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17  
18 UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
19 SAN FRANCISCO DIVISION

20 YUROK TRIBE, PACIFIC COAST  
FEDERATION OF FISHERMEN’S  
ASSOCIATIONS, INSTITUTE FOR  
21 FISHERIES RESOURCES, and KLAMATH  
RIVERKEEPER,

22 Plaintiffs,

23 v.

Case No.  
Related Case No. C16-cv-04294-WHO  
COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF  
Endangered Species Act and  
Administrative Procedure Act Case

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

3 Defendants.

4 INTRODUCTION

5 1. This case presents the latest chapter in a long-running controversy over the  
6 impacts of the U.S. Bureau of Reclamation's ("Bureau") operation of the Klamath Project on  
7 Pacific salmon and the communities that depend on those salmon for their livelihood,  
8 sustenance, cultural identity, and well-being. Like its predecessors, this case seeks to protect  
9 Southern Oregon/Northern California Coast ("SONCC") coho salmon, which are listed as  
10 threatened, from an altered river regime that has diminished river flows and impaired salmon  
11 habitat. Earlier litigation compelled the Bureau to consult with the National Marine Fisheries  
12 Service ("NMFS") over its Klamath Project operations, as required by the Endangered Species  
13 Act ("ESA"), and to increase in-river flows to support threatened coho salmon spawning,  
14 juvenile rearing, and migration to and from the ocean. Tragedy struck in 2002 when more than  
15 34,000 adult salmon died from disease caused by low flows in the lower Klamath River as they  
16 were returning to spawn.  
17 [http://www.yuroktribe.org/departments/fisheries/documents/FINAL2002FISHKILLREPORTYT  
19 FP.pdf](http://www.yuroktribe.org/departments/fisheries/documents/FINAL2002FISHKILLREPORTYT<br/>18 FP.pdf). Releasing pulse flows in the summer has largely prevented a recurrence of that disaster.  
20 The threat to SONCC salmon from low flows remains. This time it is from a different parasite  
21 that infects juvenile salmon as they begin their migration to the ocean and often causes mortality.  
22 This parasite – called *Ceratanova shasta* or *Ceratomyxa shasta* (*C. shasta*) – produces higher  
23 infection rates in juvenile salmon in low-flow conditions that produce warm, slack water where  
24 juveniles congregate. A 2013 biological opinion issued by NMFS assumed, and the incidental  
25 take statement required, that juvenile salmon infection rates would not exceed 49% via

1 quantitative polymerase chain reaction genetic analysis, the highest recorded levels. In 2014 and  
2 2015, however, *C. shasta* infection rates in juvenile salmon that were sampled soared to 81% and  
3 91% respectively. This lawsuit seeks to compel the Bureau and NMFS to make changes in  
4 Klamath Project operations to prevent a recurrence of such high *C. shasta* infection rates.

5 2. First, because the incidental take statement's numeric limits on disease in juvenile  
6 coho salmon were exceeded in 2014 and 2015, this action seeks an order compelling the Bureau  
7 and NMFS to reinstate formal consultation over Klamath Project operations. Second, this action  
8 seeks a declaration that the 2013 Biological Opinion for 2013-2023 Klamath Project operations  
9 is arbitrary, capricious, and not in accordance with the ESA in violation of the Administrative  
10 Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), because it assumes the operations will improve  
11 conditions for threatened SONCC coho salmon compared to the period of record without  
12 determining that the "improved" conditions will avoid jeopardizing SONCC survival and  
13 recovery or adversely modifying SONCC coho critical habitat. Third, this action asks the Court  
14 to enjoin the Bureau from taking SONCC coho through the increase in disease and mortality in  
15 juvenile coho salmon from operation of the Klamath Project.

16 3. To remedy these violations of the ESA, plaintiffs seek an injunction to reduce  
17 illegal take of SONCC coho and to prevent irreparable harm to listed coho during the time it will  
18 take the Bureau and NMFS to complete formal ESA consultation and implement measures that  
19 will avoid jeopardy to and take of SONCC coho salmon, including preventive measures to  
20 reduce disease proliferation identified in the Disease Technical Advisory Team Guidance  
21 Document, described herein. Relatedly, this action seeks an injunction directing NMFS to  
22 declare invalid and enjoin operation of those parts of the biological opinion that could preclude  
23 releasing additional flows to the river to reduce the incidence of disease in threatened juvenile  
24

1 coho salmon.

2 4. This action also seeks to compel the Bureau and NMFS to complete consultation  
3 on the impact of Klamath Project operations on essential fish habitat for chinook salmon, as  
4 required by the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §  
5 1855(b).

6 JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

7 5. The reinitiation of consultation claim against the Bureau and NMFS and the take  
8 claim against the Bureau are brought pursuant to the ESA, 16 U.S.C. § 1540(g)(1), and the  
9 challenge to the biological opinion is brought against NMFS pursuant to the APA, 5 U.S.C. §  
10 706. The APA provides an alternative basis for the reinitiation of consultation claim against  
11 NMFS. It also provides a cause of action for the essential fish habitat claim. This Court has  
12 jurisdiction pursuant to 28 U.S.C. § 1331 and 16 U.S.C. § 1540(g)(1), and with respect to the  
13 Yurok Tribe pursuant to 28 U.S.C. § 1362 and 16 U.S.C. § 1540(g)(1).

14 6. As required by the ESA, 16 U.S.C. § 1540(g), plaintiff Yurok Tribe provided a  
15 60-day notice of their intent to sue on June 24, 2016 to both the Bureau and NMFS. The Bureau,  
16 in coordination with NMFS, responded by letter dated August 1, 2016, but they have not  
17 remedied the violations giving rise to this complaint.

18 7. As required by the ESA, 16 U.S.C. § 1540(g), the commercial fishing and  
19 conservation plaintiffs provided a 60-day notice of their intent to sue on July 20, 2016 to both the  
20 Bureau and NMFS. The Bureau, in coordination with NMFS, responded by letter dated August  
21 19, 2016, but they have not remedied the violations giving rise to this complaint.

22 8. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and 16 U.S.C. §  
23 1540(g)(3) because the Yurok Tribe is located in the district, the commercial fishing and  
24 conservation plaintiffs reside in this district, and many of the events, omissions, and

1 consequences of the defendants' violations of the law giving rise to the claims occurred or will  
2 occur in this district.

3 9. This case is properly assigned to the San Francisco/Oakland Division under Civil  
4 L.R. 3-2(c) because the Yurok Tribe's Reservation is located in Humboldt and Del Norte  
5 counties, a substantial part of the events or omissions which give rise to this action occurred in  
6 Humboldt and Del Norte counties through which the lower Klamath River flows, and because  
7 plaintiffs are located in San Francisco and Humboldt counties.

8 PARTIES

9 A. Tribal Plaintiff

10 10. The Yurok Tribe is a sovereign, federally recognized Indian Tribe whose  
11 reservation is located on the lower Klamath River in northern California. With more than 6,100  
12 members, the Yurok Tribe is the largest Indian tribe in California. The Tribe dedicates a  
13 significant share of its financial and human resources to manage and regulate Klamath River  
14 fisheries. The Tribe employs approximately 75 employees for fisheries, water quality, and  
15 watershed restoration activities specifically, while nearly all departments directly or indirectly  
16 work on fisheries-related issues.

17 11. Yurok people are fishing people who have lived on the Klamath River since time  
18 immemorial. The Tribe's ancestral territory includes the Klamath River and the lands  
19 surrounding it to the north and south. The original Klamath River Reservation, which included  
20 the lower portion of the Yurok Reservation, was created by Executive Order on November 16,  
21 1855. The present-day Yurok Reservation, established by the 1988 Hoopa-Yurok Settlement Act,  
22 25 U.S.C. §§ 1300i, *et seq.*, enlarged the original reservation. It extends for one mile each side  
23 of the Klamath River from the mouth at the Pacific Ocean approximately 44 miles upriver. just  
24 upstream of the confluence of the Klamath and Trinity Rivers, bordering the Hoopa Valley

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1 Indian Tribe's Reservation.

2 12. The Executive Orders that created the Yurok Reservation vested the Yurok Tribe  
3 with "federally reserved fishing rights." *Parravano v. Masten*, 70 F.3d 539, 541 (9th Cir. 1996).  
4 Federally reserved fishing rights in Yurok trust fish species are integral to the Yurok way of life  
5 for subsistence, commercial, and cultural purposes. Yurok trust species include, but are not  
6 limited to, coho and chinook salmon, steelhead trout, lamprey, sturgeon, and eulachon.

7 13. The Klamath River and its fishery are central to the Yurok way of life. The  
8 Klamath River fishery is "not much less necessary to the existence of the [Yurok] than the  
9 atmosphere they breathe[.]" *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United*  
10 *States v. Winans*, 198 U.S. 371, 381 (1905)). The Tribe has a constitutional obligation to protect  
11 the natural resources of the reservation and "to restore, enhance and manage the tribal fishery  
12 [and] tribal water rights." Yurok Constitution, Preamble. The elected leaders of the Yurok Tribe  
13 are charged "to further the objectives of the Yurok Tribe as reflected in the Preamble" and to  
14 safeguard the "natural resources" of the Tribe. Yurok Constitution, Article IV Section 1(g) and  
15 Section 5.

16 14. The Yurok Tribe has an existential interest in protecting its federally reserved  
17 fishing rights due to its cultural and spiritual reliance on the Klamath fishery, including coho and  
18 chinook salmon. Defendants' illegal operations of the Klamath Project threaten the health and  
19 viability of these species and, in turn, threaten the continued ability of the Yurok Tribe and its  
20 members to harvest fish for subsistence and commercial purposes, and conduct ceremonies for  
21 the fish and well-being of the Yurok people, and threaten the very identity of the Yurok Tribe  
22 and its people.

