



United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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Memorandum

To: Secretary

From: Robert T. Anderson
Solicitor

Subject: Implementation of the Trinity River Restoration Record of Decision (2000)

I. Introduction

The Hoopa Valley Tribe (Hoopa) has asserted a permanent and continuing “concurrence” right regarding implementation of Trinity River fishery restoration measures.¹ Hoopa bases its assertion on the 1992 Central Valley Project Improvement Act (CVPIA)² as well as the Trinity River Mainstem Fishery Restoration Record of Decision (2000 ROD),³ signed by Secretary Babbitt and Hoopa Chairman Sherman along the banks of the Trinity River within the Hoopa Valley Indian Reservation in northern California.

This concurrence issue has arisen periodically since 2000 but came to a head more recently based on Hoopa’s challenges to Water Infrastructure Improvements for the Nation Act (WIIN Act) contract conversions, the “Winter Flow Variability” proposals for Water Year (WY) 2021 and WY2022 related to CVP Trinity River Division (TRD) releases, and pending Endangered Species Act and National Environmental Policy Act reviews for CVP operations (including TRD). This memorandum evaluates this issue and concludes that, although the Secretary has explicit trust and statutory obligations to protect and restore the Trinity River fishery, neither the CVPIA nor the 2000 ROD established a continuing concurrence right with respect to TRD operations and restoration implementation.

This conclusion does not mean that Hoopa’s concurrence has no continuing effect today and into the future nor that the Department of the Interior (Department) may completely disregard recommendations adopted by the 2000 ROD in which Hoopa concurred. To the contrary, as directed by the CVPIA and the ROD, the Department must implement the recommendations set forth in the 2000 ROD, including channel rehabilitation. Only after implementation of the 2000

¹ See, e.g., *infra* notes 4, 12-13, and accompanying text.

² Pub. L. No. 102-575, Title XXXIV, §§ 3401-3412, 106 Stat. 4600, 4706-4731.

³ U.S. Dep’t of the Interior, Record of Decision, Trinity River mainstem fishery restoration final environmental impact statement/environmental impact report (Dec. 2020), <https://www.trrp.net/library/document/?id=227>.

ROD will the Department be able to assess and determine whether additional or modified actions may be necessary to restore the Trinity River fishery to pre-TRD levels in light of the Department's broader Federal trust responsibility to Hoopa as well as to the Yurok Tribe.

II. Background

A. 1992 Central Valley Project Improvement Act

Congress enacted the CVPIA, *inter alia*, to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins. CVPIA § 3402(a). Congress further directed the Secretary of the Interior (Secretary) to take three specific actions related to Trinity River fishery restoration:

1. release not less than 340,000 acre-feet per year from the TRD into the mainstem Trinity River from 1992-1996 to support the flow study initiated by Secretary Andrus in 1981;
2. complete the flow study, after consultation with Hoopa, "in a manner which insures the development of recommendations . . . regarding permanent instream fishery flow requirements and [TRD] operating criteria and procedures [OCAP] for the restoration and maintenance of the Trinity River fishery;" and
3. implement the flow study recommendations: "If the Secretary and the Hoopa Valley Tribe concur in these recommendations, any increase to the minimum Trinity River instream fishery releases . . . and [OCAP] . . . shall be implemented accordingly."⁴

Id. § 3406(b)(23) (full text below). Congress directed these actions "to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe,⁵ and to meet the

⁴ If the Secretary and Hoopa did not concur, the pre-Flow Study *status quo* (*i.e.*, releases "of not less than 340,000 acre-feet per year for the purposes of fishery restoration, propagation, and maintenance") would be preserved pending further action by Congress or the courts or pending separate agreement between the Secretary and Hoopa. CVPIA § 3406(b)(23).

⁵ The fishery resources of the Klamath River Basin, including the Trinity River, have been the cornerstone of the Hoopa Valley and Yurok Tribes' culture, religion, and economy since time immemorial. *See, e.g., Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995); *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986); Solicitor Leshy, U.S. Dep't of the Interior, M-36979, *Fishing Rights of the Yurok and Hoopa Valley Tribes* (Oct. 3, 1993). The Tribes previously shared the "Joint" Hoopa Valley Reservation, established by executive order in 1891 and encompassing previously established reservations (Klamath River Reservation, along the lower 20 miles of the Klamath River inhabited primarily by Yuroks; original Hoopa Reservation, a 12-mile square centered on the Trinity River inhabited primarily by Hupas) and a strip of land along the Klamath River that connected the two original reservations.

1 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 815 (1904). In 1988, Congress partitioned the Joint Reservation, establishing the original Klamath River Reservation and connecting strip as the Yurok Reservation and the "Square" as the Hoopa Valley Reservation. Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, § 2, 102 Stat. 2924, 2925-2927 (codified as amended at 25 U.S.C. § 1300i *et seq.*) (1988 Act); *see also* S. Rep. No. 564, 100th Cong., 2d Sess. at 4-7 (1988) (Senate Report for 1988 Act).

Congress's naming Hoopa and not Yurok in CVPIA Section 3406(b)(23) seems to be somewhat of an incident of timing. Although federally recognized for decades, the Yurok Tribe had no formal organization and no membership rolls prior to the 1988 Act. *See* S. Rep. No. 564, *supra*, at 2, 7, 12-13. In addition to partitioning the previous "Joint" Reservation as noted above, the 1988 Act expressly provided for the formal organization of the Yurok Tribe and established the Yurok Interim Council as "the governing body of the [Yurok]" pending adoption of a constitution and election of a tribal council. 25 U.S.C. § 1300i-8. The Yurok Tribe ratified its tribal constitution in

fishery restoration goals” of a 1984 Act of Congress,⁶ including the restoration of fish populations to pre-TRD levels. No legislative history exists to interpret this provision.

