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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

YUROK TRIBE, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES,

Plaintiffs,

v.

U.S. BUREAU OF RECLAMATION and NATIONAL MARINE FISHERIES SERVICE,

Defendants,

and

KLAMATH WATER USERS ASSOCIATION,

Intervenor-Defendant.

Case No. 3:19-cv-04405-WHO

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO LIFT THE STAY OF LITIGATION AND TO ENTER A TEMPORARY RESTRAINING ORDER (ECF 909)

Hearing Date: May 22, 2020
Hearing Time: 10:00 AM
Judge William H. Orrick

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I. Introduction

As the Court is aware, this litigation is currently stayed pursuant to the unanimous stipulation of the parties, which was approved by this Court on March 27, 2020. ECF 907 & 908. The stipulation was the end result of intensive negotiations in which all parties to the litigation actively participated over the course of many weeks, and during which the parties discussed in detail the U.S. Bureau of Reclamation's ("Bureau") proposed plan for interim operation of the Klamath Project (the "Interim Plan") while it completes reinitiated consultation pursuant to the Endangered Species Act ("ESA") on a longer-term plan that protects endangered suckers in Upper Klamath Lake ("UKL") and threatened Southern Oregon/Northern California Coast coho salmon ("SONCC coho") in the Klamath River, listed species with countervailing water needs, among other listed species. Methods of maintaining elevations of UKL to protect suckers and Klamath River flows to protect SONCC coho in light of various potential hydrology scenarios were discussed. In the end, all parties agreed that the litigation should remain stayed in full until September 30, 2022, so long as the Bureau did not deviate from implementation of the Interim Plan, the details of which were fully, and well, known to all parties. ECF 907 at 5, ¶ 3.[1]

A key benchmark of the Interim Plan was holding an elevation of 4,142.00 feet in UKL in April and May for suckers, and the Plan intended that there would be no augmentation of Klamath River flows if implementation of such flows would thwart this elevation. The Interim Plan provides that the Bureau would coordinate with the Services, Yurok Tribe, and other affected Klamath River Tribes on how to manage water to best meet the needs of listed species if augmentation was triggered by the April 1 forecast but delivery of those flows would cause UKL to fall below 4,142.00 feet in elevation. The Plan provides that the Bureau would adaptively manage the situation in coordination with the relevant stakeholders to best protect suckers and coho salmon while it continues to operate the Project. As it turned out, due to a late storm event, the Natural Resources Conservation Service's ("NRCS") April 1, 2020 forecast for inflows to UKL – the standard metric used for operational decisions – eked in near the bottom end of the range of inflows that would trigger a 40 thousand acre feet ("TAF") augmentation of river flows under the Interim Plan.

[1] Citations to ECF filings are to the ECF pagination, not the internal pagination on the filings.

Regrettably, the forecast proved to be grossly inaccurate, predicting there would be approximately an additional 109 TAF of water that did not materialize. Had the April 1, 2020 forecast been accurate, the Interim Plan would not have called for *any* augmentation of Klamath River flows, as flows are expected to be lower in drought years like this one. Water year 2020 is shaping up to be among the most severe droughts ever experienced in the Klamath Basin in the entire period of record. Due to the severe drought conditions, UKL fell below the Interim Plan's 4,142.00 foot benchmark elevation on April 19, 2020, after having achieved that elevation earlier in the month. Deliveries to irrigation were minimal at the time. The Bureau's subsequent implementation of a surface flushing flow for the protection of the SONCC coho in late April and early May – which released a total of 43,125 AF from UKL – resulted in a drop in UKL elevations of approximately 0.50 feet.

As soon as the Bureau discovered that the April 1 forecast was grossly inaccurate, it initiated discussions with the stakeholders regarding its plan for adaptively managing the situation, precisely as called for in the Interim Plan. Meanwhile, the Bureau continued to provide augmented releases into the Klamath River consistent with the Interim Plan. As of May 14, 2020, some 7 TAF of releases to the river had been made. The Bureau discussed several adaptive management approaches with Plaintiffs to get through this exceptionally dire water year, all of which were rejected. Rather than continue to work through the issues collaboratively towards a compromise agreement, Plaintiffs abruptly left the negotiating table and ran to Court in the hopes of using the wildly inaccurate forecast to force their preferred operation for this water year. Despite the fact that the Bureau has: (1) set aside an environmental water account ("EWA") under the 2018 Operations Plan ("2018 Plan") of 400 TAF for SONCC coho protection (plus 7 TAF for the Yurok's ceremonial Boat Dance); (2) implemented, in good faith, a surface flushing flow from the EWA consuming approximately 43 TAF for the protection of SONCC coho, even though it caused a 0.5 foot drop in UKL elevations; (3) continues to release EWA flows from UKL at a rate of 1,175 cubic feet per second ("cfs") pursuant to the 2018 Plan; and (4) provided an additional 7 TAF of augmentation flows this May, Plaintiffs have come to this Court on a reported emergency basis to request no more than an additional 16 TAF for additional ESA river augmentation flows, in this water year only.

Given that: (1) no augmented releases at all would have been required by an accurate April 1 forecast; (2) 7 TAF in augmented releases at Iron Gate Dam had been consumed as of May 14; (3) discussions with Plaintiffs regarding how to adaptively manage the situation were not progressing and litigation was threatened; and (4) augmented flows would continue to consume an additional 5.5 TAF per week as discussions continued, the Bureau elected to ramp down the augmented flows while it continues to determine how to best adaptively manage the situation going forward. This will likely involve substantial reductions in the neighborhood of 60 TAF from the initial allocation for irrigation deliveries, which was already exceptionally low at 140 TAF. At bottom, there is far less water than anticipated for all stakeholders, and the Bureau is in the position of trying to account for and manage these competing interests consistent with the requirements of the ESA.

For present purposes, the threshold question before this Court is whether the Bureau has deviated from the Interim Plan in such a way that would justify lifting the stay of the litigation that the parties agreed to only weeks ago. Although this remains a continually evolving situation, to date, the Bureau has not, as the Bureau's adaptive management in response to emergency drought conditions is allowed by the Plan, and therefore the stay of litigation should remain in place. Because the litigation should remain stayed pursuant to the prior agreement of the parties, the Court need not reach Plaintiffs' requests to "reinstate" their motion for preliminary injunction ("PI") and enter a temporary restraining order ("TRO") altering ongoing releases from UKL. ECF 909. The Bureau stands ready to continue to coordinate with the Yurok Tribe and other affected stakeholders towards a reasonable compromise approach to adaptively manage the Project through this challenging water year. The public interest favors orderly collaboration among Klamath Basin stakeholders, not repeated motions for TROs and PIs.

Nonetheless, if the Court were to lift the stay of litigation, it should deny Plaintiffs' request to enter a TRO. Granting Plaintiffs' TRO motion would harm endangered suckers by causing a further drop in UKL elevations. The Court should not grant a TRO in an attempt to protect one listed species at the expense of two others. In fact, Plaintiffs have not carried their heavy burden on any one of the requisite factors that are necessary to obtain this extraordinary relief. Plaintiffs are not likely to prevail on the merits of their challenges to the National Marine Fisheries Service's

("NMFS") biological opinion ("BiOp"), which concluded that the Bureau's 2018 Plan is not likely to jeopardize the continued existence of the SONCC coho or destroy or adversely modify its critical habitat. Plaintiffs also do not show that NMFS' BiOp is so severely deficient that, even if the Bureau operates the Project precisely in the manner that NMFS concluded would not jeopardize or destroy or adversely modify critical habitat, it is nonetheless likely to cause immediate and irreparable harm to the SONCC coho unless the flow rates that Plaintiffs request are reinstated. If the Court reaches Plaintiffs' motion for TRO, it should deny it.

