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20 UNITED STATES DISTRICT COURT
21 EASTERN DISTRICT OF CALIFORNIA

22 SAN LUIS & DELTA-MENDOTA
23 WATER AUTHORITY and
24 WESTLANDS WATER DISTRICT

25 Plaintiffs,

26 v.

27 SALLY JEWELL, et al.,

28 Defendants,

and

THE HOOPA VALLEY TRIBE; THE
YUROK TRIBE; PACIFIC COAST
FEDERATION OF FISHERMEN'S
ASSOCIATIONS; and INSTITUTE FOR
FISHERIES RESOURCES,

Defendant-Intervenors.

CASE NO. 1:13-CV-01232-LJO-GSA

**FEDERAL DEFENDANTS'
SUPPLEMENTAL BRIEF**

Judge: Honorable Lawrence J. O'Neill
Date: No Hearing Set
Time: No Hearing Set
Courtroom: No Hearing Set

1 In response to the Court's request, Federal Defendants file this supplemental brief on the
2 issue of whether the challenged flow augmentation releases are excluded from the Environmental
3 Impact Statement ("EIS") requirement of the National Environmental Policy Act ("NEPA"),
4 because those releases fall "within the originally authorized limits of an ongoing project which
5 was constructed prior to the effective date of NEPA, January 1, 1970," see Dkt. 137 ("Order") at
6 2 (quoting *County of Trinity v. Andrus*, 438 F. Supp. 1368, 1388 (E.D. Cal. 1977)). The Court
7 requested Federal Defendants' position on this issue and directed the parties to address the
8 following three questions:

- 9 (1) What record evidence establishes that the augmentation releases fall within the range
10 of historic operations of the TRD?
- 11 (2) In light of any such evidence, how should the Court apply *County of Trinity* and/or
12 any other related authorities, including *Upper Snake River chapter of Trout Unlimited*
13 *v. Hodel*, 921 F.2d 232 (9th Cir. 1990)?
- 14 (3) What is the import of Federal Defendants' failure to assert this "defense" anywhere in
15 the record, including in the NEPA document itself?

16 Order at 2. Each request is taken in turn below.

17 **I. The Flow Augmentation Releases Fall Within The Originally Authorized Limits Of**
18 **An Ongoing Project Constructed Prior To NEPA.**

19 The flow augmentation releases described in the 2012 and 2013 Environmental
20 Assessments ("EAs") fall within the originally authorized limits of the Trinity River Division
21 ("TRD") of the Central Valley Project ("CVP"), specifically, the Secretary's authority to adopt
22 appropriate measures to preserve and protect fish and wildlife within the Trinity/Klamath Basin
23 as a limitation to the TRD's integration with the rest of the CVP. See Pub. L. 84-386, 69 Stat.
719, § 2 (1955) ("1955 Act").

24 **II. The Record Shows That Reclamation Did Not Exercise Its Authority To Make**
25 **Augmentation Releases As Part Of Operations Of The TRD Before 2003.**

26 Federal Defendants do not contend that there is record evidence that establishes that the
27 August and September flow augmentation releases challenged in this case have generally been
28 within the historic range of releases. Reclamation has operated the TRD such that summer base

1 flow in August and September below the TRD generally ranged between 150 to 300 cubic feet
2 per second (“cfs”) from 1964 to 1991, and generally have been 450 cfs since 1991. See AR 71 at
3 03889, 03891, and 4114 – 4135 (Appendix F).

4 But the record also shows that releases above these general historic base flow levels have
5 occurred multiple times over the course of several years, and these releases are all within the
6 originally authorized limits of the TRD. *See* Pub. L. 84-386, 69 Stat. 719, § 2 (1955).
7 Specifically, past releases above the historic summer base flow levels have occurred under two
8 separate scenarios: (1) additional releases of up to 2,500 cfs for a period of several days during
9 late August or early September to support tribal ceremonial needs, *see* AR 2 at 00020-00022; and
10 (2) augmentation releases, such as those being challenged by Plaintiffs, in 2003, 2004, 2012, and
11 2013. *See* AR 2 at 00016. As previously explained, this second category of releases was based on
12 the experience of the massive 2002 fish die-off and scientific recommendations that additional
13 TRD releases were needed to protect Klamath and Trinity-run fish through the lower Klamath
14 River from a similar catastrophe. *See* AR 2 at 00016. During the implementation of the actions
15 challenged by Plaintiffs in this case, the 2012 and 2013 augmentation releases, the flows below
16 the TRD were in the range of 1000 and 900 cfs (not including the ceremonial flows),
17 respectively. AR 23; National Water Information System: Web Interface, Trinity River at
18 Lewiston, nwis.waterdata.usgs.gov (last visited Aug. 21, 2014).

