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14 UNITED STATES DISTRICT COURT
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION

17 PACIFIC COAST FEDERATION OF) Civ. No. C02-2006 SBA
18 FISHERMEN'S ASSOCIATIONS, INSTITUTE)
19 FOR FISHERIES RESOURCES,) Related Case No. C00-01955 SBA
20 NORTHCOAST ENVIRONMENTAL CENTER,)
21 KLAMATH FOREST ALLIANCE, OREGON) FIRST AMENDED COMPLAINT FOR
22 NATURAL RESOURCES COUNCIL, THE) DECLARATORY AND INJUNCTIVE
23 WILDERNESS SOCIETY, WATERWATCH OF) RELIEF
24 OREGON, DEFENDERS OF WILDLIFE,)
25 HEADWATERS, and REPRESENTATIVE)
26 MIKE THOMPSON,)
27 Plaintiffs,)
28 v.)
29 U.S. BUREAU OF RECLAMATION, and)
30 NATIONAL MARINE FISHERIES SERVICE,)
31 Defendants.)

FIRST AMENDED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF
Civ. No. C02-2006 SBA

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1 INTRODUCTION

2 1. This action seeks review of a biological opinion issued by the National Marine
3 Fisheries Service ("NMFS") on May 31, 2002, following reinitiation of consultation with the
4 U.S. Bureau of Reclamation ("BOR") under Section 7 of the Endangered Species Act ("ESA"),
5 16 U.S.C. § 1536, regarding the operation of the Klamath Project for the years 2002-2012.
6

7 2. The biological opinion ("Klamath BiOp" or "BiOp") addresses the effects of
8 proposed Klamath Project operations on Southern Oregon/Northern California Coast
9 ("SONCC") coho salmon that are listed as threatened under the ESA. The BiOp concludes that
10 the actions proposed by the BOR would jeopardize the continued existence of these fish and
11 adversely modify their designated critical habitat. Accordingly, pursuant to the requirements of
12 ESA section 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A), and 50 C.F.R. § 402.14(h)(3), NMFS
13 proposes in the BiOp a "reasonable and prudent alternative" course of action (the "RPA") that it
14 concludes will avoid both jeopardy to coho salmon and adverse modification of their critical
15 habitat.
16

17 3. This action seeks invalidation of the Klamath BiOp and RPA for at least four
18 reasons. First, NMFS' assessment of why the steps it proposes in the BiOp's RPA will avoid
19 jeopardy relies extensively on speculative and voluntary actions by other federal agencies, as
20 well as state and private entities, in areas unrelated to Klamath operations and beyond the control
21 or authority of the BOR, contrary to the requirements of the ESA and its implementing
22 regulations.
23

24 4. Second, in the RPA, NMFS arbitrarily apportions BOR's responsibility for flow
25 levels to prevent jeopardy at 57% of the flows identified as necessary by NMFS. The RPA
26 rationalizes this figure as reflecting the fraction of irrigated land in the Klamath Basin served by
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1 the Project -- an allocation that bears no relationship to the water consumption from the Project
2 that the BiOp admits is jeopardizing coho and is not supported in the BiOp.

3 5. Third, the RPA does not require BOR to supply its 57% of the long-term river
4 flows for several years, even though NMFS found that the low river flows are now causing
5 jeopardy.

6 6. Fourth, the long-term flow objectives themselves are not based on the best
7 available science.

8 7. For at least these reasons, this action seeks a declaration that the no-jeopardy
9 finding for the RPA, as set forth in the BiOp, violates ESA section 7, 16 U.S.C. § 1536, and is
10 arbitrary, capricious, an abuse of discretion, and not in accordance with law in violation of the
11 Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A).

12 8. This action also seeks an injunction directing NMFS to withdraw the BiOp and
13 RPA, rescind the incidental take statement that accompanies the RPA, and reinitiate consultation
14 with BOR on a schedule set by the Court. This relief is necessary to preserve the status quo, to
15 correct an illegal final agency action, and to prevent unlawful agency action that may cause
16 irreparable harm to the environment and species listed for protection under the ESA.

17 9. For its part, BOR announced on June 3, 2002 that it would operate the Project in
18 accordance with the RPA for the 2002 irrigation season, but that it would not comply with the
19 RPA in future years and wished to reinitiate consultation. Given the timing constraints involved
20 with ESA § 7 consultation, BOR may again attempt to begin the next irrigation season without a
21 valid biological opinion.

22 10. This action also seeks an injunction preventing BOR from relying on the BiOp to
23 satisfy ESA obligations and an injunction requiring BOR to limit irrigation water deliveries from
24

1 the Klamath project that would cause Klamath River flows below Iron Gate Dam to fall below
2 biologically adequate levels before a valid biological opinion is issued.

