Stanford Law School
Mills Legal Clinic

Deborah A. Sivas
Matthew J. Sanders
Stephanie L. Safdi
Environmental Law Clinic
Mills Legal Clinic at Stanford Law School

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 497.9443
dsivas@stanford.edu
matthewjsanders@stanford.edu
ssafdi@stanford.edu

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Via Electronic Submission

Environmental Protection Agency

Re: Comments on Proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights

Submitted by Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, and Save California Salmon

INTRODUCTION

The Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, and Save California Salmon respectfully submit this comment on the Proposed Rule by the U.S. Environmental Protection Agency ("EPA") to revise the Federal Clean Water Act ("CWA") water quality standards regulations to protect tribal reserved rights ("Proposed Rule"). We write in strong support of EPA's recognition that tribal reserved rights may be impaired by water quality standards that fail to, for instance, ensure sufficient instream flows to protect native fisheries and other riparian resources. And we write in strong support of EPA's efforts through the Proposed Rule to clarify its position that water quality standards must account for and protect tribal reserved rights, and to create a consistent process for effecting such protections. At the same time, as California tribes, and advocates for California tribes, that were cheated by the state and federal governments out of treaty reservations, we have significant concerns about the shortcomings of the Proposed Rule for many California tribes. We therefore also write to urge EPA to take a more expansive approach to protecting and promoting tribes' beneficial uses and stewardship of water and riparian resources.

As discussed below, the Proposed Rule falls short for tribes like the Winnemem Wintu and Shingle Springs Band of Miwok Indians, who were signatories to unratified treaties. The ongoing injustice that the federal government's duplicity wrought is brought into stark relief as those with recognized reserved rights appropriately gain protections, while others are left behind. The federal government's trust responsibilities toward tribes, and particularly toward California tribes in light of its role in negating their treaty reservations, should sweep more broadly.

To address these issues, we start by recounting the history of broken treaty promises that forms the foundation on which this Proposed Rule sits for California tribes. We urge EPA to more fully engage with this history. Second, we encourage EPA to clarify that any doubts regarding the scope of reserved rights for purposes of establishing water quality standards will be

resolved in favor of tribes, consistent with EPA's fiduciary obligations toward tribes, canons of Federal Indian law, and recognition of challenges and resource limitations that tribes will face in demonstrating their reserved rights in this venue. For similar reasons, we urge EPA to ensure that decisions on reserved rights for purposes of establishing water quality standards do not prejudice efforts by tribes to adjudicate, quantify, or enforce their reserved rights more generally. Finally, we ask that EPA exercise its trust responsibilities toward all tribes, including California tribes without federal recognition, by acknowledging the federal government's responsibility toward tribes who were deceived by its refusals to ratify the California treaties and by advancing designation and protection of tribal beneficial uses.

COMMENTING PARTIES

The **Shingle Springs Band of Miwok Indians** are Indigenous Peoples of the Sacramento Valley in Northern California. Waterways of the Sacramento-San Joaquin River Delta ("Delta") – including the Sacramento, American, Feather, Bear, and Cosumnes Rivers – are the lifeblood of the Tribe. The Tribe has stewarded and utilized resources from these rivers for sustenance, medicine, transportation, ceremony, clothing, and shelter, among other cultural and subsistence uses, since time immemorial.[1]

The 600 present-day members of the Shingle Springs Band of Miwok Indians are descendants of the Miwok and Southern Nisenan Indians who thrived in California's fertile Central Valley for thousands of years before contact with Europeans. The Tribe is also descended from ten native Hawaiians who were forcibly brought to Nisenan territory in 1839 by John Sutter, a Swiss land baron who enslaved hundreds of Indigenous people to power his nearly 50,000-acre ranch in the Sacramento Valley. The Tribe's deep connection to Delta waterways was severed when its members were forced from their ancestral villages through colonization, disease, state-sponsored violence, and privatization of land, among other forms of dispossession.

The Secretary of the Interior purchased the 160-acre Shingle Springs Rancheria east of Sacramento in El Dorado County and placed it into trust for the displaced Tribe in 1920. However, the landlocked and roadless Rancheria remained inaccessible to the Tribe for decades. The Rancheria is also largely devoid of usable surface water resources and far from the Delta waterways that define the Tribe's way of life.

