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

20 YUROK TRIBE, PACIFIC COAST  
FEDERATION OF FISHERMEN’S  
21 ASSOCIATIONS, and INSTITUTE FOR  
FISHERIES RESOURCES,

22  
23 Plaintiffs,

24 v.

Case No.

Related Cases: No. C16-cv-06863-WHO  
No. C16-cv-04294-WHO

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

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

3 Defendants.

Administrative Procedure Act Case

4  
5 INTRODUCTION

6 1. This case presents the latest chapter in a long-running controversy over the  
7 impacts of the U.S. Bureau of Reclamation’s (“Bureau’s”) operation of the Klamath Project on  
8 Pacific salmon and the communities that depend on the salmon for their livelihood, sustenance,  
9 cultural identity, and well-being. This case seeks to protect Southern Oregon/Northern  
10 California Coast Coho Salmon (“SONCC Coho” or “Coho”), which are listed as threatened  
11 under the Endangered Species Act (“ESA”), from severely diminished Klamath River flows  
12 resulting from the Klamath Project’s water withdrawals. It also seeks to ensure abundant  
13 Klamath River Chinook salmon populations to sustain the Yurok Tribe, which has fished on the  
14 lower Klamath River since time immemorial, and endangered Southern Resident Killer Whales  
15 (“Southern Residents” or “Orcas”), which depend on Chinook as their prey.

16 2. Recent litigation compelled the Bureau to reinstate ESA consultation with the  
17 National Marine Fisheries Service (“NMFS”) over Klamath Project operations because disease  
18 infection rates exceeded what was allowed under the 2013 biological opinion and incidental take  
19 statement for the 2013-2023 Klamath Project Operations Plan. *Yurok Tribe v. U.S. Bureau of*  
20 *Reclamation*, 231 F. Supp.3d 450 (N.D. Cal. 2017). As part of that litigation, this Court issued  
21 an injunction requiring disease mitigation flows during the reinstated consultation. ECF 70.<sup>1</sup>  
22 On March 29, 2019, the Bureau and NMFS completed the reinstated consultation with NMFS’s

23  
24 <sup>1</sup> ECF cites are to *Yurok Tribe v. U.S. Bureau of Reclamation*, No. 16-cv-6863 (N.D. Cal.).

1 issuance of a biological opinion (“2019 biological opinion”) and incidental take statement for the  
2 Bureau’s Plan for 2019-2024 Klamath Project operations (“Plan”).

3         3. This action challenges the 2019 biological opinion because: (A) it finds no  
4 jeopardy based on the assumption that the Plan will improve conditions for Coho and Chinook  
5 Salmon compared to the period of record without determining that the “improved” conditions  
6 will avoid jeopardizing Coho and Orca survival and recovery; (B) it signs off on the Bureau’s  
7 failure to require dilution flows in the event of a disease outbreak contrary to the best available  
8 science demonstrating that such measures are necessary and effective; and (C) it finds that the  
9 Plan will not adversely modify Coho critical habitat, even though it will reduce the amount of  
10 Coho rearing habitat to far less than the standard NMFS has deemed necessary to conserve the  
11 species. This action also challenges the incidental take statement because its limit on take allows  
12 approximately half the outmigrating salmon to perish, which is an unacceptable amount of take  
13 that threatens to cause jeopardy, and it is based on a preliminary draft model that has not  
14 undergone peer review, contrary to Bureau policy.

15         4. This lawsuit also challenges the Bureau’s environmental assessment (“EA”) and  
16 finding of no significant impact (“FONSI”) for the 2019-2024 Plan. First, the EA fails to  
17 consider an alternative that includes the flows required under this Court’s 2017 injunction either  
18 as the no-action alternative or another viable alternative. Second, the FONSI concludes that the  
19 Plan’s effects will not be significant because they will be reduced compared to the no-action  
20 alternative, but a reduction in adverse effects is not the same as no significant adverse effects.  
21 Third, the Bureau’s finding that the Plan will not have significant adverse environmental effects  
22 is indefensible because of the fundamental and far-reaching impacts the Plan has on threatened  
23  
24

1 and endangered Coho and Orcas.<sup>2</sup>

2 5. This action asks the Court to: (1) vacate the 2019 biological opinion, the EA, and  
3 the FONSI; (2) remand for the Bureau and NMFS to complete the reinitiated consultation on  
4 Klamath Project operations ordered by this Court in 2017; and (3) remand for the Bureau to  
5 prepare an environmental impact statement on the 2019-2024 Plan. Vacatur of the 2019  
6 biological opinion would have the effect of reinstating the 2013 biological opinion and 2017  
7 injunction for the duration of the reinitiated consultation. Alternatively, this action seeks  
8 injunctive relief to reduce *C. shasta* disease and to ensure sufficient rearing habitat for juvenile  
9 salmon.

10 JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

11 6. This action is brought under the Administrative Procedure Act (“APA”), 5 U.S.C.  
12 § 706(2)(A). This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362.

13 7. Venue is proper in this Court under 28 U.S.C. § 1391(e) because the Yurok Tribe  
14 is located in the district, the commercial fishing and conservation plaintiffs reside in this district,  
15 and many of the events and consequences of the defendants’ violations of law occurred or will  
16 occur in this district.

17 8. This case is properly assigned to the San Francisco/Oakland Division under Civil  
18 L.R. 3-2(c) because plaintiffs are located in Humboldt, Del Norte, and San Francisco counties,  
19 and a substantial part of the events or omissions which give rise to this action occurred in

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21 <sup>2</sup> On July 30, 2019, plaintiffs sent a 60-day notice to the Bureau and NMFS pursuant to the ESA,  
22 16 U.S.C. § 1540(g)(2)(A). The notice alleges ESA violations by both agencies for failing to  
23 reinitiate consultation when conditions under the first year under the Plan proved to be far worse  
24 for salmon than predicted and by the Bureau for failing to ensure the Plan will avoid jeopardizing  
the survival and recovery of listed species and adversely modifying critical habitat, as it is  
obligated to do under ESA Section 7. If the violations are not corrected, plaintiffs plan to amend  
their complaint to add ESA claims under the ESA citizen suit provision. *Id.* § 1540(g).

1 Humboldt and Del Norte counties through which the lower Klamath River flows.

2 PARTIES

3 A. Tribal Plaintiff

4 9. The Yurok Tribe is a sovereign, federally recognized Indian Tribe. By filing this  
5 action, the Tribe does not waive its sovereign immunity and does not consent to suit as to any  
6 claim, demand, offset, or cause of action of the United States, its agencies, officers, agents, or  
7 any other person or entity in this or any other court.

8 10. With more than 6,400 members, the Yurok Tribe is the largest Indian Tribe in  
9 California. Yurok people are fishing people who have lived on the Klamath River since time  
10 immemorial.

11 11. The Tribe's ancestral territory includes the lower Klamath River and the lands  
12 surrounding it to the north and south. The Klamath River Reservation was originally created by  
13 Executive Order on November 16, 1855. The Reservation extends for one mile on each side of  
14 the Klamath River in northern California from the mouth at the Pacific Ocean approximately 45  
15 miles upriver.

16 12. The Executive Order that created the Yurok Reservation vested the Yurok Tribe  
17 with "federally reserved fishing rights." *Parravano v. Masten*, 70 F.3d 539, 541 (9th Cir. 1995).  
18 Federally reserved fishing rights are integral to the Yurok way of life for subsistence,  
19 commercial, and cultural purposes. Yurok trust species include, but are not limited to, Coho and  
20 Chinook Salmon, Steelhead Trout, lamprey, sturgeon, and eulachon. The Tribe dedicates a  
21 significant share of its financial and human resources to manage and regulate Klamath River  
22 fisheries. The Tribe employs approximately 75 employees for fisheries, water quality, and  
23 watershed restoration activities specifically, while nearly all departments directly or indirectly  
24 work on fisheries-related issues. The Klamath River and its fishery are "not much less necessary

1 to the existence of the [Yurok] than the atmosphere they breathe[.]” *Blake v. Arnett*, 663 F.2d  
2 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

3 13. Mismanagement of the Klamath Project has severely diminished the Tribe’s  
4 ability to exercise its reserved fishing rights. Tragedy struck in 2002 when Project water  
5 diversions led to a massive outbreak of fish disease that killed as many as 78,000 adult salmon  
6 before they could spawn, all within the Yurok Reservation. The 2002 fish kill is one of the  
7 darkest events in Yurok history. Releasing pulse flows from the Trinity River in the summer has  
8 largely prevented a recurrence of that disaster.

9 14. Tragedy struck again in 2014 and 2015 when monitoring revealed that  
10 outmigrating juvenile infection rates of *C. shasta*, a fish disease that is often fatal, reached 81%  
11 and 91% respectively. The few salmon that survived to return as adults in 2016 and 2017 came  
12 back in near-record low numbers, shutting down commercial and Tribal fisheries, leading to  
13 another fisheries disaster. 2017 was the first year in history that the Yurok Tribal Council closed  
14 its subsistence fishery and Yurok people did not gill net for subsistence purposes on the lower  
15 Klamath River. It was the second consecutive year that the Yurok Tribe cancelled its  
16 commercial fishery due to low salmon returns. The Tribe and its members rely on salmon as a  
17 healthy food source. Fishing for salmon provides food for Yurok families, economic  
18 opportunity, and the fabric of the community, bringing people together to fish, connect with each  
19 other and their heritage, and anchor themselves to their fishing culture. If anything, salmon have  
20 become even more important as the community is plagued with poverty, a suicide crisis, and lack  
21 of economic opportunities. Indeed, just months after the Tribal Council voted to close the  
22 fishery for conservation purposes, it declared a suicide emergency due to a Reservation-wide  
23 epidemic of suicides by Tribal members under the age of 30. Without a fishery, the Tribe’s  
24

1 traditional way of life is disrupted, and hope is lost.

2 15. In the development of the 2019-2024 Plan, the Bureau failed to provide the Tribe  
3 with sufficient information about the proposed plan for the Tribe to assess the impacts and  
4 provide comprehensive input. The Tribe's fears materialized in the first two months under the  
5 new operations plan. Even though the water year has been average to above average, and Upper  
6 Klamath Lake has been full or nearly full throughout the spring, spring flows in the Klamath  
7 River below Iron Gate Dam were extremely low at critical times when disease risks were high.  
8 Spore counts reached 100 spores per liter the second week of May, and prevalence of infection  
9 of *C. shasta* in sampled fish reached 83%, 87%, and 88% in the first three weeks of May. At the  
10 same time, flows below Iron Gate Dam approached extreme minimums during the third week of  
11 May, despite a full Upper Klamath Lake and tributary flows throughout the Klamath Basin that  
12 were near or above average.

13 B. Commercial Fishing Plaintiffs

14 16. Pacific Coast Federation of Fishermen's Associations ("PCFFA") is the largest  
15 organization of commercial fishing families on the west coast, with member organizations from  
16 San Diego to Washington State collectively representing the interests of thousands of men and  
17 women in the Pacific ocean commercial salmon fishing fleet. Many of PCFFA's members are  
18 fishermen and fisherwomen whose livelihoods depend upon harvesting and marketing salmon,  
19 including those from the Klamath River, which, until recent fisheries closures, generated  
20 hundreds of millions of dollars per year in personal income in the region. PCFFA has its main  
21 office in San Francisco, California, and a Northwest regional office in Eugene, Oregon.

