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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^g

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

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

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

9 **I. BACKGROUND**

10 **A. Factual Background**

11 The following facts are not disputed by the parties. The Yurok Tribe is a federally-
12 recognized Indian Tribe. Since time immemorial, the Tribe and its members have used and continue
13 to use the Klamath River and its anadromous fishery resources for subsistence, commercial, cultural,
14 and religious purposes. See generally Parravano v. Babbitt, 861 F. Supp. 914, 919-20 (N.D. Cal.
15 1994) (summarizing the history of the Yurok Reservation and the Tribe's historic reliance on
16 fishing), aff'd 70 F.3d 539 (9th Cir. 1995), cert. denied, 518 U.S. 1016 (1996). Approximately 45
17 miles of the Klamath River flow through the very center of the Yurok Reservation from the River's
18 mouth at the Pacific Ocean, to the confluence with the Trinity River at the Yurok village of
19 Weitchpec, California. The Yurok Reservation was created in that location in the 1800's because
20 the River then "abounded in salmon and other fish" and was "ideally suited for the Yuroks." Mattz
21 v. Arnett, 412 U.S. 481, 487 (1973).

22 The BOR manages the Klamath Reclamation Project (Klamath Project), an area of
23 approximately 240,000 acres located in the Upper Klamath River Basin in the States of Oregon and
24 California, and through a system of dams, headgates and canals provides water from the Upper
25 Klamath Lake and Klamath River to the Klamath Project for use in agriculture by the Irrigators, and
26 two National Wildlife Refuges within the Project boundaries. The BOR determines the level, timing
27 and rate of water flow through the Klamath Project. See Kandra v. United States, 145 F. Supp. 2d
28 1192, 1196 (D. Or. 2001). The Klamath Project is one of the earliest federal reclamation projects

1 authorized under provisions of the Reclamation Act of 1902, 43 U.S.C. § 372, *et seq.* Link River
2 Dam, owned and operated by the BOR, is the first in a series of dams on the Klamath River, the last
3 being Iron Gate Dam. Link River Dam regulates the flow of water into the lower Klamath River.
4 Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 138 F. Supp. 2d 1228,
5 1230 (N.D. Cal. 2001) (PCFFA I). PacifiCorp owns Iron Gate Dam; flows from Iron Gate Dam,
6 which are affected by the BOR's operation of Link River Dam upstream, affect directly the
7 availability of fishery habitat in the Klamath River below the Dam. See id. at 1230, 1232.

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

17 Beginning on September 19, 2002, reports were made to Tribal, state and federal agencies
18 that dead adult fish were observed in the lower reaches of the Klamath River within the Yurok
19 Reservation. By September 27, 2002, approximately 34,000 fish were estimated (conservatively)
20 to have been killed; the majority of the dead fish were adult fall Chinook salmon which had returned
21

22 ^{2/} The 2002 Biological Opinion, issued by NMFS on the BOR's proposed 10-year plan of
23 operation for the Klamath Project, was the subject of other claims in this litigation brought pursuant
24 to the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, by plaintiff PCFFA, and by the
25 Yurok and Hoopa Valley Tribes. In the July 15, 2003 Order on cross-motions for summary
26 judgment, the Court set aside and remanded portions of the Biological Opinion to NMFS, while
27 upholding BOR's decision to adopt the measures recommended by NMFS as reasonable and prudent
28 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.

1 to the River after a period in the Pacific Ocean, for the purpose of spawning. The size of the fish kill
2 was unprecedented in the oral and written history of the Tribe; no kill of such magnitude had been
3 known to occur in adult salmonids prior to this event. The fish kill occurred primarily in the lower
4 30 miles of the River entirely within the Yurok Reservation. The period of the fish kill ended
5 approximately on October 1, 2002, though occasional reports of additional dead fish were made for
6 a week following that date.

7 Since 2002, there has been no die-off of adult salmonids in the lower Klamath River such
8 as occurred that year. In 2003 and 2004, the BOR provided supplemental releases of water to
9 provide benefits to returning Chinook salmon and to avoid another fish die-off such as occurred in
10 2002.

11 It is not disputed that the Tribe has a federally-protected fishing right and that the federal
12 government "has a responsibility to protect the Tribes' rights and resources." Klamath Water Users
13 Protection Association v. Patterson, 204 F.3d 1206, 1213-1214 (9th Cir. 1999), amended on denial
14 of reh'g, 203 F.3d 1175 (9th Cir. 2000), cert. denied 531 U.S. 812 (2000). The Federal Defendants
15 and the Water Users dispute that BOR's management of the Klamath Project caused the September
16 2002 fish die-off on the Klamath River, or breached the government's trust duty to the Tribe. Before
17 the Court can consider the merits, however, it must assure itself that it has jurisdiction over the
18 Tribe's Fourth Claim for Relief.