The Tribe's removal from ancestral waterways has eroded its identity, traditional knowledge, and cultural practices. In recent years, the Tribe has been returning to the Delta's waterways and working to restore connections to cultural resources and traditional ways of life. In 2020, the Tribe purchased a small tract of land at its ancestral village site in Verona, where the Feather River meets the Sacramento River. Yet, despite regaining this limited riparian access to ancestral waterways, the degraded condition of the Delta is impeding the Tribe's long-sought reconnection. For example, traditional riparian cultural resources – like tule, a long grassy plant

[1] Shingle Springs Band of Miwok Indians et al., *Title VI Complaint and Petition for Rulemaking for Promulgation of Bay-Delta Water Quality Standards* at Exhibit E, Attachment B, Decl. of Malissa Tayaba ¶ 2 (Dec. 16, 2022), https://www.restorethedelta.org/wp-content/uploads/2022-12-16-Bay-Delta-Complaint-and-Petition.pdf ("Decl. of Malissa Tayaba").

that once lined the waterways and from which the Tribe fashioned fishing boats, regalia, and other important cultural and subsistence implements – either no longer exist or are largely unsuitable for use because of the polluted state of the water.

The **Winnemem Wintu** are a California Tribe whose identity and existence are intertwined with the headwaters of the Delta. In the Winnemem language, "Winnemem Wintu" translates to Middle Water People, reflecting the Tribe's identification with its ancestral homelands along the McCloud River between the Sacramento and Pit Rivers. These waters have sustained the life and spirituality of the Tribe since time immemorial.[2]

The Nur, or Chinook salmon, which once flourished in these waterways, are the source of Winnemem Wintu culture and identity. In the Tribe's creation story, the Winnemem Wintu were helpless and could not speak when they were brought forth by the Creator from a sacred spring on Mt. Shasta. The Nur took pity on the Winnemem Wintu and gave their voice to the Tribe. In return, the Winnemem Wintu promised to always speak for the Nur. Side by side, the Winnemem Wintu and the Nur have depended on each other for thousands of years – the Winnemem speaking for, caring for, and endeavoring to protect the salmon, and the salmon giving themselves to the Winnemem to provide sustenance throughout the year. Ceremonies, songs, dances, and prayers about the relationship between the Nur and the Winnemem Wintu are the fabric of Winnemem Wintu culture, religion, and spirituality.

Excessive appropriation of Delta water resources has contributed to the near extinction of Chinook salmon, thereby threatening the continued existence of the Winnemem Wintu as a People. This existential threat layers on top of centuries of state-supported campaigns and projects to remove the Winnemem Wintu from their historic homelands and divest them of their relationship to the water. These efforts culminated in the U.S. Bureau of Reclamation's construction of the Shasta Dam in the 1930s and 40s as part of the federal Central Valley Project. The dam flooded over 90 percent of the Winnemem Wintu's historical village sites, sacred sites, burial sites, and cultural gathering sites and blocked the Nur from migrating into the Delta headwaters to spawn. In the words of the Tribe's Chief, Caleen Sisk: "We used to be 20,000 people along the river and we're dwindling out like the salmon. We only have 126 members of the Tribe left and so if the salmon are going extinct, we can only guess that so will we."

Save California Salmon is a 501(c)(3) organization dedicated to restoring clean and plentiful flows and fish habitat, removing dams, and improving water quality throughout Northern California watersheds so that the region's fish-dependent tribes and communities can thrive. Save California Salmon is also dedicated to fighting emergent threats on rivers, such as new dams, diversions, and pipelines, and empowering communities affected by diversions and poor water management to fight for rivers and salmon.

Save California Salmon works with over a dozen California tribes with an interest in water quality and fisheries-related decisions, as well as with tribal members directly. Save California Salmon's advisory board is chiefly comprised of leaders and members of tribes from the Northern California watersheds in which the organization works – including the Winnemem

[2] *Id.* at Exhibit E, Attachment B, Decl. of Gary Mulcahy ("Decl. of Gary Mulcahy").