3 JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT
4

5 11. This action is brought pursuant to the APA, 5 U.S.C. § 706, and the ESA, 16
6 U.S.C. § 1540(g)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 16 U.S.C. §
7 1540(g)(1). As required by the ESA, 16 U.S.C. § 1540(g), plaintiffs provided 60 days' notice of
8 intent to sue on February 22, 2002 to defendant BOR. A copy of the notice is appended as
9 Exhibit A.¹

10 12. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and 16 U.S.C. §
11 1540(g)(3) as a number of the plaintiffs reside in this district and many of the events, omissions,
12 and consequences of the defendant's violations of the law giving rise to the claims occurred or
13 will occur in this district.

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

19 PARTIES
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21 14. The plaintiffs in this action are:

22 A. Pacific Coast Federation of Fishermen's Associations ("PCFFA"), the largest
23 organization of commercial fishermen on the west coast, with member organizations from San
24 Diego to Alaska representing thousands of men and women in the Pacific fleet. Many of
25 PCFFA's members are fishermen whose livelihoods depend upon fish as a natural resource and
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27
28 ¹ TWS, Headwaters, and Representative Thompson are not signatories to the 60-day notice letter
and therefore at this time join only the First, Second, and Third Claims For Relief.

1 who, until recent fisheries closures, generated hundreds of millions of dollars in personal income
2 to the region. The interests of PCFFA members will be impaired if the Klamath Project
3 operations that are the subject of this challenge proceed as planned.

4 B. Institute for Fisheries Resources, a non-profit corporation that constitutes the
5 conservation arm of PCFFA.
6

7 C. Northcoast Environmental Center ("NEC"), a registered California non-profit
8 corporation dedicated to protecting and conserving northern California wildlife, lands, waters,
9 and natural resources. NEC's members for the most part live in northern California.

10 D. Klamath Forest Alliance (the "Alliance"), a non-profit organization formed in
11 1989 under the laws of the State of California with its principal place of business in Etna,
12 California. The Alliance's mission is to protect and promote sustainable ecosystems and
13 communities throughout northern California and southern Oregon. In pursuit of this mission, the
14 Alliance participates in public and private forest management decisions, water quality and water
15 allocation reform, ecosystem and watershed rehabilitation, economic and social redevelopment
16 and related outreach, and education and training programs. The Alliance has approximately 200
17 members who either use or depend directly for their livelihood upon healthy Klamath River
18 ecosystems and fisheries, including coho salmon, to support commercial and recreational
19 activities like fishing and river guiding, or who conduct traditional activities that are associated
20 with the use of fish native to the Klamath River basin for subsistence and ceremonial purposes.
21

22 E. Oregon Natural Resources Council ("ONRC"), a non-profit corporation with
23 6,000 members throughout the state of Oregon and the Pacific Northwest. ONRC and its
24 members are dedicated to protecting and conserving the region's wildlife, lands, waters, and
25 natural resources, including coho salmon and other anadromous fish. ONRC members use the
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1 Klamath River Basin for fishing, hiking, recreation, and other pursuits. The interests of ONRC
2 members will be impaired if the Klamath Project operations that are the subject of this challenge
3 proceed as planned.

4 F. The Wilderness Society (“TWS”), a non-profit national membership organization
5 that devotes its resources to preserving wilderness and wildlife on federal public lands, and
6 fostering an American land ethic. Founded in 1935, TWS is a non-profit organization
7 headquartered in Washington, D.C. with over 300,000 members who reside nationwide. TWS
8 has approximately 10,000 members in its Northwest Region, with many members who
9 frequently visit and enjoy the resources of the Klamath Basin. For many years, TWS has been
10 active in advocating for greater protection of the wildlife and other resources of the Klamath
11 Basin.
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14 G. WaterWatch of Oregon (“WaterWatch”), a non-profit conservation organization
15 incorporated under the laws of Oregon, with approximately 800 members throughout Oregon
16 and the Pacific Northwest. WaterWatch’s mission is to promote water policies and water
17 allocation decisions in Oregon that provide for the quality and quantity of water necessary to
18 support fish, wildlife, recreation, ecological values, public health, and a sound state economy.
19 WaterWatch and its members work to protect anadromous and resident fish populations and
20 water quality in the Klamath River basin, resources that are adversely affected by the agency
21 decisions at issue in this case.
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24 H. Defenders of Wildlife (“Defenders”), a non-profit corporation, with its principal
25 office in Washington, D.C. and field offices in California and Oregon. Defenders has over
26 470,000 members and supporters, including over 100,000 members and supporters in California
27 and Oregon. Defenders’ primary mission is to further the protection of native wildlife and plants
28

1 in their natural communities, including the quality and quantity of western rivers and stream
2 systems. Defenders is actively involved in species protection and restoration efforts throughout
3 the nation and, in particular, in the Oregon Biodiversity Project and California Legacy Project,
4 efforts aimed at assessing, prioritizing, and restoring the States' biodiversity and ecosystems.
5 Through education, advocacy, litigation and other efforts, Defenders works to preserve species
6 and the habitats upon which they depend.

