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M E M O R A N D U M

TO: Paul S. Simmons

FROM: Brittany K. Johnson and Ramsey L. Kropf

SUBJECT: Reclamation's Authority and Obligations at the Klamath Project

DATE: March 9, 2021

This memorandum reflects the firm's internal research that was the basis for Klamath Water Users Association's (KWUA) requests for legal review of the United States Bureau of Reclamation's (Reclamation) obligations and authorities for water management with regard to the Klamath Water Project in south-central Oregon and northernmost California (Project). A map of the Project facilities, which straddle the Oregon-California border in Klamath County, Oregon, and Siskiyou and Modoc Counties, California, is attached hereto as Exhibit 1.

As you know, over the past few decades, Project operations have been guided generally by a memorandum dated July 25, 1995, from the Regional Solicitor of the Pacific Southwest Region of the Department of the Interior (1995 Memorandum).[1] In addition, there was a January 9, 1997 supplement by the Regional Solicitors of the Pacific Southwest Region and the Pacific Northwest Region (1997 Memorandum),[2] which responded to a 1996 letter from the Oregon Department of Justice.[3]

More recently, the Solicitor's office determined that legal and regulatory developments since 1997 "compel a new analysis of Reclamation's obligations."[4] The

[1] Memorandum from Regional Solicitor, Pacific Southwest Region, to Regional Director, Bureau of Reclamation, Mid-Pacific Region, Subject: Certain Legal Rights and Obligations Related to the U.S. Bureau of Reclamation, Klamath Project for Use in Preparation of the Klamath Project Operations Plan (KPOP) (July 25, 1995).

[2] Memorandum from Regional Solicitor, Pacific Southwest Region and Regional Solicitor, Pacific Northwest Region, to Regional Director, Region 1, U.S. Fish and Wildlife Service, Regional Director U.S. Bureau of Reclamation, Mid-Pacific Region, Area Director, Portland Area Office, Bureau of Indian Affairs, Area Director, Sacramento Area Office, Bureau of Indian Affairs, Oregon Attorney General's March 18, 1996 Letter Regarding Klamath Basin Water Rights Adjudication and Management of the Klamath Project (January 9, 1997).

[3] Letter from Stephen E.A. Sanders, Assistant Attorney General, Natural Resources Section, State of Oregon Department of Justice, to Martha Pagel, Director, Water Resources Division (March 18, 1996), Subject: Klamath Adjudication (Sanders Letter) (on file with the Office of the Solicitor).

[4] November 12, 2020 Letter from David Bernhardt, Secretary of the Interior, to Klamath Water Users Association.

Solicitor's office Memorandum dated October 29, 2020, relies upon contemporary legal authority, including the United States Supreme Court decision in *National Association of Home Builders v. Defenders of Wildlife*.[5] Following the issuance of the October 29, 2020 Memorandum, Reclamation completed its Reassessment of U.S. Bureau of Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act (2021 Reassessment) in January 2021. The Reassessment also relied on follow-up memoranda from the Solicitor dated January 14, 2021, and January 16, 2021.[6]

Overall, the Solicitor's more recent analysis reflects the significant evolution of legal authority, anchored by *Home Builders*, concerning the obligations of federal action agencies under Section 7(a)(2) of the Endangered Species Act (ESA).[7] The important conclusions of the analysis are: (i) that Section 7 does not grant federal agencies affirmative authority under the ESA to take actions to benefit listed species that goes beyond the authority granted by the agencies' governing authorities, and (ii) that Section 7(a)(2) applies only to discretionary actions where the federal agency has, or has retained, authority to alter an activity in order to benefit listed species. The latter principle was articulated by the Ninth Circuit Court of Appeals as early as 1995, in *Sierra Club v. Babbitt*,[8] but has more recently been applied in the context of ongoing operations of federal water projects.

In this regard, the 2021 Reassessment relies on outcomes in recent litigation that were consistent with the positions of the federal agency defendants. For example:

1. California: Beginning at least as early as 2015, Reclamation has taken the position that Reclamation contracts with Sacramento River Settlement contractors did not provide Reclamation with discretion to modify contract terms to increase protections for species under ESA Section 7. This position has been upheld.[9]

2. New Mexico: A 2013 legal memorandum from the Chief Counsel of the Army Corps of Engineers informed the Army Corps determination of its discretion under the ESA.[10] The 2013 Corps Memorandum directed agency counsel to conduct careful legal review of the agency's discretion in the operation of

[5] *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007) (*Home Builders*).
[6] Memorandum from Solicitor to Secretary of Interior re: Use of Water Previously Stored in Priority for Satisfaction of Downstream Rights (Jan. 14, 2021) (Stored Water Memorandum); Memorandum from Solicitor to Secretary of Interior re: Analysis of Klamath Project contracts to determine discretionary authority in accordance with the November 12, 2020 Letter of the Secretary of the Interior (Jan. 14, 2021) (Discretion Memorandum).
[7] 16 U.S.C. § 1536(a)(2).
[8] *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995) (*Babbitt*).
[9] *NRDC v. Norton*, 236 F. Supp. 3d 1198, 1219-20 (E.D. Cal. 2017) (*NRDC v. Norton*).
[10] Memorandum from Chief Counsel, U.S. Army Corps of Engineers, to All Counsel HQ, DIV, DIST, CENTER, LAB & FOA Offices re: ESA Guidance (June 11, 2013) (2013 Corps Memorandum), attached hereto as Exhibit 2.

projects in order to determine what actions are and are not subject to the mandates of Section 7(a)(2). As a policy, the legal guidance was adopted to ensure that the "Civil Works budget is not inappropriately diverted to pay for large-scale environmental restoration projects that Congress has not authorized or funded, in the guise of alleged ESA responsibilities."[11] Based on this guidance, the Army Corps conducted a reassessment of its obligations with regard to facilities on the Rio Grande system. The Army Corps' conclusions were tested and affirmed in 2020 by the Tenth Circuit Court of Appeals, which relied on *Home Builders*.[12]

3. Other legal developments: The Solicitor's review also included reference to *Alaska Wilderness League v. Jewell*, which held that a federal agency was not required to consult under the ESA when approving an oil and gas development because the statute involved required the agency to approve when a plan met specified statutory criteria.[13] Further, the "baseline" definition in 50 C.F.R § 402.02, amended by the United States Fish and Wildlife Service (USFWS), supported the Solicitor's analysis.

The Solicitor's legal analysis used for the Reassessment also addressed tribal water rights for the protection of federal reserved fishing rights held by three tribes in the Klamath Basin. Some of these rights (rights held by or for the Klamath Tribes) are undergoing adjudication in Oregon state court. Others (rights held by or for the Yurok Tribe and Hoopa Valley Tribe) have not been the subject of adjudication or quantification. A significant conclusion is that any water rights to instream flows in the Klamath River do not include a right to release water in Upper Klamath Lake that has the legal character of "stored" water. This conclusion is based on, and consistent with, core principles of water law, as discussed in section IV.B of this memorandum.

The recent surge in litigation related to the Project, division among key parties, drought conditions in 2021, and related climate change predictions underscore the importance of clear and accurate guidance.[14] In addition, the guidance provides a platform upon which the parties in the basin may be able to change the current dynamic to support more robust science and productive cross-cutting basin-wide solutions.

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[11] 2013 Corps Memorandum at 5.
[12] *WildEarth Guardians v. United States Army Corps of Eng'rs*, 947 F.3d 635 (10th Cir. 2020) (*WildEarth Guardians II*).
[13] *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1219-25 (9th Cir. 2015).
[14] Since 2016, there have been at least nine new lawsuits filed that implicate issues in this memorandum. This follows a period of over ten years when there was no new litigation related to these issues.

I. KLAMATH PROJECT

A. Project Overview

Under the design of the 1902 Reclamation Act,[15] Reclamation financed and constructed works for storage, diversion, and delivery to irrigated land. Generally, it entered into contracts with individuals, then with irrigation districts and similar water delivery agencies, under which the contractor agreed to repay to Reclamation allocated portions of the cost of construction of a project, and reimburse Reclamation for its share of the costs of operation and maintenance, in exchange for water delivery via Project works.

The Project was authorized in May of 1905 in accordance with the 1902 Act.[16] The Project was largely built out by approximately 1950 and experiences ongoing improvements based on technology, experience, and practical needs of system operators and cultural practices. On the Klamath River system, the major water storage facility is Upper Klamath Lake (UKL), a natural lake that was modified in the early 1920s by the construction of Link River Dam (LRD) to provide operable storage. Diversions for irrigation use occur directly from UKL and from locations on the Klamath River downstream of LRD. Keno Dam, a water control structure that functions as a diversion dam for the Project, is the most downstream Project-related facility.

On the Lost River system, Clear Lake and Gerber Dams provide water storage. Diversions for irrigation use occur from locations on Lost River and the Lost River Diversion Channel. In addition, Lower Klamath and Tule Lake National Wildlife Refuges receive water through Project infrastructure and systems operated by the local water delivery districts.

B. Legal Authorities Applicable to Reclamation Projects and the Klamath Project

1. Contracts

Reclamation has entered into over 200 perpetual contracts related to water delivery to Project lands. The great majority of the contracts are between Reclamation and individual landowners, but by far the greatest number of acres are served under contracts between Reclamation and irrigation districts and similar entities. In parts of the Project, contracts have transferred to districts the responsibility for operation and maintenance of federally owned delivery systems, and the contracting entity delivers water to land within its service area. Additionally, other Project contractors were required to construct, operate, and maintain systems for delivery of water to the land eligible to be served under their respective contracts.

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[15] Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. § 371, *et seq*.).
[16] Congress and the Legislatures of Oregon and California enacted statutes to enable the Project. Act of February 9, 1905, 33 Stat. 714 (codified at 43 U.S.C. § 601); General Laws of Oregon at 63 (Jan. 20, 1905); Cal. Stat. 1905, at 4.

2. State Water Law

"The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress."[17] Thus, section 8 of the 1902 Act requires that Reclamation comply with state water law. Specifically, Reclamation must "proceed in conformity with" state laws "relating to the control, appropriation, use, or distribution of water used in irrigation."[18] State water law applies, absent a clear congressional directive to the contrary.[19]

Similar to most western states, under Oregon[20] law, water rights arise where there has been an intent to use water and diversion and application of beneficial use.[21] Prior to 1909, parties could appropriate water through their own actions; subsequent to that time, one must make application to the state for a permit and, if appropriation occurs under the permit, the water right vests upon beneficial use.[22]

In the Klamath Project, prior to 1909, Reclamation followed applicable procedures for the appropriation of water for the Project.[23] Reclamation also acquired water rights and systems that pre-dated the authorization of the Project, to avoid interference with the development of the Project, in some cases incorporating prior systems into the Project design.[24]

Like other western states, Oregon has enacted procedures for the comprehensive adjudication of water rights in a system.[25] The orders and judgments in a water rights adjudication do not create or confer water rights; rather, the adjudication determines the existence and characteristics of rights (authorized point of diversion, rate of diversion, place and purpose of use, etc.) that arise under principles of water law. The process thus makes

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[17] *California v. United States*, 438 U.S. 645, 653 (1978).
[18] 43 U.S.C. § 383.
[19] *California v. United States*, 438 U.S. at 678.
[20] Although the Project includes irrigated land in California, water is diverted at locations in Oregon for use in California. Thus, there are Oregon water rights for irrigation of land in California.
[21] *In Re Water Rights of Deschutes River & Tributaries*, 286 P. 563, 567 (Or. 1930); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976) (*Colorado River*).
[22] *See* Janet Neuman, *Oregon Water Law: a comprehensive treatise on the law of water and water rights in Oregon*, ch. 3 (2011).
[23] *See Klamath Irrigation Dist. v. United States*, 227 P.3d 1145, 1150 (Or. 2010).
[24] *See* Amended and Corrected Findings of Fact and Order of Determination, *In the Matter of the Determination of the Relative Rights to the Use of the Water of the Klamath River and Its Tributaries*, Oregon Water Resources Department, Klamath River Basin General Stream Adjudication (No. KBA_ACFFOD-00001) (Feb. 28, 2014) (ACFFOD). The ACFFOD is available at https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx (last visited on Mar. 9, 2021) at KBA_ACFFOD_07091-07101.
[25] Or. Rev. Stat. ch. 539 (2019).

possible the regulation of water rights based on the priority dates of the relative rights and the characteristics of each right.[26]

Oregon's procedure involves two major steps. The first step involves the filing and consideration of claimed water rights, and contests of claims. At the conclusion of the first step, the Director of the Oregon Water Resources Department (OWRD) issues his or her findings of fact and order of determination, which constitutes the administrative determination of the validity of claimed water rights and the elements of approved rights. That order is filed with the county circuit court. Following the order of determination, parties who disagree with that determination may file exceptions with the court. After hearing on the exceptions, the court affirms or modifies the order of determination.[27]

Although the findings of fact and order of determination is subject to modification by the court, it has significant legal consequences. Specifically, the administrative determinations are binding and enforceable in the same manner as a court judgment. Unless stayed under other provisions of adjudication law, the determination "shall be in full force and effect from the date of its entry in the records of the [water resources] department."[28] As such, the order of determination is the basis for water rights regulation for as long as it is in effect.[29] Regulation based on the nature and scope of rights, and their relative priorities, is the responsibility of the state watermaster.[30]

In 1952, Congress enacted the McCarran Amendment,[31] waiving the sovereign immunity of the United States to be joined to state court proceedings for the adjudication of water rights. As a result, state water rights held by Reclamation and other federal agencies can be determined in a state proceeding. In addition, federal reserved water rights, which arise under federal law, are subject to adjudication in state courts.[32]

Relevant to the Klamath Project, there have been adjudication proceedings on both the Lost River and Klamath River.