23 B. Commercial Fishing and Conservation Plaintiffs

24 15. Pacific Coast Federation of Fishermen's Associations ("PCFFA") is the largest

1 organization of commercial fishermen on the west coast, with member organizations from San  
2 Diego to Alaska representing thousands of men and women in the Pacific fleet. Many of  
3 PCFFA's members are fishermen whose livelihoods depend upon fish including from the  
4 Klamath River as a natural resource and who, until recent fisheries closures, generated hundreds  
5 of millions of dollars in personal income in the region. The interests of PCFFA members will be  
6 impaired if the Klamath Project operations that are the subject of this challenge proceed as  
7 planned.

8 16. PCFFA has its main office in Sausalito, California, and a Northwest regional  
9 office in Eugene, Oregon.

10 17. Institute for Fisheries Resources ("IFR") is a non-profit corporation that  
11 constitutes the conservation arm of PCFFA and shares PCFFA's offices in Sausalito, California,  
12 and Eugene, Oregon.

13 18. Klamath Riverkeeper is a community- and member-based non-profit corporation  
14 with an active membership of people from all over the Klamath River Basin and the Western  
15 United States. Klamath Riverkeeper works closely with the Klamath River tribes, fishermen,  
16 and recreational groups in all aspects of its programs, which include policy advocacy, litigation,  
17 grassroots organizing, outreach, and education, and scientific needs analysis and water quality  
18 monitoring. Klamath Riverkeeper members use the Klamath River and its tributaries for water  
19 contact recreation, wildlife observation and study, aesthetic enjoyment, and/or spiritual renewal.  
20 Klamath Riverkeeper members particularly enjoy, as a recreational, educational, and/or spiritual  
21 pursuit, observing and studying the migration of anadromous fish in the Klamath River,  
22 including chinook and SONCC coho. Klamath Riverkeeper members' interests will be impaired  
23 if the Klamath Project operates as planned.

1 19. Klamath Riverkeeper has offices in Orleans, California and Klamath Falls,  
2 Oregon.

3 20. The commercial fishing and conservation plaintiffs and their members use the  
4 Klamath River and its tributaries in California and Oregon for recreational, scientific, aesthetic,  
5 and commercial purposes. They derive, or, but for the imperiled status and decline of coho  
6 salmon, chinook salmon, and other anadromous fish in the Klamath basin, would derive  
7 recreational, scientific, aesthetic, and commercial benefits from the existence in the wild of  
8 salmon and steelhead through commercial fishing, wildlife observation, study, and photography  
9 and recreational fishing within the Klamath Basin and the Pacific Ocean. The past, present, and  
10 future enjoyment of these benefits by the commercial fishing and conservation plaintiffs and  
11 their members has been, is being, and will continue to be irreparably harmed by defendants'  
12 disregard of their statutory duties and by the unlawful injuries imposed on Klamath River coho  
13 and chinook salmon by the Klamath Project operations.

14 21. The aesthetic, conservation, recreational, commercial, and scientific interests of  
15 these groups and their members in the survival and recovery of Klamath River coho salmon, as  
16 well as their interest in the compliance with environmental law by federal agencies, have been,  
17 are being, and, unless the relief prayed for is granted, will continue to be directly and adversely  
18 affected by the failure of defendants to comply with the law.

19 C. Defendants

20 22. Defendant United States Bureau of Reclamation is an agency of the United States  
21 Department of the Interior that constructs and operates federal water projects throughout the  
22 United States. The Bureau has primary management authority over the Klamath Project, the  
23 operation of which is at the heart of this action.

24 23. Defendant National Marine Fisheries Service is an agency of the United States

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1 Department of Commerce. The Department has delegated to NMFS its responsibility for  
2 administering the ESA with regard to threatened and endangered marine species, including the  
3 species of threatened coho salmon that live in the Klamath River basin. Under the Magnuson-  
4 Stevens Fishery Conservation and Management Act, NMFS is obligated to engage in  
5 consultation and provide conservation recommendations to federal agencies, like the Bureau, on  
6 impacts of their actions on essential fish habitat.

## 7 BACKGROUND

### 8 I. THE KLAMATH RIVER AND THE DECLINE OF ITS FISHERIES

9 24. The Klamath River basin straddles northern California and southern Oregon. The  
10 Klamath River was once the third most productive salmon-producing river in the continental  
11 United States. Several species of anadromous fish inhabit the Klamath River and its tributaries,  
12 including chinook, coho, steelhead, and coastal cutthroat trout. SONCC coho salmon, a  
13 population that includes Klamath River coho, were estimated in 1940 to range between 150,000  
14 and 400,000 naturally spawning fish annually. Threatened Status for SONCC Evolutionarily  
15 Significant Unit (“ESU”) of Coho Salmon, 62 Fed. Reg. 24,588 (May 6, 1997) (“Listing  
16 Notice”). A multitude of factors, including overutilization, habitat destruction, water diversions,  
17 and hydropower development, contributed to drastic declines of all stocks of Klamath salmonids.

18 25. SONCC coho have a three-year life cycle, spending half their lives in fresh water  
19 and half in salt water. After the eggs hatch in the winter, the coho fry spend up to 15 months in  
20 freshwater. They out-migrate to the sea between mid-February and mid-June. At about three-  
21 years old, they return beginning in September through December to the same stream where they  
22 were born to spawn and die.

23 26. In 1997, NMFS listed SONCC coho under the ESA as threatened. It found that  
24 “coho populations in this ESU are very depressed, currently numbering approximately 10,000

1 naturally produced adults.” 62 Fed. Reg. 24,588 (May 6, 1997). NMFS noted that “water  
2 diversions” and “water withdrawals” for irrigation were “major activities responsible for the  
3 decline of coho salmon in Oregon and California.” *Id.* at 24,592.

4 27. NMFS designated critical habitat for SONCC coho salmon in 1999, and included  
5 most of the Klamath River below Iron Gate Dam in the critical habitat designation. Designated  
6 Critical Habitat: Central California Coast and SONCC Coho Salmon, 64 Fed. Reg. 24,049 (May  
7 5, 1999). NMFS concluded that irrigation water withdrawals and dam operations were  
8 “activities that may require special management considerations” for juvenile coho salmon. *Id.* at  
9 24,059.

10 28. In its five-year status review of SONCC coho salmon completed in 2016, NMFS  
11 found that SONCC coho salmon continue to be at high risk of extinction and noted significant  
12 negative changes in the status of SONCC coho since 2011. NMFS observed that drought  
13 conditions had persisted in four of the last five years, conditions that were unprecedented at the  
14 time of the listing. Five-Year Review: Summary & Evaluation of SONCC Coho Salmon at 47-  
15 49 (2016).

16 29. The 2016 Five-Year SONCC status review identified *C. shasta* as one of the  
17 most significant threats to SONCC coho due to its prevalence and impacts on juvenile coho in  
18 the Klamath Basin. SONCC Status Review at 34. *C. shasta* infects chinook and coho juvenile  
19 salmon. It causes sublethal harm and often mortality. Signs of infected salmon include necrosis  
20 of intestinal tissue that can be accompanied by a severe inflammatory reaction and subsequent  
21 death. Infection rates increase when densities of *C. shasta* spores are high, when the worms  
22 (polychaetes) that host the parasite, known as *Manayunkia speciosa* (*M. speciosa*), are abundant,  
23 when juvenile salmon congregate and transmit disease, and when high temperatures render  
24

1 juvenile salmon more susceptible to infection and disease-related mortality. Low flows make  
2 coho more susceptible to *C. shasta* because *C. shasta* densities tend to be higher and juveniles  
3 more crowded together in warm waters.

4 30. NMFS released a draft recovery plan for SONCC coho for public comment in  
5 2012 and finalized the recovery plan in 2014. The recovery plan notes that disease was not  
6 believed to be a major factor contributing to the decline of SONCC coho salmon at the time of  
7 listing in 1997, but it is now a high or very high stress to 13 populations in the listing, including  
8 three in the Klamath Basin. Final Recovery Plan for the SONCC ESU of Coho Salmon at 1-5; 3-  
9 19 (2014). The recovery plan identifies *C. shasta* as responsible for most of the mortality of  
10 Klamath River juvenile coho in recent years. *Id.* at 3-20. It establishes a recovery goal and  
11 habitat indicator of no greater than 10% mortality of coho juveniles in the Klamath River from  
12 *C. shasta*, which it equates with natural background levels. *Id.* at 4-14 & 4-15. The recovery  
13 plan has as a recovery action development and implementation of a plan to use “all means  
14 possible to disrupt the life cycle of the *C. shasta* parasite.” *Id.* at 6-3.

## 15 II. THE BUREAU’S OPERATION OF THE KLAMATH PROJECT

16 31. Congress authorized construction and development of the Klamath Project in  
17 1905, pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, which is part of the  
18 Reclamation Act of 1902, 43 U.S.C. §§ 372, *et seq.* Various Project facilities were built between  
19 1906 and 1966. The Project consists of various diversions, canals, and pumping stations. The  
20 Project provides irrigation water to approximately 200,000 acres of agricultural land each year,  
21 as well as to four national wildlife refuges that lie within its boundaries. The Bureau’s operation  
22 of the Klamath Project determines the level, timing, and rate of water flow in the Klamath River  
23 below Iron Gate Dam, which blocks salmon fish passage upstream. Operation of the Klamath  
24 Project determines the quantity of water available in the Klamath River downstream of Iron Gate

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1 Dam to support anadromous fish.

2 32. Pursuant to a 1956 contract with the Bureau, PacifiCorp, a private corporation,  
3 operates the Project’s Link River Dam, although the Bureau controls water releases at the dam.  
4 PacifiCorp also owns and operates several downstream dams on the Klamath River for  
5 hydroelectric power generation. In September 2016, PacifiCorp applied to the Federal Energy  
6 Regulatory Commission (“FERC”) for a transfer of its license with respect to four dams in the  
7 lower portion of the Klamath Project, including Iron Gate Dam, to a corporation established to  
8 oversee removal of those dams beginning in 2020.

