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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' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** **Date:** January 27, 2017 **Time:** 9:00 a.m. **Judge:** Honorable William H. Orrick **Location:** Courtroom 2, 17TH Floor

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

FEDERAL REGULATIONS

I. INTRODUCTION

Plaintiff has filed a motion for partial summary judgment on its first claim for relief in its amended complaint, asking this Court to permanently enjoin the U.S. Bureau of Reclamation ("Reclamation's") operation of the Klamath Irrigation Project ("Klamath Project"). Plaintiff contends this relief is warranted because Reclamation has failed to commence a procedure under the Endangered Species Act ("ESA") – known as reinitiation of formal consultation – with the National Marine Fisheries Service ("NMFS") on the Southern Oregon/Northern California Coast Evolutionarily Significant Unit of coho salmon ("SONCC coho"), a species listed as "threatened" under the ESA. As explained in Federal Defendants' pending motion to dismiss (ECF Nos. 33 & 60) and below, Plaintiff is incorrect. Reclamation has in fact reinitiated formal consultation with NMFS and the U.S. Fish and Wildlife Service ("FWS") on the Klamath Project. *See* ECF 33; AR0001-08.[1] Thus, Federal Defendants already have afforded Plaintiff all the relief it seeks, and all the relief to which it could be entitled, on its claim. Plaintiff's claim therefore is moot and the Court lacks subject matter jurisdiction to adjudicate it.

Even if the Court had jurisdiction over the claim, Plaintiff's requested injunctive relief is wholly unjustified. Putting aside the fact that the requested relief is not narrowly tailored to the procedural violation alleged, water conditions in 2017 are expected to be favorable, which eliminates the risk of jeopardy to SONCC coho. Furthermore, Plaintiff's proposed interim operations are risky, as they could harm two other species that are listed as "endangered" under the ESA – the shortnose and Lost River suckers. These endangered fish under the jurisdiction of FWS depend on the same water for their survival and recovery as the SONCC coho does, and are no less deserving. Operating the Klamath Project involves harmonizing multiple statutory and regulatory responsibilities, and Plaintiff's drastic demand for relief blithely ignores the

[1] The citations refer to the excerpts of the administrative records filed with the Court on January 6, 2017. The citation form "ARxxxxxx" refers to Reclamation's excerpt, whereas citations to "NMFSxxxxxx" refer to NMFS' excerpt

complexity of fulfilling these competing requirements. The Court should deny Plaintiff's motion for partial summary judgment and grant Federal Defendants' motion to dismiss.

II. STATEMENT OF ISSUES

A. Whether Reclamation has reinitiated formal consultation in accordance with 50 C.F.R. §§ 402.14(i)(4) and 402.16?[2]

III. STATUTORY BACKGROUND

Section 7(a)(2) of the ESA requires federal agencies proposing to take an action ("action agencies") to ensure that any action they authorize, fund, or carry out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). To ensure compliance with those mandates, the ESA's implementing regulations outline a detailed process whereby action agencies consult with the appropriate expert "consulting agency" (either NMFS or FWS), or both, depending on the species involved)[3] to, among other things, analyze the potential impacts of a proposed action on ESA-listed species and their critical habitat.

The action agency must engage in consultation (either "informal" or "formal," as appropriate) if its proposed action "may affect" a listed species or critical habitat. Informal consultation is "an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency . . . designed to assist the [action agency] in determining whether formal consultation . . . is required." 50 C.F.R. § 402.13(a). "If during informal consultation it is determined by the [action agency], with the written concurrence of [the consulting agency], that the action is not likely to adversely affect listed species or critical

[2] Also at issue is whether Plaintiff can state a claim against NMFS for failure to reinitiate. Federal Defendants incorporate by reference previous arguments. ECF 33 at 8, ECF 60 at 2.

[3] Responsibility for implementing the ESA is primarily divided between the Secretaries of Interior and Commerce, who are responsible for terrestrial and marine species, respectively. 16 U.S.C. §§ 1532(15), 1533(a)(2). These Secretaries have delegated their responsibilities to FWS in the case of Interior and to NMFS in the case of Commerce.

habitat, the consultation process is terminated, and no further action is necessary." 50 C.F.R. § 402.13(a), 402.14(b)(1); *Water Keeper Alliance v. U.S. Dep't of Def.*, 271 F.3d 21, 25 (1st Cir. 2001). If, however, the action agency or the consulting agency determines that the action is "likely to adversely affect" listed species or designated critical habitat, the agencies will then engage in formal consultation. 50 C.F.R. § 402.13(a), 402.14(a)–(b). Formal consultation leads to the issuance of a written biological opinion ("BiOp") by the consulting agency that assesses the likelihood of "jeopardy" to the species and "destruction or adverse modification" of its critical habitat. *Id*. § 402.14(g)-(h).

Following consultation, the action agency must determine "whether and in what manner to proceed with the action in light of its Section 7 obligations and the Service's biological opinion." 50 C.F.R. § 402.15(a). Where a BiOp concludes that the proposed action is not likely to jeopardize a listed species or destroy or adversely modify critical habitat, the action agency may reasonably rely on the BiOp and proceed with the action in compliance with the ESA. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1415-16 (9th Cir. 1990) (affirming agency's reasonable reliance on a BiOp). Reinitiation of consultation may be required under certain enumerated circumstances. 50 C.F.R. § 402.16. While the consulting agency can request that the action agency reinitiate consultation, the authority to reinitiate rests solely with the action agency, as the obligation to avoid jeopardy and adverse modification of critical habitat is borne by the action agency. *Id*. Nor is there any deadline for completing reinitiated consultation. 16 U.S.C. § 1536(b)(1)(A) (consultation in the first instance "shall be concluded within the 90-day period … or . . . within such other period of time as is mutually agreeable to the Secretary and the Federal agency"); 50 C.F.R. § 402.16.

