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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 SEAN K. WHITE, an individual,
13 Plaintiff,

14 v.

15 UNITED STATES ARMY CORPS OF
16 ENGINEERS; LIEUTENANT GENERAL
SCOTT A. SPELLMON, in his official
17 capacity as Chief of Engineers and
Commanding General, United States Army
18 Corps of Engineers; NATIONAL MARINE
FISHERIES SERVICE; HON. GINA
19 RAIMONDA, in her official capacity as
Secretary of Commerce; and DOES 1-20.

20 Defendants.
21

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

22
23 Mr. Sean K. White (“Mr. White” or “Plaintiff”), an individual residing in the City of
24 Ukiah, in Mendocino County, in the State of California, by and through his attorneys, alleges, on
25 personal knowledge of his own acts and status, and on information and belief as to all other
26 matters, as follows:
27
28

INTRODUCTION

1
2 1. “No man ever steps in the same river twice, for it is not the same river and he is not the
3 same man,” observed Heraclitus. Around seventy years ago, in the interests of flood control and
4 water supply, Coyote Valley Dam was constructed on the East Branch of the Russian River, thus
5 creating Lake Mendocino. Seventy years ago, the designers thought an earthen dam with an outlet
6 near the bottom was a feasible way to both impound the water and provide for releases for flood
7 control operations. Seventy years ago, it didn’t occur to anyone to think of a changing climate.
8 Seventy years ago, we had not yet experienced the decline of the abundant salmon and steelhead
9 that blessed the waters of the Russian River from Jenner to what was then Coyote Valley and
10 beyond. Seventy years ago, we did not understand the challenges that climate change and species
11 decline would present to flood control operations of Coyote Valley Dam. The Russian River is not
12 the same river it was seventy years ago.

13 2. Neither are we the same people. The odds are against the fact of anyone being alive
14 today who initially designed or constructed Coyote Valley Dam – certainly no one associated with
15 this Complaint. We also know more. We have a far better understanding of our world and its natural
16 cycles and ecology: its fecundity, its hydrology, its biology, and its chemistry. We have a far better
17 understanding of the impacts modern human industrial life has on the land, the water, and the
18 species with which we share this planet. Just around twenty years after Coyote Valley Dam was
19 constructed, we passed the National Environmental Policy Act (1970), the Clean Water Act (1972),
20 and the Endangered Species Act (1973). Much of our modern ecological understanding is a result
21 of the institutionalization these laws, and others, have had on decision making and our ethics as
22 stewards of that ecology.

23 3. Seventy years ago, an earthen dam on the East Branch of the Russian River with a single
24 outlet at the bottom made sense – it penciled out in the rather simple math we then knew to do. We
25 need not, and do not here, resort to petulant accusations lobbed from the safety of time against those
26 who went before us and laid the foundation of the blessings we now enjoy. Instead, we merely offer

1 the simple observation that yesterday’s understanding does not meet the imperatives of today. The
2 fact is that today the calculus is much more complicated – it is thus far more important that we get
3 it right. Today, we understand so much better that the health of our world, of our communities, and
4 of our posterity depend on getting the complex calculus of designing a dam – where algebra,
5 geometry, physics, biology, chemistry, economics, politics, and the law all intersect – right. We
6 have inherited what was done yesterday. We understand what we know today. And we are
7 responsible for what happens tomorrow. Our law compels nothing more from us than to understand
8 the facts of yesterday, the imperatives of today, and to look to tomorrow. This Complaint is filed
9 entirely in that spirit.

10 **JURISDICTION AND VENUE**

11 4. This Court has jurisdiction over this matter under the Endangered Species Act’s
12 jurisdictional provision, 16 U.S.C. § 1540(g), as an action arising under the Endangered Species
13 Act (the “ESA”), and 28 U.S.C. § 1331, as an action arising under the laws of the United States.
14 The requested relief is proper under 28 U.S.C. §§ 2201 – 2202, 5 U.S.C. §§ 701- 706, and 16 U.S.C.
15 § 1540(g).

16 5. This Court also has jurisdiction under 28 U.S.C. §§ 2201 and 2202 to issue a declaration
17 of Plaintiff’s rights and to grant Plaintiff injunctive relief.

18 6. This Court has jurisdiction and discretion to award the Plaintiff his costs of litigation,
19 including reasonable attorney and expert witness fees, under 16 U.S.C. § 1540(g)(4).

20 7. Venue is proper in this district under 28 U.S.C. § 1391(b)(1), (2) as a substantial part of
21 the events giving rise to Plaintiff’s claims occurred in this judicial district, and 16 U.S.C. §
22 1540(g)(3)(A), as the violations of the ESA occurred in this judicial district.

23 8. Plaintiff provided more than 60-days’ notice of intent to file this suit pursuant to and in
24 accordance with the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), by letter to Defendants
25 dated August 1, 2022. Defendants have not taken action to remedy their continued violations of the
26

1 ESA by the date of this Complaint's filing. Therefore, an actual justiciable controversy now exists
2 between the parties under 28 U.S.C. § 2201.

3 **PARTIES**

4 9. Mr. Sean White, the Plaintiff, is an individual person, a citizen of the United States of
5 America, and a resident of the City of Ukiah, an incorporated municipality nestled against the
6 Russian River and immediately downstream of Coyote Valley Dam ("CVD") in Mendocino
7 County. Mr. White has been personally, professionally, and financially invested in healthy fisheries
8 his entire adult life, receiving a Bachelor of Science degree in Fisheries Biology from Humboldt
9 State University as an Honors Graduate in 1991. Mr. White has been working on water issues in
10 the Russian River Watershed, much of it in roles as a fisheries biologist, for nearly thirty years. In
11 1994, he was elected to the Marin Municipal Water District Board of Directors, where he helped
12 resolve issues related to flow requirements of Lagunitas Creek. While working at Sonoma County
13 Water Agency ("SCWA"), he led the Natural Resources Section for over thirteen years. While at
14 SCWA, he served as Project Manager for SCWA's Fisheries Enhancement Program as well as a
15 variety of other projects related to fisheries in the Russian River. While at SCWA, Mr. White
16 directed research and restoration efforts to assess and mitigate SCWA's operations including the
17 Russian River Flow Assessment, the Russian River Coho and Steelhead (two of the species directly
18 at issue in this Complaint) Population Monitoring Program, the Russian River migration studies,
19 water quality monitoring, and the Russian River Estuary Monitoring Plan. All of these efforts, and
20 others, were driven by his love of fisheries, his professional interest in those fisheries, and his desire
21 to see the Russian River become a healthy ecosystem for fisheries once again.

22 10. In his capacity as the Principal Environmental Specialist in charge of the Natural
23 Resources Section at SCWA, Mr. White was heavily engaged in the ESA Section 7 consultation
24 that eventually produced the Biological Opinion for Water Supply, Flood Control Operations, and
25 Channel Maintenance conducted by the U.S. Army Corps of Engineers, the Sonoma County Water
26 Agency, and the Mendocino County Russian River Flood Control and Water Conservation

1 Improvement District in the Russian River watershed, PCTS Tracking Number
2 F/SWR/2006/07316, issued September 24, 2008, (the “BiOp”) a true and correct copy of which is
3 attached hereto as Exhibit A. His primary task for the BiOp as Principal Environmental Specialist
4 was to design studies and collect data to inform the Biological Assessment behind the BiOp; such
5 studies included population assessments, fish passage, habitat utilization, habitat quantification,
6 water quality, and instream flow requirements for the species discussed further below. Furthermore,
7 Mr. White was also a member of the Public Participation Facilitation Committee for development
8 of the BiOp, where he initially represented SCWA.