B. Flow Study, 2000 ROD, and Hoopa’s Concurrence

The Department (through the U.S. Fish and Wildlife Service (FWS)) and Hoopa co-authored the Trinity River Flow Evaluation Study (TRFES) Final Report, providing recommendations to the Secretary as required by CVPIA Section 3406(b)(23).⁷ Hoopa also served as co-lead agency for the environmental reviews with FWS, Reclamation, and Trinity County. Hoopa concurred in the recommendations, and Secretary Babbitt signed the ROD adopting those recommendations with Hoopa Chairman Sherman in December 2000. *See also* 2000 ROD at 26 (“By Tribal Resolution #00-94 . . . the Tribe formally concurred in and agreed with the underlying recommendations and this decision.”).

The 2000 ROD directed the Department’s agencies to implement the TRFES Final Report recommendations. 2000 ROD at 2, 11. These recommendations included:

- (1) “Variable annual instream flows for the Trinity River” from TRD releases based on annual basin hydrology, ranging in volume from 369,000 acre-feet (af) in critically dry years to 815,000 af in extremely wet years;
- (2) forty-seven (47) river channel rehabilitation sites;
- (3) sediment management;
- (4) watershed restoration; and,

November 1993, over a year after Congress enacted the CVPIA. Notwithstanding this anomaly, the Department has always recognized that both Hoopa and the Yurok Tribe have significant interests in the fishery resources of the Klamath and Trinity Rivers, and Congress in 1996 added the Yurok Tribe to the Trinity River Basin Fish and Wildlife Task Force first established in the 1984 Act. *See infra* note 6 (discussing 1984 and 1996 Acts).

⁶ The Trinity River Basin Fish and Wildlife Management Act, Pub. L. No. 98-541, 98 Stat. 2721 (1984 Act) recognized that TRD operations substantially reduced Trinity River flows, resulting in degraded fish habitat and a drastic reduction in anadromous fish populations. The 1984 Act directed the Secretary to develop a program to restore fish and wildlife populations to levels approximating those that existed immediately before construction of TRD began, including measures to rehabilitate fish habitats in the mainstem Trinity River and its tributaries below Lewiston Dam, increase the effectiveness of the Trinity River Fish Hatchery, monitor fish and wildlife populations and the effectiveness of rehabilitation efforts, and other activities necessary to achieve restoration goals.

In 1996, Congress reauthorized and amended the 1984 Act to redefine its goals so fishery restoration would be measured not only by returning anadromous fish spawners, but also by the ability of dependent tribal, sport, and commercial fishers to participate fully in the benefits of restoration through meaningful in-river and ocean harvest opportunities. Trinity River Basin Fish and Wildlife Management Reauthorization Act of 1995 (Pub. L. No. 104-143, 110 Stat. 1338) (May 15, 1996) (1996 Act). The amendments also expanded the scope of habitat restoration efforts beyond Weitchpec and the immediate Trinity River Basin, to include the lower Klamath River downstream of its confluence with the Trinity, and clarified that the fish hatchery portion of the program required by the 1984 Act be undertaken “so that it can best serve its purpose of mitigation of fish habitat loss above Lewiston Dam while not impairing efforts to restore and maintain naturally reproducing anadromous fish stocks within the basin.”

⁷ Prepared in consultation with the U.S. Geological Survey (USGS), Bureau of Reclamation (Reclamation), National Marine Fisheries Service (NMFS), and California Department of Fish and Game (CDFG), the TRFES Final Report can be found at the following link: <https://www.trrp.net/library/document/?id=226>.

(5) infrastructure modifications (including bridge and structure removal or replacement).

Id. at 2-3, 11-14. The 2000 ROD also incorporated an adaptive management program and established the Trinity Management Council (TMC) to “ensure the proper implementation of these measures,” including “possible adjustments to the annual flow schedule within the designated flow volumes provided for in this ROD or other measures to ensure that the restoration and maintenance of the Trinity River anadromous fishery continues based on the best available scientific information and analysis.” *Id.* at 3; *see also id.* at 11 (“Although the Secretary retains ultimate authority over this program, by this [2000 ROD], the [TMC] is established which will guide overall implementation of the management actions of the Implementation Plan.”). The TMC includes representation of various federal and state agencies as well as Trinity County, the Yurok Tribe, and the Hoopa Valley Tribe.