In addition to Section 7's requirement that federal agencies avoid jeopardizing listed species and destroying or adversely modifying their critical habitats, Section 9 of the ESA prohibits the "take" of any endangered species, 16 U.S.C. § 1538(a)(1)(B), a prohibition that

NMFS has extended to the threatened SONCC evolutionarily significant unit ("ESU") of coho salmon, *id.* § 1533(d); 50 C.F.R. § 223.203. "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). In conjunction with a BiOp produced during formal consultation that concludes the proposed action will not cause jeopardy but may result in incidental take of listed species, the consulting agency issues an "Incidental Take Statement" ("ITS") to the action agency. Any taking in compliance with the terms and conditions of the ITS is exempt from the general take prohibition in ESA Section 9. 16 U.S.C. § 1536(b)(4)(iv), (o)(2).

If the specified level of incidental take is exceeded, the ESA regulations state that reinitiation of consultation is required. 50 C.F.R. §§ 402.14(i)(4); 402.16(a). There is no deadline for completing reinitiated consultation (16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. §§ 402.14(i)(4); 402.16), and "[w]here [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." *Mayo v. Jarvis*, 2016 WL 1254213, *29 (D.D.C. Mar. 29, 2016); ESA Consultation Handbook, 4-64 (at http://www.nmfs.noaa.gov/pr/laws/esa/policies.htm#consultation).

IV. FACTUAL AND PROCEDURAL BACKGROUND

A. The Klamath Project

Reclamation operates the Klamath Project, a complex federal water management project located in the Upper Klamath and Lost River Basins in southern Oregon and northern California. AR001279. The Klamath Project consists of an interconnected system of rivers, reservoirs, canals, lakes, dams, diversions, marshes, wildlife refuges, and undeveloped areas. AR001279-80; AR000666. The Klamath Project provides irrigation water to approximately 200,000 acres of cropland in south-central Oregon and north-central California, as well as water for use in the Tule Lake and Lower Klamath Lake National Wildlife Refuges. AR0001279; AR001282.

The principal source of water used in the Klamath Project is stored in Upper Klamath Lake, a relatively shallow naturally occurring lake located on the Klamath River in Oregon. AR001279; AR001304. The natural level of water in Upper Klamath Lake varies and is dependent on natural conditions like rainfall, snowpack, and climate. AR001316. Link River Dam, which is owned by Reclamation and located at the southern end of Upper Klamath Lake, allows Reclamation to regulate the water level in Upper Klamath Lake and the flow of water from the lake into the lower Klamath River. AR001282. Link River Dam is operated and maintained by PacifiCorp, a utility company, pursuant to a contract with Reclamation. *Id.* But, Reclamation retains the discretion to specify Upper Klamath Lake elevations and the release of water into the lower Klamath River. *Id.* Below Link River Dam, water is either left in the river for downstream species or diverted, directed, and delivered using an extensive system of canals, diversions, reservoirs, and dams operated by Reclamation or third parties coordinating with Reclamation to meet Klamath Project objectives. *See* AR001279-80; *see generally* AR0001259-1623. Reclamation's water deliveries from Upper Klamath Lake mainly occur from April 1 to October 15, but limited deliveries also occur during the remainder of the year for irrigation and Wildlife Refuge uses. *See* AR001321; AR001352.

Reclamation must manage and operate the Klamath Project, and make water management decisions, in a way that balances multiple competing interests and responsibilities. *See* AR001279-89; *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1230-31 (N.D. Cal. 2001). Two species of fish that are listed as endangered under the ESA, the Lost River sucker and the shortnose sucker, are only found in Upper Klamath Lake, nearby Klamath Project reservoirs, and their tributaries. *See* Designation of Critical Habitat for Lost River Sucker and Shortnose Sucker, 77 Fed. Reg. 73,740 (Dec. 11, 2012); AR 000666. Although populations of both species occur in Tule Lake, Clear Lake Reservoir, and Gerber Reservoir, Upper Klamath Lake supports large population of the shortnose sucker and the

largest population of the Lost River sucker, and is the only remaining spring-spawning group of the Lost River sucker. AR000734. In order to survive, the species require specific habitat conditions including varied water depths for different life stages, minimum water flows, a pH of less than 9.75, and water temperatures of less than 82.4 degrees Fahrenheit. AR000844. Additionally, below Iron Gate Dam, the Klamath River contains the SONCC coho, a species listed as threatened under the ESA. AR000666; AR000879. Two wildlife refuges, the Lower Klamath and Tule Lake National Wildlife Refuges, are also dependent on the Klamath Project and have reserved water rights. AR001282-83. Moreover, Reclamation's statutory authorities include supplying water to various water districts and users for irrigation purposes consistent with the Reclamation Act of 1902. AR001280-82.

B. Recent Consultations and the 2013 Biological Opinion.

In October 2007, Reclamation finalized a biological assessment that covered Klamath Project operations from April 1, 2008 to March 31, 2018, and requested ESA Section 7 consultation with both NMFS and FWS. AR001293. In response, FWS issued a BiOp on April 2, 2008, concluding that Reclamation's proposed action was not likely to jeopardize the continued existence of the Lost River sucker or the shortnose sucker. *Id.* NMFS presented a draft of its BiOp to Reclamation and technical representatives of the Hoopa Valley Tribe and Yurok Tribe ("the Tribes") for comment on June 3, 2008. "Biological Opinion on the Operation of the Klamath Project between 2010 and 2018," at 4 (March 2010). NMFS received comments from Reclamation on June 20, 2008, and from the Tribes on July 9, 2008. After considering the comments it received as a result of this collaborative process, NMFS revised its BiOp and issued a final version on March 15, 2010. *See* AR001293. NMFS' BiOp concluded that Reclamation's proposed action was likely to jeopardize the continued existence of SONCC coho salmon, and were likely to destroy or adversely modify SONCC coho salmon designated critical habitat. *Id.*

In order to avoid jeopardizing SONCC coho salmon or its critical habitat, Reclamation employed NMFS's recommended reasonable and prudent alternative. *See* AR000668.

