Thomas P. Schlosser WSBA #06276
Thane D. Somerville WSBA #31468 (*pro hac vice*)
MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE
Suite 1115, Norton Building
801 Second Avenue
Seattle, WA 98104-1509
Tel: 206-386-5200
Fax: 206-386-7322
t.schlosser@msaj.com
t.somerville@msaj.com
Attorneys for Plaintiff Hoopa Valley Tribe

Patricia A. Prochaska, CA #142161
Attorney at Law
577 9th Avenue
Menlo Park, CA 94025
Telephone: 650-562-7060
patprochaska@gmail.com
Local Counsel for Plaintiff

UNITED STATES DISTRICT COURT

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. 16-cv-4294-WHO PLAINTIFF'S REPLY TO FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT Judge: Hon. William H. Orrick Hearing Date: January 27, 2017 Hearing Time: 9:00 AM Courtroom: 2, 17th Floor

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I. REPLY ARGUMENT AND AUTHORITY

A. The Hoopa Valley Tribe Has Established Standing.

With its motion for partial summary judgment, the Tribe submitted Declarations of Sean Ledwin of the Hoopa Valley Tribal Fisheries Department and Joshua Strange, Ph.D. Dkt. ##70, 71. These Declarations plainly show that the Tribe has suffered injury in fact by way of the harm and death of salmon caused by continued operations of the Klamath Project under the 2013 Biological Opinion (BiOp). *See e.g.*, Dkt. 71-2, ¶ 5 (explaining that Klamath River flows through Hoopa Valley Reservation and "central importance that anadromous fish and fishing have to the Hoopa Valley Tribe's subsistence, culture, and economy"); ¶ 7 (explaining that Klamath Project operations exacerbate fish disease, which is a major factor limiting survival and recovery of coho salmon); ¶ 20 (explaining that this injury of harm and death to coho will continue if Klamath Project operations continue under the 2013 BiOp; ¶ 22 (explaining that immediate redress from this Court is required to protect coho from injury). *See* Dkt. ##70, 71 (explaining relationship between Klamath Project and injury to salmon and need for immediate relief here); Second Amended Complaint, ¶ ¶ 18-20; *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995) (recognizing Hoopa Valley Tribe's federal reserved fishing rights and the significance and importance of fish and fishing to the Tribe and its members). Although the Tribe has already established standing, the Tribe submits the Declaration of Hoopa Chairman Ryan Jackson with this reply to provide additional evidence in support of the Tribe's standing.

B. Federal Defendants Have Not Reinitiated Formal Consultation.

Federal Defendants now argue that they reinitiated formal consultation in March 2016 or at some other unspecified date prior to commencement of Plaintiff's suit. Dkt. #93, p. 9, Dkt. #93, p. 13, fn. 9 (alleging failure to reinitiate claim was moot upon filing). This assertion is expressly contradicted by Federal Defendants' prior admissions throughout 2016, which are contained in the administrative record. Formal consultation has not been reinitiated by BOR or NMFS; thus, Plaintiff is entitled to partial summary judgment on its failure to reinitiate claim.

On May 17, 2016, the Hoopa Valley Tribe sent notice to NMFS and BOR that they were in violation of their obligation to reinitiate formal consultation on the 2013 BiOp as a result of the take exceedances that occurred in 2014 and 2015. AR000496-500. This Notice of Violation ("NOV") is required by 16 U.S.C. § 1540(g)(2)(A)(i) and its purpose is to provide the federal agencies with "an opportunity to review their actions and take corrective measures . . . ." in response to the alleged violation before a citizen suit is commenced. *SW Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998).

On July 13, 2016, Bureau of Reclamation (BOR) Regional Director David G. Murillo responded to the Tribe's NOV letter. AR000434-35. In the letter, Mr. Murillo acknowledged receipt of the letter which "outlines alleged violations arising from . . . Reclamation's and [NMFS]' failure to reinitiate formal consultation . . . ." *Id.* He acknowledged coordinating with NMFS in preparing his response. *Id.* Regional Director Murillo did not state that BOR or NMFS had already reinitiated formal consultation prior to that date. Instead, Mr. Murillo stated:

> Reclamation, NMFS, and USFWS are interested, willing, and available to meet and engage in discussions with the Tribe regarding the concerns expressed in the NOV. . . . *This information will also be used to inform Reclamation's determination regarding the need to reinitiate consultation along with the extent and scope of the consultation, if reinitiated*. (emphasis added)

AR000435. BOR and NMFS had not reinitiated formal consultation as of July 13, 2016. They refused to correct the violation in response to the NOV and Plaintiff filed suit on July 29, 2016.

