Endangered Species Act Litigation:

Reinitiation of Section 7 Consultation

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I. The Statutory Obligations

A. Section 7: No Jeopardy Standard.

Section 7 of the Endangered Species Act ("ESA") prohibits federal agency actions that may jeopardize the continued existence of a listed species or adversely modify its critical habitat:

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

16 U.S.C. § 1536(a)(2). "Jeopardize the continued existence of" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02

B. Section 7: Consultation, Biological Opinion, and Incidental Take Statement.

Section 7 of the ESA establishes an interagency consultation process to assist federal agencies in complying with their duty to avoid jeopardy to listed species, or destruction or adverse modification of critical habitat. Under this process, a federal agency proposing an action that "may affect" a listed species must prepare and provide to the appropriate expert consulting agency, i.e., NMFS or USFWS (depending on the species), a "biological assessment" of the effects of the proposed action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

Interagency consultation required by the ESA is also known as "formal consultation," which is defined by regulation as the "process between the Service [NMFS or USFWS] and the Federal agency that commences with the Federal agency's written request for consultation under Section 7(a)(2) of the [ESA] and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the [ESA]." "Informal consultation" is 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. Informal consultation may, but is not required to, occur prior to formal consultation.

Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates [or reinitiates] consultation on an action under Section 7(a)(2) of the ESA, it "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [Section 7(a)(2)]." *See also* 50 C.F.R. § 402.09. The purpose of Section 7(d) is to maintain the status quo pending the completion of interagency formal consultation.

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

C. Section 9: No "Take" of Listed Species.

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

"Take" of listed species by federal agencies is permitted only if the agency receives an Incidental Take Statement ("ITS") pursuant to Section 7(b)(4) upon completion of formal consultation. 16 U.S.C. § 1536(b)(4). As part of any ITS, NMFS (for anadromous fish) or USFWS (for resident species) must specify "the impact of such incidental taking on the species" – quantifying by amount or extent the allowed incidental take. 16 U.S.C. § 1536(b)(4)(C)(i). Such a statement of impact makes explicit the basis for NMFS' required finding that an incidental take will not jeopardize the species and it provides a check on the adequacy of NMFS' "reasonable and prudent measures . . . necessary or appropriate to minimize such impact." 16 U.S.C. § 1536(b)(4)(C)(ii). If an ITS is issued, any take that occurs thereafter must be within the limits set in the ITS.

D. Judicial Review of Alleged ESA Violations.

The ESA grants the right to any person to bring suit "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the ESA] or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1)(A). Federal district courts have jurisdiction "to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be." 16 U.S.C. § 1540(g). The Administrative Procedure Act ("APA") authorizes courts to review agency action and to hold unlawful and set aside final agency action, findings, and conclusions that are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

II. Federal Regulations Regarding Consultation and Reinitiation of Consultation

A. Reinitiation of Consultation.

After issuance of a Biological Opinion, NMFS (or USFWS) and the action agency with discretionary federal involvement or control over the action must reinitiate formal consultation in certain circumstances. 50 C.F.R. § 402.16. Specifically, "reinitiation of formal consultation is

required and must be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) if the amount or extent of taking specified in the ITS is exceeded;
(b) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
(c) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
(d) if a new species is listed or critical habitat designated that may be affected by the identified action.

Id. "After reinitiation of consultation, the Federal agency and any applicant shall make no irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would avoid violating section 7(a)(2). This prohibition is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied." 50 C.F.R. 402.09.

B. Formal Consultation Process.

Formal consultation is initiated by a written request submitted to NMFS [or USFWS depending on the species], which shall describe the proposed action, area of potential impacts, any listed species or critical habitat that may be affected by the action and how so, and any cumulative effects of the action. The initial request must also include relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared and any other relevant available information on the action, affected listed species, or critical habitat. 50 C.F.R. § 402.14(c). Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to [NMFS/USFWS] in accordance with 50 C.F.R. § 402.12. The Federal agency requesting consultation must provide [NMFS/USFWS] with the best scientific and commercial data available or which can be obtained. 50 C.F.R. § 402.14(d). Formal consultation ends upon issuance of the biological opinion. 50 C.F.R. § 402.14(l)(1).

C. Biological Opinion.

The Service must review all relevant information regarding the action, species, and habitat and "formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(4). In the event that the Service concludes that the action would result in jeopardy, the Service will analyze in consultation with the Federal agency and applicant reasonable and prudent alternatives to the action that could be taken to avoid a violation of Section 7(a)(2) (a jeopardy finding). 50 C.F.R. § 402.14(g)(5).