In 1918, the Klamath County Circuit Court issued a judgment, decreeing the relative water rights to the use of Lost River and its tributaries. The decree recognizes rights to the

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[26] *United States v. Oregon, Water Resources Dep't*, 44 F.3d 758, 769 (9th Cir. 1994) (*United States v. Oregon*); *see* Neuman, *supra* note 24, § 5.2.
[27] Or. Rev. Stat. 539; *see generally United States v. Oregon*, 44 F.3d at 764.
[28] Or. Rev. Stat. 539.130(4).
[29] Or. Rev. Stat. 539.170.
[30] Or. Rev. Stat. 540.045.
[31] 66 Stat. 560 (1952) (codified at 43 U.S.C. § 666(a)).
[32] Federal reserved rights arise by implication when water is necessary for the primary purposes of a reservation of land by the United States. The date of priority is the date of the reservation. *United States v. New Mexico*, 438 U.S. 696, 699-700 (1978); *Cappaert v. United States*, 426 U.S. 128, 147 (1976) (*Cappaert*). In *Colorado River*, the United States Supreme Court held that the McCarran Amendment's waiver of sovereign immunity extends to the United States in its capacity as trustee for federal Indian tribes. 424 U.S. at 809.

use of water from Lost River, and from Clear Lake and Gerber Reservoir storage, on various lands in the Project service area. The United States was not a party to the Lost River adjudication, as that case pre-dated the McCarran Amendment.

More recently, in a McCarran Amendment proceeding, Oregon concluded the administrative phase of the adjudication of the Klamath River and tributaries.[33] In 2013, the KBA "Adjudicator" (the Director's delegee) issued the findings of fact and order of determination in the KBA. The Adjudicator subsequently made various technical corrections, resulting in the ACFFOD in 2014. The ACFFOD consists of general findings followed by partial orders and other documents that constitute the determinations on individual water right claims.

With respect to the Klamath River, Project-related water rights determined in the ACFFOD include rights to the use for irrigation of both live flow and water stored in UKL. ("Live flow" is essentially the rate of flow of water in a river or through a lake or reservoir that occurs naturally or after diversions by upstream users. "Stored water" is water that has been diverted and stored – such as the impoundment of water behind a dam – at one time for use at a later time.) The live flow rights include water rights based on pre-Project appropriations, with Van Brimmer Ditch Company, a part of Klamath Irrigation District and a part of Klamath Drainage District, having water rights with priority dates in 1883.[34]

The ACFFOD determines that Reclamation holds a right to storage of nearly 500,000 acre-feet of water in UKL, which has a priority of May 19, 1905, based on an appropriation by Reclamation and development of the stored water via construction of LRD. The only purposes for which storage by Reclamation is authorized are "domestic use and irrigation."[35] Based on the same May 1905 appropriation and beneficial use, Reclamation's contractors, for the benefit of their patrons, hold rights to live flow, and rights to the use of the stored water.[36] The authorized purpose of use for live flow and storage by Reclamation's contractors is domestic and irrigation use, and incidental livestock watering, on described lands.[37]

The ACFFOD also determines many other water right claims, of both federal and non-federal parties. These include junior water rights on Klamath Basin wildlife refuges, including refuges that receive water via Project infrastructure.[38] The status of claims of the

[33] *In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries*, Oregon Water Resources Department, Klamath River Basin General Stream Adjudication (KBA).
[34] *See* KBA_ACFFOD_07140-07141, 07147-07148, 07150-07151.
[35] KBA_ACFFOD_07117-07118.
[36] *See* KBA_ACFFOD_07077, 07082, 07153-07160.
[37] KBA_ACFFOD_07155.
[38] The water rights for refuge purposes have priorities that are junior to Project irrigation rights. However, the USFWS has filed exceptions to the ACFFOD related to the scope of allowable uses under an irrigation right.

United States Bureau of Indian Affairs (BIA), as trustee for the Klamath Tribes, is discussed in section IV.A, *infra*.

II. REGULATION OF THE PROJECT UNDER THE ESA

Over the past few decades, Reclamation's operations have been affected by agency determinations concerning diversion and use of water as it impacts aquatic species listed as threatened or endangered. The shortnose sucker and Lost River sucker, both endangered species, inhabit water bodies in the Upper Klamath Basin including UKL and Clear Lake and Gerber Reservoir. A major ESA focus has been the elevations of Project reservoirs that will be maintained for the protection of these species. The threatened Southern Oregon/Northern California Coast (SONCC) coho salmon makes use of the Klamath River in California downstream of Iron Gate Dam. The most recent ESA consultation over Project operations also resulted in limitations related to the endangered Southern DPS killer whale, which preys on Klamath River Chinook salmon as part of its diet. For the latter two species, a major ESA focus has been the flow of water in the Klamath River below Iron Gate Dam maintained for the protection of the species.[39]

The sections immediately below set forth the relevant provisions of the ESA and the evolution of the regulation of the Project for ESA purposes.

A. Section 7 and Section 9 of the ESA

Two provisions of the ESA are important to Reclamation's activities at the Klamath Project. First, Section 9 of the ESA, which applies to federal and non-federal parties alike, prohibits the "take" of endangered fish and wildlife.[40] A threatened species of fish or wildlife is subject to the take prohibition if determined appropriate by the listing agency, which is the USFWS or National Marine Fisheries Service (NMFS) (collectively, "Services"), depending on the species.[41]

Section 7(a)(2) of the ESA (Section 7(a)(2)) imposes additional obligations on federal agencies. It provides that each federal agency shall:

> [I]nsure 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

[39] Two other species, the threatened Southern DPS of the North American green sturgeon, and threatened DPS of Pacific eulachon, have also been considered in the ESA consultation process. The analysis in this memorandum applies with respect to any current or future-listed species.
[40] 16 U.S.C. § 1538(a)(1)(B).
[41] *Id.* § 1533(d).

> species or result in the destruction or adverse modification of [critical] habitat of such species.[42]

Procedurally, the action agency must consult with, and obtain the biological opinion (BiOp) of, the applicable consulting agency with respect to whether a proposed action is likely to cause jeopardy or adverse modification of critical habitat.[43] To that end, the action agency prepares a biological assessment (BA) describing the proposed action and species likely to be affected.[44] If the consulting agency in its BiOp finds that jeopardy or adverse modification is likely, it must also specify any reasonable and prudent alternatives (RPAs) that it determines would be in compliance with Section 7(a)(2).[45]

If the consulting agency finds no jeopardy or adverse modification, or if it provides RPAs, it must provide an incidental take statement (ITS). The ITS identifies the impact of the incidental taking of the species and specifies reasonable and prudent measures to minimize take, along with terms and conditions to implement the reasonable and prudent measures.[46] Any take that is in compliance with the terms and conditions of the ITS is not subject to the take prohibition of Section 9.[47] After receipt of a BiOp, the federal action agency decides how to proceed in light of its substantive obligation under Section 7 not to jeopardize species.[48]

The ESA does not create a water right, but holding state water rights does not exempt a party from compliance with the ESA. In *United States v. Glenn-Colusa Irrigation District*,[49] the United States District Court for the Eastern District of California explained that enforcement of the ESA did not affect the district's water rights, "but only the manner in which it exercises those rights."[50]

B. Evolution of Section 7(a)(2) Consultations for the Project

In recent years, Reclamation has developed BAs for Project operations through dialogue with the Services, seeking to develop a proposed action that was likely to result in non-jeopardy BiOps from the Services. This process has focused on amounts of water that would be released to the Klamath River, and projected UKL elevations, under varying operations scenarios.

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[42] *Id.* § 1536(a)(2).
[43] *Id.* § 1536(b)(3).
[44] *Id.* § 1536(c).
[45] *Id.* § 1536(b)(3)(A).
[46] *Id.* § 1536(b)(4); *see also* 50 C.F.R. § 402.14 (describing formal consultation process).
[47] 16 U.S.C. § 1536(o)(2).
[48] 50 C.F.R. § 402.15.
[49] *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126 (E.D. Cal. 1992).
[50] *Id*. at 1134.

More current authority provides the proper legal basis for Reclamation's approach to ESA consultation as reflected in the 2021 Reassessment. In context, however, it is understandable how the prior approach arose. The current framework for evaluating Reclamation's compliance with the ESA is the result of events related to the KBA and the state of ESA jurisprudence in the 1990s.

In its landmark decision in *Tennessee Valley Authority v. Hill*,[51] the Supreme Court held that the Tennessee Valley Authority was properly enjoined from completing construction of a dam and impounding water in the new reservoir. The Court noted that the completion of the dam and closing of the gates was an agency action within the meaning of Section 7(a)(2), and that the completion of the dam would eliminate the habitat of the snail darter.[52] The Court rejected arguments based on balancing of equities and arguments that the statute should not apply because the dam was already under construction prior to ESA passage. In often-quoted language, the Supreme Court stated that Section 7 "indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."[53] Additional statements on congressional intent include: "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost,"[54] and that the legislative history "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies."[55] In opining on the reach of Section 7, the Court quoted the statutory language found in 16 U.S.C. § 1536, and how all federal agencies must "insure that actions authorized, funded or carried out by them do not jeopardize the continued existence" of an endangered species or the destruction of their critical habitat, adding: "[t]his language admits of no exception."[56]

Following the strong statements in *TVA v. Hill*, lower courts followed a similar approach. In 1994, in *Pacific Rivers Council v. Thomas*,[57] for example, the Ninth Circuit quoted *TVA v. Hill* and stated "there is little doubt that Congress intended to enact a broad definition of agency action in the ESA" and that "the Supreme Court has interpreted the plain meaning of agency action broadly."[58] In 1998, in *Natural Resources Defense Council v. Houston*,[59] the Ninth Circuit quoted the above passages from *TVA v. Hill* and stated the "term 'agency action' has been defined broadly."[60] The Ninth Circuit went on to hold in *Houston* that negotiating the renewal of certain water contracts is "agency action" because the federal

[51] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (*TVA v. Hill*).
[52] *Id.* at 173-74 & n.18.
[53] *Id.* at 174.
[54] *Id.* at 184.
[55] *Id.* at 185.
[56] *Id.* at 173.
[57] *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (*Pacific Rivers Council*).
[58] *Id.* at 1054-55 (quoting *TVA v. Hill*, 437 U.S. at 173) (holding that implementation of land and resource management plans by the Forest Service is a continuing "agency action" within the meaning of Section 7(a)(2)).
[59] *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998) (*Houston*).
[60] *Id.* at 1125 (quoting *TVA v. Hill*, 437 U.S. at 173).

agency has some discretion available during the negotiation process to alter key terms in the contract that could benefit species.[61]

Concurrent with development of ESA Section 7 jurisprudence after *TVA v. Hill*, Reclamation and other agencies were reacting to developments in the KBA. In 1990, the OWRD issued a notice to file water right claims to all persons in the Klamath Basin. The United States then filed a lawsuit challenging its required participation in the KBA under the McCarran Amendment. The Ninth Circuit upheld the validity of Oregon's surface water adjudication statute in *United States v. Oregon*.[62] The OWRD subsequently issued a second notice to persons who claim water rights associated with federal reserved rights or the Project.

1. The 1995 and 1997 Memoranda

The 1995 Memorandum opined on Reclamation's legal obligations to Klamath Project water users, wildlife refuges, tribes, and species protected under the ESA. A key statement in the 1995 Memorandum was the conclusion that "Reclamation is obligated to ensure that project operations not interfere with the Tribes' senior water rights. This is dictated by the doctrine of prior appropriation as well as Reclamation's trust responsibility to protect tribal trust resources."[63] At the time of the 1995 Memorandum, the "senior water rights" of the Klamath Tribes, Yurok Tribe, and Hoopa Valley Tribe had not been articulated in water right claims, let alone adjudicated, settled, or otherwise quantified.

In response to the 1995 Memorandum and Reclamation's public process to develop an operations plan during the pending adjudication, a letter from the Oregon Department of Justice challenged many of the conclusions offered in the 1995 Memorandum and questioned the direction of the interim operations plan as an attempt to "reallocate water from irrigation uses to other, unquantified and unadjudicated uses for the protection of fish and satisfaction of California tribal claims."[64]

The 1997 Memorandum followed Oregon's challenge to the federal position. In that document, two Regional Solicitors responded to the statements in the Sanders Letter. The 1997 Memorandum "builds on" the 1995 Memorandum. The 1997 Memorandum also states that it "adhere[d] to the conclusions set forth" in the 1995 Memorandum, and expressed that the fact that the tribal rights were unadjudicated does not preclude Reclamation from "manag[ing] irrigation deliveries to protect senior tribal water rights."[65]

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[61] *Houston*, 146 F.3d at 1126.
[62] 44 F.3d at 758.
[63] 1995 Memorandum at 8; *see also id.* at 10 ("Reclamation must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights").
[64] Sanders Letter at 8.
[65] 1997 Memorandum at 5.

