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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

HOOPA VALLEY TRIBE,

Plaintiff,

v.

U.S. BUREAU OF RECLAMATION

and

NATIONAL MARINE FISHERIES SERVICE,

Defendants.

CASE NO. 3:16-cv-04294-WHO

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY (DN 33)

Date: January 11, 2017
Time: 2:00 p.m.
Judge: Honorable William H. Orrick
Location: Courtroom 2, 17TH Floor

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I. INTRODUCTION

Plaintiff concedes that it cannot maintain its claim against the National Marine Fisheries Service ("NMFS") for allegedly committing unlawful "take" of coho salmon (Count III),[1] presumably because – as Federal Defendants explained in their motion to dismiss – NMFS does not operate the Klamath Project. It is for that same basic reason that Plaintiff also cannot maintain its failure to consult claims against NMFS (Counts I & IV). The duty to consult under both the Endangered Species Act ("ESA") and the Magnuson-Stevens Act ("MSA") lies solely with the action agency, not NMFS. Plaintiff's contention that NMFS becomes independently responsible for reinitiating consultation under the ESA on actions authorized, funded, or carried out by other agencies by virtue of completing consultation with such agencies has no support in the statute and is flatly contradicted by the implementing regulations and the ESA Section 7 Consultation Handbook. Plaintiff simply ignores these directly contrary authorities, which should be dispositive of Count I as alleged against NMFS. Similarly, Count IV does not state a claim against NMFS for failure to consult under the MSA because it does not allege NMFS has received an essential fish habitat assessment, which is necessary for NMFS to consult.

Plaintiff argues that Count III is cognizable against the U.S. Bureau of Reclamation ("Reclamation") because the claim seeks to preemptively enjoin future "takings" of coho in alleged violation of ESA Section 9, proffering an extra-record declaration as support. Putting aside the facts that: (1) Plaintiff fails to show that its declaration could be considered in deciding this case, which is not subject to *de novo* fact finding; (2) it is undisputed that Reclamation has not exceeded its incidental take limit in 2016; and (3) the record evidence shows no exceedance is "imminent" and "reasonably certain to occur," Count III fails to state a claim for relief because takings in excess of an incidental take limit are not unlawful if the action agency is in compliance with the terms and conditions set forth in its incidental take statement ("ITS"). Count III does not allege that Reclamation is out of compliance with the terms and conditions in the ITS, and thus Count III would not state a claim for relief even if the alleged facts were true.

[1] Pl's Opp. to Fed. Defs' Mot. to Dismiss at 21 n.11 (stipulating to the dismissal of Count III against NMFS) (DN 44) ("Pl's Opp.").

In any event, this Court need not reach the merits of Plaintiff's complaint because, as Federal Defendants have explained, Reclamation and NMFS expect to complete the ESA and MSA consultations at issue long before this case likely would be decided on the merits. Plaintiff's contention that its ESA claims are not prudentially moot is based on several serious mischaracterizations of the ESA. The law is clear that a biological opinion ("BiOp") and ITS are not automatically invalidated when consultation is reinitiated and, consequently, that reinitiation of consultation does not mandate preparation of an entirely new BiOp and ITS. Thus, Plaintiff's contention that Reclamation and NMFS will not lawfully complete reinitiation of formal ESA consultation has no support in the law. Plaintiff offers no principled argument as to why its MSA claim is not prudentially moot. This Court therefore can and should dismiss the complaint as prudentially moot or, in the alternative, stay it until April 24, 2017.

II. ARGUMENT

A. Count I Is Not Cognizable Against NMFS

Plaintiff concedes that Count I is not cognizable against NMFS under the ESA citizen suit provision but asserts that it is cognizable "under the APA." Pl's Opp. at 9. That is incorrect. Plaintiff simply ignores the fact that the ESA, its implementing regulations, and the Section 7 Consultation Handbook all squarely demonstrate that NMFS has no independent duty to reinitiate consultation. FDs' Mem. Supp. Mot. to Dismiss at 10 (DN 33) ("FDs' Mem."); *contra* Pl's Opp. at 8-13. These authorities should be dispositive of Count I as alleged against NMFS.

