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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

U.S. BUREAU OF RECLAMATION and NATIONAL MARINE FISHERIES SERVICE,

Defendants,

and

KLAMATH WATER USERS ASSOCIATION,

Defendant-Intervenors.

Case No. 3:19-cv-04405-WHO

AMICUS BRIEF REGARDING POTENTIAL IMPACT ON OREGON WATER RIGHTS

I. INTRODUCTION

Amicus curiae Klamath Irrigation District ("KID") files this amicus brief to ensure this Court is aware of ongoing federal, state, and administrative proceedings in Oregon which relate to water rights in Upper Klamath Lake ("UKL"). UKL is an Oregon reservoir which stores water for irrigation purposes in southern Oregon and northern California. KID understands the primary concern of Plaintiffs in the above-captioned suit relate to the actual flow of water in the Klamath River below Iron Gate Dam, located in California and separated from UKL by several additional dams and corresponding impoundments of water. Therefore, the issues raised by KID in its Oregon proceedings are not directly relevant to the issues presented in this case. Nevertheless, as a practical matter, one of the means employed by Defendant Bureau of Reclamation ("Reclamation") to increase flows over Iron Gate Dam has been the seizure of water rights in UKL and release of water for these instream purposes. KID's proceedings in Oregon related to Reclamation's authority to seize these water rights without complying with state law, as required by the Reclamation Act. Because of the potential for overlapping issues between these matters, KID files this brief to alert the Court to these matters.

KID does not believe it is yet necessary to seek intervention here. Even if preliminary injunctive relief is issued by this Court, it can be issued in a manner that does not impact KID's proceedings in Oregon or excuse Reclamation from its obligations under the Reclamation Act. While KID does not believe preliminary injunctive relief is necessary here, and supports the position of Defendant-Intervenors Klamath Water Users Association ("KWUA"), even if such relief were issued, the mandates of the Reclamation Act and the Endangered Species Act ("ESA") are not mutually exclusive. Appropriate relief can acknowledge Reclamation must follow both.

More particularly, the ESA imposes obligations on Reclamation and other federal agencies to discharge their discretionary duties in a manner that does not jeopardize the existence of endangered species and requires agencies to consult with the National Marine Fisheries Service ("NMFS") and the Fish and Wildlife Service ("FWS") to ensure a lack of jeopardy. The ESA does not grant agencies *more* authority than otherwise given in their enabling acts: it simply directs them to use their authority to ensure their discretionary acts do not create jeopardy. As the Supreme Court has confirmed, there is

no obligation to engage in these reviews under the ESA where the agency has no discretion, because the agency's lack of discretion means it cannot change its course of action to prevent jeopardy.

The actual powers of Reclamation to procure water are found in the Reclamation Act. Reclamation is permitted to appropriate water through purchase or condemnation. However, Reclamation is required to abide by state law in doing so. Thus, to the extent Reclamation requires water to discharge its obligations under the ESA, it has a method and means to do so: the acquisition of water rights through condemnation or purchase. KID's ongoing proceedings concern Reclamation's failure to appropriately discharge this authority. Instead of purchasing, leasing, or condemning the water rights of KID's constituent members, Reclamation has elected to simply seize these water rights without lawful basis. This failure to lawfully procure water rights is the genesis of the ongoing federal, state, and administrative proceedings KID has filed.

Because Reclamation can simultaneously comply with both the ESA and the Reclamation Act, there is no necessary conflict between the varying proceedings. KID simply requests that, if this Court issues preliminary injunctive relief, it take care to do so in a manner that does not prejudice KID's ongoing proceedings and does not appear to relieve Reclamation of any obligations it may have under the Reclamation Act or Oregon state law vis a vis the procurement of water rights.

II. BACKGROUND

In this case, Plaintiffs have brought claims related to Reclamation's consultation and no-jeopardy obligations under ESA § 7(a)(2).[1] (*See* First Amended Complaint ["FAC"], Doc. No. 17 at ¶¶ 92–96.) More specifically, these claims allege Reclamation's determinations regarding jeopardy and adverse modification of critical habit, as well as its refusal to reinitiate consultation, are arbitrary, capricious, and in violation of its own implementing regulations. (*See* FAC, Doc. No. 17 at ¶¶ 97–156.) Plaintiffs moved for a preliminary injunction on October 18, 2019, seeking to prevent irreparable harm related to Defendants' alleged failure to comply with the ESA. (Doc. No. 27.) Pursuant to the stipulation of the parties, the matter was stayed on March 27, 2020. (Doc. No. 908.)

