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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

HOOPA VALLEY TRIBE,	)	Case No. 16-cv-4294-WHO
	)	
Plaintiff,	)	
	)	PLAINTIFF'S REPLY TO
v.	)	DEFENDANT-INTERVENORS'
	)	RESPONSE TO PLAINTIFF'S
U.S. BUREAU OF RECLAMATION	)	MOTION FOR PARTIAL
	)	SUMMARY JUDGMENT AND
and	)	INJUNCTIVE RELIEF
	)	
NATIONAL MARINE FISHERIES SERVICE,	)	Judge: Hon. William H. Orrick
	)	Hearing Date: January 27, 2017
Defendants.	)	Hearing Time: 9:00 AM
	)	Courtroom: 2, 17 <sup>th</sup> Floor

Plaintiff's Reply to Defendant-Intervenors' Response  
 to Motion for Partial Summary Judgment  
 16-cv-4294-WHO

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1 **I. REPLY ARGUMENT AND AUTHORITY**

2 Defendant-Intervenors' (herein "Intervenors") response brief (Dkt. #94) substantially  
 3 overlaps with the Federal Defendants' opposition brief (Dkt. #93). Thus, to avoid repetition of  
 4 argument, Plaintiff incorporates by reference the arguments made in its Reply to Federal  
 5 Defendants' Opposition filed today and the Declarations submitted in support of that reply.<sup>1</sup> The  
 6 substance of this reply will focus solely on arguments that are unique to Intervenors' response.

7 **A. To Prevail on Its Failure to Reinitiate Claim, Plaintiff Need Not Prove That "Each**  
 8 **and Every Incidence" of Take Results From the Klamath Project Operations.**

9 Intervenors argue that Plaintiff must prove that each instance of take of SONCC Coho is  
 10 caused by the Klamath Project to prevail on its failure to reinitiate claim. But Intervenors cite  
 11 inapposite cases that address liability for takings under Section 9 of the ESA. While Plaintiff  
 12 has alleged a Section 9 takings claim in this case, that claim is not the subject of its Motion for  
 13 Partial Summary Judgment. Instead, Plaintiff's failure to reinitiate claim is based on 50 C.F.R.  
 14 §402.14(i)(4) and 50 C.F.R. §402.16, which requires reinitiation of formal consultation "if the  
 15 amount or extent of taking specified in the incidental take statement is exceeded." Here, the  
 16 relevant "amount or extent of taking" specified by NMFS in the ITS for the Project is described  
 17 as follows: "If the percent of *C. shasta* infections for Chinook salmon juveniles in the mainstem  
 18 Klamath River between Shasta River and Trinity River during May to July exceed these levels  
 19 (i.e., 54 percent infection via histology or 49 percent infection via QPCR), reinitiation of formal  
 20 consultation will be necessary." NMFS000413-14. No party disputes that these triggers were  
 21 significantly exceeded in 2014 and 2015. NMFS confirmed in writing that the relevant triggers  
 22 were exceeded. AR000502-503. Thus, reinitiation of formal consultation is legally required.

23 \_\_\_\_\_  
 24 <sup>1</sup> Plaintiff incorporates its arguments from its Reply to Federal Defendants' Opposition  
 25 to show Plaintiff has standing, that Federal Defendants have not reinitiated formal consultation,  
 26 that Plaintiff's failure to reinitiate claim is not moot, that Plaintiff is entitled to injunctive relief  
 as a result of Federal Defendants' procedural violation, that Plaintiff has shown irreparable harm  
 to SONCC Coho and itself, and that the scope of injunctive relief is necessary and appropriate.

Although causation is not a necessary element to prevail on Plaintiff's procedural failure to reinitiate claim, NMFS' analysis in the 2013 BiOp confirms that the Project is the principal cause of fish disease and corresponding take in the Klamath River downstream of Iron Gate Dam (IGD) due to the significant impacts the Project has on the natural flow regime. Project operations divert water from Upper Klamath Lake (UKL) and the Klamath River and decrease flows available for fish in the Klamath River downstream. NMFS0000251-53. Diversions out of UKL in the Spring/Summer are typically above 350,000 acre-feet annually. *Id.* (Figure 11.3).

