

1 Thomas P. Schlosser WSBA# 06276
MORISSET, SCHLOSSER, HOMER, JOZWIAK & McGAW
2 Suite 1115 Norton Building
801 Second Avenue
3 Seattle, WA 98104-1509
Telephone: (206) 386-5200
4 Facsimile: (206) 386-7322
E-mail: t.schlosser@msaj.com

5 Philip T. Ashworth, Esq.
6 OFFICE OF TRIBAL ATTORNEY
HOOPA VALLEY TRIBE
7 P.O. Box 188
Hoopa, CA 95546

8 Telephone: (530) 625-4211, ext. 129

9 *Attorneys for Plaintiff-Intervenor Applicant,*
10 *Hoopa Valley Tribe*

11 UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION

14 PACIFIC COAST FEDERATION OF FISHERMEN'S)
15 ASSOCIATIONS, INSTITUTE FOR FISHERIES)
RESOURCES, NORTHCOAST ENVIRONMENTAL)
16 CENTER, KLAMATH FOREST ALLIANCE,)
OREGON NATURAL RESOURCES COUNCIL, THE)
17 WILDERNESS SOCIETY, WATERWATCH OF)
OREGON, DEFENDERS OF WILDLIFE,)
18 HEADWATERS, and REPRESENTATIVE MIKE)
THOMPSON,)

19 Plaintiffs,)

20 HOOPA VALLEY TRIBE,)

21 Plaintiff-Intervenor Applicant,)

22 v.)

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

24 Defendants.)
25)
26)
27)
28)

Civ. No. C02-2006 SBA

Related Case No. C00-01955 SBA

HOOPA VALLEY TRIBE'S
PROPOSED COMPLAINT IN
INTERVENTION

DATE: February 4, 2003

TIME: 1:00 p.m.

COURT: Room 3

INTRODUCTION

1
2 1. In this action Plaintiffs seek review of a 10-year biological opinion issued by the
3 National Marine Fisheries Service (“NMFS”) on May 31, 2002, under Section 7 of the
4 Endangered Species Act (“ESA”), 16 U.S.C. § 1536, and the actions pursuant thereto of the
5 United States Bureau of Reclamation (“BOR”) regarding the operation of the Klamath Irrigation
6 Project. The Hoopa Valley Tribe (“Tribe”), a plaintiff-intervenor applicant, as part of that
7 challenge, seeks review of the effects of Klamath Project operations on chinook and coho salmon
8 in the Klamath-Trinity River system and the Hoopa Valley Reservation during 2002. Pursuant
9 to its 2002 operations plan, BOR has operated the Klamath Irrigation Project in violation of the
10 Tribe’s federal reserved fishing and water rights, and its trust responsibility to the Tribe. In late
11 September 2002, between 20,000 and 40,000 salmon, including adult chinook and substantial
12 numbers of protected coho, died as they began their fall migration runs to spawning grounds in
13 the Klamath-Trinity River system. The massive kill of salmon was caused by factors including
14 low stream flows and high adult returns. BOR controls releases of flows from Iron Gate Dam,
15 which in turn substantially affects flow levels downstream of the dam.

16 2. NMFS’ 2002 Biological Opinion (“BiOp”) addresses the effects of proposed
17 Klamath Project operations on Southern Oregon/Northern California Coast (“SONCC”) coho
18 salmon that are listed as threatened under the ESA. The BiOp concludes that the actions
19 proposed by the BOR would jeopardize the continued existence of these fish and adversely
20 modify their designated critical habitat. BiOp at 51. Accordingly, pursuant to the requirements
21 of ESA section 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A), and 50 C.F.R. § 402.14(h)(3), NMFS
22 proposes in the BiOp a “reasonable and prudent alternative” course of action (the “RPA”) that it
23 concludes will avoid both jeopardy to coho salmon and adverse modification of their critical
24 habitat. *Id.* at 52.

25 3. The BOR 2002 operations plan identifies timely volume of flows at Iron Gate
26 Dam that are available for chinook, coho, and other salmon habitat after BOR has estimated the
27 water supply needs throughout the year of the Klamath Project for irrigation purposes.
28

1 4. This action seeks to invalidate the BiOp and RPA for at least four reasons. First,
2 NMFS' assessment how the BiOp's RPA will avoid jeopardy relies extensively on speculative
3 and voluntary actions by other federal agencies, as well as state and private entities, in areas
4 unrelated to Klamath operations and beyond the control or authority of the BOR, contrary to the
5 requirements of the ESA and its implementing regulations.

6 5. Second, in the RPA, NMFS arbitrarily apportions BOR's responsibility for flow
7 levels to prevent jeopardy at 57% of the flows identified as necessary by NMFS. The RPA
8 suggests this figure reflects the fraction of irrigated land in the Klamath Basin served by the
9 Project – an allocation that bears no relationship to the water consumption by the Project that the
10 BiOp admits is jeopardizing coho and is not supported in the BiOp.

11 6. Third, the RPA does not require BOR to supply its 57% of the long-term river
12 flows for several years, even though NMFS found that the low river flows are now causing
13 jeopardy.

14 7. Fourth, the RPA's long-term flow objectives are not based on the best available
15 science.