9 III. THE ENDANGERED SPECIES ACT’S REQUIREMENTS

10 A. The Duty to Engage in Consultation and to Avoid Jeopardy and Adverse  
11 Modification of Critical Habitat.

12 33. Section 7 of the ESA prohibits agency actions that may jeopardize the survival  
13 and recovery of a listed species or adversely modify its critical habitat:

14 Each federal agency shall, in consultation with and with the assistance of the  
15 Secretary, insure that any action authorized, funded, or carried out by such agency  
16 (hereinafter in this section referred to as an “agency action”) is not likely to  
jeopardize the continued existence of any endangered species or threatened  
species or result in the destruction or adverse modification of habitat of such  
species which is determined by the Secretary . . . to be critical . . . .

17 16 U.S.C. § 1536(a)(2).

18 34. “Action” is defined broadly to encompass “all activities or programs of any kind  
19 authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02.  
20 An agency’s Section 7 obligations extend to ongoing actions over which the agency retains  
21 authority or discretionary control.

22 35. Section 7 establishes an interagency consultation process to assist federal agencies  
23 in complying with their duty to avoid jeopardy to listed species or destruction or adverse  
24 modification of critical habitat. Under this process, a federal agency proposing an action that

1 “may affect” a listed species, including salmon and steelhead, must prepare and provide to the  
2 appropriate expert agency a “biological assessment” of the effects of the proposed action. 16  
3 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

4 36. Where the agency proposing the action determines that an action “may affect”  
5 protected salmon, but is “not likely to adversely affect” the species, it may attempt “informal  
6 consultation” with NMFS. 50 C.F.R. §§ 402.13, 402.14(b)(1). “Informal consultation” is  
7 defined by the ESA’s implementing regulations as “an optional process that includes all  
8 discussions, correspondence, etc., between the Service and the Federal agency or the designated  
9 non-Federal representative prior to formal consultation, if required.” 50 C.F.R. § 402.02. An  
10 agency’s “not likely to adversely affect” determination becomes final and terminates  
11 consultation only when NMFS concurs in writing in the determination. 50 C.F.R. §§ 402.13,  
12 402.14(b)(1).

13 37. For actions that may adversely affect a listed species or critical habitat, a formal  
14 consultation with the expert fish and wildlife agency is required. 50 C.F.R. § 402.14.

15 38. At the conclusion of a formal consultation, the expert fish and wildlife agency  
16 issues a biological opinion assessing the effects of the action on the species and its critical  
17 habitat, determining whether the action is likely to jeopardize the continued existence of the  
18 species or adversely modify its critical habitat and, if so, offering a reasonable and prudent  
19 alternative that will avoid jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A); 50  
20 C.F.R. § 402.14(g)-(h).

21 39. The ESA implementing regulations define “jeopardize the continued existence” to  
22 mean “to engage in an action that reasonably would be expected, directly or indirectly, to reduce  
23 appreciably the likelihood of both the survival and recovery of a listed species in the wild by  
24

1 reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. Under  
2 this definition, NMFS must assess an action’s impacts on both survival and recovery.

3 “Recovery” is defined to mean “improvement in the status of listed species to the point at which  
4 listing is no longer appropriate under the criteria set out” in the Act. *Id.* NOAA Fisheries and  
5 U.S. Fish & Wildlife’s *Endangered Species Consultation Handbook*, at xviii-xix (“Consultation  
6 Handbook”), defines “survival” for purposes of the jeopardy analysis as “the condition in which  
7 a species continues to exist into the future while retaining the potential for recovery.”

8 B. The Prohibition on Take of Listed Species and Incidental Take Statements.

9 40. Section 9 of the ESA prohibits “take” of endangered species by any person, which  
10 includes federal agencies. 16 U.S.C. § 1538(a)(1). “Take” means to “harass, harm, pursue, hunt,  
11 shoot, wound, kill, trap, capture, or collect.” 16 U.S.C. § 1532(19). NMFS has defined “harm”  
12 to include “significant habitat modification or degradation which actually kills or injures fish or  
13 wildlife by significantly impairing essential behavioral patterns, including breeding, spawning,  
14 rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

15 41. NMFS has extended the take prohibition to listed salmon, including SONCC  
16 coho. 50 C.F.R. § 223.203(a); 65 Fed. Reg. 42,422 (2000).

17 42. If a federal action undergoing consultation will take a listed species, the biological  
18 opinion must include an “incidental take statement” that specifies the amount and extent of  
19 incidental take of listed species that may occur and “terms and conditions.” 16 U.S.C. §  
20 1536(b)(4); 50 C.F.R. § 402.14(i).

21 43. The incidental take statement provides a safe harbor, insulating from take liability  
22 activities undertaken in compliance with the incidental take statement’s terms and conditions. 16  
23 U.S.C. § 1536(o)(2); *see* 16 U.S.C. § 1536(b)(4)(C).

24 44. An incidental take statement serves as a check on the biological opinion’s

1 assumptions and conclusions. It sets out a “trigger” that specifies an unacceptable level of take  
2 that invalidates the safe harbor and requires the agencies to reinitiate consultation.

3 C. The Duty to Reinitiate Consultation

4 45. The ESA implementing regulations provide:

5 Reinitiation of formal consultation is required and shall be requested by the  
6 Federal agency or by the Service, where discretionary Federal involvement or  
control over the action has been retained or is authorized by law and

7 (a) If the amount or extent of taking specified in the incidental take statement is  
8 exceeded; [or]

9 (b) If new information reveals effects of the action that may affect listed species  
or critical habitat in a manner or to an extent not previously considered . . . .

10 50 C.F.R. § 402.16 & (a)-(b). If either of these triggers occurs, both the action agency and the  
11 expert fish and wildlife agency have a duty to request reinitiation of consultation. *Salmon*  
12 *Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008).

13 IV. THE BUREAU’S ESA CONSULTATIONS FOR KLAMATH PROJECT  
14 OPERATIONS

15 A. Consultation on Annual Operating Plans.

16 46. When SONCC coho were listed, the Bureau operated the Klamath Project under  
17 annual operating plans that determined the flow levels in the Klamath River downstream of Iron  
18 Gate Dam. The first ESA consultation on the impacts of Klamath Project operations on listed  
19 coho considered the 1999 annual plan. NMFS issued a biological opinion finding that operation  
20 of the Klamath Project, and its associated water diversions, withdrawals, temperature impacts  
21 and pollutant loadings, adversely affected listed coho salmon and juveniles in particular,  
22 although NMFS found the annual operations were not likely to jeopardize coho salmon.

23 47. NMFS failed to complete ESA consultation on the Bureau’s 2000 annual  
24 operating plan, and PCFFA, IFR, and others challenged this failure. This Court held that the

1 Bureau violated the ESA by failing to consult on the 2000 plan, stating that “[d]espite the weight  
2 which the Ninth Circuit repeatedly has placed upon the procedural requirements of the ESA, it is  
3 clear that the Bureau of Reclamation failed to comply with these requirements before  
4 implementing its 2000 Operations Plan for the Klamath Project.” *PCFFA v. Bureau of*  
5 *Reclamation*, 138 F. Supp. 2d 1228, 1242-43 (N.D. Cal. 2001). This Court issued an injunction  
6 requiring the Bureau to curtail water deliveries that would cause river levels to drop below  
7 specific flows at Iron Gate Dam until a formal ESA § 7(a)(2) consultation was completed. *Id.* at  
8 1249-50. The flows were based on a report prepared by Dr. Thomas Hardy for the Department  
9 of the Interior, with review by the Yurok, Karuk, and Hoopa Valley Tribes among others, that  
10 identified the flows needed to inundate and provide useable coho habitat, particularly for juvenile  
11 salmon.

12 48. Recognizing the need to plan Klamath Project operations over a longer time  
13 horizon, the Bureau began developing ten-year operating plans. As the 2002 irrigation season  
14 approached, NMFS had not issued a biological opinion on the Bureau’s ten-year operating plan  
15 for the Klamath Project. The Bureau asked NMFS to informally concur in a “not likely to  
16 adversely affect” determination for “below average” water year flows for April 1 - May 31,  
17 2002. NMFS issued the requested not likely to adversely affect (“NLAA”) concurrence in  
18 March 2002, stating that the agency “currently has no basis for contradicting your  
19 determination.”

20 49. PCFFA, IFR, and others sought a temporary restraining order to keep more water  
21 in the river in these spring months. This Court held that the agencies could not lawfully make a  
22 NLAA determination for a segment of a larger project that it had found would be likely to  
23 adversely affect listed salmon and thereby avoid formal consultation. It declined, however, to  
24

1 issue a temporary restraining order upon finding that the spring flows would not negatively affect  
2 the status quo.

3 B. Biological Opinion for 2002-2012 Klamath Project Operations.

4 50. In May 2002, NMFS released its biological opinion on Klamath Project  
5 operations for 2002-2012, concluding that the proposed operations under the plan would likely  
6 jeopardize the coho's survival and recovery and adversely modify its critical habitat. NMFS  
7 found the Bureau's use of minimum flows over the past ten years as the target for minimum  
8 flows over the next years would not provide sufficient water to support coho spawning, rearing,  
9 and juvenile migration. NMFS offered a reasonable and prudent alternative that established  
10 higher long-term minimum flows based on a draft of Dr. Hardy's Phase II report evaluating  
11 instream flow needs, but did not require those flows in the first and second phases of the plan,  
12 which spanned eight years.

13 51. PCFFA, IFR, the Yurok Tribe, the Hoopa Valley Tribe, and other conservation  
14 groups challenged the biological opinion's reasonable and prudent alternative ("RPA") for  
15 failing to provide sufficient flows for SONCC coho salmon, as well as its incidental take  
16 statement. The district court upheld the reasonable and prudent alternative's long-term flow  
17 targets and its phased approach, but invalidated the RPA's reliance on future state and private  
18 actions to meet some of the flow needs because those actions were not reasonably certain to  
19 occur. The court also invalidated the incidental take statement because it lacked any threshold  
20 that would indicate an unacceptable level of take had occurred and serve as a trigger to reinitiate  
21 consultation.

