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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.

KLAMATH WATER USERS ASSOCIATION,  
 SUNNYSIDE IRRIGATION DISTRICT, and  
 BEN DUVAL,

Defendant-Intervenors.

KLAMATH DRAINAGE DISTRICT,

Defendant-Intervenor.

KLAMATH IRRIGATION DISTRICT and PINE  
 GROVE IRRIGATION DISTRICT,

Defendant-Intervenors.

Case No. 3:16-CV-04294-WHO  
 (Related Case No. 3:16-CV-06863-WHO)

DEFENDANT-INTERVENORS'  
 RESPONSE TO PLAINTIFF'S MOTION  
 FOR PARTIAL SUMMARY JUDGMENT  
 AND INJUNCTIVE RELIEF

Judge: Honorable William H. Orrick  
 Hearing Date: January 27, 2017  
 Hearing Time: 9:00 a.m.  
 Courtroom: 2, 17th Floor

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Intervenors oppose Plaintiff's motion for partial summary judgment<sup>1</sup> and injunction. The motion includes issues that overlap considerably with the motion for partial summary judgment and injunction filed in *Yurok Tribe, et al. v. U.S. Bureau of Reclamation, et al.*, Case No. 3:16-CV-06863-WHO. This memorandum includes material responsive to motions in both actions.<sup>2</sup>

## I. INTRODUCTION

Plaintiff's motion asks the Court to direct the complex operation of dams and irrigation works in the Upper Klamath River Basin in accordance with a draft "guidance" document being written by plaintiffs in the two related lawsuits. Plaintiff asks the Court to ignore the adverse effects that the implementation of its plan would have on people and rural communities that depend on the Klamath Project for their livelihoods. Plaintiff also would have the Court ignore adverse impacts on two endangered fish species as well as national wildlife refuges.

The Klamath Project, the target of Plaintiff's motion, has furnished irrigation water to family farms in south-central Oregon and northern California for more than a century, and the production of crops sustains farms and entire communities. In addition to their importance for agricultural communities, Klamath Project facilities, including canals operated by Intervenors, are essential to the delivery of water to national wildlife refuges of international importance.

The Klamath Project's land comprises about 2 percent of the massive Klamath River Basin. The agricultural community's water use is, however, subject to strict regulation under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (ESA). The regulation relates both to coho salmon that migrate through a part of the Klamath River downstream of the Klamath Project and to endangered fish species that inhabit Upper Klamath Lake, which is Intervenors' main water source and a source to the Klamath River. An incidental take statement (ITS) for coho salmon issued in a 2013 Biological Opinion (BiOp) for the Klamath Project described the expectation that a certain percentage of juvenile Chinook salmon, in a specific downstream river segment, would become infected by a naturally-occurring parasite during certain months of the year. That

<sup>1</sup> Administrative records have been filed in this case, but the motion has not proceeded in accordance with Civ. L. R. 16-5.

<sup>2</sup> Similarly, declarations filed with this memorandum address motions in both the related cases.

1 segment is roughly 70 to 200 miles downstream of the Klamath Project. Defendants determined  
2 that a higher percentage of juvenile Chinook salmon were infected in 2014 and 2015. Plaintiff  
3 claims a procedural violation of the ESA, arguing there must be, but has not been, a reinitiation of  
4 consultation under ESA Section 7, and that Plaintiff is entitled to the requested injunction.

5 Plaintiff is not entitled to summary judgment or the requested mandatory injunction. First,  
6 Plaintiff cannot demonstrate that Defendants were or are required to reinitiate consultation  
7 because it is an arbitrary and false assumption that the Klamath Project is the cause of all  
8 incidence of disease of Chinook salmon in the Klamath River; therefore, it has not been  
9 established that reinitiation of consultation is required.

10 Second, the only ESA violation alleged on the current motion is a procedural violation for  
11 failure to reinitiate consultation. Defendant U.S. Bureau of Reclamation (Reclamation) has  
12 reinitiated consultation and thus no injunctive relief can be granted. Plaintiff's "failure to  
13 reinitiate" claim is moot.

14 Third, if injunctive relief related to Klamath Project operations is somehow available on  
15 the current motion, Plaintiff fails to acknowledge, let alone meet, its burden to demonstrate that  
16 each element of the requested relief is *necessary* to avoid *irreparable* harm to Plaintiff. Similarly,  
17 Plaintiff does not acknowledge or meet the extreme burden to demonstrate that a mandatory  
18 injunction must issue that prescribes the assorted actions proposed by Plaintiff in its motion for  
19 summary judgment. The requested injunctive relief is based on hypotheses of dubious merit.  
20 Nevertheless, Plaintiff asks the Court to take drastic actions in reliance thereon, and before any  
21 discovery has occurred, such as ordering releases of water in massive volumes so as to stir up  
22 sediment and scrape from rocks the microscopic worms that excrete spores that cause infection of  
23 salmon. What is more, the measures Plaintiff is requesting do not pertain to avoidance of "take"  
24 of coho salmon by the Klamath Project. In fact, the relief Plaintiff is requesting would have the  
25 Court reallocate water from other uses in hopes of *preventing* infections of Chinook salmon  
26 occurring for any reason, including by augmenting flows to levels higher than would occur if the  
27 Klamath Project were doing nothing at all. Defendants do not have a legal duty to take this  
28 action.

Further, Plaintiff's argument for injunction ignores that: the ESA-listed species is coho salmon, not Chinook; infection or disease or mortality in Chinook salmon does not equate to infection or disease or mortality in coho salmon because of very different characteristics and behaviors between the species as well as other environmental and biological factors; other factors than disease have the dominant influence on survival across the full life cycle of coho salmon; and natural variation in environmental conditions, not the operation of the Klamath Project, is the dominant condition affecting occurrence of such infection. Indeed, as described herein, the evidence before the court confirms that continued operation of the Klamath Project within the parameters of the 2013 BiOp does not create risk of irreparable harm to the coho salmon population or the Plaintiff.

Fourth, at the very least there are disputed issues of fact that preclude Plaintiff's requests for injunctive relief. A full evidentiary hearing is required to resolve these disputed issues of fact, and discovery must be allowed prior to any hearing. The consequences of Plaintiff's requested relief are far too significant to be imposed based on the abbreviated process Plaintiff seeks.

## II. STATEMENT OF ISSUES

1. Were Defendants required to reinitiate consultation under Section 7 of the ESA with respect to the effects of operation of the Klamath Project on coho salmon, a threatened species under the ESA?

2. Should the motion be denied because consultation has been reinitiated, such that there is no relief that can be granted on the first claim for relief?

3. Is Plaintiff entitled to a permanent injunction of any kind?

4. Can Plaintiff's requested permanent injunction be issued?

5. Should the motion be denied pursuant to Fed. R. Civ. P. 56(d)?

6. Should the motion be denied because there are disputed issues of material fact and an evidentiary hearing is necessary?

7. Should the hearing on the motion be continued to allow opportunity for discovery?

### III. BACKGROUND

#### A. Statutory Background/Endangered Species Act (ESA)

Section 7(a) of the ESA imposes substantive and procedural requirements on federal agencies proposing to undertake certain actions or projects. *See* 16 U.S.C. § 1536(a)(2)-(3). Substantively, Section 7(a)(2) of the ESA requires action agencies to insure that any discretionary action or project they authorize, fund, and carry out “is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification” of critical habitat designated for such species. *Id.*, § 1536(a)(2); *see also* 50 C.F.R. § 402.02 (defining “action” to which Section 7 applies). Section 7(a) also imposes a procedural requirement on action agencies to consult with federal fish and wildlife agencies—National Marine Fisheries Service (NMFS) or the U.S. Fish and Wildlife Service (USFWS) (collectively “consulting agencies” or “Services”) or both—on the potential impacts of a proposed action on endangered and threatened species and their critical habitat. 16 U.S.C. § 1536(a)(2), (3); *see also* 50 C.F.R. §§ 402.10-402.16.