8 I. Headwaters, a non-profit conservation organization with its principal office in
9 Ashland, Oregon. Headwaters is comprised of hundreds of individuals dedicated to the
10 conservation, protection, and restoration of forest ecosystems, clean water, and biological
11 diversity in the Klamath-Siskiyou Bioregion.

13 J. Congressman Mike Thompson (D-Napa Valley), United States Representative for
14 California's First Congressional District. Elected in 1998, his district includes all of Napa, Lake,
15 Mendocino, Humboldt, and Del Norte Counties as well as portions of Solano and Sonoma
16 Counties. He is a member of the House Armed Services Committee and the House Agriculture
17 Committee. Representative Thompson is co-founder and co-chair of the Congressional Wine
18 Caucus, co-founder and co-chair of the Congressional Forest Caucus, and is co-chair of the
19 Congressional Sportsmen's Caucus. He is also a member of the New Democratic Coalition and
20 the Blue Dog Coalition, which is comprised of moderate Democrats committed to bipartisan
21 problem solving. Representative Thompson has worked for many years in a personal and
22 professional capacity with Indian tribes, fishermen, conservationists, the business community,
23 farmers, and others to protect Klamath River fish and water quality. Representative Thompson is
24 a resident of St. Helena, California; he is a lifelong fishermen and duck hunter.

1 15. Plaintiffs and their members use the Klamath River and its tributaries in
2 California and Oregon for recreational, scientific, aesthetic, and commercial purposes. Plaintiffs
3 and their members derive, or, but for the imperiled status of coho salmon and other anadromous
4 fish in the Klamath basin, would derive recreational, scientific, aesthetic, and commercial
5 benefits from the existence in the wild of salmon and steelhead through wildlife observation,
6 study, and photography and recreational and commercial fishing within the Klamath basin and
7 the Pacific Ocean. The past, present, and future enjoyment of these benefits by plaintiffs and
8 their members has been, is being, and will continue to be irreparably harmed by defendants'
9 disregard of their statutory duties and by the unlawful injuries imposed on Klamath River coho
10 salmon by the proposed Klamath Project operations.
11

12 16. The aesthetic, conservation, recreational, commercial, and scientific interests of
13 these groups and their members in the survival and recovery of Klamath River coho salmon, as
14 well as in the compliance with environmental law by federal agencies, have been, are being, and,
15 unless the relief prayed for is granted, will continue to be directly and adversely affected by the
16 failure of defendants to comply with the law.
17

18 17. The defendants in this action are:
19

20 A. United States Bureau of Reclamation, an agency of the United States Department of
21 the Interior that constructs and operates federal water projects throughout the United States. The
22 Bureau has primary management authority over the Klamath Project, the operation of which is at
23 the heart of this action.
24

25 B. National Marine Fisheries Service, an agency of the United States Department of
26 Commerce responsible for administering the provisions of the Endangered Species Act with regard
27 to threatened and endangered marine species, including the species of threatened coho salmon that
28

1 live in the Klamath River basin.

2 BACKGROUND

3 A. The Klamath River's Imperiled Ecosystem

4 18. From Iron Gate Dam in California near the Oregon border, the Klamath River
5 flows uninterrupted to the Pacific Ocean near Klamath, California. Several species of
6 anadromous fish inhabit the Klamath River, its tributaries, and lakes, including chinook, coho,
7 steelhead, and coastal cutthroat trout. Klamath River runs of salmon and steelhead at one time
8 were among the region's mightiest. Southern Oregon/Northern California Coast coho salmon, a
9 population that includes Klamath River coho, was estimated in 1940 to range between 150,000
10 and 400,000 naturally spawning fish annually. See Threatened Status for SONCC ESU of Coho
11 Salmon, 62 Fed. Reg. 24588, 24588 (May 6, 1997) ("Listing Notice"). A multitude of factors,
12 including overutilization, habitat destruction, and hydropower development contributed to drastic
13 declines of all stocks of Klamath salmonids in recent decades. In 1997, NMFS concluded that
14 "coho populations in this ESU are very depressed, currently numbering approximately 10,000
15 naturally produced adults." Id.

