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

THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

YUROK TRIBE,

Plaintiff-intervenor,

v.

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

Federal Defendants.

Civ. No. C 02-02006 SBA

ORDER 384

Defendant's Counsel are directed to serve this order upon all other parties in this actions.

This matter comes before the Court on the Motion to Dismiss the Yurok Tribe's Fourth Claim for Relief, filed by defendants U.S. Bureau of Reclamation (BOR) and National Marine Fisheries Service (NMFS) (collectively, "Federal Defendants") (Docket #285); and the Motion to Dismiss the Yurok Tribes' Fourth Claim for Relief, filed by defendant-intervenor Klamath Water Users Association ("Water Users") (Docket #277). These Motions are now addressed solely to the Fourth Claim for Relief of plaintiff-intervenor Yurok Tribe.[1]

In its Fourth Claim for Relief, the Yurok Tribe (Tribe) alleges that the BOR violated the federal reserved fishing right of the Tribe, and breached its trust obligation to the Tribe, by allegedly failing to provide adequate levels of water flow in the Klamath River in August and September, 2002. That failure, according to the Tribe, was a substantially contributing cause of the death of an

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[1] The Fourth Claim for Relief of plaintiff-intervenor Hoopa Valley Tribe was previously dismissed pursuant to a settlement agreement between the Hoopa Valley Tribe and the Federal Defendants. (See Docket #344).

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estimated 34,000-60,000 fish in the lower Klamath River on the Yurok Reservation during the period of approximately September 19, 2002, to October 1, 2002. The Tribe seeks declaratory and injunctive relief.

The Water Users' and Federal Defendants' Motions to Dismiss contend that this Court lacks subject matter jurisdiction over the Tribe's Fourth Claim for Relief. Having read and considered the arguments presented by the parties in their moving papers, and after hearing extensive oral argument on January 13, 2005, the Court HEREBY GRANTS the Water Users' Motion to Dismiss and GRANTS the Federal Defendants' Motion to Dismiss.

I. BACKGROUND

A. Factual Background

The following facts are not disputed by the parties. The Yurok Tribe is a federally-recognized Indian Tribe. Since time immemorial, the Tribe and its members have used and continue to use the Klamath River and its anadromous fishery resources for subsistence, commercial, cultural, and religious purposes. See generally Parravano v. Babbitt, 861 F. Supp. 914, 919-20 (N.D. Cal. 1994) (summarizing the history of the Yurok Reservation and the Tribe's historic reliance on fishing), aff'd 70 F.3d 539 (9th Cir. 1995), cert. denied, 518 U.S. 1016 (1996). Approximately 45 miles of the Klamath River flow through the very center of the Yurok Reservation from the River's mouth at the Pacific Ocean, to the confluence with the Trinity River at the Yurok village of Weitchpec, California. The Yurok Reservation was created in that location in the 1800's because the River then "abounded in salmon and other fish" and was "ideally suited for the Yuroks." Mattz v. Arnett, 412 U.S. 481, 487 (1973).

The BOR manages the Klamath Reclamation Project (Klamath Project), an area of approximately 240,000 acres located in the Upper Klamath River Basin in the States of Oregon and California, and through a system of dams, headgates and canals provides water from the Upper Klamath Lake and Klamath River to the Klamath Project for use in agriculture by the Irrigators, and two National Wildlife Refuges within the Project boundaries. The BOR determines the level, timing and rate of water flow through the Klamath Project. See Kandra v. United States, 145 F. Supp. 2d 1192, 1196 (D. Or. 2001). The Klamath Project is one of the earliest federal reclamation projects

authorized under provisions of the Reclamation Act of 1902, 43 U.S.C. § 372, *et seq.* Link River Dam, owned and operated by the BOR, is the first in a series of dams on the Klamath River, the last being Iron Gate Dam. Link River Dam regulates the flow of water into the lower Klamath River. Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 138 F. Supp. 2d 1228, 1230 (N.D. Cal. 2001) (PCFFA I). PacifiCorp owns Iron Gate Dam; flows from Iron Gate Dam, which are affected by the BOR's operation of Link River Dam upstream, affect directly the availability of fishery habitat in the Klamath River below the Dam. See id. at 1230, 1232.

On June 10, 2002, the BOR announced publicly its annual operations plan for the Klamath Project for that year. The Tribe's representatives informed the BOR that proposed Klamath River flows in BOR's draft Biological Assessment were insufficient to protect the Tribe's fishery. The Tribe requested changes in proposed flow levels and other operating criteria that the Tribe believed would have better protected the Tribe's fishery. On July 10, 2002, the BOR reclassified the water year type under the 2002 Biological Opinion for coho from "below average" to "dry" and further reduced flows to the lower Klamath River.[2/] After the BOR announced its decision to reclassify the water year type, the Tribe requested that the BOR fulfill the BOR's fiduciary obligation to the Tribe by rescinding the decision. The BOR refused to modify its revised flow schedule.

