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
and WESTLANDS WATER DISTRICT,
Plaintiffs/Appellees/Cross-Appellants,

v.

SALLY JEWELL, *et al.*,
Defendants/Appellants/Cross-Appellees,

YUROK TRIBE and HOOPA VALLEY TRIBE,
Intervenor-Defendants/Appellants/Cross-Appellees,

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS
and INSTITUTE FOR FISHERIES RESOURCES,
Intervenor-Defendants/Appellees.

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on Appeal from the United States District Court for the
Eastern District of California (No. 13-CV-1232-LJO-GSA)

THIRD BRIEF ON CROSS-APPEAL BY APPELLANT YUROK TRIBE

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INTRODUCTION

The Yurok Reservation encompasses one mile on each side of the lower Klamath River, from its mouth about 44 miles to and including its confluence with the Trinity River. Appellants' Joint Excerpts of Record ("ER") 41, 43. The Yurok Reservation was established by 1855 and 1891 Executive Orders, including a portion of the Yurok Tribe's aboriginal territory, *Mattz v. Arnett*, 412 U.S. 481, 485-88, 493 (1973), and because the lower Klamath fishery has always been essential to the Tribe's subsistence, culture, and economy, *see* ER 43, 574; *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981). The Yurok Reservation includes the Klamath River, *Donnelly v. United States*, 228 U.S. 243, 259 (1913), *modified on other grounds*, 228 U.S. 708 (1913), and its establishment included fishing rights which the federal government has a fiduciary duty to protect, *Parravano v. Babbitt*, 70 F.3d 539, 542, 545-46 (9th Cir. 1995).

The United States has long recognized these rights and this duty. *E.g.*, *id.* at 546-47; *Blake*, 663 F.2d at 911; ER 92-95, 98-121, 653, 741-42. For example, the United States has regulated fishing in both the lower Klamath and the Pacific Ocean to protect the Yurok fishery. *Parravano*, 70 F.3d at 547-48; *United States v. Eberhardt*, 789 F.2d 1354, 1356-57 (9th Cir. 1986). The United States also has operated the Klamath Project on the upper Klamath to provide water to protect the Yurok fishery. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206,

1209, 1213-14 (9th Cir. 2000). It also has long sought to restore Klamath and Trinity fisheries in part to fulfill trust duties to Yurok. ER 43-44.

In September 2002, an unprecedented fish kill of between 34,000 and 68,000 spawning fall-run Chinook salmon, endangered coho salmon, and steelhead trout occurred within the Yurok Reservation, caused by low water flow and resulting high fish density and epizootic infection. ER 482-83, 486-87, 499, 515-16. This killed between 19% and 40% of the Chinook on the Yurok Reservation, a quantity that was at least almost equal to and possibly more than twice the total Klamath basin fishing harvest. *See* ER 482, 489; Fed. Defs.' & Yurok Tribe's Further Excerpts of Record ("FER") 6-7. "Although a larger number of Klamath River fall-run Chinook died, a greater proportion of the Trinity River run was impacted by the fish-kill, because the Trinity run is substantially smaller than the Klamath run on an annual basis and the peak of the Trinity run was present during the height of the fish-kill." ER 482. Only about 80,500 fall Chinook spawners escaped the 2002 fish kill on the Yurok Reservation to the upper Klamath, and only about 18,500 fall Chinook spawners escaped to the Trinity basin. FER 5-6.

In 2013, forecasts of the same dry, low water flows and over 100,000 more spawning salmon in the Klamath basin compared to 2002 made fish biologists concerned about another massive fish kill. ER 192, 205, 211. Because there was not more water available from the upper Klamath in late summer 2013, the United

States sought to reduce the risk and potential severity of another massive fish kill and to protect tribal trust fisheries by authorizing flow augmentation releases ("FARs") from the Trinity River Division ("TRD"). ER 198, 205-06, 212, 224-25, 236, 336. The authorized FARs were for up to 62,000 acre-feet of water, or about 4.5% of the forecasted stored water in the Trinity Reservoir for the end of water year 2013, and would not affect out-of-basin TRD exports. ER 195-96. Ultimately, only 17,500 acre-feet of water was released in the 2013 FARs. ER 47.

