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21 UNITED STATES DISTRICT COURT
22 FOR THE NORTHERN DISTRICT OF CALIFORNIA
23 OAKLAND DIVISION

24 PACIFIC COAST FEDERATION OF) Civ. No.
25 FISHERMEN’S ASSOCIATIONS, INSTITUTE)
26 FOR FISHERIES RESOURCES,) COMPLAINT FOR DECLARATORY
27 NORTHCOAST ENVIRONMENTAL CENTER,) AND INJUNCTIVE RELIEF
28 KLAMATH FOREST ALLIANCE, OREGON)
29 NATURAL RESOURCES COUNCIL, THE) Endangered Species Act, 16 U.S.C. § 1531
30 WILDERNESS SOCIETY, WATERWATCH OF) et seq. and Administrative Procedure Act, 5
31 OREGON, and DEFENDERS OF WILDLIFE,) U.S.C. § 551 et seq.

32 Plaintiffs,)

33 v.)

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

36 Defendants.)
37)
38)

1 INTRODUCTION

2 1. This is an action for declaratory judgment and injunctive relief. It arises under
3 and asserts violations of the Endangered Species Act (“ESA”) 16 U.S.C. § 1531 et seq. and the
4 Administrative Procedure Act (“APA”), 5 U.S.C. § 551 et seq.
5

6 2. In adopting the first two months of its six month 2002 Klamath Project
7 operations, the Bureau of Reclamation (“BOR”) set flow levels in the Klamath River that are
8 inadequate to protect and sustain coho salmon listed under the ESA as well as other anadromous
9 fish. By going forward with flow reduction in April and May, BOR failed to complete formal
10 consultation as required by ESA § 7(a)(2), and the agency irretrievably committed resources
11 pending completion of consultation in violation of Section 7(d). This action challenges the
12 failure of the BOR to complete formal ESA § 7(a)(2) consultation over its 2002 operations of the
13 Klamath Project and the effects of those project operations on threatened Klamath River coho.
14

15 3. With respect to BOR’s failure to complete consultation prior to proceeding with
16 its 2002 operations, this action seeks (1) a declaration that BOR has violated Section 7(a)(2) of
17 the ESA by failing to complete formal consultation with NMFS on the impacts of the plan to
18 listed fish; (2) a declaration that current operations constitute an irreversible and irretrievable
19 commitment of resources in violation of Section 7(d); and (3) an injunction requiring the BOR to
20 limit irrigation water deliveries from the federal Klamath project that would cause Klamath
21 River flows below Iron Gate Dam to fall below biologically adequate levels before a valid
22 biological opinion is issued.
23

24 4. This action also challenges a “not likely to adversely affect” concurrence letter
25 issued by the National Marine Fisheries Service (“NMFS”) on March 28, 2002 for the United
26 States Bureau of Reclamation’s operation of the Klamath Project to provide “Below Average
27 Water Year” flows at Iron Gate Dam through May 31, 2002. The informal concurrence letter,
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1 allegedly issued pursuant to ESA § 7(a)(2), concludes that the April 1 - May 31, 2002 proposed
2 flows are “not likely to adversely affect” (“NLAA”) threatened Southern Oregon/Northern
3 California Coast coho salmon in the Klamath River. This action challenges the informal
4 concurrence letter because it runs counter to the evidence before the agency and prior
5 determinations made by the agency; it fails to independently assess the project’s impact on
6 designated critical habitat; it fails to rely on the best available science; and it invalidly segments
7 and curtails the ongoing – and as yet incomplete – formal ESA consultation.
8

9 5. This action seeks a declaration that the informal concurrence letter is arbitrary,
10 capricious, and contrary to the ESA’s consultation requirements, 16 U.S.C. § 1536(a)(2), in
11 violation of the APA, 5 U.S.C. § 706(2)(A). This action also seeks an injunction directing
12 NMFS to withdraw the informal concurrence letter.
13

