



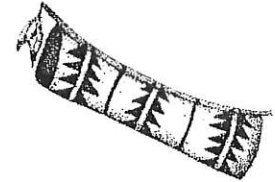
HOOPA VALLEY TRIBAL COUNCIL

Hoopa Valley Tribe

Post Office Box 1348 Hoopa, California 95546

PH (530) 625-4211 • FX (530) 625-4594

www.hoopa-nsn.gov



Chairman Joe Davis

July 13, 2023

By Email: jbeck@usbr.gov

Ms. Jo Anna Beck
U.S. Bureau of Reclamation
Bay-Delta Office
8011 I Street, Suite 140
Sacramento, CA 95814-2536
Dear Ms. Beck:

- I. By your email of June 5, 2023, the Bureau of Reclamation (Reclamation) announced that it “is seeking red flag review of the draft document, meaning we are looking for high level comments. The Hoopa Valley Tribe (Hoopa) submits the following comments on the Draft Preliminary Alternatives (Draft) relating to the reinitiation of consultation (ROC) for the long-term operation of the Central Valley Project (CVP) and the State Water Project (SWP). Hoopa notes that Reclamation has twice extended the comment period in this matter. Hoopa submits these comments with the understanding that it retains the right to supplement them in light of ongoing developments between the date of these comments and the current comment deadline, July 21, 2023.
- II. INTRODUCTION

In its present form the published Draft:

- is unlawful;
- is unscientific;
- harms the fishery resources that the United States holds in trust for Hoopa;
- unilaterally terminates the 2000 Trinity River Mainstem Fishery Restoration Record of Decision (ROD), which is a solemn agreement between the Secretary of the Interior and Hoopa to restore fishery resources for which the United States has a specific statutory trust responsibility;
- violates Hoopa’s congressionally delegated sovereignty that requires the Secretary to obtain Hoopa’s concurrence in TRD operations that affect its fishery; and
- violates Hoopa’s co-lead role in the ROC that Deputy Commissioner of Reclamation David Palumbo established by letter of July 18, 2022.

The Draft and the process that led to its adoption are fundamentally flawed. Both are based on an uncritical acceptance of the:

- 1) existential crisis Hoopa faces because of damage done by the CVP’s Trinity River Division to the Trinity River fishery;
- 2) chronic failure to implement Trinity River fishery restoration according to the “permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River

fishery” in which the Secretary of the Interior and Hoopa concurred on December 19, 2000;

- 3) unlawful elimination of past and future costs owed by CVP contractors for implementing the 2000 ROD and renovating the Trinity River Hatchery; or
- 4) failure to achieve the fishery restoration goals established by Act of Congress nearly 40 years ago.

The Draft’s first paragraph states that its “Alternatives are not finalized and have not undergone modeling or legal sufficiency review. The alternative development process will continue to be refined.” “Draft Preliminary Alternatives” manifestly “are not finalized”.

Nonetheless, it is unlawful and in bad faith for the Bureau of Reclamation to publish the Draft Preliminary Alternatives without developing and vetting it in concert with the Department’s designated tribal co-leads, without complying with Hoopa’s delegated sovereign concurrence authority, and in disregard of Hoopa’s institutional knowledge of the law and science of Trinity River.

In 2004, the Ninth Circuit Court of Appeals ordered full implementation of the ROD after disposing of objections raised by CVP water and power contractors and observing that Trinity restoration was “unlawfully long overdue”. The Draft and the process that produced it are the latest evidence of restoration being unlawfully long overdue.

Pursuant to § 3406(b)(23) of the Central Valley Project Improvement Act (CVPIA), Public Law 102-575 Title XXXIV, 106 Stat.4706 (October 30, 1992), the Secretary of the Interior is not authorized to modify the ROD, or TRD operations thereunder, including flows and operating criteria and procedures, absent the concurrence of the Hoopa Valley Tribe.

Accordingly, Reclamation should withdraw the Draft and recommence the development of the Trinity component of the ROC. Given its concurrence rights, the vested property rights in the Trinity River’s fishery resources that the United States holds in trust, and the specific and detailed trust obligations established in Acts of Congress for Hoopa’s benefit, the Secretary of the Interior must seek and obtain Hoopa’s concurrence prior to approving any ROC final action that deviates from the ROD.