16 8. For at least these four reasons, this action seeks a declaration that the no-jeopardy
17 finding for the RPA, as set forth in the BiOp, violates ESA section 7, 16 U.S.C. § 1536, and is
18 arbitrary, capricious, an abuse of discretion, and is otherwise not in accordance with law in
19 violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A).

20 9. The Tribe joins in the assertion that the BiOp is legally invalid. The BiOp and
21 RPA have clearly failed to protect a threatened species and its habitat. In addition, the Tribe
22 seeks a declaration that BOR operated and continues to operate the Klamath Project in violation
23 of the Tribe's reserved fishing rights by failing to allow Klamath River flow levels adequate to
24 support a productive habitat for all species of anadromous fish on the Hoopa Valley Reservation,
25 and that this operation is in direct violation of the defendants' federal trust responsibility to the
26 Tribe.

27 10. This action also seeks an injunction directing NMFS to withdraw the BiOp and
28 RPA, rescind the incidental take statement that accompanies the RPA, reinstate consultation

1 with BOR on a schedule set by the Court, and operate the project in a manner which preserves
2 and protects the Tribe's fishery. This relief is necessary to preserve the status quo, to correct an
3 illegal final agency action, to prevent future unlawful agency actions that may cause additional
4 irreparable harm to the environment and species listed for protection under the ESA, and to
5 protect tribal trust resources.

6 11. BOR announced on June 3, 2002 that it would operate the Project in accordance
7 with the RPA for the 2002 irrigation season, but that it would not comply with the RPA in future
8 years and wished to reinitiate consultation. Given the time constraints involved with ESA § 7
9 consultation, BOR may again attempt to begin the next irrigation season without a valid
10 biological opinion.

11 12. This action also seeks an injunction preventing BOR from relying on the BiOp to
12 satisfy ESA obligations, and an injunction requiring BOR to limit irrigation water deliveries
13 from the Klamath project that would cause Klamath River flows below Iron Gate Dam to fall
14 below the levels necessary for fish survival before a legally and biologically valid biological
15 opinion is issued.

16 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

17 13. This action is brought pursuant to the APA, 5 U.S.C. § 706, and the ESA, 16
18 U.S.C. § 1540(g)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 16 U.S.C. §
19 1540(g)(1). In addition, this Court has jurisdiction of the Hoopa Valley Tribe's claims under 28
20 U.S.C. § 1331 and § 1362, and under 16 U.S.C. § 1540(g)(1).

21 14. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and 16 U.S.C. §
22 1540(g)(3) as a number of the plaintiffs reside in this district and many of the events, omissions,
23 and consequences of the defendant's violations of the law giving rise to the claims occurred or
24 will occur in this district.

25 15. This case is properly assigned to the San Francisco/Oakland Division under Civil
26 L.R. 3-2(c) because a substantial part of the events or omissions which give rise to this action
27 occurred in Humboldt and Del Norte counties, counties through which the lower Klamath River
28 flows, because plaintiffs are located in San Francisco and Humboldt counties, and because the

1 Tribe is located in Humboldt County and the location of the fish kill, which includes the Tribe's
2 Reservation, is located in Humboldt and Del Norte Counties.

3 **PARTIES**

4 16. Plaintiff-intervenor applicant Hoopa Valley Tribe incorporates by reference the
5 descriptions of the plaintiffs and their interests contained in paragraphs 14-16 of the First
6 Amended Complaint for Declaratory and Injunctive Relief.

7 17. Plaintiff-intervenor applicant is a federally-recognized Indian tribe. Since time
8 immemorial, the Tribe and its members have used, and continue to use, the Klamath-Trinity
9 River system and its anadromous fishery resource for subsistence, cultural, ceremonial, religious,
10 and commercial purposes. The lower twelve miles of the Trinity River and a stretch of the
11 Klamath River flows through the Hoopa Valley Reservation. All migrating salmon from the
12 Trinity River must use the mainstem of the Klamath River as their corridor to and from the sea.
13 Hoopa Valley members' past, present, and future enjoyment of the benefits provided by the
14 Klamath-Trinity River system has been, is being, and will continue to be injured by defendants'
15 on-going disregard of their statutory and federal common law duties to provide sufficient flows
16 to protect and enhance the anadromous fishery of the Tribe and by the injuries caused by the
17 unlawful operation of the Klamath Irrigation Project.

18 18. The defendants in this action are:

19 A. United States Bureau of Reclamation, an agency of the United States Department
20 of the Interior, constructs and operates federal water projects throughout the United States. The
21 Bureau has primary management authority over the Klamath Project, the operation of which is at
22 the heart of this action, and has a trust responsibility to ensure a continued fishery for the Tribe.

23 B. National Marine Fisheries Service is an agency of the United States Department
24 of Commerce responsible for administering the provisions of the Endangered Species Act with
25 regard to threatened and endangered marine species, including the species of threatened coho
26 salmon that live in the Klamath River basin. Both Reclamation and NMFS are obligated by
27 federal law to respect and protect plaintiff-intervenor applicant Tribe's fishing rights in the
28

1 Klamath-Trinity River system, including but not limited to chinook salmon, and has a trust
2 responsibility to ensure a continued fishery for the Tribe.

