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7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 SAN LUIS & DELTA-MENDOTA WATER  
11 AUTHORITY and WESTLANDS WATER  
DISTRICT,

Plaintiffs,

12 vs.

13 SALLY JEWELL, et al.,  
14 Defendants.

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

Defendant-Intervenors.

Case No.: 13-cv-01232-LJO-GSA

**YUROK TRIBE'S RESPONSE TO  
REQUEST FOR SUPPLEMENTAL  
BRIEFING**

Hearing Date: TBD

Hearing Time: TBD

Courtroom: TBD

Judge: Hon. Lawrence J. O'Neill

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20 Defendant-Intervenor Yurok Tribe ("Yurok") provides this response to the Court's  
21 August 12, 2014, request for supplemental briefing (Doc. 137) regarding National Environmental  
22 Policy Act ("NEPA") requirements. Yurok responds in Part I to question (1) "What record  
23 evidence establishes that the augmentation releases fall within the range of historic operations of  
24 the TRD?" and in Part II to question (2) "In light of any such evidence, how should the Court  
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1 apply *County of Trinity* and/or any other related authorities, including *Upper Snake River*  
2 *Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232 (9th Cir. 1990).”<sup>1</sup>

3  
4 **I. RECORD EVIDENCE SHOWS SUPPLEMENTAL RELEASES ARE WITHIN**  
5 **THE RANGE OF HISTORIC TRINITY RIVER DIVISION OPERATIONS AND**  
6 **TRINITY RIVER FLOWS**

7 The Trinity River Flow Evaluation Study (“TRFES”) Appendix F provides hydrographs  
8 of the Trinity River at the Lewiston gage from water year (“WY”) 1912 through 1997. AR 4114-  
9 35. The Lewiston gage is located just downstream from the Trinity River Division (“TRD”)  
10 Lewiston dam, essentially measuring TRD releases. AR 3807. The Lewiston gage has monitored  
11 flows regulated by the TRD since the TRD’s completion in 1964. AR 3750, 3807. TRFES  
12 Appendix F shows flows at Lewiston for the period of TRD operations from 1965 through 1997.  
13 AR 4127-35. Historically during that period, TRD regulated flows have approached and  
14 exceeded 1100 cubic feet per second (“cfs”) at the Lewiston gage during August and September,  
15 the period of the supplemental flows. *See, e.g.*, AR 4133 (WY 1991); AR 4134 (WY 1993 and  
16 1995). Finally, TRD releases measured at Lewiston during August and September in 2001, 2003,  
17 2004, 2007, 2009, and 2011 have all exceeded 1,700 cfs. *See* AR 514-15 (WY 2001) (showing  
18 Lewiston releases under identifier “LEW”); AR 518-19 (WY 2003); AR 520-21 (WY 2004); AR  
19 522-23 (WY 2007); AR 526-27 (WY 2009); AR 530-31 (WY 2011). Of these years, only 2003  
20 and 2004 included supplemental flows for the Lower Klamath River.

21 Pre-TRD unregulated flows within the Trinity River at Lewiston gage have been  
22 monitored since WY 1912. AR 3887. Post-TRD unregulated flows were reconstructed from the  
23 total TRD outflow, including Lewiston gage records and stage height measurements from Trinity  
24 Reservoir. AR 3807, 3818, 3887. TRFES Appendix F hydrographs show historic unregulated  
25 Trinity River flows during August and September on the order of 1100 cfs and greater at  
26

27 <sup>1</sup> Regarding the third question raised by the Court and Plaintiffs’ response, Yurok discusses the  
28 impact of a post hoc rationalization in its Reply to Plaintiffs’ Opposition to Motion for Summary  
Judgment, Doc. 134 at 6.

1 Lewiston gage. *See, e.g.*, AR 4115 (WY 1912 and 1915); AR 4116 (WY 1918); AR 4118 (WY  
2 1925); AR 4112 (WY 1941); AR 4125 (WY 1954); AR 4126 (WY 1957); AR 4128 (WY 1970);  
3 AR 4129 (WY 1972); AR 4130 (WY 1977 and 1978); AR 4131 (WY 1983); AR 4133 (WY  
4 1989).