III. BACKGROUND

A. Hoopa and Its People Have Relied Upon the Trinity River Fishery Since Time Immemorial.

Hoopa and its people have lived along the Trinity River, and relied upon its fish resources, since time immemorial. The United States government located and set aside the Hoopa Valley Reservation, within which the Trinity River flows through, on August 21, 1864. *Mattz v. Arnett*, 412 U.S. 481, 490, fn. 9 (1973); *Short v. United States*, 202 Ct. Cl. 870, 875-980 (1973). On June 23, 1876, President Grant issued an Executive Order formally setting aside the Hoopa Reservation for “Indian purposes.” *Short*, 202 Ct. Cl. at 877. Traditional salmon fishing is one of the “Indian purposes” for which the Reservation was created. *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995).

In 1864, the United States determined the Reservation a suitable permanent homeland for two principal reasons. First, the Reservation is within the heart of Hoopa’s aboriginal lands, which Hupa Indians occupied and fished upon for generations. *Parravano v. Babbitt*, 70 F.3d

539, 546 (9th Cir. 1995). Hoopa Indians possessed fishing and hunting rights long before contact with white settlers and their salmon fishery was “not much less necessary to [their existence] than the atmosphere they breathed.” *Id.* at 542, quoting *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1991). Second, the Reservation set aside resources of the Trinity and Klamath Rivers for Hoopa people to be self-sufficient and achieve a moderate living based on fish. *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986).

Hoopa’s rights entitle Hoopa and its people to take fish from the Trinity and Klamath Rivers for ceremonial, subsistence, and commercial purposes. *Eberhardt*, 789 F.2d at 1359. In 1993, the Interior Solicitor Leshy examined the “history of the [Hoopa] reservation, the Indians’ dependence on the Klamath and Trinity River fisheries, the United States’ awareness of that dependence, and the federal intent to create the reservation in order to protect the Indians’ ability to maintain a way of life, which included reliance on the fisheries. 1993 Solicitor Opinion M-36979, p. 3. Solicitor Leshy found: “[T]he Government intended to reserve for the [Hoopa] a fishing right which includes a right to harvest a sufficient share of the resource to sustain a moderate standard of living.” *Id.* at 21. Hoopa’s rights are not satisfied simply by the presence of fish in the river, but rather by the harvesting of an adequate supply of fish by Hoopa’s people. *United States v. Washington*, 853 F.3d 946, 958, 965-66 (9th Cir. 2017), affirmed per curiam, 584 U.S. - (2018) (“moderate living” standard requires protection of continued supply of fish for the Tribes.

B. Development and Operation of the TRD Severely Damaged Hoopa and Its Fishery.

In 1955, Congress authorized development of the TRD as a feature of the Central Valley Project. The construction, operation and maintenance of the TRD caused widespread catastrophic environmental impacts in both the Trinity basin and in the Central Valley. TRD development and operations decimated fish populations in the Trinity River, including those required to fulfill Hoopa’s rights. The TRD permanently eliminated fish access to 109 miles of habitat upstream of Lewiston Dam previously used by anadromous fish for holding, spawning, and rearing. During its first ten years of operations, the TRD diverted an average of 88% of the annual inflow out of the Trinity River and into the Sacramento River Basin. *Westlands Water Dist. v. U.S. Dep’t of the Interior*, 376 F.3d 853, 861 (9th Cir. 2004).

Within a decade of the TRD’s completion, salmonid populations dramatically decreased. In 1980, the U.S. Fish and Wildlife Service estimated that the Trinity River fish population suffered a reduction of 60% to 80% and fishery habitat loss of 80% to 90%. *Westlands Water Dist.*, 376 F.3d at 862-63. The reduction in salmon populations had, and continues to have, a devastating impact on Hoopa.

C. To Protect Hoopa’s Rights and Interests, the Secretary and Congress Took Action to Restore Fish and Fish Habitat to Pre-Project Levels.

In 1981, following an environmental study, the Secretary ordered an increase in annual flows released from the TRD to the Trinity River downstream of Lewiston Dam. Under the 1981 Secretarial Order, flows released from the TRD in normal water years increased from 120,500 acre-feet annually to 340,000 acre-feet annually. The Secretary also directed initiation of the Trinity River Flow Study to study and develop a flow regime and other measures to improve habitat conditions in the Trinity River.