Beginning on September 19, 2002, reports were made to Tribal, state and federal agencies that dead adult fish were observed in the lower reaches of the Klamath River within the Yurok Reservation. By September 27, 2002, approximately 34,000 fish were estimated (conservatively) to have been killed; the majority of the dead fish were adult fall Chinook salmon which had returned

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[2/] The 2002 Biological Opinion, issued by NMFS on the BOR's proposed 10-year plan of operation for the Klamath Project, was the subject of other claims in this litigation brought pursuant to the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, by plaintiff PCFFA, and by the Yurok and Hoopa Valley Tribes. In the July 15, 2003 Order on cross-motions for summary judgment, the Court set aside and remanded portions of the Biological Opinion to NMFS, while upholding BOR's decision to adopt the measures recommended by NMFS as reasonable and prudent alternatives for the years 2002 and 2003. See July 2003 Order at 31. The reasonable and prudent alternatives in the 2002 Biological Opinion recommend a flow schedule for the lower Klamath River according to water-year types (*e.g.*, critically dry, dry, below average, above average, and wet) based largely on Klamath Basin hydrology during the 1990s. The ESA claims in this case are not at issue in the current Motions to Dismiss.

to the River after a period in the Pacific Ocean, for the purpose of spawning. The size of the fish kill was unprecedented in the oral and written history of the Tribe; no kill of such magnitude had been known to occur in adult salmonids prior to this event. The fish kill occurred primarily in the lower 30 miles of the River entirely within the Yurok Reservation. The period of the fish kill ended approximately on October 1, 2002, though occasional reports of additional dead fish were made for a week following that date.

Since 2002, there has been no die-off of adult salmonids in the lower Klamath River such as occurred that year. In 2003 and 2004, the BOR provided supplemental releases of water to provide benefits to returning Chinook salmon and to avoid another fish die-off such as occurred in 2002.

It is not disputed that the Tribe has a federally-protected fishing right and that the federal government "has a responsibility to protect the Tribes' rights and resources." Klamath Water Users Protection Association v. Patterson, 204 F.3d 1206, 1213-1214 (9th Cir. 1999), amended on denial of reh'g, 203 F.3d 1175 (9th Cir. 2000), cert. denied 531 U.S. 812 (2000). The Federal Defendants and the Water Users dispute that BOR's management of the Klamath Project caused the September 2002 fish die-off on the Klamath River, or breached the government's trust duty to the Tribe. Before the Court can consider the merits, however, it must assure itself that it has jurisdiction over the Tribe's Fourth Claim for Relief.

B. The Tribe's Fourth Claim for Relief

The Tribe's Fourth Claim for Relief states as follows:

FOURTH CLAIM FOR RELIEF

Violation of the Yurok Tribe's Federal Reserved Fishing Right and APA by BOR For Failing to Provide Flow Levels Adequate to Support Productive Fishery Habitat and Salmon Populations

> 76. Federal law requires BOR to provide flow levels below Iron Gate Dam of sufficient quantity, quality and timing to support a productive and viable anadromous fishery in the Klamath River on the Yurok Reservation.
>
> 77. BOR violated that legal duty by failing to provide biologically adequate flows in 2002 and by operating the Klamath Irrigation Project in a manner that contributed to the deaths of over 23,000 adult chinook and threatened coho salmon.

> 78. BOR's actions and omissions are arbitrary, capricious, and [sic] abuse of discretion and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §§ 701-706.

Yurok Compl. at 18.

In terms of relief, the Tribe seeks a declaration that the BOR's operation of the Klamath Project violated the Tribe's fishing right, and an injunction ordering "BOR to limit irrigation water deliveries from the Klamath Project in order to implement an interim flow regime in the Klamath River below Iron Gate Dam that will protect anadromous fish pending BOR's full compliance with its obligations under the ESA, and with its duty to protect the Yurok fishing and water rights." Yurok Compl. at 19, ¶ D.[3]/ The Tribe's summary judgment brief confirmed that this injunction is intended to compel the BOR to operate the Klamath Project in the future in a particular way. See Yurok Summ. J. Memo at 3 (Docket #214) ("The Tribe seeks relief declaring that BOR violated the fishing right and an injunction requiring BOR in the future to operate the Project in compliance with that right"). A Stipulation filed January 21, 2003, in which the Tribe clarified that its Fourth Claim for Relief seeks prospective relief against BOR based on alleged violations of the Tribe's fishing right due to Project operations in 2002, similarly confirmed the scope of injunctive relief sought by the Tribe. See Stipulation ¶ 4 (filed Jan. 21, 2003) (Docket #124) (2003 Stipulation).[4]/ The Tribe does not, however, indicate the manner in which it would have BOR comply with the Tribe's fishing

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[3]/ Elsewhere in its Complaint, the Yurok Tribe states that it seeks "an injunction requiring BOR to limit irrigation water deliveries from the Klamath project that would cause Klamath River flows below Iron Gate Dam to fall below biologically adequate levels before a valid biological opinion is issued." Yurok Compl. ¶ 12.

[4]/ Paragraph 4 of the Stipulation provides as follows:

> 4. The Yurok Tribe hereby reaffirms and stipulates that its Fourth Claim for Relief involves the resolution of two questions only: 1) did BOR violate the Yurok Tribe's federal reserved fishing right in 2002 by providing stream flows that were inadequate to protect the Tribe's anadromous fishery? and 2) must BOR operate the Klamath Irrigation Project in future years to avoid violations of the Yurok Tribe's fishing right? In seeking a resolution of these questions in its Fourth Claim for Relief, the Tribe is not seeking an order establishing flow levels for all species of salmon covered by the Tribe's fishing right for all life stages for all water-year types. The Yurok Tribe hereby reaffirms those representations here.

right other than to maintain flow conditions in the Klamath River at unspecified levels which, in the Tribe's opinion, are needed to protect its fishery.[5]