Wintu Tribe and Shingle Springs Band of Miwok Indians, as well as the Hoopa Valley Tribe, Karuk Tribe, Pit River Tribe, Wiyot Tribe, Blue Lake Rancheria, Mechoopda Indian Tribe, and the Yurok Tribe – and who depend on healthy and sustainable surface water flows for spiritual, cultural, subsistence, and recreational purposes and for satisfaction of reserved rights.

DISCUSSION

A. For California tribes, the Proposed Rule rests on a foundation of broken treaty promises and dispossession.

The Proposed Rule would help to ensure that water quality standards under the CWA protect aquatic and aquatic-dependent resources reserved to tribes through treaties, statutes, executive orders, or other sources of Federal law. But the Proposed Rule has a major limitation: "tribes without federally reserved rights to aquatic or aquatic-dependent resources will not be directly impacted by this rulemaking."[3] As EPA acknowledges, tribes whose interests are left out of the Proposed Rule include those who "negotiated treaties with the U.S. government that were not ratified."[4] This passing reference to unratified treaties does not do justice to the interests of the many California tribes who were deprived of their treaty reserved rights through federal and state deception.

Between 1851 and 1852, 139 California tribes were compelled to sign 18 treaties that would have ceded the tribes' ancestral lands in exchange for reservations, and the benefits that flowed from them, including reserved water rights.[5] The lands reserved to the tribes under the treaties encompassed 7.5 million acres – upwards of seven percent of the modern state of California.[6] The Winnemem Wintu Tribe, for instance, signed a Treaty of Peace and Friendship on August 16, 1851, at Reading's Ranch in Cottonwood, California.[7] This treaty promised a 25-square-mile reservation comprising land along the Pit, McCloud, and Sacramento Rivers.[8]

Had these treaties been ratified, they would have guaranteed California tribes extensive reserved rights to water and aquatic resources. But the federal government broke its promises. Following objections from California's legislature and industry that the treaties would reserve valuable mineral estate and agricultural lands to the tribes, the U.S. Senate refused to ratify the treaties and instead placed the treaties and related documents "under an injunction of secrecy"

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[3] Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, 87 Fed. Reg. 74361, 74364, 74378 (Dec. 5, 2022) ("Proposed Rule").
[4] *Id.* at 74364.
[5] The Advisory Council on California Indian Policy, *The ACCIP Historical Overview Report: The Special Circumstances of California Indians* 5 (1997), https://cthcupdates.files.wordpress.com/2021/05/accip-historical-overview-report-1.pdf ("*ACCIP Historical Overview Report*").
[6] *See* National Park Service, *A History of American Indians in California: 1849-1879*, https://www.nps.gov/parkhistory/online_books/5views/5views1c.htm; *cf. ACCIP Historical Overview Report* at 5 (reporting that treaties would have retained 8.5 million acres for the tribes).
[7] Decl. of Gary Mulcahy at ¶ 9.
[8] *Id.*

for over fifty years.[9] In the words of historian Benjamin Madley, the "eighteen treaties comprised evidence related to a deceitful crime of vast proportions and documented a mass betrayal" by the federal government toward California tribes.[10]

Although many of the signatory tribes were unaware that the treaties had not been ratified and their inherent title to the lands remained intact, state and federal officials nonetheless acted as if the lands had been ceded, opening them up for settlement by non-Natives without establishing the reservations.[11] When Natives who had left their ancestral lands for reservations returned after the reservations were nullified by the U.S. Senate, they found that their lands had been appropriated.[12] The government's duplicity rendered Native tribes "landless"[13] and robbed them of federal reserved rights that would have adhered to the treaty reservations.[14] At the same time, state-sponsored murders of tribal members together with state and federal laws – like the federal Land Claims Act – furthered dispossession and removal of California tribes from their ancestral lands.[15]

Over fifty years later, a clerk in the Senate Archives uncovered the "lost" California treaties, leading to federal investigations of the condition of tribes in the state. Unsurprisingly, many were struggling to survive on "unusable lands abandoned by settlers."[16] In response to the investigations, Congress appropriated money to purchase land for California tribes. The resulting rancherias "did provide a refuge" for some tribes, but "the main goal of the land acquisition program – to provide homeless California Indians with a secure and usable land base – was not realized in most cases."[17] Rancherias were often located in rocky and inhospitable

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[9] *ACCIP Historical Overview Report* at 5; *see also* National Park Service, *A History of American Indians in California* (explaining that the California State Senate objected that the treaties "committed an error in assigning large portions of the richest mineral and agricultural lands to the Indians, who did not appreciate the land's value").