In the 2013 BiOp, NMFS affirmatively linked disease incidence and resulting death of coho salmon to the reduction and alteration of flows caused by Project operations. Intervenor have not challenged the 2013 BiOp's conclusions linking Project operations to downstream fish disease, or the ITS. At page 346 of the 2013 BiOp (NMFS0000368), NMFS explains:

NMFS believes the high incidence of disease for rearing coho salmon in certain years within the mainstem Klamath River results largely from the reduction in magnitude, frequency, and duration of mainstem flows from the natural flow regime under which the fish evolved. The proposed action will generally reduce spring flows in the mainstem Klamath River downstream of [IGD] relative to the natural flow regime. By reducing spring flows, the proposed action will decrease the diluting effect of high spring flows, will likely lead to high *C. shasta* actinospore concentrations (e.g., greater than 5 spores/L actinospore genotype II), and will likely increase the percentage of disease-related mortality to coho salmon fry in the mainstem Klamath River . . . in May to mid-June.

Later, NMFS explained that: "The proposed action will likely result in increased risks to coho salmon individuals. Of all the different life stages, coho salmon fry and juveniles (parr and smolts) face the highest risks from the hydrologic effects of the proposed action."

NMFS0000377. NMFS summarized the adverse effects of Project operations as follows:

Decreased spring flows in the mainstem Klamath River downstream of [IGD] and increased likelihood of consecutive drier years in the Klamath River, which will likely:

- Increase the likelihood of sub-lethal disease-related effects to coho salmon fry and juveniles while they are in the mainstem Klamath River between Klamathon Bridge (RM 184) and Orleans (RM 59),
- Increase the likelihood of disease-related mortality for coho salmon fry and juveniles in the mainstem Klamath River between Trees of Heaven

(RM 172) and Seiad Valley (RM 129) in May to June when environmental conditions are conducive to disease proliferation,

- Increase stress to coho salmon fry and juveniles when daily maximum water temperature become chronically above 16.5 C in the mainstem Klamath River between IGD and Scott River (RM 143) in May to June.

NMFS0000392. NMFS concluded that “Of all the adverse effects of the proposed action, NMFS believes that the disease risk from *C. shasta* is the most significant to coho salmon.

NMFS0000399. In its no-jeopardy determination, NMFS assumed that Project operations under the 2013 BiOp would “result in disease risks to coho salmon that are lower than under observed POR conditions . . . .” *Id.* That assumption was proven wrong in 2014 and 2015. Because incidence of disease was measured at levels that exceeded the limitations in the ITS in 2014 and again in 2015, reinitiation of formal consultation to reevaluate Project effects is required.

B. Intervenor’s Arguments Regarding the Scope of Injunction Fail: Their Proposal to Continue Diverting Substantial Amounts of Water Out of UKL While Denying Any Additional Water to Protect SONCC Coho From Disease Pending Completion of Formal Consultation Is Inconsistent With the ESA.

Instead of granting any relief to Plaintiff, Intervenor’s propose that the Court should simply allow the Project to continue operating under the 2013 BiOp without any additional mitigation or protections for SONCC Coho in 2017. In other words, Intervenor’s propose to continue their diversions from the Klamath River and UKL, which typically exceed 350,000 annual acre-feet per year, while at the same time asserting that Plaintiff’s request to hold 50,000 acre-feet in reserve for emergency purposes would somehow result in peril to ESA-listed suckers. If BOR can currently comply with its obligations to suckers while diverting more than 350,000 acre-feet out of UKL to the Project each year, there is absolutely no basis to support the claim that Plaintiff’s proposed injunction would harm suckers. Second Strange Decl., ¶ 6. There is no genuine dispute on this issue. If the Court is disinclined to order the specific measures from the Guidance Document proposed by Plaintiff, the Court should instead enter a prohibitory injunction that precludes any diversions from UKL and the Klamath River for the Project pending completion of formal consultation to prevent irreparable harm to SONCC coho in 2017.

1                   1. The Guidance Document May Form the Basis for Injunctive Relief Even If In  
 2                   Draft Form Where Defendants Present No Better Science or Any Alternative  
 3                   Other Than Continued Project Operations Without Mitigation.

4                   Intervenors argue that the Court should not enter Plaintiff's proposed injunction because  
 5                   it is based on a Guidance Document that is in draft form. First, this is incorrect because the  
 6                   Guidance Document is now final. Third Declaration of Sean Ledwin, Exh. A. Even if it were  
 7                   still considered draft, that is no bar to relying on such measures as an interim remedy pending  
 8                   completion of federal agencies' consultation obligation. In prior litigation regarding the Project,  
 9                   the Court based an injunction on a draft flow study offered by Plaintiffs. Acknowledging the  
 10                  study was in draft form, the Court noted that no Defendant had put forward any better science to  
 11                  rely on for purposes of interim protection pending consultation. *PCFFA v. Bureau of*  
 12                  *Reclamation*, 138 F. Supp. 2d 1228, 1249-1250 (N.D. Cal. 2001). Enjoining all diversions  
 13                  would be a more drastic remedy than ordering the specific measures in the draft flow study. *Id.*