C. 2000 ROD Implementation and Developing Concurrence Issue

After execution of the 2000 ROD in which Hoopa concurred, litigation challenging the ROD and the need to perform initial infrastructure measures delayed implementation of the ROD’s full flow regime (particularly higher flow releases in above-normal hydrologic years). Insufficient funding, a recurring concern raised by Hoopa,⁸ also delayed implementation of mechanical channel rehabilitation and other restoration measures. One of the earliest signals regarding Hoopa’s current views regarding concurrence may be a 2009 letter to Reclamation regarding the draft CVPIA Program Activity Report (CPAR) report, in which Hoopa generally agreed with Reclamation and FWS’s conclusions but emphasized a few fundamental premises, including:

Hoopa’s concurrence “triggered a mandate that the [2000] ROD be implemented according to its terms”; and,

ROD implementation “has been found . . . to be unlawfully long overdue, and the consequences of not only that delay but also under funding and failure to implement the ROD according to its terms have led to the continued degradation of the Trinity River fishery.”⁹

This concurrence issue has come to a head more recently based on various Departmental actions or proposals that Hoopa has perceived as potential threats to full implementation of the 2000 ROD and realization of the fishery restoration goals. These actions and proposals include WIIN

⁸ Although litigation caused a three-year delay before full implementation of the 2000 ROD’s flow-related recommendations, the district court emphasized repeatedly that the *non*-flow restoration measures should proceed, and the appellate court further emphasized that restoration was “unlawfully long overdue.” *See Westlands Water Dist. v. Dep’t of the Interior*, 376 F.3d 853, 878 (9th Cir. 2004) (quoting lower court’s order). As discussed below, the 2000 ROD required completion of 24 channel rehabilitation sites in the first three years of the TRRP, but only one site (Hocker Flat) had been initiated as of 2005. The TRRP did not complete the first 24 sites until 2016, eleven years later than the ROD envisioned.

⁹ February 27, 2009 Letter from Daniel Jordan, HVT CPAR Coordinator, to Mr. Michael Heaton, Bureau of Reclamation, Re: Comments of the Hoopa Valley Tribe on Central Valley Project Improvement Act December 22, 2008 Draft Program Activity Review (CPAR) Report, at 1-3.

Act contract conversions, “Winter Flow Variability” proposals related to TRD releases, and pending Endangered Species Act and National Environmental Policy Act reviews that implicate TRD operations. For example, Hoopa sought to enjoin implementation of the winter flow proposal adopted by the TMC in December 2022 (and partially implemented in 2023) based in part on the following argument:

CVPIA section 3406(b)(23) also delegated permanent authority to Hoopa to require Reclamation to obtain Hoopa’s concurrence in all decisions involving Reclamation’s management of the Trinity River Division operation and maintenance that affect Hoopa’s fishery and its timely restoration to pre-project levels of abundance. Accordingly, . . . CVPIA section 3406(b)(23) delegated sovereignty to Hoopa to participate in governance of the Trinity River Division through its authority to concur in Secretarial management decision [sic] that affect the restoration and maintenance of the Trinity River fishery.¹⁰

In subsequent correspondence, Hoopa’s legal counsel raised similar concerns regarding the pending reinitiation of consultation (ROC) on the CVP’s Long-Term Operation under the Endangered Species Act:

The ROC contemplates a new operations plan for TRD management that could change the terms of the 2000 [ROD] . . . without seeking or obtaining Hoopa’s concurrence If this occurs, the action will have the effect of terminating Hoopa’s delegated sovereignty in the CVPIA and breach the Trinity ROD contract, which Hoopa considers akin to a modern treaty.¹¹

The Department partially briefed this continuing concurrence issue in response to Hoopa’s challenge to the winter flow proposal, arguing that the proposal fell within the 2000 ROD’s adaptive management program in which Hoopa already concurred and participated as a TMC member.¹² The Department further argued that Hoopa cannot justify its concurrence claims related to issues “that fall either wholly outside the CVPIA and 2000 ROD (*i.e.*, WIIN Act contract conversions) or that fall within the explicit recommendations and procedures set forth in the 2000 ROD (*e.g.*, TMC’s recommended Winter Flow Proposal and any decision by the Secretary to implement the proposed intra-annual flow schedule adjustment).”¹³

¹⁰ Second Amended and Supplemental Complaint for Declaratory and Injunctive Relief ¶ 197, *Hoopa Valley Tribe v. U.S. Bureau of Reclamation et al.*, No. 1:20-cv-01814-JLT-EPG (E.D. Cal., filed Feb. 1, 2023) (ECF No. 142).

¹¹ Letter from Thane Somerville to Solicitor Robert Anderson re *Hoopa Valley Tribe v. U.S. Bureau of Reclamation*: Continued Request for Meeting re Denial of Validation and Reformation of Westlands Water District’s WIIN Act Contract, at 5 (March 13, 2024) [hereinafter Somerville Letter].

¹² Federal Defendants’ Response in Opposition to Plaintiff’s Motion for Preliminary Injunction at 10-14, *Hoopa Valley Tribe v. U.S. Bureau of Reclamation et al.*, No. 1:20-cv-01814-JLT-EPG (E.D. Cal., filed Dec. 30, 2022) (ECF No. 118).

¹³ Federal Defendants’ Memorandum in Support of Motion to Dismiss Plaintiff’s First Amended Complaint at 41, *Hoopa Valley Tribe v. U.S. Bureau of Reclamation et al.*, No. 1:20-cv-01814-JLT-EPG (E.D. Cal., filed Jan. 13, 2023) (ECF No. 125).

The federal district court essentially adopted the Department's arguments and concluded:

Nothing in the statutory language suggests that Hoopa retains an ongoing "concurrence right" regarding recommendations made or actions taken within the scope of the TRROD's AEAM [Adaptive Environmental Assessment and Management] procedures—*procedures with which Hoopa has already concurred*. On the present record, the Court finds that the text of § 3406(b)(23) is simply not amenable to Plaintiff's position.

...