3 NATURE AND BACKGROUND OF CASE

4 A. The Klamath River's Imperiled Ecosystem

5 19. Much of the habitat critical for the survival of the coho salmon is located within
6 the Hoopa Valley Reservation or the Tribe's former ancestral lands in the southern part of the
7 Klamath Basin. For more than 100 years the Hoopa Valley Reservation has encompassed much
8 of the Klamath and Trinity Rivers. In 1988, Congress partitioned the Hoopa Valley Reservation,
9 reserving to the Hoopa Valley Tribe the portion of the reservation extending six miles to either
10 side of the Trinity River and part of the Klamath river, near the confluence with the Trinity
11 River. Several species of anadromous fish inhabit the Klamath-Trinity River system and its
12 tributaries, including chinook, coho, steelhead, green sturgeon, and coastal cutthroat trout.
13 Klamath River runs of salmon and steelhead at one time were among the region's mightiest.
14 SONCC coho salmon, a population that includes Klamath and Trinity River coho, was estimated
15 in 1940 to range between 150,000 and 400,000 naturally spawning fish annually. *See*
16 *Threatened Status for SONCC ESU of Coho Salmon*, 62 Fed. Reg. 24588, 24588 (May 6, 1997)
17 ("Listing Notice"). A multitude of factors, including habitat destruction, and hydropower
18 development contributed to drastic declines of all stocks of salmonids in recent decades. In
19 1997, NMFS concluded that "coho populations in this ESU are very depressed, currently
20 numbering approximately 10,000 naturally produced adults." *Id.*

21 20. The perilous situation of the SONCC coho salmon prompted NMFS in 1997 to
22 list the fish under the ESA as threatened. In listing the coho, NMFS noted that "water
23 diversions" and "water withdrawals" for irrigation were "major activities responsible for the
24 decline of coho salmon in Oregon and California." *Id.* at 24,592. NMFS further concluded that

25 Depletion and storage of natural flows have drastically altered natural
26 hydrological cycles, especially in California and southern Oregon rivers and
27 streams. Alteration of streamflows has increased juvenile salmonid mortality for a
28 variety of reasons: Migration delay resulting from insufficient flows or habitat
blockages; loss of usable habitat due to dewatering and blockage; stranding of
fish resulting from rapid flow fluctuations; entrainment of juveniles into
unscreened or poorly screened diversions; and increased juvenile mortality

1 resulting from increased water temperatures. In addition, reduced flows degrade
2 or diminish fish habitats via increased deposition of fine sediments in spawning
3 gravels, decreased recruitment of new spawning gravels, and encroachment of
4 riparian and non-endemic vegetations into spawning and rearing areas.

5 *Id.* at 24,593. Klamath River basin steelhead, part of the Klamath Mountains Province steelhead
6 ESU, remain a candidate species for listing under the ESA due to high risk factors. 63 Fed. Reg.
7 13347 (Mar. 19, 1998). Klamath River basin chinook suffer the same ill effects from Klamath
8 Project withdrawals.

9 21. In originally designating critical habitat for the SONCC coho salmon, NMFS
10 noted that “essential features” of coho habitat include water quantity, water velocity, and water
11 temperature. *See* Designated Critical Habitat: Central California Coast and Southern
12 Oregon/Northern California Coast Coho Salmon, 64 Fed. Reg. 24,049, 25,059 (May 5, 1999).
13 NMFS further concluded that irrigation water withdrawals and dam operations were “activities
14 that may require special management considerations” for juvenile coho salmon. *Id.* at 24,059.
15 Chinook salmon require the same habitat characteristics, and water withdrawals and dam
16 operations also affect chinook salmon habitat and populations.

17 22. The Klamath River below Iron Gate Dam was included in the designation of
18 critical habitat for SONCC coho salmon, *id.* at 24,062. On April 30, 2002, in *National*
19 *Association of Home Builders v. Evans*, No. 1:00-CV-02799 CKK (D.D.C.), a district court
20 approved a consent decree vacating 19 salmon and steelhead critical habitat designations,
21 including that for SONCC coho.

22 23. Concerned with continued drastic drops in salmon populations in the Klamath and
23 Trinity Rivers, Congress in 1984 enacted the Trinity River Basin Fish and Wildlife Management
24 Act of 1984, Pub. L. 98-541, noting the decreased flows in the Trinity River caused by
25 Reclamation’s operations and directing the Secretary of the Interior to develop a management
26 program for the river to restore fish levels. Subsequently in 1986, Congress enacted the Klamath
27 Basin Fishery Resources Restoration Act (“Klamath Restoration Act”), 16 U.S.C. § 460ss.
28 Among various causes of the declines in salmon, Congress cited “the construction and operations
of dams, diversions, and hydroelectric projects” which have contributed to, among other things,

1 “reduced flows . . . which ha[ve] significantly reduced the anadromous fish habitat in the
2 Klamath-Trinity River system.” 16 U.S.C. § 460ss(3).

3 B. BOR’s Management of Water in the Klamath Basin

4 24. Congress authorized construction and development of the Klamath Project in
5 1905, pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, which is part of the
6 Reclamation Act of 1902, 43 U.S.C. § 372 *et seq.* Various project facilities were built between
7 1906 and 1966. The Project consists of several major dams, including Link River Dam, Clear
8 Lake Dam, and Gerber Dam, as well as various canals and pumping stations. BOR’s project
9 operations determine the level, timing, and rate of water flow in the Klamath River below Iron
10 Gate Dam.

