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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OUR CHILDREN'S EARTH FOUNDATION, a non-profit corporation, and ECOLOGICAL RIGHTS FOUNDATION, a non-profit corporation, Plaintiffs, v. LELAND STANFORD JUNIOR UNIVERSITY, Defendant.	Civil Case No.: 13-cv-00402-EDL **SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** **(Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*.)**

Our Children's Earth Foundation ("OCE") and Ecological Rights Foundation ("ERF") (collectively "Plaintiffs") allege as follows:

INTRODUCTION

1. Plaintiffs bring this action under the provisions of the Endangered Species Act ("ESA") that permit aggrieved parties to redress harms caused by violations of the ESA. *See* 16 U.S.C. § 1540(g).

2. Plaintiffs seek relief from conduct by the Leland Stanford Junior University ("Stanford").

Stanford operates and maintains Searsville Dam and Searsville Reservoir and diverts water from San Francisquito Creek watershed from water diversions located in the watershed. These operations are perpetrating "take" within the meaning of ESA section 9, 16 U.S.C. § 1538, of three species listed as protected under the ESA: Central California Coast steelhead ("CCC steelhead"), the California red-legged frog, and San Francisco garter snake (collectively, "the Listed Species"). Stanford is perpetrating this "take" without having obtained an Incidental Take Permit pursuant to ESA section 10, 16 U.S.C. § 1539. This constitutes a violation of ESA section 9, 16 U.S.C. § 1538.

JURISDICTION

3. This Court has subject matter jurisdiction over the ESA claims set forth in this Complaint pursuant to 28 U.S.C. section 1331 (an action for declaratory, injunctive and other relief arising under the Constitution and laws of the United States) because this case involves a civil action arising under the laws of the United States, specifically 16 U.S.C. section 1540(g)(1), which authorizes citizens to bring suit to enjoin any person that is in violation of the ESA or any regulation issued pursuant to the ESA. Further, 16 U.S.C. section 1540(g)(1) also grants jurisdiction to this Court to hear this ESA citizen suit.

4. Pursuant to 16 U.S.C. section 1540(g)(2)(A)(i), Plaintiffs provided notice of Stanford's violation of the ESA, and of Plaintiffs' intention to file suit against Stanford, to Stanford and to the Secretary of Commerce on November 20, 2012. Additionally, Plaintiffs provided notice of Stanford's violation of the ESA, and of Plaintiffs' intention to file suit against Stanford, to Stanford and the Secretary of Interior on March 6, 2013. The allegations of ESA violation in this Complaint are timely since they were filed after the expiration of this 60-day notice period.

5. Plaintiffs and their members are aggrieved by Stanford's unlawful taking of the Listed Species. Plaintiffs' members visit the San Francisquito Creek watershed for wildlife viewing, scientific observation, educational study, aesthetic enjoyment, spiritual contemplation, cultural fulfillment, and recreation. Stanford's unlawful taking of the Listed Species have caused and will in the future continue to cause an impairment of the state of the ecosystem of the San Francisquito Creek watershed, and as a result, Plaintiffs' members' use of the area is impaired and diminished. Stanford's unlawful taking of the Listed Species has led and will continue to lead to increased scarcity and diminished health of the Listed

Species in the San Francisquito watershed. As a result, Plaintiffs' members' enjoyment of those species has been and is being impaired and diminished.

6. This Court has personal jurisdiction over Stanford. Stanford is a trust with corporate powers under the laws of the State of California and a tax-exempt entity under section 501(c)(3) of the Internal Revenue Code. Stanford is located in Stanford, California, in the county of Santa Clara.

VENUE

7. Venue in the United States District for the Northern District of California is proper under 28 U.S.C. section 1391(b) because a substantial part of the events or omissions giving rise to the claims in this case occurred in the Northern District of California, and a substantial part of the property that is the subject of the action is situated in the Northern District of California.

INTRADISTRICT ASSIGNMENT

8. Intradistrict assignment of this matter to San Francisco Division of the Court is appropriate pursuant to Civil Local Rule 3-2(e) because a substantial part of the events or omissions giving rise to the claims in this case occurred in San Mateo County and a substantial part of the property that is the subject of this action is situated in San Mateo County.