22 17. Institute for Fisheries Resources ("IFR") is a non-profit corporation that  
23 constitutes the conservation arm of PCFFA and shares PCFFA's offices in San Francisco,  
24 California, and Eugene, Oregon. IFR, although legally and financially independent of PCFFA,

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1 was originally formed by PCFFA and from within the fishing industry, and today serves as the  
2 science, resource conservation and restoration arm of PCFFA, implementing and funding a  
3 number of PCFFA projects to recover and restore many now ecologically damaged but once  
4 productive salmon-bearing watersheds throughout the U.S. west coast

5 18. The financial and livelihood interests of PCFFA, IFR, and their members (and the  
6 fishing-dependent communities those members live in) will be severely impaired if the Klamath  
7 Project operations are managed under the Plan. The 2002 fish kill subsequently contributed to a  
8 massive 2006 commercial ocean salmon fishery shutdown, driven by Klamath losses under weak  
9 stock management. When multiple salmon stocks from different rivers mingle together at sea,  
10 the weakest (*i.e.*, least numerous) of these stocks is the limiting factor in opening and closing the  
11 whole ocean salmon fishery. In 2006, by far the weakest salmon stock was the Klamath fall-run  
12 Chinook returning as adults. This weak stock had to be placed in a “zero harvest” mode, which  
13 triggered the closure of all other ocean salmon fisheries, however abundant, over 700 miles of  
14 coastline in order to prevent the total collapse of Klamath Chinook. That fishery closure cost  
15 west-coast ocean salmon fishing communities at least \$200 million.

16 19. Salmon fishing declined again in recent years due, in part, to *C. shasta* infection  
17 outbreaks. In 2016, allocable catches of Klamath fall Chinook in ocean fisheries were reduced  
18 significantly due to very low adult returns. In 2017, this ocean salmon fishery was closed due to  
19 low adult returns, and in-river fishing for Klamath Chinook Salmon was prohibited, due to the  
20 lowest projected abundance since forecasting began in the mid-1980s. The losses to commercial  
21 fishing families were devastating, with less than 10% of the average revenues for the preceding  
22 five years. These losses had ripple effects on the fish processors, fishing equipment retailers,  
23 marine repair and moorage businesses, and other businesses that depend on healthy salmon

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1 fisheries.

2 20. Both the Yurok Tribe and the commercial fishing plaintiffs have been and will  
3 continue to be irreparably harmed by defendants' disregard of their statutory duties and by the  
4 unlawful injuries imposed on Klamath River Coho and Chinook Salmon by Klamath Project  
5 operations. The interests of the plaintiffs in the survival and recovery of Klamath River salmon  
6 have been, are being, and, unless the relief prayed for is granted, will continue to be directly and  
7 adversely affected by the failure of defendants to comply with the law.

8 C. Federal Defendants

9 21. Defendant United States Bureau of Reclamation is an agency of the United States  
10 Department of the Interior that constructs and operates federal water projects throughout the  
11 United States. The Bureau has primary management authority over the Klamath Project.

12 22. Defendant National Marine Fisheries Service is an agency of the United States  
13 Department of Commerce. The Department has delegated to NMFS its responsibility for  
14 administering the ESA with regard to threatened and endangered marine species, including  
15 threatened Coho that live in the Klamath River basin and endangered Orcas.

16 BACKGROUND

17 I. THE KLAMATH RIVER AND THE DECLINE OF ITS FISHERIES

18 A. Salmon

19 23. The Klamath River basin straddles northern California and southern Oregon. The  
20 Klamath River was once the third most productive salmon-producing river in the continental  
21 United States. Several species of anadromous fish inhabit the Klamath River and its tributaries,  
22 including Chinook and Coho. In 1940, SONCC Coho Salmon, a population that includes  
23 Klamath River Coho, were estimated to range between 150,000 and 400,000 naturally spawning  
24 fish annually. 62 Fed. Reg. 24,588 (May 6, 1997). A multitude of factors, including water

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1 diversions, contributed to drastic declines of Coho.

2 24. Coho have a three-year life cycle, spending half their lives in fresh water and half  
3 in salt water. After the eggs hatch in the winter, the Coho fry spend up to 15 months in  
4 freshwater. They out-migrate to the sea between mid-February and mid-June, which makes them  
5 especially sensitive to changes in river flows. At about three-years old, they return in September  
6 through December to the same stream where they were born to spawn and die.

7 25. In 1997, NMFS listed SONCC Coho under the ESA as threatened. It found that  
8 the Coho populations “are very depressed, currently numbering approximately 10,000 naturally  
9 produced adults.” 62 Fed. Reg. 24,588 (May 6, 1997). NMFS noted that “water diversions” and  
10 “water withdrawals” for irrigation were “major activities responsible for the decline of coho  
11 salmon in Oregon and California.” *Id.* at 24,592.

12 26. NMFS designated critical habitat for SONCC Coho in 1999 and included most of  
13 the Klamath River below Iron Gate Dam in the designation. 64 Fed. Reg. 24,049 (May 5, 1999).  
14 NMFS found that irrigation water withdrawals and dam operations were “[a]ctivities that may  
15 require special management considerations” for juvenile Coho. *Id.* at 24,059.

16 27. In its five-year status review completed in 2016, NMFS found that Coho continue  
17 to be at high risk of extinction and noted heightened risk to Coho persistence since 2011 from  
18 increased water withdrawals and unprecedented drought conditions in four of the previous five  
19 years that likely resulted in reduced juvenile survival and stressful rearing conditions in nearly all  
20 parts of the range. Five-Year SONCC Coho Review at 47-49 (2016).

21 28. The status review identified *C. shasta* as one of the most significant threats to  
22 Coho due to its prevalence and impacts on juvenile Coho. *Id.* at 34. *C. shasta* infects Coho and  
23 Chinook juveniles. Signs of infected salmon include necrosis of intestinal tissue that can be  
24

1 accompanied by a severe inflammatory reaction and subsequent death. Infection rates increase  
2 when densities of *C. shasta* spores are high and when the polychaete worms that host the parasite  
3 are abundant. Low flows lead to higher water temperatures and increases in salmon mortalities  
4 from *C. shasta*.

5 29. The Coho recovery plan adopted by NMFS finds that disease poses a high or very  
6 high stress to 13 populations in the listing, including three in the Klamath Basin. Final SONCC  
7 Coho Recovery Plan at 1-5; 3-19 (2014). The recovery plan identifies *C. shasta* as responsible  
8 for most of the mortality of Klamath River juvenile Coho in recent years. *Id.* at 3-20. It  
9 establishes a recovery goal of no greater than 10% mortality of Coho juveniles from *C. shasta*,  
10 which it equates with natural background levels. *Id.* at 4-14, 4-15.

11 B. Southern Resident Killer Whales

12 30. NOAA Fisheries listed Southern Resident Orcas as endangered in 2005. 70 Fed.  
13 Reg. 69.903 (Nov. 18, 2005). The Orca population had declined by 20% between 1996-2001 to  
14 81 whales. It subsequently grew to 87 whales, but declined recently to 75 whales due a series of  
15 failed pregnancies, calf mortalities, and starving adults.

16 31. The Orca listing and recovery plan identified three principal threats: (A) reduced  
17 quantity and quality of the Orcas' prey; (B) toxic chemicals that accumulate in top predators like  
18 Orcas; and (C) disturbance from noise and vessels. Of these threats, the loss of prey is primary  
19 and most urgent. 2019 BiOp at 223-24.

20 32. The Southern Residents are fish-eating Orcas. Salmon and Steelhead make up to  
21 98% of their diet and Chinook, the largest salmon with the highest fat content, comprise almost  
22 80%. 2019 BiOp at 224. Scientific experts have correlated prey abundance with fecundity and  
23 producing calves, and have determined that Chinook abundance would need to increase by 15%  
24 for the Orcas to reach the growth target in the recovery plan. 2019 BiOp at 220. When prey is

1 scarce, Orcas expend more energy foraging, experience nutritional stress, and have difficulty  
2 becoming pregnant. In recent years, some Orcas have lost body mass and died. 2019 BiOp at  
3 228-29, 260-61, 265.

4 33. The Orcas follow salmon runs in the Salish Sea, along Vancouver Island, and  
5 along the coast of Washington, Oregon, and Northern California. J pod spends most of its time  
6 in and around the Salish Sea and all three pods generally are present in the inland waters of the  
7 Salish Sea in May and June and spend a considerable amount of time inland through September.  
8 Two of the three pods – K and L pods, which have 52 of the remaining whales – feed along the  
9 coast as far south as Monterrey Bay during the winter and spring. 2019 BiOp at 222-23, 264.  
10 They feed primarily on Chinook, including from the Klamath River. The Klamath Project has  
11 diminished Chinook abundance and viability, decreasing the available Chinook prey for Orcas.

#### 12 I. THE BUREAU'S OPERATION OF THE KLAMATH PROJECT

13 34. Congress authorized construction and development of the Klamath Project in  
14 1905, pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, which is part of the  
15 Reclamation Act of 1902, 43 U.S.C. §§ 372, *et seq.* Various Project facilities were built between  
16 1906 and 1966. The Project consists of over 185 miles of various diversions, canals, and  
17 pumping stations. The Project provides irrigation water to approximately 200,000 acres of  
18 agricultural land each year, as well as to four national wildlife refuges within its boundaries. The  
19 Bureau's operation of the Klamath Project determines the level, timing, and rate of water flow in  
20 the Klamath River below Iron Gate Dam, the lowest downriver dam, which blocks salmon fish  
21 passage upstream. Klamath Project operations determine the quantity of water available in the  
22 Klamath River to support salmon. Water withdrawals for irrigation have increased in the 1961-  
23 2007 period, particularly in dry years, and this trend is expected to continue. 2019 BiOp at 107.

24 35. Pursuant to a 1956 contract with the Bureau, PacifiCorp, a private corporation,

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1 operates the Project’s Link River Dam, although the Bureau controls water releases at the dam.  
2 PacifiCorp also owns and operates several downstream dams on the Klamath River for  
3 hydroelectric power generation. In September 2016, PacifiCorp applied to the Federal Energy  
4 Regulatory Commission for a transfer of its license with respect to four dams in the lower  
5 portion of the Klamath Project, including Iron Gate Dam, to a corporation established to oversee  
6 removal of those dams beginning in 2020.

7 II. THE ENDANGERED SPECIES ACT’S REQUIREMENTS

8 A. The Duty to Engage in Consultation and to Avoid Jeopardy and Adverse  
9 Modification of Critical Habitat.

10 36. Section 7 of the ESA prohibits agency actions that may jeopardize the survival  
11 and recovery of a listed species or adversely modify its critical habitat:

12 Each federal agency shall, in consultation with and with the assistance of the  
13 Secretary, insure that any action authorized, funded, or carried out by such agency  
14 (hereinafter in this section referred to as an “agency action”) is not likely to  
15 jeopardize the continued existence of any endangered species or threatened  
16 species or result in the destruction or adverse modification of habitat of such  
17 species which is determined by the Secretary . . . to be critical . . . .

18 16 U.S.C. § 1536(a)(2).

19 37. “Action” is defined broadly to encompass “all activities or programs of any kind  
20 authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02.  
21 An agency’s Section 7 obligations extend to ongoing actions over which the agency retains  
22 authority or discretionary control.

23 38. Section 7 establishes an interagency consultation process to assist federal agencies  
24 in complying with their duty to avoid jeopardy to listed species or destruction or adverse  
25 modification of critical habitat. Under this process, a federal agency proposing an action that  
26 “may affect” a listed species, including salmon and steelhead, must prepare and provide to the  
appropriate expert agency a description of the proposed action, its effects, and the relevant

1 scientific evidence. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

2 39. Where the agency proposing the action determines that an action “may affect”  
3 protected salmon, but is “not likely to adversely affect” the species, it may attempt “informal  
4 consultation” with NMFS. 50 C.F.R. §§ 402.13, 402.14(b)(1). An agency’s “not likely to  
5 adversely affect” determination becomes final and terminates consultation only when NMFS  
6 concurs in writing in the determination. 50 C.F.R. §§ 402.13, 402.14(b)(1).

7 40. For actions that may adversely affect a listed species or critical habitat, a formal  
8 consultation with the expert fish and wildlife agency is required. 50 C.F.R. § 402.14. At the  
9 conclusion of a formal consultation, the expert fish and wildlife agency issues a biological  
10 opinion assessing the effects of the action on the species and its critical habitat, determining  
11 whether the action is likely to jeopardize the continued existence of the species or adversely  
12 modify its critical habitat and, if so, offering a reasonable and prudent alternative that will avoid  
13 jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h).