11 25. The project provides irrigation water to approximately 200,000 acres of
12 agricultural land each year. The project also supplies water for a system of wildlife refuges
13 operated by the U.S. Fish and Wildlife Service (“FWS”). Four national wildlife refuges – Lower
14 Klamath, Tule Lake, Clear Lake, and Upper Klamath – lie within the boundaries of the project.

15 26. Pursuant to a 1956 contract with BOR, PacifiCorp, a private corporation, operates
16 the Project’s Link River Dam. PacifiCorp also owns and operates several downstream dams on
17 the Klamath River for hydroelectric power generation, including the Iron Gate Dam in Northern
18 California. These projects are operated pursuant to a Federal Energy Regulatory Commission
19 (“FERC”) license that sets certain minimum instream flows at Iron Gate Dam.

20 27. Operation of the Klamath Project has a major impact on flows in the Klamath
21 River downstream of Iron Gate Dam and on the habitat of anadromous fish in both the Klamath
22 and Trinity Rivers. Since 1996, BOR has operated the Klamath Project with annual operating
23 plans that designate or identify minimum flow levels in the Klamath River downstream of Iron
24 Gate Dam. These plans identify flows that are likely to be met – after agricultural diversions are
25 satisfied – during particular times of the year in terms of the cubic feet per second (“cfs”) of
26 water as measured flowing past Iron Gate Dam.

27 C. Endangered Species Act Consultation

1 28. The Administrative Procedure Act (“APA”) authorizes courts reviewing agency
2 action to hold unlawful and set aside final agency action, findings, and conclusions that are
3 arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5
4 U.S.C. § 706(2)(A). Biological opinions issued pursuant to Section 7 of the ESA are reviewed
5 under this provision of the APA. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 175 (1997).

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

8 [e]ach federal agency shall, in consultation with and with the assistance of the
9 Secretary, insure that any action authorized, funded, or carried out by such agency
10 (hereinafter in this section referred to as an “agency action”) is not likely to
11 jeopardize the continued existence of any endangered species or threatened
12 species or result in the destruction or adverse modification of habitat of such
13 species which is determined by the Secretary . . . to be critical. . . .

14 16 U.S.C. § 1536(a)(2).

15 30. Section 9 of the ESA prohibits “take” of listed species by anyone, including
16 federal agencies. 16 U.S.C. § 1538. “Take” means to “harass, harm, pursue, hunt, shoot, wound,
17 kill, trap, capture, or collect.” 16 U.S.C. § 1532(19). NMFS has defined “harm” to include
18 “significant habitat modification or degradation which actually kills or injures fish or wildlife by
19 significantly impairing essential behavioral patterns, including breeding, spawning, rearing,
20 migrating, feeding or sheltering.” 50 C.F.R. § 222.102. “Take” by federal agencies is permitted
21 only if the agency receives an Incidental Take Statement (“ITS”) pursuant to Section 7(b)(4),
22 upon completion of formal consultation. 16 U.S.C. § 1536(b)(4).

23 31. As part of any ITS, NMFS must specify “the impact of such incidental taking on
24 the species” -- quantifying by amount or extent the allowed incidental take. 16 U.S.C. §
25 1536(b)(4)(C)(i). Such a statement of impact makes explicit the basis for NMFS’ required
26 finding that an incidental take will not jeopardize the species, 16 U.S.C. § 1536(b)(4), and it
27 provides a check on the adequacy of NMFS’ “reasonable and prudent measures . . . necessary or
28 appropriate to minimize such impact.” 16 U.S.C. § 1536(b)(4)(C)(ii).

 32. Section 7 of the Act also establishes an interagency consultation process to assist
federal agencies in complying with their duty to avoid jeopardy to listed species, or destruction

1 or adverse modification of critical habitat. Under this process, a federal agency proposing an
2 action that “may affect” a listed species, including salmon and steelhead, must prepare and
3 provide to the appropriate expert agency, here NMFS, a “biological assessment” of the effects of
4 the proposed action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

5 33. Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency
6 initiates consultation on an action under ESA § 7(a)(2), it “shall not make any irreversible or
7 irretrievable commitment of resources with respect to the agency action which has the effect of
8 foreclosing the formulation or implementation of any reasonable and prudent alternative
9 measures which would not violate subsection (a)(2) of this section.” The purpose of ESA § 7(d)
10 is to maintain the status quo pending the completion of interagency consultation.

11
12 34. For those actions that may adversely affect a species, NMFS must review all
13 information provided by the action agency in the biological assessment, as well as any other
14 relevant information, to determine whether the proposed action is likely to jeopardize a listed
15 species or destroy or adversely modify its designated critical habitat. 50 C.F.R. § 402.14(h)(3).
16 This determination is set forth in a biological opinion from NMFS. *Id.*; 16 U.S.C. §
17 1536(b)(3)(A).

18 35. In formulating its biological opinion, NMFS must evaluate the “effects of the
19 action” together with “cumulative effects” on the listed species. 50 C.F.R. §§ 402.14(g)(3)-(4).
20 This multi-step analysis requires NMFS to consider:

21 a. the direct, indirect, interrelated, and interdependent effects of the proposed
22 action, 50 C.F.R. § 402.02;

23 b. the “environmental baseline” to which the proposed action will be added.