THE PARTIES

9. OCE is a non-profit corporation dedicated to protecting the environment, including the San Francisco Bay Area. OCE's office is located in San Francisco, California. OCE promotes public awareness of domestic and international environmental impacts through information dissemination, education, and private enforcement of environmental protection statutes. OCE enforcement cases aim to achieve public access to government information, ensure proper implementation of environmental statutes and permitting, and enjoin illegal violations.

10. OCE has an active membership of people from all over the United States with a majority of its members residing in San Francisco Bay Area. OCE members use San Francisquito Creek and San Francisco Bay for recreation, wildlife observation and study (including observation of CCC steelhead, the California red-legged frog, and San Francisco garter snake), aesthetic enjoyment, and spiritual renewal. OCE members particularly enjoy as recreational, educational, and/or spiritual pursuits observing, studying and contemplating the migration of anadromous fish in San Francisquito Creek in

San Francisco Bay, including CCC steelhead. These members' enjoyment of CCC steelhead on San Francisquito Creek and San Francisco Bay is being substantially diminished by the dramatic decline in the numbers and health of CCC steelhead on these waterways due to the adverse impacts of Searsville Dam and Stanford's diversions of water from San Francisquito Creek watershed. These members continue to hope for survival and recovery of CCC steelhead on these waterways. Additionally, these members' enjoyment of observation of California red legged frogs, and San Francisco garter snakes in the San Francisquito watershed is being substantially diminished by the decline in the numbers and health of these species in the watershed due to the adverse impacts of Searsville Dam and Stanford's diversions of water from the San Francisquito Creek watershed.

11. ERF is a non-profit, public benefit corporation, organized under the laws of the State of California, devoted to furthering the rights of all people to a clean, healthful and biologically diverse environment. To further its environmental advocacy goals, ERF actively seeks federal and state agency implementation of state and federal water quality related laws, and as necessary, directly initiates enforcement actions on behalf of itself and its members. ERF's members use San Francisquito Creek and San Francisco Bay for recreation, wildlife observation and study (including observation of CCC steelhead, the California red-legged frog, and San Francisco garter snake), aesthetic enjoyment, and spiritual renewal. ERF members particularly enjoy as a recreational, educational, and/or spiritual pursuit observing, studying and contemplating the migration of anadromous fish in San Francisquito Creek and San Francisco Bay, including CCC steelhead. These members' enjoyment of CCC steelhead on San Francisquito Creek and San Francisco Bay is being substantially diminished by the dramatic decline in the numbers and health of CCC steelhead on these waterways due to the adverse impacts of Searsville Dam and Stanford's diversions of water from the San Francisquito Creek watershed. These members continue to hope for survival and recovery of CCC steelhead on these waterways. Additionally, these members' enjoyment of observation of California red legged frogs, and San Francisco garter snakes in San Francisquito watershed is being substantially diminished by the decline in the numbers and health of these species in the watershed due to the adverse impacts of Searsville Dam and Stanford's diversions of water from the San Francisquito Creek watershed.

12. As a result of the acts and omissions of Stanford alleged herein, Plaintiffs' members have suffered and will continue to suffer injuries to their aesthetic, environmental, educational, spiritual, and economic interests in enjoying and using San Francisquito Creek and San Francisco Bay.

13. Defendant Stanford is a trust with corporate powers under the laws of the State of California and a tax-exempt entity under section 501(c)(3) of the Internal Revenue Code. Stanford is located in Stanford, California.