Consultation may be informal or formal. *See* 50 C.F.R. §§ 402.13, 402.14. Formal consultation results in the issuance of a BiOp that analyzes the effects of the proposed action and includes the consulting agency’s conclusion whether the proposed action will or will not jeopardize the continued existence of the listed species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(h)(2), (3). If it is determined that listed species will be jeopardized or designated critical habitat adversely affected, then the consulting agency must include in its BiOp reasonable and prudent alternatives (RPA) that, if followed by the action agency, would avoid jeopardizing the listed species or destroying or adversely modifying critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

Where a BiOp determines a proposed action, or the implementation of any RPA, will result in incidental take of a listed species but not violate the action agency’s substantive Section 7(a)(2) obligation to avoid jeopardy, the consulting agency must include an ITS with its BiOp. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1); *see also* *Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife Serv., et al.*, 273 F.3d 1229, 1239 (9th Cir. 2001) (*Ariz. Cattle*

1 *Growers' Ass'n.*). An ITS specifies the amount or extent of incidental take permitted and  
 2 includes measures to minimize take. 16 U.S.C. § 1536(b)(4)(C)(i)-(ii); 50 C.F.R.  
 3 § 402.14(i)(1)(i)-(ii). While Section 9 of the ESA generally disallows take absent authorization  
 4 that can occur through various mechanisms (*see* 16 U.S.C. § 1538(a)(1)(B) [general take  
 5 prohibition], 16 U.S.C. § 1539 [mechanisms for permitting take by non-federal entities]), take  
 6 consistent with an ITS is permissible. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(5); *see also*  
 7 *Ariz. Cattle Growers' Ass'n.*, 273 F.3d at 1239.

8 Issuance of a BiOp concludes formal consultation. 50 C.F.R. § 402.02. After receipt of a  
 9 BiOp, the action agency determines how to proceed in light of its substantive obligations under  
 10 the ESA. *Id.*, § 402.15(a).

11 An action agency must reinitiate consultation under certain circumstances, including if an  
 12 ITS limit is exceeded and if new information reveals that the action may affect a listed species or  
 13 adversely affect habitat in a manner not previously considered. 50 C.F.R. §§ 402.14(i)(4),  
 14 402.16(a), (b).

#### 15 **B. The Klamath Basin and Klamath Project**

16 The administrative records<sup>3</sup> and the Declaration of Brad Kirby in Support of Defendant-  
 17 Intervenor's Response to Motion for Partial Summary Judgment and Injunctive Relief (Kirby  
 18 Decl.) characterize the Klamath Basin and Klamath Project.<sup>4</sup> The Klamath Basin occupies about  
 19 10 million acres in south-central Oregon and northern California. In the uppermost watershed,  
 20 various rain and snowmelt-fed streams flow into Upper Klamath Lake at the city of Klamath  
 21 Falls, Oregon. Upper Klamath Lake is controlled by Link River Dam, such that Upper Klamath  
 22 Lake stores water during higher runoff periods that can be diverted for irrigation, or released to

23 <sup>3</sup> Excerpt of Administrative Record, Bureau of Reclamation (USBR AR); Excerpt of Administrative Record, National  
 24 Marine Fisheries Service (NMFS AR).

25 <sup>4</sup> Intervenor's concur with Defendants that the instant motion should be adjudicated based on the agency record.  
 26 Owing to the circumstances of Plaintiff's motion, Intervenor's were not in possession of the record until shortly  
 27 before opposition briefs are due in the related cases, and in any event the Kirby Declaration provides background as  
 28 well as explanation of technical terms and complex subjects and is proper. *See, e.g., Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). Declarations filed by Intervenor's (including the entire Kirby Decl.) are also relevant if the Court considers any extra-record evidence for any purpose and particularly the request for injunctive relief. The Kirby Declaration also provides factual corrections. *See, e.g., Kirby Decl.*, ¶¶ 13, 19, 21, 26, 31, 35

1 flow downstream, at later times of the year when natural run-off has diminished. The Klamath  
2 River proper begins downstream of Link River Dam and flows approximately 240 miles before it  
3 reaches the Pacific Ocean, being joined by over 100 tributaries as it flows downstream. The total  
4 volume of runoff to surface flow generated by precipitation in the basin is about 12.5 million  
5 acre-feet per year on average. Kirby Decl. ¶¶ 8-11, Exh. A; *see* USBR AR673-674.

6 On the mainstem of the Klamath River there are also four dams used solely in hydropower  
7 generation, owned by PacifiCorp, a private utility. USBR AR1311. The most downstream of  
8 these is Iron Gate Dam, which is approximately 60 miles downstream of Link River Dam.  
9 Salmon in the Klamath River cannot move upstream beyond Iron Gate Dam. Thus, there is  
10 attention to volumes of flow that occur below Iron Gate Dam. The volume of the Klamath River  
11 increases with inflows from many tributaries as the river moves downstream.

12 The Klamath Project is a reclamation project authorized in 1905, under the Reclamation  
13 Act of 1902, 32 Stat. 388, codified as 43 U.S.C. § 372 *et seq.* In general, at the Klamath Project,  
14 Reclamation constructed irrigation works and contracted with individuals or irrigation districts  
15 who agreed to repay allocated construction costs and reimburse ongoing operations costs; in  
16 exchange, these entities receive water delivered through Project facilities or facilities they  
17 themselves constructed. The Klamath Project irrigated land area is about 200,000 acres, with  
18 most of that acreage receiving water diverted from the Klamath River system. Water is diverted  
19 from Upper Klamath Lake or locations just downstream of Link River Dam. The water taken  
20 includes both “live” flow (i.e., water at the rate flowing into or through the lake at a specific time)  
21 and stored water that has been collected behind Link River Dam for subsequent use. The  
22 irrigated lands produce about \$400 million in annual economic value for family farms and rural  
23 communities in the region. Kirby Decl., ¶¶ 14-18; *see* USBR AR1279-1282.

24 The Klamath Project is highly efficient in its water use. Its water use in the past 15 years  
25 has been less than in the decades preceding. Kirby Decl., ¶ 21. The total volume of water  
26 diverted for irrigation in 2016, a year of good basin-wide water supply, was approximately  
27 362,000 acre-feet. *Id.*, ¶¶ 15-16. Water diversions through the Klamath Project are also the water  
28

1 source for two national wildlife refuges, the Tule Lake National Wildlife Refuge (TLNWR) and  
 2 the Lower Klamath National Wildlife Refuge (LKNWR). *Id.*, ¶ 17; USBR AR1282-1283.

