

1 Thomas P. Schlosser WSBA #06276
 2 Thane D. Somerville WSBA #31468
 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE
 3 811 First Avenue, Suite 218
 Seattle, WA 98104
 4 Tel: 206-386-5200
 Fax: 206-386-7322
 5 t.schlosser@msaj.com
 6 t.somerville@msaj.com
 Attorneys for Plaintiff Hoopa Valley Tribe

7
 8 UNITED STATES DISTRICT COURT
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 10 EUREKA DIVISION
 11

12	HOOPA VALLEY TRIBE,)	Civ. No.
13)	
14	Plaintiff,)	
15)	COMPLAINT FOR
16	v.)	DECLARATORY AND
17)	INJUNCTIVE RELIEF
18	UNITED STATES BUREAU OF)	
19	RECLAMATION; DAVID BERNHARDT, in his)	Administrative Procedure Act Case
20	official capacity as Secretary of the Interior;)	
21	BRENDA BURMAN, in her official capacity as)	
22	Commissioner of the United States Bureau of)	
23	Reclamation; ERNEST CONANT, in his official)	
24	capacity as U.S. Bureau of Reclamation)	
25	California-Great Basin Regional Director; and)	
26	UNITED STATES DEPARTMENT OF THE)	
	INTERIOR)	
)	
	Defendants.)	

1 **I. INTRODUCTION**

2 1. Plaintiff Hoopa Valley Tribe (“Hoopa”) hereby sues Defendants United States
3 Bureau of Reclamation, David Bernhardt, in his official capacity as Secretary of the Interior,
4 Brenda Burman, in her official capacity as Commissioner of the United States Bureau of
5 Reclamation, Ernest Conant, in his official capacity as United States Bureau of Reclamation
6 California-Great Basin Regional Director, and United States Department of the Interior
7 (collectively herein, “Reclamation”) for violations of the Central Valley Project Improvement
8 Act (CVPIA)¹, the WIIN Act², the National Environmental Policy Act (NEPA)³, and the
9 Administrative Procedure Act (APA).⁴

10 2. Hoopa seeks an order and judgment setting aside, declaring invalid, and
11 rescinding Reclamation’s conversion of certain time-limited Central Valley Project (“CVP”)
12 renewal contracts into permanent repayment contracts with water contractors (including but not
13 limited to Westlands Water District Contract No. 14-06-200-495A-IR1-P) due to Reclamation’s
14 failure to comply with the CVPIA, NEPA, and APA. Hoopa further seeks an order enjoining
15 Reclamation from converting or amending any additional CVP contracts that Reclamation is in
16 the process of converting into permanent repayment contracts absent full compliance with the
17 CVPIA, NEPA, WIIN Act, and APA as discussed herein.

18 3. In approving conversion of the renewal contracts into permanent repayment
19 contracts, Reclamation has failed to comply with Section 3404(c)(2) of the CVPIA, which
20 mandates incorporation of all requirements imposed by existing law as contract terms. Relevant
21 legal requirements include the CVPIA fishery mitigation, protection, and restoration (herein,
22 “restoration”) measures, other legal requirements that confirm in-basin priority of Trinity River
23 flow releases over out-of-basin diversions to Central Valley contractors, the fish and wildlife

24 _____
25 ¹ Pub. L. No. 102-575, §§3401-12, 106 Stat. 4600, 4706-31 (1992)

26 ² Public Law 114-322, 130 Stat. 1628 (December 16, 2016),

³ 42 U.S.C. §§ 4321 et seq.

⁴ 5 U.S.C. §§ 501 et seq.

1 preservation and propagation mandates in the Act of August 12, 1955, Pub. L. 84-386, 69 Stat.
2 719 (1955 Act), which authorized the Trinity River Division (TRD) of the CVP and the Trinity
3 River Hatchery (TRH), and contractors' obligations to pay the costs of implementing these
4 requirements pursuant to applicable law including CVPIA Section 3406(b)(23).

5 4. Pursuant to Section 3404(c)(2), the legal priority of in-basin flow releases must be
6 included as conditions on supply made available for delivery to CVP contractors. CVP
7 contractors must be explicitly contractually bound to all fishery restoration measures required
8 by existing law, including the CVPIA, and corresponding payment obligations. Reclamation's
9 failure to include as contract terms the required fishery restoration, in-basin flow, and payment
10 obligations imposed by existing law violates the clear statutory language of CVPIA Section
11 3404(c)(2). Failure to specifically include the requirements of existing law as contract terms in
12 the permanent contracts will directly impair Hoopa interests in the fish and water resources of
13 the Trinity River that support its federally reserved rights.

14 5. Diversions of water from the Trinity River to the Central Valley have had and
15 continue to have a devastating impact on the fish, water, and other environmental resources of
16 the Trinity River that Hoopa relies upon. The action of converting the currently time-limited
17 CVP contracts into permanent contracts is an action with significant environmental impacts that
18 requires NEPA review. Reclamation has discretion in determining and negotiating the terms
19 and conditions of the contract conversions, and must comply with NEPA, including preparation
20 of an Environmental Impact Statement ("EIS") and/or an Environmental Assessment ("EA")
21 and evaluating appropriate alternatives before approving the contract conversions. Reclamation
22 has failed to prepare an EIS, EA, or to comply with NEPA in any way whatsoever.

23 6. Because of its violations of CVPIA Section 3404(c)(2) and NEPA, Reclamation's
24 approvals of the contract conversions also violate the APA as the approvals are arbitrary,
25 capricious, an abuse of discretion, or otherwise not in accordance with law, and without
26 observance of the procedure required by law. 5 U.S.C. 704, 706.

1 7. Due to Reclamation’s legal violations, Reclamation’s approvals of the permanent
2 contracts are legally invalid. Reclamation’s approvals and the contracts must be set aside by
3 this Court and the matter remanded to Reclamation for further action consistent with law.

4 **II. JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

5 8. Jurisdiction: This case presents federal law claims by an Indian tribe challenging
6 federal agency action. This Court has jurisdiction pursuant to 5 U.S.C. §§ 702 - 706, 28 U.S.C.
7 § 1331, 28 U.S.C. § 1346, 28 U.S.C. § 1361 - 1362, and 28 U.S.C. § 2201 - 2202.

8 9. Venue is properly vested in this Court under 28 U.S.C. § 1391(e)(1) because
9 Hoopa and its Reservation are located in Humboldt County and because no real property is
10 involved in this action.

11 10. Intradistrict Assignment: this case is properly assigned to the Eureka Division
12 under Civil L.R. 3-2 because Hoopa and its Reservation are located in Humboldt County.

13 11. There exists now between the parties an actual, justiciable controversy in which
14 Hoopa is entitled to have a declaration of its rights and of Reclamation’s obligations and in
15 which Hoopa is entitled to declaratory and injunctive relief based on the allegations herein.

16 12. This Complaint is timely filed within the applicable six-year statute of limitations
17 set forth in 28 U.S.C. § 2401(a).

18 **III. STANDING**

19 13. Hoopa, a federally-recognized Indian tribe, has standing to assert its claims
20 herein. Since time immemorial, Hoopa and its members, the Hupa people, have used and
21 continue to use the Klamath-Trinity River system and its anadromous fishery resource for
22 subsistence, cultural, ceremonial, religious, and commercial purposes. The lower twelve miles
23 of the Trinity River and a stretch of the Klamath River flow through the Hoopa Valley
24 Reservation.

25 14. Since time immemorial, the fishery resources of the Trinity and Klamath Rivers
26 have been the mainstay of the life and culture of Hoopa and its people. The fishery is “not

1 much less necessary to the existence of the Indians than the atmosphere they breathed.” *Blake*
2 *v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381
3 (1905)). The salmon fishery holds significant commercial and economic value in Hoopa’s
4 culture and economy. *See* Memorandum from John D. Leshy, Solicitor of the Department of
5 the Interior to the Secretary of the Interior (Oct. 4, 1993) (M-36979) (hereinafter “1993 Solicitor
6 Opinion”).