14 JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

15 6. This action is brought pursuant to the APA, 5 U.S.C. § 706, and the ESA, 16
16 U.S.C. § 1540(g)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 16 U.S.C. §
17 1540(g)(1). As required by the ESA, 16 U.S.C. § 1540(g), plaintiffs provided 60 days’ notice of
18 intent to sue on January 23, 2002 to defendant BOR. A copy of the notice is appended as Exhibit
19 A.
20

21 7. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and 16 U.S.C. §
22 1540(g)(3) as a number of the plaintiffs reside in this district and many of the events, omissions,
23 and consequences of the defendant’s violations of the law giving rise to the claims occurred or
24 will occur in this district.
25

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

3
4 PARTIES

5 9. The plaintiffs in this action are:

6 A. Pacific Coast Federation of Fishermen's Associations ("PCFFA"), the largest
7 organization of commercial fishermen on the west coast, with member organizations from San
8 Diego to Alaska representing thousands of men and women in the Pacific fleet. Many of
9 PCFFA's members are fishermen whose livelihoods depend upon fish as a natural resource and
10 who, until recent fisheries closures, generated hundreds of millions of dollars in personal income
11 to the region. The interests of PCFFA members will be impaired if the Klamath Project
12 operations that are the subject of this challenge proceed as planned.

13
14 B. Institute for Fisheries Resources, a non-profit corporation that constitutes the
15 conservation arm of PCFFA.

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

19
20 D. Klamath Forest Alliance (the "Alliance"), a non-profit organization formed in 1989
21 under the laws of the State of California with its principal place of business in Etna, California. The
22 Alliance's mission is to protect and promote sustainable ecosystems and communities throughout
23 northern California and southern Oregon. In pursuit of this mission, the Alliance participates in
24 public and private forest management decisions, water quality and water allocation reform,
25 ecosystem and watershed rehabilitation, economic and social redevelopment and related outreach,
26 and education and training programs. The Alliance has approximately 200 members who either use
27
28 or depend directly for their livelihood upon healthy Klamath River ecosystems and fisheries,

1 including coho salmon, to support commercial and recreational activities like fishing and river
2 guiding, or who conduct traditional activities that are associated with the use of fish native to the
3 Klamath River basin for subsistence and ceremonial purposes.

4 E. Oregon Natural Resources Council (“ONRC”), a non-profit corporation with 6,000
5 members throughout the state of Oregon and the Pacific Northwest. ONRC and its members are
6 dedicated to protecting and conserving the region’s wildlife, lands, waters, and natural resources,
7 including coho salmon and other anadromous fish. ONRC members use the Klamath River Basin
8 for fishing, hiking, recreation, and other pursuits. The interests of ONRC members will be impaired
9 if the Klamath Project operations that are the subject of this challenge proceed as planned.
10

11 F. The Wilderness Society (“TWS”), a non-profit national membership organization
12 that devotes its resources to preserving wilderness and wildlife on federal public lands, and fostering
13 an American land ethic. Founded in 1935, TWS is a non-profit organization headquartered in
14 Washington, D.C. with over 300,000 members who reside nationwide. TWS has approximately
15 10,000 members in its Northwest Region, with many members who frequently visit and enjoy the
16 resources of the Klamath Basin. For many years, TWS has been active in advocating for greater
17 protection of the wildlife and other resources of the Klamath Basin.
18

19 G. WaterWatch of Oregon (“WaterWatch”), a non-profit conservation organization
20 incorporated under the laws of Oregon, with approximately 800 members throughout Oregon and
21 the Pacific Northwest. WaterWatch’s mission is to promote water policies and water allocation
22 decisions in Oregon that provide for the quality and quantity of water necessary to support fish,
23 wildlife, recreation, ecological values, public health, and a sound state economy. WaterWatch and
24 its members work to protect anadromous and resident fish populations and water quality in the
25 Klamath River basin, resources that are adversely affected by the agency decisions at issue in this
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1 case.