The 1995 and 1997 Memoranda were followed by Reclamation's adoption of the 1997 Klamath Project Operations Plan (1997 Plan), and the 1997 Plan referenced and relied on the 1995 and 1997 Memoranda. The 1997 Plan listed the guiding principles for the operation of the Project as: Meeting the Requirements of the ESA, Federal Trust Responsibility to Federally Recognized Tribes within the Klamath River Basin, Providing Deliveries of Project Water, and Conserving Wetland and Wildlife Values.[66] The 1997 Plan then identified minimum UKL elevations and minimum Klamath River flows below Iron Gate Dam.[67] These instream requirements were to be achieved even if the result was to deprive Project users of water. For the first time, ESA species were explicitly afforded priority in the operation of the Project.

2. Early Case Law on Project Operations

As of the late 1990s, PacifiCorp operated LRD in accordance with a contract between Reclamation and PacifiCorp that had been entered into in 1956.[68] Under that contract, PacifiCorp was generally allowed to manage LRD operations and storage so as to benefit its downstream power generation facilities, subject to the priority of the Project needs for water for irrigation. Reclamation also had the ability to specify operating criteria if Reclamation's contracting officer determined that to be necessary to protect irrigation.[69] In connection with the 1997 Plan, Reclamation entered into a one-year amendment of the 1956 contract, which provided, essentially, that PacifiCorp would operate in accordance with Reclamation's direction and the 1997 Plan.[70] Water users in the Project filed a lawsuit, alleging, among other things, that they were intended third-party beneficiaries of the 1956 contract and that compliance with the 1997 Plan was a breach of contract.[71] The water users' lawsuit was dismissed voluntarily but PacifiCorp had filed a counterclaim seeking a declaration that the water users were not intended third-party beneficiaries.[72] The district court granted PacifiCorp's request for a declaratory judgment that: (1) plaintiffs were not intended third-party beneficiaries of the 1956 contract, and the 1956 contract created no rights for plaintiffs to irrigation water; (2) the 1956 contract may be amended without plaintiffs' consent; and (3) PacifiCorp has no liability to plaintiffs for implementing Reclamation's water management decisions for the Project.[73]

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[66] 1997 Plan at 1-2.
[67] *Id.* at 4-5.
[68] *See Klamath Water Users Ass'n v. Patterson*, 15 F. Supp. 2d 990, 992 (D. Or. 1998) (*Patterson I*).
[69] *Id.*
[70] *Id.* at 993.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 996-97.

Plaintiffs appealed. The Ninth Circuit Court of Appeals framed the issue and its holding as follows:

> This appeal involves a basic contract issue: whether the [Project water users] are third-party beneficiaries to a 1956 contract (the "Contract") between [Reclamation and PacifiCorp's predecessor] that governs the management of [LRD] in the Klamath Basin (the "Project"). We hold that they are not. The district court concluded that the Irrigators do not have third-party beneficiary water rights under the Contract. It granted a declaratory judgment to Reclamation and PacifiCorp . . . holding that PacifiCorp is not liable to the Irrigators for implementing Reclamation's water allocation decisions for the Project. *See* [*Patterson I*]. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.[74]

In its conclusion, the court of appeals stated: "[u]nder the plain language of the 1956 Contract between [PacifiCorp] and Reclamation, the Irrigators do not possess third-party beneficiary water rights. Accordingly, the district court's grant of summary judgment to Reclamation and PacifiCorp is AFFIRMED."[75]

Although the holding of the appellate decision concerned the intent of parties to a 1956 contract, the court was, of course, informed that the protection of ESA-listed species was a driver of the 1997 Plan that threatened irrigation supplies. Relative to this fact, the plaintiffs had argued that the district court had inappropriately provided general discussion of the ESA (which was enacted in 1973) in the course of determining intent of the parties to the 1956 contract.[76] In response, the Ninth Circuit stated:

> Because Reclamation retains authority to manage the Dam, and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators. Accordingly, we hold that the district court did not err in concluding that Reclamation has the authority to direct Dam operations to comply with the ESA.[77]

Since *Patterson I* and *Patterson II*, this language regarding Reclamation's obligations under the ESA has been cited and quoted by litigants and courts many times. But the language is not necessary to the court's conclusion on the matter identified as being in issue; i.e., the water users' status under the 1956 contract. It was thus *dicta* and not controlling. Also, the *Patterson II* court does not identify which provision or provisions of the ESA are

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[74] *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1209 (9th Cir. 1999) (*Patterson II*).
[75] *Id*. at 1214.
[76] *See Patterson I*, 15 F. Supp. 2d at 996.
[77] *Patterson II*, 204 F.3d at 1213.

being referenced in the quoted passage's three references to the ESA. Apart, from its merits at the time, the *dicta* does not reflect current ESA jurisprudence.

C. 2019 Plan and Joint Section 7(a)(2) Consultation

Reclamation completed a Section 7(a)(2) consultation with both Services in 2019. This consultation continued the pattern since 2012-2013 of Reclamation working with the Services to develop a Proposed Action that was expected to result in a no-jeopardy opinion.[78] The 2019 Proposed Action refers to three major elements covered by the BA, as follows:

> 1. Store waters of the Upper Klamath Basin and Lost River.
> 2. Operate the Project, or direct the operation of Project facilities, for the delivery of water for irrigation purposes or [National Wildlife Refuge] needs, or releases for flood control purposes, subject to water availability; while maintaining conditions in UKL and the Klamath River that meet the legal requirements under Section 7 of the ESA.
> 3. Perform [operation and maintenance] activities necessary to maintain Project facilities.[79]
>
> Element 2 is further defined to have two major components:
>
> 1. UKL elevations and storage . . . to protect sucker habitat and ensure adequate storage to meet the needs of listed species in UKL and the Klamath River and water supply for the Project; and
> 2. Klamath River flows, specifically EWA to support coho needs and to produce flows for disease mitigation or protection of coho habitat during the spring/summer operational period (between March 1 and September 30), and a formulaic approach for calculating IGD releases in the fall/winter (October 1-February 28/29).[80]

Several water accounting concepts are key to the approach in the 2019 Proposed Action. "UKL Supply" is the volume of water available for the "Environmental Water Account" (EWA) and "Project Supply." UKL Supply is calculated using end of February

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[78] Reclamation issued a BA in December 2018. *See Final Biological Assessment on the Effects of the Proposed Action to Operate the Klamath Project from April 1, 2019 through March 31, 2029 on Federally-Listed Threatened and Endangered Species* (Dec. 2018). Reclamation then amended the Proposed Action in February 2019 (hereinafter, "2019 Proposed Action"). *See* Letter from Jeffrey Nettleton, Area Manager, Reclamation, to Jim Simondet, NMFS, Subject: Addendum to the Proposed Action included in Reclamation's December 21, 2018 *Final Biological Assessment on the Effects of the Proposed Action to Operate the Klamath Project from April 1, 2019 through March 31, 2029 on Federally-Listed Threatened and Endangered Species* (Feb. 15, 2019). There was an additional consultation, with the USFWS only, on an "interim" plan proposed and ultimately adopted in April 2020.

[79] 2019 Proposed Action at 4-9.

[80] *Id.* at 4-13.

storage in UKL, observed and forecasted monthly UKL inflows (March-September), and the end of September storage target.[81] The end of September storage target is informed by a central tendency elevation, which is protective of sucker species.

"EWA" is the volume of water allocated from UKL Supply to provide flows in the Klamath River below Iron Gate Dam. "Minimum EWA is 400,000 AF, which occurs when UKL Supply is less than 660,000 AF. When UKL Supply is greater than 1,035,000 AF, EWA is calculated as UKL Supply minus the maximum Project Supply (350,000 AF)."[82]

"Project Supply" represents the volume of water in UKL that is available for diversion to meet irrigations demands. Under the 2019 Proposed Action, "[m]aximum Project Supply is 350,000 AF, which occurs when UKL Supply is greater than 1,035,000 AF (which occurs in 30 percent of simulated years). When UKL Supply is less than 1,035,000 AF, Project Supply is equal to UKL Supply minus EWA."[83]

III. ESA JURISPRUDENCE UNDER *HOME BUILDERS*

In relatively recent Project-related cases where parties have alleged non-compliance with the ESA, courts have found procedural violations,[84] or found the reasoning of a BiOp to be deficient on technical issues.[85] These precedents have not involved a rigorous analysis of the proper application of the specific substantive requirements of Section 7(a)(2) in the unique facts and circumstances of the Project, resulting in confusion over Reclamation's legal obligations and authority relative to conflicting demands on the water supply. Given the developments related to the ACFFOD and Section 7(a)(2) jurisprudence since *Patterson II*, an in-depth and up-to-date assessment of the application of Section 7(a)(2) is appropriate and warranted.

A. Evolution of Case Law Defining Agency Action under Section 7(a)(2)

1. "Discretionary Federal Involvement or Control" under 50 C.F.R. § 402.03

Although lower courts have frequently invoked the admonition from *TVA v. Hill* that the language of Section 7(a)(2) "admits of no exception," there is significantly more nuance in the regulatory framework that defines "agency action" for purposes of the ESA consultation requirement.[86] Even before the Court decided *TVA v. Hill* (in June 1978), the Services had

[81] *Id.* at 4-19.
[82] *Id.* at 4-25.
[83] *Id.* at 4-22.
[84] *See Pac. Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation,* 138 F. Supp. 2d 1228 (N.D. Cal. 2001); *Yurok Tribe v. United States Bureau of Reclamation,* 231 F. Supp. 3d 450 (N.D. Cal. 2017).
[85] *See Pac. Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation,* 426 F.3d 1082 (9th Cir. 2005).
[86] The ESA regulations define "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.02.

promulgated regulations on the procedures for consultations under Section 7.[87] In that rulemaking, the Services interpreted Section 7 to apply to "all activities or programs where Federal involvement or control remains which in itself could jeopardize the continued existence of a listed species or modify or destroy its critical habitat."[88] Thus, from the beginning, the Services recognized that a consultation would only be meaningful if the action agency had some power to modify the action. In the 1986 amendments to the ESA regulations, the Services revised the language in 50 C.F.R. § 402.03 to state: "Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control."[89] The current regulation includes identical language.[90]

The Ninth Circuit has frequently decided cases concerning the question whether an action qualifies as an "agency action" under Section 7(a)(2) triggering the requirement to consult. For example, in *Pacific Rivers Council*,[91] the Ninth Circuit expanded the concept of agency action when it rejected the arguments of the Forest Service that a land and resource management plan (LRMP) establishing forest-wide standards is only an "agency action" at the time it is adopted, revised, or amended. The Ninth Circuit reasoned that these plans "have an ongoing and long-lasting effect even after adoption" and that the LRMP represents an "ongoing agency action" subject to the continuing obligation to consult under Section 7.[92]

In other cases with facts more similar to the Project circumstances, the Ninth Circuit reached the opposite conclusion. In *Babbitt*,[93] the court evaluated whether the Bureau of Land Management (BLM) violated the ESA when it did not consult regarding the effects on the threatened spotted owl before a permittee with an existing right-of-way agreement began a road construction project to access its private property. The Ninth Circuit phrased the question presented as: "[t]o what extent does section 7 apply where the BLM granted right-of-way by contract to a private entity *before* passage of the ESA *and* the agency's continuing ability to influence the private conduct is limited to three factors unrelated to the conservation of the threatened spotted owl."[94] The court answered that 50 C.F.R. § 402.03 "suppl[ies] the answer."[95] Here, the agency considered its obligations under "the right-of-way agreement, the regulations, and the statute, and determined there was no discretionary federal action to which

[87] Final Rulemaking, 43 Fed. Reg. 870 (Jan. 4, 1978).
[88] *Id.* at 875 (publishing 1978 version of 50 C.F.R. § 402.03).
[89] Final Rule, 51 Fed. Reg. 19,926, 19,937, 19,958 (June 3, 1986).
[90] 50 C.F.R. § 402.03 (last revised May 4, 2009).
[91] *Pacific Rivers Council*, 30 F.3d at 1054-55.
[92] *Id.* at 1053, 1056; *see also Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 977 (9th Cir. 2003) (holding the agency's continued issuance of fishing permits under the High Seas Fishing Compliance Act constitutes ongoing agency action); *Wash. Toxics Coal. v. U.S. Envtl. Prot. Agency*, 413 F.3d 1024 (9th Cir. 2005) (holding the EPA's registration and regulation of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act constitutes ongoing agency action).
[93] *Babbitt*, 65 F.3d at 1502.
[94] *Id.* at 1508.
[95] *Id.* at 1509.

section 7(a)(2) could apply."[96] This was because BLM could take no further action to benefit the spotted owl under a right-of-way agreement that was granted prior to the enactment of the ESA.[97] In this way, the court stated that the agency's "inability to influence [the construction project] is what sets this case apart from *Pacific Rivers*."[98]

The court also rejected the environmental plaintiffs' arguments that the ESA "implicitly abrogates preexisting agreements such as the one at issue here."[99] While acknowledging that Congress has the power to legislatively alter contractual arrangements to which the federal government is a party, the Ninth Circuit found this was not the case with Section 7(a)(2) "where Congress specifically limited the application of section 7(a)(2) to cases where the federal agency retained some measure of control over the private activity."[100]

The Ninth Circuit applied the reasoning from *Babbitt* in other cases.[101] The most relevant of these precedents to the unique facts of the Project is *Environmental Protection Information Center v. Simpson Timber Co*.[102] In *EPIC*, plaintiffs brought suit against the USFWS for its refusal to reinitiate consultation regarding the effects of an incidental take permit for the northern spotted owl on two other, newly listed species.[103] The court concluded that *Babbitt* provided the appropriate test: the plaintiff "must allege facts to show that the [Service] retained sufficient discretionary involvement or control over [the] permit 'to implement measures that inure to the benefit of the' species."[104] In contrast to the LRMP at issue in *Pacific Rivers*, the incidental take permit, "like the right-of-way agreement in *Sierra Club*, involves agency authorization of a private action and a more limited role for the [Service]. In such a case, the issue of ongoing agency involvement turns on whether the agency has retained the power to 'implement measures that inure to the benefit of the protected species.' "[105]