SUMMARY OF THE ARGUMENT

The Act of August 12, 1955, Pub. L. No. No. 84-386, 69 Stat. 719 ("1955 Act") established the TRD and "authorized and directed . . . 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 . . . ." 1955 Act § 2, first proviso. The plain meaning of that proviso certainly authorized the U.S. Bureau of Reclamation ("Reclamation") to operate the TRD in 2013 to augment in-stream water flow to prevent another massive fish kill of spawning salmon in the lower Klamath, into which the Trinity flows and through which salmon must swim to spawn in the Trinity River and the upper Klamath. This authorization is confirmed by legislative history and Reclamation's longstanding, consistent, expert, and persuasive interpretation, which warrants deference. This authorization also has not been impliedly repealed by the Central

Valley Project Improvement Act ("CVPIA"), Pub. L. No.102-575, §§ 3401-3412, 106 Stat. 4600, 4706-4731 (1992), because the CVPIA only concerns the Trinity basin. Also, the CVPIA's mandates concerning restoration, minimum flows, and the Hoopa Valley Tribe ("Hoopa") did not repeal the 1955 Act's authorization for greater flows to preserve downstream fish in the lower Klamath for Yurok. Finally, the 1955 Act's authorization for the 2013 FARs is supported by the United States' fiduciary duty to protect the longstanding federal reserved fishing rights of the Yurok Tribe in the lower Klamath.

ARGUMENT

I. The 1955 Act Plainly Authorized the 2013 FARs that Protected Spawning Salmon From Another Massive Fish Kill in the Lower Klamath.

A. *The plain language of the 1955 Act's direction "to insure the preservation and propagation of fish" necessarily includes protecting downstream spawning salmon from another massive fish kill.*

As explained in the opening briefs of Defendants-Appellants, the district court erred by not concluding that the plain language of the 1955 Act authorized Reclamation to implement the 2013 FARs. *E.g.*, Yurok Opening Br. at 9-14. In response, San Luis and Delta-Mendota Water Authority and Westlands Water District (collectively, "Water Contractors") argue that the 1955 Act did not authorize the FARs because it is limited in geographic scope to the Trinity River Basin. Water Contractors' Opening Br. at 48-49 (citing ER 76). Like the district

court, the Water Contractors fail to appreciate the plain meaning of the relevant statutory text in the context of the basic local water flow and fish migration.

The 1955 Act authorized construction and operation of the TRD to export water from the Trinity River to the Central Valley Project ("CVP"). 1955 Act § 1. The 1955 Act also provided that the TRD's "operation" shall be integrated and coordinated with the CVP, *id.* § 2, "*Provided*, That the Secretary [of the Interior] 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 of July through November . . . ." *Id*. Nothing in this limits its application to the Trinity River, as opposed to downstream of the diversion point, which includes the lower Klamath. Therefore, as this Court has recognized, the 1955 Act ensures that only "'surplus' water could be diverted to the Central Valley without harming the fishery of the Trinity and the Klamath Rivers." *Westlands Water Dist. v. U.S. Dep't of Interior* ("*Westlands*"), 376 F.3d 853, 861 (9th Cir. 2004) (emphasis added).

Two basic premises for this are that "the flow of the Trinity River below the diversion point" as referenced in the 1955 Act proviso goes downstream to "join . . . the Klamath River at a confluence" and that both rivers support abundant anadromous fish which migrate from the Pacific Ocean up both of those rivers to

spawn. *Id.* at 860-61 & nn.1-2. The Water Contractors wisely concede these indisputable points. Water Contractors' Opening Br. at 9, 63-64. The Water Contractors ignore, however, an additional important point. Namely, the reference to "including, but not limited to, . . ." in the 1955 Act proviso necessarily means that the Secretary of the Interior ("Secretary") had additional authority "to insure the preservation and propagation of fish" downstream from the TRD beyond only maintaining a certain minimum water flow for certain months of the year in a certain portion of the Trinity River. *See, e.g.*, *Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001); *Puerto Rico Maritime Shipping Auth. v. ICC*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) ("It is hornbook law that the use of the word 'including' indicates that the specified list . . . that follows is illustrative, not exclusive.") (citation omitted). Given all this, the 1955 Act's authorization and direction to insure the preservation and propagation of fish necessarily includes allowing water otherwise diverted or stored by the TRD to flow down the Trinity River into the lower Klamath, through which local anadromous fish must swim in order to be preserved and to propagate anywhere. *See, e.g.*, ER 218.

Swimming against this strong current, the Water Contractors contend that the 1955 Act does not authorize the FARs because the FARs do not address an impact caused by the TRD. Water Contractors' Opening Br. at 66-67. But that overlooks the district court's well-founded findings that "impacts from the TRD

were not necessarily confined to the Trinity River Basin[]" and that "the Trinity River fishery was an asset beyond the Trinity River Basin[.]" ER 74. Also, the 1955 Act does not limit "measures to insure the preservation and propagation of fish" to impacts caused by the TRD. Instead, this proviso "clearly imposes a duty to consider the needs of the fish and to adjust operations, including the amounts of water allocated to other users, where it is appropriate to do so." *County of Trinity v. Andrus*, 438 F. Supp. 1368, 1380 (E.D. Cal. 1977). It is indisputable that the 2013 FARs were adopted via just such an operation of the TRD. *See* ER 192, 196.