### 3 **C. Application of the ESA in the Klamath Project**

4 This case concerns the Southern Oregon-Northern California Coast (SONCC) coho  
 5 salmon, a species that primarily uses downstream tributaries of the Klamath River for spawning  
 6 and rearing and uses the mainstem river for migration. It has been determined to be a  
 7 “threatened” species under the ESA. In addition, relevant here are two species that are listed as  
 8 “endangered” under the ESA: the shortnose sucker and the Lost River sucker. 53 Fed. Reg.  
 9 274130 (July 18, 1988). The endangered species of sucker inhabit Upper Klamath Lake and other  
 10 water bodies. A focus in ESA regulation relative to suckers is the maintenance of water surface  
 11 elevations in Upper Klamath Lake to protect the endangered suckers. Diversion of water from  
 12 Upper Klamath Lake, or release of water from Upper Klamath Lake to the Klamath River, lowers  
 13 water levels (“lake levels”) resulting in less water being available for endangered suckers. Kirby  
 14 Decl., ¶ 21; *see* USBR AR779-818 (BiOp analysis of effects on endangered suckers).

15 Over recent years, Reclamation has consulted with NMFS in regard to coho, and with  
 16 USFWS in regard to suckers, on the effects or potential effects of Klamath Project operations on  
 17 the listed species. USBR AR1293-1301. Most recently, consultation occurred in 2012-2013,  
 18 resulting in BiOps issued by NMFS and USFWS in a single document: the “Biological Opinions  
 19 on the Effects of Proposed Klamath Project Operations from May 31, 2013, through March 31,  
 20 2023, on Five Federally Listed Threatened and Endangered Species” (2013 BiOp). USBR  
 21 AR649-1255. To develop the biological assessment and ultimate 2013 BiOp, agencies made use  
 22 of the work of a hydrology team led by the Klamath Tribes. (The Klamath Tribes is a tribe not  
 23 party to either of the related actions.) This work supported the development of proposed  
 24 operations for the Klamath Project through all year-types (*e.g.*, wet years, dry years), incorporated  
 25 into Reclamation’s biological assessment (USBR AR1311, 1322-1372), which were adjusted  
 26 after delivery of the biological assessment based on Reclamation’s interaction with the Services.  
 27 USBR AR698; Kirby Decl., ¶ 25. Based on this extensive effort, the Services each found that the  
 28 operations of the Klamath Project as proposed would not jeopardize the continued existence of

1 endangered suckers or threatened coho. USBR AR861, 1042 (section 12.7).

2 The operations under the 2013 BiOp (USBR AR680-702) are complex, and summarized  
3 in paragraph 26 of the Kirby Declaration. In general, during a “fall-winter” period “there is  
4 frequent examination of Upper Klamath Lake storage conditions, river flows, forecasted runoff,  
5 and potential for regular adjustment of Link River Dam operations based on changing conditions  
6 and objectives for the upcoming spring-summer period. The BiOp operations for the spring-  
7 summer period determine water allocations for Link River Dam releases, Klamath Project  
8 diversions, and lake levels for endangered suckers. Generally speaking, calculations are  
9 performed in early spring based on information known in the spring when most precipitation has  
10 been realized, and forecasts from the Natural Resources Conservation Service (NRCS).” Kirby  
11 Decl., ¶ 26. Calculations built into the operational criteria determine amounts of water that will  
12 be allocated to various purposes. One is the Project Allocation, expressed in acre-feet and the  
13 maximum amount allowable for Klamath Project use for irrigation and national wildlife refuge  
14 use. Another is the Environmental Water Account (EWA), the amount of water in acre-feet to be  
15 managed for release for coho. In addition, however, there are minimum allowable flows that  
16 must be met even if the EWA as it was calculated is not sufficient to meet those flows. The  
17 minimum flow-based operation rather than the EWA can be determinative of total amounts of  
18 water released to the river in dry years such as the recent past. In sum, the allocation of water to  
19 the river is the EWA or the minimum flows, whichever is greater. The Project Allocation can be  
20 reduced from what was otherwise calculated, if necessary to ensure that the minimum river flows  
21 are met. *Id.* At the beginning of the irrigation season, Reclamation issues “operations plans”  
22 based on the 2013 BiOp. *Id.*, ¶ 27. A technical advisory team provides recommendations to  
23 Reclamation for ongoing management of the EWA. USBR AR1357.

#### 24 **D. Context for this Litigation and Motion**

25 As required by the Section 7(b)(4) of the ESA (*see* section III.A, *supra*), the non-jeopardy  
26 2013 BiOp issued by NMFS included an ITS. Relevant here, the ITS does not relate to coho  
27 salmon, but uses a metric for a different species, Chinook salmon, as a surrogate. Based on then-  
28 recent historical data, NMFS stated its expectation that “up to 49 percent of the total annual

Chinook salmon juveniles in the mainstem Klamath River between the Shasta River and the Trinity River may be infected with *C. shasta* during the months of May to July.” USBR AR1057 (Table 13.6). The stretch of the Klamath River referenced in this component of the ITS is between 70 and 200 miles downstream of the Klamath Project. Kirby Decl., ¶ 28, Exh. D.

Defendants have determined that in 2014 and 2015, the percentages of juvenile Chinook salmon that incurred infection were higher than the percentages in the ITS. These were also two years of extraordinary meteorological conditions throughout the Klamath Basin. USBR AR544 (unprecedented multi-year drought); USBR AR525 (elevated temperature); Kirby Decl., ¶ 20 (snowpack 7 percent of average in 2015).

#### IV. ARGUMENT

##### A. There Is No Subject Matter Jurisdiction

Plaintiff has the burden to demonstrate the Court’s subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). In order to do so, Plaintiff must show that it has standing under U.S. Const. art. III. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (*Lujan*). U.S. Const. art. III requires a plaintiff seeking injunctive relief to present evidence that “he is under threat of suffering ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). However, Plaintiff submits no affidavit or specific facts in support of its standing. *See Lujan*, 504 U.S. at 561. Accordingly, Plaintiff’s motion must be denied because the Court is without subject matter jurisdiction to adjudicate it.

##### B. Summary Judgment Requires There Be No Disputed Material Facts and Alleged Failure to Reconsult Is Reviewed Under the Arbitrary and Capricious Standard

A motion for partial summary judgment is considered pursuant to Fed. R. Civ. P. 56(a). “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Id.* The moving party has the burden of establishing that there are no genuine disputes as to any material fact.

*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court must view the evidence in the light most favorable to the non-moving party, and make all reasonable inferences in favor of the non-moving party. *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001).

Plaintiff alleges violation of the ESA due to failure to reinitiate consultation. Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment and Injunctive Relief (MSJ), ECF No. 69-1, at 10. It is not disputed that the claim triggers the standard of review for agency action or inaction under the "arbitrary and capricious" standard of the Administrative Procedure Act (APA), 5 U.S.C. § 706. Judicial review under the APA's arbitrary and capricious standard is narrow. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014) (*SLDMWA*).<sup>5</sup>

**C. The Court Cannot Find That There Is a Procedural or Substantive Violation of the ESA**

**1. The Klamath Project Is Not the Cause of Each and Every Incidence of Infections of Fish in the Klamath River**

Plaintiff's motion rests on a nonsensical and incorrect assumption that each and every incidence of infection of a juvenile Chinook salmon, from 70 to 200 miles downstream of the Klamath Project, is caused by the Klamath Project. An ITS properly pertains to incidental take caused by an agency action, and any exceedance of an incidental take threshold in an ITS must be attributable to an agency action in order to trigger the duty to reinitiate consultation. *See* 16 U.S.C. § 1536(b)(4)(C)(i) (ITS relates to taking incidental to the agency action); 50 C.F.R. § 402.14(i)(1) (ITS addresses incidental take associated with "an action"). The ESA does not require that the Klamath Project ensure that no fish in the Klamath River incur a naturally-occurring disease, and irrespective of the cause or causes of any incidence of infection or disease. Rather, it places constraints on "take" *caused by* operation of the Klamath Project.