19 **B. The Tribe's Fourth Claim for Relief**

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

21 **FOURTH CLAIM FOR RELIEF**

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

24 76. Federal law requires BOR to provide flow levels below Iron Gate
25 Dam of sufficient quantity, quality and timing to support a productive and viable
anadromous fishery in the Klamath River on the Yurok Reservation.

26 77. BOR violated that legal duty by failing to provide biologically
27 adequate flows in 2002 and by operating the Klamath Irrigation Project in a manner
28 that contributed to the deaths of over 23,000 adult chinook and threatened coho
salmon.

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

4 Yurok Compl. at 18.

5 In terms of relief, the Tribe seeks a declaration that the BOR's operation of the Klamath
6 Project violated the Tribe's fishing right, and an injunction ordering "BOR to limit irrigation water
7 deliveries from the Klamath Project in order to implement an interim flow regime in the Klamath
8 River below Iron Gate Dam that will protect anadromous fish pending BOR's full compliance with
9 its obligations under the ESA, and with its duty to protect the Yurok fishing and water rights."

10 Yurok Compl. at 19, ¶ D.^{3/} The Tribe's summary judgment brief confirmed that this injunction is
11 intended to compel the BOR to operate the Klamath Project in the future in a particular way. See
12 Yurok Summ. J. Memo at 3 (Docket #214) ("The Tribe seeks relief declaring that BOR violated the
13 fishing right and an injunction requiring BOR in the future to operate the Project in compliance with
14 that right"). A Stipulation filed January 21, 2003, in which the Tribe clarified that its Fourth Claim
15 for Relief seeks prospective relief against BOR based on alleged violations of the Tribe's fishing
16 right due to Project operations in 2002, similarly confirmed the scope of injunctive relief sought by
17 the Tribe. See Stipulation ¶ 4 (filed Jan. 21, 2003) (Docket #124) (2003 Stipulation)^{4/} The Tribe
18 does not, however, indicate the manner in which it would have BOR comply with the Tribe's fishing

19 ^{3/} Elsewhere in its Complaint, the Yurok Tribe states that it seeks "an injunction requiring BOR
20 to limit irrigation water deliveries from the Klamath project that would cause Klamath River flows
21 below Iron Gate Dam to fall below biologically adequate levels before a valid biological opinion is
22 issued." Yurok Compl. ¶ 12.

23 ^{4/} Paragraph 4 of the Stipulation provides as follows:

24 4. The Yurok Tribe hereby reaffirms and stipulates that its Fourth Claim
25 for Relief involves the resolution of two questions only: 1) did BOR violate the
26 Yurok Tribe's federal reserved fishing right in 2002 by providing stream flows that
27 were inadequate to protect the Tribe's anadromous fishery? and 2) must BOR operate
28 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.

1 right other than to maintain flow conditions in the Klamath River at unspecified levels which, in the
2 Tribe's opinion, are needed to protect its fishery.^{5/}

3 **III. DISCUSSION**

4 **A. Timeliness of the Motions to Dismiss**

5 Both Motions seek dismissal of the Tribe's Fourth Claim for lack of subject matter
6 jurisdiction. The Tribe first objects to the Motions as untimely. Fed. R. Civ. P. 12(b)(1) authorizes
7 a party to seek dismissal of an action for lack of subject matter jurisdiction. "When subject matter
8 jurisdiction is challenged under Federal Rule of [Civil] Procedure 12(b)(1), the plaintiff has the
9 burden of proving jurisdiction in order to survive the motion." Tosco Corp. v. Communities for a
10 Better Environment, 236 F.3d 495, 499 (9th Cir. 2001). Although a Rule 12(b)(1) motion must be
11 made prior to filing a responsive pleading, because lack of subject matter is not a waiveable defect,
12 an untimely Rule 12(b)(1) motion may be construed under Rule 12(h)(3). Augustine v. United
13 States, 704 F.3d 1074, 1075, n.3 (9th Cir. 1983). Rule 12(h)(3) provides, "[w]henever it appears by
14 suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court
15 shall dismiss the action." *Id.* (citations omitted). A court may dismiss a particular claim for lack of
16 subject matter jurisdiction at any time, even if such dismissal does not dispose of the entire action.
17 See Skillsky v. Lucky Stores, Inc., 893 F.2d 1088, 1095 (9th Cir. 1990) (affirming, in part, a district
18 court order that partially granted a motion to dismiss two of three pending claims under Rule
19 12(h)(3) which was filed just eleven days before trial). "Because sovereign immunity is a question
20 of subject matter jurisdiction, the United States may raise it at any point in the proceedings." U.S.
21 v. Nye County, 178 F.3d 1080, 1089 n.12 (9th Cir. 1999) (citing Fed. R. Civ. P. 12(h)(3)).