For the most part, [Plaintiff's] arguments do not directly address the statutory language and are therefore largely unhelpful. For example, Plaintiff cites Section 301 of the TMC By-Laws . . . [.] This generic language does nothing to change the fact that the concurrence right Hoopa claims to possess does not appear in § 3406(b)(23).¹⁴

The Department has not previously analyzed the broader implications of Hoopa's position, however. This memorandum explores those issues below.

III. Analysis

A. No Permanent, Continuing Concurrence Right

Neither the CVPIA nor the 2000 ROD established a permanent, continuing concurrence right for Hoopa with respect to TRD operations and restoration implementation under the 2000 ROD. CVPIA Section 3406(b)(23) provided both for consultation with and concurrence by Hoopa with respect to the TRFES Final Report and the recommendations adopted in the 2000 ROD, respectively. The Department satisfied both conditions in the 1990s and in 2000.

The CVPIA does not authorize a continuing Hoopa concurrence role, a conclusion with which a federal district court has already agreed. *See Hoopa Valley Tribe*, 2023 U.S. Dist. LEXIS 21392 at *25 ("Nothing in the statutory language suggests that Hoopa retains an ongoing 'concurrence right' regarding recommendations made or actions taken within the scope of the TRROD's AEAM procedures."). No legislative history exists that would suggest to the contrary.

Moreover, even assuming the 2000 ROD effected a permanent contract between the Secretary and Hoopa, the 2000 ROD recognized not only that the Secretary "retain[ed] ultimate authority" over the ROD's implementation, but also that Hoopa's role would continue not as a co-lead but as one of eight TMC members. 2000 ROD at 11-12 (discussing "ultimate authority"); *see also* Final Trinity River Mainstem Fishery Restoration Environmental Impact Statement/Environmental Impact Report for the Trinity River Fishery Restoration (FEIS), App. C, at C-20 to C-21 (Oct. 2000) (listing TMC members and noting that TMC and the Restoration Program's Executive Director "advis[e] the Secretary").¹⁵ These statements from the 2000 ROD and related

¹⁴ *Hoopa Valley Tribe v. U.S. Bureau of Reclamation*, 2023 U.S. Dist. LEXIS 21392 at *25-*26 (E.D. Cal., Feb. 8, 2023) (Order Denying Motion for Preliminary Injunction) (emphasis in original).

¹⁵ In addition, the TMC "will consult on these [implementation] actions with the Hoopa [] and Yurok Tribes and other responsible Federal, State and local jurisdictions, and private landowners as appropriate." 2000 ROD at 12.

FEIS further refute Hoopa's position.¹⁶ As the federal court noted in its order last year, Hoopa concurred in the 2000 ROD, which included adoption of the TMC and its processes, and "the concurrence right Hoopa claims to possess does not appear" in the CVPIA.¹⁷

Indian treaties and similar documents are to be construed liberally in favor of Indians Tribes and ambiguities are to be resolved in their favor,¹⁸ but no such ambiguities exist in either the CVPIA or the 2000 ROD, which unambiguously set forth the respective roles of the TMC, Hoopa, and the Secretary. The TMC ensures implementation of the AEAM; Hoopa is a member of the TMC and is to be consulted; and most importantly, the Secretary "retains ultimate authority." Therefore, based on the text of the CVPIA and the 2000 ROD, Hoopa does not have a continuing concurrence right.

This conclusion, however, should not be read to diminish the importance of Hoopa's continuing role as a TMC member, its participation and contributions in other Trinity River basin resource issues, or its sovereign and property interests generally. More importantly, this conclusion does not mean that Hoopa's concurrence with the recommendations adopted by the 2000 ROD has no continuing effect. Nor should it be interpreted to minimize the Department's commitment to achieve restoration and protection of the Trinity River fishery. To the contrary, the Department must implement the channel and watershed rehabilitation goals, flow provisions and operating procedures (including adaptive management) established by the 2000 ROD in which Hoopa concurred. Further, the Department's trust responsibility to Hoopa (and the Yurok Tribe) includes the goal of restoring a meaningful fishery capable of supporting a moderate standard of living. Implementation of the 2000 ROD may achieve this result. Until the 2000 ROD is implemented, it remains unclear what further actions the Department may be required to take to

¹⁶ Most recently, Hoopa has asserted that CVPIA Section 3406(b)(23) established a "mandate" that "delegates authority to Hoopa to limit and direct what would otherwise be the [Secretary's] exclusive discretionary authority to decide on restoration measures and associated [TRD] operations required for restoration[.]" including "participation in the Secretary's management of a federal reclamation project." Somerville Letter, *supra* note 11, at 2-3. Hoopa's position relies primarily on *Bugenis v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) and on the proposition that the U.S. Constitution vests Congress with plenary authority over Indian affairs, including its ability to delegate authority to Indian tribes. Congress may delegate authority to a tribe or expand on a tribe's inherent authority. *United States v. Lara*, 541 U.S. 193, 199, 202, 211 (2004). But nothing in the CVPIA delegates broad (or any) off-reservation authority to Hoopa.

¹⁷ *Hoopa Valley Tribe*, 2023 U.S. Dist. LEXIS 21392 at *26. Although Hoopa cites briefs filed by the United States in this litigation that broadly discuss tribal authorities (Somerville Letter, *supra* note 11, at 3), Hoopa wholly ignores both (a) the United States position specific to this issue (Federal Defendants' Memorandum, at 37-39) and (b) the court's order on motions for preliminary injunction that rejected Hoopa's position.