9 11. During his service at SCWA, Mr. White was awarded the National Oceanic and
10 Atmospheric Association’s (“NOAA”) Environmental Stewardship Award in 1998. Vice President
11 Al Gore also awarded him the National Performance Review in 1998 for his contributions as part
12 of the Adobe Creek Fish Step-Pool Pathway Team.

13 12. From 2008 to 2015, Mr. White served as the General Manger of the Mendocino County
14 Russian River Flood Control and Water Conservation Improvement District (“RRFC”), one of the
15 two entities, SCWA being the other, which holds rights to store water in Lake Mendocino. At
16 RRFC, Mr. White was heavily engaged in resolving conflicts between endangered salmon and
17 diversions of Russian River water for frost protection. While at RRFC, he also continued to serve
18 on the Public Participation Facilitation Committee for development of the BiOp.

19 13. In 2002, Mr. White moved to Ukiah with his family. What drew him to move his family
20 to Ukiah was his work on the Russian River related to fisheries, particularly the salmon and
21 steelhead that used to be abundant in the stretch of the Russian River from Healdsburg north (the
22 “Upper Russian River”). Since that time, however, he has witnessed a steady and significant decline
23 in the quality of the Upper Russian River, and particularly in the health and numbers of salmonids
24 in the Upper Russian River, a fact which not only affects him personally as a lover of healthy rivers
25 and healthy fisheries generally, but which also questions the validity of the past thirty years of his
26 professional devotion to fisheries restoration in the Russian River. He remains committed to solving

1 what he sees as a legacy he and so many others have inherited, namely, Coyote Valley Dam is
2 simply incapable of managing turbidity and other water quality constituents in a way that allows
3 for the return of the healthy fisheries he has devoted his life's work to realizing. He now better
4 understands those previous decades of work as treating the symptom rather than the underlying
5 cause, namely, a seventy-year old, half-built earthen dam designed and constructed to address, and
6 which dam reflects, what we knew seventy years ago. Now, knowing so much more about the
7 drivers of healthy ecosystems and the health of salmonids in the Russian River, he understands that
8 the only way to solve for the pattern of salmonid decline in the Russian River is to modernize
9 Coyote Valley Dam to reflect what we know today and what we can expect tomorrow, to include
10 our posterity's judgment. He now understands that to do anything less is to continue to live in the
11 ignorance of yesterday while the ecosystem of today collapses around us.

12 14. Defendant United States Army Corps of Engineers (the "Army Corps") is a United
13 States agency that, in part, provides flood control of navigable waters of the United States. It is the
14 lead federal agency for the Coyote Valley Dam project and its associated flood control operations.

15 15. Defendant Lieutenant General Scott A. Spellmon serves as the Chief of Engineers and
16 the Commanding General of the United States Army Corps of Engineers and is sued in his official
17 capacity. LTG Spellmon is the federal official with the ultimate authority and responsibility for
18 ensuring the Army Corps' compliance with federal laws, including the ESA and the APA, and LTG
19 Spellmon has authority to grant, at least in part, the relief requested in this Complaint.

20 16. Defendant National Marine Fisheries Service is a United States agency that has been
21 delegated the authority by the Secretary of Commerce to conserve and protect most species listed
22 as endangered or threatened under the ESA.

23 17. Defendant The Honorable Gina Raimondo serves as the Secretary of the Department of
24 Commerce and is sued in her official capacity. Secretary Raimondo is the federal official with the
25 ultimate authority and responsibility for ensuring the actions and management decisions of the
26 Department of Commerce and its subordinate agencies, including NMFS, comply with federal

1 laws, including the ESA and APA, and Secretary Raimondo has the authority to grant the relief
2 requested in this Complaint.

3 18. The true names of Defendants DOES 1-20, inclusive, whether individual, corporate,
4 associate, or otherwise, are unknown to Plaintiff. Plaintiff is informed and believes and thereon
5 alleges that each of the DOE Defendants is in some manner affiliated with either the Army Corps
6 or NMFS and with the unlawful conduct described herein.

7 19. Defendants Secretary Raimondo and LTG Spellmon (the "Appointed Defendants") are
8 appointed officials of the United States of America who at all relevant times have purported to act
9 under color of federal law and continue to exercise their supervisory authority, duties, and
10 responsibilities over subordinates within their respective agencies, including direction provided to
11 their respective subordinates within the Army Corps, the San Francisco District of the Army Corps,
12 NMFS, and/ or the West Coast Region of NMFS, including supervision and authority for, and
13 responsibility for compliance with, the BiOp.

14 20. Plaintiff brings his claims for injunctive and declaratory relief against each of the
15 Appointed Defendants and both of them in the official capacities of their respective titles above.

16 21. To the extent any conduct alleged herein was undertaken by a subordinate or delegee of
17 any of the Appointed Defendants, such conduct was taken with the relevant Appointed Defendants'
18 actual knowledge, their constructive knowledge, or both.

19 LEGAL BACKGROUND

20 The Endangered Species Act

21 22. Congress enacted the Endangered Species Act nearly forty-five years ago in a bipartisan
22 effort "to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley*
23 *Auth. v. Hill*, 437 U.S. 153, 184 (1978); *see also* 16 U.S.C. § 1531(a). The ESA reflects a national
24 policy of "institutionalized caution" in recognition of the "overriding need to *devote whatever effort*
25 *and resources [are] necessary* to avoid further diminution of national and worldwide wildlife
26 resources." *TVA*, 437 U.S. at 177, 194 (internal quotation omitted; emphasis in original). The ESA

1 constitutes "the most comprehensive legislation for the preservation of endangered species ever
2 enacted by any nation." *Id.* at 180.

3 23. The fundamental purposes of the ESA are to "provide a means whereby the ecosystems
4 upon which endangered ... and threatened species depend may be conserved, [and] to provide a
5 program for the conservation of such [endangered and threatened] species." 16 U.S.C. § 1531(b).

6 24. Section 4 of the ESA, at 16 U.S.C. § 1533, prescribes the process for, depending on
7 their respective jurisdictions, either the National Marine Fisheries Service ("NMFS") or the United
8 States Fish and Wildlife Service ("FWS") (together the "Services") to list a species as "endangered"
9 or "threatened" within the meaning of the ESA and to designate "critical habitat" for each such
10 species. The ESA defines an endangered species as one "in danger of extinction throughout all or
11 a significant portion of its range," while a threatened species is one "likely to become an endangered
12 species within the foreseeable future throughout all or a significant portion of its range." *Id.* §
13 1532(6), (20).

14 25. When the Services list a species as endangered or threatened, they generally also must
15 designate critical habitat for that species. 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C). The ESA defines
16 critical habitat as "(i) the specific areas within the geographical area occupied by the species, at the
17 time it is listed in accordance with the [ESA], on which are found those physical or biological
18 features (I) essential to the conservation of the species and (II) which may require special
19 management considerations or protection; and (ii) specific areas outside the geographical area
20 occupied by the species at the time it is listed ... upon a determination by the Secretary that such
21 areas are essential for the conservation of the species." *Id.* § 1532(5)(A).