19
20 **III. If The Court Finds That These Releases Fall Within The Original Authorized**
21 **Limits Of The TRD And The Range Originally Available Pursuant To The 1955**
22 **Act, The Court Should Apply *County Of Trinity And/Or Upper Snake River Chapter***
***Of Trout Unlimited V. Hodel*, 921 F.2d 232 (9th Cir. 1990), To Hold That An EIS**
Was Not Required.

23 In *County of Trinity and Upper Snake River*, the district court and Ninth Circuit,
24 respectively, held that Reclamation’s continuing operations of a completed facility did not
25 constitute a “major Federal action” that triggered NEPA.¹ Most recently, the Ninth Circuit
26

27 ¹ NEPA requires all federal agencies to prepare a detailed EIS for “every recommendation or report on proposals for
28 legislation and other major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C.
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1 reached the same conclusion in *Grand Canyon Trust v. Bureau of Reclamation*, 691 F.3d 1008,
2 1021-22 (9th Cir. 2012). Specifically, in *County of Trinity*, 438 F. Supp. 1368, plaintiffs sought
3 to enjoin Reclamation from lowering the level of a reservoir during the drought year of 1977
4 because of the potential damage to the fish population in the reservoir. The district court
5 explained that the issue was “not whether the actions are of sufficient magnitude to require the
6 preparation of an EIS, but rather whether NEPA was intended to apply at all to the continuing
7 operations of completed facilities.” *Id.* at 1388. The court distinguished the case from cases
8 “when a project takes place in incremental stages of major proportions,” and from cases where “a
9 revision or expansion of the original facilities is contemplated,” *id.* Neither of these situations
10 applied, the court observed. Instead,

11 [Reclamation] has neither enlarged its capacity to divert water from the Trinity
12 River nor revised its procedures or standards for releases into the Trinity River
13 and the drawdown of reservoirs. It is simply operating the [TRD] within the range
14 originally available pursuant to the authorizing statute, in response to changing
environmental conditions.

15 *Id.* at 1388-89. The court thus concluded that Reclamation’s actions taken in operating the
16 system of dams and reservoirs, particularly operational responses to a drought year, were not
17 “major Federal actions” within the meaning of NEPA, and thus no EIS was required. *Id.* at 1388-
18 89; Dkt. 116 at 3-4.

19 *Upper Snake River*, 921 F.2d 232, concerned Reclamation’s decision to reduce flows
20 below Palisades Dam and Reservoir to below 1,000 cfs “[d]ue to lack of precipitation ... to
21 increase water stored for irrigation” *Id.* at 234. There, it had been standard operating
22 procedure since 1956 to maintain flows below Palisades at greater than 1,000 cfs, but average
23 flows during previous dry periods had “been lower than 1,000 cfs for 555 days (or 4.75% of the
24

25 § 4332(2)(C); *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234 (9th Cir. 1990). “Projects
26 such as the CVP ... constructed prior to the date on which NEPA became effective, January 1, 1970, are not
27 retroactively subject to NEPA.” *Consol. Salmonid Cases*, 688 F. Supp. 2d 1013, 1027 (E.D. Cal. 2010); citing
Upper Snake River, 921 F.2d at 234. “However, if an ongoing project undergoes changes which themselves amount
28 to major Federal actions, the operating agency must prepare an EIS.” *Id.* at 234–35 (citation omitted).