5         The supplemental flows are within the historic range of TRD operations and unregulated  
6 Trinity River flows. Hydrographs showing proposed supplemental flows for 2012 and 2013 are  
7 included in the respective Environmental Assessment (“EA”) for that year. AR 22, 1184. Each of  
8 the hydrographs in these EAs include additional peak flows. While those peak flows were  
9 provided for ceremonial purposes and are not the subject of this litigation, the ceremonial flows  
10 are part of the historic range of TRD operations. *See* AR 20-21 (providing that 2013 augmented  
11 flows would not interfere with Hoopa Valley Tribe ceremonial flows); AR 1183 (noting 2012  
12 pulse flow adjustment for Yurok ceremonial purposes). The 2012 EA anticipated ramping up  
13 flows at Lewiston from 450 cfs to approximately 1100 cfs from mid-August to the end of  
14 September. AR 1184. The actual 2012 supplemental flows hovered around 1000 cfs. AR 532.  
15 The 2013 proposed action was to increase flows from 450 cfs to approximately 1150 cfs at  
16 Lewiston from mid-August through September 21. AR 22. At the time of the Court’s preliminary  
17 injunction hearing on August 21-22, 2013, the actual water required for the 2013 supplemental  
18 flows was two-thirds less than that specified in the 2013 EA. Doc. 91 at 19:12-13; *see also* Doc.  
19 81, Exhibit YT-25, Memorandum from Michael Belchik to Whom it May Concern, regarding  
20 Estimate of Amount of Water Needed to Reach Target Flow of 2800 cfs from August 23rd, 2013  
21 to September 21, 2013 (Aug. 19, 2013) at 2. This reduced amount resulted in projected flow  
22 requirements at Lewiston ranging from 832 to 904 cfs. Doc. 81, Exhibit YT-26, Trinity River  
23 Projected Releases for Augmented Flows Spreadsheet prepared by Michael Belchik (Apr. 19,  
24 2013) (identifying Lewiston releases in last column). The 2012 and 2013 supplemental flows of  
25 approximately 1000 cfs at Lewiston gage are within the historic range of TRD regulated flows  
26 and of unregulated flows for August and September.

1 **II. SUPPLEMENTAL FLOWS ARE WITHIN THE ORIGINALLY AUTHORIZED**  
 2 **LIMITS OF THE TRD TO PROTECT FISH IN THE LOWER KLAMATH**  
 3 **RIVER AND DO NOT REQUIRE AN EIS UNDER NEPA**

4 If a proposed federal action does not change the status quo, an Environmental Impact  
 5 Statement (“EIS”) under NEPA section 42 U.S.C. § 4332(2)(c) is not required. *Upper Snake*  
 6 *River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234 (9th Cir. 1990). Under *County of*  
 7 *Trinity v. Andrus*, 438 F. Supp. 1368 (E. Dist. Cal. 1977), and related authorities, the U.S.  
 8 Bureau of Reclamation (“Reclamation” or “BOR”) is not required to complete an EIS for water  
 9 releases from a pre-NEPA project if the releases fall within the range of operations contemplated  
 10 under the authorizing statute. Such releases in response to environmental conditions are routine  
 11 managerial actions. *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1021-22  
 12 (9th Cir. 2012); *Upper Snake River Chapter of Trout Unlimited v. Hodel* (“*Upper Snake R.*”),  
 13 921 F.2d 232, 235 (9th Cir. 1990). While a project’s historic range of operations may be  
 14 considered, the routine nature of the action stems from BOR’s monitoring and control of flow  
 15 rate to meet statutory purposes. *Upper Snake R.*, 921 F.2d at 235-36.

16 Congress passed the Central Valley Project Act of August 12, 1955 (“1955 Trinity Act”),  
 17 Pub. L. 84-386, 69 Stat. 719, authorizing construction of the TRD and directing Reclamation in  
 18 section 2 to operate the TRD “in such manner as will effectuate the fullest, most beneficial, and  
 19 most economic utilization” of Trinity River water resources and “to adopt appropriate measures  
 20 to insure the preservation and propagation of fish and wildlife.” BOR’s authority under the 1955  
 21 Trinity Act includes the authority to release flows to insure the preservation of fish in the lower  
 22 Klamath River.<sup>2</sup> Reclamation cannot separate the issue of appropriate fish conservation measures  
 23 from management practices. *County of Trinity*, 438 F. Supp. at 1380. “The formulation of  
 24 measures for fish preservation is part of a continuing planning process [by BOR] which requires  
 25 monitoring of ongoing operations under constantly changing conditions, as well as analysis of  
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27  
 28 <sup>2</sup> For a full discussion of this authority, see Yurok’s Motion for Summary Judgment, Doc. 119 at  
 2-3, and Yurok’s Reply, Doc. 134 at 1.