Shortly after consultation was completed, Reclamation, NMFS, and FWS determined that during drought years, Reclamation would be unable to simultaneously comply with: (1) the water needs of the Klamath Project; (2) FWS's BiOp; and (3) NMFS's BiOp. AR000669. The agencies determined that the possibility of conflicting requirements in the BiOps necessitated the development of a new proposed action on Klamath Project operations and a joint BiOp from FWS and NMFS. *Id.* In 2011, the three agencies jointly established an Agency Coordination Team to address how to manage competing and conflicting water resource needs with a limited water supply, to provide more certainty for Project water users, Upper Klamath Lake elevations, and Klamath River flows. *Id.* The Agency Coordination Team consisted of hydrologists, biologists, managers from each agency, and support staff. *Id.* The Team met on over 25 occasions, developing an innovative water management approach that covered Klamath Project operations and the effect of operations on all three listed species: Lost River suckers, shortnose suckers, and SONCC coho salmon. *See id.*; AR 000649-001256.

On December 1, 2012, Reclamation sent letters to NMFS and FWS requesting reinitiation of consultation, attaching the proposed action developed by the Agency Coordination Team. AR000670. In May 2013, Reclamation revised its proposed action to further minimize adverse effects of the Klamath Project on SONCC coho salmon and its critical habitat. AR000671. The revised proposed action consists of: (1) increasing the minimum daily Iron Gate Dam flow targets for April, May, and June; (2) clarifying flexibility on in operations regarding meeting minimum daily average flows downstream of Iron Gate Dam; (3) clarifying that the proposed action daily modeled Iron Gate Dam flows during high flow events will be achieved during real-time operations; (4) increasing annual fisheries habitat restoration funding to $500,000; and (5) using adaptive management for minimizing fish disease. *Id.* NMFS and FWS issued the joint

BiOp in May 2013, concluding that Reclamation's revised proposed action, which more closely mimics natural hydrology than previous Project operations, would not jeopardize the continued existence of coho salmon and Lost River and shortnose suckers, nor adversely modify their critical habitat. AR000861; AR001042. With the 2013 BiOp, NMFS issued Reclamation an Incidental Take Statement ("ITS") that specifies an amount or extent of incidental take of SONCC coho salmon that is anticipated to occur as a result of the revised proposed action and is exempt under the ESA if the taking is in compliance with the terms and conditions of the ITS.[4] AR001043-AR001069. The ITS states that the percentage of *C. shasta* infections for Chinook salmon juveniles (a surrogate species similar to SONCC coho salmon that has been monitored for *C. shasta*) in the mainstem Klamath River between the Shasta River and Trinity River may not exceed 54% infection via histology or 49% infection via quantitative polymerase chain reaction[5] during the months of May to July. AR001055-56.

C. Water Years 2014-2016

Due to an unprecedented, multiyear drought that affected the entire Klamath Basin, the surrogate in the ITS for SONCC coho salmon was exceeded in 2014 and 2015. AR000502. The low levels of stream flows, combined with above average spring air temperatures, created in-river conditions favorable for *C. shasta* release and fish infection. AR000502. Because of this event, Reclamation sent a letter to NMFS and a corresponding memorandum to FWS in July 2015, stating that prolonged and severe drought resulted in hydrological conditions in the Klamath River that were not anticipated in Reclamation's revised proposed action or analyzed in the 2013 BiOp. AR000544; AR000546.

[4] FWS also issued Reclamation an ITS for incidental take of the suckers. *Id.*

[5] Histology is the study of the microscopic structure of tissues. Quantitative polymerase chain reaction refers to the process of copying a segment of DNA, which can be useful for identifying diseases like *C. shasta*.

In March 2016, NMFS and Reclamation officially reinitiated consultation on the Klamath Project to address the exceedance of take associated with the *C. shasta* infection rates that occurred during 2014 and 2015. *See* AR000502. During 2016, Reclamation operated the Klamath Project in accordance with the revised proposed action and the 2013 BiOp, just as it had in 2014 and 2015. The ITS for SONCC coho salmon was not exceeded in 2016 because the Klamath Basin was not experiencing the unprecedented drought that had occurred the previous years. *See* AR000023.

Since March 2016, NMFS and Reclamation have continued the consultation process. In addition, they, along with FWS, formed a Disease Technical Advisory Team ("DTAT") on July 7, 2016 to summarize recent monitoring data and study results into four technical memoranda in an effort to describe the current understanding of juvenile fish health and *C. shasta* dynamics in the Klamath River. *See* AR000340. The DTAT was comprised of representatives from federal and state agencies, along with the Tribes. *Id.* The four technical memoranda were primarily drafted by the FWS Arcata Office. *Id.*; NMFS0001544-597. Based on the four technical memoranda, the Tribes prepared a draft Guidance Document that includes management measures intended to mitigate the effects of *C. shasta* disease infection rates in coho and Chinook salmon below Iron Gate Dam. AR000231. In late November, 2016, the agencies provided substantive comments on the draft Guidance Document but a revised Guidance Document has not yet been issued. *See* AR000044-132; AR000133-34; NMFS0002796. The draft Guidance Document has not been finalized at this point and has not undergone independent scientific review.

V. STANDARD OF REVIEW

A. Review Under the Administrative Procedure Act.

Plaintiff's claim for relief is reviewed in accordance with an APA standard of review. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (*en banc*) ("An agency's compliance with the ESA is reviewed under the [APA]."); *see also Grand Canyon Trust v. U.S.*

Bureau of Reclamation, 691 F.3d 1008, 1016 (9th Cir. 2012) ("We review Reclamation and FWS's compliance with the ESA . . . under the standard set forth in the APA."). Plaintiff agrees that its claim is reviewed under the APA standard of review. ECF 69-1 at 14.

