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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

Case No. 3:19-cv-04405-WHO
Related Cases: No. C16-cv-06863-WHO
No. C16-cv-04294-WHO

REPLY IN SUPPORT OF MOTION TO LIFT STAY AND ENTER TEMPORARY RESTRAINING ORDER

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

Defendants,

and

KLAMATH WATER USERS ASSOCIATION,

Defendant-Intervenor.

Hearing Date: May 22, 2020
Hearing Time: 10:00 AM
Judge William H. Orrick

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INTRODUCTION

Plaintiffs Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources (hereinafter "Yurok Tribe" or "Tribe") had sincerely hoped that the good-faith negotiations that produced and are required in the Interim Plan and the Stipulated Stay would have led to continued data-driven, collaborative work to find solutions — even in a challenging water year. When the May 1 water forecast indicated reduced water availability and the Bureau of Reclamation turned to the parties to find solutions, the parties rolled up their sleeves and poured over model runs and water management scenarios for May. For its part, the Tribe agreed to forgo a large portion of the promised augmented river flows. That collaborative spirit ended on May 11 when the Bureau of Reclamation presented the Tribe a take-it-or-leave-it plan that ignored forecasts for substantial rain, the actual inflows from tributaries into Upper Klamath Lake ("UKL") and how these were outperforming the forecasts, and the prospect of additional water from PacifiCorp reservoirs. The Bureau's actions deviate significantly from the Interim Plan and thus warrant lifting the stay.

The Tribe seeks emergency relief because the situation for Klamath River salmon is so dire. The first two years under the 2019 Plan have shown a high prevalence of *C. shasta* infections, with the infection rate this year topping 97% in the last three weeks. Most alarmingly, 90% of the infections were severe and expected to be fatal during the week of May 11, with mortalities at 43% and 55% in the following and preceding weeks.

Such devastating population-level effects will reverberate in the fisheries in the years to come. Spring is the critical period for young salmon when they not only face *C. shasta* infections and mortalities, but need river flows to inundate rearing habitat. Yet for a second year in a row, river flows have been kept by the Bureau at near minimum levels during these critical times. These minimums are designed to prevent lethal conditions, which they fail to do when *C. shasta* is a threat; they are not sufficient to sustain viable populations.

While the Tribe supports and understands that the Bureau must balance the needs of endangered suckers in UKL and threatened Coho salmon in the Klamath River, the Bureau cannot abruptly cut off augmented flows for salmon when they are most needed, even as the

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agency itself identified alternative paths forward that could retain augmented flows and avoid undue harm to suckers. The augmented flows the Tribe seeks are volume-neutral as to the UKL because the Tribe is willing to forgo that portion of the flows that would have come from the lake in light of drought conditions. Moreover, given that recent inflows have significantly outperformed the May 1 forecast and a subsequent interim June-September forecast indicates substantially more water is available, any remaining concerns about the impact of providing augmented flows at this reduced level on lake levels are vastly reduced, if not eliminated. The remaining augmented flows should resume as soon as possible to avoid irreparable harm to Coho, Chinook, endangered Southern Resident Killer Whales that depend on Chinook as their preferred prey, and Tribal fishing rights, all of which share priority to water with suckers.

Since the Bureau cut off the flows, UKL inflows have significantly outperformed the inflow estimates. Over an inch of rain fell on parts of the Upper Klamath Basin, inflows from the Williamson River are running double what they were in dataset the Bureau used, and an updated forecast from NRCS has bolstered inflow predictions, suggesting more than 36,000 acre-feet of water is available than the Bureau assumed. 3rd Belchik Decl. ¶¶ 10-15.

Based on the modeling shared on May 8, augmentation flows can be provided at the reduced levels the Tribe seeks in this motion (forgoing the 17,000 acre-feet from UKL) in light of the rosier inflows and particularly if irrigation levels were reduced. Even if the Court is reluctant to order flows in May because UKL is below 4142 feet, that limit exists only in April and May. The federal brief's reference to it as a requirement in June is in error. ECF 919 at 24. At a minimum, the Court should direct the Bureau to provide augmentation flows once the 4142 feet threshold no longer applies.