22 52. On appeal of the decision upholding the phased approach, the Ninth Circuit held  
23 that NMFS acted arbitrarily, capriciously, and against the best available science by requiring  
24 only a portion of the flows NMFS deemed necessary for SONCC coho in the initial two phases

1 of the plan, leaving the coho with flows NMFS had deemed insufficient for eight of the plan's  
 2 ten years. *PCFFA v. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005). The Ninth Circuit  
 3 reversed and remanded the case for issuance of injunctive relief.

4 53. On remand, NMFS asked this Court not to issue an injunction because the agency  
 5 had produced a new supplement to its 2002 biological opinion that articulated a further rationale  
 6 for its no-jeopardy conclusion. The Court held that, when new information emerges, such as the  
 7 Ninth Circuit decision and the September 2002 fish kill, consultation must be reinitiated and  
 8 NMFS must produce a new biological opinion, not a supplement explaining why the new  
 9 information does not change its prior conclusions. The Court issued an injunction requiring that  
 10 the Bureau limit water withdrawals if flows in the Klamath River below Iron Gate Dam would  
 11 fall below 100% of the minimum flows in the reasonable and prudent alternative. The minimum  
 12 daily flows by water year type (in cubic feet per second (“cfs”)) were:

Month	Dry	Below Average	Average	Above Average	Wet
Oct-Feb	1300	1300	1300	1300	1300
March	1450	1725	2750	2525	2300
April	1500	1575	2850	2700	2050
May	1500	1400	3025	3025	2600
June	1400	1525	1500	3000	2900
July-Sept	1000	1000	1000	1000	1000

18 C. Consultation and the Biological Opinion for the 2013-2023 Klamath Project  
 19 Operations.

20 54. The Bureau reinitiated consultation in 2007. In March 2010, NMFS issued a  
 21 jeopardy biological opinion on Klamath Project operations for 2010-2018. NMFS concluded  
 22 that the proposed Project operations would have negative effects on coho abundance primarily  
 23 because of reduced juvenile survival and growth and would be likely to increase the population's  
 24 risk of extinction. It determined that the proposed Project operations would be likely to cause

1 jeopardy and adverse modification of coho critical habitat. NMFS proposed a reasonable and  
 2 prudent alternative with spring flows designed to reduce the amount of habitat available to  
 3 juvenile coho by no more than 10% from what would be available without the Project.

4 55. Because of some tension between NMFS's reasonable and prudent alternative for  
 5 Klamath River flows for coho and the Upper Klamath Lake levels deemed necessary by the Fish  
 6 and Wildlife Service ("FWS") to support the Lost River and Shortnose Suckers, two fish species  
 7 listed as endangered, the agencies embarked on a comprehensive consultation integrating the  
 8 needs of the listed species under the jurisdiction of both expert fish and wildlife agencies.

9 56. In 2012, the Bureau provided NMFS a biological assessment, initiating  
 10 consultation on SONCC coho. The Bureau proposed a process for determining Klamath River  
 11 flows, but did not commit to maintaining minimum flows below Iron Gate Dam. After a series  
 12 of communications between the two agencies, the Bureau proposed to maintain minimum flows  
 13 below Iron Gate Dam. NMFS informed the Bureau that the proposed minimum flows for April,  
 14 May and June would pose unacceptable risks to coho salmon and their critical habitat. The  
 15 Bureau then proposed to increase the minimum flows to 1325 cfs for April, 1175 cfs for May,  
 16 and 1025 cfs for June. The Bureau's proposed minimum flows below Iron Gate Dam are:

Month	Average Minimum Daily Target Flows (cfs)
March	1275
April	1325
May	1175
June	1025
July	900
August	900
September	1000

17  
 18  
 19  
 20  
 21  
 22  
 23 57. The minimum flows proposed by the Bureau for 2013-2023 Project operations are  
 24 lower than the minimums incorporated into the 2002 biological opinion's reasonable and prudent

1 alternative for dry years. The previous biological opinions had focused on useable habitat for  
2 juvenile coho. Useable habitat is the habitat that is inundated and available for spawning and  
3 rearing. The Hardy Phase II report that formed the basis for the minimum flows used in the 2002  
4 biological opinion in draft form and in the 2010 and 2013 biological opinions in its final iteration  
5 “did not quantitatively assess disease risks in the ecological base flow recommendation.” BiOp  
6 at 341.

7 58. In May 2013, the Bureau proposed, in addition to higher spring minimum flows,  
8 the possibility of deviating from the biological opinion’s formula for determining flows when  
9 disease rates are at or above threshold levels set in the biological opinion. Additional releases to  
10 the Klamath River would occur, however, only if surplus water was available from the  
11 Environmental Water Account (“EWA”). Surplus water refers to amounts of water above what  
12 has been allocated for irrigation and Upper Klamath Lake levels. The amount of water allocated  
13 to irrigation is locked in by April 1<sup>st</sup> and cannot be reduced during the rest of that water year.

14 59. In May 2013, the consultation culminated in a joint NMFS-FWS biological  
15 opinion on the 2013-2023 Klamath Project operations. NMFS relied heavily on the newly added  
16 minimum flows and disease management program to make a no-jeopardy call. NMFS based its  
17 no-jeopardy conclusion on its view that the management regime with these additions would  
18 improve conditions for coho compared to the period of record, defined as 1981-2012. It did not  
19 identify population levels and distributions necessary for recovery or the Project operation’s  
20 impacts on achieving those recovery metrics. NMFS also determined that critical habitat would  
21 continue to be degraded, but the Project’s adverse impacts would be lessened due to the  
22 minimum flows and disease management program.

23 60. Of all of the adverse effects, “NMFS concludes that disease risk from *C. shasta* is  
24

1 the most significant to coho salmon because *C. shasta* is a key factor limiting salmon recovery in  
2 the Klamath River.” BiOp at 376; *see id.* at 341 (*C. shasta* is a key limiting factor for SONCC  
3 coho recovery). While *C. shasta* and salmon have long co-existed in the Klamath Basin, the  
4 Klamath Project has increased the incidence of *C. shasta* infection rates because the host worm is  
5 not flushed out without strong spring flows and juvenile salmon congregate in slack waters  
6 where the host worms thrive. The Project also has caused the parasite-salmon equilibrium to  
7 shift out of balance by changing environmental conditions in the Basin, as the parasite is able to  
8 evolve in shorter time periods than the salmon, elevating *C. shasta* levels well above background  
9 levels. The juvenile salmon are more susceptible to infection and disease-related mortality in the  
10 high temperatures that pervade in low flows. BiOp at 339, 341, 343. NMFS concluded that, in  
11 below average water years, 2013-2023 Project operations would likely lead to the proliferation of  
12 *C. shasta* and higher infection rates and mortalities of juvenile coho. NMFS did not find that the  
13 minimum spring flows would prevent this harm. Instead, it found that the minimum spring flows  
14 would “provide a limit to the increase in disease risks to coho salmon.” It also indicated that the  
15 real-time disease management would likely “partially offset the increased disease risks to coho  
16 salmon during average and below average water years.” BiOp at 346-47.

17         61. As with the other impacts, NMFS believed the proposed operations would lead to  
18 an improvement over historical and recent conditions. Specifically, “NMFS concluded that the  
19 proposed action will likely result in disease risks to coho salmon fry and juveniles that are lower  
20 than under the observed POR [period of record] conditions.” BiOp at 391. NMFS  
21 acknowledged that it “does not have information to specifically estimate what the reduced  
22 *C. shasta* infection rates for salmon will be under the proposed action; however, for the reasons  
23 described . . . NMFS concludes that the incidental take of coho salmon fry and juveniles would  
24

1 not exceed the rates observed in the POR.” *Id.*

2 By lowering disease risks in a direction toward those under natural flow  
3 conditions, NMFS believes that coho salmon abundance and productivity will  
4 likely improve over the next ten years for the Upper Klamath, Middle Klamath,  
5 Shasta, and Scott river populations. NMFS believes the proposed action is not  
likely to result in a level of habitat reduction where coho salmon fry and juveniles  
in the Upper Klamath, Middle Klamath, Shasta, and Scott river populations will  
have reduced life history diversity.

6 BiOp at 377.

7 62. NMFS imposed two types of limits in the incidental take statement to serve as a  
8 check on its conclusion that the 2013-2023 operations would improve conditions for coho. First,  
9 it made the minimum flows for the months of March to August a mandatory limit. BiOp at 389.  
10 Second, NMFS set a limit on the incidence of *C. shasta*. It used infection rates in chinook  
11 salmon as a surrogate for SONCC coho because chinook are more abundant, chinook and coho  
12 have similar susceptibility to *C. shasta*, and chinook disease monitoring has been in place since  
13 2004. NMFS used this monitoring data to set the incidental take statement’s limit at the highest  
14 *C. shasta* infection rates from that monitoring data, 49% via quantitative polymerase chain  
15 reaction (“QPCR”) or 54% via histology. NMFS explained: “By using the highest percentage of  
16 *C. shasta* infection rates for chinook salmon observed in the POR, NMFS has a secondary  
17 surrogate in addition to the March to August minimum daily average IGD flows and the EWA  
18 volumes to estimate the incidental take of coho from increased disease risk.” BiOp at 391. The  
19 biological opinion then spelled out the consequences if the disease rates are higher than these  
20 limits:

21 If the percent of *C. shasta* infections for Chinook salmon juveniles in the  
22 mainstream Klamath River between Shasta River and Trinity River during May to  
July exceed these levels . . . reinitiation of formal consultation will be necessary.

23 *Id.*

1 V. THE AGENCIES' RESPONSE TO *C. SHASTA* INFECTION RATES THAT  
2 EXCEEDED THE LIMITS IN THE INCIDENTAL TAKE STATEMENT

3 63. In the first two years under the 2013 Biological Opinion, juvenile salmon *C.*  
4 *shasta* infection rates exceeded the incidental take statement's limit of 49% via QPCR. Chinook  
5 salmon infection rates of sampled fish were 81% in 2014 and 91% in 2015 using QPCR.