Establishing "take" requires a showing of causation. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 700 n.13 (1995) (violation of ESA take prohibition requires showing of actual and proximate causation); *Cold Mt. v. Garber*, 375 F.3d

<sup>5</sup> Based on previous briefing in this case and the related case, Intervenor's adopt the federal party Defendants' discussion of standard and scope of review.

884, 890 (9th Cir. 2004) (requiring “causal link” between challenged action and alleged take of listed species). Plaintiff identifies nothing in the administrative records that supports that the Klamath Project caused each occurrence of infection of any juvenile Chinook salmon, or any increase in occurrence of infection in juvenile Chinook salmon in 2014 and 2015, let alone any such evidence related to coho salmon or take of coho salmon. The Klamath Basin is a 10 million acre watershed. Numerous factors can influence the occurrence of infections by *C. shasta*. Declaration of Steven P. Cramer in Support of Defendant-Intervenors’ Response to Motion for Partial Summary Judgment and Injunctive Relief (Cramer Decl.) at ¶¶ 9(x, xiii), 18-31, 40. And no evidence, record or non-record, demonstrates that, in 2014 and 2015, Reclamation caused each incidence of infection throughout a reach of the mainstem Klamath River that is between 70 and 200 miles downstream of the Klamath Project. *Id.*, ¶ 9(xii). At different times and at different locations, diversions of water may affect one or more variables that affect the production of spores into the water column that can infect salmon. But even then, there are numerous diversions throughout the Klamath watershed, and indeed the Klamath Project is a minority of irrigated acreage. USBR AR896-897 (diversions other than Klamath Project). Under Plaintiff’s theory, the obligation to reinitiate consultation would be triggered even if Reclamation had done absolutely nothing in 2014 or 2015, or even if Reclamation had done nothing but augment river flows. This would be nonsensical, as is any assumption that the Klamath Project caused or causes all *C. shasta* infection in the Klamath River.

## **2. Defendants Have Reinitiated Consultation and the Motion Must Be Denied In Its Entirety**

Plaintiff’s motion is based on a single contention: that Defendants are in breach of obligations under the regulations implementing Section 7 of the ESA to reinitiate consultation, based on the occurrence of a triggering event that requires reinitiation of consultation and Defendants’ failure to do so. MSJ, ECF No. 69-1, at 10 (citing 50 C.F.R. §§ 402.14(i)(4), 402.16). Plaintiff argues that Defendants’ prior actions and communications directed toward modification of the 2013 BiOp that occurred prior to the lawsuit were insufficient to constitute “reinitiation.” MSJ, ECF No. 69-1, at 12-16. Intervenors disagree. In any event, “Reclamation

has reinitiated formal consultation[.]” USBR AR1, 5. Accordingly, Plaintiff’s “failure to reinitiate consultation” claim is moot and not justiciable. *See Native Fish Soc’y v. Nat’l Marine Fisheries Serv.*, 992 F.Supp.2d 1095, 1115-16 (D. Or. 2014); *Defenders of Wildlife v. Martin*, 454 F.Supp.2d 1085, 1103 (E.D. Wash. 2006); *Greenpeace Found. v. Mineta*, 122 F.Supp.2d 1123, 1127-28 (D. Haw. 2000) (*Greenpeace Found.*). Intervenor’s are aware that Defendants’ briefing will address mootness. Intervenor’s support, and here do not duplicate, that discussion.

Also, in this regard, the Court should recognize the distinctions between the claims for relief in this matter and reject Plaintiff’s efforts to adjudicate issues that are not properly before the Court. For example, the second claim for relief in the Second Amended Complaint alleges that Reclamation has not complied with its substantive obligations under Section 7(a)(2) of the ESA. Second Amended Complaint for Declaratory and Injunctive Relief, Second Claim for Relief at ¶¶ 24-25, 90-96. Plaintiff’s motion is replete with arguments that the 2013 BiOp is insufficient or that operation under the 2013 BiOp is insufficient for ESA compliance. MSJ, ECF No. 69-1, at 14, 15, 16 (alleging the assumptions underlying the 2013 BiOp are false rendering its “no jeopardy” determination erroneous). But adjudication of such claims is on the administrative record and APA standard of review, not on evidence presented in court with a motion for summary judgment, let alone a motion on an entirely separate issue. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602-604 (9th Cir. 2014) (limiting review of APA challenge of BiOp to administrative record). The question relevant to this motion is merely whether Reclamation must and has reinitiated consultation. Whether the existing BiOp is adequate is not an issue that could be determined on this motion or record, and whether a future BiOp will be adequate is not an issue that can be determined until that BiOp exists.<sup>6</sup> Similarly, Reclamation has determined that its operations pending the conclusion of consultation will be consistent with

<sup>6</sup> “Where a full [BiOp] already exists for a particular federal action, and an [action] 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*, No. CV 14-1751 (RC), 2016 U.S. Dist. LEXIS 41005, at \*109 (D.D.C., Mar. 29, 2016), amended by 2016 U.S. Dist. LEXIS 99916 (D.D.C., Aug. 1, 2016).

1 Section 7(d) of the ESA, 16 U.S.C. § 1536(d)<sup>7</sup>. USBR AR7. Any dispute over that conclusion is  
2 irrelevant to the motion.

3 **D. Plaintiff Is Not Entitled to the Requested Injunctive Relief**

4 Plaintiff's request for permanent injunctive relief must be denied because Plaintiff is not  
5 eligible for injunctive relief of any kind. In the alternative, if injunctive relief were somehow  
6 available, the requested relief is not supported, or at minimum, an evidentiary hearing would be  
7 required prior to consideration of such relief.

8 **1. Plaintiff Is Not Entitled to Injunctive Relief of Any Kind**

9 To be eligible for permanent injunctive relief, a plaintiff must have realized actual success  
10 on the merits of plaintiff's claim. *NRDC v. Evans*, 364 F.Supp.2d 1083, 1139 (N.D. Cal. 2003).  
11 This alone requires denial of the requested injunction. Further, the appropriate remedy in the  
12 nature of injunction for any failure of a requirement to reinitiate consultation would be to order  
13 that Reclamation reinitiate consultation. That remedy is irrelevant because Reclamation has done  
14 just that. *See Defenders of Wildlife v. Jackson*, 791 F.Supp.2d 96, 109 (D.D.C. 2011) (request for  
15 injunctive relief "moot because it would 'accomplish nothing' for the Court to order the Agency  
16 to start consulting . . . when it has already begun to do so"). Plaintiff's request for injunctive  
17 relief is thus disconnected from the claim for relief that is being prosecuted by the instant motion.

18 **2. Plaintiff Fails to Meet its Burden to Establish That the Requested Relief Is**  
19 **Warranted**

20 Notwithstanding the above, should the Court for any reason find the Plaintiff may be  
21 eligible for relief (which Intervenor's dispute), Plaintiff has not met the burdens necessary for  
22 issuance of the specific relief that has been requested. Plaintiff requests a mandatory injunction,  
23 under which the Court would direct the operation of Link River Dam and other facilities under  
24 various operating rules. *See* [Proposed] Order Granting Partial Summary Judgment and  
25

26  
27 <sup>7</sup> Section 7(d) of the ESA provides that after initiation of consultation, the agency may not make any irreversible or  
28 irretrievable commitment of resources which has the effect of foreclosing the formulation of any reasonable and  
prudent measures which would not violate section 7(a)(2). 16 U.S.C. § 1536(d).