16 19. The perilous situation of the SONCC coho salmon prompted NMFS to list the fish
17 under the ESA as threatened in 1997. In listing the coho, NMFS noted that "water diversions"
18 and "water withdrawals" for irrigation were "major activities responsible for the decline of coho
19 salmon in Oregon and California." Id. at 24,592. NMFS further concluded that

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24 Depletion and storage of natural flows have drastically altered natural
25 hydrological cycles, especially in California and southern Oregon rivers and
26 streams. Alteration of streamflows has increased juvenile salmonid mortality for a
27 variety of reasons: Migration delay resulting from insufficient flows or habitat
28 blockages; loss of usable habitat due to dewatering and blockage; stranding of fish
resulting from rapid flow fluctuations; entrainment of juveniles into unscreened or
poorly screened diversions; and increased juvenile mortality resulting from
increased water temperatures. In addition, reduced flows degrade or diminish fish

1 habitats via increased deposition of fine sediments in spawning gravels, decreased
2 recruitment of new spawning gravels, and encroachment of riparian and non-
3 endemic vegetations into spawning and rearing areas.

4 Id. at 24,593. Klamath River steelhead, part of the Klamath Mountains Province steelhead ESU,
5 remain a candidate species for listing under the ESA due to high risk factors. 63 Fed. Reg. 13347
6 (March 19, 1998).

7 20. In originally designating critical habitat for the SONCC coho salmon, NMFS
8 noted that “essential features” of coho habitat include water quantity, water velocity, and water
9 temperature. See Designated Critical Habitat: Central California Coast and Southern
10 Oregon/Northern California Coast Coho Salmon, 64 Fed. Reg. 24,049, 25,059 (May 5, 1999).
11 NMFS further concluded that irrigation water withdrawals and dam operations were “activities
12 that may require special management considerations” for juvenile coho salmon. Id. at 24,059.

13 21. The Klamath River below Iron Gate Dam was included in the designation of
14 critical habitat for SONCC coho salmon, id. at 24,062. On April 30, 2002, in National
15 Association of Home Builders v. Evans, No. 1:00-CV-02799 CKK (D.D.C.), a district court
16 approved a consent decree vacating 19 salmon and steelhead critical habitat designations,
17 including that for SONCC coho.

18 22. Concerned with continued drastic drops in salmon populations in the Klamath and
19 Trinity Rivers, Congress in 1986 enacted the Klamath Basin Fishery Resources Restoration Act
20 (“Klamath Restoration Act”), 16 U.S.C. § 460ss. Among various causes of the declines in
21 salmon, Congress cited “the construction and operations of dams, diversions, and hydroelectric
22 projects” which have contributed to, among other things, “reduced flows . . . which ha[ve]
23 significantly reduced the anadromous fish habitat in the Klamath-Trinity River system.” 16
24 U.S.C. § 460ss(3).

1 B. BOR's Management of Water in the Klamath Basin

2 23. Congress authorized construction and development of the Klamath Project in
3 1905, pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, which is part of the
4 Reclamation Act of 1902, 43 U.S.C. § 372 et seq. Various project facilities were built between
5 1906 and 1966. The Project consists of several major dams, including Link River Dam, Clear
6 Lake Dam, and Gerber Dam, as well as various canals and pumping stations. BOR's project
7 operations determine the level, timing, and rate of water flow in the Klamath River below Iron
8 Gate Dam.
9

10 24. The project provides irrigation water to approximately 200,000 acres of
11 agricultural land each year. The project also supplies water for a system of wildlife refuges
12 operated by the U.S. Fish and Wildlife Service ("FWS"). Four national wildlife refuges – Lower
13 Klamath, Tule Lake, Clear Lake, and Upper Klamath – lie within the boundaries of the project.
14

15 25. Pursuant to a 1956 contract with BOR, PacifiCorp, a private corporation, operates
16 the Project's Link River Dam. PacifiCorp also owns and operates several downstream dams on
17 the Klamath River for hydroelectric power generation, including the Iron Gate Dam in Northern
18 California. These projects are operated pursuant to a Federal Energy Regulatory Commission
19 ("FERC") license that sets certain minimum instream flows at Iron Gate Dam.
20

21 26. Operation of the Klamath Project has a major impact on flows in the Klamath
22 River downstream of Iron Gate Dam and on the habitat of anadromous fish in that river. Since
23 1996, BOR has operated the Klamath Project with annual operating plans that designate
24 minimum flow levels in the Klamath River downstream of Iron Gate Dam. These plans specify
25 flows to be met during particular times of the year in terms of the cubic feet per second ("cfs") of
26 water as measured flowing past Iron Gate Dam.
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1 C. Endangered Species Act Consultation

2 27. The Administrative Procedure Act (“APA”) authorizes courts reviewing agency
3 action to hold unlawful and set aside final agency action, findings, and conclusions that are
4 arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5
5 U.S.C. § 706(2)(A). Biological opinions issued pursuant to Section 7 of the ESA are reviewed
6 under this provision of the APA. See, e.g., Bennett v. Spear, 520 U.S. 154, 175 (1997).
7

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

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

16 16 U.S.C. § 1536(a)(2).