6 64. In July 2015, the Bureau sent NMFS a letter entitled, "Notification of  
7 Modification, Amendment, Clarification, and/or Reinitiation of Formal Consultation on Klamath  
8 Project Operations." In the letter, the Bureau indicated that the agencies should begin  
9 "comprehensive discussions" to address the impacts of recent drought conditions on listed  
10 species and the biological opinion. The Bureau described the issue as follows:

11 During the time that Reclamation has been implementing the Proposed Action  
12 under the BiOp, unprecedented, multi-year drought conditions have persisted  
13 which have caused variations in operations and hydrologic conditions that were  
14 not anticipated at the time the Proposed Action was analyzed in the BiOp.

15 Letter to Lisa Van Atta, NMFS, from Therese O'Rourke Bradford, Bureau Klamath Basin Area  
16 Manager (July 17, 2015). In light of these conditions, the Bureau indicated a desire "to begin  
17 comprehensive discussions to clearly establish a path forward to resolve the outstanding issues."

18 *Id.*

19 65. NMFS responded to the Bureau's request by letter dated March 29, 2016. NMFS  
20 confirmed that the incidence of *C. shasta* exceeded the limits in the incidental take statement in  
21 both 2014 and 2015. Rather than reinitiate formal consultation, NMFS indicated that it would  
22 revise the incidental take statement prior to the 2017 water year commencing April 1, 2017.

23 NMFS asserted in its March 2016 letter (at 2) that the biological opinion's effects analysis and  
24 conclusions remain valid.

25 66. The Yurok, Karuk, and Hoopa Valley Tribes, and a coalition consisting of  
26 PCFFA, IFR, and Klamath Riverkeeper, issued separate notices of intent to sue the Bureau and

1 NMFS for violations of the ESA and the APA. The Hoopa Valley Tribe filed a complaint  
2 against the Bureau and NMFS on July 29, 2016 at the end of its 60-day notice period.

3 67. During the week of July 11, 2016, the Yurok and Karuk Tribes met with the  
4 Bureau, NMFS, and FWS to discuss 2014 and 2015 infection rates, the notices of intent to sue,  
5 and approaches to address the juvenile fish disease issues in the Klamath River occurring as a  
6 result of the Project. The federal agencies and the Tribes agreed to form a collaborative Disease  
7 Technical Advisory Team (“DTAT”) tasked with compiling “the best available science available  
8 to provide synthesis and guidance for measures that have the potential to mitigate the effects of  
9 *C. shasta*.” Final Revised Technical Advisory Team Scoping Document (Sept. 9, 2016). As a  
10 final goal, the DTAT would develop a guidance document the Bureau could use to identify and  
11 implement management recommendations to combat *C. shasta* proliferation.

12 68. In August 2016, the Bureau in coordination with NMFS responded to the 60-day  
13 notices sent by the Yurok Tribe, PCFFA, IFR, and Klamath Riverkeeper. In the responses, the  
14 Bureau first noted that due to high spring flows, juvenile *C. shasta* infection rates for 2016  
15 appeared to be 33-39%, below the 49% limit in the incidental take statement. Second, the  
16 Bureau described the disease management planning effort by the federal agencies and the Tribes  
17 that is compiling the best available scientific information, preparing a technical assessment, and  
18 producing recommendations for flow management and other actions to reduce coho disease  
19 prevalence. Through the DTAT process, FWS developed, with input from and peer review by  
20 technical experts from the other federal agencies and the Tribes, technical memos on: (a)  
21 sediment mobilization and flow history in the Klamath River below Iron Gate Dam, also called  
22 the geomorphic memo; (b) polychaete distribution and infections; (c) *C. shasta* waterborne sport  
23 stages; and (d) prevalence of *C. shasta* infections in juvenile and adult salmonids.

1           69.     In their motion to dismiss the Hoopa Valley Tribe’s complaint, the agencies  
2 indicated that after the disease management team produces a guidance document, the Bureau will  
3 coordinate with NMFS and FWS to determine how to apply the guidance document and  
4 technical assessments to Klamath Project operations. The agencies further represented that they  
5 “may otherwise” use the document to inform the extent and scope of any reinitiation of formal  
6 consultation and revision of the incidental take statement. The agencies currently plan to revise  
7 the incidental take statement prior to April 1, 2017.

8           70.     On November 9, 2016 the Tribal members of the DTAT completed a guidance  
9 document on measures to reduce *C. shasta* infection of Klamath River salmonids and sent it to  
10 the Bureau, NMFS and FWS for comment. The guidance document synthesized the scientific  
11 information compiled in the four technical memoranda and found that the memoranda indicate  
12 that “more river flow initiates the physical, geomorphic, and ecological changes that result in less  
13 [*C. shasta*] disease in juvenile salmonids including Coho Salmon.” *Id.* at 6. “The loss of these  
14 high dynamic flow events,” the DTAT document continues, “ha[s] led to river channel  
15 conditions that favor the proliferation of *M. speciosa*, *C. shasta*, and high rates of fish disease.”  
16 *Id.* The guidance document described six disease control measures to combat *C. shasta*  
17 proliferation. The first five measures would provide water to enhance mainstem Klamath River  
18 flows below Iron Gate Dam, including:

19           (1) Providing surface flushing flows of at least 6,030 cfs every year between November  
20           1-April 30 for a 72-hour period to induce the movement of fine sediments to reduce  
21           the populations of the polychaete host of *C.shasta*, *M. speciosa*, that have been  
22           observed in these unnatural sediment deposits. *Id.* at 7-9.

23           (2) Providing deep flushing flows of at least 11,250 cfs and six hours in duration between  
24

1 February 15 and May 31 in 2017 and at least every other year thereafter to move  
2 sediment from the deeper armored bed layer, thereby removing polychaete worms  
3 attached to the layer. Historically a common occurrence, these deeper flushing flows  
4 have become rare over the past 16 years and have occurred only twice in the past 10  
5 years (2006 and 2016). These flows appear to have the most demonstrated success at  
6 significantly reducing polychaete density. *Id.* at 9-10.

7 (3) Opportunistically providing short-term peak flows greater than 11,250 cfs whenever  
8 conditions and public safety allow. *Id.* at 10.

9 (4) Holding in reserve 50,000 acre feet of water to implement emergency spring disease  
10 dilution and disruption flows between April 1 and June 15, when certain disease,  
11 spore concentration, outmigration, and water temperature thresholds are triggered  
12 based on sampling. *Id.* at 10-12.

13 (5) Providing fall/early-winter flushing flows of 1500 to 2000 cfs every year for 3-5 days  
14 between November 15 and January 15 to reduce *M. speciosa* infection rates by  
15 redistributing salmon carcasses that can emit large numbers of myxospores. *Id.* at 13.

16 The final guidance document recommends implementing release strategies for Iron Gate  
17 Hatchery fall chinook that are timed to minimize overlap with *C. shasta* infection levels in the  
18 Klamath River. *Id.* at 14-16. Because “Klamath fisheries are in dire need of measures to  
19 alleviate high disease rates immediately,” the guidance document urged that “disease rates can  
20 best be controlled by disrupting the habitat of *M. speciosa* and diluting *C. shasta* spores with  
21 increased flows.” *Id.* at 16.

22 71. On November 28, 2016, technical staff with the federal agencies provided  
23 comments on the guidance document, largely agreeing on the need for additional flows to flush  
24

1 out polychaetes and an emergency dilution flow regime should infection rates or spore  
2 concentrations reach high levels. The Bureau did not commit to any particular mitigation  
3 measures.

#### 4 VI. ESSENTIAL FISH HABITAT

##### 5 A. Essential Fish Habitat Consultation Requirements.

6 72. The Magnuson-Stevens Fishery Conservation and Management Act requires that  
7 “[e]ach Federal agency shall consult with the Secretary with respect to any action authorized,  
8 funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that  
9 may adversely affect any essential fish habitat identified under this chapter.” 16 U.S.C. §  
10 1855(b)(2). If NMFS receives information from a federal agency, or determines from other  
11 sources, that an action would adversely affect essential fish habitat (“EFH”), “the Secretary  
12 [NMFS] shall recommend to such agency measures that can be taken by such agency to conserve  
13 the habitat.” *Id.* at § 1855(b)(4)(A). Within 30 days of receiving the recommendation, the  
14 federal agency “shall provide a detailed response” to NMFS which “shall include a description of  
15 measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity  
16 on such habitat.” *Id.* at § 1855(b)(4)(B). The implementing regulations reiterate that NMFS is  
17 required to provide conservation recommendations for agency actions that would adversely  
18 affect essential fish habitat. 50 C.F.R. § 600.925(a). The regulations further provide that: “If  
19 NMFS becomes aware of a Federal action that would adversely affect EFH, but for which a  
20 Federal agency has not initiated an EFH consultation, NMFS may request that the Federal  
21 agency initiate EFH consultation, or NMFS will provide EFH Conservation Recommendations  
22 based on the information available.” 50 C.F.R. § 600.925(b).

23 73. The implementing regulations define adverse effect as “any impact that reduces  
24 quality and/or quantity of EFH.” 50 C.F.R. § 600.910(a).

1 74. NMFS has identified and designated EFH for Pacific Salmon, including chinook  
2 and coho salmon, in the Upper and Lower Klamath River. 79 Fed. Reg. 75449 (Dec. 18, 2014).

3 B. The Agencies' Failure to Complete Consultation on the Klamath Project  
4 Operation's Impacts on Essential Fish Habitat

5 75. The 2013 biological opinion completed consultation under the ESA only. It does  
6 not address essential fish habitat.

7 76. In a July 2015 letter to NMFS, the Bureau acknowledged that completion of the  
8 essential fish habitat consultation remains an outstanding obligation for Klamath Project  
9 operations. The letter stated that "additional modeling tools that would aid in this analysis are  
10 not complete and the data gap still exists." Pursuant to the letter, the Bureau requested further  
11 discussions with NMFS to complete EFH consultation. Letter to Lisa Van Atta, NMFS, from  
12 Therese O'Rourke Bradford, Bureau Klamath Basin Area Manager (July 17, 2015).