24 This baseline includes “all past and present impacts of all Federal, State, or private
25 actions and other human activities in the action area; the anticipated impacts of all
26 proposed Federal projects in the action area that have already undergone formal or early
27 section 7 consultation; and the impact of State or private actions which are
28 contemporaneous with the consultation in progress,” 50 C.F.R. § 402.02; and,

1 c. any “future State or private activities, not involving Federal activities, that
2 are reasonably certain to occur within the action area of the Federal action subject to
3 consultation,” 50 C.F.R. § 402.02.

4 36. The regulations do not, however, permit NMFS to consider the effects of future
5 federal actions when determining whether a proposed federal action will jeopardize a listed
6 species. *Id.*; see also 51 Fed. Reg. 19933 (June 3, 1986) (Interagency Cooperation – Endangered
7 Species Act of 1973, as Amended; Final Rule) (“Since all future Federal actions will at some
8 point be subject to the section 7 consultation process pursuant to these regulations, their effects
9 on a particular species will be considered at that time and will not be included in the cumulative
10 effects analysis.”). Such future federal actions also are not properly a part of the environmental
11 baseline since they have not yet occurred.

12 37. If, based upon an analysis of these factors, NMFS concludes that the proposed
13 action is likely to jeopardize a listed species, or destroy or adversely modify its critical habitat,
14 NMFS must identify and describe any reasonable and prudent alternative (“RPA”) to the
15 proposed action that it believes would avoid jeopardy and adverse habitat modification. 16
16 U.S.C. § 1536(b)(3)(B). An RPA may only consist of measures that are within the scope of the
17 action agency’s legal authority and jurisdiction, that can be implemented consistent with the
18 purpose of the proposed action, and that will avoid jeopardizing the continued existence of the
19 listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.02. The effects of an RPA must be
20 analyzed under the same Section 7 framework described above as an action proposed by an
21 action agency.

22 D. BOR’s Past Consultation Efforts

23 38. In 1999, BOR consulted with NMFS regarding the impacts of the 1999
24 Operations Plan on listed coho salmon under Section 7(a)(2) of the ESA. The biological opinion
25 that NMFS issued in July of 1999 (“1999 BiOp”) found that operation of the Klamath Project,
26 and its associated water diversions, withdrawals, temperature impacts, and pollutant loadings
27 would adversely affect listed coho salmon. The 1999 BiOp described how inadequate flows and
28 sudden changes in flow level result in stranding of anadromous fish and the destruction of usable

1 habitat. The 1999 BiOp also concluded that higher flows in the Klamath River are associated
2 with increased juvenile salmon survival. Nevertheless, NMFS found that the Project was not
3 likely to jeopardize coho salmon.

4 39. In 2000, BOR's Operation Plan again specified minimum flow levels that varied
5 on a monthly or bi-weekly basis, but BOR never completed the requisite ESA consultation.
6 BOR's failure to follow the law led this Court to rule that "[d]espite the weight which the Ninth
7 Circuit repeatedly has placed upon the procedural requirements of the ESA, it is clear that the
8 Bureau of Reclamation failed to comply with these requirements before implementing its 2000
9 Operations Plan for the Klamath Project." *Pacific Coast Fed'n of Fishermen's Ass'ns v. United*
10 *States Bureau of Reclamation*, 138 F. Supp.2d 1228, 1242-43 (N.D. Cal. 2001).

11 40. On April 6, 2001, NMFS issued a formal biological opinion on the impacts of the
12 Klamath Project for the 2001 season. This biological opinion found that the proposed operation
13 of the Klamath Project was likely to jeopardize the continued existence of Klamath River coho
14 salmon and adversely modify their critical habitat. Based on this jeopardy finding, NMFS set
15 forth a reasonable and prudent alternative for Project operation with specific monthly flows that
16 it found were the minimum necessary to prevent jeopardy to the coho salmon in a near-record
17 drought year. This biological opinion expired by its terms on March 31, 2002.

18 41. On February 25, 2002, BOR issued its Final Biological Assessment: "The Effects
19 of Proposed Actions Related to Klamath Project Operation (April 1, 2002 - March 31, 2012) on
20 Federally-Listed Threatened and Endangered Species." In the Biological Assessment, BOR
21 determined its proposed plan of action "may affect" listed coho salmon. *Id.* at 93. BOR
22 submitted the biological assessment to NMFS and initiated formal ESA § 7(a)(2) consultation.

23 42. Because the irrigation season at the Klamath Project begins on April 1st of each
24 year, BOR once again could not complete formal ESA consultation, nor consultation with Indian
25 tribes, before commencing project operations. Rather than wait for the ongoing formal
26 consultation process for the entire operations plan to conclude, BOR determined that project
27 operations for April 1 - May 31, 2002 were "not likely to adversely affect" coho salmon for a
28 "Below Average" water year.

1 43. On March 27, 2002, BOR asked NMFS to informally concur in its “not likely to
2 adversely affect” finding, and one day later, NMFS issued its “not likely to adversely affect”
3 concurrence letter, stating that the agency “currently has no basis for contradicting your
4 determination.”

5 44. Plaintiffs challenged BOR’s failure to complete consultation prior to proceeding
6 with the 2002 operations and challenged NMFS’ concurrence letter. After a hearing on May 3,
7 2002, this Court denied plaintiffs’ motion for temporary restraining order, finding that although
8 plaintiffs were likely to succeed on the merits, they had not established the requisite irreparable
9 harm.