2 H. Defenders of Wildlife (“Defenders”), a non-profit corporation, with its principal
3 office in Washington, D.C. and field offices in California and Oregon. Defenders has over 470,000
4 members and supporters, including over 100,000 members and supporters in California and Oregon.
5 Defenders’ primary mission is to further the protection of native wildlife and plants in their natural
6 communities, including the quality and quantity of western rivers and stream systems. Defenders is
7 actively involved in species protection and restoration efforts throughout the nation and, in
8 particular, in the Oregon Biodiversity Project and California Legacy Project, efforts aimed at
9 assessing, prioritizing, and restoring the States’ biodiversity and ecosystems. Through education,
10 advocacy, litigation and other efforts, Defenders works to preserve species and the habitats upon
11 which they depend.¹

14 10. Plaintiffs and their members use the Klamath River and its tributaries in
15 California and Oregon for recreational, scientific, aesthetic, and commercial purposes. Plaintiffs
16 and their members derive, or, but for the imperiled status of coho salmon and other anadromous
17 fish in the Klamath basin, would derive recreational, scientific, aesthetic, and commercial
18 benefits from the existence in the wild of salmon and steelhead through wildlife observation,
19 study, and photography and recreational and commercial fishing within the Klamath basin and
20 the Pacific Ocean. The past, present, and future enjoyment of these benefits by plaintiffs and
21 their members has been, is being, and will continue to be irreparably harmed by defendants’
22 disregard of their statutory duties and by the unlawful injuries imposed on Klamath River coho
23 salmon by the proposed Klamath Project operations.

27 ¹ Defenders of Wildlife challenges only the actions of the National Marine Fisheries Service as
28 set forth in the Third, Fourth, and Fifth Claims For Relief.

1 24588 (May 6, 1997) (“Listing Notice”). A multitude of factors, including overutilization,
2 habitat destruction, and hydropower development contributed to drastic declines of all stocks of
3 Klamath salmonids in recent decades. In 1997, NMFS concluded that “coho populations in this
4 ESU are very depressed, currently numbering approximately 10,000 naturally produced adults.”

5 Id.

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7 14. The perilous situation of the SO/NCC Coho salmon prompted NMFS to list the
8 fish under the ESA as threatened in 1997. In listing the coho, NMFS noted that “water
9 diversions” and “water withdrawals” for irrigation were “major activities responsible for the
10 decline of coho salmon in Oregon and California.” Id. at 24,592. NMFS further concluded that

11
12 Depletion and storage of natural flows have drastically altered natural
13 hydrological cycles, especially in California and southern Oregon rivers and
14 streams. Alteration of streamflows has increased juvenile salmonid mortality for a
15 variety of reasons: Migration delay resulting from insufficient flows or habitat
16 blockages; loss of usable habitat due to dewatering and blockage; stranding of fish
17 resulting from rapid flow fluctuations; entrainment of juveniles into unscreened or
18 poorly screened diversions; and increased juvenile mortality resulting from
increased water temperatures. In addition, reduced flows degrade or diminish fish
habitats via increased deposition of fine sediments in spawning gravels, decreased
recruitment of new spawning gravels, and encroachment of riparian and non-
endemic vegetations into spawning and rearing areas.

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

22
23 15. In designating critical habitat for the SO/NCC coho salmon, NMFS noted that
24 “essential features” of coho habitat include water quantity, water velocity, and water
25 temperature. See Designated Critical Habitat: Central California Coast and Southern
26 Oregon/Northern California Coast Coho Salmon, 64 Fed. Reg. 24,049, 25,059 (May 5, 1999).
27 NMFS further concluded that irrigation water withdrawals and dam operations were “activities
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1 that may require special management considerations” for juvenile coho salmon. *Id.* at 24,059.
2 The Klamath River below Iron Gate Dam is included in the designation of critical habitat for
3 SO/NCC coho salmon. *Id.* at 24,062.

