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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
IN OPPOSITION TO PLAINTIFFS'
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

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 in
2 opposition to the Plaintiffs' Motion for Temporary Restraining Order and Preliminary
3 Injunction dated August 25, 2014. The questions surrounding the legal authority of the
4 Secretary to take appropriate measures to preserve fish pursuant to the Act of August 12, 1955,
5 69 Stat. 719 (P.L. 84-386) ("1955 Act") and her trust responsibilities to the Tribe have been
6 thoroughly briefed by the Tribe and other parties. The Tribe relies primarily on its previously
7 filed briefs and incorporates the legal analysis in those briefs by reference. *See* Dkt. # 50, 118,
8 133.

9 The Tribe specifically directs the Court to pages 6-8 of its Response and Cross-Motion
10 for Summary Judgment, Dkt. #118, which discusses the broad authority and mandate of the
11 1955 Act "to insure the preservation and propagation of fish. . . ." As explained in the
12 Memorandum from Solicitor to Assistant Secretary, Land and Water Resources, Dec. 7, 1979
13 (1979 Opinion), pp. 3-4 (Dkt. 44, Exh. 8), the first proviso of Section 2 of the 1955 Act limits
14 the integration of the TRD into the CVP and requires the Secretary to exercise a priority for
15 use of all TRD water necessary to protect fish and wildlife. "Congress specifically provided
16 that in-basin flows (in excess of a statutorily prescribed minimum) determined by the Secretary
17 to be necessary to meet in-basin needs take precedence over needs to be served by out-of-basin
18 diversion. *See* Pub. L. No. 84-386, § 2." *Id.* *See also* *Pyramid Lake Paiute Tribe of Indians v.*
19 *Morton*, 354 F. Supp. 252, 256-57 (D.D.C. 1972) (Secretary had trust obligation to "assert his
20 statutory and contractual authority to the fullest extent possible" in order to preserve water for
21 Indian tribe). The issues raised in Plaintiffs' request for TRO do not permit a balancing of
22 equities; rather, Congress through the 1955 Act has directed a priority use of water for in-basin
23 needs.

24 In this brief, the Tribe specifically responds to the Court's request of August 26, 2014
25 asking for information "regarding the need for the flow augmentation this year." Dkt. #152.
26 The Tribe also responds in support of the Secretary's reliance on NEPA's emergency

1 protocols. In order to protect against a devastating fish kill and loss of tribal trust resources,
2 the Tribe urges the Court to deny Plaintiffs' requests for a Temporary Restraining Order and/or
3 Preliminary Injunction.

4 **I. Fishery Scientists and Managers Have Concluded That Current, Real-Time,**
5 **Unusually Severe Environmental Conditions in the Lower-Klamath River**
6 **Are Likely To Result in A Fish-Kill and Require Release of Flow From the**
7 **TRD As An Emergency Measure.**

8 At this time, the Hoopa Valley Tribe's fisheries resources are at risk of a catastrophic
9 fish die-off in the Lower Klamath River. *Declaration of Michael Orcutt*, ¶ 3. On August 15,
10 2014, Dr. Joshua Strange (who testified in this case last year), prepared a memorandum that
11 reports: "a fish kill is more likely than not in 2014 among adult fall Chinook salmon migrating
12 in the Lower Klamath River." Orcutt Declaration, ¶ 4. Dr. Strange's August 15 memorandum
13 is attached to the Declaration of Michael Orcutt.

14 Dr. Strange notes, in his August 15 memorandum, that 22 salmon carcasses were
15 counted in the Lower Klamath River on August 14, 2014 and he points out that an additional
16 stressor "is the high amount of the toxic blue-green algae microcystis . . . that is being released
17 into the River from the Klamath Hydroelectric Reservoirs." Orcutt Declaration, ¶ 4, Strange
18 Memorandum, p. 7. Toxic blue-green algae has in recent days been verified in the Trinity
19 River for the first time, prompting the Humboldt County Department of Health to post
20 warnings after detecting toxins in water samples retrieved at a popular swimming beach
21 located upstream from the Reservation boundary. Orcutt Declaration, ¶ 6. Blue green algae
22 thrives in slow moving water at higher temperatures such as have been common over the past
23 several weeks. *Id.* See also August 20, 2014 letter from United States Public Health Service,
24 attached to Orcutt Declaration.