7 15. The principal purpose of Hoopa’s Reservation was to set aside sufficient
8 resources of the Trinity and Klamath Rivers for the Indians to be self-sufficient and achieve a
9 moderate living based on fish. *See* 1993 Solicitor Opinion 3, 15, 18-21, *cited with approval*,
10 *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996).
11 Hoopa’s federal reserved fishing right carries with it a corresponding right to Trinity and
12 Klamath River flow levels that are sufficient to support a productive habitat for Hoopa’s
13 anadromous fishery, including but not limited to salmon and steelhead, including those
14 produced by the TRH, and other culturally important salmon and non-salmonid species.

15 16. Reclamation diverts water through the Trinity River Division (TRD) of the CVP,
16 which would otherwise flow downstream through Hoopa’s Reservation, and sends it out of the
17 Trinity River Basin to implement the contracts at issue in this case. Congress and the
18 Department of the Interior have repeatedly affirmed and required protection of in-basin flows in
19 the Trinity River from impacts of Reclamation’s TRD/CVP out-of-basin diversions. In the
20 TRD’s authorizing legislation in 1955 (Pub. L. 84-386, 69 Stat. 719), Congress conditioned out-
21 of-basin diversions on preservation and propagation of fish and wildlife in the Trinity River
22 Basin as well as on a separate provision for the annual release of not less than 50,000 acre-feet
23 from Trinity Reservoir to be made available to Humboldt County and downstream water users
24 including Hoopa.⁵ In 1979, Interior Solicitor Krulitz explained that the provisos of Section 2 of

25
26 ⁵ 1955 Trinity River Division Central Valley Project Act (the “1955 Act”), Pub. L. No. 84-386,
69 Stat. 719, § 2.

1 the 1955 Act limit the integration of the TRD into the CVP and require the Secretary to exercise
2 a priority for use of all TRD water necessary to protect fish and other in-basin needs over TRD
3 diversions to the Central Valley for use in the CVP.⁶

4 17. In 1981, the Secretary of the Interior ordered increased flows into the Trinity
5 River from the TRD for the benefit of Hoopa and its fishery resources. The increased flows
6 were to be used in a study to determine what TRD releases in addition to the initial flow release
7 regimen established in the 1955 Act were needed for the preservation and propagation of the
8 Trinity River fishery. A 1981 Secretarial Order found that:

9 [T]he [Hoopa] and Yurok Indians have rights to fish from the Trinity and Klamath Rivers
10 and to adequate water to make their fishing rights meaningful. These rights are tribal
11 assets which the Secretary, as trustee, has an obligation to manage for the benefit of the
12 tribes. The Secretary may not abrogate these rights even if the benefit to a portion of the
13 public from such abrogation would be greater than the loss to the Indians. . . . There are
14 responsibilities arising from congressional enactments, which are augmented by the
15 federal trust responsibility to the Hupa and Yurok tribes, that compel restoration of the
16 river's salmon and steelhead resources to pre-project levels.

17 18. In 1984, Congress authorized the Secretary to adopt and implement a program to
18 "achieve the long-term goal of restoring fish and wildlife populations in the Trinity River Basin
19 to a level approximating that which existed immediately before the start of the construction of
20 the [TRD] . . . and to maintain such levels."⁷

21 19. In 1992, Congress enacted the CVPIA which dramatically altered the structure
22 and purpose of the CVP. CVPIA Section 3406(a) amended the project purposes of the CVP set
23 forth in 50 Stat. 844, 850, §2 (Act of August 21, 1937) by adding "mitigation, protection, and
24 restoration of fish and wildlife" to the purposes of "improving navigation, regulating the flow of
25 the San Joaquin River and the Sacramento River, controlling floods, providing for storage and
26 for the delivery of the stored waters thereof, for construction under the provisions of the Federal

⁶ Memorandum from Solicitor to Assistant Secretary, Land and Water Resources, Dec. 7, 1979 (the "1979 Opinion")

⁷ Trinity River Basin Fish and Wildlife Management Act of 1984, Pub. L. No. 98-541, 98 Stat. 2721, § 2(a).

1 reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in
2 connection with lands for which said stored waters are to be delivered, for the reclamation of
3 arid and semiarid lands and lands of Indian reservations . . .”. In CVPIA Section 3406(b)(23),
4 Congress required the Secretary to take specific actions “in order to meet Federal trust
5 responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to meet the
6 fishery restoration goals of the [1984 Act].”⁸ The 1984 Act actions identified in section
7 3406(b)(23) included completion by the Secretary, in consultation with Hoopa, of the Trinity
8 River Flow Evaluation Study ordered by the Secretarial Decision of January 14, 1981; obtaining
9 Hoopa’s concurrence in the study results, and implementing the recommendations and
10 associated operating criteria and procedures accordingly. The 1984 Act also requires the
11 Secretary to modernize and increase the effectiveness of the TRH. CVPIA Section 3406(b)(23)
12 mandates that “[c]osts associated with implementation of this paragraph shall be reimbursable
13 as operation and maintenance expenditures pursuant to existing law” (emphasis added).

14 20. In the CVPIA, Congress also required that: “Upon renewal of any long-term
15 repayment or water service contract providing for the delivery of water from the [CVP], the
16 Secretary shall incorporate all requirements imposed by existing law, including provisions of
17 this title, within such renewed contracts.” CVPIA, § 3404(c)(2). Congress further required
18 environmental review pursuant to NEPA prior to renewal of CVP contracts. CVPIA, §
19 3404(c)(1), § 3409.

20 21. Hoopa’s rights to water and fish in the Trinity River, confirmed by Congress, the
21 Secretaries of Interior and Commerce and multiple court cases, are directly threatened by
22 Reclamation’s failures to comply with the CVPIA, NEPA, and APA as related to the long-term
23 (permanent) contracts at issue here. The TRD diverts water that would otherwise flow through
24 the Trinity River Basin and through Hoopa’s Reservation. The diversion of vast amounts of
25 water from the Trinity River Basin through TRD facilities to out-of-basin water contractors

26 ⁸ Section 3406(b)(23) is reproduced in Exhibit 1.

1 directly harms Hoopa and its interests. The TRH is a source of fish to implement Hoopa fishing
2 rights. The Congressional directive of restoring Trinity River fish and wildlife populations to
3 pre-project levels has not yet been achieved. Reclamation's failure to comply with applicable
4 statutory, regulatory, and contractual requirements directly harms Hoopa and its interests in the
5 fish and water resources of the Trinity River.

6 22. The CVPIA, the 1955 Act, and other provisions of existing law affirmatively
7 protect Hoopa's vested property rights in the Trinity River fishery and the priority that exists for
8 in-basin uses in the Trinity River over out-of-basin diversions to the CVP. Here, Reclamation
9 unlawfully seeks to circumvent and nullify the applicable legal protections by failing in its
10 affirmative legal duty to incorporate the requirements imposed by existing law, including but
11 not limited to the CVPIA and the WIIN Act, into the contracts at issue.

12 23. Reclamation further seeks to avoid its duty to analyze the environmental impacts
13 of the continued out-of-basin diversions as well as appropriate alternatives to such continued
14 diversions (including the appropriate quantity of such diversions) and appropriate mitigation. In
15 converting contracts to permanent repayment contracts, or renewing contracts in their existing
16 quantities, NEPA requires Reclamation to evaluate alternatives that would implement the
17 conversions in ways that will assure fulfillment of the congressionally mandated Trinity River
18 fish and wildlife restoration, preservation and propagation requirements as well as its federal
19 trust responsibilities to Hoopa.

20 24. Reclamation's failure to comply with its legal duties affirmatively harms Hoopa.
21 An order of this Court finding Reclamation's acts and omissions unlawful, rescinding the
22 unlawful contracts, and remanding to Reclamation with a direction to comply with its legal
23 responsibilities would redress the injury that Hoopa alleges in this action.