Finally, the Water Contractors speciously suggest that the 2013 FARs constitute an improper exercise of "unbounded discretion" or an "absurd result[.]" *See* Water Contractors' Opening Br. at 67-68. That cannot fairly describe the limited release of additional retained in-basin water over a single, six-week period in 2013 to prevent another massive fish kill downstream when there are many more fish and too little water, after a formal, public, interagency, and intergovernmental process, and informed by active monitoring that could alter the release's timing and duration as needed. ER 192-93, 228-29, 233-40. Consequently, this appeal should begin and end with the preeminent canon of statutory interpretation which requires presuming that Congress says what it means and means what it says in a statute where the text is unambiguous, as in the relevant proviso here. *See Tides v. The Boeing Co.*, 644 F.3d 809, 814 (9th Cir. 2011).

B. *The legislative history for the 1955 Act confirms that its mandate for "preservation and propagation of fish" encompasses operating the TRD to preserve the propagation of the lower Klamath fishery.*

If any more were needed to discern congressional intent for the relevant proviso in the 1955 Act, this Court should look again to the Act's legislative history to confirm its plain meaning. *See Westlands*, 376 F.3d at 861 (citing H.R. Rep. No. 84-602, at 4-5 (1955); S. Rep. No. 84-1154, at 5 (1955)); *Tides*, 644 F.3d at 814 ("If the statutory language is ambiguous, . . . we may refer to legislative history to discern congressional intent."). As explained at length in each of Defendants' opening briefs, the district court failed to give due consideration to the 1955 Act's legislative history. *See* Federal Defendants' Opening Br. at 35-38; Hoopa Opening Br. at 31-37; Yurok Opening Br. at 14-21. This included congressional recognition that the TRD was intended to divert to the Central Valley only water that was surplus to "the present and future requirements of the Trinity and Klamath Basins" and "without detrimental effect on the fishery resources." S. Rep. No. 84-1154, at 5 (1955). Indeed, the district court here recognized that this legislative history indicated an intent for the TRD "to maintain[] and improve[e] fishery conditions" as an asset for "'*the whole north coast area*[.]'" ER 74 (quoting same) (emphasis by district court).

This is not surprising. Congress in enacting the 1955 Act knew that the Trinity River "flows through . . . Humboldt County . . . and joins the Klamath

River at the town of Weitchpec, flowing northerly into Del Norte County and empties into the ocean at the town of Requa." Trinity River Project, California: Hearing on H.R. 4663 before Subcomm. on Irrigation & Reclamation of H. Comm. on Interior & Insular Affairs, 84th Cong., 104 (1955). Congress also was aware of the concerns by "the people of Humboldt and Del Norte Counties . . . as to whether sufficient water will be available" and "t[ook] into consideration the needs of the area through which the Klamath and Trinity Rivers flow . . . ." *Id.* at 104, 107. Congress also addressed comments by Reclamation and the State of California that the Act should improve or at least not harm the Trinity and the Klamath fisheries. *See* Trinity River Development: Hearing on H.R. 123 before Subcomm. on Irrigation & Reclamation of H. Comm. on Interior & Insular Affairs, 83rd Cong. 5, 28 (1954); S. Rep. No. 84-1154, at 5 (1955) (referencing same).

The Water Contractors do not even try to oppose the significant discussion of this extensive legislative history. Instead, they only illogically allude to it in passing in addressing prior interpretations of the 1955 Act to avoid administrative deference. Water Contractors' Opening Br. at 54-55. That fleeting reference in discussing a separate issue abandons this key point. *See Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1993); *see also Hamilton v. Southland Christian Sch.*, 680 F.3d 1316, 1319 (11th Cir. 2012) ("A passing reference to an issue in a brief . . .

waives it."); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Finally, both the district court and the Water Contractors here wrongly relied on separate statutes enacted decades later to somehow discern congressional intent for the 1955 Act. *See* ER 74-76 (discussing 1984 and 1986 statutes and the 1992 CVPIA); Water Contractors' Opening Br. at 48-49 (discussing 1984 statute and the 1992 CVPIA). This is unavailing because there are inherent difficulties in relying on such "subsequent legislative history[.]" *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.8 (1990). Namely, the actions and views of subsequent Congresses—especially ones 30 or almost 40 years later—are "'a hazardous basis for inferring the intent of an earlier one.'" *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 840 (1988) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)); *see Sullivan*, 496 U.S. at 631 (Scalia, J., concurring in part) ("The legislative history of a statute is the history of its consideration and enactment. 'Subsequent legislative history' . . . is a contradiction in terms."). Accordingly, no amount of harmoniously interpreting statutes dealing with similar subjects, ER 74, can affect a generational gap of time-travelling legislative intent. In sum, the actual legislative intent for the 1955 Act confirms its plain meaning as authorizing the Secretary to operate the TRD to preserve downstream fish, including protecting against another massive fish kill of spawning salmon in the lower Klamath.

