

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4
5 HOOPA VALLEY TRIBE,) Case No. 3:16-cv-04294-WHO
6 Plaintiff,)
7 v.) **ORDER**
8 U.S. BUREAU OF RECLAMATION, et al.,) **MODIFYING FEBRUARY 8, 2017**
9 Defendants,) **INJUNCTION**
10 and)
11 KLAMATH WATER USERS)
12 ASSOCIATION, et al.,)
13 Defendant-Intervenors.)
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16 For the reasons stated in the Court’s February 8, 2017 Order (Dckt. No. 102), the
17 Court hereby enters the following injunction,¹ modifying page 53, lines 5-22, of that Order:

18 1. Until such time as the formal consultation, recently initiated by the federal
19 defendants, is completed, the Bureau is ordered to require two types of flows: (1) winter-
20 spring flushing flows modeled on Management Guidance 1 and 2 designed to dislodge and
21 flush out polychaete worms that host *Ceratanova shasta* (*C. shasta*) and (2) emergency
22 dilution flows modeled on Management Guidance 4, in *Measures to Reduce Ceratanova*
23 *Shasta Infection of Klamath River Salmonids: A Guidance Document* (Jan. 17, 2017)
24 (“Guidance Document”) (Dckt. No. 96-4). The parameters of these required flows are

25 ¹ This Order does not prescribe the U.S. Bureau of Reclamation’s (“Bureau”) proposed action
26 or the National Marine Fisheries Service’s (“NMFS”) jeopardy determination or incidental
27 take statement for the reinitiated Endangered Species Act (“ESA”) consultation for the
28 operation of the Klamath Project.

1 described below. Subject to the timeframes described in Management Guidance ##1, 2, and
2 4, the timing of the releases of water is left to the Bureau’s discretion.

3 2. In all other respects, the 2013 Biological Opinion on Klamath Project
4 Operations (“2013 BiOp”) and incidental take statement remain in effect pending completion
5 of the reinitiated formal consultation.

6 3. In no event shall the mitigation measures interfere with conditions necessary to
7 protect the endangered sucker fish.

8 **I. Winter-Spring Surface Flushing Flows and Deep Flushing Flows**

9 **a. 2017**

10 4. As of the date of this injunction, the Parties² have agreed that surface flushing
11 flows consistent with Management Guidance #1 and that the spirit and intent, although not the
12 specific desired magnitude, of deep flushing flows modeled on Management Guidance #2
13 were met twice during February 2017 flow events.

14 5. If sufficient hydrologic conditions exist, and increased downstream flows
15 would not interfere with the conditions necessary to protect endangered Lost River and
16 shortnose suckers or negatively impact water available for the implementation of emergency
17 dilution flows, the Bureau shall make another attempt to implement a deep flushing flow
18 modeled on Management Guidance #2 within the inherent infrastructure limitations and
19 public safety constraints (*e.g.*, Link River Dam release capacity, flooding concerns, etc.).

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23 ² For purposes of this Order, the term “Parties” refers to the parties in both this case and the
24 companion case, No. 16-4294-WHO, and specifically includes: Plaintiffs Yurok Tribe,
25 Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, and
26 Klamath Riverkeeper in this case and Plaintiff Hoopa Valley Tribe in the companion case;
27 Federal Defendants U.S. Bureau of Reclamation and National Marine Fisheries Service; and
28 Defendant-Intervenors Klamath Water Users Association, Sunnyside Irrigation District, Ben
DuVal, Klamath Drainage District, Klamath Irrigation District, and Pine Grove Irrigation
District.

a. Establishment of Reserve Water Supply

11. The Bureau shall set water operations and water supply allocations for Upper Klamath Lake, the EWA, and the Project Supply as defined in the 2013 BiOp, consistent with the Proposed Action outlined in the 2013 BiOp, except as may be affected by this Order.

12. Each year this plan is in effect, the Bureau shall establish a 50,000 acre foot ("50 TAF") Reserve Water ("Reserve Water") supply to implement the emergency dilution flows modeled on Management Guidance #4 as described in paragraph 14 herein. Reserve Water shall be available from April 1 through the earlier of the two cessation dates identified in paragraph 14.d. and shall be utilized if the disease threshold criteria described in paragraph 14.c. are met or exceeded.

13. The Bureau shall manage the Klamath Reclamation Project ("Project"), including Project deliveries from upper Klamath Lake ("UKL"), in a manner that will not preclude the ability to provide Reserve Water to implement up to 50 TAF of emergency dilution flows and/or interfere with its ability to meet its obligations under the ESA with regard to endangered suckers and/or their critical habitat.

b. Implementation of Emergency Dilution Flows

14. Reserve Water for emergency dilution flows shall be released downstream of Iron Gate Dam ("IGD") following Management Guidance #4 when either of the disease threshold criteria described in paragraph 14.c. below is met.

a. Water releases to achieve 3,000 cfs at IGD shall be implemented immediately if the disease thresholds are met and flows at IGD are below 3,000 cfs. If flows at IGD already exceed 3,000 cfs, and have been at or above 3,000 cfs for at least seven days, flows to achieve 4,000 cfs at IGD shall be implemented. Flows at IGD shall be maintained or increased from 3,000 cfs to 4,000 cfs if disease levels remain above disease threshold criteria. If disease levels become

1 reduced below the paragraph 14.c. thresholds, flows at IGD shall be
2 reduced slowly while disease rates are monitored. Release of Reserve
3 Water shall not count against the EWA and Reserve Water volume
4 shall be capped at 50 TAF. If the 50 TAF of Reserve Water is expended
5 before the 80% outmigration date as described in paragraph 14.d.
6 below, the Bureau shall confer with the Parties to evaluate the
7 feasibility and desirability of utilizing other water sources to prolong
8 emergency dilution flows.