25 Dr. Strange's memorandum further notes that "[f]lows in July and August of 2014 are
26 exceptionally low, significantly lower than in July of 2002 (the fish kill year)." Strange
memorandum, p. 1. The flows for July 2014 in the lower Klamath river are tied for the second
lowest on record with 1994. *Id.* at p. 2. "Simply put, the drought conditions of 2014 are

1 extreme and appear to be headed towards near record levels for the month of September in the
2 lower Klamath river based on the period of record.” *Id.* In addition to flow conditions being at
3 near record-low levels, “other uncertainties and unusually severe stressors increase the risk
4 level for an Ich outbreak [and potential fish kill] in 2014.” *Id.* at p. 3.

5 While Plaintiffs argue that the predicted run size is less than last year, the Klamath run
6 prediction is known to vary widely from final post-season counts, at times under-predicting by
7 a factor of two or more. Orcutt Declaration, ¶ 5. The pre-season prediction for Klamath River
8 fall Chinook appears low when viewed alongside record returns predicted this year in the
9 Columbia River. *Id.*; see also Strange Memorandum, p. 4. Reports of higher than normal
10 numbers of early-arriving fall Chinook, provided by Yurok Tribal Fisheries Department, are
11 suggestive of a higher than predicted run size. Orcutt Declaration, ¶ 5. Dr. Strange’s
12 memorandum also opines that the pre-season run predictions are “more likely to be an under-
13 prediction.” Strange memorandum, p. 4. Even if the run size predictions turn out to accurately
14 predict a below-average run, Dr. Strange’s August 15 memorandum reports that “the
15 mechanisms responsible for an Ich outbreak such as occurred in 2002 are not nullified by
16 below average run size; rather flow (i.e. water velocities and turnover rates) is the primary
17 determinant of an Ich outbreak [citation omitted].” Strange memorandum, p. 4. Dr. Strange
18 adds that “multiple lines of evidence . . . indicate that a below average run size will not
19 adequately compensate for low flows in terms of fish kill risk.” *Id.*

20 Dr. Strange reports that “several other stress factors are notably contributing to
21 increased fish kill risk in 2014.” Strange memorandum, p. 7. First, there are elevated
22 background levels of fish diseases in the river due to spring and summer run Chinook salmon
23 in the Klamath basin experiencing higher than normal levels of stress and pre-spawn mortality.
24 Strange memorandum, p. 7. As noted above, 22 salmon carcasses were counted in the lower
25 Klamath river over a 55 mile reach on August 14, 2014. *Id.*

26 Another stressor that is unusually high in 2014 is the “myxosporidian parasites” which

1 cause “some level of mortality to juvenile salmonids in the Klamath River every year, with
2 2014 having one of the worst levels of incidence . . . and associated mortality . . . since
3 monitoring began.” Strange memorandum, p. 7. The final additional stressor is the high level
4 of blue-green toxic algae that was noted above.

5 Dr. Strange’s memorandum concludes: “the risk of a fish kill (Ich epizootic outbreak)
6 occurring in the lower Klamath River in 2014 as occurred in 2002 without proactive protective
7 flow releases is more likely than not with unreasonably high risk due to near-record low flows
8 (forecast of only ~1800 cfs by September 1).” Strange memorandum, p. 7. This risk is
9 increased by the other “unusually severe” stressors present in the river this year. *Id.*

10 **II. If NEPA Applies, the Federal Defendants’ Reliance on Emergency Protocols**
11 **Is Appropriate as the Severe and Worsening River Conditions Present An**
12 **Emergency Situation.**

13 As discussed in the Tribe’s Response to Request for Supplemental Briefing (Dkt.
14 #155), the Secretary’s decision to release flow pursuant to her statutory authority and direction
15 to preserve fish under the 1955 Act and her fiduciary trust responsibilities to the Tribe is not a
16 “major federal action” subject to NEPA’s requirement to prepare an EIS. 42 U.S.C. § 4332(C)
17 (requiring detailed statement [EIS] for major federal actions significantly affecting the quality
18 of the human environment). However, assuming *arguendo* that NEPA applies, the Secretary’s
19 reliance on NEPA’s emergency protocols are entirely appropriate and lawful here. The current
20 conditions on the Lower Klamath River, and the more than likely possibility of a fish kill
21 similar to that occurring in 2002, present an emergency requiring immediate action by the
22 Secretary.