14 B. The Prohibition on Take of Listed Species and Incidental Take Statements.

15 41. Section 9 of the ESA prohibits “take” of endangered species by any person, which  
16 includes federal agencies. 16 U.S.C. § 1538(a)(1). “Take” means to “harass, harm, pursue, hunt,  
17 shoot, wound, kill, trap, capture, or collect.” 16 U.S.C. § 1532(19). NMFS has defined “harm”  
18 to include “significant habitat modification or degradation which actually kills or injures fish or  
19 wildlife by significantly impairing essential behavioral patterns, including breeding, spawning,  
20 rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

21 42. The ESA makes the take prohibition applicable to species listed as endangered,  
22 like Orcas. NMFS has extended the take prohibition to listed salmon, including SONCC Coho.  
23 50 C.F.R. § 223.203(a); 65 Fed. Reg. 42,422 (2000).

24 43. If a federal action undergoing consultation will take a listed species, the biological

1 opinion must include an “incidental take statement” that specifies the amount and extent of  
 2 incidental take of listed species that may occur without causing jeopardy or adverse modification  
 3 of critical habitat. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The incidental take statement  
 4 provides a safe harbor, insulating from take liability activities undertaken in compliance with the  
 5 incidental take statement’s terms and conditions. 16 U.S.C. § 1536(o)(2); *see* 16 U.S.C. §  
 6 1536(b)(4)(C). An incidental take statement also serves as a check on the biological opinion’s  
 7 assumptions and conclusions and provides for monitoring. 50 C.F.R. § 402.14(i)(3). It must set  
 8 out a “trigger” that specifies an unacceptable level of take that invalidates the safe harbor and  
 9 requires the agencies to immediately reinstate consultation. *Id.* § 402.14(i)(4).

10 44. The ESA implementing regulations provide:

11 Reinitiation of formal consultation is required and shall be requested by the  
 12 Federal agency or by the Service, where discretionary Federal involvement or  
 control over the action has been retained or is authorized by law and

13 (a) If the amount or extent of taking specified in the incidental take statement is  
 14 exceeded; [or]

15 (b) If new information reveals effects of the action that may affect listed species  
 or critical habitat in a manner or to an extent not previously considered . . . .

16 50 C.F.R. § 402.16 & (a)-(b). If either of these triggers occurs, both the action agency and the  
 17 expert fish and wildlife agency have a duty to request reinitiation of consultation.

### 18 III. THE BUREAU’S ESA CONSULTATIONS FOR KLAMATH PROJECT 19 OPERATIONS

#### 20 A. Early Consultations on Klamath Project Operations.

21 45. The Bureau operates the Klamath Project under operating plans that determine the  
 22 flow levels in the Klamath River downstream of Iron Gate Dam. This Court has held that the  
 23 Bureau must engage in Section 7 consultation on its operating plans. *PCFFA v. Bureau of*  
 24 *Reclamation*, 138 F. Supp. 2d 1228, 1242-43 (N.D. Cal. 2001). When the Bureau failed to do so

1 in 2000, this Court issued an injunction requiring the Bureau to curtail water deliveries that  
2 would cause river levels to drop below specific flows needed to provide useable Coho juvenile  
3 rearing habitat until it completed formal consultation. *Id.* at 1249-50. The flows were based on a  
4 report prepared for the Department of Interior by Dr. Thomas Hardy to prevent unacceptable  
5 risks to salmon.

6 46. Recognizing the need to plan Klamath Project operations over a longer time  
7 horizon, the Bureau began developing ten-year operating plans. As the 2002 irrigation season  
8 approached, NMFS had not issued a biological opinion on the 2002-2012 plan. NMFS  
9 concurred in the Bureau's "not likely to adversely affect" determination for "below average"  
10 water year flows for 2002, but this Court held that the agencies could not lawfully avoid formal  
11 consultation for a segment of a larger project that was likely to adversely affect Coho.

12 47. In that consultation, NMFS subsequently issued a biological opinion concluding  
13 that the 2002-2012 Plan would likely jeopardize the Coho's survival and recovery and adversely  
14 modify its critical habitat. NMFS found the Bureau's replication of the last ten years' minimum  
15 flows would not provide sufficient water to support Coho spawning, rearing, and juvenile  
16 migration. NMFS offered a reasonable and prudent alternative ("RPA") that established higher  
17 long-term minimum flows based on Dr. Hardy's report on instream flow needs, but did not  
18 require those flows in the first and second phases of the plan, which spanned eight years.

19 48. Yurok Tribe and others challenged the RPA for failing to provide sufficient flows  
20 for Coho. This Court invalidated: (1) the RPA's reliance on speculative, future state and private  
21 actions to meet some of the flow needs because those actions were not reasonably certain to  
22 occur; and (2) the incidental take statement because it lacked a take limit that would serve as a  
23 trigger to reinitiate consultation. On appeal, the Ninth Circuit held that NMFS acted unlawfully  
24



1 by requiring only a portion of the flows NMFS deemed necessary in the initial two phases of the  
2 plan, leaving Coho with insufficient flows for eight of the plan's ten years. *PCFFA v. Bureau of*  
3 *Reclamation*, 426 F.3d 1082 (9th Cir. 2005). On remand, this Court issued an injunction limiting  
4 water withdrawals if Klamath River flows would fall below the minimum flows in the RPA.

5 B. Consultation on the 2013-2023 Klamath Project Operations Plan.

6 49. In March 2010 in the reinitiated consultation, NMFS issued a jeopardy biological  
7 opinion based on reduced juvenile Coho survival and adverse modification of Coho critical  
8 habitat. NMFS proposed an RPA with spring flows that would prevent reduction in the amount  
9 of juvenile Coho habitat by no more than 10% from what would be available without the Project.

10 50. The Bureau never implemented this biological opinion and instead proposed a  
11 different plan. After NMFS objected to the Bureau's inadequate river flows, the Bureau agreed  
12 to minimum spring flows based on Dr. Hardy's work. In addition, the Bureau established a real-  
13 time disease management program that could produce dilution flows at the Bureau's discretion  
14 when infection rates are above disease thresholds. The dilution flows, however, would come  
15 from the Environmental Water Account ("EWA"), which is the amount of water set aside to  
16 provide for Klamath River flows to meet the needs of Coho between March 1 and September 30.  
17 The Bureau locks in the amount of water allocated to irrigation as of April 1<sup>st</sup>, and the allocations  
18 cannot be reduced during the rest of that water year. It also sets the amount of water in the EWA  
19 as of April 1<sup>st</sup>.

20 51. In the May 2013 biological opinion, NMFS made a no-jeopardy finding on the  
21 2013-2023 Klamath Project operations plan based on its view that the plan would improve  
22 conditions for Coho compared to the period of record, defined as 1981-2012. NMFS found that  
23 disease risk from *C. shasta* is the key factor limiting salmon recovery in the Klamath River.  
24 2013 BiOp at 341, 376. While *C. shasta* and salmon have long co-existed in the Klamath Basin,

1 the Klamath Project has increased the incidence of *C. shasta* infection rates because the  
2 parasite's host worm is not flushed out without the high winter and spring flows that occurred  
3 historically. 2013 BiOp at 339, 341, 343. NMFS concluded that, in below average water years,  
4 *C. shasta* would proliferate and lead to higher infection rates and mortalities of juvenile Coho.  
5 However, it made a no-jeopardy because it believed the minimum spring flows and real-time  
6 disease management program would improve disease risks compared to the period of record.  
7 2013 BiOp at 40-41, 346-47, 377, 391.

8 52. The 2013 incidental take statement set a limit on the incidence of *C. shasta*  
9 infections. It used infection rates in Chinook as a surrogate for Coho because Coho are now too  
10 rare to sample reliably in the mainstem Klamath River, Chinook and Coho have similar  
11 susceptibility to *C. shasta*, and a scientifically sound Chinook disease monitoring has been in  
12 place since 2005. NMFS used this monitoring data to set the take limit at 49%, the highest *C.*  
13 *shasta* infection rates observed in the monitoring program. 2013 BiOp at 391. The biological  
14 opinion then spelled out the consequences if actual disease rates exceed these limits:

15 If the percent of *C. shasta* infections for Chinook salmon juveniles in the  
16 mainstream Klamath River between Shasta River and Trinity River during May to  
July exceed these levels . . . reinitiation of formal consultation will be necessary.

17 *Id.*

18 IV. THIS COURT'S ORDERS REQUIRING REINITIATION OF FORMAL  
CONSULTATION AND DISEASE MANAGEMENT FLOWS.

19 A. This Court Held That The Agencies Had A Legal Duty To Reinitiate Formal  
20 Consultation.

21 53. Because the 2013 biological opinion did not mandate disease management flows,  
22 the necessary flows failed to materialize. In 2014 and 2015, both below-average water years, *C.*  
23 *shasta* rates of 81% and 91% far exceeded the incidental take statement's 49% cap. *C. shasta*  
24 infection rates also bumped up against the cap in average water years in 2013 and 2016, coming

1 in at 46% and 48%. In granting Yurok Tribe summary judgment, this Court held that the Bureau  
2 had a legal duty to reinitiate consultation to determine what is needed to reduce infections and  
3 avoid jeopardizing Coho survival and recovery. *Yurok Tribe*, 231 F. Supp. 3d at 475.

4 54. This Court determined that “[i]njunctive relief is appropriate” because plaintiffs  
5 “have presented sufficient evidence to show that they will face irreparable harm absent an  
6 injunction,” Coho are in a precarious state after years of high *C. shasta* rates, and, without  
7 protective flows, are likely to face another year of high infection rates that will weaken an  
8 already weakened population. *Id.* at 479, 483-84. This harm to the salmon would harm both the  
9 Yurok Tribe and the fishing association plaintiffs. *See id.* at 481 (“The Yurok Tribe has  
10 demonstrated that the Yurok people’s lives are inextricably linked to salmon and that they rely  
11 on salmon for their subsistence, cultural identity, rituals, and economic well-being.”); *id.* (“The  
12 fishing associations have shown that they are harmed when salmon abundance drops because the  
13 potential salmon harvests decrease.”). Applying controlling Ninth Circuit precedent, this Court  
14 held that the balance of hardships and public interest tip heavily in favor of protecting  
15 endangered species, like Coho, and providing water to support the salmon fisheries that are  
16 subject to the Yurok Tribe’s federally recognized fishing rights, which carry a priority date of  
17 time immemorial and therefore have precedence over irrigation withdrawals. *Id.* at 484, 486.

18 B. The Court Issued An Injunction Requiring Disease Management Flows.

19 55. After the infection rates spiked in 2014 and 2015, the federal agencies and Tribes  
20 formed a Disease Technical Advisory Team to guide the development of measures to mitigate  
21 the effects of *C. shasta*. FWS compiled the best available scientific information on *C. shasta*  
22 infections and the need for and efficacy of disease management flows. The tribal experts on the  
23 technical team, with input from the federal agencies, completed a Guidance Document laying out  
24 disease management flows to reduce *C. shasta* infections. The Bureau subsequently

1 commissioned a formal, independent peer review, which concluded that the Guidance Document  
2 is comprehensive and scientifically sound, and its management measures to mitigate the effects  
3 of *C. shasta* are well supported by available scientific data. Independent Peer Review at i, 8  
4 (2018). This Court held that: “Plaintiffs have demonstrated that flushing flows and emergency  
5 dilution flows would reduce *C. shasta* rates among Coho salmon. There is no meaningful dispute  
6 among the parties on this point.” *Yurok Tribe*, 231 F. Supp. 3d at 489.

7         56. The Court entered an injunction that required two types of disease management  
8 flows until formal reinitiated consultation is completed. ECF 70. First, it required surface or  
9 deep flushing flows every year to disrupt the habitat supporting the host worms. Second, the  
10 injunction required the Bureau to release emergency dilution flows when spore concentrations  
11 exceed 5 spores per liter or when the prevalence of infection exceeds 20% in sampling done as  
12 part of the *C. shasta* monitoring program. No dilution flows were required if 80% of wild  
13 juvenile Chinook had outmigrated or after June 15, whichever occurred first. The injunction  
14 required the Bureau to establish a 50,000 acre foot reserve water supply to ensure that water is  
15 available for emergency dilution flows.

