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19 **IN THE UNITED STATES DISTRICT COURT**
20 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

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

24 Plaintiffs,

25 v.

26 SALLY JEWELL, et al.,

Defendants,

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

Defendant-Intervenors.

Case No.: 1:13-CV-01232-LJO-GSA

**HOOPA VALLEY TRIBE'S RESPONSE
TO REQUEST FOR SUPPLEMENTAL
BRIEFING**

Judge: Hon. Lawrence J. O'Neill

Date: No Hearing Set

Time: No Hearing Set

Crtrm.: No Hearing Set

1 The Defendant-Intervenor Hoopa Valley Tribe hereby submits the following response to
2 the Court's Request For Supplemental Briefing dated August 12, 2014.

3 **1. What record evidence establishes that the augmentation releases fall within**
4 **the range of historic operations of the TRD?**

5 The Bureau of Reclamation has repeatedly made flow releases from the Trinity River
6 Division ("TRD"), independent of flows mandated by the Trinity River ROD, for a variety of
7 purposes. Those releases have varied in both duration and quantity. Releases challenged by
8 Plaintiffs in this case are comparable to prior late-summer releases and are well within the
9 "range of historic operations of the TRD." More important, as discussed in response to
10 Question #2 below, the late-summer releases made for the preservation of fish fall squarely
11 within the statutory authority and direction provided to the Secretary in the first proviso of
12 Section 2 of the TRD's authorization legislation. Act of August 12, 1955, 69 Stat. 719 (P.L. 84-
13 386) ("1955 Act"). Those past releases and the releases challenged in this case are within the
14 original intent and statutorily authorized ongoing operations of the TRD, which was completed
15 and operational prior to NEPA. Thus, Reclamation was not obligated to prepare an EIS prior to
16 taking action to prevent recurrence of fish-kill conditions in the lower-Klamath River.

17 a) Late-Summer Flow Releases for Prevention of Fish-Kill Conditions

18 Late-summer flow releases, made for the purpose of preventing fish-kill conditions in
19 the lower-Klamath River, have been made five times in the twelve years since the fish-kill
20 event of 2002. AR 16. Reclamation made such releases to prevent fish-kill conditions in
21 2003, 2004, 2012, 2013, and 2014. *Id.* In those years, federal, state and tribal fishery scientists
22 and the Secretary acting as fiduciary for tribal trust resources determined that late-summer
23 flow releases were necessary and prudent based on existing and predicted conditions. including
24 run size, hydrologic conditions, and observations of fish health and condition. *Id.* Based on
25 scientific analysis, including those factors, Reclamation did not make late-summer releases
26 solely for fisheries in any of the seven consecutive years between 2005-2011. *Id.*

In 2003, the Secretary released a total of 38,000 acre-feet of water for the purpose of

1 preventing replication of fish-kill conditions in the lower-Klamath River. AR 16. In 2004, the
2 Secretary released 36,000 acre-feet for that purpose. *Id.* After seven years without late-summer
3 flow releases, the Secretary determined that such releases were again necessary in 2012 based
4 on predicted conditions. In 2012, the Secretary released 39,000 acre-feet of water. *Id.* In
5 2013, the flows released by the Secretary totaled approximately 17,500 acre-feet. *See* Federal
6 Defendants' Memorandum, Dkt. 120-1, p. 9. Thus, the releases made in 2013 were less than,
7 but within the range of, late-summer releases in the years that they have occurred. There is no
8 evidence in the record that any of the environmental impacts that the Plaintiffs alleged would
9 result from those releases occurred in any of the years when the releases were made.