Under the APA, judicial review is based on the administrative record filed by the agencies. *Karuk Tribe*, 681 F.3d at 1017 ("Because this is a record review case, we may direct that summary judgment be granted to either party based upon our review of the administrative record."); *Florida Power & Light v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court"). These principles apply irrespective of whether the case is viewed as a challenge to agency action, or agency inaction. 5 U.S.C. § 706(1); *Sierra Club v. Marsh*, 816 F.2d 1376, 1384, 1386-87 (9th Cir. 1987) (reviewing an ESA citizen-suit claim for failure to reinitiate consultation under the APA's scope and standard of review).

Under the APA, a plaintiff must satisfy a "high threshold" to establish that agency action or inaction is unlawful. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010). In recent years, the Ninth Circuit has strongly affirmed the narrow and deferential nature of that APA standard. *See Lands Council v. McNair*, 537 F.3d 981, 988 (9th Cir. 2008) (*en banc*) (overturning prior jurisprudence that had "shifted away from the appropriate standard of review"). The Court's role is "not to make its own judgment" on the matters considered and resolved by the agency, as the standard of review "does not allow the court to overturn an agency decision because it disagrees with the decision." *River Runners*, 593 F.3d at 1070. Moreover, courts must not draw new conclusions from a "battle of the experts," rather than affording the underlying agency decision the proper level of deference. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) ("[A]n agency must have discretion to rely on the reasonable

opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.").[6]

B. Summary Judgment

As discussed above and in Federal Defendants' motion to strike, Plaintiff's failure to reinitate claim should be reviewed in accordance with APA record-review principles, under which there are no disputed facts. Here, there can be no reasonable dispute that Reclamation has reinitiated formal consultation. The available evidence[7] demonstrates that Reclamation has stated in no uncertain terms that it has reinitiated consultation, and Reclamation's assertion is entitled to a presumption of regularity. BOR AR 0001-04; 0005-08. Indeed, Reclamation is in the best position to determine whether Reclamation has in fact reinitiated formal consultation. Even if this Court decides to review Plaintiff's failure to reinitiate claim under a more traditional *de novo* summary judgment standard instead of an APA record-review standard, then the facts must be viewed in the light most favorable to the non-moving party, here Federal Defendants. *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987) ("if direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact.").

Thus, Plaintiff must concede that Reclamation has reinitiated consultation and, as a necessary consequence, that its failure to reinitiate claim is not actionable. Alternatively, if Plaintiff disputes Federal Defendants' evidence of reinitated consultation, that is a dispute of material fact requires

[6] Federal Defendants have filed a motion to strike Plaintiff's proffered extra-record declarations. ECF 88.

[7] Premature motions for summary judgment are generally disfavored, particularly when the record (administrative or evidentiary) has not been adequately developed. *Wild Fish Conservancy v. Nat'l Park Serv.*, 2012 WL 6615925, at *4 (W.D. Wash. Dec. 19, 2012). Here, in the interest of time, Federal Defendants have filed excerpts of the administrative records for Plaintiff's first claim for relief, which is the subject of the instant motion for partial summary judgment. ECF 91.

denial of Plaintiff's summary judgment motion. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

VI. ARGUMENT

A. The Court Lacks Jurisdiction to Adjudicate Plaintiff's Claim

This Court must first determine whether Plaintiff has properly invoked the Court's jurisdiction before it may consider the merits of Plaintiff's claim. *Raines v. Byrd*, 521 U.S. 811, 820 (1997). At the summary judgment stage, Plaintiff cannot rest on "mere allegations," but must set forth by affidavit or other evidence specific facts to establish each element of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Here, Plaintiff has failed to establish jurisdiction over its claim for several reasons.

1. Plaintiff Has Not Established Standing.

Plaintiff has not submitted any declarations or evidence that would establish standing and thus the Court lacks subject matter jurisdiction to entertain its claim.

2. Plaintiff's Failure to Reinitiate Claim is Moot.

Plaintiff has moved for summary judgment on a claim that is entirely procedural in nature. Specifically, Plaintiff alleges that Reclamation and NMFS have failed to reinitiate formal consultation in accordance with 50 C.F.R. § 402.16. ECF 69-1 at 15 ("BOR and NMFS were required to reinitiate formal consultation . . . ."). Plaintiff asks this Court to "order Federal Defendants to reinitiate formal consultation immediately." *Id.* at 21.[8] To the extent that Plaintiff has disputed whether the agencies' prior correspondence evidenced reinitiated formal consultation, Reclamation has now stated in no uncertain terms that it has reinitiated formal consultation with NMFS and FWS on the Klamath Project. *See* BOR AR 0001-04; 0005-08. Thus, Federal Defendants already have performed the relief requested by Plaintiff on its claim.

[8] As explained in Federal Defendants' motion to dismiss, this claim is not cognizable against NMFS because it is not an "action agency." ECF 33; ECF 60.

There is no longer any effective relief the Court can grant on Plaintiff's first claim for relief and it is therefore constitutionally moot.[9]

Article III limits a federal court's jurisdiction to "cases or controversies." *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797 (9th Cir. 1999). A plaintiff must therefore maintain a live case throughout litigation to preserve federal jurisdiction. *Id.* "Federal courts lack jurisdiction to consider 'moot questions ... or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)). Put simply, a court cannot "take jurisdiction over a claim to which no effective relief can be granted." *Headwaters, Inc. v. BLM*, 893 F.2d 1012, 1015 (9th Cir. 1990). The party asserting mootness bears the burden of establishing that there is no effective relief the Court can provide. *Forest Guardians*, 450 F.3d at 461.

Numerous courts have held that reinitiating formal consultation moots a claim that the agency has failed to engage in the Section 7 consultation process.[10] *All. for the Wild Rockies v. U.S. Dep't of Agric.*, 772 F.3d 592, 601 (9th Cir. 2014) ("Reinitiation of consultation is the precise relief sought by Alliance. Accordingly, Alliance's Section 7 claim is moot."); *Native Fish Soc. v. NMFS*, 992 F. Supp. 2d 1095, 1115–16 (D. Or. 2014) ("NMFS has reinitiated consultation, but plaintiffs contend that the reinitiation was untimely and request declaratory

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[9] Federal Defendants dispute that jurisdiction existed over Plaintiff's failure to reinitiate claim at the time Plaintiff filed its complaint because the agencies had already commenced that procedure. However, even if jurisdiction did exist, Plaintiff's claim is moot.

