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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS, et al.,

No. C 02-2006 SBA

Plaintiffs,

Related Case No.
C 00-01955 SBA

v.

ORDER

UNITED STATES BUREAU OF
RECLAMATION, et al.,

*Plaintiff's Counsel are directed to serve this
order upon all other parties in this action.*

Defendants.

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment [Doc. 147], the Federal Defendants' Cross-Motion for Summary Judgment [Doc. 166], the Water Users' Cross-Motion for Summary Judgment [Doc. 167], Yurok Tribe's Motion for Summary Judgment [Doc. 144], and Hoopa Valley Tribe's Motion for Summary Judgment on the Fourth Claim for Relief [Doc. 157]. Having read and considered the arguments and evidence presented to the Court in the papers submitted by the parties and at the telephonic hearing held on June 5, 2003, the Court hereby GRANTS IN PART and DENIES IN PART Plaintiffs' Motion for Summary Judgment, GRANTS IN PART AND DENIES IN PART the Federal Defendants' Cross-Motion for Summary Judgment, GRANTS IN PART AND DENIES IN PART the Water Users' Cross-Motion for Summary Judgment, DENIES Yurok Tribe's Motion for Summary Judgment and DENIES Hoopa Valley Tribe's Motion for Summary Judgment.

I. Background

A. The Klamath Project

The present litigation concerns the operation of the Klamath Reclamation Project ("the Project") for the years 2002-2012. The U.S. Bureau of Reclamation (the "BOR") manages the Klamath Reclamation Project, which covers approximately 200,000 miles in Northern California and Southern

1 Oregon. See Kandra v. United States, 145 F.Supp.2d 1192, 1196 (D.Or. 2001). Water collects in the
2 Upper Klamath Lake ("UKL"), which is relatively shallow and has a limited storage capacity available
3 for use during dry years. Water is drawn from UKL into the Project via the A-canal, which sits above
4 Link River Dam. Link River Dam regulates the flow of water into the lower Klamath River. Link River
5 Dam is the first in a series of dams in the Project, the last being the Iron Gate Dam. From Iron Gate
6 Dam, the Klamath River flows into the Pacific Ocean.

7 The BOR determines the level, timing, and rate of water flow through the Klamath Project. In
8 managing the Project, the BOR must balance many interests and obligations, all potentially competing
9 for the same valuable, but limited, resource. Pursuant to contracts authorized by the Reclamation Act,
10 the Project provides irrigation water to farmers and communities in the area. Additionally, water from
11 the Project supports two national wildlife refuges, the Lower Klamath and Tule Lake National Wildlife
12 Refuges. The BOR must also preserve the tribal resources of three Native American Tribes whose
13 territory falls within the Project-- the Hoopa, Klamath, and Yurok Tribes. See Pacific Coast Federation
14 of Fishermen's Associations v. U.S. Bureau of Reclamation, 138 F.Supp.2d 1228, 1231 (N.D.Cal. 2001);
15 see also Patterson v. Klamath Water Users Protective Ass'n, 204 F.3d 1206, 1213 (9th Cir. 2000) (citing
16 United States v. Adair, 723 F.3d 1394, 1408-11, 1415 (9th Cir. 1983)). The preservation of tribal
17 resources includes protection of the coho salmon and maintaining the tribes' water rights. See Kandra
18 v. U.S., 145 F.Supp.2d 1192, 1197 (D.Or. 2001) Additionally, the Project must comply with the
19 Endangered Species Act ("ESA"), Title 16 U.S.C. section 1531 *et seq.*, because its territory encompasses
20 the habitat of the coho salmon, a threatened species under the Endangered Species Act. See 62 Fed.Reg.
21 24588, 24592 (May 6, 1997).¹ The coho salmon populate the waters below the Iron Gate Dam in the
22 Klamath River and its tributaries, and the Klamath River from Iron Gate Dam to the Pacific Ocean has
23 been designated critical habitat for the coho salmon.

24 **B. Requirements Under the ESA**

25 Under the ESA, the Project is prohibited from engaging in any action that is likely to "jeopardize
26

27 ¹The Ninth Circuit has found that the interests of the Tribes as well as compliance with the ESA
28 take precedence over contracts with irrigators under the Reclamation Act. See Patterson, 204 F.3d at
1213-14.

1 the continued existence of" an endangered or threatened species or result in "destruction or adverse
2 modification of [the designated critical habitat]." 16 U.S.C. § 1536(a)(2). An action "jeopardizes the
3 continued existence" of a species when the action "reasonably would be expected, directly or indirectly,
4 to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by
5 reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. §402.02. An action
6 results in "destruction or adverse modification" when the action results in a "direct or indirect alteration
7 that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed
8 species." Id.

9 Whenever an agency undertakes an action that "may affect" a species listed as threatened under
10 the ESA, it must pursue consultation with the United States Fish and Wildlife Service ("FWS") or the
11 National Marine Fish Service (the "NMFS"). The agency proposing the action (the "acting agency") may
12 prepare a "biological assessment" ("BA") to evaluate the potential effects of a proposed action. 50
13 C.F.R. § 402.12(a). As part of the formal consultation process, the consulting agency will issue a
14 "biological opinion" detailing how the proposed action will affect the listed species. 16 U.S.C.
15 §1536(b)(3)(A). If the NMFS or the FWS determines that the agency action will jeopardize or adversely
16 modify the species or its critical habitat, the NMFS or the FWS will suggest reasonable and prudent
17 alternatives ("RPAs") that "avoid the likelihood of jeopardizing the continued existence of listed species
18 or result in the destruction or modification of critical habitat." 50 C.F.R. § 402.02; see also 16 U.S.C.
19 § 1536(a)(2); 16 U.S.C. § 1536(b)(a)(3). In evaluating whether a proposed action is likely to avoid
20 jeopardy or destroy or modify a critical habitat, the NMFS or the FWS must evaluate the "effects of the
21 action," along with the "cumulative effects" on the species. 50 C.F.R. § 402.14(g)(3). "Effects of the
22 action" refers to the direct and indirect effects of an action on the species or critical habitat, together with
23 the effects of other activities that are interrelated or interdependent with that action, that will be added
24 to the environmental baseline. The environmental baseline includes...the anticipated impact of all
25 proposed Federal projects in the action area that have already undergone...consultation, and the impact
26 of State or private actions which are contemporaneous with the consultation in process. Indirect effects
27 are those that are caused by the proposed action and are later in time, but are still reasonably certain to
28 occur." 50 C.F.R. § 402.02. "Cumulative effects" are those effects of future State or private activities,