In 1984, Congress affirmed and authorized the Secretary’s restoration goal in the Trinity River Basin Fish and Wildlife Management Act (“1984 Act”), Pub. L. No. 98-541, 98 Stat. 2721.

Congress found that “the Secretary requires additional authority [beyond that provided in the 1955 Act] to implement a basin-wide fish and wildlife management program in order to achieve the long-term goal of restoring fish and wildlife populations in the Trinity River basin to a level approximating that which existed immediately before the construction of the [TRD].” Section 2(a) of the 1984 Act directed the Secretary to formulate and implement a program designed to restore the fish and wildlife populations in the Trinity Basin to pre-TRD levels. Congress required the program to include: (1) rehabilitation of fish habitats in the Trinity River between Lewiston Dam and Weitchpec; (2) rehabilitation of fish habitats in tributaries of the Trinity River below Lewiston Dam; and (3) modernization and improved effectiveness of the Trinity River Fish Hatchery. 1984 Act, § 2(a)(1). The 1984 Act focused on restoration of fish habitat in the mainstem Trinity River and its tributaries, which would help to achieve the goal of restoring Trinity River fish populations.

D. In CVPIA, Section 3406(b)(23), Congress Vested Hoopa With Concurrence Authority to Ensure Continued Protection of the Trinity Fishery and Hoopa Interests.

The 1992 CVPIA requires the Secretary to take specific actions “in order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to meet the fishery restoration goals of the [1984 Act].” CVPIA, § 3406(b)(23). First, the CVPIA directed the Secretary to release, during water years 1992 through 1996, an instream release of not less than 340,000 acre-feet for the purpose of fishery restoration, propagation, and maintenance. This was the amount of flow directed by Interior Secretary Cecil D. Andrus in 1981, as amended by Secretary Manuel Lujan in 1991, and which releases continued up to passage of the CVPIA. Second, the CVPIA directed the Secretary, “after consultation with the Hoopa Valley Tribe,” to complete the Flow Study by September 30, 1996 “in a manner which insures the development of recommendations, based on the best available scientific data, regarding permanent instream fishery flow requirements and [TRD] operating criteria and procedures for the restoration and maintenance of the Trinity River fishery.” CVPIA §3406(b)(23)(A). Third, following completion of the Flow Study and its recommendations, Congress directed that: “If the Secretary and the Hoopa Valley Tribe concur in these recommendations, any increase to the minimum Trinity River instream fishery releases established under this paragraph and the operating criteria and procedures referred to in subparagraph (A) shall be implemented accordingly.” CVPIA §3406(b)(23)(B).

Pursuant to the authority of CVPIA section 3406(b)(23), the Secretary made the Hoopa Valley Tribe and the U.S. Fish and Wildlife Service coauthors of the Flow Study, which they completed, and the Department published in 1999. Prior to TRD development, the Trinity River was a “dynamic alluvial river,” in which plentiful salmon spawning and rearing habitat existed. See Flow Study, Executive Summary, p. xxvi. The Flow Study analyzed the fundamental attributes of an alluvial river and how those attributes could be restored (in part) through carefully managed flow releases. See Flow Study, Executive Summary. The Flow Study recommended a variable flow regime and management actions (dependent on water year type) to rehabilitate habitat in the mainstem channel of the Trinity River between Lewison Dam and the Klamath confluence at Weitchpec. See Flow Study, Chapter 8, Recommendations. The Flow Study recommended a total minimum annual volume of water dependent on water year type but also provided detailed recommendations for specific volumes of releases at specific times of year, along with a discussion of the purpose and benefits of providing those specific volumes at

specific times. See Flow Study, Tables 8.5 – 8.7. Hoopa and federal scientists carefully developed the flow recommendations in the Flow Study to achieve the CVPIA’s specific management objectives and habitat-restorative purposes on the mainstem Trinity River. See Flow Study, Chapter 8, Tables 8.2-8.3. The Flow Study allocated all available annual flow amounts in the recommended flow regimes to meet the intended objectives.