I. THE STAY SHOULD BE LIFTED.

The Court should lift the stay because the Bureau is deviating from, not implementing, and/or modifying the Interim Plan in three respects. First, the Interim Plan requires the Bureau to allocate 40,000 acre-feet for augmentation flows based on the April 1inflow forecast. ECF 907-2 at 3. It is undisputed that the April 1 forecast produced an estimated UKL supply that fell within the range requiring augmentation flows, and the Bureau at first appropriately made the

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allocation. The Bureau, however, now calls the April 1 forecast "grossly" and "wildly inaccurate" and asserts that it was reasonable to reduce the allocation to what it would have been based on a forecast obtained on May 1. It contends that its action is consistent with the letter and spirit of the Interim Plan "to correct for the inaccurate forecast information and reflect the fact that the actual hydrologic conditions prevailing in the Klamath Basin should not have resulted in an additional 40 TAF of augmented river flows." ECF 919-13. But that is not what the Interim Plan requires. The Yurok Tribe has argued for years that the Bureau should not fully lock in its irrigation and river allocations based on April 1 forecasts, but the Bureau and irrigators insisted on locking in allocations based on April 1 forecasts and made the lock-in a non-negotiable term of the Interim Plan. Because the April 1 date now favors the river, the Bureau has changed its position, in violation of the Interim Plan that the Tribe relied upon when agreeing to a stay.

Second, while the Interim Plan allows the Bureau some flexibility in the timing and distribution of the augmented volumes, it does not allow the Bureau to jettison the augmented flows altogether. ECF 907-2 at 4; *see also id.* ("Any unused portion of the augmentation water would remain in the EWA after June and the formulaic approach to EWA release would be followed in the July through September period"). The 4142-foot lake level provision applies only in April and May, and provides no barrier to resuming augmented flows in June. The Bureau asserts that it is uncertain whether any additional augmented flows may still occur, but it cut off the flows when the Tribe did not agree to the take-it-or-leave it option on the table on May 11, and the Declaration of Jared Bottcher contains a table indicating that no - zero – augmented flows will occur in June. ECF 919-1 at 13. It violates the Interim Plan for the Bureau to claim the discretion to eliminate all augmented flows.

Third, when the UKL fell below 4142 feet, it triggered the Bureau's obligation to coordinate, obtain input, and engage in government-to-government consultation with the Yurok Tribe on how to manage water "to best meet the needs of ESA-listed species." ECF 907-2 at 4. The Bureau did not believe augmented flows were absolutely prohibited. Indeed, it began providing daily flows at a level recommended by the technical experts after the May 1 forecast, then convened discussions of various scenarios that would continue augmented flows, ECF 918-

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3, and even its May 11 proposal provided an additional 5,000 acre-feet for augmented flows in May and a possibility of another 5,000 in June.[1] The Bureau deviated from its obligation to coordinate and consult on May 11 when it put forward a take-it-or-leave-it plan based on more pessimistic modeling that deviated from its standard methodology and ignored a forecast for substantial rain and ongoing negotiations with PacifiCorp, both of which were projected to and ultimately did make additional water available.[2] When the Tribe did not accept the plan on that day, although it already agreed to forgo 17,000 acre-feet that would come from the UKL, the Bureau unilaterally and summarily cut off the augmented flows despite no change in the hydrologic conditions. The Bureau's action was particularly troubling because the prevalence of *C. shasta* infections in sampled juvenile salmon on May 5, 2020 was 98% with 90% of the infections so severe they will likely prove fatal. ECF 909-12, at Slide 49. The Bureau's actions beginning on May 11 do not comport with the letter or spirit of the coordination and consultation requirements in the Interim Plan. Because the Bureau has deviated from, modified, and is not fully implementing the Interim Plan, the Court should lift the stay.