22 26. Section 7 of the ESA requires all federal agencies, including the Army Corps and the
23 Services, to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out
24 programs for the conservation of" endangered and threatened species. 16 U.S.C. § 1536(a)(1).
25 Section 7 of the ESA requires each federal agency, in consultation with NMFS, FWS, or both
26 Services, to "insure" that "any action authorized, funded, or carried out by such agency ... is not

1 likely to jeopardize the continued existence of any endangered species or threatened species or
2 result in the destruction or adverse modification” of designated critical habitat. "Jeopardize the
3 continued existence of” an endangered species "means to engage in an action that reasonably would
4 be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and
5 recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of
6 that species." *Id.* § 1536(a)(2)

7 27. If a federal agency action “may affect” any listed species or critical habitat, the federal
8 action agency must initiate consultation with the relevant Service. 50 C.F.R. § 402.12(c) – (e),
9 402.14(a), (b)(1); *see* 16 U.S.C. § 1536(b)(3), (c)(1). If the federal action agency or the appropriate
10 Service determines that the action is “likely to adversely affect” a listed species, designated critical
11 habitat, or both, the Service must prepare a biological opinion on the effects of the action on the
12 species, critical habitat, or both, as may be relevant. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §
13 402.14(b)(1). Under section 7, the relevant Service’s biological opinion must determine whether
14 the action is likely to jeopardize the continued existence of any listed species or adversely modify
15 or destroy any designated critical habitat. 16 U.S.C. § 1536(b)(3)(A).

16 28. If, through Section 7 consultation, the relevant Service determines the federal action
17 will result in jeopardy or adverse modification, the biological opinion must include “reasonable and
18 prudent alternatives” to the agency action that “can be taken by the federal agency or applicant in
19 implementing” the action and that the relevant Secretary (for NFMS, the Secretary of Commerce)
20 believes would avoid jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A).

21 29. However, the mandate for Federal agencies such as the Army Corps to avoid jeopardy
22 or adverse habitat modification through their proposed actions is distinct from the broader mandate
23 in Section 9 of the ESA which prohibits the take of listed species without special exemption. 16
24 U.S.C. § 1538(a)(1)(B), (G). Section 9 prohibits the unauthorized “take” of any listed fish or
25 wildlife species. “Take is defined broadly in the ESA as “to harass, harm, pursue, hunt, shoot,
26 wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19).

1 “Harass” in the definition of “take” means “an intentional or negligent act or omission which creates
2 the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal
3 behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50
4 C.F.R. § 17.3. “Harm” in the definition of “take” in the ESA means “an act which actually kills or
5 injures wildlife. Such act may include significant habitat modification or degradation where it
6 actually kills or injures wildlife by significantly impairing essential behavioral patterns, including
7 breeding, feeding or sheltering.” *Id.* “Take” therefore includes harassment to the point such
8 harassment significantly disrupts normal behavioral patterns and harm caused by habitat
9 degradation that significantly impairs essential behavioral patterns.

10 30. Section 4(d) of the ESA authorizes the Services to extend by regulation any or all of the
11 section 9 prohibitions to any or all species listed as threatened under the ESA. 16 U.S.C. § 1533(d).
12 The Services have extended the take prohibition of Section 9 to threatened species and to salmonids
13 in particular. *See* 40 Fed. Reg. 44,412 (Sept. 26, 1975) (promulgating 50 C.F.R. § 17.31 regarding
14 threatened fish and wildlife species). Section 9 of the ESA is therefore as important as section 7 in
15 safeguarding endangered and threatened species by prohibiting the unauthorized take of those listed
16 species.

17 31. As distinguished from the *unauthorized take* prohibited in Section 9, *incidental take*
18 may be provided for in accordance with Section 7. Incidental take is defined as take that is
19 “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” Section
20 7(b)(4) of the ESA states in part that, “[i]f after consultation under [subsection 7(a)(2)], the
21 Secretary concludes that ... the agency action will not violate [subsection 7(a)(2)], or offers
22 reasonable and prudent alternatives which the Secretary believes would not violate [subsection
23 7(a)(2)] ... [and] the taking of an endangered species or a threatened species incidental to the
24 agency action will not violate [subsection 7(a)(2)] ... the Secretary shall provide the Federal agency
25 and the applicant concerned, if any, with a written statement [referred to as an ‘*incidental take*
26 *statement*’] that ... specifies those *reasonable and prudent measures* that the Secretary considers

1 necessary or appropriate to minimize such impact[and] sets forth *the terms and conditions ... that*
2 *must be complied with* by the Federal agency ... to implement the [reasonable and prudent measures
3 specified above].” 16 U.S.C. § 1536(b)(4) (emphasis added). Under the terms of Section 7(b)(4)
4 and 7(o)(2), therefore, a taking that is incidental to and not the purpose of the agency action is not
5 considered to be a prohibited taking under Section 9 of the ESA, *provided* that such taking is in
6 compliance with the terms and conditions of any incidental take statement granted the action agency
7 by the respective Service.

8 **The Administrative Procedure Act**

9 32. Judicial review of federal agency action is governed by the Administrative Procedure
10 Act (the “APA”). 5 U.S.C. §§ 701-706. The APA provides that courts “shall ... hold unlawful and
11 set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of
12 discretion, or otherwise not in accordance with law” or “without observance of procedure required
13 by law.” 5 U.S.C. § 706(2)(A), (D), The APA provides that a person may also seek judicial review
14 to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

15 **FACTUAL BACKGROUND**

16 33. The Army Corps’ construction of Coyote Valley Dam and Lake Mendocino was
17 authorized by section 204 of the Flood Control Act of 1950, Publ. L. No. 81-516, in accordance
18 with the Chief of Engineers’ Report dated November 15, 1949, House Doc. Number 518 (Oct. 10,
19 1966), for the purposes of flood control, water supply, recreation, and streamflow regulation.
20 Among other activities on the Russian River, the Army Corps operates CVD for flood control
21 operations. CVD is an earthen dam that impounds water from the East Fork of the Russian River
22 and water imported from the Eel River watershed through the Potter Valley Project. The City of
23 Ukiah (“Ukiah”), of which Mr. White is a resident, lies immediately below CVD. Prior to
24 construction of CVD, Ukiah suffered from floods during especially high periods of rain; the ability
25 of the Army Corps to capture especially high flood flows behind CVD mitigated against large
26 portions of Ukiah flooding again.

1 34. Issued in 2008, the BiOp was the result of a request from the Army Corps and other
2 local agencies to implement ongoing practices and operations, including flood control operations
3 at CVD for which the Army Corps was and remains responsible. NMFS determined that the suite
4 of actions proposed to be undertaken (the “Action”) were likely to affect Central California Coast
5 steelhead (*Oncorhynchus mykiss*, “CCC steelhead”), CCC coho salmon (*O. kisutch*, “CCC coho”),
6 and California Coastal Chinook salmon (*O. tshawytscha*, “CC Chinook”) (collectively, the “Listed
7 Salmonids”), each of which was and remains protected as threatened or endangered under the ESA.