III. DISCUSSION

A. Timeliness of the Motions to Dismiss

Both Motions seek dismissal of the Tribe's Fourth Claim for lack of subject matter jurisdiction. The Tribe first objects to the Motions as untimely. Fed. R. Civ. P. 12(b)(1) authorizes a party to seek dismissal of an action for lack of subject matter jurisdiction. "When subject matter jurisdiction is challenged under Federal Rule of [Civil] Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." Tosco Corp. v. Communities for a Better Environment, 236 F.3d 495, 499 (9th Cir. 2001). Although a Rule 12(b)(1) motion must be made prior to filing a responsive pleading, because lack of subject matter is not a waiveable defect, an untimely Rule 12(b)(1) motion may be construed under Rule 12(h)(3). Augustine v. United States, 704 F.3d 1074, 1075, n.3 (9th Cir. 1983). Rule 12(h)(3) provides, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Id.* (citations omitted). A court may dismiss a particular claim for lack of subject matter jurisdiction at any time, even if such dismissal does not dispose of the entire action. See Skillsky v. Lucky Stores, Inc., 893 F.2d 1088, 1095 (9th Cir. 1990) (affirming, in part, a district court order that partially granted a motion to dismiss two of three pending claims under Rule 12(h)(3) which was filed just eleven days before trial). "Because sovereign immunity is a question of subject matter jurisdiction, the United States may raise it at any point in the proceedings." U.S. v. Nye County, 178 F.3d 1080, 1089 n.12 (9th Cir. 1999) (citing Fed. R. Civ. P. 12(h)(3)).

Here, the Water Users and the Federal Defendants both bring their motions under Fed. R.

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[5] In its Opposition to the Federal Defendants' Motion to Dismiss ("Opp. to Fed."), the Tribe also stated that it "also seeks a permanent injunction to require Reclamation to protect the Tribe's fishery from similar harm in the future." Id. at 5 (Docket #329). The Tribe stated that such an injunction should require BOR to engage in a "formal consultation process" with the Tribe "that will ensure lawful consideration of Klamath Project impacts on tribal trust species"; the preparation of annual "Tribal Trust Impact Statements" by BOR; and the preparation of a long-term plan by BOR, in consultation with the Tribe, "to protect tribal trust species in terms of both water quantity and water quality." Id.

Civ. P. 12(b)(1), asserting lack of subject matter jurisdiction. The Court construes these motions under Fed. R. Civ. P. 12(h)(3), and therefore finds that the motions are timely.

B. Subject Matter Jurisdiction Over the Tribe's Fourth Claim for Relief

Between them, the Motions to Dismiss raise lack of subject matter jurisdiction over the Tribe's Fourth Claim for Relief on several grounds, including mootness, failure to join indispensable parties, and lack of jurisdiction under the Administrative Procedure Act. The Court will address these grounds in turn.

1. Mootness

The Water Users move for dismissal of the Tribe's Fourth Claim on grounds of mootness. Article III of the United States Constitution gives jurisdiction to the federal courts over "all cases [or] controversies" arising under the Constitution and the laws of the United States. U.S. CONST. ART. III, § 2. "[A] federal court has no authority 'to give opinions upon moot questions . . . or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)). An action is mooted "when the issues presented are no longer live and therefore the parties lack a legally cognizable interest for which the courts can grant a remedy." Alaska Ctr. for the Environment v. United States Forest Service, 189 F.3d 851, 854 (9th Cir. 1999).

A claim that seeks declaratory or injunctive relief is moot unless there is a real or immediate threat that the wrong will be repeated. See Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1042 (9th Cir. 1999). The mere possibility that the harm will be repeated is not enough. Id.

"[S]tanding and mootness both pertain to a federal court's subject-matter jurisdiction." White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). "When evaluating the factual basis for jurisdiction, a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment." Id.

It is undisputed that the fish die-off of September 2002 was an unprecedented event. Two water years have passed since 2002, and it is undisputed that there has been no recurrence of a fish die-off such as happened in September 2002. The injunctive relief sought by the Tribe is simply not available without a showing that, among other things, the recurrence of such an event is more than

a mere possibility. The Tribe contends that a live dispute exists with the BOR over whether the BOR has honored its trust duty to protect trust resources of the Tribe, but that is not the relevant showing (see Yurok Op. to Water Users' Motion to Dism. at 11-13 (Docket #331)); it is, rather, whether a recurrence of *harm* to the Tribe from another fish die-off is real and immediate. See Hodgers-Durgin, 199 F.3d at 1042-44. At the hearing, counsel for the Tribe was queried by the Court at length on the question of imminent harm from another fish die-off. Despite the Court's effort to elicit some showing from the Tribe on this point, none was forthcoming. Although counsel for the Tribe referred to declarations previously submitted by the Tribe from biologists purporting to show the continued degradation of the Klamath River ecosystem in general, counsel also repeatedly stated that it is impossible to predict with certainty the chances of a recurrence of an event like the fish die-off of September 2002. Moreover, counsel for the Tribe provided no evidence that there was any "real or immediate threat" of a recurrence.