On July 20, 2016, Federal Defendants received another NOV sent by Earthjustice regarding failure to reinitiate formal consultation. AR000424-431. This NOV alleged that BOR and NMFS were "in violation of the ESA for failing to reinitiate consultation on Klamath Project Operations" and threatened suit based on that violation. AR000424, 431. On August 19, 2016, Regional Director Murillo responded to the Earthjustice NOV. AR000422-423. He acknowledged receipt of the NOV letter and the alleged failure to reinitiate consultation. *Id.* He coordinated with NMFS in preparing his August 19 response letter. *Id.* Mr. Murillo did not state that BOR or NMFS had already reinitiated formal consultation. Instead, he explained that

BOR and NMFS were monitoring and had agreed to develop a Disease Management Plan. *Id.*

> The Plan is intended to include a technical assessment and recommendations of flow management and other actions that could effectively manage *C.shasta* in the mainstem Klamath River, *as well as inform Reclamation's determination regarding the need to reinitiate consultation*. (emphasis added)

AR000423. Similarly, on August 22, 2016, Mr. Murillo wrote a letter to the Karuk Tribe in response to their NOV. AR000420-421. He referenced the disease management plan and concluded: "The Plan may also be used to inform Reclamation *regarding the need to reinitiate consultation along with the extent and scope of consultation, if reinitiated*." *Id*. (emphasis added). These letters were also copied to Jim Simondet of NMFS and Laurie Sada of USFWS, two of the Federal Defendants' declarants here. AR000421, 423. The Murillo letters are admissions that BOR and NMFS had not reinitiated formal consultation as of August 22, 2016 and are fatal to Federal Defendants' argument that reinitiation commenced prior to that date. Due to lack of formal consultation, Earthjustice filed suit for its clients on November 29, 2016.

Federal Defendants' current argument strains credulity. Their own prior admissions contained in documents produced in the administrative record confirm that formal consultation was not reinitiated in March 2016 or thereafter. As late as August 22, 2016, Regional Director Murillo made clear that Federal Defendants were still evaluating the need to reinitiate formal consultation. If BOR and NMFS had already reinitiated formal consultation, they would have made that clear in response to the NOVs rather than be subjected to two separate lawsuits. Nor do Federal Defendants identify any document after August 2016 in which BOR or NMFS requested reinitiation of formal consultation. The only conclusion that can be reached is that Federal Defendants have not reinitiated formal consultation as required by 50 C.F.R. § 402.16.[1]

[1] None of Federal Defendants' declarants and nothing in the administrative record offer a specific date or document upon which the alleged formal consultation was reinitiated. Declarants Simondet and Sada both state they have "reviewed Reclamation's request for reinitiation of formal [consultation]" but fail to attach any such request or cite to its location in the record. Dkt. #93-3, ¶ 2; 93-4, ¶ 4. Declarant Cameron asserts formal consultation "was initiated earlier this year after [BOR] received the March 2016 letter from NMFS." Dkt. #93-2, ¶ 21, AR000502. Federal Defendants' brief, Dkt. #93, p. 9, cites the March 29 NMFS letter

Federal Defendants also have made no showing that their own procedures relating to formal consultation have been followed. 50 C.F.R. § 402.14(c) provides that the action agency initiates formal consultation through a written request to the Director which shall include specific enumerated items. For example, prior to reinitiating the formal consultation that led to the 2013 BiOp, BOR sent NMFS a letter on December 1, 2012 that stated in no uncertain terms: "Reclamation . . . is requesting initiation [of] formal ESA Section 7(a)(2) consultation [with NMFS and USFWS]." NMFS00001. There, BOR confirmed "all information necessary to initiate formal consultation has been provided" and expressed its desire to complete formal consultation prior to the 2013 irrigation season. NMFS00002. In this record, there is no such request for reinitiation of formal consultation following the take exceedances in 2014 or 2015.