8 35. CCC coho salmon have been listed as endangered (71 FR 37192-93 [June 28, 2005];
9 updated by 79 FR 20802 [April 14, 2014]), and the Russian River has been designated as their
10 critical habitat (64 FR 24049 [May 5, 1999]). CCC steelhead have been listed as threatened (71 FR
11 857 [January 5, 2006]; updated by 79 FR 20802 [April 14, 2014]), and the Russian River has been
12 designated as their critical habitat (70 FR 52487 [September 2, 2005]). CC Chinook salmon have
13 been listed as threatened (70 FR 37192 [June 28, 2005]; updated by 79 FR 20802 [April 14, 2014]),
14 and the Russian River has been designated as their critical habitat (70 FR 52487 [September 2,
15 2005]).

16 36. NMFS, through its Section 7 consultation with the Army Corps and the resulting BiOp,
17 provided the Army Corps with its opinion that the suite of actions proposed to be taken by the Army
18 Corps related to flood control operations in the Russian River would result in jeopardizing the
19 continued existence of CCC steelhead and CCC coho and in adversely modifying those species’
20 critical habitat. BiOp at 240. NMFS then found that certain elements of the Action, as modified by
21 the Reasonable and Prudent Alternative, which elements include turbidity releases from CVD,
22 would result in incidental take of CC Chinook and CCC steelhead (*see*, BiOp at 296-297, 305
23 [“Turbidity releases from CVD are anticipated to result in minor reductions in Chinook salmon and
24 steelhead egg, alevin, fry, and juvenile survival in the upper Russian River mainstem below the
25 confluence with the East Branch.”]). Accordingly, NMFS provided the Army Corps with an
26 incidental take statement “for the taking of listed salmonids that is likely to occur due to the

1 implementation of the proposed action and [Reasonable and Prudent Alternative] for [the Action].”
2 (Henceforth, the “Incidental Take Statement”.) BiOp at xviii. In the Incidental Take Statement,
3 NMFS determined that a number of “reasonable and prudent measures are necessary and
4 appropriate to minimize the likelihood of take on [the Listed Salmonids.]” (Hereafter, the
5 “Reasonable and Prudent Measures”.) *Id.* at 318. The Incidental Take Statement included the
6 Reasonable and Prudent Measures and those Measures’ associated terms and conditions.

7 37. In the Incidental Take Statement, NMFS made clear the effect of noncompliance with
8 the Incidental Take Statement’s Reasonable and Prudent Measures and their related terms and
9 conditions, describing the Reasonable and Prudent Measures as “nondiscretionary” and
10 emphasizing that those measures “must be undertaken” for the “exemption in [ESA Section] 7(o)(2)
11 to apply.” BiOp at 296. Speaking directly to the terms and conditions in the various Reasonable
12 and Prudent Measures in the Incidental Take Statement and the legal effect of noncompliance with
13 those terms and conditions, NMFS emphasized that the Army Corps has “a continuing duty to
14 regulate the activity covered by this incidental take statement[,]” and “[i]f the [Army] Corps ...
15 fail[s] to assume and implement the terms and conditions ... the protective coverage of section
16 7(o)(2) may lapse.” BiOp at 296.

17 **A. The Army Corps’ Failure to Comply with RPM 4’s Nondiscretionary Terms and**
18 **Conditions**

19 38. In the BiOp, NFMS made clear that the taking of the Listed Salmonids identified
20 through its consultation with the Army Corps is incidental and therefore not prohibited by the ESA
21 “provided that [the Army Corps] is in compliance with the Terms and Conditions included with the
22 incidental take statement.” BiOp at xviii. NMFS then provided the eight Reasonable and Prudent
23 Measures as part of the Army Corps’ Incidental Take Statement.

24 39. Reasonable and Prudent Measure 4 (“RPM 4”) specifically addresses the issue of
25 turbidity releases from CVD, which is identified early in the BiOp by acknowledging that “CVD is
26 also known to release highly turbid water for extended periods well after turbidity levels have

1 diminished upstream of the mainstem’s confluence with the East Branch [of the Russian River] and
2 elsewhere in the [Russian River’s] unregulated tributaries.” BiOp at xi. The National Ocean
3 Service, which, like NMFS, is an arm of the National Oceanic and Atmospheric Administration,
4 defines turbidity as “a measure of the level of particles such as sediment, plankton, or organic by-
5 products, in a body of water. As the turbidity of water increases, it becomes denser and less clear
6 due to a higher concentration of these light-blocking particles.” See,
7 <https://oceanservice.noaa.gov/facts/turbidity.html#:~:text=Turbidity%20is%20a%20measure%20of,of%20these%20light%2Dblocking%20particles> (last accessed, October 3, 2022). RPM 4
8 requires the Army Corps to “[u]ndertake measures to assist NFMS in determining the amount of
9 take resulting from turbidity releases at CVD.” BiOp at 321.

11 40. Importantly, NMFS did not impose RPM 4 to determine *whether* take resulted from
12 these turbidity releases, but the *extent* of that take. In the first section of the Incidental Take
13 Statement, under the subheading “Amount or Extent of Take” NMFS addressed, among other
14 things, “Turbidity Releases from CVD.” BiOp, at 305. In framing the issue and impacts to the
15 Listed Salmonids due to turbidity releases from CVD, NMFS found in the BiOp that:

16 Turbidity releases from CVD are anticipated to result in minor reductions in
17 Chinook salmon and steelhead egg, alevin, fry, and juvenile survival in the [U]pper
18 Russian River mainstem below the confluence with the East Branch [of the Russian
19 River]. These reductions may occur via entombment of eggs and alevins, and loss
20 of prey for fry and juveniles *due to high elevated turbidity*. Information is not
21 available to specifically quantify take that may be associated with turbidity releases
22 from CVD nor is information available to quantify an *extent* of take using a
23 surrogate such as the magnitude or time of the releases.

24 BiOp at 305-306 (emphasis added).

25 41. Therefore, in an attempt to gain the information needed to specifically quantify the
26 *extent* of take due to turbidity releases from CVD, NMFS defined RPM 4’s purpose:

27 This RPM is focused on developing the information necessary to more precisely
28 determine the impact of turbidity from CVD on salmonid growth and survival to
emergence, and appropriately acting on that information. *The preceding biological
opinion identifies Coyote Valley Dam as a major contributor to sustained turbidity
in the Russian River. The sustained level of turbidity is expected to adversely affect*

1 *the growth and survival of steelhead and Chinook salmon incubating eggs and*
2 *alevins* within Russian River gravels. However, the precise *magnitude* of impact,
3 while expected to be low, is currently unknown. In order to better determine the
4 magnitude of adverse effects that may result from turbidity associated with releases
5 from Coyote Valley Dam and Warm Springs Dam, the [Army] Corps shall conduct
6 turbidity monitoring at most of the existing stream flow gauges currently operated
7 by the U.S. Geological Survey Water Resources Division (USGS). Based on this
8 information, the [Army] Corps shall also develop and begin implementation of a
9 plan to avoid and minimize these impacts.

10 BiOp at 321-322 (emphasis added).

11 42. NMFS then listed ten terms and conditions under RPM 4 which it identifies as
12 “nondiscretionary” for the Army Corps to avoid Section 9’s prohibition against unauthorized take,
13 as defined to include harassment and harm. To date, with a single exception, the Army Corps has
14 failed to perform any of the terms and conditions associated with RPM 4.

15 43. Term and Condition A requires that “The [Army] Corps shall conduct a bathymetric
16 survey of Lake Mendocino to determine the level of siltation and if dredging is a reasonable
17 alternative to reduce turbidity levels.” BiOp at 322. The Army Corps has performed Term and
18 Condition A.