There are, moreover, contra-indications that another fish die-off like that of September 2002 is likely to recur. The reasonable and prudent alternatives contained in the 2002 Biological Opinion call for the BOR to reduce the Klamath Project's demand on surface water from the Klamath River, and to augment flows in the Klamath River below Iron Gate Dam, through the use of a water bank. In 2002, the water bank requirement was 30,000 acre feet; in 2003, it was 50,000 acre feet; in 2004, it was 75,000 acre feet; and it is 100,000 acre feet in 2005. NMFS Admin. Rec. at 4596 (Table 8). There is no dispute that BOR complied with this requirement in 2002, 2003, and 2004, and the Court has no basis to doubt that the BOR will comply with the water bank requirement in 2005. In addition, the BOR made additional late summer/early fall releases of water down the Trinity River for the benefit of returning Chinook salmon in 2003 and 2004, and to avoid a recurrence of a major die-off of returning Chinook on the lower Klamath River. The fact that a major fish die-off occurred in September 2002 is now part of the knowledge base with which the BOR manages the Klamath Project and federal reclamation facilities on the Trinity River (a major tributary of the Klamath River which flows into the Klamath River at the eastern end of the Yurok Reservation). While these measures do not establish that a fish die-off like that of September 2002 will never happen again, these measures underscore that nothing in the record indicates that there is a "real or immediate

threat" of another fish die-off.

At the hearing, the Tribe also argued that its Fourth Claim falls within an exception to mootness for claims that are capable of repetition but which may evade review. The Court is unpersuaded that such an event would evade review. If the Tribe believes that conditions on the Klamath River are such that a fish die-off comparable to that of September 2002 is imminent at some future time, it may seek review without waiting for another die-off to begin.

Accordingly, the Court holds that it lacks subject matter jurisdiction over the Tribe's Fourth Claim because that claim is moot, and GRANTS the Water Users' Motion to Dismiss on that basis.

2. Failure to Join Indispensable Parties

The Water Users advance a separate ground for dismissal based on the alleged failure to join indispensable parties under Rule 19 of the Federal Rules of Civil Procedure. The Water Users argue that there are other water users in the Klamath Basin who are necessary parties to the action, and that although the Tribe stipulated that it did not seek an order establishing flow levels for salmon covered by the Tribe's fishing rights, the Tribe nevertheless seeks a declaration from the Court concerning the amount of water necessary to make its fishing right meaningful. The Water Users' arguments on this point are unconvincing.

Rule 19 provides the framework for determining whether a party is necessary and indispensable to an action. Rule 19(a) "contemplates a two-part analysis" as to whether an absent party is necessary. Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1498 (9th Cir. 1991). First, the court must consider if complete relief is possible among those parties already in the action. Id. Second, the court must consider whether the absent party has a legally protected interest in the outcome of the action, and if so, if a decision in that party's absence will (i) impair or impede its ability to protect that interest; or (ii) expose it to the risk of multiple or inconsistent obligations by reason of that interest. Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1155 (9th Cir.), cert. denied, 537 U.S. 820 (2002). If an absent party satisfies either of these alternative tests, it is necessary to the resolution of the claim. Id.

If an absent party is a necessary party, the court must then determine whether it is

indispensable, that is, "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed." Fed. R. Civ. Proc. 19(b). To make this determination, a court considers four factors: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Id.

In this case, the Water Users have not satisfied the criteria under either Rule 19(a)(2)(i) or 19(a)(2)(ii). Although they contend that there are "other water users in the Klamath Basin" whose interests may be impaired if they are not joined to the Tribe's Fourth Claim for Relief, the identities and interests of these "other water users" are by no means clear. At the hearing, the Water Users were unable to describe the "other water users" in any specific way, other than to say that they were not members of the Klamath Water Users Association, and to assert that they existed, that there were many of them, and that they diverted water from the Klamath River. Such vague allegations make it impossible for the Court to determine whether a decision on the merits of the Tribe's claim would either impair the ability of any such parties to protect their interests in Klamath River water, or expose the present parties to a risk of multiple or inconsistent obligations. Such risks are highly unlikely, however, because the Tribe's Fourth Claim seeks relief only against the BOR with regard to Klamath Project operations. Thus, while a ruling in the Tribe's favor on its Fourth Claim could, in theory, affect the interests of Klamath Project water users who are already parties to this action, the Tribe has disclaimed any intention of "seeking an order establishing flow levels for all species of salmon covered by the Tribe's fishing right for all life stages for all water-year types." 2003 Stipulation ¶ 4 (Docket # 124). Given the Tribe's representations on the scope of its Fourth Claim for Relief, any impairment of the interests of Klamath River water users outside of the Klamath Project is speculative. The Water Users have not established that "other water users in the Klamath Basin" are necessary parties to this action.

Accordingly, the Water Users' Motion to Dismiss for failure to join necessary and indispensable parties is DENIED.

3. Jurisdiction under the Administrative Procedure Act

In its Fourth Claim for Relief, the Tribe alleges that the BOR breached its responsibility to protect the Tribe's fishing rights by failing to provide biologically adequate flows in the Klamath River in 2002 through its operation of the Klamath Project. The Tribe seeks an injunction compelling BOR in the future to operate the Project to maintain an unspecified flow regime which the Tribe contends is necessary for the protection of its fishing rights, and to adopt certain procedures which the Tribe contends are also necessary to avoid future harm to the Tribe's fishery. Yurok Compl. at 19, ¶ D; Opp. to Fed. at 5. In seeking dismissal of this claim for lack of jurisdiction, the Federal Defendants argue that the Tribe's claim does not fall within the scope of the waiver of sovereign immunity under the Administrative Procedure Act (APA), §§ 701-706. The Water Users' Motion to Dismiss makes a similar argument.

a. The APA supplies the applicable waiver of sovereign immunity in this case

"It long has been established . . . that the United States, as sovereign, 'is immune from suit save as it consents to be sued.'" United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). The Government's waiver of its sovereign immunity "cannot be implied but must be unequivocally expressed." Testan, 424 U.S. at 399 (quoting United States v. King, 395 U.S. 1, 4 (1969)). "Limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." Soriano v. United States, 352 U.S. 270, 273 (1957). A Congressionally-defined waiver of sovereign immunity is thus a "prerequisite" for subject-matter jurisdiction. United States v. Mitchell, 463 U.S. 206, 212 (1983) (Mitchell II). Additionally, jurisdiction requires a claim falling within the terms of the waiver. Gros Ventre Tribe v. United States, 344 F. Supp. 2d 1221, 1225 (D. Mont. 2004). "For jurisdictional purposes, the nature of the relief sought determines the source of the sovereign immunity waiver." Id. at 1226.