The Consultation Handbook also explains that formal consultation "(2) begins with a Federal agency's written request *and submittal of a complete initiation package*; and (3) concludes with the issuance of a biological opinion and incidental take statement by either of the Services." Consultation Handbook, p. xiv (definition of "formal consultation") (emphasis added). The "initiation package is submitted with the request for formal consultation and must include [six enumerated items]." *Id.* at 4-4. "Formal consultation is 'initiated' on the date the request is received, *if the action agency provides all the relevant data required by 50 C.F.R. § 402.14(c)*. *Id.* at 4-6. (emphasis added). The Cameron and Simondet Declarations confirm that BOR has not yet provided any "consultation package" to NMFS. Dkt. #93-2, ¶ 21; Dkt. #93-4, ¶ 7. Nor has there even been any written request to reinitiate formal consultation. Compare NMFS 000001 (12/1/12 reinitiation request). The Handbook also advises NMFS to

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[AR000502] but that letter by its own terms does not request reinitiation of formal consultation. And, according to Federal Defendants' arguments here, only BOR (not NMFS) can reinitiate. Dkt. #33. Federal Defendants also do not argue that the January 4, 2017 "clarification" letter [AR000001-04] reinitiated formal consultation and the letter, by its own terms, does not request reinitiation of formal consultation. Instead, Federal Defendants argue that reinitiation of formal consultation had already begun prior to commencement of the Tribe's suit, filed July 29, 2016. Dkt. 93, p.13, fn. 9. No evidence, or document in the record, supports that claim.

"provide written acknowledgement of the consultation request" so that the "actual initiation date" can be identified. *Id.* at 4-6. No such written acknowledgement is in the record here. Once initiated, formal consultation concludes within 90 days unless extended by agency agreement. 50 C.F.R. § 402.14(e). If formal consultation was reinitiated by April 1, 2016, it should have been completed and a new BiOp issued by July 1, 2016 absent agreement of NMFS and BOR, but there is no such agreement in the record here.

Federal Defendants' actions in this litigation also confirm that formal consultation was not reinitiated in March 2016 or thereafter. Federal Defendants filed a Motion to Dismiss on October 5, 2016 alleging numerous reasons why Plaintiff's case should be dismissed. Dkt. #33. Federal Defendants did not assert that formal consultation had already been reinitiated or that the case was constitutionally moot. Their motion concedes Federal Defendants are engaging in "informal Section 7 consultation . . . for the purpose of determining how best to reinitiate formal consultation." Dkt. #33, pp. 1, 19. In their reply filed November 16, 2016, Federal Defendants argued they "have been properly discussing on an 'informal basis' reinitiating formal consultation and revising or amending the ITS." Dkt. #60, p. 12, n. 8. These statements are consistent with the Murillo letters discussed above and are entirely inconsistent with Federal Defendants' current position, which appears solely designed to avoid summary judgment.

Whether liability is reviewed on the record, or de novo, there is simply no *genuine* dispute of material fact as to whether Federal Defendants have reinitiated formal consultation. *Block v. City of Los Angeles*, 253 F.3d 410, 419, n. 2 (9th Cir. 2001) ("A party cannot create a genuine issue of material fact to survive summary judgment by contradicting his earlier version of the facts"). In light of their repeated and continuous admissions that formal consultation has not been reinitiated, their failure to comply with applicable federal regulations and guidelines regarding initiation of formal consultation, and the transparent nature of their current litigation strategy to revise history, the only conclusion that can be reached is that formal consultation has not been reinitiated and that Plaintiff is entitled to partial summary judgment on Count I.

C. Plaintiff's Failure to Reinitiate Claim is Not Moot.

Since Federal Defendants have not yet reinitiated formal consultation, their mootness argument must fail. But even if this Court were to somehow find that Federal Defendants have reinitiated formal consultation, Plaintiff's claim would still not be moot, because this Court could still grant effective relief to the Tribe in the form of declaratory and/or injunctive relief.

"The burden of demonstrating mootness is a heavy one." *NW Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241 (9th Cir. 1988); *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006). Federal Defendants have that burden here. *Id*. In determining mootness, the relevant question is whether *any* effective relief can be granted. *Gordon*, 849 F.2d at 1245, quoting *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986). "The fact that the alleged violation has itself ceased is not sufficient to render a case moot. As long as effective relief may still be available to counteract the effects of the violation, the controversy remains live and present." *Id. Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065 (9th Cir. 2002) ("a case is moot only where no effective relief for the alleged violation can be given"). Here, even if the Court were to find that reinitiation of formal consultation has commenced, both declaratory and injunctive relief remain available to remedy the effects of BOR and NMFS' failure to reinitiate consultation in a timely manner following take exceedances in 2014 and 2015 and to protect threatened SONCC Coho pending completion of the consultation.