Beginning with the statute, the parties agree that Section 7 places the duty to consult in the first instance solely on the action agency. FDs' Mem. at 10-11; Pl's Opp. at 10. Plaintiff contends, however, that the consulting agency inherits independent responsibility for reinitiating consultation on the action agency's action once it completes consultation with the action agency because reinitiation "arises under circumstances that directly relate to the validity of the consulting agency's own BiOp and ITS." Pl's Opp. at 10. Plaintiff identifies no support for its contention in the statute and there is none. To the contrary, the ESA places responsibility for consulting solely on the agency that is taking the action affecting listed species, because that is the entity with the duty to ensure that its action avoids jeopardy. 16 U.S.C. § 1536(a)(2); FDs'

Mem. at 10-13 (citing authorities). This does not change after consultation is completed and a BiOp and ITS are issued. To the contrary, in discussing the exact circumstances that Plaintiff alleges have occurred here, Congress stated that the action agency bears the duty to reinitiate consultation. H.R. Rep. No. 97-567, at 27 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2827 ("If the specified impact on the species is exceeded, the Committee expects that *the Federal agency or permittee or licensee* will immediately reinitiate consultation . . .") (emphasis added). This flows from the fact that "[t]he consultation process is designed to *assist Federal agencies* in complying with the requirements of section 7 and provide[] such agencies with *advice and guidance from the Secretary [i.e., NMFS]* on whether an action complies with the substantive requirements of section 7." 51 Fed. Reg. 19926 (June 3, 1986) (emphasis added); *see also id*. at 19928, 19953. Hence, reinitiation concerns action by the action agency, not NMFS.

The ESA's regulations leave no room for debate on this point, stating unequivocally that "[i]f during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, *the Federal agency must reinitiate consultation* immediately." 50 C.F.R. § 402.14(i)(4) (emphasis added); *accord* 51 Fed. Reg. at 19954 (NMFS and FWS explaining that "Paragraph (i)(4) requires *the Federal agency or the applicant* to immediately request reinitiation of formal consultation if the specified amount or extent of incidental take is exceeded") (emphasis added). Section 402.14(i)(4) is directly on point here[2] and should be dispositive of Count I insofar as it is alleged against NMFS. Plaintiff offers no response to Section 402.14(i)(4) (FDs' Mem. at 11) because there is none. Section 402.14(i)(4) squarely refutes Count I as asserted against NMFS.

Ignoring Section 402.14(i)(4), Plaintiff instead relies on Section 402.16 (Pl's Opp. at 8), which provides no basis for asserting Count I against NMFS. Section 402.16 states, in pertinent part: "Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law." 50 C.F.R. § 402.16. Plaintiff emphasizes the word

[2] *Contra* Pl's Opp. at 9 (erroneously asserting that Federal Defendants' motion to dismiss Count I was based "entirely on authorities that relate to initiation of consultation in the first instance").

"shall" (Pl's Opp. at 8), but all that "shall" refers to is *requesting* reinitiation. FDs' Mem. at 12. NMFS and FWS made this clear when they promulgated Section 402.16 in 1986. 51 Fed. Reg. at 19956 (explaining that the consulting agencies lack the "authority to *require* Federal agencies to reinitiate consultation if they choose not to do so . . . . [but that they] *shall request* reinitiation when [they] believe[] that any condition described in this section applies") (emphasis added). Thus, while Section 402.16 enumerates the circumstances under which consultation "is required," it notably does not make the consulting agencies responsible for doing so, particularly when read together with Section 402.14(i)(4). Indeed, Section 402.16(c) plainly applies only to the action agency, as the consulting agency would not necessarily know when "the identified action is subsequently modified" by the action agency. 50 C.F.R. § 402.16(c). In sum, the ESA's regulations do not grant NMFS the authority that Count I accuses it of failing to exercise.[3]

The consulting agencies' joint ESA Section 7 Consultation Handbook also should be dispositive of Count I as asserted against NMFS. The Handbook expressly states that "[t]he *action agency* is responsible for reinitiating consultation should their actions result in exceeding the level of incidental take." Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act, at 2-5 (emphasis added); *accord id*. at 4-64 ("When the action agency determines that one or more of the four conditions requiring reinitiation of formal consultation has occurred, consultation must be reinitiated. Similarly, if the Services recognize that any of these conditions have occurred, written advice is provided to the action agency of the need to reinitiate consultation"); *id*. at 2-11 ("the Services' can not [sic] require Federal agencies to reinitiate consultation if they choose not to do so").[4] As with Section 402.14(i)(4), Plaintiff offers no

[3] Plaintiff attempts to sidestep NMFS' lack of authority to compel reinitation by declaring it "not at issue here" (Pl's Opp. at 11), but it is at the very heart of the issue. NMFS' lack of authority to compel reinitiation is incompatible with having an independent legal duty to reinitiate. FDs' Mem. at 12. Furthermore, Plaintiff cannot redress Reclamation's alleged failure to reinitate by suing NMFS, which cannot compel reinitation. *Id*. at 13. Plaintiff's only response to the lack of redressability of Count I is to repeat its erroneous argument that NMFS has the authority to compel Reclamation to reinitiate. Pl's Opp. at 12-13.