23 The facts in the present case are distinguishable from those in the sole case relied on by
24 Plaintiffs, *Natural Res. Def. Council, Inc. v. Winter*, 527 F. Supp. 2d 1216 (C.D. Cal. 2008)
25 *aff’d* 518 F.3d 658 (9th Cir. 2008), *rev’d on other grounds*, 555 U.S. 7 (2008). In *Winter*, there
26 was no conceivable emergency present – rather the challenged action was a long-planned and
routine action. There is nothing long-planned or routine about the flows being made here. As

1 Plaintiffs note, Reclamation made a preliminary decision in late July to not release additional
2 flows for fish in 2014 based on the conditions at that time. However, by the date of Dr.
3 Strange's memorandum of August 15, conditions in the river had worsened and warranted
4 immediate action. As Dr. Strange notes in his memorandum, "the occurrence of a fish kill is
5 an event determined by multiple interacting probabilities and is best characterized by the
6 concept of risk, which by definition includes uncertainty." Strange Memorandum, p. 4. The
7 current conditions, despite Plaintiffs' contentions, were not unchanged and were not known
8 even a few weeks ago. The Secretary, based on real-time conditions, and the more-likely-than-
9 not risk of a fish kill event, exercised her statutory authority (and duty) to release flow to
10 protect fish and tribal trust resources from a die-off.

11 The arguments made by Plaintiffs here are similar to those made, and ultimately
12 rejected on appeal, in *Nat'l Audubon Society v. Hester*, 801 F.2d 405 (D.C. Cir. 1986). In
13 *Hester*, the Fish and Wildlife Service made a decision to bring the last six remaining wild
14 condors into captivity. The Plaintiffs argued that the FWS decision was a change in prior
15 policy and that there was no emergency because the number of condors had been declining
16 over a period of eight months prior to the FWS action and that FWS conceivably could have
17 prepared an EIS during that time period to justify the removal of the last condors from the
18 wild. While the District Court agreed with Plaintiffs, the D.C. Circuit Court of Appeals
19 reversed. Much like in the present case, the Circuit Court noted that while the agency had
20 recently endorsed maintaining a small flock of condors in the wild, "there were weighty
21 arguments to the contrary and that the question was close." 801 F.2d at 408. The agency had
22 advised that "if the condor population appears to continue steadily downward after
23 implementation of this option, we stand ready to reevaluate the taking into captivity of all, or a
24 significant portion of, the remaining [wild] population." *Id.* The Court of Appeals found that
25 the agency acted reasonably and lawfully by "reconsider[ing] its policy after learning of recent
26 developments, including the lead poisoning suffered by a bird inhabiting what was thought to

1 be one of the safest locations. The Wildlife Service simply exercised its discretion to ‘adapt
2 [its] rules and policies to the demands of changing circumstances.’ *Id.* That is analogous to
3 what happened here, where the Secretary initially decided against releasing additional flow in
4 late July 2014, but continued to monitor the situation based on real-time data and then decided,
5 based on changing circumstances and worsening conditions, to make releases to preserve fish
6 and prevent a fish-kill. In *Hester*, the Court of Appeals refused to second-guess the agency’s
7 use of NEPA’s emergency provisions. *Id.* at fn. 3 (finding that the “district court erred in
8 deciding itself that no emergency existed that would excuse NEPA documentation”). *See also*
9 *Flint Ridge Dev. Co. v. Scenic Rivers Assn*, 426 U.S. 776, 788 (1976) (holding that NEPA does
10 not require preparation of an EIS where “requiring the Secretary to prepare such a statement
11 would create an irreconcilable and fundamental conflict with the Secretary’s duties under [the
12 Act].”

13 **III. Conclusion.**

14 The Hoopa Valley Tribe respectfully requests that the Court deny Plaintiffs’ motion for
15 a temporary restraining order and/or preliminary injunction.

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

17
18 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

19 /s/ Thomas P. Schlosser
20 Thomas P. Schlosser
21 Attorneys for Defendant-Intervenor Hoopa Valley Tribe
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CERTIFICATE OF SERVICE

1 I hereby certify that I electronically filed the foregoing document, Hoopa Valley Tribe's
2 Response to Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction,
3 with the Clerk of the Court for the United States District Court for the Eastern District of
4 California by using the CM/ECF system on August 26, 2014. I certify that all participants in
5 the case are registered CM/ECF users and that service will be accomplished by the appellate
6 CM/ECF system on August 26, 2014.

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

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9 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

10
11 s/Thomas P. Schlosser

12 Thomas P. Schlosser

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