Claims alleging failure to reinitiate formal consultation are not mooted by subsequent reinitiation that occurs during the litigation if there remains effective relief to be granted. In *Johanns*, the Ninth Circuit rejected the Forest Service's argument that a failure to reinitiate claim was moot because the Forest Service had reinitiated during the litigation. *Johanns*, 450 F.3d at 461-63. The Court found that a declaratory judgment could still provide effective relief to ensure that similar violations would not occur in the future. *Id.; See also Conservation Cong. v. Finley*, 774 F.3d 611 (9th Cir. 2014) (failure to reinitiate consultation claim not moot).

Here, as in *Johanns*, Federal Defendants have vigorously resisted their obligation to reinitiate formal consultation despite the fact that a clear and non-discretionary legal duty to reinitiate was triggered under 50 C.F.R. § 402.16 and 50 C.F.R. § 402.14(i)(4) after the significant take exceedances (81% infection rate) that occurred in 2014. Instead of reinitiating formal consultation, BOR proceeded to continue operating the Project under the 2013 BiOp, leading to an even higher disease infection rate of 91% in 2015. Throughout 2015 and 2016, Federal Defendants still declined to reinitiate formal consultation. Now, only in response to Plaintiff's summary judgment motion, they assert without support that formal reinitiation did commence at some point in 2016, but they do not have time to complete formal consultation before the 2017 irrigation season. Thus, they propose to continue operating the Project under the 2013 BiOp and continue to put SONCC Coho at risk of jeopardy. Consultation Handbook, p. 4-54 ("if the anticipated level of incidental take [in an ITS] is exceeded, the action agency must immediately stop the action causing the taking and reinitiate formal consultation").

Even if reinitiation has occurred (which it has not), that claim is not moot because declaratory and injunctive relief remains available to remedy Federal Defendants' failures to timely reinitiate. *Johanns*, 450 F.3d at 461-63. Declaratory relief is also necessary to address NMFS' independent violation of its obligation to reinitiate, which NMFS disputes here despite the plain language of 50 C.F.R. 402.16. Plaintiff is also entitled to injunctive relief to protect SONCC Coho from harm pending completion of the consultation. *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005) (granting injunction preventing action pending completion of consultation).[2] While a failure to reinitiate claim can become moot if the only

[2] Allowing Federal Defendants to avoid injunctive relief on mootness grounds by reinitiating consultation on the cusp of agency action would significantly impair protections under the ESA. Section 7 of the ESA is clearly designed to require not only reinitiation, but completion, of consultation prior to agency action. *Wash. Toxics*, 413 F.3d at 1036 (enjoining action pending completion of consultation); *Greenpeace v. NMFS*, 106 F. Supp. 2d 1066, 1075 (W.D. Wash. 2000) ("[consultation] must be fulfilled before initiation of agency action").

relief requested is an order compelling reinitiation, a belated reinitiation does not moot a failure to reinitiate claim where plaintiffs have sought other associated remedies such as an injunction pending completion of the consultation. *Cal. Trout, Inc. v. U.S. Bureau of Reclamation*, 115 F. Supp.3d 1102, 1112 (C.D. Cal. 2015) (denying motion to dismiss for mootness where other remedies for declaratory and injunctive relief remained available).

In *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982 (D. Or. 2010), the Court disagreed that plaintiff's failure to reinitiate claims had been rendered moot by subsequent reinitiation, due to continued availability of declaratory and injunctive relief. *Id.* at 993. Despite reinitiation, federal defendants (as in this case) proposed to continue operating under the existing BiOp during the reinitiated consultation. It was clear that defendants had violated the ESA by failing to *timely* reinitiate formal consultation. Also, "federal defendants' response to violations of the ITS appears to have been influenced by a litigation strategy rather than the reinitiation regulations." *Id.* at 995. For those reasons, the Court rejected the mootness defense and granted summary judgment to Plaintiff on its failure to reinitiate claim. *Id.* at 1006-1008.[3]

