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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

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.: 13-cv-01232-LJO-GSA

**YUROK TRIBE'S REPLY TO
PLAINTIFFS' OPPOSITION TO
MOTION FOR SUMMARY
JUDGMENT**

Hearing Date: TBD
Hearing Time: TBD
Courtroom: TBD
Judge: Hon. Lawrence J. O'Neill

Defendant-Intervenor Yurok Tribe ("Yurok") hereby submits this reply to Plaintiffs' opposition to Yurok's cross-motion for summary judgment and incorporates by reference the replies of the other Defendant-Intervenors.¹ As discussed below, this reply provides additional support for Yurok's argument that Defendants maintain sufficient authority to release supplemental flows to protect anadromous fish in the lower Klamath River.

¹ The Court allocated 60 pages for all summary judgment briefing by the Defendant-Intervenors. Doc. 108. Yurok has made use of one additional page provided by PCFFA, keeping Defendant-Intervenors within the 60-page limit.

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FEDERAL STATUTES

16 U.S.C. §§ 1851-18533

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 (1955).....1

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CALIFORNIA STATUTES

Cal. Fish & Game Code § 59372

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1 **I. THE 1955 ACT AUTHORIZES RECLAMATION TO PROTECT FISH IN THE**
2 **LOWER KLAMATH RIVER**

3 Plaintiffs attempt to obfuscate the authority of the U.S. Bureau of Reclamation (“BOR”
4 or “Reclamation”) under the Central Valley Project Act of August 12, 1955 (“1955 Act”) to
5 implement supplemental releases for fish purposes in the lower Klamath River by claiming this
6 “cannot be what Congress understood and intended in 1955.” Doc. 125 at 12:20-21. In a case
7 previously litigated by Plaintiffs, the Ninth Circuit Court of Appeals recognized that Congress
8 considered potential harm to “the fishery of the Trinity and Klamath Rivers.” *Westlands Water*
9 *Dist. v. U.S. Dept. of the Interior*, 376 F.3d 853, 861 (9th Cir. 2004). Plaintiffs’ cited legislative
10 history also shows concern for Klamath River flows and ensuring that fishery needs downstream
11 of the Trinity River Division (“TRD”) hold first order of priority. *See, e.g.*, Doc. 128-1 at 5
12 (“Planned operating criteria [of the TRD] are such that low-water flows throughout the lower
13 Trinity and Klamath Rivers would be improved . . .”); Doc. 128-1 at 5 (prescribing first order of
14 priority in TRD operating criteria for flows “down the channel of the Trinity River” to preserve
15 fish); Doc. 128-2 at 4 (noting the release of water for fish downstream of Lewiston dam as a first
16 priority for Trinity River water). Congress clearly understood and intended in passing the 1955
17 Act that Reclamation would have authority to preserve and protect fish downstream of the TRD
18 in the lower Klamath River.

19 The 1955 Act’s mandate to “preserve and propagate” fish as a first order priority for TRD
20 operations and Central Valley Project Improvement Act (“CVPIA”) section 3406(b)(23) do not
21 conflict. Section 3406(b)(23)(A) directed the Secretary of the Interior (“Secretary”) to establish
22 permanent instream fishery flow requirements for the Trinity River fishery. The Secretary
23 exercised discretion in limiting the December 2000 Trinity River Record of Decision (“ROD”) to
24 the Trinity River mainstem. *See Westlands*, 376 F.3d at 867 (rejecting the need for the Secretary
25 to consider a larger geographic area). Section 3406(b)(23) as implemented by the ROD did not
26 establish flow requirements for the lower Klamath River fishery, of which Trinity River fish
27 stock are only a portion. Reclamation maintains authority under the 1955 Act to release water

1 from TRD to meet downstream fishery needs in the lower Klamath River, even as it acts under
2 the ROD to provide water for mainstem Trinity River restoration. *See Nat’l Ass’n of Home*
3 *Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (requiring clear Congressional intent and
4 express contradiction or absolute necessity to effectuate an implied repeal).