[10] *See also Defs. of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 109 (D.D.C. 2011) (EPA's initiation of ESA consultation process mooted plaintiffs' request for an order requiring the agency to "engage in" consulting with FWS); *Am. Littoral Soc'y v. EPA*, 199 F. Supp. 2d 217, 245–47 (D.N.J. 2002) (finding that a claim for failure to consult under Section 7(a)(2) was moot where the agency had sent letters to resource agencies seeking consultation); *Ctr. for Marine Conservation v. Brown*, 917 F. Supp. 1128, 1144-45 (S.D. Tex. 1996) (granting summary judgment for defendants on claim for failure to reinitiate consultation where affidavit established that reinitiation had been requested, and noting that "it is unnecessary for the Court to order the Federal Defendants to do what they have already done").

relief. The court concludes that this claim is moot as the court cannot provide plaintiffs with any meaningful relief."); *Defenders of Wildlife v. Martin*, 454 F. Supp. 2d 1085, 1103 (E.D. Wash. 2006) ("no effective relief" could be granted because defendants had "already engaged in consultation"); *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1127–28 (D. Haw. 2000) (plaintiff's claim for reinitiation was moot because the agency had already requested reinitiation, and "[i]t would serve no purpose to order [the agency] to do what it has already done"); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv*., 82 F. Supp. 2d 1070, 1079 (D. Ariz. 2000) (finding a claim for failure to consult under Section 7(a)(2) moot where the agencies had begun consultation, noting the "settled rule against issuing advisory opinions"). Like those cases, because Reclamation here has already commenced formal consultation, Plaintiff's request for an order requiring Reclamation to engage in formal consultation is moot.[11]

Nor is this a case where a request for declaratory relief remains live. *See Forest Guardians v. Johanns*, 450 F.3d 455 (9th Cir. 2006). In *Forest Guardians*, the court found that a request for declaratory relief was not moot even though the agencies reinitiated ESA consultation. *Id*. at 462-63. But that holding was predicated on the existence of a continuing practice (there, grazing) that was subject to annual reconsideration, and the disputed issue (failure to comply with monitoring standards) was likely to recur. *Id*. The Ninth Circuit has

[11] Even a cursory examination of exceptions to the mootness doctrine demonstrate that none apply here. First, there is no reasonable expectation that the challenged conduct – failure to reinitiate consultation – will recur. *See* Simondet Decl. ¶¶ 6-7 (demonstrating that the consultation process is proceeding, which will evaluate all of the best available science); s*ee also White v. Lee*, 227 F.3d 1214, 1243-44 (9th Cir. 2000) (permanent change in way agency conducted business, not merely a temporary policy, established that the challenged conduct could not reasonably be expected to recur); *NRDC v. U.S. Nuclear Regulatory Comm'n*, 680 F.2d 810, 814 n.8 (D.C. Cir. 1982) ("corrective action" is "more accurately characterized as the provision of appropriate relief to petitioner than as the 'cessation of illegal conduct'"). Nor will the product of any agency reviews, such as a new or supplemental BiOp be of such duration as to evade review. *See, e.g., Am. Rivers v. Nat'l Marine Fisheries Serv*., 126 F.3d 1118, 1124 (9th Cir. 1997) (BiOp that spanned four years would not "evade review" and thus the "capable of repetition, yet evading review" exception does not apply).

since clarified that a request for declaratory relief remains live only where there is evidence that the action agency is uncooperative in the consultation process and there is an annual obligation to consult. *All. for the Wild Rockies v. U.S. Dep't of Agric.*, 772 F.3d 592, 601 n.4 (9th Cir. 2014) ("Unlike in *Johanns*, however, there is no evidence in the summary judgment record to suggest that the Park Service has been uncooperative in the Section 7 consultation process, nor that the Park Service is under any annual obligation to undertake consultation absent new information. *See id.* at 462. Accordingly, *Johanns* does not apply . . . .").

Here, Reclamation has been cooperative in the consultation process and it has no obligation to consult on an annual basis. Cameron Decl. ¶¶ 16-23. Thus, the factual situation reviewed in and the holdings of *Johanns* are inapposite. Thfere is simply no "'controversy … of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 987 (9th Cir. 2007) (citations omitted); *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 04-cv-3096-PA, 2007 WL 1072112, at *5 (D. Or. Apr. 3, 2007) ("Plaintiffs also argue that declaratory relief would be helpful to 'ensure that the [new] BiOp complies with the law and does so in a timely manner' and that declaratory relief would 'clarify and settle' defendants' legal obligations. I agree with defendants, however, such justifications are so vague as to make Article III's 'case or controversy' requirement meaningless.").

Plaintiff also relies heavily on *Cottonwood Envt. Law Center v. Forest Service*, 789 F.3d 1075 (9th Cir. 2015). ECF 69-1 at 22. This reliance is misplaced. In *Cottonwood*, the Forest Service took the position that it did not need to reinitiate consultation at all on the re-designation of critical habitat and made a number of legal arguments as to why the obligation to reinitiate consultation was not applicable under those circumstances. 789 F.3d at 1084–85 ("The Forest Service asserts that it had no remaining Section 7 obligations . . . "). Here, however, Reclamation does not dispute that it has remaining Section 7 obligations; it fully recognizes its

obligation under Section 7(a)(2), and has in fact reinitiated formal consultation with NMFS and FWS in accordance with 50 C.F.R. § 402.16. BOR AR 0001-08. *Cottonwood* presents a far different scenario than the facts here.