The Court also should deny Plaintiffs' request to "reinstate" their PI motion because Plaintiffs seek to raise issues outside the scope of their prior motion and the motion is likely to be mooted by the Court's resolution of the TRO motion in any event. Though Plaintiffs ask the Court to "reinstate" their prior PI motion, as modified, their latest filing actually describes a new motion for a PI that would seek to compel an additional 23 TAF for ESA flows (in reality, 16 TAF after subtracting the 7 TAF that already have been provided), plus an additional 7 TAF for the Yurok Tribe's ceremonial Boat Dance in August 2020. But there is no mention of the Boat Dance in either Plaintiffs' complaint or either of their previous PI motions. Plaintiffs' previous motions were based solely on a subset of their ESA claims. The Boat Dance flows are for ceremonial, not biological purposes. Thus, Plaintiffs are requesting to "reinstate" a new PI motion that has not, in fact, been put before this Court and could not properly be put before this Court without the filing of an amended complaint or determination and quantification of federal reserved water rights. Plaintiffs' request to "reinstate" their PI motion should be denied as to the Boat Dance flows with leave to amend their complaint and file a new PI motion. As a practical matter, if Plaintiffs' TRO motion is denied, then any motion for PI on their ESA claims should be denied as well, as the motions are essentially identical. If the TRO is granted, it would likely moot a PI motion on Plaintiffs' ESA claims, as the order would likely cause the 16 TAF that is in dispute to be expended in approximately 20 days, leaving the Boat Dance flows as the only potential dispute.

II. Statutory Background: the Endangered Species Act

The statutory background discussion in Federal Defendants' opposition to Plaintiffs' original PI motion (ECF 46 at 10-12) is incorporated by reference.

III. Factual Background: Klamath Project, Endangered Suckers, Threatened Salmon

The factual background section in Federal Defendants' opposition to Plaintiffs' original PI motion (ECF 46 at 12-15) is incorporated by reference.

IV. Standards for Emergency Preliminary Injunctive Relief

The Court is undoubtedly familiar with the standards for emergency injunctive relief. A recitation of those standards has been provided in Federal Defendants' opposition to Plaintiffs' original PI motion (ECF 46 at 15-16) and is incorporated by reference. Federal Defendants stress that a TRO may not be issued "based only on a possibility of irreparable harm." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22, 24 (2008). Rather, it is the plaintiff's burden to show that such relief is likely unless the requested relief is granted.

V. Standard of Review on the Merits of Plaintiffs' Claims

A recitation of the pertinent standard of review for Plaintiffs' likelihood of succeeding on the merits of their claims has been provided in Federal Defendants' opposition to Plaintiffs' original PI motion (ECF 46 at 16-18) and is incorporated by reference. Of note, in accordance with the appropriate standard of review and the ESA's "best available science" standard, Federal Defendants have moved to exclude Plaintiffs' extra-record materials. ECF 50.

VI. Argument

A. The Negotiated Stay of Litigation Should Not Be Lifted Because the Bureau Continues to Operate the Project In Accordance With the Interim Plan

Plaintiffs assert that the stay may be lifted because the Bureau has "reduced the 40,000 acre-feet required to be set aside for augmented flows under the Interim Plan, and is cutting off augmented spring flows."[2] ECF 909-1 at 13-14. Even if true, these facts do not constitute grounds

[2] Elsewhere, Plaintiffs assert that "the Bureau told the Tribe that it intends to violate the 2019 Plan's requirement that 7,000 acre-feet of water be reserved for the Yurok Tribe's ceremonial Boat Dance this summer." ECF 909-1 at 13. Initially, the Bureau objects to Plaintiffs' disclosure of what it believed were confidential communications sent as part of continuing compromise negotiations regarding the stipulated stay of this litigation; under Fed. Rule Evid. 408, this evidence is inadmissible and cannot be considered to support Plaintiffs' contentions. Beyond this, as is implicit in Plaintiffs' contention that the Bureau has told Yurok it "intends" to eliminate the Boat Dance allocation, no formal decision has been made to remove the Boat Dance flows from the 2019 Plan, which are not scheduled to occur until August. The Bureau has merely discussed the potential reduction or elimination of these flows with Plaintiffs. There is no basis upon which Plaintiffs may

for lifting the stay, as the actions being taken by the Bureau are precisely the type of adaptive management actions that are contemplated by the Interim Plan under the circumstances presented, and that Plaintiffs were aware of when they stipulated to stay this litigation. The Bureau does not dispute that, in response to extreme drought conditions in the Klamath Basin, it plans to reduce a portion of the additional 40 TAF that was triggered for augmentation flows under the Interim Plan, based on the inaccurate April 1 forecast. The Bureau does not believe it can continue these releases presently, and questions whether there is any amount of additional water that will be able to be provided for augmentation flows, as hydrologic conditions evolve in this dire drought year.

However, rather than constituting a deviation from the Interim Plan, the Plan specifically provides for adaptive management, where, as here, delivery of the full 40 TAF would draw elevations in UKL further below the 4,142.00 feet required for April and May under the Interim Plan.[3]

As stated in the Interim Plan:

> In the event PacifiCorp is unable to provide the water, and/or if modeling shows that implementation of the 40,000 AF of EWA augmentation releases is likely to result in UKL elevations below 4,142.0 feet in April or May, despite good faith efforts to rearrange the 40,000 AF of EWA releases within reasonable bounds, Reclamation will coordinate with the Services and PacifiCorp to best meet the needs of ESA-listed species as well as coordinate and obtain input from Yurok and other affected Klamath River Basin Tribes through government-to-government consultation on how to manage water.

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seek relief in connection with these flows unless and until there is a formal decision to set them aside. For present purposes, the Boat Dance flows are ceremonial, and not ESA-based, and Plaintiffs have not included these flows in their TRO motion. ECF 99 at 4-5, ¶ 3.

[3] The obligation to allocate an additional 40 TAF of water for augmentation flows under the Interim Plan is triggered "in water years with an Upper Klamath Lake (UKL) Supply at or above 550,000 AF and at or below 950,000 AF," as projected by an April 1 hydrologic forecast from the NRCS. ECF 907-1 at 3. Precipitation in late March put the Projected UKL supply just above the 550 TAF minimum threshold. Bottcher Decl. ¶ 7. However, over the ensuing month, hydrologic projections dramatically worsened, and "the updated May 1 NRCS UKL inflow forecast . . . reflected a dramatic decline of approximately 110,000 AF in projected and realized inflows to UKL, relative to the April 1 UKL inflow forecast." *Id.* ¶ 8. The obligation to allocate an additional 40 TAF would not have been triggered if the threshold determination had been based upon those subsequent forecasted conditions. *See id.* In fact, the 577 TAF projected as of April 1 has now fallen to 535 TAF. *See id.* ¶¶ 7-8

ECF 907-1 at 4; *see also id.* at 5 ("Although KBPM simulations can help frame potential implications, in real-time operations, Reclamation would work with PacifiCorp to borrow water or modify augmentation releases in coordination with the FASTA process to ensure that UKL elevations would not fall below 4,142.0 feet during April and May during that water year").