10 There is not a record of late-summer flow releases specifically for fish preservation
11 prior to 2003, because such releases only began occurring after the devastating fish-kill event
12 that occurred in 2002. AR 16. The late-summer flow releases are a scientifically-based
13 operational response and mechanism intended to prevent such a fish-kill from occurring again
14 in the future. Such a response is an environmentally-protective measure within the Secretary's
15 ongoing statutory mandate to take appropriate measures to preserve fish in operating the TRD
16 and does not require preparation of an EIS under NEPA. *Upper Snake River Chapter of Trout*
17 *Unlimited v. Hodel*, 921 F.2d 232, 235-236 (9th Cir. 1990) (holding that a lower-than-usual
18 flow release fell within the range of routine operational actions even though comparable
19 releases had occurred only three other years in more than thirty years of operation); *County of*
20 *Trinity v. Andrus*, 438 F. Supp. 1368, 1389-90 (E.D. Cal. 1977) (no EIS required where short-
21 term operational changes were made at the TRD to address previously unknown conditions);
22 *Kandra v. United States*, 145 F. Supp.2d 1192, 1204-05 (D. Or. 2001) (holding the Secretary's
23 operational changes in annual operating plan for Klamath River facilities were mandated, in
24 part, by responsibility to protect tribal trust resources and were thus not subject to NEPA).¹

25 b) Releases for Hoopa Valley Tribe Boat Dance Ceremony

26 ¹ Plaintiffs fail to cite *Kandra* in their Response to Request for Supplemental Briefing, Dkt. #141.

1 There are other flow releases that regularly occur as part of ongoing TRD operations in
 2 late-summer and to which the EIS requirements of NEPA do not apply. In odd-numbered
 3 years since 1989, the Secretary has made flow releases from the TRD in late-August/early
 4 September for the purpose of facilitating the Hoopa Valley Tribe Boat Dance Ceremony. AR
 5 20 (noting that such releases are “customary in odd numbered years”).² The hydrographs in
 6 Appendix F of the Trinity River Flow Evaluation Study show that these late-summer
 7 ceremonial flow releases occurred in odd-numbered years in 1989-1997. AR 4133-4135
 8 (showing spike in daily average discharge around September 1 in each of 1989, 1991, 1993,
 9 1995, and 1997). These releases have also customarily occurred in odd-numbered years since
 10 1997, and including in 2013. AR 20. Franklin Declaration re Hydrology. (August 25, 2014).
 11 This further rebuts Plaintiffs’ claim, at Dkt. 141, p. 2, that a spike in late-summer flows was
 12 “never the historical operation.” There has not ever been a claim that NEPA applies to such
 13 releases or that an EIS must be prepared prior to such releases. Nor do Plaintiffs here
 14 challenge the 2013 release of flow for the Boat Dance ceremony. Stipulation & Order, Dkt. 74.

15 To facilitate the Boat Dance ceremony, the Secretary increases the release of flow from
 16 Lewiston Dam up to a peak flow of approximately 2,650 cfs. AR 20. Due to requirements for
 17 gradually ramping the flow up to the peak and back down to “normal” operating levels, the
 18 Boat Dance releases result in increased flows at Lewiston in the range of 500 cfs to 2650 cfs
 19 for a period of approximately 5 days. AR 20 (stating that implementation of ceremonial flow
 20 will result in 5-day span of increased flow accounting for approximately 11,000 total acre-
 21 feet); *see also* Franklin Declaration re Hydrology Attachment 1 (USGS hydrograph reports for
 22 Lewiston Gage (August 2009, August/September 2011). In comparison, the challenged late-
 23 summer flows that the Secretary evaluated in its 2013 EA did not call for any releases from
 24 Lewiston Dam in excess of 1,500 cfs on any given day (other than those days on which Boat
 25

26 ² Boat Dance flows were included in the 2013 EA as part of the “No Action Alternative.” AR 20, 22.

1 Dance flows also occurred). AR 22 (graph of flow at Lewiston Dam).³ On a daily basis, the
2 flow releases required for the Boat Dance ceremony far exceeded those required for fish-kill
3 preventative purposes, though they occurred for a shorter period of time. *Id.* Biennial release
4 of flow to facilitate the Boat Dance ceremony provides further evidence that the late-summer
5 flows challenged by Plaintiffs here fall within the “range of historic operations of the TRD.”