5 BOR reasonably balanced the irrigation needs of and water available from the TRD and
6 the Klamath Project in order to optimize use of stored water and improve lower Klamath River
7 conditions. AR 2, 505, 561, 1170, 1719. This decision was authorized by the 1955 Act.²

8 **II. THE CVPIA AUTHORIZES BOR TO RELEASE WATER FOR FISH AND**
9 **TRIBAL TRUST PURPOSES BEYOND THAT ALLOCATED UNDER THE ROD**

10 It is undisputed that Defendants maintain adequate substantive authority under CVPIA
11 sections 3402 and 3406(b) to release supplemental flows to protect anadromous fish in the lower
12 Klamath River. Plaintiffs’ entire argument to the contrary states that “Federal Defendants did not
13 cite CVPIA section 3406(b) as a source of authority for the Excess Releases [], and this post hoc
14 rationalization should be rejected [].” Doc. 125 at 20 n. 8 (citations omitted).

15 CVPIA section 3406(b)(2) establishes a hierarchy of purposes. *San Luis & Delta-*
16 *Mendota Water Auth. v. United States*, 672 F.3d 676, 704-05 (9th Cir. 2012). It authorizes flows
17 above and beyond ROD volumes for the secondary purpose of meeting tribal trust obligations to
18 Yurok and the Hoopa Valley Tribe under federal law. Alternatively, supplemental flows may be
19 charged against the 800,000 acre-feet authorized under section 3406(b)(2)(A)—an amount “in
20 addition to” water allocated under the ROD—to meet the section 3406(b)(23) primary purpose of

21
22 ² As amicus California Department of Fish and Wildlife Service notes, Doc. 122, Reclamation’s
23 decision also comports with California Fish and Game Code section 5937 and the public trust
24 doctrine. The very terms of section 5937 require dam owners to release sufficient water at all
25 times to keep fish downstream in good condition. The public trust doctrine obligates all persons
26 to avoid harm to public trust resources, including fish. *See, e.g., People v. Murrison*, 101 Cal.
27 App. 4th 349, 360 (2002); *People v. Glenn Colusa Irrigation Dist.*, 127 Cal. App. 30, 34-35, 38
28 (1932); *People v. Truckee Lumber Co.*, 116 Cal. 397, 400-402 (1897). These are ongoing duties
that are not limited by the terms and conditions in a water right permit. A water user never has a
vested right to an appropriation of water that harms public trust uses, even though the water user
may be legally authorized to appropriate that water by the state water board. *See Nat’l Audubon*
Soc’y v. Superior Court, 33 Cal. 3d 419, 426, 437, 440, 445, 447, 452 (1983).

1 providing water to restore the Trinity River fishery. Assuming arguendo that this is a post hoc
2 rationalization, it does not negate the substance of Reclamation's congressionally delegated
3 authority under sections 3402 and 3406(b) as explained below in Section V. Yurok is entitled to
4 judgment as a matter of law in favor of BOR's authority under CVPIA sections 3402 and
5 3406(b) for the supplemental releases.

6 **III. RECLAMATION MAINTAINS AUTHORITY TO OPERATE TRD TO PROVIDE**
7 **WATER NECESSARY TO SUPPORT YUROK'S FISHING RIGHTS**

8 Plaintiffs claim that the water rights of Yurok and the Hoopa Valley Tribe do not
9 encompass the release of stored TRD water.³ Doc. 125 at 18:11-20. While the implied water
10 right is non-consumptive, Reclamation is authorized to direct operations as necessary to support
11 Yurok's fishing right.

12 Reclamation has a duty to preserve Yurok's fishing rights. *Parravano v. Masten*, 70 F.3d
13 539, 547 (9th Cir. 1996). In *United States v. Adair*, the Ninth Circuit held that a tribe maintains
14 an implied reserved water right for the purpose of maintaining its fishing right. 723 F.2d 1394,
15 1410 (9th Cir. 1983). The water right confirms to the tribe the amount of water necessary to
16 support its fishing rights to provide a moderate living. *Id.* at 1414-15. The Ninth Circuit
17 subsequently recognized Yurok's implied water rights, noted Reclamation's "responsibility to
18 divert the water and resources necessary to fulfill the Tribes' rights," and upheld the agency's
19 authority to direct operations to comply with tribal instream water needs. *Klamath Water Users*
20 *Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213-14 (9th Cir. 1999).

