in irrigation.'" ER 80.

Plaintiffs' references to California Water Code (CWC) sections 1381 and 1052(c) offer no support to its argument. Section 1381 establishes that a permit is effective so long as water is being used for beneficial purposes, and section 1052(c) authorizes the state Attorney General, at the request of the SWRCB, to institute actions to stop unauthorized diversions. These sections have no relevance here as neither the State Water Board nor the California Attorney General have taken any action against Reclamation or given any indication that Reclamation was acting improperly. In fact, the only communication provided by the state regarding the FARs is that Reclamation is acting in conformance with state law and that no change in place of use under the permits is required. While asserting that Reclamation failed to comply with federal laws respecting state sovereignty, Plaintiffs ask this Court to overturn or disregard the views of the state agency with authority to interpret and enforce California water law. In addition to lacking merit, Plaintiffs' attack on the state's interpretation is improper in this forum where the state is not a party to this case.

Plaintiffs also suggest in their brief to this Court that Reclamation violated the law by “abandoning” its CVP/TRD water right by failing to put it to beneficial use under its permits. Although this was not an argument made by Plaintiffs at the District Court (ER 80, n. 28), the District Court did note that California state law, in CWC § 1241 confirms that a temporary failure to put water to beneficial use is not automatically an abandonment under state law, that the SWRCB has sole authority to determine whether an abandonment has occurred, and that such a finding of abandonment may only be made under state law where a permittee has failed to put water to beneficial use for a period of five years. ER 80. Thus, Plaintiffs’ new contention that Reclamation’s actions amount to abandonment under its state permits is wholly meritless.

Plaintiffs’ contention that Reclamation violated Section 3411(a) of the CVPIA, which incorporates and restates applicable requirements of California water law is also meritless. The District Court’s analysis of this issue is correct:

Nevertheless, Plaintiffs’ assertion ignores the plain language of CVPIA § 3411, which incorporates by reference ‘provisions of applicable State water law.’ ‘In short, section 3411(a) restates the requirements of California water law.’ *Westlands Water Dist. v. Natural Res. Def. Council*, 43 F.3d 457, 461 (9<sup>th</sup> Cir. 1994). Because no change of place of use permit was required by state law prior to Reclamation’s implementation of the FARs, Reclamation did not violate § 3411(a). To find otherwise (i.e., to find that CVPIA § 3411(a) imposes an independent, federal obligation to obtain a change of place of use permit) would upend the well-established principle that Reclamation should proceed in conformity with state law in connection with the appropriation of water. 43 U.S.C. § 383.

ER 81. Plaintiffs' interpretation of Section 3411(a) would require Reclamation to seek and obtain a change of place of use permit under state law from the State of California in circumstances, as here, where the State says no such permit is required under state law. Plaintiffs' interpretation of Section 3411(a) compels absurd results and should be rejected.

### **III. CONCLUSION**

The Tribe requests that this Court rule that the Secretary has statutory authority, pursuant to the first proviso of Section 2 of the 1955 Act, to release water from the TRD into the Trinity River for the purpose of preserving fish from harm or death during their upstream migration through the lower-Klamath River. The District Court's judgment and ruling that the Secretary lacked statutory authority under the first proviso to implement the FARs should be reversed.

The District Court's ruling and judgment that neither CVPIA Section 3406(b)(23) nor the TRROD preclude the Secretary's implementation of the FARs should be affirmed. The District Court's ruling and judgment that the Federal Defendants' actions did not violate 43 U.S.C. § 383 or Section 3411(a) of the CVPIA should also be affirmed. Finally, the District Court's ruling that Plaintiffs



lack standing to pursue their claim under the Endangered Species Act (ESA) should be affirmed.<sup>7</sup>

Respectfully submitted this 1st day of July, 2016.

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<sup>7</sup> The Tribe joins in the arguments relating to the ESA issue made by Federal Defendants and Defendant-Intervenors.

**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because: this brief contains 12,641 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Respectfully submitted this 1st day of July, 2016.

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                  /s/ Thomas P. Schlosser                    
Thomas P. Schlosser

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 1, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system on July 1, 2016.

Executed this 1st day of July, 2016, at Seattle, Washington.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE,  
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s/ *Thomas P. Schlosser*  
Thomas P. Schlosser