In this case, the Tribe invoked the APA, 5 U.S.C. §§ 701-706, in seeking judicial review of its Fourth Claim for Relief. See Yurok Compl. ¶¶ 76-78. The APA waives the government's immunity to suit for non-monetary claims for which "there is no other adequate remedy in a court,"

5 U.S.C. § 704, and where no other statute provides a private right of action, by providing that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Section 706 defines the scope of judicial review of agency action under the APA. Section 706 states that "[t]he reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be," *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. The APA provides the generally applicable means for obtaining judicial review of actions taken by federal agencies, and its provisions apply in this case given that the Tribe seeks non-monetary relief against the BOR in connection with Klamath Project operations in 2002. See Clouser v. Espy, 42 F.3d 1522, 1527 n.5 (9th Cir. 1994), cert. denied, 515 U.S. 1141 (1995); see also Gallo Cattle Co. v. United States Dep't of Agriculture, 159 F.3d 1194, 1198-99 (9th Cir. 1998) (discussing the limitations on the APA's waiver of sovereign immunity with respect to final agency action).

The Tribe's Complaint does not specify the provision of Section 706 under which it seeks review. During summary judgment briefing in 2003, however, the Tribe clarified that its Fourth Claim sought to compel agency action unlawfully withheld within the meaning of Section 706(1). The Tribe asserted that its Fourth Claim was based on BOR's alleged failure "to provide adequate stream flows in August and September 2002" (Yurok Summ. J. Memo at 8), by "unlawfully interfer[ing] with the exercise of the . . . Tribe's right to take fish from the Klamath River." Id. at 8-9 (Docket #214). The Tribe concluded, "BOR's failure constitutes agency action unlawfully withheld within the meaning of the APA, and should, therefore, be declared unlawful [under] 5 U.S.C. § 706(1)." Id. at 9. However, in its Oppositions to the Motions to Dismiss, the Tribe argues that its claim is not based on § 706(1) of the APA but on § 706(2). (Opp. to Water Users at 8-10; Opp. to Fed. at 4-7). The Tribe reiterated this position at the hearing. Whatever the reasons for this change in position, the Court accepted the Tribe's representation that its Fourth Claim does not seek to compel agency action unlawfully withheld under§ 706(1) of the APA and evaluated the Fourth Claim pursuant to APA § 706(2) rather than §706(1).

b. Considered under APA § 706(2), the Tribe's Fourth Claim for Relief Falls Outside the Court's Jurisdiction

The Tribe has not stated a viable claim for relief within the terms of the APA's waiver of sovereign immunity. Any challenge to BOR's operation of the Klamath Project under Section 706(2) must be presented in the context of a final agency action within the meaning of the APA. See 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); Norton v. SUWA,124 S. Ct. at 2380 (discussing Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990)); Gallo Cattle Co., 159 F.3d at 1198; San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 883 (D. Az. 2003); see also Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001) ("Whether there is a final agency action is ... a jurisdictional question. With a few exceptions, if there is no final agency action, there is no basis for review of the government's decision or policy."). For an agency action to be final, first, it must "mark the consummation of the agency's decisionmaking process, * * * it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal quotations and citations omitted); see also Gallo, 159 F.3d at 1198-99 (citations omitted).

In this case, the Tribe's Fourth Claim targets BOR's operation of the Klamath Project, rather than a discrete agency action within the meaning of the APA. See Compl. ¶ 77. The day-to-day operations of an agency's programs are readily distinguishable from final agency action, as the Supreme Court recognized in Lujan v. National Wildlife Federation, 497 U.S. at 890-891. That case presented a challenge under Section 706(2) of the APA to "the continuing (and thus constantly changing) operations of the BLM" in considering applications to revoke withdrawals of land from the public domain, reviewing classifications of public land, and developing land use plans. Id. at 890. The Supreme Court held that those activities could not be challenged "wholesale" under § 706(2) because they did not constitute "an identifiable 'agency action' -- much less a 'final agency action'" -- within the meaning of the APA. Id. at 890, 891; accord San Carlos Apache, 272 F. Supp. 2d at 884 ("The day to day operation of a dam is not a final agency action under the APA."). The

Tribe's Fourth Claim does not identify a final agency action within the meaning of the APA, as it must, and is therefore jurisdictionally defective for that reason.

The relief sought by the Tribe also lies outside the jurisdiction of the Court. The injunctive relief sought by the Tribe would compel BOR to follow particular procedures, and manage the Klamath Project to maintain particular flows in the lower Klamath River which the Tribe deems "sufficient" to protect its fishery.