STATUTORY BACKGROUND

14. The ESA was enacted to provide a means to conserve threatened and endangered species and to conserve the ecosystems upon which those species depend. 16 U.S.C. § 1531(b). The ESA prohibits "take" of endangered and certain threatened species listed under the ESA. 16 U.S.C. § 1538(a)(1). The National Marine Fisheries Service ("NMFS") has listed CCC Steelhead under the ESA as a threatened species. The U.S. Fish and Wildlife Service ("FWS") has listed San Francisco Garter Snake as an endangered species and California red-legged frog as a threatened species. The FWS has further promulgated regulations making it unlawful to take California red-legged frog. "Take" of a listed species means, *inter alia*, to harass, harm, kill, trap or capture the species. 16 U.S.C. § 1532(19). An actor can take a listed species within the meaning of the ESA by killing or injuring an individual member of the species, or by engaging in an act that causes significant habitat modification or degradation or which kills or injures a member of the species, or significantly impairs essential behavioral patterns of individuals of the species, including, breeding, spawning, rearing, migrating, feeding or sheltering. 50 C.F.R. § 222.102.

15. ESA section 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B), provides that NMFS or the FWS may issue permits, under such terms and conditions as NMFS shall prescribe, to allow any "taking" otherwise prohibited by ESA section 9 if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. For such "taking" to be permissible under the ESA, the actor must consult with the relevant federal wildlife agency with jurisdiction over the affected species, either NMFS or FWS, and obtain an Incidental Take Permit ("ITP") under ESA section 10. If a party fails to consult and obtain an ITP for its activities, and those activities cause "take," the party is in violation of ESA section 9.

FACTUAL BACKGROUND

Setting and Location of Searsville Dam and Searsville Reservoir

16. Searsville Dam is located on Stanford property in San Francisco Bay Area. Searsville Dam impounds water from Corte Madera Creek (part of San Francisquito Creek watershed), forming a reservoir known as Searsville Reservoir. Tributaries in the upper watershed that feed into Searsville Reservoir include Alambique Creek, Dennis Martin Creek, Sausal Creek, Westridge Creek, and Corte Madera Creek. Searsville Dam and Searsville Reservoir are located in San Mateo County. San Francisquito Creek originates approximately ¼ mile downstream of the outlet of Searsville Dam, on Corte Madera Creek, from where it eventually flows to San Francisco Bay. San Francisquito Creek drains a total watershed area of 47.5 square miles and is the largest stream on the western margin of San Francisco Bay. San Francisquito Creek provides important local habitat for CCC steelhead.

17. Searsville Dam, a 65-foot tall and 275 feet wide concrete block dam, was built between 1888 and 1892 by the Spring Valley Water Company for the intended purpose of providing drinking water to San Francisco Peninsula. However, that intended purpose was never realized because the water is non-potable. Stanford took over the operation of the dam in the early 1900s. Currently, Stanford uses the water stored behind the dam as a water source for irrigation of a golf course, athletic fields, and campus landscaping and as backup for fire protection. The dam serves no other functions, i.e., the dam does not provide drinking water, flood control, or hydropower.

Precarious Status of CCC Steelhead

18. NMFS listed CCC steelhead as a protected threatened species under the ESA on August 18, 1997. 62 Fed. Reg. 43,937. NMFS reaffirmed this ESA listing on January 5, 2006. 71 Fed. Reg. 834. NFMS has designated critical habitat for CCC steelhead to include approximately 1,465 miles of stream habitat in central coastal California and an additional 386 square miles of estuarine habitat in San Pablo and San Francisco Bays. 70 Fed. Reg. 52,488 (Sept. 2, 2005). The San Francisquito Creek watershed – which includes water impounded by Searsville Dam (Corte Madera Creek, Alambique Creek, Martin Creek, and Sausal Creek) and water that originates at Searsville Dam (Corte Madera Creek) – is within this critical habitat designation.

19. NMFS has designated critical habitat for the CCC steelhead to include all accessible reaches of rivers (including estuarine areas and tributaries) between Cape Blanco, Oregon, and Punta Gorda, California. 64 Fed. Reg. 24,049 (May 5, 1999); 50 C.F.R. § 226.210(b).

20. FWS has similarly listed San Francisco garter snake as endangered and California red legged frog as threatened.

Degraded Condition of San Francisquito Creek

21. CCC steelhead's fresh water habitat needs include: (1) cool water temperatures for successful embryo incubation and for optimum health and survival of juvenile and adult fish; (2) high dissolved oxygen content in the waters the fish inhabit; (3) suitable gravel substrate for successful spawning; (4) presence of large woody debris anchored in the fish's river habitat to provide cool deep water pools with reduced flow velocities that provide spawning habitat and refuge from predators; (5) sustained and sufficient flow to allow unimpeded migratory passage of adult and juvenile fish; and (6) consistent inundation of areas utilized for spawning (to ensure that placed fish egg clusters or "redds" remain inundated until eggs hatch). The San Francisquito Creek watershed areas utilized by CCC steelhead are degraded such that these waters are impaired at providing these habitat attributes for CCC steelhead.

