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13 UNITED STATES DISTRICT COURT
 14 EASTERN DISTRICT OF CALIFORNIA

15
 16 SAN LUIS & DELTA-MENDOTA
 WATER AUTHORITY and
 17 WESTLANDS WATER DISTRICT,

18 Plaintiffs,

19 v.

20 SALLY JEWELL, et al.

21 Defendants,

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

25 Defendant-Intervenors.
 26
 27
 28

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

PLAINTIFFS SAN LUIS & DELTA-MENDOTA WATER AUTHORITY AND WESTLANDS WATER DISTRICT'S REPLY TO OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

DATE: August 21-23, 2013

TIME: 8:30 a.m.

COURTROOM: 4

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I.

INTRODUCTION

As the Court found in its Modified Temporary Restraining Order Extending Injunction, dated August 14, 2013 (“Modified TRO”), Plaintiffs will likely succeed on the merits. The Excess Releases would violate at least Federal Defendants’ mandatory statutory duties under section 3406(b)(23) of the Central Valley Project Improvement Act (“CVPIA”), Title XXXIV, Pub. L. No. 102-575, 106 Stat. 4700 (1992), and the National Environmental Policy Act (“NEPA”), 42 U.S.C. section 43214 et seq. The tribal fishing rights do not trump these statutory duties. Imposition of the Excess Releases will likely cause irreparable harm to agricultural and municipal water users and to the human environment by reducing Central Valley Project (“CVP”) water allocations. On the other hand, Defendants have conceded that the scientific basis for making the Excess Releases is weak. The balance of hardships and the public interest favor injunctive relief. This Court should continue its existing temporary restraining order as its preliminary injunction, and enjoin the Excess Releases.

II.

ARGUMENT

A. CVPIA Section 3406(b)(23) Prohibits Instream Fishery Releases In Excess Of The ROD Flows

CVPIA section 3406(b)(23) requires Reclamation to implement permanent instream fishery flow requirements for the restoration and maintenance of the Trinity River fishery specified in the Trinity River Record of Decision (“ROD”). The ROD prescribes a total volume of 453,000 acre-feet of fishery releases this “dry” year. Reclamation is precluded by section 3406(b)(23) from making the Excess Releases, because they exceed the ROD limit. Federal Defendants argue that the provision of the 1955 Act directing the Secretary “adopt appropriate measures to insure the preservation and propagation of fish and wildlife” authorizes the Excess Releases. Federal Defendants’ interpretation of the 1955 Act raises a conflict with section 3406(b)(23). CVPIA section 3406(b)(23) is the later, more specific statute, and hence it controls over the earlier, more general direction in the 1955 Act. *U.S. v. Estate of Romani*, 523 U.S. 517,

1 530-31 (1998); *U.S. v. Juvenile Male*, 670 F.3d 999, 1008 (9th Cir. 2012). The enactments
2 regarding the Trinity River Division adopted over the decades reflect a more and more specific
3 direction to the Secretary regarding releases for fishery purposes, culminating in the ROD. The
4 ROD explains: “In section 3406(b)(23) of the CVPIA, Congress sought the final resolution of
5 these issues in order to meet the federal trust responsibility and to meet the goals of prior
6 legislation, calling for the completion of the scientific efforts initiated by Secretary Andrus and
7 for the implementation of recommendations, based on the best available scientific information,
8 regarding permanent instream fishery flow requirements and TRD operating criteria and
9 procedures necessary for the restoration and maintenance of the Trinity River anadromous
10 fishery.” Exh. 1 to Akroyd Dec. at 17 (emphasis added).

11 Federal Defendants erroneously argue that Plaintiffs’ construction would mean “that when
12 Congress enacted the CVPIA, ... it intended to prohibit the Secretary from providing the flows
13 necessary to ensure the protection of fishery resources during the upstream migration through the
14 Klamath River to the Trinity River.” Fed. Oppn. at 16:21-26. Although the annual flow volumes
15 “may not be changed,” the ROD allows for flexibility in varying the daily release schedule within
16 a year. Exh. 1 to Akroyd Dec. at 12. This means that the block of water set aside by the ROD
17 could have been used in 2013 to increase flows in the late summer and fall. Federal Defendants
18 simply chose not to do so.