[4] *See* http://www.nmfs.noaa.gov/pr/laws/esa/policies.htm#consultation (last visited 11/16/2016).

response to the Consultation Handbook (FDs' Mem. at 11-12) because there is none.[5] In sum, the ESA (16 U.S.C. § 1536(a)(2)), its implementing regulations (50 C.F.R. § 402.14(i)(4)), and the Consultation Handbook (at 2-11, 4-64) all refute Count I as asserted against NMFS.

Plaintiff's assertion that the Ninth Circuit has "rejected the argument made by Federal Defendants here" (Pl's Opp. at 8) is incorrect. As an initial matter, Plaintiff ignores the fact that the Ninth Circuit has held that the consulting agency "lacks the authority to require the initiation of consultation," *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1070 (9th Cir. 2005), which is true with respect to both consultation in the first instance as well as reinitiated consultation, and refutes Count I as asserted against NMFS. FDs' Mem. at 12. Furthermore, the Ninth Circuit did not even consider, much less decide, whether consulting agencies have an independent legal obligation to reinitiate consultation in any of the cases cited by Plaintiff. In *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220 (9th Cir. 2008), the Court considered whether there was sufficient causation and redressability to bring a claim *at all* for failure to reinitiate consultation on the U.S. State Department's decision to enter into a treaty with Canada given that the Court lacked the authority to rescind that action. The statement in the opinion that the "duty to reinitiate consultation lies with both the action agency and the consulting agency" (545 F.3d at 1229) is dicta, as it appears gratuitously, and in passing as part of a cursory mention of Section 402.16. *Id*. That the statement is dicta is confirmed by the Court's actual holding that the "ESA's citizen-suit provision authorizes the groups to bring suit *against the State Department, as the action agency*, for failure to comply with its ESA obligations." *Id*. at 1229 (emphasis added, citation omitted). The Court made no mention of an independent claim against the consulting agency. The same is true of the other Ninth Circuit opinion cited by Plaintiff, *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059 (9th Cir. 2004). Pl's Opp. at 8. The issue in this case was neither presented nor decided in *Gifford Pinchot*.

[5] The Services' interpretations of their own consultation regulations that are reflected in the Handbook are entitled to deference given that FWS and NMFS published the Handbook after providing an opportunity for public comment. 60 Fed. Reg. 8729 (Feb. 15, 1995); *Christensen v. Harris Cty*., 529 U.S. 576, 587 (2000).

Plaintiff also relies on *Pacificans for a Scenic Coast v. Cal. DOT*, Case No. 15-cv-02090-VC, 2016 WL 4585768 (N.D. Cal. Sept. 2, 2016) (Pl's Opp. at 9), which is neither controlling nor persuasive. As an initial matter, the *Pacificans* court's actual ruling is unclear, as the court may have conflated an independent duty to reinitiate consultation with a duty to request reinitiation. Specifically, although the opinion purports to hold that the consulting agency has an independent duty to reinitiate consultation, it states that discharging such duty "would not be especially burdensome" because the agency "could presumably satisfy [its] duty by simply *requesting* that [the action agency] reinitiate consultation before reauthorizing or funding the project." *Id*. at *12 (emphasis added). The opinion does not explain how an independent duty to reinitiate could be discharged by merely requesting it. Indeed, *Pacificans* includes only a cursory discussion of the reinitiation issue, and makes no mention of 50 C.F.R. § 402.14(i)(4) or the Consultation Handbook, both of which, as explained above, are directly contrary to the holding purportedly reached on this point. The only support the opinion cites is *Salmon Spawning* and 50 C.F.R. § 402.16 which, in reality, are no support at all. For these reasons, this Court should not be guided by *Pacificans*.