In the ROD, the Secretary and Hoopa accepted and concurred in the recommendations in the Flow Study, together signing the ROD at a sacred location in Hoopa’s homeland on the banks of the Trinity River on December 19, 2000. Those adopted recommendations were “based on the extensive scientific studies contained in the [Flow Study]” and offered “the most practical and scientifically based restoration strategy.” ROD, p. 8. The ROD “represents the culmination of over two decades of efforts aimed at understanding the necessary instream flow and physical habitat restoration requirements in order to restore the Trinity River anadromous fishery.” Pursuant to Section 3406(b)(23), the flows prescribed in the ROD may not be modified absent Hoopa’s concurrence. Accordingly, no alternative can be adopted here that deviates from or modifies ROD flows or operating criteria and procedures in absence of Hoopa concurrence.¹

E. The Concurrence Authority in CVPIA Section 3406(b)(23) is a Congressional Delegation of Sovereignty to Hoopa and a Congressional Affirmation of the Federal Trust Responsibility to Hoopa

The plain meaning and intent of section 3406(b)(23) are to fulfill federal trust responsibilities to Hoopa’s fishery resources through a specified course of action. *Id.* Congress required Hoopa’s concurrence in order for the Secretary to implement the fishery flow recommendations and OCAP for fishery restoration and maintenance developed pursuant to Section 3406(b)(23). Hoopa’s concurrence triggered a mandate that the Secretary implement restoration actions according to their terms. Hoopa is the only Indian tribe referenced in the statute; Congress delegated concurrence authority exclusively to Hoopa. *Id.* See also, San Luis & Delta-Mendota Water Authority v. Haugrud, 848 F.3d 1216, 1232 (9th Cir. 2017) (stating, “We also find significant section 3406(b)(23)’s reference to the Hoopa Valley Tribe—and its exclusion of all other tribes.”)

Congress has the constitutional authority to delegate a “portion of its own authority” to Hoopa in 3406(b)(23). United States v. Mazurie, 419 U.S. 544, 556–57 (1975). (“[I]ndependent tribal authority is quite sufficient to protect Congress’ decision to vest in tribal councils this portion of its own authority ‘to regulate Commerce ... with the Indian tribes.’ ” (Emphasis

¹ On February 8, 2023, the U.S. District Court for the Eastern District of California denied Hoopa’s motion for preliminary injunction relating to the Secretary’s approval and implementation of the Trinity River Winter Flow Variability (WFV) Project. See *Hoopa Valley Tribe v. U.S. Bureau of Reclamation*, Case No. 20-cv-1814-JLT-EPG (Dkt. #144). Hoopa argued the WFV Project could not be approved or implemented in absence of Hoopa concurrence. The Court reasoned that the WFV Project fell within the adaptive management (AEAM) procedures within the ROD that Hoopa concurred in. While Hoopa disagrees with the Court’s reasoning, nothing in the Court’s order undermines or affects Hoopa’s concurrence authority in this proceeding, in which Reclamation is proposing alternatives clearly outside the context of AEAM that would wholly deviate from and contradict prescriptions of the ROD, if approved. Hoopa concurrence is required here.

added). CVPIA § 3406(b)(23) is a statutory delegation of enhanced and specific sovereignty to Hoopa by Congress that provides Hoopa with authority to ensure implementation of the Trinity River restoration mandated in that statute. The United States Constitution vests Congress with “plenary and exclusive power over Indian affairs.” *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979). See also *Haaland v. Brackeen*, Case No. 21-376 (June 15, 2023). Congress’ authority over Indian affairs includes the responsibility for protecting tribal resources because of their vital importance to the existence and integrity of Indian tribes. Congress meets that responsibility through “statutes, treaties, and the general course of dealing with Indian tribes.” 25 U.S.C. §1901.²

Furthermore, as a statute passed for the benefit of the Hoopa Valley Tribe, CVPIA § 3406(b)(23) is to be construed liberally in Hoopa’s favor. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (stating, “a principle deeply rooted in this Court’s Indian jurisprudence [is that] ‘Statutes are to be construed liberally in favor of the Indians . . .’”, quoting *Montana v. Blackfoot Tribe*, 471 U.S. 759, 767-68 (1985); *Ramah Navajo School Board v. Bur. of Revenue*, 458 U.S. 832, 846 (1982) (“We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.”))