16         57. Defendant-intervenors Klamath Water Users Association *et al.* (“KWUA”)  
17 appealed the injunction and the final judgment in April and October 2017, ECF 75, 91, and the  
18 federal defendants filed protective notices of appeal. ECF 81, 90. Both KWUA and the federal  
19 defendants subsequently dismissed their appeals.

20         C. Implementation of the Injunction Flows

21         58. This Court’s February 2017 order came during an above-average water year. The  
22 Bureau implemented a surface flushing flow to coincide with precipitation events. The  
23 thresholds triggering emergency dilution flows were not exceeded so the water reserved for such  
24 flows was made available for irrigation. In 2017, the prevalence of infection rate during the peak

1 outmigration period was 26%, lower than any previous year under the 2013 biological opinion.

2 59. 2018 was a below-average water year. KWUA sought relief from the injunction  
3 to avoid disease management flows, and the Bureau sought clarification to eliminate the dilution  
4 flows. ECF 101; 109-1. This Court denied those motions. ECF 129. In early April, the Bureau  
5 began implementing a surface flushing flow. When *C. shasta* prevalence of infection exceeded  
6 the injunction's trigger, the Bureau implemented a dilution flow and infection rates declined.

## 7 V. THE REINITIATED CONSULTATION

### 8 A. The 2019-2024 Klamath Project Operations Plan

9 60. The Bureau presented a Proposed Action to NMFS in a December 2018 biological  
10 assessment, which it subsequently modified to respond to some concerns raised by NMFS about  
11 inadequate flows for Klamath River salmon. The 2019-2024 Klamath Project Operations Plan  
12 ("2019-2024 Plan" or "Plan") started with the formulaic approach used in the 2013 biological  
13 opinion modified to increase Upper Klamath Lake levels to meet the needs of the endangered  
14 suckers. It establishes minimum releases for Coho habitat needs and allows more water to be  
15 added to the EWA by April 1<sup>st</sup> based on Upper Klamath Lake levels in the early spring period  
16 and forecast inflow to lake. The amount of water in the EWA is fixed as of April 1<sup>st</sup>. The Plan  
17 continues to lock in an allocation for irrigation as of April 1<sup>st</sup>, which can be increased, but not  
18 decreased, based on subsequent water availability forecasts.

19 61. NMFS sought an additional 30,000 acre feet to increase the low flows proposed  
20 for May-June to increase habitat for juvenile Coho at a critical time for rearing. The Bureau  
21 responded by providing 20,000 acre feet to enhance May and June flows during water years that  
22 are classified as neither wet nor dry as of April 1<sup>st</sup>. 2019 BiOp at 41-42. Even with this  
23 additional amount of water, the May and June flows would frequently provide less than the  
24 amount of available rearing habitat that NMFS has deemed necessary for conservation of the

1 salmon species. 2019 BiOp at 146, 148-50, 155, 160.

2         62. Unlike the 2013 biological opinion, the 2019-2024 Plan provides for a surface  
3 flushing flow in most years. In average to wet years, the Bureau will implement a surface  
4 flushing flow meeting the parameters of the 2017 injunction. In below-average or dry years, an  
5 additional 50,000 acre feet of water will be available for disease management and habitat needs,  
6 which the Bureau and NMFS expect to be used for a surface flushing flow. The model predicts  
7 that the Plan will result in a surface flushing flow in the hydrologic conditions present in 34 out  
8 of 36 years in the period of record.

9         63. The 2019-2024 Plan requires no dilution flows when infection rates spike, as was  
10 required under the 2017 injunction. Instead, it relies on the real-time disease management  
11 program established in 2013, which allows technical experts to recommend using EWA water to  
12 provide flows to reduce disease, but gives the Bureau discretion to decide whether to provide any  
13 dilution flows. Because the amount of water available for river flows is capped as of April 1<sup>st</sup>,  
14 using EWA water in May and June for disease management will reduce the amount of water  
15 available for salmon later in the water year.

16         B. The 2019 Biological Opinion

17             1. *Coho Salmon*

18         64. The 2019 biological opinion focused on two key concerns about the impacts of  
19 the Plan on Coho: (1) disease in outmigrating juveniles; and (2) sufficient juvenile rearing  
20 habitat.

21         65. In terms of disease, the 2019 biological opinion identified *C. shasta* as a key  
22 limiting factor impeding salmon recovery and characterized the high mortality rates in recent  
23 years as worse than natural conditions. 2019 BiOp at 160-61. It indicated that the high  
24 incidence of disease has been due to the Klamath Project's reduction in the magnitude,

1 frequency, and duration of spring flows. 2019 BiOp at 161, 167.

2 66. The 2019 biological opinion acknowledges the science demonstrating benefits of  
3 surface flushing flows and notes that the surface flushing flows under the 2017 injunction  
4 disrupted the polychaete host worms and reduced disease risks in 2016-2018. 2019 BiOp at 134.  
5 Yet, immobile bed conditions, which provide habitat to support host worms, will continue 70%  
6 of each year and 50% of the time under the Plan. 2019 BiOp at 132-33.

7 67. The 2019 biological opinion concludes that the “net disease effect to coho salmon  
8 from implementation of surface flushing flows is somewhat unclear, but is likely to be improved  
9 over the observed POR because the increased frequency of surface flushing flow events will  
10 provide more intense and frequent disturbance to polychaetes and sediment.” 2019 BiOp at 166;  
11 *id.* at 167 (increased frequency of surface flushing flows “is expected to somewhat disrupt the  
12 life cycle of *C. shasta*,” but increase sublethal effects of *C. shasta* infections); *id.* (“NMFS  
13 concludes that the proposed action will result in disease risks to coho salmon that are lower than  
14 under observed POR conditions yet higher than under natural flow conditions.”). It believes that  
15 lowering disease risks will likely improve Coho abundance and productivity. 2019 BiOp at 216.

16 68. The 2019 biological opinion does not base its jeopardy conclusion on the extent to  
17 which *C. shasta* infections and disease would impede survival or attainment of abundance  
18 targets. Nor does it address the extent to which the Plan will impede attaining the Coho recovery  
19 plan’s target of reducing Coho mortality from *C. shasta* to no more than 10% of outmigrating  
20 juveniles. The 2019 biological opinion focuses on the benefits of having surface flushing flows,  
21 but pays scant attention to the negative effects of making dilution flows discretionary, even  
22 though it identifies the density of actinospores as the primary determinant of salmon infections  
23 and mortality and finds that high spring flows can dilute spore densities and reduce *C. shasta*

1 transmission efficiency. 2019 BiOp at 161.

2         69. The 2019 biological opinion relies on real-time disease management to use water  
3 from the EWA to address disease threats and outbreaks. It states that real-time disease  
4 management is likely to partially offset the increased disease risks during average and below-  
5 average water years. While it notes that using EWA water for spring disease management flows  
6 will reduce the amount of water available for summer flows, it does not analyze the effects of  
7 lower summer flows on Coho. 2019 BiOp at 167. The 2019 biological opinion is relying on the  
8 same real-time disease management program that failed, under the 2013 biological opinion, to  
9 prevent the exceedingly high infection rates and disease outbreaks in 2014 and 2015. The 2019  
10 biological opinion never addresses this failure.

11         70. In terms of Coho rearing habitat, the Plan will reduce spring flows, which in turn,  
12 will reduce available habitat at a critical time for juvenile Coho rearing, particularly in below-  
13 average and dry water years. 2019 BiOp at 130, 136, 174, 202-05, 208-09. The 2019 biological  
14 opinion focuses on conditions when habitat availability will be less than 80% of the maximum  
15 available habitat because NMFS has deemed that amount of available habitat necessary to  
16 provide for the conservation of the species. 2019 BiOp at 144, 146, 155. It finds that the Plan  
17 will decrease available juvenile habitat below this standard in most months of the year and in  
18 most water year types. 2019 BiOp at 155; *see also id.* at 146, 148-150, 155, 159-60, 175. It will  
19 reduce habitat availability in the Seiad Valley the most, including in March-June, the critical  
20 rearing period for Coho fry and for outmigration of juveniles. 2019 BiOp at 202-03.

21                 2. *Southern Resident Orcas*

22         71. A majority of the remaining Southern Residents feed along the coast as far south  
23 as Monterey Bay during the winter and spring. 2019 BiOp at 222-23, 264. Fall and spring  
24 Chinook from the Klamath River are among the stocks identified as preferred prey for the Orcas.



1 2019 BiOp at 227. The 2019 biological opinion finds that Klamath River Chinook can constitute  
2 a sizeable percentage of Chinook encountered by Orcas in the coastal waters off Northern  
3 California and South/Central Oregon and at least a small portion encountered as far north as the  
4 Columbia River. 2019 BiOp at 235, 237. NMFS concluded that Klamath River salmon are an  
5 important part of the Orcas' diet when they are in coastal waters, especially south of the  
6 Columbia River, which includes times when they have reduced body condition and increased  
7 diet diversity. 2019 BiOp at 234-35.

8 72. The 2019 biological opinion estimated 2019 ocean Chinook abundance as  
9 274,200 fish, which is consistent with the average overall abundance over the past 10 years and  
10 substantially less than the historic abundance of one million fish. The biological opinion  
11 estimates that the Klamath River produces 1-10% of the Chinook found in coastal waters from  
12 California through British Columbia. 2019 BiOp at 236, 259. This is a sizeable portion of the  
13 Chinook available to the Orcas, likely at least several hundred thousand fish, and as much as  
14 45% of local Chinook abundance when Orcas are foraging in the area. 2019 BiOp at 235, 237,  
15 259, 261.

16 73. The 2019 biological opinion relied on its analysis of the Plan on Coho to assess its  
17 impacts on Chinook with a separate analysis of the more severe shortfalls in available Chinook  
18 habitat. 2019 BiOp at 247, 298-302. It finds that the Plan will reduce Chinook abundance and  
19 that the principal threat is disease in juveniles, which will reduce Chinook prey for the Orcas.  
20 However, it believes the surface flushing flows and augmented May-June flows in some years  
21 will improve conditions compared to the period of record. 2019 BiOp at 240-45, 256-59. It  
22 further finds that the reduced Chinook abundance will reduce fitness of Orcas in K and L pods  
23 due to increased energy necessary to find prey and nutritional stress. 2019 BiOp at 261. The  
24

1 reduced Chinook abundance will continue through 2027, when the juveniles that outmigrate in  
2 2024 return as adults. 2019 BiOp at 261-62, 264.

3 74. Although the Plan will continue to reduce Chinook abundance, the 2019  
4 biological opinion relies on surface flushing flows to conclude that the available Chinook prey  
5 will increase compared to the period of record without assessing whether the remaining Chinook  
6 abundance will meet the Orcas' needs. 2019 BiOp at 265. Orcas will be harmed by the lack of  
7 prey, expend more energy foraging, and experience nutritional stress and even the poor body  
8 condition that has led to mortalities of food-deprived whales. Because of the increased  
9 abundance compared to the period of record, however, the 2019 biological opinion concludes  
10 that the 2019-2024 Plan would not be expected to reduce the fitness of individual Orcas or  
11 reduce the reproduction, numbers, or distribution of the Orca population. 2019 BiOp at 265-66.

12 C. The 2019 Incidental Take Statement

13 75. NMFS set take limits on *C. shasta* disease, but did not use prevalence of infection  
14 rates drawn from the *C. shasta* monitoring data, as the 2013 biological opinion did, even though  
15 it concluded that prevalence of infection continues to be an important tool for addressing  
16 infections and disease. Instead, NMFS used a preliminary draft model that estimates the  
17 prevalence of mortality, defined as the predicted proportion of spring/early summer outmigrating  
18 juveniles that will suffer *C. shasta* induced mortality. 2019 BiOp at 273.

19 76. It set the take limit for Coho at 49% prevalence of mortality for Coho Salmon  
20 juveniles emigrating from the Shasta River. This is the mortality that the preliminary draft  
21 indicates would have occurred in 2009 (the highest estimated prevalence of mortality for the  
22 period of record) if there had been a 25% reduction in *C. shasta* actinospores that NMFS predicts  
23 from surface flushing flows. 2019 BiOp at 273-74.