Each of these conditions for potential reduction of the additional 40 TAF of augmentation water under this provision are met. First, there can be no dispute that "implementation of the 40,000 AF of EWA augmentation releases is likely to result in UKL elevations below 4,142.00 feet in April or May." In fact, even before delivering any portion of the 40 TAF, UKL elevations had already dropped below 4,142.00 feet as of April 19, due to the precipitous decline in the observed hydrology that occurred shortly after the 40 TAF augmentation was triggered based on the April 1 forecast. *See* Bottcher Decl. ¶ 9. UKL elevations were further reduced in late April with implementation of a surface flushing flow, which reduced elevations by approximately 0.5 ft. *Id.* Elevations are not expected to rise back above this elevation for the remainder of the month. *See id.* In these circumstances, the Bureau cannot "rearrange the 40,000 AF of EWA releases within reasonable bounds" in an attempt to restore the 4,142.00 foot elevation, as delivery of any of this additional augmentation water in May will only cause a further drop.

Second, the Bureau has coordinated with PacifiCorp to borrow water that otherwise would have been used in connection with hydropower operations at four dams operated by PacifiCorp on the Klamath River below the Project in an attempt to maintain elevations in UKL. This coordination has resulted in the borrowing of approximately 15 TAF of water from PacifiCorp—far in excess of the up to 5 TAF that the Bureau and PacifiCorp previously had contemplated might be borrowed at the time the Interim Plan was finalized. Bottcher Decl. ¶ 13. And yet, while the timing of paying back this borrowed water is uncertain, even with the retention of this additional water in UKL into the fall, it is not expected that elevations will rise back above 4,142.00 feet in May. *See id.* ¶ 9.

Third, the Bureau has coordinated with the consulting agencies "to best meet the needs of ESA-listed species" and has "coordinate[d] and obtain[ed] input from Yurok and other affected Klamath River Basin Tribes through government-to-government consultation on how to manage

water." In fact, the Bureau has had repeated and frequent meetings with representatives of Yurok, the consulting agencies, and the other listed parties, both in joint and separate negotiating sessions, throughout May in an attempt to formulate an emergency drought plan and determine if concurrence on such a plan was possible. Bottcher Decl. ¶ 21. Reclamation specifically sought to determine through this coordination how "to best meet the needs of ESA-listed species"—endangered suckers in UKL and threatened SONCC coho downstream in the Klamath River—with the limited inflow into UKL that is 109 TAF below the April 1 forecast. *Id.* ¶ 8. The measures the Bureau has taken or anticipates taking to mitigate this shortfall and adaptively manage the Project to protect SONCC coho in response to this dramatically-reduced inflow include: (1) the above-discussed borrowing from PacifiCorp of approximately 15 TAF of water in an attempt to avoid further drops in UKL elevations; (2) significant further curtailment of Project deliveries for irrigation; and (3) reduction of the 40 TAF in additional augmentation water triggered under the Interim Plan based on the inaccurate April 1 forecast.

At present, the ultimate reduction in the volume of augmentation water for river flows to be released from the Project remains uncertain, with future hydrology determining how much, if any, additional water can be provided. The eventual volume of reductions to the 40 TAF of additional augmentation water and Project supply are being assessed by the Bureau through continuing coordination and adaptive management in response to changing and the extremely challenging hydrologic conditions. Any augmented river flows are in addition to the minimum flows already being provided from the 407 TAF EWA established under the 2018 Plan, onto which the Interim Plan is overlaid. River flows under the 2018 Plan have ranged between 1,175 cfs and 6,030 cfs in April and May, which are supported and made possible by releasing water from UKL. The surface flushing flow releases and ramp down period far exceeded the UKL net inflows during this time and over the course of the year, the Bureau anticipates Klamath River releases will far exceed the anticipated UKL inflows for the entire season. Bottcher Decl. ¶ 16, Table 1. These minimum flows, which are supported by releases from UKL through Link River and Iron Gate Dams, are in addition to the 7 TAF of augmented flows that were already released into the Klamath River under the Interim Plan at the Bureau's direction. *Id.* ¶ 10. By contrast, the Bureau anticipates that it will

further reduce Project deliveries for irrigation from the 140 TAF allocated under the 2018 Plan, which already have been curtailed as a result of the 407 TAF allocation for the EWA and the 7 TAF of additional augmented flows, to a Project supply around 80 TAF. *Id.* ¶¶ 14, 19.

Regardless of the final allocation numbers, the bottom line is that the augmentation flows, lake levels, and Project supply provided for under the 2018 Plan and Interim Plan must all necessarily be modified as the Bureau attempts to best approximate the provisions of those Plans in response to the historic drought conditions prevailing in the Klamath Basin and the inaccurate April 1 forecast. Indeed, the Bureau's decision to reduce the 40 TAF volume for augmentation flows is entirely reasonable in the circumstances, given that this allocation would not even have occurred had the minimum amount of water that must be in UKL storage in order to trigger the allocation been determined based on the May 1 forecasting information. *Id.* ¶ 8. In effect, the Bureau is implementing the Interim Plan consistent with the letter and intent of that Plan to correct for the inaccurate forecast information and reflect the fact that the actual hydrologic conditions prevailing in the Klamath Basin should not have resulted in an additional 40 TAF of augmented river flows. The parties to this litigation stipulated that the case would be stayed under these circumstances, and a forecast that was wildly inaccurate should not excuse Plaintiffs from that commitment.

Plaintiffs themselves concede that some reduction of the flows is appropriate, proposing a reduction from 40 to 23 TAF; they simply disagree with the Bureau's determination that further reductions are appropriate. But there is no requirement in the Interim Plan that Plaintiffs approve the specific quantum of the reductions determined to be appropriate by the Bureau in the exercise of its informed discretion in these circumstances; rather, the Plan provides that the Bureau shall "coordinate and obtain input" from them, the consulting agencies, and the other interested parties listed in the Interim Plan in determining how "to best meet the needs of ESA-listed species." As described above, the Bureau has fully discharged these duties.

Finally, to the extent Plaintiffs assert that the stay should be lifted because the Bureau has ramped down river flows by approximately 390 cfs, Plaintiffs allege a deviation from a requirement that the Interim Plan nowhere imposes. By its terms, the Interim Plan allocates a volume of water

for additional augmentation flows to be delivered in May and/or June, but otherwise leaves the timing and rate of these flows to be determined by Reclamation. As stated in the Plan:

> Reclamation would maintain a flexible approach to utilizing the proposed 40,000 AF of EWA augmentation and enhanced May/June flows. With the exception that the EWA augmentation water and enhanced May/June flows would be utilized within the March through June timeframe, Reclamation would allow for flexibility in the timing and distribution of augmentation volumes. EWA augmentation and enhanced May/June water use would be tracked separately from formulaic use of EWA during March through June. Any unused portion of the augmentation water would remain in the EWA after June and the formulaic approach to EWA release would be followed in the July through September period.

ECF 907-1 at 4. The Bureau's ramp down of the augmentation flows in May, after having already delivered approximately 7 TAF of the additional augmentation water, is not a deviation from the Interim Plan, and Plaintiffs have identified no other deviation that would allow the stay to be lifted.