21 Yurok exercises its fishing rights under a specific harvest allocation pursuant to federal
22 law. 16 U.S.C. §§ 1851-1853. It maintains a corresponding water right sufficient to protect these
23 allocated fish. *Adair*, 723 F.2d at 1414. The supplemental releases were needed "to reduce the
24 likelihood, and potentially reduce the severity, of any Ich epizootic event that could lead to an
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26 ³ Plaintiffs' reference to state water law for consistency with Plaintiffs' interpretation of tribal
27 water rights is inapposite. Doc. 125 at 18:19-23. Tribal water rights derive from federal law, not
28 state law. *United States v. New Mexico*, 438 U.S. 696, 718 (1978); *Arizona v. California*, 373
U.S. 546 (1963); *Winters v. United States*, 207 U.S. 564 (1908).

1 associated fish die-off in 2013 . . . Reductions in the Klamath and Trinity River fish populations
2 would affect tribal fishery harvest opportunities . . .” AR 15-16; *see also* AR 1179. The releases
3 provided the water necessary to protect Yurok’s federal allocation of Klamath River fish and
4 Reclamation maintained authority to direct TRD operations to that end.

5 **IV. ADJUSTMENT TO ROD FLOWS OUTSIDE OF THE ADAPTIVE**
6 **MANAGEMENT PROCESS IMPAIRS ROD MANAGEMENT OBJECTIVES**

7 Plaintiffs argue that “it defies reason and common sense” that ROD flows are “so exact
8 that a modest variance would significantly impair achieving” ROD objectives. Doc. 125 at 17-
9 19. To the contrary, the ROD was so precise. It incorporated decades’ worth of scientific studies
10 and established a scientific and technical process to meet ROD objectives.

11 ROD flows were designed to achieve specific, quantified management targets for the
12 Trinity River, such as habitat rehabilitation, flow management to improve water temperature, and
13 sediment transport to reshape the channel. AR 3974. The management actions are designed to
14 rehabilitate “the river itself, restoring the attributes that produce a healthy, functioning alluvial
15 river system” and to overcome lack of rearing habitat. AR 3004; *see also* AR 4024 (describing
16 goals of improving smolt size and optimizing conditions for spawning, incubation, and young-of
17 year production). It links two essential purposes for mainstem Trinity River restoration and
18 maintenance: flows to provide physical fish habitat and flows to restore riverine processes for
19 fish habitat. AR 3014. Even though the annual ROD volume varies depending on the water-year
20 class, the daily flow regimes are tailored to the specific management objectives for that water-
21 year. AR 3978-79. The flows assigned to each water year are designed to restore river processes
22 and improve fish habitat for smolt production and fry survival and rearing. AR 3972-74. The
23 management targets are location and anadromous fish life-stage specific. *See* AR 3974-75
24 (describing temperature and microhabitat suitability for adult holding, spawning, incubation, and
25 juvenile rearing habitat relative to location in the mainstem Trinity River); AR 3979 (noting
26 assignment of “[t]argeted fluvial processes and desired habitat conditions (microhabitat and
27 temperature objectives)” to each water-year class); AR 3981-82 (highlighting fluvial

1 geomorphic, salmonid microhabitat, and temperature management objectives specific to each
2 water-year class). ROD flow release objectives are specifically focused on the mainstem Trinity
3 River and are not designed to ameliorate conditions in the lower Klamath River. Lower Klamath
4 River fall flows were not evaluated in the ROD. Using ROD flows for a non-ROD purpose
5 would jeopardize essential ROD objectives.

