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STATE OF OREGON
Marion County Circuit Courts
AUG 15 2018
FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

KLAMATH IRRIGATION DISTRICT, *an Oregon irrigation district*

Plaintiffs,

v.

OREGON WATER RESOURCES DEPARTMENT, *an Oregon administrative agency,* **TOM BYLER,** *in his capacity as Director of the Oregon Water Resources Department,* and **DANNETTE WATSON,** *in her capacity as District 17 Watermaster for the State of Oregon*

Defendants.

Case No. 18CV18112
Judge Claudia Burton

GENERAL JUDGMENT

THIS MATTER came before the Court on August 6, 2018 for hearing upon Plaintiff's Motion for Summary Judgment and Defendant's Response to Summary Judgment and Cross-Motion to Dismiss or for Summary Judgment. Nathan R. Rietmann (OSB #053630) appeared on behalf of Plaintiff. Darsee Staley (OSB #873511) and Nicole DeFever (OSB #030929) appeared on behalf of Defendants. After reviewing the written submissions of the parties and being fully advised upon the premises, the Court made findings of fact and conclusions of law from the bench. The Court's oral findings of fact and conclusions of law are incorporated herein by reference and made part of this judgment as though fully set forth herein.

NOW THEREFORE IT IS ORDERED AND ADJUDGED AS FOLLOWS:

1. Plaintiff's Motion for Summary Judgment upon its First Claim for Relief is GRANTED. Pursuant to ORS 183.490, Defendants are ordered to take charge of Upper Klamath Lake for the purpose of dividing and distributing the water

RIETMANN LAW P.C.
Nathan R. Rietmann
1270 Chemeketa St NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

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therefrom in accordance with the respective and relative rights of the various users of water from the reservoir in accordance with ORS 540.210. Defendants shall continue the work until the necessity therefore shall cease to exist.

2. Defendants' motion to dismiss pursuant to ORCP 21A(1) is DENIED.
3. Defendants' motion to dismiss pursuant to ORCP 21A(3) is DENIED.
4. Defendants' cross-motion for summary judgment is DENIED.
5. Plaintiff is the prevailing party and may seek costs and disbursements pursuant to ORCP 68B.

8/15/18

Submitted By:
Nathan R. Rietmann, OSB #053630
1270 Chemeketa St. NE
Salem, Oregon 97301
Tel: (503) 551-2740
e-mail: nathan@rietmannlaw.com
Attorneys for Plaintiffs

RIETMANN LAW P C.
Nathan R. Rietmann
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

KLAMATH IRRIGATION DISTRICT, *an Oregon irrigation district* Plaintiffs, v. **OREGON WATER RESOURCES DEPARTMENT,** *an Oregon administrative agency,* **TOM BYLER,** *in his capacity as Director of the Oregon Water Resources Department,* and **DANNETTE WATSON,** *in her capacity as District 17 Watermaster for the State of Oregon* Defendants.	Case No. 18CV18112 Judge Claudia Burton **CERTIFICATE OF READINESS**

This proposed order or judgment is ready for judicial signature because:

1. [ ] Each party affected by this order or judgment has stipulated to the order or judgment, as shown by each party's signature on the document being submitted.

2. [X] Each party affected by this order or judgment has approved the order or judgment, as shown by signature on the document being submitted or by written confirmation of approval sent to me.

3. [ ] I have served a copy of this order or judgment on all parties entitled to service and:

    a. [ ] No objection has been served on me.
    b. [ ] I received objections that I could not resolve with the opposing party despite reasonable efforts to do so. I have

RIETMANN LAW P.C.
Nathan R. Rietmann
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

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filed a copy of the objections I received and indicated which objections remain unresolved.

c. [ ] After conferring about objections, Defendants, agreed to independently file any remaining objection.

4. [ ] Service is not required pursuant to subsection (3) of this rule or by statute, rule, or otherwise.

5. [ ] This is a proposed judgment that includes an award of punitive damages and notice has been served on the Director of the Crime Victims' Assistance Section as required by subsection (4) of this rule.

6. [ ] Other: _____.

DATED: August 13, 2018

RIETMANN LAW P.C.
Attorneys for Plaintiffs

/s/ Nathan R. Rietmann
Nathan R. Rietmann, OSB #053630
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

RIETMANN LAW P.C.
Nathan R. Rietmann
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

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CERTIFICATE OF SERVICE

I certify that on August 13, 2018, I served the foregoing GENERAL JUDGEMENT (Proposed) upon the parties indicated below, by U.S. Mail, addressed to the following:

Darsee Staley
Oregon Department of Justice
DOJ Trial Division
100 SW Market St
Portland OR 97201

RIETMANN LAW, PC

s/ Nathan R. Rietmann

Nathan R. Rietmann, OSB #053630
Attorney at Law
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

RIETMANN LAW P.C.
Nathan R. Rietmann
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

942 F.3d 1312
United States Court of Appeals, Federal Circuit.

Lonny E. BALEY, et al., John Anderson Farms, Inc., et al., Plaintiffs-Appellants

v.

UNITED STATES, Pacific Coast Federation of Fishermen's Associations, Defendants-Appellees

2018-1323, 2018-1325
|
Decided: November 14, 2019

Synopsis

Background: Farmers filed class actions against United States, claiming that Bureau of Reclamation effected Fifth Amendment taking and violated their water rights, under Klamath River Basin Compact between California and Oregon, by temporarily terminating water deliveries to farmers for irrigation in order to preserve habitat of three species of fish protected under Endangered Species Act (ESA) and to comply with government's tribal trust obligations to several Indian tribes. Following consolidation of actions and class certification, the Court of Federal Claims, Marian Blank Horn, Senior Judge, 134 Fed.Cl. 619, entered summary judgment for government. Farmers appealed.

Holdings: The Court of Appeals, Schall, Circuit Judge, held that:

[1] tribes' reserved water rights were senior to class of farmers' rights to irrigation water, and Bureau of Reclamation's temporary termination of water deliveries to farmers did not effect Fifth Amendment taking or impair farmers' water rights under interstate compact, and

[2] final State adjudication and quantification was not required under Oregon law before Reclamation temporarily terminated water deliveries to farmers.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (13)

[1] **Water Law** Nature and Elements of Appropriation
Water Law First in time, first in right
Water Law Nature and Extent of Rights Acquired

Under California's and Oregon's prior appropriation doctrine, diversion and application of water to a beneficial use constitutes an appropriation, and entitles the appropriator to a continuing right to use the water, to the extent of the appropriation, but not beyond that reasonably required and actually used; the appropriator first in time is prior in right over others upon the same stream.

4 Cases that cite this headnote
More cases on this issue

[2] **Water Law** First in time, first in right

Under California's and Oregon's "prior appropriation doctrine," rights to water for irrigation are perfected and enforced in order of seniority, starting with the first person to divert water from a natural stream and apply it to a beneficial use, or to begin such a project, if diligently completed.

4 Cases that cite this headnote
More cases on this issue

[3] **Water Law** Priorities
Water Law Quantity of Water

Under California's and Oregon's prior appropriation doctrine, once a water right is perfected, it is senior to any later appropriators' rights and may be fulfilled entirely before those junior appropriators get any water at all.

5 Cases that cite this headnote
More cases on this issue

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[4] **Federal Courts** Questions of Law in General

Federal Courts "Clearly erroneous" standard of review in general

The Court of Appeals reviews a judgment of the Court of Federal Claims following a trial to determine if it is incorrect as a matter of law, or premised on clearly erroneous factual determinations.

[5] **Federal Courts** Questions of Law in General

Federal Courts "Clearly erroneous" standard of review in general

The Court of Appeals reviews the Court of Federal Claims' legal conclusions after entering judgment following a trial de novo, and its factual findings for clear error.

[6] **Federal Courts** Definite and firm conviction of mistake

A trial court's factual findings may be held clearly erroneous by an appellate court when it is left with a definite and firm conviction a mistake has been committed.

[7] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

Eminent Domain Property and Rights Subject of Compensation

When evaluating whether governmental action constitutes a taking violative of Fifth Amendment, the court employs a two-part test: (1) it determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking; and (2) if such an interest exists, the court determines whether the government's action amounted to a compensable taking of that interest. U.S. Const. Amend. 5.

1 Case that cites this headnote

[8] **Indians** Amount, measure, and allowable purposes

Water Law Waters reserved for purposes of Indian reservations in general

The creation of a tribal reservation carries an implied right to unappropriated water, to the extent needed to accomplish the purpose of the reservation.

[9] **Eminent Domain** Water rights

Indians Amount, measure, and allowable purposes

Water Law Priorities and notice

Court of Federal Claims did not err by determining, under California's and Oregon's doctrine of prior appropriation, Indian tribes held rights to amount of water that was at least equal to what was needed to satisfy Bureau of Reclamation's obligations under Endangered Species Act (ESA), such that tribes' reserved water rights were senior to class of farmers' rights to irrigation water, and Bureau's temporary termination of water deliveries to farmers in order to preserve habitat of three fish species protected under ESA and to comply with government's tribal trust obligations did not effect Fifth Amendment taking or impair farmers' water rights under interstate compact; tribes' entitlement to "reasonable livelihood" or "moderate living" did not constitute lower standard than that required to avoid jeopardizing existence of fish species, and tribes did not abandon rights to fish species because due to fact they were endangered. U.S. Const. Amend. 5; Endangered Species Act of 1973 § 7, 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. § 402.02.

7 Cases that cite this headnote
More cases on this issue

[10] **Eminent Domain** Water rights

Indians Amount, measure, and allowable purposes

Water Law Waters reserved for purposes of Indian reservations in general

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Court of Federal Claims did not err by determining, under California's and Oregon's doctrine of prior appropriation, Indian tribes held implied water rights to Upper Klamath Lake when deciding that tribes' reserved water rights were senior to class of farmers' rights to irrigation water, and Bureau of Reclamation's temporary termination of water deliveries to farmers in order to preserve habitat of three fish species protected under Endangered Species Act (ESA) and to comply with government's tribal trust obligations did not effect Fifth Amendment taking or impair farmers' water rights under interstate compact; tribes had implied right to water to extent necessary to hunt, fish and gather on former reservation, Lake was boundary of reservation as it was created, and maintaining minimum levels in Lake was necessary to avoid jeopardy and adverse modification of proposed critical habitat for fish. U.S. Const. Amend. 5; Endangered Species Act of 1973 § 7, 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. § 402.02.

6 Cases that cite this headnote
More cases on this issue

[11] **Indians** Amount, measure, and allowable purposes

Water Law Effect of state law in general

Final State adjudication and quantification was not required under Oregon law before Bureau of Reclamation temporarily terminated water deliveries to farmers in order to preserve habitat of three fish species protected under Endangered Species Act (ESA) and to comply with government's tribal trust obligations to Indian tribes who held reserved senior rights to water over farmers' rights to irrigation water; tribal water rights arising from federal reservations were federal water rights not governed by State law. Or. Rev. Stat. § 540.045(4).

9 Cases that cite this headnote
More cases on this issue

[12] **Water Law** Effect of state law in general

As the volume and scope of particular reserved water rights are federal questions, there is no need for a state adjudication to occur before federal reserved rights are recognized.

2 Cases that cite this headnote

[13] **Water Law** Jurisdiction and venue

States have the ability to adjudicate rights in a water or river system within their jurisdiction, but they cannot adjudicate water rights in another state.

2 Cases that cite this headnote

***1314** Appeals from the United States Court of Federal Claims in Nos. 1:01-cv-00591-MBH, 1:07-cv-00194-MBH, 1:07-cv-19401-MBH, 1:07-cv-19402-MBH, 1:07-cv-19403-MBH, 1:07-cv-19404-MBH, 1:07-cv-19405-MBH, 1:07-cv-19406-MBH, 1:07-cv-19407-MBH, 1:07-cv-19408-MBH, 1:07-cv-19409-MBH, 1:07-cv-19410-MBH, 1:07-cv-19411-MBH, 1:07-cv-19412-MBH, 1:07-cv-19413-MBH, 1:07-cv-19414-MBH, 1:07-cv-19415-MBH, 1:07-cv-19416-MBH, 1:07-cv-19417-MBH, 1:07-cv-19418-MBH, 1:07-cv-19419-MBH, 1:07-cv-19420-MBH, Senior Judge Marian Blank Horn.

Attorneys and Law Firms

Roger J. Marzulla, Marzulla Law, LLC, Washington, DC, argued for plaintiffs-appellants Lonny E. Baley, Mark R. Trotman, Baley Trotman Farms, James L. Moore, Cheryl L. Moore, Daniel G. Chin, Deloris D. Chin, Wong Potatoes, Inc., Michael J. Byrne, Byrne Brothers, John Anderson Farms, Inc., Buckingham Family Trust, Eileen Buckingham, Keith Buckingham, Shelly Buckingham, Constance Frank, John Frank, Hill Land and Cattle Co., Inc., Jeff Hunter, Sandra Hunter, McVay Farms, Inc., Barbara McVay, Matthew K. McVay, Michael McVay, Ronald McVay, Suzan McVay, Tatiana V. McVay, Henry O'Keeffe, Patricia O'Keeffe, Shasta View Produce, Inc., Edwin Stastny, Jr., All Plaintiffs. Also represented by Nancie Gail Marzulla. Plaintiffs-appellants John Anderson Farms, Inc., Buckingham Family Trust, Eileen Buckingham, Keith Buckingham, Shelly Buckingham, Constance Frank, John Frank, Hill Land and Cattle Co., Inc., Jeff Hunter, Sandra Hunter, McVay Farms, Inc., Barbara McVay, Matthew K. McVay, Michael McVay, Ronald McVay,

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Suzan McVay, Tatiana V. McVay, Henry O'Keeffe, Patricia O'Keeffe, Shasta View Produce, Inc., Edwin Stastny, Jr. also represented by Alan Irving Saltman, Smith, Currie & Hancock LLP, Washington, DC.

John Luther Smeltzer, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by Elizabeth Ann Peterson, Eric Grant, Jeffrey H. Wood.

Todd D. True, Earthjustice, Seattle, WA, argued for defendant-appellee Pacific Coast Federation of Fishermen's Associations. Also represented by Stephanie Kathleen Tsosie.

Charles T. DuMars, Law & Resource Planning Associates, PC, Albuquerque, NM, argued for amicus curiae The Middle Rio Grande Conservancy District. Also represented by Tanya L. Scott; Lorna M. Wiggins, Wiggins, Williams & Wiggins, PC, Albuquerque, NM.

Craig A. Parton, Price, Postel & Parma LLP, Santa Barbara, CA, for amici curiae City of Fresno, Arvin-Edison Water Storage District, Chowchilla Water District, Delano-Earlimart Irrigation District, Exeter Irrigation District, Ivanhoe Irrigation District, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, Lower Tule River Irrigation District, Orange Cove Irrigation District, Porterville Irrigation District, Saucelito Irrigation District, Shafter-Wasco Irrigation District, Southern San Joaquin Municipal Utility District, Stone Corral Irrigation District, Terra Bella Irrigation District, Tulare Irrigation District, Kern Tulare Water District, Kaweah Delta Water Conservation District, Tea Pot Dome Water District, Fresno Irrigation District, Friant Water Authority.

Daniel Lucas, Office of the Attorney General, California Department of Justice, Los Angeles, CA, for amicus curiae California State Water Resources Control Board. Also represented by Xavier Becerra, Robert W. Byrne, Eric M. Katz, Melinda Pilling, San Francisco, CA; JOSHUA A. KLEIN, Oakland, CA.

James Huffman, Portland, OR, for amici curiae Family Farm Alliance, National Water Resources Association.

David E. Filippi, Stoel Rives LLP, Portland, OR, for amicus curiae Oregon Water Resources Congress. Also represented by Kirk Benny Maag; Steven L. Shropshire, Jordan Ramis PC, Bend, OR.

Douglas W. MacDougal, Marten Law PLLC, Portland, OR, for amici curiae Oregon Farm Bureau Federation, California Farm Bureau Federation, Idaho Farm Bureau Federation, New Mexico Farm and Livestock Bureau, Colorado Farm Bureau, Nevada Farm Bureau, Utah Farm Bureau Federation, Wyoming Farm Bureau Federation. Also represented by Sarah Elizabeth Peterson, Coblentz Patch Duffy & Bass LLP, San Francisco, CA.

David R.E. Aladjem, Downey Brand LLP, Sacramento, CA, for amicus curiae Association of California Water Agencies. Also represented by Samuel Bivins, Avalon J. Fitzgerald, Meredith E. Nikkel.

Denise Fjordbeck, Oregon Department of Justice, Salem, OR, for amicus curiae State of Oregon. Also represented by Benjamin N. Gutman, Ellen F. Rosenblum.

Robert T. Anderson, University of Washington School of Law, for amici curiae Robert T. Anderson, Reed D. Benson, Michael C. Blumm, Barbara Cosens, Sarah Krakoff, John D. Leshy, Monte Mills, Joseph William Singer, A. Dan Tarlock, Charles F. Wilkinson, Jeanette Wolfley. Amici curiae Michael C. Blumm, John D. Leshy, also represented by David R. Owen, Hastings College of Law, University of California, San Francisco, CA,

David R. Owen, Hastings College of Law, University of California, San Francisco, CA, for amici curiae Robert Abrams, Craig Anthony Arnold, Karrigan Bork, Lee P. Breckenridge, Michelle Bryan, Robin K. Craig, Daniel A. Farber, Richard M. Frank, Eric Freyfogle, Robert L. Glicksman, Sean B. Hecht, Oliver A. Houck, Blake Hudson, Christine A. Klein, Rhett Larson, Timothy M. Mulvaney, David R. Owen, Patrick Parenteau, Justin Pidot, Antonio Rossmann, J.B. Ruhl, Erin Ryan, Mark Squillace, David Takacs, Gerald Torres, Sandra Zellmer, Michael Pappas.

Susan Y. Noe, Native American Rights Fund, Boulder, CO, for amicus curiae Klamath Tribes.

Thomas Paul Schlosser, Morisset Schlosser Jozwiak & Somerville, Seattle, WA, for amicus curiae Hoopa Valley Tribe. Also represented by Thane D. Somerville.

John Echeverria, Vermont Law School, South Royalton, VT, for amicus curiae Natural Resources Defense Council.

Amy Christine Cordalis, Yurok Tribe, Klamath, CA, for amicus curiae Yurok Tribe.

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Before Newman, Schall, and Chen, Circuit Judges.

Schall, Circuit Judge.

***1316** Introduction and Decision

This case arises out of the Klamath River Basin reclamation project ("the Klamath Project" or "the Project"). The Project straddles the southern Oregon and northern California borders. Key features of the Project are Upper Klamath Lake in Oregon, where water is stored for the Project, and the Klamath River. The Klamath River rises at the south end of Upper Klamath Lake and flows from Oregon into California. The river eventually enters the Pacific Ocean near Klamath, California. The Project supplies water to hundreds of farms, comprising approximately 200,000 acres of agricultural land. The Project is managed and operated by the United States Department of the Interior's Bureau of Reclamation ("the Bureau of Reclamation" or "the Bureau"). The Bureau of Reclamation also manages the Klamath Project to protect the tribal trust resources of several Native American Tribes.

In 2001, the Bureau temporarily halted water deliveries to farmers and irrigation districts served by the Project. It took this action in order to meet the requirements of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (2000) ("the ESA"), as outlined in Biological Opinions from the United States Fish and Wildlife Service ("the FWS") and the United States National Marine Fisheries Service ("the NMFS"). It also took this action in order to meet its tribal trust obligations.

In October of 2001, fourteen irrigation organizations and thirteen individual farmers filed suit in the United States Court of Federal Claims in *Klamath Irrigation District v. United States*, No. 1:01-cv-00591. In their second amended complaint, filed on January 31, 2005, the plaintiffs alleged that the Bureau of Reclamation's action in temporarily halting their water deliveries in 2001 constituted a taking of their water rights without just compensation, in violation of the Fifth Amendment to the United States Constitution. They also alleged that the Bureau's action impaired their water rights under the Klamath River Basin Compact ("the Klamath Compact" or "the Compact").[1] The plaintiffs ***1317** further alleged that the Bureau's action breached certain water delivery contracts they had with the Bureau. The Court of Federal Claims exercised jurisdiction pursuant to 28 U.S.C. § 1491(a)(1).[2]

On August 31, 2005, the Court of Federal Claims granted the government summary judgment on the plaintiffs' taking and Klamath Compact claims. *See generally Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005). Thereafter, on March 16, 2007, the court also granted the government summary judgment on the plaintiffs' breach of contract claims. *See generally Klamath Irrigation Dist. v. United States*, 75 Fed. Cl. 677 (2007).[3] Based upon these two summary judgment decisions, the court entered judgment dismissing the plaintiffs' taking claims, their claims arising under the Compact, and their breach of contract claims. The plaintiffs appealed to this court.

On July 16, 2008, we issued an order in which we certified three questions to the Oregon Supreme Court. The questions related to the plaintiffs' water rights under Oregon law. *See Klamath Irrigation Dist. v. United States*, 532 F.3d 1376 (Fed. Cir. 2008) ("*Certification Order*"). We issued the *Certification Order* pursuant to a procedure whereby unsettled questions of state law may be certified to the Oregon Supreme Court. *Id.* at 1377; *see* Or. Rev. Stat. §§ 28.200–28.255 (2007). Pending action by the Oregon Supreme Court, we withheld decision on all of the plaintiffs' claims. The Oregon Supreme Court accepted the case for certification, *Klamath Irrigation Dist. v. United States*, 345 Or. 638, 202 P.3d 159, 165 (2009), and on March 11, 2010, the court rendered its decision answering our certified questions. *See Klamath Irrigation Dist. v. United States*, 348 Or. 15, 227 P.3d 1145 (2010) (en banc) ("*Certification Decision*"). Following receipt of the *Certification Decision*, we vacated the judgment of the Court of Federal Claims and remanded the case to the court for further proceedings. *See Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 522 (Fed. Cir. 2011) ("*Remand Decision*").

Following our decision and remand, the Court of Federal Claims entered several ***1318** orders relevant to the *Klamath Irrigation District* case. It also entered several orders relevant to a related case filed by individual water user plaintiffs, *John Anderson Farms, et al. v. United States*, No. 1:07-cv-00194. First, in an order dated November 22, 2013, the court dismissed the breach of contract claims of three of the *Klamath Irrigation District* plaintiffs for lack of jurisdiction. *Klamath Irrigation Dist. v. United States*, 113 Fed. Cl. 688, 718 (2013). Thereafter, on June 3, 2014, the court granted the remaining *Klamath Irrigation District* plaintiffs' motion

to voluntarily dismiss all their pending breach of contract claims. No. 1:01-cv-00591, ECF No. 343. Similarly, on March 13, 2014, the court granted a motion by the plaintiffs in *John Anderson Farms* to voluntarily dismiss their breach of contract claims. No. 1:07-cv-00194, ECF No. 65. Next, on January 12, 2016, the court issued an order consolidating the *Klamath Irrigation District* and *John Anderson Farms* cases. Subsequently, the parties filed cross-motions *in limine* on the question of whether the plaintiffs' taking claims should be analyzed as potential physical or regulatory takings. The plaintiffs urged a physical takings approach. On December 21, 2016, the court issued an opinion ruling in favor of the plaintiffs. *Klamath Irrigation Dist. v. United States*, 129 Fed. Cl. 722 (2016). In its opinion, the court held that "the government's actions in the present cases 'should be analyzed under the physical takings rubric.' " *Id.* at 737 (quoting *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008)). The court's rulings left for trial the plaintiffs' claims that the Bureau of Reclamation's action in 2001 constituted a taking and/or a violation of the Klamath Compact.

Finally, at a pretrial conference on January 10, 2017, the court granted a motion for class certification. The certified class included, as opt-in plaintiffs, all persons who owned or leased land within, or who received water from, the fourteen plaintiff irrigation organizations and who claimed an appurtenant right to Project water[4] and alleged a Fifth Amendment taking and an impairment of their rights under the Compact.

The Court of Federal Claims held a ten-day trial commencing on January 30, 2017. Following the trial and post-trial briefing, all the irrigation organization plaintiffs moved to voluntarily dismiss their claims. The court granted the motion, which left as plaintiffs the surviving individual farmers and the class action opt-in plaintiffs. This resulted in the recaptioning of the consolidated case to *Lonny Baley, et al. v. United States*. Thereafter, on September 29, 2017, the court issued its final decision in the case. *Baley v. United States*, 134 Fed. Cl. 619 (2017) ("*Baley*"). In its decision, before addressing the plaintiffs' taking and Compact claims, the court made several rulings. Three of those rulings disposed of the claims of various plaintiffs. First, the court dismissed the claims of any plaintiffs deriving water rights from the Van Brimmer Ditch Company. *Id.* at 645–52.[5] Second, the court barred the ***1319** claims of certain of the plaintiffs who receive water under what are called "Warren Act Contracts." *Id.* at 656–59.[6] And third, the court ruled that plaintiffs who receive their water through leases for lands in the National Wildlife Refuges that are located within the Klamath Project were barred from recovering damages from the government based upon the denial of water because of certain provisions in their leases. *Id.* at 659.

The court turned finally to the taking and Compact claims of the remaining plaintiffs. After examining the facts and what it viewed to be the pertinent law, the court held that Klamath Project operations in 2001 did not result in takings or violate the plaintiffs' rights under the Compact because the waters retained in Upper Klamath Lake and the waters in the Klamath River were within the scope of federal reserved water rights for tribal fishing that were senior in priority to the plaintiffs' water rights. *Baley*, 134 Fed. Cl. at 659–80.

Following the entry of judgment in favor of the government on October 24, 2017, the plaintiffs timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3). For the reasons set forth below, we now affirm the judgment of the Court of Federal Claims.

Background

I. The Klamath Project

The Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (codified, as amended, at 43 U.S.C. § 371 *et seq.*) ("the Reclamation Act" or "the Act") "laid the groundwork for a vast and ambitious federal program to irrigate the arid lands of the western states." *Grant Cty. Black Sands Irrigation Dist. v. U.S. Bureau of Reclamation*, 579 F.3d 1345, 1351 (Fed. Cir. 2009).[7] Section 8 of the Reclamation ***1320** Act requires the Secretary of the Interior to comply with state law regarding the appropriation of water for irrigation, to the extent such law is not inconsistent with federal law. *Baley*, 134 Fed. Cl. at 626 (citing 43 U.S.C. § 383).

[1] **[2]** **[3]** Relevant to this case, both Oregon and California follow the doctrine of prior appropriation of water rights. *See Baley*, 134 Fed. Cl. at 669 (citing *Irwin v. Phillips*, 5 Cal. 140, 143 (1855) (California); *Teel Irrigation Dist. v. Water Res. Dep't of Or.*, 323 Or. 663, 919 P.2d 1172, 1174 (1996) (Oregon)). Under the prior appropriation doctrine, "diversion and application of water to a beneficial use constitute an appropriation, and entitle the appropriator to a continuing right to use the water, to the extent of the appropriation, but not beyond that reasonably required and

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actually used. The appropriator first in time is prior in right over others upon the same stream." *Arizona v. California,* 298 U.S. 558, 565–66, 56 S.Ct. 848, 80 L.Ed. 1331 (1936). "[T]he doctrine provides that rights to water for irrigation are perfected and enforced in order of seniority, starting with the first person to divert water from a natural stream and apply it to a beneficial use (or to begin such a project, if diligently completed)." *Montana v. Wyoming*, 563 U.S. 368, 375–76, 131 S.Ct. 1765, 179 L.Ed.2d 799 (2011) (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 98, 58 S.Ct. 803, 82 L.Ed. 1202 (1938); *Arizona v. California*, 298 U.S. at 565–66, 56 S.Ct. 848; Wyo. Const., Art. 8, § 3). "Once such a water right is perfected, it is senior to any later appropriators' rights and may be fulfilled entirely before those junior appropriators get any water at all." *Id.* at 376, 131 S.Ct. 1765.

Subsequent to the passage of the Reclamation Act, on February 22, 1905, the Oregon legislature enacted a statute ("1905 Oregon Act") codifying a procedure to assist the United States in appropriating water for the irrigation works contemplated by the Act. *Remand Decision*, 635 F.3d at 508 (citing Or. Gen. Laws, 1905, ch. 228, § 2 (repealed 1953) and Or. Gen. Laws, 1905, ch. 5, §§ 1–2); *Baley*, 134 Fed. Cl. at 626. Under that procedure, once an officer of the United States filed in the office of the State Engineer a written notice that the United States intended to use certain previously unappropriated waters, the waters were "deemed to have been appropriated by the United States," provided certain deadlines for the filing of plans and construction were met. *Baley*, 134 Fed. Cl. at 626 (quoting Or. Gen. Laws, 1905, ch. 228, § 2). In authorizing the United States to appropriate water for the construction of the Klamath Project irrigation works, "the Oregon legislature authorized the United States to appropriate state water rights pursuant to the 1905 [Oregon A]ct for the benefit of those persons who the Reclamation Act contemplated would put water to beneficial use." *Certification Decision*, 227 P.3d at 1159; *see also Remand Decision*, 635 F.3d at 518 n.8.

On May 17, 1905, the United States Reclamation Service, the predecessor to the Bureau of Reclamation, filed a notice with the Oregon State Engineer. The notice set forth plans for proposed works and proof of authorization for the Klamath Project, as required by the 1905 Oregon Act. *Baley*, 134 Fed. Cl. at 626. The notice stated that "the United States intends to utilize ... [a]ll of the waters of the Klamath Basin in Oregon, constituting the entire drainage basins of the Klamath River and Lost River, and all of the lakes, streams and rivers supplying water thereto ***1321** or receiving water therefrom" for purposes of "the operation of works for the utilization of water ... under the provisions of the ... Reclamation Act." *Id.*[8]

Under the Klamath Project, water is stored in Upper Klamath Lake by means of the Link River Dam. Water is diverted from Upper Klamath Lake and locations downstream from the lake on the Klamath River and conveyed through canals and laterals to individual users in Oregon and California. *Id.* As part of this process, water is stored and its flow is controlled using a series of dams downstream from the Link River Dam, which is at the south end of Upper Klamath Lake. The last of these dams on the Klamath River is the Iron Gate Dam in California. The works that divert water were constructed by the United States between 1906 and 1966 and are currently owned by the United States. *Id.*[9] A map of the Klamath River Basin in Oregon and California is provided in the Appendix.

Individual plaintiff landowners (or their lessees) have applied water diverted from the Klamath River to irrigate crops. *Baley*, 134 Fed. Cl. at 626. In this manner, they have put Klamath Project water to beneficial use. As a result, the water became appurtenant to their land. *See Certification Decision*, 227 P.3d at 1163, 1169; *Remand Decision*, 635 F.3d at 518. The United States "holds the water right that it appropriated pursuant to the 1905 Oregon [A]ct for the use and benefit of the landowners." *Certification Decision*, 227 P.3d at 1163–64; *see Remand Decision*, 635 F.3d at 518.

In 1975, Oregon began a general adjudication for the purpose of determining surface water rights in the Klamath River Drainage Basin ("the Klamath Adjudication" or "the Adjudication").[10] *Baley*, 134 Fed. Cl. at 635. The Adjudication was undertaken pursuant to the Oregon Water Rights Act of 1909, Or. Rev. Stat. §§ 539.005–539.240. *See id.* The Adjudication covers pre-1909 state-based water rights not previously adjudicated, as well as federal reserved water rights. *Id.* Claims were filed beginning in 1990. Administrative hearings were initiated in 2001, and on February 28, 2014, the adjudicator issued amended and corrected versions of previous orders of determination. Those orders are now before Oregon state courts for judicial confirmation. *Id.*; *see* Klamath Basin General Stream Adjudication, Corrected Partial Order of Determination (Feb. 28, 2014), https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_07017. PDF.

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II. Tribal Fishing Rights

The Klamath Tribes, the Yurok Tribe, and the Hoopa Valley Tribe of Native ***1322** Americans (collectively, the "Tribes") each hold rights to take fish from water sources on their reservations. These rights were set aside for them when their reservations were created, as discussed in further detail below. The Tribes' rights are non-consumptive, meaning that the Tribes are "not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses." *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983). Instead, they hold "the right to prevent other appropriators from depleting the streams[']waters below a protected level in any area where the non-consumptive right applies." *Id.*

The Klamath Tribes, which include the Klamath and Moadoc Tribes and the Yahooskin Band of Snake Indians, constitute a federally-recognized tribe which has hunted, fished, and foraged in the Klamath Basin for over a thousand years. *Id.* at 1397; *see Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 755, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985). The basis for the Klamath Tribes' fishing rights is an 1864 treaty with the United States, in which the Klamath Tribes "relinquished [their] aboriginal claim to some 12 million acres of land in return for a reservation of approximately 800,000 acres" of land that abutted Upper Klamath Lake and included several of its tributaries. *Adair*, 723 F.2d at 1397–98. In addition to other rights, the 1864 Treaty guaranteed the Klamath Tribes "the exclusive right of taking fish in the streams and lakes, included in said reservation." Treaty Between the United States of Am. & the Klamath & Moadoc Tribes & Yahooskin Band of Snake Indians, Art. I, Oct. 14, 1864, 16 Stat. 707 ("the Klamath Treaty" or "the 1864 Treaty"). In *Adair*, the Ninth Circuit determined that "one of the 'very purposes' of establishing the Klamath [r]eservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle." 723 F.2d at 1408–09.[11] The Klamath Tribes' water rights "necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights." *Adair*, 723 F.2d at 1414 (collecting cases).

Until 1887, the Klamath Tribes lived on their reservation under the terms of the 1864 Treaty, holding the reservation land in communal ownership. *Adair*, 723 F.2d at 1398. In 1887, Congress passed the General Allotment Act, 24 Stat. 388. Under the General Allotment Act, approximately 25% of the reservation passed from tribal to individual Indian ownership. *Id.* In 1954, Congress passed the Klamath Termination Act, 68 Stat. 718 (codified at 25 U.S.C. §§ 564–564w (1976)) ("the Termination Act"), largely terminating the reservation. *Id.* at 1398, 1411–12. This led a large majority of tribal members to give up their interests in tribal property for cash. *Id.* at 1398. However, § 564m(a) of the Termination Act provides that "[n]othing in sections 564–564w of this title shall abrogate any water rights of the tribe and its members," *id.* at 1412, and § 564m(b) specifies that the Termination Act's provisions will not "abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty," *Oregon Department of Fish & Wildlife*, 473 U.S. at 761–62, 105 S.Ct. 3420. Courts have subsequently held that the Klamath Tribes' hunting, fishing and implied reserved water rights survived passage of ***1323** the Termination Act. *See, e.g.*, *Adair*, 723 F.2d at 1412; *Mattz v. Superior Court*, 46 Cal.3d 355, 250 Cal.Rptr. 278, 758 P.2d 606, 610 (1988); *Kimball v. Callahan*, 590 F.2d 768, 774–75 (9th Cir. 1979); *Kimball v. Callahan*, 493 F.2d 564, 568–69 (9th Cir. 1974).

The United States purchased parts of the former Klamath reservation in 1958 and 1961, in order to establish a migratory bird refuge and in order to provide for part of the Winema National Forest. *Adair*, 723 F.2d at 1398. Thereafter, in 1973, the government condemned most of the remaining tribal land, which essentially extinguished the original reservation. *Id.* The Klamath Tribes were later restored as a federally-recognized tribe under the Klamath Indian Tribe Restoration Act of 1986. Pub. L. No. 99-398, 100 Stat. 849.

The rights of the Yurok and Hoopa Valley Tribes, both located in California, were secured by three presidential Executive Orders, issued in 1855, 1876, and 1891. The rights were confirmed by the 1988 Hoopa-Yurok Settlement Act, 25 U.S.C. § 1300i *et seq*. *See Baley*, 134 Fed. Cl. at 633–34 & n.4. Like the Klamath Tribes, the Yurok and Hoopa Valley Tribes are federally-recognized tribes. Indian Entities Recognized and Eligible To Receive Services From the Bureau of Indian Affairs, 77 Fed. Reg. 47,868, 47,869, 47,870, 47,872. The Hoopa Valley reservation is a nearly twelve-mile square on the Trinity River at its confluence with the Klamath River. *See Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1370 (Fed. Cir. 2000). The Yurok reservation runs along the Klamath River, one mile on each side, from the Hoopa Valley reservation downstream to the Pacific Ocean. *See id.*; *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995). Federal and California state courts have recognized that the right of the Yurok and Hoopa Valley Tribes to take fish

from the Klamath River for ceremonial, subsistence, and commercial purposes was reserved when the Hoopa Valley reservation was created. *See* *Baley*, 134 Fed. Cl. at 634, 671; *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986); *People v. McCovey*, 36 Cal.3d 517, 205 Cal.Rptr. 643, 685 P.2d 687, 697 (1984). A January 9, 1997 Memorandum by the Department of the Interior's Regional Solicitors for the Pacific Southwest and Pacific Northwest Regions recognized that the Yurok and Hoopa Valley Tribes "hold adjudicated water rights which vested at the latest in 1891 and perhaps as early as 1855." *Baley*, 134 Fed. Cl. at 634.

III. Events of 2001

As noted, the Klamath Project is subject to the requirements of the ESA. In addition, as we noted in the *Remand Decision*, the Ninth Circuit has declared the rights of Klamath Project water users to be subservient to the requirements of the ESA. *Remand Decision*, 635 F.3d at 508 (citing *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 2000)). "Pursuant to the ESA, the Bureau has an obligation not to engage in any action that is likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such a species." *Id.* at 509 (citing 16 U.S.C. § 1536(a)(1)). "As a result, the Bureau is required to perform biological assessments to determine the impact of the diversion of Klamath Project water for irrigation purposes upon endangered and threatened species and to adjust water delivery to minimize the impact upon the habitat of such species." *Id.* (citing 16 U.S.C. § 1536(a)(2), (c)(1)).

As the Bureau of Reclamation developed its operating plan for the 2001 water year, forecasts from the Natural Resources Conservation ***1324** Service indicated that it would be a "critical dry" year due to drought conditions. *Baley*, 134 Fed. Cl. at 637; *Kandra v. United States*, 145 F. Supp. 2d 1192, 1198 (D. Or. 2001) ("As of April 6, 2001, [the Bureau] determined that inflow volume into [Upper Klamath Lake] would be 108,000 acre feet during the period of April through September, the smallest amount of inflow on record."). In response, the Bureau performed biological assessments of the Klamath Project's operations on three species of fish that inhabit associated waters: the endangered shortnose sucker; the endangered Lost River sucker;[12] and the threatened Southern Oregon Northern California Coast ("SONCC") coho salmon.[13] *Baley*, 134 Fed. Cl. at 637 (citing *Klamath Irrigation Dist.*, 67 Fed. Cl. at 513).

On January 22, 2001, the Bureau of Reclamation forwarded its biological assessment regarding the SONCC coho salmon to the NMFS, which has jurisdiction over marine and anadromous species. *See id.* On February 13, 2001, the Bureau also forwarded its biological assessment regarding the shortnose and Lost River suckers to the FWS, which has jurisdiction over terrestrial and freshwater species. *See id.* The Bureau requested a formal consultation with both the NMFS and FWS pursuant to § 7(a)(2) of the ESA. Also, it notified the irrigation districts they should not divert or use Project water until the consultations were complete. *Id.* at 637–38.[14] On April 5, 2001, the FWS issued a final Biological Opinion ("FWS Biological Opinion"), concluding that the Bureau's proposed 2001 operating plan was "likely to jeopardize the continued existence of the [Lost River and shortnose] suckers and adversely modify their proposed critical habitat." *See id.* at 638 (quoting FWS Biological Opinion, J.A. 2673). The next day, the NMFS issued its final Biological Opinion ("NMFS Biological Opinion"), concluding similarly that the ***1325** Project's 2001 operating plan was "likely to jeopardize the continued existence of SONCC coho salmon" and "to adversely modify critical habitat for the SONCC coho salmon." *Id.* (quoting NMFS Biological Opinion, J.A. 2995).

As required by the ESA, 16 U.S.C. § 1536(b)(3)(A), the FWS and NMFS Biological Opinions each included "reasonable and prudent alternatives" to address the threat to the fish. The FWS Biological Opinion proposed, among other actions, that the Bureau "not divert water from UKL [Upper Klamath Lake] for irrigation purposes if surface elevations are anticipated to go below [certain minimum levels], regardless of inflow year type." *Baley*, 134 Fed. Cl. at 638 (alterations in original); J.A. 2919. The NMFS Biological Opinion's reasonable and prudent alternative was to operate the Project in a manner that provided certain levels of minimum water releases from the Iron Gate Dam into the Klamath River between April and September of 2001. *Baley*, 134 Fed. Cl. at 638; J.A. 2998–99.

On April 6, 2001, the Bureau issued a Revised 2001 Operations Plan for the Klamath Project ("the Plan"). The Plan incorporated the reasonable and prudent alternatives set forth in the Biological Opinions. The Plan stated that, "[d]ue to the requirements of the biological opinions and the ESA [Endangered Species Act] and the current drought conditions, only limited deliveries of Project water will be made for

irrigation." *Baley*, 134 Fed. Cl. at 639 (second alteration in original); J.A. 3177. The Plan also stated:

> The United States has a trust responsibility to protect rights reserved by or for federally recognized Indian tribes by treaties, statutes and executive orders. Reclamation must operate the Project consistent with its trust obligations to the tribes in the Klamath River Basin ....
>
> ...
>
> Trust Responsibility of the United States to Federally Recognized Tribes Within the Klamath River Basin The trust responsibility to the Klamath Basin Tribes is shared by all federal agencies that undertake activities in the Klamath Basin. Fishery and other resources in the Klamath River, Upper Klamath Lake ..., and nearby lakes and streams are important tribal trust resources to the Klamath Basin tribes. Reclamation's Plan provides flow regimes and lake levels for protection of tribal trust resources within the limitations of the available water supply.
>
> ...
>
> Prior to listing of endangered and threatened species and the increased scientific understanding of the needs of ESA-listed species and tribal trust resources, the Project was operated to optimize irrigation diversions ....
>
> ...
>
> ... Under the current hydrology, the [Upper Klamath Lake] levels and river flows under this Plan are consistent with requirements of the ESA and Reclamation's obligation to protect Tribal trust resources.

J.A. 3176–78. As a result, the Bureau ceased water deliveries from the Project until July 2001, when it released approximately 70,000 acre-feet of water. *Baley*, 134 Fed. Cl. at 640.[15] The plaintiffs' suits in the Court of Federal Claims followed.

***1326** IV. Prior Proceedings in the Federal Circuit

As indicated above, after the Court of Federal Claims initially entered judgment against the plaintiffs and dismissed their taking, Compact, and breach of contract claims, the plaintiffs appealed to this court. Thereafter, as noted, in the *Certification Order*, we certified three questions of law to the Supreme Court of Oregon.[16] The Oregon court answered those questions in the *Certification Decision*.[17] Following receipt of the *Certification Decision*, we vacated the prior decision of the Court of Federal Claims and remanded the case to the court with instructions:

> [W]e remand plaintiffs' takings and Compact claims for (1) determination, based on the *Certification Decision*, on a case-by-case basis, of any out-standing property interest questions; and (2) determination on the merits, on a case-by-case basis, of all surviving takings and Compact claims. On remand, the Court of Federal Claims should proceed as follows: First, it should determine, for purposes of plaintiffs' takings and Compact claims, whether plaintiffs have asserted cognizable property interests. In making that determination, the court should direct its attention to the third part of the three-part test set forth by the Oregon Supreme Court in response to our certified question 2. That is because it is not disputed that, in this case, the first two parts of the three-part test have been met. Specifically, the parties ***1327** do not dispute that plaintiffs have put Klamath Project water to beneficial use and that the United States acquired the pertinent water rights for plaintiffs' use and benefit. As far as the third part of the three-part test is concerned, the court should address whether contractual agreements between plaintiffs and the government have clarified, redefined, or altered the foregoing beneficial relationship so as to deprive plaintiffs of cognizable property interests for purposes of their takings and Compact claims.

Remand Decision, 635 F.3d at 519.

V. Decision of the Court of Federal Claims on Remand

On remand, the Court of Federal Claims held a ten-day trial. *Baley*, 134 Fed. Cl. at 645. As noted above, following various pretrial rulings, what remained at issue for trial were the plaintiffs' claims that the Bureau of Reclamation's actions in 2001 constituted a taking and/or a violation of the Klamath Compact. In its subsequent final decision, the court began by dismissing the claims of plaintiffs whose water rights are derived from the Van Brimmer Ditch Company. It did so because the court determined that a November 13, 2003 Order of the Court of Federal Claims remained in effect and continued to bar the plaintiffs from "making any claims or seeking any relief in this case based on rights, titles, or interests that are or may be subject to determination in the Adjudication." *Baley*, 134 Fed. Cl. at 650. The court determined that the Van Brimmer Ditch Company's claims

were based on the same water rights that were at issue in the Klamath Adjudication. *Id.* at 651. Accordingly, the court held that plaintiffs whose rights derived from shares in the Van Brimmer Ditch Company were barred from bringing claims to Klamath Project water based on those shares. *Id.* at 651–52.