1 total days in operation).” *Id.* at 233. The Ninth Circuit explained that an EIS is required only
2 where an ongoing project undergoes changes which themselves amount to “major Federal
3 actions,” *id.* at 235, and held that because Reclamation was “operating the facility in the manner
4 intended [and] doing nothing new, nor more extensive, nor other than that contemplated when
5 the project was first operational,” Reclamation was not required to prepare an EIS before
6 reducing flow rates through Palisades. *Id.*

7 In *Grand Canyon Trust*, the Ninth Circuit found that annual operating plans (“AOP”) for
8 the Glen Canyon Dam on the Colorado River did not constitute major federal actions because the
9 AOPs did not change the status quo and they set forth operations consistent with the
10 authorization for the project. 691 F.3d 1022. Specifically, the Ninth Circuit explained that,
11 “Reclamation is not authorized to operate the Dam under another flow regime by simply
12 declaring such a change in an AOP. Instead, . . . an AOP merely chronicles Reclamation’s
13 ongoing operation of the Dam under existing operating criteria.” *Id.*

14 Ultimately, the determination of whether or not an EIS is required “will, of necessity,
15 depend heavily upon the unique factual circumstances of each case.” *Westside Property Owners*
16 *v. Schlesinger*, 597 F.2d 1214, 1224 (9th Cir.1979).

17 To some extent, the finding is based on whether the proposed agency action and
18 its environmental effects were within the contemplation of the original project
19 when adopted or approved.

20 *Westlands Water Dist. v. U.S. Dept. of Interior, Bureau of Reclamation*, 850 F. Supp. 1388, 1415
21 (E.D. Cal. 1994) (internal citations omitted). Here, although augmentation releases have occurred
22 several times in the past decade as part of TRD operations, the releases challenged in this case
23 fall outside the general range of historic releases. Accordingly, Federal Defendants elected to
24 prepare NEPA documentation for these releases. However, as noted above, the TRD
25 augmentation releases fall within the TRD’s original authority under the 1955 Act to preserve
26 and protect fish in the basin. Accordingly, if this Court disagrees that Federal Defendants’
27 documentation complies with NEPA, alternative grounds exist for rejecting Plaintiffs’ claims

1 under *County of Trinity*. 438 F. Supp. 1368.

2 **IV. Federal Defendants’ Failure To Assert This “Defense” Does Not Strip The Court Of**
3 **Its Discretion To Award Summary Judgment In Favor Of Federal Defendants.**

4 While Federal Defendants have not argued that the flow augmentation releases described
5 in the 2012 and 2013 EAs are excluded from NEPA, Defendant-Intervenors Pacific Coast
6 Federation of Fishermen’s Associations and Institute for Fisheries Resources (collectively,
7 “PCFFA”) filed their own cross-motion for summary judgment expressly making that argument:

8 Because the Bureau was acting through the authority granted to it by Congress to
9 take measures for the ‘preservation and propagation’ of fish and wildlife ... the
10 increase in flows constitutes the Bureau “simply operating the Division within the
11 range originally available pursuant to the authorizing statute,” meaning no EIS
12 was required.

13 Dkt. 116 at 3-6. The Court retains its discretion to award summary judgment in favor of Federal
14 Defendants on this legal theory advanced by PCFFA. *See e.g., Western Watersheds Project v.*
15 *BLM*, 971 F. Supp. 2d 957, 965, 988 (E.D. Cal. 2013) (addressing and ruling upon legal arguments
16 advanced solely by intervenors related to exhaustion and abandonment of causes of action). Indeed,
17 if relief could not be awarded on the basis of a legal theory asserted only by an intervening party,
18 the purpose of intervention would be defeated. *See e.g., Southwest Ctr. For Biological Diversity v.*
19 *Berg*, 268 F.3d 810, 820 (9th Cir. 2001) (under Fed. R. Civ. P. 24(a)(2), applicant’s interest must be
20 inadequately represented by the parties to the action); *see* Fed. R. Civ. P. 24(b)(2) (court may, in its
21 discretion, permit intervention, “when an applicant's claim or defense and the main action have a
22 question of law or fact in common”).

23 Accordingly, if the Court agrees that the augmentation releases fall within the original
24 authorized limits of the TRD and the range originally available pursuant to the 1955 Act, *County*
25 *of Trinity*, 438 F. Supp. at 1389, then Federal Defendants were not required to prepare an EIS and
26 cannot be deemed to have violated NEPA on this basis. *See* Dkt. 116 at 6 (“This Court should deny
27 plaintiffs’ motion for summary judgment, and grant PCFFA’s on the NEPA claims”).

28 Respectfully submitted this 28th day of August, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this August 26, 2014, I filed a copy of this document electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means as reflected on the Notice of Electronic Filing.

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