24 25. Hoopa also incorporates by reference all allegations below in support of its
25 standing.
26

1 **IV. PARTIES**

2 26. Plaintiff Hoopa Valley Tribe is a federally-recognized Indian tribe located on the
3 Hoopa Valley Reservation which is within Humboldt County, California. The Trinity River and
4 a stretch of the Klamath River flows through the Reservation. Hoopa and its members have
5 federal reserved rights to take hatchery and natural fish and a corresponding water right to
6 protect and implement their rights to take hatchery and natural fish in the Trinity and Klamath
7 Rivers. Hoopa's interests are further described herein.

8 27. Defendants in this action are:

9 A. United States Bureau of Reclamation is a federal agency within the United
10 States Department of the Interior that has primary management authority over the CVP and TRD
11 and has a fiduciary trust responsibility to protect and preserve Hoopa's reserved rights, as well as
12 an obligation to comply with NEPA in connection with its CVP management actions. The
13 United States Bureau of Reclamation approved, and is planning to approve, contracts challenged
14 in this litigation without complying with the CVPIA, NEPA, the WIIN Act, or the APA.

15 B. David Bernhardt is sued in his official capacity as Secretary of the
16 Interior. He oversees the Department of the Interior and Bureau of Reclamation and is
17 responsible for the operation of the CVP and TRD, subject to the mandates of the CVPIA and
18 other applicable federal law.

19 C. Brenda Burman is sued in her official capacity as the Commissioner of the
20 United States Bureau of Reclamation.

21 D. Ernest Conant is sued in his official capacity as Regional Director of the
22 California-Great Basin Region of the United States Bureau of Reclamation.

23 E. United States Department of the Interior is a cabinet-level federal agency
24 and the parent agency of the United States Bureau of Reclamation.

1 **V. STATUTORY AND REGULATORY BACKGROUND**

2 **THE CENTRAL VALLEY PROJECT IMPROVEMENT ACT (CVPIA)**

- 3 28. Section 3402 of the CVPIA states that the purposes of the CVPIA are to:
- 4 (a) protect, restore, and enhance fish, wildlife, and associated habitats in the
- 5 Central Valley and Trinity River basins of California;
- 6 (b) address impacts of the CVP on fish, wildlife, and associated habitats;
- 7 (c) improve the operational flexibility of the CVP;
- 8 (d) increase water-related benefits provided by the CVP to the State of California
- 9 through expanded use of voluntary water transfers and improved water
- 10 conservation;
- 11 (e) contribute to the State of California’s interim and long-term efforts to protect
- 12 the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and
- 13 (f) achieve a reasonable balance among competing demands for use of CVP
- 14 water, including the requirements of fish and wildlife, agricultural, municipal
- 15 and industrial and power contractors.

16 29. Section 3406(b)(23) of the CVPIA specifically applies the federal government’s

17 trust responsibilities for Hoopa’s Trinity River fishery resources to Reclamation and mandated

18 implementation of the Trinity River Mainstem Fishery Restoration Program and associated

19 TRD flow releases according to the terms concurred in by Hoopa in the December 18, 2000,

20 Record of Decision executed on the Hoopa Valley Reservation by the Secretary and Hoopa’s

21 Chairman. See Exhibit 1.

22 30. Section 3404(c)(1) requires Reclamation to conduct environmental review prior to

23 renewal of any long-term water contract. Such appropriate environmental review includes, but

24 is not limited to, the directive to the Secretary to prepare a programmatic EIS pursuant to

25 Section 3409 of the CVPIA.

26

1 31. Section 3404(c)(2) requires that: “Upon renewal of any long-term repayment or
2 water service contract providing for the delivery of water from the CVP, the Secretary shall
3 incorporate all requirements imposed by existing law, including provisions of this title, within
4 such renewed contracts. The Secretary shall also administer all existing, new, and renewed
5 contracts in conformance with the requirements and goals of this title.”

6 **THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)**

7 32. NEPA is “our basic national charter for protection of the environment.” 40
8 C.F.R. § 1500.1(a). Congress directed “that, to the fullest extent possible . . . the policies,
9 regulations, and public laws of the United States shall be interpreted and administered in
10 accordance with the policies set forth in [NEPA]” 42 U.S.C. § 4332.

11 33. The purposes of NEPA are to: (1) declare a national policy which will encourage
12 productive and enjoyable harmony between man and his environment; (2) promote efforts
13 which will prevent or eliminate damage to the environment and biosphere and stimulate the
14 health and welfare of man; and to (3) enrich the understanding of the ecological systems and
15 natural resources important to the Nation. 42 U.S.C. § 4321. NEPA recognizes that “each
16 person should enjoy a healthful environment” and ensures that the federal government uses all
17 practicable means to “fulfill the responsibilities of each generation as trustee of the environment
18 for succeeding generations” and “assure for all Americans safe, healthful, productive, and
19 esthetically and culturally pleasing surroundings.” *Id.* § 4331(b)-(c).

20 34. To fulfill these purposes, NEPA requires that: (1) agencies take a “hard look” at
21 the environmental impacts of their actions before the actions occur, thereby ensuring “that the
22 agency, in reaching its decision, will have available, and will carefully consider, detailed
23 information concerning significant environmental impacts,” and (2) “the relevant information
24 will be made available to the larger audience that may also play a role in both the
25 decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley*
26 *Citizens Council*, 490 U.S. 332, 349 (1989).

1 35. NEPA requires federal agencies to prepare an EIS for “major Federal actions
2 significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

3 36. “Major Federal actions” subject to NEPA include both new and continuing
4 activities. 40 C.F.R. § 1508.18(a).

5 37. To determine whether the nature and extent of a proposed action’s environmental
6 effects requires preparing an EIS, federal agencies may first prepare an EA. 40 C.F.R. §
7 1501.4(b)-(c). If, on the basis of the EA, the agency finds that the proposed action will produce
8 “no significant impact” on the environment, then an EIS need not be prepared. *Id.* § 1501.4(e).

9 38. An agency’s NEPA analysis must assess the direct, indirect, and cumulative
10 impacts of its action. 40 C.F.R. § 1508.8. As part of its NEPA review, an agency is also
11 required to prepare a detailed statement regarding the alternatives to the proposed action. 42
12 U.S.C. § 4332(2)(C)(iii), (E). An agency must “[r]igorously explore and objectively evaluate
13 all reasonable alternatives,” including a “no-action” alternative. 40 C.F.R. § 1502.14.

14 **THE ADMINISTRATIVE PROCEDURE ACT (APA)**

15 39. The APA provides a right to judicial review for any “person suffering legal wrong
16 because of agency action.” 5 U.S.C. § 702. Final agency actions “for which there is no other
17 adequate remedy in a court” are reviewable under the APA. *Id.* § 704.

18 40. Under the APA, a reviewing court shall set aside agency action found to be
19 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or without
20 observance of procedure required by law. 5 U.S.C. §706. A reviewing court shall compel
21 agency action unlawfully withheld or unreasonably delayed. *Id.*

22 **THE WATER INFRASTRUCTURE IMPROVEMENTS OF THE NATION (WIIN) ACT**

23 41. In 2016, Congress enacted the WIIN Act. The WIIN Act directs Reclamation to
24 convert existing CVP water service contracts to permanent repayment contracts upon the request
25 of the contractor, under mutually agreeable terms and conditions. WIIN Act, §4011(a). The
26 Secretary’s administrative implementation of the WIIN Act must be consistent with and may not

1 alter existing applicable federal and state laws. WIIN Act, § 4001(a), (b). WIIN Act § 4012
2 provides that the Act “shall not be interpreted or implemented in a manner that ... (2) affects or
3 modifies any obligation under the Central Valley Project Improvement Act (Public Law 102–
4 575; 106 Stat. 4706.” This includes, but is not limited to: (1) the CVP’s environmental
5 restoration purpose established by CVPIA §3406(a); (2) associated contractor cost obligations,
6 particularly regarding the Trinity River; and (3) the CVPIA’s §3404(c)(2) mandate to incorporate
7 such terms in renewed contracts.