C. *The Secretary's interpretation of the 1955 Act as authorizing FARs from the TRD to preserve downstream fish warrants deference because it is expert, consistent, longstanding, and persuasive.*

As explained in Defendants' opening briefs, the district court erred by not providing due deference to the Secretary's consistent, reasonable, expert, and persuasive interpretation of the 1955 Act as authorizing the FARs. *Compare* ER 69-72, *with* Yurok Opening Br. at 21-28 (both discussing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). The Water Contractors respond that the Secretary's interpretation of the 1955 Act is not entitled to *Skidmore* deference because it is not persuasive, thorough, consistent, or expert. Water Contractors' Opening Br. at 52-56. As with other arguments by the Water Contractors, this does not hold water.

First, the Secretary certainly has specialized expertise in administration of the TRD and the specific proviso at issue here.

> [T]he proviso on its face allocated the authority to make this determination [of appropriate measures to insure the preservation of fish] to the Secretary, who is charged with overall responsibility for the operation of the [TRD] project. This is because the questions involved are precisely the sort that call for initial decision by an administrative body. The formulation of measures for fish preservation is part of a continuing planning process which requires monitoring of ongoing operations under constantly changing conditions, as well as analysis of expert recommendations on the basis of technical expertise and familiarity with a particular geographical and subject matter area.

County of Trinity, 438 F. Supp. at 1375. Thus, "the determination of appropriateness" under this proviso of the 1955 Act "is a matter for the 'informed

judgment' of the Secretary." *Id.* at 1377. This specialized experience in operating the TRD and administering this proviso over more than 50 years certainly supports *Skidmore* deference. *Compare id.* at 1372, 1375 *and United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) *with* Water Contractors' Opening Br. at 55-56.

Second, the deference due to the Secretary's expert interpretation is bolstered by its long consistency. Since 1955, the Secretary has interpreted the 1955 Act to confer responsibility and discretion to "determine what flow release modifications might be necessary for fish preservation . . . ." *County of Trinity*, 438 F. Supp. at 1376 (citing Report of the Secretary of the Interior, H.R. Doc. No. 84-281 (1955)). The Secretary also has consistently interpreted the 1955 Act proviso to provide that in-basin flows determined by the Secretary to be necessary to meet in-basin needs take precedence over out-of-basin diversion. *E.g.*, ER 135 (1979 memo), 743 (1981 Secretarial Issue Document), 206 (2013 FARs environmental assessment). Thus, the Secretary has long-adhered to the legislative intent that only "'water that is surplus to the present and future needs of the Trinity and Klamath Basins . . . can be diverted to the Central Valley without detriment to the fishery resources.'" ER 642 (1999 Trinity River Flow Evaluation quoting H.R. Rep. No. 84-602, at 4-5 (1955)); *see also* ER 630, 642, 646 (quoting same).

Even a 1974 solicitor's opinion relied on by the Water Contractors reflected the Secretary's recognition that there are "specifically authorized downstream

releases provided for in Section 2 of the [1955] Act" to ensure "a minimum adequate supply of water for their needs . . . ." Water Contractors' Supplemental Excerpts of the Record ("SER") 315 (citing H.R. Rep. No. 84-602, at 5, 9 (1955); S. Rep. No. 84-1154, at 8 (1955); 101 Cong. Rec. 8860-8881, 12315 (1955)). Also, the relevant statutory interpretation is the Secretary's longstanding one, not the Water Contractors' own anachronistic assertion that the 1955 Act allows additional retained in-basin water only after exhausting flows authorized by the 1992 CVPIA. *See* Water Contractors' Opening Br. at 55. Furthermore, contrary to the Water Contractors' contention, *see id.*, the decision-making for the 2003 and 2004 FARs was consistent with the Secretary's interpretation previously and here. Namely, the 2003 FARs were based in part on the 1955 Act, and the 2004 FARs were modeled on the 2003 FARs and logically cited additional authority to restore the Trinity River fishery. *See* Water Contractors' Request for Judicial Notice (Feb. 26, 2016), ECF No. 47 at ECF pp. 20, 35, 40, 53, 59, 65.