Injunctive Relief, ECF No. 69-2, at 4.<sup>8</sup> The rules have the purported intent of reducing numbers of the polychaete worms that are a necessary intermediate host for *C. shasta*, or reducing concentration of *C. shasta* spores in the river. They derive from a draft document prepared by Plaintiffs in this and the related litigation, which is titled “Measures to Reduce *Ceratanova shasta* Infections of Klamath River Salmonids: A Guidance Document” (Plaintiffs’ Draft Guidance). Plaintiffs’ Draft Guidance bears the footer “**Deliberative Draft not for Distribution.**” USBR AR231 (emphasis added). The discussion following addresses the origin, relevant content, and consequences of Plaintiffs’ Draft Guidance, and confirms that Plaintiff is not entitled to the requested mandatory injunction.

**a. Context: Development of Plaintiffs’ Draft Guidance Departed From a Planned Science-Based Process**

Plaintiff gave notice of intent to file suit during the first part of 2016. Based on materials filed by Plaintiff and the administrative record, various parties then agreed to a technical approach to evaluation of the occurrence of *C. shasta* infection of salmon. USBR AR418-421. A Disease Technical Advisory Team (DTAT) would be formed, and include personnel from federal and state agencies as well as four tribes, including the plaintiff tribe. As a first step, the USFWS would prepare technical memoranda providing or summarizing information on various subjects. Then, the DTAT would propose guidance (as opposed to management recommendations) for science-based measures intended to mitigate the effects of disease infection rates below Iron Gate Dam. The guidance would be provided to NMFS and Reclamation for consideration of how to apply or use any of the information. The charter for the process stated that the DTAT would “not make specific management recommendations to the Bureau of Reclamation or other entities.” USBR AR340-341.

The first step proceeded as planned: USFWS prepared technical memoranda, and these four memoranda are attached to Plaintiffs’ Draft Guidance. USBR AR252-319. However, there

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<sup>8</sup> Plaintiff also requested, in the alternative, an order that would preclude *any* irrigation deliveries for the Klamath Project. MSJ, ECF No. 69-1, at 2:20-21. Plaintiff presents no evidence that such extreme relief is necessary to prevent irreparable harm to Plaintiff pending conclusion of reinitiated consultation (nor would such an order represent the status quo as Plaintiff asserts), and this issue is not discussed further here.

1 was a deviation from the charter for the joint scientific process, in that plaintiffs tribes elected to  
2 generate Plaintiffs' Draft Guidance, which contains very specific proposed management  
3 directives for Reclamation. These directives have now been offered to the Court for inclusion in  
4 a proposed mandatory injunction to Reclamation.

5 Plaintiffs' Draft "Guidance" 1 is the provision of surface "flushing" flows, consisting of  
6 very high volumes of water over a period of time during winter in hopes of mobilizing sediments  
7 to reduce host worm populations. USBR AR237. This approach, proposed for ordering by the  
8 Court, is characterized as a hypothesis bearing uncertainties. USBR AR238. Federal agencies  
9 who reviewed Plaintiffs' Draft Guidance recommended modification, and also questioned its  
10 efficacy and why it had been proposed for implementation each year and pointed to the "difficulty  
11 of proving that these flows are having measurable positive effects outside of increased 'natural'  
12 hydrologic functions in the river." USBR AR51. Plaintiffs' Draft Guidance 2 involves providing  
13 "deep flushing flows" and "armor disturbing flows." USBR AR239. USFWS noted that  
14 Plaintiffs' Draft Guidance 2 did not appear to present a benefit to the ecosystem and may "create  
15 unforeseen difficulties for the very species we are trying to protect." USBR AR52. Plaintiffs'  
16 Draft Guidance 4 involves holding 50,000 acre-feet of water in reserve, for release if determined  
17 to be desired for dilution of spores. USBR AR241. Again, federal agencies including USFWS,  
18 the author of relevant technical memoranda, said: "There is little evidence in the tech memos to  
19 support the need or effectiveness of this action." USBR AR53. USFWS commented that  
20 Plaintiffs' Draft Guidance 5 pointed to "tenuous" logic of the measure, and suggested it be  
21 removed. USBR AR55, 56. For its part, Reclamation has indicated that, pending conclusion of  
22 reinitiated consultation, the Klamath Project will be operated in accordance with the two  
23 2013 BiOps and principles of adaptive management under the flexibility of the BiOps. Specific  
24 consideration of Plaintiffs' Draft Guidance Measures can occur "once the document has been  
25 finalized by addressing substantive comments that were provided and has undergone appropriate  
26 scientific peer review consistent with" applicable Department of the Interior policy. USBR AR7.  
27  
28

**b. Consequences of Implementation of Plaintiffs' Draft Guidance and Proposed Injunction**

In the meantime, the consequences of implementing the proffered hypotheses are real. There is a certain amount of confusion generated by differences in the characterization of the measures among the plaintiffs in the related actions, but the impacts are nonetheless substantial.

The "Proposed Order" submitted by the Hoopa Valley Tribe states on page 4 that "Reclamation, in addition to any and all amounts of water required to be reserved and set aside for the Environmental Water Account and released as described in the 2013 Biological Opinion, shall reserve and set-aside an additional quantity of not less than 50,000 acre-feet of water for the purpose of immediately implementing the flow measures described in Management Guidance 1, Management Guidance 2, and Management Guidance 4 in the Guidance Document" and implement those guidance measures. In my opinion, this is a confused statement and also is not possible. First, the amount of water necessary to implement the three listed guidance measures is much more than 50,000 acre-feet. Second, the periods of Guidance measures 1 and 2 begin prior to the calculation of the EWA, so it would not be possible to set aside water in addition to the EWA. In fact, if implemented prior to the date the EWA is calculated, the effect of implementing Guidance measures 1 and 2 would more than likely reduce the volume of the EWA, as well as reduce the Project Allocation. This is because the EWA calculation partly depends on water volumes in Upper Klamath Lake on the date of the calculation, and Guidance measures 1 and 2 would necessarily have the effect of reducing that volume. If the Hoopa proposed order is read to mean that this should not occur and the EWA in this circumstance should be calculated to be what it otherwise would have been if Guidance measures 1 and 2 had not been implemented (which I assume to be the approach all the plaintiffs are taking in the lawsuits), then all of the impact of Guidance measures 1 and 2 would be on the Klamath Project and national wildlife refuges (reduced diversion), Upper Klamath Lake levels for suckers, or some combination of these. Also, all of the impact of implementing Guidance measure 4, proposed by all the plaintiffs, would be on the Klamath Project and national wildlife refuges (reduced diversion), Upper Klamath Lake levels for suckers, or some combination of these. I believe it would depend on the circumstances and otherwise someone would have to decide.

Kirby Decl. at ¶ 31. Implementation of measures 1 and 4 alone could require over 100,000 acre-feet of water, "at the expense of the Klamath Project, Lower Klamath National Wildlife Refuge, and Upper Klamath Lake and suckers, or some combination of those water needs." *Id.* at ¶ 30. The effects of implementation in one year "could easily" have carry-over effects into the next year's operations and water allocation. *Id.* at ¶ 31.<sup>9</sup>

<sup>9</sup> There could arise circumstances under which flows identified in some of Plaintiffs' Draft Guidance Measures such as #1 would simply occur or be realized with minimal active management or impact, simply because of hydrologic conditions in the Klamath Basin (for example, a wet winter condition). The motion, however, is directed toward mandating operations that would cause major impacts on irrigation or refuges or lake levels for endangered suckers.