8 42. The WIIN Act shall not be interpreted or implemented in a manner that (1)
9 preempts or modifies any obligation of the United States under state law; (2) affects or modifies
10 any obligation under the CVPIA, with an exception related to Stanislaus River predator
11 management unrelated to this case; (3) overrides, modifies, or amends applicability of the ESA;
12 (4) would cause additional adverse effects on listed fish species beyond the range of effects
13 anticipated to occur to the listed fish species for the duration of the applicable biological
14 opinion, using the best available scientific and commercial data available; or (5) overrides,
15 modifies, or amends any obligation of the Pacific Fisheries Management Council. WIIN Act,
16 §4012(a).

17 VI. FACTUAL ALLEGATIONS

18 A. The TRD’s Out-of-Basin Diversions, Which Support the Contracts at Issue, 19 Continue to Imperil Hoopa’s Fish and Water Resources in Violation of Law.

20 43. Hoopa and its people have lived along the Trinity River, and relied upon its fish
21 resources, since time immemorial. The United States government located and set aside the
22 Hoopa Valley Reservation, which the Trinity River flows through, on August 21, 1864. *Mattz v.*
23 *Arnett*, 412 U.S. 481, 490, fn. 9 (1973); *Short v. United States*, 202 Ct. Cl. 870, 875-980 (1973).
24 On June 23, 1876, President Grant issued an Executive Order formally setting aside the
25 Reservation for “Indian purposes.” *Short*, 202 Ct. Cl. at 877. Traditional salmon fishing is one
26

1 of the “Indian purposes” for which the Reservation was created. *Parravano v. Babbitt*, 70 F.3d
2 539, 546 (9th Cir. 1995).

3 44. In 1864, the United States determined the Reservation a suitable permanent
4 homeland for two principal reasons. First, the Reservation is within the heart of Hoopa’s
5 aboriginal lands, which Hupa Indians occupied and fished upon for generations.⁹ *Parravano v.*
6 *Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995). Hupa Indians possessed fishing and hunting rights
7 long before contact with white settlers and their salmon fishery was “not much less necessary to
8 [their existence] than the atmosphere they breathed.” *Id.* at 542, quoting *Blake v. Arnett*, 663
9 F.2d 906, 909 (9th Cir. 1991). Second, the Reservation set aside resources of the Trinity and
10 Klamath rivers for Hupa people to be self-sufficient and achieve a moderate living based on fish.
11 *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986).

12 45. Hoopa’s rights entitle Hoopa and its people to take fish from the Trinity and Klamath
13 Rivers for ceremonial, subsistence, and commercial purposes. *Eberhardt*, 789 F.2d at 1359. In
14 1993, the Interior Solicitor Leshy examined the “history of the [Hoopa] reservation, the Indians’
15 dependence on the Klamath and Trinity River fisheries, the United States’ awareness of that
16 dependence, and the federal intent to create the reservation in order to protect the Indians’ ability
17 to maintain a way of life, which included reliance on the fisheries. 1993 Solicitor Opinion, p. 3.
18 Solicitor Leshy found: “[T]he Government intended to reserve for the [Hoopa] a fishing right
19 which includes a right to harvest a sufficient share of the resource to sustain a moderate standard
20 of living.” *Id.* at p. 21. Hoopa’s rights are not satisfied simply by the presence of fish in the
21 river, but rather by the harvesting of an adequate supply of fish by Hoopa’s people. *United*
22 *States v. Washington*, 853 F.3d 946, 958, 965-66 (9th Cir. 2017), *affirmed per curiam*, 584 U.S.
23 ____ (2018) (“moderate living” standard requires protection of continued supply of fish for the
24 Tribes).

25
26 _____
⁹ Hupa are the people of the federally-recognized Hoopa Valley Tribe.

1 46. In 1955, Congress authorized development of the Trinity River Division (TRD) as
2 a part of the CVP – the extensive system of dams, canals, and reservoirs that divert, store, and
3 regulate water for California’s Central Valley. Through the TRD, Reclamation diverts
4 substantial quantities of water from the Trinity River and sends such water out-of-basin to CVP
5 contractors. The TRD, which includes Trinity Dam and Lewiston Dam on the Trinity River
6 upstream of the Hoopa Valley Reservation, became operational in 1964, approximately 100
7 years after the United States set aside the Hoopa Reservation as a permanent homeland for Hupa
8 Indians, reserving Trinity River water and fish for their subsistence and livelihood. The TRH
9 was an integral part of the TRD to replace fish lost by blocking 109 miles of habitat.

10 47. Throughout the planning process for the TRD, the Trinity fishery was understood to
11 be a significant concern that needed to be protected:

12 Although the two major functions of the [TRD] are to provide an additional supply of
13 irrigation water and to generate hydroelectric energy, there are other important benefits to
14 be gained by the construction and operation of the proposed development. The present
15 fishery resources of the Trinity River are an economic asset to the Trinity River Basin, as
16 well as to the whole north coastal area, and therefore would require that the proposed
17 development be operated to their advantage.

18 House Doc. No. 53, 83d Cong., 1st Sess., “Letter from the Secretary of the Interior transmitting
19 the Report and Findings of the Trinity River Division of the Central Valley Project, California,
20 Pursuant to Section 9(A) of the Reclamation Project Act of 1939” at 76.

21 48. Both the House and Senate, in their deliberations on the TRD, reported that the
22 fishery resources of the Trinity River are an asset to the Trinity River basin as well as to the
23 whole north coastal area and that the TRD was planned with a view to maintaining and
24 improving fishery conditions. House Rept. No. 602, 84th Cong., 1st Sess. at 2 (May 19, 1955);
25 Senate Rept. No. 1154, 84th Cong., 1st Sess. at 5.

26 49. When Congress authorized the TRD in 1955, Congress recognized the critical
importance of the fishery resources of the Trinity River and the need to protect them. Congress
intended the TRD be designed “with a view to maintaining and improving fishery conditions.”

1 *San Luis & Delta-Mendota Water Authority v. Haugrud*, 848 F.3d 1216, 1223 (9th Cir. 2017).

2 Section 2 of the 1955 Act provides that “the Secretary is authorized and directed to adopt
3 appropriate measures to insure the preservation and propagation of fish and wildlife”

4 Section 2 of the 1955 Act also provides that “not less than 50,000 acre-feet shall be released
5 annually from the Trinity Reservoir and made available to Humboldt County and downstream
6 water users.” These two provisos address distinct in-basin releases that have priority over out-
7 of-basin diversions. *See* Solicitor Memorandum M-37030 regarding “Trinity River Division
8 Authorization’s 50,000 Acre-Foot Proviso and the 1959 Contract Between the Bureau of
9 Reclamation and Humboldt County” (December 23, 2014).

10 50. The TRD is the only source of CVP water imported to the Central Valley. The
11 original TRD legislation would have authorized both the TRD and the San Luis Unit (SLU).¹⁰
12 However the SLU planning report was delayed and the TRD proceeded to authorization in 1955
13 (Pub. L. 84-386). The SLU was eventually authorized by Public Law 86-488, 74 Stat.156 (June
14 3, 1960). The water¹¹ and energy¹² developed by the TRD are integral to the development,

15 ¹⁰ Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs,
16 *Hearing on H.R. 4663 to authorize the Trinity River division, Central Valley Project*, page 93,
17 84th Cong., 1st Sess., page 3. (April 13, 1955).

