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

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

12 Plaintiffs,

13 vs.

14 SALLY JEWELL, et al.,
 15 Defendants.

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

20 Defendant-Intervenors.

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

**YUROK TRIBE'S RESPONSE IN
 OPPOSITION TO PLAINTIFFS'
 MOTION FOR TEMPORARY
 RESTRAINING ORDER**

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

21 Defendant-Intervenor Yurok Tribe ("Yurok") respectfully requests that the Court deny
 22 Plaintiffs' Motion for Temporary Restraining Order (Doc. 142) and Motion for Preliminary
 23 Injunction (Doc. 143). Yurok refers the Court to its previous filings for a full discussion of the
 24 authority of the U.S. Bureau of Reclamation ("Reclamation" or "BOR") to implement
 25 supplemental releases to prevent the risk of a fish kill. *See* Doc. 119, 134. An order ending the
 26 supplemental flows, which began on August 23, 2014, would make the likelihood of an adult fish
 27 kill on the lower Klamath River more likely than not. This would cause Yurok irreparable harm
 28 and the balance of hardships favors the denial of injunctive relief. In addition, Reclamation's

1 emergency decision under severe drought conditions based on extensive technical and scientific
2 analyses is entitled to deference.¹

3 **I. THE LIKELIHOOD OF A FISH KILL EVENT IS MORE LIKELY THAN NOT**
4 **WITHOUT SUPPLEMENTAL FLOW RELEASES**

5 Flows in the lower Klamath River have been at or near record lows this year. Declaration
6 of Michael Belchik (“Belchik Decl.”) at ¶ 17. In late July and early August 2014, these flows
7 were significantly lower than in 2002, the year of the fish kill, and projected to drop farther.
8 Belchik Decl. at ¶ 17.

9 The risk of a fish kill derives from the biology of Ich, which is a parasite that, at its
10 infective swimming stage, can move from an infected fish to a non-infected fish. Declaration of
11 Josh Strange (“Strange Decl.”) at ¶ III.2. A controlled hatchery study has shown that increased
12 water flow, and specifically increased water velocities and turnover rates, is the most effective
13 means to prevent an Ich outbreak. Strange Decl. at ¶ III.2. While it is inappropriate to try to
14 transfer the quantitative water velocities and turnover rates from this controlled study to the
15 Klamath River, it is known with certainty that the low flows of 2002 allowed for an explosive
16 Ich outbreak. Strange Decl. at ¶ III.2. In addition, from previous fish kills in other river systems
17 it is known that these Ich outbreaks occurred with adult salmon that were holding prior to
18 spawning. Strange Decl. at ¶ III.3. In the case of the 2002 Klamath River fish kill, the Ich
19 outbreak occurred in migrating fish because of the unusual behavior of Klamath and Trinity fall
20 run fish to suspend their migration for 7 to 10 days and hold in deep pools. Strange Decl. at ¶

21 ¹ In addition, as a federal reclamation facility, the Bureau must operate the Trinity River Division
22 consistent with section 8 of the federal Reclamation Act of 1902. The Supreme Court has held
23 that section 8 requires the Bureau to comply with state water law, unless state law is directly
24 inconsistent with clear congressional directives regarding the project. *California v. United*
25 *States*, 438 U.S. 645, 678-679 (1978). California’s public trust doctrine and section 5937 of the
26 California Fish and Game Code are part of California water law and fully support the Bureau’s
27 supplemental releases. Section 8 of the Reclamation Act and California state law therefore
28 provide a further justification for the Bureau’s fishery releases. *See California Department of*
Fish and Wildlife’s Amicus Curiae Brief in Opposition to Plaintiffs’ Motion for Summary
Judgment and In Support of Defendants’ Cross-Motion for Summary Judgment on the First
Claim for Relief, Doc. 122.

1 III.4. These fish are essentially behaving like fish holding in one location, increasing the risk of
2 Ich outbreaks when flows are too low. Strange Decl. at ¶ III.4.