17 29. Section 9 of the ESA prohibits “take” of listed species by anyone, including
18 federal agencies. 16 U.S.C. § 1538. “Take” means to “harass, harm, pursue, hunt, shoot, wound,
19 kill, trap, capture, or collect.” 16 U.S.C. § 1532(19). NMFS has defined “harm” to include
20 “significant habitat modification or degradation which actually kills or injures fish or wildlife by
21 significantly impairing essential behavioral patterns, including breeding, spawning, rearing,
22 migrating, feeding or sheltering.” 50 C.F.R. § 222.102. “Take” by federal agencies is permitted
23 only if the agency receives an Incidental Take Statement (“ITS”) pursuant to Section 7(b)(4),
24 upon completion of formal consultation. 16 U.S.C. § 1536(b)(4).

25 30. As part of any incidental take statement, NMFS specify “the impact of such
26 incidental taking on the species” -- quantifying by amount or extent the allowed incidental take.

27 16 U.S.C. § 1536(b)(4)(C)(i). Such a statement of impact makes explicit the basis for NMFS’
28

1 required finding that an incidental take will not jeopardize the species, 16 U.S.C. § 1536(b)(4),
2 and it provides a check on the adequacy of NMFS' "reasonable and prudent measures . . .
3 necessary or appropriate to minimize such impact," 16 U.S.C. § 1536(b)(4)(C)(ii).
4

5 31. Section 7 of the Act also establishes an interagency consultation process to assist
6 federal agencies in complying with their duty to avoid jeopardy to listed species or destruction or
7 adverse modification of critical habitat. Under this process, a federal agency proposing an action
8 that "may affect" a listed species, including salmon and steelhead, must prepare and provide to
9 the appropriate expert agency, here NMFS, a "biological assessment" of the effects of the
10 proposed action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).
11

12 32. Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency
13 initiates consultation on an action under ESA § 7(a)(2), it "shall not make any irreversible or
14 irretrievable commitment of resources with respect to the agency action which has the effect of
15 foreclosing the formulation or implementation of any reasonable and prudent alternative
16 measures which would not violate subsection (a)(2) of this section." The purpose of ESA § 7(d)
17 is to maintain the status quo pending the completion of interagency consultation.
18

19 33. Alternatively, where the agency proposing the action determines that an action
20 "may affect" protected salmon but is "not likely to adversely affect" the species, it may attempt
21 "informal consultation" with NMFS. 50 C.F.R. §§ 402.13, 402.14(b)(1). An agency's "not
22 likely to adversely affect" determination becomes final for consultation purposes only when
23 NMFS concurs in writing in the determination. Id.
24

25 34. "Informal consultation" is defined by the ESA's implementing regulations as "an
26 optional process that includes all discussions, correspondence, etc., between the Service and the
27 Federal agency or the designated non-Federal representative prior to formal consultation, if
28

1 required.” 50 C.F.R. § 402.02. Because informal consultation may be conducted only “prior to
2 formal consultation,” an action cannot undergo both formal and informal consultation nor can a
3 single large action that may affect a species be segmented into smaller actions in order to justify
4 a “not likely to adversely affect” conclusion.

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6 35. For those actions that may adversely affect a species, NMFS must review all
7 information provided by the action agency in the biological assessment, as well as any other
8 relevant information, to determine whether the proposed action is likely to jeopardize a listed
9 species or destroy or adversely modify its designated critical habitat. 50 C.F.R. § 402.14(h)(3).
10 This determination is set forth in a biological opinion from NMFS. *Id.*; 16 U.S.C. §
11 1536(b)(3)(A).
12

13 36. In formulating its biological opinion, NMFS must evaluate the “effects of the
14 action” together with “cumulative effects” on the listed species. 50 C.F.R. §§ 402.14(g)(3)-(4).
15 This multi-step analysis requires NMFS to consider:

16 a. the direct, indirect, interrelated, and interdependent effects of the proposed
17 action, 50 C.F.R. § 402.02;

18 b. the “environmental baseline” to which the proposed action will be added.
19 This baseline includes “all past and present impacts of all Federal, State, or private actions
20 and other human activities in the action area; the anticipated impacts of all proposed Federal
21 projects in the action area that have already undergone formal or early section 7
22 consultation; and the impact of State or private actions which are contemporaneous with the
23 consultation in progress,” 50 C.F.R. § 402.02; and,
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26 c. any “future State or private activities, not involving Federal activities, that
27 are reasonably certain to occur within the action area of the Federal action subject to
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1 consultation,” 50 C.F.R. § 402.02.