22. The primary cause of degraded habitat conditions in San Francisquito Creek watershed is the presence of Searsville Dam and Stanford's excessive diversion of water from the San Francisquito watershed. Such water diversions have reduced flows in San Francisquito Creek dramatically. In addition, San Francisquito Creek has substantially less riparian vegetation than existed historically—in part due to loss of natural flow conditions needed to support such vegetation. This loss of flow and loss of riparian vegetation has seriously degraded the water quality and habitat value of the creek. With less flow, the creek is shallower, meaning it is more prone to being heated by solar radiation. Loss of riparian vegetation that shades the creek and thus reduces solar radiation has exacerbated the heating of the creek. Warmer water temperatures in the creek reduce dissolved oxygen levels as cold water inherently has greater capacity for retaining dissolved oxygen.

23. As discussed below, Stanford's operation and maintenance of Searsville Dam and Searsville Reservoir and related water diversions are leading causes of the decline in the CCC steelhead

population in San Francisquito Creek watershed and are leading contributory causes to the degraded habitat conditions in San Francisquito Creek. These degraded conditions are also diminishing the habitat value of San Francisquito Creek watershed for California red-legged frog and San Francisco garter snake.

VIOLATIONS OF THE ESA

24. Stanford's operation and maintenance of Searsville Dam, Searsville Reservoir, and its water diversions in the San Francisquito Creek watershed, is harassing, wounding, killing, trapping, capturing, and most certainly harming CCC steelhead both by killing and/or injuring individuals of this species and by causing significant habitat modification or degradation to its habitat that significantly impairs the fish's behavioral patterns, including spawning, rearing, migrating, feeding, and sheltering—and thus has caused substantial decline in the CCC steelhead population in San Francisquito Creek and its tributaries. Stanford is further harming and taking other ESA listed species as described below.

25. Stanford's operation and maintenance of Searsville Dam, Searsville Reservoir and related water diversions is taking CCC steelhead in the following ways:

26. One, Searsville Dam completely blocks access to CCC steelhead's historic habitat in the tributaries to San Francisquito Creek located above the dam and thereby substantially diminishes the habitat available to the species. Reducing the species' available habitat reduces the species' abundance by limiting area for spawning, rearing, and refuge from predators. In addition, this reduction of habitat abundance crowds the remaining CCC steelhead population into a smaller area, reducing its health and increasing mortality in this population due to reduced feeding opportunity and increased competition with other fish species. This taking activity is perpetual, i.e., has happened on every day that CCC steelhead have been an ESA-listed species (Searsville Dam has been operated and maintained every day during this time period) and will continue every day in the future until CCC steelhead passage past the present location of Searsville Dam is achieved.

27. Two, by blocking and diverting the natural flow of San Francisquito Creek and tributaries to the Creek, Searsville Dam, Searsville Reservoir and related water diversions are substantially adversely affecting the CCC steelhead critical habitat in San Francisquito Creek below Searsville Dam. This flow diversion substantially reduces the flow of San Francisquito Creek and Corte Madera Creek

below historic levels. Stanford's diversion of stream flows from Corte Madera and San Francisquito Creek is the single leading cause of this diminished flow level. Stanford's diversion of these flows leaves substantially less aquatic area in Corte Madera and San Francisquito Creeks and by thereby diminishing the area utilized by CCC steelhead for spawning, rearing, feeding, and refuge from predators is causing a decline in CCC steelhead population--and thus perpetuating take of the species.

28. Stanford's diversion of flows into Searsville Reservoir and from the San Francisquito Creek watershed further dewaters areas of Corte Madera and San Francisquito Creek, causing direct mortality to stranded adult and juvenile CCC steelhead and to CCC steelhead redds.