The biological opinion shall include:

(1) A summary of the information on which the opinion is based;
(2) A detailed discussion of the effects of the action on listed species or critical habitat; and
(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy biological opinion" shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

50 C.F.R. § 402.14(h).

D. Incidental Take Statement.

If an action will not result in jeopardy (either with or without implementation of reasonable and prudent alternatives), but will result in "take" of species, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental take on the species;
(ii) Specifies those reasonable and prudent measures that [NMFS/USFWS] considers necessary or appropriate to minimize such impact; . . .
(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures [required by the ITS]; and
(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

50 C.F.R. § 402.14(i). Any taking which is subject to [an ITS] and which is in compliance with the terms and conditions of that [ITS] is not a prohibited taking under the Act, and no other authorization or permit under the Act is required. 50 C.F.R § 402(i)(5).

If during the course of the action the amount or extent of incidental taking [set forth in the ITS] is exceeded, the Federal agency must reinitiate consultation immediately. 50 C.F.R. § 402.14(i)(4). *See also* 50 C.F.R. § 402.16 (placing reinitiation duty on both the action agency and the Service).

III. Issues That May Arise When Litigating A Reinitiation Claim.

A. Is Reinitiation of Formal Consultation Required When An Incidental Take Exceedance Occurs?

The language in 50 C.F.R. § 402.16 means what it says; that is, when the level of take identified in an Incidental Take Statement is exceeded, reinitation of formal consultation is

required. In *Cottonwood Envtl. Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015), the Ninth Circuit affirmed the District Court's order granting summary judgment to the plaintiff on a failure to reinitiate consultation claim. The Ninth Circuit held that a plaintiff in a failure to reinitiate claim is "not required to establish what a Section 7 consultation would reveal, or what standards would be set, if the [federal agency] were to reinitiate consultation. Ideally, that is the objective and purpose of the consultation process." *Id.* at 1082. Finding the failure to reinitiate claim ripe, the Ninth Circuit noted that "[b]ecause the alleged procedural violation – failure to reinitiate consultation – is complete, so too is the factual development necessary to adjudicate the case." *Id.* at 1084. The Ninth Circuit also confirmed the continuing legal obligation placed on the federal agencies to reinitiate consultation when triggers identified in 50 C.F.R. § 402.16 are met. *Id.* at 1086-87 (noting "the ESA's statutory command that agencies consult to ensure the '*continued* existence' of listed species") (emphasis in original).

Other cases agree that reinitiation of formal consultation (and not some lesser action such as informal consultation) is required upon an exceedance of the level of take permitted by an Incidental Take Statement or if one of the other triggers in 50 C.F.R. § 402.16 is met. *Center for Biological Diversity v. U.S. Bureau of Land Management*, 698 F.3d 1101, 1108 (9th Cir. 2012) ("If the amount or extent of incidental taking is exceeded, the action agency must immediately reinitiate consultation . . . ."); *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059, 1076-77 (9th Cir. 2004) ("discovery of new facts does not justify an 'amendment' to the BiOp, but mandates reinitiating formal consultations"); *Arizona Cattle Growers' Association v. USFWS*, 273 F.3d 1229, 1249 fn. 28, 1251 (9th Cir. 2001) (take limit triggers in ITS are "integral parts of statutory scheme, determining, among other things, when consultation must be reinitiated"); *Hoopa Valley Tribe v. NMFS*, 230 F. Supp. 3d 1106, 1130-31 (N.D. Cal. 2017) ("The federal defendants previously disputed that formal consultation was necessary [after the *C. Shasta* rates exceeded the maximum percentage permitted by the 2013 Incidental Take Statement] but now concede that reinitiation of formal consultation is required"); *Pacificans for a Scenic Coast v. Cal. DOT*, Case No. 15-cv-02090-VC, 2016 U.S. Dist. LEXIS 119479 (N.D. Cal., Sep. 2, 2016) (reinitiation is required once a trigger identified in 50 C.F.R. § 402.16 occurs); *Oregon Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 1006 (D. Or. 2010) (agency violated ESA by failing to reinitiate [formal] consultation following take exceedances).

"Informal" consultation is not sufficient when a trigger for reinitiation of consultation is met. The applicable regulation in 50 C.F.R. § 402.16 expressly refers to "formal consultation." *See also Tidwell*, 716 F. Supp. 2d at 1006 (informal consultation following violation of ITS not consistent with duty to reinitiate formal consultation). "Informal consultation" as provided for in 50 C.F.R. § 402.13 is a preliminary process used to determine whether a proposed action is or is not likely to adversely affect listed species or critical habitat. It is used to determine whether formal consultation and preparation of a Biological Opinion will be required in the first instance for a proposed project. 50 C.F.R. § 402.13. However, in the reinitiation context, the federal agencies have already determined in the existing Biological Opinion and Incidental Take Statement that the agency action is likely to adversely affect listed species. The relevant question at the reinitiation stage is whether one of the triggers identified in 50 C.F.R. § 402.16 has been met. If such trigger has been met, such as exceedance of take limits, reinitiation of formal consultation is required.