The court in *EPIC* also distinguished *Houston*. The court acknowledged the holding in *Houston* that negotiating and executing contracts constitutes "agency action" because Reclamation retained the discretion to set contract terms and decrease the available water quantities. The court clarified that it "did not suggest in *Houston* that once the renewed

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[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.* at 1510.
[100] *Id.*
[101] *See, e.g.*, *Cal. Sportfishing Prot. Alliance v. Fed. Energy Regulatory Comm'n*, 472 F.3d 593, 597-99 (9th Cir. 2006) (granting of a license to operate hydroelectric project is not "ongoing agency action" because there is no ongoing program of issuing new permits, the granting of the permit was completed in 1980, a private party operates the project, and the reopener provisions in the license "no more than give the agency discretion to decide whether to exercise discretion, subject to the requirements of notice and hearing" and are not "in and of themselves . . . sufficient to constitute any discretionary agency 'involvement or control' ").
[102] *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) (*EPIC*).
[103] *Id.* at 1075-76.
[104] *Id.* at 1080.
[105] *Id.*

contracts were executed, the agency had continuing discretion to amend them at any time to address the needs of endangered or threatened species."[106] The court concluded that the agency did not have a duty to reinitiate because the Service did not retain the discretion in the permit to impose an amendment that would benefit the new species.[107]

2. Evolution from *Defenders* to *Home Builders*

Jurisprudence regarding the scope of Section 7(a)(2) and the meaning of "discretionary Federal involvement or control" came into sharp focus in *Defenders of Wildlife v. United States Environmental Protection Agency*.[108] The case involved the transfer of permitting authority under the Clean Water Act (CWA) from the United States Environmental Protection Agency (USEPA) to the State of Arizona. Under the CWA, USEPA initially administers the National Pollution Discharge Elimination System (NPDES) program for each state. A state may then apply to USEPA to administer the NPDES program and must demonstrate certain criteria are met related to whether the responsible state agency has the requisite authority under state law. If the nine statutory criteria are met, the transfer to the state must be approved.[109]

In 2002, the State of Arizona applied for transfer of NPDES permitting authority.[110] It was undisputed that the state met all nine criteria.[111] USEPA engaged with USFWS in a Section 7 consultation to determine whether transfer of the program would jeopardize listed species or adversely modify their critical habitat. After deliberation between the two agencies, USFWS issued a BiOp that recognized that although no federal agency would have the legal authority to consult with permit applicants concerning potential impacts to species, the transfer would not cause jeopardy.[112] Environmental plaintiffs then challenged the transfer of the permitting program under the CWA as well as the BiOp supporting the transfer.[113]

The Ninth Circuit framed the issue in *Defenders* as follows: "[d]oes the Endangered Species Act authorize—indeed, require—the EPA to consider the impact on endangered and threated species and their habitat when it decides whether to transfer water pollution

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[106] *Id.* at 1082.
[107] *Id.* at 1081-82.
[108] *Defs. of Wildlife v. U.S. Envtl. Prot. Agency*, 420 F.3d 946 (9th Cir. 2005) (*Defenders*).
[109] *Id.* at 950.
[110] *Id.* at 952.
[111] *Id.* at 963 n.11.
[112] *Id.* at 953-55. The BiOp reasoned that:
> "[T]he loss of section 7-related conservation benefits . . . is not an indirect effect of the authorization action," because "loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather the absence of the section 7 process that exists with respect to Federal [Clean Water Act] permits reflects Congress' decision to grant States the rights to administer these programs.

[113] *Home Builders*, 551 U.S. at 654-55.

permitting authority to state governments?"[114] It answered that question in the affirmative. The Ninth Circuit held that Section 7 confers authority on federal agencies to protect listed species that "goes beyond that conferred by agencies' own governing statutes."[115] "We conclude that the obligation of each agency to 'insure' that its covered actions are not likely to jeopardize listed species is an obligation in addition to those created by the agencies' own governing statute."[116]

The Ninth Circuit then moved to the question of which actions are covered by Section 7(a)(2). On that point, the Ninth Circuit interpreted the language in 50 C.F.R. § 402.03 related to discretionary actions to be "congruent with the statutory reference to actions 'authorized, funded, or carried out' by the agency."[117] Ultimately, the Ninth Circuit found that USEPA failed to understand its own authority under Section 7(a)(2) to act on behalf of listed species and that the Section 7(a)(2) consultation that did occur was inadequate.[118]

The Supreme Court reversed the Ninth Circuit's *Defenders* decision. Before that reversal, however, other judges in the Ninth Circuit expressed their concern with the panel's decision in *Defenders* in a unique order in which the author of the panel opinion defended the decision against six judges dissenting from the denial of petition for rehearing en banc.[119] The dissent remarked that the panel decision nullified the ESA regulation and erroneously "transformed the ESA into an overriding mandate that trumps an agency's obligations under its own governing statute."[120]

By reversing *Defenders* in *Home Builders*, the Supreme Court set the record straight on the reach of Section 7(a)(2). The Court acknowledged the panel's "substantive construction of the statutes at issue" and its holding that "the ESA granted the EPA both the power and the duty to determine whether its transfer decision would jeopardize threatened or endangered species."[121] The Court also acknowledged the dissent from the denial of rehearing en banc and the decisions of other courts of appeal that conflicted with the Ninth Circuit's construction of Section 7(a)(2).[122]

The Supreme Court explained that the Ninth Circuit's reading of Section 7(a)(2) "would effectively repeal § 402(b)'s statutory mandate by engrafting a tenth criterion onto the

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[114] *Defenders*, 420 F.3d at 950.
[115] *Id.* at 964; *see also id.* ("section 7 includes an affirmative grant of authority to attend to protection of listed species within agencies' authority when they take actions covered by section 7(a)(2)").
[116] *Id.* at 967.
[117] *Id.* at 968; *see also id.* at 970 (explaining the regulation is "coterminous" with Section 7(a)(2)).
[118] *Id.* at 977.
[119] *See Defs. of Wildlife v. U.S. Envtl. Prot. Agency*, 450 F.3d 394 (9th Cir. 2006).
[120] *Id.* at 398.
[121] *Home Builders*, 551 U.S. at 656.
[122] *Id.* at 656-57.

CWA."[123] The Supreme Court extended this reasoning to all other statutes: "[r]eading the provision broadly would thus partially override every federal statute mandating agency action by subjecting such action to the further conditions that it pose no jeopardy to endangered species."[124] The Court found that this interpretation runs counter to the presumption against implied repeals and could not stand.[125] The Court then turned to the agencies' attempt to resolve the "tension" through its regulations implementing Section 7(a)(2).

Under 50 C.F.R. § 402.03, the "ESA's requirements would come into play only when an action results from the exercise of agency discretion."[126] The Court found the regulation harmonizes statutes "by applying § 7(a)(2) to guide the agencies' existing discretionary authority, but not reading it to override express statutory mandates."[127] The Court found this interpretation to be reasonable, entitled to deference under the *Chevron* framework,[128] and consistent with other Supreme Court precedent.[129]

Thus, the Supreme Court rejected a reading of Section 7(a)(2) which would grant federal agencies affirmative authority under the ESA to take actions to benefit listed species that goes beyond the authority granted by the agencies' governing authorities. Instead, the Court articulated an interpretation of Section 7(a)(2) which limits its application to actions that an agency takes under its governing statutes that involve its discretion.[130]

3. Subsequent Application of *Home Builders* and *EPIC* to Similar Federal Water Projects and Water Supply Contracts

Home Builders is the applicable Supreme Court precedent on the scope of Section 7(a)(2) and when consultation is required. Following the decision, lower courts and federal agencies have reconsidered and adjusted their approaches to Section 7(a)(2) consultations. Two examples that are relevant to the Project are discussed below.

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[123] *Id.* at 663.
[124] *Id.* at 664.
[125] *Id.*
[126] *Id.* at 665.
[127] *Id.* at 666.
[128] *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[129] *Home Builders*, 551 U.S. at 666-67.
[130] *Home Builders* also implicitly affirms statements in Ninth Circuit decisions prior to *Defenders* and the decisions of other courts of appeal noted by the Court that were in conflict with *Defenders*. *See Home Builders*, 551 U.S. at 656-57 (citing *Platte River Whooping Crane Critical Habitat Maint. Tr. v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27, 33-34 (D.C. Cir. 1992) (*Platte River*) (holding that Section 7 "does not *expand* the power conferred on an agency by its enabling act") (emphasis in original)); *see also County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081, 1085 (9th Cir. 2003) ("There is authority that the ESA does not grant powers to federal agencies they do not otherwise have.") (citing *TVA v. Hill*, 437 U.S. at 183); *Babbitt*, 65 F.3d at 1510 (agreeing with construction of Section 7 announced in *Platte River*).

a. California: Sacramento River Settlement Contracts and the *NRDC v. Bernhardt* Litigation

Unlike the Klamath Project, the Central Valley Project (CVP) is authorized for multiple purposes, including fish and wildlife restoration.[131] In 2004, Reclamation prepared an operation plan for the CVP, known as "OCAP," to serve as the basis for an ESA consultation with both Services to support the renewal of different forms of water supply contracts that were set to expire in 2004 and 2005.[132] Specifically, Reclamation proposed to renew a set of long-term contracts that it had executed in the 1960s with senior water right holders in the Sacramento Valley in order to settle these water users' protests to the water right applications for the CVP. These contracts are known as the "Sacramento River Settlement Contracts" (SRS Contracts).[133] The BiOps issued in 2004 and 2005 by the USFWS and NMFS analyzing the effect of the 2004 OCAP were found invalid in separate district court cases.[134] USFWS issued a new BiOp in 2008, and NMFS issued a new BiOp in 2009.[135]

In 2008, environmental plaintiffs amended their complaint in the *NRDC* litigation to specifically challenge the renewal and implementation of the SRS Contracts based on the consultations that occurred in 2004 and 2005.[136] Following a trip to the Ninth Circuit in which they obtained a favorable ruling,[137] the plaintiffs again amended their complaint in 2016. Plaintiffs added the "Fifth Claim for Relief," which alleged that in response to specific events in 2009, 2011, 2014, and 2015, Reclamation "unlawfully failed to request re-initiation of consultation with NMFS on the impacts of the SRS Contract renewals on the winter-run and spring-run Chinook" salmon. [138] Federal defendants moved to dismiss this claim, arguing that Reclamation did not retain sufficient discretionary control or involvement over implementing the terms of the SRS Contracts to trigger reinitiation of consultation.[139]

In deciding the federal defendants' motion to dismiss, the court carefully reviewed the pleadings and summarized the claim alleging that "Reclamation retains discretionary involvement or control over SRS Contract implementation and that the new information alleged in the complaint regarding impacts of SRS Contract implementation on salmonids

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[131] Central Valley Project Improvement Act of 1992, Pub. L. No. 102-575, § 3406, 106 Stat. 4714.
[132] *NRDC v. Norton*, 236 F. Supp. 3d at 1204-05. The *NRDC* case began in 2005, and the case name has changed with the appointment of Secretaries over time. Herein, the case is referred to in text as "*NRDC* litigation" or "*NRDC v. Bernhardt* litigation."
[133] *Id.* at 1204-05, 1208-09.
[134] *Id.* at 1205-07.
[135] *Id.* at 1207.
[136] *Id.* at 1206-07.
[137] *See Nat. Res. Def. Council v. Jewell*, 749 F.3d 776 (9th Cir. 2014) (*NRDC v. Jewell*); *see also NRDC v. Norton*, 236 F. Supp. 3d at 1207-09 (describing procedural history).
[138] *NRDC v. Norton*, 236 F. Supp. 3d at 1210.
[139] *Id.* at 1212. The regulation on the requirement to reinitiate consultation includes the same qualifying language – "discretionary Federal involvement or control" – to define for which action the agency must reinitiate consultation. *See* 50 C.F.R. § 402.16.

requires re-initiation of consultation regarding SRS Contract adoption."[140] The court then carefully explained the authority that controls the disposition of the claim: *EPIC*.