The courts have power to review agency action and to declare it unlawful or inadequate pursuant to the standards articulated in the APA. But "that authority is not power to exercise an essentially administrative function." Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 21 (1952). The "guiding principle ... is that the function of the reviewing court ends when an error of law is laid bare." Id. at 20. District courts are generally required to remand an action back to the federal agency upon making a finding that it was "arbitrary and capricious." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) ("if the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"); UOP v. United States, 99 F.3d 344, 351 (9th Cir. 1996) (citing Abramowtiz v. EPA, 832 F.2d 1071, 1078 (9th Cir. 1987) ("The general rule is that when an administrative agency has abused its discretion or exceeded its statutory authority, a court should remand the matter to the agency for further consideration"). Moreover, a court may not inject itself into the agency's decision-making process by imposing additional procedural – much less, substantive – requirements on agencies beyond those mandated by statute. As the Supreme Court explained in Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1978), the judiciary may not dictate to agencies the methods and procedures of needed inquiries on remand because "[s]uch a procedure clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'" Id. at 545 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)). Perhaps most clearly of all, a court cannot, consistent with the separation of powers, order "wholesale improvement of [a] program by court decree, rather than in the offices of the Department

[of the Interior] or the halls of Congress, where programmatic improvements are normally made." Lujan v. National Wildlife Fed'n, 497 U.S. at 891.

Absent "rare circumstances," the appropriate remedy under Section 706(2) is an order setting aside the challenged action and remanding to the agency. See Florida Power & Light, 470 U.S. at 744; UOP, 99 F.3d at 351 (proper scope of relief under § 706(2), if court determines agency has acted arbitrarily and capriciously, is to remand); Kandra, 145 F. Supp. 2d at 1205 ("The APA authorizes the court to 'set aside, rather than compel,' agency actions,"citing 5 U.S.C. § 706(2)). The Tribe has not identified, in either its briefing on the motion or at the hearing, any "rare circumstances" that would merit relief other than a remand to the agency. Thus, even if the Court had determined that the BOR's actions were arbitrary and capricious or not in accordance with law, the proper remedy would have been to set aside the action and remand to the agency. At the hearing, however, counsel for the Tribe stated that, if a remand were the only relief that the Court could award if the Court were to find that some final agency action taken by the BOR in 2002 was arbitrary and capricious, the Tribe would have failed to state a claim with regard to its Fourth Claim for Relief.

Because the Tribe's Fourth Claim fails to identify the final agency action challenged, and because the relief sought by the Tribe lies outside the jurisdiction of the Court to award, the Federal Defendants' Motion to Dismiss the Tribe's Fourth Claim for Relief under Section 706(2) of the APA is GRANTED.

c. The common law does not provide an independent basis for review of the Fourth Claim

The Tribe also argues that the Court can "invoke the common law of trusts" as an independent basis of substantive rights and obligations, assert jurisdiction under 28 U.S.C. § 1362 and the APA's waiver provision in 5 U.S.C. § 702, and proceed to a trial without regard to the APA's limitations on judicial review of agency action. Opp. to Fed. at 2-3, 16. The Tribe is mistaken for two principal reasons. First, the APA provides the applicable framework for review of agency action in this case, and this framework cannot be circumvented simply by invoking Section 1362, Section 702 of the APA, and the common law. Second, the common law does not provide an

independent basis for the rights asserted by the Tribe in this case. The absence of a statute or other source of positive law defining the federal government's obligations is fatal to the Tribe's argument that the BOR has specifically enforceable fiduciary obligations, akin to the standards applicable to private fiduciaries, with respect to the Tribe's fishing right. In short, the Court may not review the Tribe's fourth claim for relief as a common law claim outside of the framework of the APA.

The Tribe alleges that its Fourth Claim for Relief is based upon a common law breach of Indian trust claim. The Tribe did not plead its Fourth Claim as arising under the common law and the Tribe has not sought to amend its Complaint to add a common law claim. Furthermore, the Tribe cites no statute or other source of positive law which establishes a right of action for such a claim against the United States except the APA, which provides a waiver of sovereign immunity and a framework for review of claims seeking non-monetary relief against federal agencies. See Clouser, 42 F.3d at 1527-28 n.5. The Tribe concedes, as it must, that any "common law" claim must still invoke the waiver of sovereign immunity under Section 702 of the APA. Opp. to Fed. at 3. In Norton v. SUWA, the Supreme Court held that Section 702, as well as Sections 704 and 706(1), "all insist upon an 'agency action,' either as the action complained of (in §§ 702 and 704) or as the action to be compelled (in § 706(1))." 124 S. Ct. at 2378. Moreover, Section 704 by its plain terms limits "actions reviewable" to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court...." 5 U.S.C. § 704 (emphasis added). Accordingly, the Tribe's failure to specify the final agency action challenged is also fatal to its Fourth Claim considered as a common law claim.