Plaintiff next contends that Count I is cognizable against NMFS because NMFS can "effectively" compel reinitiation by submitting a "reinitiation notice or request," which causes any BiOp and ITS provided to the action agency to "lose their force and validity." Pl's Opp. at 11. Even if this contention was correct (which it is not), it would not be a basis for a cognizable claim under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1). NMFS' alleged failure to "effectively" compel reinitiation does not implicate a "*discrete* agency action that [NMFS] is *required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) ("*SUWA*"). To the contrary, Plaintiff's contention that NMFS can "effectively" compel reinitiation of consultation is an implicit concession that NMFS lacks the actual legal authority to do so. This Court should reject Plaintiff's "effective" authority argument and disregard the cases cited in support thereof (Pl's Opp. at 11) for this reason alone. NMFS' ability to invalidate a BiOp and ITS has no bearing on whether it has an independent duty to reinitiate consultation. As

explained above, the duty to reinitiate is a function of the duty to avoid jeopardy, which the action agency alone bears. 50 C.F.R. § 402.14(i)(4); Consultation Handbook, 2-11, 4-64.

Furthermore, Plaintiff's "effective" authority argument is contrary to law. As explained above, a consulting agency cannot unilaterally reinitiate consultation with a "reinitiation notice or request" as Plaintiff asserts (Pl's Opp. at 11), and when an action agency reinitiates consultation, the BiOp and ITS do not automatically "lose their force and validity." *Defs. of Wildlife v. Bureau of Ocean Energy Mgmt.*, 684 F.3d 1242, 1252 (11th Cir. 2012) (finding "no precedent in our circuit to support Petitioners' argument that BOEM's choice to reinitiate consultation with NMFS and FWS automatically renders the former biological opinions invalid. The biological opinions . . . were reconfirmed in 2008 and 2009, and have not been withdrawn despite reinitiation of consultations") (footnotes omitted); *Mayo v. Jarvis*, No. CV 14-1751 (RC), 2016 WL 1254213 (D.D.C. Mar. 29, 2016), *29, *amended* 2016 WL 4083308 (D.D.C. Aug. 1, 2016) (finding "no authority for [the] proposition that, whenever the FWS reinitiates formal consultation, the consultation must result in the production of a new, full-blown BiOp").

The ESA's regulations state that, if the specified amount or extent of incidental take is exceeded, reinitiation of consultation is required; take in exceedance of the ITS limit does not automatically render an existing BiOp and ITS invalid. *Id.*; 50 C.F.R. § 402.14(i)(4); *infra* § II.B.1. This is logical where, as here, an agency assiduously adheres to the terms and conditions of the ITS but, due to outside circumstances (*i.e.*, drought), a higher-than-anticipated level of take occurs. The agency should reexamine the impacts of its action, not suddenly be subject to potential criminal liability. Consistent with this reading, NMFS and FWS have explained that:

> Exceeding the level of anticipated taking does not, by itself, require the stopping of an ongoing action during reinitiation of consultation. The Federal agency must make this ultimate decision, taking into consideration the prohibitions of sections 7(a)(2) and 7(d).

51 Fed. Reg. at 19954; *accord* H.R. Rep. No. 97-567, at 27 ("In the interim period between the initiation and completion of the new consultation, the Committee would not expect the Federal agency . . . to cease all operations unless it was clear that the impact of the additional taking would cause an irreversible and adverse impact on the species"). Requiring reinitiation rather

than invalidation of the BiOp and ITS does not "allow[] the 'jeopardy' ceiling to be exceeded" because "[i]t is not expected that the level of incidental take anticipated for most 'no jeopardy' actions would come close to the section 7(a)(2) [jeopardy] barrier." 51 Fed. Reg. at 19954. If such a high taking level was necessary to exempt the incidental takings from a proposed action, then "it is questionable whether the issuance of a 'no jeopardy' opinion is appropriate." *Id.*

Lastly, the Ninth Circuit decisions that Plaintiff cites in support of its "effective" authority argument (Pl's Opp. at 11) actually refute Count I as asserted against NMFS. In *Ctr. for Biol. Div. v. BLM*, 698 F.3d 1101 (9th Cir. 2012), the Ninth Circuit observed, citing *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031, 1034-35 (9th Cir. 2007), and 50 C.F.R. §§ 402.14(i)(4), 402.16(a), that "[i]f the amount or extent of incidental taking is exceeded, *the action agency* 'must immediately reinitiate consultation with the FWS.'" *Id.* at 1108 (emphasis added, citation omitted); *accord Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056-57 (9th Cir. 1994) ("affirm[ing] the district court's order requiring *the Forest Service* to reinitiate consultation under § 7(a)(2)") (emphasis added); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1450 (9th Cir. 1992) (plaintiff alleging that "*the Forest Service* was required to reinitiate formal consultation with the Fish and Wildlife Service" pursuant to ESA Section 7, which "requires *a 'Federal agency'*—in this case, the Forest Service—to initiate formal consultation with the Fish and Wildlife Service") (emphasis added). None of the aforementioned decisions held that a consulting agency has an independent duty to reinitiate consultation.