13 77. In the Bureau's August 2016 response to the Yurok Tribe's 60-day notice, the  
14 Bureau acknowledged its legal obligation to conduct ESA consultation on the impacts of the  
15 Klamath Project operations on the Southern Resident Killer Whale, which is listed as  
16 endangered. The Southern Residents are adversely affected because Klamath Project operations  
17 reduce the abundance of salmon, and chinook salmon in particular, which are their primary food  
18 source. The Bureau indicated that new modeling tools and "completion of a Magnuson Stevens  
19 Act Essential Fish Habitat Consultation" would provide information on chinook salmon that  
20 would be useful in the required ESA consultation on the Klamath Project operation's impacts on  
21 the Southern Residents. Letter to Chairman Thomas P. O'Rourke, Yurok Tribe, from David  
22 Murillo, Regional Director (August 1, 2016).

23 78. In October 2016, the Bureau and NMFS memorialized a schedule and milestone  
24 document "to provide interim milestones that will guide the remainder of the EFH consultation

1 process to its conclusion by the agreed upon date of April 24, 2017.” Bureau Memorandum from  
2 Jeffrey Nettleton, Area Manager (October 4, 2016). The schedule and milestones confirm that  
3 the Bureau has neither initiated nor completed the EFH consultation, and that NMFS has not yet  
4 completed the consultation.

## 5 CLAIMS FOR RELIEF

### 6 FIRST CLAIM FOR RELIEF

#### 7 The Bureau and NMFS are in Violation of the ESA Implementing Regulations, 8 50 C.F.R. § 402.16, By Failing to Reinitiate Formal Consultation on the Impact of Klamath Project Operations on SONCC Coho.

9 79. Plaintiff realleges each and every allegation set forth in this complaint.

10 80. An incidental take statement serves as a check on a biological opinion’s  
11 assumptions and conclusions. It sets out a trigger that specifies an unacceptable level of take.

12 81. The ESA Implementing Regulations, 50 C.F.R. § 402.16, require reinitiation of  
13 consultation where discretionary involvement or control is retained or authorized by law when  
14 the amount or extent of take specified in the incidental take statement is exceeded. The  
15 regulation applies on its face to both the action agency and NMFS.

16 82. The Bureau retains discretionary involvement and control over Klamath Project  
17 operations and is authorized by law to manage Klamath Project operations.

18 83. The 2013 Biological Opinion’s incidental take statement imposes a limit on *C.*  
19 *shasta* infections. NMFS used chinook salmon infection rates as a surrogate for coho salmon  
20 infections because chinook are more plentiful, have been the subject of the past and ongoing  
21 monitoring, and *C. shasta* disease exists in both coho and chinook salmon.

22 84. In the 2013 Biological Opinion, NMFS assumed that the status of coho would  
23 improve under the 2013-2023 operations compared to the 1981-2012 period of record and on that  
24 basis made a no-jeopardy finding. NMFS similarly assumed that *C. shasta* infection rates would

1 not be higher than those documented in recent monitoring. To provide a check on this  
2 assumption and the biological opinion’s no-jeopardy conclusion, the incidental take statement  
3 sets a limit on *C. shasta* infection rates equal to the highest incidence in the period of record –  
4 49% via QPCR. The Biological Opinion provides that if the percent of *C. shasta* infections for  
5 juvenile chinook salmon in the Klamath River mainstem during May to July exceeds this limit,  
6 “reinitiation of formal consultation will be necessary.”

7 85. In 2014, the *C. shasta* infection rate was 81% and in 2015, the infection rate was  
8 91% measured using QPCR. These infection rates exceed the limit in the incidental take  
9 statement.

10 86. Under 50 C.F.R. § 402.16, the Bureau and NMFS each have a duty to reinitiate  
11 formal consultation over the impacts of Klamath Project operation on SONCC coho.

12 87. In July 2015, the Bureau notified NMFS that the agencies should begin  
13 comprehensive discussions to address the impacts of drought conditions on listed species and the  
14 biological opinion. The Bureau did not, however, reinitiate or request reinitiation of formal  
15 consultation.

16 88. In addition to requiring reinitiation of consultation when the limits in an incidental  
17 take statement have been exceeded, 50 C.F.R. § 402.16 requires reinitiation of consultation when  
18 new information reveals effects of an action on a listed species or its critical habitat “to an extent  
19 not previously considered.”

20 89. In its July 2015 notification, the Bureau stated that the hydrologic conditions that  
21 persisted in multi-year drought conditions like those in 2014 and 2015 “were not anticipated at  
22 the time the Proposed Action was analyzed in the BiOp.” The hydrologic conditions that  
23 resulted and their impact on SONCC coho constitute new information that reveals effects of the  
24

1 action that may affect SONCC coho and their critical habitat to an extent not previously  
2 considered.

3 90. In the 2016 SONCC Coho Status Review, NMFS found that the recent multi-year  
4 drought conditions in the Klamath Basin are unprecedented.

5 91. The Bureau and NMFS have a legal duty to reinitiate consultation to assess this  
6 new information.

7 92. NMFS responded to the Bureau's notification by letter dated March 29, 2016,  
8 determining that the *C. shasta* infection rates in the incidental take statement were exceeded in  
9 2014 and 2015. NMFS indicated that in April 2017 it will revise the incidental take statement to  
10 change the amount and extent of allowed take of coho salmon from disease. The letter states that  
11 "the effects analysis and conclusions in the 2013 BiOp remain valid." In support of this  
12 assertion, the letter states that the biological opinion expected that disease rates would be higher  
13 in dry years. NMFS did not try to reconcile this statement with its conclusion that conditions for  
14 coho salmon would improve under the 2013-2023 operations compared to the worse disease  
15 rates on record, which never exceeded 49%.

16 93. When the limits in an incidental take statement have been exceeded or new  
17 information reveals effects on listed species or their critical habitat to an extent not previously  
18 considered, the action agency and NMFS have a legal obligation to reinitiate formal consultation  
19 and to request reinitiation of formal consultation to start that process.

20 94. Exceedance of the incidental take statement's limits on *C. shasta* infection rates  
21 calls into question NMFS's specific assumption that infection rates would not exceed the rates in  
22 the period of *C. shasta* monitoring and its general conclusion that conditions for coho would  
23 improve under the 2013-2023 Klamath Project operations plan compared to the period of record.

1 NMFS identified *C. shasta* as a key factor limiting salmon recovery in the Klamath River. In  
2 2014 and 2015, *C. shasta* infection rates were far worse than in any year on record. These  
3 unprecedented infection rates disprove or undercut NMFS's assumption that conditions would  
4 improve and its no-jeopardy finding made based on that assumption. Reinitiated formal  
5 consultation is required to reconsider the assumptions made and conclusions reached in the 2013  
6 biological opinion.

7 95. Neither the Bureau nor NMFS has reinitiated consultation on the 2013-2023  
8 Klamath Project operations. Nor has either agency requested reinitiation of consultation.

9 96. The agencies have been engaged in technical discussions with each other, the  
10 Yurok, Karuk, and Hoopa Valley Tribes, and other federal agencies. The Bureau and NMFS  
11 assert that they have been engaged in informal consultation. "Informal consultation" is defined  
12 as an optional process of discussions and communications between the agencies "prior to formal  
13 consultation, if required." 50 C.F.R. § 402.02. The agencies cannot engage in informal  
14 consultation on an action that is likely to adversely affect a listed species or its critical habitat or  
15 after a biological opinion on such an action has been produced in formal consultation.

16 97. The Bureau's failure to reinitiate consultation violates its affirmative ESA Section  
17 7 duty to ensure its actions are not likely to jeopardize the continued existence of listed SONCC  
18 coho or adversely modify their critical habitat.

19 98. By failing to reinitiate formal consultation, the Bureau and NMFS are in violation  
20 of the ESA implementing regulations, 50 C.F.R. § 402.16.

21 99. The ESA citizen suit provision authorizes civil suits to enjoin any person,  
22 including federal agencies, who is alleged to be in violation of any provision of the ESA or of  
23 regulations issued pursuant to the ESA. 16 U.S.C. § 1540(g)(1). This Court has jurisdiction  
24

1 under the ESA citizen suit provision to enjoin the violations by both the Bureau and NMFS of 50  
2 C.F.R. § 402.16.

3 100. In the alternative, the Administrative Procedure Act, 5 U.S.C. § 706(2)(A),  
4 creates a cause of action to challenge agency actions that are arbitrary, capricious, and contrary  
5 to law. NMFS's failure to reinitiate consultation over 2013-2023 Klamath Project operations is  
6 arbitrary, capricious, and contrary to 50 C.F.R. § 402.16. Courts have jurisdiction over such  
7 claims when there is no other remedy at law. If this Court determines the ESA citizen suit fails  
8 to provide jurisdiction over this claim with respect to NMFS, the APA provides a basis for  
9 review and redress for NMFS's violation of 50 C.F.R. § 402.16.

10 SECOND CLAIM FOR RELIEF

11 NMFS's 2013 Biological Opinion is Arbitrary, Capricious, and Contrary  
12 to the ESA and the ESA Implementing Regulations, in Violation of the APA.

13 101. Plaintiffs reallege each and every allegation set forth in this complaint.

14 102. The ESA directs that the Bureau, like other federal agencies,  
15 shall, in consultation with and with the assistance of the Secretary, insure that any  
16 action authorized, funded, or carried out by such agency (hereinafter in this  
17 section referred to as an "agency action") is not likely to jeopardize the continued  
existence of any endangered species or threatened species or result in the  
destruction or adverse modification of habitat of such species which is determined  
by the Secretary . . . to be critical . . . .

18 16 U.S.C. § 1536(a)(2).

19 103. "Action" is defined broadly to encompass "all activities or programs of any kind  
20 authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02.

21 104. The Bureau's operation of the Klamath Project is an action over which the Bureau  
22 has discretion and control and is subject to ESA Section 7. The Bureau must consult with NMFS  
23 over the impacts of its Klamath Project operations on listed SONCC coho salmon.

24 105. The Bureau's Klamath Project operations are likely to adversely affect listed

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1 SONCC coho salmon and their critical habitat. The Bureau initiated Section 7 consultation by  
2 submitting to NMFS a biological assessment on its 2013-2023 Klamath Project operations. The  
3 Bureau found in its biological assessment that its Klamath Project operations are likely to  
4 adversely affect SONCC coho salmon and their critical habitat. The Bureau must complete a  
5 formal consultation with NMFS on its Klamath Project operations.