2 37. The regulations do not, however, permit NMFS to consider the effects of future
3 Federal actions when determining whether a proposed Federal action will jeopardize a listed
4 species. Id.; see also 51 Fed. Reg. 19933 (June 3, 1986) (Interagency Cooperation – Endangered
5 Species Act of 1973, as Amended; Final Rule) (“Since all future Federal actions will at some
6 point be subject to the section 7 consultation process pursuant to these regulations, their effects
7 on a particular species will be considered at that time and will not be included in the cumulative
8 effects analysis.”). Such future Federal actions also are not properly a part of the environmental
9 baseline since they have not yet occurred.
10

11 38. If, based upon an analysis of these factors, NMFS concludes that the proposed
12 action is likely to jeopardize a listed species, or destroy or adversely modify its critical habitat,
13 NMFS must identify and describe any reasonable and prudent alternative (“RPA”) to the
14 proposed action that it believes would avoid jeopardy and adverse modification. 16 U.S.C. §
15 1536(b)(3)(B). An RPA may only consist of measures that are within the scope of the action
16 agency’s legal authority and jurisdiction, that can be implemented consistent with the purpose of
17 the proposed action, and that will avoid jeopardizing the continued existence of the listed
18 species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.02. The effects of an RPA must be
19 analyzed under the same Section 7 framework described above as an action proposed by an
20 action agency.
21

22 39. If NMFS reaches a no-jeopardy/no-adverse modification finding for either a
23 proposed action or an RPA, it may also issue an incidental take statement for any take of a listed
24 species that is likely to occur as a consequence of those actions that avoid jeopardy and adverse
25 modification. 50 C.F.R. § 402.14(I). Take of listed species that is consistent with an incidental
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1 take statement is not subject to the prohibition against take in section 9 of the ESA. 16 U.S.C. §
2 1536(b)(4).

3 D. BOR's Past Consultation Efforts

4 40. In 1999, BOR consulted with NMFS regarding the impacts of the 1999
5 Operations Plan on listed coho salmon under Section 7(a)(2) of the ESA. The biological opinion
6 that NMFS issued in July of 1999 ("1999 BiOp") found that operation of the Klamath Project,
7 and its associated water diversions, withdrawals, temperature impacts and pollutant loadings,
8 would adversely affect listed coho salmon. The 1999 BiOp described how inadequate flows and
9 sudden changes in flow level result in stranding of anadromous fish and the destruction of usable
10 habitat. The 1999 BiOp also concluded that higher flows in the Klamath River are associated
11 with increased juvenile salmon survival. Nevertheless, NMFS found that the Project was not
12 likely to jeopardize coho salmon.
13
14

15 41. In 2000, BOR's Operation Plan again specified minimum flow levels that varied
16 on a monthly or bi-weekly basis, but BOR never completed Endangered Species Act
17 consultation. BOR's failure to follow the law led this Court to rule that "[d]espite the weight
18 which the Ninth Circuit repeatedly has placed upon the procedural requirements of the ESA, it is
19 clear that the Bureau of Reclamation failed to comply with these requirements before
20 implementing its 2000 Operations Plan for the Klamath Project." Pacific Coast Fed'n of
21 Fishermen's Ass'ns v. United States Bureau of Reclamation, 138 F. Supp.2d 1228, 1242-43
22 (N.D. Cal. 2001). This Court issued an injunction requiring the BOR to curtail water deliveries
23 that would cause river levels to drop below specific flows at Iron Gate Dam in accordance with
24 the best available science until a valid, formal ESA § 7(a)(2) consultation was completed. Id. at
25 1249-50.
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1 42. On April 6, 2001, NMFS issued a formal biological opinion on the impacts of the
2 Klamath Project for the 2001 season. This biological opinion found that the proposed operation
3 of the Klamath Project was likely to jeopardize the continued existence of Klamath River coho
4 salmon and adversely modify their critical habitat. Based on this jeopardy finding, NMFS set
5 forth a reasonable and prudent alternative for Project operation with specific monthly flows that
6 it found were the minimum necessary to prevent jeopardy to the coho salmon in a near-record
7 drought year. This biological opinion expired by its terms on March 31, 2002.

9 43. BOR issued its Final Biological Assessment: "The Effects of Proposed Actions
10 Related to Klamath Project Operation (April 1, 2002 - March 31, 2012) on Federally-Listed
11 Threatened and Endangered Species" on February 25, 2002. In the Biological Assessment, BOR
12 determined its proposed plan of action "may affect" listed coho salmon. *Id.* at 93. BOR
13 submitted the biological assessment to NMFS and initiated formal ESA § 7(a)(2) consultation.
14

15 44. As the irrigation season at the Klamath Project begins on April 1 of each year,
16 BOR faced a situation where it would, once again, not have completed formal consultation
17 before commencing project operations. Rather than wait for the ongoing formal consultation
18 process for the entire operations plan to conclude, BOR asked NMFS to informally concur in its
19 "not likely to adversely affect" determination for "Below Average" water year Project flows
20 from April 1 - May 31, 2002 only.
21

22 45. BOR asked for NMFS' concurrence on March 27, 2002, and one day later, NMFS
23 issued its NLAA concurrence letter, stating that the agency "currently has no basis for
24 contradicting your determination."
25

26 46. Plaintiffs PCFFA *et al.* challenged BOR's failure to complete consultation prior to
27 proceeding with the 2002 operations and challenged NMFS' NLAA concurrence letter. After a
28

1 hearing on May 3, 2002, this Court denied plaintiffs' motion for temporary restraining order,
2 finding that although plaintiffs were likely to succeed on the merits, they had not established the
3 requisite irreparable harm.