14                  In any event, the Guidance Document is now final. The DTAT received and reviewed  
 15                  comments of NMFS, USFWS, BOR, and the Intervenors on the Guidance Document measures.  
 16                  The primary focus of the comments asked the DTAT authors to provide additional scientific  
 17                  support and justification for the Guidance Document measures. Over the past six weeks, the  
 18                  DTAT has considered those comments and revised and finalized the Guidance Document  
 19                  accordingly. A copy of the finalized Guidance Document and the comment matrix that includes  
 20                  comments and responses is attached to the Third Declaration of Sean Ledwin. The revisions to  
 21                  the Guidance Document do not require any change to the terms of the Plaintiff's proposed  
 22                  injunction order other than the document's date. Plaintiff is submitting an amended order today.

23                  The DTAT process, which included development of the technical memorandums by  
 24                  USFWS and the development of implementation recommendations by the collective of tribal  
 25                  scientists is the direct result of the "informal" consultation process that the Federal Defendants  
 26                  currently suggest that the Court defer to (though they argue that the Project should simply be  
                 allowed to continue operating under the 2013 BiOp through Spring/Summer 2017 pending



1 further federal evaluation and peer review of the measures). Other than vague allusions to  
2 “coordination,” none of the Federal Declarants provide any detail of any ongoing scientific  
3 review of the disease issues *other than* the DTAT and the Guidance Document. BOR Declarant  
4 Cameron acknowledges that the information in the Guidance Document “is now available in  
5 draft form and when finalized will inform future operations with regard to disease issues.”  
6 Cameron Decl., Dkt. #93-2, ¶ 18. Cameron further concedes that the scientific research in the  
7 Guidance Document “suggests that preventative management actions in the form of increased  
8 flow events to the Klamath River downstream of IGD earlier in the year (winter or early spring)  
9 could be effective at reducing *C. shasta* infection rates later in the year” *Id.* See also Simondet  
10 Decl., Dkt. #93-4, ¶ 7, 13 (explaining that NMFS is currently reviewing the new information  
11 contained in the technical memorandums and the DTAT synthesis report, and acknowledging  
12 that the lower disease incidence levels in 2016 may be due in part to BOR’s implementation of a  
13 high spring flow event of 11,100 cfs in mid-March 2016 that is quite similar to proposed  
14 Guidance Document measures). Federal Defendants concede the validity of the measures and  
15 that the Guidance Document represents the best available science to address disease issues.

16 Thus, the primary dispute between the parties is not whether the measures in the  
17 Guidance Document are valid science or whether they provide a reasonable basis for governing  
18 future Project operations to mitigate fish disease. Rather, the primary dispute at this time is  
19 whether the Court should impose interim relief pending federal agencies’ reinitiation of formal  
20 consultation and their consideration of the Guidance Document measures in the context of  
21 preparing a new BiOp for the Project. Given Federal Defendants’ substantial procedural  
22 violation of the ESA and Plaintiff’s showing of irreparable injury, some form of an injunction of  
23 the Project pending completion of consultation is required. *Washington Toxics Coalition v.*  
24 *EPA*, 413 F.3d 1024, 1034 (9<sup>th</sup> Cir. 2005). The scope of the injunction could prohibit Project  
25 deliveries in their entirety or could be a more narrowly tailored injunction as requested by  
26 Plaintiffs. *PCFFA*, 138 F. Supp. 2d at 1249-1250. But simply operating the Project under the

1 2013 BiOp without additional interim mitigation for Coho is not a permissible option. *Id.*

2 2. Intervenors Cannot Establish That “Adaptive Management” Under the 2013  
 3 BiOp Will Adequately Protect SONCC Coho; Water for Such Adaptive  
 4 Management Is Not Available After Irrigation Allocations Are Locked In.

5 Intervenors argue that continued operation under the 2013 BiOp is sufficient because it  
 6 provides for “adaptive management” that will allow BOR to adequately protect SONCC Coho.  
 7 This is wrong because as of April 1, 2017, the Project irrigation allocation will be locked in and  
 8 unchangeable per the 2013 BiOp. As of that date, and absent an injunction here, any adaptive  
 9 management for SONCC Coho would be limited to whatever water is left over, if any, after  
 10 accounting for Project deliveries and needs of suckers in UKL. Plaintiff’s proposed injunction  
 11 is necessary to ensure additional amounts of water beyond those currently required by the 2013  
 12 BiOp are set aside for SONCC Coho and available for use on and after the date the irrigation  
 13 allocation is locked in. *See* Second Strange Decl. Absent an injunction that reserves and sets  
 14 aside additional water, the risk of drier than expected hydrologic conditions or other conditions  
 15 that warrant increased downstream flows in Spring 2017 will be borne by the SONCC Coho.