[1] The complaint also includes claims under the National Environmental Policy Act ("NEPA") regarding Reclamation's failure to prepare an EIS. (See FAC, Doc. No. 17 at ¶¶ 157–182.) However, the preliminary injunctive relief is being sought for Plaintiffs' ESA claims, not their NEPA claims. As such, the NEPA claims are not further discussed here.

Plaintiffs have now filed a motion to lift the stay and seek a temporary restraining order ("TRO"), pending their motion for preliminary injunction being ruled upon. (*See* Doc. No. 909-1.)

The amicus before the court here is an irrigation district who is not a party to this matter. KID has been involved in several ongoing judicial and administrative proceedings against Reclamation related to Reclamation's appropriation of water rights belonging to KID and its constituent members under Oregon law. First, KID filed suit against Reclamation in the U.S. District Court for the District of Oregon in March 2019 (the "Oregon federal suit"), alleging Reclamation is violating its authority under the Reclamation Act and is unlawfully seizing Oregon water rights held by KID. (*See* Exh. A to Declaration of Nathan Rietmann ("Rietmann Decl.").) Specifically, the Oregon federal suit alleges that the rights to water in the Klamath Basin were the subject of a state adjudicatory proceeding that began in the late 1970s and culminated in the issuance of a Findings of Fact and Order of Determination ("FFOD") in 2013, and subsequently an Amended and Corrected Findings of Fact and Order of Determination ("ACFFOD") in 2014. (*See id.*) This adjudication—the ACFFOD—was conducted by the Oregon Water Resources Department ("OWRD") and, in accordance with Oregon law and the McCarran Amendment (43 U.S.C. § 666), comprehensively determined <u>all</u> water rights in UKL reservoir, <u>including all federal reserved water rights held by the United States and federally recognized tribes in UKL reservoir.</u> *(Id.)* While a second, judicial stage of the adjudication is now pending, the ACFFOD is in full effect and enforceable under Oregon law unless and until its application is stayed by the Klamath County Circuit Court. (*Id.*) No such stay has been sought. (*Id.*) The ACFFOD found that Reclamation was entitled to store up to approximately 486,000 acre-feet of water in UKL, but had no right to use the water; the use of the stored water was a right belonging to various irrigators, who possessed the right to use up to 3.5 acre-feet per irrigable acre each irrigation season. (*Id.*) Notwithstanding that decision, Reclamation has continued to release water to satisfy its own instream obligations, including obligations under the ESA, without leasing or purchasing these rights from KID. (*Id.*) KID seeks declaratory relief establishing that Reclamation may not simply release this water, and must instead appropriate it pursuant to state law, namely by leasing, purchasing, or condemning whatever amounts it requires from Oregon water rights holders. (*Id.*)

When it became apparent that Reclamation was, once again, planning to simply release water without procuring the necessary water rights, KID filed a mandamus action in Oregon state court seeking to have OWRD "take exclusive charge" of UKL in accordance with ORS 540.210, due to a dispute between KID and Reclamation about the latter's ability to release water without a corresponding water right. (*See* Rietmann Decl., Exh. C.) The Marion County Circuit Court issued a mandamus order directing OWRD to take exclusive charge of UKL on April 16, 2020. (*See* Rietmann Decl., Exh. D.) OWRD filed a response to the writ indicating that it had done so. (*See* Rietmann Decl., Exh. E.) Though KID did not agree that OWRD had adequately responded, KID allowed the writ to be discharged without objection because it agreed that an emergency mandamus petition was no longer the correct procedural vehicle. (*See* Rietmann Decl. at ¶ 6.)