The Ninth Circuit has also found it unlawful for the consulting agency (NMFS or USFWS) to "revise" or "amend" an existing Biological Opinion or Incidental Take Statement outside of the formal consultation process where the authorized level of taking has been exceeded by the action agency or other triggers identified in 50 C.F.R. § 402.16 have been met. *Gifford Pinchot*, 378 F.3d at 1076-77. In *Gifford Pinchot*, after completing BiOps relating to timber harvesting under the Northwest Forest Plan, FWS issued "amendments" to the BiOps outside of formal consultation based on new data that may have affected the jeopardy or critical habitat analysis. *Id.* The Court ruled that the amendments to the BiOps were unlawful and that reinitiation of formal consultation was required. "As we have recognized, the discovery of new facts does not justify an 'amendment' to the BiOp, but mandates reinitiating formal consultations . . . . If the data is new and the new data may affect the jeopardy or critical habitat analysis, then the FWS was obligated to reinitiate consultation pursuant to 50 C.F.R. § 402.16." *Id. PCFFA v. Bureau of Reclamation*, 226 Fed. Appx. 715, 717 (9th Cir. 2007) ("it is well settled that a previous agency determination in a Biological Opinion cannot be amended or supplemented with post-determination analysis or evidence without reinitiating the consultation process").

B. Do the Consulting Agencies (NMFS/USFWS) Have the Duty to Reinitiate and Are They Subject to Suit For Failing to Reinitiate If Incidental Take Exceedance Occurs?

The duty to reinitiate consultation lies with both the action agency and also with the consulting agency (i.e., NMFS/USFWS). 50 C.F.R. § 402.16 provides that: "*Reinitiation of formal consultation is required and shall be requested by the Federal Agency or by the Service*, "where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (a) if the amount or extent of taking specified in the incidental take statement is exceeded; . . . ." (emphasis added). The "Service" as referred to in 50 C.F.R. § 402.16 "means the U.S. Fish and Wildlife Service [FWS] or the National Marine Fisheries Service [NMFS], as appropriate." 50 C.F.R. § 402.02 (definitions).

In *Hoopa Valley Tribe v. NMFS*, 230 F. Supp. 3d 1106 (N.D. Cal. 2017), NMFS argued that it had no duty to reinitiate consultation despite the presence of an undisputed exceedance of the applicable incidental take statement. The Court ruled that NMFS did have a duty to reinitiate consultation and could be subject to suit under the APA for its failure to do so:

> While the federal agencies' arguments might be compelling if this was an issue of first impression, the Ninth Circuit has already addressed this precise issue multiple times and confirmed that both the action agency and the consulting agency have a duty to reinitiate consultation. *See Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008) ("The duty to reinitiate consultation lies with both the action agency and the consulting agency"); *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059, 1076-77 (9th Cir. 2004) (holding that discovery of new facts 'mandates reinitiating formal consultations' and that '[the consulting agency] was obligated to reinitiate consultation pursuant to 50 C.F.R. § 402.16"); *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) ("The duty to reinitiate consultation lies with both the action agency and the consultation agency."). Indeed Judge Chhabria of this District recently rejected the arguments the federal defendants make here, applying the Ninth Circuit's holding from *Salmon*

> *Spawning* that both the action agency and consulting agency are obligated to reinitiate consultation. *Pacificans for a Scenic Coast v. Cal. DOT*, No. 15-cv-2090-VC, 2016 WL 4585768, *11 (N.D. Cal., Sep. 2, 2016) ("Consistent with the plain text of [50 C.F.R. Section 402.16], the Ninth Circuit has stated that the duty to reinitiate consultation lies with both the action agency and the consulting agency."). . . .
>
> Formal consultation is a collaborative process that requires the participation of both the [action agency] and NMFS. The purpose of reinitiating formal consultation is not simply to check off a procedural box, but to complete a formal consultation process that ensures to the extent possible that there are no substantive violations of the ESA. Both the NMFS and [the action agency] have a clear obligation to participate in and complete this reinitiation process. As the Ninth Circuit has already held, "[t]he duty to reinitiate consultation lies with both the action agency and the consulting agency." *Salmon Spawning*, 545 F.3d at 1229. The . . . claim that a reinitiation claim is not cognizable against NMFS fails.

Id., at 1117. The duty to reinitiate is placed on the consulting agency (as well as the action agency), because reinitiation relates directly to the opinions, assumptions, and legal standards developed and imposed by the consulting agency in its Biological Opinion and Incidental Take Statement. When those standards are exceeded or new information is learned that undermines the validity of the BiOp and ITS, both the consulting agency and action agency have the duty to reinitiate. *NRDC v. Evans*, 364 F. Supp. 2d 1083, 1133 (N.D. Cal. 2003) ("the ITS serves as a check on the agency's original decision that the incidental take of listed species resulting from the proposed action will not violate section 7(a)(2) of the ESA."). In contrast, when formal consultation is required in the first instance (i.e., prior to the original agency action), the duty is placed only on the action agency to initiate and request consultation because at that time the action agency is the agency with primary knowledge of the proposed action and the effects that it may have on ESA-listed species. That agency also has a substantive legal obligation to ensure that its actions do not result in take or jeopardy to listed species. Reinitiation of formal consultation, however, arises under circumstances that directly relate to the validity of the consulting agency's own Biological Opinion and Incidental Take Statement. Thus, the consulting agency has an affirmative legal obligation to reinitiate consultation if an exceedance of the ITS (or other factor requiring reinitiation) occurs.