> *EPIC* generically holds that "to survive a Rule 12(b)(6) motion to dismiss, [a plaintiff] must allege facts to show that [the action agency] retained sufficient discretionary involvement or control over [the permit or contract in question] to implement measures that inure to the benefit of the [relevant species]." *EPIC*, 255 F.3d at 1080. Plaintiffs point to numerous contract provisions and other aspects of law they claim grant to Reclamation the discretion to take action to implement the SRS Contracts in ways that would benefit winter-run and spring-run Chinook salmon and their habitats. [Citation.]
>
> Federal Defendants advocate for a more narrow reading of EPIC, based in part on *EPIC*'s application of *Houston* . . . Federal Defendants advocate for turning [the ruling in *Houston*] into an affirmative rule that would require allegations that the agency retained continuing discretion to amend the renewed contracts to address the needs of endangered or threatened species. [Citation.] According to Federal Defendants, *EPIC*'s generic holding—that "to survive a Rule 12(b)(6) motion to dismiss, [a plaintiff] must allege facts to show that [the action agency] retained sufficient discretionary involvement or control over [the permit or contract in question] to implement measures that inure to the benefit of the [relevant species]," 255 F.3d at 1080—is further limited by the more specific requirement that the type of discretion the action agency must retain under the circumstances is discretion to modify the contracts themselves to benefit the species.
>
> A close examination of how the *EPIC* court evaluated the terms of the ITP at issue in that case suggests Federal Defendants are correct. *EPIC* focused on examining the ITP to determine whether the action agency retained discretionary control to modify or add to the ITP's terms by: "mak[ing] new requirements to protect species that subsequently might be listed as endangered or threatened"; "expand[ing] the conservation goals of the [ITP]"; and "demand[ing] additional measures to protect new species." *Id*. at 1081-82 (emphasis added). See *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1170 (W.D. Wash. 2004) (emphasizing that *EPIC* involved a completed contract between the agency and a private entity and interpreting *EPIC* as holding that FWS did not " 'retain discretionary control [under the permit] to make new requirements to protect' the marbled murrelet or the coho salmon . . . or impose new requirements on the company" (quoting *EPIC*, 255 F.3d at 1081-83)). **In other words, in order to trigger the requirement for re-consultation under *EPIC* and 50 C.F.R. § 402.16 in the context of an executed and otherwise**

[140] *NRDC v. Norton*, 236 F. Supp. 3d at 1207-09.

> **valid contract, the action agency must have retained sufficient discretion in that contract to permit material revisions to it that might benefit the listed species in question.**[141]

Plaintiffs in *NRDC v. Norton* contended that more than a dozen different provisions in the SRS Contracts were sources of discretion to take actions that could benefit species. In response, the court examined each provision, analyzing the contract language to determine whether Reclamation retained discretion to impose revisions to the executed contract to address the needs of protected species.[142] For example, article 3(i) of the SRS Contracts provides that if there is a "shortage of Project Water because of actions taken by the Contracting Officer to meet legal obligations then . . . no liability shall accrue against the United States or any of its officers, agents, or employees for any damage direct or indirect, arising therefrom."[143] Plaintiffs argued that this provision allows Reclamation to reduce diversion of Project Water to meet other legal obligations. The court disagreed, finding that the provision was a force majeure clause that limited legal liability in the event of certain shortages. More pertinent, the court found the force majeure language did not qualify as "discretionary Federal involvement or control" under the *EPIC* standard.[144] The court concluded that plaintiffs had identified no contract provision and no other source of authority that would have permitted Reclamation to modify contract terms to increase protections for listed species, and dismissed the claim.

b. New Mexico: Army Corps' Approach Leading to *WildEarth Guardians*

In 2013, the Chief Counsel for the Corps issued a legal memorandum to all offices of the Corps providing ESA guidance.[145] Specifically, the 2013 Corps Memorandum directs agency counsel to conduct careful legal review of ESA consultations involving the Corps:

> [S]o that measures that the Corps adopts to implement . . . ESA responsibilities will be within Corps' legal authorities . . . this requires accurate description of the action being proposed by the Corps, a careful determination regarding what to include in the environmental baseline, as well as thoughtful adoption of measures designed to meet the requirements and intent of the ESA.[146]

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[141] *Id.* at 1216-17 (bold emphasis added; other emphasis in original).
[142] *Id.* at 1219-30 (evaluating contract provisions on quantity, beneficial use, shortage, rates and charges, among other provisions).
[143] *Id.* at 1219 (internal citation omitted).
[144] *Id.* at 1219-20.
[145] Memorandum from Chief Counsel, U.S. Army Corps of Engineers, to All Counsel HQ, DIV, DIST, CENTER, LAB & FOA Offices re: ESA Guidance (June 11, 2013) (Corps Memorandum).
[146] *Id.* at 1.

The 2013 Corps Memorandum notes the frequent "challenges" present in ESA consultations for Civil Works projects that were authorized and constructed before the enactment of the ESA in 1973 and are now operated and maintained by the Corps.[147] "Determining the Corps' ESA legal responsibilities for such existing Civil Works projects requires care and precision."[148] Additionally, the 2013 Corps Memorandum acknowledges the importance of the Services' responsibilities under the ESA, but notes that the Corps must ensure that it "can plan, design, build, operate, and maintain Civil Works projects that serve the purposes for which Congress authorized each project (such as navigation, flood control, water supply, hydropower, etc.) . . . ."[149]

The 2013 Corps Memorandum provides specific directions to accomplish these objectives, including the careful identification and definition of the "action" that must comply with the ESA, and that the Corps, not the resource agencies, define the "action" at issue. "[I]t is important for the Corps to define and describe [the] agency's 'action' in a precise manner, to ensure that any measures intended to minimize adverse impacts pursuant to the ESA accurately account for only those activities over which the Corps has discretion."[150] Other conclusions from the 2013 Corps Memorandum include:

- "It is the view of the Corps that the responsibility to maintain Civil Works structures so that they continue to serve their congressionally authorized purposes is inherent in the authority to construct them and is therefore non-discretionary."[151]
- "Because the Corps has a non-discretionary duty to maintain those Civil Works structures for which it has O&M responsibilities, the fact that the Corps perpetuates the structure's existence is not an action subject to consultation. The how and when of the maintenance activities may be subject to Section 7 consultation if the process of maintenance (as opposed to the results of maintenance) could affect listed species or designated critical habitat."[152]
- "[T]he Corps' positions on important matters such as what activities are included in the agency action and what conditions are included in the environmental baseline should be presented clearly and forcefully in the biological assessment (BA) that the Corps prepares and submits to the resource agency at the beginning of the consultation process."[153]

The 2013 Corps Memorandum concludes by stating the importance of following the legal guidance so that "the Corps can try to ensure that the Civil Works budget is not inappropriately diverted to pay for large-scale environmental restoration projects that

[147] *Id.* at 1-2.
[148] *Id.* at 2.
[149] *Id.*
[150] *Id.*
[151] *Id.* at 2-3.
[152] *Id.* at 3.
[153] *Id.*

Congress has not authorized or funded, in the guise of alleged ESA responsibilities that are not legitimately the Corps' responsibilities under the ESA."[154]

The Corps' approach was tested in litigation challenging the agency's compliance with the ESA in operating certain works in the Middle Rio Grande Project. In *WildEarth Guardians v. United States Army Corps of Engineers*,[155] environmental plaintiffs alleged that the Corps, in operating the Middle Rio Grande Project, violated Section 7(a)(2) by failing to consult with USFWS on the effects of operations on the listed Rio Grande silvery minnow and southwestern willow flycatcher.[156] The Corps operates four dams in the Middle Rio Grande Project, and each dam is authorized for limited purposes of flood control, sediment control, or storing specific pools of water.[157] Reclamation also operates project works, and the agencies had traditionally initiated joint Section 7(a)(2) consultations with USFWS. In 2013, the Corps desired to consult solely on Corps-specific actions. USFWS did not agree, and the Corps proceeded to withdraw from the consultation. In response to the Corps Memorandum (described above), the Corps reassessed its actions and legal obligations in the Middle Rio Grande Project.[158]

The ultimate result was the "2014 Reassessment," which identified 13 actions that the Corps undertakes when operating the four dams of the Middle Rio Grande Project, and then analyzed whether the Corps had discretion over any of the 13 actions.[159] In evaluating whether it has discretion to take actions to benefit species for environmental purposes, the Corps "looked to caselaw . . . ; statutes (for example, parsing the text of the [Flood Control Act of 1960]) . . . ; and its own expertise (for example, noticing that Galisteo Reservoir, as an unregulated outlet structure, is physically incapable of retaining carryover storage) . . . . ."[160] The Corps concluded that it did not "need to consult on 11 of 13 identified actions, because those actions are either non-discretionary, not Corps actions, or not applicable given certain facts . . . ."[161] The remaining two actions involved maintenance, which the Corps also considered to be non-discretionary, but recognized that the manner in which those actions are executed could require consultation if the execution affected listed species or their habitats.[162]

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[154] *Id.* at 5.
[155] *WildEarth Guardians v. U.S. Army Corps of Eng'rs,* 314 F. Supp. 3d 1178 (D.N.M. 2018) (*WildEarth Guardians I*).
[156] *Id.* at 1184-85.
[157] *Id.* at 1185-86.
[158] *Id.* at 1186.
[159] *Id.* at 1186-91 (listing the 13 actions, such as "Flood Control Operation" or "Release of Carryover Storage" and summarizing the Corps' conclusions on discretion from the 2014 Reassessment).
[160] *Id.* at 1194.
[161] *Id.* at 1191.
[162] *Id.*

The court found the 2014 Reassessment to be the "result of thorough, careful, and expert analysis," and largely upheld the Corps' approach and conclusions.[163] Specifically concerning the various flood control acts under which the dams were authorized, the court found *Home Builders* to be "directly on point."[164] The court agreed with the Corps' position that the flood control acts "entirely stifle [the Corps'] ability to deviate in its operations" as the Corps "is directed to only consider flood and sediment control; [and] Congress explicitly provided a way to deal with environmental issues in the statutes . . . ."[165] The court also applied the precedent in *Home Builders* and explained that the ESA did not implicitly repeal or modify the Flood Control Act of 1960.[166]

The Tenth Circuit affirmed the district court's decision.[167] The appellate court also invoked *Home Builders* in analyzing whether discretion existed under the flood control acts:

> [T]he Corps is only required to engage in consultations under § 7(a)(2) when it has discretion to pursue objectives under the [ESA]. Under the Flood Control Acts' statutory mandates, the Corps does not have discretion. Because the Acts are silent on any consultation requirements, we would have to interpret them as including an implicit consultation requirement. We cannot interpret the Acts this way.[168]

The court concluded that the Corps lacks discretion to act on behalf of the minnow and flycatcher and thus did not have to engage in a Section 7(a)(2) consultation.[169]

The Corps' approach and the *WildEarth Guardians* cases from the Tenth Circuit stand in contrast to the 2008 decision from the Ninth Circuit in *National Wildlife Federation v. National Marine Fisheries Service*,[170] in which the Ninth Circuit reviewed the Section 7(a)(2) consultation for the Federal Columbia River Power System dams on listed fish in the Columbia and Snake Rivers. In that case, the Ninth Circuit agreed with the district court's determination that the agencies' treatment of discretionary and nondiscretionary dam operations was objectionable.[171] However, *NWF v. NMFS* is distinguishable from the Corps' recommended approach on ESA consultations on multiple grounds.

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[163] *Id.* at 1194-98. The court reversed and remanded to the Corps on the issue of consultation over the maintenance operations in the Abiquiu Dam tunnel and the Jemez Canyon Dam stilling basin, and denied the remainder of plaintiff's motion. *Id.* at 1205.
[164] *Id.* at 1196.
[165] *Id.* at 1195.
[166] *Id.*
[167] *WildEarth Guardians II*, 947 F.3d 635.
[168] *Id.* at 641.
[169] *Id.* at 641-42.
[170] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008) (*NWF v. NMFS*).
[171] *Id.* at 928-29.

First, the Ninth Circuit noted that the BiOp in that case "offer[ed] little detail on the nature and extent of the purportedly nondiscretionary obligations of NMFS's basis for finding them to be nondiscretionary."[172] In the *WildEarth Guardians I* litigation, the Corps, as the action agency, was "meticulous and thorough" in its documentation of its statutory authorities and operations in the 2014 Reassessment.[173] In *NWF v. NMFS*, the court cautioned that "NMFS may not avoid determining the limits of the action agencies' discretion by using a reference operation to sweep so-called 'nondiscretionary' operations into the environmental baseline, thereby excluding them from the requisite ESA jeopardy analysis."[174] The Corps' approach tested in *WildEarth Guardians I* is not about avoiding an effects analysis, but rather delineating which actions the Corps has statutory authority to take and which it does not.[175] And the Ninth Circuit in *NWF v. NMFS* was concerned with an agency action intended to further a "broad Congressional mandate," which it found, by definition, to be discretionary.[176] For the dams operated by the Corps at issue in *WildEarth Guardians I*, there are not broad congressional mandates, but rather very specific statutory directives on how to operate facilities.[177] And in the Project, there are specific contracts, and a specific authorization that is only for 1902 Reclamation Act purposes, that direct that the holding in *NWF v. NMFS* is not on point.

c. Key Conclusions Regarding Application of the ESA to the Project

1. No Precedent to Date has Considered Precisely How Section 7(a)(2) Applies to Project Operations, Particularly under Modern Authority

Statements in prior court decisions that involve the Klamath Project and suggest that Reclamation can act solely under the ESA to benefit species would be in conflict with the now-controlling precedent announced in *Home Builders*, and as further developed in the lower courts.[178] Thus, there is limited value in looking to these cases for direction in crafting a current framework for ESA consultation for the Project.

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[172] *Id.* at 926.
[173] *WildEarth Guardians I*, 314 F. Supp. 3d at 1194.
[174] *NWF v. NMFS*, 524 F.3d at 929.
[175] *WildEarth Guardians I*, 314 F. Supp. 3d at 1185-91.
[176] *NWF v. NMFS*, 524 F.3d at 929.
[177] *See, e.g., WildEarth Guardians I*, 314 F. Supp. 3d at 1186-91.
[178] *See, e.g., Patterson II*, 204 F.3d at 1213 ("we hold that the district court did not err in concluding that Reclamation has the authority to direct Dam operations to comply with the ESA"); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1206-07 (D. Or. 2001).