The Tribe is not seeking specific performance of the Interim Plan nor basing this motion on the Bureau's failure to implement the Plan. The Tribe agrees that lifting the stay restores the parties to the *status quo* before entry of the stay, ECF 919 at 15, and no additional 60-day notice is required. The Tribe's claims revert to the challenges to the 2019 biological opinion ("BiOp") presented in its preliminary injunction motion, with the harm and equities informed by the evolving circumstances in the river. The 2019 BiOp remains unchanged. The National Marine Fisheries Service issued a three-page informal concurrence letter, finding the Interim Plan consistent with the 2019 BiOp's no-jeopardy and adverse-modification conclusions. ECF 909-1. Accordingly, the Tribe's challenge to the 2019 BiOp is not moot.

[1] While the parties entered into a confidentiality agreement for the settlement negotiations that led to the Interim Plan and Stipulated Stay, the agreement ended with the Stipulation and does not shield the coordination and consultation that occurred under the Interim Plan.

[2] PacifiCorp has provided 15,000 AF of water from its reservoirs and negotiations continue regarding the timing of refilling their reservoirs.

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II. A TEMPORARY RESTRAINING ORDER SHOULD ISSUE.

The Tribe agrees with the Bureau that this motion seeking a resumption of augmented flows merges with the preliminary injunction motion seeking an additional amount of water in the EWA. The Tribe is seeking only up to an additional 16,000 acre-feet of water, corresponding to the remaining contribution to the augmented flows from the irrigators, which is a fraction of what the modified preliminary injunction sought.

The Tribe also agrees with the Bureau that the Tribe's ceremonial Boat Dance is not part of this motion because it takes place later in the season. The Bureau has provided Boat Dance water for years; it was required under the 2019 Plan; and the Tribe never imagined the Bureau would cut off the flows promised for it. The Tribe will seek leave to amend or supplement the complaint to add a claim and file a motion seeking relief as to Boat Dance, and the Bureau appears to consent to such leave. ECF 919 at 8.

A. The Tribe Is Likely To Succeed On The Merits.

1. The Adverse Modification Analysis Is Based On Erroneous Data.

The 2019 BiOp's no adverse modification conclusion is invalid because it relies on erroneous data. NMFS based its adverse modification analysis on the work of Dr. Thomas Hardy, which is the best available scientific information available, and the only science that quantifies the relationship between Klamath flows and salmon habitat needs. Simondet Decl. ¶¶ 6-7; BiOp 61-63, 128-29, 141-42. In particular, NMFS has used the Hardy weighted usable area ("WUA") curves that quantify the relationship between habitat and flow in the Klamath River. But the curves NMFS used calculated the WUA curves with erroneous data suggesting lower river flows would provide more suitable Coho salmon fry and juvenile rearing habitat than is supported by Dr. Hardy's work. *See* Hardy Decl. ¶¶ 10-13 (Oct. 17, 2019) (ECF 27-3).[3]

The Bureau and NMFS have reinitiated consultation based on this admitted error, but assert that the 2019 BiOp was based on the best available science, because the error had not yet

[3] Dr. Hardy conducted his work under a contract with the Department of the Interior and remains a consultant to the federal agencies. The Tribe retained him to figure out what went awry in the 2019 BiOp, and the federal agencies agreed with what he produced.

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been uncovered, despite their suspicions that the curves suggested far less water could produce more suitable habitat. The Bureau, NMFS, U.S. Geological Survey, and Fish and Wildlife Service ("FWS") all noted the dramatic change in the habitat curves from the 2013 BiOp. NMFS AR B-2309-10 (need to discuss "contrasting results"), B-2318-19 ("don't have a good explanation for the big changes between the BiOp and our current WUA curves"), B-5446 (Yurok Tribe's questions "likely track the same questions we had during the consultation when comparing coho fry curves from 2013 and what was provided in Reclamation's BA"). However, the federal agencies failed to investigate further until the Tribe retained Dr. Hardy to figure out what went wrong. ECF 27-4, ¶¶ 4-6.

