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NATIONAL MARINE FISHERIES SERVICE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ECOLOGICAL RIGHTS FOUNDATION, Plaintiff, v. NATIONAL MARINE FISHERIES SERVICE, Defendant.	CASE NO. 18-cv-888 JSC **DECLARATION OF DONALD TANNER IN SUPPORT OF DEFENDANT'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** Date: July 19, 2018 Time: 2:00 p.m. Place: Courtroom F, 15th Fl. Hon. Jacqueline Scott Corley

Pursuant to 28 U.S.C. §1746, I, Donald L. Tanner, declare and state as follows:

1. I am currently a Special Agent with the National Oceanic and Atmospheric Administration (NOAA), Office of Law Enforcement (OLE), which is part of the United States Department of Commerce (DOC). I have occupied this position since 2002. My primary duties include investigation and enforcement of regulatory and statutory violations of law under the jurisdiction of the NOAA/OLE. In that capacity, my current area of operation falls within the borders of the

State of California and includes, but is not limited to: the Central Valley of California and Coastline North of San Luis Obispo to the Oregon boarder; as well as regulatory oversight of the commercial fishing industry; the international import/export of fish products through U.S. ports; and National Marine Sanctuaries along the Coast of California.

2. I am personally familiar with the Freedom of Information Act (FOIA) request of Plaintiff Ecological Rights Foundation, which is at issue in this case. The statements contained in this declaration are based upon my personal knowledge and review of the responsive documents in my possession at the time of the FOIA searches discussed in this declaration.

3. I have read Plaintiff's Opposition to Defendant's Motion for Summary Judgement and Reply in Support of Plaintiff's Motion for Summary Judgement (June 8, 2018), and provide the following statements in support of Defendant's Reply In Support of Cross-Motion for Summary Judgment.

SITE VISIT TO YUBA RIVER AND RELATED DOCUMENT RETENTION

4. Around 2015, I was asked by National Marine Fisheries Service (NMFS) Fishery Biologist Larry Thompson to join him on a site visit to the Englebright Dam because he believed there may be take of salmonids listed under the Endangered Species Act (ESA) occurring at the site. This was an informal site visit; OLE routinely participates on a ride along or may accompany NOAA Fisheries employees to site visits on occasion merely to become familiar with a site or particular concern and/or to gain local area knowledge of PRD related projects.

5. Around 2015, during my one and only visit to the area, Thompson and I visited Narrows 2 and the Yuba River. I considered this site visit to be an informal opportunity to visit the area and was not conducting an investigation. Thompson was present with me during the entirety of this visit. I did not take notes, collect physical evidence, or take any photographs because I did not see anything indicating evidence of unauthorized takes of ESA-listed salmonid species.

6. During this visit, I reminded Thompson that OLE initiates investigations with an official referral from a NMFS Fishery Biologist, including completion of a memorandum or email detailing the alleged unauthorized take. Thompson never made such a referral, and OLE never received an official referral from any NMFS Fishery Biologist. Accordingly, I did not open an incident report or initiate an investigation for unauthorized take at Narrows 2.

7. Between approximately 2014 and 2017, I received unsolicited emails from Thompson about the Federal Energy Regulatory Commission project he was involved in that included, among other locations, the Yuba River. Ultimately, Thompson did not make a formal referral to OLE to investigate take allegations at the narrows or related areas. Other than receiving emails from Thompson, I have not collected any additional documents related to this matter. I did not personally track reports of salmonid strandings at the referenced locations because Thompson did not initiate a referral to OLE.

PLAINTIFF'S FOIA REQUEST AND ADDITIONAL RECORD SEARCHES

8. On or about April 21, 2017, I received a second FOIA search task memo. Previously on or about December 12, 2016, I had conducted a search in response to the Plaintiff's FOIA request that included both my electronic and paper records.

9. On or about April 21 & 25 and May 5, 2017, I conducted an electronic search of my agency issued laptop computer, utilizing all of the search terms referenced in the April 21, 2017 FOIA search task memo, to identify any emails and/or documents related to the FOIA request as well as documents sent to me by Larry Thompson.

10. As part of this effort, I reviewed my files and determined that I had no paper (hardcopy) documents that might be responsive.

11. During all document searches I conducted in response to this FOIA request, I did not use any date restrictions. The end date for each search was the date that I conducted each search.

12. I have reviewed the FOIA request terms again and am not aware of any "potentially overlooked material" as described by Plaintiff.

PHISHING SCAM AND DELETION OF DOCUMENTS

13. In an email exchange with Arlyn Penaranda, FOIA Coordinator, regarding my efforts to query emails related to this FOIA request, I indicated to her that due to an email/phishing scam dating back to 2014, a great number of my archived emails were lost and unrecoverable.

14. I do not recall whether any potentially responsive documents for this FOIA request were deleted during this process.

Pursuant to 28 U.S.C. §1746, I hereby affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 20 day of June, 2018, Sacramento, California.

Donald L. Tanner