16 3. Intervenors Mischaracterize the Guidance Document and Minimize the  
 17 Impacts of Continued Project Operations on SONCC Coho and Suckers.

18 Intervenors mischaracterize the Guidance Document measures and the relief requested  
 19 by Plaintiff. In accordance with the Guidance Document, Plaintiff’s proposed order would  
 20 require BOR to hold 50,000 additional acre-feet of water in reserve beyond those amounts  
 21 already required to be reserved for the Environmental Water Account in the 2013 BiOp. This  
 22 amount of 50,000 acre-feet is tied to Guidance Document Measure 4, which recommended a  
 23 reserve of 50,000 to be held for possible use between April 1 through June 15. Third Ledwin  
 24 Declaration, Exh. A., p. 12. Absent an injunction requiring this reserve, such additional water  
 25 would not be available for emergency dilution flows, because the Project delivery allocation is  
 26 locked in on April 1. Intervenors ignore that the 50,000 acre-foot reserve is for emergency use  
 only and, absent emergency, may not be needed for use at all, in which case it would remain in  
 UKL and be available to maintain UKL lake levels or for Project deliveries in BOR’s discretion.

1 Moreover, the injunction would not be permanent, but would only remain in effect pending  
2 Federal Defendants' completion of formal consultation and issuance of a new BiOp.

3 Full implementation of Guidance Document Measures 1, 2, and 4 could require more  
4 than 50,000 acre-feet, but Plaintiff's proposed order does not affirmatively require BOR to  
5 reserve additional amounts for implementation of Measures 1 and 2. That is consistent with the  
6 Guidance Document, which vests BOR with significant discretion as to how and when to  
7 implement those flow measures. Measure 2 calls for a 24-hour deep flushing flow of 11,250 cfs  
8 as measured in the Klamath River at IGD. This 24-hour deep flushing flow would occur once  
9 per year and BOR has discretion as to when to make the release between the dates of February  
10 15 and May 31. BOR also has a large operational window (Nov. 1 – April 30) to implement  
11 Measure 1, which also can be combined and released simultaneously with Measure 2, reducing  
12 the total amount of water necessary for those measures. Third Ledwin Declaration, Exh. A, pp.  
13 8-10. The Guidance Document provides BOR with parameters to implement large flushing  
14 flows, which the best available science shows are effective to reduce disease. BOR's ability and  
15 discretion to time these flows with other accretions to the system reduces any potential conflict  
16 with management for suckers. Plaintiff's proposed order expressly recognizes that BOR must  
17 implement all other provisions of the 2013 BiOp including those protections for suckers.

18 Intervenor's complain that reserving 50,000 acre-feet in UKL for emergency flow  
19 purposes is inappropriate, but at the same time they propose no additional restrictions on  
20 deliveries to the Project, which typically takes in excess of 350,000 acre-feet per year directly  
21 out of UKL, significantly reducing water available for suckers and SONCC Coho. *See*  
22 NMFS0000251-53, Figure 11.3. Intervenor's argument that the SONCC Coho should bear the  
23 risk of unfavorable environmental conditions instead of the Project turns the science and the law  
24 on its head. The Project is the federal action regulated under the ESA and an injunction is  
25 required to protect SONCC Coho pending completion of formal consultation to evaluate the  
26 effects of the Project on the protected species. Second Strange Decl., ¶¶ 10, 13.

1 Implementation of Plaintiff's proposed injunction and Guidance Measures 1, 2, and 4  
 2 could result in some limitations on Project deliveries in Spring 2017. While Project  
 3 management is complex, the available water is essentially divided into three components: (1)  
 4 water for UKL and suckers; (2) water delivered out of UKL and the Klamath River to the  
 5 Project for irrigation; and (3) water delivered downstream for SONCC Coho and other species.  
 6 NMFS000038. Increased water allocations for fish may result in less water available for the  
 7 Project, but BOR has a statutory obligation to the suckers and SONCC Coho under the ESA. It  
 8 must ensure adequate protection of those species before allocating water to the Project.