29. Stanford's diversion of flows from the San Francisquito Creek watershed further causes an increase in temperature in San Francisquito Creek downstream of Searsville Dam. This increase in temperature impedes CCC steelhead spawning as temperatures in the creek are occasionally elevated to levels lethal to CCC steelhead embryos and to levels that harm the health of juvenile and adult CCC steelhead--which need cool water temperatures to thrive.

30. Stanford's diversion of flows from the San Francisquito Creek watershed further harms the riparian vegetation of San Francisquito Creek by decreasing the creek flow that would naturally feed such riparian vegetation. This in turn harms CCC steelhead by reducing the vegetative shade canopy over San Francisquito Creek that would help to naturally keep water temperatures in the creek down and by reducing the supply of large woody debris that provides important spawning and rearing habitat for CCC steelhead. Woody debris fallen into the creek naturally creates cool deepwater pools of diminished flow velocity--conditions valuable for CCC steelhead spawning, rearing, and refuge behaviors.

31. By diminishing the aquatic area of San Francisquito Creek due to its water diversions from the San Francisquito Creek watershed, Stanford is further causing harm to and take of California red legged frogs and San Francisco garter snakes which need a substantial aquatic area as part of their life cycle functioning. The diminished water area caused by Stanford's water diversions have shrunk the area usable by these ESA protected species for feeding, breeding, and refuge behaviors.

32. This taking activity is perpetual, i.e., has happened on every day that CCC steelhead, California red legged frogs, and San Francisco garter snakes have been ESA-listed species (Searsville Dam and Searsville Reservoir have been operated and maintained every day during this time period) and

will continue every day in the future until Stanford no longer diverts a significant quantity of flow from the San Francisquito Creek watershed.

33. Three, Searsville Dam takes CCC steelhead and adversely modifies CCC steelhead critical habitat by trapping and blocking the downstream migration of natural river gravel and large woody debris which play a critical role in providing suitable spawning and rearing habitat for CCC steelhead. This taking activity is perpetual, i.e., has happened on every day that CCC steelhead have been an ESA-listed species and will continue every day in the future until Stanford implements a means to augment gravel and large woody debris downstream in San Francisquito Creek.

34. Four, Searsville Dam creates poor water quality conditions in Searsville Reservoir by creating a large pool of stagnant water that collects nutrients and is excessively warmed by solar radiation. Searsville Reservoir experiences eutrophic conditions, i.e., has low dissolved oxygen levels, warm water temperatures, high nutrient levels, and excessive algae blooms. Stanford harms the water quality of San Francisquito Creek when Stanford releases water from Searsville Reservoir to San Francisquito Creek, as it occasionally does during high flow conditions. By lowering the oxygen levels, increasing the water temperature, and increasing the nutrient levels in San Francisquito Creek, Stanford's releases of water from Searsville Reservoir harm CCC steelhead which need high dissolved oxygen levels, cold water, and lower nutrient levels in the waters they inhabit to survive and thrive. This taking activity has happened on every day that Stanford releases water from Searsville Reservoir to San Francisquito Creek (which Stanford does several times every year). Harm and take from such water releases from Searsville Reservoir will continue on each day in the future that Stanford continues these releases.

35. Five, Searsville Reservoir creates artificial habitat where non-native and other species of fish that are predators of CCC steelhead thrive. Stanford has no fish screen on the diversion point that it uses to convey water from Searsville Reservoir into San Francisquito Creek. Accordingly, when Stanford has released water from Searsville Reservoir via this diversion conveyance that lacks a screen into San Francisquito Creek, Stanford has released predators into San Francisquito Creek that prey upon and thus take CCC steelhead. Stanford is aware of the days on which it has released water via this diversion conveyance from Searsville Reservoir to San Francisquito Creek, which generally are days of

significant rainfall. Harm and take from such water releases from Searsville Reservoir will continue on each day in the future that Stanford continues these releases without installing an effective fish screen.