6 106. To complete formal consultation, NMFS must issue a biological opinion assessing  
7 the effects of the action on the species and its critical habitat and determining whether the action  
8 is likely to jeopardize the continued existence of the species or adversely modify its critical  
9 habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h).

10 107. The APA authorizes courts to review agency action and to hold unlawful and set  
11 aside final agency action, findings, and conclusions that are arbitrary and capricious, an abuse of  
12 discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). The APA provides  
13 the basis for judicial review of the federal fish and wildlife agencies' issuance of biological  
14 opinions pursuant to Section 7 of the ESA. *Bennett v. Spear*, 520 U.S. 154, 175 (1997).

15 108. The ESA implementing regulations define “jeopardize the continued existence”  
16 as:

17 to engage in an action that reasonably would be expected, directly or indirectly, to  
18 reduce appreciably the likelihood of both the survival and recovery of a listed  
19 species in the wild by reducing the reproduction, numbers, or distribution of that  
20 species.

21 50 C.F.R. § 402.02.

22 109. Under the definition in the ESA regulations of “jeopardize the continued  
23 existence,” NMFS must assess an action’s impacts on both survival and recovery. “Recovery” is  
24 defined to mean “improvement in the status of listed species to the point at which listing is no  
25 longer appropriate under the criteria set out” in the Act. *Id.* The Consultation Handbook (at

1 xviii-xix) defines “survival” for purposes of the jeopardy analysis as “the condition in which a  
2 species continues to exist into the future while retaining the potential for recovery.” The  
3 Consultation Handbook includes in the definition of “survival,” “the species’ persistence as  
4 listed or as a recovery unit, beyond the conditions leading to its endangerment, with sufficient  
5 resilience to allow for the potential recovery from endangerment.” *Id.*

6 110. Assessing and determining whether an action (here Klamath Project operations)  
7 will jeopardize the continued existence of listed salmon requires NMFS to evaluate the effects of  
8 that action on both survival and recovery. 50 C.F.R § 402.02.

9 111. In its 2013 biological opinion, NMFS concluded that, with the minimum flows  
10 and other May 2013 additions, the 2013-2023 Klamath Project operations will likely improve  
11 conditions for SONCC coho salmon compared to the period of record. NMFS did not assess  
12 whether the 2013-2023 Klamath Project operations with the May 2013 additions would  
13 appreciably reduce the likelihood of SONCC coho survival and recovery. It did not determine  
14 what levels of abundance, spatial structure, and diversity are needed for survival or recovery and  
15 the impacts of the Project operations on achieving those survival and recovery needs.

16 112. NMFS identified disease from *C. shasta* as the most significant risk to SONCC  
17 coho salmon. NMFS found that the 2013-2023 Klamath Project operations would increase  
18 disease and disease-related mortality in juvenile coho salmon. It believed that the minimum  
19 flows and real-time disease management would lower disease risks compared to the incidence  
20 recorded in recent monitoring. On that basis, NMFS stated its belief that the 2013-2023 Klamath  
21 Project operations are not likely to increase extinction risk and jeopardize the continued  
22 existence of SONCC coho salmon. BiOp at 377.

23 113. In 2002 and 2010, NMFS found that the Bureau’s proposed Klamath Project  
24

1 operations would be likely to jeopardize the continued existence of SONCC coho salmon. In the  
2 previous consultations, NMFS made jeopardy calls because flows in the Klamath River would be  
3 insufficient to inundate and make useable sufficient habitat to support juvenile coho. NMFS  
4 relied on scientific studies that have identified flows that would produce quantifiable amounts of  
5 useable habitat in analyzing the efficacy of the minimum flows. The minimum flows approved  
6 by NMFS in the 2013 biological opinion rely on lower flows and a riskier flow regime than those  
7 in NMFS's 2002 reasonable and prudent alternative. Moreover, the scientific studies underlying  
8 the 2013-2023 minimum flows did not analyze the efficacy of the minimum flows in reducing *C.*  
9 *shasta* infection rates.

10 114. NMFS did not quantify the reduction in disease rates it believed would occur as a  
11 result of the minimum flows. The flows below Iron Gate Dam for the year with the previously  
12 highest recorded disease levels were twice as high as the biological opinion's minimum flows for  
13 April and May and almost twice as high as the minimum flows for June. NMFS did not compare  
14 the biological opinion's minimum flows to those associated with high infection rates documented  
15 prior to issuance of the biological opinion.

16 115. The fish disease management aspects of the 2013-2023 Klamath Project  
17 operations will lead to additional flows when disease rates are at or above 49% via QPCR only  
18 when surplus water is available. The biological opinion provides that water volumes committed  
19 to irrigation as of April 1<sup>st</sup> cannot be reduced during the water year. Disease rates are generally  
20 measured after April 1<sup>st</sup>. Unless more water becomes available than needed to meet the  
21 irrigation allocation, surplus water may not be available after April 1<sup>st</sup>. It is arbitrary and  
22 capricious for NMFS to rely on the fish disease management process when it is not reasonably  
23 certain to produce additional flows or other measures to reduce disease.

1 116. NMFS’s conclusion that the 2013-2023 Klamath Project operations will not be  
2 likely to jeopardize survival of threatened coho salmon or adversely affect its critical habitat  
3 lacks a rational basis in the biological opinion’s analysis and is undercut by NMFS prior  
4 jeopardy findings. NMFS failed to articulate a rational explanation for its no-jeopardy  
5 conclusion.

6 117. NMFS has failed to follow, and has violated, the requirements of ESA Section 7  
7 and its implementing regulations, and has acted arbitrarily, capriciously, without any rational  
8 basis, and in disregard of the best available scientific information in concluding in the 2013  
9 Biological Opinion that the 2013-2023 Klamath Project operations are not likely to jeopardize  
10 SONCC coho salmon or destroy or adversely modify its critical habitat. NMFS’s actions and  
11 omissions are arbitrary, capricious, and contrary to the ESA Section 7 and the ESA  
12 implementing regulations, in violation of the APA, 5 U.S.C. § 706(2)(A).

13 THIRD CLAIM FOR RELIEF

14 The Bureau’s Operation of the Klamath Project is Reasonably Certain to Take  
15 Listed SONCC Coho in Violation of the ESA.

16 118. Plaintiffs re-allege each and every allegation set forth in this complaint.

17 119. The ESA prohibits any person from “taking” an endangered species. 16 U.S.C. §  
18 1538(a)(1)(B). Under Section 4(d), 16 U.S.C. § 1533(d), NMFS has the authority to issue  
19 regulations extending the take prohibition to threatened species. NMFS has extended the take  
20 prohibition to threatened species, including SONCC coho salmon. 50 C.F.R. § 223.203. Under  
21 Section 9(a)(1)(G), it is unlawful to take threatened salmon in violation of this 4(d) regulation.

22 120. The take prohibition applies to “any person.” 16 U.S.C. § 1538(a)(1). The ESA  
23 defines “any person” to include any officer, employee, agent, department, or instrumentality of  
24 the Federal Government . . . .” 16 U.S.C. § 1532(13). The ESA citizen suit provision authorizes

1 suits to enforce the ESA and its implementing regulations against any person, including federal  
2 agencies. *Id.* § 1540(g)(1).

3 121. The Bureau is a person subject to the ESA take prohibition and to ESA citizen  
4 suits.

5 122. The ESA defines “take” to include “harm.” *Id.* § 1532(19). By regulation, NMFS  
6 has defined “harm” to include:

7 Significant habitat modification or degradation which actually kills or injures fish  
8 or wildlife by significantly impairing essential behavioral patterns, including  
breeding, spawning, rearing, migrating, feeding or sheltering.

9 50 C.F.R. § 222.102.

10 123. In 2014 and 2015, the *C. shasta* infection rates exceeded the numeric limits in the  
11 incidental take statement. Because the incidental take statement’s limits were exceeded, it no  
12 longer provides a safe harbor from the ESA’s take prohibition for the Bureau’s operation of the  
13 Klamath Project.

14 124. The Bureau’s operation of the Klamath Project is significantly modifying and  
15 degrading SONCC coho habitat by altering environmental conditions on the mainstem Klamath  
16 River below Iron Gate Dam in a manner that exacerbates the proliferation of *C. shasta* and *M.*  
17 *speciosa*. By operating the Project in a manner that inhibits critical high Klamath River flows,  
18 deep and shallow sediment layers where polychaetes reside accumulate that would otherwise be  
19 flushed periodically during high precipitation events. In the past 16 years, as shown in the graph  
20 below, only 2006 experienced flows of a magnitude necessary to provide necessary deep  
21 flushing flows.