9 The remedy for a substantial procedural violation of the ESA, such as failure to reinitiate  
 10 formal consultation in light of significant take exceedances, is an injunction of the Project  
 11 pending completion of the consultation. 50 C.F.R. § 402.16 (requiring reinitiation of formal  
 12 consultation upon exceedance of take limitations in ITS); *Wash. Toxics Coalition v. EPA*, 413  
 13 F.3d 1024, 1034 (9<sup>th</sup> Cir. 2005) (granting injunction pending completion of consultation);  
 14 *PCFFA v. U.S. Bureau of Reclamation*, 226 Fed. Appx. 715 (9<sup>th</sup> Cir. 2007) (affirming injunction  
 15 of Klamath Project pending completion of consultation and new BiOp); *Alliance for Wild*  
 16 *Rockies v. Krueger*, 950 F. Supp. 2d 1196, 1217 (D. Mont. 2013) (enjoining agency action  
 17 pending completion of reinitiated consultation). Here, NMFS and BOR have failed to reinitiate  
 18 formal consultation following the significant take exceedances in 2014 and again in 2015. They  
 19 declined to reinitiate formal consultation in 2016, yet they continue to expect the species to bear  
 20 the risk of increased disease in Spring 2017 without completion of formal consultation. This is  
 21 illegal and an injunction must be entered to remedy the effects of this procedural violation and  
 22 to prevent SONCC Coho from suffering irreparable injury and take from disease in Spring 2017.

23 C. Plaintiff Has Established All Necessary Elements for An Injunction Here.

24 As explained in more detail in Plaintiff's Reply to Federal Defendants' Opposition, the  
 25 Court should grant the Tribe summary judgment on its claim that NMFS and BOR have  
 26 unlawfully failed to reinitiate formal consultation. In such event, the Tribe would have achieved

1 actual success on the merits. The Tribe has also established that SONCC Coho will suffer  
2 irreparable harm in Spring 2017 if the Project is permitted to continue operating under the terms  
3 of the 2013 BiOp, which provides for minimum flows that are inadequate to reduce disease  
4 below the levels established in the ITS. Dkt. ##70-71; Second Strange Decl. Operation under  
5 the 2013 BiOp in 2014 and 2015 resulted in skyrocketing disease levels (81% and 91%, as  
6 compared to the applicable limit of 49%). Disease levels in 2016 were at 48% even though flow  
7 released into the Klamath River that year was well in excess of the minimum flows imposed by  
8 the 2013 BiOp. *Amoco Prod. Co. v. Vill of Gambell*, 480 U.S. 531, 545 (1987) (“Environmental  
9 injury, by its nature, . . . is often permanent or at least of long duration; i.e., irreparable.”)

10 Intervenor complain about the scope of the injunctive relief requested. Given the  
11 showing of success on the merits and irreparable injury, an injunction of the Project pending  
12 completion of consultation is clearly required under the ESA. Plaintiff has proposed two  
13 alternative proposals for injunctive relief. Under the first alternative, the Court would enjoin  
14 and prohibit BOR from diverting or using any water from the Klamath River, including water in  
15 UKL, for purposes of sending or providing any irrigation deliveries to the Project pending  
16 completion of reinitiated formal consultation. Intervenor make no substantive argument against  
17 this proposed prohibitory injunction (Dkt. #94, n. 8) and thus the Court clearly may enter it to  
18 protect the status quo and SONCC Coho from irreparable harm pending completion of  
19 consultation if the Court is disinclined to enter the alternative injunction discussed below.

20 Plaintiff also put forward an alternative, narrower, request for injunctive relief based on  
21 measures 1, 2, and 4 in the Guidance Document. While such an injunction may be mandatory in  
22 that it requires specific action, it is actually a far less drastic remedy than simply enjoining the  
23 Project from any operation in Spring 2017. And while such an injunction may be labeled as  
24 permanent if it follows final adjudication on the merits, its scope is actually interim in nature  
25 because it will only remain in effect pending Federal Defendants’ completion of consultation.  
26 Mr. Simondet of NMFS asserts that consultation could be complete within six months from

1 initiation. Dkt. 93-4, ¶ 7. This Court has broad authority to craft equitable remedies as  
 2 appropriate to the facts and circumstances of the case. *Sierra Forest Legacy v. Rey*, 577 F.3d  
 3 1015, 1022-23 (9<sup>th</sup> Cir. 2009). In prior proceedings regarding the Project, the Court similarly  
 4 crafted injunctive relief pending completion of consultation that was targeted to address the flow  
 5 conditions downstream of IGD despite the fact that such flows were based only on an interim  
 6 report. *PCFFA*, 138 F. Supp. 2d at 1248-50. In later proceedings regarding a subsequent BiOp,  
 7 the Ninth Circuit affirmed the Court's broad authority to enjoin Project operations pending  
 8 completion of consultation. *PCFFA*, 226 Fed. Appx. 715 (9<sup>th</sup> Cir. 2007).