1 expert recommendations on the basis of technical expertise and familiarity with a particular  
2 geographical and subject matter area.” *County of Trinity*, 438 F. Supp. at 1375.

3 The drought conditions, subject matter, and technical issues in *County of Trinity* parallel  
4 those in this case. The administrative record contains numerous technical reports, expert  
5 recommendations, and analyses of the particular conditions of the lower Klamath River and its  
6 fishery. Based on this information, BOR determined that supplemental flows were necessary in  
7 2012 and 2013 in order to preserve fish in the lower Klamath River. BOR maintained its  
8 ongoing, pre-NEPA routine of controlling flow rate for 1955 Trinity Act purposes, which  
9 directed BOR to adopt appropriate measures to insure the preservation of fish downstream of  
10 TRD.

11 The supplemental releases are within the historic range of TRD operations. As described  
12 in Part I above, the administrative record includes extensive evidence that BOR has implemented  
13 TRD releases on the order of and exceeding those of the 2012 and 2013 supplemental releases.  
14 The record is also replete with evidence that the flow magnitudes are within historic levels for  
15 the Trinity River prior to TRD construction, bolstering the conclusion that such flows are within  
16 the range contemplated by the 1955 Trinity Act. Reclamation modified TRD operations within  
17 “the range originally available to the authorizing statute, in response to changing environmental  
18 conditions.” *Id.* At 1389. Even assuming *arguendo* that flows are not within the historic range,  
19 the releases remain routine. *Upper Snake R.*, 921 F.2d at 235-36 (noting that while plaintiffs  
20 suggested the level of regulated flows at issue were uncommon, Reclamation’s monitoring and  
21 control of flow rate during drought years was routine).

22 Despite the fact that no EIS is required, BOR assessed its operation of TRD in light of its  
23 environmental impacts by completing the 2012 EA and 2013 EA. By preparing an EA, BOR  
24 “gains the benefit of a more relaxed standard of judicial review of any decision not to prepare an  
25 EIS.” *Pac. Coast Fed’n of Fishermen’s Assoc. v. U.S. DOI*, No. 12-CV-01303, 2014 U.S. Dist.  
26 LEXIS 15072 at \*21 (E. Dist. Cal. Feb. 6, 2014) (citing *High Sierra Hikers Ass’n v. Blackwell*,  
27 390 F.3d 630, 640 (9th Cir. 2004)). The reasonableness of BOR’s determination that no EIS is  
28 required is clear. Supplemental flows were on the order of 1000 cfs at the Lewiston gage. BOR

1 has operated TRD in the past to provide flows at Lewiston of 1000 cfs and greater in August and  
2 September. In addition, the Trinity River experienced similar pre-TRD flow volumes at  
3 Lewiston. The specific reasons for these historic flows are immaterial if they fall within the  
4 range of operations under the purposes of the authorizing statute. Based on the historic data and  
5 the analyses contained in the EAs, BOR reasonably concluded that an EIS was not required  
6 under NEPA based on the routine nature of increasing flows to meet 1955 Trinity Act purposes.

7 **CONCLUSION**

8 The August and September supplemental releases are well within the range of TRD  
9 operations since 1964 and unregulated Trinity River flows since 1912. This is shown in the  
10 TRFES, 2012 EA, 2013 EA, and various spreadsheets and hydrographs cited in the record,  
11 detailing flows at Lewiston from 1912 through 2013. The supplemental flows are a routine  
12 management action to control releases in during drought conditions in order to meet the statutory  
13 purposes of the 1955 Trinity Act. BOR was not required under NEPA to undertake an EIS.

14  
15 Dated: August 26, 2014

Respectfully submitted,

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18  
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**CERTIFICATE OF SERVICE**

I certify that on August 26, 2014, I filed a copy of this document electronically through the CM/ECF system for the United States District Court, Eastern District of California, that all participants in this case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

/s/ Nathan Voegeli  
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