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

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13 B. BOR’s Management of Water in the Klamath Basin

14 17. Congress authorized construction and development of the Klamath Project in
15 1905, pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, which is part of the
16 Reclamation Act of 1902, 43 U.S.C. § 372 *et seq.* Various project facilities were built between
17 1906 and 1966. The Project consists of several major dams, including Link River Dam, Clear
18 Lake Dam, and Gerber Dam, as well as various canals and pumping stations. BOR’s project
19 operations determine the level, timing, and rate of water flow in the Klamath River below Iron
20 Gate Dam.
21

22 18. The project provides irrigation water to approximately 200,000 acres of
23 agricultural land each year. The project also supplies water for a system of wildlife refuges
24 operated by the U.S. Fish and Wildlife Service (“FWS”). Four national wildlife refuges – Lower
25 Klamath, Tule Lake, Clear Lake, and Upper Klamath – lie within the boundaries of the project.
26

27 19. Pursuant to a 1956 contract with the BOR, PacifiCorp, a private corporation,
28 operates the Project’s Link River Dam. PacifiCorp also owns and operates several downstream

1 dams on the Klamath River for hydroelectric power generation, including the Iron Gate Dam in
2 Northern California. These projects are operated pursuant to a Federal Energy Regulatory
3 Commission (“FERC”) license that sets certain minimum instream flows at Iron Gate Dam.

4
5 20. Operation of the Klamath Project has a major impact on flows in the Klamath
6 River downstream of Iron Gate Dam and on the habitat of anadromous fish in that river. Since
7 1996, BOR has operated the Klamath Project with annual operating plans that designate
8 minimum flow levels in the Klamath River downstream of Iron Gate Dam. These plans specify
9 flows to be met during particular times of the year in terms of the cubic feet per second (“cfs”) of
10 water as measured flowing past Iron Gate Dam.

11
12 C. Endangered Species Act Consultation

13 21. Under the Endangered Species Act, 16 U.S.C. § 1536(a)(2), “[e]ach federal
14 agency shall, in consultation with and with the assistance of the Secretary, insure that any action
15 authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued
16 existence of any endangered species or threatened species . . .” or “result in the destruction or
17 adverse modification of [the designated critical] habitat” of a listed species.

18
19 22. Federal agencies must consult with NMFS whenever their actions may affect a
20 listed salmon species or its designated critical habitat. 50 C.F.R. § 402.14. NMFS must then
21 issue a biological opinion, considering the best available science, that determines if the action is
22 likely to jeopardize the species or result in adverse modification of its critical habitat. 16 U.S.C.
23 §§ 1536(a)(2), (b)(3)(A); 50 C.F.R. §§ 402.14(g), (h). If so, NMFS shall suggest, if possible,
24 reasonable and prudent alternatives that it believes will avoid jeopardy and adverse modification.
25 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.12(h)(3).

26
27 23. Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency
28 initiates consultation on an action under ESA § 7(a)(2), it “shall not make any irreversible or

1 irretrievable commitment of resources with respect to the agency action which has the effect of
2 foreclosing the formulation or implementation of any reasonable and prudent alternative
3 measures which would not violate subsection (a)(2) of this section.” The purpose of ESA § 7(d)
4 is to maintain the status quo pending the completion of interagency consultation.
5

6 24. Alternatively, where the agency proposing the action determines that an action
7 “may affect” protected salmon but is “not likely to adversely affect” the species, it may attempt
8 “informal consultation” with NMFS. 50 C.F.R. §§ 402.13, 402.14(b)(1). An agency’s “not
9 likely to adversely affect” determination becomes final for consultation purposes only when
10 NMFS concurs in writing in the determination. Id.

11
12 25. “Informal consultation” defined by the ESA’s implementing regulations as “an
13 optional process that includes all discussions, correspondence, etc., between the Service and the
14 Federal agency or the designated non-Federal representative prior to formal consultation, if
15 required.” 50 C.F.R. § 402.02. Because informal consultation may be conducted only “prior to
16 formal consultation,” an action cannot undergo both formal and informal consultation nor can a
17 single large action that may affect a species be segmented into smaller actions in order to justify
18 a “not likely to adversely affect” conclusion.