NMFS argues that the admitted error is irrelevant because it learned of the error after issuing the BiOp. This contention is empty in light of pre-BiOp emails expressing incredulity that far lower flows than the Hardy curves could provide adequate habitat. Moreover, under Ninth Circuit precedent, an agency's reliance on erroneous data renders a decision arbitrary and a clear error in judgment, even if the mistake is uncovered after the decision has been made. *NRDC v. Forest Serv.*, 421 F.3d 797, 802, 806-07, 810 (9th Cir. 2005).

2. The Adverse Modification Determination Fails to Confront the Pervasive Violations of NMFS's Habitat Conservation Standard.

NMFS has set a standard equating 80% of maximum available habitat with not adversely affecting the functioning of critical habitat and used this standard in its BiOp. In river reaches important to Coho, the 2019 Plan will reduce available habitat "below 80 percent of maximum available in most months of the year and in most water year types" with one critical reach meeting this standard only 17% of the time between March-June. BiOp at 149, 155, 202-03, 205. NMFS concluded that the 2019 Plan would not adversely modify critical habitat without explaining how this is consistent with such frequent and pervasive violations of its own standard.

NMFS misunderstands this claim when it accuses the Tribe of trying to turn the 80% standard into a bright-line test that forbids any deviations. It is NMFS that set this standard, not the Tribe. And NMFS itself found rampant violations, not isolated ones. When a standard is

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violated so often in such important reaches for Coho viability, NMFS must explain how that result avoids diminishing the value of critical habitat. *See* Motion (ECF 909-1 at 17).

Belatedly searching for such an explanation, NMFS points to its ability to provide augmented releases in the spring, but its failure to do so this year is precisely the reason we are before the Court on an emergency basis. ECF 919 at 18. NMFS also points to flows provided by rain and snowpack in wet years, which can provide short-term increases in rearing habitat, *id*., but such temporary boosts fail to grapple with the systemic shortfalls in habitat flows, and water conditions like those present this year.[4] Turning to the dry years, NMFS points to the minimum flows, *id*., without explaining they will produce adequate critical habitat.

In an attempt to deflect attention from its paltry explanation, NMFS changes the subject. The agency seizes on the fact that the 80% standard is called a "conservation standard," asserts that a conservation standard is legally irrelevant to under ESA Section 7. This assertion ignores the controlling law, set out in: (1) the ESA's definition of critical habitat as those features essential for conservation, 16 U.S.C. § 1532(5)(A)(i); (2) the regulatory definition of adverse modification as an alteration that appreciably diminishes the critical habitat's value for the listed species' conservation, 50 C.F.R. § 402.02,; and (3) Ninth Circuit precedent holding that adverse modification can occur when an action impedes progress toward recovery. *Gifford Pinchot Task Force v. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069-70 (9th Cir. 2004) (§ 7 prohibits adversely modifying critical habitat that appreciably reduces likelihood of recovery). The 80% standard is entirely relevant to NMFS' adverse modification analysis.

Finally, NMFS tries to distinguish *PCFFA v. BOR*, 426 F.3d 1082, 1091, 1089, 1093-94 (9th Cir. 2005), because it addressed flow requirements in a reasonable and prudent alternative designed to avoid jeopardy, that used the same 80% standard in allowing no more than a 20% reduction in suitable habitat from an unimpaired flow regime. In other words, NMFS created the 80% standard to avoid jeopardy, incorporated it into the recovery plan a decade later, and then

[4] NMFS also cites a statement about the Plan's effects on thermal refugia in the mainstem that is part of the jeopardy, not the adverse modification of critical habitat, analysis. BiOp at 173-74.

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used it in its adverse modification analysis in the 2013 and 2019 BiOps. Arguing that NMFS's own 80% standard is irrelevant ignores both the origin and NMFS's past use of the standard.

3. The Tribe Is Likely To Succeed On Its Claim That Reducing Harm Is Not The Same As Avoiding Jeopardy.

The Tribe challenges NMFS's jeopardy determination because it is predicated on only on slightly improved conditions compared to the past. In response, NMFS misconstrues the claim.