4 E. NMFS' Ten-Year Biological Opinion

5
6 47. On May 31, 2002, NMFS issued its Biological Opinion: Klamath Project
7 Operations, June 1, 2002 - March 31, 2012. NMFS found the operation of the Klamath Project
8 as proposed is likely to jeopardize the continued existence of SONCC coho salmon and to
9 adversely modify their designated critical habitat.

10 48. After finding jeopardy, NMFS identified and described the reasonable and
11 prudent alternative ("RPA") to the proposed action that it believed would avoid jeopardy and
12 adverse modification. 16 U.S.C. § 1536(b)(3)(B).

13
14 49. The RPA has five major components, including specific water management
15 measures over the ten-year period, a water bank and water supply enhancement program for
16 flows in the Klamath River below Iron Gate dam, a long-term flow target, an inter-governmental
17 task force, and an inter-governmental research science panel.

18
19 50. In arriving at the final RPA requirements, NMFS had first proposed flows
20 necessary to prevent jeopardy to the species and prevent adverse modification of critical habitat.
21 BOR apparently rejected those flows "because they would result in deficiencies in deliveries to
22 project contractors of such a magnitude and frequency that the RPA flows could not be
23 considered reasonably to allow Reclamation to operate in a manner consistent with the intended
24 purpose of the project." BiOp at 54.
25
26
27
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1 51. The in-river flows identified by NMFS as necessary to prevent jeopardy are found
2 at Table 9. BiOp. at 70. These flows are less than those identified by Hardy and Addley,
3 Evaluation of Interim Instream Flow Needs in the Klamath River, Phase II (Nov. 21, 2001).

4 52. While the in-river flows identified by NMFS are less than that identified in Hardy
5 and Addley, instead of devising a final RPA that required those flows below Iron Gate dam,
6 NMFS' RPA requires BOR to provide only 57% of the flows, even though "NMFS pointed out
7 that establishing flows of only 57% of the RPA flows may not avoid jeopardy over the 10-year
8 period of proposed Project operations, and therefore would not constitute a viable RPA." BiOp
9 at 55.
10

11 53. NMFS' acceptance of BOR's proposal to base its share of the required flows on
12 the percent of acres within the Klamath Basin irrigated by Project contractors ignores the key
13 factor of water consumption and is not supported in the BiOp. BiOp at 55. Moreover, NMFS
14 gives no support in the BiOp for the calculation of irrigated acres.
15

16 54. NMFS anticipates that the remaining 43% of the flows it believes are needed for
17 salmon survival will come from unknown and voluntary sources to be identified sometime in the
18 future through a multi-agency task force. BiOp at 55.
19

20 55. At the same time, the RPA does not require BOR to supply even its 57% of the
21 long-term river flows for several years, until at least 2006, even though NMFS found that
22 operation of the Klamath Project is currently causing jeopardy to the species.
23

24 56. In its incidental take statement for the RPA, NMFS found that "some level of
25 incidental take [is] to occur due to implementation of some of the actions outlined in the
26 reasonable and prudent alternative." BiOp at 71. However, NMFS failed to quantify, either
27 numerically or by extent, the incidental take permitted under the Biological Opinion. Moreover,
28

1 NMFS failed to evaluate whether this unspecified level of take, combined with already-permitted
2 levels of take for SONCC coho, would jeopardize the continued existence of the species.

3 57. The only reasonable and prudent measures specified to minimize the likelihood of
4 take from ongoing operation of the Project are collection and analysis of data and further studies
5 to identify additional water supplies in the Klamath Basin.
6

7 58. Despite the failure to quantify take, NMFS found that reinitiation of consultation
8 was required if the amount or extent of incidental take is exceeded. BiOp at 74.

9 F. Recent Events

10 59. At the end of April 2002, as BOR's irrigation deliveries dropped Klamath River
11 flows, California Fish and Game and Tribal staff rushed to rescue chinook and coho fry that were
12 stranded in disconnected channels. An unknown number of chinook and coho fry were not
13 rescued and died.
14

15 60. Three days after release of the Klamath BiOp, BOR announced that it would
16 operate the Project in accordance with the RPA for the 2002 irrigation season, but that it would
17 not comply with the RPA in future years. Specifically, BOR rejected NMFS' RPA with respect
18 to any requirement to find the unidentified, and yet necessary, 43% of Klamath River flows.