OWRD has advised KID it is investigating KID's complaints (the "administrative proceeding") and will comply with its obligation under ORS 540.210 to "divid[e] or distribut[e] the water [in UKL] in accordance with the respective and relative rights of the various users of water from the ditch or reservoir." (*See* Rietmann Decl., Exh. E.) Nevertheless, KID has been forced to file an additional complaint under the Oregon Administrative Procedures Act ("APA," hereafter the "state APA action"), because OWRD has not actually taken "exclusive charge" of UKL under state law. (*See* Rietmann Decl., Exh. F.) KID is seeking a temporary restraining order in that proceeding in the Marion County Circuit Court, which will be heard on Friday, May 22, 2020 at 10:30 a.m. (*See* Rietmann Decl. at ¶ 7.)

These three matters all remain pending. However, they all concern fundamentally different issues from those raised in the case pending in front of this Court. The matter pending in front of this Court concerns Reclamation's obligations under the ESA to provide a certain amount of water flowing over Iron Gate Dam in California, and thereby avoid jeopardy of certain threatened and endangered species. The Oregon federal action, the state APA action, and the administrative proceeding all concern Reclamation's obligations under the Reclamation Act and Oregon state law, which it is required to follow by virtue of the Reclamation Act.

Because one of the methods Reclamation has historically used to meet its obligations to ensure certain flows in the Klamath River below Iron Gate Dam is the release of stored water from UKL,

KID files this amicus brief to assist this Court in distinguishing the various pending matters. Despite the obvious potential for overlap between the matters, there is not yet a need to intervene for KID to intervene here,[2] as the proceedings concern very different issues, seek different relief, and concern obligations on Reclamation that are not mutually exclusive. KID asserts in the Oregon federal suit that, whatever obligations to supply water Reclamation may have, it must follow a legal process to acquire the water rights necessary to supply that water. The operative Second Amended Complaint ("SAC") in the Oregon federal action alleges Reclamation has indicated an intention to seize and use KID and others' Oregon water to satisfy obligations Reclamation has under the ESA, without purchasing, condemning, or otherwise lawfully obtaining any right to do so in accordance with Oregon law. (*See* Rietmann Decl, Exh. B at ¶¶ 14–50.) The Reclamation Act prohibits Reclamation from doing exactly that, and instead requires it to comply with state law regarding water rights. (*Id.* at ¶¶ 15–18.) The Oregon federal action contains a narrowly crafted prayer for relief designed to avoid potential conflicts between these two lawsuits, and KID seeks only declaratory relief concerning Reclamation's power and authority to act under the Reclamation Act. (*See id.* at 22–23 [Prayer for Relief].) KID recognizes the Reclamation Act *specifically permits* Reclamation to condemn its water rights in accordance with Oregon state law. (*Id.* at ¶ 14–18.) It is therefore fully possible for Reclamation to comply with its obligations under both the Reclamation Act and the ESA, because KID cannot stop Reclamation from acquiring water rights. (*See id.* at ¶ 50 ["It is possible for Defendants [Reclamation and its officers] to comply with the applicable *and* use water in the manner they are using water today."].) Reclamation has demonstrated this ability in the past, seeking and obtaining limited licenses from irrigators to release stored water for instream purposes in 2013, 2014, and 2015. (*See* Rietmann Decl. at Exh. H.) The Oregon federal action does not allege Reclamation can be prevented from acquiring the water it needs; it simply must acquire the water *lawfully*.

Put another way, this California suit concerns Reclamation's obligation to provide *a flow of water* down the river below Iron Gate Dam to protect endangered fish populations under the ESA, and the Oregon lawsuits and administrative proceeding concern how Reclamation must obtain *water rights*

[2] KID sought to discern whether Plaintiffs would oppose KID's intervention, and were advised Plaintiffs would oppose intervention. (*See* Rietmann Decl., Exh. G.) To permit this Court to proceed without the delay of ruling on a request to intervene, this amicus shows this Court can award injunctive relief without prejudicing KID's other pending disputes.

to release stored water, whether it will use this water to fulfill ESA obligations or for some other purpose. The California case is about water; the Oregon case is about water rights.