The Court of Federal Claims next addressed the claims of plaintiffs who receive water under Warren Act Contracts. This was in response to our instruction to "address whether contractual agreements between plaintiffs and the government" had "clarified, redefined, or altered" the beneficial relationship such plaintiffs had obtained by putting to beneficial use Klamath Project water "so as to deprive plaintiffs of cognizable property interests for purposes of their takings and Compact claims." *Baley*, 134 Fed. Cl. at 652 (quoting *Remand Decision*, 635 F.3d at 519). This instruction was prompted by the third part of the Supreme Court of Oregon's answer to our second certified question noted above. The Court of Federal Claims held that plaintiffs whose Warren Act contracts include a short-age provision providing that the United States is immune from liability caused "[o]n account of drought, inaccuracy in distribution or *other cause*" had had their rights altered in such a way that they were barred from seeking compensation for a taking under the Fifth Amendment or for an impairment of their rights under the Klamath Compact. *Baley*, 134 Fed. Cl. at 657–59 (emphasis added).[18]

Turning to plaintiffs who receive water through leases for land in National Wildlife Refuges, the Court of Federal Claims held such plaintiffs were barred from recovering damages. Among other provisions, those plaintiffs' leases state that "the United States ... shall not be held liable for damages because irrigation water is not available." *Id.* at 659. Because ***1328** those plaintiffs' rights were subject to this provision and because "[t]he provision contain[ed] no language requiring that water be unavailable due to specific causes," the court concluded that the claims of plaintiffs who leased land in the National Wildlife Refuges were barred. *Id.*

The Court of Federal Claims then addressed the request of the United States and the Federation to reconsider the court's December 21, 2016 ruling that the Bureau of Reclamation's 2001 actions should be analyzed under a physical taking rubric. *Baley*, 134 Fed. Cl. at 660–66. The court rejected the United States' and the Federation's arguments, again concluding that the Bureau's diversion of water should be analyzed as a potential physical taking. *Id.* at 663–66. In addition, expanding upon its December 21, 2016 opinion, the court concluded that the diversion of water should be analyzed as a potential *permanent* physical taking. *Id.* at 668.

Finally, turning to the issue of tribal water rights, the Court of Federal Claims determined those rights to be federal reserved rights. *Id.* at 669–70 (quoting *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976) ("[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.")). The water rights stemming from tribal reservations established by treaties and executive orders are "substantively the same, at least with respect to non-federal interests," the court observed. *Id.* at 670 (quoting *Parravano*, 70 F.3d at 545). Reserved rights, the court stated, "represent an exception to the general rule that allocation of water is the province of the states," and "need not be adjudicated only in state courts." *Id.* (first quoting F. Cohen, Handbook of Federal Indian Law ("Cohen") § 19.01[1] (2012), then quoting *Cappaert*, 426 U.S. at 145, 96 S.Ct. 2062).

The Court of Federal Claims stated that the priority date of a tribe's reserved rights is "no later than the date on which a reservation was established." *Id.* (quoting Cohen § 19.01[1]). When a treaty recognizes the continued existence of a tribe's water rights, as the 1864 Treaty with the Klamath Tribes did for those tribes, the rights carry a priority date of "time immemorial," the court stated. *Id.* (quoting *Adair*, 723 F.2d at 1414). Although the Yurok and Hoopa Valley Tribes' reserved water rights had not previously been assigned a priority date, the Court of Federal Claims determined that the priority date for those rights must be at least 1891, the year of the last executive order creating the Yurok and Hoopa Valley reservations, possibly earlier. *Id.* In contrast, the court noted, the United States first posted notice that it was appropriating water for the Klamath Project in 1905, making the plaintiffs' priority date 1905 at the earliest. *Id.* Thus, the court concluded, the Tribes' reserved rights are senior to those of the plaintiffs. *Id.*

Continuing, the court stated that the Klamath Tribes' non-consumptive rights entitle them to "prevent other appropriators from depleting [Upper Klamath Lake and its tributaries'] waters below levels that would prevent them from 'support[ing] game and fish adequate to the needs of Indian hunters and fishers.' " *Id.* at 671 (quoting *Adair*, 723 F.2d at 1410–11). "The Lost River and short nose suckers

are tribal resources of the Klamath Tribes and uncontested evidence presented at trial demonstrated that the fish have played an important role in the Klamath Tribes' history," the court noted. *Id.* "Thus," the court held, "the Klamath Tribes' aboriginal right to take fish entitles ***1329** them to prevent junior appropriators from withdrawing water from Upper Klamath Lake and its tributaries in amounts that would cause the extinction of the Lost River and short nose suckers." *Id.* (citing *United States v. Anderson*, 591 F. Supp. 1, 5–6 (E.D. Wash. 1982)).

Similarly, the Court of Federal Claims determined that the SONCC coho salmon is a tribal trust resource for the Yurok and Hoopa Valley Tribes, who hold the right to take fish from the Klamath River for "ceremonial, subsistence, and commercial purposes." *Id.* (quoting *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986)). Citing *Adair*, the court held that the Yurok and Hoopa Valley Tribes, like the Klamath Tribes, hold a non-consumptive water right that entitles them, at a minimum, to prevent junior appropriators from withdrawing water from the Klamath River in amounts that would cause the endangerment and extinction of the SONCC coho salmon. *Id.* at 672.

Rejecting the plaintiffs' argument that, absent quantification of the Tribes' water rights, the government could not show that all or any portion of the water in Upper Klamath Lake belonged to the Tribes, the court pointed to the FWS and NMFS Biological Opinions, which set forth minimum elevations in Upper Klamath Lake and minimum flows into the Klamath River needed to avoid jeopardizing the continued existence of the relevant fish. *Id.* at 673–76. The court found the Biological Opinions to be reasoned and credible. *Id.* at 676. Moreover, the court "accept[ed] the conclusions of the FWS Biological Opinion, including that the elevation levels for Upper Klamath Lake ... were necessary to avoid jeopardizing the continued existence of the Lost River and shortnose suckers." *Id.* Likewise, the court "accept[ed] the conclusions of the NMFS Biological Opinion, including that the release of certain minimum flows of Klamath Project water ... were necessary to avoid jeopardizing the continued existence of the SONCC coho salmon." *Id.* Next, the court rejected the plaintiffs' argument that the Bureau's actions were intended solely to meet its obligations under the ESA and were not intended to satisfy the Bureau's tribal trust obligations. *Id.* at 677. In doing so, the court agreed with an argument set forth in the amicus brief filed by the Klamath Tribes that the Bureau's motives are not dispositive. *Id.* at 678. The court also rejected the plaintiffs' contention that because the Yurok and Hoopa Valley Tribes did not file a claim in the Klamath Adjudication, they do not hold Oregon water rights, pointing out that those tribes hold reserved rights arising out of federal, not state, law. *Id.* at 679.

Concluding, the Court of Federal Claims noted that plaintiffs had "perfected their water rights under state law" and had "relied upon those rights" and that many plaintiffs "were severely and negatively impacted by the [Bureau of Reclamation]'s actions." *Id.* at 679–80. The court nonetheless held that the Bureau's actions did not constitute a taking of the plaintiffs' water rights or a violation of the plaintiffs' rights under the Compact. *Id.* The court stated:

> [B]ecause the Tribes held water rights to Klamath Project water that were senior to those held by all remaining plaintiff class members, and because the Tribes['] water rights were at least co-extensive to the amount of water that was required by defendant to satisfy its obligations under the [ESA] concerning the Lost River and shortnose suckers and the coho salmon in 2001, plaintiffs had no entitlement to receive any water before the government had satisfied what it determined to be its obligations under the [ESA] and its Tribal Trust responsibilities.

***1330** *Id.* The court therefore entered judgment in favor of the government. This appeal followed.[19]

Discussion

I. Standard of Review and Legal Framework

[4] [5] [6] We review a judgment of the Court of Federal Claims following a trial "to determine if [it is] incorrect as a matter of law or premised on clearly erroneous factual determinations." *Stockton East Water Dist. v. United States*, 761 F.3d 1344, 1349 (Fed. Cir. 2014) (quoting *Dairyland Power Co-op v. United States*, 645 F.3d 1363, 1368–69 (Fed. Cir. 2011)). "We review the Court of Federal Claims' legal conclusions de novo and its factual findings for clear error." *Meridian Eng'g Co. v. United States*, 885 F.3d 1351, 1354–55 (Fed. Cir. 2018) (citing *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1353 (Fed. Cir. 2006), ***aff'd*** 552 U.S. 130, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008)). "A finding may be held clearly erroneous when the appellate court is left with a definite and firm conviction that a mistake has been committed." *Id.* at 1355 (quoting *Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1373 (Fed. Cir. 2005) (internal quotation marks, ellipsis, and citation omitted)).

[7] The Fifth Amendment to the United States Constitution proscribes the taking of private property "for public use, without just compensation." U.S. CONST. amend. V, cl. 4. When evaluating whether governmental action constitutes a taking, a court employs a two-part test. First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether the government's action amounted to a compensable taking of that property interest. *See Alimanestianu v. United States*, 888 F.3d 1374, 1380 (Fed. Cir. 2018); *Aviation & General Ins. Co. v. United States*, 882 F.3d 1088, 1096 (Fed. Cir. 2018).

II. Overall Contentions of the Parties

On appeal, appellants argue that the Court of Federal Claims erred in holding that their taking claims were barred by the prior reserved water rights of the Tribes.[20] Appellants also challenge the ***1331** court's determinations that appellants who receive water under National Wildlife Refuge leases and that appellants who receive water under Warren Act contracts that limit the government's liability for "other cause" are barred from seeking compensation. Appellants' Br. 43–55. In addition, appellants challenge the court's dismissal of the claims of farmers whose water rights are derived from the Van Brimmer Ditch Company. Appellants' Br. 55–59.[21]

The government and the Federation (collectively, "appellees") respond that the Court of Federal Claims did not err in ruling that superior tribal rights defeated appellants' claims. They also contend that the court did not err in its rulings with respect to claims arising from National Wildlife Refuge leases, claims arising from Warren Act contracts containing limiting language, and claims of farmers deriving their water rights from the Van Brimmer Ditch Company. United States' Br. 52–66. In addition, appellees argue that, should we determine that the Court of Federal Claims erred in its tribal rights ruling, we should vacate the court's decision and remand with the instruction that the court analyze appellants' claims as asserting regulatory, as opposed to physical, takings. Federation Br. 36–53; United States' Br. 70–77.

The parties state, and we agree, that we must affirm the judgment of the Court of Federal Claims if we conclude the court did not err in holding that, in 2001, the superior water rights of the Tribes required that the Bureau temporarily halt deliveries of water to appellants. Oral arg. 16:18–54, 17:10–18:22 (appellants); 37:28–43 (government) (requesting affirmance on two independent bases).[22] Accordingly, it is to the issue of tribal rights that we turn first.

III. Contentions of the Parties Regarding Tribal Rights

A.

According to the Court of Federal Claims, the rights of appellants to Klamath Project water constitute cognizable property interests for which they may seek compensation. And appellees do not challenge this ruling. As seen, however, the court also ruled that those property interests were inferior to the Tribes' non-consumptive water rights—another property interest. It therefore held that appellants could not establish their taking or Compact claims and entered judgment for the government and the Federation.

Preliminarily, the parties agree that the Klamath Tribes have federally-reserved non-consumptive water rights to support fishing on their former reservation. Appellants' ***1332** Br. 8; Federation's Br. 10–11; United States' Br. 21–22. The parties also agree that the Klamath Tribes' rights have priority to a date of "time immemorial." Appellants' Br. 8; Federation's Br. 10–11; United States' Br. 21–23. Similarly, the parties do not appear to dispute that the Yurok and Hoopa Valley Tribes hold federally-reserved fishing rights, impliedly created by executive order, that permit them to take anadromous fish from waters adjacent to their reservations. *See* Federation's Br. 12–13; United States' Br. 23–24.[23]

B.

Appellants make three main arguments relating to tribal rights. First, they argue that it was error for the Court of Federal Claims to hold that, in 2001, the Tribes held rights to an amount of water that was at least equal to what was needed to satisfy the Bureau of Reclamation's ESA obligations. Appellants' Br. 21. The ESA requires that the Bureau not "jeopardize the continued existence" of endangered and threatened fish. 16 U.S.C. § 1536(a)(2). Appellants contend that the Tribes' water rights only entitled them to a catch that was adequate to support a "reasonable livelihood" or

a "moderate living," as stated in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. at 685, 686, 99 S.Ct. 3055. Appellants' Br. 21–23. In other words, appellants argue that the Court of Federal Claims erred by looking to a standard that gave the Tribes more water than they were entitled to.

Continuing with this argument, appellants state that the Klamath Tribes do not fish or use the suckers "for any purpose today." *Id.* at 25. Appellants claim that, under *Adair*, the Tribes are entitled to only the amount of water that is sufficient to support their hunting and fishing rights as they currently are exercised. Oral arg. 6:58–10:55; Citation to Supplemental Authority Fed. R. App. P. 28(j) (July 9, 2019). Turning to the Yurok and Hoopa Valley Tribes, appellants state that those tribes catch sufficient fish to sustain their "reasonable livelihood" since they harvest abundant chinook salmon. Appellants' Br. 23–25. In sum, appellants urge that the "reasonable livelihood" or "moderate living" needs of the Tribes did not require that the Bureau halt water deliveries to the extent required to comply with the ESA.

***1333** Second, appellants contend that the Court of Federal Claims erred in concluding that the Tribes have senior rights in Klamath Project water. Appellants argue that the Tribes' water rights were created before the Klamath Project and therefore do not include a right to the then nonexistent stored water produced by the Klamath Project. *Id.* at 40–41. According to appellants, in *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. at 768, 105 S.Ct. 3420, the Supreme Court held that the Klamath Tribes' fishing rights extend only to lakes and streams within the tribes' former reservation, which did not include Upper Klamath Lake, where Project water is stored. *Id.* at 26, 31–33. Appellants argue that the Court of Federal Claims misread *Adair* to extend the Klamath Tribes' right to fish to include access to Upper Klamath Lake, since *Adair* dealt only with the Klamath Tribes' fishing rights in the Williamson River, which, along with the Sprague River, flows into Upper Klamath Lake.[24] Appellants maintain there is no evidence showing that water in Upper Klamath Lake flows upstream into these rivers. On these grounds, appellants assert that the Klamath Tribes do not have implied rights to the water stored in Upper Klamath Lake for purposes of the Klamath Project.

As far as the Yurok and Hoopa Valley Tribes are concerned, appellants argue that the tribes have waived any rights they have to Klamath Project water because they declined to participate in the Klamath Adjudication. In addition, appellants contend, because the reservations of those tribes lie approximately 200 miles downstream of Upper Klamath Lake, Klamath Project water is not "appurtenant" to their reservations, as required by *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). Appellants' Br. 26–30.

In *Winters*, the United States brought suit to enjoin upstream irrigators from constructing or maintaining dams on the Milk River, or from otherwise preventing the water of the river or its tributaries from flowing downstream to the Fort Belknap Indian Reservation in Montana. 207 U.S. at 565, 28 S.Ct. 207. Although there was no express reservation of the river's water in the 1888 agreement creating the reservation, the Supreme Court noted that it was the "policy" of the government and the "desire of the Indians" to become "a pastoral and civilized people" and that, without the river water to irrigate the land of the reservation, the land would be "practically valueless." *Id.* at 576, 28 S.Ct. 207. Noting that "[b]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians," the Court affirmed the permanent injunction of the district court that prevented the irrigators from interfering with the water flow needed by the reservation. *Id.* at 576–78, 28 S.Ct. 207. The Supreme Court has subsequently restated this "Reserved-Water-Rights Doctrine" as follows:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.

Cappaert, 426 U.S. at 138, 96 S.Ct. 2062. Cases refer to these reserved water rights ***1334** as *Winters* rights. *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1352, 1355–56 (Fed. Cir. 2018); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1155 (9th Cir. 2017); *see Arizona v. California*, 373 U.S. 546, 600, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963) ("The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless.").

Appellants' argument is that the distance of their respective reservations from Upper Klamath Lake prevents the Yurok and Hoopa Valley Tribes from claiming *Winters* rights with respect to Klamath Project water. Any reserved rights intended for those tribes, appellants contend, would have been in the closer Lower Klamath Basin or Trinity River. Appellants' Br. 28–30.

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Third, appellants argue that the Court of Federal Claims erred in several respects regarding the exercise of the Tribes' rights. Appellants' Br. 33–43. Specifically, according to appellants, the Bureau of Reclamation should not have taken unilateral action in response to the FWS and NMFS Biological Opinions, but instead should have sought a "judicial determination regarding the existence, location, quantity, source, and lawful purposes of the water rights [at issue], which had not occurred by 2001." *Id.* at 39. In making this argument, appellants cite Section 8 of the Reclamation Act, which states that the Bureau is to distribute water "in conformity with [state] laws." *See* 43 U.S.C. § 383. The "state" law to which appellants point is Or. Rev. Stat. § 540.045(4) (2017). In further support of their argument, appellants cite *United States v. Puerto Rico*, 287 F.3d 212 (1st Cir. 2002). Relatedly, appellants contend that the Yurok and Hoopa Valley Tribes waived their water rights because they did not participate in the Klamath Adjudication. Appellants Br. 30. In addition, appellants urge that the water of parties with rights junior to the Klamath farmers and irrigators should have been curtailed first, in reverse order of priority, to satisfy any senior rights of the Tribes. Appellants' Br. 33–36. Finally, relying on *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), appellants argue that the Bureau's compliance with the ESA "discharged any trust responsibility it had to the tribes." Appellants' Br. 41. Appellants assert that "[b]ecause the Government's fiduciary duty attached only to tribal property that it holds in trust, [the Bureau of] Reclamation lacked any authority to withhold Klamath farmers' water in 2001 to satisfy a nonexistent Hoopa/Yurok water right in Klamath Project water, nor an as-yet-undetermined and unquantified Klamath Tribes' water right." *Id.* at 42.[25]

C.

In response to appellants' first argument, appellees contend that the minimum lake and flow levels the Bureau of Reclamation imposed in the Plan were critical to the survival of the relevant fish, and therefore within the Tribes' federal reserved rights. Indeed, appellees argue, avoiding jeopardy under the ESA is a lower threshold than the "reasonable livelihood," or "moderate living," standard for tribal trust resources. Federation's Br. 17–18. Appellees ***1335** contend that the Klamath Tribes' reserved rights are based on the historical circumstances surrounding the importance of the suckers to the tribes' diets. That the Klamath Tribes no longer harvest suckers is irrelevant, appellees assert, as the tribes' inability to harvest the suckers is because of ESA restrictions and population loss due in part to the Klamath Project. Appellees also contend that, in the Court of Federal Claims, appellants presented no evidence that lower flow levels in the Klamath River would protect the chinook salmon, which are also declining in population, so as to afford the Yurok and Hoopa Valley Tribes a "reasonable livelihood" or "moderate living." United States' Br. 41–42.

Second, appellees respond that the Court of Federal Claims correctly found that the retained waters of Upper Klamath Lake and the Klamath River are within the scope of federal reserved rights of the Tribes. Federation's Br. 8–13; United States' Br. 33, 34–39. According to appellees, the 1864 Klamath Treaty reserved rights in water necessary to fulfill the fishing-related purposes of the Klamath Tribes' reservation, and this reservation of rights extends to water in Upper Klamath Lake. Appellees point to the FWS Biological Opinion as demonstrating that Upper Klamath Lake provides critical habitat for suckers that populate the fisheries on the former Klamath reservation. United States' Br. 36. Similarly, appellees contend, in reserving lands for the purpose of preserving tribal subsistence fishing, the United States reserved sufficient flow of the Klamath River to preserve adequate habitat for salmon for the benefit of the Yurok and Hoopa Valley Tribes. Federation's Br. 12–13; United States' Br. 37–39. Further, once established, the Tribes' rights exist, appellees urge, even if the Klamath Project was developed at a later point in time. Federation's Br. 9–10.

Third, appellees contend that the Tribes' federal reserved rights need not be quantified or adjudicated to be enforced. Federation's Br. 18–20; United States' Br. at 46–49. This requirement, appellees contend, pertains to state rights, not federal reserved rights. Appellees argue that state adjudications are limited to waters within a state and cannot encompass water rights to bodies of water that run through other states. For that reason, appellees claim, the California-based Hoopa Valley and Yurok Tribes could not have waived their federal reserved water rights by failing to participate in Oregon's Klamath Adjudication. Federation's Br. 21–22; United States' Br. at 48–49.

IV. Analysis

[8] As the Court of Federal Claims noted, it is well-established that the creation of a tribal reservation carries an

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implied right to unappropriated water "to the extent needed to accomplish the purpose of the reservation." *Baley*, 134 Fed. Cl. at 669–70 (quoting *Cappaert*, 426 U.S. at 138, 96 S.Ct. 2062); *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1352, 1356 (Fed. Cir. 2018); *see also United States v. New Mexico*, 438 U.S. 696, 702, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978) ("Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water."). Relevant to this case, courts have concluded that the purposes of the Tribes' reservations were to secure to the Tribes a continuation of their traditional hunting and fishing lifestyle. *Adair*, 723 F.2d at 1408–09 (Klamath); *Parravano*, 70 F.3d at 546 (Yurok and Hoopa Valley).

***1336** **[9]** We are not persuaded by appellants' argument that the Tribes' entitlement to a "reasonable livelihood" or "moderate living" did not require that the Bureau halt water deliveries to the extent required to comply with the ESA. Beginning with the suckers and the Klamath Tribes, appellants have not argued that the Court of Federal Claims erred when it found that the "Lost River and short nose suckers are tribal resources of the Klamath Tribes and uncontested evidence presented at trial demonstrated that the fish have played an important role in the Klamath Tribes' history." *Baley*, 134 Fed. Cl. at 671. Given that the standard of the ESA is to avoid jeopardizing the existence of the suckers, we do not see how, in this case, the "reasonable livelihood" or "moderate living" standard constitutes a standard lower than the requirement that the very existence of this important tribal resource not be placed in jeopardy.

We also do not agree with appellants that the Klamath Tribes have no rights to the suckers because they do not fish or use the suckers "for any purpose today." That the Tribes do not use endangered species cannot be held against them. In fact, as appellants point out, if the Klamath Tribes' members were to take the endangered suckers, they would be committing a federal offense. Reply Br. 7 & n.23 (quoting 16 U.S.C. § 1538(a)(1)(B)). It does not follow that by not fishing the endangered suckerfish, the Klamath Tribes have abandoned their rights to fish them. *See Navajo Nation*, 876 F.3d at 1155 ("*Winters* rights, unlike water rights gained through prior appropriation, are not lost through non-use.") (citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981)).

Similarly, that the Yurok and Hoopa Valley Tribes catch significantly more chinook salmon than SONCC coho salmon does not necessarily mean that they can sustain a "reasonable livelihood" or "moderate living" through the chinook salmon alone.[26] This is particularly true since the NMFS Biological Opinion indicates that the habitat needs of the chinook and SONCC coho salmon are similar and that "populations of chinook salmon ... have declined to levels that have warranted their consideration for listing." J.A. 2983. Indeed, the NMFS Biological Opinion also indicates that the Bureau's proposed 2001 operating plan to continue operating the Klamath Project would have reduced the spawning habitat for the chinook salmon. J.A. 2963, 2988, 2995. Moreover, appellants do not dispute the importance of salmon, generally, to the Yurok and Hoopa Valley Tribes.[27] Thus, we do not see how the ***1337** requirement that these tribes maintain a "reasonable livelihood" or a "moderate living" from the fish can possibly be a lesser standard than the requirement that the SONCC coho salmon's very existence not be placed in jeopardy.

It is not necessary for us to determine the amount of fish that would constitute a "reasonable livelihood" or a "moderate living" for the Tribes. At the bare minimum, the Tribes' rights entitle them to the government's compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy. We therefore reject appellants' argument that the Court of Federal Claims erred when it held that the Tribes had rights to an amount of water that was at least equal to what was needed to satisfy the Bureau of Reclamation's ESA obligations.

[10] We turn now to appellants' second main argument noted above: that there are geographic limitations on the Tribes' rights that exclude Upper Klamath Lake, and accordingly Klamath Project water, from the reach of those rights.

The record on appeal is not clear as to whether the Klamath Tribes' fishing rights include the right of tribe members to take fish from Upper Klamath Lake while they stand on former reservation lands. At the same time, appellants are correct that we do not have evidence before us establishing that water from Upper Klamath Lake flows upstream into the Williamson and Sprague rivers. However, there is evidence before us establishing that the Lost River and shortnose suckers *do* travel upstream from Upper Klamath Lake into its tributaries. For example, in *Baley*, the Court of Federal Claims relied upon the Determination of Endangered Status for Shortnose Sucker and Lost River Sucker, which states:

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> The present or threatened destruction, modification, or curtailment of its habitat or range. Initial biological surveys of the Klamath Basin indicated the presence of large populations of fishes, and suckers in particular. *Spawning runs of suckers from Upper Klamath Lake were large enough to provide a major food source for Indians and local settlers.* The shortnose sucker and Lost River sucker were staples in the diet of the Klamath Indians for thousands of years. ... Even through the 1960's and 1970's, *runs of suckers moving from Upper Klamath Lake up into the Williamson and Sprague Rivers were great enough to provide a major sport fishery that annually attracted many people from throughout the West*. The primary species was the larger Lost River sucker, locally known as mullet, but significant numbers of shortnose suckers also occurred in the runs. During the past years, however, [t]he Klamath Tribe and local biologists have been so alarmed by the population decline of both suckers that in 1987, the Oregon Fish and Wildlife Commission closed the fishery for both species and place[d] them on the State's list of protected species.

53 Fed. Reg. at 27,130 (emphasis added, citations omitted); *see Baley*, 134 Fed. Cl. at 636; FWS Biological Opinion, § III, Part 2, p.44, J.A. 2820 (noting spawning runs of the Lost River suckers in the Williamson and Sprague Rivers).

As noted, the Klamath Tribes have an implied right to water to the extent necessary for them to accomplish hunting, fishing, and gathering on the former reservation, a primary purpose of the Klamath reservation. *See Adair*, 723 F.2d at 1408–09. This entitlement includes the right to prevent appropriators from utilizing water in a way that depletes adjoined water sources below a level that damages the habitat of the fish they have a right to take. *Id.* While the Klamath Project did ***1338** not exist at the time of the creation of the Klamath Tribes' reservation, Upper Klamath Lake undisputedly did exist at that time, as it was the boundary of the reservation as it was created. *See* Klamath Treaty, Art. I, 16 Stat. 707. The FWS Biological Opinion indicated that maintaining minimum levels in Upper Klamath Lake was "necessary to avoid jeopardy and adverse modification of proposed critical habitat" for the suckers. J.A. 2920. Appellants do not challenge the findings of the FWS Biological Opinion. Thus, given the facts of record, the Court of Federal Claims did not err in finding that the Klamath Tribes' implied water rights include Upper Klamath Lake.

As seen above, appellants cite *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. at 768, 105 S.Ct. 3420, for the proposition that "[t]he Supreme Court has ruled that the Klamath Tribes' treaty fishing right extends only to lakes and streams within the Tribes' former reservation." Appellants' Br. 31. Accordingly, and because the Klamath Project and its additional stored water did not exist in 1864, appellants contend that the Court of Federal Claims "lacked any basis, in law or in fact, to declare a water right for the Tribes in Upper Klamath Lake." *Id. Oregon Department of Fish & Wildlife* does not stand for the broad proposition that appellants assert, however. The case did not involve water rights on the Klamath Tribes' former reservation. Rather, the question before the Court was whether the tribes retained hunting and fishing rights on land the tribes had ceded to the United States from the reservation under a 1901 agreement. *See* 473 U.S. at 764, 105 S.Ct. 3420.

Even if the Klamath Tribes' *fishing* rights extend only to lakes and streams within their former reservation, this does not mean their reserved *water* right is so limited. *See John v. United States*, 720 F.3d 1214, 1230 (9th Cir. 2013) ("No court has ever held that the waters on which the United States may exercise its reserved water rights are limited to the water within the borders of a given federal reservation."). *Winters* itself makes this clear. 207 U.S. at 568, 576–77, 28 S.Ct. 207. In addition, in *Cappaert*, the United States had reserved Devil's Hole Monument, which included an underground pool that was the only habitat for a type of desert pupfish, for the purpose of preserving the pool. 426 U.S. at 131–32, 141, 96 S.Ct. 2062. The Supreme Court held that the United States could enjoin the pumping of groundwater at a ranch two and a half miles from Devil's Hole. *Id.* at 133, 147, 96 S.Ct. 2062. In reaching this conclusion, the Court held that the "Reserved-Water-Rights Doctrine" was not limited to surface water and could be extended to groundwater as it is "based on the necessity of water for the purpose of the federal reservation." *Id.* at 142–43, 96 S.Ct. 2062. Likewise, water outside the Klamath Tribes' former reservation is necessary for the purposes of the tribes' reservation—to secure to the Tribes a continuation of their traditional hunting and fishing lifestyles.

Relatedly, we do not agree with appellants that the geography of the Klamath Basin and the distance between Upper Klamath Lake and the Yurok and Hoopa Valley Tribes' reservations mean that Klamath Project water is not subject to those tribes' reserved water rights. It is true that, downstream from Upper Klamath Lake, between the Iron Gate Dam and the Hoopa Valley reservation (and subsequently, the Yurok reservation) there are other water sources. Specifically, the

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Trinity River joins the Klamath River at the Hoopa Valley reservation, and there are several other tributaries to the Klamath River along the way. However, appellants' focus on the distance between the tribes' reservations, ***1339** on the one hand, and the Project water in Upper Klamath Lake and Iron Gate Dam, on the other hand, is misplaced. In *Winters*, the Supreme Court held that the 1888 treaty that established the Fort Belknap reservation had also impliedly reserved water that was being diverted upstream from the reservation. 207 U.S. at 576–77, 28 S.Ct. 207; ***see also*** *Cappaert*, 426 U.S. at 133, 147, 96 S.Ct. 2062. Not only does the Klamath River flow from Upper Klamath Lake through the Yurok and Hoopa Valley Tribes' reservations,[28] but the river's very path defines the borders of the Yurok reservation. Moreover, as set forth in the NMFS Biological Opinion, the varying water flows at Iron Gate Dam were designed to provide suitable habitat, and adequate water temperatures and quality, to avoid the likelihood of jeopardizing the existence of the SONCC coho salmon. They also were designed to avoid the destruction or adverse modification of the critical habitat of the coho salmon. Thus, while the fish may be taken by members of the Yurok and Hoopa Valley Tribes as they stand on their reservations, the habitat of the coho salmon includes waters both downstream from the reservations and also upstream from the reservations to the Iron Gate Dam. The dam is the stopping point for the salmon's spawning migration because there is no way for the fish to pass through the dam. J.A. 2109–10, J.A. 2616. In addition, the dam controls the water of the Klamath River that flows to it from Upper Klamath Lake. As it is the habitat for the salmon they fish, and as it flows through their reservations, the Yurok and Hoopa Valley Tribes have an implied water right that includes the Klamath River and the flows therein as controlled by the Iron Gate Dam.[29]

We thus conclude that the Court of Federal Claims did not err when it determined that the Tribes' reserved water rights encompass Klamath Project water. We turn now to the question of whether the Tribes' rights were properly exercised.

[11] As noted, appellants contend that it was contrary to Oregon law, specifically, Or. Rev. Stat. § 540.045(4), and thus the Reclamation Act, for Klamath Project water to be "delivered" to anyone other than the Klamath farmers without there first being a final adjudication and quantification. Appellants' Br. 38–40. We disagree.

To begin with, the statute appellants cite simply defines the term "existing water rights of record," as it relates to water to be distributed by a water district's watermaster, to include "all completed permits, certificates, licenses and ground water registration statements filed under [Or. Rev. Stat. § 537.605] and related court decrees." Or. Rev. Stat. § 540.045(1), (4); *see also* Or. Rev. Stat. §§ 540.010 (stating that the ***1340** state shall be divided into water districts), 540.020 (explaining that each water district shall have an appointed watermaster). We fail to see how this statute relates to the issue of tribal rights that is before us in this case.

More importantly, federal courts have consistently held that tribal water rights arising from federal reservations are federal water rights not governed by state law. *Arizona v. California*, 373 U.S. at 597, 83 S.Ct. 1468; ***see also*** *Cappaert*, 426 U.S. at 145, 96 S.Ct. 2062; *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985).

[12] As the "volume and scope of particular reserved rights ... are federal questions," *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), there is no need for a state adjudication to occur before federal reserved rights are recognized. *See Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1272 (9th Cir. 2017) ("[S]tate water rights are preempted by federal reserved rights."). Thus, given the facts of record in this case, it was not necessary for the Tribes' rights to have been adjudicated before the Bureau acted.[30]

Appellants' reliance on *United States v. Puerto Rico* is misplaced. *Puerto Rico* involved the McCarran Amendment, 43 U.S.C. § 666, a law that waived the sovereign immunity of the United States in suits for the general adjudication or administration of water rights. 287 F.3d at 213. The issue before the court was whether the statute divested the United States of its sovereign immunity so as to compel the United States Navy to participate in administrative proceedings concerning the Commonwealth of Puerto Rico's efforts to impose restrictions on the extraction of water from the Rio Blanco River. *Id.* The court held that the McCarran Amendment did not waive sovereign immunity with respect to the proceedings because the proceedings did not involve a "suit" within the meaning of the McCarran Amendment. *Id.* at 214. In arriving at its decision, the court discussed *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), relied upon by Puerto Rico. In that case, the court considered a statutory scheme having both administrative and judicial components. *Oregon*, 44 F.3d at 767. The *Puerto Rico* court found that the Oregon law in that case "construct[ed] a seamless proceeding,

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possessing both administrative and judicial components." 287 F.3d at 219 (citing *Oregon*, 44 F.3d at 764). Puerto Rico's administrative ***1341** scheme, the court determined, did not "establish a seamless process with both administrative and judicial components. Rather, it contemplates a purely administrative proceeding." *Id.* We are unable to see how *Puerto Rico* is pertinent to this case.

[13] Nor do we believe that the Yurok and Hoopa Valley Tribes waived their rights because they did not participate in the Klamath Adjudication. For the reasons discussed above, their rights are federal reserved water rights not governed by state law. Moreover, states have the ability to adjudicate rights in a water or river system within their jurisdiction, but they cannot adjudicate water rights in another state. *United States v. Dist. Court for Eagle County, Colo.*, 401 U.S. 520, 523, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971) ("No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many states. The 'river system' must be read as embracing one within the particular State's jurisdiction."). Thus, 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.

Finally, we are not persuaded by appellants' argument, relying upon *Gros Ventre v. United States,* that the Bureau of Reclamation lacked authority in 2001 to withhold Klamath Project water. In the first place, as noted above, in making this argument, appellants refer to "a nonexistent Hoopa/Yurok water right in Klamath Project water" and "an as-yet-undetermined and unquantified Klamath Tribes' water right." As just seen, however, the Yurok and Hoopa Valley Tribes did in fact have reserved rights in Klamath Project water, while the Klamath Tribes also had reserved rights in Klamath Project water. Furthermore, as we have just demonstrated, none of these rights had to be quantified. Beyond that, appellants' reliance on *Gros Ventre* is misplaced. In that case, the Ninth Circuit determined that the Gros Ventre Tribe, Assiniboine Tribe, and Fort Belknap Indian Community Council did not have a cause of action for breach of the government's tribal trust obligations separate from any cause of action arising from a statutorily granted right. 469 F.3d at 807, 809–14. Here, the Bureau's actions to comply with the ESA and to protect tribal resources were one and the same. Whether the Tribes would have had a separate cause of action against the United States had the Bureau not complied with the ESA is not before us.

In sum, given the facts of this case, the federal reserved rights of the Tribes need not have been adjudicated or quantified before they were asserted to protect the Tribes' fishing rights.

Conclusion

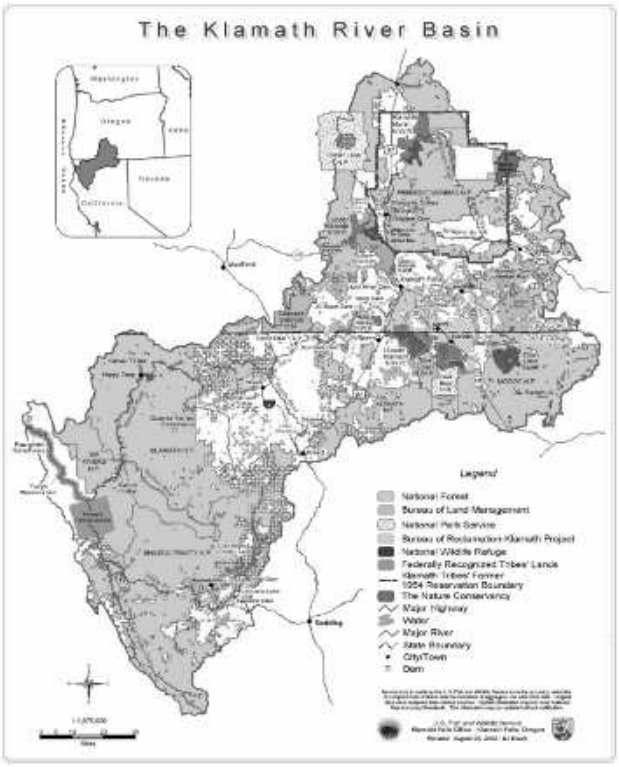
For the foregoing reasons, we agree with the Court of Federal Claims that appellants' water rights were subordinate to the Tribes' federal reserved water rights. We therefore see no error in the court's holding that the Bureau of Reclamation's action in temporarily halting deliveries of Klamath Project water in 2001 did not constitute a taking of appellants' property. Because the parties agree this ruling is dispositive of the case, we need not reach appellants' remaining arguments on appeal noted above.[31]

AFFIRMED

***1342** Costs

Each party shall bear its own costs.

Appendix



U.S. Fish & Wildlife Serv., Map of the Klamath River Basin (2003), *available at* https://www.fws.gov/yreka/Maps/KlamathRvBasinV4.jpg.

All Citations

942 F.3d 1312

Footnotes

1 The Klamath Compact is a congressionally-approved interstate compact between California and Oregon. *See* 71 Stat. 497–508 (1957). The Compact's purposes are to "facilitate and promote the orderly, integrated, and comprehensive development, use, conservation, and control [of the water resources of the Klamath River Basin] for various purposes" and to "further intergovernmental cooperation and comity with respect to these resources and programs for their use and development and to remove causes of present and future controversies." *Id.* at 497. Section XIII of the Compact states that "[t]he United States shall not, without payment of just compensation, impair any rights to the use of water for [domestic or irrigation purposes] within the Upper Klamath River Basin." *Id.* at 507. However, this obligation is limited to rights acquired after the effective date of the Compact. *Id.* With respect to the rights of Native American tribes, Article X of the Compact states: "Nothing in this compact shall be deemed ... [t]o deprive any individual Indian, tribe, band or community of Indians of any rights, privileges, or immunities afforded under Federal treaty, agreement or statute." *Id.* at 505.

2 On February 28, 2005, the Court of Federal Claims granted the motion of the Pacific Coast Federation of Fishermen's Associations ("the Federation") to intervene as a defendant. *Klamath Irrigation Dist. v. United States*, 64 Fed. Cl. 328, 331 (2005). The Federation represents approximately 3,000 small commercial fishing operators who derive income from Pacific salmon that spawn in the Klamath River Basin. *Id.*

3 The Federation joined the government's motion for summary judgment on the breach of contract claims. Notice of Intervenor-Def. Pac. Coast Fed'n of Fishermen's Ass'ns' Joinder in Federal Defs.' Mot. for Summ. J. on Contract Claims, No. 1:01-cv-00591 (Ct. Fed. Claims Feb. 17, 2006), ECF No. 263.

4 In the context of real property, something is "appurtenant" to land "when it is by right used with the land for its benefit." Appurtenant, Black's Law Dictionary (6th ed. 1990); *see also* Appurtenant, Black's Law Dictionary (11th ed. 2019) (defining appurtenant as "[a]nnexed to a more important thing").

5 The Van Brimmer Ditch Company is not an irrigation district, but an Oregon business corporation that delivers irrigation water to landowners. *Baley*, 134 Fed. Cl. at 632. The company traces its history to the 1880s, when its founders began drawing water from White Lake. *Id.* White Lake was associated with Lower Klamath Lake, which is along the border between Oregon and California. *See id.* The subsequent creation of the Klamath Project resulted in the draining of

White Lake and Lower Klamath Lake (which is now a National Wildlife Refuge). *Id.*; *see also* U.S. Dep't of the Interior, Ground-Water Hydrology of the Upper Klamath Basin, Oregon and California at 1–2, 6 (2010), https://pubs.usgs.gov/sir/2007/5050/. On November 6, 1909, the Van Brimmer Ditch Company contracted with the United States to receive water from Upper Klamath Lake. *Baley*, 134 Fed. Cl. at 632. In its contract, the Van Brimmer Ditch Company agreed to "waive[ ] and renounce[ ] ... any and all of its riparian rights, in relation to the waters and shores of Lower Klamath Lake." *Id.* In exchange, the United States agreed to "deliver to the Company during each and every irrigation season ... a quantity of water, not to exceed fifty second feet." *Id.* Named plaintiffs James and Cheryl Moore are landowner-shareholders in the Van Brimmer Ditch Company. In 2001, they owned 135 shares of stock in the company, each of which corresponded to one acre of irrigable land, with an appurtenant right to receive irrigation water from the company. *Id.*

6 These irrigation contracts were made pursuant to the Warren Act of 1911, Pub. L. No. 61-406, 36 Stat. 925 (codified at 43 U.S.C. §§ 523–25 (2012)). *Baley*, 134 Fed. Cl. at 630. They are between the United States on the one hand, and individual water users and irrigation districts on the other. *Id.* The contracts cover lands that were not part of the Klamath Project when it was originally developed and contain language stating that water rights acquired under the contracts are inferior to prior rights reserved for the lands of the Klamath Project. *Id.* The Warren Act contracts also include language immunizing the United States from liability in the event of water shortages, although this language takes two different forms. *Id.* at 631. The contracts with individuals and certain irrigation districts include language limiting the United States' liability for shortages caused by droughts or "other cause." *Id.* at 631–32. Contracts with other irrigation districts do not include the "other cause" language. *Id.* at 631. The Court of Federal Claims held that the claims of plaintiffs whose Warren Act contracts included the "other cause" language were barred. *Id.* at 658–59.

7 Prior to passage of the Reclamation Act, at least part of the Klamath Basin was not arid land, but wetlands or marshes that were subsequently drained and converted to farmland pursuant to the Klamath Project.

8 Private landowners and irrigation companies had begun to divert water for irrigation purposes prior to the development of the Klamath Project; most of those interests were integrated into the Klamath Project. *Baley*, 134 Fed. Cl. at 626.

9 The operation and maintenance of all the federally-owned works downstream of the headgates of Upper Klamath Lake and the operation and maintenance of works that divert water directly from the Klamath River have been transferred by contract to the Klamath Irrigation District and Tulelake Irrigation District, which distribute water to irrigators. *Baley*, 134 Fed. Cl. at 626–27. Similarly, other irrigation districts and individuals have constructed, and own, their own diversion and delivery facilities pursuant to contracts with the United States. *Id.*

10 An adjudication is a process through which water rights can be quantified; i.e., quantities of water can be allocated to holders of rights in a water source. *See generally* A. Tarlock & J. Robison, Law of Water Rights and Resources §§ 1.1, 7.2 (2019).

11 The *Adair* court referred to the "Klamath Tribe," as opposed to the Klamath Tribes. The parties do not contend that *Adair* does not apply to all the Klamath Tribes. *See Baley*, 134 Fed. Cl. at 633, 670–72; Appellants' Br. 8, 27, 30, 31; Federation's Br. 23; United States' Br. 22.

12 The shortnose and Lost River suckers were listed as endangered in 1988. *Baley*, 134 Fed. Cl. at 636 (citing Final Rule, Determination of Endangered Status for Shortnose Sucker and Lost River Sucker, 53 Fed. Reg. 27,130 (July 18, 1988)). The Lost River and shortnose suckers' only habitat is Upper Klamath Lake and nearby Project waters. *Baley*, 134 Fed. Cl. at 636; *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228 (N.D. Cal. 2001).

13 The SONCC coho salmon was listed as threatened in 1997. *Baley*, 134 Fed. Cl. at 636 (citing Final Rule, Threatened Status for Southern Oregon/Northern California Coast Evolutionary Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24,588 (May 6, 1997)). SONCC coho salmon are anadromous fish, meaning they "hatch in fresh water, migrate to the ocean where they are reared and reach mature size, and eventually complete their life cycle by returning to the fresh-water place of their origin to spawn." *Baley*, 134 Fed. Cl. at 634 n.5 (quoting *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979), *modified sub nom. Washington v. United States*, 444 U.S. 816, 100 S.Ct. 34, 62 L.Ed.2d 24 (1979)). The Klamath River downstream of the Iron Gate Dam in

California has been designated a "critical habitat" for the SONCC coho salmon. *Pac. Coast Fed'n of Fishermen's Ass'ns*, 138 F. Supp. 2d at 1232 (quoting 64 Fed. Reg. 24,049, 24,062 (May 5, 1999)).

14 Notably, during this time period, the Federation was involved in litigation with the Bureau in the Northern District of California. Specifically, the Federation brought a suit alleging, *inter alia*, that the Bureau had violated the ESA by failing to consult with the NMFS concerning the impact of the Klamath Project's 2000 Operations Plan. *Pac. Coast Fed'n of Fishermen's Ass'ns*, 138 F. Supp. 2d at 1240. The court in that case issued an injunction on April 3, 2001, restricting the Bureau from delivering Project water when Klamath River flows at the Iron Gate Dam dropped below certain minimum levels, until the Bureau complied with ESA consultation requirements. *Id.* at 1251.

15 On April 9, 2001, a group of Klamath Project water users filed a lawsuit in the United States District Court for the District of Oregon seeking to enjoin the Bureau from implementing the Plan. *Baley*, 134 Fed. Cl. at 640; *see Kandra*, 145 F. Supp. 2d at 1195–96, 1199. The *Kandra* plaintiffs alleged breach of contractual rights to irrigation water, as well as violations of the ESA due to issues in the Biological Opinions. *See Kandra*, 145 F. Supp. 2d at 1201–02, 1206–11. The district court denied a preliminary injunction, and the case was ultimately dismissed. *Id.* at 1211; *Baley*, 134 Fed. Cl. at 640.