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

23 _____
24 ^{5/} In its Opposition to the Federal Defendants' Motion to Dismiss ("Opp. to Fed."), the Tribe
25 also stated that it "also seeks a permanent injunction to require Reclamation to protect the Tribe's
26 fishery from similar harm in the future." *Id.* at 5 (Docket #329). The Tribe stated that such an
27 injunction should require BOR to engage in a "formal consultation process" with the Tribe "that will
28 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.*

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

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

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

8 1. Mootness

9 The Water Users move for dismissal of the Tribe's Fourth Claim on grounds of mootness.
10 Article III of the United States Constitution gives jurisdiction to the federal courts over "all cases [or]
11 controversies" arising under the Constitution and the laws of the United States. U.S. CONST. ART.
12 III, § 2. "[A] federal court has no authority 'to give opinions upon moot questions . . . or to declare
13 principles or rules of law which cannot affect the matter in issue in the case before it.'" Church of
14 Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (quoting Mills v. Green, 159 U.S. 651,
15 653 (1895)). An action is moot "when the issues presented are no longer live and therefore the
16 parties lack a legally cognizable interest for which the courts can grant a remedy." Alaska Ctr. for
17 the Environment v. United States Forest Service, 189 F.3d 851, 854 (9th Cir. 1999).

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

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

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

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

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

1 threat” of another fish die-off.

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

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

9 2. Failure to Join Indispensable Parties

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

17 Rule 19 provides the framework for determining whether a party is necessary and
18 indispensable to an action. Rule 19(a) “contemplates a two-part analysis” as to whether an absent
19 party is necessary. Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496,
20 1498 (9th Cir. 1991). First, the court must consider if complete relief is possible among those parties
21 already in the action. Id. Second, the court must consider whether the absent party has a legally
22 protected interest in the outcome of the action, and if so, if a decision in that party’s absence will (i)
23 impair or impede its ability to protect that interest; or (ii) expose it to the risk of multiple or
24 inconsistent obligations by reason of that interest. Dawavendewa v. Salt River Project Agric.
25 Improvement & Power Dist., 276 F.3d 1150, 1155 (9th Cir.), cert. denied, 537 U.S. 820 (2002). If
26 an absent party satisfies either of these alternative tests, it is necessary to the resolution of the claim.
27 Id.

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

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

8 In this case, the Water Users have not satisfied the criteria under either Rule 19(a)(2)(i) or
9 19(a)(2)(ii). Although they contend that there are “other water users in the Klamath Basin” whose
10 interests may be impaired if they are not joined to the Tribe’s Fourth Claim for Relief, the identities
11 and interests of these “other water users” are by no means clear. At the hearing, the Water Users
12 were unable to describe the “other water users” in any specific way, other than to say that they were
13 not members of the Klamath Water Users Association, and to assert that they existed, that there were
14 many of them, and that they diverted water from the Klamath River. Such vague allegations make
15 it impossible for the Court to determine whether a decision on the merits of the Tribe’s claim would
16 either impair the ability of any such parties to protect their interests in Klamath River water, or
17 expose the present parties to a risk of multiple or inconsistent obligations. Such risks are highly
18 unlikely, however, because the Tribe’s Fourth Claim seeks relief only against the BOR with regard
19 to Klamath Project operations. Thus, while a ruling in the Tribe’s favor on its Fourth Claim could,
20 in theory, affect the interests of Klamath Project water users who are already parties to this action,
21 the Tribe has disclaimed any intention of “seeking an order establishing flow levels for all species
22 of salmon covered by the Tribe’s fishing right for all life stages for all water-year types.” 2003
23 Stipulation ¶ 4 (Docket # 124). Given the Tribe’s representations on the scope of its Fourth Claim
24 for Relief, any impairment of the interests of Klamath River water users outside of the Klamath
25 Project is speculative. The Water Users have not established that “other water users in the Klamath
26 Basin” are necessary parties to this action.

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