Plaintiffs attempt to sidestep the requirement that UKL elevations stay above 4,142.00 feet in April and May of this year by making a textual – and specious – argument that the provision "becomes operative only after lake levels have reached 4142.00 feet" and "[t]his spring, Upper Klamath Lake levels would not have reached or maintained 4142.00 due to existing water conditions." ECF 909-1 at 25-26. Firstly, UKL did, in fact, reach 4,142.00 feet in April, which disposes of Plaintiffs' argument. Bottcher Decl. ¶ 10. Moreover, the undeniable intent of this provision in the Interim Plan is to maintain UKL elevations as far above 4,142.00 in elevation as possible in April and May. What Plaintiffs are suggesting is that, because the key benchmark elevation of 4,142.00 feet was regrettably not upheld, there is now free reign to deplete UKL of another 16 TAF (while erroneously asserting this would have no effect on suckers). In extreme and anomalous hydrologic years such as the present one in which the 40 TAF of augmentation water is triggered, but 4,142.00 feet was not maintained, it is all the more critical that the Bureau adaptively manage the Project in an attempt to seek to avoid further drops below this elevation in April and May. Any argument that the augmentation releases are permissible because the 4,142.00 foot threshold does not even apply in this extreme drought year is flatly inconsistent with the letter and intent of the Interim Plan.

B. If the Stay of Litigation is Lifted, Plaintiffs Have Failed to Carry their Burden of Demonstrating Entitlement to a Temporary Restraining Order

1. Plaintiffs have failed to establish a likelihood of success on the merits

(a) Plaintiffs have no claim based on the Interim Plan

Plaintiffs' central justification for seeking a TRO granting them up to 23 TAF is that this is the volume of water that the Bureau and Klamath Water Users' Association agreed to reallocate from Project supply under the terms of the Interim Plan to augment river flows, to be combined with 17 TAF from UKL. ECF 907-1 at 3. Impliedly, Plaintiffs appear to be asserting that the Interim Plan legally entitles them to at least this amount of water. Any such suggestion is incorrect. The Interim Plan, by its terms, does not give rise to a claim for breach or specific performance and, in any event, plaintiffs have not pled a cause of action challenging the Interim Plan in a complaint or provided statutorily-required 60-days' notice of their intent to sue on this particular issue, 16 U.S.C. § 1540(g)(2)(A), which is a strictly construed jurisdictional bar to suit. By the terms of the stipulated stay, "[n]o party may seek specific performance of any term or condition of this Stipulation or the Interim Plan," ECF 907 at 5, ¶ 6, and "[n]othing in this Stipulation shall be construed to constitute . . . a concession by any . . . party that the Interim Plan either does or does not meet, or either is or is not necessary to meet, the needs of ESA-listed species or critical habitat, Tribal trust resources, or any legal requirements." *Id.* at 5, ¶ 7. In short, Plaintiffs cannot demonstrate a likelihood of prevailing on the merits of any claim based on any alleged requirement of the Interim Plan.

Rather, if the stipulated stay is lifted because the Bureau is deemed to have deviated from the Interim Plan, then under the stipulation the parties are restored to their respective positions as they existed prior to the entry of the stay. Plaintiffs must demonstrate a likelihood of succeeding on the merits of their claims independent of any provisions of the Interim Plan. Plaintiffs cannot show a likelihood of success on the merits by simply pointing to the Plan's re-allocation of 23 TAF from Project supply to the additional augmentation flows, as it is neither a claim for relief nor evidence that this is the volume of water needed to avoid violation of the ESA. Nor can Plaintiffs argue that the Bureau should immediately be compelled to deliver an additional 390 cfs in augmentation flows simply because such flows were previously occurring under the Interim Plan before the more accurate May 1 hydrology reporting revealed there was less water in the system than previously

forecasted. This is particularly true given that the Interim Plan only allocates a total volume of water for the additional augmentation flows and does not specify the rate or timing of these flows. To carry their burden on the likelihood of success on the merits prong, Plaintiffs must establish a legal violation of the ESA in accordance with Administrative Procedure Act ("APA") principles and entitlement to the specific relief that they request, irrespective of the provisions of the Plan. For the reasons previously explained in Federal Defendants' opposition to Plaintiffs' PI motion, objection to reply evidence and sur-reply, and motion to exclude, or limit consideration of, Plaintiffs' extra-record evidence, this is something Plaintiffs cannot do. ECF 46, ECF 50, ECF 57, ECF 58.

(b) Plaintiffs' Challenges to NMFS' 2019 BiOp Lack Merit

(i) NMFS' Critical Habitat Finding Was Based on the Best Available Science and Cannot Be Assailed With Post-Decisional Information (ESA Count III)

Undeterred by the fact that it was their own declarant who provided erroneous critical habitat suitability data that made its way into NMFS' BiOp, Plaintiffs continue to make this fact their lead merits challenge to NMFS' BiOp, continuing to disingenuously suggest that it was NMFS that committed the error. ECF 909-1 at 15-16. Federal Defendants have explained why this argument fails in prior briefing. ECF 46 at 23-26; ECF 50; ECF 57 at 10, n.1; ECF 58. As an initial matter, it fails because Plaintiffs may not use post-decisional evidence of the weighted usable area curves to attack NMFS' 2019 BiOp on the merits, or the Bureau's decision to rely on it, under basic APA record review principles. ECF 50; ECF 46 at 16-18. Rather, the BiOp must be judged based on the administrative record that was before NMFS at the time it completed the BiOp, which did not include knowledge that habitat data was erroneous, much less the corrected habitat data itself. Second, NMFS made no error here with respect to the erroneous habitat data curves. ECF 46-1 ¶¶ 4-18. Third, that the habitat suitability data supplied by Dr. Hardy was shown to be inaccurate *after* the 2019 BiOp was issued does not change the fact that NMFS used the best available science at the time the BiOp was finalized as the ESA requires. While an agency cannot disregard or ignore available scientific evidence, the ESA's "best available science" standard, 16 U.S.C. § 1536(a)(2), does not "require an agency to conduct new tests or make decisions on data that does not yet exist." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014).

Here, NMFS used the best information that was available at the time to develop its 2019 BiOp in accordance with the ESA, and NMFS' use of that information may not be second-guessed in hindsight with post-decisional information. Post-BiOp information could be relevant to whether reinitiation is required, 50 C.F.R. § 402.16(a)(2), but Plaintiffs have not moved for a TRO based on a "failure to reinitiate" claim, and the Bureau has commenced reinitiated consultation with NMFS in any event. The reinitiated consultation will result in new jeopardy and destruction or adverse modification analyses based on the corrected data, mooting Plaintiffs' claim. ECF 46-1 ¶ 18.

(ii) NMFS' Critical Habitat Conclusion Was Rational

Plaintiffs next argue that NMFS' conclusion that the operations plan is not likely to destroy or adversely modify juvenile rearing habitat should be overturned because a flow level not meeting the 80% conservation standard would destroy or adversely modify critical habitat. ECF 909-1 at 16-18. But a conservation standard is just that—a standard for conserving the species, not for ensuring that a federal action does not destroy or adversely modify its critical habitat. To "conserve" a species in the context of the ESA means to use "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [in the ESA] are no longer necessary." 16 U.S.C. § 1532(3); *compare* 50 C.F.R. § 402.02 (defining destruction or adverse modification). Plaintiffs do not, and cannot, show that irreparable harm is likely to occur in the absence of a TRO simply because the operations plan does not, in every month and under every hydrologic condition, meet the conservation standard. The magnitude and duration of habitat limitations and what effect (if any) they may have on the physical and biological features of critical habitat is key to the analysis of effects to critical habitat. ECF 46-1 ¶ 20.