First, the 2019 Plan reduces spring habitat-supporting flows. In other words, it is demonstrably worse than the 2013 BiOp when it comes to habitat flows. NMFS responds by again changing the subject and pointing to the 2019 Plan's surface flushing and minimum flows, neither of which provides adequate habitat flows. It also touts the 40,000 acre-feet allocation for augmented flows, but of course only a small portion of those flows materialized. And NMFS relies on real-time disease management that might produce emergency dilution flows "to partially offset the increased disease risks" in below average years. BiOp 167. Because the 2019 Plan set aside no water for emergency dilution flows, it is hard to see how one would materialize with any frequency and certainly not in dry years.

Second, the Tribe claims that NMFS found no jeopardy based on a belief there would be a slight improvement in *C. shasta* infection and mortality rates compared to the period of record, and questions how NMFS could equate losing more than half of the outmigrating juveniles with no jeopardy. In response, NMFS defends the prevalence of mortality dataset and model as the best available science. Even if true, that does not justify NMFS's use of the model to sign off on only a slight improvement over the worst *C. shasta* outbreaks on record without undertaking more rigorous analysis.

Third, in response to the claim that a no-jeopardy determination must be based on more than a slight improvement in conditions and must assess whether the action will reduce the species' likelihood of survival, NMFS contends that, in fact, it performed such an analysis. Admittedly, NMFS used its viable salmonid population framework, but it did so to ascertain baseline conditions, which showed Coho face a high risk of extinction. BiOp 66-67, 206-07. Under the ESA, its implementing regulations, and controlling precedent, NMFS needed to go

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further and assess whether the Plan's impacts, when added to those degraded baseline conditions, will appreciably reduce the likelihood of survival and recovery. The BiOp is devoid of this analysis. The heavily qualified statement NMFS quotes reveals the circular nature of its no-jeopardy determination: "By lowering disease risks in a direction toward those under natural conditions, NMFS believes that coho salmon abundance and productivity will likely improve over the period of effects." BiOp 216-17. This hollow statement could be true whenever any proposed plan would reduce disease risks to any extent. The proper point of comparison is what Coho need to survive and recover, not whether the 2019 Plan might be somewhat better than its predecessors, which severely depressed Coho populations. NMFS had to assess whether disease risks will be lowered enough to improve abundance and productivity or to avoid perpetuating the current suppressed abundance, and it failed to do so. *See* Motion (ECF 909-1 at 19-20).

The Tribe does not claim that NMFS must establish numerical standards or import wholesale recovery plans into its jeopardy analysis. ESA Section 7 requires NMFS to determine whether the Plan will appreciably reduce the likelihood of both survival and recovery. In order to conduct that analyses, NMFS must determine whether Coho will have the abundance, productivity, and distribution needed to survive and have the potential to recover in the face of the Plan's perpetuation of the principal threats to Coho survival and recovery – increased *C. shasta* risks and inadequate rearing habitat. ECF 27 at 24-25.

4. The Bureau Is Failing To Comply With ESA Section 7.

The Bureau violated its ESA obligations by relying on the flawed 2019 BiOp. *See* Motion (ECF 909-1 at 20). In feigning ignorance over the error, the Bureau skips over the serious concerns expressed by agency experts over reducing spring habitat flows needed for Coho rearing. *See supra* at I.A. And the Tribe's 60-day notice presented evidence that the 2019 Plan dramatically diminishes spring flows and suitable rearing habitat, even though the Tribe had not yet identified the error as one of the reasons. ECF 17-1.

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B. The Tribe Has Demonstrated Irreparable Harm Is Likely.

1. Irreparable Harm to Coho From Insufficient Rearing Habitat.

Coho in the Klamath River are in a precarious state that is getting worse with inadequate rearing habitat and disease as primary threats to their survival. The Shasta River population is a core population that must be at low risk of extinction for Coho to be viable. Tragically, its numbers are so low that only 39 adults returned to the Shasta River in 2018 and an average of a mere 44 adults from 2014-2018. Hillemeier Decl. ¶¶ 18-20 (ECF-5).