9 Plaintiff's request for imposition of the Guidance Document Measures 1, 2, and 4 is not  
 10 based on speculation, but rather is based on the best available science relating to disease  
 11 management in the Klamath River. Dkt. ##70, 71, Second Strange Decl. Federal declarants  
 12 acknowledge that the Guidance Document "when finalized will inform future operations with  
 13 regard to disease issues." Dkt. #93-2, Cameron Declaration, ¶ 18. While Intervenor criticize  
 14 Plaintiff's proposed relief, they offer no alternative mitigation or science. Instead, they simply  
 15 propose that the Project continue to operate without additional mitigation in Spring 2017 and  
 16 continue to divert substantial amounts of water from UKL with no additional mitigation or water  
 17 for SONCC Coho. This is despite the fact that the 2013 BiOp has been confirmed as inadequate  
 18 to reduce disease levels as NMFS had expected and despite the fact that Federal Defendants have  
 19 failed to reinitiate formal consultation to address that issue.

20 In *PCFFA*, the Court addressed similar arguments from these same parties, which  
 21 criticized a proposed injunction of Klamath Project operations: The Court found:

22 Neither the Bureau nor Intervenor direct the Court to any better science. Nor do  
 23 they offer a counter proposal concerning the type of injunction that should be  
 24 entered. Based upon its review of the administrative record, and the evidence  
 25 presented by the parties, and guided by Congress' policy of 'institutionalized  
 26 caution', *see, Tennessee Valley, supra*, 437 U.S. at 194, 98 S.Ct. at 2302, therefore,  
 the Court concludes that the Phase I report is the best science currently available  
 and that it appropriately may be used as a guide for the Court's injunction, pending

the Bureau's proposal of some concrete operations plan (whether annual or long-term), and completion of the consultation process with respect to it.

138 F. Supp. 2d at 1249. History is repeating itself here. Federal Defendants and Intervenor again criticize a proposed interim remedy to protect SONCC Coho pending Federal Defendants' compliance with their legal consultation obligations while proposing no alternative other than continued Project operations under the 2013 BiOp flow regime which is demonstrably inadequate to protect SONCC Coho from irreparable harm.<sup>2</sup> The Court should grant summary judgment to Plaintiff and enter injunctive relief as requested by Plaintiff in order to protect SONCC Coho from irreparable harm pending completion of consultation.

D. The Court May Not Weigh Impacts to Intervenor In Its Determination of Injunctive Relief Necessary to Protect SONCC Coho From Irreparable Harm.

Intervenor submit declarations regarding the nature of their constituents' farming operations and the impacts that water restrictions have on their operations, but Intervenor do not argue that the Court can weigh those declarations in its determination of the equities and public interest as related to an injunction under the ESA. Dkt. #94, p. 22. In *Cottonwood Envtl. Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9<sup>th</sup> Cir. 2015), the Court reaffirmed that in a case involving the ESA, irreparable harm to the listed species is the only relevant factor in the traditional four-factor injunction test. "The ESA strips courts of at least some of their equitable discretion in determining whether injunctive relief is warranted." *Id.* at 1090. "... courts do

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<sup>2</sup> The Declaration of Steven Cramer, Dkt. #94-2, which attempts to negate the effect that the Project (with its annual diversions in excess of 350,000 acre-feet of water) has on fish disease in the Klamath River is directly inconsistent with NMFS' own analysis in the 2013 BiOp, which has not been challenged by Intervenor. NMFS affirmatively linked the reduction in flows caused by Project operations to incidence of fish disease in the Klamath River downstream. The fact that disease incidence may be lower in years with increased precipitation or snowpack does not negate the need for legal standards mandating specific amounts of flow downstream as conditions warrant. Mr. Cramer also appears to call into question the basis for the take limitations expressed by NMFS in the ITS, but that issue is not before the Court and no challenge has been made to the validity of the ITS. In sum, Mr. Cramer offers no alternative approach to mitigate impacts to SONCC Coho pending completion of formal consultation, but simply maintains that the Project should be permitted to continue operating and diverting water out of the Klamath River system unabated under the existing terms of the 2013 BiOp.