But even considering the conservation standard, the expert fisheries biologists at NMFS had a reasonable basis for determining at the time of their analysis that the 2019 operations plan is not likely to destroy or adversely modify critical habitat, even though it was discovered later that the amount of available critical habitat was likely overestimated due to the erroneous weighted usable area ("WUA") curves. The administrative record at that time showed that flows in the Bureau's proposed action would meet the conservation standard for coho juveniles during the months of October through June for 46% of the exceedance intervals at the Rogers Creek reach, 35% of the

exceedance intervals at the Trees of Heaven reach, and 16.9% of the exceedance intervals at the Seiad Valley reach. BiOp at 148-50, Tables 18-20. If only the flows during March through June are considered, when habitat availability is considered "the most essential" for coho salmon juveniles, the statistics were even better. The conservation standard was expected to be met for 60.5% of the exceedance intervals at the Rogers Creek reach, 42% of the exceedance intervals at the Trees of Heaven reach, and 17.1% of the exceedance intervals at the Seiad Valley reach. *Id.* All told, in every water year analyzed, the Bureau's flows met the conservation standard for coho juveniles over 32% of the exceedance intervals. *Id.*

Plaintiffs fail to acknowledge the rational explanation that NMFS provided in the 2019 BiOp as to why flows providing less than the 80% conservation standard were not likely to adversely modify critical habitat. While NMFS found that the operations plan will reduce juvenile rearing habitat availability at various times of the year and at different flow exceedances, particularly in the Seiad Valley reach, NMFS found that it "does have flexibility at critical periods, to increase flows and enhance habitat in the mainstem, primarily through the augmented release of 20,000 ac. ft. in May and June and through the formulaic approach that releases [of water from the Environmental Water Account] during periods of increased UKL net inflow." BiOp at 202-03; ECF 46-3 at ¶ 24; ECF 46-1 at ¶ 27. NMFS also concluded that the adverse effects to juvenile rearing habitat are likely to be somewhat moderated by the flow variability during wet years, reflecting the qualities of a natural flow regime. BiOp at 202-03. "Temporary increases in mainstem flows are expected to result in short-term increases in the amount and quality of habitat in the mainstem" for juveniles. *Id.* In short, NMFS concluded that the 2018 Plan "includes provisions to reduce some adverse effects to coho salmon [] juvenile habitat." *Id.* NMFS further determined that the plan is likely to have an insignificant effect to mainstem thermal refugial size downstream of the Seiad Valley. *Id.* at 173-174.

Furthermore, NMFS concluded, based on recommendations of the Hardy Phase II Report, the 2018 Plan would ensure that, even in the "driest hydrologic conditions in the Klamath Basin, minimum flows will be met, and thus during the period of effects of the plan the overall risk to coho salmon fry and juvenile habitat in the mainstem will be low, depending on water year type." *Id.* at 203. Plaintiffs may prefer a plan that provided more usable habitat, but the record provides a

rational basis for NMFS' finding of not likely to result in destruction or adverse modification and that determination is not "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Plaintiffs' attempt to analogize the conservation standard here to the reasonable and prudent alternative ("RPA") in *Pac. Coast Fed'n. of Fishermen's Ass'ns. v. U.S. Bureau of Recl.*, 426 F.3d 1082 (9th Cir. 2005) ("*PCFFA*") is wholly unavailing. In *PCFFA*, the Court overruled a plan that provided only 57% of the flows that NMFS had determined were necessary to *avoid jeopardy*. *Id.* at 1093-94. In stark contrast, here Plaintiffs are attempting to impose a *conservation standard* that NMFS has *not* deemed strictly necessary to avoid jeopardy and adverse modification of critical habitat.

(iii) NMFS' "No Jeopardy" Conclusion Was Rational (ESA Counts I & II)

Plaintiffs next claim that NMFS did not rationally conclude that the 2018 Plan is not likely to jeopardize the SONCC coho's continued existence. First, Plaintiffs essentially recycle their attack on NMFS' critical habit analysis, contending that NMFS' jeopardy analysis should be overturned for the same reasons as its critical habitat analysis: the 2018 Plan does not provide sufficient spring habitat forming flows. This argument is conclusory, and easily dismissed. Plaintiffs make no showing that the 2018 Plan reduces flows in a way that is likely to jeopardize SONCC coho, contrary to NMFS' determination. Also, this argument lacks merit for the reasons explained above, and is contradicted by the facts that – even though it is an extreme drought year – the 2018 Plan: (1) provides a 407 TAF volume for the EWA this year (separate and apart from the 40 TAF augmentation under the Interim Plan); (2) delivered a full surface flushing flow in late April (approximately 43 TAF); (3) is ensuring minimum daily river flows that are consistent with those analyzed in NMFS' 2019 BiOp; and (4) in addition to all of this water, pursuant to the Interim Plan, the Bureau provided an additional 7 TAF to augment river flows this spring.

NMFS concluded in its BiOp that "[t]he increase in frequency of surface flushing flows (*i.e.*, at least 6,030 cfs for 72 hours) is expected to somewhat disrupt the life cycle of *C. shasta* in the mainstem Klamath River between Trees of Heaven (RM 172) and Seiad Valley (RM 129) in May to mid-June." BiOp at 167. NMFS further found that, if implementation of a surface flushing flow does not eliminate the need for an emergency dilution flow, "the real-time disease management

element of the proposed action is likely to partially offset the increased disease risks to coho salmon during average and below average water years, and the minimum daily flows provide a limit to the increase in disease risks posed to coho salmon under the proposed action." *Id.; see also id.* at 44-45. NMFS plainly had a rational basis for its conclusions, which clear the APA's highly deferential "arbitrary and capricious" standard with room to spare. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d. at 581, 622-623 (9th Cir. 2014) (upholding adaptive management program in a reasonable and prudent alternative).

Plaintiffs next argue NMFS' jeopardy call should be overturned because NMFS analyzed the expected *C. shasta* infection rates under the 2018 Plan compared to those recorded in 2005-2016, a timeframe when coho abundance declined and *C. shasta* infection and mortality rates exceeded natural conditions. This argument, too, is easily dismissed. Weekly spore measures do not exist prior to 2005, and the 2005-2016 timeframe was not even selected by NMFS, it is the timeframe of the data set that was analyzed by FWS in a peer-reviewed model that FWS developed to estimate the prevalence of mortality. BiOp at 273; NMFS AR B_005347-49. That model is undeniably the best science available. Plaintiffs can point to no superior science that was available.