19 44. Term and Condition B requires that “The [Army] Corps will conduct the bathymetric
20 survey of Lake Mendocino within two years.” BiOp at 322. Though it conducted the bathymetric
21 surveys required by Term and Condition A, the Army Corps did not do so within the required two
22 years as required by Term and Condition B.

23 45. Term and Condition C requires that “The [Army] Corps shall install turbidity meters at
24 existing USGS gauging stations (non low-flow gages). In addition to the existing turbidity
25 monitoring currently conducted on the mainstem Russian River at Hopland (11462500), Digger
26 Bend (11463980), and Guerneville (11467000), turbidity monitoring will be conducted at [certain
27 identified] stream gauges[.]” BiOp at 322. The Army Corps has not done so.

28 46. Term and Condition D requires that “The [Army] Corps shall contract with the USGS
 to have turbidity monitoring equipment installed and functioning at the sties listed above by
 October 1, 2009.” BiOp at 322. The Army Corps has not done so.

1 47. Term and Condition E requires that “The [Army] Corps shall contract with the USGS
2 to maintain and publish turbidity data using USGS guidelines for a period of ten years and provide
3 annual reporting of the analysis of the data to NMFS. NMFS expects that ten years, while shorter
4 than the project duration analyzed in the preceding biological opinion will provide enough data on
5 different conditions of (water year types) to estimate the impact of turbidity releases from CVD.”
6 BiOp at 322. The Army Corps has not done so.

7 48. Term and Condition F requires that “The [Army] Corps shall report to the NMFS by
8 October 1, 2009, on the progress of the turbidity monitoring contracts with USGS and overall
9 progress of the monitoring effort.” BiOp at 322. The Army Corps has provided no such report.

10 49. Term and Condition G requires that “The [Army] Corps shall analyze the turbidity data
11 to determine if flood control operations contribute to an increase in turbidity that adversely affect
12 rearing and spawning habitat on the mainstem Russian River between Coyote Valley Dam and
13 Cloverdale and monitor the turbidity that Warm Springs Dam contributes to Dry Creek.” BiOp at
14 323. The Army Corps has conducted no such analyses.

15 50. Term and Condition H requires that “The [Army] Corps shall report the results of their
16 analysis to NMFS for review and approval. The Corps shall provide NMFS with the turbidity data
17 and results on an annual basis. Turbidity data collected each winter and spring will be provided no
18 later than August 15 of the same year.” BiOp at 323. The Army Corps has provided no such reports.

19 51. Term and Condition I requires that “If turbidity data confirm that adverse effects to
20 listed salmonids are likely to occur as described in the preceding biological opinion or indicate
21 effects are worse than anticipated, the [Army] Corps shall provide a draft plan to minimize and
22 avoid these effects to NMFS for review no later than July 1, 2013.” BiOp at 323. The Army Corps
23 has drafted no such plan.

24 52. Term and Condition J requires that “If turbidity from CVD or WSD is adversely
25 affecting listed salmonids as described above, the [Army] Corps shall complete and begin
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1 implementation of a plan to minimize and avoid these adverse effects by no later than January 1,
2 2014.” BiOp at 323. The Army Corps has implemented no such plan.

3 53. In short, the Army Corps has failed to conduct the analyses necessary for it to understand
4 the “magnitude” of take of Listed Salmonids due to the turbidity releases from CVD. As a result of
5 that failure, the Army has failed to create and implement a plan to reduce the “expected” adverse
6 effects of turbidity. This despite the fact that NFMS stated that the terms and conditions of the
7 Army Corps’ Incidental Take Statement, including those in RPM 4, are “nondiscretionary” if the
8 Army Corps is to avoid violating Section 9’s prohibition against unauthorized take, including
9 prohibiting “harass[ment]” and “harm” of the Listed Salmonids.

10 **B. The BiOp Identifies Turbidity’s Adverse Effects on Listed Salmonids**

11 54. The Army Corps’ “negligent ... omission” in complying with most of RPM 4’s
12 nondiscretionary terms and conditions has masked turbidity’s likely effects on the Listed Salmonids
13 which “significantly disrupt[s] normal behavioral patterns which include ... breeding, feeding, and
14 sheltering.” *See* definition of “harass” in 50 C.F.R. § 17.3. Furthermore, the Army Corps’ failure
15 has masked turbidity’s “significant degradation” for Listed Salmonids’ habitats and the resulting
16 “impair[ment of] essential behavioral patterns, including breeding, feeding, or sheltering.” *See*
17 definition of “harm” in 50 C.F.R. § 17.3.

18 55. In multiple places in the BiOp, NMFS addressed the effects of turbidity on the Listed
19 Salmonids. For salmonids generally, and during rearing, “suspended and deposited fine sediments
20 can directly affect salmonids by abrading and clogging gills, and indirectly cause reduced feeding,
21 avoidance reactions, destruction of food supplies, reduced egg and alevin survival, and changed
22 rearing habitat.” *Id.* at 56; *see* Reiser, *Habitat requirements of anadromous salmonids* (1979), cited
23 in the BiOp for support. In short, turbid water either chokes, starves, or exposes young salmonids
24 to predation, and that’s only if the turbidity allows them to survive to emerge from their eggs to
25 begin with. The BiOp cites to a published report (*see* Bell, *Fisheries handbook of engineering*
26 *requirements and biological criteria* (1991), as referenced in BiOp on page 56) which found that

1 “suspended silt loads of less than 25 mg/l permit good rearing conditions for juvenile salmonids.”
2 BiOp at 56. Anecdotal evidence (see pictures below provided via email entitled “WATER SUPPLY
3 CONDITIONS UPDATE 1/28/22” from RRFC on January 28, 2022) of suspended silt loads in the
4 Russian River below Coyote Valley Dam likely exceed that – but, and again, that fourteen years
5 later we still do not have a better understanding of the level of turbidity and the extent and
6 magnitude of its effect on the Listed Salmonids is a direct result of the Army Corps’ failure to
7 perform the terms and conditions in RPM 4.



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18 (Photo taken from a southern and downstream vantage at the confluence of the Eastern (top right)
19 and Western (left) Branches of the Russian River immediately below Coyote Valley Dam. The
20 turbid water from the Eastern Branch is clearly evident and in marked contrast to the clarity of
water from the Western Branch. Photo by “CJW 1/28/22”.)

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11 (Photo taken of same location as the photo above, but from a western vantage point. The turbidity
12 line marking the difference in water clarity between the Eastern Branch (top) and Western Branch
(bottom) is clearly evident. Photo by “CJW 1/28/22”.)

13 56. Citing to another published paper (*see* “Baker and Reynolds (1986)”, as referenced in
14 the BiOp on page 52), NMFS found that CCC coho eggs may experience mortality rates as high as
15 100% “under adverse conditions of high scouring flows or heavy siltation.” BiOp at 52.
16 Furthermore, NMFS found that “[p]referred rearing habitat [for coho salmon] has little or no
17 turbidity”, as “[j]uvenile coho salmon feed primarily on drifting terrestrial insects ... and on aquatic
18 invertebrates growing in the interstices of the substrate and in the leaf litter within pools.” *Id.* In
19 short, to survive, young CCC coho must have clear water that does not suffocate them when in their
20 eggs and that allows them to see their food once they emerge.