¹⁸ Three primary rules or canons of construction may apply to the interpretation of Indian treaties, statutes, or other binding documents intended for the benefit of Indians. First, such documents "must be interpreted as [the Indians] would have understood them." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them."). Second, ambiguities or "any doubtful expressions in [those documents] should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. at 631. Third, "[such documents] should be construed liberally in favor of the Indians." *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). But application of these canons requires the documents to be ambiguous in the first place. "The canon of construction regarding the resolution of ambiguities in favor of Indians ... does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986).

fulfill its Federal trust responsibility and ensure Trinity River fishery restoration as directed by Congress.

B. Effect of 2000 ROD Concurrence

1. The Trinity River Fishery Restoration Mandate

Congress recognized and defined the need to restore the Trinity River fishery 40 years ago. In the 1984 Act, Congress initially established the goal that Trinity River basin fish populations be restored to levels approximating those that existed immediately before TRD construction. 1984 Act § 1(6). Congress subsequently redefined this goal so fishery restoration would be measured not only by returning anadromous fish spawners, but also by the ability of tribal, sport, and commercial fishers to participate fully in the benefits of restoration through meaningful in-river and ocean harvest opportunities. 1996 Act § 2(2), *supra* note 6.

Trinity River restoration goals are rooted in the Department's trust responsibilities, not only to Hoopa but also to the Yurok Tribe.¹⁹ Secretary Andrus based his 1981 Secretarial Issue Document (1981 SID) that initiated the TRFES in large part on the Department's trust responsibility to both Tribes:

[T]he 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. The Secretary may not abrogate these rights even if the benefit to a portion of the public from such an abrogation would be greater than the loss to the Indians.²⁰

The 1981 SID concluded that the federal trust responsibility to the Tribes, combined with applicable federal laws, required "restoration of the [Trinity] river's salmon and steelhead resources to pre-[TRD] levels."²¹

Subsequent federal court decisions and legal opinions issued by this Office have built upon these concepts. Courts have recognized that the salmon fishery was "not much less necessary to the

¹⁹ The Yurok Tribe shares with Hoopa a substantial interest in the Trinity River and its fishery resources and the 2000 ROD repeatedly recognized that both Tribes have interests here. *See, e.g.*, 2000 ROD at 1-2, 4, 6, 8.

²⁰ Secretarial Issue Document, Trinity River Fishery Mitigation 3 (Jan. 14, 1981). Appendix A of the TRFES Final Report, *supra* note 7, includes a copy of the 1981 SID.

²¹ *Id.* at 15. *See also* 2000 ROD at 17 ("The Department has a trust obligation not only to protect these trust assets but also to make them productive. Thus, the Department must manage these assets for the benefit of the Tribes so that they can enjoy a meaningful fishery--for ceremonial, subsistence, and commercial purposes."); *United States v. Washington*, 853 F.3d 946, 965 (9th Cir. 2017) (holding in a similar context that, for tribal hunting and fishing rights to be meaningful, they need to be preserved into the future).

existence of the Indians than the atmosphere they breathed”²² and that the Tribes’ fishing right includes “fishing for ceremonial, subsistence, and commercial purposes.”²³

In 1993, Solicitor Leshy issued M-36979, *Fishing Rights of the Yurok and Hoopa Valley Tribes* (Oct. 3, 1993) (M-Opinion), which addressed the Tribes’ rights to an allocation of the Klamath Basin’s fishery resources. After reviewing extensive caselaw and addressing the Tribes’ historic dependence on the fishery and more recent depressed fishery conditions, the M-Opinion stated:

The Secretary . . . has acted in the past to increase flows in the Trinity River, in part to improve the fishery for the benefit of Indians. This was a recognition that protection of the fishery itself is necessary to make the fishing right meaningful. In order for both the purposes of the reservations and the objectives of the Magnuson [Fishery Conservation and Management] Act to be fulfilled, the fishery resource here must be rebuilt to sustain a viable fishery for all user groups[.] . . . As a general matter, all parties that manage the fishery, or whose actions affect the fishery, have a responsibility to act in accordance with the fishing rights of the Tribes. This may go beyond safeguarding their right to an appropriate share of the harvest on their reservation . . . to include a viable and adequate fishery from which to fulfill the Tribes’ rights[.]

Id. at 29-30 (footnotes and citations omitted). The M-Opinion concluded the Tribes have a “right to harvest quantities of fish on their reservations sufficient to support a moderate standard of living.” *Id.* at 3; *see also id.* at 32. The M-Opinion established the basis on which the Department of Commerce regulates ocean fishing harvest to protect the Tribes’ in-river trust fishery, and the federal courts cited the M-Opinion with approval in upholding such off-reservation regulation in support of the Tribes’ on-reservation fishing rights.²⁴

Thus, the Tribes have on-reservation fishing rights that envision a meaningful fishery from which to support a moderate standard of living, and federal law requires restoration of the Trinity River fishery to pre-TRD levels based on those rights and the federal trust responsibility to the Tribes. Moreover, in upholding the 2000 ROD, the Ninth Circuit has previously recognized that restoration of the Trinity River fishery was already “unlawfully long overdue.”²⁵

Twenty years later, the Department has not achieved the restoration goal set by Congress. The TRFES Final Report established naturally produced spawner escapement goals for fall chinook (62,000 fish) as well as spring chinook (6,000), coho (1,400), and steelhead (40,000). TFRES App. E-2 to E-4.²⁶ To date, annual returns have not reached these levels; for example, fall

²² *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

²³ *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986).