18 ¹¹ House Report No. 602, 84th Cong., 1st Sess. on H.R. 4664 (May 19, 1955) at 4, “Under the
19 plan of development and operation an average of 704,000 acre-feet of Trinity River water would
20 be diverted annually to the Sacramento River Basin . . . [of which] 525,000 acre-feet annually
21 would be available for use on lands of the west side of the San Joaquin Valley.”

22 ¹² San Luis Unit, Central Valley Project, California: A Report on the feasibility of Water Supply
23 Development, U.S. Department of the Interior, Bureau of Reclamation GPO 968842 (1956) at 3
24 and 7-8 “Power from the Trinity River Division is contemplated as the major source for the San
25 Luis Unit pumping requirements.” “As stated in . . . [the] January 19, 1955 report, which was
26 adopted by Secretary McKay as his proposed report on the Trinity River Division, assurance of
power for San Luis pumping, on advantageous terms would be basic in such arrangements. Since
there are no existing arrangements to sell falling water in connection with the Trinity River
development, estimates in this report are based on power supplies from Federally-constructed
powerplants.” 1956 Feasibility Report on the San Luis Unit *Letter from Secretary of the Interior
to the President, August 1, 1956*: “The Unit will provide a full water supply to 440,000 acres of

1 construction, and operation of the SLU¹³ whose member districts, including the Westlands Water
2 District, have contracts with Reclamation for CVP water service. Those contracts include
3 Contract No. 14-06-200-495A-IR1-P. Congress conditioned the use of TRD water and energy
4 for the benefit of the SLU and other CVP purposes by establishing first priorities to TRD water
5 for Trinity River fish and wildlife resources and California's North Coast's economy. The
6 Bureau of Reclamation disobeyed or ignored or rejected those priorities for decades.

7 51. Construction, operation and maintenance of the TRD and the SLU caused
8 widespread catastrophic environmental impacts in both the Trinity basin and in the Central
9 Valley. Damming the Trinity River and over-diverting water to the Central Valley devastated
10 Trinity basin fish and wildlife and caused economic hardship in North Coast Communities.

11 52. The TRD Act and the SLU Act further confirm the nexus between: (1) Hoopa's
12 property rights and interest in the Trinity River and its fishery; and (2) interests purported to be
13 established by Reclamation in contracts with the Westlands Water District and other contractors
14 in the SLU.

15 53. In 1979, Interior Solicitor Krulitz explained that the provisos of Section 2 of the 1955
16 Act limit the integration of the TRD into the CVP and require the Secretary to exercise a priority
17 for use of all TRD water necessary to protect fish and other in-basin needs:

18 On occasion the Congress has specifically limited the Secretary's discretion in meeting
19 the general CVP priorities. For example, in authorizing the Trinity River Division of the
20 CVP in 1955, Congress specifically provided that in-basin flows (in excess of a
21 statutorily prescribed minimum) determined by the Secretary to be necessary to meet in-
basin needs take precedence over needs to be served by out-of-basin diversion. See Pub.

22 land along the west side of the San Joaquin valley. Most of this area is presently irrigated from
23 ground water, but due to the rapidly lowering water levels, it is estimated that less than 150,000
24 acres can be sustained in permanent irrigated agriculture under present conditions.

25 ¹³ *Id.* at 93. Congressman Sisk of California: "This particular project, the Trinity and the San
26 Luis project, have already been considered as definite parts of and an integral part of and feature
of the Central Valley project from its very inception."

1 L. No. 84-386, § 2. In that case, Congress' usual direction that the Trinity River Division
2 be integrated into the overall CVP, set forth at the beginning of section 2, is expressly
3 modified by and made subject to the provisos that follow giving specific direction to the
4 Secretary regarding in-basin needs.

5 Memorandum from Solicitor to Assistant Secretary, Land and Water Resources, Dec. 7, 1979.

6 54. Contrary to the intent of Congress, the TRD development, operations, and resulting
7 out-of-basin water diversions decimated fish populations including those required to fulfill
8 Hoopa reserved fishing rights. The TRD diverted an average of 88% of the annual inflow out of
9 the Trinity River and into the Sacramento River Basin during its first ten years of operation.
10 *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 861 (9th Cir. 2004). The TRD
11 also permanently eliminated fish access to 109 miles of habitat upstream of Lewiston Dam
12 previously used by anadromous fish for holding, spawning, and rearing. Within a decade of the
13 TRD's completion, salmonid populations dramatically decreased. In 1980, the U.S. Fish and
14 Wildlife Service estimated that the Trinity River fish population suffered a reduction of 60% to
15 80% and fishery habitat loss of 80% to 90%. *Id.* at 862-63.

16 55. The reduction in salmon populations had, and continues to have, a devastating
17 impact on Hoopa. In 1981, relying on an environmental study, the authority provided by the
18 1955 Act, § 2, and the federal trust obligation to protect Hoopa's reserved rights, the Secretary of
19 the Interior ordered an increase in annual flows released from the TRD to the Trinity River
20 downstream of Lewiston Dam. 1981 Secretarial Order. The Secretary confirmed that mitigation
21 is required to provide fish harvest opportunities to Hoopa for both subsistence and commercial
22 purposes and that flow is critical to restoration, preservation, and propagation of the Trinity
23 River fishery resource.

24 56. In 1984, Congress affirmed and authorized the Secretary's restoration goal in the
25 Trinity River Basin Fish and Wildlife Management Act ("1984 Act"), Pub. L. No. 98-541, 98
26 Stat. 2721. Congress found that "the Secretary requires additional authority to implement a
basin-wide fish and wildlife management program in order to achieve the long-term goal of
restoring fish and wildlife populations in the Trinity River Basin to a level approximating that

1 which existed immediately before the start of the construction of the Trinity River division.”
2 1984 Act, § 1(6). Congress directed the Secretary to develop and implement a fish and wildlife
3 management program for the Trinity River Basin designed to restore the fish and wildlife
4 populations in such basin to the levels approximating those which existed immediately before the
5 start of the construction [of the TRD] and to maintain those levels.” 1984 Act, § 2(a). The 1984
6 Act directed the “design, construction, operation and maintenance of facilities to—(A)
7 rehabilitate fish habitats in the Trinity River between Lewistown Dam and Weitchpec; (B)
8 rehabilitate fish habitats in the tributaries of such river below Lewiston Dam and in the south
9 fork of such river; and (C) modernize and otherwise increase the effectiveness of the Trinity
10 River Fish Hatchery.”

11 57. In 1992, Congress enacted the CVPIA which, among other things, sought “to protect,
12 restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity
13 River basins” CVPIA, § 3402(a). In Section 3406(b)(23), Congress required actions to
14 “meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe,
15 and to meet the fishery restoration goals of the [1984 Act].” Section 3406(b)(23) required
16 Hoopa’s concurrence on certain flow measures proposed for implementation.

17 58. Subject to certain exceptions not relevant to this case, CVPIA section 3404(a)
18 prohibited any new contracts for CVP water for any purpose other than fish and wildlife before .
19 . . the provisions of subsections 3406(b)-(d) . . . were met.” Section 3406(b) enumerated twenty-
20 three fish and wildlife restoration activities subject to that requirement. Section 3406(b)(23)¹⁴

21 59. Congress, in CVPIA section 3404(c)(2), requires that: “Upon renewal of any long-
22 term repayment or water service contract providing for the delivery of water from the [CVP], the
23 Secretary shall incorporate all requirements imposed by existing law, including provisions of this
24 title, within such renewed contracts.” CVPIA, § 3404(c)(2). The Secretary shall also administer

25 ¹⁴ The WIIN Act amended CVPIA to delete two programs--(b)(14) and (18)--under 3406(b),
26 resulting in 3406(b)(23) being re-designated as 3406(b)(21) WIIN Act section 4010(g)(1)(B).

1 all existing, new, and renewed contracts in conformance with the requirements and goals of this
2 title. *Id.* Congress further required environmental review pursuant to NEPA prior to renewal of
3 CVP contracts. CVPIA, § 3404(c)(1), § 3409.