36. Searsville Reservoir also creates artificial habitat for bullfrog, which prey upon the ESA listed California red legged frog, and for crayfish, which also prey upon downstream ESA listed species. During high flow conditions, bullfrog and crayfish are released from Searsville Reservoir into San Francisquito Creek--thus perpetuating take of ESA listed species inhabiting San Francisquito Creek.

37. Six, Stanford has had periodic projects to dredge Searsville Reservoir, channel areas or causeway areas immediately up gradient of the Reservoir in the past and is planning additional such projects in the future. These dredging projects have had various adverse impacts on CCC steelhead and other ESA Listed Species. The dredging projects have increased the release of sediments downstream into San Francisquito Creek. This increased sediment load increases water column turbidity, which diminishes the value of the Creek as habitat for steelhead. Turbid water reduces the ability of steelhead to feed on drifting insects. Sand and silt sediments in the streambed provide unstable habitats and fill crevices and gravels and cobbles, thereby reducing insect and steelhead abundance and reducing steelhead growth. This added loading of sediments has also tended to bury steelhead eggs and interfered with spawning success.

38. In operating and maintaining Searsville Dam and Searsville Reservoir as it currently does, Stanford is perpetuating adverse modification of the NMFS-designated critical habitat for CCC steelhead and important habitat for California red legged frog and San Francisco garter snake. Searsville Dam, Searsville Reservoir and Stanford's water diversions as currently operated and maintained render San Francisquito Creek and its tributaries far less suitable habitat for these CCC steelhead, California red legged frog and San Francisco garter snake on a daily basis for the variety of reasons set out above.

39. For Stanford's operation and maintenance of Searsville Dam, Searsville Reservoir, and its water diversions in the San Francisquito Creek watershed to be legal under the ESA, Stanford was required to consult with NMFS and obtain an ITP under ESA section 10. 16 U.S.C. § 1539. Stanford has not obtained such a permit. As such, Stanford is in violation of ESA section 9 for taking species via its maintenance and operation of Searsville Dam, Searsville Reservoir and its water diversions in all of the manners explained above. Stanford is in further violation of ESA section 10 for failure to seek an ITP.

FIRST CLAIM FOR RELIEF

Violation of the ESA
16 U.S.C. § 1538(a)(1)(B)

Request for Declaratory Relief and Injunction to Enjoin Stanford from Taking ESA Listed Species

40. Plaintiffs reassert and reallege paragraphs 1 through 36 above.

41. ESA section 9(a)(1)(B) prohibits any person from taking certain species listed as threatened under the ESA, including CCC steelhead and the California red-legged frog and species listed as endangered such as San Francisco garter snake.

42. As discussed above, Stanford's operation and maintenance of Searsville Dam, Searsville Reservoir, and its water diversions in San Francisquito Creek watershed, is harassing, wounding, killing, trapping, capturing, and harming CCC steelhead both by killing and/or injuring individuals of this species and by causing significant habitat modification or degradation to its habitat that significantly impairs the fish's behavioral patterns, including spawning, rearing, migrating, feeding, and sheltering—and thus has caused substantial decline in the CCC steelhead population in San Francisquito Creek and its tributaries. Stanford is further harming and taking California red-legged frog and San Francisco garter snake.

43. Stanford has perpetrated such take without obtaining an ITP in violation of ESA section 9(a)(1)(B), 16 U.SC. § 1538(a)(1)(B). Stanford is in further violation of ESA section 10 for failure to seek an ITP.

REMEDY

44. Plaintiffs have no plain, speedy, and adequate remedy, in the ordinary course of law, other than the relief sought in this Complaint, because there is no other mechanism for compelling Stanford to take the action necessary under the ESA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs seek the following relief:

1. A declaratory judgment establishing that Stanford is in violation of ESA section 9 by perpetrating "take" without obtaining an ITP.

2. An injunction preventing Stanford from perpetrating further "take" without obtaining an ITP.

3. An award of attorneys' fees and costs to Plaintiffs.

4. Such other and further relief as this Court deems just and proper.

Respectfully Submitted,

Dated: May 20, 2013

By: Christopher a. Sproul

Christopher Sproul
Environmental Advocates
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on May 20, 2013, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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s/ Michael A. Costa