In addition to disease, the 2019 Plan dramatically reduced the spring flows that create and make accessible rearing habitat, by 25,000 acre-feet on average. 2nd Belchik Decl. ¶ 3. Available habitat for Coho juveniles and fry is below NMFS's 80% standard in most water years in the spring in the Trees of Heaven and Seiad Valley reaches used by the Shasta population, even using the admittedly erroneous data that over-estimates available habitat. NMFS AR 1 at 144, 148-49, 202-03. Using the corrected data, hardly any scenarios pass muster. For example, in the Shasta to Scott reach of critical importance for Coho fry, the BiOp estimated the conservation standard would be met 90% of the time in June, but the corrected WUA curves indicate the standard would be violated most of the time in June in the three reaches most important to young salmon. 2nd Belchik Decl. ¶¶ 7-8 (ECF 48-1).

The Bureau and KWUA argue spring habitat flows are unimportant because the outmigration is largely over this year. That argument misses the point entirely. While outmigrating juveniles face disease risks as they move through *C. shasta* infested waters, juvenile Coho over-winter and spend the first 1-and 1/2 years of their life in freshwater habitat, where they need habitat made accessible by spring flows for rearing, foraging, and escaping from predation. BiOp 83, 129-30, 135-37, 141.

Given that NMFS deems spring habitat-forming flows vitally important, it takes a different tack. First, it highlights that minimum base flows must be met, ignoring that the BiOp describes minimum flows as the bare minimums that will avoid "unacceptable levels of risk," BiOp 129, and repeatedly emphasizes that natural flow variability is essential in March-June to reduce disease and to provide rearing habitat. *E.g.*, BiOp 121-36, 141-50, 167-68.

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Second, NMFS argues that the 80% standard is designed to promote conservation, not to measure harm. But the BiOp describes the 80% standard as identifying flows that would not harm Coho or adversely affect the functioning of critical habitat, strongly implying that harm will occur when the 80% standard is violated. BiOp 63. Harm is especially likely when the 80% standard is so frequently violated in the spring with Coho abundance is so low and declining.

KWUA and the Bureau accuse the Tribe of not proving that Coho will suffer irreparable harm without the specific flows we seek. This accusation ignores the Hardy curves, which correlate river flows and suitable rearing habitat and NMFS's 80% standard, which quantifies how much suitable habitat will meet Coho needs. The 2019 Plan falls far short of this standard, and the deficiencies are not just on paper. The first year under the Plan was an above-average water year and yet river flows were at near drought levels in May. This year, the river went down to the minimums when the Bureau cut off the augmented flows.

The Bureau disparages the 23,000 acre-feet volume as not biologically based, but NMFS found that 40,000 acre-feet in augmented flows would markedly increase suitable habitat for young Coho. ECF 909-6. And the Flow Account Scheduling Technical Advisory ("FASTA") Team developed the 390 cfs/day distribution to increase base flows in order to help meet Coho needs. While it may not be sufficient, experts believe the additional water will reduce the harm.

2. C. Shasta Infections and Mortality Remain a Threat.

This year has been disastrous for Chinook. The last three weeks of *C. shasta* monitoring have recorded infection rates at 97% or 98%. KWUA asserts that infection rates dropped dramatically last week, but the prevalence of infection, which remained steady at 98%. The severity of infections declined to 43% on May 12 from 55% on April 28 and a shocking 90% on May 5. ECF 919-1 (Exh. D). Disease experts equate severe infections with a death sentence. The high severity of infections this year will almost certainly translate to a high mortality rate that exceeds the limit in the BiOp's incidental take statement when extrapolated to the population level in subsequent studies. 3rd Belchik Decl. ¶ 4.

Both the Bureau and KWUA argue that *C. shasta* infections will have little remaining effect this year because Chinook juveniles have outmigrated. FWS has estimated that 80% of the

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wild Chinook juvenile has outmigrated, ECF 919-1, ¶ 24 & Exh. B, but the number of juvenile Chinook outmigrants sampled past the Kinsman trap remained fairly consistent through May 15, indicating substantial numbers of juvenile Chinook are present. 2nd Hilleimeier Decl. ¶ 8. The same FWS assessment indicates that Coho use the mainstem Klamath River through the spring and into the summer and 80% of the Coho outmigration did not occur until June in the Shasta and Scott Rivers in most years. ECF 919-1 - Exh. B; 2nd Hilleimeier Decl. ¶ 6. Accordingly, a substantial portion of the small Coho outmigrant population could still be infected.