9 b. The volume of Reserve Water released shall be accounted for as the
10 difference between the emergency dilution flow (*i.e.*, 3,000 cfs or 4,000
11 cfs) and the calculated IGD flow release based upon the formulaic
12 approach for EWA distribution.

13 c. Emergency dilution releases using up to 50 TAF of Reserve Water shall
14 be implemented when the following disease threshold criteria are met
15 or exceeded:

16 1. Spore concentrations exceed 5 spores (non-specified genotype)
17 per liter for the preceding sample based on quantitative polymerase
18 chain reaction (qPCR) from water filtration samples at any sampling
19 station;

20 or (whichever occurs first)

21 2. The prevalence of infection of all captured juvenile Chinook
22 salmon (both wild and hatchery) exceeds 20% in aggregate for the
23 preceding week at the Kinsman Rotary Screw Trap.

24 d. Emergency dilution flows shall not be implemented or shall cease if an
25 estimated 80 percent of the wild juvenile Chinook salmon have
26 outmigrated past the Kinsman Rotary Screw Trap, or after June 15,
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1 whichever occurs first. The predictive model currently under
2 development by the U.S. Fish & Wildlife Service's ("USFWS") Arcata
3 Field Office shall be used in making the 80% outmigration estimation
4 determination. The Parties understand that the predictive model will
5 identify a week at which 80 percent of the wild run has outmigrated.
6 To account for model uncertainty and ensure a reasonable level of
7 confidence that 80 percent of the wild run has outmigrated, the Bureau
8 shall deem the date that is seven (7) additional calendar days after the
9 last calendar day of the identified week to be the date that 80% of the
10 wild run has outmigrated. If future refinements allow for a more
11 accurate model prediction on a daily timestep, to account for
12 uncertainty the Bureau shall deem the date that is seven (7) additional
13 calendar days after the point identified by USFWS to be the date that
14 80% of the wild run has outmigrated. In the absence of a sufficient
15 predictive model as determined by USFWS's Arcata Field Office, the
16 Bureau shall deem the date that is seven (7) additional calendar days
17 after the last calendar day of the estimated week provided by that
18 Office to be the date that 80 percent of the wild run has outmigrated.

19 15. Klamath River flows at IGD and distribution of the EWA shall be implemented
20 consistent with the approach for EWA distribution described in the 2013 BiOp except as set
21 out in this Order. Deviations from the formulaic approach regarding the use of EWA to
22 improve conditions for coho salmon may occur subject to the procedures in (a) through (f)
23 below and consistent with the 2013 BiOp except for (e)-(f) below:

24 a. The FASTA ("Flow Account Scheduling Technical Advisory") Team may
25 recommend deviations to the Bureau, NMFS, and USFWS.

1 b. The Bureau and NMFS may also make recommendations to deviate from the
2 formulaic approach consistent with the purpose of improving conditions for coho salmon
3 including to address urgent ecological concerns such as mitigating fish disease.

4 c. In the event that the Bureau and/or NMFS recommend deviations, the Agencies
5 shall coordinate with FASTA prior to implementation with the goal of gaining consensus on
6 the flow recommendation.

7 d. Deviations shall not be implemented unless both NMFS and USFWS have
8 determined that the resulting deviations will not result in adverse effects to ESA-listed species
9 that would otherwise not occur without deviating from the formulaic approach.

10 e. In the event that one or more of the disease threshold criteria identified in paragraph
11 14.c. is met while flow augmentation is occurring through deviation from the formulaic
12 approach for the use of EWA under the FASTA process or as a result of an agency
13 recommendation, IGD releases shall be adjusted to be consistent with Management Guidance
14 #4. The volume of Reserve Water used to implement those flows shall be accounted for as the
15 difference between the resulting flow and the calculated IGD flow release based upon the
16 formulaic approach for EWA distribution (*i.e.*, not the discharge resulting from the deviation
17 from the formulaic approach).

18 f. If disease threshold criteria have been met and flows have been increased consistent
19 with Management Guidance #4, the FASTA Team, or Agencies may recommend increased
20 flows above those contained within Management Guidance #4 (3,000 cfs or 4,000 cfs at IGD)
21 through the use of EWA.

22 **III. Adaptive Management**

23 16. Until reinitiated formal consultation is complete, the flushing flows and the emergency
24 dilution flows shall be provided according to the terms in this Order, subject to adaptive
25 management as set forth herein. The technical representatives of the parties shall
26 collaboratively identify and discuss reliable, newly-identified information that may relate to
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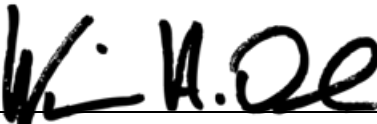
1 provisions of this Order and achieving the fish disease management purposes of this Order. If
2 the Parties reach consensus that an amended flow plan is warranted before reinitiated formal
3 consultation is completed, they may jointly submit such plan to the Court for approval.

4 **IV. Conclusion**

5 17. The Parties shall meet and confer in a good faith attempt to resolve any disputes that
6 may arise relating to the Bureau's implementation of the surface flushing flows, deep flushing
7 flows, and emergency dilution flows ordered herein, and/or the adaptive management process
8 in paragraph 16, prior to seeking further intervention from this Court.

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10 IT IS SO ORDERED.

11 Dated March 24, 2017.

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16 HON. WILLIAM H. ORRICK
17 United States District Judge
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