Plaintiff also makes a number of inaccurate assumptions about the scope of any new BiOp or ITS. ECF 69-1 at 19. The Klamath Project is incredibly complex. It involves implementing Reclamation's statutory authorities, as well as evaluating the effect of operations on listed SONCC coho and the endangered suckers. Depending on the water year, these three listed species (not to mention other non-listed species) compete for the same water and therefore any adjustment to operations must be done very carefully, based on the best available science and giving consideration to all listed species, and not based on the myopic desires of one litigant. Cameron Decl. ¶¶ 8-11. Before the complaint in this case filed, Reclamation had already recognized its obligation to reinitiate consultation with both NMFS and FWS, and it was working with those agencies to formulate a plan for completing those consultations in light of the complexities involved. ECF 33; ECF 60. NMFS and FWS, in turn, have been evaluating how best to complete their consultations for the species under their respective jurisdictions. Simondet Decl. ¶¶ 6-7; Sada Decl. ¶ 2. While considerable discussion has occurred, NMFS and FWS cannot pre-determine what the end-product of the consultations will be, especially with a project as complex as Klamath. What is clear, however, is that Plaintiff's assumptions regarding the substance of a yet-to-be completed consultation are inaccurate and not ripe. Moreover, if Plaintiff is ultimately dissatisfied with NMFS or FWS when they complete their respective consultations, it is free to challenge those decisions if all the jurisdictional prerequisites are met. Until then, litigating in the abstract will only produce an impermissible advisory opinion. *Martin*, 454 F. Supp. 2d at 1104.

Finally, the ESA contemplates action agencies proceeding with actions while consultation is ongoing, even where the action agencies has not previously completed

consultation like Reclamation has done here. The operative statutory provision is ESA § 7(d). 16 U.S.C. § 1536(d), which provides: "[A]fter inititiation of consultation" an agency "shall not make any irreversible or irretrievable commitment of resources" that would foreclose "the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) . . . ." *Id.* This is a different statutory obligation than § 7(a)(2), and it carries separate and distinct responsibilities. *Id.*

To the extent Plaintiff argues that Reclamation is in violation of ESA § 7(d), this argument is barred because it was not pled in Plaintiff's amended complaint. *See Pickern v. Pier 1 Imports (U.S.),* 457 F.3d 963 (9th Cir. 2006); *see also Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1080 (9th Cir. 2008). In fact, Plaintiff has not provided the requisite written 60-day notice alerting Reclamation that it is in alleged violation of ESA § 7(d), which is a mandatory, jurisdictional prerequisite to suit. *Southwest Ctr.*, 143 F.3d at 520 (requiring the notice to "sufficiently alert" the potential defendants "to the actual violation" that will be alleged in the complaint). Additionally, Plaintiff has not advanced any argument, much less carried its burden of showing, that these Federal agencies' actions are arbitrary and capricious under the operative statutory provision of ESA § 7(d); namely whether Reclamation has irreversibly and irretrievably committed resources that would foreclose the formulation of reasonable a prudent measures that may be designed in the course of the on-going consultation. *See* BOR AR 0001-08 (explaining how Reclamation is complying with ESA § 7(d) by implementing the 2013 BiOp and ITS while it proceeds with its consultation). Compliance with an existing BiOp does not foreclose development of a reasonable and prudent alternative, and therefore even if Plaintiff had pled this claim (which it did not), it would fail. *Oceana v. BOEM*, 37 F. Supp. 3d 147, 182 (D.D.C. 2014) (reliance on existing BiOp while reinitiating consultation was reasonable).

B. Plaintiff is Not Entitled to Any Relief.

The Court should not reach the issue of remedy for the reasons stated above, but even if it did, it must deny the requested relief for a number of additional reasons.

1. The Requested Relief Is Not Narrowly Tailored to the Alleged Violation.

Plaintiff candidly admits that the requested injunction is not even designed to address the only claim upon which it has moved for summary judgment (*i.e.*, its first claim for alleged failure to reinitiate consultation), but rather its second and third claims for relief (*i.e.*, alleged violation of the substantive duty to avoid jeopardy and unlawful take) – claims on which Plaintiff did not move for summary judgment. ECF 69-1 at 21 ("the Tribe seeks an injunction prohibiting Federal Defendants from taking any action that could result in *take* or *jeopardy* of SONCC coho.") (emphasis added); *see also* Amended Complaint ¶¶ 90-105. By Plaintiff's own admission then, its requested relief immediately runs afoul of this Circuit's long-established precedent that injunctive relief must be narrowly tailored to the identified legal deficiency. *See Nat'l Wildlife Fed. V. NMFS*, 422 F.3d 782, 800 (9th Cir. 2005) (remanding to the district court because the injunctive relief was not narrowly tailored to the identified statutory deficiency); *Monsanto*, 130 S.Ct. at 2761; *California ex rel. Lockyer v. U.S. Dep't of Agric*., 468 F. Supp. 2d 1140, 1144 (N.D. Cal.2006); *see also People Who Care v. Rockford Bd. of Educ., School Dist. No. 205*, 111 F.3d 528, 534 (7th Cir. 1997) (Posner, J.) ("the remedy must be tailored to the violation, rather than the violation's being a pretext for the remedy. Violations of law must be dealt with firmly, but not used to launch the federal courts on ambitious schemes of social engineering."). Here, Plaintiff's motion complains only that Reclamation failed to reinitiate formal consultation, which is an alleged *procedural* violation, not a substantive violation. Under controlling Ninth Circuit precedent, any remedy must be narrowly tailored to only that alleged procedural violation, which would be an order to complete that procedure. *Nat'l Wildlife Fed.*, 422 F.3d at 800. Plaintiff could have moved for summary judgment on its substantive Section 7 and Section 9 claims, but chose not to do so. Therefore, the relief Plaintiff seeks in this motion

exceeds the relief permissible under the first claim for relief in its amended complaint. This alone is fatal to its request.