16 The certified questions were:

> 1. Assuming that Klamath Basin water for the Klamath Reclamation Project ''may be deemed to have been appropriated by the United States'' pursuant to Oregon General Laws, Chapter 228, § 2 (1905), does that statute preclude irrigation districts and landowners from acquiring a beneficial or equitable property interest in the water right acquired by the United States?
>
> 2. In light of the [1905 Oregon] statute, do the landowners who receive water from the Klamath Basin Reclamation Project and put the water to beneficial use have a beneficial or equitable property interest appurtenant to their land in the water right acquired by the United States, and do the irrigation districts that receive water from the Klamath Basin Reclamation Project have a beneficial or equitable property interest in the water right acquired by the United States?
>
> 3. With respect to surface water rights where appropriation was initiated under Oregon law prior to February 24, 1909, and where such rights are not within any previously adjudicated area of the Klamath Basin, does Oregon State law recognize any property interest, whether legal or equitable, in the use of Klamath Basin water that is not subject to adjudication in the Klamath Basin Adjudication?

Certification Order, 532 F.3d at 1377–78.

17 The Supreme Court of Oregon answered "no" to our first certified question and "yes" to our third certified question. *Certification Decision*, 227 P.3d at 1157, 1166. The Court's answer to our second certified question was not definitive:

> 2. Under Oregon law, whether plaintiffs acquired an equitable or beneficial property interest in the water right turns on three factors: whether plaintiffs put the water to beneficial use with the result that it became appurtenant to their land, whether the United States acquired the water right for plaintiffs' use and benefit, and, if it did, whether the contractual agreements between the United States and plaintiffs somehow have altered that relationship. In this case, the first two factors suggest that plaintiffs acquired a beneficial or equitable property interest in the water right to which the United States claims legal title, but we cannot provide a definitive answer to the court's second question because all the agreements between the parties are not before us.

Certification Decision, 227 P.3d at 1169.

18 The court held that plaintiffs whose contracts do not include the "other cause" language hold beneficial rights to receive Klamath water for which they could seek compensation under the Fifth Amendment or the Klamath Compact. *Baley*, 134 Fed. Cl. at 658.

19 From this point on, we refer to the remaining plaintiffs as "appellants."

20 In addition to requesting that we vacate and remand the case for a determination and award of taking damages, appellants request, in a single sentence in their opening brief, that we award them damages for breach of the Klamath Compact.

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Appellants' Br. 60; *see also* Reply Br. 13 (alleging that, under the Compact, irrigation rights take priority over water rights for fish and wildlife). The Court of Federal Claims did not provide analysis regarding appellants' rights under the Compact separate from its analysis of their Fifth Amendment claims. *See e.g., Baley*, 134 Fed. Cl. at 652–53, 680. In any event, appellants' cursory mention of the Klamath Compact is insufficient to preserve any separate arguments pertaining to the Compact. *See Trading Techs. Int'l, Inc. v. IBG, LLC*, 921 F.3d 1378, 1385 (Fed. Cir. 2019) ("[A] conclusory assertion with no analysis is insufficient to preserve the issue for appeal."); *United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived."); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("[M]ere statements of disagreement with the district court as to the existence of factual disputes do not amount to a developed argument."); *United States v. Zannino,* 895 F.2d 1, 17 (1st Cir. 1990) ("[W]e see no reason to abandon the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). We therefore decline to separately address appellants' rights under the Klamath Compact.

21 In their opening brief, appellants assert that the water rights deriving from the Van Brimmer Ditch Company date back to 1883, which they claim makes them senior to the "alleged 1891 Hoopa Valley and Yurok tribes' water rights." Appellants' Br. 36. For its part, the government contends that the Yurok and Hoopa Valley Tribes' rights have priority dates of no later than 1855 and 1876, the dates on which their land was reserved. United States' Br. at 32 & n.3. At oral argument, however, appellants' counsel agreed that the Van Brimmer Ditch Company appellants are "in the same situation as everyone else." Oral arg. 17:12–18:22 (July 8, 2019).

22 If the Tribes' rights control over appellants' property interests, any taking claims asserted by appellants, as well as appellants' other claims, are with respect to inferior property interests and therefore must fail. *See Winters v. United States*, 207 U.S. 564, 568–70, 576–78, 28 S.Ct. 207, 52 L.Ed. 340 (1908) (holding that a tribe's senior, federally-protected right had priority over irrigators' junior, state-law rights).

23 In their briefs, appellants suggest that cases from this court lead to the conclusion that Congress did not confer any property rights, including water rights, upon the Yurok and Hoopa Valley tribes. Appellants' Br. 27–28; Reply Br. 15–16. In making this suggestion, appellants rely upon *Karuk Tribe of California v. Ammon*, 209 F.3d 1366. In that case, we held that certain individuals and tribes, including the Yurok Tribe, did not possess vested, compensable property interests in the land of the Hoopa Valley reservation for purposes of the Fifth Amendment. *Id.* at 1370, 1375–76. At oral argument, appellants appear to have conceded the existence of the water rights of the Yurok and Hoopa Valley Tribes and to have focused their argument on the scope of those rights. *See* Oral arg. at 5:40–6:16 ("[T]hey have only so much water as is necessary to fulfill the purposes of the reservation [which] were of course to allow for fishing ... adjacent to the reservation for the Hoopa and Yurok. Those were the original purposes of the reservation.") & 1:15:00—1:16:12 ("Did Congress really intend that [Upper Klamath Lake], 200 miles away, which might supply ... one percent, two percent, no percent of the flows needed for the salmon runs at the Hoopa, did Congress really intend that that would all come from Klamath Lake and not from anywhere like say, the Trinity River, which has flows of over a million acre-feet per year?"). In any event, to the extent appellants maintain this argument, we do not read *Karuk Tribe* as repudiating the Yurok and Hoopa Valley Tribes' fishing rights. *See Baley*, 134 Fed. Cl. at 634, 671; *Eberhardt*, 789 F.2d at 1359; *McCovey*, 205 Cal.Rptr. 643, 685 P.2d at 697.

24 In *Adair*, the Ninth Circuit affirmed a decision declaring that the "Klamath Tribe" and its members have water rights, with a priority date of time immemorial, sufficient to maintain their treaty rights to hunt and fish in the Williamson River watershed on the former Klamath reservation. 723 F.2d at 1397, 1415.

25 Appellants also contend that the Court of Federal Claims failed to address the rights of two entities, the Klamath Drainage District and the Klamath Hills District Improvement Company, whom they assert hold state water rights for irrigation independent of the Klamath Project. Appellants' Br. 42–43. Those entities are no longer parties to these proceedings, however. Therefore, this issue is moot.

26 The amicus brief of the Hoopa Valley Tribe asserts that "[e]ven the comparatively larger Chinook harvests in 2000–2001 cited by Plaintiff-Appellants equate to only 3 to 4 fish annually per member." Amicus Br. of Hoopa Valley Tribe Supporting Defendants-Appellees and Affirmance at 21 n.7.

27 The Court of Federal Claims cited *Parravano* with respect to the general importance of salmon fisheries to the Yurok and Hoopa Valley tribes. *Baley*, 134 Fed. Cl. at 671. In *Parravano*, the Ninth Circuit determined that the Secretary of Commerce had authority under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.,* to reduce the ocean harvest rate of chinook salmon by non-tribal commercial fishermen and fishing associations to protect the Yurok and Hoopa Valley Tribes' federally-reserved fishing rights. 70 F.3d at 541, 547. *Parravano* was decided in 1995; the coho salmon was identified as being a threatened species in 1997. The Final Rule listing the SONCC coho salmon as "threatened" indicates that the population of SONCC coho salmon had been in decline for years. *See generally* 62 Fed. Reg. 24,588. According to the Final Rule, "[d]ue to concerns over declining population status, directed harvest of coho salmon has been eliminated since 1994." *Id.* at 24,604.

28 Although it is difficult to ascertain the position of the Klamath River as it relates to the Hoopa Valley reservation in the pertinent maps in the record, e.g., J.A. 3182, the amicus brief of the Hoopa Valley Tribe asserts that the Klamath River flows through the Hoopa Valley reservation. Amicus Br. of Hoopa Valley Tribe Supporting Defendants-Appellees and Affirmance at 1. Appellants do not state otherwise.

29 Appellants argue that "[t]he Court of Federal Claims ... made no finding to support a conclusion that the amount of water Reclamation released to maintain in-stream flows was necessary to fulfill the salmon-fishing rights of the Hoopa and Yurok Tribes." Reply Br. 3. However, as noted above, the court based its conclusion on the reasoning laid out by the NMFS Biological Opinion, which indicated that a reasonable and prudent alternative was to operate the Project in a manner that provided certain levels of minimum water releases into the Klamath River between April and September of 2001 that, in NMFS's judgment, would be "sufficient to avoid jeopardizing the species." J.A. 2997–99. We see no clear error in this factual determination.

30 In support of their argument that parties whose water rights are junior to theirs should have been curtailed first, appellants point us to websites for executing water rights queries directed to Oregon's Water Resource Department and to the California State Water Resource Control Board. Appellants' Br. 34 nn.131 & 132. A user selecting the relevant time period for the Klamath Basin watersheds on these websites is presented with lists of over a thousand entities claiming water rights. Given that there are hundreds of plaintiffs in this case, to determine (1) which entities were junior to which appellants, and (2) the basis for those entities' junior status, is beyond the purview of this court, particularly when it is not clear from the record that this information was before the Court of Federal Claims. *See* *Pullman-Standard v. Swint*, 456 U.S. 273, 291–92, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) ("[A] Court of Appeals should not ... resolve[ ] in the first instance [a] factual dispute which [was not] considered by the District Court.") (citing *DeMarco v. United States*, 415 U.S. 449, 450 n.*, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974)).

Further, given the ongoing, unfinished status of the Klamath Adjudication in 2001, we see no reason for the Bureau to have curtailed junior users' water before curtailing appellants' water, particularly when it is not evident that doing so would have been sufficient to satisfy the Tribes' reserved water rights.

31 In addition, in view of our disposition of the case, it is not necessary for us to address appellees' argument that the Court of Federal Claims erred in employing a physical, instead of a regulatory, taking analysis. We therefore express no view on the issue.

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KLAMATH IRRIGATION DISTRICT
6640 K.I.D. Lane
Klamath Falls, OR 97603
Phone: (541)882-6661; Fax (541)882-4004

KLAMATH DRAINAGE DISTRICT

KWUA Klamath Water Users Association
Phone (541) 883-6100 Fax (541) 883-8893 –
2312 South Sixth Street, Suite A
Klamath Falls, OR 97601

TID
P.O. Box 699
2717 Havlina Road
Tulelake, CA 96134
Phone: 530-667-2249
Fax: 530-667-4228
Email: tid@cot.net

SHASTA VIEW IRRIGATION DISTRICT
P.O. Box 40
Malin, OR 97632
Phone: (541) 591-7442

MALIN IRRIGATION DISTRICT
P.O. Box 355
Malin, OR 97632
Phone: (541) 591-7442

VAN BRIMMER DITCH COMPANY
620 Main Street, Suite 200
Klamath Falls, OR 97601
Phone: (541) 882-6331

July 16, 2020

Via Electronic Mail Only

Honorable Daniel Jorjani
Solicitor, U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
daniel.jorjani@sol.doi.gov

RE: Klamath Project: Request for Solicitor's Opinion

Dear Mr. Jorjani:

As public agency districts who operate Klamath Project (Project) works and deliver Upper Klamath Lake and Klamath River water to the vast majority of all Project land reliant on that water, and the trade organization for such parties, we respectfully request that your office complete an opinion providing advice on the obligations and authorities of the United States Bureau of Reclamation (Reclamation) at the Klamath Project, specifically in regard to section 7(a)(2) of the Endangered Species Act (ESA), section 8 of the Reclamation Act, applicable contracts, and Reclamation's trust responsibilities. Such an opinion will require revisiting and updating a 1995 Regional Solicitor's Memorandum, which was supplemented by a 1997 Regional Solicitors' Memorandum that responded to an analysis by the Oregon Department of Justice.

Relevant developments since the time of the two Regional Solicitors' memoranda include:

- The decision of the United States Supreme Court in *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007) (*Home Builders*), and conforming and consistent decisions of lower courts.
- The state of Oregon's adoption of its Findings of Fact and Order of Determination in the Klamath River Basin Adjudication, as modified in the Amended and Corrected Findings of Fact and Order of Determination (ACFFOD).
- The decision of the United States Supreme Court in *United States* v. *Jicarilla Apache Nation,* 564 U.S. 162 (2011) (*Jicarilla Apache Nation)*, and consistent or conforming decisions of lower courts, including a federal district court decision agreeing with Reclamation's characterization of its trust responsibilities in the Klamath Basin.

We submit that this analysis must include consideration of the authorized purpose or purposes of the Project, the nature of water rights associated with the Project including both storage and use rights, the activities that are and are not discretionary actions, the relative roles of Reclamation and consulting agencies in characterizing and evaluating effects of a proposed action, and any other responsibilities that affect Project operations. It is the water users' position that Reclamation does not have legal authority or discretion in the Klamath Basin to operate the Project, or direct the operation of the Project, for the benefit of fish species over irrigation uses.

The last several years of Klamath Project operations have been extremely challenging and damaging for our communities. We believe that it is critically important to give attention to outdated assumptions or understandings of Reclamation's authority and obligations. We understand that the results of this analysis cannot be predicted, but we believe it is essential.

Legal authority supporting this policy change is outlined in Attachment A. We also request that we and counsel be provided with an opportunity to discuss these legal and operational concepts with your team as the work proceeds.

Finally, we recognize that the issues raised here have significant implications for Project operations. To the extent there is flexibility in Project operations consistent with the application of all of the principles discussed in the attached analysis, we will support working with Reclamation and all stakeholders to identify the optimum management for all affected resources.

Sincerely,[1]

/s/ Tricia Hill
Tricia Hill, President
KLAMATH WATER USERS ASSOCIATION

/s/ Jason Flowers
Jason Flowers, President
KLAMATH DRAINAGE DISTRICT

/s/ Ty Kliewer
Ty Kliewer, President
KLAMATH IRRIGATION DISTRICT

/s/ Ed Stastny
Ed Stastny, President
MALIN IRRIGATION DISTRICT

[1] Signatures as authorized.

/s/ Gary Derry
Gary Derry, President
SHASTA VIEW IRRIGATION DISTRICT

/s/ John Crawford
John Crawford, President
TULELAKE IRRIGATION DISTRICT

/s/ Gary Orem
Gary Orem, President
VAN BRIMMER DITCH COMPANY

Encs.
cc: Greg Zerzan (Greg.Zerzan@sol.doi.gov)
Lance Wenger (Lance.Wenger@sol.doi.gov)
Lynn Peterson (Lynn.Peterson@sol.doi.gov)
Paul Simmons (psimmons@somachlaw.com)
Nathan Rietmann (nathan@rietmannlaw.com)
Reagan Desmond (rlbd@clydesnow.com)
Nathan Ratliff (nathan@parksandratliff.com)
PSS:cr

ATTACHMENT A

ANALYSIS IN SUPPORT OF REQUEST FOR SOLICITOR'S OPINION: KLAMATH PROJECT

BACKGROUND

The Klamath Basin occupies about 10 million acres in south-central Oregon and northern California. In the uppermost watershed, various rain and snowmelt-fed streams flow into Upper Klamath Lake (UKL). UKL is a naturally-occurring lake in south-central Oregon. It lies to the west and south of the former reservation of the Klamath Tribes. Beginning in the latter nineteenth century, areas on the northern and western periphery of the lake were reclaimed for agricultural use by diking. Similarly, upland areas on the former reservation were made available for farming and ranching. In all, there are about 200,000 acres of ranches and farms upstream or immediately adjacent to UKL. These agricultural lands are not part of the Project.

The Project area lies to the south and east of UKL. The Project is a reclamation project authorized in 1905, under the Reclamation Act of 1902, 32 Stat. 388, codified as 43 U.S.C. § 372 *et seq*. In general, at the Project, Reclamation constructed irrigation works and contracted with individuals or irrigation districts who agreed to repay allocated construction costs and reimburse ongoing operation costs; in exchange, these entities receive water delivered through Project facilities or facilities they themselves constructed. The Project irrigated land area is about 200,000 acres, roughly equal to what it was 80 years ago, with most of that acreage receiving water diverted from the Klamath River system. Water is diverted from the Klamath River system at A Canal on the southeast end of UKL or locations just downstream of Link River Dam. *Id*. The water taken includes both "live" flow (i.e., water at the rate flowing into or through UKL at a specific time) and stored water that has been collected behind Link River Dam for subsequent use. Water released from UKL also flows down the Klamath River and provides flows for fisheries including coho salmon, a species listed as threatened under the ESA.

The Project is highly efficient in its water use. The total volume of water diverted for irrigation in 2016, a year of good basin-wide water supply, was approximately 362,000 acre-feet. The Project's irrigated lands produce about $400 million in annual economic value for family farms and rural communities in the region. Water diversions through the Project and district facilities are also the water source for two National Wildlife Refuges: the Tule Lake National Wildlife Refuge (TLNWR) and the Lower Klamath National Wildlife Refuge (LKNWR).

Link River Dam, at the outlet of UKL, provides operable water storage and controlled release of water to the Klamath River. Link River Dam was constructed in the early 1920s under a contract between Reclamation and the California-Oregon Power Company (now PacifiCorp). Installation of the dam involved removal or lowering of the reef at UKL's outlet, and construction of the dam, which allows for both raising and lowering of the lake level. The active storage volume in UKL is on the order of one-half million acre-feet.

The United States holds fishing rights in trust for three federally-recognized tribes in the Klamath Basin. The Yurok and Hoopa Valley Tribes' reservations are in California, 200 miles downriver of the Klamath Project. Their reservations were established by executive orders in the nineteenth century and the reserved land portioned into distinct reservations in 1988. The Yurok reservation straddles the lowermost 44 miles of the Klamath River. The Hoopa Valley reservation is located on and is bisected by the Trinity River, a tributary of the Klamath River, and touches the Klamath River. These California tribes have federally-protected rights to fish on their reservations. *See Parravano v. Masten*, 70 F.3d 539 (9th Cir. 1995). A 1995 Regional Solicitor memorandum (see below) opined that the Yurok and Hoopa Valley Tribes have water rights to support their on-reservation fishery, with a priority of not later than 1891. Neither the United States nor either Tribe has ever sought an adjudicatory determination of the existence, source, location, quantity, or priority date of any such rights.

The former Klamath Indian Reservation lays upstream of UKL and the Project in Oregon. In 1864, the Klamath Tribes and the United States entered into a treaty that reserved to the Klamath Tribes the right to hunt and fish on the reservation. The reservation was terminated in 1954, but the Klamath Tribes' rights to hunt and fish continue. The determination of water rights associated with hunting and fishing on the Klamath Tribes' former reservation has been the subject of extensive litigation. In *United States v. Adair*, 723 F.2d 1394, 1415 (9th Cir. 1983), the United States and Klamath Tribes sued landowners within the former reservation lands seeking a determination of water rights within the former reservation boundary. *Id.* at 1397. The Ninth Circuit held that it was proper for the federal court to adjudicate the existence and priority of tribal rights, and held that water rights with a priority of "time immemorial" existed sufficient to support hunting and fishing in the former reservation. *Id.* at 1414. However, *Adair* specifically left the quantification of those rights to Oregon's ongoing adjudication proceeding. *Id.* at 1407.

All of the claims filed by the Klamath Tribes were denied in the ACFFOD, with rights for tribal purposes being recognized only in the name of the United States. The Adjudicator approved the United States' claim for water levels in UKL but, under the ACFFOD, until the judicial phase of the Klamath Basin Adjudication is complete, that right may not be used as a basis for a senior priority call against any water rights that have priority earlier than August 1908.[2] Meanwhile, the UKL claim itself is still subject to contest in the state court proceeding. The Adjudicator denied tribal claims for instream flow for tribal fisheries in the Klamath River[3] and tributaries outside the former Klamath Reservation, but approved tribal claims for flows in tributaries to UKL that are on the former reservation, with a priority of time immemorial.

On July 25, 1995, the Regional Solicitor for the Pacific Southwest Region issued a memorandum to the Regional Director for the Mid-Pacific Region, titled "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)." This memorandum has been generally considered to provide the legal framework for Project operations. In a letter to the

[2] https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_04938.PDF, 4941-4944.

[3] Of note, the Bureau of Indian Affairs and Klamath Tribes' claims for flows in the Klamath River are limited to "natural" flow and do not include storage releases from UKL.

Oregon Water Resources Director (dated March 18, 1996), the Oregon Department of Justice disagreed with the 1995 Regional Solicitor memorandum. Then, an additional Regional Solicitor memorandum was issued in response to the Oregon Department of Justice's disagreements with the July 1995 memorandum. That second memorandum is titled "Memorandum from Regional Solicitors to Regional Directors, Oregon Assistant Attorney General's March 18, 1996 Letter Regarding Klamath Basin Water Rights Adjudication and Management of the Klamath Project" (Jan. 9, 1997). The three documents are enclosed with the letter to which this memorandum is attached.

RECLAMATION DISCRETION AND AUTHORITY

Each of the districts here requesting a Solicitor's Opinion has obligations under state law to deliver water to our patrons who pay the costs of operation and maintenance of federal- and district-owned facilities. We have in the past, and this year, been directed not to fulfill these obligations in order that diversions not exceed quantities that Reclamation considers to be available. We are unaware of any discretion or authority for Reclamation to issue that direction, or to otherwise curtail diversion for Project irrigation.

A common expression, based largely on the 1995 memorandum and actions that it drove, is that Reclamation's highest legal obligation is to provide sufficient water for ESA-listed species. We do not believe that legal advice was accurate in 1995, but in any event, subsequent court decisions have made clear that the previous memorandum cannot be relied on. The law has evolved, and federal courts have made clear that section 7(a)(2) of the ESA applies only to *discretionary* actions, and section 7(a)(2) is not a source of federal power or authority to take actions that are not already authorized. *Home Builders*, 551 U.S. at 669; *see also Cty. 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."); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (*Sierra Club*) ("we conclude that where, as here, the federal agency lacks the discretion to influence the private action, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species"); *Platte River Whooping Crane Critical Habitat Maint. Tr. v. FERC*, 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).

The Project is authorized for irrigation under the 1902 Reclamation Act. This is different from many other Reclamation projects where project purposes include non-irrigation purposes such as fish and wildlife, recreation, or even protection of threatened and endangered species. *See, e.g.*, Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, tit. XXXIV, 106 Stat. 4706 (1992). In the allocation of reimbursement of costs of operation and maintenance of the Project, with the exception of limited, non-reimbursable flood control, Reclamation allocates 100 percent of project costs to the single, irrigation purpose, and the districts and water users pay those costs. Yet the current and planned operation is dominated by a different, non-authorized purpose: threatened and endangered species protection. Earlier this year, and consistent with the fact that section 7(a)(2) of the

ESA does not confer power on federal agencies, the United States Court of Appeals for the Tenth Circuit ruled that there is no obligation for an agency to engage in section 7 consultation with respect to operation of a water project consistent with its exclusively authorized purposes. *WildEarth Guardians v. United States Army Corps of Eng'rs*, 947 F.3d 635 (10th Cir. 2020) (*Corps of Eng'rs*). That principle applies equally to the Project.

The districts have perpetual contracts with the United States, all executed before enactment of section 7(a)(s) of the ESA and any listings of species under the ESA. In general, the contracts provide that the districts will operate and maintain both Project and district works and use these works to deliver water to water right holders in the districts, and repay and reimburse the United States for specified costs. With the exception of major dams, responsibility for the operation of federally-owned diversion and delivery works has been transferred to districts under perpetual contracts. Other significant works were constructed, and are owned and operated, by districts.

In the recent past, there has been a significant amount of litigation concerning the applicability of ESA section 7 requirements in regard to executed contracts and renewals of contracts. As the United States successfully argued recently, a plaintiff contending that Reclamation has a duty to consult must show that "Reclamation retained . . . discretion in the executed contracts . . . that would permit revisions to executed contracts to address the needs of listed species." Federal Defendants' Supplemental Brief in Support of Motion to Dismiss Plaintiffs' Fifth and Sixth Claims, ECF No. 1052 at 4:22-24, *Nat. Res. Def. Council v. Jewell*, No. 1:05-cv-01207 DAD-EPG (E.D. Cal., filed Jan. 9, 2017) (citation omitted) (emphasis in original); see also *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1080 (9th Cir. 2001) (in order for the consultation requirement to apply, the agency must possess the ability to implement measures that inure to the benefit of the protected species); *Sierra Club,* 65 F.3d at 1510 (the ESA "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act" (emphasis in original)).

The United States District Court for the Eastern District of California has agreed with the United States' explanation of current law:

> *EPIC*'s discussion of *Houston* strongly suggests that in the context of a previously-executed contract, the type of discretion *EPIC* demands is discretion to modify that contract. Put another way, the re-consultation regulation requires as a pre-requisite "discretionary Federal involvement or control over the action." 50 C.F.R. § 402.16. In light of *EPIC's* discussion of Houston, the "action" in the present circumstances is contract execution. *Once executed, Reclamation would only retain discretion over contract execution if the contract in question provided Reclamation authority to modify the contractual arrangement*.

Nat. Res. Def. Council v. Norton, 236 F. Supp. 3d 1198, 1217 (E.D. Cal. 2017) (*Norton*) (second emphasis added).

Accordingly, it is necessary to examine each specific contract in detail to determine whether Reclamation retains authority to unilaterally modify each of the contracts to benefit listed species. *See also* Memorandum Decision and Order Re Motions to Dismiss, *Nat. Res. Def. Council v. Norton*, No. 1:05-cv-01207, 2016 U.S. Dist. LEXIS 145788, at *59-60 (E.D. Cal. Oct. 20, 2016) (conducting analysis of various contract terms and agreeing with federal defendants that " 'while Reclamation retains some limited discretionary control or involvement in implementing the terms of the SRS Contracts, that level of involvement is not sufficient to trigger re-initiation because in the end, Reclamation ultimately cannot unilaterally alter the existing terms of the contracts in a manner that will inure to the benefit of [the] species.' FD MTD at 9" (alteration in original).).

There are numerous contracts between Project water users and the United States. One of the most significant is the 1954 contract between Klamath Irrigation District (KID) and the United States, No. 14-06-200-3784. Under that contract, KID assumed responsibility for the operation and maintenance of the Main Division of the Project (A Canal and associated systems) and additionally agreed to perform the obligations of the United States for delivery of water to areas not within KID. It states:

> Delivery of Water Supply and Assumption by District of Outstanding Contract Obligations of the United States
>
> 13. (a) The District shall take the water supply for the lands within the limits of the District, as the same are now or hereafter defined, to be served by or through the transferred works, at the headworks of the main canal and other delivery locations now in existence or that may be constructed in the future, and shall distribute the same to the water users entitled thereto.
>
> (b) The District hereby assumes and agrees to carry out, during the term of this contract, to the satisfaction of the Secretary, all the obligations imposed upon the United States by the contracts listed on Exhibit "A," or any amendment or supplements thereto . . . for the carriage and delivery of water, in force as of the effective date of this agreement, insofar as said contracts relate to the delivery and carriage of irrigation and drainage water through the transferred works.

Contract No. 14-06-200-3784, Amendatory Contract Between the United States of America and the Klamath Irrigation District, art. 13 (Nov. 29, 1954).

There is no language in this contract conferring authority on the United States or giving it broad discretion to modify the contract for the benefit of listed species or to order KID to do so. Although there is variability among the remaining permanent contracts, the same conclusion applies universally.[4]

[4] Most of the permanent contracts include "shortage" clauses, which state, in specified circumstances, the United States will not be liable for damages caused by water shortage. A notable exception is the 1909 contract for

As another example, the 1948 contract between Shasta View Irrigation District (SVID) and the United States (No. IIr-1531) provides:

> Water Supply for District
>
> 13. The United States will impound, store or otherwise provide water for the irrigation of lands in the District and deliver same to the District through the Adams or "D" Canal of the Klamath Project at turnouts located on the north side of said canal.[5]

Contract IIr-1531, Amendatory Repayment Contract Between the United States and Shasta View Irrigation District Under the Reclamation Project Act of 1939, art. 13 (Aug. 20, 1948).

The preceding discussion of discretionary and non-discretionary actions pertains to all aspects of the operation of the Project for irrigation use. There is a critical, more narrow issue: whether, even if activities associated with Project operations are subject to section 7(a)(2) of the ESA, section 7(a)(2) authorizes or requires the use or release of stored water for the benefit of listed species. It does not.

The Project is authorized for the purposes of the Reclamation Act, which is limited to irrigation only, and the Reclamation Act does not include fish or wildlife or listed species as an authorized purpose. Under section 8 of the Reclamation Act, Reclamation must comply with state water law unless there is a clear congressional directive to the contrary. *California v. United States*, 438 U.S. 645, 672 (1978). In the ACFFOD, Oregon confirmed the United States' claim of a right to store water in UKL, and Project water users' claims to stored water.[6] The only Project water rights claimed by and recognized for the United States were for Reclamation Act purposes. The rights of use are owned by beneficial users, and the only relevant contracts relate to use of stored water for irrigation. Under Oregon law, the ACFFOD is binding and enforceable until such time as there is a decree. Or. Rev. Stat. 539.130(3), 539.170. Under the ACFFOD, the only authorized use of stored water is irrigation. KBA_ACFFOD_07117. Under Oregon law, stored water in UKL is a separate source of water that cannot be called by any senior water rights holder in the Klamath River. ESA section 7(a)(2) does not change that and does not confer powers on Reclamation that it does not already have, and under state law, Reclamation does not have the power to reauthorize the use of stored water for environmental purposes.

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delivery of 50 cubic feet per second of water to the Van Brimmer Ditch Company in perpetuity, which has no shortage provision. Regardless, the federal courts have concluded that clauses of this sort are not a *source of authority* that can create a water shortage. *Norton*, 236 F. Supp. 3d at 1217-18; *Jewell*, 749 F.3d at 784-85. Additionally, paragraph 26 of KID's contract, as one example, specifically states that "the United States will assume all reasonable means to guard against such shortages."

[5] KID has assumed the responsibility for delivery of water to SVID's pumps on the D Canal.

[6] *See* Corrected Partial Order of Determination for Water Right Claims (OAH Case 003), Amended and Corrected Findings of Fact and Order of Determination for the Klamath Basin General Stream Adjudication (Feb. 28, 2014) at KBA_ACFFOD_07082-07084.

The currently-applicable ESA for consultation contemplates storing, retaining, and releasing stored water downstream to California to benefit listed species. It further contemplates that such action is necessary to ensure compliance with the substantive obligation of section 7(a)(2) of the ESA. But section 7(a)(2) does not confer any legal powers on federal agencies that they do not already have; it is merely a limitation on the exercise of existing powers. *Home Builders*, 551 U.S. at 668-69; *see NRDC v. Jewell*, 749 F.3d 776, 785 (9th Cir. 2014) (*Jewell*). Similarly, any "reasonable and prudent alternatives" identified in a biological opinion must be within Reclamation's existing legal authority. 50 C.F.R. § 402.01 (2019)[7]; *Delta Smelt Consol. Cases v. Salazar*, 666 F. Supp. 2d 1137, 1143 (E.D. Cal. 2009). We believe that, because Reclamation does not have authority to store, retain, or release water for listed species, the ESA cannot require it to do so. The contracts, the Project authorization, and the purposes of use for Reclamation's state water rights do not provide Reclamation with discretion to store water and release water for ESA purposes. *See also Corps of Eng'rs*, 947 F.3d at 641 ("[b]ecause the Corps lacks discretion to operate the projects outside of flood control purposes, requiring consultation under these circumstances would effectively add another statutory requirement").

In addition, even if section 7(a)(2) of the ESA applied to the storage and use of water for irrigation, it would be necessary to use a proper analytical approach to determine whether that action causes jeopardy to listed species or permanent destruction or adverse modification of designated critical habitat. To evaluate that question, one must determine the "effects" of the action. The effects of the action are the comparison of the anticipated post-action conduct to the environmental baseline. As clarified in the 2019 amendments to the regulations implementing the ESA, the environmental baseline "refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action." 50 C.F.R. § 402.02. It is our understanding that, under the environmental baseline, UKL elevations and Klamath River flows would not be above those that would occur if Link River Dam were simply opened to permit run-of-the river operations. Yet during April-September of 2020, Reclamation will have released over 150,000 acre-feet more to the Klamath River than the total inflow to UKL, thus artificially augmenting river flows with stored irrigation water in a manner that ESA section 7(a)(2) does not require.

The dedication of stored water to unauthorized purposes is a long-standing concern of water users in the Project. In the recent past, districts acting from desperation have, in various forums, sought attention to this issue that Reclamation has refused to afford. Now is the time.

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[7] Reasonable and prudent alternatives (RPAs) refer to alternative actions identified during formal consultation that:

(1) can be implemented in a manner consistent with the intended purpose of the action;

(2) can be implemented consistent with the scope of the federal agency's legal authority and jurisdiction;

(3) are economically and technologically feasible; and

(4) 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 C.F.R. § 402.02 (2020).

TRUST RESPONSIBILITIES

It is also appropriate to address the relationship of tribal trust responsibilities to the operation of the Project. Since the time of the above-referenced Regional Solicitor memoranda, this issue has been characterized by ambiguity and inconsistency. We believe Reclamation must heed current understandings of that responsibility and that it should conform to positions that it has taken in other basins.

One frequently-referenced case is referred to as *Klamath Basin Water Users Protective Association v. Patterson*, 204 F.3d 1206 (9th Cir. 2000) (*Patterson*), which arose soon after the 1997 Solicitor memorandum discussed above. In *Patterson*, the issue was whether irrigation-related parties were intended third party beneficiaries of a contract between Reclamation and a power company. *Patterson*, 204 F.3d at 1209. The Ninth Circuit affirmed the ruling of the district court, and held that the irrigators were not third party beneficiaries. *Id*. The Ninth Circuit elected to go beyond the contract beneficiary issue, however, and provided incautious, and objectively incorrect, *dicta* concerning various issues. As relevant here, the *Patterson* court referred to *Adair* for the proposition that "Klamath Basin Tribes" in Oregon and California hold rights under treaties with priority of time immemorial. *Patterson*, 204 F.2d at 1214. Respectfully, this statement is not correct. The *Adair* case had nothing to do with the Yurok or Hoopa Valley Tribes (neither of whom is party to a treaty with the United States). *Adair* merely held that there are water rights to support hunting and fishing on the Klamath Tribes' former reservation, in Oregon, which lies upstream of UKL and upstream of the Project. *Adair*, 723 F.2d at 1408-12, n.15. The *Patterson* court also referred to an obligation to "*divert the water and resources* needed to fulfill the Tribes' rights." *Patterson*, 204 F.2d at 1214 (emphasis added). The reference to "diverting water and resources" is uncertain in that the interest asserted by the tribes relates to instream water for fish, and such water is not "diverted." In any event, the *Patterson* case ultimately provides no relevant holding or authority.

Notably, soon after the *Patterson dicta*, Reclamation argued, successfully that there is no independent trust obligation relative to allocation of water. In the late summer of 2002, there was significant mortality of adult salmon, mostly Chinook, near the mouth of the Klamath River. Fish migrated into the river but then crowded and did not move upstream to spawning areas. The fish were mostly Trinity River fish and died from a disease known as Ich. *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, No. C 02-02006 SBA, 2005 U.S. Dist. LEXIS 36035 at *8 (N.D. Cal. Mar. 7, 2005) (*PCFFA*). Some assigned blame to the Project for this event that occurred 200 miles downstream, arguing that there should have been greater amounts of water released from the Project. The Yurok Tribe filed an amended complaint in a then-existing ESA case, asserting that the government has an independent trust obligation to maintain flows for various fish species to protect the Yurok Tribe's fishing rights. The Tribe sought not only a declaration that Reclamation's operation of the Project violated the Tribe's fishing right, but also a mandatory injunction ordering Reclamation to limit irrigation water deliveries from the Project in order to implement an interim flow regime in the Klamath River below Iron Gate Dam that would protect

anadromous fish pending Reclamation's compliance with its obligations under the ESA, and with its duty to protect the Yurok Tribe's fishing and water rights.

The government moved successfully to dismiss. It explained:

> While the Yurok Tribe repeatedly invokes its federal reserved fishing rights, nowhere in its Complaint, the Stipulation, or Summary Judgment Brief does it identify a provision of positive law that imposes a specific duty on BOR to maintain particular flows in the Klamath River for the protection of non-ESA-listed fish and the Yurok Tribe's fishing rights.

Federal Defendant's Notice of Motion and Motion to Dismiss Yurok Tribe's Fourth Claim for Relief; Memorandum of Point and Authorities in Support of Motion to Dismiss Yurok Tribe's Fourth Claim for Relief, ECF No. 285 at 7, *Pac. Coast Fed'n of Fisherman's Ass'ns, v. U.S. Bureau of Reclamation,* No. C 02-02006 SBA (N.D. Cal., filed Aug. 4, 2004). Federal Defendants' briefing on the motion to dismiss are enclosed with the letter to which this memorandum is attached.

The court agreed with the government that, "[i]n the absence of a specific [statutory] duty, the government's general trust responsibilities to the Tribe are discharged by compliance with generally applicable regulations and statutes." *PCFFA*, 2005 U.S. Dist. LEXIS 36035 at *41. It found that "[t]he absence of a statute or other source of positive law defining the federal government's obligations is fatal to the Tribe's argument that BOR has specifically enforceable fiduciary obligations, akin to the standards applicable to private fiduciaries, with respect to the Tribe's fishing right," and granted the motion to dismiss. *Id.* at *34.

As the Supreme Court has made clear, "the government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Jicarilla Apache Nation,* 564 U.S. at 177. And, there is neither statutory authority nor any independent trust power that authorizes the United States to quantify and administer water rights. *See PCFFA*, 2005 U.S. Dist. LEXIS 36035 at *41. This principle is frequently articulated by the United States when it defends the United States against trust assertions from tribes. *See Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (*Hopi*). *Hopi* explains that "[t]he Supreme Court found in *Mitchell I* that such 'bare' trust language is not sufficient to establish a fiduciary duty to manage resources on the land. The same is true of the bare trust language here: it does not establish any particular fiduciary duty to manage water resources on the land." *Hopi*, 782 F.3d at 669 (citation omitted). More recently, the Navajo Nation's attempts to broaden a tribal trust claims in a third amended complaint against the Department of the Interior were rejected by a district court because the Nation's water rights had not been adjudicated. Absent an adjudicated right, the court would not determine if a breach of trust had occurred. *Nation v. U.S. DOI*, No. CV-03-00507-PCT-GMS, 2018 U.S. Dist. LEXIS 208456 (D. Ariz. Dec. 11, 2018).

There is nothing in last year's *Baley* decision by the United States Court of Appeals for the Federal Circuit that points to a different conclusion. In fact, that court expressly

declined to address whether there is an independent duty to operate the Project based on an agency assessment of water right claims. *See Baley* v. *United States*, 942 F.3d 1312, 1341 (Fed. Cir. 2019) ("Whether the Tribes would have had a separate cause of action against the United States had the Bureau not complied with the ESA is not before us."). The United States' consistent, correct position, required by *Jicarilla* and other authorities, is that it does not. As stated by the Ninth Circuit, "although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998).

United States Department of the Interior

OFFICE OF THE SOLICITOR
Pacific Southwest Region
2800 Cottage Way
Room E-2753
Sacramento, California 95825-1890

IN REPLY REFER TO:

JUL 25 1995

TO: Regional Director, Bureau of Reclamation, Mid-Pacific Region

FROM: Regional Solicitor, Pacific Southwest 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)

This memorandum describes the general rights to the waters in the Klamath and Lost River drainages affected by the operation of the U.S. Bureau of Reclamation's (Reclamation) Klamath Irrigation Project located within the Upper Klamath and Lost River Basins in Oregon and California. In addition, the obligations of Reclamation to the holders of these rights are discussed. The rights that are treated in this memorandum include those of the Klamath Project water users (those who hold contracts with the United States to receive water from the project), the Upper Klamath, Lower Klamath, Tule Lake, and Clear Lake National Wildlife Refuges (NWR) managed by the U.S. Fish and Wildlife Service (these refuges are located within the exterior boundaries of the Klamath Project), and the Klamath, Yurok, and Hoopa Tribes (they have treaty-based or federally reserved fishing and water rights that are or may be affected by project operations). None of the above water rights has been quantified.[1]

Rights

Klamath Project Water Users

The Klamath Project water users obtain their supply of water for irrigation purposes from the project facilities pursuant to various contracts with Reclamation entered into pursuant to the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 371 et seq., as amended and supplemented. The contracts are between Reclamation and a water district or Reclamation and an individual water user. These contracts provide, in general, that the water user is to receive enough water to satisfy the beneficial use for

[1] The existence and nature of the Klamath Tribes' reserved water rights for hunting, fishing, and gathering were declared in United States v. Adair, 723 F.2d 1394, 1412 (9th Cir.), cert. denied, 467 U.S. 1252 (1984).

the irrigation of a specified acreage. Certain of the contracts specify the beneficial use amount on a per acre basis.

The underlying water rights for the project, upon which the water supply stated in each of the contracts discussed above depends, were obtained by Reclamation, in accordance with state law, in 1905, when Reclamation filed a notice of intent to appropriate all of the available water in the Klamath River and Lost River and their tributaries in Oregon. Similar filings were made for the waters originating in California, within the Lost River and Clear Lake drainages.[2] Subsequent to these filings, Reclamation constructed project facilities through which water is delivered to the project water users. The project's 1905 water rights are junior to the reserved water rights of the tribes but senior to the reserved water rights of the refuges, as discussed below.

Federal law provides that Reclamation obtain water rights for its projects and administer its projects pursuant to state law relating to the control, appropriation, use or distribution of water used in irrigation, unless the state laws are inconsistent with express or clearly implied congressional directives. 43 U.S.C. § 383; California v. United States, 438 U.S. 645, 678 (1978); appeal on remand, 694 F.2d 117 (1982). The beneficial ownership of a project water right is in the water users who put the water to beneficial use. Nevada v. United States, 463 U.S. 110 (1983). Under law of most western states a water right is obtained through appropriation followed by application within a reasonable time to beneficial use. Nebraska v. Wyoming, 325 U.S. 589 (1945); Ickes v. Fox, 300 U.S. 82 (1937). Oregon law (as well as California law) is similar to the laws of most other western states in that actual application of the water to the land is required to perfect a water right for agricultural use.[3]

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[2] Oregon statutes concerning the appropriation of water before February 24, 1909, the effective date of the Oregon Water Rights Act of 1909, provided that the extent of the appropriation was determined by the actual capacity of the completed diversion structure, assuming that the requirement to post a notice of intent to appropriate together with application of water to beneficial use within a reasonable time had occurred. See In re Waters of the Tualatin River and its Tributaries, 366 P.2d 174 (Or. 1961). The laws for appropriation of water in California that were in effect in 1905 were similar to those in Oregon. Cal. Civil Code of 1872, §§ 1410-22 (Deering 1977). The effective date of the California Water Commission Act, which established California's current appropriation scheme, is December 19, 1914.

[3] See ORS §§ 539.010 et seq.; State ex rel. v. Hibbard, 570 P.2d 1190, 1194 (Or. Ct. App. 1977); Alexander v. Central Oregon Irrigation District, 528 P.2d 582 (Or. Ct. App. 1974), and Cal.

Oregon also recognizes that water for irrigation purposes is appurtenant to the land for which it is appropriated and applied, but is not inseparable from the land. In re Deschutes River and Tributaries, 286 P. 563 (Or. 1930); see also United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 858 (9th Cir.), cert. denied, 464 U.S. 863 (1983). Federal law concerning Reclamation projects also provides that the use of water acquired under the Act "shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and the limit of the right." 43 U.S.C. § 372. Beneficial use is determined in accordance with state law to the extent not inconsistent with congressional directives. See Alpine Land & Reservoir Co., 697 F.2d at 853-854; see also California v. United States, 438 U.S. at 678.

Wildlife Refuges

There are two National Wildlife Refuges that are particularly dependent on project operations: Lower Klamath and Tule Lake NWRs.[4] The Lower Klamath NWR consists of 51,713 acres which straddle the Oregon-California border. This NWR was created by Executive Order No. 924 (Aug. 8, 1908) "as a preserve and breeding ground for native birds." The boundaries of the Lower Klamath NWR were altered by Executive Order No. 2200 (May 14, 1915). The Tule Lake NWR is a 39,990 acre marsh area located in northern California just south of the Oregon border. Tule Lake was created by Executive Order No. 4975 (Oct. 4, 1928) also "as a refuge and breeding ground for birds."[5]

Each refuge has a federal reserved water right to the amount of water, unappropriated at the time of creation of the refuge, necessary to fulfill the primary purposes of the refuge. See United States v. New Mexico, 438 U.S. 696 (1978). The priority date for the reserved water right of each refuge is the date of the executive order creating that refuge. See Cappaert v. United

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Water Code § 1240; Joerger v. Pacific Gas & Elec. Co., 276 P. 1017 (Cal. 1929); Madera Irr. Dist. v. All Persons, 306 P.2d 886 (Cal. 1957).

[4] There are two other National Wildlife Refuges within the exterior boundaries of the project that are also dependent on project operations. The Upper Klamath NWR was created in 1928 and is located at the northern portion of Upper Klamath Lake. It encompasses 14,965 acres of marsh and open water. The Clear Lake NWR was created in 1911 and encompasses 20,000 acres of water surface and upland area within the Clear Lake drainage in the Lost River Basin.