6 c) Other Releases

7 There are other releases that the Secretary makes from the TRD into the Trinity River
8 independent of the Trinity River ROD. For example, Reclamation makes releases to ensure the
9 safety of dams. AR 28. Such releases occurred in both 2012 and 2013. *Id.* Safety-of-dams
10 releases can result in releases of volumes of water of 20,000 to 50,000 acre-feet. AR 129.

11 **2. In light of any such evidence, how should the Court apply *County of Trinity***
12 **and/or any other related authorities, including *Upper Snake River chapter***
13 **of *Trout Unlimited v. Hodel*, 921 F.2d 232 (9th Cir. 1990)?**

14 While there is evidence that the releases challenged here fall within the range of actual
15 historical TRD operations, the dispositive question for NEPA purposes is whether the releases
16 fall “within the range originally available pursuant to the authorizing statute, in response to
17 changing environmental conditions.” *County of Trinity v. Andrus*, 438 F. Supp. 1368, 1389
18 (E.D. Cal. 1977). Where the operations at a project constructed prior to NEPA are within the
19 range originally intended by the authorizing statute, the agency is typically not required to
20 evaluate such ongoing and authorized operations in an EIS. *Id.*; *Upper Snake River*, 921 F.2d
21 at 235-236 (9th Cir. 1990); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1204-05 (D. Or.
22 2001). As in *Kandra*, Plaintiffs’ characterization of the Secretary’s action to preserve fish,
23 pursuant to her statutory mandate, as a “change in operations” is incorrect. *Id.* at 1204-05.

24 ³ This contradicts Plaintiffs’ assertion that a one-day release of 2,450 cfs, called for in 2014, would
25 cause “even greater impacts to biological resources” than releases in 2012 or 2013. Dkt. #151, p. 16.
26 Such a release is less than the one-day release of 2,650 cfs for the 2013 (and 2011) Boat Dance, which
Plaintiffs did not challenge. The purpose of the flow is immaterial for NEPA purposes, which focuses
on resulting environmental impacts. The fact that a release is for ceremonial, rather than fish, purposes
has no bearing on whether such release would result in environmental impacts alleged here by Plaintiffs.

1 Here, the challenged flows are not subject to the EIS requirements of NEPA because
2 they are clearly within the original intent and scope of authority provided to the Secretary
3 pursuant to the 1955 Act, which provides, in relevant part, that “the Secretary is authorized
4 and *directed* to adopt appropriate measures to insure the preservation and propagation of fish
5 and wildlife . . .” (emphasis added). Section 2 of the 1955 Act provides the Secretary with
6 broad discretionary authority and direction to take appropriate measures to preserve and
7 propagate the fishery. The Secretary’s obligation to take appropriate measures to preserve
8 fish has been part of her statutory mandate in TRD operations since inception of the project
9 and constitutes the “status quo.” This statutory duty is overlain by the federal responsibility
10 for the tribal fishery resources that the United States holds in trust for the Tribe. The Secretary
11 exercised her authority under the 1955 Act pursuant to her trust responsibility in this action.
12 AR 17. Moreover, requiring Reclamation to prepare an EIS prior to making the releases
13 challenged here would be wholly impractical and serve purely as an improper obstructionist
14 tactic designed to prevent an environmentally beneficial and necessary action from occurring.