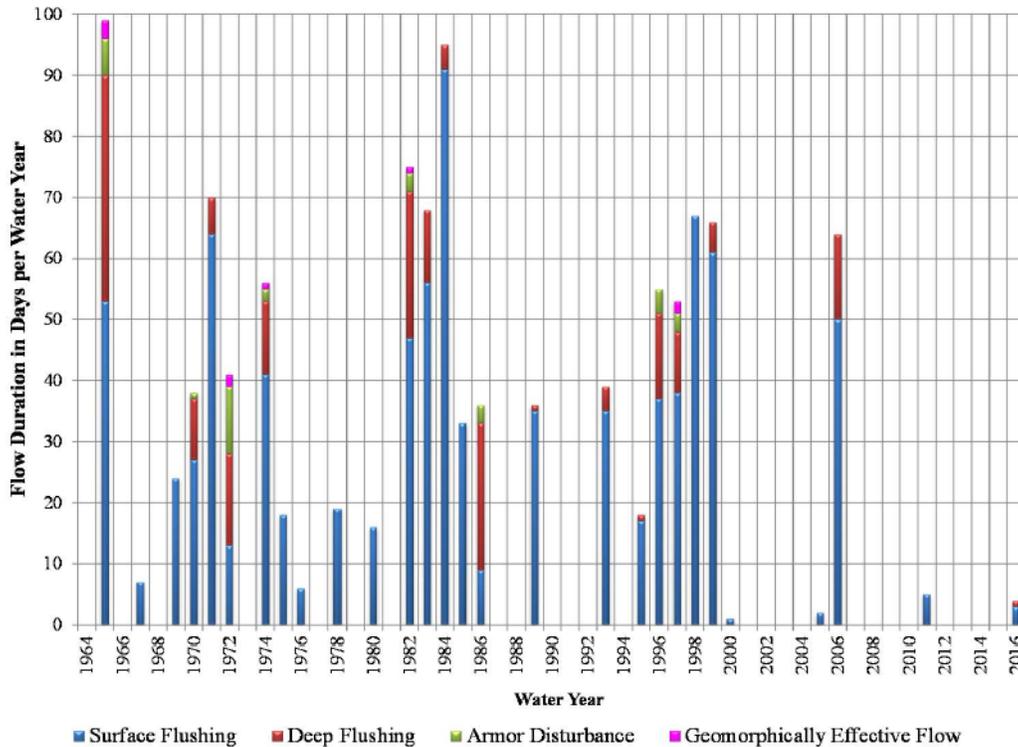


Chart: Duration of sediment mobilization flows in days per Water Year in the Klamath River below Iron Gate Dam for Water Years 1964-2016.

125. The operation of the Klamath Project affects the total volume of flow in the Klamath River, the water quality of the Klamath River, the natural hydrograph, and generally alters the geomorphic features of the Klamath River.

126. The altered river channel caused by Project operations has resulted in an atypically stable river bed below Iron Gate Dam, which provides a favorable habitat for the polychaete host for *C. shasta*. High polychaete densities lead to increased parasite loads in places where juvenile coho congregate, which in turn leads to higher rates of juvenile coho infection and mortality.

127. Increased temperatures caused by reduced flows and slack water as a result of Project operations increase juvenile coho susceptibility to *C. shasta*.

128. Coho infected with *C. shasta* suffer from necrosis of intestinal tissue that can be

1 accompanied by a severe inflammatory reaction, eventually succumbing to death through  
2 intestinal perforation, co-occurring infection, or predation as a result of their weakened state.

3 129. The Bureau's operation of the Klamath Project resulted in the take of large  
4 numbers of SONCC coho salmon in 2014 and 2015. The seasonal prevalence of infection of *C.*  
5 *shasta* by QPCR was 81% in 2014 and 91% in 2015. Because this disease is nearly 100% lethal,  
6 there is a high likelihood that the mortality rate of infected salmonids was commensurately high  
7 in those years.

8 130. Unless the Bureau changes its operation of the Klamath Project, its operation of  
9 the Project is reasonably certain to take SONCC coho. In dry and below average water years, the  
10 level of take is likely to exceed 49% via QPCR.

11 131. An injunction implementing the management measures identified by the DTAT  
12 guidance document or comparable measures would reduce the take of SONCC coho salmon in  
13 the Klamath River. Based on the best available science, there is a high likelihood of these  
14 measures reducing the infection prevalence and severity of *C. shasta* in the Klamath River.

15 132. Unless enjoined to modify Klamath Project operations at the outset of dry and  
16 below-average flow years, the Bureau's operation of the Klamath Project is likely to take  
17 threatened SONCC coho in violation of 50 C.F.R. § 223.203(a), and 16 U.S.C. §§ 1538(a)(1)(G)  
18 and 1538(1)(B).

19 FOURTH CLAIM FOR RELIEF

20 The Bureau's Failure to Initiate Consultation and NMFS's failure to Complete  
21 Consultation on the Impacts of Operation of the Klamath Project on Essential Fish  
22 Habitat is Contrary to the Magnuson-Stevens Fishery Conservation and  
23 Management Act, in Violation of the APA.

24 133. Plaintiff realleges each and every allegation set forth in this complaint.

25 134. The Magnuson-Stevens Fishery Conservation and Management Act requires that

1 federal agencies “shall consult with the Secretary with respect to any action authorized, funded,  
2 or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may  
3 adversely affect any essential fish habitat identified under this chapter.” 16 U.S.C. § 1855(b)(2).

4 135. “Adverse effect” is identified as “any impact that reduces quality and/or quantity  
5 of EFH.” 50 C.F.R. § 600.910(a).

6 136. The operation of the Klamath Project is a federal action authorized, funded, or  
7 undertaken by the Bureau of Reclamation.

8 137. The Bureau’s Klamath Project operations adversely affect chinook salmon  
9 essential fish habitat by reducing flows resulting in ecological conditions that perpetuate the life  
10 cycle of *C. shasta*, thereby resulting in high incidence of disease in chinook and coho salmon.

11 138. The Bureau has a legal obligation to consult with NMFS over the impacts its  
12 operation of the Klamath Project has on EFH of chinook and coho salmon.

13 139. The Bureau and NMFS have acknowledged that EFH consultation on 2013-2023  
14 Klamath Project operations is legally required.

15 140. The Bureau has neither initiated nor completed consultation on the impacts of  
16 Klamath Project operation on essential fish habitat for chinook and coho salmon.

17 141. The Magnuson-Stevens Fishery Conservation and Management Act provides that  
18 NMFS “shall recommend” measures that can be taken to conserve essential fish habitat if it  
19 receives information from the federal agency or other sources that a federal agency action would  
20 adversely affect essential fish habitat. 16 U.S.C. § 1855(4)(A). If the federal action agency does  
21 not initiate consultation on essential fish habitat, NMFS may request initiation of consultation.  
22 Alternatively, the regulations provide that NMFS will provide conservation recommendations  
23 based on the information available. 50 C.F.R. § 600.925(b).

1 142. NMFS has received information from the Bureau and from other sources  
2 revealing that the Bureau's operations of the Klamath Project adversely affect essential fish  
3 habitat for chinook and coho salmon.

4 143. NMFS has failed to recommend measures that can be taken by the Bureau in  
5 operating the Klamath Project to conserve essential fish habitat for chinook and coho salmon.  
6 Nor has NMFS requested that the Bureau initiate essential fish habitat consultation.

7 144. The Magnuson-Stevens Fishery Conservation and Management Act does not  
8 provide a remedy for violations of its EFH consultation obligations. The APA authorizes  
9 judicial review of agency actions when there is no adequate remedy at law. The APA authorizes  
10 courts to review agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise  
11 not in accordance with law. 5 U.S.C. § 706(2)(A). The APA also authorizes federal courts to  
12 compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1).

13 145. The Bureau has acted arbitrarily, capriciously, and contrary to 16 U.S.C.  
14 § 1855(2) by failing to consult with NMFS on the impacts of the Bureau's Klamath Project  
15 operations on essential fish habitat for chinook and coho salmon.

16 146. NMFS has acted arbitrarily, capriciously, and contrary to 16 U.S.C. § 1855(4)(A)  
17 by failing to recommend measures to the Bureau to conserve essential fish habitat for chinook  
18 and coho salmon or request that the Bureau initiate consultation on such essential fish habitat.

19 147. The Bureau and NMFS have unreasonably delayed discharging their essential fish  
20 habitat consultation obligations with respect to the Bureau's Klamath Project operations.

21 PRAYER FOR RELIEF

22 WHEREFORE, plaintiffs respectfully request that this Court:

23 A. Declare that the Bureau has violated ESA Section 7 and its implementing  
24 regulations, 50 C.F.R. § 402.16, by failing to reinitiate or request reinitiation of formal

1 consultation on Klamath Project operations;

2 B. Declare that NMFS has violated the ESA implementing regulations, 50 C.F.R. §  
3 402.16, by failing to reinitiate or request formal reinitiation of consultation on Klamath Project  
4 operations;

5 C. Enjoin the Bureau and NMFS to reinitiate formal consultation forthwith;

6 D. Pursuant to 16 U.S.C. § 1536(a) and (d) and the Court's equitable discretion,  
7 enjoin the Bureau to provide sufficient flows to prevent irreparable harm to SONCC coho  
8 salmon during the time it will take to complete reinitiated formal consultation;

9 E. Declare that NMFS acted arbitrarily, capriciously, and contrary to ESA Section 7  
10 and its implementing regulations in violation of the APA, 5 U.S.C. § 706(2)(A), in concluding in  
11 its 2013 biological opinion that the Bureau's 2013-2023 operations of the Klamath Project are  
12 not likely to jeopardize the continued existence of threatened SONCC coho salmon or adversely  
13 modify SONCC coho critical habitat;

14 F. Invalidate provisions in the 2013 biological opinion that limit disease  
15 management flows to times when surplus water is available and when infection rates have  
16 already exceeded 49% via QPCR, enjoin the Bureau from so limiting disease management flows,  
17 and enjoin the Bureau from locking in irrigation allocations on or around April 1<sup>st</sup>, and thereby  
18 making water unavailable for emergency dilution flows that prove to be necessary to reduce *C.*  
19 *shasta* infection rates later in the water year;

20 G. Declare that the Bureau's operations of the Klamath Project are reasonably certain  
21 to take SONCC coho salmon from *C.shasta* infections, particularly in dry and below average  
22 water years;

23 H. Enjoin the Bureau from operating the Klamath Project in ways that are reasonably  
24

1 certain to take juvenile coho salmon;

2 I. Enjoin the Bureau to initiate, and NMFS to complete consultation on the impacts  
3 of the 2013-2023 operations of the Klamath Project on essential fish habitat for chinook and  
4 coho salmon;

5 J. Award plaintiffs their reasonable fees, expenses, costs, and disbursements,  
6 including attorneys' fees associated with this litigation under the citizen suit provision of the  
7 ESA, 16 U.S.C. § 1540(g)(4) and the Equal Access to Justice Act 28 U.S.C. § 2412; and

8 K. Grant plaintiffs such further and additional relief as the Court may deem just and  
9 proper.

10 DATED this 29<sup>th</sup> day of November, 2016.

11 Respectfully submitted,

12 /s/ Kristen L. Boyles

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