C. Are Failure to Reinitiate Claims Brought Pursuant to the ESA's Citizen Suit Provision or Pursuant to the Administrative Procedure Act (APA)?

The ESA grants the right to any person to bring suit "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the ESA] or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1)(A). Federal district courts have jurisdiction "to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be." 16 U.S.C. § 1540(g). This "citizen suit" provision of the ESA authorizes any person to initiate a lawsuit against federal action agencies (the agencies implementing the project or action) for

unlawfully taking fish under Section 9 of the ESA or for failing to reinitiate consultation when one of the triggers in 50 C.F.R. § 402.16 is satisfied (or for other violations of the ESA). The ESA's citizen suit provision generally provides an adequate remedy for any of the action agency's ESA violations thus making review under the APA unnecessary or duplicative. 5 U.S.C. § 704 (providing for judicial review of agency action where "there is no other adequate remedy in a court").

In contrast, a failure to reinitiate claim against the consulting agency (NMFS/USFWS) is properly brought under the APA and not under the ESA citizen suit provision. In *Hoopa Valley Tribe*, the Court explained:

> . . . NMFS is an administrator of the ESA and the Supreme Court has held that Section 1540(g)(1)(A) does not provide a cause of action to sue the Secretary (which includes the Secretary of the Interior, Secretary of Commerce, and their delegate services, such as NMFS) for "failure to perform [its] duties as administrator of the ESA." *Bennett v. Spear*, 520 U.S. 154, 174 (1997). In *Bennett*, the Court attempted to reconcile Section 1540(g)(1)(C), which provides a specific right to sue the Secretary for certain specific non-discretionary Section 1533 violations, with Section 1540(g)(1)(A), the general citizen suit provision. *Id.* at 173. The Court concluded that, because Section 1540(g)(1)(C) provides a specific, but limited cause of action against the Secretary, Section 1540(g)(1)(A) cannot offer an alternative, general, cause of action. . . . *Bennett* effectively holds that the Secretary may only be sued under the ESA in its capacity as a consulting agency pursuant to the specifications outlined in Section 1540(g)(1)(C).

Hoopa Valley Tribe, 230 F. Supp. 3d at 1116. Because a failure to reinitiate claim does not fall within the non-discretionary duties outlined in Section 1533, a failure to reinitiate claim against the consulting agency cannot be brought under the ESA. However, such a claim can be brought against the consulting agency under the APA, which authorizes courts to review agency action and to hold unlawful and set aside final agency action, findings, and conclusions that are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). There may also be circumstances in which NMFS or USFWS are the action agency, in which case a citizen suit under the ESA may be available.

D. Scope of Judicial Review: Are ESA Claims Alleging Failure to Reinitiate Against the Action Agency Limited to Administrative Record?

Suits to compel action agencies to comply with the substantive provisions of the ESA arise under the ESA citizen suit provision and not the APA. *Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005). In *Hoopa Valley Tribe*, the Court found that the scope of review for the Tribe's failure to reinitiate claims against the action agency were not subject to administrative record limitations of the APA. The Court summarized applicable 9th Circuit law:

> In *Washington Toxics*, plaintiffs brought an ESA citizen suit against the Environmental Protection Agency ("EPA") for its alleged failure to consult with the NMFS regarding the effects of its ongoing pesticide registrations. 'After a hearing

> and consideration of voluminous evidence bearing on the appropriate scope of injunctive relief,' including evidence on the effects of the challenged pesticides, the district court enjoined the EPA's authorization of the use of certain pesticides pending compliance with the ESA. *Washington Toxics*, 413 F.3d at 1031. The intervening defendants argued on appeal that the district court erred by failing to limit review to the administrative record in accordance with APA standards. *Id.* at 1034. The Ninth Circuit rejected this argument and stated that the lower court 'correctly held . . . that the ESA citizen suit provision creates an express, adequate remedy.' *Id.* The Ninth Circuit concluded that '[b]ecause [the ESA] independently authorizes a private right of action, the APA does not govern the plaintiffs' claims. Plaintiffs' suits to compel agencies to comply with the substantive provisions of the ESA arise under the ESA citizen suit provision, and not the APA.' *Id.*

Hoopa Valley Tribe, 230 F. Supp. 3d at 1123-24. The Court in *Hoopa Valley Tribe* also cited to *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011), a case in which the Ninth Circuit affirmed the district court's admission of extra-record evidence in a claim alleging that BLM failed to consult under the ESA.

