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2 NATHAN VOEGELI, Staff Attorney, CSBN 279481 3 nvocgelie wynoktribe.nsn.us 4 PO Box 1027 5 Klamath, California 95548 5 Telephone: (707) 482-1350 6 Attorneys for Defendant Yurok Tribe 7 Facsimile: (707) 482-1353 8 IN THE UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF CALIFORNIA 10 SAN LUIS & DELTA-MENDOTA WATER DISTRICT, 11 DISTRICT, 12 Plaintiffs, 13 VUROK TRIBE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY 14 Defendants. 15 HOOPA VALLEY TRIBE; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; and YUROK TRIBE, 18 Defendant-Intervenors. 19 Injunction (Doc. 143). Yurok refers the Court to its previous filings for a full discussion of authority of the U.S. Bureau of Reclamation ("Reclamation" or "BOR") to implement 24 supplemental releases to prevent the risk of a fish kill. See Doc. 119, 134. An order endir supplemental flows, which began on August 23, 2014, would make the likelihood of an a kill on the lower Klamath River more likely than not. This would cause Yurok irreparabl and the balance of hardships favors the denial of injunctive relief. In addition, Reclamatia		406		1			
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emergency decision under severe drought conditions based on extensive technical and scientific
 analyses is entitled to deference.¹

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

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

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

¹ In addition, as a federal reclamation facility, the Bureau must operate the Trinity River Division consistent with section 8 of the federal Reclamation Act of 1902. The Supreme Court has held that section 8 requires the Bureau to comply with state water law, unless state law is directly inconsistent with clear congressional directives regarding the project. California v. United States, 438 U.S. 645, 678-679 (1978). California's public trust doctrine and section 5937 of the California Fish and Game Code are part of California water law and fully support the Bureau's supplemental releases. Section 8 of the Reclamation Act and California State law therefore 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.

YT Opposition to Motion for TRO_Final - 2 - 13-cv-01232-LJO-GSA YUROK TRIBE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER III.4. These fish are essentially behaving like fish holding in one location, increasing the risk ofIch outbreaks when flows are too low. Strange Decl. at ¶ III.4.

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

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

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YT Opposition to Motion for TRO_Final - 3 - 13-cv-01232-LJO-GSA YUROK TRIBE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER Because the risk of a fish kill is more likely than not without supplemental flows, the balance of the hardships favors Yurok and Defendants. Yurok would face irreparable harm if the Court were to grant Plaintiffs' motions for injunctive relief.

II.RECLAMATION'S DETERMINATION THAT THE SUPPLEMENTALRELEASES ARE AN EMERGENCY RESPONSE UNDER NEPA REGULATIONS ISENTITLED TO DEFERENCE

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

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

CONCLUSION

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

YT Opposition to Motion for TRO_Final - 4 - 13-cv-01232-LJO-GSA YUROK TRIBE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

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1	1 Dated: August 26, 2014 Respect	fully submitted,
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28	YUROK TRIBE'S RESPONSE IN OPP	- 5 - 13-cv-01232-LJO-GSA POSITION TO PLAINTIFFS' MOTION FOR ESTRAINING ORDER

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

YT Opposition to Motion for TRO_Final	- 1 -	13-cv-01232-LJO-GSA			
YUROK TRIBE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR					
TEMPORARY RESTRAINING ORDER					
	YUROK TRIBE'S RESPONSE	YUROK TRIBE'S RESPONSE IN OPPOSITION TO			