The cases cited by Federal Defendants on pp. 13-14 of its opposition stand only for the proposition that a failure to reinitiate claim *could* become moot if an order compelling reinitiation were literally the *only* relief requested by Plaintiff or available to the court. *See, e.g., Ctr. for Biological Diversity v. U.S. Forest Service*, 820 F. Supp. 2d 1029, 1036 (D. Az. 2011) (rejecting mootness argument and explaining that mootness was found in *Southwest Ctr. for Biological Diversity* (cited here by Federal Defendants) only because there was "literally no

[3] Other courts have declined to find claims moot where defendants voluntarily ceased the challenged activity without admitting wrongdoing or changing behavior. Should the Court find that Federal Defendants have reinitiated formal consultation, the voluntary cessation exception also applies here. *NRDC v. Norton*, CV-05-01207, 2006 U.S. Dist. LEXIS 94689 (E.D. Cal. 2006) (refusing to dismiss on prudential mootness grounds despite reinitiation of consultation where agencies involved did not intend to change their opinion or alter their operations significantly); *Am. Rivers, Inc. v. NOAA Fisheries*, CV-04-0061, 2004 U.S. Dist. LEXIS 18928, 2004 WL 2075032, at *3 (D. Or., Sept. 14, 2004) (same). The same is true here.

other relief that could be granted to plaintiffs."). Or, in the case of *Alliance for the Wild Rockies v. U.S. Dep't of Agric.*, 772 F.3d 592, 601 (9th Cir. 2014), a case could become moot where the reinitiated consultation has been fully completed. Here, Plaintiff not only seeks an order compelling reinitiation, but also associated declaratory and injunctive relief that will protect SONCC Coho during completion of the consultation. Thus, even if reinitiation has commenced (which it has not), Plaintiff's failure to reinitiate claim would not be moot due to the continued availability of other meaningful declaratory and injunctive relief. Of course, the primary reason that the claim is not moot is that Federal Defendants have not yet reinitiated.[4]

D. Plaintiff Is Entitled to Injunctive Relief Pending Completion of Consultation.

Federal Defendants argue that Plaintiff is not entitled to an injunction here, because the failure to reinitiate claim is procedural and not substantive. This argument is wholly meritless and inconsistent with the purpose of the ESA and its "institutionalized caution mandate." W*ash. Toxics*, 413 F.3d at 1035. "The purpose of the consultation process . . . is to prevent later substantive violations of the ESA. The remedy for a substantial procedural violation of the ESA – a violation that is not technical or de minimis – must therefore be an injunction of the project pending compliance with the ESA." *Id.* at 1035. "If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (holding District Court erred by declining to enjoin project pending compliance with consultation requirements). An injunction serves the purpose of preventing

[4] Even if the Court found the failure to reinitiate claim moot with no relief of any kind available for that claim, Plaintiff still would be entitled to preliminary injunctive relief to enjoin operation of the Project pending completion of the reinitiated consultation due to the irreparable harm from ongoing substantive violations of Sections 7 and 9, which Plaintiff has alleged and established likelihood of success on the merits through briefing and Declarations here. Plaintiff may also receive preliminary injunctive relief here pending final adjudication or completion of consultation if genuine disputes of material fact bar summary judgment. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1022-23 (9th Cir. 2009) (court has broad authority to craft equitable relief).

jeopardy and take of protected species pending completion of the reinitiated consultation.

The appropriate remedy for procedural violations of the ESA, and specifically the failure to consult, is an injunction of the project or action pending completion of consultation and issuance of a new Biological Opinion. *Wash. Toxics*, 413 F.3d at 1034-1036 (granting injunction preventing action pending completion of consultation); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (affirming injunction against project pending compliance with procedural consultation requirements); *Alliance for Wild Rockies v. Krueger*, 950 F. Supp. 2d 1196, 1217 (D. Mont. 2013) (enjoining agency action pending completion of reinitiated consultation); *Ctr. for Biological Diversity v. United States Forest Service*, 820 F. Supp. 2d 1029 (D. Az. 2011) (rejecting mootness argument, despite reinitiation of consultation, and granting preliminary injunction pending completion of the reinitiated consultation).[5]

In prior litigation regarding Reclamation's failure to consult on Klamath Project operations, the Court entered an injunction mandating a protective flow regime for SONCC Coho pending completion of consultation between Reclamation and NMFS. *PCFFA v. U.S. Bureau of Reclamation*, 138 F. Supp.3d 1228, 1248-1250 (N.D. Cal. 2001). And later, the Ninth Circuit affirmed a subsequent injunction that prevented Reclamation from making irrigation diversions from the Klamath Project pending completion of consultation and preparation of a new Biological Opinion. *PCFFA v. U.S. Bureau of Reclamation*, 226 Fed. Appx. 715 (9th Cir.