2. The Requested Relief Could Harm Other ESA-Listed Species

Besides seeking a remedy for claims that it did not move upon, Plaintiff asks this Court to alter the *status quo* by forcing Reclamation to release specific water flows that could adversely affect or take other ESA listed species. Plaintiff badly misstates the legal standard for permanent injunctive relief and effectively requests this Court to assume operational control of the Klamath Project based on little more than a draft document that has not been peer reviewed according to the Department of the Interior's Integrity of Science and Scholarly Activity Policy and two brief, equivocal declarations. Bottcher Decl. ¶¶ 5-6. More importantly, depending on the water year, Plaintiff's proposal has the potential to harm the shortnose and Lost River suckers – species listed as endangered under the ESA. Remarkably, Plaintiff's declarants and brief are silent as to this important consideration. The Court should not reach the issue of remedy, but if it determines Plaintiff is entitled to any interim operational relief, with the level complexity at stake it should bifurcate the issue of remedy to allow the parties to thoroughly brief what, if any, such relief is necessary after completing an expedited discovery schedule.

3. Plaintiff Fails to Show that it Will Be Irreparably Harmed In the Absence of the Requested Relief.

To obtain permanent injunctive relief, a plaintiff must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010) (citation omitted). But the standards are altered where, as here, a plaintiff seeks a mandatory injunction that "goes well beyond simply maintaining the *status quo pendent lite*."

Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994); *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (mandatory injunctions are those that "order [] a responsible party to take action") (citation omitted). Because mandatory injunctions are "particularly disfavored," requests for this relief are subject to "heightened scrutiny." *Dahl v. HEM Pharms. Corp*. 7 F.3d 1399, 1403 (9th Cir. 1993). As the Ninth Circuit recently explained, "[t]he 'district court should deny such relief 'unless the facts and law clearly favor the moving party.'" *Garcia*, 786 F.3d at 740 (citation omitted). "In plain terms, mandatory injunctions should not issue in 'doubtful cases.'" *Id*. (citation omitted).

To prevail, Plaintiff must also demonstrate that *it*—not the environment—is likely to suffer irreparable harm. *Winter*, 555 U.S. at 20 (plaintiff must establish "that *he* is likely to suffer irreparable harm") (emphasis added); *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 180-81 (2000) (relevant showing "is not injury to the environment, but injury to the plaintiff"). The harm must be immediate, individualized, and substantiated with evidence. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *Leiva-Perez v. Holder*, 640 F.3d at 968-69. And Plaintiffs must do more than establish standing. *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) ("Of course, … a plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm.").

Here, Plaintiff has failed to present any evidence showing how it is harmed (indeed it failed to even submit standing declarations).[12] Instead Plaintiff apparently assumes that this

[12] Plaintiff appears to continue to rely on a presumption of irreparable harm. *See* ECF 69-1 at 23 n. 10 (arguing that this Court is free to ignore binding Ninth Circuit precedent because a *dissent* suggested *Cottonwood* was not contrary to Supreme Court precedent). This, of course, is not the law. *Cottonwood*, 789 F.3d at 1090–91. ("Where Supreme Court precedent 'undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable,' the prior circuit precedent is no longer binding. We must therefore conclude that there is no presumption of irreparable injury where there has been a procedural violation in ESA cases.") (citation omitted).

Court should divine that it will suffer immediate and irreparable harm based derivatively on the harm they allege to SONCC coho. *See Idaho Rivers United v. U.S. Army Corps of Eng'rs*, --F.Supp.3d--, 2015 WL 9700887, at *6 (W.D. Wash. Jan. 7, 2015). If that is the case, to "irreparably" injure its unarticulated interests, it is axiomatic that there must be significant species-level effects to the species in question. *Id.* at *7-8; *Winter*, 555 U.S. at 22-23 (plaintiffs must show each element of the proposed injunction is necessary to avoid irreparable harm to their viewing activities). These standards accord with the ESA, which does not confer private rights in individual animals, but provides public rights in the protection of "species." 16 U.S.C. § 1531(b); *Defenders of Wildlife v. Salazar*, 812 F. Supp. 2d 1205, 1209 (D. Mont. 2009) ("[T]o consider any taking of a listed species as irreparable harm would produce an irrational result" because, *inter alia*, the ESA permits incidental takings).

Thus, as many courts have held, "[i]rreparable harm to ESA listed species must be measured at the *species* level," and a "plaintiff must present a 'concrete showing of probable deaths during the interim period and of how these deaths may impact the species.'" *Nw. Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs*, 817 F. Supp. 2d 1290, 1315 (D. Or. 2011) (citation omitted); *see also Idaho Rivers*, 2015 WL 9700887, at *7-8; *S. Yuba River Citizens League v. NMFS*, No. 2:13-cv-00059-MCE, 2013 WL 4094777, at *7 (E.D. Cal. Aug. 13, 2013); *Defenders of Wildlife*, 812 F. Supp. 2d at 1209; *Pac. Coast Fed'n of Fisherman's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1210, n.12 (E.D. Cal. 2008). Plaintiff has not and cannot make this showing. None of the Plaintiff's declarants opine that there will be harm to SONCC coho at the species level. Strange Decl. ¶¶ 6-7 (focusing on the Chinook population rather than the SONCC coho evolutionary significant unit ("ESU") or species). Imminent irreparable harm is not likely to occur, either to SONCC coho or Plaintiff's derivative interests in them.

4. Plaintiff Fails to Demonstrate the SONCC Coho Will Be Irreparably Harmed In the Absence of the Requested Relief.

Another fundamental problem with Plaintiff's requested relief is that any claim of irreparable harm to SONCC coho is speculative, at best. Hydrological conditions in 2017 appear favorable, similar to 2016. Under those conditions, Reclamation operated its project in accordance with the 2013 BiOp, which resulted in a final estimated *C. Shasta* prevalence of infection below the level in the ITS (48%). Simondet Decl. ¶ 13. Thus, the harm that Plaintiff contends is certain – and imminent – *never even happened last year*. Plaintiff's declarants conspicuously neglect to address the fact that there was no unanticipated harm to SONCC coho in 2016. Notwithstanding that Reclamation fully complied with the *C. Shasta* surrogate in the ITS last year, Plaintiff seeks sweeping injunctive relief based on: (1) the assumption of continued, historic drought conditions, like those in 2014 and 2015; (2) no consideration of the endangered suckers; and (3) speculation regarding how Reclamation intends to operate the Project in 2017. This oversimplified and cavalier request is neither prudent nor warranted.