19
20 D. BOR’s Past Consultation Efforts

21 26. In 1999, BOR consulted with NMFS regarding the impacts of the 1999
22 Operations Plan on listed coho salmon under Section 7(a)(2) of the ESA. The biological opinion
23 that NMFS issued in July of 1999 (“1999 BiOp”) found that operation of the Klamath Project,
24 and its associated water diversions, withdrawals, temperature impacts and pollutant loadings,
25 would adversely affect listed coho salmon. The 1999 BiOp described how inadequate flows and
26 sudden changes in flow level result in stranding of anadromous fish and the destruction of usable
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28

1 habitat. The 1999 BiOp also concluded that higher flows in the Klamath River are associated
2 with increased juvenile salmon survival.

3 27. In 2000, BOR's Operation Plan again specified minimum flow levels that varied
4 on a monthly or bi-weekly basis, but BOR never completed Endangered Species Act
5 consultation. BOR's failure to follow the law led this Court to rule that "[d]espite the weight
6 which the Ninth Circuit repeatedly has placed upon the procedural requirements of the ESA, it is
7 clear that the Bureau of Reclamation failed to comply with these requirements before
8 implementing its 2000 Operations Plan for the Klamath Project." Pacific Coast Fed'n of
9 Fishermen's Ass'ns v. United States Bureau of Reclamation, 138 F. Supp.2d 1228, 1242-43
10 (N.D. Cal. 2001). This Court issued an injunction requiring the BOR to curtail water deliveries
11 that would cause river levels to drop below specific flows at Iron Gate Dam in accordance with
12 the best available science until a valid, formal ESA § 7(a)(2) consultation was completed. Id. at
13 1249-50.

14 28. On April 6, 2001, NMFS issued a formal biological opinion on the 2001 impacts
15 of the Klamath Project. This biological opinion found that the proposed operation of the
16 Klamath Project was likely to jeopardize the continued existence of Klamath River coho salmon
17 and adversely modify their critical habitat. Based on this jeopardy finding, NMFS set forth a
18 reasonable and prudent alternative for Project operation with specific monthly flows that it found
19 were the minimum necessary to prevent jeopardy to the coho salmon in a near-record drought
20 year. This biological opinion expired by its terms on March 31, 2002.

21 E. BOR's 2002 Operations

22 29. Although it has not yet issued an final Operation Plan for 2002, BOR issued its
23 Final Biological Assessment: "The Effects of Proposed Actions Related to Klamath Project
24 Operation (April 1, 2002 - March 31, 2012) on Federally-Listed Threatened and Endangered

1 Species” on February 25, 2002. In the Biological Assessment, BOR determined its proposed
2 plan of action “may affect” listed coho salmon. Id. at 93.

3 30. BOR submitted the biological assessment to NMFS and initiated formal ESA §
4 7(a)(2) consultation.

5
6 31. As outlined in the Biological Assessment, BOR’s 2002 proposed operations plan
7 specifies minimum flow levels measured at Iron Gate Dam that vary on a monthly or bi-weekly
8 basis. The National Resource Conservation Service’s April forecast for the April through
9 September 2002 inflow into Upper Klamath Lake was 333 thousand acre feet at a 70%
10 exceedance level. The 70% exceedance value means that there is a 70% probability that the
11 flows will be higher than predicted. That forecast places the upcoming year as a BOR-classified
12 “Below Average” water year. The spring flow levels proposed in the 2002 operations plan for
13 April 1 – June 30, 2002 for a “Below Average” water year are:

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April 1-15	1742 cfs
April 16-30	1347 cfs
May 1-15	1021 cfs
May 16-31	1043 cfs
June 1-15	959 cfs
June 16-30	746 cfs

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23 32. The flow levels adopted in the 2002 proposed operation plan for April 1- June 30
24 are significantly less than the minimum necessary for coho salmon during these months and will
25 result in harm to coho salmon in the Klamath River.