[5] The interrelation of the Klamath Project irrigation uses and the NWR purposes are further delineated in the Kuchel Act, 16 U.S.C. §§ 695k-695r.

States, 426 U.S. 128, 138 (1976). In addition, certain lands within the Lower Klamath and Tule Lake refuges that are irrigated have a priority date of 1905 based on the Klamath Project water rights. Finally, the refuges receive significant quantities of return flows and other project waters which, although initially used for irrigation purposes, are beneficially reused for refuge purposes.

Klamath Indian Tribes

The Klamath Indian Tribes have treaty-based rights. The exercise of certain of these rights are affected by project operations. The Tribes' primary interest is in the operation of Upper Klamath Lake because it serves as habitat for fish protected by their treaty rights, including two endangered species of fish, the Lost River and shortnose suckers. These fish are a traditional food source for the Tribes. Changing water elevation in the lake and recurring water quality problems impact the suckers.

A treaty entered into in 1864 reserves to the Klamath Tribes fishing, hunting, and gathering rights on lands that were formerly part of the original Klamath Indian Reservation in Oregon.[6] The reservation abutted Upper Klamath Lake and included several of its tributaries, notably the Williamson River. Treaty Between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 107. The treaty reserves to the Tribes a federal Indian reserved water right to support their hunting, fishing, and gathering rights.[7] United States v. Adair, 723 F.2d 1394 (9th Cir.), cert. denied, 444 U.S. 1252 (1984). The Tribes' water

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[6] In 1954, the Klamath Indian Reservation in Oregon was terminated pursuant to the Klamath Termination Act. Act of Aug. 13, 1954, c. 732, § 1, 68 Stat. 718 (codified at 25 U.S.C. §§ 564-564x). Under this Act, reservation lands were disposed to private parties, individual Indians, the Forest Service and the Fish and Wildlife Service, but the Tribes' hunting, fishing, and gathering rights, and supporting water rights, were left intact. United States v. Adair, 723 F.2d 1394, 1412 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); Kimball v. Callahan, 590 F.2d 768, 775 (9th Cir.), cert. denied, 444 U.S. 826 (1979); Kimball v. Callahan, 493 F.2d 564, 568-69 (9th Cir.), cert. denied, 419 U.S. 1019 (1974). The Klamath Tribes were later restored as a federally recognized tribe under the Klamath Restoration Act of 1986. Pub. L. No. 99-398, 100 Stat. 849.

[7] The Tribes' water right is not dependent on state law, but rather is controlled by federal law. However, in an adjudication of water rights pursuant to the McCarran Amendment, 43 U.S.C. § 666, this federal right would be subject to quantification by a state court. Adair, 723 F.2d at 1411 n.19.

Tribes' water right includes "the right to prevent other appropriators from depleting the streams[']s waters below a protected level in any area where the non-consumptive right applies." Adair, 723 F.2d at 1411; accord Joint Board of Control v. United States, 832 F.2d 1127, 1131-32 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988); Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032, 1033 (9th Cir. 1985), cert. denied, 474 U.S. 1032 (1985).

The Tribes' water right includes the right to certain conditions of water quality and flow to support all life stages of fish. See United States v. Anderson, 591 F.Supp. 1, 5-6 (E.D. Wash. 1982), aff'd in part & rev'd in part on other grounds, 736 F.2d 1358 (9th Cir. 1984); see also United States v. Gila Valley Irrigation Dist., 804 F.Supp. 1, 7 (D. Ariz. 1992), aff'd in part & vacated in part, 31 F.3d 1428 (9th Cir. 1994), on remand Globe Equity No. 59, Phase IV, slip op. (April 14, 1995). The Tribes' water right attaches to bodies of water located within the original boundaries of the Klamath Indian Reservation. The Tribes' fishing right also supports a water right in off-reservation areas to the extent necessary to support a tribal fishery within the original reservation.[8] Cf. Arizona v. California, 373 U.S. 546, 595 n.97, 600, decree entered, 376 U.S. 340, 344 (1964) (awarding reserved water right in off-reservation river). The standard to be applied in determining the quantity of water secured by this right has not been determined as of the date of this memorandum. The Tribes' water right is aboriginal in origin and thus has a priority date of time immemorial. Adair, 723 F.2d at 1415.

Yurok and Hoopa Valley Indian Tribes

The Yurok and Hoopa Valley Tribes have federal Indian reserved fishing rights to take anadromous fish within their reservations in California. Memorandum from the Solicitor to the Secretary, Fishing Rights of the Yurok and Hoopa Valley Tribes, M-36979 (Oct. 4, 1993) (Sol. Op.). These rights were secured to the Yurok and Hoopa Indians by a series of nineteenth century executive orders and confirmed to the Yurok and Hoopa Tribes by

[8] In the pending Snake River Basin Adjudication in Idaho, the United States has made claims for off-reservation instream flow water rights derived from Indian fishing rights to anadromous fish. The quantity of flow claimed is that amount required to provide adequate flows to maintain fisheries habitat in the stream reach on a monthly basis.

the 1988 Hoopa-Yurok Settlement Act (HYSA), 25 U.S.C. § 1300i et seq.[9]

In 1855, the President, by Executive Proclamation, established the Klamath Reservation in California.[10] I C. Kappler, Indian Affairs: Laws and Treaties 816-817 (1904). The Hoopa Valley Reservation was formally set aside for Indian purposes by executive order in 1876, and the reservation was extended by another executive order in 1891 to encompass the Klamath Reservation and the connecting strip of land in between.[11] Id. at 815; see People v. McCovey, 685 P.2d 687, 689 (Cal. 1984); see also Donnelly v. United States, 228 U.S. 243, 253-259 (1912); Blake v. Arnett, 663 F.2d 906, 911 (9th Cir. 1981); Esler v. Gill Net Number One, 54 Cal. Rptr. 568, 571-72 (1966). The HYSA partitioned the extended reservation into the present Hoopa Valley and Yurok Reservations and declared the assets of each reservation held in trust by the United States for the benefit of the respective Tribes. 25 U.S.C. § 1300i-1(b).

The Yurok and Hoopa Valley Tribes' fishing rights entitle them to take fish for ceremonial, subsistence, and commercial purposes. United States v. Eberhardt, 789 F.2d 1353, 1359 (9th Cir. 1986). Their fishing rights "include the right to harvest quantities of fish on their reservations sufficient to support a moderate standard of living." Sol. Op. at 3.

The executive orders setting aside what are now the Yurok and Hoopa Valley Reservations also reserved rights to an instream flow of water sufficient to protect the Tribes' rights to take fish within their reservations. See Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir.), cert. denied, 454 U.S. 1092 (1981); Anderson, 591 F.Supp. at 5-6. As with the Klamath Tribes, the Yurok and Hoopa Tribes' water rights include the right to prevent other appropriators from depleting the streams' waters below a protected level. See Joint Board of Control, 832 F.2d at 1131-32; Adair, 723 F.2d at 1411; see also Kittitas Reclamation District, 763 F.2d at 1033. The Tribes' rights include the right to certain conditions of water quality and flow

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[9] For the purpose of determining the existence of reserved water rights, there is no consequence to the fact that the Tribes' rights are derived from executive orders rather than treaties. Arizona v. California, 373 U.S. at 598.

[10] The executive order establishing the Klamath Indian Reservation was issued pursuant to the Act of March 3, 1853, 10 Stat. 238, authorizing the President "to make . . . reservations in the State of California for Indian purposes."

[11] These executive orders were issued pursuant to the Act of April 8, 1864, 13 Stat. 39.

to support all life stages of fish. See Anderson, 591 F.Supp. at 5-6; see also Gila Valley Irrigation District, 804 F.Supp. at 7. The Tribes' fishing right also supports a water right in off-reservation areas to the extent necessary to support the Tribes' on-reservation fisheries. Cf. Arizona v. California, 373 U.S. at 595 n.97, 600 (awarding reserved water right in off-reservation river). The exact standard to determine the amount of water secured by these rights has not been determined as of the date of this memorandum. The priority date of the Yurok and Hoopa water rights are at least as early as 1891, and may be earlier.

Obligations

Klamath Project Water Users

Reclamation has an obligation to deliver water to the project water users in accordance with the project water rights and the contracts between Reclamation and the water user (which may be through a water district) subject to the availability of water. Reclamation must protect the rights of the users of project water, see Filing of Claims for Water Rights in General Stream Adjudications, M-36966, 97 I.D. 21 (July 6, 1989), and cannot "ignore . . . the obligations that necessarily devolve upon it from having mere title to water rights for the [project], when the beneficial ownership of these water rights resides elsewhere." Nevada v. United States, 463 U.S. at 127. Water would not be available, for example, due to drought, a need to forego diversions to satisfy prior existing rights, or compliance with other federal laws such as the Endangered Species Act. Water lawfully stored in the project's reservoirs can be used for domestic and irrigation purposes to the extent the water is applied to beneficial use within the project. Reclamation cannot store or divert water for project purposes that is needed to satisfy prior existing rights.

Refuges

Reclamation has an obligation to ensure that the refuges receive adequate water to fulfill their federal reserved water rights (i.e., the amount of water necessary to fulfill the primary purposes of the refuges) when in priority and when water is available. In addition, Reclamation can continue to provide available project water for beneficial reuse by the refuges to the extent of past and current usage and consistent with project purposes.

The Kuchel Act (see footnote 5) requires that the refuge lands be used primarily for waterfowl purposes but with full consideration given to optimum agricultural use so far as agricultural use is consistent with the refuge purposes. 16 U.S.C. § 695l. In addition, the pattern of agricultural leasing existing in 1964 is to be continued on specified lands within the refuges as

consistent with proper waterfowl management. Id. § 695n. Thus, it is possible that certain irrigated lands within the refuge boundaries would not be cultivated in the usual manner if that would be inconsistent with the purposes of the refuges. If such change in cultivation resulted in less water being used for irrigation within the project, then more water may be available for the refuges, pursuant to a change in the water right or otherwise, subject to prior existing rights and water availability.

The Tribes

The United States has a trust responsibility to protect tribal trust resources. This trust responsibility is one held by all federal agencies. Pyramid Lake Paiute Tribe v. Department of the Navy, 898 F.2d 1410, 1420 (9th Cir. 1990). In general, the trust responsibility requires the United States to protect tribal fishing and water rights, which are held in trust for the benefit of the tribes. See Mitchell v. United States, 463 U.S. 206, 224-226 (1982); Fort Mojave Indian Tribe v. United States, 23 Cl. Ct. 417, 425-426 (1991); Joint Board of Control of the Flathead, Mission and Jocko Irr. Dist. v. United States, 862 F.2d 195 (1988).

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.

With respect to the Tribes' fishing rights, Reclamation must, pursuant to its trust responsibility and consistent with its other legal obligations, prevent activities under its control that would adversely affect those rights, even though those activities take place off-reservation. See Parravano v. Babbitt, 861 F.Supp. 914, 924 (N.D. Cal. 1994), appeal pending. Thus, Reclamation must use any operational discretion it may have to ensure that those rights are not diminished. In doing so, Reclamation, in formulating any operating plan, must minimize unnecessary waste and take such other steps within its legal and contractual authority as are necessary to protect tribal rights. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252, 255-256 (1973). In relation to a different Reclamation project, a court directed Reclamation, in formulating an operating plan, to provide, among other things, an effective means to measure water use, to end delivery of water to unentitled lands, and to assure compliance with such measures by project water users. Id. at 258.

Endangered Species Act

The Endangered Species Act (ESA), 16 U.S.C. §§ 1531 et seq., requires Reclamation to review its programs and utilize them in furtherance of the purposes of the ESA. 16 U.S.C. § 1536(a)(1). Reclamation has an obligation not to engage in any action that is likely to jeopardize the continued existence of a listed species. In addition, Reclamation must consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (with respect to anadromous species) to insure that any action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat of such species.[12] Id. § 1536(a)(2). If as a result of such consultation, FWS or NMFS, as appropriate, finds that the action will result in the incidental taking of a listed species but is not likely to jeopardize the continued existence of the species, or that there is a reasonable and prudent alternative to the proposed action that will avoid such jeopardy, then FWS or NMFS will set forth the impact of such incidental taking, the reasonable and prudent measures necessary to minimize such impact, and the terms and conditions that Reclamation must comply with to implement such measures. Id. § 1536(b)(4).

Two species of sucker fish that occupy Upper Klamath Lake and its tributaries (as well as other water bodies within and adjacent to the project) have been listed as endangered under the ESA and Reclamation has consulted with the FWS with respect to the effects of project operations on these species. The FWS issued a Biological Opinion in 1992 (Long Term Biological Opinion) that set certain mandatory lake level elevations for Upper Klamath Lake necessary to avoid jeopardizing the species.

The coastal steelhead has been proposed for listing by NMFS. 60 Fed. Reg. 14253 (March 16, 1995). Reclamation has, through the conferencing provisions of the ESA, Id. § 1536(a)(4), determined that the 1995 operations of the Klamath Project will not jeopardize the continued existence of the steelhead. NMFS has concurred in this determination.[13]

Conclusion

None of the rights discussed above are quantified (except see footnote 1). Even so, Reclamation is not free to disregard these

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[12] Critical habitat has not been designated for the Lost River and shortnose suckers.

[13] A petition to list the chinook salmon has been received by NMFS. 60 Fed. Reg. 30263 (June 8, 1995). NMFS has proposed to list the coho salmon. ____ Fed. Reg. (____ July ___, 1995).

rights, and its discretion to determine the necessary means to protect and fulfill each of these rights is limited. Reclamation must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights. Reclamation must also, consistent with its statutory, contractual and trust obligations, fulfill the rights of the project water users and the refuges.

David Nawi

David Nawi

THEODORE R. KULONGOSKI
ATTORNEY GENERAL

THOMAS A. BALMER
DEPUTY ATTORNEY GENERAL

1162 Court Street NE
Salem, Oregon 97310

FAX: (503) 378-3802
TDD: (503) 378-5938
Telephone: (503) 378-4402

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

March 18, 1996

Martha Pagel, Director
Water Resources Department
158 12th Street NE
Salem, OR 97310

Re: Klamath Adjudication
DOJ File No. 690-002-G0037-86-0010

Dear Ms. Pagel:

You have asked for a description of the types of claims likely to be asserted by the federal government in the Klamath Basin adjudication, and an analysis of water management authority in the basin pending the completion of the adjudication. The questions follow the Ninth Circuit Court of Appeals decision in *US v. Oregon* 44 F.3d 758 (9th Cir. 1994), *cert denied sub nom Tribe v. State of Oregon*, ___ US ___, 116 SCt 378, 133 L Ed 2d 302 (October 30, 1995). The case affirmed Oregon's authority, under the McCarran Amendment, to adjudicate federal and tribal water rights claims, and cleared the path for the adjudication to begin.[1]

The adjudication will resolve three general categories of claims in the Basin: the claims of private users holding individual water rights; the claims of Klamath Project irrigation districts holding rights developed under the authority of the federal Reclamation Act and Oregon law; and the claims of federal agencies and tribes, holding federal reserved water rights. The Department has already received claims from private users in the Basin. The claiming period for this category of claims closed February 1, 1991. The Department may now open the claiming period for Klamath Project and federal reserved claims. All

[1] The Ninth Circuit case did not resolve the claims of the Klamath Allottees Association, which asserted that individual tribal allottees were not required to pay filing fees. We believe the adjudication could continue even while those claims are being resolved, since the allottees' challenge to the state's underlying jurisdiction was conclusively resolved by the court's opinion.

claims must be filed before the "open inspection period" (pursuant to ORS 539.090) since all claims must be available for inspection by all other parties to the proceeding at one time. After the open inspection period, the opportunity for contests, and the preparation of the Director's determination, the matter will be referred to the Klamath County Circuit Court for entry of the final decree.

Regardless of the legal basis of the claims, the state will adjudicate all claims under Oregon's adjudication law (ORS chapter 539). The adjudication will establish the relative priority dates as well as the nature and scope (e.g., allowed rate, duty, use, place of use and point of diversion) of all claims. Once adjudicated, the state will then regulate water use as between the rights. *Pacific Live Stock Company v. Lewis*, 241 US 440, 36 SCt 637, 60 LEd 2d 1084 (1916). The state has authority under the McCarran Amendment (43 USC § 666) and *US v. Oregon* to adjudicate these claims regardless of their legal basis (i.e., state or federal law) and to issue water right certificates as evidence of those rights.

I. CLASSES OF CLAIMS

A. Private Water Rights

The unadjudicated rights of private appropriators are derived from state law, primarily the common law of prior appropriation based on the use of water initiated prior to February 24, 1909.[2/] (Technically, Klamath Project water rights might be viewed as private water rights, held by non-federal entities, but these claims are discussed separately, below.) In addition, private individuals occupying property that was formerly Klamath Indian Reservation or federal forest land may be entitled to claim "Walton" rights for those lands. They have acquired a quasi-federal reserved right with the acquisition of the land to which the federal reserved right was appurtenant. *See Colville Confederated Tribes v. Walton* 647 F2d 42, 50-51 (9th Cir 1981).

[2/] Post-1909 water rights are acquired after an application for a water right has been evaluated under public interest standards, a permit granted, the use developed ("perfected"), and a certificate issued. Persons holding these rights have the right to be parties to the adjudication, and are allowed to contest the claims of others whose rights are being adjudicated. However, these post-1909 water right holders need not participate in the adjudication to re-establish or protect their rights.

B. Klamath Project Water Rights

Water rights associated with the irrigation of the Klamath Project are based upon the federal Reclamation Act of 1902 (32 Stat 388) and a 1905 Oregon statute (1905 Or Laws ch 228) intended to assist the federal government in developing irrigation projects. The 1905 Oregon statute authorized the federal government to tie up unappropriated water of a river system for future irrigation projects by filing a Notice with the state identifying its intention to develop a particular project. The United States' Notice with respect to the Klamath Project specified that:

> The United States intends to use the above described waters [of the Klamath River Basin] in the operation of works for the utilization of water in the State of Oregon under the provisions of the act of Congress approved June 17, 1902 (32 Stat. 388) known as the Reclamation Act. (Notice signed by T.H. Humpherys, Engineer of the U.S. Reclamation Service, dated May 17, 1905.)

The water was "deemed appropriated" under Oregon law when the United States made its filing. *In Re Waters of the Umatilla River* 88 Or 376, 385 (1918). The Reclamation Act, authorized the Secretary of the Interior to "locate and construct . . . irrigation works for the storage, diversion, and development of waters". 32 Stat. 388 § 2. The rights developed under the Reclamation Act and the 1905 Notice must, therefore, be used for the purpose specified in the Act and the Notice, that is, only for irrigation. A memo prepared by David Nawi, regional solicitor for the Department of Interior dated July 25, 1995 (Nawi memo), recognizes that whatever claims the Bureau will assert in the adjudication will be based on this authority.

Apparently, a dispute has emerged about who will actually own these rights. The Bureau may claim ownership of the water right under the Reclamation Act and its 1905 Notice. However, the United States Supreme Court has consistently held that water rights developed under a federal Reclamation Act project, (such as the Klamath Project) do not belong to the Bureau. "Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract . . . the water rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works." *Nevada v. United States*, 463 US 110, 125, 103 SCt 2906, 2916, 77 LEd 2d 509 (1983) (quoting *Nebraska v. Wyoming*, 325 US 589, 65 SCt 1332, 89 LEd 2d 1815 (1945)). *See also Ickes v. Fox*, 300 US 82, 57 SCt 412, 81 LEd 2d 412 (1937). The Bureau might hold the storage rights associated with the Klamath Project, since the Bureau may own the land covered by

the reservoirs. However, a final determination of the ownership question will require further factual determination.

More likely, these water rights are held by the irrigation districts or perhaps by individual district members. Whether the right is owned by the district or its members is based upon the contractual arrangement between the districts and its members. See *In Re Waters of Willow Creek* 119 Or 155 (1925).

C. Federal Reserved Water Rights

The class of claims which gave rise to the *US v. Oregon* law suit is that associated with federal agencies under *Winters v. United States*, 207 US 564, 28 SCt 207, 52 LEd 2d 340 (1908). *Winters* announced what has become known as the reserved rights doctrine. Under the reserved rights doctrine, when land is set aside from the public domain, enough of the then existing unappropriated water is reserved to satisfy the primary purpose(s) of the reservation. *United States v. New Mexico*, 438 US 696, 98 SCt 3012, 57 LEd 2d 1052 (1978); *Cappaert v. United States*, 426 US 128, 96 SCt 2062, 48 LEd 2d 523 (1976). The doctrine creates water rights impliedly, rather than expressly, and is an exception to Congress' explicit deference to state water laws in other areas. *United States v. New Mexico*, 438 US at 715. *See also San Carlos Apache Tribe v. Arizona*, 668 F2d 1093 (9th Cir 1982) and *Colville Federated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981).

For the Klamath Tribes, the reserved right purposes have been identified in *US v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1983): "[T]he right to hunt, fish and gather * * * [and] convert[ing] the Indians to an agricultural way of life * * * qualify as primary purposes of the 1864 treaty." The reserved rights of other federal reservations, (national forests and wildlife refuges and the Crater Lake National Park, for example) will similarly be established for, and at the level necessary to accomplish their primary purpose(s), but "no more". *Cappaert* at 141.

The purpose of the foregoing discussion is not to pre-judge any of the claims. All claimants will be expected to establish the legal and factual basis for their claims. This description is intended to merely give a glimpse of the nature and complexity of the claims likely to be asserted by the various claimants. Once the rights have been adjudicated, the state will regulate between users based on priority date, regardless of how the right was created.

II. WATER MANAGEMENT PENDING COMPLETION OF THE ADJUDICATION

While the law is relatively clear with respect to water management after the adjudication is completed, recent assertions by the federal government have raised questions about how water must be used while the adjudication is in progress. Historically, the Bureau has managed the Klamath Project by diverting live flow from the Klamath River and water stored in the Upper Klamath Lake for irrigation in the Project, consistent with the Notice the United States filed in 1905. The Bureau has operated the storage projects consistent with irrigation use. Now the Bureau is asserting an obligation to change its management of the storage projects to benefit downstream fishery and tribal interests, rather than irrigation uses.

A. State Regulation

While the state has the authority under the McCarran Amendment to both adjudicate and then administer, i.e., regulate between, water rights, it is less clear how water must be managed pending completion of the adjudication. Oregon has taken the position that it regulates neither in favor of nor against unadjudicated water rights. Accord *Rettkowski v. Department of Ecology*, 858 P2d 232 (Wash. 1993); *South Delta Water Agency v. U.S., Dept. of Int.* 767 F 2d 531 (1985) (quantification of federal water rights must occur before authority to administer those rights conferred under McCarran Amendment).[3/]

B. Federal Regulation

Because the state will not regulate unadjudicated rights, the federal government conceivably could. The basis of the proposed Klamath Project Operations Plan (KPOP), discussed below, is that the federal government asserts it has the authority to regulate water uses in the Basin, at least among the federal claimants, pending completion of the adjudication. I conclude that there is no such federal authority for three reasons, set forth below.

1. There is no federal regulatory authority or system. The Nawi memo does not identify any authority which authorizes the Bureau, or any federal agency, to regulate water uses under the prior appropriation doctrine. While the western states have developed elaborate systems to ensure the legal distribution of water among competing claimants, there is no parallel federal system. The purpose of the McCarran Amendment was to require

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[3/] Of course, we presume that all users exercise their rights within their legal limits, even though the state will not shut off unadjudicated rights (nor shut off any other user to satisfy the claim of an unadjudicated right).

federal and tribal participation in the states' water rights systems rather than to create a duplicative federal system.

2. The rights have not been determined. Until the completion of the Klamath Basin Adjudication, none of the federal, Klamath Project or private claims have been quantified. In *South Delta Water Agency*, the United States asserted and successfully established the rule of law that no regulation of federal rights may occur until those rights have been adjudicated pursuant to the McCarran Amendment. The rule is based on the legal truism that regulation in favor of a water right necessarily requires a determination of what that right is. Any attempt to regulate unquantified rights creates both practical and legal problems. For example, since the California Tribes' claims are unquantified, there is no way to calculate the amount of water to which the tribes would be entitled. The Nawi memo concedes that there is not yet even a standard by which the tribal reserved rights can be quantified.[4/]

Distribution of water to the wildlife refuges is also problematic. First, I understand that some land acquired for use as the wildlife refuges was acquired from the states of Oregon and California. As a technical matter, only land "set aside from the public domain" may acquire a reserved right, not formerly state or privately owned land. Second, if the United States does not agree with the 1950 Oregon AG opinion cited in footnote 6, at the time the refuges were created, all water in the basin was "deemed appropriated" by the Klamath Project, and no unappropriated water could be reserved for the refuges or any other use.

Third, the Nawi memo assumes that the refuges are entitled to return flows from project water, or perhaps that the refuges can use water diverted for project use interchangeably for refuge or irrigation uses. Under the Oregon law governing the irrigation rights, the return flows of water diverted for irrigation purposes, but still within the district's boundaries, are still under the control and subject to appropriation by the districts for the underlying (that is, irrigation) purposes. *Jones v. Warmsprings Irrigation District*, 162 Or 186, 91 P.2d 542 (1939); *Cleaver v. Judd*, 238 Or 266, 393 P.2d 193 (1964).

[4/] Even if the adjudication had been completed, under *Adair*, a tribal reserved instream flow claim is only for the amount of water to support the tribal fishery as "currently exercised," 723 F2d at 1414, not as it may have been at the time the reservation was created. Thus, I do not believe that the tribal claim could be used as the basis to "restore" a fishery to what it may have been in the early part of the century. The fishing rights of the California tribes as currently exercized necessarily cannot require a change in the way the Klamath Project and other unadjudicated rights have historically been used.

While return flows may be subject to appropriation by others, for example the refuges, those claims will always be inferior to the claims of the original appropriator. An appropriator who has acquired a right to return flows is at the mercy of the original appropriator, who may decide (or be ordered by the state) not to divert water at a rate that creates return flows. (The presence of return flows may be an indication that more water is being diverted than is necessary to satisfy the underlying beneficial use, and may therefore constitute "waste.")

3. Not all rights are subject to federal regulation. To be fair and effective, any system of regulation between rights in a prior appropriation system must necessarily include all holders of water rights. The prior appropriation system of water law requires that in times of shortage, the senior-most user (the user with the oldest, or most senior, priority date) may place a "call" on the water source. Then, the junior-most users, in reverse order of priority date, must cease to use any water until all senior users are completely satisfied. To work, every user must be subject to the system. The Bureau identifies no way that it can shut off junior users who are not under direct federal control, to satisfy the calls of senior appropriators. Only the state has the authority and the regulatory system to establish relative priority dates and enforce the priority system.

There are a number of rights junior to the Klamath Project rights, both in California and Oregon. For example, I understand that the Central Valley Project (CVP) in California diverts from the Trinity River (a tributary to the lower Klamath River) an amount of water equal to the flow of the upper Klamath River. The CVP was authorized under the provisions of the Emergency Relief Appropriation Act of 1935, ch. 48, § 4, 49 Stat. 115, and reauthorized pursuant to the Rivers and Harbors Act of August 26, 1937, ch. 832, 50 Stat. 844, 850. Consequently, the CVP priority date is significantly junior to Klamath Project water rights. Presumably, there are other non-federal users in California and Oregon whose priority dates are junior to (and thus would be required to provide water to senior users before) the Klamath Project. California and Oregon will regulate users of the Klamath River based on priority date, not on the location of the state line, once the rights are established by court decree. ORS 540.045(3).

C. Bureau Reallocation of Klamath Project Water

A related and troubling issue has arisen because the Bureau is taking the position that "it must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights." Nawi Memo at 10. Implementing this advice, a draft of the Klamath Project Operations Plan (KPOP) purports to authorize the Bureau (at

least pending completion of the adjudication) to reallocate water from irrigation uses to other, unquantified and unadjudicated uses for the protection of fish and satisfaction of California tribal claims.

I do not dispute that the California tribes may have reserved water rights for fisheries and other purposes. However, the Nawi memo does not identify either how the amount of water the tribes are entitled to could be determined, or why a tribal "call" on the river could only be satisfied from Klamath Project water rather than by standard application of the prior appropriation system by regulating the junior-most users first.

The KPOP aims to protect the downstream anadromous fish which have been proposed for listing under the federal Endangered Species Act (ESA). Until a listing is made, action under the ESA seems premature. Also, while the Nawi memo argues the Bureau is required to exercise its statutory authority to preserve endangered fish, it does not identify the source of that authority. The ESA does not confer additional authority on the Bureau to protect the fish; rather, it requires the Bureau (and every federal agency) to exercise the authority it already possesses in a certain way. I am unaware of any independent grant of statutory authority to the Bureau which would allow the transfer of water from the Klamath Project to protect endangered fish. The Bureau exercised its statutory authority when it filed for all unappropriated water necessary to develop the Klamath Project pursuant to state statute and the 1902 Reclamation Act. It has identified no independent authority to reallocate water legally obligated to that original purpose.

The United States Supreme Court specifically rejected a United States' contention that it had the authority to unilaterally reallocate state-law based water rights acquired under the Reclamation Act to endangered fish protection or tribal treaty purposes. In *Nevada v. United States*, 463 US 110, 103 S Ct 2906, 77 L Ed 2d 509 (1983) the United States sought to reallocate water from irrigators within a federal project for the benefit of endangered fish and a tribal fishery. The Court rejected the United States' position:

> We conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the Orr ditch decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit.

Nevada v. United States, 463 US at 1126, 103 SCt at 2916.

The Klamath Project water rights have not been adjudicated, but I see nothing in the rationale of *Nevada* which would justify a view that the United States could reallocate water rights acquired under the Reclamation Act pending completion of a state adjudication. Rather, the court rejected inherent United States' authority to ignore the limitations of the water rights it held, stressing the disruption that would otherwise result:[5/]

> We are bound to say that the Government's position, if accepted, would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West.

Id., 463 US at 121, 103 SCt at 2914.

Thus, while I recognize the United States' obligations to both Indian Tribes and endangered species, I do not see how a general governmental obligation can be converted to specific Bureau authority to reallocate water stored under a right acquired for irrigation in the Klamath Project to either of these other uses, absent specific federal authorization for the new use and compliance with state law.

Several cases analyzing Bureau efforts to satisfy endangered fishery protection and tribal trust responsibilities from Bureau projects illustrate this analysis. In *Carson-Truckee Water Conservancy District v. Clark*, 741 F2d 257 (1983), the Ninth Circuit held that the Bureau could operate the Stampede Reservoir (located in California) for the purpose of maintaining endangered fish in the Pyramid Lake (located in Nevada) and to satisfy its trust obligations to the Pyramid Lake tribe. However, those uses were allowed because the reservoir had been specifically authorized for the purpose of protecting fish and wildlife and the Bureau water was legally stored in the reservoir under a permit from the state of California for those purposes. No state water rights (from either state) had been acquired to use the water for irrigation, municipal or industrial purposes, although the authorizing act

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[5/] The Bureau may be able to reach the same result by "transferring" the water right from irrigation use to fishery purposes. The state allowed the use of water stored for irrigation purposes in McKay reservoir (under the authority of the Reclamation Act and the 1905 Oregon law) to be transferred to fishery and tribal purposes upon compliance with state transfer law. The Bureau in that case had separate authority under the federal Umatilla Basin Project Act to allow the use of the Umatilla Project for non-irrigation uses. A transfer can occur only after the right is decreed, however. ORS 540.505(4).

would have allowed water rights for those purposes. The Court held the Bureau could not be forced to provide water to uses (municipal and industrial) for which neither it nor the districts held a right.

Here, however, the Klamath Project has acquired vested rights under state law for all unappropriated water as of 1905 necessary to satisfy the Klamath Project beneficial uses.[6] While that right will be quantified in the adjudication, the Nawi memo recognizes that the Klamath Project's claim for both the storage of water in the Klamath Lake and for diversion of live flow into the Klamath Project system is pursuant to irrigation rights developed under the Reclamation Act and state law.

O'Neill v. United States, 50 F.3d 677 (9th Cir 1995) further illustrates this point. In *O'Neill* the court noted that Congress amended the Central Valley Project Act by means of the Central Valley Project Improvement Act (CVPIA), Pub.L. No. 102-575, 106 Stat. 4706 *et seq.*, to require the Bureau to satisfy fishery needs. The CVPIA created the specific statutory authority necessary to allow the Bureau to provide water for endangered fish. By contrast, in the Klamath Project situation, the Nawi memo does not identify, nor am I aware of, any corresponding federal law to authorize these new uses of water stored in the Klamath Lake to which the Klamath Project irrigation districts are entitled.

The KPOP must be based on legal authority (even if unadjudicated at present) which the Bureau presently has. I am unaware, and the Nawi memo does not identify, what authority that might be.

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[6] Technically, the United States acquired absolutely all unappropriated water of the Basin by its filing in 1905, so long as it was developed for irrigation purposes pursuant to the Reclamation Act and the 1905 Oregon statute. That reservation has not ever been technically relinquished, but I assume that the United States does not intend to disagree with the 1950 Oregon Attorney General Opinion, 25 Op Atty Gen 62, that determined that water which was not developed by at least 1950 was available for appropriation by others. Should the United States take the position that it still had all water unappropriated as of 1905 tied up under its 1905 filing for purposes of continuing the development of irrigation in the Klamath project, there would be no water available to reserve for purposes of the wildlife refuges, developed after 1905, nor for any other post-1905 federal reserved or other water right.

CONCLUSION

Water rights for the Klamath Project were acquired for irrigation purposes. No state or federal authority has reallocated this irrigation right to other uses. The specific nature and scope of Klamath Project, federal reserved and private water rights will be determined in the Klamath Basin Adjudication.

Additional Questions to Be Answered in Separate Advice

In meeting with officials from the State of California, we have also identified a number of other issues relating to overlapping or ambiguous jurisdiction between the two states. Those questions will be the subject of separate advice.

Sincerely,

Stephen E.A. Sanders
Assistant Attorney General
Natural Resources Section

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United States Department of the Interior

IN REPLY REFER TO:

OFFICE OF THE SOLICITOR
Pacific Southwest Region
2800 Cottage Way
Room W-2215
Sacramento, California 95825-1890

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RECLAMATION
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KLAMATH FALLS OREGON

JAN 9 1997

Memorandum

To: Regional Director, Region 1, U.S. Fish and Wildlife Service, Portland, OR
Regional Director, U.S. Bureau of Reclamation, Mid-Pacific Region, Sacramento, CA
Area Director, Portland Area Office, Bureau of Indian Affairs, Portland, OR
Area Director, Sacramento Area Office, Bureau of Indian Affairs, Sacramento, CA

From: Regional Solicitor
Pacific Southwest Region

Regional Solicitor
Pacific Northwest Region

Subject: Oregon Assistant Attorney General's March 18, 1996, Letter Regarding Klamath Basin Water Rights Adjudication and Management of the Klamath Project

As requested, we have reviewed the March 18, 1996, letter from Stephen Sanders, Assistant Attorney General, Natural Resources Section, to Martha Pagel, Director, Oregon Water Resources Department (OWRD) (March 18 letter). The March 18 letter responds to a request of the Director of the OWRD for "a description of the types of claims likely to be asserted by the federal government in the Klamath Basin adjudication, and an analysis of water management authority in the basin pending the completion of the adjudication." We are responding jointly because the March 18 letter addresses issues of concern to agencies within the responsibility of both the Pacific Southwest and the Pacific Northwest Regions of the Solicitor's Office.

The issues raised in the March 18 letter arise in the context of actions by the Secretary of the Interior (Secretary), acting through the Bureau of Reclamation (Reclamation), to manage and operate the Klamath Project (Project) and particularly to develop a Project operations plan. In so doing, Reclamation and other Federal agencies with responsibility related to water and wildlife resources, including Indian trust resources, in the Klamath Basin (Fish and Wildlife Service, Bureau of Indian Affairs, and National Marine Fisheries Service) are engaged in a process of consultation with and consideration of the interests of diverse groups,

including agricultural water users, Indian tribes, and wildlife interests, regarding Project operations and the development of a plan intended to govern operations pending completion of the Klamath Basin adjudication presently being conducted by the State of Oregon.[1]

The March 18 letter raises issues regarding the authority of the Secretary to manage the Klamath Project pending completion of the adjudication, as well as issues regarding the United States' water rights, including tribal water rights the United States holds in trust, in the Klamath Basin. The March 18 letter is in wide circulation and may be read as calling into question the legal basis of various federal actions to manage the Project, including the development of an operations plan. Our conclusions regarding a number of the issues differ from those contained in the March 18 letter. For these reasons, we think it important to set out in general terms our views on the major issues for our client agencies and interested parties.

This memorandum reaffirms long-standing positions of the United States regarding management of water projects for irrigation, wildlife protection, and Indian rights, and builds on the July 25, 1995, memorandum from the Regional Solicitor, Pacific Southwest Region, to the Regional Director, Bureau of Reclamation, Mid-Pacific Region (July 25 memorandum).[2] This memorandum does not attempt to provide a complete legal analysis of all the issues raised by the March 18 letter. Further legal analysis will be presented, as needed, in connection with the adjudication or otherwise.

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[1] Upon completion of the adjudication and pursuant to section 8 of the Reclamation Act of 1902, the Project will be operated in accordance with the outcome of the adjudication, as well as with other applicable requirements, and the operations plan will be revised as appropriate. As discussed throughout this memorandum, many of the issues raised in the March 18 letter arise as a result of Reclamation's need to meet its obligations and responsibilities in operating the Project, the absence of a completed adjudication of the Klamath Basin, and the lack of any other action by the State of Oregon to administer junior water rights in relation to senior unadjudicated water rights in the Basin.

[2] The March 18 letter contains several references to the July 25 memorandum, which describes the general rights to the waters of the Klamath and Lost River drainages affected by the operation of the Klamath Project and the obligations of the Bureau of Reclamation to the holders of these rights. We adhere to the conclusions set forth in the July 25 memorandum. This memorandum addresses additional issues not raised in the July 25 memorandum.

I. Management of the Klamath Project

The March 18 letter states that the United States, through development of an operations plan by Reclamation, is asserting that it has the authority to regulate water uses in the Klamath Basin where no such authority exists. March 18 letter, pages 5-7. The United States is not, however, seeking in the operations plan to preempt or supplant the State's role in adjudicating and administering water uses; rather, it is carrying out the responsibilities federal law places on it in managing the Klamath Project.[3]

An operations plan is being developed through an open process, including consultation with affected government and other interests and an opportunity for public comment, to arrive at an informed decision regarding Reclamation's operation of the Project pending completion of the adjudication. Reclamation is using this process to review Project operations to assure that they are consistent with all of Reclamation's responsibilities and obligations concerning senior water rights, tribal trust resources, Project water users' contractual rights, the Endangered Species Act (ESA) and other requirements mandated by law and within the authority of the Secretary.[4]

The March 18 letter states that it is unclear how water must be managed pending completion of the adjudication and declares that the state will not regulate or administer unadjudicated water rights or water uses. March 18 letter, page 5. The March 18 letter also asserts that the federal government lacks authority to manage any water uses in the basin, even those involving water

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[3] The March 18 letter refers to the project operations plan as the Klamath Project Operations Plan or "KPOP." KPOP is no longer the label applied to the operations plan now being developed which will address project management pending completion of the Klamath Basin adjudication being conducted by the State of Oregon. Our analysis of the underlying authorities is applicable to whatever operations plan is ultimately adopted.

[4] The March 18 letter bases its analysis and conclusions on the proposition that the 1905 water rights filing by the United States for development of the Klamath Project is limited to irrigation uses. ("The rights developed under the Reclamation Act and the 1905 Notice must, therefore, be used for the purpose specified in the Act and the Notice, that is, only for irrigation." March 18 letter, page 3.) This memorandum focuses on the issue of authority raised in the March 18 letter. The nature of the Project water rights will be addressed at the appropriate time in the pending adjudication.

rights and uses subject to federal law. For the reasons set out below, we have a different view.

The Secretary, through Reclamation, must manage and operate reclamation projects developed pursuant to the Reclamation Act of 1902 (43 U.S.C. § 372 et seq., Act of June 17, 1902, 32 Stat. 388) and its amendments and supplements. Specifically, section 10 of the Reclamation Act, 43 U.S.C. § 373, expressly directs the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper" to carry out the reclamation laws. See United States v. Alpine Land and Reservoir Co., 887 F.2d 207, 212 (9th Cir. 1989). Districts and water users within the project must comply with such actions taken pursuant to section 10 and pursuant to contracts between Reclamation and the districts and water users. Id.; Pyramid Lake Paiute Tribe v. Hodel, 878 F.2d 1215 (9th Cir. 1989); Truckee-Carson Irrigation District v. Secretary of Department of Interior, 742 F.2d 527 (9th Cir. 1984), cert. denied, 472 U.S. 1007 (1985). The operations plan process and resulting plan are clearly authorized by section 10 of the Reclamation Act of 1902. See July 25 memorandum for further discussion.[5]

The federal courts have not hesitated to order the Secretary to fulfill his tribal trust obligations and to comply with the ESA in operating reclamation projects. See Pyramid Lake Paiute Tribe v. Morton, 353 F.Supp. 252, 255-56 (D.D.C. 1973). The Secretary, through Reclamation, must operate reclamation projects consistent with vested, fairly implied senior Indian water rights. Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032, 1033 (9th Cir.), cert. denied, 474 U.S. 1032 (1985) (district court did not abuse its discretion in ordering Reclamation to make water available to protect unquantified, unadjudicated treaty-reserved fisheries related water rights); Pyramid Lake Paiute Tribe v. Morton, supra (Secretary of the Interior "was obliged to formulate a closely developed regulation that would preserve water for the Tribe . . . [and] to assert his statutory and contractual authority to the fullest extent possible to accomplish the result." Id. at 256). Cf. Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts v. United States, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 486

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[5] See also Israel v. Morton, 549 F.2d 128, 132-33 (9th Cir. 1977) (water obtained from a federal reclamation project is not there for the taking by the landowner, but for the giving by the United States, and terms upon which water can be put to use, and manner in which rights to use can be acquired, are only for the United States to fix, and if such rights are subject to becoming vested beyond the power of the United States to take without compensation, such vesting can only occur on terms fixed by the United States).

U.S. 1007 (1988) (prior to allocating water from a federal irrigation project among project water users, the Department had to adequately protect the tribe's senior instream flow water rights). See also Parravano v. Babbitt, 861 F.Supp. 914 (N.D. Cal. 1994), aff'd. 70 F.3d 539 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996) (Secretary of Commerce properly considered the tribe's federally reserved fishing rights in issuing emergency regulations reducing harvest limits of Klamath River salmon).

Moreover, a specific statutory directive is not needed for Reclamation to manage irrigation deliveries to protect senior tribal water rights. Although the Klamath Tribes' water rights have not yet been quantified in an adjudication, the existence of the Klamath Tribes' rights to the water needed to protect their treaty-reserved hunting and fishing rights (with a priority date of time immemorial) and for agricultural uses has been confirmed by the Ninth Circuit Court of Appeals. United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984). The Yurok and Hoopa Valley Tribes in California hold unadjudicated water rights which vested at the latest in 1891 and perhaps as early as 1855. See, e.g., United States v. Adair, supra; Arizona v. California, 373 U.S. 546, 600 (1963); United States v. Winans, 198 U.S. 371 (1905). Cf. Solicitor's Opinion, M-36979, Fishing Rights of the Yurok and Hoopa Valley Tribes (Oct. 4, 1993).[6]

While the March 18 letter asserts that "[o]nly the state has the authority and the regulatory system to establish relative priority dates and enforce the priority system," March 18 letter, page 7, both federal and state courts have jurisdiction in appropriate cases to establish and enforce the priority system. See, e.g., Cappaert v. United States, 426 U.S. 126 (1976) and Winters v. United States, 207 U.S. 564 (1908). In addition, nothing in the McCarran Amendment, 43 U.S.C. § 666, prohibits the United States from managing and operating its reclamation projects. The priority water rights system is one of the bases upon which reclamation projects are operated. While Reclamation does not adjudicate water rights, the absence of a completed adjudication and Reclamation's legal obligation to manage the project in accordance with law require that Reclamation use its best efforts to operate the project consistent with existing water rights.

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[6] Although tacitly recognizing the fisheries reserved water rights of the Klamath Tribes and the Yurok and Hoopa Valley Tribes, the March 18 letter questions without answering the extent of the Klamath tribal right, and implies that the Yurok and Hoopa Valley Tribes' rights are "paper" rights with no enforceability. March 18 letter, pages 6-7, fn. 4. As discussed above, and in the July 25 memorandum, pages 4-5, in our view the tribes' rights are senior and enforceable against junior uses, and adjustments may be required in how the Klamath Project is operated to be consistent with the tribes' rights.

The March 18 letter further asserts that regulation in favor of senior tribal, federal, and project water rights may not occur until those rights have been adjudicated and cites South Delta Water Agency v. U.S. Department of the Interior, 767 F.2d 531 (9th Cir. 1985), as supporting the proposition. March 18 letter, pages 5-6. However, that case does not address the issue. The Ninth Circuit merely held that, contrary to the State of California's argument, suit cannot be brought pursuant to the McCarran Amendment against the United States for the administration of water rights without a prior general stream adjudication having determined those rights.

The State of Oregon has declined to administer junior rights to protect senior tribal, project, and other federal rights on the grounds that such rights are unknown until the adjudication is complete. However, in the absence of a completed adjudication or other determination of the senior water rights, the project must be operated based on the best available information. For example, the Project irrigation water rights can be reasonably estimated. Similarly, although the tribal instream flow and lake rights are complex, they also may be reasonably estimated; and even though unadjudicated, they are vested, senior rights, and Reclamation must operate the project consistent with those rights. Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts v. United States, supra, at 1131-32. ("The priority date of time immemorial obviously predates all competing rights" and to ignore this would violate "the fundamental principles of the appropriative system of water rights.")