[5] ESA Section 7(d) has no application here because Federal Defendants have not reinitiated formal consultation. *Pacific Rivers Council*, 30 F.3d at 1056 (agency cannot rely on Section 7(d) as basis for action if it has not initiated formal consultation). Upon re-initiation of formal consultation, Section 7(d) bars action agencies from making "any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures . . . ." Consultation Handbook, at p. 2-9. Independent of Section 7(d), courts retain authority to enjoin agency action pending completion of consultation for violations of Section 7(a)(2). *Wash. Toxics*, 413 F.3d at 1034-36 (holding appropriate remedy for violation of procedural Section 7(a)(2) consultation obligation is injunction pending completion of consultation). Thus, even if the Court finds Federal Defendants have reinitiated, Section 7(d) does not limit this Court's authority to enjoin the Project pending completion of consultation.

2007). ESA procedural requirements are designed to prevent later substantive violations of jeopardy and take and must be stringently enforced. *Thomas*, 753 F. 2d at 764. Federal Defendants' claim that procedural violations cannot support injunctive relief is wholly meritless.

E. Plaintiff Has Established Irreparable Injury Both to the Species and Itself.

Continued operation under the 2013 BiOp will result in irreparable injury to SONCC Coho through unlawful take and risk of jeopardy. In the first year of operation under the BiOp (in 2014), 81% of sampled juvenile Chinook were infected with *C. shasta*. In the second year of operation under the BiOp (in 2015), 91% of such fish were infected. In other words, in the first two years of operation under the 2013 BiOp, nearly all of the juvenile Chinook and Coho salmon were harmed and/or killed.[6] NMFS and BOR are required by 50 C.F.R. § 402.16 to reinitiate formal consultation in light of these take exceedances, but they have failed to do so.

The 2013 BiOp confirms that "[o]f all the adverse effects of the proposed action [the Project], NMFS believes that disease risk from *C.shasta* is the most significant to coho salmon." NMFS000399. NMFS' no-jeopardy determination in 2013 was based on the assumption that the flow regime established in the 2013 BiOp would reduce disease-related mortality to coho salmon. NMFS000365-377. NMFS set a cap on permissible incidence of disease that was equal to the *highest* previously recorded disease level in the period of record, 49%. NMFS000413. Thus, compliance with the ITS does not mean that coho are unharmed by Project operations in such years. Roughly half of juvenile coho are allowed to be taken before BOR is in violation of the ITS. NMFS000414. That is significant harm in itself, but the death of 81-91% of juvenile fish threatened with extinction clearly constitutes irreparable injury supporting injunctive relief.

Plaintiff has adequately shown that juvenile fish remain at risk of irreparable harm if the Project continues operation under the 2013 BiOp. The Strange and Ledwin Declarations, the

[6] Although SONCC Coho, not Chinook, are the species listed as threatened by the ESA, the 2013 BiOp uses infection rates in Chinook as a surrogate for infection rates in Coho due to similarities of disease impact on those species. NMFS 000412-13. The trigger for reinitiation of formal consultation in the ITS is based on disease rates in Chinook. NMFS000414.

recent technical memos prepared by USFWS (AR000344-411), and NMFS own analysis in the 2013 BiOp confirms the significant relationship between increased flows and reduction in fish disease levels. That science and the prior monitoring of disease levels shows that releases well in excess of the flows provided in the 2013 BiOp are necessary to keep disease incidence below the 49% level required by the 2013 BiOp. *Id.* If BOR is permitted to operate the Project in accordance with 2013 BiOp flows as occurred in 2014 and 2015, the take limitation of 49% will not be met. Dkt. ##70-71. Disease (often resulting in death) of more than 49% of fish already threatened with extinction constitutes irreparable harm justifying injunctive relief pending completion of the federal agencies' consultation obligation. *Cottonwood Envtl. Law Center v. U.S. Forest Service*, 789 F.3d 1075, 1091 (9th Cir. 2015) ("In light of the stated purposes of the ESA in conserving endangered and threatened species and the ecosystems that support them, establishing irreparable injury should not be an onerous task for plaintiffs").