Finally, there should be no concern about "thoroughness" of the Secretary's longstanding, consistent, and expert interpretation of the 1955 Act. That interpretation is quite reasonable, if not rather obvious, in light of local hydrology and fish migration and the Act's plain meaning and legislative history. *See supra* Sections I.A-I.B. There is no requirement that an administrative interpretation be

prolix. Instead, all the circumstances above make the Secretary's interpretation of her authority under the 1955 Act persuasive, so that warrants deference here.

II. The 1992 CVPIA Does Not Abrogate or Limit the Secretary's Authority to Make FARs Under the 1955 Act.

The Water Contractors devote much of their opening brief to arguing that the 1992 CVPIA precludes authority for the 2013 FARs under the 1955 Act because the later law also applied outside the Trinity Basin, its restoration mandate superseded the 1955 Act's preservation mandate, the CVPIA led to maximum flow limits for the Trinity which the FARs would violate, and the CVPIA required specific action to fulfill federal trust duties which already have been fulfilled. *See* Water Contractors' Opening Br. at 30-64, 70-71. These arguments fail because the district court correctly concluded that the CVPIA restoration mandate is limited to the Trinity Basin and did not supersede the 1955 Act, so that flow limits under the CVPIA cannot preclude the 2013 FARs to benefit the lower Klamath. ER 60-67; *see also Westlands*, 376 F.3d at 866-67. Also, actions to meet trust duties to Hoopa cannot fulfill trust duties to the Yurok Tribe.

A. *Section 3406(b)(23) only concerned Hoopa and the Trinity River Basin, so it cannot preclude FARs under the 1955 Act to benefit Yurok and fish outside the Trinity Basin.*

The district court, like this Court in *Westlands*, concluded that Section 3406(b)(23) of the CVPIA applies to the Trinity River Basin. ER 62; *Westlands*, 376 F.3d at 866-67. The Water Contractors contend that the district court misread

the relevant laws, *Westlands*, and additional authorities, and that the Secretary already has fulfilled its trust duties under the CVPIA. Water Contractors' Opening Br. at 42-48, 70-71. All these arguments are unavailing.

Section 3406(b)(23) of the CVPIA provides in relevant part for minimum instream flows in the Trinity River for certain years "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[, 98 Stat. 2721 ("1984 Act")]." CVPIA § 3406(b)(23). In turn, the 1984 Act authorized a restoration program just for the Trinity River Basin. 1984 Act §§ 1-3. Like Section 3406(b)(23), the 1984 Act also only referenced the Trinity River, *id.*, and not also the lower Klamath.

Two additional statutes and a decision by this Court are also relevant here. In 1986, Congress enacted the Klamath River Basin Fishery Resources Restoration Act, Pub. L. No. 99-552, 100 Stat. 3080 (1986) (codified at 16 U.S.C. §§ 460ss to ss-6) ("1986 Act"), because the Secretary previously "ha[d] the authority to implement a restoration program only in the Trinity River Basin and needs additional authority to implement a restoration program . . . to restore anadromous fish . . . in both the Klamath and Trinity Basins[.]" 16 U.S.C. § 460ss(9). Also, Congress in 1996 amended the 1984 Act to expand its scope to include Yurok and the Karuk Tribe and "the Klamath River downstream of the confluence with the

Trinity River[.]" Trinity River Basin Fish and Wildlife Management Act of 1995, Pub. L. No. 104-143, §§ 3(b), 4(a)(3), 110 Stat. 1338, 1339 (1996) ("1996 Act"). In addition, in *Westlands*, this Court concluded that the 1984 Act concerned "the entire Trinity River basin, including the 'tributaries[.]'" *Westlands*, 376 F.3d at 866. Notwithstanding that, this Court found that "federal agencies were within their discretion in focusing" on the Trinity River mainstem rather than "the basin as a whole" in an environmental study under CVPIA Section 3406(b)(23) because "the mainstem is a central, primary part of . . . the basin as a whole." *Id.* at 867.

In light of all the above, the district court reasonably ruled that the plain meaning of the CVPIA, like the 1984 Act, was limited to the Trinity River Basin. Most notably, the terms of the 1984 Act and the 1992 CVPIA must be read in context with a view to their place in the overall statutory scheme. *See Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc) (recognizing this "fundamental canon"). Namely, the 1986 Act and the 1996 amendments to the 1984 Act would have been superfluous if the 1984 Act (and by implication the 1992 CVPIA) already incorporated the lower Klamath.