2. The ESA Is Not an Independent Source of Authority for Reclamation to Take Action that Benefits Protected Species or Their Critical Habitat

Under the line of authority related to the Supreme Court's decision in *Home Builders*, the ESA does not grant independent statutory authority to a federal agency to take action to benefit protected species.[179] The agency must have authority under its governing statutes to take any such action, or have reserved discretion to impose measures to benefit listed species. With respect to the Project, the Project was authorized for the purposes of the 1902 Act; there is no other enabling legislation to consider.[180] The Project's water rights are defined according to the ACFFOD. The only purposes for which storage by Reclamation is authorized are "domestic use and irrigation."[181] Reclamation does not have authority to store water or release stored water from LRD for the purpose of benefitting ESA-listed species.

3. Based on Current ESA Jurisprudence, the Requirement to Consult under Section 7(a)(2) Does Not Apply to Many Aspects of Project Operations

At a general level, the operation of the Project can be described as two components: storage of water in Project reservoirs including LRD, Clear Lake, and Gerber Reservoirs to ensure diversion and delivery to all land served pursuant to permanent contracts between Reclamation and Project contractors; and diversion and delivery of live flow and stored water from Project reservoirs, the Klamath River, and Lost River to all land served pursuant to permanent contracts between Reclamation and Project contractors.[182]

To determine whether Section 7(a)(2) applies to these actions and whether Reclamation must engage in a consultation with the Services, Reclamation must evaluate whether it has some discretion to take action for the benefit of a protected species. Reclamation diverts and stores water in UKL and other reservoirs according to its water rights obtained under state law. Under the ACFFOD, the purpose of use for water diverted to storage is irrigation. There is no discretion to take action to manage storage for the benefit of listed species over the interests of Project irrigators. Moreover, Reclamation is bound by legal obligations in permanent contracts with irrigation districts and individual contractors to supply the amount of water necessary for irrigation. These permanent contracts also represent legal obligations that restrict Reclamation's discretion; Reclamation may not restrict

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[179] *Id.* at 656-57 (citing *Platte River*, 962 F.2d at 33-34); *Babbitt*, 65 F.3d at 1510 (agreeing with construction of Section 7 announced in *Platte River*).
[180] *See* section I.A, *supra*.
[181] KBA_ACFFOD_07117-07118.
[182] There are other incidental Project operations such as flood control, maintenance, delivery of water to refuges, and delivery of water under temporary contracts that are not the subject of the immediate analysis and conclusions here, but that should be separately considered in accordance with the conclusion of this memorandum.

deliveries under those contracts unless, and only to the extent that, it has retained discretion to amend the contracts in a manner that inures to the benefit of listed species.

Reclamation has transferred the responsibilities for many Project works to irrigation districts and no longer operates them. Other works have been owned and operated by the irrigation districts for decades. To the extent that there is any federal involvement in the operation of Project works, *EPIC* provides the relevant standard to determine whether this is the type of discretionary involvement or control that would trigger a Section 7(a)(2) consultation regarding the ongoing operations of these facilities. The *EPIC* standard, as recently interpreted in *NRDC v. Norton*, provides that in the context of a permanent contract, the action agency must have retained sufficient discretion in that contract to permit material revision to it that might benefit the listed species in question.[183]

Based on a review of major Project contracts,[184] we did not find that Reclamation has sufficient discretion over the second component of Project operations (diversion and delivery of water to Project lands) to require a Section 7(a)(2) consultation for this aspect of Project operations. This was a major trigger for requesting that Reclamation conduct the sort of legal analysis and reassessment that had been completed by the Corps in its 2013 guidance and its operations on the Rio Grande.

B. The Application of Section 9

The proper application of Section 7(a)(2) does not eliminate the potential applicability of the take prohibition of Section 9 of the ESA. As explained above, during a Section 7(a)(2) consultation, if the Services find no jeopardy or adverse modification, or if they provide RPAs, they must also provide an ITS.[185] Any take that is in compliance with the terms and conditions of the ITS is not subject to the take prohibition of Section 9.[186] And actions by private parties that are contemplated by the ITS, that are explicitly described within the proposed action approved under the ITS, and that comply with the terms of the ITS are similarly exempt from liability under the Section 9 take prohibition.[187]

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[183] *NRDC v. Norton*, 236 F. Supp. 3d at 1216-17.

[184] There are over 200 contracts with Project water users, and review of each contract for this purpose was not performed as part of the analysis herein. We have reviewed the following contracts with the largest Project water users, and do not believe the provisions satisfy the *EPIC* standard: Van Brimmer Ditch Company (1909), Klamath Irrigation District, Shasta View Irrigation District, Malin Irrigation District, Klamath Basin Improvement District, Klamath Drainage District, Tulelake Irrigation District, Colonial Realty Company, Ady District Improvement Company, Langell Valley Irrigation District, Horsefly Irrigation District, and former Warren Act contracts with D Canal landowners.

[185] 16 U.S.C. § 1536(b)(4); *see also* 50 C.F.R. § 402.14 (describing formal consultation process).

[186] 16 U.S.C. § 1536(o)(2).

[187] *Ramsey v. Kantor*, 96 F.3d 434, 441-42 (9th Cir. 1996); *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 342 F. Supp. 3d 1047, 1062 (D. Mont. 2018) (holding that the ITS at issue there "clearly contemplates trapping by individuals" and could be relied upon by states and tribes for incidental take coverage).

Regardless of the ultimate scope of Section 7 consultation, it is likely that there will be a consultation and ITS. Indeed, this is the outcome of the 2021 Reassessment. The application of Section 9 to any federal activities requires case-by-case evaluation. In addition, similar to the evolution of ESA jurisprudence on the scope of Section 7(a)(2), there is authority in recent years that point to a new or modified approach to the regulatory framework for Section 9 and its application that have implications for the Project. These cases are described below.

1. *NRDC v. Norton* Decision on Section 9 Liability for Nondiscretionary Water Deliveries

In addition to claims alleging violations of Section 9, the environmental plaintiffs in the *NRDC v. Bernhardt* litigation in 2016 also alleged violations of Section 9.[188] The Section 9 claim alleged that Reclamation's releases of water from Shasta Dam and Reservoir to satisfy its SRS Contract obligations, and the diversion of water by the SRS Contractors in the drought years in 2014 and 2015, resulted in the unlawful take of endangered winter-run Chinook salmon in the Upper Sacramento River.[189]

Federal defendants argued that dismissal of the Section 9 claim is required because plaintiffs did not allege a "legally relevant causal link between Reclamation's alleged act and Plaintiffs' alleged take."[190] Because concepts of proximate cause apply to Section 9 claims, federal defendants asserted that an agency cannot, as a matter of law, be the proximate cause of any take that occurs as a result of that agency implementing a legally mandated water delivery (i.e., a non-discretionary action).[191] This argument was grounded in the precedent from *United States Department of Transportation v. Public Citizen*,[192] in which the Supreme Court held that a federal agency did not violate the National Environmental Policy Act (NEPA) when it failed to analyze environmental effects of permitting cross-border truck traffic because the agency was statutorily required to allow the trucks to enter the country.[193]

In response, plaintiffs argued that *Public Citizen* is inapplicable to the ESA context given the key differences between NEPA, a procedural statute, and the ESA, a statute that

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[188] *NRDC v. Norton*, 236 F. Supp. 3d at 1209.
[189] *Nat. Res. Def. Council v. Norton*, 2016 U.S. Dist. LEXIS 145788, at *82-86 (E.D. Cal. Oct. 20, 2016). In deciding federal defendants' and the SRS Contractors' motions to dismiss, Judge O'Neill issued an initial order on October 20, 2016, which requested supplemental briefing on certain issues, and then a final order on February 23, 2017, granting in part and denying in part defendants' motions. The February 23, 2017 order contains the rulings on both the *EPIC* standard and the scope of Section 9 liability for nondiscretionary actions.
[190] *Id.* at *100 (quoting federal defendants' motion to dismiss) (internal quotations omitted). Because the SRS Contracts are "settlement contracts" with senior water right holders, Reclamation's position is that deliveries to the SRS Contractors (for certain contract quantities) are non-discretionary. *See NRDC v. Norton*, 236 F. Supp. 3d at 1224, 1231-32.
[191] *NRDC v. Norton*, 236 F. Supp. 3d at 1235.
[192] *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004) (*Public Citizen*).
[193] *Id.* at 767-68.

imposes substantive obligations on federal agencies.[194] The court took extra care to consider whether it was proper to extend the logic of *Public Citizen* to the ESA given that the "ESA's purpose is decidedly different" than NEPA and that the Court in *Home Builders* specifically noted that *Public Citizen* did not control the outcome of *Home Builders* on the scope of Section 7(a)(2) because of these differences.[195] The court concluded as follows:

> Plaintiffs correctly point out that the Supreme Court has held that "[a]ll persons, including federal agencies, are specifically instructed not to 'take' endangered species." [Citation.] But this does not resolve the key question: whether a federal agency acting to implement a non-discretionary duty imposed by a valid contract should be subject to Section 9 liability. Here, to be blunt, analogizing to *Public Citizen*, the Court does not believe it is appropriate to impose Section 9 liability on a government agency for take caused by an action over which it has no control. In this case, to do the opposite would require Reclamation to either breach still-valid SRS Contracts necessary to operation of the CVP in compliance with state law, or obtain a Section 10 [incidental take permit] before implementing any non-discretionary aspect of the SRS Contracts. ***Accordingly, the Court finds that a federal agency that is legally required to take an action pursuant to federal law, such as by implementing non-discretionary terms in an otherwise valid water delivery contract, that agency cannot be the proximate cause of Section 9 take by undertaking that non-discretionary action***. While the concept of proximate cause limits a federal agency's Section 9 liability for actions over which it has no control, such a limit naturally would not apply where the federal agency does retain some degree of control. Accordingly, Section 9 take liability may attach to take otherwise proximately caused by actions over which a federal agency <u>does</u> have control.[196]

The court found two examples where Reclamation's discretionary conduct could have, accepting plaintiffs' allegations as true, been the proximate cause of the alleged take in 2014 and 2015. The court allowed the Section 9 claim against Reclamation to proceed on these two narrow grounds.[197]

2. Causation in Section 9 Cases Is Fact-Dependent

The *NRDC v. Bernhardt* litigation proceeded to discovery and motions for summary judgment.[198] The court's analysis on the motions includes several notable principles:

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[194] *NRDC v. Norton*, 236 F. Supp. 3d at 1236.
[195] *Id.* at 1237-38.
[196] *Id.* at 1239 (emphasis in italics added, emphasis in underline in original) (footnotes omitted).
[197] *Id.* at 1240-41.
[198] *Nat. Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465 (E.D. Cal. 2018).

- The record review rules that apply to a claim under the Administrative Procedure Act do not apply to a Section 9 claim, and evidence, including expert evidence, must be treated in a more traditional manner, including rules on hearsay applicable to government documents.[199]
- Plaintiffs must prove causation-in-fact, or but-for causation, although a court may consider whether a strict or more relaxed but-for causation standard may be appropriate under the circumstances.[200]
- Plaintiffs must also prove proximate causation.[201] "In the context of the ESA, the proximate cause inquiry requires determining whether the alleged injury is fairly traceable to the challenged action of the defendants."[202]

The Fifth Circuit Court of Appeals decision in *Aransas Project v. Shaw*[203] is also instructive. In that case, the Fifth Circuit summarized the "principal liability issue" as "whether the actions of [the Texas Commission of Environmental Quality] in administering licenses to take water from the Guadalupe and San Antonio rivers for human, manufacturing and agricultural use foreseeably and proximately cause the deaths of whooping cranes in the winter of 2008-2009."[204] The court also expanded on the "proximate cause limit" to Section 9 of the ESA and found it to "mean that liability may be based neither on the 'butterfly effect' nor on remote actors in a vast and complex ecosystem."[205] The Fifth Circuit found proximate cause to be lacking as a matter of law in that case.[206] Both cases instruct that Section 9 claims in complex water projects, like the Project, will require careful legal analysis and be factually intensive and highly dependent on evidentiary demonstrations of causation.

IV. TRIBAL RIGHTS AND RECLAMATION'S OBLIGATIONS

Operation of the Project can affect the interests of federally recognized Indian tribes and the United States as tribal trustee. This section examines tribal water rights and claims and Reclamation's responsibilities, including reference to the recent 2021 Reassessment and Solicitor Opinions.

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[199] *Id.* at 495-97.
[200] *Id.* at 487-92.
[201] *Id.* at 492-95.
[202] *Id.* at 492.
[203] 775 F.3d 641 (5th Cir. 2014).
[204] *Id.* at 656.
[205] *Id.* at 657-58 (citing *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 713 (1995) (O'Connor, J., concurring)).
[206] *Id.* at 660 (explaining that "there is a long chain of causation here between the TCEQ's issuance of permits to take water from the rivers and cranes' mortality" and "[e]very link of this chain depends on modeling and estimation").