²⁴ *Parravano v. Babbitt*, 837 F. Supp. 1034 and 861 F. Supp. 914 (N.D. Calif. 1994), *aff’d*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996).

²⁵ *Westlands Water Dist. v. Dep’t of the Interior*, 376 F.3d 853, 878 (9th Cir. 2004) (quoting lower court’s order).

²⁶ Salmon runs in the Klamath Basin (including the Trinity River) once “totaled approximately 500,000 salmon” from which “local Indians consumed over 2 million pounds” annually. 2000 ROD at 3; M-Opinion at 8. More

chinook have only twice exceeded 30,000 spawners since 2004 (less than half the identified restoration goal) and more often fall under 10,000.²⁷ Reclamation and the Trinity River Restoration Program (TRRP), through the National Fish and Wildlife Foundation, recently requested quotations to perform a “Limiting Factors Analysis,” which will help determine whether 2000 ROD implementation may need adjustments or whether factors beyond the control and influence of the TRRP have hindered restoration goals.

2. 2000 ROD Implementation

The Ninth Circuit’s decision cleared the way for implementation of the 2000 ROD. At a minimum, as noted above, the Department must implement the channel and watershed rehabilitation goals, flow provisions and operating procedures (including adaptive management) established by the 2000 ROD.

Significant progress has occurred with respect to implementation, including annual flow releases, gravel augmentation and sediment management, fully resolved infrastructure issues, and other measures. The TRRP has also performed various watershed and tributary projects, some of which have gone above and beyond the recommendations outlined in the 2000 ROD. Indeed, most of the 2000 ROD’s recommendations have been implemented; in some cases, projects have been modified to achieve better restoration outcomes. Nonetheless the Department has not yet implemented the full suite of recommendations Secretary Babbitt adopted with Hoopa’s concurrence.

For example, the 2000 ROD directed mechanical channel rehabilitation at 47 sites (plus two tributary delta sites). 2000 ROD at 9-10, 13 and C-5; TRFES Final Report, *supra* note 7, at 274. Restoration work represents a critical component that helped justify selection of the 2000 ROD’s Preferred Alternative rather than the Maximum Flow Alternative, which would have kept all inflows above TRD in-basin and precluded *any* water exports to the CVP. 2000 ROD at 10, 25.²⁸ Only 34 of the 47 sites have been addressed to date. To some extent this reflects insufficient funding and other obstacles, but decisions about some sites reflect ongoing expert assessment about how best to achieve restoration goals.²⁹

specific to the Trinity River, estimates for the fall chinook salmon run above the North Fork Trinity River prior to TRD’s construction ranged from 19,000 to over 75,000 fish. 2000 ROD at 3-4.

²⁷ Pacific Fishery Management Council, Review of 2023 Ocean Salmon Fisheries 223 (Feb. 2024).

²⁸ The Maximum Flow Alternative scored better than the Preferred Alternative for fishery population increases, but would have precluded or severely limited the TRD’s continued general integration with the CVP with respect to water diversions to the Central Valley and power production. 2000 ROD at 25.

²⁹ Implementation and monitoring over the past 20 years have resulted in lessons learned for the entire TRRP Program, including selection and development of channel rehabilitation sites. As recognized in the TRFES Final Report, implementation of remaining sites (after completion of the initial 24 sites) may proceed as re-evaluated by the AEAM Program as adopted in the 2000 ROD. TRFES Final Report, *supra* n.7, at 274

Even once all channel restoration has been completed, implementation of other measures identified in the 2000 ROD (e.g., annual flow releases,³⁰ sediment management, adaptive management, and monitoring) will continue. The 2000 ROD acknowledged as much: “This decision recognizes that restoration and perpetual maintenance of the Trinity River’s fishery resources require rehabilitating the river itself, restoring the attributes that produce a healthy, functioning alluvial river system.” *Id.* at 2.³¹

As discussed above, CVPIA Section 3406(b)(23) directed the development of fishery restoration recommendations and further directed that, if the Secretary and Hoopa concurred in them, then they “shall be implemented accordingly.” The statutory language identified instream flows and OCAP as the basis for such recommendations, but also emphasized the development of recommendations based on the best available science. *Id.* Given the foundational information available at the time (e.g., 1981 SID) and recognition of instream flows as the most critical limiting factor after decades of excessive diversions to the Central Valley that resulted in severely depleted fish populations, *see, e.g.*, 2000 ROD at 5-6, it is not surprising that Congress focused on such measures in 1992.

³⁰ Although the 2000 ROD allowed for certain daily flow release adjustments based on science and monitoring, the CVPIA and ROD established permanent annual volumes that would be released for fishery restoration purposes in accordance with TRFES recommendations. CVPIA Section 3406(b)(23) (directing development and ultimate adoption, upon Hoopa’s concurrence, of “recommendations . . . regarding permanent instream fishery flow requirements” that would replace the interim 340,000 acre-foot per year instream releases); 2000 ROD at 12 (stating that “the annual flow volumes established in Table 1 may not be changed”); *id.* at 3 (TMC may “recommend possible adjustments to the annual flow schedule within the designated flow volumes . . . to ensure that the restoration and maintenance of the Trinity River anadromous fishery continues based on the best available scientific information and analysis.”). *See also San Luis & Delta Water Authority v. Haugrud*, 848 F.3d 1216, 1231-32 (9th Cir. 2017) (discussing permanent water release schedule under 2000 ROD and CVPIA Section 3406(b)(23)); *Westlands Water Dist. v. Dep’t of the Interior*, 376 F.3d 853, 863, 868 (9th Cir. 2004) (same).