While KID believes the TRO requested by Plaintiffs here is unnecessary and supports KWUA in its opposition, KID files this brief to ensure that, if this Court does award preliminary injunctive relief, it does so without prejudice to KID's ability to maintain its ongoing proceedings in Oregon. The relief sought in these matters is not mutually exclusive. Reclamation can both comply with any ESA obligations it may be found to have by this Court as well as comply with any order of an Oregon court or administrative agency to abide by the Reclamation Act and lawfully appropriate any water rights it may need. Indeed, Reclamation has done so in the past. (*See* Rietmann Decl. at Exh. H.)

III. APPLICABLE LAW AND ANALYSIS

It is well-established that the ESA imposes obligations on federal agencies, but does not expand the authority of agencies to act beyond the power the agency otherwise possesses. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995) ("[The ESA] directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act.'") (quoting *Platte River Whooping Crane v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992)). The D.C. Circuit described as "far-fetched" the argument that the general consultation requirements of the ESA expand agencies' authority to act beyond their enabling acts. *See Platte River Whooping Crane*, 962 F.2d at 34. This principle has not only been upheld by the Ninth and D.C. Circuits, but also the Fifth Circuit. *See Am. Forest & Paper Ass'n v. U.S. EPA*, 137 F.3d 291, 299 (5th Cir. 1998) ("We agree that the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction.")

The Supreme Court recently weighed in on an analogous issue in *National Association of Home Builders v. Defenders of Wildlife* ("*Home Builders*"), 551 U.S. 644 (2007). At issue in *Home Builders* was a conflict between the ESA's consultation requirement under 16 U.S.C. § 1536(a)(2) and a requirement under the Clean Water Act that the EPA turn over authority to issue discharge permits to a state if the state met nine specified criteria. *Home Builders*, 551 U.S. at 651–52. The Ninth Circuit held the ESA required the agency to consider whether turning over this authority to the states would create jeopardy for an endangered species, even though the requirement to turn over authority

was mandatory if the nine criteria were met. *Id.* at 655–57. The Supreme Court, noting the Circuit split on the issue created by this holding and the D.C. Circuit's holding in *Platte River Whooping Crane*, reversed. *Id.* at 657. In doing so, it noted that the ESA's general consulting obligation under 16 U.S.C. § 1536(a)(2) does not effect an implied repeal of previously-enacted statutes. *Id.* at 662–66. As such, it imposes no consultation obligation on agency actions that are mandatory, and can only apply where the actions of the agency are discretionary. *Id.* at 666–67.

The Supreme Court's holding in *Home Builders* establishes an important principle that supports the holdings of *Sierra Club*, *Platte River Whooping Crane*, and *American Forest & Paper Association* by analogy. Where an agency lacks discretion, there is no requirement to consult under Section 7 of the ESA. *See Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1086–87 (9th Cir. 2015) ("[I]f an agency has no discretion to take any action that might benefit the threatened species, Section 7 consultation would be 'a meaningless exercise.'") (quoting *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1085 (9th Cir. 2001)); *see also Home Builders*, 551 U.S. at 669 (noting the ESA's "no-jeopardy duty covers only discretionary agency actions and does not attach to actions . . . that an agency is required by statute to undertake once certain specified triggering events have occurred"). This is because the ESA does not grant the agency any additional powers to act it did not already possess. *Am. Forest & Paper Ass'n*, 137 F.3d at 299; *Sierra Club*, 65 F.3d at 1510; *Platte River Whooping Crane*, 962 F.2d at 34. Instead, the ESA requires the agency to discharge the discretionary powers it was given in other statutes in accordance with the ESA. 16 U.S.C. § 1536(a)(2). Similarly, an agency's non-discretionary obligations or duties under other statutes are not modified, discharged, or excused by the consultation and no-jeopardy requirements of the ESA.