4 60. In 1996, Congress enacted the Trinity River Basin and Wildlife Management
5 Reauthorization Act (the “1996 Act”). Pub. L. No. 104-143, 110 Stat. 1338 (1996). The 1996
6 Act amended the scope of the 1984 Act’s mandate to include rehabilitation of fish habitat “in the
7 Klamath River downstream of the confluence with the Trinity River.” 1996 Act, § 3(b). The
8 1996 Act also confirmed that “Trinity Basin fisheries restoration is to be measured not only by
9 returning adult anadromous spawners, but by the ability of dependent tribal, commercial, and
10 sport fisheries to participate fully, through enhanced in-river and ocean harvest opportunities, in
11 the benefits of restoration.” 1996 Act, Section 2.

12 61. In 2000, Interior Secretary Babbitt signed a Record of Decision on Trinity River
13 Mainstem Fishery Restoration (the “TRROD”) which provided for flows intended to restore
14 fishery habitat in the Trinity River downstream of Lewiston Dam. Secretary Babbitt found that
15 the Preferred Alternative was the “action which best meets the statutory and trust obligation [to
16 Hoopa] of the Department to restore and maintain the Trinity River’s anadromous fishery
17 resources.” TRROD, p. 2. In section 3406(b)(23) of the CVPIA, Congress required Hoopa’s
18 concurrence to make the TRROD effective, expressly establishing Hoopa’s role as a co-manager
19 of the Trinity River resources.

20 62. The United States government, including the Department of the Interior, and its
21 agencies, have a trust obligation to preserve, protect, and to restore Hoopa’s rights. The
22 Supreme Court has long recognized “the distinctive obligation of trust” that the federal
23 government owes to Indian tribes and federally protected rights. *Seminole Nation v. United*
24 *States*, 316 U.S. 286 (1942). In carrying out its obligations to the Indians, the United States is
25 charged with “moral obligations of the highest responsibility and trust.” *Id.* at 296-97. This trust
26

1 obligation extends to any federal government action affecting Indians or their rights. *Pyramid*
2 *Lake Paiute Tribe of Indians v. United States Dep't of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990).

3 63. The Ninth Circuit Court of Appeals has specifically recognized that the federal
4 government is trustee of the Hoopa Valley Tribe's federal reserved fishing and water rights.
5 *Parravano*, 70 F.3d at 546; *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206,
6 1214-15 (9th Cir. 2000).

7 64. In 1995, Reclamation's Regional Solicitor explained in a memorandum to the Bureau
8 of Reclamation's Mid-Pacific Regional Director that "Reclamation must exercise its statutory
9 and contractual authority to the fullest extent to protect [Hoopa's] tribal fisheries and tribal water
10 rights." Memorandum on "Certain Legal Rights and Obligations Related to the U.S. Bureau of
11 Reclamation, Klamath Project for Use in Preparation of the Klamath Project Operations Plan"
12 (July 25, 1995). That direction applies no less to Reclamation's management actions relating to
13 the Trinity River.

14 65. Congress has specifically recognized the federal government's trust obligation to
15 Hoopa and has affirmatively legislated direct protection of Hoopa' rights and interests in Trinity
16 River fish and water resources in Section 2 of the 1955 Act, the 1984 Act, and Section
17 3406(b)(23) of the CVPIA. "We also find significant section 3406(b)(23)'s reference to the
18 Hoopa Valley Tribe – and its exclusion of all other tribes." *Haugrud*, 848 F.3d at 1232.

19 66. Since the beginning of the TRD, Congress has mandated that the Interior
20 Department, including Reclamation, act to ensure the preservation and protection of fish
21 populations in the Trinity River. In addition to its general fiduciary trust obligation to protect
22 and preserve Hoopa's reserved rights, Congress imposed a specific requirement on the Interior
23 Department in the 1955 Act to mitigate TRD impacts on Hoopa's fishery upstream of Lewiston.
24 In addition, the 1984 Act directed the Secretary to develop and implement a program that would
25 restore Trinity River fish populations to pre-project (TRD) levels and to modernize and increase
26 the effectiveness of the TRH. In 1992, Congress affirmatively recognized the federal

1 government's specific trust obligation to Hoopa and protection of its fishery resource. In the
2 1996 Act, Congress confirmed that the purpose of the program authorized by the 1984 Act was
3 not merely to preserve fish for preservation's sake, but to provide a harvestable population of
4 salmon for Hupa people as well as other tribal and non-tribal fishers. Congress and the Secretary
5 have repeatedly and explicitly recognized the specific trust obligation that exists regarding
6 protection of Hoopa's trust fishing resource from impacts of the TRD.

7 67. Yet, today, fish populations are not at pre-project levels nor anything close to them.
8 SONCC Coho salmon, a population that includes Klamath and Trinity River Coho, was
9 estimated in 1940 to range between 150,000 and 400,000 naturally spawning fish annually. *See*
10 *Threatened Status for SONCC ESU of Coho Salmon*, 62 Fed. Reg. 24588, 24588 (May 6, 1997)
11 ("Listing Notice"). In 1997, NMFS concluded that "Coho populations in this ESU are very
12 depressed, currently numbering approximately 10,000 naturally produced adults." *Id.* The
13 perilous situation of the SONCC Coho salmon prompted NMFS in 1997 to list the fish under the
14 ESA as threatened. In listing the Coho, NMFS noted that "water diversions" and "water
15 withdrawals" for irrigation were "major activities responsible for the decline of Coho salmon in
16 Oregon and California." *Id.* at 24,592. SONCC coho remain listed as threatened under the ESA
17 due to their continued depressed populations.

18 68. In 1957, the Secretary concluded that the 1955 Act's mandate for preservation and
19 propagation of Trinity River basin fish and wildlife required, as an authorized feature of the
20 TRD, the construction and operation of the Trinity River Hatchery (TRH) near Lewiston,
21 California, to mitigate for loss of anadromous fish production in 109 miles of stream habitat
22 permanently blocked by TRD facilities.

23 69. Although the TRH was authorized and constructed as a feature of the TRD to
24 mitigate those habitat impacts, Reclamation failed to oversee and manage the performance of the
25 State of California's Department of Fish and Wildlife with whom it had contracted to run the
26 TRH. The condition of the TRH has deteriorated during the decades of mismanagement.

1 Reclamation has failed to fulfill the mandates of the 1984 Act to modernize and increase the
2 effectiveness of the TRH (Public Law 98-541 §2(a)(1)(C)) or require CVP contractors to pay the
3 cost pursuant to CVPIA section 3406(b)(23).

4 70. A 2012 California Hatchery Review Report reported, with regard to the Trinity
5 River, that:

6 Mitigation goals for lost adult production were determined from pre-project studies of
7 anadromous fish population in the basin. The USFWS and CDFG (1956) estimated that
8 5,000 coho; 3,000 spring Chinook; 8,000 summer Chinook and 24,000 fall Chinook; and
9 10,000 steelhead (no run timing was designated) passed above the Lewiston Dam site
10 prior to its construction. Total annual adult production goals (catch plus escapement) for
11 TRH [Trinity River Hatchery] were further defined in 1980 to be 7,500 coho, 6,000
12 spring Chinook, 70,000 fall Chinook and 22,000 steelhead (Frederickson et al. 1980).
13 Escapement goals to the hatchery were further defined in 1983 as 2,100 coho, 3,000
14 spring Chinook, 9,000 fall Chinook and 10,000 steelhead (USFWS 1983).

15 71. Average returns of hatchery fish to Trinity River above Willow Creek in recently
16 completed brood cycles (run years 2015-2018) fall far short of the 1983 goals for all species
17 (which goals still less than the estimated pre-project escapement levels). Significantly an
18 average of only 6,200 fall Chinook returned to TRH between 2010 and 2019. This has
19 substantially deprived Hoopa of its right to take fish.