[10] Benjamin Madley, *An American Genocide: The United States and the Californian Indian Catastrophe, 1846-1873* at 168 (2017); *see also id.* at 14 (recording that state and federal "lawmakers played a key role in th[e] genocide" against Native Californians "by stripping them of legal rights, by making anti-Indian crimes extremely difficult to prosecute, and by refusing to ratify treaties signed by federal agencies and California Indian leaders that could have restrained the violence").

[11] *ACCIP Historical Overview Report* at 5; *see also* Madley, *An American Genocide* at 211.

[12] Madley, *An American Genocide* at 212.

[13] *ACCIP Historical Overview Report* at 7.

[14] Madley, *An American Genocide* at 168.

[15] *See id.* at 234 (recounting that by the mid-1850s, "[a] new era of increasingly lethal state-sponsored Indian killing had begun as the US government, state legislators, militiamen, and vigilantes perfected the killing machine"); *ACCIP Historical Overview Report* at 5 (detailing the role of the Land Claims Act of March 3, 1851 in denying tribes' legal interests in ancestral lands); An Act to Ascertain and Settle the Land Claims in the State of California, 9 Stat. 631, 632-33 (1851).

[16] *ACCIP Historical Overview Report* at 11.

[17] *Id.* at 12.

land with scant water resources and removed from tribal homelands.[18] For example, the Shingle Springs Rancheria lies 40 miles away from Pusune, a historic tribal village at the confluence of the Sacramento and American Rivers.[19] Pusune was a bustling "center of life," with the rivers serving as the "grocery store" for the tribe and its "source of . . . spiritual and religious practice, providing materials for traditional regalia, cultural practices, and sites for ceremony."[20] In contrast, on the Shingle Springs Rancheria, the only surface water comes from two ephemeral streams that are dry except for short periods of time following precipitation.[21]

Some tribes, including the Winnemem Wintu, were never accorded rancherias at all.

This history does not take away from the significant benefits that will accrue to tribes holding federal reserved rights under the Proposed Rule; rather, it shows that those benefits do not fully protect the interests of many California tribes whose reserved rights were diminished by government action.

B. EPA should ensure that implementation of the Proposed Rule adequately protects tribes' interests and ability to assert reserved rights.

The Proposed Rule raises important implementation questions, particularly for tribes like Shingle Springs Band of Miwok Indians, whose reserved rights have not been subject to prior adjudication. The Proposed Rule is explicit that "tribal reserved rights means any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law" and that "instruments other than treaties may also reserve tribal rights, with equally binding effect."[22] This includes rights created by executive order or legislation establishing reservations or rancherias in California.

Where reserved rights are implicit – that is, where they do not explicitly describe "rights to aquatic and/or aquatic-dependent resources" such as the "right to fish in [tribes'] usual and accustomed areas" – the extent of those reserved rights and the protections that adhere to them may be less clear.[23] EPA must take pains to ensure that any ambiguities or failures by drafters to make reserved rights explicit do not work against tribes in establishment of adequately protective water quality standards.

Three important points should weigh on determinations of the extent of implied tribal reserved rights for purposes of establishing water quality standards under the CWA. First, the

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[18] *Id.* at 12.
[19] Decl. of Malissa Tayaba at ¶ 11.
[20] *Id.* at ¶ 10.
[21] *Title VI Complaint and Petition for Rulemaking*, Attachment F at 26.
[22] Proposed Rule at 74363, 74364 & n.22 (noting that in *Menominee Tribe of Indians v. U.S.*, the Supreme Court found that while "nothing was said in the 1854 treaty about hunting and fishing rights," such rights were implied because the treaty phrase "to be held as Indian lands are held" including the right to fish and hunt")
[23] *See Id.* at 74363, 74364 n.26.

"Indian canons of construction" require that "any ambiguities are to be resolved in [tribes'] favor," including in the context of "determining the scope of tribes' rights under statutes or executive orders setting aside land for tribes."[24] These canons should apply equally to any consideration of tribal reserved rights under the CWA.