The Court in *Hoopa Valley Tribe* also disagreed with the federal defendants' argument that the more recent opinion in *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2012) implicitly overruled the reasoning in *Washington Toxics* and *Kraayenbrink*. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1124-25. While the 9th Circuit stated in passing that the *Karuk* case was a "record review" case, the Court did not mention either of those prior cases. Other courts considering failure to act claims under the ESA have similarly held that *Karuk Tribe* does not silently overrule *Washington Toxics* or *Kraayenbrink*. *See Northwest Coal. for Alternatives to Pesticides v. EPA*, 920 F. Supp. 2d 1168, 1174 (W.D. Wash. 2013) (holding "*Karuk Tribe* cannot reasonably be read to implicitly or silently overrule the Ninth Circuit's reasoned holdings that, in circumstances where a plaintiff challenges a federal agency's failure to act under the citizen suit provision of the ESA, review is not confined to an administrative record"); *Ellis v. Housenger*, No. C-13-1266-MMC, 2015 WL 3660079, at *3 (N.D. Cal. June 12, 2015) (rejecting the argument that *Karuk Tribe* silently overrules *Washington Toxics* and *Kraayenbrink* given that it cites to neither case and "does not address in any manner the issue of whether evidence outside the administrative record can be considered").

Thus, in an ESA citizen suit case alleging failure to consult or reinitiate, the APA's record review provision does not apply and 'evidence outside the administrative record [may be considered] for the limited purposes of reviewing Plaintiffs' ESA claim.'" *Hoopa Valley Tribe*, *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1125, citing *Kraayenbrink*, 632 F.3d at 497.

While failure to reinitiate claims against NMFS arise under the APA, some extra-record evidence may also be reviewed in those claims as well. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (when a plaintiff seeks to compel agency action unlawfully withheld or unreasonably delayed "review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record"); *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002) ("As this case concerns agency inaction, there can be no final agency action that closes the administrative

record or explains the agency's actions"). "The reason for this rule is that when a court is asked to review agency inaction before the agency has made a final decision, there is often no official statement of the agency's justification for its actions or inactions." *S.F. Baykeeper*, 297 F.3d at 886.

The Court in *Hoopa Valley Tribe* found the cases "clear that review is not wholly limited to an administrative record in a failure to act case, but they are not entirely clear on what extra-record evidence may be considered." *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1126. Because it was not clear that all extra-record evidence was properly considered in a failure to act APA case, the Court voluntarily limited its review to the administrative record after finding that its analysis would be the same regardless of whether it reviewed the claim under the administrative record or considered extra-record evidence. *Id*. Because there was ample evidence in the record to support plaintiffs' failure to reinitiate claims, review of extra-record evidence was unnecessary. Also, even in a record review case, extra-record evidence can be considered for purposes of demonstrating standing and regarding necessity of injunctive relief. *Id*.

E. <u>If the Agency Requests Reinitiation During Litigation – Is the Claim Moot</u>?

If the agency reinitiates formal consultation during the course of litigating a failure to reinitiate claim, the case does not necessarily become moot if there remains some other effective relief to be granted, such as injunctive relief pending completion of the consultation. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1131-32.

"The burden of demonstrating mootness is a heavy one." *NW Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241 (9th Cir. 1988); *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006). In determining mootness, the relevant question is whether *any* effective relief can be granted. *Gordon*, 849 F.2d at 1245, quoting *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986). "The fact that the alleged violation has ceased is not sufficient to render a case moot. As long as effective relief may still be available to counteract the effects of the violation, the controversy remains live and present." *Id.*; *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065 (9th Cir. 2002) ("a case is moot only where no effective relief for the alleged violation can be given").

In *Johanns*, the Ninth Circuit rejected the Forest Service's argument that a failure to reinitiate claim was moot because the Forest Service had reinitiated during the litigation. *Johanns*, 450 F.3d at 461-463. The Court found that a declaratory judgment could still provide effective relief to ensure that similar violations would not occur in the future. While a failure to reinitiate claim could become moot if the only relief requested is an order compelling reinitiation, a belated reinitiation does not moot a failure to reinitiate claim where plaintiffs have sought other associated remedies such as an injunction pending completion of the consultation. *Cal. Trout, Inc. v. U.S Bureau of Reclamation*, 115 F. Supp. 3d 1102, 1112 (C.D. Cal. 2015) (denying motion to dismiss for mootness where other remedies for declaratory and injunctive relief remained available).