24 77. For impacts to Chinook that are prey for the Orcas, NMFS set a take limit based

1 on modeled prevalence of *C. shasta* mortality at a specific sampling location. It set the take limit  
2 at 53% based on model results indicating that the prevalence of juvenile Chinook mortality  
3 would not have exceeded 53% if the Plan had been implemented during the period of record.  
4 2019 BiOp at 278-79.

5 VI. THE NATIONAL ENVIRONMENTAL POLICY ACT AND KLAMATH PROJECT  
6 OPERATIONS.

7 A. The National Environmental Policy Act's Requirements

8 78. The National Environmental Policy Act ("NEPA") is our "basic national charter  
9 for protection of the environment." 40 C.F.R. § 1500.1(a). Under NEPA, federal agencies must  
10 take a hard look at the environmental impacts of their proposed major federal actions before  
11 deciding to proceed with the proposed action. 42 U.S.C. §§ 4321, *et seq.* NEPA has two  
12 principal purposes: (1) to ensure that an agency, in reaching its decision, will have available, and  
13 will carefully consider, detailed information concerning the significant environmental impacts of  
14 its proposed actions and alternatives; and (2) to disclose that information to stakeholders and the  
15 public so they can play a role in the decision-making process and implementation of the decision.

16 79. To that end, NEPA requires federal agencies to evaluate and disclose the  
17 significant adverse environmental impacts of their proposed actions and alternatives. 42 U.S.C. §  
18 4332(C). If an agency action is likely to have adverse environmental effects that are  
19 "significant," they need to be analyzed in an environmental impact statement ("EIS"). 40 C.F.R.  
20 § 1501.4. If it is unclear whether the impacts are significant, the agency may prepare an  
21 environmental assessment ("EA") to assist in making that determination. *Id.* Based on the EA,  
22 the agency can determine whether the action may have significant adverse environmental effects.  
23 If the agency determines that the agency action is not likely to have significant environmental  
24 impacts in what is called a finding of no significant impact ("FONSI"), then it need not prepare

1 an EIS. In the absence of such a finding or if such a finding flies in the face of evidence of  
2 significant environmental impacts, the agency must prepare an EIS.

3 80. The Council on Environmental Quality (“CEQ”) has promulgated regulations  
4 implementing NEPA that are binding on all federal agencies. *Andrus v. Sierra Club*, 442 U.S.  
5 347 (1979). The CEQ regulations define significance in terms of the action’s context—the  
6 setting in which the proposed action will take place—and intensity—the severity of its  
7 environmental impacts. 40 C.F.R. § 1508.27(a), (b). CEQ regulations identify the “significance  
8 factors” that agencies must consider in determining the intensity of a proposed action’s  
9 environmental impacts, which includes the degree to which the proposed action may adversely  
10 affect a threatened or endangered species or its habitat. 40 C.F.R. § 1508.27(b)(9).

11 81. An EA, like an EIS, must include a no-action alternative that reflects the status  
12 quo at the time a proposed action is being considered. The no-action alternative cannot be an  
13 option that has been found to be inadequate by the court. The EA or EIS must compare the  
14 effects of the proposed action to the effects of the no-action alternative. This comparison is  
15 designed to produce an objective analysis of the effects of the proposed action.

16 82. The EA must also detail “alternatives to the proposed action.” 42 U.S.C. §  
17 4332(C)(iii), (E); 40 C.F.R. § 1508.9(b). NEPA requires federal agencies to “study, develop, and  
18 describe appropriate alternatives to recommended courses of action in any proposal which  
19 involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. §  
20 4332(2)(E); *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013). CEQ  
21 regulations direct federal agencies to discuss “the environmental impacts of the proposed action  
22 and alternatives.” 40 C.F.R. § 1508.9(b). The discussion of alternatives is “the heart” of the  
23 NEPA process and is intended to provide a “clear basis for choice among options by the  
24

1 decisionmaker and the public.” 40 C.F.R. § 1502.14. Federal agencies must “[r]igorously  
2 explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a).

3 B. The Bureau’s Past Efforts To Comply With NEPA For Klamath Project  
4 Operations.

5 83. Construction and development of the Klamath Project preceded enactment of  
6 NEPA. The Bureau, therefore, does not need to comply with NEPA for routine managerial  
7 actions that have been carried out from the outset without change. When operations of pre-  
8 NEPA projects change substantially, the agency must determine whether the changes in  
9 operations may have significant adverse environmental effects that need to be analyzed under  
10 NEPA.

11 84. The Bureau recognizes that there have been substantial changes in Klamath  
12 Project operations that must be assessed under NEPA. EA at 1. Over the last two decades,  
13 courts have established and the Bureau has recognized its obligation to ensure operation of the  
14 Klamath Project will comply with the ESA and protect Tribal fisheries. These legal obligations  
15 have led to substantial changes in operation of the Klamath Project to provide more water to the  
16 river to sustain salmon.

17 85. The Bureau did not prepare an EA or EIS for the 2013-2023 operations plan. The  
18 last official reference to a NEPA analysis for Klamath Project operations appears in a 2003  
19 Federal Register notice initiating a scoping process for an EIS. 68 Fed. Reg. 23,761 (May 5,  
20 2003). The notice refers back to earlier notices of intent to prepare an EIS in 1997 and 1999 and  
21 to alternatives developed in 2001. There is no public record of any EIS that grew out of these  
22 notices. The 2019 EA is the first EA or EIS that the Bureau has completed on Klamath Project  
23 operations in at least the last two decades.

24 C. The Bureau’s EA And FONSI On The 2019-2024 Plan

1           86.     As part of the process to develop a new operations plan in the reinitiated  
2 consultation, the Bureau indicated that it would prepare an EA. On March 4, 2019, the Bureau  
3 released a draft EA for public comment. It allowed only 15 days for public comment. Yurok  
4 Tribe, PCFFA, and IFR submitted comments on March 19, 2019, the 15-day deadline. The  
5 comments objected to the short comment period on a complex project that has such far-reaching  
6 and pervasive impacts on Salmon and Orcas, as well as on Yurok fisheries, economic well-being,  
7 and way of life. The comments objected to the EA's alternatives analysis because the Bureau  
8 eliminated from consideration an alternative that would operate the Klamath Project with the  
9 disease management flows required by the 2017 injunction. The comments pointed out that the  
10 proposed action would reduce flows that provide juvenile Coho habitat in May and June and  
11 would not require dilution flows, as the 2017 injunction did, yet the draft EA failed to evaluate  
12 the risks posed by the lower spring flows and lack of mandatory dilution flows. Finally, the  
13 comments pointed to the significant adverse environmental effects of the Plan that warrant  
14 preparation of an EIS rather than an EA.

15           87.     On April 1, 2019, the Bureau issued a final EA and FONSI. The EA identifies the  
16 purpose and need as providing certainty regarding Project operations while complying with the  
17 ESA and protecting federally reserved Tribal fishing and water rights. EA at 1-2; FONSI at 1.  
18 The no-action alternative would operate the Project under the 2013 biological opinion without  
19 any of the 2017 injunction flows. The EA and FONSI find disease risks from the 2019-2024  
20 Plan will be less than the no-action alternative, due to more frequent surface flushing flows.  
21 FONSI at 15; EA at 60. Based on this statement, the Bureau made a finding of no significant  
22 impact for Plan's impacts on Coho, Chinook, and Orcas. FONSI at 15.

23           88.     The EA eliminates from further analysis an alternative requiring the other disease  
24

1 management flows that were recommended in the Guidance Document and embodied in the  
2 2017 injunction. The sole explanation it offers consists of a bullet point that lists “best available  
3 scientific information, hydrologic modeling constraints, unacceptable level of certainty for  
4 meeting Project contractual and/or water right delivery obligations, not appropriately protective  
5 of Lost River and shortnose suckers.” EA at 6. The EA contains no further explanation.

6 89. The EA and FONSI acknowledge the Bureau’s obligation to protect fishery  
7 resources of the Yurok Tribe and the other Klamath Basin Tribes, EA at 39-40, and recognize the  
8 profound effect salmon declines have had on the Yurok Tribe’s culture, traditional and spiritual  
9 practices, and economic well-being. EA at 38-40, 73. However, because it believes that the Plan  
10 would reduce disease risk compared to the no-action alternative, the Bureau stated there will be  
11 no change in fishing opportunities or possibly increased fishing for subsistence, ceremonial, and  
12 commercial needs. EA at 73, 75-76; FONSI at 18-19.

13 CLAIMS FOR RELIEF

14 ALLEGATIONS COMMON TO ESA CLAIMS

15 90. Plaintiffs reallege each and every allegation set forth in this complaint.

16 91. The ESA directs that the Bureau, like other federal agencies,  
17 shall, in consultation with and with the assistance of the Secretary, insure that any  
18 action authorized, funded, or carried out by such agency (hereinafter in this  
19 section referred to as an “agency action”) is not likely to jeopardize the continued  
20 existence of any endangered species or threatened species or result in the  
destruction or adverse modification of habitat of such species which is determined  
by the Secretary . . . to be critical . . . .

21 16 U.S.C. § 1536(a)(2).

22 92. “Action” is defined broadly to encompass “all activities or programs of any kind  
23 authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02.

24 93. The Bureau’s operation of the Klamath Project is an action over which the Bureau

1 has discretion and control and is subject to ESA Section 7. The Bureau must consult with NMFS  
2 over the impacts of its 2019-2024 Plan on listed species, including threatened Coho and  
3 endangered Orcas.

4 94. The Bureau's Plan is likely to adversely affect: (A) Coho Salmon and their critical  
5 habitat; and (B) Orcas because of impacts to their Chinook prey. The Bureau initiated formal  
6 Section 7 consultation by submitting to NMFS a biological assessment, which found that its  
7 proposed operations are likely to adversely affect Coho and their critical habitat. NMFS  
8 concurred in that finding. The Bureau's biological assessment asserts that its proposed  
9 operations are not likely to adversely affect Orcas. NMFS did not concur in that finding and  
10 instead found that the Plan is likely to adversely affect Orcas.

11 95. The Bureau had a legal obligation to complete formal reinitiated consultation with  
12 NMFS on its Plan. To complete the formal reinitiated consultation, NMFS issued a biological  
13 opinion, as it is obligated to do, and concluded that the Plan is not likely to jeopardize the  
14 continued existence of Coho or Orcas or adversely modify Coho critical habitat. 16 U.S.C. §  
15 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h). The biological opinion and accompanying incidental  
16 take statement are final agency actions subject to judicial review under the APA. *Bennett v.*  
17 *Spear*, 520 U.S. 154, 175 (1997). The APA authorizes courts to review, hold unlawful, and set  
18 aside final agency action, findings, and conclusions that are arbitrary and capricious, an abuse of  
19 discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

#### 20 FIRST ESA CLAIM FOR RELIEF

21 THE NO-JEOPARDY CONCLUSION IS FLAWED BECAUSE IT IS BASED ON WHETHER  
22 IMPACTS WILL BE REDUCED INSTEAD OF WHETHER IMPACTS WILL IMPEDE  
SURVIVAL OR RECOVERY.

23 96. The ESA implementing regulations, 50 C.F.R. § 402.02, define "jeopardize the  
24 continued existence" as:

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1 to engage in an action that reasonably would be expected, directly or indirectly, to  
2 reduce appreciably the likelihood of both the survival and recovery of a listed  
3 species in the wild by reducing the reproduction, numbers, or distribution of that  
4 species.

5 97. Under this definition, NMFS must evaluate an action's impacts on both survival  
6 and recovery. The Joint NMFS-FWS Consultation Handbook (at xviii-xix) defines "survival"  
7 for purposes of the jeopardy analysis as "the condition in which a species continues to exist into  
8 the future while retaining the potential for recovery," and as "the species' persistence as listed or  
9 as a recovery unit, beyond the conditions leading to its endangerment, with sufficient resilience  
10 to allow for the potential recovery from endangerment." *Id.* The fact that an action may be  
11 slightly less harmful than the status quo is the wrong question. Continuation of a precarious state  
12 may increase the probability of extinction, given the likelihood of chance events, worsening  
13 conditions due to climate change, and other threats.