Second, states and the federal government should be cognizant of power dynamics and resource constraints facing many tribes in presenting and asserting reserved rights in water quality standard proceedings. Agencies must take care to ensure careful, early, and comprehensive notification and outreach to tribes. And they must follow up to provide tribes with resources and adequate consultation and process to ensure their voices will be heard and their interests centered in decision-making.

Third, EPA should be clear that such determinations will not be construed to have any preclusive effect on or otherwise prejudice subsequent efforts by tribes to obtain recognition of reserved rights, including but not limited to efforts to quantify reserved water (or "*Winters*") rights. This is essential because, even with implementation of measures for tribal inclusion in water quality standard proceedings discussed above, not all tribes will be able to fully participate nor be accorded full due process in such proceedings, and their interests in reserved rights should not be prejudiced by these deficiencies.

C. EPA should exercise its trust responsibility to acknowledge and protect tribal beneficial uses of water beyond the scope of reserved rights.

The federal government's general trust responsibility toward tribes "has been the cornerstone of federal-Indian relations since the founding of the American republic," and "exists between the United States and all Indian people."[25] The distinction between federally recognized and non-federally recognized tribes "often seems to be made out of a habitual reluctance to assume broader responsibility, even when Congress intends that agencies do so."[26] Efforts to restrict benefits on the basis of federal recognition may "constitute[] a breach of trust between the government and the California Indians."[27]

In light of its trust responsibility toward all tribes, EPA should build on this Proposed Rule by exercising its authority to protect the rights and interests of tribes in water, aquatic resources, and aquatic-dependent resources, even when those rights and interests fall outside of recognized tribal reserved rights.[28] While EPA acknowledges that "this rulemaking does not address all obstacles to the full exercise of [non-federally reserved rights]" and indicates that it

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[24] Proposed Rule at 74364 & n.17.
[25] The Advisory Council on California Indian Policy, *The ACCIP Trust and Natural Resources Report* 6, 8 (1997).
[26] *Id.* at 8.
[27] *See id.* at 9.
[28] Proposed Rule at 74378 (asserting that "tribes without aquatic or aquatic-dependent resources will not be directly impacted by this rulemaking").

"will continue to work with states and tribes" to protect those rights, we urge EPA to take the following concrete steps toward that end.[29]

First, the final rule should do more to acknowledge the history of broken treaties outlined above, in which the federal government deceived tribes out of both their ancestral lands and the lands and reserved rights to which they were entitled under these federal instruments. Currently, this history is relegated to a hollow statement that "some tribes negotiated treaties with the U.S. government that were not ratified," citing to a Ninth Circuit decision holding that such treaties carry no legal effect.[30] Without more, this treatment minimizes the government's role in that deception and dispossession, and its responsibility to rectify it.

Second, EPA should substantively act to mitigate these harms by formalizing protections for non-recognized tribes. EPA suggests that "many of the coordination and collaboration processes that will be developed to implement this rule will also lead to better protection of aquatic and aquatic-dependent resources not referenced in treaties and similar instruments because this rulemaking aims to facilitate greater coordination between state and tribal governments."[31] However, the experience of many tribes, including the Shingle Springs Band of Miwok Indians and the Winnemem Wintu Tribe, with state agencies provides reason to be skeptical that this aspiration of improved state protection of tribal resources will be realized absent strict legal requirement.[32] Instead of pursuing meaningful consultation with tribes to affirmatively protect their water-related cultural resources and uses, states including California have demonstrated a recurring practice of excluding tribes from decision-making processes and coordinating with them only as a check-the-box exercise.[33] In addition, the California State Water Resources Control Board has taken an expansive view of the degree to which tribal water rights, including reserved rights, as well as traditional cultural practices have been "lost."[34] In reality, California tribes have persevered in the face of major obstacles in maintaining cultural, spiritual, and subsistence practices and in asserting reserved rights.[35] This disconnect further demonstrates the importance of EPA exercising its trust responsibility to dignify and protect those rights and interests.