In *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982 (D. Or. 2010), the Court disagreed that plaintiff's failure to reinitiate claims had been rendered moot by subsequent

reinitiation, due to the continued availability of declaratory and injunctive relief. *Id.* at 993. Despite reinitiation, the federal defendants proposed to continue operating under the existing Biological Opinion during the reinitiated consultation. It was clear that defendants had violated the ESA by failing to timely reinitiate formal consultation. Also, "federal defendants' response to violations of the ITS appears to have been influenced by a litigation strategy rather than the reinitiation regulations." *Id.* at 995. For those reasons, the Court rejected the mootness defense and granted summary judgment to Plaintiff on its failure to reinitiate claim. *Id.* at 1006-1008. *See also NRDC v. Norton*, CV-05-01207, 2006 U.S. Dist. LEXIS 94689 (E.D. Cal. 2006) (refusing to dismiss on prudential mootness grounds despite reinitiation of consultation where agencies involved did not intend to change their opinion or alter their operations significantly). The *Hoopa Valley Tribe* court also agreed that the Tribe's claim was not moot despite federal defendants' claim that they commenced reinitiation of consultation shortly before the hearing on summary judgment. "Because plaintiffs do not merely seek declaratory relief ordering the federal agencies to reinitiate consultation, but also seek an injunction until formal consultation is completed, the court may still grant plaintiffs effective relief on their reinitiation claim. The claim is not moot." *Hoopa Valley Tribe*, 230 F. Supp.3d at 1132.

Mootness could arise in failure to reinitiate cases where an order compelling reinitiation was literally the only relief requested by plaintiff or available to the court. *See, e.g., Ctr. for Biological Diversity v. U.S. Forest Service*, 820 F.Supp.2d 1029, 1036 (D. Ariz. 2011) (rejecting mootness argument and explaining that mootness was found in *SW Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998) only because there was "literally no other relief that could be granted to plaintiffs"). Or, a failure to reinitiate case could become moot where the reinitiated consultation has been fully completed and a new Biological Opinion has issued. *Alliance for the Wild Rockies v. U.S. Dep't of Agriculture*, 772 F.3d 592, 601 (9th Cir. 2014). However, where the plaintiff seeks injunctive or declaratory relief along with an order compelling consultation or reinitiation of consultation, the case should not be found moot simply because the federal agencies belatedly commenced the consultation process after being sued.

F. Do Agencies Lose Protection of the Incidental Take Statement From Take Liability If Consultation Not Reinitiated?

Generally, compliance with terms and conditions of an incidental take statement provides protection and a safe harbor from liability for take. Section 7(c)(2) of the ESA states that "any taking that is in compliance with the terms and conditions specified in a written [incidental take] statement . . . shall not be considered to be a prohibited taking of the species concerned." 16 U.S.C. 1536(a)(2). The "terms and conditions" of an incidental take statement are the rules "with which the action agency must comply to implement the reasonable and prudent measures" outlined by the consulting agency as necessary to limit impact to the relevant species. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1118, quoting *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031, 1034 (9th Cir. 2007). Thus, in general, as long as any takings comply with the terms and conditions of the Incidental Take Statement, the action agency is exempt from penalties for such takings." *Id.*

However, the "Ninth Circuit has repeatedly indicated that when an agency exceeds the 'trigger' of an incidental take statement, the relevant agencies are required to reinitiate formal

consultation and the safe harbor provision becomes invalid." *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1119, citing *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Service*, 273 F.3d 1229, 1249 (9th Cir. 2001) ("In general, Incidental Take Statements set forth a 'trigger' that, when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provision, and requiring the parties to re-initiate consultation."); *Allen*, 476 F.3d at 1039 (9th Cir. 2007) (noting that an Incidental Take Statement was invalid because it 'fails to set forth a trigger that would invalidate the safe harbor provision and reinitiate the consultation process'); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 531 (9th Cir. 2010) (*quoting Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1249) ('Incidental Take Statements set forth a 'trigger' that, when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provision.').

In *Hoopa Valley Tribe*, the Court found it "unclear exactly when or how the safe harbor provision of an incidental take statement becomes invalid after the incidental take trigger is met and how courts should analyze a subsequent Section 9 claim." *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1119. While the Court seemed to agree that exceeding the reinitiation trigger of an incidental take statement should not immediately subject the agency to Section 9 take liability (as that could render the safe harbor virtually worthless), the Court also disagreed that the safe harbor remains in place indefinitely. *Id.* In *Hoopa Valley Tribe*, where the take exceedances (which triggered the obligation to reinitiate consultation) occurred in 2014 and again in 2015 without reinitiation of consultation by the agencies, the Court found that "for the purposes of pleading, plaintiffs have demonstrated that it is plausible that the safe harbor provision is no longer valid and cannot protect the [action agency] from Section 9 liability for future takings." *Id*. The Tribe also showed that a future taking violation was reasonably certain to occur if the Bureau of Reclamation continued to operate the Project on terms of the existing BiOp. Thus, the Court denied the Bureau's motion to dismiss the Section 9 taking claim. *Id.* at 1121.