19 Letter to Rodney R. McInnis, NMFS Acting Regional Administrator, from Kirk Rodgers, BOR
20 Regional Director (June 3, 2002).
21

22 61. Contrary to the requirements of the Klamath BiOp, which mandates that BOR
23 provide flows in 2002 "for a below average water year," BiOp at 59, in July 2002, BOR
24 unilaterally reclassified the water year as "Dry" and further reduced the flows in the Klamath
25 River below Iron Gate dam.
26
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- 1 • The RPA does not require BOR to supply its 57% of the long-term river flows for
- 2 several years, even though NMFS found that the low river flows are currently
- 3 causing jeopardy.
- 4
- 5 • The long-term flow objectives themselves are not based on the best available science.

6 64. NMFS' actions and omissions are arbitrary, capricious, an abuse of discretion,
7 and otherwise not in accordance with the ESA and are reviewable under the APA, 5 U.S.C. §§
8 701-706.

9
10 SECOND CLAIM FOR RELIEF

11 Violation of the ESA and APA by NMFS
12 For Failing to Quantify Incidental Take

13 65. Section 7 requires that, as part of any incidental take statement, NMFS specify
14 "the impact of such incidental taking on the species." 16 U.S.C. § 1536(b)(4)(C)(i). Such a
15 statement of impact makes explicit the basis for NMFS' required finding that an incidental take
16 will not jeopardize the species. 16 U.S.C. § 1536(b)(4). Moreover, it provides a check on the
17 adequacy of NMFS' "reasonable and prudent measures . . . necessary or appropriate to minimize
18 such impact," 16 U.S.C. § 1536(b)(4)(C)(ii). By furnishing an estimate of the anticipated impact
19 of the take on a species, it provides a concrete measure of the extent to which that take has been
20 minimized and mitigated. Additionally, the requirement to specify the amount of incidental take
21 on the species provides a trigger for reinitiation of consultation.

22
23 66. NMFS violated § 7(b)(4) of the ESA, 16 U.S.C. § 1536(b)(4), by issuing an
24 incidental take statement that fails to quantify the amount of incidental take of threatened
25 Klamath River coho salmon and fails to evaluate whether this unspecified level of take,
26 combined with already-permitted levels of take for SONCC coho, would jeopardize the
27 continued existence of the species.
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FOURTH CLAIM FOR RELIEF

Violation of the ESA and APA by BOR
For Proceeding With Agency Action Without Completion of Adequate Consultation

72. Pursuant to § 7(a)(2) of the ESA, every federal agency shall “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the designated critical] habitat” of such species. 16 U.S.C. § 1536(a)(2).

73. BOR has not obtained a valid, completed § 7(a)(2) consultation for the Klamath Project. The Project is an “action” under the terms of the ESA.

74. BOR is violating § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations by failing to ensure that the Klamath Project is not likely to jeopardize the continued existence of threatened SONCC coho salmon and carrying out activities that jeopardize SONCC coho salmon.

75. BOR’s Klamath Project operation is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the ESA and is reviewable under the ESA, 16 U.S.C. § 1540(g)(1) and the APA, 5 U.S.C. §§ 701-706.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

- A. Adjudge and declare that NMFS has violated ESA section 7 and its implementing regulations by making a no-jeopardy finding in the Klamath BiOp for the RPA and issuing an incidental take statement that are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;
- B. Enjoin NMFS to withdraw the BiOp, the RPA, and the accompanying incidental

1 take statement, notify BOR of these withdrawals, and reinitiate consultation with
2 BOR in order to prepare a biological opinion for Klamath Project operations and any
3 related actions that complies with the requirements of the ESA, on a schedule to be
4 set by the Court;

5
6 C. Order BOR to limit irrigation water deliveries from the federal Klamath Project in
7 order to implement an interim flow regime in the Klamath River below Iron Gate
8 Dam that will protect anadromous fish pending BOR's full compliance with its
9 statutory obligations under ESA;

10
11 D. Grant such restraining orders and/or preliminary and permanent injunctive relief as
12 plaintiffs may from time to time request to ensure that the Klamath River
13 anadromous fishery does not continue to suffer irreparable harm pending resolution
14 of the merits of this action;

15
16 E. Award plaintiffs their reasonable fees, expenses, costs, and disbursements, including
17 attorneys' fees associated with this litigation under the citizen suit provision of the
18 ESA, 16 U.S.C. § 1540(g)(4) and the Equal Access to Justice Act 28 U.S.C. § 2412.

19
20 F. Grant plaintiffs such further and additional relief as the Court may deem just and
21 proper.

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1 DATED this 25th day of September 2002.

2 Respectfully submitted,

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4 

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