6 Defendants would have the Court require a significant shift in ROD flows, ignoring the
7 rigorous technical and scientific adaptive management process established by the ROD. While
8 the ROD's daily release schedule may vary, the mechanism to do so is the Adaptive
9 Environmental Assessment and Management Program ("AEAMP"). The AEAMP evaluates all
10 management prescriptions. AR 3974. The ROD is based on three main hypotheses, which are
11 transferred into a set of measurable responses. AR 4025. The AEAMP tests the underlying ROD
12 hypotheses, reviews how proposed changes may impact ROD management targets, monitors the
13 physical and biological response from implementation, and then revises the underlying
14 hypotheses. AR4023-30 (describing AEAMP scientific review of hypotheses and model
15 recalibration); AR 4034 (specifying need for AEAMP to ensure monitoring and modification
16 process consistent with ROD flow recommendations); AR 04201-05 (highlighting 10-step
17 AEAMP process for management actions). Adjustments under the AEAMP are based on best
18 science and continued scientific monitoring and studies. AR 4030. The AEAMP allows
19 refinement of ROD flow schedules and other activities based on annual assessments and
20 recommendations of a technical analysis and implementation team. AR 3017. Shifting a
21 significant amount of volume for a purpose that was not evaluated in the development of the
22 ROD will impede the ability of ROD flows to meet quantified management targets that are
23 critical to the restoration of Trinity River processes and fish populations. Any shift of water for
24 purposes other than those identified in the ROD will limit the effectiveness of ROD flows to
25 meet in-river management targets.

1 **V. POST HOC RATIONALIZATION DOES NOT NEGATE RECLAMATION'S**
2 **SUBSTANTIVE AUTHORITY FOR SUPPLEMENTAL RELEASES**

3 Plaintiffs claim that because the 1955 Act is the sole legal authority cited by the federal
4 Defendants, alternative legal authority constitutes a post hoc rationalization. Doc. 113 at 19:20-
5 24; Doc. 125 at 7:7-8, 9:12, 20 n. 8, 38:6-8. Whether an argument is a post hoc rationalization
6 goes to the appropriate remedy but does not negate an agency's statutory authority. Otherwise,
7 legislative authority could be voided simply by a federal agency neglecting to mention it.

8 Post hoc rationalizations cannot serve as a predicate for an agency to act beyond its
9 statutory authority. *American Textile Manufacturers v. Donovan*, 452 U.S. 490, 539 (1981).
10 However, a court cannot limit an agency's statutory authority simply because of a post hoc
11 rationalization. *SEC v. Chenery*, 318 U.S. 80, 95 (1943) (affirming an administrative body's
12 authority to act and "not imposing any trammels on its powers," but remanding because the
13 entity failed to provide adequate grounds for its decision). Providing sufficient rationalization for
14 an action within the substantive authority of the agency renders remand futile and moots a claim
15 for injunctive relief. *See Mass. Tr. of E. Gas and Fuel Assocs. v. United States*, 377 U.S. 235,
16 247-48 (1964) (holding that even though an administrative body's stated basis of authority was
17 in error, it maintained the requisite authority such that the error would have no bearing on the
18 substance of the decision and remand was not appropriate); *NLRB v. Wyman-Gordon Co.*, 394
19 U.S. 759, 766 n.6 (1969) (describing remand as a useless formality where the agency's
20 substantive basis was not seriously contestable); *Friends of Clearwater v. Dombeck*, 222 F.3d
21 552, 560-61 (9th Cir. 2000) (holding that while a federal agency violated the National
22 Environmental Policy Act, the production of extra-record evidence showing substantive
23 compliance left no justification for an injunction against the agency action, which could no
24 longer be successfully challenged).

25 Assuming arguendo that the 1955 Act does not provide authority, BOR cited the 1955
26 Act as the "principal authorization," not the sole authorization. AR 17. There is substantial
27 evidence in the record that the CVPIA and tribal trust obligations were squarely before

1 Reclamation as potential additional authority. AR 19, 35, 36, 116-17, 145, 156, 402, 1206-07.
2 Even if BOR did not identify these as sources of its authority, a post hoc rationalization does not
3 invalidate Reclamation's statutory authority to implement the releases, it only goes to the
4 appropriate remedy. *Mass. Trans.*, 377 U.S. at 248.

5 **CONCLUSION**

6 For the reasons set forth above, as well as the arguments set forth in Yurok's cross-
7 motion for summary judgment and opposition to Plaintiff's motion for summary judgment, Doc.
8 119, Yurok respectfully requests that the Court grant its motion for summary judgment.

9
10 Dated: May 15, 2014

Respectfully submitted,

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