10 E. NMFS’ Ten-Year Biological Opinion

11 45. On May 31, 2002, NMFS issued its Biological Opinion: Klamath Project
12 Operations, June 1, 2002 - March 31, 2012 (“BiOp”). NMFS found the operation of the Klamath
13 Project as proposed is likely to jeopardize the continued existence of SONCC coho salmon and
14 to adversely modify their designated critical habitat.

15 46. After finding jeopardy, NMFS identified and described the RPA to the proposed
16 action that it believed would avoid jeopardy and adverse modification. 16 U.S.C. §
17 1536(b)(3)(B).

18 47. The RPA has five major components, including: specific water management
19 measures over the ten-year period; a water bank and water supply enhancement program for
20 flows in the Klamath River below Iron Gate dam; a long-term flow target; an inter-governmental
21 task force; and an inter-governmental research science panel.

22 48. In arriving at the final RPA requirements, NMFS had first proposed flows
23 necessary to prevent jeopardy to the species and prevent adverse modification of critical habitat.
24 BOR apparently rejected those flows “because they would result in deficiencies in deliveries to
25 project contractors of such a magnitude and frequency that the RPA flows could not be
26 considered reasonably to allow Reclamation to operate in a manner consistent with the intended
27 purpose of the project.” BiOp at 54.

1 49. The in-river flows identified by NMFS as necessary to prevent jeopardy are found
2 at Table 9. BiOp. at 70. These flows are less than those identified by Hardy and Addley,
3 Evaluation of Interim Instream Flow Needs in the Klamath River, Phase II (Nov. 21, 2001). *See*
4 BiOp at 5.

5 50. Although the in-river flows identified by NMFS are less than those identified in
6 Hardy and Addley, instead of devising a final RPA that required those flows below Iron Gate
7 dam, NMFS' RPA requires BOR to provide by 2006 only 57% of the flows, even though
8 "NMFS pointed out that establishing flows of only 57% of the RPA flows may not avoid
9 jeopardy over the 10-year period of proposed Project operations, and therefore would not
10 constitute a viable RPA." BiOp at 55.

11 51. NMFS' acceptance of BOR's proposal to base its share of the required flows on
12 the percentage of acres within the Klamath Basin irrigated by Project contractors ignores water
13 consumption and is not supported by evidence in the BiOp. BiOp at 55. Moreover, NMFS
14 provides no support in the BiOp for the calculation of irrigated acres.

15 52. According to NMFS, the remaining 43% of the flows it believes are needed for
16 salmon survival will come from unknown and voluntary sources to be identified at an unknown
17 time in the future through a yet undeveloped multi-agency task force. BiOp at 55.

18 53. The RPA does not require BOR to supply even its 57% of the long-term river
19 flows for several years, until at least 2006, even though NMFS found that operation of the
20 Klamath Project is currently causing jeopardy to the species.

21 54. In its ITS for the RPA, NMFS found that "some level of incidental take [is] to
22 occur due to implementation of some of the actions outlined in the reasonable and prudent
23 alternative." BiOp at 71. However, NMFS failed to quantify, either numerically or by extent,
24 the incidental take permitted under the Biological Opinion. Moreover, NMFS failed to evaluate
25 whether this unspecified level of take, combined with already-permitted levels of take for
26 SONCC coho, would jeopardize the continued existence of the species.

1 55. The only reasonable and prudent measures specified to minimize the likelihood of
2 take from ongoing operation of the Project are collection and analysis of data and further studies
3 to identify additional water supplies in the Klamath Basin.

4 56. Despite the failure to quantify take, NMFS found that reinitiation of consultation
5 was only required if the amount or extent of incidental take is exceeded. BiOp at 74.

6 57. In November 2002, NMFS' fisheries biologist Michael Kelly sought the
7 protection available to a "whistleblower" from the U.S. Office of Special Counsel. Mr. Kelly
8 disclosed that the Draft Biological Opinion prepared by NIMS in April 2002 was abruptly
9 altered at the behest of BOR and that those alterations lowered the minimum in-stream flow
10 levels below what fishery scientists believe necessary for the survival of coho salmon in the
11 Klamath river system.

12 F. The Tribe's Fishing Right

13 58. Since time immemorial, the fishery resources of the Klamath and Trinity Rivers
14 have been the mainstay of the life and culture of the Hoopa Valley Tribe. The fishery was "not
15 much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v.*
16 *Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381
17 (1905)). The salmon fishery also holds significant commercial and economic value in the Hoopa
18 culture and economies, and the Tribe holds property rights in the Klamath River Basin fishery.
19 The lower twelve miles of the Trinity River and a stretch of the Klamath River near the
20 confluence with the Trinity River flow through the Hoopa Valley Reservation. *See*
21 Memorandum from John D. Leshy, Solicitor of the Department of the Interior to the Secretary of
22 the Interior 3-4 (Oct. 4, 1993) (hereinafter 1993 Solicitor Opinion). The principal purpose of the
23 Tribe's Reservation was to set aside sufficient resources of these rivers for the Indians to be
24 self-sufficient and achieve a moderate living based on fish. *See* 1993 Solicitor Opinion 3, 15,
25 18-21, *cited with approval*, *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995), *cert. denied*,
26 518 U.S. 1016 (1996).