Because hydrological conditions appear favorable this year, Reclamation expects to continue to implement both the coho and sucker BiOps in a manner that ensures all of the species are not jeopardized and that there will be no irretrievable commitment of resources that would preclude formulation of a reasonable and prudent alternative. 16 U.S.C. § 1536(d); Cameron Decl. ¶ 22. As of early January 2017, the Klamath Basin is 135 percent of average precipitation and 123 percent of average snowpack. Simondet Decl. ¶ 14. In addition, in coordination with the Disease Technical Advisory Team ("DTAT") a pulse flow of 3,000 cfs for 15 hours was released from Iron Gate Dam on November 9, 2016, to distribute adult salmon carcasses downstream to disrupt the *C. shasta* life cycle and potentially reduce future transmission and/or infection rates of the *C. shasta* disease. *Id.* Reclamation is further committed to adaptively managing the anticipated water supply, and if conditions allow or are necessary, Reclamation intends to provide other management actions that would provide beneficial effects for SONCC coho. Cameron Decl. ¶ 17. The favorable hydrological conditions, combined with actions

already taken by Reclamation and those that are further anticipated this winter and spring, will benefit SONCC coho while allowing Reclamation to comply with its equally important sucker BiOp and ITS. This is a far-cry from causing irreparable harm to the species. Even if the Court reaches the issue of remedy, Plaintiff has failed to carry its burden of demonstrating that imminent, irreparable harm is *likely* to warrant the extraordinary remedy of a permanent, mandatory injunction.

5. The Balance of Hardships and Public Interest Factors Tip Strongly Against Granting Plaintiff's Proposed Injunction.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted). "In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987). These factors—balance of harms and the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

In ESA cases, "the balance of hardships and the public interest tip heavily in favor of endangered species." *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987). Contrary to Plaintiff's claims, ECF 69-1 at 22, this does not mean that the Court is foreclosed from balancing harms or considering the public interest. Harm to other listed species and efforts to protect those species are undeniably relevant considerations properly balanced. *Humane Soc'y of U.S. v. Bryson*, 2012 WL 1952329, at *9 (balancing the harm to "Defendants' ability to protect endangered and threatened salmonid stocks and aid in their recovery"); *Idaho Rivers*, 2015 WL 9700887, at *10 (balancing harm to efforts to protect listed species). Further, where Plaintiff makes no showing of success or irreparable harm, other national, state, and private interests are properly considered. *W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012)

(affirming denial of an injunction in a case involving the desert tortoise, a threatened species, where the district court properly considered, *inter alia*, protecting jobs).

Under certain hydrological conditions, Plaintiff's proposed injunction could upset the delicate balance between three species that are all listed under the ESA. Plaintiff seeks to provide more water for SONCC coho (and unlisted Chinook), but sending this water could adversely affect the shortnose and Lost River suckers. Sada Decl. ¶¶ 3, 17-26. Primarily as a result of habitat loss, both species of suckers were listed as endangered under the ESA. *Id.* ¶ 9. The most important remaining habitat occurs in upper Klamath Lake because it supports the largest populations of each species, and the only remaining spring-spawning group of Lost River sucker. *Id.* ¶ 8. As more water is sent downstream from the Project, the surface elevation of the lake is reduced. *Id.* ¶ 3. As surface elevations decline, there is an adverse effect on these endangered species. *Id.* Any operational adjustments must take into account this potential adverse effect on suckers, and here Plaintiff has completely ignored this important consideration.

During development of the 2013 BiOp, tension emerged between operations for SONCC coho and suckers because the winter-spring timeframe is generally the most important times for all three species. Between February and May, the suckers begin to spawn in rivers and groundwater springs in upper Klamath lake. *Id.* ¶ 5. When the surface elevation of the lake drops, it reduces sucker spawning and rearing habitat, especially in critical near-shore areas. *Id.* For example, in 2010, the surface elevation in the lake was very low throughout the spawning season and as a result nearly 25 percent fewer adults participated in spawning at the shoreline spring areas, and those that did spawn, spent considerably less time in those areas. *Id.* ¶ 19. With this imperiled species, the reduction in spawning effort poses a significant threat to the recovery of the species. *Id.* Reductions in surface elevations also could negatively affect larvae and juveniles because as surface elevations drop, rearing habitat diminishes. *Id.* ¶ 20. In particular, if surface elevations drop, it may preclude juveniles from accessing wetland areas. *Id.*

¶ 21. This exposes juveniles to increased predation, diminishes access to food or less favorable food, and/or increases the risk of entrainment into the dam. *Id.* Plaintiff's proposal threatens this listed species.

The coordinated effort that led to the 2013 BiOp took all of these factors into account and was a deliberate and thoughtful approach to balancing the needs of coho as well as the endangered suckers. Plaintiff's proposal is notably one-sided and myopically focuses only on coho and Chinook. However, the agencies cannot short-change one species, at the expense of another. The law is clear on this point -- the Court must take the impact to suckers into account when balancing respective harms -- and here, multiple federal agencies have exhaustively wrestled with this very issue to reach a responsible and protective operational regime. Their collective expertise warrants deference. *Nw. Envtl. Def. Ctr. v. U.S. Army Corps of Engineers*, 817 F. Supp. 2d 1290, 1315 (D. Or. 2011) (deferring to agency's assessment of harm). The public interest lies decidedly in a thoughtful and holistic approach to all of the affected species, as occurred in the 2013 BiOp. In contrast, Plaintiff has presented *no evidence* as to the effect of their proposed operation on suckers. Under these circumstances, the balance of harm and the public interest tips sharply in favor of denying Plaintiff's request for injunctive relief.

VII. CONCLUSION

The Court should deny Plaintiff's motion for partial summary judgment and grant Federal Defendants' motion to dismiss.

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Respectfully submitted,

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