1           Irrigation water users in the Klamath Project have in some years, and especially extreme  
 2 drought years before basin-wide conditions improved in 2016, endured shortages due to ESA-  
 3 based regulation for suckers and coho. The impacts have been and remain very damaging, and  
 4 Plaintiff would have the Court institutionalize and magnify such impacts. Agriculture supports  
 5 family farm and ranch operations. The revenue also supports agriculture-related jobs, businesses,  
 6 and local communities generally. Declaration of Jason Chapman in Support of Defendant-  
 7 Intervenor's Response to Motion for Partial Summary Judgment and Injunctive Relief (Chapman  
 8 Decl.) at ¶¶ 8-9, 11-12; Declaration of Ben DuVal in Support of Defendant-Intervenor's  
 9 Response to Motion for Partial Summary Judgment and Injunctive Relief (DuVal Decl.) at ¶ 3;  
 10 Declaration of Robert Unruh in Support of Defendant-Intervenor's Response to Motion for Partial  
 11 Summary Judgment and Injunctive Relief (Unruh Decl.) at ¶¶ 2-4, 6; Declaration of Luther  
 12 Horsley in Support of Defendant-Intervenor's Response to Motion for Partial Summary Judgment  
 13 and Injunctive Relief (Horsley Decl.) at ¶¶ 9, 11-13 (describing agricultural operations generally,  
 14 including crop types, employment, packing and shipping cooperatives, and other dependent  
 15 businesses). If Klamath Project water deliveries are curtailed, the consequences may include  
 16 bankruptcy and loss of farms, impacts on the ability to maintain contracts with food processors,  
 17 impacts on the ability to borrow and finance operations, impacts on employment opportunities,  
 18 impacts on local businesses and their employees, and a panoply of other adverse consequences.  
 19 Horsley Decl. at ¶¶ 13-17; Unruh Decl. at ¶¶ 5-9, 21-22; Chapman Decl. at ¶¶ 10-13; DuVal  
 20 Decl. at ¶¶ 4-5; Declaration of John Wolf in Support of Defendant-Intervenor's Response to  
 21 Motion for Partial Summary Judgment and Injunctive Relief (Wolf Decl.) at ¶¶ 17-20;  
 22 Declaration of Earl C. Danosky in Support of Defendant-Intervenor's Response to Motion for  
 23 Partial Summary Judgment and Injunctive Relief (Danosky Decl.) at ¶¶ 19-20 (describing harms  
 24 to Klamath Project water users from water shortage, as well as impacts to the individual districts).

25           Water supplied through the Klamath Project also supports the TLNWR and LKNWR.  
 26 Danosky Decl. at ¶ 14; Horsley Decl. at ¶¶ 5-6. These wildlife refuges support tremendous  
 27 numbers of waterfowl and other wildlife, and are important staging areas for Pacific Flyway bird  
 28 migration. Danosky Decl. at ¶ 18. In summary, any additional curtailment of water to the

Klamath Project affects not just individual farmers, but the entire upper Klamath Basin community, including the federal wildlife refuges, agricultural-dependent and related businesses, and local government tax revenue. Further, even a single-season curtailment may manifest itself for several or more years. For example, a prior curtailment in a single year resulted in a decline in the local population, adversely affecting local school enrollments and overall community vitality. *See, e.g.,* Horsley Decl. at ¶ 16; Unruh Decl. at ¶ 22.

**c. Plaintiff Has Not Addressed or Met the Burden It Must Meet in Order to Obtain the Permanent Mandatory Injunction**

The law and facts do not warrant the conclusion that the requested relief is necessary to prevent irreparable harm pending conclusion of reinitiated consultation or that continued Klamath Project operation pending conclusion of reinitiated consultation (or otherwise) will result in irreparable harm to Plaintiff, or that the requested permanent injunction would serve the public interest.

**i. Applicable Standard**

“[T]o be entitled to a permanent injunction, a plaintiff must demonstrate: (1) actual success on the merits; (2) that it has suffered an irreparable injury; (3) that remedies available at law are inadequate; (3) (sic) that the balance of hardships justify a remedy in equity; and (5) that the public interest would not be disserved by a permanent injunction.” *Indep. Training & Apprenticeship Program v. Calif. Dep’t of Indus. Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013). “An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course.” *Monsanto Co. v. Geertson Seed Farm*, 561 U.S. 139, 165 (2010). In *Cottonwood Envtl. Law Ctr. v. United States Forest Serv.*, 789 F.3d 1075, 1089-90 (9th Cir. 2015) (*Cottonwood*), the Ninth Circuit definitively overruled its prior precedent that presumed irreparable injury in ESA injunction cases. Contrary to any suggestion that irreparable harm may still be presumed, courts in the Ninth Circuit follow *Cottonwood* and require the movant to show irreparable harm. *Defenders of Wildlife v. Jewell*, No. CV 14-1656-MWF (R2x), 2014 U.S. Dist. LEXIS 50614 (C.D. Cal., Apr. 2, 2014) (holding that to obtain an injunction the plaintiff “must show at a minimum that irreparable harm is likely”); *Center for Envtl. Science, Accuracy & Reliability v.*

1 *Cowin*, No. 15-CV-00884-JO BAM, 2015 U.S. Dist. LEXIS 79442 (E.D. Cal., June 18, 2015)  
 2 (*Cowin*) (holding that the plaintiff must show, at a minimum, there is “a definitive threat of future  
 3 harm . . . based on something other than mere speculation”). Therefore, to receive an injunction  
 4 the Plaintiff must demonstrate that without the injunction the species as a whole will be  
 5 irreparably harmed. *Klamath-Siskiyou Wildlands Ctr. v. Nat’l Oceanic & Atmospheric Admin.*  
 6 *Nat’l Marine Fisheries Serv.*, 109 F.Supp.3d 1238, 1248 (N.D. Cal. 2015).

7 “A mere ‘possibility’ of irreparable harm is insufficient.” *Souza v. Cal. DOT*, No. 13-CV-  
 8 04407-JD, 2014 U.S. Dist. LEXIS 61489, at \*22 (N.D. Cal., May 2, 2014). The Plaintiff must  
 9 show that, at a minimum, there is “a definitive threat of future harm [to a listed species] based on  
 10 something other than mere speculation.” *Cowin*, 2015 U.S. Dist. LEXIS 79442, at \*4-5.

11 “Injunctive relief must be tailored to remedy the specific harm alleged.” *NRDC v. Winter*,  
 12 508 F.3d 885, 886 (9th Cir. 2007). The Plaintiff must show that **each measure** of the requested  
 13 permanent injunction will prevent irreparable harm to the species. *S. Yuba River Citizens League*  
 14 *v. Nat’l Marine Fisheries Serv.*, 804 F.Supp.2d 1045, 1052 (E.D. Cal. 2011).

15 Here, Plaintiff’s burden is even more demanding because it seeks a mandatory injunction  
 16 requiring Reclamation to take action, as opposed to a prohibitory injunction enjoining a proposed  
 17 action. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir.  
 18 2009) (*Marlyn Nutraceuticals*). Mandatory injunctions go “well beyond simply maintaining the  
 19 status quo” and, as a result, are “particularly disfavored.” *Id.* (citation omitted); *Stanley v. Univ.*  
 20 *S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994). “In general, mandatory injunctions are not granted  
 21 unless extreme or very serious damage will result and are not issued in doubtful cases.” *Marlyn*  
 22 *Nutraceuticals* at 879 (internal quotations and citation omitted); *Park Vill. Apt. Tenants Ass’n v.*  
 23 *Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011). Consequently, the Plaintiff must  
 24 “establish that the law and facts *clearly favor*” issuing an injunction. *Garcia v. Google, Inc.*,  
 25 786 F.3d 733, 740 (9th Cir. 2015) (*Garcia*) (emphasis added).