The March 18 letter also states that users junior to the Klamath Project should provide water to senior rights holders before the Project does so. March 18 letter, page 7. We agree that to do so best comports with the priority system of water rights administration. But the March 18 letter does not address the situation, as in this case, where the State is not protecting senior water rights. Moreover, the March 18 letter offers no avenue or mechanism for effecting calls on junior users. It adopts a hands-off position even though the State is in a better position to deal with junior nonfederal water users.[7] In such a situation, the Secretary must exercise what authority he has in managing the Project to protect senior water rights and meet requirements of federal law.

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[7] The March 18 letter sets forth at page 5 Oregon's position that it "neither regulates in favor of nor against unadjudicated water rights." The letter fails, however, to discuss whether the State has authority to regulate junior water rights in relation to senior unadjudicated rights prior to completion of the adjudication, and if so, whether the State should exercise that authority in the Klamath Basin. This has contributed to the demand for Reclamation to prepare an operations plan.

We disagree with the assertions in the March 18 letter regarding the water rights for the national wildlife refuges.[8] March 18 letter, pages 5-6. Among others, bases for the refuge water rights include state-based rights perfected by applying project water or return flows to beneficial use, and federal reserved rights to the water unappropriated at the time of the refuges' creation and needed to carry out the refuges' purposes. See Arizona v. California, supra, at 598.

In sum, the operations plan is not an attempt to regulate water uses in the Klamath Basin. Rather, it reflects Reclamation's effort to exercise its authority to manage the project consistent with all of its obligations, including senior Indian water rights, contractual obligations and ESA requirements. See Pyramid Lake Paiute Tribes v. Morton, supra; United States v. Alpine Land and Reservoir Co., supra.[9]

II. The Project Operations Plan is not a "Reallocation" of Klamath Project Water

The March 18 letter states that obligations to Indian tribes and listed species do not provide authority to "reallocate" water

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[8] Although the distinction may not be at issue here, we also disagree with the view expressed at page 6 of the March 18 letter that "[as] a technical matter, only 'land set aside from the public domain' may acquire a reserved right" and not land acquired by the United States. See Memorandum, Department of Justice, Office of Legal Counsel, June 16, 1982, at pages 77-78. In that opinion, the issue of reserved rights for acquired lands was directly addressed:

> Much of the language used by the Court to describe the scope of the reservation doctrine, in fact, is broad enough to cover all lands set aside for a particular federal purpose, regardless of the prior ownership of the land. . . . [I]n [United States v. New Mexico], the Court did not suggest that the reserved rights doctrine applies only to lands that may be formally reserved from the public domain; it recognized rather that the doctrine applies to any land that has been set aside as a national forest (which could be reserved or acquired lands). See 438 U.S. at 698-99.

Id. at 78.

[9] For the Newlands Project, discussed in United States v. Alpine Land and Reservoir Co., supra, the initial project operation criteria and procedures (OCAP) were issued prior to a final adjudication of water rights in the Newlands Project, while the final OCAP were adopted after the final decree was affirmed. The Alpine decision upheld the final OCAP.

absent specific federal authority for the new use and compliance with state law. March 18 letter, page 9; see also pages 3, 5, 8, 10, 11. Once again, we believe the March 18 letter mischaracterizes the nature of the issue. The lack of a completed water rights adjudication does not legitimize uses of water that would not otherwise be authorized. Reclamation's actions are intended to result in management and operation of the Klamath Project in a manner which is consistent with and carries out all its legal obligations and responsibilities. Operation of the project to reflect Reclamation's obligations is not a reallocation of water.

The March 18 letter cites several cases to support the proposition that Project water stored under a water right "acquired for irrigation" cannot be used to meet the United States' obligations to Indian tribes and under the ESA. March 18 letter, pages 9-10. In our view, the cases cited either do not apply to the situation at hand or do not support the proposition that the United States may ignore Indian water rights or its obligations under the ESA.

In Nevada v. United States, 463 U.S. 110 (1983), the Supreme Court simply held that the United States could not ignore the limits of decreed federal reserved or other water rights where all the water rights, including the Indian rights, had already been fully adjudicated. Nevada does not address the issue of whether project operations must be consistent with existing senior water rights or the ESA where none of the water rights have been fully adjudicated.

In Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257 (9th Cir. 1984), cert. denied, 470 U.S. 1083 (1985), the court found that the Secretary's decision to operate Stampede Dam solely for the purpose of conserving an endangered species of fish was not arbitrary. Although the court explicitly found that it need not address tribal water rights to reach its decision, the court stated that any asserted obligation of the Secretary to enter into contracts for the sale of project water for municipal and industrial purposes pursuant to the project's authorizing legislation should be considered only when his superseding obligations to the Tribe and under the ESA have been fulfilled. (This case concerned the same Reclamation project that was the subject of Nevada v. United States. However, the water rights connected with Stampede Dam are not adjudicated.)

Likewise, in O'Neill v. United States, 50 F.3d 677 (9th Cir.), cert. denied, U.S. 116 S. Ct. 672 (1995), the court held that the United States was not liable for not furnishing the full contractual amount of water to water users when that amount could not be delivered consistent with the requirements of the ESA and the Central Valley Project Improvement Act, Pub. L. No. 102-575. The court found that the provisions in the contract which precluded

federal liability for water shortage were broad enough to include the "mandates of valid legislation."[10]

Reclamation is mandated by the ESA to avoid jeopardizing the continued existence of listed species and to conserve listed species.[11] In addition, individual water users and water districts, as well as Reclamation, are subject to the prohibition in section 9 of the ESA on taking listed species. See, e.g., United States v. Glenn-Colusa Irrigation District, 788 F.Supp. 1126 (E.D. Cal. 1992).

As a final matter, the March 18 letter seems to assume that once the Klamath Basin adjudication is completed and the State begins administering the water rights, the Secretary will no longer need to manage the Project. See, e.g., March 18 letter, pages 2, 4-5. The cases make clear, however, that the Secretary's authority and responsibilities under federal law to manage the Project will continue, concurrent with the requirement to operate the Project consistent with adjudicated water rights. See Pyramid Lake Paiute Tribes v. Morton, supra and United States v. Alpine Land and Reservoir Co., supra, cases which involved previously adjudicated project water rights.

III. The Klamath Basin Adjudication

The March 18 letter addresses the three general categories of claims the author believes will be resolved in the Klamath Basin adjudication. We do not propose to address these issues now. The United States will make appropriate arguments and set forth in full the federal position regarding these issues in the course of the adjudication. We do, however, make the observations set out below with respect to certain points raised in the March 18 letter concerning the adjudication.[12]

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[10] Similar shortage provisions are found in Klamath Project contracts.

[11] Reclamation is also obligated to confer with the Fish and Wildlife Service or the National Marine Fisheries Service on any action which is likely to jeopardize the continued existence of any species proposed to be listed, and is authorized to take conservation measures to minimize impacts on the proposed species. ESA, section 7(a)(4), 16 U.S.C. § 1536(a)(4), and section 5(a), 16 U.S.C. § 1534(a).

[12] The March 18 letter was written by an Assistant Attorney General of the State of Oregon who we understand will advise the decision maker in the administrative phase of the adjudication. Several aspects of his letter raise a concern that he appears to have taken positions on issues to be determined in the adjudication before the parties have had opportunity to brief and litigate them.

The March 18 letter states that Klamath Project water rights "likely . . . are held by the irrigation districts or perhaps by individual district members" rather than by the United States. March 18 letter, page 4. It is well established, however, that the United States through the Bureau of Reclamation holds the legal title to the water rights for the project. Nevada v. United States, supra; Ide v. United States, 263 U.S. 497 (1924); United States v. Humboldt Lovelock Irr. Light & Power Co., 97 F.2d 38 (9th Cir. 1938), cert. denied, 305 U.S. 636 (1938); United States v. Tilley, 124 F.2d 850 (8th Cir. 1942); see also Solicitor's Opinion, M-36966, 97 I.D. 21, Filings of Claims for Water Rights in General Stream Adjudications (July 6, 1989); Solicitor's Opinion, M-36967, 97 I.D. 32, Authority to Provide Water to Stillwater Wildlife Management Area (July 10, 1989). In 1905, the United States, through the Secretary of the Interior, pursuant to the Reclamation Act of 1902 and Oregon law, initiated the appropriation of the amount of water necessary to develop the Klamath Project.

The United States Supreme Court has long held that individual water users who have entered into contracts with the United States to receive project water, hold a beneficial interest in that portion of the project water right actually put to beneficial use. Nevada v. United States, supra; Nebraska v. Wyoming, 325 U.S. 589 (1945); Ickes v. Fox, 300 U.S. 82 (1937). Unlike the United States and individual water users, in the typical case irrigation districts hold neither a legal nor beneficial interest in the water right. They have no property interest in the water, nor have they in their own right diverted the water to storage. Truckee-Carson Irrigation District v. Secretary of the Interior, supra. Moreover, the districts have not put the water to beneficial use and thus do not hold an interest in the water right.

In light of the foregoing, Reclamation is the proper entity to file claims on and hold the water rights for the Klamath Project, 97 I.D. 21, recognizing the beneficial interest of individual water users entitled to use project water for beneficial uses, provided that the use comports with the terms of applicable Reclamation contracts and state and federal law.

Although the March 18 letter does not discuss the subject, there are federally owned lands within the project boundaries that receive project water. The United States is the proper party to file for those water rights in this situation, where the United States holds both the legal and beneficial interests in the lands and the water.

Finally, the United States has control of the project return flows within the boundaries of the project, has the right to use the return flows, and has the right to continue such use. Ide v. United States, supra. Contrary to assertions in the March 18 letter, the United States Supreme Court did not hold in Ide that use of recaptured water had to be the original use; the Court

merely held that the recaptured water had to be beneficially used. Thus, we do not believe that Ide or subsequent cases preclude the United States from using return flows for uses other than irrigation and domestic purposes.

Similarly, Jones v. Warmsprings Irrigation District, 91 P.2d 542 (Or. 1939), is not applicable to circumstances where water remains within the project boundaries and control of the appropriator; that case concerned return flow deemed to be abandoned because there had been no indication of an attempt to recapture. Finally, the Oregon Supreme Court in Cleaver v. Judd, 393 P.2d 193 (Or. 1964), recognized that under Oregon law an appropriator is justified in recapturing waste, seepage, and occasional surface water runoff.

IV. CONCLUSION

Pending completion of the adjudication, Reclamation is authorized and obligated to manage and operate the Klamath Project consistent with all of Reclamation's responsibilities and obligations concerning senior water rights, tribal trust resources, Project water users' contractual rights, the Endangered Species Act and other requirements mandated by law and within the authority of the Secretary. These obligations may be clarified or otherwise affected by the pending adjudication; however, Reclamation will continue to have authority to manage and operate the Project consistent with its obligations after completion of the adjudication.

KEVIN V. RYAN
United States Attorney
JAMES A. CODA (SBN 1012669) (WI)
Assistant United States Attorney

THOMAS L. SANSONETTI, Assistant Attorney General
JEAN E. WILLIAMS, Section Chief
SETH BARSKY, Assistant Section Chief
S. JAY GOVINDAN, Trial Attorney
Environment & Natural Resources Division
Wildlife & Marine Resources Section
United States Department of Justice
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
Tel: (202) 305-0237 / Fax: (202) 305-0275

MARIA A. IIZUKA, Trial Attorney
STEPHEN M. MACFARLANE, Trial Attorney
Environment & Natural Resources Division
General Litigation Section
U.S. Department of Justice
501 I Street, Suite 9-700
Sacramento, CA 95814-2322
Tel: (202) 930-2202 / Fax: (202) 930-2210

Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, et al., Plaintiffs, YUROK TRIBE, and HOOPA VALLEY TRIBE, Plaintiff-Intervenors, v. U.S. BUREAU OF RECLAMATION, and NATIONAL MARINE FISHERIES SERVICE, Federal Defendants.	Civ. No. C 02-02006 SBA FEDERAL DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS YUROK TRIBE'S FOURTH CLAIM FOR RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS YUROK TRIBE'S FOURTH CLAIM FOR RELIEF Date: October 26, 2004 Time: 1:00 p.m. Courtroom: 3

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NOTICE OF MOTION AND MOTION

This motion is noticed for October 26, 2004, at 1:00 p.m. in Courtroom 3 of the United States District Court for the Northern District of California, Oakland Division, located at 1301 Clay Street, #400 South, Oakland, California 94612. Pursuant to Local Rule 1-5(n), undersigned counsel for the Federal Defendants met and conferred telephonically with counsel for Plaintiff-Intervenors Yurok Tribe and Hoopa Valley Tribe, and Defendant-Intervenor Klamath Water Users' Association, prior to the filing of this motion. See Declaration of Stephen M. Macfarlane, filed concurrently herewith (Macfarlane Declaration).

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3), Federal Defendants – U.S. Bureau of Reclamation (BOR), and National Marine Fisheries Service (NOAA Fisheries) – move to dismiss for lack of jurisdiction the Yurok Tribe's Fourth Claim for Relief. This Motion is based on a recent and controlling decision of the United States Supreme Court, decided June 14, 2004, clarifying and limiting the availability of injunctive relief under the Administrative Procedure Act (APA), 5 U.S.C. § 706(1), to compel federal agencies to undertake particular actions. Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373 (2004) (Norton v. SUWA).[1]/ Under Norton v. SUWA, the Supreme Court reversed separate decisions by the United States Courts of Appeals for the Ninth and Tenth Circuits, which had upheld APA-based claims seeking to compel federal resource management agencies to comply with duties which those courts found were mandatory and nondiscretionary under substantive law. See id., rev'g 301 F.3d 1217 (10th Cir. 2002), and rev'g Montana Wilderness Ass'n v. United States Forest Serv., 314 F.3d 1146 (9th Cir. 2003). Under the Supreme Court's holding in Norton v. SUWA, the Yurok Tribe has failed to state a cognizable claim for breach of trust against the Federal Defendants under Section 706 of the APA, and is not entitled to the relief it seeks against BOR. Accordingly, Federal Defendants respectfully suggest that this Court lacks jurisdiction to consider the Yurok Tribe's Fourth Claim for Relief under the APA's

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[1]/ For the Court's convenience, a copy of the decision in Norton v. SUWA is attached herewith as Exhibit 1 to the Macfarlane Declaration.

limited waiver of sovereign immunity, and therefore should dismiss that claim.

This motion is based on the accompanying memorandum of law, the administrative record in this case, the pleadings previously filed with the Court, declarations, exhibits, and papers previously submitted and submitted herewith, and such other evidence that this Court deems appropriate.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES TO BE DECIDED

Pursuant to the U.S. Supreme Court's recent decision in Norton v. SUWA, this Court must determine whether to dismiss the Fourth Claim for Relief (breach of trust) in the Yurok Tribe's Complaint-in-Intervention because that claim – which seeks to compel BOR to operate the Klamath Project to maintain particular levels of flow to protect the Yurok Tribe's fishing right – seeks relief outside the scope of the APA's waiver of sovereign immunity.

II. INTRODUCTION

This motion to dismiss is limited to the Yurok Tribe's claim for breach of trust arising from BOR's operation of the Klamath Project in 2002. The Federal Defendants do not seek similar relief at this time regarding a similar claim asserted by Plaintiff-Intervenor Hoopa Valley Tribe.[2/] As this Court noted, both Tribes seek "an order declaring that the BOR violated the Tribes' fishing rights in 2002 by failing to provide biologically adequate stream flows, and . . . an injunction requiring the BOR to operate the Project in the future in a manner that satisfies the Tribes' fishing rights." Order filed July 15, 2003, at 12, Pacific Coast Fed'n of Fishermen's Ass'n v. United States Bureau of Reclamation, No. C 02-2006 SBA (N.D. Cal. July 15, 2003) (July 2003 Order), As we explain in detail below, however, neither remedy is available to the Yurok Tribe under the APA in light of the

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[2/] The Federal Defendants and the Hoopa Valley Tribe are currently discussing settlement of that Tribe's fourth claim for relief (alleged breach of trust), and prospects for a negotiated resolution of that claim are promising. Federal Defendants reserve their right to seek dismissal of the Hoopa Valley Tribe's claim for breach of trust, however, in the event that a settlement of that claim is not reached.

Supreme Court's decision in Norton v. SUWA.

In this case, the APA provides the only applicable waiver of the federal government's sovereign immunity for the Yurok Tribe's breach of trust claim. The Yurok Tribe appears to acknowledge this indisputable point by citing generally to the APA in its Fourth Claim for Relief, and by clarifying in its Summary Judgment Brief filed on or about February 14, 2003, that this claim seeks to compel agency action unlawfully withheld under Section 706(1) of the APA. Accordingly, to prevail on its breach of trust claim for declaratory and injunctive relief, the Yurok Tribe must comply with the strict requirements of the APA. However, the Yurok Tribe has failed to satisfy the APA's requirements, as Norton v. SUWA now makes clear, for two principal reasons. First, the Yurok Tribe's Fourth Claim for Relief does not seek to compel discrete, legally required "agency action" within the meaning of the APA, as it must in order to obtain judicial review under that waiver of sovereign immunity. A claim seeking to compel changes in the day-to-day administration of a government program—in this instance, BOR's operation of the Klamath Project—is not cognizable under the APA because such operations do not fall within the statutory definition of "final agency action."

Second, the Tribe has failed to identify a specific duty based in positive law or established property rights that could provide the basis for an injunction compelling BOR *in the future* to maintain particular conditions of flow in the Klamath River for the benefit of non-Endangered Species Act (ESA)-listed anadromous fish. In the absence of a fishing right with adjudicated water flows or some other established water right, or a statute or regulation directing BOR to operate Klamath Project facilities to maintain particular conditions of flow in the Klamath River for non-ESA-listed fish, the Secretary of the Interior (Secretary) retains discretion as to the means of protecting the Yurok Tribe's fishing right, and this Court is without jurisdiction under the APA to issue an order directing BOR to exercise the discretion delegated to it by the Secretary in a particular way, as Norton v. SUWA makes clear.

The Yurok Tribe is not entitled to the relief it seeks under its claim for breach of trust, and

therefore the Court should dismiss the Tribe's Fourth Claim for Relief.

III. BACKGROUND

On May 31, 2002, NOAA Fisheries released its Biological Opinion (BiOp) on BOR's 2002 Biological Assessment of a proposed ten-year plan of operations for the Klamath Project. (See July 2003 Order at 10.) NOAA Fisheries concluded in its BiOp that BOR's proposed action was likely to jeopardize the continued existence of the ESA-listed coho salmon. Id. NOAA Fisheries then proposed a Reasonable and Prudent Alternative (RPA) designed to avoid jeopardy to the coho. Id. The RPA modified the plan proposed by BOR, and contained three phases of implementation over the course of a ten-year period, during which BOR was to implement specific flow requirements which reasonably balanced, in the scientific judgment of NOAA Fisheries, conflicting scientific data on the stream flow requirements of coho, and whether increased stream flow was even beneficial to the species. Id. at 10-11. During Phases II and III of the RPA (which cover the balance of the ten years after 2005), NOAA Fisheries concurred that BOR would be responsible for contributing 57% of the long-term RPA flow to the Klamath River below Iron Gate Dam or the flow identified in BOR's Biological Assessment, whichever was greater. Id. at 10.

In September 2002, as BOR proceeded with implementing the RPA, approximately 33,000 salmonids, mostly non-listed chinook salmon, died in the Klamath River. Id. at 11. Soon after the fish die-off, the Yurok Tribe and Hoopa Valley Tribe separately moved to intervene as plaintiffs in the ongoing PCFFA II case. In a Stipulation with the Yurok Tribe filed January 21, 2003, the Federal Defendants withdrew their opposition to the Yurok Tribe's intervention in this case, and the Yurok Tribe clarified the nature of its Fourth Claim for Relief. On February 4, 2003, the court granted the Hoopa's and the Yurok's respective motions to intervene. Id. at 12.

A. The Yurok Tribe's Claim for Breach of Trust

In addition to asserting claims alleging that the 2002 coho BiOp violated the ESA, the Yurok Tribe also asserts a claim for breach of trust arising from BOR's operation of the Klamath Project, which the Tribe alleges caused the 2002 fish die-off. This breach of trust claim is contained in the

Fourth Claim for Relief of the Tribe's Complaint-in-Intervention. We briefly summarize that claim here.

The Yurok Tribe's Fourth Claim for Relief states as follows:

> FOURTH CLAIM FOR RELIEF
>
> Violation of the Yurok Tribe's Federal Reserved Fishing Right and APA by BOR For Failing to Provide Flow Levels Adequate to Support Productive Fishery Habitat and Salmon Populations
>
> 76. Federal law requires BOR to provide flow levels below Iron Gate Dam of sufficient quantity, quality and timing to support a productive and viable anadromous fishery in the Klamath River on the Yurok Reservation.
>
> 77. BOR violated that legal duty by failing to provide biologically adequate flows in 2002 and by operating the Klamath Irrigation Project in a manner that contributed to the deaths of over 23,000 adult chinook and threatened coho salmon.
>
> 78. BOR's actions and omissions are arbitrary, capricious, and [sic] abuse of discretion and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §§ 701-706.

(Yurok Complt. at 18.) Although the Yurok Tribe's Complaint does not specify the provision of the APA under which it seeks review, the Tribe's Summary Judgment Brief clarifies that it seeks to compel agency action unlawfully withheld within the meaning of Section 706(1) of the APA based on BOR's alleged failure "to provide adequate stream flows in August and September 2002," (Yurok Summ. J. Memo at 8), by "unlawfully interfer[ing] with the exercise of the . . . Tribe's right to take fish from the Klamath River." Id. at 8-9. The Tribe concluded, "BOR's failure constitutes agency action unlawfully withheld within the meaning of the APA, and should, therefore, be declared unlawful [under] 5 U.S.C. § 706(1)." Id. at 9.

The claim quoted above also makes clear that the "action" challenged by the Yurok Tribe is the continuing operation of the Klamath Project during 2002 in accordance with the terms of the RPA in the 2002 BiOp issued by NOAA Fisheries. The Introduction and Background sections of the Yurok Complaint confirm that the Tribe seeks to challenge Klamath Project operations, including those operations conducted in accordance with the RPA. (See Yurok Compl. at 1-3, 15.)

The Yurok Tribe claims that these operations caused the 2002 fish die-off on the Klamath River by failing to provide flows adequate to support spawning salmon. (See Yurok Summ. J. Memo at 3.) The Yurok Tribe alleges, as this Court noted in its July 2003 Order, "that the BOR's operation of the Klamath Project resulted in the September 2002 fish kill." (July 2003 Order at 28.)

In terms of relief, the Yurok Tribe seeks not only a declaration that BOR's operation of the Klamath Project violated the Tribe's fishing right, but also a mandatory injunction ordering "BOR to limit irrigation water deliveries from the Klamath Project in order to implement an interim flow regime in the Klamath River below Iron Gate Dam that will protect anadromous fish pending BOR's full compliance with its obligations under the ESA, and with its duty to protect the Yurok fishing and water rights." (Yurok Compl. at 19, ¶ D.)[3]/ The Tribe's summary judgment brief again confirms that this injunction is intended to compel BOR to operate the Klamath Project in the future in a particular way. (See Yurok Summ. J. Memo at 3) ("The Tribe seeks relief declaring that BOR violated the fishing right and an injunction requiring BOR in the future to operate the Project in compliance with that right"). So does the Stipulation filed January 21, 2003, in which the Yurok Tribe clarified that its Fourth Claim for Relief seeks prospective relief against BOR based on alleged violations of the Tribe's fishing right due to Project operations in 2002. (Stip. ¶ 4 (filed Jan. 21, 2003)).[4]/ The Yurok Tribe does not, however, indicate the manner in which it would have BOR

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[3]/ Elsewhere in its Complaint, the Yurok Tribe states that it seeks "an injunction requiring BOR to limit irrigation water deliveries from the Klamath project that would cause Klamath River flows below Iron Gate Dam to fall below biologically adequate levels before a valid biological opinion is issued." (Yurok Complt. ¶ 12.)

[4]/ Paragraph 4 of the Stipulation provides as follows:

> 4. The Yurok Tribe hereby reaffirms and stipulates that its Fourth Claim for Relief involves the resolution of two questions only: 1) did BOR violate the Yurok Tribe's federal reserved fishing right in 2002 by providing stream flows that were inadequate to protect the Tribe's anadromous fishery? and 2) must BOR operate the Klamath Irrigation Project in future years to avoid violations of the Yurok Tribe's fishing right? In seeking a resolution of these questions in its Fourth Claim for Relief, the Tribe is not seeking an order establishing flow levels for all

comply with its fishing right other than to maintain flow conditions in the Klamath River at unspecified levels which, in the Tribe's opinion, are needed to protect its fishery.

While the Yurok Tribe repeatedly invokes its federal reserved fishing rights, nowhere in its Complaint, the Stipulation, or Summary Judgment Brief does it identify a provision of positive law that imposes a specific duty on BOR to maintain particular flows in the Klamath River for the protection of non-ESA-listed fish and the Yurok Tribe's fishing rights.

B. This Court's July 2003 Order

In the July 2003 Order, this Court ruled that the RPA's reliance on future uncertain cooperative agreements to satisfy its flow levels was arbitrary and capricious under § 706(2) of the APA. Id. at 22. The Court also ruled that the incidental take statement issued as required by the ESA was arbitrary and capricious for failing to delineate a threshold incidental take level that, when crossed, would trigger re-consultation under the ESA. Id. at 23-24. However, the Court upheld both the short- and long-term flow levels contained in the May 31, 2004 RPA, noting that because they "are based on a compromise between two conflicting studies regarding the effect of flow rates on coho salmon, NMFS' decision to use a phased approach is not arbitrary and capricious." Id. at 19. Moreover, the Court held that BOR's decision to comply with the RPA for the years 2002 and 2003 was not arbitrary and capricious. Id. at 31. The Court allowed the 2002 BiOp to remain in place during the remand to NOAA Fisheries, while that agency addressed the defects identified by the Court in its July 2003 Order. Accordingly, the Court denied Plaintiffs' request for injunctive relief.

With respect to the Yurok and Hoopa Valley Tribes' claims for breach of trust for the fish die-off, the Court denied cross motions for summary judgment, finding that triable issues of material fact existed as to whether BOR had breached its trust duties to the Tribes. Id. at 26-30. The Court did reject other breach of trust claims as a matter of law. In considering and rejecting an argument

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species of salmon covered by the Tribe's fishing right for all life stages for all water-year types. The Yurok Tribe hereby reaffirms those representations here.

that a claim for breach of trust could be based on BOR's alleged failure to comply with the procedural requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSCMA), 16 U.S.C. § 1855(b)(4)(B), the Court cited the precedents and reasoning of recent U.S. Supreme Court decisions addressing the standards for determining whether the federal government has breached a trust duty to an Indian tribe. See id. at 27 n.12 (citing and discussing United States v. Navajo Nation, 537 U.S 488 (2003), and United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003)). In discussing Navajo Nation, the Court noted that "to state a cognizable claim for breach of trust based on a violation of a federal statute, the Tribe must 'identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.'" Id. (quoting Navajo Nation, 537 U.S. at 506). The Court found that the MSCMA did not constitute such a substantive source of law establishing specific fiduciary duties on BOR and dismissed this claim.

But with respect to the Yurok Tribe's claims for breach of trust for the fish die-off, the Court deviated from the APA analysis and instead appeared poised to apply the standards that the Court might apply in determining whether a private fiduciary had breached its duty of trust. Id. at 24-25 n.9.[5/] In this context, the Court appears not to have considered whether the Yurok Tribe had identified any other statute, regulation, other source of substantive law, or an established and precisely delineated property right, that would support a cognizable claim for breach of trust under the applicable waiver of the federal government's sovereign immunity. Id.

C. *Norton v. SUWA*

On June 14, 2004, a unanimous Supreme Court issued its decision in Norton v. SUWA, which examined the availability of judicial review under the APA in a suit challenging an agency's

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[5/] As we note below, this approach appears inconsistent with Nevada v. United States, 463 U.S. 110, 128, 141-42 (1983), in which the United States Supreme Court held that the United States was barred from bringing certain claims on a tribe's behalf. In so holding, the Court rejected the application of the standards of a private fiduciary to the federal government when the government is required by Congress to administer water resources between parties with competing interests.

alleged failure to act. In Norton v. SUWA, plaintiff Southern Utah Wilderness Alliance brought suit against the Bureau of Land Management (BLM) for failing to comply with a directive in the Federal Land Policy and Management Act (FLPMA) to manage certain public lands "in a manner so as not to impair the suitability of such areas for preservation as wilderness" (non-impairment mandate). Norton v. SUWA, 124 S. Ct. 2373, 2377 (2004) (quoting 43 U.S.C. § 1782(c)). SUWA's lawsuit alleged, inter alia, that BLM was in violation of FLPMA's non-impairment mandate by allowing off-road vehicles (ORVs) to degrade lands classified as wilderness study areas which were awaiting formal wilderness designation by Congress. Id. at 2378. SUWA sought relief under Section 706(1) of the APA which allows a court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), where an agency has failed to act in accordance with a legal duty. Norton v. SUWA, 124 S. Ct. at 2378. SUWA sought a declaration that BLM was in violation of the non-impairment mandate, and an injunction ordering compliance with the non-impairment mandate. Id. at 2377-78. Although the district court dismissed these claims, a divided panel of the Tenth Circuit held that the district court had jurisdiction to award this form of relief under the APA. See Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217 (10th Cir. 2002), rev'd, 124 S. Ct. 2373 (2004).

The Supreme Court unanimously rejected this application of the APA for two principal reasons. First, the Court examined Section 702 of the APA, which limits judicial review to suits challenging "agency action" as it is defined in Section 551(13) of that statute. Norton v. SUWA, 124 S. Ct. at 2378. The Court emphasized that the specific categories of "agency action" given in Section 551(13) all "involve circumscribed, discrete agency actions." Id. Applying this analysis to SUWA's claims, the Court concluded that SUWA's challenges to BLM's alleged failure to manage wilderness study areas in compliance with FLPMA's non-impairment mandate was not a challenge to "agency action" as defined in the APA, but rather was a challenge to the continuing, day-to-day administration of wilderness study areas by BLM. A challenge to such ongoing management activities is not cognizable under the APA, the Court held, because day-to-day

management is not discrete agency action as defined in the APA. Id. at 2380-2381.

Second, the Supreme Court held that Section 706(1) of the APA did not permit a court to award such relief for SUWA's non-impairment claim because only "*discrete* agency action that [an agency] is *required to take*" may be compelled under § 706(1). Id. at 2379 (emphasis in original). Put differently, "the only agency action that can be compelled under the APA is action legally *required*." Id. (emphasis in original). Since nothing in FLPMA's non-impairment mandate specifies any particular "legally required" action, the district court was without power under the APA to compel agency action. Id. at 2380-81. The Supreme Court noted that, although FLPMA's non-impairment mandate "is mandatory as to the object to be achieved . . . it leaves BLM a great deal of discretion in deciding how to achieve it." Id. at 2380. Accordingly, a plaintiff cannot invoke Section 706(1) of the APA to compel an agency to exercise its discretion in a certain way because Section 706(1) "empowers a court only to compel an agency to perform a ministerial or non-discretionary act." Id. at 2379 (internal quotations omitted).

In addition to the specific Norton v. SUWA case arising from the Tenth Circuit, the Supreme Court also vacated a Ninth Circuit decision involving a similar claim against the United States Forest Service, and remanded it for further consideration based on Norton v. SUWA. See Blue Ribbon Coalition, Inc. v. Montana Wilderness Ass'n, 124 S. Ct. 2870 (2004), vacating sub nom. Montana Wilderness Ass'n v. United State Forest Serv., 314 F.3d 1146. In Montana Wilderness Association, the Ninth Circuit had held that the plaintiff environmental organizations could assert claims under Section 706(1) of the APA against the Forest Service, asserting that the Forest Service had failed to take actions allegedly required under FLPMA to maintain the wilderness character of certain wilderness study areas pending final designation by Congress. See 314 F.3d at 1151.

IV. STANDARDS FOR DISMISSAL FOR LACK OF JURISDICTION

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a motion to dismiss for lack of subject matter jurisdiction. It is fundamental that federal courts are courts of limited jurisdiction, and that the limits on federal jurisdiction must not be disregarded or evaded. Del Puerto Water Dist.

v. U.S. Bureau of Reclamation, 271 F. Supp. 2d 1224, 1230 (E.D. Cal. 2003) (citing Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978)). The doctrine of sovereign immunity, moreover, is one of those limitations on the power of a federal court to hear a claim for relief against the United States. See Tucson Airport Auth. v. General Dynamics Corp., 136 F.3d 641, 644 (9th Cir. 1998). The burden of asserting jurisdiction rests on the plaintiff. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). A jurisdictional challenge can be raised at any time by any party. See United States v. Bennett, 147 F.3d 912, 914 (9th Cir. 1998); Del Puerto, 271 F. Supp. 2d at 1231 (citing Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951)); Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action").

As discussed below, dismissal of the Yurok Tribe's breach of trust claim is appropriate in light of the Supreme Court's recent decision in Norton v. SUWA which clarifies the application of the APA to claims seeking to compel agency action.

V. DISCUSSION

The Yurok Tribe claims that the Government breached its responsibility to protect the Tribe's fishing rights by failing to provide biologically adequate flows in the Klamath River in 2002 through its operation of the Klamath Project.[6/] The Tribe seeks a mandatory injunction compelling BOR in the future to operate the Project to maintain an unspecified flow regime which the Tribe

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[6/] The United States is a trustee for the Yurok Tribe, including its fishing rights, and has an obligation to protect the those rights and has taken steps to do so. See Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 1999) ("[T]he United States, as trustee for the [Hoopa and Yurok] Tribes, has a responsibility to protect their rights and resources."); Kandra v. United States, 145 F. Supp. 2d 1192 (D. Or. 2001) (during drought conditions, drastically reducing water deliveries to the Klamath Project to comply with RPAs for the protection of threatened and endangered fishes in the Klamath River and in Upper Klamath Lake which were also part of the fishery resource of Klamath Basin tribes). See also Pyramid Lake Paiute Tribe of Indians v. United States Dep't of the Navy, 898 F.2d 1410, 1420 (9th Cir. 1990); Parravano v. Babbitt, 70 F.3d 539, 544-47 (9th Cir. 1995).

contends is necessary for the protection of its fishing rights. (Yurok Complt. at 19, ¶ D.) Under Norton v. SUWA, however, the Yurok Tribe's claim for mandatory injunctive relief is not cognizable under the APA, principally because the Tribe does not seek to compel a discrete agency action and because the Tribe has not alleged that BOR has failed to implement some legally required ministerial or non-discretionary act. As discussed more fully below, because the Yurok Tribe has failed to assert a legally cognizable claim for breach of trust under Section 706(1) of the APA, the Court should now dismiss that claim.

A. The APA Provides the Only Applicable Waiver of Sovereign Immunity to Review the Tribes' Claims for Breach of Trust

"It long has been established . . . that the United States, as sovereign, 'is immune from suit save as it consents to be sued.'" United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). The Government's waiver of its sovereign immunity "cannot be implied but must be unequivocally expressed." Testan, 424 U.S. at 399 (quoting United States v. King, 395 U.S. 1, 4 (1969)). "Limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." Soriano v. United States, 352 U.S. 270, 273 (1957).

In this case, the Yurok Tribe has invoked the APA, 5 U.S.C. §§ 701-706, in seeking judicial review of its breach of trust claim. (Yurok Complt. ¶¶ 76-78.) The APA waives the government's immunity to suit for non-monetary claims for which "there is no other adequate remedy in a court," 5 U.S.C. § 704, and where no other statute provides a private right of action, by providing that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. §

702. Section 706, the provision at issue in this case, defines the scope of judicial review under the APA. Section 706 states that "[t]he reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be," inter alia, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

As shown above, the Yurok Tribe has specifically invoked APA Section 706(1) with respect to its claim for breach of trust, and seeks injunctive relief compelling BOR to operate the Klamath Project *in the future* to maintain particular conditions of flow which the Tribe deems necessary to protect its fishing rights. Accordingly, the APA provides the framework for review of the Tribe's Fourth Claim for Relief.

B. In this Case, the Tribe Does Not Seek to Compel Discrete Agency Action as Required Under *Norton v. SUWA*

In Norton v. SUWA, the Supreme Court held that a complaint seeking to compel agency action under Section 706(1) must do precisely that – seek to compel an "agency action" as that term is defined by the APA. "Sections 702, 704, and 706(1) all insist upon an 'agency action,' either as the action complained of (in §§ 702 and 704) or as the action to be compelled (in § 706(1))." Norton v. SUWA, 124 S. Ct. at 2378. The Court found that the definition of "agency action" set forth in Section 551(13) involves "decisions made or outcomes implemented by an agency" through "circumscribed, discrete agency actions," such as the promulgation of a rule, the issuance of an order, the grant or denial of a license, the imposition of a sanction or the refusal to impose one, or the allowance or withholding of relief upon a petition to the agency. Id. The Court emphasized that the "important point is that a 'failure to act' is properly understood to be limited, as are the other

items in § 551(13), to a *discrete* action." Id. at 2379 (emphasis in original).

Applying this analysis to SUWA's claims, the Court concluded that SUWA was not properly seeking to compel an agency action as defined in the APA; rather, SUWA was seeking to compel compliance with a broad duty – namely, the duty to manage wilderness study areas in compliance with FLPMA's non-impairment mandate. Id. at 2380-81. The Court held that the APA did not allow courts to compel general compliance with such a duty: "General deficiencies in compliance . . . lack the specificity requisite for agency action." Id. at 2381.

The Yurok Tribe's breach of trust claim suffers from the same defect. Like the plaintiff in SUWA, the Yurok Tribe does not seek to compel some discrete agency action to protect a cognizable and precise legal interest. It does not (and cannot) allege that a particular flow must be maintained on a particular day, or otherwise allege that some discrete agency action must be compelled. Instead, the Tribe talks generally of compelling unspecified "flow levels" and the need to maintain "biologically adequate flows."[7/] As did the plaintiff in SUWA, the Tribe seeks to compel general compliance with a broad duty – in this case, the duty to protect the Tribe's fishing rights. As explained by the Supreme Court, this is simply not a cognizable claim under Section 706(1) of the APA because the Tribe does not seek to compel any particular discrete agency action unlawfully withheld. For this reason alone, the Tribe's breach of trust claim should be dismissed.

C. In this Case, the Tribe Does Not Seek to Compel a Ministerial, Nondiscretionary Action as Required Under *Norton v. SUWA*

In Norton v. SUWA, the Supreme Court further explained that a claim under 706(1) must seek to compel a ministerial, non-discretionary action. On this issue, the Court started out by

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7/ BOR, in fact, operates the Project consistent with NOAA's RPA, which seeks to provide biologically adequate flows to maintain the survival and lead to recovery of the coho.

highlighting that the action sought to be compelled must be legally required as well as discrete:

> A second point central to the analysis of the present case is that the only agency action that can be compelled under the APA is action legally *required.* * * * Thus, a claim under §706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take.*

124 S. Ct. at 2379 (emphasis in original). The Court examined the history of Section 706(1) of the APA, rooted in writs of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), and cited the 1947 Attorney General's Manual on the APA for the proposition that "§ 706(1) empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing how it shall act.'" Id. (emphasis in original) (quoting Attorney General's Manual on the Administrative Procedure Act 108 (1947)).

The Court later emphasized that these limitations on judicial review serve the important purpose of preventing improper judicial entanglement in agency decision-making:

> The principal purpose of the APA limitations . . . is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which the courts lack both expertise and information to resolve. If the courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day management.

Norton v. SUWA, 124 S. Ct. at 2381. Thus, in the absence of a legal duty to act, the "great deal of discretion" inherent in fulfilling agency mandates is properly lodged in the agencies themselves. Id. at 2380.

Applying these principles, the Court held that since nothing in FLPMA's non-impairment

mandate specifies any particular "legally required" action, the district court was without power under the APA to compel agency action. Id. at 2380-81. The Supreme Court noted that, although FLPMA's non-impairment mandate "is mandatory as to the object to be achieved . . . it leaves BLM a great deal of discretion in deciding how to achieve it." Id. at 2380. Accordingly, the plaintiff could not invoke Section 706(1) of the APA because that provision "empowers a court only to compel an agency to perform a ministerial or non-discretionary act." Id. at 2379 (internal quotations omitted).

Similarly, the Tribe in this case has not and cannot point to any ministerial or non-discretionary act that BOR has failed to implement. The Yurok Tribe asserts that "Federal law requires BOR to permit water flow levels below Iron Gate Dam of sufficient quantity, quality, and timing to support a productive and viable anadromous fishery" on the Yurok Reservation. (Yurok Compl. ¶ 76.) Like the Wilderness Act mandate at issue in Norton v. SUWA, to "manage [Wilderness Study Areas] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness," there is nothing ministerial or non-discretionary about the duty asserted by the Tribe, especially when the Secretary's other duties are considered. See 124 S. Ct. at 2380 (discussing 43 U.S.C. § 1782(c)). As courts have repeatedly held, BOR must operate the Klamath Project to address multiple legal obligations: to threatened and endangered species under the ESA, to the Indian tribes of both the upper and lower Klamath basins, to Project water users, and to National Wildlife Refuges which receive water through the Project. See Patterson, 204 F.3d at 1213; Kandra v. United States, 145 F. Supp. 2d 1192, 1196-97 (D. Or. 2001); Pacific Coast Federation of Fishermen's Ass'n v. U.S. Bureau of Reclamation, 138 F. Supp. 2d 1228, 1230 (N.D. Cal. 2001). These multiple and often conflicting duties create the antithesis of a ministerial

directive, necessarily requiring the Secretary to exercise judgment and make difficult choices. In the context of these competing generalized obligations, the duty asserted by the Yurok Tribe, to maintain biologically "sufficient" flows, like the Wilderness Act duty in Norton v. SUWA, "does not mandate, with the clarity necessary to support judicial action under §706(1)," judicial imposition of the flows sought by the Tribe.[8]/ See Norton v. SUWA , 124 S. Ct. at 2380.

Given the discretion inherent in complying with the multiple mandates applicable to the Secretary in operating the Klamath Project, there is no "ministerial action" upon which the Tribe can base its claim under Section 706(1). Accordingly, the Tribe's claim should be dismissed.

D. The Defects in the Tribe's Allegations Cannot Be Corrected By Seeking Review Under APA Section 706(2) .

The defects in the Tribe's claim is not a technicality based on its citation of 706(1) rather than 706(2) of the APA. Under either provision, the claim must be dismissed because it fails to challenge discrete agency action. The Supreme Court addressed this issue in SUWA, noting that a plaintiff who failed to challenge discrete agency action would fare no better under an analysis of Section 706(2). Norton v. SUWA, 124 S. Ct. at 2379-80. The Court reemphasized its earlier ruling in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), that the APA precluded broad, programmatic attacks on agency management of public lands. Id. at 2380. Similarly, here the Tribe would also fare no better if it tried to convert its claim to one under Section 706(2), since it has not alleged injury caused by a discrete agency action as defined by the APA.

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[8]/ At this time, the Tribe's water claims have not been adjudicated. Moreover, the Tribe asserts that it is not seeking to adjudicate its water claims in the context of this case. (Stip. filed Jan. 21, 2003, ¶ 4.) To the extent that the Tribe established a property right in Klamath water, however, it might be possible to fashion a cognizable claim pursuant to section 706(1) or 706(2) narrowly relating to the parameters of that property right.

Even without the benefit of the Supreme Court's recent decision, a district court reached the same conclusion in a case similar to the one before this Court. In San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860 (D. Ariz. 2003)[9], the San Carlos Apache Tribe sought to enjoin the release of irrigation water from San Carlos Reservoir until a minimum volume of water was established in the reservoir. The Tribe alleged that releasing irrigation water from the San Carlos Reservoir violated various statutes, including the ESA, and also constituted a breach of the Secretary's trust obligations to the Tribe. Id. at 867, 894-97. The United States District Court for the District of Arizona rejected the Tribe's challenge and granted the government's motion for summary judgment, finding that "[t]he day to day operation of the dam is not a final agency action reviewable under the APA." Id. at 884. The same conclusion applies to the Yurok Tribe's amorphous breach of trust claim in this case.[10]

Moreover, if the Tribe were to attempt to convert its action to one under Section 706(2),

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[9] The San Carlos Apache opinion contains an extensive review of the applicability and requirements of the APA in factual circumstances resembling those in this case, and to claims for non-monetary relief involving alleged violations of statutes and the government's fiduciary obligations to the plaintiff tribe. However, the United States District Court for the District of Arizona issued its opinion in San Carlos Apache on July 9, 2003, less than a week before this Court issued the July 2003 Order. Thus, no party to this case was able to cite San Carlos Apache to this Court during the prior briefing on summary judgment motions. The undersigned counsel for the Federal Defendants did not become aware of the decision until well after the Court issued its July 2003 Order.