21 57. Similarly, NMFS found that CC Chinook “prefer[] spawning substrate [that] is clean,
22 loose gravel[and that g]ravels are unsuitable when they have been cemented with clay or fines or
23 when sediments settle out onto redds, reducing intergravel percolation.” *Id.* at 50. NMFS found that
24 “[m]inimum integral percolation rate depends [in part on] water quality.” *Id.* In short, turbidity
25 prevents CC Chinook from mating to produce the next generation, risking extirpation.

1 58. NMFS found that “[s]teelhead spawn in cool, clear streams featuring suitable water
2 depth, gravel size, and current velocity.” BiOp at 55. “The survival of embryos is reduced when
3 fines smaller than 6.4 millimeters comprise 20 to 25 percent of the substrate.” *Id.* Like CCC coho
4 and CC Chinook, “[y]oung steelhead feed on a wide variety of aquatic and terrestrial insects” and
5 must be able to see their food. *Id.* Citing to the effects of turbidity on salmonids generally referenced
6 above, NMFS concluded that “[i]t is unlikely that steelhead differ substantially from other
7 salmonids in [terms of the effects of suspended and deposited fine sediments], [and so assumed]
8 this finding applies to steelhead as well.” *Id.* at 56.

9 59. In short, turbidity prevents spawning, suffocates eggs, and starves or strangles juveniles.
10 NMFS “expected” these affects, and only questioned their “magnitude”. The fact that we do not
11 fully understand the true extent of this regime of contraception, suffocation, starvation, and
12 strangulation is entirely due to the Army Corps’ failure to perform the nondiscretionary terms and
13 conditions for RPM 4 as NMFS required as a condition of the Army Corps’ Incidental Take
14 Statement and exemption from “take”.

15 **The Army Corps is in Violation of the ESA for the Unauthorized Take of Listed Salmonids**

16 60. NMFS made clear in the BiOp that the extent of take expected from the turbidity
17 releases from CVD is incidental and therefore not prohibited by the ESA, provided that the Army
18 Corps complies with the terms and conditions of the Incidental Take Statement. The Incidental
19 Take Statement includes RPM 4, which requires the Army Corps to take a suite of actions
20 associated with turbidity releases and those releases’ effects on listed salmonids and their critical
21 habitat. To date, nearly fourteen years later, the Army Corps has failed to perform nine of the ten
22 terms and conditions of RPM 4.

23 61. The ESA’s implementing regulations provide that “[i]n order to monitor the impacts of
24 incidental take, the Federal agency or any applicant *must report the progress of the action* and its
25 impact on the species to the Service *as specified in the incidental take statement.*” 50 C.F.R. §
26 402.14(i)(3) (emphasis added). Commenting on this regulation, in 2010 the Ninth Circuit observed

1 that “[t]he regulation makes clear that the Service [in this case, NMFS] is responsible for specifying
2 in the [incidental take] statement how the action agency is to monitor and report the effects of the
3 action on listed species.” *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 531-532 (9th Cir. 2010).
4 NFMS accomplished this responsibility in part through the terms and conditions in RPM 4
5 regarding turbidity releases from CVD.

6 62. Absent an exemption, an agency is not permitted to take a listed species in any amount.
7 16 U.S.C. § 1538(a)(1)(B) (“[W]ith respect to any endangered species of fish or wildlife ... it is
8 unlawful for any person subject to the jurisdiction of the United States to (B) take any such
9 species....”)

10 63. The incidental take statement, therefore, has often been described as a “safe harbor”
11 from Section 9’s prohibition against take. *See, e.g., Wild Fish Conservancy*, 628 F.3d at 530 (“The
12 [incidental take] statement acts as a safe harbor, exempting the specified amount of incidental
13 taking from the take prohibitions of ESA section 9.”); *Nat’l Wildflie Fed’n v. Nat’l Maring*
14 *Fisheries Serv.*, 481 F.3d 1224, 1230 (9th Cir. 2007) (emphasis added) (An “‘Incidental Take
15 Statement’ ... *if followed*, exempts the action agency from the prohibition on taking found in
16 Section 9 of the ESA.”); *Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife, BLM*, 273
17 F.3d 1229, 1249 (9th Cir. 2001) (emphasis added) (“In general, Incidental Take Statements set forth
18 a “trigger” that, when reached, results in an unacceptable level of incidental take, *invalidating the*
19 *safe harbor provision*, and requiring the parties to re-initiate consultation.”); *Ramsey v. Kantor*, 96
20 F.3d 434, 442 (9th Cir. 1996) (emphasis added) (Actions “contemplated by an incidental take
21 statement issued under Section 7 of the ESA *and ... conducted in compliance with the requirements*
22 *of that statement*” do not violate Section 9.).

23 64. Read together, Section 7(b)(4) and Section 9(a)(1) create a regime of prohibiting
24 unauthorized take (i.e., Section 9(a)(1)) and allowing incidental take of listed species as provided
25 for under certain terms and conditions (i.e., Section 7(b)(4)) contained in an incidental take
26 statement. There is no other mechanism in the ESA other than an incidental take statement that

1 allows for take other than an exemption granted by the Endangered Species Committee under
2 Section 7 (*see* 16 U.S.C. § 1536(e), (h)). The Army Corps has been provided no such exemption
3 by the Endangered Species Committee. The logical conclusion of the safe harbor under Section
4 7(b)(4) is that, if the safe harbor afforded by the incidental take statement becomes invalid, the
5 action agency is then prohibited from any taking of the listed species.

6 65. Therefore, by not performing the “nondiscretionary” terms and conditions of RPM 4, as
7 detailed above, the safe harbor the Army Corps was provided by the Incidental Take Statement is
8 removed and the Army Corps is subject to Section 9’s prohibitions against take of the Listed
9 Salmonids, including, under the broad definition of “take” to include the definitions of “harass”
10 and harm”, adverse impacts on the Listed Species’ abilities to “breed, feed, or shelter.” That such
11 “take” is occurring due to the turbidity releases from CVD is clear in the BiOp.

12 66. As described in part above, the BiOp itself documents the effects turbidity has on Listed
13 Salmonids: turbidity prevents spawning, suffocates eggs while incubating, and then starves or
14 strangles those juveniles fortunate enough to be born and to emerge from their eggs. In the BiOp,
15 NMFS did not question *whether* turbidity had such effects – the effects were clear. Rather, NMFS
16 required the Army Corps, as a condition of the Incidental Take Statement, to study and to
17 understand *the extent of that effect* and to plan against it. These many years later, we still have no
18 better understanding of the extent of the unauthorized take, harassment, and harm – only that it has
19 been, and continues to this day to be, inflicted.

20 67. However, the Russian River is not simply *habitat* for the Listed Salmonids – it is
21 designated as *critical habitat* for the Listed Salmonids. The United States Supreme Court recently
22 observed that, “[a]ccording to the ordinary understanding of how adjectives work, ‘critical habitat’
23 must also be ‘habitat’ It follows that ‘critical habitat’ is the subset of ‘habitat’ that is ‘critical’ to
24 the conservation of an endangered species.” *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*,
25 139 S.Ct. 361, 368 (2018). NMFS made certain conclusions in the BiOp regarding the statuses of
26 the Listed Salmonids’ critical habitats which make the impacts to those habitats due to turbidity

1 releases from CVD all the more untenable in light of the definitions of “harass” and “harm” under
2 the ESA as they each relate to habitat, breeding, feeding, and sheltering.