**ii. The Applicable Standard Is Not Met With Respect to the Showing of Likely Irreparable Harm That Would Be Avoided Through Each Element of the Requested Permanent Injunction**

Plaintiff does not even address its evidentiary burdens in its brief. Notably, Plaintiff's [Proposed] Order says absolutely nothing about the need to order the relief, let alone each element of the relief, in order to prevent irreparable harm to Plaintiff that would otherwise result from operation of the Klamath Project pending the conclusion of a reinitiated consultation. The extraordinary conditions that existed in 2014 and 2015 are not present now and there is no basis to believe they will re-occur, or that the Klamath Project itself will cause infection rates comparable to those that occurred in those two years, and let alone that the specific question here pertains to coho salmon. Plaintiff's declarant states that it is "urgent" and "critical" and "essential" to implement the measures Plaintiff proposes. Second Declaration of Sean Ledwin, ECF No. 71, at ¶¶ 13, 15, 19. But advocacy for the measures does not establish that a definitive threat exists. Setting aside whether each element of the proposed injunction is necessary to prevent irreparable harm to the Plaintiff, the injury asserted by Plaintiff, which relates to circumstances in 2014 and 2015 is wholly speculative. It is well-established that "speculative injury" however, "does not constitute irreparable injury." *Goldie's Bookstore, Inc. v. Superior Court of State of Calif.*, 739 F.2d 466, 472 (9th Cir. 1984); *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 675 (9th Cir. 1988). Plaintiff does not meet its burden of identifying "likely" and "irreparable harm tied to" the operation of the Klamath Project. *See Salix v. United States Forest Serv.*, 944 F.Supp.2d 984 (D. Mont. 2013). Nor does Plaintiff meet its burden of demonstrating that each element of the requested injunction is tailored to meeting the specific harm associated with the action Plaintiff seeks to modify. Rather, Plaintiff asks the Court to require Reclamation to attempt to inoculate the Klamath River by delivering large volumes of water down the river. Plaintiff has not shown "the law and facts *clearly favor*" such a mandatory permanent injunction. *Garcia*, 786 F.3d at 740 (emphasis added).

Moreover, Plaintiff seeks to require Reclamation to artificially augment the volume of water flowing below Iron Gate Dam beyond what would occur if Reclamation did nothing and all water simply passed through Upper Klamath Lake and Link River Dam. Kirby Decl. at ¶ 33.

1 Thus, the requested relief is not directed to preventing irreparable harm caused by the Klamath  
2 Project; rather, it seeks to require the Klamath Project to take actions to affirmatively prevent  
3 infection from occurring regardless of the cause for infection.<sup>10</sup>

4 Fisheries scientist Steven Cramer’s analysis and opinions are informed by four decades’  
5 working experience, including his key roles in several studies of salmon in the Klamath Basin.  
6 This work has included a comprehensive technical evaluation of coho salmon distribution and  
7 behavior and all factors affecting coho populations. Cramer Decl., ¶¶ 1-4; Exh A. Mr. Cramer’s  
8 Declaration furnishes an informed evaluation that confirms, even if injunctive relief were  
9 potentially available, the remedy or remedies requested are unnecessary to prevent any irreparable  
10 harm pending the completion of the reinitiated consultation or otherwise.

11 Mr. Cramer’s evaluation takes into consideration the full life cycle of coho salmon  
12 including the ocean stage where they spend half or more of their lives. Indeed, “[v]ariation in  
13 ocean conditions alone cause 10-fold variation between years in survival from smolt-to-adult, and  
14 is widely recognized as the dominant factor driving annual variation in abundance of Coho  
15 populations on the Pacific Coast.” Cramer Decl., ¶ 9(xiii). Furthermore, in the relevant parts of  
16 the Klamath River, differences in spore concentration and disease are affected by differences in  
17 water temperature, not water volumes below Iron Gate Dam (*id.*, ¶¶ 9(iv, v, x), 24-27), and in fact  
18 “it is clear that natural environmental variation . . . is the key factor driving differences in  
19 *C. Shasta* infection rates between and within years.” *Id.*, ¶¶ 9(x), 43, 54. Spore dilution via flow  
20 augmentation has not been shown to appreciably decrease infection rates in Klamath River  
21 salmon. *Id.*, ¶¶ 9(xi), 43, 51. “Weather conditions during spring have a much stronger influence  
22 on survival of emigrating smolts than the volume of water released from Iron Gate Dam.” *Id.*,  
23 ¶ 9(xiii). “Any assumption that operations of the Klamath Project is the cause of a given  
24 incidence of *C. shasta* infections of salmonids in the Klamath River between the Shasta River and

25 \_\_\_\_\_  
26 <sup>10</sup> Reclamation’s authority to take such action is in doubt. The Klamath Project’s authorized purposes include only  
27 purposes of the original 1902 Reclamation Act. The only water rights for use of water stored in Upper Klamath Lake  
28 are rights for irrigation, not wildlife purposes. Kirby Decl., Exh. B at ¶ KBA\_ACFOD\_07155; *see also Southwest*  
*Ctr. for Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515, 522-23 (9th Cir. 1998) (affirming  
district court decision that it was not arbitrary and capricious for Reclamation to discount an RPA based on its lack of  
discretion to lower the water level of Lake Mead to implement plaintiff’s preferred RPA).

1 Trinity River, or of increases between years in the rate of infections, is not supported by the  
2 available data.” *Id.*, ¶ 9(xii).

3 With respect to the freshwater stages of the species’ life cycle, and the consideration of  
4 *C. shasta* infection, it is notable that coho behavior and habitat utilization is quite distinct from  
5 that of Chinook salmon. Coho spawn and rear almost exclusively in tributaries and sub-  
6 tributaries of the Klamath River where *C. shasta* spores and resulting infection do not occur. *Id.*,  
7 ¶¶ 10-13, 18-21. Thus, the only potential exposure to infection is when coho are on their  
8 outmigration to the ocean. *Id.*, ¶¶ 14-16, 29. Also, coho migration to the ocean occurs early in  
9 the year (and earlier than Chinook), during times when temperatures are lower and therefore risks  
10 of infection are lower. *Id.*, ¶¶ 14-17, 30, 32. Thus, infection rates for Chinook salmon do not  
11 translate to impacts to coho. That is not to say that coho cannot be infected, but infection does  
12 not necessarily translate to mortality (*see id.*, ¶¶ 9(i-iii), 23, 27, 28, 30), and “other factors than  
13 disease have the dominant influence on survival across the full life cycle of coho salmon.”  
14 *Id.*, ¶ 27.

15 Mr. Cramer evaluated the draft guidance measures advocated by Plaintiff and, like others,  
16 found them to be little more than hypotheses, and in some cases contradicted by empirical  
17 evidence. *Id.*, ¶¶ 9(vi-viii, xi), 31, 43, 45, 47-48, 51; *see also id.* at ¶ 37 (difficulties of disease  
18 management through host control effort). Mr. Cramer concludes “that available evidence does  
19 not indicate that measures for release of water below Iron Gate Dam recommended by the  
20 plaintiffs are necessary to prevent irreparable harm to the SONCC Coho before the conclusion of  
21 re-consultation” and “that continued operation of the Klamath Project consistent with the  
22 2013 BiOp would not result in irreparable harm to the species.” *Id.*, ¶ 9(xiv).