Moreover, the aforementioned decisions have no bearing on the validity of the BiOp and ITS here. In *Allen*, 476 F.3d 1031, the consulting agency had partially withdrawn the BiOp in accordance with *Gifford Pinchot*, 378 F.3d 1059, which had rendered it invalid. *Id.* at 1035. Here, in stark contrast, NMFS has confirmed that the effects analysis and conclusions of the BiOp "remain valid." FDs' Mem. at 19. *Ctr. for Biol. Div.* is similarly inapposite here, and the statement that an "original biological opinion loses its validity as does its accompanying incidental take statement" (Pl's Opp. at 11) is also dicta. As support for the assertion, *Ctr. for Biol. Div.* cites *Allen*, 476 F.3d 1031 – which is inapposite – and page 4-23 of the Consultation Handbook. Page 4-23 of the Handbook concerns the environmental baseline analysis in a BiOp,

stating that it is appropriate for the consulting agency to exclude the effects of other agency actions if, among other things, "a biological opinion for the proposed action (*not an ongoing action*) is no longer valid because reinitiation of consultation is required and the action agency has been so informed in writing by the Services, or has requested that the Services reinitiate consultation." Handbook at 4-23 (emphasis added). In this case, by contrast: (1) the BiOp's environmental baseline analysis is not at issue; (2) operation of the Klamath Project *is* an ongoing action; (3) NMFS has confirmed that the effects analysis and conclusions of the BiOp remain valid (FDs' Mem. at 19); and (4) the applicable section of the Consultation Handbook is "Procedures for Modifying Biological Opinions and Incidental Take Statements" which, as the name would suggest, advises that reinitiation of consultation may be completed without preparing a new BiOp and ITS (Handbook at 4-64; FDs' Mem. at 19, 24).

The quotation from *Mt. Graham*, 954 F.2d at 1451, that "[r]einitiation of consultation requires the [consulting agency] to issue a new Biological Opinion before a project may go forward" (Pl's Opp. at 11) is – as the Eleventh Circuit has noted – not entitled to "any weight since [the] ESA has no such requirement." *Defs. of Wildlife*, 684 F.3d at 1252 n.4; *accord Oceana v. BOEM*, 37 F. Supp. 3d 147, 175 n.26 (D.D.C. 2014) (statement from *Mt. Graham* is "not persuasive because [it] appear[s] in dicta and the relevant quote[] [is] dropped in the legal standard section[] with no explanation or citation whatsoever"). The same is true for similar dicta from *Nat. Res. Def. Council v. Evans*, 279 F. Supp. 2d 1129, 1182 (N.D. Cal. 2003), and *Pacific Rivers*, 30 F.3d 1050, which are not even failure-to-reinitiate cases, and thus have no bearing here on whether NMFS has an independent legal duty to reinitiate. In sum, none of the decisions cited by Plaintiff refute the ESA, its implementing regulations, and the Consultation Handbook, all of which squarely demonstrate that NMFS has no independent duty to reinitiate consultation, and hence that Count I is not cognizable against NMFS.

B. Plaintiff's Claims Are Prudentially Moot

1. Plaintiff's ESA Claims (Counts I, II, & III) Are Prudentially Moot

Plaintiff contends that its ESA claims are not prudentially moot because Reclamation and NMFS allegedly will not complete a lawful reinitiated consultation. Pl's Opp. at 13-21.

Plaintiff is wrong on the law;[6] however, as an initial matter, its argument has no bearing on whether its claims are prudentially moot. Regardless of Plaintiff's views on the requirements of reinitiated consultation, the agencies will, in all likelihood, have completed a process to fulfill the very procedural and substantive duties that Counts I and II allege they have failed to fulfill, and to avoid the very violations that Count III alleges they will commit, long before this case could be decided on the merits. FDs' Mem. at 19. Proceeding with this litigation despite this would be a waste of judicial and party resources. This Court therefore can, and should, dismiss the complaint as prudentially moot. Courts in the Ninth Circuit have applied the doctrine of prudential mootness and Plaintiff identifies no authority disapproving of it. FDs' Mem. at 21; *contra* Pl's Opp. at 17. If, after Reclamation and NMFS have completed reinitiated consultation, Plaintiff believes they have not complied with the ESA, it can seek judicial review at that time. It would be inappropriate for this Court to opine on the course of action Reclamation and NMFS are currently pursuing, as the ultimate outcome of that process cannot be known at this juncture.