[10] This is not to say that Klamath Project operations may never be reviewed in a suit under the APA. For example, the adoption of regulations governing the operations of a reclamation project would be reviewable as final agency action under Section 706(2) of the APA. See United States v. Alpine Land & Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989) (review of regulations classifying project lands with respect to water deliveries); see also Florida Power & Light v. Lorion, 470 U.S. 729, 743 (1985) (in a suit under § 706, review is limited to the administrative record). Similarly, as Norton v. SUWA suggests, a plaintiff might seek judicial review under Section 706(2) of an agency decision granting or denying the plaintiff's petition for relief. See 124 S. Ct. at 2378.

under the facts of this case it would be unable to state a viable claim for relief. Any challenge to BOR's operation of the Klamath Project under Section 706(2) must be presented in the context of a final agency action within the meaning of the APA, which would then be reviewed based upon an administrative record, not a *de novo* record created in the district court. See 124 S. Ct. at 2380 (discussing Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990)). In the absence of any specific duty to operate the Klamath Project in a particular way, or to protect a particular cognizable property interest in a particular way, judicial relief under the APA is unavailable to the Yurok Tribe dictating *how* the Secretary should exercise her authority to protect the Tribe's fishing rights while balancing her other statutory duties. As the Supreme Court stated in Nevada v. United States, 463 U.S. 110 (1983) – a water adjudication in which the Supreme Court held that the United States was barred from reopening the adjudication to bring certain claims on a tribe's behalf – "[t]he Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact it simultaneously performs another task for another interest that Congress has obligated it by statute to do." Nevada, 463 U.S. at 128. Nevada arose in the context of a similar competition for scarce water resources between water users in a reclamation project and an Indian Tribe.

Although the Yurok Tribe's Complaint and Summary Judgment Brief are replete with references to the Tribe's federal reserved fishing rights, the existence of which has been acknowledged by the Department of the Interior, those rights have never been adjudicated as to the quantities of flow that may be necessary "to support a productive and viable anadromous fishery." Thus, the Yurok Tribe has failed to identify a substantive legal duty to operate the Klamath Project to maintain flow conditions on the Klamath River at particular levels deemed necessary *by the Tribe* "to support a productive and viable anadromous fishery." In the absence of any such legal duty or

precise property interest, this Court could not, under either Section 706(1) or 706(2) of the APA, grant the injunctive relief sought by the Tribe.

Moreover, unlike the plaintiff Pyramid Lake Paiute Tribe in Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D. D.C. 1973), the Yurok Tribe has not alleged, let alone proved, that BOR violated any decree, provision of Federal reclamation law, or regulation, in connection with its operation of the Klamath Project. The Yurok Tribe has not demonstrated that BOR has failed to comply with general regulations or statutes applicable to the Klamath Project. See Morongo Band of Mission Indians v. Federal Aviation Admin., 161 F.3d 569, 574 (9th Cir. 1998) ("Although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific, substantive duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."); Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 479 (9th Cir. 2000) (Tribe's claim that BLM approval of gold mine violated trust obligations is satisfied by BLM's compliance with the National Environmental Policy Act, 42 U.S.C. § 4321 et seq.). The only substantive statute that the Tribe claims that BOR has violated is the ESA, but this Court upheld BOR's adoption of the flow measures in the RPA for 2002 and 2003, and the Tribe has claimed no other violation of the ESA by BOR in this case. (See July 2003 Order at 31.) Accordingly, the Tribe's claims for breach of trust in this case would fail to state a claim even if presented under Section 706(2) of the APA.

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VI. CONCLUSION

The Supreme Court's recent decision in Norton v. SUWA clarifies that the relief sought by the Yurok Tribe in its Fourth Claim for Relief in this case is not available under the only applicable waiver of the federal government's sovereign immunity. In light of Norton v. SUWA and the applicable provisions of the APA, the Court should grant the Federal Defendants' motion herein, and dismiss the Yurok Tribe's Fourth Claim for Relief.

Respectfully submitted this 3d day of August, 2004.

KEVIN V. RYAN
United States Attorney
JAMES A. CODA (SBN 1012669) (WI))
Assistant United States Attorney

THOMAS L. SANSONETTI, Assistant Attorney General
JEAN E. WILLIAMS, Section Chief
SETH BARSKY, Assistant Section Chief
S. JAY GOVINDAN, Trial Attorney-
Environment & Natural Resources Division
Wildlife & Marine Resources Section
United States Department of Justice
Ben Franklin Station, P.O. Box 7369
Washington, DC 20044-7369
Tel: (202) 305-0237 / Fax: (202) 305-0275

MARIA A. IIZUKA, Trial Attorney
STEPHEN M. MACFARLANE, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
General Litigation Section
501 I Street, Suite 9-700
Sacramento, California 95814-2322
Tel: (916) 930-2202 / Fax: (20) 930-2210

OF COUNSEL:

STEPHEN PALMER
Assistant Regional Solicitor
Pacific Southwest Region
U.S. Department of the Interior
Sacramento, California

CHRISTOPHER KEIFER
Office of the General Counsel
National Oceanic and Atmospheric Administration
Long Beach, California

Attorneys for Federal Defendants

Counsel for the Federal Defendants would like to express the Federal Defendants' sincere appreciation for the outstanding legal assistance provided in preparing this memorandum by Mr. Robert Sheffield, a law student at the George Washington University School of Law, who served as a legal intern with the Department of Justice.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Sacramento Field Office of the United States Department of Justice, Environment and Natural Resources Division, 501 "I" Street, Suite 9-700, Sacramento, California, 95814-2322; and is a person of such age and discretion to be competent to serve papers.

That, on August 3, 2004 she served copies of the attached:

Federal Defendants' Notice Of Motion And Motion To Dismiss Yurok Tribe's Fourth Claim For Relief; Memorandum Of Points And Authorities In Support Of Motion To Dismiss Yurok Tribe's Fourth Claim For Relief

Declaration Of Stephen M. Mcfarlane In Support Of Federal Defendants' Motion To Dismiss Yurok Tribe's Fourth Claim For Relief

[Proposed] Order

by causing said copies to be placed in a prepaid or postpaid envelope addressed to the persons hereinafter named, at the places and addresses stated below, which are the last known addresses, and by either delivering said envelope to Federal Express for overnight delivery or depositing said envelope and contents in the United States Mail at Sacramento, California, or by facsimile as indicated below.

VIA Federal Express:

Richard W. Wieking
Clerk of the Court,
U.S. District Court
Northern District of California, Oakland Division
1301 Clay Street, Room 400 South
Oakland, CA 94612-5212

VIA U.S. Mail:

Kristen L. Boyles
Earthjustice Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, WA 98104-1711

Michael R. Sherwood
Earthjustice Legal Defense Fund
426 Seventeenth Street
Oakland, CA 94612

Russ Brooks
Pacific Legal Foundation
10940 NE 33rd Place, Suite 109
Bellevue, WA 98004

Andrew Lloyd
Robin Rivett
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834

Walter Echo-Hawk
Native American Rights Fund
1506 Broadway
Boulder, CO 80302

Curtis G. Berkey
Scott W. Williams
Alexander, Berkey, Williams & Weathers, LLP
2000 Center Street, Suite 308
Berkeley, CA 94704

Stephen V. Quesenberry
California Indian Legal Services
510 16th Street, 4th Floor
Oakland, CA 94612-1520

Gregory K. Wilkinson
Law Offices of
Best Best & Krieger
3750 University Avenue, Suite 400
P.O. Box 1028
Riverside , CA 92502-1028

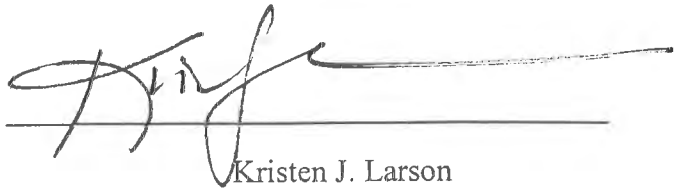
Christian C. Scheuring
Somach Simmons & Dunn
A Professional Corporation
Hall of Justice Building
813 Sixth Street, 3rd Floor
Sacramento, CA 95814-2403

Carl Ullman
Klamath Tribes
P.O. Box 957
116 Chocktoot Street
Chiloquin, Or. 97624

Thomas P. Schlosser
Rob Roy Smith
Morrisset, Schlosser, Homer, Jozwiak & McGaw
Suite 115 Norton Building
801 Second Avenue
Seattle, Washington 98104-1509

Grett Hurley
Office of Tribal Attorney
Hoopa Valley Tribe
P.O. Box 188
Hoopa, California 95546

Jeremiah R. Scott, Jr.
Scott, Scott, Robinson & Pavlich
1118 Sixth Street
Eureka, CA 95501



Kristen J. Larson

KEVIN V. RYAN
United States Attorney
JAMES A. CODA (SBN 1012669) (WI)
Assistant United States Attorney

THOMAS L. SANSONETTI, Assistant Attorney General
JEAN E. WILLIAMS, Section Chief
SETH BARSKY, Assistant Section Chief
S. JAY GOVINDAN, Trial Attorney
Environment & Natural Resources Division
Wildlife & Marine Resources Section
United States Department of Justice
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
Tel: (202) 305-0237 / Fax: (202) 305-0275

MARIA A. IIZUKA, Trial Attorney
STEPHEN M. MACFARLANE, Trial Attorney
Environment & Natural Resources Division
Natural Resources Section
U.S. Department of Justice
501 I Street, Suite 9-700
Sacramento, CA 95814-2322
Tel: (202) 930-2202 / Fax: (202) 930-2210
Email: Maria.Iizuka@usdoj.gov
Stephen.Macfarlane@usdoj.gov

Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, et al., Plaintiffs, YUROK TRIBE, Plaintiff-Intervenor, v. U.S. BUREAU OF RECLAMATION, and NATIONAL MARINE FISHERIES SERVICE, Federal Defendants.	Civ. No. C 02-02006 SBA FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS YUROK TRIBE'S FOURTH CLAIM FOR RELIEF Date: October 26, 2004 Time: 1:00 p.m. Courtroom: 3

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I. INTRODUCTION

In our opening brief, Federal Defendants demonstrated that the Yurok Tribe's Fourth Claim for Relief – which alleges that the Bureau of Reclamation's (BOR) operation of the Klamath Project in 2002 substantially contributed to a fish die-off in the Klamath River and thereby breached BOR's trust obligation to the Tribe – fails to state a cognizable claim for relief under § 706(1) of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, in light of the U.S. Supreme Court's holdings in Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373 (2004) (Norton v. SUWA), and accordingly should be dismissed for lack of jurisdiction as not falling within the APA's waiver of sovereign immunity. Under Norton v. SUWA, the Yurok Tribe (Tribe) may not rely on § 706(1) to compel BOR to exercise its discretion in managing Klamath Project operations in a particular way in order to meet its trust obligations to the Tribe. Implicitly conceding the point, the Tribe now responds that its Fourth Claim for Relief is not, after all, a claim to compel agency action alleged to have been unlawfully denied under § 706(1), despite having maintained that position until the government filed the instant motion to dismiss. Rather, the Tribe now argues that its Fourth Claim for Relief is in fact two claims, one challenging final agency action under § 706(2) and one arising under the common law of trusts, although the injunctive relief it continues to seek is manifestly mandatory in nature. This belated attempt to salvage a jurisdictional basis for its Fourth Claim for Relief should be rejected.

Before addressing the Tribe's attempt to recast its claim, however, we address the Tribe's sweeping and erroneous assertions that Federal Defendants are disclaiming their trust obligations to the Tribe and its fishery. In moving to dismiss the Yurok Tribe's claim, Federal Defendants have not stated that the United States has no trust responsibility to the Tribe or that the Tribe does not have a federally reserved fishing right. Nor is the Federal Defendants' position on the nature of the trust relationship between BOR and the Tribe inconsistent with positions Federal Defendants have taken in previous litigation. The Tribe's attempt to invoke judicial estoppel against Federal Defendants (see Yurok Op. at 9-12) is therefore based on a fundamental distortion of the government's position in this case, and the government's position in Klamath Water Users

Protective Ass'n v. Patterson, 203 F.3d 1175 (9th Cir), cert. denied, 531 U.S. 812 (2000). It is one thing to acknowledge that BOR shares in a trust obligation to take actions within its authority to protect the Tribe's fishery and fishing rights, and quite another to concede (as the Tribe apparently expects) that the Tribe has properly invoked this Court's jurisdiction under the APA with regard to its Fourth Claim for Relief in this case.

The United States contends, and our motion to dismiss establishes, that the Tribe's Fourth Claim for Relief seeks relief that is simply unavailable under the APA. The Supreme Court, in Norton v. SUWA, unanimously held that the availability of mandamus-like relief is limited under the APA to agency actions (as defined by the APA) that agencies are legally required to take. As explained in our opening brief, the Tribe's Fourth Claim fails this test because it does not (and cannot) identify an "agency action" which BOR had a ministerial duty to take, and did not take, in connection with Klamath Project operations in 2002. The Tribe's belated attempt to salvage its claim by invoking theories that it failed to advance during summary judgment briefing last year only deepens the legal confusion, and underscores that the Fourth Claim for Relief must be dismissed.

II. THE GOVERNMENT'S MOTION IS TIMELY

The Tribe asserts that Federal Defendants' motion to dismiss is untimely. This assertion is meritless. The Tribe should not be heard to complain about the timing of our motion in light of its mercurial characterizations of the nature of its claim. Norton v. SUWA clarified the standards for claims to compel agency action within the scope of the waiver of the government's sovereign immunity under the APA. A plaintiff invoking the APA must satisfy all of its requirements unless the plaintiff can point to a separate provision which grants him a private right of action. Clouser v. Espy, 42 F.3d 1522, 1527-28 n.5 (9th Cir. 1994), cert. denied 515 U.S. 1141 (1995). The instant motion seeks dismissal of the Tribe's Fourth Claim for relief for lack of subject matter jurisdiction under both Fed. R. Civ. P. 12(b)(1) and 12(h)(3). "Because sovereign immunity is a question of subject matter jurisdiction, the United States may raise it at any point in the proceedings." United States v. Nye County, 178 F.3d 1080, 1089 n.12 (9th Cir. 1999) (citing Fed. R. Civ. P. 12(h)(3)); see also Augustine v. United States, 704 F.2d 1074, 1075 n.3 (9th Cir. 1983) ("The matter of subject

matter jurisdiction ... may be raised by the parties at any time pursuant to Fed. R. Civ. P. 12(h)(3)."); 5C Charles Alan Wright et al., Federal Practice and Procedure 3d § 1393 (2004) at 536 (a question of subject matter jurisdiction may be presented by any interested party at any time throughout the course of the lawsuit, including by motion). Accordingly, the motion is timely.

III. THE TRIBE CANNOT EVADE *NORTON V. SUWA*'S HOLDING

The Tribe's contention that its Fourth Claim for Relief is not, after all, a claim to compel agency action under § 706(1), and therefore is not subject to dismissal under Norton v. SUWA, is belied by the relief it seeks. Although the Tribe has displayed considerable confusion regarding the nature of the right of action asserted under its Fourth Claim for Relief, it has never wavered in seeking mandatory injunctive relief. Thus, the Tribe prays for an injunction that will require BOR to establish "a formal consultation process," to prepare an annual "Tribal Trust Impact Statement," and to develop a long-term plan "to protect tribal trust species in terms of both water quantity and water quality." Yurok Op. at 5. The Tribe also seeks an injunction "requiring BOR to take steps that will provide sufficient water to protect and restore the Tribe's fishery, and/or otherwise to take steps to insure that the Klamath River anadromous fishery does not continue to suffer further degradation" (Joint Pre-Trial Statement (Docket #290) at 2; see also Compl. at 19), although the Tribe has not defined what "sufficient water" means, and this Court has previously noted the "conflicting and uncertain scientific evidence regarding whether increased flows will in fact benefit coho salmon." July 2003 Order (Docket # 217) at 25. In short, the Tribe seeks an injunction that compels BOR to exercise its discretion in particular ways by adopting procedures and guaranteeing particular levels of flow in the lower Klamath River. This interference with the lawful discretion of federal agencies is precisely what the Supreme Court held could not be done under the APA. Norton v. SUWA, 124 S. Ct. at 2380, 2381; see also Mt. St. Helens Mining and Recovery Limited Partnership v. United States, ___ F.3d ___, 2004 WL 1949424, at *6 (9th Cir., Sept. 3, 2004) ("§ 706(1) of the APA does not empower the district court to conduct a de novo review of the

administrative decision and order the agency to reach a particular result.").[1]/

There are two fatal flaws in the Tribe's argument. First, none of the injunctive relief sought by the Tribe targets, as it must, a discrete, agency action as defined in the APA, and that may be compelled under § 706(1). Norton v. SUWA, 124 S. Ct. at 2378-79.[2]/ Second, and more fundamentally, the Tribe has utterly failed to demonstrate that any of the procedures it seeks to impose on BOR, or changes in the operation of Klamath Project facilities to provide a "sufficient quantity" of water in the lower Klamath River (however that is defined), is legally required. The Supreme Court made crystal clear in Norton v. SUWA that the only agency action that may be compelled in a suit under the APA is an action that is ministerial and non-discretionary. Id. at 2379 (citing the Attorney General's Manual on the APA). While the Tribe has a federal reserved fishing right which entitles the Tribe to harvest fish for commercial, subsistence, and ceremonial purposes, see United States v. Eberhardt, 789 F.2d 1354, 1359 (9th Cir. 1986), the Tribe cannot point to any decree or other authority in positive law which imposes a ministerial, non-discretionary duty to maintain specified quantities and timing of flows in the Klamath River below Iron Gate Dam to support a "productive and viable anadromous fishery" (Compl ¶ 76), let alone flows the Tribe claims to have demanded in 2002, or a ministerial, non-discretionary duty to adopt particular consultation procedures, let alone prepare "Tribal Trust Impact Statements."

Simply put, this Court does not have the authority to impose the injunctive relief sought by the Tribe on BOR under the limited waiver of sovereign immunity in the APA. The courts have power to review agency action and to declare it unlawful or inadequate pursuant to the standards articulated in the APA. But "that authority is not power to exercise an essentially administrative function." Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 21 (1952). The "guiding

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[1]/ A copy of this recent decision is attached as Exhibit 1 to the Declaration of Stephen M. Macfarlane (Macfarlane Decl.), filed concurrently herewith.

[2]/ The APA defines "agency action" to "include[ ] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13); see also Norton v. SUWA, 124 S. Ct. at 2378-79 (noting that this provision focuses on discrete action).

principle ... is that the function of the reviewing court ends when an error of law is laid bare." Id. at 20. Nor may a court insert itself into the agency's decision-making process by imposing additional procedural – much less, substantive -- requirements on agencies beyond those mandated by statute. As the Supreme Court stressed in Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1987), the judiciary may not dictate to agencies the methods and procedures of needed inquiries on remand because "[s]uch a procedure clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'" Id. at 545 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)). Perhaps most clearly of all, a court cannot, consistent with the separation of powers, order "wholesale improvement of [a] program by court decree, rather than in the offices of the Department [of the Interior] or the halls of Congress, where programmatic improvements are normally made." Lujan v. National Wildlife Fed'n, 497 U.S. 871, 891 (1990).

IV. THE TRIBE CANNOT AVOID THE APA BY ASSERTING A CLAIM UNDER THE COMMON LAW OF TRUSTS

Implicitly acknowledging these points, the Tribe now contends that its Fourth Claim for Relief is a "common law claim" for non-monetary relief under the waiver of sovereign immunity in § 702 of the APA, and that this Court can proceed to a de novo trial of that claim on the merits. The Tribe is mistaken. The Tribe cannot evade the APA's limitations on judicial review by invoking the common law for two principal reasons. First, the APA provides the applicable framework for review of agency action in this case. Second, the common law does not provide an independent basis for the rights asserted by the Tribe in this case.

A. The Tribe Must Satisfy All of the APA's Requirements

The Tribe alleges that its Fourth Claim for Relief is based upon a common law breach of Indian trust claim. However, the Tribe cites no statute which establishes a right of action for such a claim against the United States except the APA, which provides a waiver of sovereign immunity and a framework for review of claims seeking non-monetary relief against federal agencies. Clouser, 42 F.3d at 1527-28 n.5; see also Gallo Cattle Co. v. United States Dep't of Agriculture,

159 F.3d 1194, 1198 (9th Cir. 1998) ("the APA prescribes standards for judicial review of an agency action, once jurisdiction is otherwise established." (citations omitted)). The Tribe concedes, as it must, that any "common law" claim must still invoke the waiver of sovereign immunity under § 702 of the APA. Yurok Op. at 3. In Norton v. SUWA, the Supreme Court held that § 702, as well as §§ 704 and 706(1), "all insist upon an 'agency action,' either as the action complained of (in §§ 702 and 704) or as the action to be compelled (in § 706(1))." 124 S. Ct. at 2378. Moreover, § 704 by its plain terms limits "actions reviewable" to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court...." 5 U.S.C. § 704 (emphasis added).

Thus, the Tribe cannot evade the APA's limitations on the scope and standard of judicial review under 5 U.S.C. § 706 by asserting a "common law" claim. A plaintiff invoking the APA must satisfy all of its requirements unless the plaintiffs can point to a separate provision which grants them a private right of action. Clouser, 42 F.3d at 1527-28 n.5. The Tribe has not pointed to any separate source of federal law, whether based on statute or treaty, that meets the requirements for recognition of a private right of action. See e.g. Alexander v. Sandoval, 532 U.S. 275, 288-89 (2001) (private rights of action to enforce federal law must be created by Congress). Nor has the Tribe alleged that the Secretary acted outside her statutory authority, i.e., alleged that certain actions were ultra vires, thereby providing a basis for "non-statutory review" under the APA's general waiver of sovereign immunity. See Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conserv.of Montana, 792 F.2d 782, 791-92 (9th Cir. 1986).[3/]

In short, the Tribe must proceed in accord with §§ 702, 704, and 706 of the APA, and its Fourth Claim for Relief is cognizable only if it challenges a discrete final agency action. See Gallo, 159 F.3d at 1198-99; San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 882-84 (D. Az 2003). If the Tribe seeks mandatory injunctive relief against BOR, it must proceed under § 706(1) and its interpreting case law. If the Tribe instead seeks to set aside agency action under §

[3/] Even in such instances, however, courts have insisted on a statutory basis for the right being asserted. See Cobell v. Babbitt, 91 F. Supp. 2d 1, 29-30 (D.D.C. 1999) (citing and discussing cases), aff'd and remanded, 240 F.3d 1081 (D.C. Cir. 2001).

706(2), it must identify a final agency action, and the Court's review is not de novo but is based on an administrative record under the deferential standards of § 706(2).

B. The Common Law of Trusts Does Not Supply an Independent Legal Standard in this Case

The Tribe now concedes that "no statute defin[es] the contours of the federal government's fiduciary obligation" toward the Tribe's fishery. Yurok Op. at 16. The Tribe argues, however, that the Court can "invoke the common law of trusts" as an independent basis of substantive rights and obligations. Id. The Tribe is again mistaken. The absence of a statute or other source of positive law defining the federal government's obligations is fatal to the Tribe's argument. Moreover, the Tribe has not identified with sufficient precision, nor can it so identify, a defined property right to particular flows in the lower Klamath River as part of any trust corpus.

While common law trust duties may inform the interpretation of statutory mandates, they do not provide an independent basis for judicial action. Rather, when seeking to enforce a trust relationship against the federal government, plaintiffs must identify a statutory right or prohibition. Cobell, 91 F. Supp. 2d at 29-31. Although the Tribe references the Cobell litigation in its brief (see Yurok Op at 16), it overlooks that the district court in that case dismissed the plaintiffs' common law claims with prejudice, concluding that they failed to state a cause of action:

> [T]o the extent that plaintiffs seek relief solely alleged to be afforded to them by rights arising under the common law of trusts, plaintiffs have failed to state a claim. The times at which this court may legitimately create federal common law are both "'few and restricted.'" [Citation omitted] While this court must consider the common law when interpreting the statutes creating and governing the IIM trust, see NLRB v. Amax Coal Co., 453 U.S. 322, 329, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981) (citing Perrin v. United States, 444 U.S. 37, 42-43, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979)), a statute or regulation must nonetheless authorize this importation of common law authority.

91 F.Supp.2d at 31.[4/] When the D.C. Circuit subsequently concluded that the Cobell plaintiffs could

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4/ "'The federal power over Indian lands is so different in nature and origin from that of a private trustee ... that caution is taught in using the mere label of a trust plus a reading of *Scott on Trusts* to impose liability on claims where assent is not unequivocally expressed.'" Cobell, 91 F. Supp. 2d at 29 (quoting United States v. Mitchell, 463 U.S. 206, 234 (1983) (Rehnquist, Powell, and

seek to enforce common law duties in a suit under the APA's waiver of sovereign immunity, it did so within a framework in which Congress had by statute imposed comprehensive management responsibilities on the federal government with respect to Indian trust accounts. See Cobell v. Norton, 240 F.3d 1081, 1088-90 (D.C. Cir. 2001). The D.C. Circuit did not endorse what the Tribe attempts here: assert the common law as the basis of a right without any statutory definition.

In the absence of a duty specified in positive law, the government's general trust responsibilities to the Tribe are discharged by compliance with generally applicable regulations and statutes. The BOR shares in the general trust obligations of all federal agencies with regard to Indian Tribes. See Parravano v. Babbitt, 70 F.3d 539, 546 (9th Cir. 1995), cert. denied, 518 U.S. 1016 (1996). As the Ninth Circuit has held, such trust obligations are discharged through compliance with general regulations and statutes not specifically aimed at protecting Indian tribes. See Morongo Band of Mission Indians v. Federal Aviation Admin., 161 F.3d 569, 574 (9th Cir. 1998) (citing Skokomish Indian Tribe v. Federal Energy Regulatory Comm'n, 121 F.3d 1303, 1308 (9th Cir. 1997), for the proposition that an agency must exercise this responsibility within the context of its authorizing statute). See also Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 479 (9th Cir. 2000) (Tribe's claim that BLM approval of gold mine violated trust obligations is satisfied by BLM's compliance with NEPA). In this case, BOR discharges its trust responsibility to the Tribe's fishing rights within the context of federal reclamation law as amended and supplemented. Apart from the ESA, the Tribe has not alleged that BOR violated any other statute or regulation with respect to Project operations in 2002. With respect to the ESA, this Court upheld BOR's compliance in 2002 and 2003 with the RPA flows established under the 2002 coho BiOp. July 2003 Order at 31.

The Tribe argues that any distinction between general and specific trust duties applies only to claims for damages brought under the Indian Tucker Act, and urges the Court not to follow Morongo Band because the Tribe thinks the case was wrongly decided by the Ninth Circuit. Yurok

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O'Connor, JJ, dissenting)).

Op. at 14 n.8, 17. This Court cannot disregard controlling Circuit precedent, particularly when the Court of Appeals continues to cite Morongo Band for this distinction in cases for non-monetary relief. See Okanogan, 236 F.3d at 479. Cf. Assiniboine, 792 F.2d at 794, 796 (referencing "specific, congressionally-imposed duties" under the Indian Mineral Leasing Act on the BLM with respect to mineral leasing for the benefit of Indians). There simply is no comparable legislation imposing detailed and comprehensive duties on BOR with respect to the management of the Tribe's fishery, as the Tribe effectively concedes. See Yurok Op. at 16. The Tribe, moreover, fails to cite any decision in which a court, in the exercise of its equitable powers under the APA, imposed sweeping injunctive relief of the sort sought here based solely on the general trust relationship between the government and Indians. Accordingly, under Morongo Band, BOR discharges its legal duties towards the Tribe's fishing right through compliance with generally applicable law.

The Tribe's common law argument is fatally flawed for a second reason. Any trust requires a clearly defined trust property. See Rest. 2d of Trusts ¶ 76 ("A trust cannot be created unless the subject matter is definite or definitely ascertainable."); see also Rest. 3d Trusts § 40, comment e ("The subject matter of a trust must be definite or ascertainable."). In this case, the Tribe's fishing right is not in the fish themselves, but in the opportunity to harvest them. The Interior Department (Interior) has acknowledged that the Tribe holds federal Indian reserved fishing rights. The Interior Solicitor has described the nature of these rights as follows:

> A federally reserved fishing right is not one of ownership in particular fish, but a right to an opportunity to obtain possession of a portion of the resources, which can best be expressed by either the numbers of fish taken or an allocation of the harvestable resource. See United States v. Washington, 520 F.2d 676, 687 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); see also Puget Sound Gillnetters Ass'n v. U.S. Dist. Ct., 573 F.2d 1123, 1129 n.6 (9th Cir. 1978), vacated and remanded, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (vacating judgments of Ninth Circuit and state supreme court and remanding for further proceedings not inconsistent with the U.S. Supreme Court's opinion).

Memorandum from the Solicitor to the Secretary of the Interior: Fishing Rights of the Yurok and Hoopa Valley Tribes (M-16979) (October 4, 1993) at 14 n.25 (Solicitor's Memo).[5/] The Solicitor's

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[5/] A copy of the Solicitor's Memo is attached as Exhibit 2 to the Macfarlane Decl.

Memo concludes that the United States intended to reserve for the Tribes on their reservations a fishing right including the right to harvest a sufficient share of the resource to sustain "a moderate standard of living." Id. at 20-21. As a specific allocation of harvest, the Solicitor's Memo concluded that the Tribes "are entitled to a sufficient quantity of fish to support a moderate standard of living, or 50% of the Klamath fishery harvest in any given year, whichever is less." Id. at 27. This recognition of the Tribe's federally reserved fishing rights in turn has been acknowledged by the Ninth Circuit. Parravano v. Babbitt, 70 F.3d at 542 (citing the Solicitor's Memo).

The Tribe claims, however, and asserts in this case, that its fishing right also includes a right to conditions of water quantity and quality. Compl ¶ 76; see also id. ¶ 61 ("The Yurok Tribe's federal reserved fishing right carries with it a corresponding right to Klamath River flow levels that are sufficient to support a productive habitat for the Tribe's anadromous fishery...."). But it is undisputed that this asserted right is and remains unadjudicated with respect to quantity and quality of flows.[6/] The quantity of water in the lower Klamath River necessary "to support a productive and viable anadromous fishery" (Compl ¶ 76) has never been determined. Consequently, this very aspect of the trust corpus at issue in this case remains undefined. While the Tribe asserts that BOR should have acceded to its requests to increase flows in the lower Klamath River in 2002, the Tribe nowhere establishes that the flows it demanded had been legally determined to be part of the trust property, or that the Tribe was otherwise entitled to them. In the absence of a clearly defined property right, particularly on the very issue that the Tribe presses in this case (alleged inadequacy of flows), the common law of trusts provides no support for the Tribe's contentions.

The BOR manages the Klamath Project, including water deliveries to Project water users and National Wildlife Refuges, pursuant to federal reclamation law as amended and supplemented, and, in doing so, must comply with other applicable federal laws, including its trust obligations to the

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[6/] Moreover, the Tribe has stipulated that it "does not seek any relief regarding the quantification of the Tribe's water right nor its priority relative to other water users in the Klamath Basin ... [and] ... does not ask this Court to establish flow levels for all species of salmon covered by the Tribe's fishing right for all life stages for all water-year types." Stipulation filed Jan. 21, 2003 (Docket # 124) ¶ 3.

Klamath Basin Tribes (including but not limited to the Tribe) and its responsibilities under the ESA. As we pointed out in our opening brief (at 16-17), given multiple and often conflicting duties, BOR must exercise discretion in managing Klamath Project operations, within the scope of its authority, to protect multiple interests, including the Tribe's federal reserved fishing right.[7]/ See National Wildlife Fed'n v. United States Army Corps of Engineers, ___ F.3d ___, 2004 WL 2211639, at *8 n.15 (9th Cir. Oct. 4, 2004) (underscoring that the "standard of review under the APA requires some deference to the agency's conclusions on the issues relating to dam operations that pose no simple solution," and noting the "contentious" issues arising among environmentalists, Indian nations, industry, relevant federal agencies, and other interested parties.).[8]/ In the absence of a statutorily-based right to particular levels of flow or a defined property right to such flows, the Tribe's effort to invoke the common law of trusts to compel BOR to exercise that discretion in a particular way must be rejected.[9]/

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[7]/ The Tribe asserts that the Federal Defendants are relying on dicta in Nevada v. United States for the proposition that the government does not compromise its obligation to one interest that Congress obliges it to represent when it performs a task that Congress obliged it to perform for another interest. Turok Op. at 12 n.7. The passage referenced by the Tribe is not dicta, but was central to the dispute between an Indian Tribe and an irrigation district over rights to water secured for them by the United States. See Nevada v. United States, 463 U.S. 110, 128 (1983). The court of appeals held that the United States had breached its duty of loyalty to the Indian Tribe by simultaneously representing the interests of the irrigation district in litigation to determine water rights on the Truckee River, and accordingly allowed the re-opening of litigation between those two parties. United States v. Truckee-Carson Irrig. Dist., 649 F.2d 1286, 1309-11 (9th Cir. 1981), amended, 666 F.2d 351 (9th Cir. 1982), aff'd in part and rev'd in part sub nom. Nevada v. United States, 463 U.S. 110. The Supreme Court reversed this holding in Nevada, concluding that, given the obligations imposed by Congress, the United States could not be held to "the fastidious standards of a private fiduciary." 463 U.S. at 128; see also id. 141-42. Other courts have so followed Nevada. See San Carlos Apache, 272 F. Supp. 2d at 894.

[8]/ A copy of this recent decision is attached as Exhibit 3 to the Macfarlane Decl.

[9]/ At pp. 15-16 of its opposition, the Tribe cites a number of cases for the proposition that only Congress can abrogate Indian rights. This point is not in dispute, but it is also not relevant to this case. The Tribe has not alleged any permanent impairment of its fishing right, but has instead limited its claim solely to actions which allegedly occurred in 2002. Stipulation ¶¶ 3-4. Moreover, two of the cases cited by the Tribe involved proposed construction projects that, if approved, would permanently impair the right of access to accustomed fishing places expressly confirmed by treaty. See Muckleshoot IndianTribe v. Hall, 698 F.2d 1504, 1511 (W.D. Wash. 1988); Confederated Tribes

V. EVEN UNDER SECTION 706(2), THE TRIBE'S CLAIM MUST BE DISMISSED

The Tribe also seeks to recast its Fourth Claim for Relief as "based on § 706(2) of the APA." Yurok Op. at 4; see also id. at 5, 6. Section 706(2)(A) provides that a court may "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party...." 5 U.S.C. § 706. Accordingly, the Tribe's Fourth Claim for Relief must be reviewed under the standard and scope of review applicable to claims under § 706(2). Those limitations on judicial review place a trial on the merits regarding the causes of the 2002 fish die-off beyond the jurisdiction of this Court, particularly since the Tribe has limited the scope of this Fourth Claim for Relief only to events which occurred in 2002. See Stip. (#124) ¶ 4.

Any challenge to BOR's operation of the Klamath Project under § 706(2) must be presented in the context of a final agency action within the meaning of the APA in order to fall within the waiver of sovereign immunity under § 702 of the APA. See 5 U.S.C. § 704; Norton v. SUWA , 124 S. Ct. at 2380 (discussing Lujan v. National Wildlife Fed'n, 497 U.S. 871); Gallo, 159 F.3d at 1198; San Carlos Apache, 272 F. Supp. 2d at 883; see also, Cobell v. Norton, 240 F.3d at 1095 ("Whether there is a final agency action is ... a jurisdictional question. With a few exceptions, if there is no final agency action, there is no basis for review of the government's decision or policy."). For an agency action to be final, first, it must "mark the consummation of the agency's decisionmaking process, * * * it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal quotations and citations omitted); see also Gallo, 159 F.3d at 1198-99 (citations omitted).

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of the Umatilla Indian Reserveration v. Alexander, 440 F. Supp. 553, 555 (D. Or. 1977). These cases are simply inapposite, and their facts are not remotely similar to the facts presented in the case at bar. Finally, it is undisputed that there has been no recurrence of a die-off of fish on the lower Klamath River such as occurred in 2002, and that BOR provided supplemental releases of water to benefit returning chinook in 2003. Joint Pre-Trial Statement (# 290) at 6.

The challenged action is then reviewed based upon an administrative record, not a *de novo* record created in the district court. See Pacific Coast Fed. of Fishermen's Ass'ns v. United States Bureau of Reclamation, 138 F. Supp. 2d 1228, 1239 (N.D. Cal. 2001) (citing 5 U.S.C. § 706, and Florida Power & Light v. Lorion, 470 U.S. 729, 743 (1985)). Should the Court determine that the agency's action was arbitrary and capricious or not in accordance with law, the proper remedy would be to set aside the action and remand to the agency. See UOP v. United States, 99 F.3d 344, 351 (9th Cir. 1996) (proper scope of relief under § 706(2), if court determines agency has acted arbitrarily and capriciously, is to remand; court lacks authority to decide issues that administrative agency did not decide); Kandra v. United States, 145 F. Supp. 2d 1192, 1205 (D. Or. 2001) ("The APA authorizes the court to 'set aside, rather than compel,' agency actions,"citing 5 U.S.C. § 706(2)).

Applying these standards, the Tribe's Fourth Claim for Relief, based upon the 2002 fish die-off, lies outside the Court's jurisdiction in this case for three reasons. First, it fails to target any final agency action within the meaning of the APA. Second, it seeks mandatory injunctive relief, not merely a declaration, which is beyond the authority of the Court to award. Third, it seeks a de novo trial including matters outside the administrative record of any action alleged by the Tribe to be final agency action. We address each of these points in turn.

In this case, the Tribe's complaint targets BOR's operation of the Klamath Project, rather than a discrete agency action within the meaning of the APA. See Compl ¶ 77. In fact, the Tribe's Fourth Claim for Relief resembles the APA claim rejected by the district court in Parravano v. Babbitt. Like the plaintiffs' claim in Parravano, the Tribe contends that BOR failed to implement measures to protect the fishery, in this instance by allegedly failing to maintain certain quantities of flow in the Klamath River. See Parravano v. Babbitt, 861 F. Supp. 914, 930 (N.D. Cal. 1994), aff'd 70 F.3d 539 (9th Cir. 1995). The district court rejected such generalized claims of inaction as outside the scope of the APA. Id. Moreover, the day-to-day operations of an agency's programs are readily distinguishable from final agency action, as the Supreme Court recognized in Lujan v. National Wildlife Federation, 497 U.S. at 890, 891. That case presented a challenge under § 706(2)

of the APA to "the continuing (and thus constantly changing) operations of the BLM" in considering applications to revoke withdrawals of land from the public domain, reviewing classifications of public land, and developing land use plans. Id. at 890. The Supreme Court held that those activities could not be challenged "wholesale" under § 706(2) because they did not constitute "an identifiable 'agency action' -- much less a 'final agency action'" -- within the meaning of the APA. Id. at 890, 891; accord San Carlos Apache, 272 F. Supp. 2d at 884 ("The day to day operation of a dam is not a final agency action under the APA.").

The Tribe now responds by claiming that its Fourth Claim for Relief targets "essentially ... an order from Reclamation that flows in the Klamath River in September and October, 2002, are to be maintained at 760 cubic feet per second, in denial of the Tribe's requests for more water to reduce risks to the Tribe's fishery." Yurok Op. at 4. The Tribe does not cite any document in the administrative record constituting such an "order," and Federal Defendants submit that there is no such document. The Tribe does refer to BOR's 2002 annual operations plan for the Klamath Project, and to BOR's letters of July 10, 2002, reclassifying the water year type from "below average" to "dry" in light of changing hydrologic conditions and forecast inflow into Upper Klamath Lake. See id.; see BOR AR Tab 24, Tabs 26-27. Even assuming, arguendo, that any of these documents may fall within the definition of "final agency action" under the APA, the Tribe's Fourth Claim for Relief is still defective under § 706(2).

As we have already shown, the injunctive relief sought by the Tribe seeks to compel BOR to follow particular procedures, and manage Klamath Project operations to maintain particular flows in the lower Klamath River which the Tribe deems "sufficient" to protect its fishery. The Tribe mistakenly asserts that this relief is available for a claim brought under § 706(2) of the APA. Yurok Op. at 5. It is not. The appropriate remedy under § 706(2) is an order setting aside the challenged action and remanding to the agency. See Florida Power & Light, 470 U.S. at 744; UOP, 99 F.3d at 351; Kandra, 145 F. Supp. 2d at 1205. This Court has no authority under the APA to impose procedural or substantive requirements on BOR that Congress has not required. See Vermont Yankee, 435 U.S. at 545.

Finally, under no stretch of the imagination is the Tribe entitled to a de novo trial on the causes of the 2002 fish die-off under § 706(2). In reviewing a final agency action, the Court evaluates BOR's conclusions based on the administrative record as it existed at the time of the decision. See National Wildlife Fed'n, 2004 WL 2211639, at *6, *9 (citing Southwest Center for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996)). This Court applied this principle in declining to consider evidence of the fish die-off in connection with claims challenging the adequacy of NOAA Fisheries' 2002 coho BiOp. July 2003 Order (# 217) at 24 n.9. Similarly, were the Tribe to identify with specificity a final agency action it challenges (which it has not done), the Court could review the administrative record for that decision pursuant to the standard of review set forth in Section 706(2).[10]/ See Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (court to review whether the agency relied upon the appropriate factors, provided an adequate explanation of its decision, and made no clear error in judgment); United States v. Alpine Land and Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989) (criticizing the district court for conducting a de novo review in a § 706(2) case). Any such review would be based upon, and limited to, the administrative record before BOR at the time the challenged action was taken.

An administrative record from the BOR is already before the Court. If the Tribe intends to target some other final agency action that it alleges constitutes the violation of BOR's trust obligations to protect the Tribe's fishery, the Tribe should specify what the action is, so that the appropriate administrative record can be lodged with the Court. Then, if the Court determines it has jurisdiction to review the Tribe's claim, the Court should determine, under the applicable APA standards, whether the Tribe has met its burden to show that BOR's agency action was arbitrary and capricious based on the record before BOR at the time the action was taken.

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[10]/ Of course, there are limited exceptions, not applicable here, when extra-record evidence may also considered as part of the Section 706(2) review. See, e.g., Southwest Center for Biological Diversity, 100 F.3d at 1450 (explaining limited exceptions warranting consideration of extra-record evidence).

VI. CONCLUSION

For the reasons set forth above and in Federal Defendants opening memorandum of points and authorities, the Federal Defendants' Motion to Dismiss the Yurok Tribe's Fourth Claim for Relief should be granted.

Respectfully submitted this 12th day of October, 2004.

KEVIN V. RYAN
United States Attorney
JAMES A. CODA (SBN 1012669) (WI))
Assistant United States Attorney

THOMAS L. SANSONETTI, Assistant Attorney General
JEAN E. WILLIAMS, Section Chief
SETH BARSKY, Assistant Section Chief
S. JAY GOVINDAN, Trial Attorney-
Environment & Natural Resources Division
Wildlife & Marine Resources Section
United States Department of Justice
Ben Franklin Station, P.O. Box 7369
Washington, DC 20044-7369
Tel: (202) 305-0237 / Fax: (202) 305-0275

MARIA A. IIZUKA, Trial Attorney
STEPHEN M. MACFARLANE, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
501 I Street, Suite 9-700
Sacramento, California 95814-2322
Tel: (916) 930-2202 / Fax: (20) 930-2210

OF COUNSEL:

STEPHEN PALMER
Assistant Regional Solicitor
Pacific Southwest Region
U.S. Department of the Interior
Sacramento, California

CHRISTOPHER KEIFER
Office of the General Counsel
National Oceanic and Atmospheric Administration
Long Beach, California

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee in the Sacramento Field Office of the United States Department of Justice, Environment and Natural Resources Division, 501 "I" Street, Suite 9-700, Sacramento, California, 95814-2322; and is a person of such age and discretion to be competent to serve papers.

That, on October 12, 2004, he served copies of the attached:

Federal Defendants' Reply In Support Of Motion To Dismiss Yurok Tribe's Fourth Claim For Relief

Declaration of Stephen M. Macfarlane In Support of Federal Defendants' Reply In Support of Motion to Dismiss Yurok Tribe's Fourth Claim for Relief

by causing said copies to be placed in a prepaid or postpaid envelope addressed to the persons hereinafter named, at the places and addresses stated below, which are the last known addresses, and by either delivering said envelope to Federal Express for overnight delivery or depositing said envelope and contents in the United States Mail at Sacramento, California, or by facsimile as indicated below.

VIA U.S. Mail:

Curtis G. Berkey, Esq.
Scott W. Williams, Esq.
Alexander, Berkey, Williams & Weathers, LLP
2000 Center Street, Suite 308
Berkeley, CA 94704

Andrew Lloyd, Esq.
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834

Thomas P. Schlosser, Esq.
Rob Roy Smith, Esq.
Morrisset, Schlosser, Jozwiak & McGaw
Suite 1115 Norton Building
801 Second Avenue
Seattle, Washington 98104-1509

Kristen L. Boyles, Esq.
Earthjustice Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, WA 98104-1711

Michael R. Sherwood, Esq.
Earthjustice Legal Defense Fund
426 Seventeenth Street
Oakland, CA 94612

Russ Brooks, Esq.
Pacific Legal Foundation
10940 NE 33rd Place, Suite 109
Bellevue, WA 98004

Walter Echo-Hawk, Esq.
Native American Rights Fund
1506 Broadway
Boulder, CO 80302

Stephen V. Quesenberry, Esq.
Karshmer & Associates
Attorneys at Law
2150 Shattuck Avenue, Suite 725
Berkeley, CA 94704

Gregory K. Wilkinson, Esq.
Law Offices of
Best Best & Krieger
3750 University Avenue, Suite 400
P.O. Box 1028
Riverside , CA 92502-1028

Christian C. Scheuring, Esq.
Somach Simmons & Dunn
A Professional Corporation
Hall of Justice Building
813 Sixth Street, 3rd Floor
Sacramento, CA 95814-2403

Carl Ullman, Esq.
Klamath Tribes
P.O. Box 957
116 Chocktoot Street
Chiloquin, Or. 97624

Grett Hurley, Esq.
Office of Tribal Attorney
Hoopa Valley Tribe
P.O. Box 188
Hoopa, California 95546

Paul A. Brisso, Esq.
Mitchell, Brisso, Delaney & Vrieze
Attoneys at Law
814 7th Street
Eureka, CA 95501

Stephen M. Macfarlane

THE SECRETARY OF THE INTERIOR
WASHINGTON

NOV 12 2020

Mr. Paul Simmons
Executive Director and Counsel
Klamath Water Users Association
2312 South Sixth Street, Suite A
Klamath Falls, OR 97601

Dear Mr. Simmons:

This letter responds to correspondence dated July 16, 2020, from the Klamath Water User's Association (Association) requesting the Department of the Interior's (Department) Office of the Solicitor review various legal issues related to the Bureau of Reclamation's (Reclamation) Klamath Water Project (Project). My visit to Klamath Falls, Oregon on July 9, 2020, during which I had the opportunity to visit with various Project stakeholders, including irrigators and representatives of local Tribes, preceded the Association's correspondence.