19 In its Modified TRO, the Court asked whether Federal Defendants’ trust responsibility to
20 the Hoopa Valley and Yurok tribes “provides an open-ended exception to limits otherwise
21 provided by law.” Modified TRO at 6:12-13. It does not. The government’s tribal trust
22 responsibility does not take precedence over or expand its statutory obligations. In *Hoopa Valley*
23 *Indian Tribe v. Ryan, et al.*, 415 F.3d 986, 992 (9th Cir. 2005), the Ninth Circuit addressed an
24 argument by the Hoopa Valley Tribe that “congressional acknowledgement of this trust
25 obligation in the CVPIA means that the Tribe’s interest trumps all others recognized in the
26 statutes authorizing Trinity River restoration.” The tribe argued that Reclamation was required to
27 provide funding for salmon restoration projects under mandatory contracting provisions of the
28 Indian Self-Determination and Education Assistance Act, claiming “that the government’s

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1 obligation as a trustee must take precedence over its other statutory obligations.” *Id.* at 991-92.
2 The court rejected this argument, explaining that “[t]he government’s trust obligations . . . can
3 coexist with its other responsibilities.” 415 F.3d at 993 (citing *Nevada v. United States*, 463 U.S.
4 110, 128, 142-43 (1983); *Arizona v. California*, 460 U.S. 605, 626-27 (1983)). Similarly, in
5 *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1421 (9th Cir. 1990),
6 the Ninth Circuit found that because the Navy had complied with the Endangered Species Act in
7 implementing diversions from the Truckee River, it had taken steps necessary to conserve water
8 for the Tribe and the tribal fishery, and therefore had not violated its trust obligations.

9 The CVPIA and ROD were aimed at meeting the government’s trust responsibilities, and
10 say so expressly. CVPIA section 3406(b)(23) directs the Secretary to provide instream releases
11 of water to the Trinity River “[i]n order to meet Federal trust responsibilities to protect the fishery
12 resources of the Hoopa Valley Tribe. . .” The ROD repeatedly explains how the permanent
13 instream flow releases satisfy the federal trust responsibility to both the Hoopa Valley and Yurok
14 Indian Tribes:

- 15 • “The necessity for these actions results from the various statutory obligations of the
16 Department as well as the federal trust responsibility to the Hoopa Valley and Yurok
17 Indian Tribes.”
- 18 • “[T]he guiding principles for this decision emanate from various Congressional mandates
19 as well as the federal government’s trust responsibility to the Hoopa Valley and Yurok
20 Indian Tribes.”
- 21 • “[T]he Preferred Alternative represents the appropriate action necessary to restore and
22 maintain the Trinity River’s anadromous fishery in accordance with the Department’s
23 statutory and trust responsibilities.”
- 24 • “[T]he statutory directives and trust responsibility require the restoration of a meaningful,
25 viable fishery from which the Hoopa Valley and Yurok Tribes can exercise their federally
26 reserved fishing rights and the non-Indian commercial and sport fishers can also share in
27 the benefits of these efforts. Based on the best available scientific information, this
28 alternative meets these statutory and trust obligations, providing the best means to achieve
the restoration objectives while continuing to operate the TRD as an integrated component
of the CVP.”

Exh. 1 to Akroyd Dec. at 2, 17, 18, 25.

Reclamation satisfies its trust obligations to the Hoopa Valley and Yurok Tribes by
complying with CVPIA section 3406(b)(23) and the ROD. The trust responsibility imposes no
obligation, nor grants any discretion, to violate section 3406(b)(23) or the ROD.