3 68. CCC steelhead critical habitat is that most in danger. For CCC steelhead, NMFS
4 concluded in part that “[h]abitat in San Francisco Bay and its tributaries is most impaired, followed
5 by the upper Russian River”, and that the “availability of transitional rearing habitat for newly
6 emerged fry is likely impacted by channel modifications and the chronic deposition of fine
7 sediments in edgewater habitats in the main stem due to turbid releases from CVD.” BiOp at 86.
8 Thus the BiOp identifies the effect turbidity is having on CCC steelhead habitat, highlighting that
9 “[j]uvenile rearing habitat in streams and estuaries is particularly degraded[.]” *Id.* at 89.

10 69. For CCC coho, NMFS similarly noted that “[j]uvenile rearing habitat is particularly
11 degraded, and ... the current condition of [Primary Constituent Elements] for CCC coho salmon is
12 likely to result in continued decline in the abundance, population growth rates, distribution, and
13 diversity of the species.” *Id.* at 85 For CC Chinook, NMFS recognized that, while the PCE’s of
14 critical habitat for CC Chinook are “not as degraded as those” for CCC steelhead and CCC coho,
15 they are “either not currently functioning, and/or have been degraded in their ability to establish
16 functions necessary to serve their intended role to conserve the species.” *Id.* at 83.

17 70. In analyzing the effects of the Action on critical habitat, NMFS concluded in part that
18 “[t]he proposed project will adversely affect designated critical habitat as the result of flow
19 management at ... CVD[.]” BiOp at 226. Specifically, NMFS found that “flow management of
20 Lake Mendocino and Lake Sonoma primarily affects CCC steelhead critical habitat by limiting the
21 value of the PCEs of freshwater and estuarine rearing habitats.” *Id.* at 227. Additionally, as to CCC
22 coho, NMFS found that, “[s]imilar to [CC] Chinook salmon and [CCC] steelhead, any [CCC] coho
23 that may spawn in the main stem will likely encounter flow levels conducive to spawning and
24 successful egg incubation, *except in areas immediately below CVD during flood control*
25 *operations[.]*” *Id.* at 229 (emphasis added).

1 71. In the BiOp, NMFS anticipated an argument that the effects of the Army Corps' actions
2 could be characterized as minimal and therefore of maintaining the status quo of critical habitat
3 absent the Action. NMFS highlighted the fallacy of such an argument as antithetical to the
4 imperatives of the ESA and observed that “[s]uch an argument is based on the premise that
5 maintaining a status quo of very limited critical habitat is all that is necessary to avoid a jeopardy
6 or adverse modification finding. However, *such an argument fails to recognize the need for the*
7 *Action Agency [in this case, the Army Corps] to ensure that the action is not likely to jeopardize*
8 *listed species or result in destruction or adverse modification of critical habitat.”* BiOp at 230
9 (emphasis added).

10 72. As to the effects of turbidity due to releases from Coyote Valley Dam, the purpose of
11 the Incidental Take Statement, including the nondiscretionary terms and conditions included in
12 RPM 4, is properly understood as necessary to avoid adverse modification of these species' critical
13 habitat. The Army Corps' failure to abide by those terms and conditions for the past fourteen years
14 not only negates the protection afforded by the Incidental Take Statement but, as importantly,
15 deprives the Army Corps, NMFS, and the public of the information needed to fully understand and
16 appreciate the extent of the take, including the impacts to the Listed Species' habitat and their
17 ability to breed, feed, and shelter. Again, and as the BiOp makes perfectly clear, NMFS did not
18 question whether turbidity releases from CVD had these effects on the Listed Species, but the
19 “magnitude” of those effects.

20 **The Army Corps and NMFS are in Violation of the ESA**
21 **for Failing to Reinitiate Consultation**

22 73. The Army Corps' failures to perform the nondiscretionary terms and conditions of its
23 Incidental Take Statement, at the very least, require reinitiation of consultation. The Ninth Circuit
24 has recently held that plaintiffs which brought an ESA suit were entitled to summary judgment on
25 their claim that by failing to perform certain required monitoring, the Forest Service had breached
26 its duty to reinitiate consultation under Section 7 and 50 C.F.R. §402.16. In *Forest Guardians v.*

1 *Johanns*, 450 F.3d 455 (9th Cir. 2006), the Forest Service, as the action agency, proposed an action
2 that included various monitoring efforts. In informal consultation with the Fish and Wildlife
3 Service, it was determined that if this monitoring was conducted, the action was “not likely to
4 adversely affect” listed species, and therefore formal consultation, a biological opinion, and an
5 incidental take statement were unnecessary. However, the Forest Service then failed to perform the
6 monitoring upon which the “not likely to adversely affect” determination had been made. *Forest*
7 *Guardians*, at 459.

8 74. Similarly, in *Oregon Natural Resources Council v. Allen* (476 F.3d 1031, 1035 (9th Cir.
9 2007)) (“*ONRC*”), the Ninth Circuit held that when an underlying biological opinion has been
10 withdrawn, the incidental take statement provided as part of that biological opinion is rendered
11 invalid, and the agency must reinitiate consultation. The Eastern District of California, in analyzing
12 *ONRC*, reasoned that the “duty [to reinitiate consultation] arises under the agency’s section 7(a)(2)
13 obligation to ensure that its actions are not likely to jeopardize the continued existence of listed
14 species.” *South Yuba River Citizens League v. NMFS*, 629 F.Supp.2d 1123, 1133 (E.D. Cal. 2009).
15 In *South Yuba*, the Eastern District acknowledged that the effect of these cases is, “when an agency
16 violates the terms of an [incidental take statement], a private party may bring a citizen suit alleging
17 that by virtue of this violation, the agency’s failure to reinitiate consultation violates the agency’s
18 statutory duty under ESA section 7(a)(2).” *Id.*

19 75. The Ninth Circuit has never held that a numerical limit for an incidental take statement
20 is required by the ESA. In *Arizona Cattle Growers’ Association*, the Ninth Circuit pointed to a
21 lower court holding supporting this pattern, which lower court concluded that an incidental take
22 statement that indexes the permissible take to successful completion of the reasonable and prudent
23 measures as well as the terms and conditions is valid. *See Ariz. Cattle Growers’ Ass’n*, 273 F.3d at
24 1249-1250, *citing Southwest Ctr. For Biological Diversity v. U.S. Bureau of Reclamation*, 6
25 F.Supp.2d 1119 (D.Ariz. 1997).

1 76. In the present case, such reinitiation of consultation is further required where the Army
2 Corps, as the action agency, was provided the Incidental Take Statement as part of NMFS'
3 determination that the Action would jeopardize the continued existence and adversely modify the
4 critical habitat of some of the Listed Salmonids and would result in incidental take of the Listed
5 Salmonids. The issue for NMFS and the Army Corps was that the extent, amount, or magnitude of
6 that take could not be determined at the time the BiOp was issued – neither agency had sufficient
7 information to support such a determination. Therefore, through RPM 4 NMFS required the Army
8 Corps to take certain steps so that the agencies could better understand the “extent” (*see* BiOp at
9 306) and “magnitude” (*see* BiOp at 321) of the effect of the turbidity releases from CVD on the
10 Listed Salmonids. These requirements are the terms and conditions identified above as part of RPM
11 4, with their associated deadlines. Having failed, in large part, to meet RPM 4’s terms and
12 conditions, the agencies remain in the same state of ignorance as they were in 2008 – over fourteen
13 years ago. Reinitiating consultation, therefore, aside from meeting the requirements of the law, will
14 also provide the useful function of forcing both agencies through the analyses necessary to better
15 understand the effects of turbidity releases from CVD, including whether such releases may result
16 in jeopardy or adverse modification. A finding of adverse modification of critical habitat is entirely
17 plausible given the information already available as documented in the BiOp. Reinitiation of
18 consultation will also likely better inform the extent of incidental take that may be appropriately
19 assigned to turbidity releases from CVD as distinguished from other elements of the Action.