After hearing from members of the water user community I directed the Office of the Solicitor to examine whether the Department's legal division had conducted a review of certain issues surrounding the Project. Such a review was warranted in light of developments, including the issuance of the 2014 Amended and Corrected Findings of Fact of the Final Order of Determination in the Klamath River Basin Adjudication, the U.S. Supreme Court's opinion in *National Ass'n of Home Builders v. Defenders of Wildlife*, (551 U.S. 644 (2007)), the U.S. district court's ruling in *Natural Resources Defense Council v. Norton*, (236 F. Supp. 3d 1198 (E.D. Cal. 2017)), and regulatory updates to the calculation of the environmental "baseline" pursuant to the Endangered Species Act (ESA). This review was consistent with the direction given by President Donald J. Trump in his Presidential Memorandum on "Promoting the Reliable Supply and Delivery of Water in the West" (October 19, 2018) to minimize unnecessary regulatory burdens and foster more efficient decision-making so that water projects are better able to meet the demands of their authorized purposes.

The Office of the Solicitor's review has determined that legal and regulatory developments compel a new analysis of Reclamation's obligations. In particular, certain analyses—a legal memorandum from the Regional Solicitor for the Pacific Southwest Region issued in 1995, and another joined by the Regional Solicitor for the Pacific Northwest Region issued in 1997—have been superseded by these developments, are no longer applicable, and have been withdrawn. Contrary to the Regional Solicitors' previous analyses, the Office of the Solicitor concludes that the discretion possessed by Reclamation in its operation of the Project is likely constrained by the contracts that govern certain Project operations. The effects of these limitations on Reclamation's discretion are such that Reclamation's fulfillment of some of its contractual obligations, including provision of water pursuant to such contracts, may not be properly viewed as a consequence to a species from Reclamation's proposed operations.

Reclamation, in coordination with the Office of the Solicitor, must review the contracts and other legal authorities governing the Project considering the analysis and conclusions of the Solicitor's memorandum. If it is determined that Reclamation possesses sufficient discretionary authority to trigger the consultation requirement with respect to any specific contracts or other operational aspects of the Project, Reclamation will need to include in the environmental baseline the consequences to the species from such actions taken to meet the terms of those contracts which establish nondiscretionary duties for Reclamation.

As a result of the Solicitor's reassessment, Reclamation is obligated to recognize the conclusions of Federal law. Consistent with recent regulatory changes codified at 50 C.F.R. § 402.02, Reclamation must reassess the Project baseline. The Solicitor's memorandum is enclosed.

Consistent with the Solicitor's analysis, Reclamation has been directed to determine what portion of water in the Project is segregable, and thus set aside for irrigation purposes and unavailable for other purposes.

The Department remains committed to fulfilling all its legal obligations. If the Department can provide additional information, please do not hesitate to contact me.

Sincerely,

Secretary of the Interior

Enclosure

United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Memorandum

To: Daniel H. Jorjani, Solicitor

From: Carter L. Brown, Associate Solicitor – Division of Water Resources
Lance C. Wenger, Regional Solicitor – Pacific Southwest

CARTER BROWN Digitally signed by CARTER BROWN Date: 2020.10.28 18:05:39 -04'00'

LANCE WENGER Digitally signed by LANCE WENGER Date: 2020.10.28 14:50:06 -07'00'

Subject: An Updated Review of Legal Issues concerning the United States Bureau of Reclamation Operation of the Klamath Project

The Secretary of the Department of the Interior has asked the Office of the Solicitor to review and provide preliminary guidance on the Bureau of Reclamation's ("Reclamation") authority with respect to certain aspects of its operation of the Klamath Project. The Secretary has specifically asked the Solicitor to review whether Reclamation must engage in consultation under Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), for its proposed operations plan. The Secretary intends to provide direction to the Bureau of Reclamation regarding the development of a plan of operations and the development of a biological assessment.

The request for a review by the Office of the Solicitor is occasioned in part by 2020's critically dry hydrological conditions and resulting water challenges, recent changes to the regulations regarding interagency consultation under Section 7 of the ESA, recent legal decisions in Oregon regarding water rights held by various entities in the Klamath Basin, and stakeholder correspondence presenting additional views and requesting review in light of, among other things, developments in ESA Section 7 case law and adoption of the 2014 Amended and Corrected Findings of Fact of the Final Order of Determination in the Klamath River Basin Adjudication (ACFFOD).

The Secretary understands the Office of the Solicitor has not reviewed its legal analysis since the issuance of the ACFFOD, the Supreme Court's Opinion in *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), the federal district court's ruling in *Natural Resources Defense Council v. Norton*, 236 F. Supp. 3d 1198 (E.D. Cal. 2017) ("*NRDC*"), and regulatory updates to the definition of "baseline" pursuant to the ESA. 50 C.F.R. § 402.02.

This reassessment finds that the discretion possessed by Reclamation in its operation of the Klamath Project requires interagency consultation for the operations of the Klamath Project. However, Reclamation's discretion on how the project is operated and whether certain consequences to listed species and their habitat are effects of the project operations is almost certainly constrained by various contracts with Klamath Project water users.

With respect to the contracts, the degree of discretion varies depending on the specific terms contained in each contract. At least one contract appears to clearly constrain

Reclamation's discretion to the point that Reclamation's fulfillment of the contract, including provision of water pursuant to that contract, is not subject to consultation under ESA Section 7. The other water user contracts related to the Klamath Project are more complicated and contain language that requires additional analysis.

This legal review is not final agency action and does not, in itself, determine which Klamath operations require ESA Section 7 consultation. Those determinations are the responsibility of Reclamation and will be made by Reclamation as part of the ESA consultation process consistent with all applicable laws and regulations. Reclamation's analysis will require a careful analysis of the discretion, if any, afforded Reclamation under the specific terms of the relevant contracts.

I. Section 7 of the Endangered Species Act

The ESA and its implementing Section 7 regulations require federal agencies to consult with the relevant ESA administering agency if any action authorized, funded, or carried out by such agency "may affect" any endangered or threatened species or critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). By regulatory definition and Supreme Court precedent, the consultation requirement is confined to instances in which the agency possesses the discretionary authority to take action which could benefit the listed species. 50 C.F.R. § 402.03 ("Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control."); 50 C.F.R. § 402.16(a) ("Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law . . . ."); *Home Builders*, 551 U.S at 667–73 (". . . we defer to the Agency's reasonable interpretation of ESA § 7(a)(2) as applying only to 'actions in which there is discretionary Federal involvement or control.'").

Assessing whether the agency possesses discretionary authority over an action such that consultation is required necessitates consideration of the relevant authorizing statute, any implementing contracts, and any other laws constraining agency authority. Regarding authorizing statutes, the Supreme Court's decision in *Home Builders* establishes that, when a statute requires an agency to take specific actions, without any ability for the agency to make discretionary decisions to benefit ESA listed species, then the agency is not required to consult under the ESA's Section 7. Following *Home Builders*, both the Ninth and Tenth Circuits have issued holdings that particular statutes do not provide agencies with sufficient discretionary authority to consult. *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1219–25 (9th Cir. 2015) (holding that the Bureau of Safety and Environmental Enforcement (BSEE) was not required to consult when approving a plan for oil and gas development because the statute required BSEE to approve a plan which met specified statutory criteria); *WildEarth Guardians v. U.S. Army Corps of Eng'rs*, 947 F.3d 635, 640–42 (10th Cir. 2020) (holding that Army Corps of Engineers was not required to consult because the statutes governing its operation of dams on the Rio Grande did not provide sufficient discretion to take action to protect ESA-listed species).

Regarding contracts, Section 7 does not "apply to an agreement finalized before passage of the ESA where the federal agency currently lacks the discretion to influence the private activity for the benefit of the protected species." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1511–12 (9th Cir. 1995). In *Environmental Protection Information Center v. Simpson Timber Co.*, 255

F.3d 1073, 1079–82 (9th Cir. 2001) ("*EPIC*"), the Ninth Circuit further affirmed that Section 7 does not amend existing contracts to impart discretionary authority to an agency.

In *NRDC*, the district court agreed with Reclamation that it must have sufficient discretion in the context of water contracts in the Sacramento Valley to take actions that may benefit ESA-listed Delta smelt in order to have a consultation duty under Section 7. 236 F. Supp. 3d at 1211–30. The court specifically addressed contracts which have already been executed, writing: "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 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." *Id.* at 1217 (emphasis in original).

Recent regulatory changes also clarified how effects from non-discretionary actions are dealt with in a Section 7 consultation. On September 26, 2019, the United States Fish and Wildlife Service amended the definition of the "baseline" in its regulations to state that the baseline refers to the condition of the species or critical habitat in the action area, without the consequences to the species or habitat caused by the proposed action. The baseline includes, among other things, all past and present impacts of all federal, state, and private actions, the anticipated impacts of all proposed federal projects in the action area, and ongoing agency activities or existing agency facilities that are not within the action agency's discretion to modify. 50 C.F.R. § 402.02. For an ESA Section 7 consultation, the "environmental baseline" includes, among other things, the effects of ongoing agency activities that the agency has no discretion to modify. If Reclamation has no discretion regarding water delivery under its contracts, the consequences to species from the administration of those contract are properly included in the baseline and are not effects of the current action.

Regarding other applicable law, the United States generally must comply with state law determining water rights and participate in state adjudications of those rights. Section 8 of the Reclamation Act generally requires the Secretary of the Interior to act in accordance with state law regarding Reclamation projects. 43 U.S.C. § 383. The McCarran Amendment further provides that the United States may be joined in adjudications under water rights when the United States holds such rights. 43 U.S.C. § 666. The Ninth Circuit has held that the United States must participate in the State of Oregon's adjudication of water rights in the Oregon portion of the Klamath Basin. *United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994). The United States has acknowledged these authorities and is an active participant in the adjudication at the administrative phase and in the current judicial phase.

II. The law governing the Klamath Project

A. Authorizing statutes

The Klamath Project was authorized in 1905 pursuant to the Reclamation Act and the Act of February 9, 1905. 43 U.S.C. § 601. The Reclamation Act authorizes the Secretary "to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters." 43 U.S.C. § 411. The Reclamation Act was enacted for the purpose of reclaiming the arid lands of the West through construction of major irrigation projects which were too expensive and large scale for private individuals to develop. *See California v. U.S.*, 438 U.S. 645 (1978) (discussing the history and purpose of the

Reclamation Act as a means to provide the irrigation needed to make arid lands in the Western United States agriculturally productive).

B. Contracts

Reclamation entered into multiple contracts with individuals and irrigation districts to establish terms for provision of water, construction and maintenance of facilities, repayment of Klamath Project costs by irrigators, and other matters related to the operation of the Project. These contracts are perpetual: there is no opportunity for Reclamation to either renew them with revised terms or refuse to renew them.

For purposes of this inquiry, generally there are three relevant contractual terms. The first relevant term is the amount of water which Reclamation agreed to provide and the timing of its delivery. The second such term are the liability waivers which absolve Reclamation of liability for water shortages. Finally, there are the re-apportionment clauses which allow Reclamation to re-apportion water among users in the event of a shortage. These clauses, as applicable, are discussed in relation to the four major contracts entered into to facilitate operation of the Klamath Project.

The Van Brimmer contract dates from 1909 and was amended by mutual assent in 1943. It addresses the water rights of irrigators whose rights predate the 1905 appropriation of waters in the Klamath Basin by the United States and construction of the Project. Because construction of the Project made it impossible for Van Brimmer to divert water in its existing manner, the contract is Reclamation's agreement to provide the water to which Van Brimmer has a right using Project facilities. The contract obligates Reclamation to provide 50 second/feet of water from April 15 through October 1 of every year. The Van Brimmer contract does not contain a liability waiver or re-apportionment clause.

The Tulelake Irrigation District contract dates from 1956, and requires the United States to deliver water "in such amounts as the District may demand, subject only to the limit of the capacity of the facilities available therefor and the amount of water required for reasonable beneficial use within the District." Contract between the United States and the Tulelake Irrigation District, Sept. 10, 1956, Sec. 33(a). Section 33(b) of the contract specifies the priority dates of the water available to the District. The shortage provision relieves the United States from liability for shortages caused by "drought" and "other causes." *Id.* at Sec. 26. This contract also authorizes Reclamation in the event of such shortages to apportion water among the different districts that share in the Project's 1905 priority date. *See* Art. 33(c) ("In the event a shortage of water available from the Klamath Project arises as a result of drought or other unavoidable causes, the United States may apportion the available supply among the District and others having rights of priority equal to the rights of the District.").

The Klamath Irrigation District contract dates from 1954 and contains a liability waiver holding the United States harmless for water shortages that prevent the United States from delivering water due to "drought or other causes." Amendatory Contract between the United States of America and the Klamath Irrigation District, Nov. 29, 1954, Sec. 26. The Klamath Irrigation District contract does not contain a re-apportionment provision. It does not specify the amount of water or dates of delivery: these terms are controlled by the contracts between the United States and individual irrigators within the Klamath Irrigation District.

The Sunnyside Irrigation District contract dates from 1923 and requires the United States to deliver up to 2 acre/feet of water per irrigable acre per irrigation season (defined as April 15 to September 30) and up to 0.6 acre/feet per month. Contract between United States and Sunnyside Irrigation District for construction of works and sale of water, Feb. 12, 1923, Sec. 5. It does not have a re-apportionment provision; however, it does have a provision which protects the United States from liability for shortages in water delivery caused by "drought, inaccuracy of distribution, or other cause." *Id.* at Sec. 9.

C. Other law

The Oregon state administrative adjudication of water rights in the Klamath Basin resulted in the 2014 ACFFOD, which is binding pending completion of the current judicial proceedings in Oregon state court and issuance of a final decree. Absent any contrary federal law, the United States is bound by the ACFFOD issued during the administrative phase and will be bound by the final decree resulting from the judicial phase. Two water rights regarding Upper Klamath Lake were determined in the adjudication. The ACFFOD has concluded that the United States is the owner of a right to store water in Upper Klamath Lake to benefit the separate irrigation rights recognized for the Klamath Project—although the ACFFOD does not determine "the relative rights of the KPWU [Klamath Project water users] entities and the United States to control or operate diversion and distribution works, including headgates, pumps, canals and other structures . . . and does not alter in any way the relative rights of the United States and the irrigation entities to control or operate the irrigation works." Since Reclamation is required under Section 8 of the Reclamation Act to follow State law, the ACFFOD's determination is legally binding to the extent that it is not inconsistent with congressional directives. In addition, in *Klamath Irrigation District v. Oregon Water Resources Department*, Case No. 20CV17922 (Cir. Ct. Marion County), a case to which the United States is not a party, the court issued an Amended Opinion on October 2, 2020 that held that, as a matter of state law, OWRD must prevent Reclamation from releasing stored water for other than a permitted purpose by users with an established right, license, or permit to use the stored water in Upper Klamath Lake. The court implemented this holding on October 13, 2020 by ordering OWRD "to immediately stop the distribution, use and/or release of Stored Water from the [Upper Klamath Lake] without determining that the distribution, use and/or release is for a permitted purpose by users with existing water rights of record or determined claims to use the Stored Water in the [Upper Klamath Lake]." Those persons have been determined by the ACFFOD to be the beneficiaries of the irrigation rights recognized for the Klamath Project.

The ACFFOD states that (1) the United States holds a federal reserved water right to fulfil the Tribes' treaty right to a fishery for suckers, (2) confirms a time immemorial priority date of that right; and (3) establishes that the right consists of specific minimum levels of Upper Klamath Lake. However, the ACFFOD also provides that, pursuant to a stipulation into which the United States and the Tribes entered, this federal reserved right cannot result in curtailment of rights older than 1908 until the conclusion of the entire state proceeding, including judicial challenges. The United States' storage right and the irrigators' water rights have a 1905 priority date, and therefore this ACFFOD provision currently limits the United States' ability to issue a call to ensure that lake levels are not depleted below the specified Tribal water right levels.

III. The Bureau of Reclamation's authority to operate the Klamath Project may be constrained by some of the existing pre-ESA water user contracts such that Reclamation may lack discretionary control over certain operations for purposes of ESA consultation.

As noted above, implementation of water contracts entered into before the enactment of the ESA may not trigger ESA consultation if Reclamation did not retain sufficient discretion in the contract to take actions that could benefit listed species. Assessment of whether Reclamation retained such discretion requires a case-by case, contract-specific analysis of the contract's terms. As to those contracts, Reclamation may not possess the discretionary authority to take action to protect listed species, and thus is not required to consult under ESA Section 7.[1]

As discussed above, the 1902 Reclamation Act authorized projects for the purpose of reclaiming lands for agriculture and has been interpreted by memoranda from the Office of the Solicitor and the Commissioner of Reclamation to authorize supporting purposes, such as flood control and power generation. *Authority for Construction of Works to Protect Tulelake Area, including Coppeck Bay Lands, from Flooding – Tulelake Division, Klamath Project*, Leland O. Graham, Regional Counsel, Office of the Solicitor (Sept. 16, 1947); *Authorization of Construction of Certain Flood Protection Works, Klamath Project*, Leland O. Graham, Regional Counsel, Office of the Solicitor (Oct. 8, 1948); *Klamath Power Determination*, Michael L. Connor, Commissioner of Reclamation (May 17, 2013). The limited statutory purpose of the Project, when read in conjunction with certain of the contracts and other laws discussed herein, arguably may not impart discretionary authority to Reclamation to take action to benefit listed species. Reclamation's discretion to take action to benefit listed species may be further constrained by the ACFFOD. Per the McCarran Amendment, Section 8 of the Reclamation Act, and other federal law, the United States must follow the ACFFOD and state law to the degree they are consistent with federal legal mandates. Further analysis is needed to determine the relationship between the 1902 Reclamation Act, the ACFFOD, and state law to Reclamation's discretionary authority.

The pre-ESA contracts between Reclamation and the irrigators, which impose a non-discretionary duty on Reclamation to deliver water for irrigation purposes, may negate any discretion to benefit listed species depending on the contract. The contractual terms vary, but one, the Van Brimmer contract, specifically obligates Reclamation to deliver a specific quantity of water during a specific time period at a specific location. The Van Brimmer contract does not contain a shortage clause or other provisions which could be interpreted to allow Reclamation to reduce, reschedule, or otherwise modify water deliveries. The proscriptive nature of the Van Brimmer contract leaves Reclamation no discretion to take actions that could benefit listed species. Without such discretion, Reclamation does not have a duty to consult under ESA Section 7 regarding its fulfillment of the Van Brimmer contract.

[1] Notwithstanding the lack of a consultation requirement pursuant to Section 7, the question of whether Reclamation and the water users may nonetheless face potential liability under ESA Section 9 is worthy of greater exposition than can be afforded in this memo. However, in general, the Solicitor's Office believes that Reclamation would not be liable for impacts to species under Section 9 if those impacts result from actions over which Reclamation has no discretion. There is a strong legal argument for the proposition that if an action agency has no ability to avoid take because Congress has set a certain path for that agency action, then any resulting take is not attributable to the agency.

The contract with the Tulelake Irrigation District requires Reclamation to deliver as much water as the irrigation district demands, subject only to the capacity of the delivery system and the amount of water reasonably needed for beneficial use. As noted below, the Tulelake contract also contains liability waiver and re-apportionment provisions addressing consequences in the event of a shortage. These requirements would need to be examined to determine whether Reclamation lacks discretion to reduce water deliveries to the Tulelake Irrigation District to benefit listed species.

The Tulelake contract contains a liability waiver shortage clause which relieves Reclamation of liability if Reclamation is unable to deliver the entire amount of water required under the contract because of drought or "other causes." As the *NRDC* court held, such a clause does not convey discretionary authority to Reclamation to act to benefit listed species but is rather a force majeure clause which shields Reclamation from liability if a drought or other event outside of Reclamation's control causes a shortage. *NRDC*'s holding was reached after the *Home Builders* decision and comports fully with the reasoning in *Home Builders*. The Tulelake contract reapportionment clause allows reapportionment of water in the event of a shortage, but only among water users with equal priority dates to the District. This provision too may not provide Reclamation with the requisite discretion to take action for the benefit of listed species but likely would require further analysis.

The remaining contracts, with Klamath Irrigation District and Sunnyside Irrigation District, are less proscriptive regarding the amount of water and timing of deliveries than the Van Brimmer and Tulelake contracts and contain shortage clauses. Reclamation may lack the discretionary authority to reduce or alter water deliveries under these contracts to benefit listed species. However, the less proscriptive nature of these contracts arguably stands as a counterweight to the proposition that Reclamation lacks discretion to trigger an ESA Section 7 consultation, and therefore would require further analysis.

If Reclamation ultimately determines that it lacks sufficient discretionary authority to trigger the consultation requirement with respect to any specific contracts or other operational aspects of the Klamath Project, any effects attributable to those non-discretionary actions will need to be included in the environmental baseline, as defined by 50 C.F.R. § 402.02, in any consultation of the discretionary contracts or actions at the Project. Because the consequences to listed species and designated critical habitat of non-discretionary actions taken pursuant to such contracts are included in the environmental baseline, these consequences are not part of the effects of the action to be analyzed in a consultation and cannot be altered through the consultation process. For example, neither reasonable and prudent measures nor any reasonable and prudent alternatives developed during the consultation process can result in diminishment of the amount of water delivered pursuant to the Van Brimmer contract, nor to alteration of the dates of delivery or other material non-discretionary terms. However, the effects of the discretionary actions will be added to the baseline consequences in making jeopardy and/or adverse modification determinations, which may result in reasonable and prudent alternatives to the discretionary actions.

IV. Other authority does not detract from this analysis.

The conclusion of this memorandum regarding the constraints imposed by the Reclamation Act on Reclamation's authority may appear to run counter to the Ninth Circuit's decision in *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917,

928–29 (9th Cir. 2008) ("*NWF*"). That decision held that agencies possess the discretion needed to consult when implementing a statute that provides a broad mandate to achieve a goal rather than the proscriptive authority of the statutes considered in *Home Builders*, *Alaska Wilderness League*, and *WildEarth Guardians*.

The distinction between the outcome in *NWF* and the present analysis depends upon the specific language in the contracts between Reclamation and the irrigators. By entering into these pre-ESA contracts, which impose a non-discretionary duty on Reclamation to deliver water for irrigation purposes, Reclamation arguably obviated any discretion to benefit listed species that it might have arguably possessed to achieve the mandates of the Reclamation Act. The proscriptive nature of these contracts sets the present case apart from the situation in *NWF*. *NWF* addressed ESA Section 7 compliance by the National Marine Fisheries Service in the context of operation of the Federal Columbia River Power System. The Ninth Circuit distinguished *Home Builders*, writing:

> The [*Home Builders*] Court found [50 C.F.R. § 402.03] to be a reasonable resolution to the problem of an agency being unable to "simultaneously obey" both Section 7 and a separate statute which expressly requires an agency to take a conflicting action. [*Home Builders*, 127 S. Ct.] at 2533–34. We do not face this problem here, however, because in the present case, Congress has imposed broad mandates, rather than directing the agency to take specific actions, and the agencies are perfectly capable of simultaneously obeying Section 7 and those mandates.

524 F.3d at 928. Here, some of the proscriptive contracts by which Reclamation meets the mandate of the Reclamation Act to reclaim lands for agriculture arguably prevent Reclamation from simultaneously obeying Section 7 and meeting its contractual obligations. As to those contracts, Reclamation thus lacks the discretionary authority to take action to benefit listed species. Without that discretionary authority, Reclamation's proposed operation must comply with the contract, and the consequences to listed species from doing so do not constitute effects that are attributable to the operation of the project.

The general premise underlying the Ninth Circuit's decision in *Klamath Water Users Protective Ass'n v. Patterson*, a portion of which broadly held that the Klamath Project is subject to the ESA, is also consistent with the direction in this memorandum. 204 F.3d 1206 (9th Cir. 1999). As a general matter, this case stands for the simple proposition that Reclamation must meet the requirements of the ESA, as all federal agencies must. However, in doing so, Reclamation must develop its future operations in a manner that is consistent with more recent regulatory changes and case law. *Patterson* predates the Supreme Court's decision in *Home Builders* and the Supreme Court's direction that ESA Section 7 is not triggered where any agency lacks discretionary authority or control over an action. Thus, *Patterson* does not perform a searching inquiry into the extent of Reclamation's discretion at the Klamath Project, nor does it conduct a detailed analysis of the contracts between Reclamation and the irrigators. Reclamation can meet both the general premise enunciated by *Patterson* and the application of Section 7 to only discretionary actions mandated by *Home Builders* and regulation by conducting the detailed reexamination of the parameters of Reclamation's discretionary authority described in this memorandum and adjusting its consultation accordingly.

Finally, in 1995, the Regional Solicitor for the Pacific Southwest Region issued a memorandum addressing water rights in the Klamath Basin. In 1997, a second memorandum

was issued jointly by the Regional Solicitors for the Pacific Northwest and Southwest Regions to address a letter from an Assistant Attorney General for the State of Oregon which had made assertions contrary to the rights asserted by the United States. These memoranda addressed, among other things, the applicability of ESA Section 7 consultation to the Klamath Project operations. But they did not address the more recent precedents, including the Supreme Court's 2007 decision in *Home Builders*. To the degree that these memoranda conflict with this analysis, they are hereby withdrawn.

V. Conclusion

In *Home Builders*, the Supreme Court acknowledged that reading ESA Section 7 to apply to all agency actions would implicitly repeal statutes with conflicting mandates, that such a reading was not required by Section 7 itself and ran contrary to the prohibition on implicitly repealing statutes, and that agency regulations implementing Section 7 resolved this issue by establishing that Section 7 applies only when an agency possesses discretionary authority to act to the benefit of listed species. Likewise, the consequences to listed species or their habitat that flow from carrying out a non-discretionary action are effects to be included in the environmental baseline.

Reclamation's Klamath operations is governed by numerous water contracts. The degree to which Reclamation's discretion is constrained varies depending on the terms of the specific contract. The Van Brimmer contract presents strong circumstances for concluding that Reclamation lacks any discretion to implement the contract in a way that could benefit listed species, and therefore is not required to consult on any aspect of its implementation of the contract. For the Tulelake contract, the only possible source of discretion is the shortage clause. Under the accurate post-*Home Builders* interpretation of the liability waiver clause, as embodied in *NRDC*, the clause is a force majeure clause that does not impart discretionary authority for Reclamation to act to benefit listed species. Further analysis of the reapportionment clause may also dictate that it does not provide Reclamation with sufficient discretion to trigger consultation. Similarly, while the contracts with the Klamath Irrigation District and Sunnyside Irrigation District impose less proscriptive requirements on Reclamation, the contracts should be examined to determine whether in light of *Home Builders* and other recent precedents whether Reclamation lacks the requisite discretionary control to consult regarding these contracts.

In light of the foregoing analysis, when developing its proposed operations for the Klamath Project, Reclamation should evaluate the contracts in light of the above-discussed principles and determine whether any portion of water in the Klamath Project is subject to nondiscretionary contract terms and include any effects attributable to the deliveries of such waters in the environmental baseline as part of any ESA consultation. To the extent other water users have competing or conflicting claims, relevant allocations shall be determined in accordance with this analysis until any final Klamath adjudication or any other relevant judicial order or determination.

Concur X

Daniel H. Jorjani

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Date: 2020.10.29 10:24:34 -04'00'

Daniel H. Jorjani, Solicitor

Do Not Concur _____

10/29/20

Date

United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 14, 2021

Memorandum

To: Secretary

From: Solicitor

Subject: Use of Water Previously Stored in Priority for Satisfaction of Downstream Rights

Pursuant to your November 12, 2020, letter, the Solicitor's Office has been undertaking a thorough review of the Klamath Project ("Project") contracts and relevant legal authorities that guide the Bureau of Reclamation's (Reclamation's) discretion in the operation of the Project, in parallel with Reclamation's effort to prepare a reassessment document. In doing so, the Solicitor's Office identified tribal water rights as being an important threshold issue in determining which Project operations can be placed in the environmental baseline, and advised Reclamation that Ninth Circuit and Federal Circuit courts have viewed tribal water rights as being generally senior to irrigation rights connected to the Project. Reclamation does not dispute the existence or priority of tribal water rights, but has requested input on whether water previously stored in priority can ever be released for satisfaction of unquantified, downstream federally reserved water rights held by the Yurok and Hoopa Valley Tribes (hereinafter collectively referred to as "the Yurok and Hoopa Tribes").

This memorandum addresses that question and ultimately concludes that water previously stored in priority is not available for satisfaction of downstream federally reserved water rights, and is instead bound by the terms of the Klamath Basin Adjudication ("KBA").

I. Background

As noted by the federal courts, "[s]everal constraints [in the operation of the Klamath Project] force Reclamation to walk a water-management tightrope in dry years." *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197 (D. Or. 2001) (internal citations omitted). Reclamation's management is made more difficult "because the Upper Klamath Lake is relatively shallow and, therefore, the Klamath Project's storage capacity is limited." *Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1231 (N.D. Ca. 2001) (hereinafter "*Pacific Coast*.").

The issue is further complicated by the fact that Endangered Species Act (ESA) compliance and tribal trust compliance have historically been conflated in the operation of the Klamath Project. Put differently, in the absence of quantified tribal water rights, the United States has taken the position that ESA compliance serves as a proxy for its minimum duty to the tribes because that tribal water right "cannot [be] any less than the quantity that would have been needed to avoid reducing appreciably the likelihood of … the survival of these same fish." *Baley v. United States*, 134 Fed. Cl. 619, 672–73 (2017) ("*Baley I*") (noting that ESA compliance and

the unique tribal trust requirements in the operation of the Klamath Project are "essentially a similar standard.") (internal citations omitted). But in reality, ESA compliance and tribal trust obligations are legally distinct.

There are—in effect—distinct categories of tribal water rights in connection with the Project: the Klamath Tribes' right to certain lake levels in Upper Klamath Lake ("UKL"), and the Yurok and Hoopa Tribes' in-stream flow rights for the Klamath River. The Klamath Tribes' rights to water levels in UKL have been quantified under McCarran Amendment proceedings in Oregon, and are not at issue for purposes of this memorandum. The Yurok and Hoopa Tribes' in-stream rights—while clearly identified by the federal courts—have not been fully quantified by an adjudication or enacted settlement.

In order to fully appreciate the issue presented here, it is necessary to briefly examine the relationship between the tribal rights, and their impact on Project operations as described by the federal courts.

Tribal water rights on the Klamath were first recognized in the *Adair* litigation. *See United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983). There, the Ninth Circuit affirmed a district court determination that the Klamath Tribes had reserved on-reservation hunting and fishing rights upon establishment of the Reservation. *Id.* at 1398. The court held that those rights carried with them federally reserved water rights to support the tribal fishery. *Id.* at 1414. Further, because treaty rights are not "a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted," the priority date for those reserved water rights predated the establishment of the reservation and were set at "time immemorial."[1] *Id.* at 1413–14 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

As mentioned above, these rights have since been administratively adjudicated and quantified, as part of the Klamath Basin Adjudication ("KBA") in Oregon, which culminated in the Amended and Corrected Findings of Fact and Order of Determination ("ACFFOD"). The ACFFOD, *inter alia*, quantifies the Klamath Tribes' federally reserved water rights, and "thus, the Klamath Tribes have a legally enforceable federal right to maintain streamflow levels as quantified." *Hawkins v. Bernhardt*, 436 F. Supp. 3d 241, 251 (D.D.C. 2020). Accordingly, Reclamation must operate the project such that UKL lake levels satisfy the Klamath Tribes' quantified, senior right.[2]

The Yurok and Hoopa Tribes also have federally reserved water rights connected to the establishment of their reservations. Like the Klamath Tribes, the origin of those water rights is in reserved fishing rights, recognized at the establishment of their reservations. *See Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995).

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[1] Put another way, the treaty recognized rights that had been exercised by the Klamath Tribes pre-European contact and promised not to *impair* those rights. Thus, unlike other treaties whose purpose was to provide agricultural land in exchange for cession of traditional hunting and fishing grounds, the Klamath Tribes retained those rights, and thus priority date for the Klamath Tribes' water rights necessarily was prior to treaty execution, and thus described as "time immemorial." *Adair*, 723 F.2d at 1413–14.

[2] Due to a stipulation signed by the Klamath Tribes, United States, and Project water users, this senior right will not be enforced against the Project until the KBA is complete. So, Reclamation has not yet had to actually operate the Project to satisfy these UKL levels.

Courts have considered *all* tribal rights—the UKL rights held by the Klamath Tribes and the in-stream rights held by the Yurok and Hoopa Tribes—as being generally senior to any other water rights connected to the Project. *See Baley v. United States*, 942 F.3d 1312, 1322 (Fed. Cir. 2019) ("*Baley II*"). But, unlike the Klamath Tribes, the Yurok and Hoopa Tribes water rights are unquantified. Thus, while Reclamation has clear direction as to how to satisfy the federally reserved water rights held on behalf of the Klamath Tribes, it does not have as specific direction as to how to satisfy the rights of the Yurok and Hoopa Tribes.[3]

Reclamation's obligations with respect to the Yurok and Hoopa Tribes is of critical importance to the review process directed in the Secretary's Letter because it guides whether Reclamation can consider any stored water as unavailable for satisfaction of federally reserved water rights, and thus only available for distribution to water users under Oregon law.[4]

II. Use of Stored Water for Satisfaction of Unquantified Downstream Rights

Three critical facts guide whether use of water previously stored in priority is subject to release for satisfaction of the Yurok and Hoopa Tribes' water rights: (1) the Yurok and Hoopa Tribes' water rights are currently unquantified; (2) Reclamation has some degree of discretion to determine how best to satisfy its trust obligations absent quantified water rights; but (3) that discretion is not unbound, and Reclamation is subject to the terms of the KBA.

As an initial matter, it is worth re-emphasizing that federally reserved water rights connected to the Yurok and Hoopa Tribes' respective reservations exist specifically to maintain a fishery reserved to tribal members upon establishment of the reservations. *Parravano*, 70 F.3d at 546. Therefore, the measure of water required to satisfy the tribal water rights is necessarily dependent on the health of the fishery, and the needs of the fish.[5] But, at its heart, the water right is a non-impairment right—i.e., the Tribes are entitled to prevent junior upstream diverters from reducing the flow of the river to the extent doing so is necessary for the protection of the tribal water right. *See id.*

And while courts have clearly recognized the existence and seniority of the Yurok and Hoopa Tribes' federally reserved water rights, those rights have not been quantified, and no court has considered Reclamation's trust obligation to fulfill those rights post-KBA or, even pre-KBA, independently from Reclamation's duties to the Klamath Tribes and its obligations under the ESA. Finally, and most importantly, no court has squarely analyzed whether the Yurok and Hoopa Tribes are entitled to the release of water previously stored in priority to supplement the Klamath River beyond that which would have been historically available, absent Project storage.

For that reason, there is sufficient authority to support an argument that Reclamation's trust responsibility does not compel it to release Project water in excess of that which would have been naturally available, absent the project.

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[3] To emphasize, there is no debate as to *whether* Reclamation has a duty to satisfy the federally reserved water rights of the Yurok and Hoopa Tribes, or their relative priority. Rather, it is the lack of quantification of those rights and their interaction with the Project that raises the issues presented in this memorandum.

[4] This, in turn, guides the scope of ESA consultation, which was the subject of the Letter.

[5] Thus, it is unsurprising that courts have historically condoned Reclamation's practice of using ESA consultation as a proxy for determining its tribal trust responsibilities. *See Baley I*, 134 Fed. Cl. at 673.

Courts have routinely recognized Reclamation's broad discretion in determining how best to satisfy "diverse, and often competing, demands for Project water." *Kandra*, 145 F. Supp. 2d at 1196. And while it is true that the courts have emphasized that tribal trust and ESA requirements are generally superior to water rights arising under water delivery contracts, Reclamation does have discretion in determining how it satisfies those superior obligations, in the absence of specific quantification.

To emphasize, the litigation in *Baley*, *Kandra*, and *Patterson* involved, *inter alia*, the reasonableness of Reclamation's position that its trust responsibility was satisfied through ESA compliance in the absence of specific quantification. For example, in *Baley II*, the Federal Circuit discussed at length the fact that the "no jeopardy" standard under the ESA was presumptively less protective of the tribal fishery than the "moderate living" standard to which the tribes were likely entitled. 942 F.3d 1336–37. Nonetheless, the *Baley II* court held that ESA compliance served as a valid proxy for then-unquantified tribal trust requirements, and noted that "[w]hether the Tribes would have had a separate cause of action against the United States had the Bureau not complied with the ESA is not before us." *Id.* at 1341.

Baley is one of many cases that upheld the reasonableness of the 2001 Operations Plan and actions taken under it, even though the Yurok and Hoopa Tribes alleged that operations under the plan violated Reclamation's trust obligations. For example, the Yurok Tribe asserted that Reclamation's failure to supplement Klamath River flows under the Operations Plan violated the trust responsibility because low river levels contributed to a large fish die-off in 2002 that adversely affected their federally reserved right to the fishery. *See Pacific Coast Federation of Fishermen's Ass'n v. United States Bureau of Reclamation*, Civ. No. C 02-02006 at 1–2 (N.D. Cal. March 8, 2005) (hereinafter "*PCFFA*"). The court disagreed, holding that because there was no quantified water right that Reclamation had failed to deliver, there was no "specific duty" Reclamation had violated by failing to supplement flows at the request of the Tribe.[6] *Id.* at 17. Put another way, there was no specific quantity of water—independent of the applicable Biological Opinion and Operations Plan—that Reclamation was required to deliver. *Id.* Again, under the Operations Plan, Reclamation had used ESA compliance as a proxy for tribal trust obligations.

Read together, these cases squarely frame the bounds of Reclamation's discretion with respect to the Yurok and Hoopa Tribes. On the one hand, Reclamation is clearly obligated to prioritize tribal water rights over other junior water rights connected to the Project, but on the other, absent a specific quantification of the tribal water rights, Reclamation necessarily has some degree of discretion to decide how best to satisfy those rights. In other words, until the rights of the Yurok and Hoopa Tribes are quantified, there is no definite quantity of water Reclamation must provide, though Reclamation is obligated to ensure the Tribes receive sufficient water to exercise their federally reserved fishing rights.

[6] This is not to say that Reclamation's tribal trust obligations require nothing but compliance with generally applicable statutes. Tribal trust requirements are substantive and require Reclamation to operate its project so as to satisfy senior tribal rights before those of any junior appropriator.

Therefore, considering the above, Reclamation must determine how best to satisfy its trust obligation to the Yurok and Hoopa Tribes, who hold senior, but unquantified, rights on the Klamath River.

Reclamation satisfies that trust obligation by providing water that would be available in the tribal fishery, absent the project.[7] Project storage, then, would be delivered pursuant to Reclamation's other obligations, and most importantly, the ACFFOD. Therefore, water previously stored in priority would not be available to draw upon to supplement the natural flow of the river.

This position neither rejects the existence and priority of the Yurok and Hoopa Tribes' water rights, nor allows any other water user connected to the Project to take any water from the tribal share. The Yurok and Hoopa Tribes would only be barred from calling upon water previously stored in priority—water that would not exist absent the Project—to supplement natural flows.

a. Storage in Western Water Law

Not only would this position be a permissible construction of the Tribes' as-yet-unquantified water rights, but it would also be harmonious with Western water law generally (and Oregon law specifically), as well as federal Reclamation Law.

The Bureau of Reclamation was established specifically to assist development of Western water by using Congressionally appropriated funds to construct large-scale storage projects that state or local entities might not be able to take on independently. As a benefit, those state and local entities receive water that otherwise would not exist for irrigation and other purposes. Water users enter into contracts to "pay back" the price of the project in exchange for access to the water facilitated by the Project.

Accordingly, in Section 8 of the Reclamation Act, Congress directed that Reclamation disperse water in accordance with state law. 43 U.S.C. § 372. And while subsequent federal laws sometimes provide Reclamation with duties that conflict with state water law, in the absence of a specific federal conflict, Reclamation still must operate its projects in comity with state water law. *California v. United States*, 438 U.S. 645, 670–71 (1978).

Accordingly, courts—including the U.S. Supreme Court—have historically recognized that water previously stored in priority under state law is not available for release to downstream water users with unquantified water rights, or water rights dependent on natural flow. *See, e.g.*, *Nebraska v. Wyoming*, 325 U.S. 589, 639–40 (1945) (declining to include storage from Reclamation Act facilities in an equitable apportionment, noting "if storage water is not segregated, those who have not contracted for the storage supply will receive at the expense of those who have contracted for it a substantial increment to the natural flow supply…").

[7] Currently, decisions on when to bypass inflow to the Klamath River or deliver it to either the Project or into storage in UKL are guided by the 2018 Biological Opinion as amended by the Interim Operations Plan. This memorandum does not address any current operations criteria, but rather focuses on the legal distinction between natural flow and water previously stored in priority as it relates to unquantified downstream rights.

There is no source of law, federal or state, that directs Reclamation to release Project storage—which has now been adjudicated under the KBA—to the Downstream Tribes. And while the Downstream Tribes could have asserted storage rights in the KBA, no such rights were asserted.[8] *Baley I*, 134 Fed. Cl. at 679.

Reclamation has a right, as determined by the ACFFOD, to store water in UKL. Once stored pursuant to Oregon law, Reclamation is significantly constrained in its discretion to release that water for any purpose other than that which is directed by the ACFFOD.[9] In the absence of any federal law to the contrary (including a quantified Indian water right), Reclamation cannot use its discretion to call upon water previously stored in priority.

Therefore, release of water previously stored in priority would be a violation of state law with no specific federal authority to justify it. Because that would run counter to Section 8 of the Reclamation Act, a reasonable interpretation of Reclamation's current duty to the Downstream Tribes is that it must provide natural flow, but not Project storage, in the absence of a quantified right or some other source of federal law that specifically conflicts with the State's currently controlling disposition on storage.

b. Distinctions from Past Klamath Cases

The critical distinguishing factors between what Reclamation is proposing here and *all* of the past cases concerning the Klamath Project are: (1) all of the Klamath-specific cases that analyze tribal water rights and their relation to Project water dealt with operations plans that conflated ESA and tribal trust responsibilities; and (2) those operations plans were in place prior to issuance of the ACFFOD.

As stated above, the Yurok and Hoopa Tribes unquestionably have reserved water rights in the Klamath River, and those rights are indeed senior to all but perhaps the Klamath Tribes.[10] However, in part because those rights have never been quantified, Reclamation must decide how to satisfy those rights through the operation of the Project without the aid of specific target flows, water level targets, or other any other specific operating criteria.[11]

As also indicated above, until the issuance of the ACFFOD, *all* tribal rights were determined by proxy through ESA compliance. The *Kandra*, *Patterson*, and *Baley* courts all permitted such an arrangement, but specifically noted that Project water rights were being actively adjudicated in the KBA. *See, e.g., Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1214 fn.3 (9th Cir. 1999). In other words, with respect to tribal water rights, the ESA served as a proxy in the absence of *otherwise quantified rights*.

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[8] This does not mean, however, that they cannot assert such rights in the future. As the *Baley I* court noted, "[a]lthough reserved rights can be adjudicated by state bodies, and the [Tribes] could have submitted claims to the [KBA] … their failure to do so *did not affect the existence or nature of their federal reserved rights*." *Baley I*, 134 Fed. Cl. at 679 (emphasis added).

[9] To note, the ACFFOD also controls lake levels Reclamation must maintain for the Klamath Tribes.

[10] Their priority date may also be "time immemorial," but their rights are at least as old as the establishment of their reservations. *See Baley I*, 134 Fed. Cl. at 670.

[11] As noted above, operations are currently guided by the 2018 Biological Opinion as amended by the Interim Operations Plan.

Thus, the operation of the Klamath Project is subject to additional constraints now, compared to the time at which those cases examined it. The KBA, when final, will have fully adjudicated the vast majority of the rights at issue in the line of cases described above—the major exception of course being the rights held by the Yurok and Hoopa Tribes.[12]

Therefore, reliance on those cases for anything other than use of ESA compliance as a project-wide proxy for unquantified tribal water rights during the pendency of a general stream adjudication stretches them beyond their own terms.

That is also important context to consider in light of the United States' opposition to the stored water argument, which was made by Project water users at multiple points in the cases described above. While it is true that the United States opposed a view that Project storage was unavailable for satisfaction of federal responsibilities *as a whole* and *during the pendency of the KBA*, it has never made the argument that downstream, unquantified rights are entitled to water previously stored in priority under the terms prescribed by state law in the ACFFOD.

That is true even of the United States' April 2020 filing in the KBA, opposing a challenge to the ACFFOD's quantification of the Klamath Tribes' right to specific water levels in UKL (hereinafter "Opposition Brief"). There, in defending a quantified tribal water right under the KBA, the United States argued that the Klamath Tribes were necessarily entitled to storage in UKL to satisfy the Tribes' quantified water right. *See* Opposition Brief at 64–75.