1 59. The Tribe’s federal reserved fishing right carries with it a corresponding right to
2 Klamath and Trinity River flow levels that are sufficient to support a productive habitat for the
3 Tribe’s anadromous fishery, including but not limited, to coho and chinook salmon.

4 G. Recent Events

5 60. At the end of April 2002, as BOR increased its irrigation deliveries and Klamath
6 River flows dropped accordingly, and an unknown number of chinook and coho fry were
7 stranded in disconnected channels and died.

8 61. Three days after release of the BiOp, BOR announced that it would operate the
9 Project in accordance with the RPA for the 2002 irrigation season, but that it would not comply
10 with the RPA in future years. Specifically, BOR rejected NMFS’ RPA with respect to any
11 requirement to find the unidentified, and yet necessary, 43% of Klamath River flows. Letter to
12 Rodney R. McInnis, NMFS Acting Regional Administrator, from Kirk Rodgers, BOR Regional
13 Director (June 3, 2002).

14 62. Contrary to the requirements of the Klamath BiOp, which mandates that BOR
15 provide flows in 2002 “for a below average water year,” in July 2002, BOR unilaterally
16 reclassified the water year as “dry” and further reduced the flows in the Klamath River below
17 Iron Gate dam. BiOp at 59. The Tribe was not adequately consulted about the change.

18 63. Adult chinook and coho salmon migrate up the Klamath River to the Trinity River
19 and other streams and tributaries from mid-September through early November to spawn. All
20 migrating salmon from the Trinity River must use the mainstem of the Klamath River as their
21 corridor to and from the sea. BiOp at 39. Beginning September 19, 2002, adult chinook and
22 coho salmon began dying by the thousands between the mouth of the Klamath River and Blue
23 Creek as they returned to the Klamath River and encountered low river flows. Over 23,000 died
24 in, approximately, the next ten days. Data collected and analyzed by tribal biologists shows that
25 low flow levels in this reach of the Klamath River were a substantial contributing factor to the
26 salmon mortality.

27 64. At the beginning of the fish mortality, the flows at Iron Gate Dam were
28 approximately 750 cubic feet per second. On September 27, 2002, BOR, in response to the

1 salmon kill, ordered flows at Iron Gate Dam to be increased to 1,300 cubic feet per second, an
2 increase of approximately 550 cfs. Following the increase, the salmon mortality substantially
3 abated. On October 11, 2002, BOR began ramping down Iron Gate Dam flows to approximately
4 850 cfs.

5 CLAIMS FOR RELIEF

6 FIRST CLAIM FOR RELIEF

7 Violation of the ESA and APA by NMFS 8 For Failing to Propose a Reasonable and Prudent Alternative That Prevents Jeopardy

9 65. NMFS has violated the requirements of ESA section 7 and its implementing
10 regulations by arbitrarily and capriciously concluding in the BiOp that the actions set forth in the
11 RPA are not likely to jeopardize any listed species, and by issuing a BiOp that is otherwise not in
12 accordance with law. The defects in the BiOp include, but are not limited to, the following:

- 13 bf. NMFS' assessment of why the steps it proposes in the BiOp's RPA will avoid
14 jeopardy relies extensively on speculative and voluntary actions by other federal
15 agencies, as well as state and private entities, in areas unrelated to Project
16 operations and beyond the control or authority of BOR, contrary to the
17 requirements of the ESA and its implementing regulations;
- 18 bg. In the RPA, NMFS arbitrarily apportioned BOR's responsibility for flow levels to
19 prevent jeopardy at 57% of the flows identified by NMFS as necessary. The RPA
20 rationalizes this figure as reflecting the fraction of irrigated land in the Klamath
21 Basin served by the project – an allocation that is questionable and that bears no
22 relationship to the water consumption from the Project that the RPA admits is
23 jeopardizing coho;
- 24 bh. The RPA does not require BOR to supply its 57% of the long-term river flows for
25 several years, even though NMFS found that the low river flows are currently
26 causing jeopardy; and
- 27 bi. The long-term flow objectives are not based on the best available science.

1 66. NMFS' actions and omissions are arbitrary, capricious, an abuse of discretion,
2 and otherwise not in accordance with the ESA and are reviewable under the APA, 5 U.S.C. §§
3 701-706.

4 **SECOND CLAIM FOR RELIEF**

5 Violation of the ESA and APA by NMFS
6 For Failing to Quantify Incidental Take

7 67. Section 7 requires that, as part of any incidental take statement, NMFS must
8 specify "the impact of such incidental taking on the species." 16 U.S.C. § 1536(b)(4)(C)(i).
9 Such a statement of impact makes explicit the basis for NMFS' required finding that an
10 incidental take will not jeopardize the species. 16 U.S.C. § 1536(b)(4). Moreover, it provides a
11 check on the adequacy of NMFS' "reasonable and prudent measures . . . necessary or appropriate
12 to minimize such impact," 16 U.S.C. § 1536(b)(4)(C)(ii). By furnishing an estimate of the
13 anticipated impact of the take on a species, it provides a concrete measure of the extent to which
14 that take has been minimized and mitigated. Additionally, the requirement to specify the amount
15 of incidental take on the species provides a trigger for reinitiating consultation.