A. Nature of Tribal Rights

1. Klamath Tribes

Three federally recognized Klamath Basin Indian tribes have federal reserved rights to hunt and fish on their reservations or former reservations.[207] The Klamath Tribes' hunting, fishing, and gathering rights are treaty-based rights.[208] The water rights to support these aboriginal rights have a priority of "time immemorial."[209] In Oregon's KBA, the BIA, in cooperation with the Klamath Tribes, filed, and the two are litigating, the Klamath Tribes' claims for non-consumptive, instream water rights including UKL elevations to support the tribal fishery. In the ACFFOD, the Adjudicator denied tribal instream claims for use of waters off the former reservation, including claims to rights to flows in the Klamath River in Oregon.[210] The Adjudicator approved claims for waters on, or bordering, the former reservation.[211] Since that time, the Klamath Tribes have made priority water right calls against upstream water users. Accordingly, Oregon has curtailed junior irrigation uses on, and upstream of, the former reservation.[212]

The United States and Klamath Tribes filed exceptions to the Adjudicator's denial of claims to rights to flows in water bodies outside the former reservation, including the denial of claims to flows in the Klamath River. In a ruling dated February 24, 2021, the Oregon court upheld the Adjudicator's determination that there are no tribal rights for the benefit of the Klamath Tribes for flows in the Klamath River (or other off-reservation, non-boundary water locations).[213]

With respect to UKL, the BIA and the Klamath Tribes filed, and the Adjudicator approved, claims to water rights for maintenance of specified UKL elevations through the year. However, under the determined right in the ACFFOD, until the entry of a judgment by the county circuit court, the UKL water right may not be exercised in a manner to curtail water rights that have a priority earlier than August 9, 1908.[214] Thus, the determined reserved right cannot restrict the Project irrigation rights, which have priority of May 19, 1905, and earlier. Non-tribal parties have filed exceptions to the Adjudicator's determination of the

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[207] *See United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983) (*Adair*) (Klamath Tribes in Oregon have rights to hunt, fish, and gather on their former reservation lands); *Parravano v. Masten*, 70 F.3d 539, 546 (9th Cir. 1995) (Yurok and Hoopa Valley Tribes have federal reserved fishing rights protectable under the Magnuson Act even though the reservations were established by executive order).
[208] *Treaty between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians*, Oct. 14, 1864, 16 Stat. 707.
[209] *Adair*, 723 F.2d at 1414.
[210] *See, e.g.*, KBA_ACFFOD_05379.
[211] *See, e.g.*, KBA_ACFFOD_05258.
[212] *See Hawkins v. Bernhardt*, 436 F. Supp. 3d 241 (D.D.C. 2020).
[213] Court's Opinion and Conclusions of Law on Phase 3, Part 1, Group C Motions, *In re Waters of the Klamath River Basin*, Klamath County Circuit Court Case No. WA1300001 (Feb. 24, 2021) at 12-13.
[214] KBA_ACFFOD_04943-04944.

UKL right and its scope. The Oregon court upheld the determination that a water right exists for UKL, but has yet to review the Adjudicator's quantification of that right.[215] Ultimately, the nature and attributes of a tribal right, and ability to enforce elevations in UKL, will be based on the adjudication court's judgment and applicable principles for water rights administration.

2. Yurok and Hoopa Valley Tribes

The 1995 Memorandum also concluded that the Yurok and Hoopa Valley Tribes have water rights in the Klamath River: "the priority date of the Hoopa and Yurok water rights are at least as early as 1891, and may be earlier."[216] In addition, the United States Court of Appeals for the Federal Circuit held that the Yurok and Hoopa Valley Tribes have water rights to support their fisheries.[217] The Solicitor's Stored Water Memorandum reaches the same conclusion. Although the ACFFOD determines water rights for land in the Project having priorities of 1883, it is assumed, for purposes of this memorandum, that all tribal rights are senior to 1883.

There are certain conclusions in the Solicitor's Stored Water Memorandum related to Project operations and tribal rights that differ from conclusions KWUA has advocated. This memorandum, however, focuses only on its conclusions related to releases of water stored in UKL, which are consistent with basic principles of water law.

B. Reclamation's Obligations Relative to Water Stored in Priority and Tribal Rights

The Solicitor's Stored Water Memorandum concludes that water previously stored while in priority is bound by the ACFFOD, to be released "in accordance with its terms."[218] This conclusion is dictated by western water law authority that stretches back more than a century, and significant storage throughout the west was built to provide a supply to juniors in times when senior users may call the natural system. This memorandum addresses only the issue of whether there is a water right for tribal uses in California of stored water in UKL.

In the ACFFOD, which is binding law on all parties, including the United States, the only lawful purposes for storing water in UKL (i.e., impounding UKL inflow via LRD) is irrigation and domestic use, and incidental livestock watering.[219] The only lawful purposes for use of water that has been stored under that right are those same purposes. The stored water is diverted directly out of UKL. It is also released to the Klamath River for diversions

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[215] Court's Opinion and Conclusions of Law on Phase 3, Part 1, Group C Motions, *In re Waters of the Klamath River Basin*, Klamath County Circuit Court Case No. WA1300001 (Feb. 24, 2021) at 14-17.
[216] 1995 Memorandum at 7.
[217] *See Baley v. United States*, 942 F.3d 1312, 1337 (Fed. Cir. 2019), *cert. den,* 19-1134, 2020 WL 3405869 (June 22, 2020) (*Baley*).
[218] Stored Water Memorandum at 7.
[219] KBA_ACFFOD_07117.

at specific locations for the irrigation use right. Project lands in both Oregon and California have rights to use of stored water from UKL.

The ACFFOD does not allow, or recognize any right to, release of stored water for instream uses, whether in the Klamath River in California or in Oregon. That does not necessarily preclude water use that has actually been released without intent of re-diversion for irrigation, but any such use is not the same as a right to the stored water. For example, in *Baley*, the plaintiffs/petitioners argued that any water rights of the California tribes have been waived because they were not asserted in the KBA. The *Baley* court did not hold that the California tribes have a water right to the stored water in UKL. Instead, the case holds that "the Yurok and Hoopa Valley Tribes' lack of participation in the state of Oregon's Klamath Adjudication did not preclude their entitlement to water that flows in the Klamath River below the Iron Gate Dam in California."[220]

This conclusion is consistent with the ACFFOD. For example, the ACFFOD approves federal reserved rights to divert and use of water of the Klamath River to provide a wildlife preserve and breeding grounds for protection of birds and their habitat on Lower Klamath National Wildlife Refuge land in Oregon and California.[221] The ACFFOD addresses whether that right includes a water right to use UKL stored water, and concludes that it does not: "The United States does not have the right under these claims to divert water which is stored in Upper Klamath Lake under the authority of other water rights."[222] The ACFFOD states that if water has been released from storage without intent to use it, the water is thus "abandoned" and constitutes "natural" or "live" flow that can be diverted as such. But use of stored water released for the intended irrigation purpose can only be a "privilege, but not a right" to use the water for refuge purposes, and any such use is subject to, and may not interfere with, Project irrigation use.[223]

Similarly, the ACFFOD approved a federal reserved right in the Klamath River for instream use for recreation and fisheries based on the Wild and Scenic Rivers Act.[224] That right exists only in natural or live flow of the Klamath River, and does not include the right to storage releases in order to furnish water necessary to ensure a flow equal to the instream right.[225] Also, the BIA filed a federal reserved water right claim for stretches of the Klamath River in Oregon for the benefit of the Klamath Tribes' fishery. The ACFFOD denied the claim, but the claim itself was only a claim to natural flow of the Klamath River, and did not assert a right to use of stored water from UKL.

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[220] *Baley*, 942 F.3d at 1341.
[221] KBA_ACFFOD_03728.
[222] KBA_ACFFOD_03724
[223] KBA_ACFFOD_03724.
[224] Wild and Scenic Rivers Act, 90 P.L. 542, 82 Stat. 906 (1968) (codified at 16 U.S.C. 1271 *et seq*.).
[225] KBA_ACFFOD_04024.

These and other claims will be resolved in the state court's final judgment. But to the extent federal reserved rights (or non-Project diversionary rights for that matter) make use of water that was in fact released from UKL, that use is a privilege and not a right. The ability to lawfully use stored water that has been released and is present is not the same as the right to require that stored water be released and be present. The United States has not asserted any right to impound water to storage for use other than rights to store and use for irrigation and domestic purposes. The authorized place of use includes land in Oregon and California, but not the Klamath River, and the authorized purposes of use do not include fish or wildlife purposes. Nor are such uses authorized purposes of the Project.

In other settings, arguments have been made that water stored in priority in UKL must be released to satisfy tribal federal reserved right purposes. However, natural flow and stored water in the Klamath Basin are distinct. It is accurate that in the Yakima basin adjudication in Washington state, reservoir water is subject to release for tribal fisheries. In that basin and reclamation project, there is 1914 legislation and a 1945 consent decree that defines water allocations such that natural flow and stored water are not distinct.[226] That legal circumstance is not present in the Klamath Basin. Similarly, arguments about stored water in the Klamath Basin cannot rely on determinations from the Colorado River basin. Legal determinations from the Colorado River[227] are not applicable because the Colorado River is governed by federal statute under the Boulder Canyon Project Act and the incredibly complicated "Law of the River."[228] Again, a federal statutory system does not apply to the Klamath River as between Oregon and California, nor change otherwise-applicable water law with regards to legal rights to the use of stored water.

In summary, there is not a legal basis in Oregon law or federal law for federal reserved rights claims to flows in the Klamath River from water that is stored by Link River Dam in UKL.

V. CONCLUSION

The above legal analysis supports Reclamation's approach in its re-evaluation and modification of Project operations and the ESA consultation for Project operations. It also explains why, as a matter of water law, any tribal rights to Klamath River flows do not include the right to releases of stored water from UKL.

Attachments

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[226] *See, e.g., Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1033 (9th Cir. 1985): *Surface Waters of the Yakima River Drainage Basin v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306, 1313 (Wash. 1993).

[227] *Arizona v. California*, 373 U.S. 546 (1963); *Arizona v. California*, 376 U.S. 540 (1963) (Decree).

[228] Boulder Canyon Project Act, 45 Stat. 1057 (1928) codified at 43 U.S.C. § 617 *et seq*. (BCPA); *Arizona v. California*, 373 U.S. at 588 (where the Secretary of the Interior carries "out a congressional plan for the complete distribution of waters to users, state law has no place").

EXHIBIT A

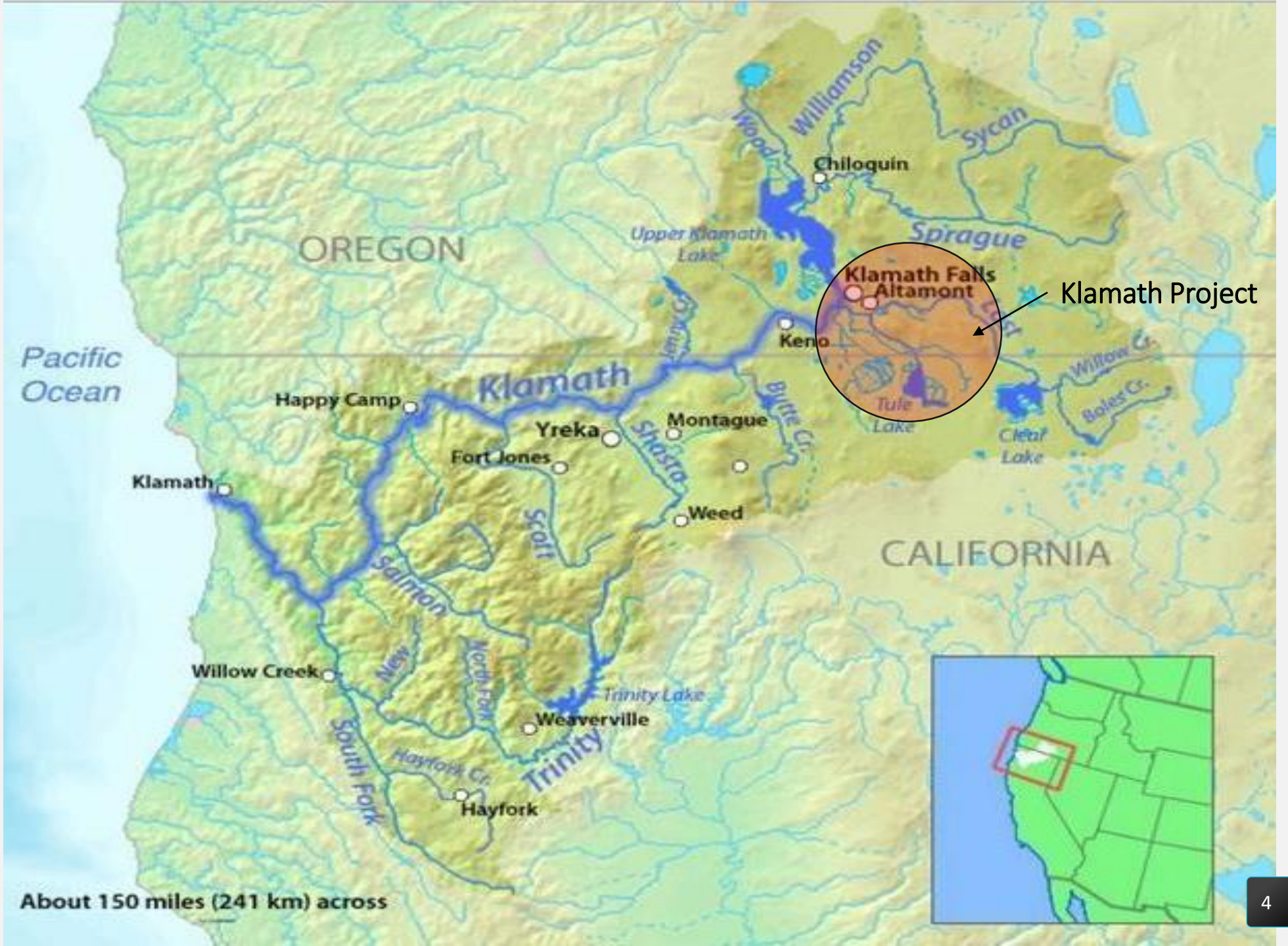
OREGON
CALIFORNIA
Pacific Ocean
Klamath Project
Klamath Falls
Altamont
Chiloquin
Williamson
Sycan
Sprague
Upper Klamath Lake
Keno
Tule Lake
Clear Lake
Willow Cr.
Boles Cr.
Lost R.
Lower Klamath Lake
Butte Cr.
Klamath
Happy Camp
Yreka
Montague
Fort Jones
Shasta
Weed
Scott
Salmon
Willow Creek
New
North Fork
Trinity Lake
Weaverville
South Fork
Hayfork Cr.
Trinity
Hayfork
About 150 miles (241 km) across

EXHIBIT B

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECC-ZA

JUN 1 1 2013

MEMORANDUM FOR ALL COUNSEL, HQ, DIV, DIST, CENTER, LAB & FOA OFFICES

SUBJECT: ESA Guidance

I. Introduction

a. Implementation of the Endangered Species Act (ESA) provides the Corps of Engineers Civil Works Program opportunities to contribute to the preservation of listed endangered and threatened species. However, the Corps must satisfy the statutory requirements of the ESA in a manner that also ensures the continued viability of the project purposes authorized by Congress, such as navigation, flood control, water supply, and hydropower. This guidance document is intended to review for all Corps commands the legal requirements of the ESA, so that measures that the Corps adopts to implement our ESA responsibilities will be within Corps' legal authorities, consistent with the Corps' missions and responsibilities, and feasible from both a technological and economic point of view. As explained further below, this requires accurate description of the action being proposed by the Corps, a careful determination regarding what to include in the environmental baseline, as well as thoughtful adoption of measures designed to meet the requirements and intent of the ESA.

b. I expect every Division Counsel and District Counsel to ensure that every ESA Section 7 formal consultation undertaken in that Division or District receives a careful legal review to determine whether the legal principles described in this document are being implemented. If not, please confer with my points of contact identified at the end of this document.