Not surprisingly, the Water Contractors do not dispute on appeal the district court's ruling that the 1992 CVPIA's specific reference to the 1984 Act did not somehow incorporate the 1996 amendment of the 1984 Act. *See* ER 61-62; *Acosta-Huerta*, 7 F.3d at 144 (concerning abandonment of issues). Also, while *Westlands*

only addressed a comparison between the Trinity basin and mainstem, it did not establish that either the (pre-1996) 1984 Act or the CVPIA also encompassed the Klamath River. This Court therefore should follow the plain meaning of Section 3406(b)(23) according to its terms, and limit its application to the Trinity River Basin. *See, e.g.*, *Caminetti v. United States*, 242 U.S. 470 (1917).

In essence, because the lower Klamath is downstream from the TRD but not within the Trinity River Basin, it makes sense that the 1955 Act encompasses actions to benefit the lower Klamath while CVPIA Section 3406(b)(23) does not. Accordingly, because Section 3406(b)(23) is geographically limited to the Trinity River Basin, it cannot preclude authorization for the 2013 FARs under the 1955 Act to benefit fish in the lower Klamath. Likewise, the CVPIA mandate "to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe" cannot preclude separate efforts to meet trust responsibilities to protect the Yurok fishery because it is indisputable that Hoopa and Yurok have been separate federally recognized Indian tribes since before the 1992 enactment of the CVPIA. *See* Hoopa-Yurok Settlement Act, Pub. L. 100-580, § 9(a)(1), 102 Stat. 2924, 2932 (1988) (codified at 25 U.S.C. § 1300i-8(a)(1)).

B. *The "restoration" mandate of the 1992 CVPIA did not impliedly amend or repeal the "preservation" mandate of the 1955 Act.*

The Water Contractors also argue that the CVPIA's focus on "restoration" somehow "updated" or impliedly amended or repealed the 1955 Act's mandate for

"preservation." Water Contractors' Opening Br. at 58, 61-63. While it is not clear what a statutory "update" means, implied amendments are disfavored and will be found only if two laws cannot be reconciled. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 n.8 (2007) (quoting other cases). Likewise, there is a cardinal rule that repeals by implication are not favored. *Morton v. Mancari*, 417 U.S. 535, 549 (1974). Specifically, repeal by implication may be found only when a later law covers the whole subject of an earlier one and is clearly intended as a substitute, or when the two laws are irreconcilable, such as by express contradiction or if required to give the later law any meaning at all. *Nat'l Ass'n of Home Builders*, 551 U.S. at 663 (quoting other cases). Also, an intention to repeal must be clear and manifest, so that courts must give effect to both statutes on the same subject if possible absent a clearly expressed contrary intent. *Mancari*, 417 U.S. at 551.

Given these strict constraints, the mandate in CVPIA Section 3406(b)(23) for "permanent instream fishery flow requirements . . . for the restoration and maintenance of the Trinity River fishery" should not be read to repeal, amend, abrogate, or otherwise modify the 1955 Act's mandate "to insure the preservation and propagation of fish[.]" For this, the district court properly recognized that there is a distinction between "preservation" in the 1955 Act and "restoration", as in later legislation. ER 76. That is especially apt in light of this Court's very recent

recognition that "restoring [salmon] habitat . . . [i]s "distinct from *preserving* habitat, which has a higher priority[.]" *United States v. Washington*, No. 13-35474, slip. op. at 50 (9th Cir. June 27, 2016) (emphasis in original).

Finally, unlike the program for natural production of anadromous fish in Central Valley rivers and streams in CVPIA Section 3406(b)(1), CVPIA Section 3406(b)(23) does not provide that "the programs and activities authorized by this section shall, when fully implemented, be deemed to meet . . . mitigation, protection, restoration, and enhancement purposes . . . ." This is key because "[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quotations and citation omitted). In sum, because Section 3406(b)(23) and the relevant proviso of the 1955 Act serve "distinct" purposes and both laws easily can be read together harmoniously, the later law does not abrogate the earlier one, which can still authorize federal action.

C. *Permanent instream fishery flow requirements for the Trinity River under the CVPIA do not preclude FARs for the lower Klamath.*

The Water Contractors assert that allowing FARs under the 1955 Act would violate the directions in CVPIA Section 3406(b)(23) to establish "permanent instream fishery flow requirements" because those limits preclude additional water releases for downstream fish. Water Contractors' Opening Br. at 56-60, 65. This

argument fails because the district court properly found that flow limits set under the CVPIA do not preclude the FARs because the FARs address issues outside the geographical reach of the CVPIA flow limits. ER 62, 64, 65. That ruling was surely correct because the relevant administrative decision expressly concerned "Trinity River Mainstem Fishery Restoration[.]" ER 524. Thus, the decision only "focus[ed] on the Trinity River mainstem and Trinity Basin" and disclaimed that it "is intended to preclude" actions "below the confluence of the Trinity and Klamath Rivers[,]" which still "may be considered . . . ." ER 538.