G. <u>What is Appropriate Relief? Injunction of Agency Action Pending Consultation</u>?

"The purpose of the consultation process . . . is to prevent later substantive violations of the ESA. The remedy for a substantial procedural violation of the ESA – a violation that is not technical or de minimis – must therefore be an injunction of the project pending compliance with the ESA." *Wash. Toxics*, 413 F.3d at 1035. "If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (holding District Court erred by declining to enjoin project pending compliance with consultation requirements). An injunction serves the purpose of preventing jeopardy and take of protected species pending completion of the reinitiated consultation.

The appropriate remedy for procedural violations of the ESA, and specifically the failure to consult, is an injunction of the project or action pending completion of consultation and issuance of a new Biological Opinion. *Wash. Toxics*, 413 F.3d at 1034-1036 (granting injunction preventing action pending completion of consultation); *PCFFA v. U.S. Bureau of Reclamation*, 226 Fed. Appx. 715 (9th Cir. 2007) (affirming injunction preventing irrigation diversions pending completion of consultation and preparation of a new Biological Opinion); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (affirming injunction against project pending compliance with procedural consultation requirements); *Alliance for Wild Rockies v. Krueger*, 950 F. Supp.

2d 1196, 1217 (D. Mont. 2013) (enjoining agency action pending completion of reinitiated consultation); *Ctr. for Biological Diversity v. U.S. Forest Service*, 820 F. Supp. 2d 1029 (D. Ariz. 2011) (rejecting mootness argument, despite reinitiation of consultation, and granting preliminary injunction pending completion of the reinitiated consultation).

In *Hoopa Valley Tribe*, the District Court agreed that injunctive relief (requiring specific flows to protect fish) was appropriate pending completion of the reinitiated consultation. The fact that the Tribe sought summary judgment only on its failure to reinitiate claim as opposed to its substantive jeopardy and taking claims did not foreclose injunctive relief. The Court found that failure to reinitiate consultation was a substantial procedural violation and thus injunctive relief, while consultation is ongoing, is the appropriate remedy. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1133-1135.

H. What Showing Must Be Made to Obtain Injunction?

Claims for injunctive relief are generally governed by a four-factor test: (1) there will be irreparable harm; (2) there are no adequate remedies at law; (3) a balance of hardships supports the requested relief; and (4) the relief is in the public interest. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1136, citing *Indep. Training & Apprenticeship Program v. Calif. Dep't of Indus. Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013). In ESA cases, the primary focus will be on proof of irreparable harm, because the other three elements should always favor injunctive relief to prevent such harm to listed species. In cases involving the ESA, Congress has stripped courts "of at least some of their equitable discretion in determining whether injunctive relief is warranted." *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1090 (9th Cir. 2015); *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 543, n. 9 (explaining that ESA "foreclose[s] the traditional discretion possessed by an equity court.").

There is no adequate remedy at law for the loss of or harm to endangered species. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1140, citing *Cottonwood*, 789 F.3d at 1090 ("Congress established an unparalleled public interest in the 'incalculable' value of preserving endangered species. It is the incalculability of the injury that renders the remedies available at law, such as monetary damages inadequate."); *Amoco*, 480 U.S. at 545 ("Environmental injury, by its nature, can seldom be adequately remedied by money damages.").

In ESA cases, "the balance of hardships and the public interest tip heavily in favor of endangered species." *Hoopa Valley Tribe*, 239 F. Supp. 3d at 1140. Courts are not permitted to favor economic interests over potential harm to endangered species. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward extinction whatever the cost."). "Congress has established that endangered species must be prioritized and 'courts may not use equity's scales to strike a different balance.'" *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1141, *quoting Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 422 F.3d 782, 793 (9th Cir. 2005); *Cottonwood*, 789 F.3d at 1091 ("[T]he equities and public interest factors always tip in favor of the protected species."). The primary inquiry in cases involving ESA-listed species is whether an injunction is necessary to prevent irreparable injury. *Cottonwood*, 789 F.3d at 1090-91. "[I]n light of the stated purposes

of the ESA in conserving endangered and threatened species and the ecosystems that support them, establishing irreparable injury should not be an onerous task for plaintiffs." *Id.*

It is not necessary to show harm to the "species as a whole" to obtain an injunction or that the species is likely to suffer extinction absent an injunction. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1137, citing *Big Country Foods, Inc. v. Bd. of Educ.*, 868 F.2d 1085, 1088 (9th Cir. 1989) (plaintiffs must show irreparable injury 'irrespective of the magnitude of the injury'); *Nat'l Wildlife Fed. v. Burlington N. R.R.*, 23 F.3d 1508, 1512 n.8 (9th Cir. 1994) ("We are not saying that a threat of extinction to the species is required before an injunction may issue under the ESA. This would be contrary to the spirit of the statute, whose goal of preserving threatened and endangered species can be achieved through incremental steps."); *Marbeled Murrelet v. Pac. Lumber Co.*, 83 F.3d 1060, 1066 (9th Cir. 1996) ("A reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction."). Thus, the Court said in *Hoopa Valley Tribe*, "[e]vidence that the Coho salmon will suffer imminent harm of any magnitude is sufficient to warrant injunctive relief." 230 F. Supp. 3d at 1137.