### 23 **iii. Other Factors Also Support Denial of the Injunction**

24 Generally, courts have stated that the fourth and fifth factors in determining injunctive  
25 relief, the balance of hardships and whether the injunction is in the public interest, are weighed in  
26 favor of species protection. *Cottonwood*, 789 F.3d at 1090. However, here, the injunction  
27 requested by Plaintiff could harm two endangered species as well as other wildlife. Kirby Decl.  
28 at ¶¶ 30, 31. The Court must consider the competing needs of multiple species, and not do as

1 Plaintiff suggests and impose a drastic measure with an uncertain outcome. Additionally,  
 2 Intervenor's real and important hardships and interests should be considered. Plaintiff seeks a  
 3 drastic remedy that would create significant hardships for the community of farmers and ranchers  
 4 that rely on water from the Klamath Project for their livelihoods.

### 5 **3. An Evidentiary Hearing Is Required Prior to Any Consideration of a** 6 **Permanent Injunction**

7 Even if Plaintiff could establish liability, a permanent injunction cannot issue unless and  
 8 until an evidentiary hearing is held to resolve disputed facts. The Court must hold an evidentiary  
 9 hearing before it can issue a permanent injunction, unless there are no disputed facts or the right  
 10 to a hearing has been waived. *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988);  
 11 *accord Natural Resources Defense Council v. United States Forest Srv.*, 421 F.3d 797, 816 n.29  
 12 (9th Cir. 2005) ("The appropriateness and scope of an injunction 'raise intensely factual  
 13 issues . . .'," [quoting *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723,  
 14 732 (9th Cir. 1995)]. Even where a statutory violation has occurred (unlike here), an "injunction"  
 15 in an environmental case "should not automatically issue." *Hells Canyon Preservation Council v.*  
 16 *Jacoby*, 9 F.Supp.2d 1216, 1245 (D. Ore. 1998), *citing Forest Conservation Council v. U.S.F.S.*,  
 17 66 F.3d 1489, 1496 (9th Cir.1995). "Instead, defendants should be given an opportunity 'to  
 18 present evidence of unusual circumstances that weigh against the injunction sought, and to  
 19 present evidence to assist the court in fashioning the appropriate scope of whatever injunctive  
 20 relief is granted.' " *Id.*, quoting *Forest Conservation*, 66 F.3d at 1496.

21 As demonstrated above, there are disputed facts related to the request for the entry of such  
 22 an injunction that will require an evidentiary hearing to resolve, including whether an injunction  
 23 is necessary to prevent irreparable harm to Plaintiff that would otherwise result from Defendants'  
 24 action, whether each element of the requested injunction is necessary to prevent irreparable harm  
 25 to the Plaintiff, and the harm that would result to other interests including two endangered  
 26 species. *See Greenpeace Found.*, 122 F.Supp.2d at 1139 (determining the court will need to  
 27 "hold an evidentiary hearing to collect necessary information" regarding the irreparable harm and  
 28 public interest factors prior to determining whether to issue requested injunction because

1 “[w]ithout the aid of more information regarding the bottomfishing industry, the Court cannot  
2 adequately and accurately assess the likelihood of future irreparable harm and the public interest  
3 at stake”). Defendants and Intervenorors have not waived their right to a hearing. Should the Court  
4 determine that injunctive relief may be available, Intervenorors request the Court hold an  
5 evidentiary hearing before determining the propriety, nature, and scope of relief.

6 **E. The Motion Must Be Denied or Deferred in Order to Allow Discovery**

7 The motion should be denied as premature pursuant to Fed. R. Civ. P. 56(d), or  
8 alternatively deferred until such time as the parties have had sufficient time to conduct discovery.  
9 Where a nonmovant demonstrates it cannot present facts essential to justify its opposition to a  
10 motion for summary judgment, Fed. R. Civ. P. 56(d) provides that the court may: (1) defer  
11 considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take  
12 discovery; or (3) issue any other appropriate order. Fed. R. Civ. P. 56(d).

13 Relief under Rule 56(d) “is appropriate when the nonmovant submits by declaration or  
14 affidavit an explanation of why he or she cannot present facts essential to justify the opposition.”  
15 *Chaffee v. Chiu*, No. 11-CV-05118-WHO, 2013 U.S. Dist. LEXIS 177008, at \*23 (N.D. Cal.  
16 Dec. 17, 2013). A continuance “should be granted almost as a matter of course unless the non-  
17 moving party has not diligently pursued discovery of the evidence.” *Burlington Northern Santa*  
18 *Fe Railroad Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773-74  
19 (9th Cir. 2003). “[T]he Supreme Court has restated the rule as requiring, rather than merely  
20 permitting, discovery where the non-moving party has not had the opportunity to discover  
21 information that is essential to its opposition.” *Metabolife, Int’l, Inc. v. Wornick*, 264 F.3d 832,  
22 846 (9th Cir. 2001) (internal quotation marks and citation omitted). “To prevail under this Rule,  
23 parties opposing a motion for summary judgment must make ‘(a) a timely application which  
24 (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that  
25 the information sought actually exists.’ ” *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1091  
26 n.9 (9th Cir. 2009).

27 No discovery of any kind has taken place between the parties. The parties have not  
28 engaged in a Fed. R. Civ. P. 26(f) conference, and are at this time precluded from seeking

discovery under Fed. R. Civ. P. 26(d)(1). Declaration of John P. Kinsey in Support of Request for Denial or Continuance of Summary Judgment Under Fed. R. Civ. P. 56(d) (Kinsey Decl.), ¶¶ 3-4; Fed. R. Civ. P. 26.

To the extent this Court's evaluation of the merits of Plaintiff's claims is not based upon the administrative record, as Plaintiff contends, discovery will be necessary to determine disputed issues, including whether there is a causal link between the challenged action and any alleged "take." *See* Kinsey Decl., ¶ 6. In addition, although Intervenor's do not believe Plaintiff can establish entitlement to an injunction, discovery is necessary for this Court to consider an appropriate remedy. This is particularly true here because the relief Plaintiff seeks would require this Court to direct the operation of the Link River Dam and other facilities, and to do so based on assertions by declarants who have not been deposed and whose assertions Intervenor's question or dispute. Discovery is necessary to determine whether the measures Plaintiff seeks to impose would (i) result in a take or adverse effects on other species, such as endangered suckers; (ii) create unforeseen difficulties for the coho salmon itself; and (iii) adversely affect wildlife refuges. Discovery is also necessary to discern whether any of Plaintiff's proposed measures would even be effective in: (i) reducing the numbers of the polychaete worms that are the intermediate host for *C. Shasta*; (ii) reducing concentration of *C. shasta* spores in the river; (iii) reducing incidence of infection or disease or mortality of Chinook or coho salmon; (iv) having any beneficial effect for coho salmon; or (v) being necessary to prevent irreparable harm to coho salmon, and to Plaintiff. *See* Kinsey Decl., ¶¶ 7-9; Cramer Decl., ¶¶ 9, 37-42.

## V. CONCLUSION

For all the foregoing reasons, the motion should be denied.

SOMACH SIMMONS & DUNN, PC

DATED: January 11, 2017

By /s/ Paul S. Simmons

Paul S. Simmons, Attorneys for  
Defendant-Intervenor's Klamath Water Users  
Association, Sunnyside Irrigation District, and  
Ben DuVal

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CLYDE SNOW & SESSIONS, P.C.

DATED: January 11, 2017

By /s/ Reagan L. B. Desmond  
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