20 72. In 2004, the Ninth Circuit Court of Appeals recognized that: “Restoration of the
21 Trinity River fishery, and the ESA-listed species that inhabit it . . . are unlawfully long
22 overdue.” *Westlands*, 376 F.3d at 878. Today, Hupa people are still not able to harvest
23 meaningful quantities of fish to support their families or to provide the moderate livelihood
24 based on fish that was promised to them by the federal government long before development of
25 the TRD.

26 B. In Approving Conversion of the CVP Contracts to Permanent Contracts,
Reclamation Failed to Comply With CVPIA Section 3404(c)(2).

73. Reclamation must comply with its legal responsibilities relating to restoration and
preservation of the Trinity River fishery, specifically including CVPIA section 3404(c)(2) and
NEPA. In addition to conducting appropriate environmental review, Reclamation must include

1 all existing requirements of law relating to the Trinity River fishery restoration program and the
2 TRH and payments therefore, as well as the in-basin priority of Trinity River flows over out-of-
3 basin diversions, in the converted contracts.

4 74. On February 28, 2020, Reclamation approved the conversion of 14 CVP contracts
5 into permanent water service contracts including a contract with Westlands Water District,
6 Contract No. 14-06-200-495A-IRI-P in the amount of 1,150,000 acre-feet per year. A table of
7 all fourteen contract conversions approved on February 28, 2020 is found at Exhibit 2 to this
8 Complaint.

9 75. Reclamation is likewise believed to be in the process of converting an additional
10 26 CVP contracts, which are shown in a table on Exhibit 3 to this Complaint.

11 76. The permanent contracts approved by Reclamation violate CVPIA section 3404(c)(2)
12 because they fail to incorporate the requirements imposed by existing law, including the fishery
13 restoration provisions of the CVPIA and associated payment obligations, within such renewed
14 contracts. Section 3404(c)(2) requires compliance with and incorporation of fishery restoration
15 requirements, including those applicable to the Trinity River, in all long-term contracts.

16 77. The permanent contracts also fail to include terms subordinating the out-of-basin
17 water deliveries to CVP contractors to in-basin flows that have legal priority pursuant to the
18 CVPIA and the 1955 Act. Failure to affirmatively incorporate the applicable legal requirements
19 relating to protection of the Trinity River and Hoopa's trust resources into the contracts is a clear
20 and express violation of CVPIA section 3404(c)(2).

21 78. Contract provisions approved by Reclamation in the converted contracts are in direct
22 conflict with CVPIA and other existing legal requirements relating to Trinity River flows and
23 fishery restoration measures. For example, paragraph 37 of the converted contract with
24 Westlands Water District states:

25 By entering into this Contract, the Contractor does not waive its rights to contest the
26 validity or application in connection with the performance of the terms and conditions of
this Contract of any Federal law or regulation; Provided, That the Contractor agrees to

1 comply with the terms and conditions of this Contract unless and until relief from
2 application of such Federal law or regulation to the implementing provision of the
3 Contract is granted by a court of competent jurisdiction.

4 This language is in direct conflict with the requirement of Section 3404(c)(2) of the CVPIA that
5 expressly requires full incorporation of the existing requirements of federal law, which would
6 include the CVPIA fishery restoration measures and legal requirements confirming priority of in-
7 basin flows pursuant to the CVPIA and 1955 Act over out-of-basin diversions.

8 79. The contracts also unlawfully fail to explicitly include terms regarding CVP
9 contractors' payment obligations regarding implementation of the CVPIA's fishery restoration
10 programs.

11 80. Reclamation is legally required to operate the TRD and CVP in a manner that
12 subordinates out-of-basin uses of TRD water to the Trinity River's in-basin needs. Reclamation
13 is attempting to write those priorities out of the law by enacting permanent contracts that fail to
14 recognize and incorporate those applicable priorities and legal requirements as contract terms.
15 This expressly violates CVPIA section 3404(c)(2) and renders the contract conversions unlawful.

16 81. Hoopa seeks to prevent further deleterious impacts to its fishery from Reclamation's
17 unlawful contracting actions. Reclamation has violated Section 3404(c)(2) of the CVPIA by
18 ignoring and failing to comply with its mandatory duty to "incorporate all requirements imposed
19 by existing law, including provisions of this title [the CVPIA], within such renewed contracts."
20 This is no minor violation; Section 3404(c)(2) is designed to ensure that CVP contracts, and any
21 out-of-basin diversions authorized therein, will remain expressly subject to the fishery restoration
22 requirements and the in-basin flow priorities contained in existing laws including the 1955 Act,
23 the CVPIA, and the TRROD. Reclamation's attempt to execute permanent water contracts
24 without these required terms is an unlawful effort to evade the established fishery restoration
25 measures and in-basin priorities affirmatively designed to protect Hoopa and the Trinity River
26 resources it relies upon. The contracts, as approved, are unlawful.

1 82. Hoopa wrote to Regional Director Conant on December 16, 2019 and on March
2 24, 2020 pointing out the need to incorporate appropriate provisions into the contracts at issue.
3 These entreaties were ignored, contrary to 43 USC 485h(f). Further, the contracts lack validation,
4 which is required by 43 U.S.C. § 511.

5 C. In Approving Conversion of the CVP Contracts to Permanent Contracts,
6 Reclamation Failed to Comply With NEPA.

7 83. Hoopa seeks to enforce Reclamation's mandatory obligation to evaluate the
8 environmental impacts of its water contracting actions pursuant to the CVPIA and NEPA and to
9 evaluate alternatives to its actions that would better protect the imperiled Trinity River resources
10 that are impacted by the out-of-basin diversions resulting from the contracts.

11 84. In 1999, Reclamation issued a programmatic EIS pursuant to the CVPIA. However,
12 that programmatic EIS did not evaluate the environmental effects of converting Reclamation's
13 existing CVP contracts to permanent contracts, but provided that future NEPA review would
14 occur at the level of specific actions, including new contracts and contract renewals consistent
15 with NEPA's tiering provisions.

16 85. In 2000, following consultation with Reclamation pursuant to section 7 of the ESA
17 (16 U.S.C. § 1536), the United States Fish and Wildlife Service released a biological opinion for
18 the implementation of the CVPIA and the continued operation and maintenance of the CVP,
19 which stated that:

20 Once the long-term contract renewal negotiations are completed, the renewals will be
21 subject to a separate, tiered analysis that is consistent with the NEPA tiering in the PEIS.
22 No contracts will be renewed until the appropriate environmental review has been
23 completed. Reclamation will consult either formally or informally with the Service
24 before executing a contract. The site specific, tiered analysis will address direct and
25 indirect effects of contract renewal.

26 86. Reclamation has not prepared an EIS, EA, or otherwise complied with NEPA in any
respect prior to making the contracts at issue permanent and its failure to comply with NEPA is
ongoing with respect to contracts that remain in the process of conversion to permanent.

1 87. The out-of-basin diversion of water to the Central Valley from the Trinity River
2 basin, which would otherwise flow through the Trinity River, significantly impacts the fish,
3 water, environmental, and socioeconomic resources of the Trinity River basin. The conversion
4 of CVP contracts to permanent contracts will perpetuate these adverse impacts. Locking in the
5 contracts for all time without environmental analysis of any kind violates NEPA.

6 88. The importance of the Trinity River and its resources to Hoopa and to the fulfillment
7 of the Hoopa Valley Reservation as a permanent homeland for Hoopa and its people, the
8 recognition and confirmation by Congress of the federal government's trust responsibilities to
9 Hoopa, and the imperiled status of the Trinity River fishery provide unique characteristics that
10 support NEPA review. 40 C.F.R. § 1508.27(b)(3).

11 89. The conversion and locking-in of the water contracts is highly controversial, which
12 supports NEPA review. 40 C.F.R. § 1508.27(b)(4).

13 90. Locking-in the contracts as permanent contracts without NEPA review forecloses
14 inquiry into possible future changes in climate and to species status and possible ways to
15 mitigate impacts resulting from such changes. 40 C.F.R. § 1508.27(b)(5).