1 **B. Plaintiffs Have Demonstrated A Likelihood Of Irreparable Harm From**
2 **Implementation Of The Excess Releases**

3 In arguing that Plaintiffs are not likely to suffer irreparable harm to water supplies and
4 allocations in 2014, Defendants simply ignore the evidence. Ronald Milligan, Manager of
5 Reclamation's Central Valley Operations Office, acknowledges that "there is about a 10% chance
6 that there will be no cumulative effect on the combined storage of Trinity and Shasta Reservoirs."
7 Milligan Dec. at ¶ 10. That means about a 90% chance there will be an impact to storage. Mr.
8 Milligan further estimates that "there is about a 10% chance that there will be no impact to CVP
9 allocations or supplies in 2014." Milligan Dec. at ¶ 11. That means about a 90% chance there
10 will be an impact to CVP allocations or supplies in 2014. A 90% chance of harm is "likely." As
11 the Court stated in its Modified TRO, this loss is "contingent" because it may not occur if the
12 coming winter is very wet compared to the historical record, but this loss is "not speculative."
13 Modified TRO at 8:18-19.

14 The Modified TRO says the "chance of harm in 2013 is low." Modified TRO at 8:10.
15 While the EA says that 2013 allocations will not change, Mr. Milligan's declaration is not so
16 definitive. He explains that if the Excess Releases are enjoined Reclamation will "need to
17 consider certain policy and technical issues" before increasing allocations. Milligan Dec. at ¶ 9.
18 He states that capacity to move the water is somewhat constrained over the next month, and
19 would require coordination with the Department of Water Resources (which operates the State
20 Water Project). *Id.* But he does not rule out an allocation increase in 2013 if the Excess Releases
21 are enjoined.

22 In any event, Mr. Milligan's declaration confirms, as the Court has found, that loss of
23 2014 water supply from the Excess Releases is likely. So too, then, is the irreparable harm to the
24 west side of the San Joaquin Valley that flows from lost CVP supplies.

25 **C. The Public Interest And Balance Of Hardships Favor Injunctive Relief**

26 **1. The Potential Harm To Salmon Alleged By Defendants Is Highly Uncertain**

27 In the last 35 years, there has been only one year in which a disease outbreak resulted in
28

1 substantial adult salmon mortality, in 2002. Hanson Dec. at ¶ 60. Other years, both prior and
2 subsequent to 2002, experienced similar conditions and yet no similar fish die-off occurred.
3 Hanson Dec. at ¶¶ 22, 60. Although the cause of the 2002 die-off is known, *i.e.*, disease, there is
4 a high degree of uncertainty as to the contribution of various environmental and biological factors
5 resulting in this disease outbreak and the potential frequency of reoccurrence in another year,
6 including 2013. *See* Hanson Dec. at ¶¶ 21 – 22.

7 Defendants concede this uncertainty in the EA, stating that “given the inherent
8 uncertainties regarding events of this nature, combined with the predicted large fish size, it is not
9 possible to predict with absolute certainty that the [Excess Releases] will preclude a fish die-off in
10 2013, nor it is it possible to accurately quantify the reduced disease risk attributed to the increased
11 flows.” *See* EA at 18. And Hoopa’s expert, Mr. Kautsky, acknowledges that it is difficult to
12 demonstrate a causal relationship between excess releases to the Trinity River made in prior years
13 and the absence of appreciable adult fish mortality or disease in the lower Klamath River. *See*
14 Kautsky Dec. at ¶18; *see also* Hanson Dec. at ¶ 24 (the results from 2003, 2004, and 2012 where
15 Reclamation provided supplemental flows “provide no scientific basis to suggest that higher
16 releases would be necessary in 2013 to avoid disease outbreak”). Defendants’ experts have
17 uniformly urged that the Excess Releases be made, but have provided no scientific basis for
18 concluding they are necessary to avoid, or will avoid, a likely repeat of the 2002 die-off in 2013.