Moreover, the Tribe cannot evade the APA's limitations on the scope and standard of judicial review under 5 U.S.C. § 706 in this case by asserting a "common law" claim. A plaintiff invoking the APA must satisfy all of its requirements unless the plaintiff can point to a separate provision which grants him a private right of action. Clouser, 42 F.3d at 1527-28 n.5. The Tribe has not pointed to any separate source of federal law, whether based on statute or treaty, that meets the requirements for recognition of a private right of action. See, e.g., Alexander v. Sandoval, 532 U.S. 275, 288-89 (2001) (private rights of action to enforce federal law must be created by Congress). Nor has the Tribe alleged that the Secretary acted outside her statutory authority, i.e., alleged that

certain actions were *ultra vires*, thereby providing a basis for "non-statutory review" under the APA's general waiver of sovereign immunity. See Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conserv.of Montana, 792 F.2d 782, 791-92 (9th Cir. 1986).[6] Finally, Section 1362 of Title 28, concerning claims arising under the Constitution and laws of the United States brought by federally recognized Indian Tribes, simply provides the district courts with original jurisdiction to hear such claims arising under Federal law, including the kinds of claims that could have been brought by the United States as trustee, but were not. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 472 (1976). It cannot be read, in conjunction with APA's waiver of sovereign immunity, 5 U.S.C. § 702, to expand the scope of Section 702, and the Ninth Circuit did not hold otherwise in Assiniboine and Sioux Tribes, 792 F.2d at 793.

While common law trust duties may inform the interpretation of statutory mandates, they do not provide an independent basis for judicial action. See Cobell v. Norton, 392 F.3d 461, ___;2004 WL 2828059, at 9-10 (D.C. Cir. Dec. 10, 2004). Rather, when seeking to enforce a trust relationship against the federal government, plaintiffs must identify a trust duty deriving from positive law, such as a statutory right or prohibition , or a property interest cognizable under the Fifth Amendment that has been impaired. See id.; Cobell v. Norton, 91 F. Supp. 2d at 29-31. For example, in the *Cobell* litigation, the district court dismissed the plaintiffs' common law claims with prejudice, concluding that they failed to state a cause of action:

> [T]o the extent that plaintiffs seek relief solely alleged to be afforded to them by rights arising under the common law of trusts, plaintiffs have failed to state a claim. The times at which this court may legitimately create federal common law are both "'few and restricted.'" [Citation omitted] While this court must consider the common law when interpreting the statutes creating and governing the IIM trust, see NLRB v. Amax Coal Co., 453 U.S. 322, 329, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981) (citing Perrin v. United States, 444 U.S. 37, 42-43, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979)), a statute or regulation must nonetheless authorize this importation of common law authority.

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[6] Even in such instances, however, courts have insisted on a statutory basis for the right being asserted. See Cobell v. Babbitt, 91 F. Supp. 2d 1, 29-30 (D.D.C. 1999) (citing and discussing cases), aff'd and remanded, 240 F.3d 1081 (D.C. Cir. 2001).

91 F.Supp.2d at 31.[7] In a more recent decision in the same litigation, the D.C. Circuit emphasized, in light of recent Supreme Court decisions, that courts may not apply common law trust duties to federal agencies without having first identified a statutory or other positive law obligation that is the basis of the right asserted. Cobell v. Norton, 392 F.3d at ___; 2004 WL 2828059, at 9 (discussing United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003)).

In this case, the United States is a trustee for the Tribe, including its fishing rights, and has an obligation to protect those rights. See Klamath Water Users Protective Ass'n, 204 F.3d at 1213 ("[T]he United States, as trustee for the [Hoopa and Yurok] Tribes, has a responsibility to protect their rights and resources."); Kandra, 145 F. Supp. 2d 1192 (during drought conditions, drastically reducing water deliveries to the Klamath Project to comply with reasonable and prudent alternatives for the protection of threatened and endangered fishes in the Klamath River and in Upper Klamath Lake which were also part of the fishery resource of Klamath Basin tribes). The Federal Defendants have acknowledged this obligation in this litigation.

However, the Tribe has failed to plead or otherwise identify any positive law imposing specific fiduciary duties on BOR in connection with Klamath Project operations which BOR allegedly violated in 2002, as it must to assert a legally cognizable claim for a breach of a fiduciary duty under the APA. See Cobell v. Norton, 392 F.3d at ___; 2004 WL 2828059, at 8-10 (discussing, inter alia, Mitchell II, 463 U.S. 206, and subsequent Supreme Court decisions applying the framework of that case). In the absence of such a specific duty, the government's general trust responsibilities to the Tribe are discharged by compliance with generally applicable regulations and statutes. See Gros Ventre, 344 F. Supp. 2d at 1226 (citing Morongo Band of Mission Indians v. Federal Aviation Admin., 161 F.3d 569, 574 (9th Cir. 1998)). For example, the Ninth Circuit in Morongo Band of Mission Indians v. Federal Aviation Administration concluded that the FAA sufficiently discharged its general trust responsibility to the Morongo Band by complying with

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[7] "'The federal power over Indian lands is so different in nature and origin from that of a private trustee . . . that caution is taught in using the mere label of a trust plus a reading of *Scott on Trusts* to impose liability on claims where assent is not unequivocally expressed.'" Cobell, 91 F. Supp. 2d at 29 (quoting United States v. Mitchell, 463 U.S. 206, 234 (1983) (Rehnquist, Powell, and O'Connor, JJ, dissenting)).

general regulations and statutes, such as the National Environmental Policy Act, when the Band could not otherwise point to a specific duty placed on the government with respect to the Band in that case which would require more. 161 F.3d 569, 574 (9th Cir. 1998). See also Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 479 (9th Cir. 2000) (Tribe's claim that BLM approval of gold mine violated trust obligations is satisfied by BLM's compliance with NEPA). This Court has already ruled that BOR's adoption of the short-term flow levels proposed in the NMFS 2002 Biological Opinion was not arbitrary and capricious (July 2003 Order at 25, 31), and no other violation of the ESA or any other statute or regulation in 2002 by BOR has been alleged by the Tribe. The Court can find no basis under the common law alone to impose on BOR the specific fiduciary duties asserted by the Tribe, let alone award the relief the Tribe seeks.