20 77. Reinitiation of consultation will provide the opportunity, among other things, to identify
21 different and better informed reasonable and prudent alternatives. Such alternatives may include
22 modernizing CVD so that, among other things, the Army Corps can better mitigate the impacts of
23 turbidity releases from CVD and better manage and provide for temperature tolerances of the Listed
24 Salmonids. Reinitiation of consultation will also allow the agencies to re-assess the status of the
25 Listed Salmonids and their critical habitat in light of the Army Corps’ operations and failures to
26 perform the terms and conditions in RPM 4.

FIRST CLAIM

Violation of the Endangered Species Act for Unauthorized Take of Listed Species

(16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1540(g))

(Against the United States Army Corps of Engineers)

78. Plaintiff incorporates all paragraphs contained in this Complaint into this claim by reference as though fully restated herein.

79. Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B), prohibits the Army Corps from the unauthorized take of any endangered or threatened species within the United States.

80. The ESA citizen suit provision authorizes suits to enforce the ESA and its implementing regulations against any person who is alleged to be in violation of any provision of the ESA or its implementing regulations. 16 U.S.C. § 1540(g).

81. As alleged above, the Army Corps' failure to perform the terms and conditions of RPM 4 of its Incidental Take Statement in the BiOp invalidate the Incidental Take Statement. The safe harbor provided to the Army Corps by the Incidental Take Statement is therefore voided and the Army Corps is subject to Section 9's absolute prohibition against unauthorized take, which is broadly defined to include impacts to habitat and breeding, feeding, and sheltering. The BiOp clearly documents the effects the turbidity releases from CVD have on the Listed Salmonids' habitats and the Listed Salmonids' abilities to breed, feed, and shelter: the turbidity releases create an ecosystem of contraception, suffocation, starvation, and strangulation – in short, “take.”

SECOND CLAIM

Violation of the Endangered Species Act and the Administrative Procedure Act for

Failure to Reinitiate Consultation

(16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16; 16 U.S.C. § 1540(g); 5 U.S.C. § 706)

(Against the United States Army Corps of Engineers and the National Marine Fisheries Service)

82. Plaintiff incorporates all paragraphs contained in this Complaint into this claim by reference as though fully restated herein.

1 83. The ESA imposes an ongoing obligation to ensure that federal agencies do not
2 jeopardize the continued existence of listed species or adversely modify such species' habitats. 16
3 U.S.C. § 1536(a)(2). This obligation applies equally to action agencies, such as the Army Corps in
4 the present case, and consulting agencies, such as NMFS.

5 84. The ESA citizen suit provision authorizes suits to enforce the ESA and its implementing
6 regulations against any person who is alleged to be in violation of any provision of the ESA or its
7 implementing regulations. 16 U.S.C. § 1540(g).

8 85. The ESA's implementing regulations, 50 C.F.R. § 402.16, require the action agency,
9 such as the Army Corps in the present case, to reinitiate ESA section 7(a)(2) consultation when, as
10 here, the Army Corps retains discretionary involvement or control over a federal action that was
11 the subject of a prior consultation and new information reveals effects of that action that were not
12 previously considered.

13 86. The Army Corps and NMFS arbitrarily and capriciously violated, and continue to
14 violate, Section 7(a)(2) of the ESA and the ESA's implementing regulations, 50 C.F.R. § 402.16,
15 by failing to reinitiate consultation on flood control operations for CVD based on the Army Corps'
16 failure to perform the terms and conditions associated with RPM 4 regarding turbidity releases from
17 CVD. The Army Corps retains discretionary federal involvement and control of the performance
18 of the terms and conditions of RPM 4. These terms and conditions were identified repeatedly as
19 "nondiscretionary" in the Incidental Take Statement as a condition of the Army Corps being
20 provided with incidental take coverage.

21 87. The Ninth Circuit has stated that exceeding the trigger of an incidental take statement
22 invalidates the safe harbor provision afforded by an incidental take statement. *See, e.g., Ariz. Cattle*
23 *Growers' Ass'n*, 273 F.3d at 1249 ("In general, Incidental Take Statements set for a "trigger" that,
24 when reached, results in an unacceptable level of incidental take, invalidating the safe harbor
25 provision, and requiring the parties to re-initiate consultation.") Here, RPM 4's terms and
26 conditions, including their associated deadlines, constituted "triggers" that were "nondiscretionary"

1 for the Army Corps to retain incidental take coverage. Having not be met, the Army Corps, as the
2 action agency, and NMFS, as the consulting agency, must reinitiate consultation to determine,
3 among other components of flood control operations of CVD, whether turbidity releases from CVD
4 jeopardize the continued existence of listed species or adversely modify those species' critical
5 habitats.

6 88. The Army Corps' and NMFS' ongoing and separate failures to ensure that the Army
7 Corps' actions do not jeopardize the continued existence of the Listed Salmonids or adversely
8 modify those species' critical habitats is arbitrary, capricious, an abuse of discretion, and not in
9 accordance with law, and is contrary to the mandates of the APA. 5 U.S.C. § 706(2). Had either or
10 both agencies simply complied with their responsibilities under the ESA, including the duty to
11 reinitiate consultation, the following prayer for relief would not be necessary.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, in connection with the preceding paragraphs, Plaintiff respectfully requests
14 that the Court enter judgment in his favor and against Defendants, and award the following relief:

15 A. Find and declare that the Army Corps is violating Section 9 of the ESA's prohibition
16 against unauthorized take through flood control operations of Coyote Valley Dam, to include the
17 turbidity releases of Coyote Valley Dam.

18 B. Enjoin LTG Spellmon, as the Chief of Engineers, from continuing to make releases of
19 water from Coyote Valley Dam where such releases will cause the unauthorized take of Listed
20 Salmonids.

21 C. Order the Appointed Defendants to comply with the law forthwith by reinitiating
22 consultation on the effects of flood control operations of Coyote Valley Dam, to include the
23 effects of turbidity releases from Coyote Valley Dam.

24 D. Order the Army Corps to comply with the terms and conditions of RPM 4 and establish a
25 schedule to be determined for compliance of each of the terms and conditions of RPM 4.
26

1 E. Retain jurisdiction over this matter until such time as the Defendants have fully complied
2 with this Court's order.

3 F. Award Plaintiff his costs of litigation, including reasonable attorney and expert witness
4 fees.

5 G. Grant Plaintiff such further and additional relief as the Court may deem just and proper.

6 Respectfully submitted,

7 WELTY WEAVER & CURRIE, PC

8
9 Dated: October 17, 2022

10 By: /s/ Philip A. Williams
11 Philip A. Williams

12 *Attorney for Plaintiff Mr. Sean White*