Third, we urge EPA to use its authority under the Clean Water Act to advance designation and protection of Tribal Beneficial Uses ("TBUs"). TBUs have been defined as "an array of beneficial uses including, but not limited to: recreation; navigation; and preservation and

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[29] *Id.*
[30] *Id.* at 74364 & n.20.
[31] *Id.* at 74378.
[32] *See generally*, *Title VI Complaint and Petition for Rulemaking* at 34.
[33] *See Title VI Complaint and Petition for Rulemaking* at 34.
[34] *See* Cal. State Water Res. Control Bd., *Resolution No. 2021-0050* at 3 (2021) (suggesting that "[h]istorical land seizures, broken promises related to federal treaty rights, and failures to recognize and protect federal reserved rights have resulted in the loss of associated water rights and other natural resources of value, as well as cultural, spiritual, and subsistence traditions that Native American people have practiced since time immemorial.")
[35] Decl. of Malissa Tayaba; Decl. of Gary Mulcahy.

enhancement of fish, wildlife, and other aquatic resources or preserves."[36] This includes, in California, tribal subsistence fishing and tribal tradition and culture.[37]

Specific designation of TBUs is vital for protecting tribal uses of waterways. As the Proposed Rule explains, "[a]n advantage to establishing designated uses that explicitly recognize specific tribal reserved rights is that it is a transparent way to identify where those rights apply and how they are protected."[38] Explicit designation would dignify and protect tribal practices such as Winnemem Wintu water blessings, which involve "cupping water in our hands from the river and placing it on our heads and hearts."[39] Importantly, designation of TBUs recognizes and requires protection of subsistence, cultural, ceremonial, spiritual, and other important uses of water bodies and aquatic resources exercised by any tribe, including those without recognized reserved rights or federal recognition.

Despite their importance in advancing recognition of tribal interests and restoring and protecting tribes' deep and enduring relationship to the water, TBUs have been designated in only a handful of states, and even those have suffered from inconsistent implementation. In California, the State Water Board, which oversees the codification of beneficial uses for the Bay-Delta, has thus far refused to designate TBUs in that water quality control plan – despite existing definitions adopted by the state, codification by regional water boards, and ample evidence of tribal beneficial uses exercised by Delta tribes like the Shingle Springs Band of Miwok Indians.[40] The situation in the Bay-Delta illustrates the inconsistency, confusion, and resistance that prevents widespread adoption of TBUs under the current system.

EPA is in a unique position to help dismantle these barriers. We urge EPA to ensure that state water quality criteria account for TBUs, including by denying state water quality plans that fail to consider TBU designations, by designating TBUs itself where states like California fail to do so, and by providing guidance and/or exercising its rulemaking authority to ensure more consistent designations.

CONCLUSION

The Proposed Rule represents an important step toward protecting tribal reserved water rights, and we strongly support the thrust of the Proposed Rule. But we ask EPA to build on this important step by affirmatively protecting the interests of tribes that are not contemplated by this rulemaking, including those whose reserved treaty rights have been limited through deceptive federal action.

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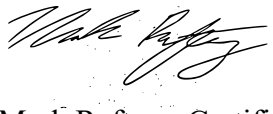
[36] Cal. State Water Res. Control Bd., *Tribal Beneficial Uses Fact Sheet* (2020), https://www.waterboards.ca.gov/tribal_affairs/docs/tbu_fact_sheet_v04.pdf.
[37] Adriana Renteria, Cal. State Water Res. Control Bd., *Tribal Beneficial Uses: California Update* (Jan. 26, 2022), https://www.epa.gov/system/files/documents/2022-02/winter-rtoc-2022-presentation-tribal-beneficial-uses-water-boards.pdf.
[38] Proposed Rule at 74371.
[39] Decl. of Gary Mulcahy at ¶ 32.
[40] *See Title VI Complaint and Petition for Rulemaking* at 54.

Thank you for your consideration.

Respectfully submitted,



Mark Raftrey, Certified Law Student
Kiran Chawla, Certified Law Student
Stephanie L. Safdi, Supervising Attorney
Environmental Law Clinic
Mills Legal Clinic at Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305
(650) 723-0325
mraftrey@stanford.edu
kiranpc@stanford.edu
ssafdi@stanford.edu

Attorneys for Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, and Save California Salmon.