Third, while not appearing to dispute that the 2018 Plan improves the likelihood of survival and recovery compared to the period of record, Plaintiffs contend that NMFS' jeopardy determination should be overturned because this is an inadequate rationale for NMFS' determination. Plaintiffs mischaracterize NMFS' analysis. NMFS did not simply perform a comparative analysis, as Plaintiffs allege. Using the viable salmonid population framework, NMFS performed a comprehensive integration and synthesis of effects to support its conclusions. BiOp at 198-217. Plaintiffs' argument ignores NMFS' actual conclusion:

> By lowering disease risks in a direction toward those under natural flow conditions, NMFS believes that coho salmon abundance and productivity will likely improve over the period of effects of the proposed action for the Upper Klamath, Middle Klamath, Shasta, that the disease risks would be lowered toward those under natural conditions, and Scott populations, which will improve survival, and not appreciably reduce the likelihood of recovery for these populations. NMFS concludes the proposed action is not likely to result in a level of habitat reduction where coho salmon fry and juveniles in the coho salmon populations in the actions area will have reduced life history diversity. Finally, NMFS does not expect the proposed action will reduce the spatial structure of coho salmon populations in the action area.

Id. at 216-17 (emphasis added).

Plaintiffs seem to suggest that NMFS must articulate definitive standards for assessing effects on survival and recovery (vis a vis reproduction, numbers, or distribution). Simply stated, this argument fails because neither the ESA, its implementing regulations, nor agency policy impose such requirements. *Lands Council v. McNair*, 537 F.3d at 981, 993 (9th Cir. 2008) (en banc) (courts may not graft into the statute their "own notion of which procedures are 'best' or most likely to further some vague, undefined public good") (citation omitted). NMFS appropriately considered all of the relevant effects and applied the applicable regulatory standards, including the likelihood of recovery of the species and whether the operations plan is likely to increase the extinction risk of the species, which factors in both survival and recovery of the species. It is not irrational or contrary to Section 7 to find, as NMFS did here, that an improvement in the likelihood of survival and recovery, even if small and compared to a degraded period of record, does not "reduce appreciably" the likelihood of survival and recovery (i.e., jeopardize). 50 C.F.R. § 402.02; *Ctr. for Biol. Diversity v. FWS*, 807 F.3d 1031, 1051–52 (9th Cir. 2015) (plaintiffs' "objections to the Biop . . . in this case can appropriately be characterized as claiming that the [action] does not do enough to ensure the survival . . . Adopting this position, however, would impermissibly broaden FWS's obligations, both as the action agency and as the consulting agency"); *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 930, 936 (9th Cir. 2008) (implying that it would be improper to import the "ESA's separate recovery planning provisions into the section 7 consultation process" and holding that "[a]n agency may still take action that … lessens the degree of jeopardy"); *Rock Creek Alliance v. FWS*, 663 F.3d 439, 444 (9th Cir. 2011) (upholding BiOp where the action and associated mitigation plan "would in fact improve conditions over the long-term over the existing conditions, ultimately promoting the recovery" of the species) (citation omitted).

With regard to its consideration of impacts to recovery, NMFS explained that "survival and recovery are conditions on a continuum with no bright dividing lines." BiOp at 58. NMFS further explained that its "jeopardy assessment focuses on whether a proposed action appreciably increases extinction risk, which is a surrogate for appreciable reduction in the likelihood of both the survival and recovery of a listed species in the wild." *Id.*; *see also id.* at 60 ("NMFS also considers the ability of

the species to recover in light of its current condition and the status of the existing and future threat regime. Generally, NMFS folds this consideration of current condition and ability to recover into a conclusion regarding the 'risk of extinction' of the population or species"). The BiOp explains that NMFS used a viable salmonid population framework to assess the likelihood of jeopardy, the parameters of which "are consistent with the 'reproduction, numbers, or distribution' criteria found within the regulatory definition of jeopardy (50 CFR 402.02) and are used as surrogates" for those parameters. *Id.* at 59-61.

In short, Plaintiffs seek greater protection and recovery of the species, but the purpose of a BiOp is not to mandate improvement of a species' condition; it is to opine on the potential for harm to the species flowing from a proposed action vis a vis its likelihood of survival and recovery. *Nat'l Wildlife Fed'n*, 524 F.3d at 936; *Salmon Spawning & Recovery All. v. NMFS*, 342 F. App'x at 336, 338 (9th Cir. 2009). Improving a species' condition to the point of recovery is addressed through provisions of ESA Section 4, none of which are implicated here. Plaintiffs also prefer explicit findings using quantitative standards and additional explanation, but NMFS made the legally-required jeopardy determination, and its path is easily followed. NMFS' determination is rational, in an area of its expertise, and entitled to deference.

(c) The Bureau Is Not "In Violation" of the ESA

Separate from their claims against NMFS challenging the merits of its BiOp, Plaintiffs press an ESA citizen suit claim against the Bureau for no other reason than that NMFS' BiOp is flawed (ESA Count VI). As the Ninth Circuit has explained, in judging an action agency's reliance on a BiOp, the consulting agency's "actions, or lack thereof, in preparing its opinions are relevant [] only to the extent that they demonstrate whether the [action agency's] reliance on the reports is 'arbitrary and capricious.'" *Pyramid Lake v. U.S. Dep't of Navy*, 898 F.2d at 1415 (9th Cir. 1990) (citation omitted); *accord City of Tacoma v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006) ("when we are reviewing the decision of an action agency to rely on a BiOp, the focus of our review is quite different than when we are reviewing a BiOp directly. In the former case, the critical question is whether the action agency's reliance was arbitrary and capricious, not whether the BiOp itself is somehow flawed") (citations omitted). Here, Plaintiffs fail to show that the BiOp is arbitrary and capricious as an initial

matter, much less that the Bureau acted irrationally as an independent matter in accepting it.[4] As explained above, the BiOp and the Bureau's reliance on it must be judged based on the information that was available to the agencies at the time of their decisions, which did not include knowledge that the WUA curves were erroneous. In addition, Plaintiffs may not challenge the Bureau's reliance on the BiOp on the basis of the erroneous WUA curves because they failed to provide the Bureau with the statutorily required 60-days' notice of their intent to sue on this particular issue before suing, 16 U.S.C. § 1540(g)(2)(A), which is a strictly construed jurisdictional bar to suit. *Sw. Ctr. for Biol. Biol. Div. v. U.S. Bureau of Recl.*, 143 F.3d at 515, 520-22 (9th Cir. 1998).

2. Plaintiffs Have Not Shown that their Requested Flows Are Necessary to Avoid Irreparable Harm to the SONCC Coho Salmon, and Granting those Flows Would Harm Endangered Suckers

The crux of Plaintiffs' request for a TRO is that the SONCC coho salmon is likely to be harmed irreparably by Project operations unless the Bureau immediately adds 390 cfs to the 1,175 cfs in base flows currently being provided under the 2018 Plan, up to a volume of 16 TAF (23 TAF total requested minus the 7 TAF already provided). ECF 909 at 4-5. As an initial matter, Plaintiffs fail on the irreparable harm prong because granting their TRO would harm endangered suckers in UKL. "Provision of the additional 16,000 AF of EWA augmentation in May would specifically result in UKL elevations further below 4,142.00 ft." Botcher Decl. ¶ 23. As a result, UKL elevations will drop further below the boundary conditions described for endangered suckers under Term and Condition 1.C. in the FWS 2020 BiOp, reducing the amount of spawning habitat along the eastern shoreline and potentially leading "to reduced use by spawning adult suckers or desiccation of sucker eggs already at the shoreline spawning areas." *Id.* Plaintiffs' TRO motion should be denied for this reason alone. The Court should not grant a TRO in an attempt to help one listed species at the expense of two others.