19 Defendants have provided no evidence to date of disease or dead fish this year, despite
20 current lower than average flows in the lower Klamath River and elevated temperatures in the
21 month of July. Presumably if an imminent threat of disease outbreak currently exists, Defendants
22 would be able to point to early signs of such an outbreak at this time. There simply is no proof
23 that a die-off such as occurred in 2002 is likely to occur in 2013, or that the Excess Releases will
24 be the difference in avoiding such a die-off. This point is reflected in the EA and has been
25 acknowledged by Defendants.

26 At bottom, Defendants and intervenors argue that the Excess Releases might reduce the
27 risk of a disease outbreak to some unknown degree, and that this speculative benefit is worth the
28 expenditure of up to 109,000 acre-feet of CVP water on top of the ROD flows. That expenditure

1 of CVP water, of course, is at no cost to them. Tellingly, when some of these same parties
2 decided how to use the ROD water this year, they did not think the benefit of the Excess Releases
3 was worth setting aside even a single drop of the ROD's assured supply of 453,000 acre-feet for
4 fishery releases.

5 **2. Plaintiffs Will Suffer Significant Hardship As A Result Of The Excess**
6 **Releases**

7 In contrast to the uncertainty surrounding the harms alleged by Defendants, Plaintiffs and
8 their constituents will likely suffer significant hardship as a result of the Excess Releases.
9 Although the precise acreage that will need to be fallowed or the employees that will not be
10 employed in 2014 as a result of the Excess Releases is unknown, the loss of CVP water next year
11 can be expected to cause the same effects as reduced water supply has in the recent past. As set
12 forth in the Declaration of Russ Freeman and the numerous declarations submitted by farmers and
13 others living and working on the west side of the San Joaquin Valley, diminished water supply
14 has resulted in decreased crop production and significant socioeconomic impacts to the
15 community. *See* Snow Dec. at ¶ 31; Freeman Dec. at ¶¶ 11, 13-14, 25; Acquistapace Dec. at ¶¶
16 5-7; Cardella Dec. at ¶ 7; Allen Dec. at ¶¶ 10-11; Nelson Dec. at ¶ 14; Bourdeau Dec. at ¶ 5.
17 Water supply shortages have also had environmental impacts in the area, including increased
18 fugitive dust emissions, land subsidence, increased salinity levels in soil, and impacts from
19 increased energy use. Freeman Dec. at ¶¶ 17-22, 26.

20 A further loss of water available to this community this year or next can only make this
21 situation worse. Freeman Dec. at ¶¶ 11, 20. And as Mr. Freeman and others explained, even a
22 small increase in water allocation could be used by farmers to dilute poor quality groundwater,
23 irrigate existing crops, make planting decisions for next year, and potentially reduce the number
24 of acres that will need to be fallowed. Freeman Dec. at ¶ 12; Allen Dec. at ¶ 8, 10-11; Bourdeau
25 Dec. at ¶ 9; Acquistapace Dec. at ¶ 8; Anderson Dec. at ¶ 10; *see also* Modified TRO at 8:22-25
26 (“Although it is true that current conditions on the ground cannot be traced to the 2013 flow
27 augmentation plan, it is equally true that every additional acre foot of surface water Plaintiffs are
28 able to obtain from the CVP will help alleviate these harms.”).

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1 In sum, Plaintiffs will suffer significant hardships if the Excess Releases are implemented,
2 and there will be significant environmental impacts. On the other hand, substantial uncertainty
3 surrounds the need for the Excess Releases to protect Klamath River salmon species. As such,
4 the balance of hardships in this action favors injunctive relief.

5 **III.**

6 **CONCLUSION**

7 Because Plaintiffs have established that: (a) they will likely prevail on the merits; (b) they
8 have suffered and will continue to suffer irreparable harm absent the requested relief; and (c) the
9 balance of hardships and public interest strongly favor granting such relief, this Court should
10 enjoin implementation of the Excess Releases.

11
12 Dated: August 16, 2013

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD

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14 By: /s/ Daniel J. O'Hanlon

15 Daniel J. O'Hanlon
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18 Dated: August 16, 2013

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