Accordingly, the Federal Defendants' Motion to Dismiss the Tribe's Fourth Claim for Relief is GRANTED on the common law issue.

IV. OBJECTIONS TO PROPOSED ORDER

There is one final administrative matter that the Court will address. At the conclusion of the hearing on the motions to dismiss, the Court ordered Federal Defendants to prepare a proposed order, consistent with the Court's findings, for the Court's review. Counsel for Federal Defendants, Stephen MacFarlane, stated that he would prepare a short proposed order. The Court responded that the hearing had been extensive and that, therefore, the proposed order might not be short. The next day, the Court directed a member of her staff to contact the parties to the motion to ensure that they understood what the Court had ordered. Specifically, it was reiterated that Mr. MacFarlane was to memorialize the Court's findings, the legal bases for the Court's conclusions, and the reasoning as argued and discussed at the hearing and in the parties' motion papers. The Court's staff also contacted Mr. Scott Williams, who had argued on behalf of the Tribe. Mr. Williams was unavailable but a voice-mail message was left for him reiterating what was said to Mr. MacFarlane.

In objections filed on January 25, 2005, the Tribe argues that the Court's communication with the Federal Defendants violated Code of Conduct for Judges Canon 3(A)(4), which states:

> A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte communications on the merits, or

procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

This section is inapplicable to the instant situation. The Court requested in open court that counsel for the prevailing party prepare the proposed order memorializing the findings the Court had made on the record during an exhaustive 3.5 hour hearing and based upon the discussion with the parties of the authorities cited in the briefs and on the record. The Court's communication with Mr. MacFarlane was not a substantive discussion implicating the merits, but was merely intended to clarify what had been ordered at the culmination of the hearing in open court. In any event, the Court's staff also provided counsel for the Tribe with the same information that was provided to counsel for the Federal Defendants.[8] Although other counsel for the Yurok Tribe (Curtis Berkey) asserts that neither he nor Mr. Williams "have had any communications with the Court subsequent to the oral argument," (Dec. of Curtis Berkey, 1) this is only true if Mr. Berkey does not regard a voice-mail message as a "communication." Given that these communications do not implicate the merits of the action, and because the Court notified both the Federal Defendants and the Tribe of its expectations for the proposed order, the Tribe's objection premised upon its assertion that the Court violated Code of Conduct for United States Judges 3(A)(4) is OVERRULED.

Plaintiff Pacific Coast Federation of Fisherman's Associations ("PCFFA") has also objected to the proposed order. PCFFA submits authorities which stand for the proposition, *inter alia*, that a district court opinion copied almost verbatim from a proposed order submitted by one of the parties is inappropriate. (PCFFA Objections at 2, citing Bright v. Westmoreland County, 380 F.3d 729, 732 (3d Cir. 2004). Preliminarily, the Court notes that the instant motions sought to dismiss the ***Yurok Tribe's*** Fourth Claim for relief. PCFFA was not a party to these motions, filed nothing in support of or in opposition to them and did not appear or otherwise participate in the hearing on the motions.

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[8]/ Subsequently, Mr. MacFarlane contacted the Court's staff and asked whether the proposed order should be shown to counsel for the Tribe and whether it should be a joint submission. The Court's staff responded that, procedurally, the proposed order should be shown to counsel for the Tribe, but that the Court had not ordered a joint submission.

Until its objections to the proposed order, PCFFA had not demonstrated any legal interest in the proceedings related to the motions and/or any desire to be heard concerning them. Accordingly, it is questionable, at best, whether PCFFA has standing to object to the proposed order or sufficient familiarity with the facts to do so consistent with its legal obligations.[9]/

In any event, the authority which PCFFA cites in support of its position is unsurprisingly inapposite. In Bright, the Third Circuit overturned the district court's findings because it did not appear that the district court had exercised independent judgment in adopting a proposed order. Id. In Bright, the district court held a preliminary case conference after motions to dismiss had been filed but before any responses to those motions had been filed. Id. at 730. During the conference, the Court indicated its intention to grant the motions and requested the moving parties to submit a statement of position in lieu of a Reply. Id. at 731. In response to this request, the moving parties prepared a proposed order which the district court adopted in nearly verbatim form and without oral argument. Id. Moreover, the proposed order included a finding based on an argument which had not been raised in the parties' papers. Id.

Here, it is abundantly clear to all parties participating in both the briefing and the oral argument related to these motions that the Court's order is a result of its independent judgment. The Court carefully reviewed the parties' briefs, independently analyzed the issues, ordered supplemental briefing, and held an exhaustive 3.5 hour hearing during which it engaged the parties in vigorous discussion on the issues and made detailed findings on the record. Moreover, the Court carefully reviewed the proposed order which was prepared by the prevailing party and made substantial revisions to ensure coincidence with the Court's conclusions and findings. Accordingly, even assuming for purposes of this objection that PCFFA has standing to object and also assuming that it has sufficient familiarity with the facts to render a legal objection, its objection to the Court ordering the Federal Defendants to prepare the proposed order is OVERRULED.

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[9]/ PCFFA also inappropriately challenges one of the Court's findings based upon authority and argument not raised in any of the briefing on the motions to dismiss. (PCFFA Objections at 5.) If PCFFA had any interest in participating in these proceedings, it should have done so or sought leave of the Court to do so prior to the Court's ruling.