Moreover, both the 2000 ROD and prior opinions from this Office recognize that the TRD must first satisfy in-basin needs before operating for and/or diverting water to the Central Valley. 2000 ROD at 17 (“From the inception of the TRD, Congress directed this Department to ensure the preservation and continued propagation of the Trinity River’s fishery resources and to divert to the Central Valley only those waters surplus to the needs of the Trinity Basin.”); *see also* Memorandum from the Solicitor Krulitz to the Assistant Secretary – Land and Water Resources, *Proposed Contract with Grasslands Water District* (December 7, 1979) (concluding both provisos of the 1955 Act authorizing the TRD provided a limitation on the integration of the TRD with the CVP and that “in-basin flows (in excess of a statutory 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” of Trinity River water to the Central Valley); M-37030, *Trinity River Division Authorization’s 50,000 Acre-Foot Proviso and the 1959 Contract between the Bureau of Reclamation and Humboldt County* (December 23, 2014) (following 1979 Krulitz Opinion and concluding 1955 Act contained two separate, independent limitations on TRD’s integration with, and thus diversion of water to, the CVP). Accordingly, not only did the CVPIA establish permanent volumes that would remain in-basin for fishery restoration purposes, but prior Solicitor opinions and other Departmental decisions have also confirmed that additional limitations exist to support in-basin needs that supersede operations or diversions to the Central Valley.

³¹ This memorandum does not define what constitutes “completion” of TRRP restoration measures for purposes of CVPIA Section 3407(d)(2)(A), which addresses collections from water and power customers for the CVP Restoration Fund. As the Secretary has recognized in this context, the 2009 CVPIA Program Activity Report (CPAR) “generally represents the most appropriate current view regarding determinations related to ‘completion’ as required by CVPIA § 3407(d)(2)(A).” Memorandum from Secretary Haaland to Assistant Secretary for Fish and Wildlife and Parks and Assistant Secretary – Water and Science re: Prior Direction on Implementation of the Central Valley Project Improvement Act (Dec. 15, 2022).

But the Department (through FWS, Reclamation, and USGS) and Hoopa, along with others, recognized that instream flows alone (particularly those identified for evaluation in the 1981 SID) may not achieve fishery restoration as directed by Congress and adopted a more holistic scientific approach. The TRFES Final Report therefore recommended a suite of integrated measures designed to achieve fishery restoration without defeating the TRD's integration with the CVP. *See supra* at 3 & n.9. In its challenge to the ROD, Central Valley interests even argued the Department did not provide sufficient consideration to non-flow measures. In upholding the 2000 ROD, the Ninth Circuit rejected this argument. The Court held the Department appropriately considered non-flow measures across all alternatives and emphasized that the Department's focus on habitat restoration (including restoration of natural channel and riparian values) as the best way to restore natural salmon and steelhead populations was "well within" the Department's discretion. *Westlands Water Dist.*, 376 F.3d at 867-68 (citing, *inter alia*, CVPIA Section 3406(b)(1)(A)).

The 2000 ROD also adopted an AEAM Program that allowed for certain adjustments to annual flow schedules and other refinements based on continuing scientific monitoring and studies. 2000 ROD at 15; *see also* TRFES Final Report, *supra* n.7, Appendix O; FEIS Appendix C. To implement the program, the 2000 ROD established an organizational structure that included an AEAM team, the Trinity Adaptive Management Working Group, Independent Review Panels, and the TMC. The TMC provides oversight and direction to the TRRP and makes recommendations to the Secretary, who retains ultimate control over how to implement the 2000 ROD. As noted above, the Department justified the WY2023 Winter Flow Variability proposal based on the 2000 ROD's AEAM Program, and the federal court upheld the Department's position in rejecting Hoopa's motion for preliminary injunction.

Significant deviations from the 2000 ROD's core requirements, however, would fall outside the scope of the AEAM Program. On one hand, variations to intra-annual instream flows as approved by the TMC generally qualify as authorized actions within the scope of the 2000 ROD so long as they are based on the forecasted hydrology and fall within the range established by the ROD. *See* 2000 ROD at 2.³² Conversely, as the Department recognized in 2017 regarding late-summer flow augmentation TRD releases:

These [2000 ROD] flow releases were designed not only to provide water of sufficient quantity and quality (e.g. temperature) for appropriate salmonid habitat and passage while in the river, but also to flush fine sediments and provide other geomorphic benefits that - combined with mechanical river restoration and other recommendations - would restore the river without seeking to keep all Trinity River water supplies within the watershed. It would not be consistent with the purposes of the [2000] ROD flows for Reclamation to reduce the amount of water scheduled to be released under the Trinity River ROD earlier in the year for a late summer flow augmentation release. Additionally, although adaptive management may in the future allow for certain substantial within-year alterations to the Trinity River ROD's flow schedule based on

³² As discussed elsewhere in this memorandum, short-term experimental flow adjustments such as the one adopted for the WY2023 Winter Flow Proposal also fall within the TMC's authority under the 2000 ROD.