III. The Federal Government's Fiduciary Duty to Protect the Yurok Fishery Provides Additional Support for the 2013 FARs under the 1955 Act.

While the district court found that Federal Defendants did not rely on their trust responsibility as an independent basis for the 2013 FARs, that responsibility still constituted "additional[,]" "complementary authority" for the FARs. ER 76-77. That authority is material, *see Patterson*, 204 F.3d at 1213; *Parravano*, 70 F.3d at 546, and supports "substantial deference" for the Secretary's interpretation of the 1955 Act to authorize the 2013 FARs, *see Parravano*, 70 F.3d at 544. None of the Water Contractors' efforts to avoid this authority can prevail.

A. *The 1955 Act mandate to insure the preservation and propagation of fish encompasses a federal trust duty to protect local tribal trust fisheries.*

Contrary to the Water Contractors' contention, *see* Water Contractors' Opening Br. at 69, the federal trust responsibility is certainly a source of additional

agency authority here. In particular, federal trust duty to protect the Yurok fishery in the lower Klamath properly informed and was encompassed in the Secretary's application of the 1955 Act's mandate to insure the preservation and propagation of fish downstream from the TRD. That additional authority makes the 2013 FARs all the more well-founded and persuasive.

Courts presume that Congress knows about relevant existing law when it enacts legislation. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Courts also presume that Congress acts consistent with the existing body of law. *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 847 (9th Cir. 2006) (en banc). Also, this Court has "long held that when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute, or executive order, unless Congress has provided otherwise." *Parravano*, 70 F.3d at 545.

These presumptions and that rule are all relevant here. The Klamath River Reservation was established by an 1855 Executive Order encompassing a portion of the Yurok Tribe's aboriginal territory and then was expanded to cover the entire lower Klamath River area by an 1891 Executive Order pursuant to an 1864 statute. *Mattz*, 412 U.S. at 485-88, 493. Also, establishment of the Yurok Reservation included the Klamath River, *Donnelly*, 228 U.S. at 259, and confirmation of Yurok fishing rights which the United States assumed a fiduciary duty to protect,

Patterson, 204 F.3d at 1213-14; *Parravano*, 70 F.3d at 542, 545-46. In addition, even when Congress enacted Public Law 280 in 1953 to grant California and other states certain jurisdiction in Indian country, Congress specifically disclaimed that nothing there "shall deprive any Indian or any Indian tribe . . . of any right . . . with respect to hunting, trapping, or fishing . . . ." Pub. L. No. 83-280, § 2(b), 67 Stat. 588, 589 (1953) (codified as amended at 18 U.S.C. § 1162(b)); *cf. Blake*, 663 F.2d at 908 (noting California's lack of authority to regulate Yurok Reservation fishing). All this means that Congress knew about and acted consistent with the then already century-old federal trust duty to protect the Yurok fishery in the lower Klamath River when the 1955 Act directed the Secretary to "insure the preservation and propagation of fish" via operation of the TRD. That trust duty, therefore, necessarily informed and supported the Secretary's decision to make the 2013 FARs under the 1955 Act. *See* ER 198.

Finally, the Water Contractors cannot avoid the use of FARs to comply with a fiduciary duty to protect the Yurok fishery by objecting to the nature or satisfaction of Yurok water rights. *See* Water Contractors' Opening Br. at 71. That argument improperly ignores that tribal water rights are implied "to support" other tribal rights, such as fishing, *United States v. Adair*, 723 F.2d 1394, 1410 (9th Cir. 1984), and that here the Secretary directly protected the Yurok fishery via the FARs, ER 198. Also, this Court has previously recognized that the Secretary may

enforce Yurok fishing rights outside the Yurok Reservation, *Parravano*, 70 F.3d at 546-47, and via operation of a Klamath basin reclamation project, *Patterson*, 204 F.3d at 1209, 1213-14. The Secretary's authority under the 1955 Act therefore encompasses the Secretary's trust duty to protect the Yurok tribal fishery and she properly acted consistent with that full authority in approving the 2013 FARs.

B. *The federal trust duty to protect tribal trust fisheries based on several statutes supports the FARs under the 1955 Act even without express statutory mandates for that trust duty.*

The Water Contractors finally wrongly assert that federal trust duties cannot support the FARs because the asserted trust duties here are not based on statutes and the government only assumes trust duties to the extent that it does so expressly by statutes. *See* Water Contractors' Opening Br. at 69-70. That argument necessarily fails because it amounts to an inapposite defense against a claim that has not been asserted here, it was not adjudicated by the district court, ER 78, and it is not necessary for resolution of this appeal. Even if there were a need to address that argument on the merits, it still fails.