26 33. As the irrigation season at the Klamath Project begins on April 1 of each year,
27 BOR faced a situation where it would, once again, not have completed formal consultation
28

1 before commencing project operations. For coho salmon, BOR attempted to solve its pending
2 illegal actions by segmenting its irrigation deliveries under the 2002 operations plan. Rather
3 than wait for the ongoing formal consultation process for the entire operations plan to conclude,
4 BOR asked NMFS to informally concur in its “not likely to adversely affect” determination for
5 “Below Average” water year Project flows from April 1 - May 31, 2002 only.
6

7 34. BOR asked for NMFS’s concurrence on March 27, 2002, and one day later,
8 NMFS issued its NLAA concurrence letter, stating that the agency “currently has no basis for
9 contradicting your determination.”
10

11 F. According to the Best Available Science, Juvenile Coho Salmon Need High
12 Spring Flows in April - June.

13 35. In 1998, the Department of the Interior contracted the services of Dr. Thomas
14 Hardy of Utah State University to provide an evaluation of the instream flow needs for
15 anadromous fish in the Klamath River below Iron Gate Dam. The study involves two phases.
16 Phase I is based primarily on hydrologic modeling and historic flow data; Phase II is based on a
17 detailed micro-habitat analysis. The Hardy Phase I Report was released on August 5, 1999.
18

19 36. The goal of the Hardy Phase I Report was to “recommend minimum flows within
20 the main stem Klamath River below Iron Gate Dam . . . necessary to aid restoration efforts and
21 the maintenance of the aquatic resources within the Klamath River in light of the Department of
22 the Interior’s trust responsibility to protect tribal rights and resources as well as other statutory
23 responsibilities such as the Endangered Species Act.” Hardy Phase I Report at 1. The Report
24 includes recommended interim minimum instream flows as well as qualitative evaluations of
25 additional factors such as temperature and habitat maintenance. *Id.* at i. The final Phase I Report
26 was prepared with the assistance and participation of a technical review team comprising
27 representatives from the U.S. Fish and Wildlife Service, NMFS, BOR, Bureau of Indian Affairs,
28

1 U.S. Geological Survey, the California Department of Fish and Game, as well as representatives
2 of the Yurok, Hoopa, and Karuk Tribes.

3 37. Phase II of the Hardy Report focuses on more intensive site-specific flow analysis
4 and relies on the most advanced field data collection methodologies available for modeling the
5 physical habitat for all life stages and species of anadromous fish specific to the Klamath River
6 based on different flow regimes. Like Phase I, the Phase II Report was conducted for the
7 Department of the Interior and has included the technical participation of all Federal, State, and
8 Tribal biologists most familiar with the Klamath River system. The final draft of the Hardy
9 Phase II Report was released in November 2001, and it is the best available science on Klamath
10 flows and coho salmon.
11

12
13 38. The Hardy Phase II Report recommended water flows in the Klamath River at and
14 below Iron Gate Dam to measure at least 2200 cfs during April, 2100 cfs during May, and 1800
15 cfs for June.
16

17 CLAIMS FOR RELIEF

18 FIRST CLAIM FOR RELIEF

19 Violation of the ESA and APA by BOR 20 Failure To Complete Formal Consultation 21 Pursuant to ESA § 7(a)(2)

22 39. Section 7 of the ESA prohibits agency actions that jeopardize the survival of
23 listed species or destroy or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2). To
24 assist federal agencies in complying with this duty, Section 7 establishes an interagency
25 consultation process to evaluate the impacts of agency action on listed species. A federal agency
26 must initiate consultation with NMFS whenever it takes an action that “may affect” a listed
27 species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).
28

1 recommended as the minimum necessary by the best available science. By diverting water to
2 irrigators, the April - May operations both provide too little water for salmon now and limit the
3 extent to which flows can be modified later in the season if NMFS so requires. This violation is
4 reviewable under the ESA, 16 U.S.C. § 1540(g).