At a minimum, the Court should stay the case until April 24, 2017. Plaintiff's contention that a stay is unwarranted because the status quo must be preserved (Pl's Opp. at 12, 18) is belied by the facts that: (1) Plaintiff has not challenged the merits of the BiOp or ITS, alleging only a failure to reinitiate consultation; (2) no violation of Section 9 is either ongoing or imminent and reasonably certain to occur (*infra* § II.C); and (3) Plaintiff actually asks this Court to *alter* the status quo by imposing an unspecified "interim flow regime" until reinitiated consultation has been completed (Corrected Amend. Compl., Prayer for Relief, ¶ F (DN 45-1)).

Indeed, the ESA, its regulations, and the Consultation Handbook all flatly contradict Plaintiff's premise that reinitiating mandates withdrawal and replacement of the BiOp and ITS. Pl's Opp. at 14. "Where [as in this case] a full BiOp already exists for a particular federal action, and an agency seeks to reinitiate consultation with the [consulting agency], the [ESA] regulations do not specify what the *product* of the reinitiated formal consultation should be." *Jarvis*, 2016

[6] Plaintiff's assertion that "Federal Defendants' Legal Violation Here is Undisputed" (Pl's Opp. at 14; *see also id*. at 19) is incorrect. While Federal Defendants may not dispute that Reclamation is required to reinitiate consultation, they plainly dispute that either Reclamation or NMFS has committed any violation of law. FDs' Mem. at 23.

WL 1254213, at *29. NMFS and FWS have made it clear, however, that the product can be an amended BiOp and/or ITS. 51 Fed. Reg. at 19935 (agencies are "available to discuss the biological opinion, any reasonable and prudent alternatives, and any conservation recommendations with the Federal agency . . . on an informal basis" and that "[i]f revisions to the opinion are necessary, consultation can be reinitiated and a revised opinion issued"). As noted above, the Consultation Handbook expressly advises that reinitiated consultation can be completed by amending an ITS. Consultation Handbook at 4-64 (explaining that "[d]ocumentation of a *reinitiated consultation* must be in writing, and must contain sufficient information to record the nature of the change in the action's effects and the rationale for *amending analyses of anticipated incidental take* or the reasonable and prudent alternatives or measures (Exhibit 4-4)") (emphasis added). The Handbook identifies only two situations where reinitiation is treated as a "new consultation," neither of which is present here: (1) "Reinitiations involving major changes in effects analyses or changes in the Services' biological opinion;" and (2) "reinitiation based on a new species listing or critical habitat designation." *Id*. at 4-65.

Plaintiff offers no response to the Consultation Handbook, the key fact that NMFS has determined that the effects analysis and conclusions of its 2013 BiOp "remain valid" in light of 2014 and 2015 environmental conditions, or the lack of a deadline for completing reinitiated consultation, because there is none. FDs' Mem. at 19, 24. These authorities and facts refute Plaintiff's contention that the agencies are acting outside of formal consultation and failing to lawfully consider the past take exceedances. Pl's Opp. at 16.[7] Indeed, Plaintiff has no meaningful response to the fact that its premise was rejected in a directly analogous case. *Jarvis*, 2016 WL 1254213 at *6; FDs' Mem. at 24. Plaintiff's only response to *Jarvis* is to note that the agencies in that case reinitiated consultation (Pl's Opp. at 17 n.8), which fails to distinguish it. Whether Reclamation and NMFS have used the label "reinitiation of formal consultation" here to describe their ongoing process is semantics given that they are following a substantively

[7] Plaintiff quotes at length from *Gifford Pinchot*, 378 F.3d 1059 (Pl's Opp. at 16-17), which bears no resemblance to this case. Here, NMFS is not unilaterally adding new information to amend the BiOp or ITS outside of consultation as was the case in *Gifford Pinchot*. Rather, the agencies have a process to complete reinitiation by April 2017. *Gifford Pinchot* has no bearing here.

analogous path to the one followed in *Jarvis*.[8] FDs' Mem. at 19-20, 24. Plaintiff cannot escape this fact or the fact that the court in *Jarvis* found "no authority for [the] proposition that, whenever the [consulting agency] reinitiates formal consultation, the consultation must result in the production of a new, full-blown BiOp." 2016 WL 1254213 at *29; *supra* § II.A. Under Plaintiff's own logic, if Reclamation simply uses the label "reinitiation of formal consultation" to describe the ongoing administrative process, this case will be indistinguishable from *Jarvis* as well as from *Oregon Nat. Res. Council v. Keys*, No. Civ. 02-3080-CO, 2004 WL 1048168, at *10 (D. Or. May 7, 2004), *report and recommendation adopted*, 2004 WL 1490320 (June 29, 2004). In sum, there is no factual or legal basis for Plaintiff's assertion that Reclamation and NMFS are not pursuing reinitiation of formal consultation.