In addition, the Iron Gate Hatchery is poised to release 1.5 million hatchery fish. Survival of these fish is vital because of the low adult returns and collapse of fisheries in 2019 and anticipated low survival of wild smolts this spring due to high disease rates. The California Department of Fish and Wildlife is exploring extreme measures to prevent disease infestation in the hatchery fish, including trucking the fish around the infectious zone and rushing the release before the cooler, stormier period passes. Adequate flows will be needed for 2-3 weeks after the hatchery releases to reduce water temperatures and disease risks. 2nd Hilleimeier Decl. ¶¶ 9-16.

3. Chinook are Suffering Irreparable Harm.

The Bureau never denies that Chinook are suffering irreparable harm. Instead, it asserts that such harm is irrelevant because the Tribe has not based its TRO motion on any legal claim pertaining to orcas, which depend on Chinook for prey, but offers no support for this preposterous contention. Obviously, the Court can consider irreparable harm that would befall an endangered species from relief it orders; indeed, the Bureau argues just that against the TRO based on alleged harm to endangered suckers.

The Bureau also suggests that the Court must ignore irreparable harm to the Tribe's fishing rights because the Tribe has not presented a reserved fishing rights claim, again citing no support. But the Bureau has a legal obligation to operate the Klamath Project consistent with applicable law, including the Tribe's fishing rights, and it has a trust responsibility to protect the Tribe's rights, without any need for the Tribe to bring a claim alleging a breach. As this Court held in *Yurok Tribe v. Bureau of Reclamation*, 231 F. Supp. 3d 450, 486 (N.D. Cal. 2017), the Tribe's fishing rights carry a priority date of time immemorial and take precedence over other

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demands for water, which this Court can consider in crafting relief. *See KWUA v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) (same).[5]

4. The Court Can Craft Relief Without Irreparable Harm to Suckers.

The Bureau faults the Tribe for seeking relief that would benefit one listed species at the expense of another. ECF 919 at 19. Unfortunately, the Bureau has already skewed the system against Coho. The Bureau greatly increased UKL levels in the 2019 Plan to the detriment of Coho, which are in a far worse position than under the 2013 Plan and this Court's 2017 injunction. While the 2019 Plan provides water for surface flushing flows, it dramatically reduced spring habitat flows without reserving water for emergency dilution flows, should a *C. shasta* outbreak occur and real-time management measures be necessary. These shortcomings led to this litigation, the reinitiation of consultation on the Plan's effects on Coho, and the negotiation of the Interim Plan to keep more water in the river.

Adam Johnson, a hydrologist with the Fish and Wildlife Service, submitted a declaration during the preliminary injunction briefing that described two habitat boundary conditions to protect suckers. UKL should not fall below: (1) 4142 feet in April or May in two consecutive years, and (2) a prescribed end-of-the-year lake level. ECF 46-2, ¶¶ 11-12. Mr. Johnson explained that the 2019 Plan provided for surface flushing flows with measures to protect UKL, including these lake levels. *Id*. He also noted that, unfortunately, sucker abundance continued to decline in 2019, despite very good UKL conditions resulting from the 2019 Plan and a wet, cool spring and summer. *Id*. ¶ 9.

[5] Klamath Irrigation District ("KID") has submitted an amicus brief asking the Court to avoid impinging on claims it is presenting in state and federal court in Oregon. While KID represents to this Court that it has not tried to prevent flows being released from the Klamath Project to comply with the ESA and meet salmon needs, its filings reveal otherwise. In April 2020, it sought orders preventing the Bureau from releasing the surface flushing flow. ECF 909-14 at 8-10, 27. KID also failed to inform the Court that a magistrate judge issued a Findings and Recommendation last week rejecting KID's claims because Tribes situated similarly to the Yurok Tribe have senior, legally protected fishing and water rights that are at least coextensive with the Bureau's obligations under the ESA to provide water for instream purposes and KID's argument to the contrary was "a radical and extreme shift" from longstanding precedent. *KID v. Bureau of Reclamation*, No. 19-451, slip op. at 12-13 (D. Or. May 15, 2020).