5
6 45. BOR's irreversible and irretrievable commitment of resources prior to the
7 completion of consultation is arbitrary and capricious and contrary to law in violation of the
8 APA, 5 U.S.C. § 706(2)(A).

9
10 THIRD CLAIM FOR RELIEF

11 Violation of the ESA and APA by NMFS
12 With Respect to Its "Not Likely to Adversely Affect" Concurrence

13 46. ESA § 7(a)(2) requires NMFS to review projects to determine if they are likely to
14 jeopardize the continued existence of any endangered or threatened species. 16 U.S.C. §
15 1536(a)(2). NMFS must use the best scientific and commercial data available in making this
16 determination. Id.

17 47. NMFS's "not likely to adversely affect" concurrence is arbitrary and capricious
18 because it does not analyze the proposed action; it does not rely on the best scientific and
19 commercial data available; and it reverses prior agency position without explanation.

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21 48. NMFS's actions and omissions are arbitrary, capricious, an abuse of discretion,
22 and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §§
23 701-706.

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FOURTH CLAIM FOR RELIEF

Violation of the ESA and the APA by NMFS
Failure to Address Destruction or
Adverse Modification of Designated Critical Habitat

49. ESA § 7(a)(2) requires NMFS to ensure that a project will not “result in the destruction or adverse modification of [the designated critical] habitat” of a listed species. 16 U.S.C. § 1536(a)(2).

50. NMFS failed to address the effects of the Klamath Project 2002 spring flows on critical habitat. The NLAA informal concurrence letter does not analyze or even mention whether the Klamath Project adversely modifies the designated critical habitat of Klamath River coho salmon.

51. NMFS’s actions and omissions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §§ 701- 706.

FIFTH CLAIM FOR RELIEF

Violation of the ESA and the APA by NMFS
Improper Concurrence In Informal Consultation

52. The ESA’s implementing regulations define “informal consultation” as “an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.” 50 C.F.R. § 402.02.

53. NMFS has violated this requirement by engaging in, and issuing a concurrence letter for, an informal consultation resulting in a “not likely to adversely affect” finding for an agency action that is already undergoing formal consultation.

1 including attorneys' fees associated with this litigation under the citizen suit
2 provision of the ESA, 16 U.S.C. § 1540(g)(4) and the Equal Access to Justice Act
3 28 U.S.C. § 2412.

4 H. Grant plaintiffs such further and additional relief as the Court may deem just and
5 proper.
6

7 DATED this 23rd day of April 2002.

8 Respectfully Submitted,

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25 Local Counsel for Plaintiffs
26
27
28

1 CERTIFICATE OF SERVICE

2 I am a citizen of the United States and a resident of the State of Washington. I am over 18
3 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203,
4 Seattle, Washington.
5

6 On April 23, 2002, I served a true and correct copy of the attached documents by ***Overnight***

7 ***Federal Express*** on:

8 John Ashcroft
9 U.S. Attorney General
10 Department of Justice
11 950 Pennsylvania Ave., NW, Room 5111
12 Washington, D.C. 20530

Dr. William Hogarth
Assistant Administrator
National Marine Fisheries Service
Silver Spring Metro Center Three
1315 East-West Highway
Silver Spring, MD 20910

13 John W. Keys
14 Commissioner
15 Bureau of Reclamation
16 1849 C Street NW
17 Washington, DC 20240-0001

David W. Shapiro
United States Attorney
450 Golden Gate Ave.
San Francisco 94102

18 I declare under penalty of perjury that the foregoing is true and correct. Executed on this
19 23rd day of April, 2002, at Seattle, Washington.
20

21 _____
22 Elizabeth Trotter
23
24
25
26
27
28