2. Plaintiff's MSA Claim Is Not Cognizable and Prudentially Moot

Plaintiff has amended Count IV in response to Federal Defendants' motion to dismiss to now assert a violation of 16 U.S.C. § 1855(b)(4)(A). Pl's Opp. at 24; DN 45. Count IV still fails, however, to state a cognizable claim for relief and is prudentially moot.

Plaintiff does not dispute that NMFS has no duty to initiate consultation under the MSA. FDs' Mem. at 18 n.12. To the extent that Section 305(b)(4)(A) places any duty on NMFS, it is to provide conservation measures *after* it receives an essential fish habitat ("EFH") assessment. 16 U.S.C. § 1855(b)(4)(A) ("*If the Secretary receives information from a . . . Federal . . . agency* or determines from other sources that an action . . . undertaken . . . by any . . . Federal agency would adversely affect any essential fish habitat . . . the Secretary shall recommend to such agency measures that can be taken by such agency to conserve such habitat") (emphasis added); 50 C.F.R. § 600.920(e) (action agencies must provide NMFS with a written assessment of effects of their action on EFH). Here, Count IV alleges that "[t]he Klamath River is included in the

[8] Plaintiff quibbles with whether the ongoing deliberations between Reclamation and NMFS can constitute informal consultation within the meaning of 50 C.F.R. § 402.13(a) (Pl's Opp. at 14-15), which is beside the point. Federal Defendants do not argue, as Plaintiff asserts, that they are pursuing a "substitute" to formal consultation. Pl's Opp. at 13. Rather, they have been properly discussing on an "informal basis" reinitiating formal consultation and revising or amending the ITS. 51 Fed. Reg. at 19935; Consultation Handbook at 4-64; FDs' Mem. at 19-20.

[designated EFH] of salmon" (DN 25 at 14, ¶ 44), but cannot allege that NMFS has received an EFH assessment from Reclamation. DN 33-1 at 624 of 624.[9] Hence, Count IV cannot state a claim that *NMFS* has failed to undertake any legal duty. As Count IV is asserted solely against NMFS, it should be dismissed. *SUWA*, 542 U.S. at 64.

Regardless, Plaintiff fails to rebut Federal Defendants' argument that Count IV is prudentially moot, merely asserting – without support – that the schedule for completion of consultation is "speculative." Pl's Opp. at 25. This Court can and should dismiss Count IV as prudentially moot or, alternatively, stay it until April 24, 2017, when the consultation that Count IV seeks to compel is likely to be completed. FDs' Mem. at 20; DN 33-1 at 622 of 624. As explained below, doing so would not prejudice Plaintiff. *See also* FDs' Mem. at 14-17.

C. Count III Is Not Cognizable Under the ESA or Article III of the Constitution

Plaintiff agrees to dismiss Count III against NMFS, and appears to concede that Count III is not cognizable against Reclamation based on past takings, pivoting (without identifying any support in the complaint) to contend that the claim seeks to "prospectively enjoin[] . . . future unlawful takings." Pl's Opp at 21 n.11, 24. Regardless, Count III is still not a cognizable claim.

Section 7(o)(2) of the ESA expressly states that "*any taking* that is in compliance with the terms and conditions specified in a written [incidental take] statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned." 16 U.S.C. § 1536(o)(2) (emphasis added); *accord* 50 C.F.R. § 402.14(i)(5) ("*Any taking* which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required") (emphasis added); 51 Fed. Reg. at 19953 ("If the action proceeds in compliance with the terms and conditions of the incidental take statement, then *any resulting incidental takings are exempt* from the prohibitions of section 4(d) or 9 of the Act") (emphasis added). Indeed, Section 7(o)(2) references compliance with the terms and

[9] The assertion in Federal Defendants' motion that Reclamation had initiated MSA consultation with NMFS in 2013 (FDs' Mem. at 20) was erroneous. In reality, the agencies have merely discussed the need to complete consultation. MSA consultation has not been initiated.

conditions of an ITS "provided under subsection (b)(4)(iv)," which in turn references the terms and conditions set forth in subsections 7(b)(4)(ii) and (iii) while making no reference to subsection 7(b)(4)(i), which requires that an ITS "specif[y] the impact of [the] incidental taking on the species" (*i.e.*, the amount or extent, 50 C.F.R. § 402.14(i)(1)(i)). 16 U.S.C. § 1536(o)(2).