3 Yurok fish biologists and technicians have observed a very high number of adult
4 salmonids holding at various areas of colder water, known as thermal refugia, in the lower
5 Klamath River. Belchik Decl. at ¶ 19. The numbers of congregated fish at Blue Creek in
6 particular has not been observed since 2002, the year of the fish kill. Belchik Decl. at ¶ 18. These
7 fish holding in thermal refugia prior to the arrival create the risk of developing and transmitting
8 Ich to the fall Chinook salmon run. Belchik Decl. at ¶ 19. In addition, Yurok fisheries staff have
9 observed an on-going low level mortality throughout the Klamath River basin. Belchik Decl. at ¶
10 22.

11 Klamath River fall Chinook salmon are particularly vulnerable to Ich infection because
12 they hold extensively and migrate slowly through the lower Klamath River. Strange Decl. at ¶
13 IV.3. At flows less than 2,500 cfs at the Klamath near Klamath gage (“KNK”), the fish densities
14 associated with small run sizes may be sufficient to allow for the initiation of an Ich outbreak.
15 Strange Decl. at ¶ IV.2. A base flow of 2,500 cfs at KNK is the minimum required for a
16 reasonable level of confidence that an Ich outbreak is unlikely to occur. Strange Decl. at ¶ IV.2.
17 Flows below this level are likely to result in a substantial risk of an Ich outbreak. Strange Decl. at
18 ¶ IV.1. In years with a large projected run size as in 2013, an additional 300 cfs is recommended.
19 Strange Decl. at ¶ IV.2. To prevent an Ich outbreak, 2,500 cfs should be provided during the
20 peak of the fall Chinook salmon migration regardless of run size or other factors. Strange Decl.
21 at ¶ IV.1.

22 The supplemental flows implemented by BOR will help flush out any Ich infective life-
23 stages to reduce the infectious environment for the fall Chinook run. Strange Decl. at ¶ V.2.
24 Ongoing base flows of 2,500 cfs will help protect against the initiation of an Ich outbreak.
25 Strange Decl. at ¶ V.2. Without these flows, or ending the flows prematurely, would make it
26 more probable than not that an adult fish kill will occur. Strange Decl. at ¶ V.3.

1 Because the risk of a fish kill is more likely than not without supplemental flows, the
2 balance of the hardships favors Yurok and Defendants. Yurok would face irreparable harm if the
3 Court were to grant Plaintiffs' motions for injunctive relief.

4 **II. RECLAMATION'S DETERMINATION THAT THE SUPPLEMENTAL**
5 **RELEASES ARE AN EMERGENCY RESPONSE UNDER NEPA REGULATIONS IS**
6 **ENTITLED TO DEFERENCE**

7 *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), set the
8 legal test for determining whether to grant deference to a government agency's interpretation of a
9 statutes which it administers. This administrative deference is applicable to this case where the
10 interpretation is within the scope of the statute. There is no clear speaking by Congress on the
11 question. If the statutes are silent or ambiguous with respect to the specific question there should
12 be deference to the agency.

13 There is also the fact that California is in a drought emergency. Under such
14 circumstances there should be extra deference to the agencies. If the Federal Courts should start
15 intervening and putting up procedural hurdles to drought emergency measures chaos could
16 develop and the Government be unable to quickly implement necessary emergency drought
17 plans. Government must be able to reverse prior decisions, change them, and act quickly for the
18 benefit of the whole in an emergency. The California drought is just such an emergency, as
19 evidenced by the federal and California drought declarations included as Exhibits 1 and 2,
20 respectively. Not only the Klamath but the entire State is in a drought emergency.

21 **CONCLUSION**

22 Yurok respectfully requests that Court deny Plaintiffs' Motion for a Temporary
23 Restraining Order and Motion for a Preliminary Injunction.

1 Dated: August 26, 2014

Respectfully submitted,

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3 Staff Attorney, Office of the Tribal Attorney

4 /s/ John Corbett
5 JOHN CORBETT
6 Senior Attorney, Office of the Tribal Attorney
7 *Attorneys for the Yurok Tribe*

CERTIFICATE OF SERVICE

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

/s/ Nathan Voegeli
NATHAN VOEGELI