15 The *County of Trinity*, *Upper Snake River*, and *Kandra* cases all strongly support the
16 argument that no EIS was required prior to implementing the late-summer releases challenged
17 here. In *County of Trinity*, a case involving the TRD, the Court found that the Secretary was
18 not obligated to prepare an EIS for its planned short-term operations of the TRD in response
19 to drought conditions in 1976-1977. *County of Trinity*, 438 F. Supp. at 1388-90. The
20 Secretary was “simply operating the [TRD] within the range originally available pursuant to
21 the authorizing statute, in response to changing environmental conditions.” *Id.* at 1389. Thus,
22 there was no “major federal action” to trigger NEPA’s requirement for EIS preparation. *Id.* at
23 1388-89. In addition, the Court in *County of Trinity* found that imposing an EIS requirement
24 on “continuing operations over a timespan short enough to allow realistic adjustments of
25 operations to meet changed conditions” would be impractical. *Id.* at 1389. The Secretary
26 would be “condemned to an endless round of paperwork” given the significant length of time

1 required to prepare an EIS. *Id.* Similarly here, even if there were a “major Federal action” to
2 analyze, preparation of a full EIS would be impossible in light of the short window of time
3 that the Secretary has to make decisions about releasing flow to aid late-summer conditions
4 and prevent recurrence of a fish-kill in the lower-Klamath. *County of Trinity* strongly
5 supports the argument that no EIS was required in this case.

6 The *Upper Snake River* case also instructs that no EIS was required here. There, the
7 Ninth Circuit Court of Appeals found that the Secretary was not required to prepare an EIS
8 prior to adjusting flow releases from Palisades Dam, which like the TRD was constructed
9 prior to passage of NEPA. The Court found the analysis from *County of Trinity* “particularly
10 instructive.” 921 F.2d at 235. The Secretary was “simply operating the facility in the manner
11 intended. . . . they are doing nothing new, nor more extensive, nor other than that
12 contemplated when the project was first operational.” *Id.* The fact that the flow levels at
13 issue were rare (only occurring three times in more than thirty years of operation) did not
14 change the Court’s opinion that was engaging in a “routine managerial action.” *Id.*⁴ “A
15 particular flow rate will vary over time as . . . conditions dictate.” *Id.* In the case now before
16 this Court, the Secretary was charged at the inception of the TRD with authority, and a
17 responsibility, to take appropriate measures to preserve fish. She need not prepare a full EIS
18 every time that she acts to implement that directive to preserve and propagate the fishery.

19 *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Oregon 2001), is also instructive and
20 supports the argument that the Secretary need not prepare an EIS here. In *Kandra*, plaintiff
21 irrigators challenged the Secretary’s annual operating plan for the Klamath Reclamation
22 Project which resulted in reduced irrigation deliveries in order to protect downstream fish. In
23

24 ⁴ In fact, the flows challenged in *Upper Snake River* (flows of less than 1000 cfs for seven days or more)
25 did not occur between 1956 and 1976, a period of twenty-one consecutive years, and then occurred three
26 times between 1978 and 1988 as a response to drought conditions then occurring. *Id.* at 235. Despite
the infrequency of such flows, the Court found that the reduction in flow below 1000 cfs was a routine
managerial action not subject to NEPA. *Id.*

1 *Kandra*, the change in operations at the Project was “*unprecedented*,” yet the dispositive
2 question for NEPA purposes remained “whether NEPA was intended to apply *at all* to the
3 continuing operations of completed facilities” (emphasis added). *Id.* at 1205, *citing County of*
4 *Trinity*, 438 F. Supp. 1368, 1388 (E.D. Cal. 1977). The Court answered the question in the
5 negative, finding that the timing of information available to the Secretary to make annual
6 operating decisions “render it impossible for the Secretary to complete an EIS for an annual
7 operating plan.” *Id.* at 1205. Citing *County of Trinity*, the Court found that it “makes no sense
8 to impose upon the Secretary a requirement it can never fulfill.” *Id.* Also of significance, the
9 Court held that the Secretary’s change in operations was required for the protection of tribal
10 trust resources as well as requirements of the ESA. *Id.* at 1204. “As such, Reclamation’s
11 ‘change in operations’ is mandated by law, and the requirements of NEPA do not apply.” *Id.* at
12 1204-1205. Similarly, a principal purpose for the Secretary’s action here is the protection of
13 tribal trust resources, because the Hoopa Valley Tribe and the trust resource itself could be
14 devastated by the recurrence of another fish-kill event. In addition to the authority provided by
15 the 1955 Act, the Secretary has a responsibility to protect tribal rights. This Court should reject
16 Plaintiffs’ efforts to use NEPA as a disingenuous means to obstruct actions intended to benefit
17 the environment and tribal trust resources.