[4] In disputing the Bureau's reliance on the BiOp, Plaintiffs are implicitly suggesting that, even though NMFS concluded that the 2019 Plan is not likely to jeopardize or adversely modify critical habitat, the Bureau should have implemented some other plan. That is implausible. *See Bennett v. Spear*, 520 U.S. 154, 168-171 (1997) (an action agency that chooses to deviate from the recommendations contained in a BiOp "must not only articulate its reasons for disagreement (which ordinarily requires species and habitat investigations that are not within the action agency's expertise), but that it runs a substantial risk if its (inexpert) reasons turn out to be wrong."). Because of this, the Supreme Court found that, while a BiOp is advisory, it nonetheless has a "virtually determinative effect." *Id.* at 170.

Additionally, Plaintiffs have failed to carry their heavy burden of demonstrating that irreparable harm is *likely* to occur to SONCC coho salmon unless their requested relief is granted. *Winter*, 555 U.S. at 22. While this is a complex and continually evolving situation based on imperfect predictions, there is no allegation that the Bureau is failing to operate in accordance with NMFS' no jeopardy BiOp or has exceeded the amount of incidental take. Rather, Plaintiffs disagree with NMFS' conclusions in that BiOp, but they have not shown that it is so extremely deficient that even strict adherence to the action analyzed in the BiOp is *likely* to cause irreparable harm to the SONCC coho salmon. The additional 16 TAF (plus 7 TAF already delivered) that Plaintiffs seek to add to the flows provided by the 2018 Plan is not a biologically-based volume, but rather is simply the volume of water that would have been surrendered from irrigation deliveries pursuant to the Interim Plan had the April 1 forecast not been inaccurate.[5]

However, the provisions of the Interim Plan are not specifically enforceable and were entered into for the sake of compromise without any concession as to whether they were necessary to meet the requirements of the ESA. Plaintiffs' memorandum is devoid of other justification for this particular volume or any showing that some lesser volume—*i.e.*, the 7 TAF already delivered in May—is insufficient to avoid irreparable harm. Plaintiffs have fallen far short of demonstrating, as they must, that this volume is biologically necessary to avoid irreparable harm to SONCC coho.

While the augmentation flow rate of 390 cfs that Plaintiffs seek was being released prior to the Bureau's ramp down operations at the recommendation of the Flow Account Scheduling Technical Advisory ("FASTA") team, Plaintiffs fail to show that the disease conditions currently being experienced in the river are being caused by the alleged deficiencies in NMFS' 2019 BiOp, or

[5] Plaintiffs' repeated attempts at a PI for ESA purposes has been a moving target. Plaintiffs first filed a motion seeking an order to return to an amalgam of the 2012 Plan and an unspecified form of the 2017 injunction entered in *Yurok Tribe v. U.S. Bureau of Recl.*, 231 F. Supp. 3d 450, 490 (N.D. Cal. 2017) (ECF 27), but quickly abandoned that motion and effectively asserted a new motion on reply asking for a PI adding 50 TAF to the EWA otherwise established in the 2019 Plan. ECF 48. Plaintiffs' latest PI motion would seek to add "23,000 acre-feet in augmented [river] flows" minus the 7 TAF of such flows already provided, for a total of 16 TAF. ECF 909 at 3. This 16 TAF would be in addition to the 407 TAF volume that Reclamation already has set aside for SONCC coho protection pursuant to the 2019 Plan (including 7 TAF for Boat Dance flows). As noted above, any volume for Boat Dance flows in August 2020 is for ceremonial, not biological purposes.

that ordering a return to such flows is likely to ameliorate the conditions.[6] As Plaintiffs acknowledge, the current conditions occurred while the Bureau was implementing the very augmentation flow rates that Plaintiffs seek, and after the Bureau implemented a full surface flushing flow from April 22 to May 3, consuming some 43 TAF. Indeed, Plaintiffs note that the Bureau's ramp down operations of the augmentation flows did not occur until May 11 to 14, ECF 909 at 21, which is after the first week of May when the infection rates cited by Plaintiffs were sampled. *Id.* at 22. Plaintiffs cannot rationally contend, much less carry their heavy burden by arguing, that the very same flow rate that they assert did not prevent the disease conditions complained of are *likely* to avoid irreparable harm from those conditions.

Plaintiffs complain that "[t]he 2019 Plan reduces spring flows to a level that provides far less juvenile rearing habitat than the NMFS's conservation standard." ECF 909-1 at 22. This argument fails for the same reasons as explained above: flows that do not meet a conservation standard do not necessarily, or automatically, destroy or adversely modify critical habitat. Plaintiffs are wrongly attempting to substitute a conservation standard for an ESA Section 7 regulatory standard. Based solely on the respective definitions of these statutory and regulatory provisions, it is apparent that Plaintiffs are not likely to succeed on the merits of their claim. To conserve a species means to utilize "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [in the ESA] are no longer necessary." 16 U.S.C. § 1532(3). By contrast, to destroy or adversely modify meant – at the time the BiOp was issued – "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species . . . . includ[ing] but [] not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features." 50 C.F.R. § 402.02 (2018).

Further, Plaintiffs' attempt to impose the 80% standard as a bright-line test for irreparable harm is overly simplistic. While flows that provide less than 80% of the maximum available habitat

[6] Plaintiffs' arguments are built on preliminary sampling estimates. An official determination of the amount of incidental take for this water year is not yet available. There has never been any determination that the amount of incidental take of SONCC coho anticipated in the 2019 incidental take statement has been exceeded.

may not "conserve" listed species or their habitat, it does not mean that they adversely modify critical habitat. There is no bright-line test for determining adverse modification. Even the flows recommended in Dr. Hardy's Phase II Report do not always result in meeting the 80% conservation standard. ECF 46-1 ¶ 21. Plaintiffs understandably seek greater conservation, or even recovery, of the species, but they cannot show that irreparable harm is likely to befall the SONCC coho if additional flows are not provided over the next several weeks in an attempt to meet the 80% conservation standard.

Finally, coho mortality "is estimated to have been around 0% (zero percent)" under the flows provided by the 2018 Plan—the very plan that Plaintiffs claim poses a threat of irreparable harm to SONCC coho. NMFS AR D_012907; ECF 46-1 ¶ 23. When coupled with "the low and consistent genotype II spore concentrations observed in 2020 thus far," it appears that "overall disease risk to outmigrating coho salmon this year will be low." Bottcher Decl. ¶ 26. This contrasts with the exceedingly high spore genotype I spore concentrations (the variant that infects Chinook) that were detected prior to surface flushing flow implementation. *Id.*; *see also id.* ¶ 24 (discussing possible juvenile coho outmigration from Klamath River). These factors further weigh against the likelihood of irreparable harm to SONCC coho absent the requested flows.

Plaintiffs also attempt to carry their burden of showing a likelihood of irreparable harm by pointing back to this Court's 2017 ruling, but that ruling reflected an entirely different situation. There, Plaintiffs brought a failure to reinitiate claim in the face of back-to-back years where the metric for measuring incidental take had been exceeded. Contrary to the plaintiffs' claims that the agencies had failed to reinitiate, this Court recognized that the Bureau had, in fact, reinitiated consultation. *Yurok Tribe v. U.S. Bureau of Reclamation*, 231 F. Supp. 3d 450, 455 (N.D. Cal. 2017). However, the Court ruled that the agencies had "violated 50 C.F.R. 402.16 because they delayed two years before reinitiating formal consultation after the incidental take trigger was exceeded in 2014." *Id.* Here, in stark contrast, Plaintiffs are attempting to justify a TRO based on a merits challenge to a new, and duly-issued BiOp, operations pursuant to which have not resulted in a recorded take exceedance. In further crucial contrast to the 2017 ruling, here there is no delay alleged in either

starting reinitiation, or completing it. Plaintiffs assert challenges to the BiOp, but NMFS' conclusions must be upheld unless they lack a rational basis, which they plainly possess.