As noted above, "when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute, or executive order . . . ." *Parravano*, 70 F.3d at 545. Also, the Yurok Reservation was established by an 1891 Executive Order pursuant to an 1864 statute and "necessarily included" fishing rights which the United States has a trust

obligation to protect, even outside the reservation. *Id.* at 542, 546-47; *see also* ER 98 & nn.2-3. Furthermore, federal agencies must operate water projects in the Klamath Basin in a manner that protects tribal trust fisheries. *Patterson*, 204 F.3d at 1213-14. Given all that, the United States reasonably relied on its trust duty to Yurok as "complementary authority" for the FARs here. *See* ER 77, 202.

The Federal trust duty to protect the Yurok fishery also supports the 2013 FARs because "[i]t is fairly clear that any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes[,]" *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (citation omitted), and federal trust duties to Indians constitute part of the law to apply under the Administrative Procedure Act, *Northwest Sea Farms v. U.S. Army Corps of Engineers*, 931 F.Supp. 1515, 1520 (W.D. Wash. 1996) (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)). Also, because "'the federal trust responsibility imposes strict fiduciary standards on the conduct of executive agencies[,]'" they must "take 'all appropriate measures for protecting and advancing' . . . tribes' interests[.]" *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (citations omitted). Federal Defendants therefore appropriately acted here based in part on their fiduciary duty to protect the Yurok trust fishery. *Compare* ER 198, 224-25 *with* 303 Dep't of the Interior Manual §§ 2.7.A, .M (Oct. 31, 2000) (trust duties include "[p]rotect[ing] and preserv[ing]

Indian trust assets from loss, damage, . . . and depletion[,]" and protecting "fishing . . . and similar rights of access and resource use on traditional tribal lands").

Furthermore, even if this Court were required to find an express statutory basis for the trust duty relied on by the Secretary here, there are such bases here and the applicable trust duty is not limited to express statutory mandates. As this Court has recognized, the United States assumed a trust duty to protect the Yurok fishery when it established the Yurok Reservation by Executive Order pursuant to statute, and that duty applies outside the Reservation. *Parravano*, 70 F.3d at 542, 546-47; *see also* ER 98 & nn.2-3. Also, the 1955 Act's specific mandate that the Secretary "adopt appropriate measures to insure the preservation and propagation of fish" encompassed the federal trust duty to protect the Yurok fishery. *See supra* § III.A. In addition, the reservation partition via Section 2 of the Hoopa-Yurok Settlement Act, 25 U.S.C. § 1300i-1, confirmed the Yurok Tribe's property interest in its fishery, which continued to be subject to a federal trust duty of protection. *Parravano*, 376 F.3d at 546. These three statutes authorize and anchor the United States' trust duty which provides "additional support" for the 2013 FARs, ER 76.

Finally, statutory language does not cabin federal trust duties to Indians because courts "look[] to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (citation omitted).

Thus, "once a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation, *Cobell v. Norton*, 392 F.3d 461, 472 (D.C. Cir. 2004), so that "[t]he general 'contours' of the government's obligations may be defined by statute, but the interstices must be filled in through reference to general trust law." *Cobell v. Norton*, 240 F.3d at 1101. Indeed, if federal trust duties were limited to the plain dictates of statutes themselves, such duties would not really be fiduciary. *See Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996).

All these aspects of federal trust duties to Indians provide additional authority for the 2013 FARs. Given that a treaty-based "'right of taking fish . . . in common with all citizens'" encompasses a prohibition on "building and maintaining barrier culverts[,]" *Washington*, slip op. at 24 (citation omitted), the 1955 Act mandate "to insure the preservation and propagation of fish" easily includes protecting tribal trust fisheries from another massive fish kill downstream in the lower Klamath. In more practical terms, "just as the right to hunt and fish on the Klamath Marsh would have been worthless without water to provide habitat for game and fish," *id.* at 31 (discussing *Adair*, 723 F.2d at 1411), so too tribal fishing rights on the lower Klamath would be worthless without water to sustain the salmon that migrate through there. Federal trust responsibilities thus properly supported the 2013 FARs under the 1955 Act.

CONCLUSION

The Yurok Tribe requests that this Court rule as follows:

First, reverse the district court's ruling that the 1955 Act did not authorize the Secretary to implement the 2013 FARs to protect and preserve fish in the lower Klamath River from another massive fish kill.

Second, affirm that CVPIA Section 3406(b)(23) does not preclude the Secretary's authority for the 2013 FARs.

Third, rule that the federal government's fiduciary duty to protect the Yurok fishery in the lower Klamath supports the decision to implement the 2013 FARs.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,710 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Date: July 1, 2016

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Third Brief on Cross-Appeal by Appellant Yurok Tribe 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, and that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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