The Ninth Circuit recently re-affirmed that a showing of extinction level risks is not necessary to obtain an injunction under the ESA. *Nat'l Wildlife Fed'n v. NMFS*, 886 F.3d 803, 818 (9th Cir. 2018). "The district court did not err when it found irreparable harm without finding an extinction-level threat to the listed species in the remaining two years of the remand period. Irreparable harm should be determined by reference to the purposes of the statute being enforced. . . . One of the ESA's central purposes is to conserve species. . . . Showing an extinction-level threat to listed species is not required before an injunction can issue under the ESA . . . . Thus, a threat of harm to a listed species that falls below an imminent extinction threat can justify an injunction. " *Id.*

It is also not necessary to show that the agency action is the only cause of harm to the listed species. As the Court in *Hoopa Valley Tribe* explained: "No doubt many factors beyond the Klamath Project's operations, impact *C. Shasta* disease rates, but there is no dispute, and the 2013 BiOp concedes, that the Klamath Project's operations increase the incidence of *C. Shasta* above natural levels. It is not necessary for plaintiffs to show that the Klamath Project causes all incidence of *C. Shasta*, only that the Coho salmon are likely to be irreparably harmed absent the requested relief." *Hoopa Valley Tribe*, 230 F. Supp.3d at 1139.

I. <u>What is Appropriate Scope of Injunctive Relief</u>?

The scope of injunctive relief will largely depend on the specific facts of the case, the proposed action, and the scope of potential harms facing the species. "Ordinarily, where an injunction is appropriate based on a substantial procedural violation of the ESA, courts have enjoined further work on the disputed project pending compliance with the Act's procedural requirements." *PCFFA*, 138 F. Supp. 2d at 1249. However, it may be possible and appropriate to enter an injunction that is narrower than complete cessation of the agency action if species will be adequate protected. For example, in *Hoopa Valley Tribe*, the Court entered an injunction that mandated deliveries of certain quantity of flow for fish, based on the best available science, rather than ordering a complete shut-off of irrigation deliveries for the Klamath Project. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1142-46. The district court has broad authority to craft

equitable remedies appropriate to the facts and circumstances of the case. *Sierra Forest Legacy v Rey*, 577 F.3d 1015, 1022-23 (9th Cir. 2009).

J. Is Evidentiary Hearing Required Prior to Granting Injunctive Relief Pending Completion of Consultation?

A trial-type hearing is not required in all cases prior to the issuance of injunctive relief. Injunctive relief may be granted without live oral testimony where the parties have a full opportunity to submit written testimony, to argue the matter, and the Court finds that decision on affidavits is appropriate. *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1326 (9th Cir. 1994). In *Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002), the Ninth Circuit affirmed a permanent injunction entered without a full evidentiary hearing where the injunction, entered after an order on summary judgment, was actually interim in nature and would expire upon Federal Defendants' compliance with their legal obligations under NEPA.

> Most importantly, this case also differs from the normal injunctive setting because even though the district court's order is termed a 'permanent injunction' we deal here only with interim, not permanent, measures. The interim measures (which are the subject of this appeal) are to be in place only so long as it takes for the BLM to conduct the environmental studies required by law so that it can properly determine, exercising appropriate discretion with extensive input from the Ranchers and Environmental Groups, what measures should be implemented permanently . . . .
>
> Because there are interim measures designed to allow for a process to take place which will determine permanent measures, and all parties will have adequate opportunity to participate in the determination of permanent measures (and if need be challenge the outcome in court), we hold that an evidentiary hearing was not required on the facts of this case.

Hahn, 307 F.3d at 831. The Court affirmed a permanent injunction without a full evidentiary hearing in *Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1139-41 (9th Cir. 2009), reversed on other grounds, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) because the Court had considered voluminous evidence and argument submitted by all parties and because the measures ordered were interim in nature and would end upon agency compliance with NEPA. The Supreme Court was asked but expressly declined to address arguments that it was error to issue the permanent injunction without a full evidentiary hearing. 539 U.S. at 166. Recently, in *Nat'l Wildlife Fed'n v. NMFS*, 886 F.3d 803 (9th Cir. 2018), the Court analyzed the issuance of injunctive relief pending completion of a new Biological Opinion as "interim" relief "because the injunction may be lifted after federal defendants issue a new BiOp and comply with NEPA." *Hoopa Valley Tribe*, 230 F .Supp. 3d at 1145 (finding no disputes of material fact that warranted full evidentiary hearing prior to issuance of injunction pending completion of consultation); *Wash. Toxics Coalition v. EPA*, CV C01-132 C, 2003 U.S. Dist. LEXIS 26088 (W.D. Wash., August 8, 2003) (declining federal agency request for "full blown evidentiary hearing" where injunction would only remain in place pending completion of consultation under ESA).