Federal Defendants argue that 2016 operations prove there is no future risk of irreparable harm from operations under the 2013 BiOp. Yet, 2016 operations prove just the opposite. In 2016, the level of disease was 48% (within the ITS take limitation by 1%). AR000010. This was the fourth highest level of disease in the period of record, following only 2014, 2015, and 2008. AR000023. Yet, as a result of hydrologic conditions, average flows in March through June 2016 were well in excess of the minimums required by the 2013 BiOp. AR000027. Due to heavy precipitation, an unusual large flow release also occurred in March 2016. AR000027-28. 2016 operations support the science underlying the Guidance Document and the testimony of Mr. Ledwin and Dr. Strange. Dkt. ##70-71; Second Strange Decl. Higher flows than those set forth in the 2013 BiOp are necessary to keep disease within prescribed limits. Allowing the Project to operate in accordance with the 2013 BiOp flows is certain to produce levels of disease beyond that permitted in the ITS. *Id.* An injunction is necessary pending completion of consultation.

Federal Defendants assert that hydrologic conditions *may* allow increased flows in 2017. This argument is speculative and does not negate the need for injunctive relief. *Bennett v. Spear*,

520 U.S. 154, 176 (1997) (ESA may not be implemented based on speculation). Current snowpack levels and future projections do not ensure that sufficient water will be available for fish during the Spring 2017 irrigation season. Second Strange Decl, ¶ 6. On April 1, 2017, the irrigation allocation is locked in per the 2013 BiOp. If the weather does not cooperate in the way that Federal Defendants expect, Coho will suffer the consequence. Given NMFS and BOR's failure to meet their legal consultation obligation and Plaintiff's showing of imminent irreparable harm, it is Federal Defendants' burden to prove that continued Project operation under the 2013 BiOp will not jeopardize SONCC Coho in 2017. *Wash. Toxics*, 413 F.3d at 1035; *Thomas*, 753 F.2d at 765. This is an unusually difficult, likely impossible, burden to carry where Project operations in the recent past have shown significant exceedances of take limits and there has been no formal consultation to analyze Project operations in light of those take exceedances.

Federal Defendants also contend that the Tribe has inadequately established irreparable injury to itself, as opposed to the species. Although the Tribe disputes this, the Declaration of Ryan Jackson describes in additional detail the injury suffered by the Tribe as a result of impacts to SONCC Coho. The Court can also take notice of prior Ninth Circuit findings regarding the Tribe's federal reserved fishing rights and the importance of fish and fishing to the Hoopa Valley Tribe. *Parravano*, 70 F.3d at 542. Salmon fishing was one of the purposes for which the Hoopa Valley Reservation was created. *Id.* at 546. The Tribe is certainly injured irreparably by upstream actions that place the imperiled SONCC salmon at risk of extinction in the Klamath River. *Id.*

F. The Scope of Injunction Requested Is Necessary, Appropriate, and Equitable.

"Given a substantial procedural violation of the ESA in connection with a federal project, the remedy must be an injunction of the project pending compliance with the ESA." *Thomas*, 753 F.2d at 765; *PCFFA*, 138 F. Supp. 2d at 1248-49. "Ordinarily, where an injunction is appropriate based on a substantial procedural violation of the ESA, courts have enjoined further work on the disputed project pending compliance with the Act's procedural requirements." *PCFFA*, 138 F. Supp.2d at 1249. Thus, in this case, in light of excessive levels of take that

occurred under the 2013 BiOp in 2014 and 2015 and the Federal Defendants' clear failure to comply with their reinitiation obligations, and Plaintiff's showing of irreparable injury, Plaintiff has asked the Court to enjoin operation of the Klamath Project pending completion of the reinitiated consultation. Plaintiff also put forward a narrower injunction request, based on best available science, which would provide interim protection for SONCC Coho during consultation while resulting in less impact to the Project than a complete Project shutdown. Federal Defendants attack the specifics of the proposed injunction and the Guidance Document, but the only thing they offer in response is continued and unchanged operations pursuant to the terms of the existing 2013 BiOp, which has been proven inadequate. *PCFFA*, 138 F. Supp. 2d at 1249 (granting Plaintiff's injunction request where BOR proposed no alternative interim solution).