CVPIA § 3406(b)(23) affirmatively and expressly confirmed in reclamation law a trust responsibility to Hoopa. And further, Congress intended that Reclamation would continue to carry out the provisions of § 3406(b)(23) in conformance with the federal trust responsibilities by vesting Hoopa with sovereign authority to concur as a condition to implementing the recommended flows and OCAP discussed in § 3406(b)(23). This delegation of sovereignty in § 3406(b)(23) ensured that the Secretary and subordinate agencies would only implement the

² Notwithstanding this authority, Federal Defendants in *Hoopa Valley Tribe v. U.S. Bureau of Reclamation*, *supra*, imply, without explanation, that Hoopa’s delegated sovereignty is constitutionally problematic. In their Motion to Dismiss, ECF Dkt. 151 at pages 46-48 of (Dkt. #151), they state that Hoopa’s

allegation that Congress implicitly delegated it permanent authority over a large federal program that operates outside its reservation raises questions regarding not only congressional limits, but potentially the complex issues of the scope of Congress’ authority, especially where, as here, Plaintiff alleges the federal government retained no control to override Plaintiff’s decision to block any restoration measure it chooses. To avoid any potential constitutional questions, the Court should reject Plaintiff’s reading of section 3406(b)(23), which also has no basis in the text of the statute. See *Kim Ho Ma v. Ashcroft*, . . . ([C]ourts should interpret statutes in a manner that avoids deciding substantial constitutional questions.”(Emphasis added).

To be clear, Hoopa argues that CVPIA § 3406(b)(23) is an explicit, not implicit, delegation of authority to Hoopa. Further, the Federal Defendants implication that Hoopa would use its authority arbitrarily and recklessly has no basis in fact. Hoopa’s record of faithful stewardship of its own resources is beyond question, including its efforts to hold Reclamation to account for actions that have resulted in the federal trustee’s failure to meet the CVPIA’s restoration mandates.

recommendations with Hoopa's approval and that, once approved, the permanent flow and OCAP requirements of the ROD could only be modified with Hoopa's concurrence.

Specifically, Congress empowered Hoopa to constrain the Secretary of the Interior to meet federal trust responsibilities to Hoopa. Congress specified the process and quantified the outcome by which Trinity River fishery restoration would occur. There was nothing temporary about that empowerment. To the contrary, Congress froze TRD fishery flow releases unless and until the Secretary obtained Hoopa's concurrence to increase them. (Congress barred any reduction in the statutory minimum releases.)

F. Over the Course of 30 Years and Four Presidential Administrations (Until Now), the Federal Government Has Honored Hoopa's Concurrence Authority.

In 1991, when the House of Representatives passed the CVPIA, it had been just three years since Congress had delegated sovereignty to Hoopa regarding regulation of non-Indian land use within the Hoopa Valley Reservation—which the tribe otherwise did not have--in the 1988 Hoopa-Yurok Settlement Act. *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001).

When Congress considered delegating additional sovereignty to Hoopa in the CVPIA, the George H. W. Bush Administration raised no objection, either while the legislation was pending or when President Bush signed the CVPIA into law in 1992. By the same token, President Bush recognized Congress' intent in the CVPIA to be "less flexible and more intrusive" as to CVP contractors' access to CVP water and power.³

The Clinton Administration made no objection to the CVPIA's mandate to implement the federal trust responsibilities to Hoopa set out in the CVPIA. Indeed, for the entirety of the Clinton Administration, Secretary Bruce Babbitt embraced Hoopa's sovereignty delegation. Secretary Babbitt: (1) named Hoopa a coauthor with the Fish and Wildlife Service of the Trinity fishery restoration documents; (2) designated Hoopa as a co-lead in developing the related environmental documents; (3) accepted that Hoopa had a decisive interest in the Secretary's action to restore the Trinity River; and (4) on sacred ground at Hoopa signed the 2000 ROD.

Following Westlands' and other contractors' legal assault on the 2000 ROD, the incoming George W. Bush Administration defended the ROD.

No Secretary or Solicitor in the Obama or Trump Administrations challenged the authority or constitutionality of Hoopa's delegated sovereignty.

In addition, by letter of June 29, 2023 to Commissioner Touton, our congressman, the Honorable Jared Huffman (2d District CA), advised Commissioner Touton that changes in the 2000 ROD proposed in a new CVP operations plan "must be approved by the Hoopa Valley Tribe." The Bureau has neither sought nor obtained Hoopa's concurrence.