1 not have discretion to balance the parties' competing interests in ESA cases because Congress  
 2 'afford[ed] first priority to the declared national policy of saving endangered species.'" *Id.*,  
 3 *quoting Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978). "Congress established an  
 4 unparalleled public interest in the 'incalculable' value of preserving endangered species. . . . It  
 5 is the uncalculability of the injury that renders the 'remedies available at law, such as monetary  
 6 damages . . . inadequate.'" *Id.* Thus, the second, third, and fourth factors of the traditional  
 7 injunction test (adequacy of legal remedies, balance of equities, and public interest) are  
 8 removed from the Court's equitable jurisdiction in a case involving the ESA. *Id.*

9 Intervenor's argue that the injunction is inappropriate because of possible harm to  
 10 suckers, yet they fail to provide any evidence to support that claim. They ignore that Plaintiff's  
 11 proposed order does not negate any protections in the 2013 BiOp applicable to suckers and  
 12 expressly requires that BOR implement all such provisions. Most significant, Intervenor's claim  
 13 that Plaintiff's proposed injunction (with a reserve of 50,000 acre-feet of water) would harm  
 14 suckers is absurd in light of their proposal to continue their own diversions in excess of 350,000  
 15 annual acre-feet out of UKL. The only possible way that suckers may be harmed is if Project  
 16 diversions are left unchanged. Plaintiff agrees that Project diversions may need to be reduced to  
 17 some degree for BOR to meet its dual legal obligations to suckers and SONCC coho.

18 E. The Court Is Not Required To Conduct A Full Evidentiary Hearing With Live  
 19 Testimony Prior to Entering Injunctive Relief to Protect SONCC Coho Pending  
Completion of Federal Defendants' Formal Consultation Obligations.

20 Intervenor's contention that a full evidentiary hearing is required before injunctive relief  
 21 can issue here is incorrect. A trial-type evidentiary hearing is not required in all cases prior to  
 22 issuance of injunctive relief. Here, all parties have had significant opportunity to submit  
 23 affidavits and argument regarding the propriety and scope of injunctive relief and the Court can  
 24 enter appropriate injunctive relief based on the substantial written evidence currently before it.

25 Injunctive relief may be granted without live oral testimony where, as here, the parties  
 26 have a full opportunity to submit written testimony, to argue the matter, and the Court finds that



1 decision on affidavits is appropriate. *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1326 (9<sup>th</sup>  
 2 Cir. 1994). In *Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9<sup>th</sup> Cir. 2002), the Ninth  
 3 Circuit affirmed a permanent injunction entered without a full evidentiary hearing where the  
 4 injunction, entered after an order of summary judgment, was actually interim in nature and  
 5 would expire upon Federal Defendants' compliance with their legal obligations under NEPA.

6 Most importantly, this case also differs from the normal injunctive setting because  
 7 even though the district court's order is termed a 'permanent injunction' we deal  
 8 here only with interim, not permanent, measures. The interim measures (which are  
 9 the subject of this appeal) are to be in place only so long as it takes for the BLM to  
 10 conduct the environmental studies required by law so that it can properly determine,  
 11 exercising appropriate discretion with extensive input from the Ranchers and  
 12 Environmental Groups, what measures should be implemented permanently. . . .

13 Because these are interim measures designed to allow for a process to take place  
 14 which will determine permanent measures, and all parties will have adequate  
 15 opportunity to participate in the determination of permanent measures (and if  
 16 need be challenge the outcome in court), we hold that an evidentiary hearing was  
 17 not required on the facts of this case.

18 *Hahn*, 307 F.3d at 831. The Court affirmed a permanent injunction without a full evidentiary  
 19 hearing in *Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1139-41 (9<sup>th</sup> Cir. 2009), reversed  
 20 on other grounds, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) because the  
 21 Court had considered voluminous evidence and argument submitted by all parties and because  
 22 the measures ordered were interim in nature and would end upon agency compliance with  
 23 NEPA.<sup>3</sup> *Wash. Toxics Coalition v. EPA*, CV C01-132 C, 2003 U.S. Dist. LEXIS 26088 (W.D.  
 24 Wash., August 8, 2003) (declining federal agency request for "full-blown evidentiary hearing"  
 25 where injunction would only remain in place pending completion of consultation under ESA).

26 Similarly, in this case, Plaintiff's proposed injunction, though labeled 'permanent'  
 because it follows summary judgment on the merits is essentially interim in nature since it will  
 remain in effect only until Federal Defendants' complete their own analysis of appropriate

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<sup>3</sup> The Supreme Court was asked, but expressly declined to address intervenors' argument that it was error to issue the permanent injunction without a full evidentiary hearing. *Id.* at 166.