[TRRP] results and objectives, *DOI has concluded that such changes to the annual hydrographs should not occur prior to full implementation of the Program*. The Program adopted by the [2000] ROD has yet to be fully implemented, thus, at this stage in the implementation of the [2000] ROD, it would not be prudent for the flow releases set forth in the [2000] ROD to be reduced at other times of year in order to provide for the late summer flow augmentation releases.³³

Accordingly, the Department rejected an alternative that would have more permanently rescheduled 2000 ROD flows from the primary spring release period to late summer. Similarly, as discussed above, the Department must restore the channel to avoid a substantial deviation from the 2000 ROD.

To provide another example, the adoption of winter flow proposals as experimental adjustments to the intra-annual flow schedule would likewise fall within the 2000 ROD's AEAM program. Conversely, altering the flow regime on a longer-term or more permanent basis, at least before full implementation of the 2000 ROD, could be a significant deviation that requires more detailed scientific support (*e.g.*, peer-reviewed flow synthesis analysis and post-experiment review and report) as well as Hoopa's agreement.

As discussed in the 2000 ROD, Secretary Babbitt's decision was the product of nearly twenty years of detailed, scientific efforts. The 2000 ROD documented measures determined to be necessary and appropriate to restore and maintain the anadromous fishery resources of the Trinity River and established the suite of restoration actions identified in the Preferred Alternative as the best way to meet the Department's statutory and trust obligations based on the best available science. 2000 ROD at 2. Hoopa worked collaboratively with the Department throughout this process, and Hoopa concurred in the 2000 ROD as authorized by Congress in CVPIA Section 3406(b)(23). Given Congress's directive that, upon Hoopa's concurrence, the recommendations adopted by the 2000 ROD "shall be implemented accordingly," the Department must implement those recommendations to comply with the CVPIA and fulfill its obligations under the 2000 ROD.

3. Trust Responsibility

The Department must also consider its trust obligations to Hoopa and the Yurok Tribe. Here, the United States has a trust responsibility to the Tribes to protect their rights to a meaningful fishery capable of supporting a moderate standard of living.³⁴

³³ Long-Term Plan to Protect Adult Salmon in the Lower Klamath River Final Environmental Impact Statement Record of Decision at 6 (April 2017) (emphasis added). *See also* US Reply and Response Brief, *San Luis & Delta-Mendota Water Authority v. Jewell*, Nos. 14-17493 et al., at 33 (9th Cir., July 2016) ("Although adaptive management may in the future allow for certain within-year alterations to the [2000] ROD's flow schedule based on [TRRP] results and objectives, Interior reasonably concluded that such changes to the hydrographs should not occur prior to full implementation of the restoration program adopted in the [2000] ROD. That program has yet to be fully implemented[.]").

³⁴ *But see Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986 (9th Cir. 2005). In that litigation, the Ninth Circuit addressed 2000 ROD implementation, in particular Hoopa's assertion that CVPIA § 3406(b)(23) entitled Hoopa to mandatory P.L. 93-638 contracts to implement portions of the TRRP. *Id.* at 987. The court rejected those

The CVPIA explicitly recognized the trust responsibility: “in order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa,” the Department must carry out the measures authorized by Section 3406(b)(23), including implementation of the 2000 ROD recommendations. In short, Congress directed the Department to take certain actions on the Trinity River to meet trust responsibilities; the 2000 ROD directed implementation of the recommendations conceived from those statutorily mandated actions; and Hoopa’s fishing right includes a “right to harvest quantities of fish on their reservation[] sufficient to support a moderate standard of living.” Therefore, at a minimum, the Department must continue implementing the 2000 ROD, which may restore the fishery to pre-TRD levels and which may fulfill Hoopa’s right to a fishery capable of supporting a moderate standard of living. If implementation of the 2000 ROD fails to achieve that result, further action by the Department may be necessary. Until the 2000 ROD has been implemented and its effects are evident, it will be unclear what further actions the Department may need to take to honor its trust obligation.

IV. Conclusion

Hoopa does not have a permanent, continuing concurrence right with respect to TRD operations and restoration implementation. Rather, Hoopa concurred in the recommendations adopted in the 2000 ROD, which fulfilled that particular and unambiguous requirement in CVPIA Section 3406(b)(23). The lone federal court to evaluate the issue agreed with this conclusion in the context of the WY2023 Winter Flow Variability proposal, although in the context of a preliminary injunction decision and not a final judgment.

Notwithstanding that conclusion, Hoopa has an important continuing role in implementing the 2000 ROD as a member of the TMC and has also raised fair concerns regarding timely implementation and potential significant deviations from the 2000 ROD’s recommendations.

Congress directed that the Trinity River fishery be restored to pre-TRD levels based in part on the Department’s broad trust responsibility to Hoopa and the Yurok Tribe. At this point, pre-TRD restoration has not been achieved. Full implementation of the 2000 ROD may satisfy this obligation. If not, the Department should fulfill its trust responsibility by consulting with the Tribes about next steps to meet the statutory goal of restoring the Trinity River fishery to pre-TRD levels.

arguments, holding instead that the TRRP benefits not only Hoopa and Yurok but also a far wider range of non-Indian interests under the 1984 and 1996 Acts and thus did not represent a program “specifically targeted” to Hoopa only. *Id.* at 990-92. The court similarly rejected Hoopa’s arguments related to trust obligations, noting that trust duties could co-exist with other responsibilities and that Reclamation’s conclusion that discretionary (rather than mandatory) contracts could be negotiated with Hoopa did not violate any trust obligation. *Id.* at 992-93. This decision, however, does not address the broader trust considerations at issue in this memorandum, and *Ryan* also recognized that trust obligations remain even if the United States has responsibilities also to non-Indian interests.