³ <https://www.presidency.ucsb.edu/documents/statement-signing-the-reclamation-projects-authorization-and-adjustment-act-1992>

Several of the provisions that substantially reform the operation of the Central Valley Project in California are less flexible and more intrusive on the rights of the State of California and current project beneficiaries than I would have preferred. Nevertheless, the final bill includes several substantial modifications to the original House-passed version. These modifications will ensure that the fish and wildlife objectives of the legislation can be met in a manner that maintains the viability of other important uses to which CVP water is now devoted.

Against that backdrop, how is it that now, after 30 years and four presidential administrations, Reclamation is now effectively acting to: terminate Hoopa's sovereignty; undermine, evade and underfund its CVPIA obligations to Hoopa; evade collecting costs owed by CVP contractors for restoration; create disunion and marginalize Hoopa in the Trinity Basin Community; ignore questionable conduct by state employees toward Hoopa at the Trinity Hatchery; terminate Hoopa's hatchery management contract; and neglect a 40-year mandate to renovate the Trinity River Hatchery.

In summary, Hoopa strongly opposes the Department of the Interior's actions to terminate the sovereignty Congress intended Hoopa to have for as long as the Secretary operated the TRD to divert water from Hoopa's fishery to the Central Valley.

IV. GENERAL COMMENTS ON ALTERNATIVES

A. Co-Lead Status and Process

By letter of July 18, 2022 from Deputy Commissioner of Reclamation David Palumbo to Yurok Tribal Chairman Joe James and Hoopa Valley Tribal Chairman Joe Davis, Reclamation designated the Tribes as Co-Leads on the ROC Environmental Impact Statement (EIS) with Reclamation. Co-Lead agencies should work together and jointly coordinate activities needed to prepare the EIS, including developing roles and responsibilities, developing the Purpose and Need for the Federal Action, developing draft and final EIS Alternatives that meet the Purpose and Need, and then analyzing the Alternatives, selecting a Preferred Alternative, and preparing the draft and final EIS documents. In disregard of those protocols, Reclamation prepared half of the draft Alternatives in isolation from the Co-Leads. The process used by Reclamation to develop a publicly released version of draft Alternatives is a fundamental flaw to the Alternatives because it excluded the Hoopa Valley Tribe and Yurok Tribe as Co-Leads in the development of those draft Alternatives. In addition, the draft Alternatives should have been, but appear not to be based on the following criteria before (emphasis added) being released to the public for review:

1. Meeting the Purpose and Need of the Federal Action, focuses on fisheries restoration in the Trinity River basin, and is consistent with the Purpose and Need of the Trinity River Restoration EIS/EIR prepared in 2000;
2. Having a logic and rationale of strategies and methods to meet the Purpose and Need; and,
3. Including a variety of actions, including flow management, water temperature management, operational strategies, infrastructure improvements, and restoration actions.

Accordingly, Reclamation should withdraw its June 5, 2023 Draft and replace it in a collaborative process with the Hoopa Valley Tribe and Yurok Tribe to:

- Develop a Purpose and Need for the Federal Action as described above; and,
- Develop new draft Alternatives that are lawful and designed to meet the Purpose and Need, and that include flow management, water temperature management, operational strategies, infrastructure improvements, and restoration actions.

Below are specific comments on the Purpose and Need, and draft Alternatives proffered by Reclamation's June 5 Draft. Our providing comments on these Alternatives does not imply agreement or acceptance to these Alternatives. Instead, they provide some context for a revised

process where the Hoopa Valley Tribe and Yurok Tribe are actual Co-Leads with Reclamation, and a Purpose and Need and new Alternatives are developed that meet that Purpose and Need.

B. Purpose and Need

As discussed above and below, all alternatives other than the No Action Alternative are fundamentally flawed from a legal, policy, and science perspective. This results, in part, from an insufficient purpose and need statement. The purpose and need for this exercise must recognize and adhere to the Law of the Trinity River and the overarching federal trust responsibility to the Hoopa Valley Tribe as enduring and unalterable baseline conditions. In all aspects of Trinity River management, the purpose and need must be the restoration of the Trinity River fishery to pre-TRD conditions to fulfill and implement the federal reserved rights of the Hoopa Valley Tribe and otherwise reestablish the fishery economy that predated the TRD. The alternatives as drafted fail to follow the science of the 1999 Flow Study and fail to adhere to the requirements and prescriptions of the 2000 ROD. The alternatives also fail to adhere to the authorities and priorities found in the provisos of the 1955 Act or the restoration mandates of the 1984 Act, as amended by the Trinity River Basin Fish and Wildlife Management Reauthorization Act of 1995, Public Law 104-143, 110 Stat. 1338 (May 15, 1996) and CVPIA Section 3406(b)(23). The purpose and need statement must be revised to adhere to the Law of the Trinity River and the federal trust duty to Hoopa. Restoration, preservation and propagation of the Trinity River fishery are a CVP purpose and statutory mandate to which CVP water and power deliveries are subordinate.