1 measures and issue a new BiOp. Federal Defendants and Intervenors have had more than six  
2 weeks to prepare written testimony in opposition to Plaintiff's motion and declarations. In  
3 addition to the administrative record, Federal Defendants and Intervenors have filed twelve  
4 separate evidentiary declarations in opposition to Plaintiff's motion and declarations, including  
5 testimony on the question of irreparable harm. They will also have the opportunity to make  
6 arguments based on this evidence at the upcoming hearing. Moreover, time is of the essence in  
7 this proceeding. While Plaintiff will suffer prejudice from delay associated with a full  
8 evidentiary hearing, Intervenors will suffer no prejudice from having this Court consider the  
9 request for injunctive relief based on the numerous affidavits and the administrative record.  
10 This approach is appropriate here, given that any injunctive relief is interim in nature and will  
11 last only pending Federal Defendants' conclusion of their formal consultation obligations.

12 F. Intervenors Request for Discovery Pursuant to FRCP 56(d) Is Procedurally Improper,  
13 Lacks Specificity, and Must Be Denied.

14 Federal Rule of Civil Procedure (FRCP) 56(d), to the extent it is applicable at all here,  
15 relates solely to Plaintiff's Motion for Partial Summary Judgment and not Plaintiff's Motion for  
16 Injunctive Relief. Intervenors base their request under 56(d) on the Declaration of John Kinsey,  
17 but Mr. Kinsey's declaration fails to identify any facts that would be sought in discovery  
18 relating to the merits of Plaintiff's summary judgment motion regarding failure to reinitiate and  
19 which are not already available in the administrative record. *Price ex rel. Price v. Western*  
20 *Res., Inc.*, 232 F.3d 779, 783 (10<sup>th</sup> Cir. 2000) (denying 56(d) relief where party failed to file  
21 affidavit specifying what facts in discovery will be sought and why necessary to oppose  
22 summary judgment). As noted above, causation is not an element of Plaintiff's motion for  
23 partial summary judgment relating to its failure to reinitiate consultation claim and thus  
24 discovery relating to the underlying cause of take exceedances is not appropriate or necessary.  
25 *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 628 (7<sup>th</sup> Cir. 2014) (denying request for  
26 discovery on issues irrelevant to issues presented in motion for summary judgment).

1 The focus of Intervenor's argument and Mr. Kinsey's declaration focuses on the  
2 question of remedy, not the merits of the summary judgment motion and thus is outside the  
3 scope of Rule 56(d), which applies only to discovery of facts necessary to oppose a motion for  
4 summary judgment. Moore's Federal Practice (3d ed.), § 56.102[3] ("if the facts could not  
5 affect the outcome of the summary judgment motion, there is no need to permit the discovery").  
6 Intervenor's cite no authority to support its use of Rule 56(d) on the question of remedy. Their  
7 request should be denied. While they argue Plaintiff's motion for partial summary judgment is  
8 premature, this Court rejected that argument in an order dated December 13, 2016 (Dkt. #82).

9 Deferral of Plaintiff's motion for purposes of conducting discovery would preclude  
10 effective injunctive relief. As previously acknowledged, this matter is time-sensitive given that  
11 BOR intends to operate the Project and permit diversion of hundreds of thousands of acre-feet  
12 of water out of UKL and the river without any additional mitigation for SONCC Coho in Spring  
13 2017. Proceeding to a determination of interim injunctive relief without additional discovery  
14 proceedings will not prejudice Intervenor's. They have put forward numerous declarations for  
15 consideration by the Court and made arguments in opposition to Plaintiff's requested relief  
16 based on those declarations. Moreover, the injunctive relief requested is temporary in nature  
17 and will expire upon completion of Federal Defendants' consultation and BiOp issuance.

18 Plaintiff disputes that there is any entitlement or basis for additional discovery or  
19 evidentiary trial-type hearings prior to issuance of injunctive relief. However, to the extent that  
20 the Court is inclined to grant any additional time for discovery or provide for a trial-type  
21 hearing before entering a mandatory or permanent injunction, the risks associated with such  
22 delay in the proceedings should not fall on the SONCC Coho. Rather, the Court should  
23 exercise its equitable authority to preserve the status quo by entering a preliminary injunction  
24 that enjoins the Project from operating pending completion of any discovery and any future  
25 evidentiary hearings that are deemed necessary to further refine the scope of injunctive relief.  
26 The Court should grant Plaintiff's Motion for Partial Summary Judgment and Injunctive Relief.

1 Respectfully submitted this 18<sup>th</sup> day of January, 2017.

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3 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

4 /s/ Thomas P. Schlosser  
5 Thomas P. Schlosser WSBA #06276  
6 Attorneys for the Hoopa Valley Tribe  
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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document, Hoopa Valley Tribe's Reply to Defendant-Intervenors' Response to Plaintiff's Motion for Partial Summary Judgment and Injunctive Relief, 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 18<sup>th</sup> day of January 2017, at Seattle, Washington.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

s/Thomas P. Schlosser

Thomas P. Schlosser

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