Thus, even if Reclamation was reasonably certain to imminently exceed its take limit (which the record evidence does not show (FDs' Mem. at 14-17)), such "takings" would not be unlawful as long as Reclamation was in compliance with the terms and conditions of the ITS. Count III does not allege, however, that Reclamation has failed, or will fail to comply with any terms and conditions, and thus does not present a cognizable ESA citizen suit for violation of Section 9. *Bennett v. Spear*, 520 U.S. 154, 170 (1997) (because of Section 7(o), ITS "constitutes a permit authorizing the action agency to 'take' the endangered or threatened species so long as it respects the Service's 'terms and conditions'"); *Ctr. for Marine Conserv. v. Brown*, 917 F. Supp. 1128, 1149 (S.D. Tex. 1996) ("Takings in excess of an incidental take statement trigger the consultation requirement . . . but do not amount to a prohibited taking as long as the terms and conditions of the incidental take statement are satisfied"); *In re Operation of Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145, 1160 (D. Minn. 2004) (action agency has an "absolute defense to a Section 9 claim so long as its operations are in accordance with the [BiOp] and the terms and conditions of the ITS"), *aff'd in part and vacated in part*, 421 F.3d 618 (8th Cir. 2005).

Plaintiff's contention that an action agency is liable for violating Section 9 even if it acts in compliance with the terms and conditions set forth in the ITS would, if accepted, mean that Section 7(o)(2) provides little "safe harbor" at all. That is not the law for obvious reasons. Rather than automatically making an exceedance of the specified take level a violation of Section 9, the ESA regulations state that reinitiation of consultation is required. 50 C.F.R. §§ 402.14(i)(4); 402.16(a); *accord* H.R. Rep. No. 97-567, at 27. As noted above (*supra* § II.A), this should not pose a risk of jeopardy because "[i]t is not expected that the level of incidental take anticipated for most 'no jeopardy' actions would come close to the section 7(a)(2) barrier." 51 Fed. Reg. at 19954.

Because Count III is not a cognizable claim regardless of the likelihood of a future take exceedance, the Court may disregard Plaintiff's proffered Declaration from Sean Ledwin (DN 44-1). In fact, the Court should disregard the declaration because Plaintiff has not shown that it would be admissible in an APA case such as this, where the Court is "'not generally empowered to conduct a *de novo* inquiry into the matter being reviewed.'" *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (citation omitted). Even if the declaration was admitted, it would be far outweighed by the undisputed record evidence showing: (1) no take exceedance in 2016; (2) that an exceedance in 2017 or beyond is speculative given that the extended drought conditions in 2014 and 2015 are rare; and (3) that NMFS intends to amend the ITS prior to the 2017 operational water year. FDs' Mem. at 14-17. Ledwin does not purport to be a biologist and provides no support for his opinions aside from the BiOp itself, which he mischaracterizes. *Jewell*, 747 F.3d at 602 (ESA's "best *available* data requirement 'merely prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on'") (citation omitted). For example, Ledwin characterizes the BiOp as prescribing a "minimum flow regime" (at ¶ 20); however, it attempts to mimic the natural hydrology based on real-time hydrologic conditions in the upper Klamath Basin and analyzes a formulaic approach that provides *at least* minimum flows needed by coho, but *greater* flows under many conditions. DN 33-1 at 40-64. Thus, the flows in March through June 2016 that Ledwin characterizes as "higher than the 2013 BiOp minimum flows" (at ¶ 16) *were a result of implementing the action* analyzed in the BiOp. In sum, Plaintiff fails to allege that a take exceedance is "imminent" and "reasonably certain" to occur, *Forest Conser. Council v. Rosboro Lumber*, 50 F.3d 781, 787 (9th Cir. 1995), or an injury in fact that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Count III therefore lacks statutory and constitutional standing and should be dismissed.

III. CONCLUSION

For all of the foregoing reasons, the Court should grant Federal Defendants' motion to dismiss or, in the alternative, to stay.

Dated: November 16, 2016

Respectfully submitted,

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