16 68. NMFS violated § 7(b)(4) of the ESA, 16 U.S.C. § 1536(b)(4), by issuing an
17 incidental take statement that fails to quantify the amount of incidental take of threatened
18 Klamath River coho salmon and fails to evaluate whether this unspecified level of take,
19 combined with already-permitted levels of take for SONCC coho, would jeopardize the
20 continued existence of the species.

21 69. NMFS' actions and omissions are arbitrary, capricious, an abuse of discretion,
22 and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §§
23 701-706.

24 **THIRD CLAIM FOR RELIEF**

25 Violation of the ESA and APA by NMFS
26 For Failing to Include and Implement All Reasonable and Prudent Measures

27 70. ESA § 7(b)(4) requires NMFS to issue an incidental take statement whenever a
28 proposed federal agency action or RPA will not jeopardize a protected species but will result in

1 incidental take of members of the species. 16 U.S.C. § 1536(b)(4). The incidental take
2 statement must specify “those reasonable and prudent measures that the Secretary considers
3 necessary or appropriate to minimize such impact” and “the terms and conditions . . . that must
4 be complied with by the Federal agency . . . to implement the measures.” *Id.*

5 71. The only reasonable and prudent measures specified to minimize the likelihood of
6 take from ongoing operation of the Project are collection and analysis of data, and further studies
7 to identify additional water supplies in the Klamath Basin.

8 72. NMFS violated § 7(b)(4) of the ESA, 16 U.S.C. § 1536(b)(4), by issuing an
9 incidental take statement that fails to include the reasonable and prudent measures necessary to
10 minimize incidental take of threatened Klamath River coho salmon.

11 73. NMFS’ actions and omissions are arbitrary, capricious, an abuse of discretion,
12 and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §§
13 701- 706.

14 **FOURTH CLAIM FOR RELIEF**

15 **Violation of the Defendants’ Trust Responsibility to the Hoopa Valley Tribe to**
16 **Protect and Preserve the Tribe’s Federal Reserved Fishing Right**

17 74. Federal law requires BOR to permit water flow levels below Iron Gate Dam of
18 sufficient quantity, quality, and timing to support a productive and viable anadromous fishery in
19 the Klamath River.

20 75. BOR violated that legal duty by failing to provide biologically adequate flows in
21 2002 and by operating the Klamath Irrigation Project in a manner that contributed to the deaths
22 of over 23,000 adult chinook and threatened coho salmon.

23 76. The requirements to provide habitat and sufficient water to protect salmon
24 populations, and correspondingly, the Hoopa Valley Tribe’s livelihood, have been well known
25 since the Hoopa Valley Reservation was created and the Tribe’s federally reserved fishing right
26 was secured in 1864.

27 77. Both NMFS and BOR have a federally mandated trust responsibility to the Tribe
28 to take affirmative steps to avoid injury to and to protect and enhance the Tribe’s

1 anadromous fishery, including providing sufficient flows to make that right
2 meaningful.

3 78. NMFS's and BOR's actions and omissions placing the needs of other water users
4 above those of the Tribe are arbitrary, capricious, and abuse of discretion, and otherwise not in
5 accordance with the law and are reviewable under the APA, 5 U.S.C. §§ 701-706.

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PRAYER FOR RELIEF

WHEREFORE, plaintiff-intervenor applicant Tribe respectfully requests that this Court:

- A. Determine and declare that NMFS has violated ESA section 7 and its implementing regulations by making a no-jeopardy finding in the Klamath BiOp for the RPA and issuing an incidental take statement that is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;
- B. Enjoin NMFS to withdraw the BiOp, the RPA, and the accompanying incidental take statement, notify BOR of these withdrawals, and reinstate consultation with BOR in order to prepare a legally adequate biological opinion for Klamath Project operations and any related actions that complies with the requirements of the ESA, on a schedule to be set by the Court;
- C. Determine and declare that BOR has violated the fishing and water rights of the Tribe, and failed to satisfy its trust responsibility to the Tribe, by interfering with biologically adequate flow levels to support anadromous fish populations in the Klamath-Trinity River system;
- D. Order BOR to limit irrigation water deliveries from the Klamath Project in order to implement an interim flow regime in the Klamath River below Iron Gate Dam that will protect anadromous fish pending BOR's full compliance with its obligations under the ESA, and with its trust obligation to protect the Tribe's fishing rights;
- E. Grant such restraining orders and/or preliminary and permanent injunctive relief as plaintiffs and plaintiff-intervenor applicant may from time to time request to ensure that the Klamath River anadromous fishery does not continue to suffer irreparable harm pending resolution of the merits of this action;
- F. Award plaintiffs and plaintiff-intervenor applicant their reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(4), and the Equal Access to Justice Act, 28 U.S.C. § 2412; and

1 G. Grant plaintiffs and plaintiff-intervenor applicant such further and additional
2 relief as the Court may deem just and proper.

3 DATED this ___ day of December, 2002.

4 Respectfully submitted,

5
6 Thomas P. Schlosser WSBA# 06276
7 MORISSET, SCHLOSSER, HOMER, JOZWIAK
8 & McGAW
9 Suite 1115 Norton Building
10 801 Second Avenue
11 Seattle, WA 98104-1509
12 Telephone: (206) 386-5200
13 Facsimile: (206) 386-7322
14 E-mail: t.schlosser@msaj.com

15 *Attorney for Plaintiff-Intervenor Applicant,*
16 *Hoopa Valley Tribe*

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