18 **3. What is the import of Federal Defendants’ failure to assert this “defense”**
19 **anywhere in the record, including in the NEPA document itself?**

20 Did NEPA, as a matter of law, require the Secretary to prepare an EIS in advance of
21 making the late-summer releases for the preservation of fish? The *County of Trinity*, *Upper*
22 *Snake River*, and *Kandra* cases confirm that no EIS was required here and thus no violation of
23 NEPA occurred. The fact that the Secretary may have done more than was necessary by
24 preparing and taking public comment on an EA does not act as a waiver or change the
25 underlying legal question of NEPA’s threshold applicability. As PCFFA notes in its reply
26 brief, at Dkt. #132, p. 5, the U.S. Environmental Protection Agency has an explicit policy on
the voluntary preparation of NEPA documentation, which permits the agency to voluntarily

1 prepare environmental documentation, such as an EA or EIS, to “provide an opportunity for
2 increased public understanding and involvement, and where the NEPA process can facilitate
3 analysis of environmental impacts.” 63 Fed. Reg. 58045-02 (Oct. 29, 1998). But, as PCFFA
4 notes, preparing a voluntary NEPA document does not give rise to legal claims for violations
5 of NEPA. *See also* 40 CFR § 1501.3(b) (“Agencies may prepare an environmental assessment
6 on any action at any time in order to assist agency planning and decision-making”).

7 In addition, it does not matter whether the legal question of NEPA’s threshold
8 applicability is raised by Federal Defendants or whether the issue is raised by PCFFA, a
9 Defendant-Intervenor. Case law in the Ninth Circuit confirms that a Defendant-Intervenor
10 may defend federal agency actions challenged under NEPA, even where the federal agency
11 declines to defend the action itself. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th
12 Cir. 2002) (holding that defendant-intervenors could appeal injunctions issued against federal
13 agency defendant even if federal agency did not appeal or challenge injunction).⁵ *See*
14 *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 866, 872 (9th Cir. 2004)
15 (reversible error raised by Hoopa Valley Tribe, not federal agencies). Similarly, a Defendant-
16 Intervenor can raise arguments or defenses in support of a federal agency action even if those
17 arguments are not expressly made by the federal agency. *Id.* The Court should hold that no
18 EIS was required in this case and no violation of NEPA occurred.

19 Respectfully submitted this 26th day of August, 2014.

20
21 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

22 /s/ Thomas P. Schlosser
23 Thomas P. Schlosser
24 Attorneys for Defendant-Intervenor Hoopa Valley Tribe

25 ⁵ In *Wilderness Society v. U.S. Forest Service*, 630 F.3d 1173 (9th Cir. 2011) (en banc),
26 the Ninth Circuit further broadened the rights of third-parties to participate in the defense of
federal agency actions challenged under NEPA, holding that such parties could intervene as of
right, and not merely through permissive intervention.

1
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that I electronically filed the foregoing document, Hoopa Valley Tribe's
4 Response to Request for Supplemental Briefing, with the Clerk of the Court for the United
5 States District Court for the Eastern District of California by using the CM/ECF system on
6 August 28, 2014. I certify that all participants in the case are registered CM/ECF users and that
7 service will be accomplished by the appellate CM/ECF system on August 28, 2014.

8 Executed this 26th day of August, 2014, at Seattle, Washington.

9
10 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

11 s/Thomas P. Schlosser

12 Thomas P. Schlosser

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