14 98. The ESA regulations define "recovery" to mean "improvement in the status of  
15 listed species to the point at which listing is no longer appropriate under the criteria set out" in  
16 the Act. 50 C.F.R. § 402.02. The ESA uses the terms "recovery" and "conservation"  
17 interchangeably. It defines "conservation" as "the use of all methods and procedures which are  
18 necessary to bring any endangered species or threatened species to the point at which the  
19 measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

20 99. Under the regulatory definition of jeopardy, NMFS must assess whether Coho and  
21 Orcas will have sufficient numbers, distribution, and productivity to exist in the future with  
22 sufficient resilience to allow for the potential for recovery. NMFS must also assess whether the  
23 Plan will impede recovery due to its impacts on reproduction, numbers, and distribution.

24 100. NMFS has developed a viable salmonid population framework to assess how near  
25 or far a listed salmon species is from a recovered state in light of current conditions and existing

1 and future threats. This analysis considers abundance, population growth, spatial structure, and  
2 diversity. Applying those factors, the 2016 Coho status review found that Coho continue to be at  
3 high risk of extinction and have faced a heightened risk to Coho persistence since 2011 due to  
4 increased water withdrawals and unprecedented drought conditions impede juvenile rearing and  
5 survival. Five-Year Status Review at 47-49.

6 101. The 2019 biological opinion finds that conditions have worsened since the 2016  
7 status review due to degraded conditions, including from reduced Klamath River flows.  
8 Spawner abundance has declined since 2016 and most independent Coho populations are below  
9 the number of adult salmon needed for the population's survival. 2019 BiOp at 67.

10 102. The 2019 biological opinion finds that the Plan will reduce juvenile salmon  
11 rearing habitat and expose Coho and Chinook to higher *C. shasta* infection and mortality rates  
12 than under natural conditions. 2019 BiOp at 215-17. Nonetheless, the 2019 biological opinion  
13 reaches a no-jeopardy conclusion based on NMFS's belief that *C. shasta* disease conditions will  
14 improve compared to the period of record. 2019 BiOp at 167-68, 170, 172, 215-17.

15 103. NMFS identified disease from *C. shasta* as the most significant risk to Coho and  
16 found that the Plan will increase disease and disease-related mortality in juvenile Coho compared  
17 to natural conditions. 2019 BiOp at 160-61, 215. It believed that the minimum flows and  
18 surface flushing flows would reduce disease risks compared to the incidence in recent  
19 monitoring. These measures would not eliminate the elevated risks from *C. shasta* or bring them  
20 into acceptable levels, but NMFS believed that they would provide a limit to the increase in  
21 disease risks. 2019 BiOp at 167. On that basis, NMFS concluded that the Plan is not likely to  
22 jeopardize the continued existence of Coho. 2019 BiOp at 167-68, 170, 172, 215-17.

23 104. This no-jeopardy conclusion is divorced from the regulatory criteria on which a  
24

1 jeopardy determination must be based. It is not based on whether the Plan will appreciably  
2 reduce the numbers, reproduction, and distribution of Coho or Orcas below that needed to ensure  
3 survival and recovery. Nor is it based on an assessment of the extent to which the Plan will  
4 impede attainment of those survival and recovery needs.

5 105. The 2019 biological opinion's no-jeopardy conclusion is also based on an  
6 arbitrary and untenable period of record. Coho salmon have been listed since 1997 and their  
7 condition has since become worse. The *C. shasta* monitoring period of record spans 2005-2018,  
8 a timeframe when Coho abundance has decreased and *C. shasta* infection and mortality rates  
9 have dwarfed natural conditions in most years. The period of record includes 2014 and 2015  
10 when *C. shasta* infection rates reached 81% and 91%. There is no scientific evidence that  
11 Klamath River juvenile salmon can withstand repeated years with infection rates at or near the  
12 worst years in the period of record, particularly since the year classes of salmon that outmigrated  
13 in 2014 and 2015 have been weakened by the high infection rates.

14 106. Nor did NMFS assess whether such infection rates will impede Coho recovery.  
15 The recovery plan identifies *C. shasta* as responsible for most of the mortality of Klamath River  
16 juvenile Coho in recent years and establishes a recovery goal of no more than 10% mortality of  
17 Coho juveniles from *C. shasta*. Coho Recovery Plan at 3-20, 4-14 & 4-15. The 2019 biological  
18 opinion's no-jeopardy analysis never addresses this recovery goal. It lacks any reasoned  
19 explanation of how NMFS can allow mortality from *C. shasta* to reach 49% and not impede  
20 recovery.

21 107. Based on its flawed assumption that conditions will improve for Chinook  
22 compared to the period of record, NMFS made a no-jeopardy conclusion for the Orcas. NMFS  
23 failed to assess whether any such improvement would be sufficient to avoid jeopardy to the  
24

1 Orcas.

2 108. The Orcas are endangered and at precariously low population levels because of a  
3 lack of prey and in particular a lack of Chinook prey. A majority of the Orcas forage off the  
4 coast in the winter and spring, including at the mouth of the Klamath River. NMFS found that  
5 Klamath River Chinook comprise a sizeable amount of the Chinook available to the Orcas when  
6 they are foraging in the area. NMFS also found that the Plan will reduce Chinook abundance  
7 and the amount of Chinook available to the Orcas, which will require the orcas to expend more  
8 energy foraging and lead to nutritional stress and possibly deteriorating body conditions and  
9 risks of starvation. Despite these findings, the 2019 biological opinion concludes that the lack of  
10 sufficient Klamath Chinook abundance will not reduce the reproduction, numbers, or fitness of  
11 the Orcas.

12 109. This conclusion is contrary to the best available science, the record, and the  
13 required jeopardy analysis. For the Orcas to survive and recover, they need more abundant  
14 Chinook stocks and this need is urgent given the recent failed pregnancies, calf mortalities, and  
15 the poor condition of individual Orcas. The NOAA Northwest Fisheries Science Center has  
16 estimated that the Orcas need a 15% increase in Chinook to meet the population growth goals in  
17 the Orca recovery plan. NMFS failed to assess whether the Plan will impede an increase in  
18 Chinook abundance to provide prey the Orcas need.

19 110. NMFS's conclusion that the Plan will not be likely to jeopardize survival or  
20 recovery of threatened Coho or endangered Orcas lacks a rational basis, is contrary to the best  
21 available science, and fails to comply with ESA Section 7 and its implementing regulations.

## SECOND ESA CLAIM FOR RELIEF

## MAKING DILUTION FLOWS DISCRETIONARY IS CONTRARY TO NMFS'S PAST FINDINGS AND THE BEST AVAILABLE SCIENCE.

111. *C. shasta* infections are the primary limiting factor and threat to Coho survival and recovery. 2013 BiOp at 341, 376; 2019 BiOp at 160, 166-67. The 2014 recovery plan identifies *C. shasta* as responsible for most of the mortality of Klamath River juvenile Coho in recent years. Recovery Plan at 3-20.

112. FWS scientists compiled the best available science on *C. shasta* threats and mitigation measures after the untenable infection rates in 2014 and 2015. The best available science demonstrates that disease management flows are the most effective measures to reduce *C. shasta* infection rates. Dilution flows serve as an emergency measure to dilute and flush out *C. shasta* spores when their density is high and infection rates spike. The independent peer review of the guidance document found strong evidence, both theoretical and empirical, that increasing flow will dilute spore concentrations and reduce infection rates. Peer Review at 9, 13.

113. The 2017 injunction required disease management flows upon concluding that plaintiffs “have convincingly shown that their proposed injunctive flows are based on the best available science and incorporate comments and feedback from experts in the field.” *Yurok Tribe*, 231 F. Supp. 3d at 488-89; *accord id.* at 488 (“The FWS memos compile the best available science on *C. shasta* life history, infection rates, and the effect of flushing and dilution flows.”). The Court held that: “Plaintiffs have demonstrated that flushing flows and emergency dilution flows would reduce *C. shasta* rates among Coho salmon. There is no meaningful dispute among the parties on this point.” *Id.* at 489. The 2017 injunction required emergency dilution flows when *C. shasta* spore concentrations or infection rates exceed certain thresholds, and it required the Bureau to set aside 50,000 acre feet of water for the dilution flows.

1           114. The 2019-2024 Plan does not require dilution flows when infection rates spike, its  
2 sets aside no water for dilution flows, and it locks in the irrigation allocation and quantity of  
3 water in the EWA as of April 1<sup>st</sup>, even if hydrologic conditions in May show that more water is  
4 needed in the EWA. Whether dilution flows will occur hinges on a real-time disease  
5 management process in which scientists recommend mitigation measures, but the Bureau retains  
6 the final decision-making authority. Dilution flows, should they occur, will use water from the  
7 EWA in May or June and will result in less water being available for other salmon needs later in  
8 the season.

9           115. In signing off on the Bureau's plan to leave dilution flows to the Bureau's  
10 discretion in the real-time disease management process, the biological opinion runs counter to  
11 the best available science in the FWS memos and independent peer review, which substantiate  
12 the need for and efficacy of dilution flows when infection rates spike. While the independent  
13 peer review identified ways the particular dilution flow regime could be improved, for example,  
14 by including water temperature as a trigger and using more water in a managed dilution flow, it  
15 substantiated the efficacy of dilution flows as an emergency disease management tool. Peer  
16 Review at 9, 13, 14, 15.

17           116. The 2019 biological opinion acknowledges this scientific evidence and finds that  
18 dilution flows are effective in reducing spore densities and transmission efficiency. 2019 BiOp  
19 at 161. Despite this acknowledgement, the 2019 biological opinion leaves dilution flows to the  
20 Bureau's discretion under the same real-time disease management process that produced no  
21 emergency dilution flows in 2014 and 2015 when infection rates reached 81% and 91%. It is  
22 arbitrary and capricious for NMFS to rely on the real-time disease management process to  
23 produce additional flows to reduce infection and disease when that process is not reasonably  
24

1 certain to produce the needed flows and, if that process leads to a dilution flow, less water will be  
2 available to meet the needs of salmon later in the year than what the biological opinion assumes.

3 **THIRD ESA CLAIM FOR RELIF**

4 **NMFS IMPROPERLY CONCLUDED THAT THE PLAN WILL NOT ADVERSELY**  
5 **MODIFY CRITICAL HABITAT WHEN IT WILL FREQUENTLY VIOLATE NMFS'S**  
6 **SALMON HABITAT CONSERVATION STANDARD.**

7 117. A biological opinion must determine whether the action is likely to result in the  
8 destruction or adverse modification of critical habitat designated for a listed species. 16 U.S.C. §  
9 1536(a)(2). “Critical habitat” of relevance to this case consists of “specific areas within the  
10 geographical area occupied by the species . . . on which are found those physical or biological  
11 features (I) essential to the conservation of the species and (II) which may require special  
12 management considerations or protection.” 16 U.S.C. § 1532(5)(A)(i).

13 118. NMFS designated critical habitat for SONCC Coho in 1999 and included most of  
14 the Klamath River below Iron Gate Dam in the designation. 64 Fed. Reg. 24,049 (May 5, 1999).  
15 NMFS identified irrigation water withdrawals and dam operations as “[a]ctivities that may  
16 require special management considerations.” *Id.* at 24,059.

17 119. The Coho critical habitat designation uses the term “primary constituent element”  
18 to refer to a physical or biological feature essential to the conservation of a species. 2019 BiOp  
19 at 56. It identifies juvenile summer and winter rearing areas, juvenile migration corridors, and  
20 areas for growth and development to adulthood as primary constituent elements of Coho critical  
21 habitat. *Id.* at 67.

22 120. “Destruction or adverse modification” of critical habitat is a “direct or indirect  
23 alteration that appreciably diminishes the value of critical habitat for the conservation of a listed  
24 species. Such alterations may include, but are not limited to, those that alter the physical or  
25 biological features essential to the conservation of a species or that preclude or significantly

1 delay development of such features.” 50 C.F.R. § 402.02. The focus is on altering, precluding,  
2 or delaying development of features needed for conservation and ultimately delisting of the  
3 species.