II. Context

a. This guidance document focuses on Section 7(a)(2) of ESA, which requires Federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service/NOAA Fisheries (NMFS) (collectively "the resource agencies"), and to ensure that actions they fund, authorize, permit, or otherwise carry out will not jeopardize the continued existence of any listed species or adversely modify designated critical habitats.

b. As the Corps conducts planning studies for new Civil Works projects, the Corps seeks the views of, and works closely with, the resource agencies pursuant to Section 7 consultation requirements of the ESA. This allows the Corps to plan and design new Civil Works projects in a way that will accommodate the needs of endangered and threatened species and critical habitats while still producing an efficient and cost-effective Corps project. The ESA presents different challenges for Civil Works projects that have already been constructed and that are now being

operated and maintained by the Corps. Many of those projects were planned, designed, and built before the ESA was enacted in 1973, and sometimes the listed species or designated critical habitats were not present in the area until after the Corps project was built. Determining the Corps' ESA legal responsibilities for such existing Civil Works projects requires care and precision.

c. In addition, for both proposed Civil Works projects and existing projects, it is important to remember that resource agencies have missions, goals, and responsibilities that are in some important respects different from those of the Corps of Engineers. For example, the FWS and the NMFS approach their responsibilities under the ESA by focusing almost exclusively on what measures would best advance the interests of listed endangered and threatened species. While the Corps shares with the resource agencies the goal of protecting listed species, we also have to ensure that we can plan, design, build, operate, and maintain Civil Works projects that serve the purposes for which Congress authorized each project (such as navigation, flood control, water supply, hydropower, etc.), in a cost-effective and efficient way. It becomes critical, therefore, that the Corps work diligently with the resource agencies to ensure that the proposed "Action" and "Environmental Baseline" are properly defined, and that alternatives that minimize impacts (and "Incidental Take") and other requirements set forth in a biological opinion are appropriate and technically and economically feasible.

III. Defining the "Action" and the "Environmental Baseline"

a. As the Corps evaluates its legal responsibilities under the ESA, the first step is to carefully identify and define the Corps' "action" that must comply with the ESA's procedural and substantive requirements. The FWS/NMFS ESA Section 7 regulations at 50 CFR Part 402 define "action" as follows:

b. "'Action' means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: . . . (d) actions directly or indirectly causing modifications to the land, water, or air." (50 CFR 402.02)

c. It is important that the Corps, not the resource agencies, defines the "action" at issue in a manner consistent with this definition. In all interactions with the resource agencies, it is important for the Corps to define and describe our agency's "action" in a precise manner, to ensure that any measures intended to minimize adverse impacts pursuant to the ESA accurately account for only those activities over which the Corps has discretion. For example, where the Corps is responsible for an existing structure such as a dam, levee, channel, etc., the mere continued existence of that structure cannot reasonably be said to cause modifications of the land, water, or air within the meaning of the ESA regulations. In other words, the existence of a Corps Civil Works structure is part of the existing "environmental baseline" for purposes of ESA compliance.

d. The FWS/NMFS regulations define the environmental baseline as follows: "The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area . . . ." (50 CFR 402.02). It is the view of

the Corps that the responsibility to maintain Civil Works structures so that they continue to serve their congressionally authorized purposes is inherent in the authority to construct them and is therefore non-discretionary. Only Congressional action to de-authorize the structure can alter or terminate this responsibility and thereby allow the maintenance of the structure to cease. For example, many years ago, and before the enactment of the ESA, the California Debris Commission constructed the congressionally authorized Englebright and Daguerre Point dams on the Yuba River in California to prevent debris from hydraulic gold mining activities from washing downstream and blocking the navigation channel of the Sacramento River. Later the Congress transferred responsibility for those dams to the Corps. After construction of those dams, anadromous fish could not swim upstream past the Englebright Dam at all, and could swim upstream of the Daguerre Point Dam only with the assistance of a fish ladder added after construction of the dam. Although the Corps maintains the fish ladder at the Daguerre Point Dam to keep it operational, the only other actions that the Corps takes at either dam is to inspect the structures from time to time to ensure their safety and integrity, and to take the minimal maintenance actions needed to ensure that the dams can continue to serve their Congressionally authorized purposes.

e. Because the Corps has a non-discretionary duty to maintain those Civil Works structures for which it has O&M responsibilities, the fact that the Corps perpetuates the structure's existence is not an action subject to consultation. The how and when of the maintenance activities may be subject to Section 7 consultation if the process of maintenance (as opposed to the results of maintenance) could affect listed species or designated critical habitat. When the Corps does conduct Section 7 consultation for an existing Corps project, the Corps' positions on important matters such as what activities are included in the agency action and what conditions are included in the environmental baseline should be presented clearly and forcefully in the biological assessment (BA) that the Corps prepares and submits to the resource agency at the beginning of the consultation process.

f. Careful definition of "action" and "environmental baseline" is critical because the analysis of the effects of the Corps' action pivots on these determinations. "Effects of the action" is defined to include "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action." (50 CFR 402.02) However, the ESA only requires the consideration of effects that are "reasonably certain to occur" (ibid) in contrast to NEPA's requirement to consider effects that are "reasonable foreseeable". *See Medina County Environmental Action Ass'n v. S.T.B.*, 602 F.3d 687, 695 (5th Cir. 2010) (quoting the FWS comments on the ESA regulations). The ESA does not require an agency to engage in speculation regarding a potential endless chain of effects. *San Francisco Baykeeper v. U.S. Army Corps of Engineers*, 219 F. Supp. 2d 1001, 1021-22 (N.D. Cal. 2002). There has to be a reasonable causal relationship between the agency action and the effects to be considered. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667-668 (2007) (assessing what actions an agency can be considered to have legally caused for purposes of the ESA). *See also Medina County*, 602 F.3d 687 (assessing causation for purposes of identifying interrelated actions). The ESA Section 7 Consultation Handbook (http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf) uses a "but for" test for determining interrelated and interdependent activities, but stresses that the question is the relationship of the activity that is potentially interrelated with the action under

consultation – not the opposite. (*See* Handbook, p.4-26 – 4-27.) Activities that relate to the action under consideration but that have independent utility apart from the action under consideration should not be included in the ESA analysis if it is "reasonably certain" that this activity would occur absent the primary action. Independent utility of an activity that is not reasonably certain to be implemented absent the primary action being considered is not grounds to exclude the activity from ESA consultation. *See* id. *See also Medina County*, 602 F.3d at 700; *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987).

IV. Adopting Reasonable and Prudent Alternatives Based on a Jeopardy Biological Opinion

a. The analysis of whether or not a proposed action is likely to jeopardize the continued existence of a listed species or adversely modify designated critical habitat is contained in a biological opinion issued by FWS and/or NMFS at the conclusion of formal Section 7 consultations. If a jeopardy or adverse modification determination is made, the biological opinion must identify any reasonable and prudent alternatives (RPAs) that could allow the project to move forward in a manner that would not jeopardize a listed species or its critical habitat. Typically such a biological opinion also includes an incidental take statement that provides an exemption to the prohibitions of Section 9 of the ESA. In such circumstances the Corps should work closely with the resource agency to develop an RPA that the Corps can implement.

b. An RPA is, from a legal point of view, a suggestion or recommendation that the Corps is not legally obligated to adopt or implement. If the Corps cannot implement the RPA that is recommended in a final biological opinion, the Corps must otherwise ensure that it is not violating the ESA: For example, the Corps may choose to not implement the project; the Corps may disagree with the jeopardy or adverse modification determinations in the biological opinion and proceed with its action (in this circumstance, the Corps must undertake a thorough evaluation of alternative approaches to ESA compliance to ensure no jeopardy or adverse modification); the Corps can seek to re-initiate ESA consultation with the resource agency hoping to receive a new and different biological opinion; or the Corps may request an exemption from the ESA from the "Endangered Species Committee" (a rarely used committee made up of seven cabinet members). If the Corps implements the project in such circumstances, the Corps needs to consider the legal vulnerabilities that come with a biological opinion that contains a finding of "jeopardy or adverse modification" under the ESA and the lack of an incidental take statement that exempts the Corps from the prohibitions of Section 9 of the ESA.

c. It is essential that the Corps work closely with the FWS and/or NMFS as that resource agency develops a suggested RPA to ensure that the RPA contained in the final biological opinion will conform to the legal requirements for what an RPA must be, and to ensure that the RPA can actually be implemented by the Corps within our existing legal, economic, and practical limitations. To accomplish those goals it is important to keep in mind the restrictions and limitations that govern the development of an RPA, and that are inherent in the legal definition of what an RPA is. The FWS/NMFS ESA Section 7 regulations define the term "RPA" as follows:

d. "Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat." (50 CFR 402.02)

e. Each element of the definition of an "RPA" requires the Corps' perspective and presents questions that are uniquely within the Corps' expertise: whether a recommended RPA would be " . . . consistent with the intended purpose of (the Corps') action . . ."; whether a suggested RPA " . . . can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction . . . "; and whether a recommended RPA would be " . . . economically and technically feasible . . . .". The law recognizes deference to the action agency on these questions, since only the action agency is responsible for the proposed action and for implementation of any recommended RPA.

f. In order to facilitate the production of a biological opinion that accurately reflects the Corps' action, authorities, and the feasibility of implementation of appropriate alternatives, the Corps should work closely with the resource agencies early in the process of developing RPAs and should formally request a draft biological opinion for review and comment in order to ensure that the view of the Corps on these questions is appropriately considered. If requested to do so, a resource agency should provide a draft Biological Opinion to the action agency for review. Attempting to resolve differences of opinion before the biological opinion is finalized benefits all parties to the process and minimizes the likelihood that the Corps will have to request re-initiation of consultation to correct incorrect facts, assumptions, and/or legal conclusions of the biological opinion. Resolving these problems at the draft BiOp stage also creates a stronger administrative record should the final decision be challenged in court. In order to help develop implementable RPAs, Corps counsel should work actively with appropriate clients, keeping in mind the applicable definition of "RPA" as it applies to Corps Civil Works activities.[1]

V. Conclusion

By following the recommendations of this guidance document, the Corps can try to ensure that the Civil Works budget is not inappropriately diverted to pay for large-scale environmental restoration projects that Congress has not authorized or funded, in the guise of alleged ESA responsibilities that are not legitimately the Corps' responsibilities under the ESA. This follows the ESA's requirement to focus "on harm to individual listed species and their habitat rather than

[1] Both the Corps and the resource agencies should recognize that the costs of RPAs added after the Corps has designed an alternative may alter costs of the alternatives so much that the recommended plan may be changed; furthermore these added RPAs may not be the best option to reduce the potential adverse effects on a protected species. To reduce these cost shifting situations and to better reduce adverse effects on protected species, interagency coordination should be a critical part of the earliest steps of alternative formulation. Through early informal coordination potential adverse effects to protected resources may be avoided or minimized to the extent practicable rather than fixing the problem as an afterthought. If formal consultation is still necessary following this early informal coordination, the Corps should formally request a draft biological opinion for review and comment in order to facilitate the production of a biological opinion that accurately reflects the Corps' action, authorities, the feasibility of implementation of appropriate RPAs.

on the health of ecosystems as a whole." *San Francisco Baykeeper v. U.S. Army Corps of Engineers*, 219 F. Supp. 2d 1001, 1021 (N.D. Cal. 2002) (finding that scope of a biological opinion for a port renovation project was properly confined to "immediate vicinity" of proposed project). My points of contact for this guidance are Lance Wood (202-761-8556) and Max Wilson (202-761-8544).

EARL H. STOCKDALE
Chief Counsel