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FWS consulted on the Interim Plan and found that the augmented flows would not cause jeopardy to the suckers or adversely modify their critical habitat. ECF 909-13. It continued the lake level conditions and made the 4142 feet limit applicable every year. ECF 909-13. It is important to note that the 2019 Interim Plan and the 2019 and 2020 sucker BiOps recognize that UKL may fall below 4142 feet in some water conditions, even if no augmented flows are provided. Indeed, as the Klamath Tribes point out, large irrigation withdrawals in the fall of 2019 significantly diminished lake levels. ECF 916 at 10. That is why the Interim Plan included the requirement for the Bureau to engage in good-faith coordination and consultation to best meet the needs of all listed species if augmented releases would result in bring UKL levels below 4142 feet.

This year the lake fell below 4142 feet before any augmentation flows were released.[6] And the surface flushing flow required under the 2019 Plan (not the Interim Plan) resulted in lower lake levels. Still neither the Bureau nor the FWS viewed the 4142-feet threshold to preclude all augmentation releases. In early May, the Bureau provided augmentation flows at a level informed by input from the FASTA team. And on May 8, the Bureau floated various scenarios based on shared modeling; three that would have provided additional augmentation flows. The only one that modeled no augmentation flows recalculated the irrigation and augmentation allocations based on May 1 forecast, assumed no water from PacifiCorp, even though 5,000 acre feet had already been secured, and would have provided substantially less water for irrigation. The data-driven coordination ended on May 11, when the Bureau described as an ultimatum an alternative plan based on more pessimistic modeling that was not shared and which ignored water coming from PacifiCorp and forecasted rainfall. Yet even that plan would have provided an additional 5,000 acre-feet in augmented flows in May, with the possibility of an additional 5,000 acre-feet in June depending on water conditions. In other words, throughout this process, the Bureau believed it could provide augmentation water for the river without

[6] Counsel for the Tribe acknowledges that UKL reached 4142 in April due to implementation of the 2019 BiOp, triggering the Interim Plan's provisions, and apologizes for the misstatement in our opening brief.

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irreparably harming the suckers. It was only after the Tribe failed to accept to the Bureau's take-it-or-leave-it proposal that the Bureau cut off augmented flows and stopped trying to meet the needs of both species.

5. No Bond Should be Required.

KWUA argues that a bond should be required. However, the Court has discretion to waive the bond requirement where a bond would deny access to judicial review. *California v. Tahoe Regional Planning Ag.*, 766 F.2d 1319, 1325 (9th Cir.), *as amended*, 775 F.2d 998 (9th Cir. 1985). In keeping with this discretion, courts "routinely impose either no bond or a minimal bond in public interest environmental cases." *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1148 (C.D. Cal. 1999); *see also Save Strawberry Canyon v. DOE*, 613 F. Supp. 2d 1177, 1190 (N.D. Cal. 2009) (waiving bond in environmental case where small nonprofit would have difficulty posting bond). Here, plaintiffs lack the resources to post a bond, and KWUA has provided a speculative basis for the draconian bond it seeks without accounting for various forms of available relief from the government. In fact, because the water inflows have significantly improved over the last several days, *see* 3rd Belchik Decl. ¶¶ 10-15, augmentation flows can be provided at the reduced levels the Tribe seeks in this motion (forgoing the 17,000 acre-feet from UKL). No bond should be required.

CONCLUSION

The Yurok Tribe respectfully asks the Court to lift the stay and to order the Bureau to resume the augmentation flows as soon as possible up to 16,000 acre-feet.

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DATED this 20th day of May, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2020, I electronically filed the foregoing REPLY IN SUPPORT OF MOTION TO LIFT STAY AND ENTER TEMPORARY RESTRAINING ORDER with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

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