4 121. The early ESA consultations on Klamath Project operations focused on obtaining  
5 sufficient flows to inundate and make habitat useable for salmon rearing. Based on a series of  
6 comprehensive, peer-reviewed studies by Dr. Hardy to correlate river flows with rearing habitat  
7 suitability, NMFS has established a conservation standard of at least 80% of maximum habitat  
8 availability. 2019 BiOp at 61-63. NMFS has determined that “at least 80 percent of maximum  
9 available habitat provides for the conservation needs of coho salmon.” 2019 BiOp at 63. Flows  
10 above this threshold are beneficial in maintaining the critical habitat functions and provide “a  
11 wide range of conditions and habitat abundance in which populations can grow and recover.”  
12 2019 BiOp at 63.

13 122. To assess the Plan’s impacts on salmon rearing habitat, NMFS evaluated how  
14 often and to what extent the 80% conservation standard will be met under varying water  
15 conditions. NMFS focused on reaches that have relatively high habitat availability and are most  
16 influenced because they are closest to Iron Gate Dam, including Trees of Heaven and Seiad  
17 Valley. *Id.* NMFS found that the Plan “will generally decrease available juvenile coho salmon  
18 habitat from [Iron Gate Dam] to the Middle Klamath River reach” and that “available habitat is  
19 reduced below 80 percent of maximum available in most months of the year and in most water  
20 year types.” 2019 BiOp at 155. The Plan will reduce habitat availability in the Seiad Valley the  
21 most, in most years and all months between March and June, *id.* at 202-03, which includes the  
22 critical rearing period for coho fry and outmigration time for juveniles. For juveniles in the  
23 Seiad Valley reach, the Plan will lead to conditions meeting the conservation standard only 17%



1 of the time between March-June and less than 16% in May-June. *Id.* at 149. In the Trees of  
2 Heaven reach, the amount of available habitat will meet the conservation standard only 42% of  
3 the time between March-June and less than 37% in May-June. *Id.* at 148. While the 2019  
4 biological opinion discloses that the Plan will lead to violations of the conservation standard  
5 most of the time in these reaches, it fails to explain how this failure avoids adversely modifying  
6 critical habitat. It never assesses the extent to which failure to provide 80% of maximum  
7 available habitat does not alter, preclude, or delay the development of functioning rearing  
8 habitat, a primary constituent element of Coho critical habitat.

9 123. It is arbitrary, capricious, contrary to the best available science and NMFS's own  
10 findings, and in violation of the ESA and its implementing regulations, for NMFS to find that the  
11 Plan is not likely to adverse modify Coho critical habitat when it will so frequently fail to meet  
12 habitat conditions NMFS has found necessary for Coho conservation.

#### 13 FOURTH ESA CLAIM FOR RELIEF

##### 14 THE 2019 BIOLOGICAL OPINION'S LIMIT ON TAKE IS INVALID.

15 124. The ESA prohibits any person from "taking" an endangered species. 16 U.S.C. §  
16 1538(a)(1)(B). Under Section 4(d), 16 U.S.C. § 1533(d), NMFS has the authority to issue  
17 regulations extending the take prohibition to threatened species. NMFS has extended the take  
18 prohibition to threatened species, including SONCC Coho. 50 C.F.R. § 223.203. Under Section  
19 9(a)(1)(G), it is unlawful to take threatened salmon in violation of this 4(d) regulation.

20 125. The take prohibition applies to "any person." 16 U.S.C. § 1538(a)(1). The ESA  
21 defines "any person" to include "any officer, employee, agent, department, or instrumentality of  
22 the Federal Government." 16 U.S.C. § 1532(13). The ESA citizen suit provision authorizes  
23 suits to enforce the ESA and its implementing regulations against any person, including federal  
24 agencies. *Id.* § 1540(g)(1). The Bureau is a person subject to the ESA take prohibition and to

1 ESA citizen suits.

2 126. The ESA defines “take” to include “harm.” *Id.* § 1532(19). By regulation, NMFS  
3 has defined “harm” to include:

4 Significant habitat modification or degradation which actually kills or injures fish  
5 or wildlife by significantly impairing essential behavioral patterns, including  
6 breeding, spawning, rearing, migrating, feeding or sheltering.

6 50 C.F.R. § 222.102.

7 127. If a federal action undergoing consultation will take a listed species, the biological  
8 opinion must include an “incidental take statement” that specifies the amount and extent of  
9 incidental take of the listed species that may occur without causing jeopardy or adverse  
10 modification, includes “terms and conditions,” and provides for monitoring of take. 16 U.S.C. §  
11 1536(b)(4); 50 C.F.R. § 402.14(i)(1)-(3). The incidental take statement insulates from take  
12 liability activities undertaken in compliance with its terms and conditions. 16 U.S.C. §  
13 1536(o)(2); *see* 16 U.S.C. § 1536(b)(4)(C).

14 128. An incidental take statement serves as a check on the biological opinion’s  
15 assumptions and conclusions. It must set out a “trigger” that specifies an unacceptable level of  
16 take that invalidates the safe harbor and requires the agencies to immediately reinitiate  
17 consultation. 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

18 129. The 2013 Biological Opinion’s incidental take statement imposed a limit of 49%  
19 on the prevalence of *C. shasta* infections in sampled Chinook, which was the highest prevalence  
20 since *C. shasta* monitoring began. NMFS based its take limit on the prevalence of infection data  
21 from the well-structured and scientifically sound *C. shasta* monitoring program. In the first two  
22 years under the 2013 biological opinion, prevalence of infection rates were 81% and 91%, far in  
23 excess of the 49% cap on *C. shasta* infection rates. Because the allowable level of take was  
24 exceeded, the Bureau and NMFS had a legal obligation to immediately reinitiate formal

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1 consultation on Klamath Project operations. That reinitiated consultation led to the 2019  
2 biological opinion.

3 130. The 2019 incidental take statement sets a limit for *C. shasta* in Coho and  
4 Chinook, but not based on prevalence of infection, like the 2013 incidental take statement.  
5 Instead, NMFS used a preliminary draft model that estimates the prevalence of mortality, defined  
6 as the predicted proportion of spring/early summer outmigrating juveniles from the Shasta River  
7 that suffer *C. shasta* induced mortality. 2019 BiOp at 273. For Coho, NMFS set the take limit at  
8 a maximum prevalence of mortality rate of 49%, which it estimated would have been the highest  
9 on record using the preliminary draft model, while assuming a 25% reduction in *C. shasta*  
10 actinospore concentrations as a result of surface flushing flows. 2019 BiOp at 273-74. For  
11 Orcas, NMFS set a take limit of 53% based on prevalence of mortality in Chinook juveniles  
12 using the same preliminary draft model. 2019 BiOp at 278-79.

13 131. The new *C. shasta* take limits lack a rational basis and are not grounded in the  
14 best available science. First, setting the take limit at the highest *C. shasta* mortalities estimated  
15 to have occurred during the period of record allows an unacceptably high level of take – the  
16 death of approximately half of outmigrating juvenile salmon – which could cause adverse  
17 population effects and even jeopardy or adverse modification of critical habitat. It would allow a  
18 repeat of the 81% and 91% infection rates in 2014 and 2015 because they would not lead to  
19 modeled mortalities above the take limit. Yet these high infection rates called into question  
20 NMFS’s no-jeopardy conclusion in the 2013 biological opinion. Allowing them to occur under  
21 the 2019-2024 Plan fails to provide a meaningful limit on harm to salmon and puts already  
22 severely weakened salmon populations at risk.

23 132. Second, the ESA’s prohibition on take extends to harm that may not produce  
24

1 mortality. It prohibits injuries that significantly impair essential behavioral patterns. The  
2 scientific evidence and NMFS's own findings confirm that *C. shasta* produces sublethal effects,  
3 such as impaired growth, swimming performance, and body condition increased stress, and  
4 susceptibility to other infections that could lead to mortality, particularly when water  
5 temperatures are high. 2019 BiOp at 164. By basing the take limit on the prevalence of  
6 mortality, NMFS is missing a substantial amount of the take caused by the Plan.

7 133. Third, the prevalence of infection rates over the period of record come from actual  
8 measured infection rates in the well-designed and scientifically sound *C. shasta* monitoring  
9 program. In contrast, NMFS based the mortality take limits on a preliminary draft model that  
10 seeks to reconstruct mortality rates during the period of record. Because the preliminary draft  
11 model produces prevalence of mortality rates only after the juvenile salmon outmigration has  
12 occurred, it cannot be used to trigger the immediate reinitiation of consultation and development  
13 of mitigation measures in real-time the way that actual infection monitoring data can and have.  
14 In using the preliminary draft model, the Bureau violated its policy of requiring independent peer  
15 review of scientific information that has a clear and substantial impact on the Bureau's actions.  
16 Reclamation Policy CMP P14, *Peer Review of Scientific Information and Assessments* (2016),  
17 <https://www.usbr.gov/recman/cmp/cmp-p14.pdf>. The Bureau obtained an independent peer  
18 review of the Guidance Document because of the role it plays in decisionmaking concerning  
19 Klamath Project operations, but did not obtain a peer review of preliminary draft model used to  
20 establish the incidental take statement's take limit.

21 134. The 2019 limits on take are arbitrary, capricious, contrary to the best available  
22 science, and in violation of the ESA and its implementing regulations.

#### 23 ALLEGATIONS COMMON TO NEPA CLAIMS

24 135. Plaintiffs re-allege each and every allegation set forth in this complaint.

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1 136. NEPA requires federal agencies to prepare an EIS for “major Federal actions  
2 significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).  
3 Federal agencies may prepare an EA to determine whether the environmental impacts of an  
4 agency action are significant and warrant an EIS. 40 C.F.R. § 1501.4(b), (c); § 1508.9.  
5 If the EA demonstrates that the proposed action might cause significant environmental impacts,  
6 then the agency must prepare an EIS before taking the proposed action. But, if based on the EA,  
7 the agency concludes that the proposed action will likely not have significant environmental  
8 impacts, then the agency may issue FONSI and need not prepare an EIS. 40 C.F.R. § 1508.13.

9 137. NEPA provides that agencies must “study, develop, and describe appropriate  
10 alternatives to recommended courses of action in any proposal which involves unresolved  
11 conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E). This  
12 requirement applies to the preparation of an EA. *Western Watersheds Project*, 719 F.3d at 1050.  
13 An EA must discuss “the environmental impacts of the proposed action and alternatives.” 40  
14 C.F.R. § 1508.9(b). An agency’s failure to consider a viable alternative is fatal to the sufficiency  
15 of its analysis of the environmental impacts of its proposed action.

16 138. The Bureau is a federal agency subject to NEPA. The Plan is a major federal  
17 action under NEPA. Because construction of the Klamath Project preceded enactment of NEPA,  
18 the Bureau does not need to comply with NEPA for routine maintenance of the project, but it has  
19 a legal obligation to comply with NEPA when operations change substantially. The amount of  
20 water withdrawn for irrigation as part of Klamath Project operations has increased since NEPA  
21 was enacted, particularly in dry years. 2019 BiOP at 107. NMFS expects this trend to continue.  
22 *Id.* Since the Coho listing and as a result of court decisions holding that the Bureau has fallen  
23 short of its ESA obligations, the Bureau has made substantial changes to its project  
24

1 operations. The Bureau develops an operations plan to try to provide for the needs of  
2 endangered suckers in Upper Klamath Lake and Klamath River Salmon while still delivering  
3 large volumes of water for agriculture. This plan has far-reaching impacts on the lake, the river,  
4 threatened and endangered fish species, and the Tribal communities and commercial fishing  
5 families that depend on them. The Bureau has a legal obligation to comply with NEPA when it  
6 adopts an operations plan for the Klamath Project. The Bureau acknowledges this obligation.  
7 EA at 1.

8 139. The Bureau prepared an EA on its Plan. Its no-action alternative consists of  
9 Project operations under the 2013 biological opinion without any of the disease management  
10 flows required under this Court's 2017 injunction. The EA eliminated from further consideration  
11 an alternative that would include operating the Klamath Project with the disease management  
12 flows that were recommended in the Guidance Document and embodied in the 2017 injunction.