Federal Defendants principally argue that Plaintiff's injunctive relief might harm suckers. This argument lacks merit for three reasons. *First*, Plaintiff's proposed injunction would not displace provisions of the 2013 BiOp that protect suckers. Under Plaintiff's proposed order, all other provisions of the 2013 BiOp including those relating to suckers remain in effect. *Second*, it is not the relief proposed by Plaintiff for SONCC Coho that could harm suckers; rather, it is the continued operation of the Project and resulting diversions of water (more than 350,000 acre-feet in Spring/Summer annually) out of Upper Klamath Lake (UKL). NMFS0000253, 273 (noting impacts of Project on UKL re-fill). Federal Defendants can comply with the proposed injunction and their obligations to suckers if diversions to the Project are reduced as necessary. Second Strange Decl., ¶ 9. *Third*, Federal Defendants mischaracterize and fail to account for the flexibility and discretion that is left to BOR to implement increased flows proposed for SONCC Coho in the Guidance Document. The measures regarding flushing flows provide a wide date range for BOR to implement them based on hydrologic conditions and other considerations. Third Ledwin Decl., Exh. A, pp. 8-10. The reserve for Spring dilution flows is kept for emergency purposes only and thus might not result in any flows out of UKL or reductions in Project diversions. *Id.*, p. 12. Federal Defendants have failed to establish that Plaintiff's

proposed injunctive relief would harm suckers, especially if diversions to the Project are limited as necessary to meet BOR's legal obligations to both suckers and SONCC Coho under the ESA.

Federal Defendants also argue Plaintiff has not made showings necessary for a permanent and mandatory injunction to direct BOR to implement measures in the Guidance Document. The Court should reject these arguments and exercise its broad authority to craft equitable remedies appropriate to the facts and circumstances of this case. *Rey*, 577 F.3d at 1022-23 (recognizing court's broad authority to craft equitable relief based on facts of case). Plaintiff's requested injunction would last only until Federal Defendants complete formal consultation. Thus, while the injunction may technically be labeled permanent because it follows adjudication of Plaintiff's Count I on the merits, it is actually interim in nature and will be lifted upon Federal Defendants' compliance with the ESA. If the Court is disinclined to order BOR to implement the specific interim measures requested, the Court should instead enter an order enjoining any operation of the Project pending completion of formal consultation. However, Plaintiff submits that its proposed injunction with implementation of specified measures in the Guidance Document is far less drastic than an order precluding any diversions to the Project, is based on best available science, is the only proposal available to address impacts to threatened SONCC Coho pending completion of consultation, and is necessary to prevent irreparable harm to the SONCC Coho that would result from continued Project operations under the 2013 BiOp.[7] Sec. Strange Decl. The Court should grant Plaintiff's Motion for Partial Summary Judgment and Injunctive Relief.

[7] Federal Defendants complain that the Guidance Document is in draft form and has not been peer reviewed. The Guidance Document is based on the recent technical memos produced by USFWS which were peer reviewed and there is no argument that those technical memos do not represent the best available science. The Guidance Document converts that science into recommendations for Project operations to protect SONCC Coho. The genesis of the technical memos and Guidance Document was the "informal" consultation that NMFS and BOR rely heavily upon in this case. In addition, the Guidance Document has now been finalized in response in federal agency and stakeholder comments. Third Ledwin Declaration, Exh. A. Even if the measures are not deemed final, that still does not preclude them as a basis for injunctive relief. *PCFFA*, 138 F. Supp. 2d at 1249-50 (relying on interim report as basis to impose flow requirements on Klamath Project pending completion of consultation).

Respectfully submitted this 18th day of January, 2017.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

/s/ Thomas P. Schlosser
Thomas P. Schlosser WSBA #06276
Attorneys for the Hoopa Valley Tribe

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document, Hoopa Valley Tribe's Reply to Federal Defendants' Opposition to Motion for Partial Summary Judgment, including the Declaration of Ryan Jackson, the Second Declaration of Joshua Strange, and the Third Declaration of Sean Ledwin, with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on January 18, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system on January 18, 2017.

Executed this 18th day of January 2017, at Seattle, Washington.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

s/*Thomas P. Schlosser*
Thomas P. Schlosser

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