To bolster their claims of likely irreparable harm, Plaintiffs attempt to expand the scope of their complaint and TRO motion by invoking alleged injury to Chinook salmon and killer whales, as well as to Plaintiffs' reserved fishing and water rights with regard to Chinook and coho salmon and undefined trust obligations owed by the United States in connection with these rights. ECF 909-1 at 24. However, Chinook salmon are not listed under the ESA, Plaintiffs have not moved for a TRO based on any claim for relief regarding killer whales, and this is not a water rights or a Tribal trust case. Plaintiffs did not include in their complaint a legal cause of action involving treaty reserved rights or Tribal trust obligations, and the relief sought by their TRO is based solely upon claims pled involving the ESA. Plaintiffs' efforts to establish irreparable harm based upon alleged injury to Chinook salmon in the Klamath River—a species that is not listed under the ESA—does not establish an injury that can be remedied through Plaintiffs' causes of action pled regarding the ESA.

3. Plaintiffs' Flow Rates Are Not in the Public Interest

Plaintiffs fail on the public interest prong of the TRO standard because the 16 TAF of augmentation flows they are requesting would come at the expense of endangered suckers in UKL, by lowering those levels further below the key 4,142.00 foot elevation. Plaintiffs' assertion that an additional 16 TAF can be released from UKL into the Klamath River without lowering UKL elevations is untrue. This would cause a drop in elevations. Plaintiffs argue as though the water volumes in the April 1 forecast exist, when they do not. Plaintiffs' TRO motion should be denied for this reason alone, as a TRO that would harm endangered suckers is against the public interest.

Although the Ninth Circuit has held that the public interest weighs in favor of protecting ESA-listed species, the Bureau wishes to inform the Court that the substantially reduced May 1 inflow forecast will require significant further reductions in the already-low 2020 Project allocation of 140,000 AF, likely in an amount of approximately 60,000 AF, which will be extremely impactful to the local rural and regional economies dependent on agricultural operations. *Id.* ¶¶ 27-29. Granting the TRO would further reduce available Project Supply and increase the likelihood of a complete Project shut-off partially through the irrigation season. *Id.* While the very worst year on

record for the Project was 2001, when there was zero water available for diversions until late July, it cannot be stressed enough that 2020 will have similar detrimental effects to the Upper Klamath Basin communities including the cities of Klamath Falls, Merrill and Malin, Oregon as well as Tule Lake, California. *Id.*

In stipulating to stay this litigation, the Bureau, the Yurok, and the Klamath Project Water Users recognized that the public interest favors orderly administration of the Klamath Project with input from, and collaboration with, the relevant stakeholders over repeated emergency runs to the courthouse. *Ctr. for Biol. Diversity v. U.S. Bureau of Recl.*, No. 6:15-CV-02358-JR, 2016 WL 9226390, at *5 (D. Or. Apr. 6, 2016) (PI would not benefit the public interest where it would "disrupt the ongoing, collaborative efforts by BOR, the [water] Districts, the State of Oregon, the Tribe and other stakeholders to address long-term changes to the dams' operations"). Indeed, the parties to that stipulation agreed that "it is in the public interest that the agencies have until September 30, 2022" to complete the reinitiated consultation between the Bureau and the consulting agencies (ECF 907 at 4) and that the purpose of the stipulation was to "avoid further litigation of the Plaintiffs' pending lawsuit, afford more time for completion of the Bureau's ESA consultations, and create opportunity for a more collaborative process for resolving conflicts concerning water in the Klamath Basin." *Id.* at 5, ¶ 7. Plaintiffs' quick return trip to the courthouse flies in the face of the letter and spirit of the agreement. The Bureau is attempting to chart a path to adaptively manage the Project in accordance with the Interim Plan in response to the extreme drought conditions that have arisen since the wildly inaccurate April 1, 2020 forecast was released. Through its adaptive management, the Bureau is seeking to maintain UKL elevations close to the key 4,142.00 foot elevation in May and June that is required by the Interim Plan for the protection of suckers but, regrettably was eclipsed. These objectives would be undermined if the Court were to intervene at this stage for the sake of compelling approximately three weeks of additional augmentation flows that Plaintiffs have failed to establish are biologically necessary or effective. The public interest favors a continuation of the collaborative and orderly consultation process called for by the stipulation and Interim Plan without unnecessary judicial intervention.

C. If the Stay of Litigation is Lifted, Plaintiffs' Request to "Reinstate" their Preliminary Injunction Motion Should Be Denied

Plaintiffs move to "reinstate" a PI motion that asks the Court to order the Bureau to: (1) provide 23 TAF in augmented flows—as compared to the 50 TAF previously requested under the last withdrawn motion—and (2) compel the 7 TAF set aside for the Yurok Tribe's ceremonial Boat Dance, which is scheduled for August of this year. This request should be denied.

Initially, there appears little reason to separately consider Plaintiffs' request for 23 TAF in augmented flows under a PI motion, given that such motion would raise the same legal issues, be resolved according to the same legal standard, and effectively seek the same volume of water as the pending TRO motion. Therefore, if the Court denies the TRO motion, it should likewise deny the request for a PI. Conversely, if the Court grants the TRO motion, the relief requested under the PI motion likely would be mooted before further briefing and a separate hearing on that motion could reasonably be concluded. A release at the rate of 390 cfs, equates to approximately 773 acre-feet per day, and would likely deplete the 16 TAF in dispute in approximately 20 days. Bottcher Decl. ¶ 22.

There is presently no legal basis for considering any request for relief regarding the Boat Dance flows. Plaintiffs have no claim based upon the Boat Dance flows in their complaint,[7] and their withdrawn PI motion seeks no such relief. Plaintiffs prosecuted the withdrawn PI motion based solely on ESA claims. The Boat Dance flows are claimed for ceremonial, not biological, purposes. ECF 909-17 at ¶¶ 3-8. The Boat Dance flows are therefore entirely outside the scope of the withdrawn motion. Plaintiffs' request to reinstate their withdrawn PI motion should be denied.[8]

VII. Conclusion

For all of the reasons set forth above, the Court should deny Plaintiffs' motion to lift the stay of litigation. However, if the stay is lifted, the Court should deny Plaintiffs' motion for a TRO and PI.

Dated: May 18, 2020

[7] Nor could Plaintiffs plead any ripe claims as to the Boat Dance flows at this time. Fn. 2, *supra*.

[8] If the PI motion on Plaintiffs' ESA claims is reinstated, Federal Defendants move to reinstate their: (1) opposition to Plaintiffs' PI motion (ECF 46); (2) objection to reply evidence and sur-reply to Plaintiffs' modified PI motion (ECF 57); and (3) motion to exclude or, in the alternative, limit consideration of Plaintiffs' extra-record materials (ECF 50) and supporting reply (ECF 58).

Respectfully submitted,

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