16 91. Reclamation's conversion of each contract establishes a precedent for future actions
17 with significant effects and represents a decision in principle about future consideration, which
18 supports NEPA review. 40 C.F.R. § 1508.27(b)(6). Reclamation is considering conversion of
19 dozens of CVP contracts. Each contract conversion establishes a precedent for future actions
20 with significant effects.

21 92. Each contract conversion is related to the conversion of the dozens of other CVP
22 contracts, which demand water supply from sources that include the Trinity River, in addition to
23 other past, ongoing, and reasonably foreseeable future actions that affect the Trinity River Basin
24 and its resources. The cumulative impact warrants NEPA review. 40 C.F.R. § 1508.27(b)(7).

25 93. Salmon are not only a source of subsistence and economy for Hoopa, but are also a
26 cultural and spiritual resource. In addition, salmon species in the Trinity River are in imperiled

1 condition. Some, such as SONCC coho, are already listed under the Endangered Species Act
2 while others, such as Chinook species, are being reviewed for possible listing. These factors
3 further support NEPA review. 40 C.F.R. § 1508.27(b)(8), (9).

4 94. The conversion of the contracts also separately threatens violations of Federal and
5 State laws and requirements imposed for the protection of the environment including Section
6 3404(c)(2) of the CVPIA and the fish protection measures and in-basin flow requirements found
7 in the CVPIA, the TRROD, and the 1955 Act. As discussed herein, the converted contracts do
8 not incorporate all requirements imposed by existing law in violation of Section 3404(c)(2). The
9 locking-in of the contracts also threatens the requirements of the 1984 Act as well as the ESA.
10 40 C.F.R. § 1508.27(b)(10).

11 95. Reclamation's failure to prepare an EIS or EA on the conversion of the contracts
12 constitutes failure to proceed in the manner required by NEPA because entering into each
13 contract was a major federal action significantly affecting the quality of the human environment.
14 42 U.S.C. § 4332(2)(C). Reclamation's failure to prepare an EIS or EA on the conversion of the
15 contracts also constitutes agency action unlawfully withheld or unreasonably delayed.

16 96. Reclamation's failure to prepare an EIS or an EA foreclosed its analysis of
17 alternatives to the proposed action in violation of NEPA. 40 C.F.R. § 1502.14(a). In light of the
18 continuing failure to meet the goals and requirements of the 1984 Act and to restore the Trinity
19 River fishery to pre-TRD levels, and given the confirmed impact that out-of-basin water
20 diversions have on Trinity River resources, the failure to consider alternatives to permanently
21 locking-in the water diversions to CVP contractors (as opposed to alternatives that either reduce
22 or otherwise mitigate the continuing effects of such diversions on environmental resources) is
23 unlawful.

24 **VII. CLAIMS FOR RELIEF**

25 **FIRST CLAIM FOR RELIEF**

26 **Violations of CVPIA and the APA.**

1 97. Hoopa re-alleges, as if fully set forth herein, each and every allegation set forth in
2 this Complaint.

3 98. Reclamation violated and is violating Section 3404(c)(2) of the CVPIA and the APA
4 by executing or otherwise approving the conversion of CVP renewal contracts into permanent
5 water service contracts without expressly incorporating all requirements imposed by existing
6 law, specifically including requirements imposed by the 1955 Act, 1984 Act, CVPIA, and
7 TRROD, which impose specific fishery restoration measures and payment obligations and which
8 confirm the in-basin priority of Trinity River flow releases over out-of-basin diversions to the
9 Central Valley contractors, as terms within such contracts. Specifically, the contracts fail to (1)
10 secure recognition of fishery restoration as a project purpose; (2) memorialize in the contract the
11 O&M cost obligation under CVPIA §3406 (b)(23); (3) specify the 2000 TRROD, the 2017 ROD
12 and 1955 Act Proviso 2 water as expressly acknowledged and accepted by the contractors; (4)
13 memorialize the 1979 Krulitz opinion confirming Trinity Basin priority; (5) address TRH
14 failures and mismanagement; and (6) declare TRH modernization and improved effectiveness is
15 an O&M expense per CVPIA §3406 (b)(23).

16 99. Reclamation's actions and omissions, specifically including their failure to comply
17 with the CVPIA as described herein, is arbitrary, capricious, an abuse of discretion, and
18 otherwise not in accordance with the law and are reviewable in this Court under the APA, 5
19 U.S.C. §§ 702 - 706.

20 100. Due to Reclamation's violations of the CVPIA and the APA, Reclamation's
21 approvals of the contracts are unlawful, and the contracts are legally invalid and must be set
22 aside by this Court.

23 **SECOND CLAIM FOR RELIEF**

24 **Violations of NEPA and APA**

25 101. Hoopa re-alleges, as if fully set forth herein, each and every allegation set forth in
26 this Complaint.

1 102. Reclamation's execution and/or approval of the conversion of CVP renewal
2 contracts into permanent water service contracts constitutes a major federal action or actions that
3 will significantly affect the quality of the human environment. Reclamation has a duty under
4 NEPA to prepare an EIS or an EA before approving conversion of the contracts.

5 103. Reclamation failed to prepare an EIS or an EA before approving the contracts in
6 violation of NEPA.

7 104. Reclamation failed to develop or consider alternatives to the proposed contract
8 conversion actions in violation of NEPA.

9 105. Reclamation's approvals of the conversion of the CVP contracts to permanent water
10 service contracts without any compliance with NEPA is unlawful under NEPA and the APA.

11 106. Reclamation's failure to comply with NEPA prior to its execution and/or approval
12 of the contract conversions constitutes arbitrary and capricious agency action, is an abuse of
13 discretion, and is contrary to law and procedures required by law and are reviewable in this
14 Court under the APA. 5 U.S.C. §§ 702 - 706.

15 107. Due to Reclamation's violations of NEPA and the APA, Reclamation's approval of
16 the contracts is unlawful, and the contracts are legally invalid and must be set aside by this
17 Court.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, plaintiff Hoopa respectfully requests that this Court:

- 20 A. Find and declare that Reclamation has failed to comply with Sections 3404(c)(2)
21 of the CVPIA by executing or otherwise approving the conversion of CVP
22 renewal contracts into permanent water service contracts without expressly
23 incorporating all requirements imposed by existing law, specifically including
24 requirements imposed by the 1955 Act, 1984 Act, CVPIA, and TRROD, which
25 impose specific fishery restoration measures and payment obligations and which
26

1 confirm the in-basin priority of Trinity River flow releases over out-of-basin
2 diversions to the Central Valley contractors, as terms within such contracts;

3 B. Find and declare that Reclamation's failure to prepare an EIS or an EA to assess,
4 disclose, and consider the environmental effects of the contract conversions, and
5 alternatives to the contract conversions, violates NEPA;

6 C. Find and declare that Reclamation's approvals of the contract conversions are
7 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
8 law, and without observance of procedure required by law;

9 D. Vacate, set aside, rescind, and nullify all of Reclamation's contract conversions
10 challenged herein;

11 E. Enjoin Reclamation from taking any action pursuant to the contract conversions,
12 until Reclamation has fully complied with NEPA and Section 3404(c)(2) of the
13 CVPIA;

14 F. Enjoin Reclamation from converting any other contracts absent full compliance
15 with CVPIA Section 3404(c)(2) and NEPA;

16 G. Grant other preliminary and/or permanent injunctive relief;

17 H. Award Hoopa its costs of litigation, including reasonable attorneys' fees; and

18 I. Grant Hoopa such additional relief as the Court may deem just and proper.

19 DATED this 13th day of August 2020.

20
21 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

22 /s/ Thomas P. Schlosser
23 Thomas P. Schlosser WSBA #06276
24 Attorneys for Plaintiff Hoopa Valley Tribe
25
26