C. No Action Alternative.

In view of the rest of the alternatives, the No Action alternative, if modified to include the 1955 Act's Proviso 2 50,000 acre-feet is the only acceptable or legally appropriate alternative for this biological assessment. Together, the TRD water supplies dedicated for Trinity basin use in the 2000 ROD, the 2017 ROD, Proviso 2 and additional TRD uses for preservation and propagation of Trinity River fish and wildlife must represent existing operations, and be constants in whatever model is developed for CVP operations pursuant to the ROC process. The other alternatives violate the CVPIA and the Law of the Trinity River by failing to adhere to and incorporate the baseline legal requirements that include all of the 2000 ROD, the 2017 Flow Augmentation Releases (FARS) ROD, the 1955 Act Proviso 2 50,000 acre-feet, and the Secretary's authority to provide flows under 1955 Act Proviso 1. No alternative can be considered, adopted, or implemented that contradicts these existing legal requirements.

Most important, the other alternatives improperly discard the 1999 Flow Study and 2000 ROD without Reclamation having completed TRRP construction for natural production or renovated the TRH for mitigation production. This remains the case nearly 20 years after the 9th Circuit in 2004 declared Trinity Restoration "unlawfully long overdue." Restoration goals are not being met because Reclamation has not given the ROD a chance to work; not because the science underlying the Flow Study or ROD is inadequate or incorrect. Reclamation has not implemented ROD flows and restoration prescriptions "accordingly" or timely. Moreover, TRH renovation with its associated mitigation production is 40 years overdue. Rather than evaluating alternatives that deviate from the ROD and Flow Study, Reclamation must focus on faithfully implementing the ROD, upgrading and modernizing the TRD, and taking all other efforts necessary to meet Congress' directive to restore Trinity fish populations to pre-TRD levels.

D. Alternative 1 – Water Quality Control Plan

Alternative 1 would unlawfully wipe out the entirety of the 1999 Trinity River Mainstem Fishery Restoration Flow Study on which the 2000 ROD is based. It also eliminates the 2017 FARs ROD for the lower Trinity and Klamath fish protection and propagation. In addition, it is silent on Proviso 2's 50,000 AF. Alternative 1 reduces the volume of 2000 ROD flow releases from 595,000 on an annual average to 340,000.

Alternative 1 identifies CVPIA section 3406(b)(23) as the authority for the 340,000 acre-feet. However, that volume is the amount that Hoopa persuaded Secretary Lujan to establish in 1991 in order to have sufficient water available to conduct and complete the studies needed to prepare the 1999 Flow Study. As Section 3406(b)(23) states, that amount of water was to be in place only until Hoopa and the Secretary reached an agreement on restoration flows. The 2000 ROD's average annual 595,000 acre-feet (higher in Wet and Wetter Years and lower in Dry and Drier Years) replaced the 340,000 acre-feet annual flow release. As CVPIA section 3406(b)(23) states, upon Hoopa's concurrence the flow volumes and restoration measures concurred in "shall be implemented accordingly."

Nonetheless, Alternative 1 states that flow releases will "be based on CVPIA" While it is unclear what that means, it does appear to mean, at a minimum, not the flows required by ROD that Hoopa concurred in.

Alternative 1 releases will also be based on "settlement contracts and making use of available water supply for deliveries to CVP water service contractors, while reducing potential for spill." Instead, the focus should be on adherence to the ROD and restoration of the Trinity fishery to fulfill the trust responsibilities to Hoopa mandated by Congress in Section 3406(b)(23).

Alternative 1 would wipe out not only the higher flows under the 2000 ROD, it would wipe out the 1999 Flow Study itself and its prescriptions, because the 340,000 acre-feet cannot serve the prescriptions and flows established in the 2000 ROD's annual water year type volumes. Alternative 1 would also nullify the Trinity River Restoration Program, which is predicated on the Flow Study and 2000 ROD. The TMC's mission is to advise the Secretary on implementing 2000 ROD "accordingly."