13 140. The Bureau finalized its EA and issued a finding of no significant impact on April  
14 1, 2019. It found that, under the Plan, disease risks would be lessened compared to the no-action  
15 alternative due to more frequent surface flushing flows. Based on this comparison, NMFS  
16 concluded that Coho, their critical habitat, and Chinook that are prey for orcas are expected to be  
17 less adversely impacted than under the no-action alternative. It relied on the more frequent  
18 surface flushing flows compared to what was required before this Court's injunction to conclude  
19 that Tribal fishing opportunities would either be unchanged or increase. Based on these  
20 conclusions, the Bureau issued a FONSI and decided not to prepare an EIS.

21 141. Upon completion of the EA and FONSI and the 2019 biological opinion, the  
22 Bureau began operating the Klamath Project in accordance with the Plan. It will continue to  
23 conduct operations in accordance with the Plan and 2019 biological opinion for the next five  
24

1 years.

2 142. Under the APA, courts may review final agency actions and hold unlawful and set  
3 aside final agency action, findings, and conclusions that are arbitrary and capricious, an abuse of  
4 discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). The APA provides  
5 for judicial review of the Bureau's EA and FONSI.

#### 6 FIRST NEPA CLAIM FOR RELIEF

#### 7 THE EA FAILED TO COMPARE THE PLAN TO THE COURT-ORDERED DISEASE 8 MANAGEMENT FLOWS AS EITHER THE NO-ACTION-ALTERNATIVE OR ANOTHER ALTERNATIVE.

9 143. The discussion of alternatives is the heart of the NEPA process and is intended to  
10 provide a clear basis for choice among options by the decision-maker and the public. 42 U.S.C.  
11 § 4332(C)(iii), (E); 40 C.F.R. § 1502.14. An agency must fully and meaningfully consider all  
12 reasonable alternatives. The scope of reasonable alternatives encompasses those that are  
13 practical or feasible. Failure to examine a viable alternative will render an EA inadequate.

14 144. In an EA, the range of alternatives must include a no-action-alternative. CEQ's  
15 guidance describes the no-action-alternative as the status quo or the current course of action at  
16 the time the proposed action is being considered. *Forty Most Asked Questions Concerning*  
17 *CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18027 (March 23, 1981).  
18 The no-action-alternative cannot embody an action that a court has found to be inadequate.

19 145. An EA, like an EIS, compares the effects of the no-action-alternative to the  
20 effects of the proposed action and often other viable alternatives. The comparison serves to  
21 produce an objective analysis and disclosure of the effects of the proposed action.

22 146. The EA's no-action-alternative consists of operation of the Klamath Project under  
23 the 2013 biological opinion. In 2017, this Court held that NMFS and the Bureau had to reinstate  
24 formal consultation on Klamath Project operations after infection rates exceeded the 49% take

1 limit. This Court issued an injunction that required the Bureau to implement winter-spring  
2 flushing flows to disrupt the habitat that supports the *C. shasta* carriers, as well as dilution flows  
3 to move *C. shasta* spores downstream if the infection rates spiked. Accordingly, the status quo  
4 included both operation of the Klamath Project in accordance with the 2013 biological opinion  
5 and the disease management flows ordered by this Court. The no-action-alternative does not  
6 reflect the status quo or management of the Klamath Project at the time the EA was finalized.

7 147. The EA also eliminated the operation of the Klamath Project with the court-  
8 ordered disease management flows from further consideration as an alternative. The Bureau's  
9 reasoning for doing so consists of only a single bullet point listing several cryptic items. The EA  
10 contains no further explanation and therefore lacks a reasoned explanation for eliminating the  
11 court-ordered disease management flows from further consideration as an alternative.

12 148. In the bullet point, the EA lists "best available scientific information" as a reason  
13 to eliminate the court-ordered disease management flows as an alternative. This Court selected  
14 injunction flows based on the Guidance Document, which it found to be the "best available  
15 science." The independent peer-review of the Guidance Document found the recommended  
16 measures to be comprehensive, scientifically sound, and well supported by scientific data. By  
17 listing "best available scientific information" as a reason not to consider the court-ordered  
18 disease management flows as an alternative, the EA fails to address and runs counter to the  
19 evidence before it.

20 149. The injunction flows are a viable alternative to the Plan. They have been the  
21 status quo since the Bureau was ordered to implement them under the 2017 injunction. In  
22 addition, implementation of the disease management flows is consistent with the Plan objectives,  
23 which include fulfilling the Bureau's obligation to protect Coho and Orcas as required under the  
24



1 ESA and its Tribal trust responsibility. The reasons the EA offers for eliminating the disease  
2 management flows as an alternative are conclusory, lack support in the record, and are contrary  
3 to this Court's findings as well as those in the independent peer review. By failing to analyze the  
4 Plan with the disease management flows as either the no-action-alternative or another alternative,  
5 the Bureau acted arbitrarily, capriciously, and contrary to NEPA and the CEQ regulations.

#### 6 SECOND NEPA CLAIM FOR RELIEF

7 THE FINDING OF NO SIGNIFICANT IMPACT IS UNLAWFULLY BASED ON A BELIEF  
8 THAT CONDITIONS WILL IMPROVE, NOT THAT THE IMPACTS WILL BE  
9 INSIGNIFICANT.

10 150. A federal agency must prepare an EIS on a major federal action if it may have  
11 significant environmental impacts. The fact that an action may decrease adverse environmental  
12 effects does not necessarily mean the remaining effects are insignificant.

13 151. The Bureau found that its Plan would improve conditions compared to the no-  
14 action-alternative, which is implementation of the 2013 biological opinion. The Bureau never  
15 prepared an EA or EIS on the operations embodied in the 2013 biological opinion. The EA,  
16 therefore, could not tier to an earlier NEPA analysis and focus only on impacts beyond those  
17 under the 2013 biological opinion. In addition, because the no-action-alternative does not reflect  
18 the status quo, it formed a fictional point of comparison.

19 152. Even if conditions might improve compared to a risky and harmful baseline, such  
20 an improvement does not mean no significant environmental impacts remain. A decrease in  
21 risks and harm compared even to a valid no-action-alternative does not ask the right question.  
22 The Bureau had to assess whether the Plan raises a substantial question as to whether the Plan  
23 may cause significant adverse environmental effects. By focusing solely on its belief that there  
24 would be some improvement over operations that fell short, the Bureau failed to evaluate and  
25 determine whether its Plan may have significant environmental impacts.



1 which has led to a substantial increase in *C. shasta* infections—the most significant threat to  
2 juvenile Coho Salmon. 2019 BiOp at 376.

3 157. While the 2019-2024 Plan will increase the frequency of surface flushing flows  
4 compared to the 2013 biological opinion, the Bureau has eliminated the dilution flows required  
5 under this Court’s 2017 injunction. Under the 2013 plan, which similarly did not set aside water  
6 for dilution flows, the Bureau did not release emergency dilution flows when infection rates  
7 reached 81% in 2014 and 91% in 2015. Under the 2019-2024 Plan, *C. shasta* infection and  
8 mortality rates will remain far greater than natural levels and far higher than the recovery plan  
9 targets. Juvenile salmon will continue to experience sub-lethal effects of *C. shasta* infections  
10 that impair growth and swimming ability and increase stress and susceptibility to secondary  
11 infections. The Plan also will result in low spring flows that diminish rearing habitat for juvenile  
12 salmon.

13 158. Coho Salmon are in a precarious state. Their condition has worsened in recent  
14 years. Operating the Klamath Project without the safeguards imposed by this Court will  
15 perpetuate this precarious state and may make it worse.

16 159. Endangered Orcas depend on Chinook, including from the Klamath River, for  
17 their sustenance, and desperately need more abundant Chinook stocks. Implementation of the  
18 Plan will reduce Chinook abundance compared to the abundance that could be achieved with  
19 more safeguards.

20 160. The CEQ regulations treat an action as significant based on the degree of its  
21 adverse effects on endangered or threatened species or critical habitat. 40 C.F.R. §  
22 1508.27(b)(9). The only defensible conclusion is that the Plan may, and is certain to, have  
23 significant adverse effects on Coho, Chinook, and Orcas. The Bureau’s conclusion that the Plan  
24

1 would not have significant adverse impacts is arbitrary, capricious, and contrary to NEPA and  
2 the CEQ regulations.

3 PRAYER FOR RELIEF

4 WHEREFORE, plaintiffs respectfully request that this Court:

5 A. Declare that the 2019 biological opinion is arbitrary, capricious, and contrary to  
6 the ESA and its implementing regulations in violation of the APA, 5 U.S.C. § 706(2)(A),

7 B. Declare that the limits NMFS set for allowable take in the incidental take  
8 statement accompanying the 2019 biological opinion are arbitrary, capricious, and contrary to the  
9 ESA and its implementing regulations in violation of the APA, 5 U.S.C. § 706(2)(A),

10 C. Vacate the 2019 biological opinion and take limits and remand to NMFS with  
11 instructions for NMFS to reopen and complete the reinitiated consultation;

12 D. Reinstate the 2017 injunction issued by this Court for duration of the reinitiated  
13 consultation;

14 E. In the alternative, enjoin the Bureau to provide sufficient flows to prevent  
15 irreparable harm to Coho and Orcas during the time it will take to complete reinitiated formal  
16 consultation;

17 F. Declare the Bureau's EA and FONSI arbitrary, capricious, and contrary to NEPA  
18 and the CEQ regulations in violation of the APA, 5 U.S.C. § 706(2)(A), and remand to the  
19 Bureau with instructions to prepare an EIS on the 2019-2024 Plan.

20 G. Award plaintiffs their reasonable fees, expenses, costs, and disbursements,  
21 including attorneys' fees associated with this litigation under the Equal Access to Justice Act 28  
22 U.S.C. § 2412; and

1 H. Grant plaintiffs such further and additional relief as the Court may deem just and  
2 proper.

3 DATED this 31st day of July, 2019.

4 Respectfully submitted,

5 /s/ Kristen L. Boyles

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CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, Institute For Fisheries Resources

(b) County of Residence of First Listed Plaintiff Humboldt and Del Norte Counties (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Boyles, Kristen L., Goldman, Patti A., Bennett, Ashley N., Earthjustice, 705 Second Avenue, Suite 203, Seattle, WA 98104, (206) 343-7340 -- Continued on attached page

DEFENDANTS

U.S. Bureau of Reclamation, and National Marine Fisheries Service

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in one Box Only)

- 1 U.S. Government Plaintiff 3 Federal Question (U.S. Government Not a Party)
X 2 U.S. Government Defendant 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, HABEAS CORPUS, OTHER, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- X 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation-Transfer 8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Administrative Procedure Act, 5 U.S.C. § 706(2)(A); National Environmental Policy Act, 42 U.S.C. § 4332(2); Endangered Species Act, 16 U.S.C. § 1536
Brief description of cause: See attached page

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ JURY DEMAND: Yes X No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE Hon. William H. Orrick DOCKET NUMBER 3:16-cv-06863-WHO and C16-cv-04294-WHO

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) X SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE 07/31/2019

SIGNATURE OF ATTORNEY OF RECORD

/s/ Kristen Boyles

**ATTACHMENT TO CIVIL COVER SHEET**

**I.(c) ATTORNEYS FOR PLAINTIFFS:**

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McKinleyville, CA 95519  
Phone: (303) 717-4618

**VI. CAUSE OF ACTION**

**Brief description of cause:**

This action challenges a biological opinion, environmental assessment, and finding of no significant impact for the Klamath Irrigation Project for violations of the Endangered Species Act, 16 U.S.C. § 1536, and the National Environmental Policy Act, 42 U.S.C. § 4332(2).

## INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

**Authority For Civil Cover Sheet.** The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)
- c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section “(see attachment).”
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an “X” in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
  - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an “X” in this box.
  - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
  - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an “X” in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an “X” in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
  - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
  - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
  - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
  - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
  - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
  - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket. Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an “X” in this box if you are filing a class action under Federal Rule of Civil Procedure 23. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: “the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.”
- Date and Attorney Signature.** Date and sign the civil cover sheet.