As referenced above, Plaintiffs' claims in this case specifically relate to the ESA's consultation and no-jeopardy obligations under ESA § 7(a)(2), codified at 16 U.S.C. § 1536(a)(2). (*See* FAC, Doc. No. 17 at ¶¶ 92–156 [ESA claims]; *id.* at ¶¶ 157–82 [NEPA claims].) However, the ESA does not modify, remove, or discharge the other obligations Reclamation has under the Reclamation Act, which require it to act in accordance with state water law in the purchase, condemnation, "control, appropriation, use, or distribution of water." *See California v. United States*, 438 U.S. 645, 674–75 (1978) ("The legislative history of the Reclamation Act of 1902 makes it abundantly clear that

Congress intended to defer to the substance, as well as the form, of state water law."). More particularly, the Reclamation Act states:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. Thus, while Reclamation is specifically given the authority to condemn property rights—such as the right in Oregon to use water, *see* ORS 307.010(1)(b)(D)—where necessary, *see* 43 U.S.C. § 421 (Reclamation may "acquire any rights or property" deemed necessary "by purchase or condemnation under judicial process"), it does not have the right to do so without complying with the Reclamation Act, which requires adherence to state law. As set forth in *Sierra Club*, *Platte River Whooping Crane*, and *American Forest & Paper Association*, and supported by the Supreme Court's decision in *Home Builders*, the ESA does not expand the authority of an agency to take actions it is not otherwise empowered to take. Thus, the ESA does not entitle Reclamation to seize or appropriate Oregon property rights; it rather creates an obligation that Reclamation use its discretionary powers to avoid jeopardy to endangered species. It is the Reclamation Act that empowers Reclamation to acquire Oregon water rights through purchase or condemnation. *See* 43 U.S.C. § 421. However, such rights must be acquired in accordance with state law. *See* 43 U.S.C. § 383; *California v. United States*, 438 U.S. at 674–75.

Because Reclamation has the authority under the Reclamation Act to acquire Oregon water rights either through purchase or condemnation, *see* 43 U.S.C. § 421, and Oregon water law permits the leasing of water rights to Reclamation for instream purposes, *see* ORS 537.348, it is entirely possible for Reclamation to comply with both its obligations under the ESA and its obligations under the Reclamation Act and Oregon law. Indeed, it has specifically done so in the past by seeking and obtaining limited licenses under Oregon law to permit it to use stored water for instream purposes. (*See* Rietmann Decl. at Exh. H.) It is clear that, even if temporary injunctive relief were ordered in both KID's state APA action and this case, Reclamation could readily comply with both, because

Reclamation can always condemn or lease KID's water rights for its ESA purposes. 43 U.S.C. § 421; ORS 537.348; Sections 1 and 2, chapter 445, Oregon Laws 201. KID simply requests that this Court bear in mind KID's interests and, in the event it grants any form of preliminary injunctive relief, ensure its order does not prejudice KID's rights in the ongoing Oregon federal action and Oregon administrative proceeding, by making clear that the order does not relieve Reclamation of any other obligations of law.[3]

V. CONCLUSION

KID understands the claims raised by Plaintiffs in this case—particularly the claims at issue in the current request for a temporary restraining order—concern Reclamation's consultation and no-jeopardy obligations. If this Court grants Plaintiffs the temporary injunctive relief sought, it should make clear that nothing about its order excuses Reclamation's compliance with other legal obligations, namely those included in the Reclamation Act and Oregon state law. Because the Court can issue orders regarding preliminary injunctive relief in this case in a manner that will not prejudice KID's rights in the Oregon federal suit, intervention does not appear necessary at present. KID only intends to seek to intervene if it appears Plaintiffs are requesting or this Court may grant relief threatening to impact KID's rights in its ongoing state and federal proceedings.

Dated: May 18, 2020

WANGER JONES HELSLEY PC

By: __/s/ Christopher A. Lisieski _____
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[3] This is also generally appropriate in the Court's review of an agency action. The APA empowers courts to set aside or hold unlawful agency action that is arbitrary, capricious, or contrary to law, but does not generally allow the reviewing court to direct how the agency must exercise its discretion upon remand. *See, e.g.*, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) (noting that a reviewing court may set aside agency action "even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason"); *New York v. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 579–80 (S.D.N.Y. 2019) (noting that "the true gravamen of an APA claim is . . . that the agency has breached the plaintiff's (and the public's) entitlement to non-arbitrary decision making"); *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic and Atm. Admin.*, 109 F. Supp. 3d 1238, 1241 (N.D. Cal. 2015) ("When a court finds an agency's decision unlawful under the Administrative Procedures Act, vacatur is the standard remedy.").