Alternative 1 makes it impossible to reach fishery restoration goals in the 1984 and 1996 Trinity restoration legislation. It would give the CVP contractors reason to argue for defunding their obligation for any Trinity restoration. Moreover, it entirely ignores Reclamation's obligation under CVPIA Section 3406(b)(23) "to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe."

Moreover, this exercise is supposed to address protection of endangered species. Threatened Coho are in the Trinity but there is little evidence that anything in the draft meaningfully considers, let alone benefits, Trinity Coho.

In summary, Alternative 1 should be removed from further consideration or evaluation.

E. Alternative 2 – Multi-Agency Deliberation

Alternative 2 creates a "jump ball" situation. It would replace the TRRP, ROD, and the entirety of the current Trinity River management regime with just ad hoc "multi-agency

deliberation.” This is shocking in view of the careful and thorough science effort that produced the 1999 Flow Study and 2000 ROD.

Alternative 2 leads with a simplistic “objective” to “shift flows earlier in the season compared to the No Action Alternative for fisheries benefit.” The assumption that the No Action alternative precludes flow shifting is mistaken. Flow shifting may occur pursuant to Hoopa concurrence in a well-developed science-based plan. Alternative 2 plainly results in unlawful termination and replacement of the 2000 ROD without Hoopa’s concurrence.

Alternative 2 next would manage TRD yield for a minimum pool in Trinity. Alternative 2 uses the ROD volumes but is silent on the Flow Study prescriptions established by the ROD. The rest of Alternative 2 is a technical discussion of flow regimes and associated flow triggers. Alternative 2 fails to recognize or provide for Hoopa’s concurrence rights.

Alternative 2 should not be evaluated or considered further.

F. Alternative 3 – Modified Natural Hydrograph

Alternative 3, with its variable instream flow releases, purports to simplify what is an extremely complex artificial ecology brought about by the TRD and diversion of 53% of the average annual flow of the Trinity at Lewiston to the Central Valley. All of the analyses in the alternatives need to be reviewed against the original ROD science and with the same interdisciplinary rigor and not in isolation from one another. This kind of integrated science is the hallmark of the 1999 Flow Study and the highly-structured, peer-reviewed, and rigorously overseen meetings of restoration scientists, policy officials, and attorneys that became known as the “Eureka Conferences.”

Alternative 3 also fails to recognize or provide for Hoopa’s concurrence rights.

Alternative 3 should not be evaluated or considered further.

G. Alternative 4 – Risk Informed Operations

Alternative 4 violates the law of the Trinity River because it “prioritizes water deliveries” instead of working to fulfill the mandate to restore Trinity fish populations to pre-TRD levels and to fulfill the trust responsibility to the Hoopa Valley Tribe. Adherence to the 2000 ROD, the 2017 FARS ROD, and the provisos of the 1955 Act, as well as the restoration mandates of the 1984 and 1996 Acts is required – not prioritization of water deliveries.

Alternative 4 establishes a criterion of 750K AF minimum carryover storage in Trinity Reservoir and then promptly contemplates breaching that minimum and then remedying the breach by expropriating 15% of restoration flow releases for reservoir replenishment. This is not acceptable or lawful, as it contradicts the 2000 ROD.

Alternative 4, among other things, violates the 1955 Act priorities confirmed by Solicitor Krulitz in his 1977 opinion, ignores the trust duty to Hoopa, and uses restoration flows for reservoir refilling unlawfully at the expense of fishery restoration.

Alternative 4 should not be evaluated or considered further.

H. Summary of General Comments.

Other than the No Action Alternative, all other alternatives are fundamentally lacking in scientific and legal support. Put more bluntly, they directly violate existing requirements of federal law as expressed in the 2000 ROD, the 2017 FARS ROD, the 1955 Act’s provisos, the 1984 Act and 1996 Act, as well as the federal trust responsibility to Hoopa. The Draft alternatives are unlawful and unacceptable to Hoopa.

July 13, 2023

Page 12

Sincerely,



Joe Davis, Chairman

cc: Hoopa Valley Tribal Council
Secretary Haaland
Solicitor Anderson
Senator Dianne Feinstein
Senator Alex Padilla
Congressman Jared Huffman