1 not involving Federal activities, that are reasonably certain to occur within the action area of the Federal
2 action subject to consultation." Id.

3 If the NMFS or the FWS determines that the proposed action or the RPA will not jeopardize a
4 species, but may result in the taking of a threatened species that is incidental to the agency action, the
5 NMFS or the FWS provides an "incidental take statement" ("ITS") along with the biological opinion.
6 16 U.S.C. § 1536(b)(4)(i)-(iii). The ITS specifies the impact of such incidental taking on the species and
7 RPAs that are necessary or appropriate to minimize such impact. 16 U.S.C. § 1536(b)(4).

8 **C. History of the BOR's Operating Plans and Compliance with ESA Requirements**

9 Beginning in 1995, the BOR began issuing annual operating plans detailing, *inter alia*, the
10 minimum flow levels in the Klamath River below the Iron Gate Dam. The plans specifically provided
11 for flows in terms of cubic feet per second ("cfs") of water. The flows were planned upon weekly or
12 monthly periods, based upon hydrological conditions for the year; e.g., Above Average, Below Average,
13 Dry, and Critically Dry. These classifications were based upon estimates received from the Natural
14 Resources Conservation Service. Generally, the accuracy of the estimates increased in temporal
15 proximity to the planned action.

16 Since 1995, the BOR has also been attempting to prepare a multiple-year operating plan,
17 including a biological assessment as required under the ESA. Before issuing the multi-year plan, the
18 BOR consulted with Thomas Hardy, Ph.D. of the NMFS, to complete a comprehensive review of the
19 status of all anadromous fish in the Klamath River. In August of 1999, Dr. Hardy released "Phase I" of
20 his report, ("Hardy Phase I"), which recommended certain interim minimum flow levels necessary to
21 protect the anadromous fish in the Klamath River. However, the Phase I report was only an interim
22 report because further testing and analysis was desired, in particular site-specific studies. In November
23 of 2001, Dr. Hardy released the draft version of the Phase II Report (the "2001 Hardy Draft Report").
24 That version included site-specific studies and further analysis. The 2001 Hardy Draft Report has not
25 been issued in its final form.

26 In 2000, the BOR issued an operating plan which instituted various flow levels. However, the
27 BOR did not seek formal consultation of the plan as required by the ESA. The Pacific Coast Federation
28 of Fishermen's Associations ("PCFFA"), brought suit in this Court challenging the BOR's 2000 plan.

1 On April 3, 2001, the Court granted PCFFA's motion for summary judgment. See Pacific Coast
2 Federation of Fishermen's Association v. U.S. Bureau of Reclamation, 138 F.Supp.2d at 1247. The
3 Court found that "[d]espite the weight which the Ninth Circuit repeatedly has placed upon the procedural
4 requirements of the ESA, it is clear that the Bureau of Reclamations failed to comply with these
5 requirements before implementing its 2000 Operations Plan for the Klamath Project." Id. at 1243.
6 Based on the substantial violation of the ESA's procedural requirements, the Court determined that an
7 injunction was appropriate. Thus, the Court enjoined the BOR from sending water irrigation deliveries
8 from the Project if the flows dropped below certain minimum amounts. See id. at 1250.

9 In order to determine what levels were appropriate, the Court looked to the best science available.
10 The Court determined that the best science available at the time was the Hardy Phase I report.

11 [The Hardy] Phase I report was based upon extensive input from the
12 members of a technical team, including Bureau of Reclamation staff, and
13 was created specifically to address the situation which the Bureau [BOR]
14 apparently still is confronting, namely, the need to present instream flow
15 recommendations without completed site-specific studies. Neither the
16 Bureau nor Intervenor direct the Court to any better science. Nor do they
17 offer a counter proposal concerning the type of injunction that should be
18 entered.

19 Id. at 1249-50. By its terms, the order was to expire when the BOR adopted a plan which met the
20 requirements of the ESA.

21 On April 6, 2001, three days after the Court issued its Order, the NMFS issued a biological
22 opinion (the "2001 NMFS Biological Opinion") discussing the on-going impact of the Project on, *inter*
23 *alia*, coho salmon. The 2001 NMFS Biological Opinion concluded that the low flow levels proposed
24 by the BOR for 2001 were likely to jeopardize the continued existence of the coho salmon and adversely
25 modify their habitat. The NMFS proposed a "reasonable and prudent alternative" for the Project's
26 operations including minimum flow levels they believed were necessary to avoid jeopardizing the coho
27 salmon.

28 On the same day, the FWS also issued an opinion stating that the Project needed to maintain
certain levels at Upper Klamath Lake in order to mitigate any deleterious impact upon the shortnose and
Lost River sucker fish, both of which have been listed as endangered. Based on these two opinions, and
after further consultation with the NMFS and the FWS, the BOR indicated it would implement the