But, again, taking the position that a specific federal responsibility—there a *quantified* federally reserved water right—entitles the United States to use storage when it otherwise might conflict with state law is materially different than taking the position that a non-specific federal responsibility—i.e. an *unquantified* federally reserved water right—entitles the United States to release storage in conflict with state law. As stated above, that is a key fact that marries federal and state law under Section 8 of the Reclamation Act. Therefore, Reclamation's position with respect to water previously stored in priority is not inconsistent with either the April 2020 Opposition Brief, or any of the Klamath-specific case law in which storage was previously raised. It is also faithful to traditional Western water law, and fully consistent with Reclamation's trust obligation to the Yurok and Hoopa Tribes, who have senior rights to natural flow from the Klamath River over junior upstream diverters.

III. Conclusion

For the reasons expressed herein, Reclamation's trust obligations to the Yurok and Hoopa Tribes require it to provide the Tribes with the full benefit of natural flow of the Klamath River to the extent necessary to satisfy their federally reserved water rights. In the absence of a specific, quantified water federally reserved water right, or other specific federal law, however, water previously stored in priority is bound by the ACFFOD and should be released in accordance with its terms.

[12] They were not required to participate in the KBA, and their non-participation did not affect the existence or nature of their rights. Quantification of the Tribes' water rights could change the analysis here.

United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 14, 2021

Memorandum

To: Secretary

From: Solicitor

Subject: Analysis of Klamath Project contracts to determine discretionary authority in accordance with the November 12, 2020 Letter of the Secretary of the Interior

Pursuant to the direction given in your November 12, 2020, letter, I provide the following analysis of contracts between the Bureau of Reclamation (Reclamation) and water users and associated entities which receive water through the Klamath Project. This analysis focuses on the degree of discretionary authority provided by the contracts to Reclamation. As discussed in the SOL October 2020 Memorandum, if a contract provides Reclamation with discretionary authority to take action that could benefit species listed under the Endangered Species Act (ESA), Reclamation must consult under ESA Section 7 on the impacts of that action. However, if a contract does not provide discretionary authority, Reclamation must include the impacts of the action in the environmental baseline of the consultation.

This memorandum is intended to implement the direction given in the Secretary's Letter and (2) inform Reclamation as it proceeds in accordance with the guidance provided by the *Reassessment of U.S. Bureau of Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act* (Reassessment) and, in particular, *Section 5.1.5 Coordinating Project Diversions*. This memorandum incorporates by reference the analysis contained in the SOL October 2020 Memorandum.

I. Introduction and Identification of Key Clauses

In accordance with the Reassessment, Reclamation must address contractual provisions as part of the consultation on overall Project operations and allocation of water. The portion of the consultation which involves the contracts affects only the water allocated to the Project.

SOL has identified six types of contractual provisions which have the potential to either impart discretionary authority or constrain the discretion of Reclamation in ways which could affect ESA listed species. These provisions are (1) liability waivers; (2) provisions addressing beneficial use to determine the amounts of water delivered under a contract and the dates of delivery; (3) the total amount of water which a contract obligates Reclamation to provide per year or irrigation season; (4) the total amount of water which a contract obligates Reclamation to provide per month; (5) the dates of delivery; and (6) reapportionment clauses.

For contracts which do not impart discretionary authority, and which are therefore included in the environmental baseline, the contracting parties other than Reclamation may still be subject to the ESA Section 9 take prohibition. *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995). Furthermore, whether Reclamation possesses discretionary authority in contract implementation does not affect the underlying water rights of the parties to the contract or other entities.

Between 1908 and 1972, Reclamation, acting through and on behalf of the Secretary, entered into over 150 perpetual contracts with district entities and individual landowners to provide water from the Project for irrigation and related purposes, in exchange for payment of Project costs and other conditions. In total, Reclamation's perpetual contracts for water from the Project (Upper Klamath Lake [UKL], Klamath and Lost River, Clear Lake and Gerber reservoirs) cover 204,239 irrigable acres, including portions of Lower Klamath and Tule Lake NWRs. In addition, there are portions of the Project that are not served under a perpetual water contract (Temporary Water Contracts).[1]

Water supply contracts for the Project fall into one of three categories. In some cases, these contracts encompass lands for which the owners claimed non-federal water rights that predated the Project and which rights were folded into the Project water supply through contract. Those types of contracts are generally called "settlement contracts." In other situations, Reclamation only agreed to deliver water to a specified point, and the contracting entity or individual was then responsible for constructing and operating the non-federal facilities necessary to convey the water to its intended place of use. Those types of contracts are generally called "Warren Act contracts." Lastly, in some cases Reclamation constructed all the works necessary to deliver the water to its intended place of use, in which case the contracts are called "repayment contracts."[2] All three types of contracts are included in the general term "water supply contracts."

II. Discussion of Key Clauses

1. Liability waivers

Most contracts between Reclamation and Klamath Project water users contain a liability waiver with language similar to Article 9 of the Sunnyside Irrigation District contract (ILR-174 – 1922-10-24): "On account of drought, inaccuracy of distribution or other cause, there may occur at times a shortage in the quantity of water provided for herein, and while the United States will

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[1] Under Ninth Circuit case law, consultation is required for non-perpetual contracts. *Nat. Res. Defense Council v. Jewell*, 749 F.3d 776, 785 (9th Cir. 2014).

[2] A subset of repayment contracts are contracts, such as the November 29, 1954 contract with the Klamath Irrigation District, transfer works constructed by Reclamation to the contracting entity, which then assumes Reclamation's responsibilities for operating and maintaining the works, delivering water, and collecting charges. The status of a contract as a transferred works contract does not affect Reclamation's discretionary authority since the contracting entity is bound by federal law and regulations (Article 6) and assumes the contractual obligations of the United States (Article 13), and because Reclamation maintains ultimate control over the transferred works through its reservation of the right to resume operation of the transferred works if the contracting entity violates any contractual provisions (Article 21).

use all reasonable means to guard against such shortages, in no event shall any liability accrue against the United States, its officers, agents or employees, for any damage, direct or indirect, arising therefrom, and the payments due hereunder shall not be reduced because of any such shortage."

As discussed in the SOL October 2020 Memorandum, these are force-majeure clauses, similar to the one which the court in *Natural Resources Defense Council v. Norton*, 236 F. Supp. 3d 1198 (E.D. Cal. 2017) found insufficient to trigger the Section 7 consultation obligation. The first part delineates the events which could prevent the United States from fulfilling its contractual obligation to deliver water. The remainder of the clauses commit the United States to taking reasonable measures to avoid shortage and absolve the United States from liability should a shortage arise notwithstanding those measures. The structure of the clauses as a single sentence indicates that each must be read as a whole. The plain language of the clauses as a whole focuses on protecting the United States from liability if drought, inaccuracy of distribution, or other causes create a shortage which prevents the United States from delivering the amount of water required under the contract, not on authorizing the United States to alter the amount of water when the United States is trying to meet another priority.

Because these liability waivers do not authorize the United States to alter the amount of water delivered, they do not provide sufficient discretion for Reclamation to consult.

2. Beneficial use

Section 8 of the Reclamation Act of 1902 dictates that "[t]he right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."[3] 43 U.S.C. § 372. All Klamath Project water contracts were executed pursuant to the Reclamation Act of 1902, as stated in the preambles to the contracts, including those contracts that also expressly reference the Warren Act. While many of the Klamath Project contracts give irrigation districts the right to divert as much water as is necessary for beneficial use on the irrigable lands they serve, the fact that the contracts were executed pursuant to the Reclamation Act of 1902 necessarily means that the provisions of the Act, including Section 8, govern the contracts.

Generally speaking, "state law governs the distribution of water from federal projects unless Congress expresses a different approach." *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981) (*citing California v. United States*, 438 U.S. 645 (1978)). Thus,

[3] The remainder of Section 8—now codified at 43 U.S.C. § 383—states: "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested rights acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." Courts have interpreted the language concerning interstate streams as a disclaimer—that the Act in no way was intended to affect the disposition of interstate streams, and that "the matter be left just as it was before [the passage of the Act.]" *State of Wyoming v. State of Colorado*, 259 U.S. 419, 463 (1922) *vacated on other grounds by State of Wyoming v. State of Colorado*, 353 U.S. 953 (1957). Section 8's primary purpose, though, is to require the use and distribution of water to be carried out in accordance with state law, absent specific contrary federal law.

unless Congress expresses an intent to supplant state law with respect to distribution from a particular Reclamation project, the concept of "beneficial use" is set by state law. *See id.*; *see also United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983) ("beneficial use itself was intended to be governed by state law.").

Beneficial use is not static. Rather, "[i]t is settled that beneficial use expresses a dynamic concept, which is 'a variable according to conditions.'" *Alpine Land & Reservoir*, 697 F.2d at 857 (internal citations omitted). Thus, the exact quantity of water necessary to satisfy beneficial use can—and presumably will—change over time. *See id.* Perhaps unsurprisingly, then, disagreements as to how much water is required to satisfy "beneficial use" are not uncommon. *See, e.g.*, *id.* (challenging the District Court's determination of 3.5 acre-feet-per-acre for bottomland farmers, and 4.5 acre-feet-per-acre for benchland farmers). Regardless, as stated above, the question of how much water is necessary to satisfy beneficial use is a factual question, determined by state law. *See, e.g.*, *Jicarilla Apache*, 657 F.2d at 1133 ("the determination of beneficial use is a question of fact.").

Therefore, the Klamath Project contracts that obligate Reclamation to provide sufficient water for beneficial use seem to provide Reclamation with very little discretion. Those contracts, in effect, set both a ceiling and a floor on the amount of water each contracting party is entitled to take from the Project—enough to satisfy beneficial use, under Oregon law. While Reclamation does have considerable authority under some contracts to re-apportion water in times of shortage, for example, it does not have the discretion to adjust the amount required to satisfy "beneficial use" when that is the measure of the right in a given contract.

In *Natural Resources Defense Council v. Norton*, the Eastern District of California examined, *inter alia*, Reclamation's discretion to modify water deliveries on executed contracts based on its own "beneficial use" determination. 236 F. Supp. 3d 1198, 1224–25 (E.D. Cal. 2017). In the contracts at issue in that litigation, Reclamation was similarly obligated to deliver sufficient water to satisfy beneficial use.[4] *Id.* Plaintiffs argued that because beneficial use is not static, and because it "requires consideration of 'alternative uses of the water' which is 'variable according to conditions,'" Reclamation had discretion to change "quantities and allocations in light of current conditions and competing uses for the water." *Id.* at 1225 (internal citations omitted). But the court disagreed. It noted that "[e]ven assuming that Reclamation has the authority to determine whether a particular use is beneficial, nothing [in the contract] suggests Reclamation may adjust contract quantities based on a beneficial use determination made after contract execution." That was so even though the contract itself did not define beneficial use as any particular amount of water. *See generally id.* In other words, even though the court recognized that the amount required to satisfy beneficial use could theoretically change over time, the contract still obligated Reclamation to deliver that quantity—whatever it was—

[4] The full provision at issue read: "During the term of this Settlement Contract and any renewals thereof [] it shall constitute full agreement as between the United States and the Contractor as to the quantities of water and the allocation thereof between Base Supply and Project water which may be diverted by the Contractor from its Source of Supply for beneficial use of the land shown on Exhibit B from April 1 through October 31, which said diversion, use, and allocation shall not be disturbed so long as the Contractor shall fulfill all of its obligations hereunder." *Id.*

notwithstanding a hypothetical determination that the water could be better used elsewhere. *See id.*

There is a colorable argument that the contracts at issue in *NRDC* are materially different than those under review in the Klamath Project. First, as the *NRDC* court noted, the contracts at issue in that case were settlement contracts which contained clauses that specified that "allocation *shall not be disturbed*" during the life of the contract. *See id.* Second, and along similar lines, those contracts also contained language that specified the agreement constituted the "full agreement as between the United States and the Contractor as to the quantities of water and the allocation thereof between Base Supply and Project water." *Id.* at 1224–25. The contracts at issue in the Klamath Project contract review are not as specific,[5] and generally only state that Reclamation is obligated to deliver water sufficient to satisfy "beneficial use" each irrigation season. Arguably, without the limiting language present in the *NRDC* contracts, these contracts afford Reclamation more discretion to adjust water deliveries based on a beneficial use determination each irrigation season.

However, that view would be unlikely to prevail in front of a reviewing court. While the language in the contracts does differ, the central question is exactly the same as that in the *NRDC* case—does Reclamation have the authority to modify water deliveries under an executed contract based on a beneficial use theory. Even assuming (as the *NRDC* court did) that Reclamation has the authority to make the beneficial use determination in the first instance,[6] that decision still must be made pursuant to state law. *See NRDC*, 236 F. Supp. 3d at 1225 ("Section 8 of the Reclamation Act of 1902 requires that all water provided pursuant to the Act be put to 'beneficial use,' *as defined by state law*.") (emphasis added); *accord California*, 438 U.S. at 665–67. And just as in the *NRDC* case, the contracting parties here have executed contracts guaranteeing sufficient water for beneficial use, so long as sufficient water is available.[7]

So while Reclamation can, by necessity, determine whether or not a certain portion of the water is "waste," or that a certain portion of land within a district is no longer irrigable,[8] Reclamation does not appear to have the discretion to modify water deliveries under an executed contract based on a determination that beneficial use demands a lower quantity, absent a showing that the particular tract at issue is wasting water, or otherwise needs less to get the full benefit of beneficial use.[9] This is emphasized by the fact that the *Amended and Corrected Findings of Fact and Order of Determination* in the Klamath River Basin General Stream Adjudication

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[5] Of course, the contract language varies, and this memo is only concerned with those that entitle irrigation districts to divert enough water to satisfy beneficial use.

[6] Indeed, in the Klamath Project, all of the water being delivered is Project water (as opposed to non-project water apportioned by the state under state law), and therefore Reclamation does make this determination. Of course, as this memo explains, that determination is nonetheless guided by state law.

[7] The "availability" determination is a separate issue and is the subject of part II of this memo.

[8] This is, indeed, part of a beneficial use determination. Some contracts contain amendments, for example, changing the determination of irrigable acres, which would necessarily change the amount of water needed to satisfy beneficial use.

[9] This is a wholly separate determination, however, from a determination that the tract *could* use the water, but that the water could be *better* used elsewhere. *See NRDC*, 236 F. Supp. 3d at 1225.

(hereinafter "*ACFFOD*") sets a standard for beneficial use, as specifically applied in the Klamath Basin. *See ACFFOD* at 13.[10]

3. Total amount of water per year/irrigation season

The total amount of water which Reclamation is obligated by a particular contract to deliver per year or per irrigation season is an area in which Reclamation's discretionary authority, if any, has significant potential to affect ESA listed species because of the importance of the volumes of water in Upper Klamath Lake and the Klamath River below Iron Gate Dam to ESA listed species. Klamath Project contracts specify that Reclamation will deliver (a) a fixed amount of water; (b) up to a specific amount of water; or (c) an amount of water determined by beneficial use. While many contracts explicitly state that the amount of water to be delivered is subject to beneficial use, the fact that all Klamath Project contracts were executed pursuant to the Reclamation Act of 1902 means that all contracts are subject to Section 8 and its requirement that beneficial use is the measure of water.

a. Fixed amount clauses

The contract with the Van Brimmer Ditch Company (I8r-1065-1909; I8r-1065a-1943) provides a prime example of a contract which requires Reclamation to deliver a fixed amount of water per irrigation season with no reference to beneficial use. Article 2 (as amended) requires the United States to "deliver to [Van Brimmer] during each and every irrigation season, that is, from April fifteenth to October first of each year, a quantity of water, not to exceed fifty second-feet, in which [Van Brimmer] claims the right to the exclusive use[.]" Article 15 of the original contract (which was not amended) provides "It is also understood and agreed that the United States hereby recognizes the right as existing in [Van Brimmer] to the perpetual use of said fifty (50) second feet of water, according to the provisions herein set forth, subject, however, to any possible established priority to the use of said fifty (50) second feet of water, other than such as may be claimed by the United States or those claiming through it."

Article 20 of the1943 amendment further establishes that Van Brimmer cannot claim, and the United States is not obligated to deliver, water in excess of 50 second-feet. "[T]he use of water by [Van Brimmer] in any year in excess of 50 cubic feet per second is not to be the basis of any claim by [Van Brimmer] for similar excess deliveries at any later date, and that the United States and its successors in control of the Klamath Project are not to be obligated at any time to deliver water to [Van Brimmer] in excess of 50 second-feet].]"

The recognition by the United States of Van Brimmer's right to the perpetual use of 50 second-feet of water in Article 15 prevents Reclamation from curtailing water deliveries below that amount. Article 20 provides further evidence of the understanding that the United States is obligated to deliver 50 second-feet of water by stating that the United States is not obligated to deliver more than that amount of water. The specific acknowledgement by the United States of

[10] The *ACFFOD* describes water delivery obligations as "duties." Thus, the standard "duty" for irrigation "is not to exceed three and one-half acre-feet-per-acre during any irrigation season, unless otherwise specified ..." *ACFFOD* at 13.

Van Brimmer's right to 50 second-feet in Article 15 provides no discretion for Reclamation to reduce the amount of water which Reclamation must deliver.

As a settlement contract, Van Brimmer contains especially proscriptive provisions specifying the amount of water which must be delivered. While the other contracts which specify fixed amounts of water are not as prescriptive as Van Brimmer, the fact that they specify that Reclamation shall deliver a specific amount of water and are subject to beneficial use means that Reclamation lacks discretion to reduce the total amount of water provided under them, and therefore is not obliged to consult on them. *See* Pine Grove Irrigation District contract (ILR-403-1918-12-21), Article 5 (stating that beneficial use is the measure for water used in the district) and Article 6 (stating in relevant part that "It is expressly understood and agreed that the amount of water to be delivered hereunder shall be two and one-half feet (2.5) acre-feet-per-acre of irrigable land [.]").

b. Ceilings on the amount of water

The contract with the Sunnyside Irrigation District (Ilr-174, dated October 24, 1922) exemplifies the relatively large number of contracts which commit Reclamation to delivering water up to a specific ceiling. Article 5 as amended requires the United States "to impound, store, or otherwise provide water for the irrigation of District lands" and to deliver that water through the C Canal in quantities that shall not "exceed [2.5] acre-feet-per-acre of irrigable land during the usual irrigation season as established on the Klamath Project, being approximately that period from April 15 to September 30 of each year, inclusive; and in no event shall it exceed 0.6 acre-feet of water per irrigable acre in any one month[.]" The subsequent article, Article 6, further provides that the United States shall deliver water "only upon written demand of the District served on the project Manager of the Klamath Project..." Reading these provisions together, Article 5 establishes a ceiling on the total amount of water which the United States must deliver and which the contractor may demand during the irrigation season but does not establish a floor of the minimum amount of water which the United States must deliver.

In isolation from the rest of the contract, it could be argued that the "up to" terminology implies an ability to deliver zero water at the discretion of the agency. However, this argument fails to consider the role of beneficial use in determining the amount of water which Reclamation must provide under the contract. When reading these contracts in their entirety and including Section 8 of the Reclamation Act of 1902, it is apparent that the volume of flow to be delivered has been determined as whatever constitutes beneficial use. As discussed earlier, beneficial use is not static and cannot be practically described in a contract, beyond its upper bound as provided in such contracts. In this manner, it is the contractor and not Reclamation that determines the schedule, volume, and rate for water deliveries, limited by contractual upper bounds and the State of Oregon's determination of beneficial use.[11]

[11] In the absence of an explicit floor on the amount of water, a finding that beneficial use does not determine the amount of water which Reclamation must deliver would mean that Reclamation would have unlimited discretion to reduce water deliveries to zero. Such a finding could render the contract illusory and therefore invalid, and could defeat the Congressionally mandated purposes of the Klamath Project. *See* October 2020 Solicitor's Office Memorandum, page 6.

c. Beneficial use as the sole measurement of water

The contract with the Tulelake Irrigation District [14-06-200-5954 (1956-09-10)] exemplifies contracts in which the amount of water to be delivered is defined solely by beneficial use. Article 33(a) provides that "The District shall have the right in perpetuity, subject to the terms and conditions of this contract and consistently with the applicable laws of the State of California, to receive from the Klamath Project all water needed by the District for beneficial irrigation uses within the District. Said water shall be delivered from the works under the control of the United States or its designees or its agents at such times and in such amounts as the District may demand, subject only to the limit of the capacity of the facilities available therefor and the amount of water required for reasonable beneficial use within the District." Because beneficial use is determined in accordance with state law pursuant to Section 8 of the Reclamation Act of 1902, Reclamation lacks the discretion to alter the definition or amount of water determined by state law to be of beneficial use. Reclamation therefore lacks the discretion to consult on the amount of water delivered pursuant to the Tulelake and similar contracts.

4. Total amount of water per month

Many of the contracts include a ceiling on the amount of water which Reclamation is obligated to provide each month. This provision is salient to consultation because the timing of water deliveries is a factor which could benefit listed species.

A typical provision is found in Article 5 of the Sunnyside contract, which states in relevant part that "in no event shall [the supply of water] exceed 0.6 acre-feet of water per irrigable acre in any one month[.]" While stated as a ceiling, the monthly water supply is also subject to the beneficial use standard, both explicitly in another part of Article 13 and implicitly through incorporation of Section 8 of the Reclamation Act of 1902. Since beneficial use determines the amount of water deliveries needed per month, Reclamation lacks the discretion to reduce the amount of water delivered per month to benefit ESA-listed species, and therefore lacks the discretion needed to consult.

5. Dates of delivery

These clauses provide that Reclamation will deliver water (a) during a specific date range; (b) during an approximate period (when contracts state "the usual irrigation season," it is always coupled with a date range); or (c) on a per annum basis. The Van Brimmer contract is an example of a contract with a specific date range. Article 2 (as amended) requires the United States to "deliver to [Van Brimmer] during each and every irrigation season, that is, from April fifteenth to October first of each year, a quantity of water, not to exceed fifty second-feet, in which [Van Brimmer] claims the right to the exclusive use[.]" The requirement to deliver that volume of water from April 15 to October 1 contained in Article 2 prevents Reclamation from altering the dates of delivery, and therefore deprives Reclamation of the discretionary authority needed to consult on the timing of water deliveries.

A number of contracts provide an approximate date range, as exemplified by the Sunnyside contract. Article 5 provides that the District will receive up to a specified amount of

water "during the usual irrigation season as established on the Klamath Project, being approximately that period from April 15 to September 30 of each year, inclusive." Other contracts, such as the Klamath Irrigation District Water User Type B Contracts (private lands) (example: Adams water right application, Certificate No. 02168) specify that water deliveries are on a per annum basis. These state in relevant part "said applicant shall be entitled to receive, subject to the payment of the annual charges for building, operation, and maintenance, [a specified number of][12] acre feet of water per annum per acre of irrigable land herein described, or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project[.]"

While use of the words "approximately" and "per annum" appear to provide Reclamation with the flexibility to alter the dates of delivery, they are subject to the beneficial use standard, at least implicitly through incorporation of Section 8 of the Reclamation Act of 1902. Since beneficial use determines when water deliveries are needed, Reclamation lacks the discretion to alter the dates of delivery to benefit ESA-listed species, and therefore lacks the discretion needed to consult.

6. Reapportionment

Certain of the contracts contain clauses allow reapportionment of water among users with equal priority dates. One key example, because of the size of the District, is Article 33(c) of the Tulelake Irrigation District contract. This clause reads: "In the event a shortage of water from the Klamath Project arises as a result of drought or other unavoidable causes, the United States may apportion the available supply among the District and others having rights of priority equal to the rights of the District." This clause authorizes the United States to reapportion available water supplies among the holders of "contract" rights. It is not an open-ended authorization for the United States to reapportion water to users or uses that are not otherwise covered by a contract for Project water, such as benefiting ESA-listed species. It therefore does not provide sufficient discretionary authority to require consultation.

Another common example is a type of reapportionment clause which exists in many of the contracts entered into pursuant to the Warren Act. Most commonly, this clause is added as a proviso to the article describing the water supply furnished by the United States under the contract. A typical example is Article 7 of the contract with Malin Irrigation District (Ilr-195, dated September 9, 1922), which provides "That all rights to the use and delivery of water acquired by the District under the contract are inferior and subject to the prior rights reserved to the lands of the Klamath project." The origins of this clause stem from a 1910 decision by the Secretary of the Interior to release certain lands from the Project, notably those to be served by pumping water out of the Project's canal system, as well as Section 1 of the Warren Act, 43 U.S.C. § 523, which authorizes the Secretary of the Interior to enter into certain contracts, subject to "preserving a first right to lands and entrymen under the project".

[12] The specified number of acre feet varies among the water right applications. For the Adams application, it is 1.8 acre-feet.

The intended operation of this provision in the Malin Irrigation District's contract is reinforced by Article 33(b) of the Tulelake Irrigation District's contact (14-06-200-5954, dated September 10, 1956), which provides that "The rights of the District to water from the Klamath Project pursuant to the terms of this contract shall be equal to those of others executing similar contracts under the Reclamation Act of June 18, 1902, as amended, and shall be prior to those rights conferred pursuant to contracts executed under the Act of February 21, 1911, commonly known as the Warren Act." Accordingly, Reclamation must ensure that Tulelake Irrigation District's contractual right to water from the Klamath Project is satisfied before making water available to Warren Act contractors. Here again is a clause authorizing the United States to reapportion the available water supply from the Klamath Project among the various water contracts within the Project, and not an open-ended authorization for the United States to reapportion water to users or uses not otherwise covered by a contract for Project water. Therefore, to the extent there is discretion afforded Reclamation by such contract provisions, it is limited to allocating water in the event of a shortage among the various water contracts within the Klamath Project.

— BUREAU OF —
RECLAMATION

Reassessment of U.S. Bureau of Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act

This Document is for Decision Purposes Only

U.S. Bureau of Reclamation
California-Great Basin Region (Region 10)
2800 Cottage Way
Sacramento, CA 95825-1898

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CHAPTER 1 - PURPOSE AND CONTENT

The U.S. Bureau of Reclamation, California-Great Basin Region ("Reclamation") has performed, and documented herein, a reassessment of actions associated with its continuing operation of the Klamath Project (Project), in southern Oregon and northern California. These actions were thoroughly and critically evaluated for the purpose of informing and supporting future consultation with the U.S. Fish and Wildlife Service ("USFWS") and National Marine Fisheries Service ("NMFS"; collectively the "Services") under Section 7(a)(2) of the Endangered Species Act ("ESA"). This comprehensive reassessment permitted careful consideration of previously proposed Reclamation actions to:

1. verify compliance with law and regulation;
2. clearly define the scope of actions;
3. correctly attribute actions to the appropriate agency;
4. ensure that non-discretionary actions are excluded from consultation; and
5. properly characterize the environmental baseline.

This reassessment report provides the legal and technical bases for all determinations. It will serve to support Reclamation's decisions and to provide guidance for future Reclamation staff. This report also serves as a record of agency determination to assist in the preparation of a biological assessment (BA) and the conduct of ensuing ESA consultation, as necessary.

This report does not evaluate or determine the actual effects of the various activities on listed species or their critical habitat. Reclamation will determine the effects of actions proposed for inclusion in ESA consultation during preparation of any subsequent BA(s), as warranted.

This report entails six primary topics. Chapter 2 summarizes the recent ESA consultation history and establishes the direction and need for this reassessment. Chapter 3 outlines the salient regulatory definitions and recent court opinions that provide context for the reassessment. Chapter 4 presents a brief description of Klamath Project operations. Chapter 5 assesses the need for ESA consultation on each pertinent aspect of Klamath Project operations. Chapter 6 applies the concept of environmental baseline to actions proposed in prior consultations. Chapter 7 summarizes the reassessment's findings, and documents Reclamation's decision regarding the need for and/or scope of ESA consultation in connection with the Klamath Project.

The structure and format of this reassessment is based on a similar product the U.S. Army Corps of Engineers prepared in June 2014, for their reservoir operations on the Middle Rio Grande Basin of New Mexico, and recently upheld by the U.S. Court of Appeals for the 10th Circuit in *WildEarth Guardians v. U.S. Army Corps of Engineers*, No. 18-2153 (2020).

CHAPTER 2 - BACKGROUND

Chapter 2 provides context and justification for this reassessment of actions associated with operation of the Klamath Project for purposes of consulting with the Services under Section 7(a)(2) of the ESA.

2.1 2018 BA, 2019 BIOPS, AND INTERIM OPERATIONS PLAN

Current ESA compliance for Reclamation's continued operation of the Klamath Project is addressed in separate biological opinions (BiOps) issued by the NMFS[1] in 2019 and USFWS[2] in 2020. These BiOps evaluated Reclamation's proposed actions described in a BA, dated December 21, 2018[3], as modified by February and October 2019 amendments, and subsequently, a letter from Reclamation to the Services dated March 27, 2020.

The 2018 BA, as modified, constitutes the "Interim Operations Plan" for the Klamath Project, while Reclamation undertakes a more extensive consultation with the Services. Reclamation reinitiated consultation with the Services by letter dated November 13, 2019, after the agency became aware of erroneous data included in the 2018 BA and relied upon by NMFS in its analysis. The Interim Operations Plan deviates from the operations proposed in the 2018 BA by adding an additional 40,000 acre-feet (AF) to the Environmental Water Account in certain year types. The Interim Operations Plan is intended to remain in effect until Reclamation completes the ongoing consultation with the Services, expected to conclude in the fall of 2022.

This reassessment provides guidance for Reclamation's ongoing Section 7(a)(2) consultation; it does not alter or affect Reclamation's current ESA compliance, as encompassed in the Interim Operations Plan.

2.2 CONSULTATION, LITIGATION, AND SETTLEMENT HISTORY

This summary provides a general picture of ESA consultations by Reclamation over more than three decades, particularly with respect to the operation of Upper Klamath Lake and resulting flows in the Klamath River. See section 2 of the 2018 BA for a more comprehensive listing of prior ESA Section 7(a)(2) consultations in connection with the Klamath Project.[4]

In July 1988, USFWS listed Lost River sucker (*Deltistes luxatus*) and shortnose suckers (*Chasmistes brevirostris*) as endangered. Reclamation consulted with USFWS the following year on the effects of aquatic herbicide use within the Klamath Project on these species. This consultation concluded with USFWS issuing a BiOp determining that Reclamation's continued use of acrolein in Klamath

[1] *Endangered Species Act Section 7(a)(2) Biological Opinion, and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response for Klamath Project Operations from April 1, 2019 through March 31, 2024*, National Marine Fisheries Serv. (Mar. 29, 2019).
[2] *Biological Opinion on the Effects of the Proposed Interim Klamath Project Operations Plan, effective April 1, 2020, through September 30, 2022, on the Lost River Sucker and the Shortnose Sucker*, USFWS (Apr. 10, 2020).
[3] *Final Biological Assessment on the Effects of the Proposed Action to Operate the Klamath Project from April 1, 2019, through March 31, 2024*, U.S. Bur. of Reclamation (Dec. 21, 2018).
[4] To briefly list notable examples, Reclamation consulted with USFWS, in some cases repeatedly, on operation of Clear Lake Reservoir, Gerber Reservoir, and the Tule Lake Sumps, including releases from Anderson-Rose Dam; replacement of Clear Lake Dam; use of pesticides and fertilizers on federal lease lands and federal rights-of-way; private algae harvesting operations on Upper Klamath Lake; Agency Lake-Barnes Ranch pumped storage operations; and modifications to the A Canal headworks and Link River Dam to reduce fish entrainment.

Project canals and drainage ditches, as traditionally applied, was likely to jeopardize the continued existence of Lost River and shortnose suckers and proposing a number of Reasonable and Prudent Alternatives (RPA) intended to avoid jeopardy.

In August 1991, Reclamation completed a consultation on the effects of overall Project operations on Lost River and shortnose suckers and bald eagles. USFWS determined that the proposed operations for 1991 would likely to jeopardize Lost River and shortnose suckers, but not bald eagles. USFWS' BiOp included an RPA requiring a minimum water surface elevation in Upper Klamath Lake of 4,142.1 feet between March 15 and May 5, and 4,242.4 feet between May 6 and June 15.[5]

Drought conditions in 1992 indicated that Reclamation would be unable to achieve the required elevation of 4,142.1 feet by March 15, triggering Reclamation to reinitiate consultation with USFWS on the effects of proposed 1992 operations. The consultation, completed in July 1992, found that Reclamation's proposed operation of the Klamath Project from April 1992 through March 2001 would likely jeopardize Lost River and shortnose suckers, but not bald eagles.

For Upper Klamath Lake, USFWS' 1992 BiOp required as an RPA that Reclamation maintain water surface elevations at not less than 4,141.0 feet and a maximum increase in elevation of one foot from March 1 through April 30 of each year, or until 80 percent of sucker spawning had occurred. Additionally, the BiOp required a water surface elevation of 4,141.0 feet by May 31 and at least 4,139.0 feet from June 1 through the end of February. To comply with the BiOp terms, these latter two elevations could be "compromised" no more than two consecutive years regardless of the time period, and in no more than four years during the ten-year term of the BiOp.

In March 1995, NMFS issued a proposed rule listing Klamath Mountains Province (KMP) steelhead (*Oncorhynchus mykiss irideus*) as a threatened species under the ESA. Reclamation consulted with NMFS on the effects of the 1995 operations plan on KMP steelhead, and in April 1995, NMFS concurred with Reclamation's conclusion that the proposed operations were unlikely to jeopardize the species.

In 1995 Reclamation began operating the Klamath Project in accordance with annual operations plans that specified designated water surface elevations in Upper Klamath Lake and flows in the Klamath River. As a starting point, the flows in the Klamath River were based on the requirements in PacifiCorp's 1956 license from the Federal Energy Regulatory Commission (FERC) for minimum releases from Iron Gate Dam, notwithstanding that it is a non-federal facility approximately 40 miles downstream the Klamath Project.

In July 1995, NMFS issued a proposed rule to list Southern Oregon-Northern California Coast (SONCC) coho salmon (*Oncorhynchus kisutch*) as threatened under the ESA.

Large fish mass-mortality (i.e., "die-off") events in Upper Klamath Lake in 1995 and 1996 in part led Reclamation to reconsider minimum water surface levels in the lake. Beginning in 1997 Reclamation agreed to manage Upper Klamath Lake to achieve a minimum September 30 water surface elevation of 4,139.0 feet. That same year NMFS also officially listed SONCC coho as threatened.

[5] All water surface elevations identified in this report are with respect to the Bureau of Reclamation datum specific to the facility.

In March 1998 NMFS determined that listing KMP steelhead was unwarranted, based in part on evidence that the fish were at a lower risk of extinction than at the time of the proposed listing.[6]

In March 1999, Reclamation requested formal Section 7(a)(2) consultation under the ESA on the effects of Project operations on coho salmon. NMFS' resulting July 1999 BiOp determined that Reclamation's proposed annual operations plan would likely adversely affect, but not jeopardize the continued existence of SONCC coho or its critical habitat. NMFS determined, however, that more information was necessary in order to fully understand the relationship between Iron Gate Dam releases and available coho habitat and water quality in the Klamath River, particularly during the summer months. NMFS also relied on the fact that Reclamation had committed to obtain additional information and analyses to assist in developing future operations plans.

In August 1999, a Department of Interior-commissioned scientific assessment of the flow needs of anadromous species in the Klamath River basin – known as Phase I of the "Hardy Report" – provided interim recommendations on minimum monthly flow levels for the mainstem of the Klamath River needed to support aquatic life.[7]

In 2000, Reclamation issued an annual operations plan providing for certain flows at Iron Gate Dam, but Reclamation did not consult with NMFS about the effects due primarily to delays in obtaining the information necessary to inform the consultation. The Pacific Coast Federation of Fishermen's Associations (PCFFA) filed suit in the U.S. District Court for the Northern District of California, and in an April 2001 opinion, the court ultimately granted PCFFA's motion for summary judgment, finding that Reclamation had failed to comply with ESA before implementing the 2000 operations plan.[8]

At the time, Reclamation also had to reconsult over the effect to endangered Lost River and shortnose suckers, with expiration of USFWS' 1992 BiOp. In February 2001, Reclamation issued a BA proposing to operate the Project consistent with historical operations, including for Upper Klamath Lake, thereby meeting or exceeding minimum levels that occurred during the period from 1960 to 1998.

In March 2001, USFWS issued a jeopardy BiOp, with an RPA requiring, among other conditions, that water not be diverted from Upper Klamath Lake for irrigation purposes if surface elevations were anticipated to go below certain designated water surface elevations, ranging between 4,141.0 feet and 4,142.5 feet at nine separate dates throughout the year (January 1, February 15, March 15, April 15, June 1, July 15, August 15, September 15, and October 15), regardless of inflow year type.

USFWS' 2001 BiOp recognized that there would be circumstances in which Reclamation could not meet both the RPA for specific lake levels and NMFS' anticipated RPA for river flows. The BiOp established a process for how these situations would be addressed. An appendix specified that, for 2001, Upper Klamath Lake water surface elevations were not to fall below 4,139.0 feet on September 30.

The April 2001 opinion from the district court also enjoined Reclamation from making irrigation deliveries that year if flows in the Klamath River dropped below the minimum flows recommended in the Phase I Hardy Report until the consultation process with NMFS was complete.[9] Three days later, NMFS issued a jeopardy BiOp on Reclamation's February 2001 BA. NMFS' BiOp included an RPA that

[6] This decision was subsequently overturned by the U.S. District Court for the Northern District of California in October 2000, but the agency nevertheless again determined in April 2001 that the species did not warrant listing.
[7] Thomas B. Hardy, *Evaluation of Interim Instream Flow Needs in the Klamath River – Phase I*, Utah State Univ. (1999).
[8] *PCFFA v. U.S.*, 138 F. Supp. 2d 1228 (2001).
[9] *Id*.

provided for flows of 1,850 cubic feet per second (cfs) between April 1 and June 30, followed by 1,000 cfs through September. To comply with this RPA and USFWS' RPA, Reclamation could not make any water available from Upper Klamath Lake for delivery to Project irrigators at the start of the irrigation season.

Phase II of the "Hardy Report" was released in November 2001.[10] The report used site-specific habitat modeling and estimates of the unimpaired flows in the main stem to arrive at a recommendation for flows for each river reach.

Following 2001, the National Research Council (NRC) was asked by the Departments of Interior and Commerce to independently review the scientific and technical validity of the government's BiOps. NRC's interim report was released in February 2002.[11]

Among other findings, NRC's report found no scientific support for the flow recommendations in the NMFS's BiOp.[12] But the report also found that no justification for the proposed action in Reclamation's 2001 BA, concluding that it "could lead to more extreme suppression of flows than has been seen in the past..."[13] Overall, the report concluded that "there is no convincing scientific justification at present for deviating from flows derived from operational practices in place between 1990 and 2000."[14]

With regard to Upper Klamath Lake, the report found that there was no clear empirical evidence for a relationship between water levels and mass-mortality events for fish. At the same time, with regard to Reclamation's 2001 BA, NRC found "no scientific basis for operating the lake at mean minimum levels below the recent historical ones (1990-2000)", and that these operations "would require acceptance of undocumented risk to the suckers."[15]

In February 2002, Reclamation issued a new BA, which proposed, for April 2002 through March 2012, in addition to numerous conservation measures, varying both river flows and lake levels by "water year type." For each type of water year, Reclamation used the historical average flow and lake levels over the previous ten-year period (1990 to 1999) to set its operational targets. In addition, Reclamation proposed to establish a "water bank" to make up to 100,000 total AF of water available to meet river flows. These conditions resulted in levels in Upper Klamath Lake in "critically dry" years between 4,137.1 feet (September) and 4,142.0 feet (March), and an overall mean lake level, across all year types of approximately 4,139.0 feet.

In May 2002 both USFWS and NMFS issued jeopardy opinions on Reclamation's proposed action.

USFWS' RPA did not prescribe specific alternative water levels in the lake, but rather that Reclamation, among other conditions: 1) use the 50-percent, instead of 70-percent, exceedance forecast for seasonal inflows; 2) reduce entrainment of suckers at Link River Dam; and 3) evaluate factors

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[10] Thomas B. Hardy and R.C. Addley, *Evaluation of Interim Instream Flow Needs in the Klamath River – Phase II*, Utah State Univ. (2001).
[11] National Research Council, *Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin* (2002).
[12] *Id*. at p. 27. NMFS later attributed NRC's conclusions to "lack of information on distribution and abundance of coho ... and the lack of studies focused on coho and factors limiting its population in the Klamath River Basin." In its 2002 BiOp, NMFS did not dismiss the NRC report, but did not adopt its conclusions in full.
[13] *Id*.
[14] *Id*.
[15] *Id*. at p. 4.

affecting water quality in Upper Klamath Lake, potential actions to reduce fish die-offs, and ongoing sucker population monitoring.

NMFS' RPA was broken into three phases, gradually leading (by 2010 and 2011) to minimum flows in the Klamath River varying between 1,000 cfs (July-September) and 1,500 cfs (April-May), based in part on the Phase II Hardy Report. The RPA was based around the principle that Reclamation should bear responsibility for only the share of water losses attributable to the Klamath Project. Because the Project represented approximately 57 percent of the irrigated land in the basin, the RPA provided for Reclamation to provide 57 percent of the water needed for coho and to establish an intergovernmental workgroup to "develop" the other 43 percent. The RPA permitted Reclamation to use its "water bank" to provide its share of the water. These flows increased based on the water year type (i.e., dry, below average, average, above average, wet).

In September 2002, a large fish mass-mortality event occurred in the lower Klamath River, resulting in over 34,000 dead fish, mostly adult Chinook salmon. PCFFA subsequently sued NMFS over its 2002 BiOp.

In July 2003, the U.S. District Court for the Northern District of California overturned part of the RPA, finding the requirement that Reclamation provide only 57 percent of the long-term flows to be arbitrary and capricious.[16] The court concluded that the NMFS had considered the effects of actions that were not "reasonably certain to occur" when it determined that the coho would receive 100 percent of the flows through a collaborative process.[17] However, the court determined that the short-term measures – phases 1 and 2 – were not arbitrary and capricious. The court ordered NMFS to revise its BiOp with respect to Phase III of the RPA, but provided that the interim measures, phases 1 and 2, would remain in effect pending a revised BiOp.[18]

The Ninth Circuit, in October 2005, overturned the district court's ruling, finding that NMFS's decision to delay the provision of the full quantity of water for eight years was not supported by the record.[19] The BiOp contained no analysis of the effect on coho during the first eight years of the RPA, despite the species' three-year life cycle. On remand, in March 2006, the U.S. District Court for the Northern District of California ordered Reclamation to comply with 100-percent of the RPA's Phase III flows until completion of a Section 7(a)(2) consultation.[20]

Beginning in 2005, stakeholders in the Klamath Basin began a settlement process to address the conflicts over water that had emerged since the 1990s. These settlement discussions involved all major water user communities and Klamath Basin Tribes and covered a broad number of topics that were included in several documents, including the Klamath Basin Restoration Agreement (KBRA) and the Klamath Hydroelectric Settlement Agreement (KHSA).

With respect to the management of Klamath Project features by Reclamation, the settlement negotiations began to form around certainty in allocations for irrigation purposes, accompanied by a designated plan to reduce irrigation demands in years when the available supply would be inadequate.

In October 2007 Reclamation issued a new BA on proposed operations from April 2008 through March 2018. Reclamation was not at the time required to reconsult with USFWS, but it elected to because

[16] *PCFFA v. U.S.*, No. 02-2006 SBA (N.D. Cal. Jul. 15, 2003).
[17] *See PCFFA v. U.S.*, 426 F.3d 1082, 1089 (9th Cir. 2005).
[18] *Id*. at 1090.
[19] *Id*. at 1091.
[20] *PCFFA v. U.S.*, No. 02-2006 SBA (N.D. Cal. May 24, 2006).

Reclamation had encountered difficulties in implementing the proposed action described in the 2002 BA. One reason was because seasonal inflows to Upper Klamath Lake between 2002 and 2007 were different from those that occurred in the 1990s, being generally drier and this made it difficult for Reclamation to operate to an annual UKL elevation curve that closely fit the period of record.

The other problem was with the use of year types and the fact that monthly inflows could vary, regardless of overall net inflow. As a result, there were times that actual monthly inflows were less than what was needed to meet Upper Klamath Lake elevations despite the projection that lake elevations would be met based on the forecast net annual inflow. Additionally, the forecasted net annual inflow did not always accurately represent the actual net inflow.

The 2007 BA proposed minimum Upper Klamath Lake elevations as low as 4,137.5 feet (September). No minimums were specified for October through January. A model indicated that lake levels would remain above 4,138.9 feet in 70 percent of the years. The BA also included an "Interactive Management" process to distribute "surplus water" between the Klamath River and Upper Klamath Lake. For the Klamath River, the BA proposed minimum flows ranging between 1,000 cfs (July-September) and 1,500 cfs (April-May), increasing under wetter conditions.

In April 2008, USFWS issued a non-jeopardy opinion on Reclamation's proposed action. In June 2008, NMFS issued a draft jeopardy opinion with no RPA. A later version of the draft BiOp included an RPA that Reclamation deemed unacceptable in terms of shortages to the Project. After further discussion, a revised RPA was developed that reduced the shortages to the Project, but which Reclamation still felt was unsupported by the science and would conflict with Reclamation's proposed action with respect to Upper Klamath Lake water surface elevations specified in USFWS' 2008 BiOp. In October 2008 Reclamation notified NMFS it was suspending the consultation. Reclamation decided to operate the Project under USFWS' 2008 BiOp and NMFS' 2002 BiOp (Phase III flows).

In February 2010, the non-federal parties, including the Klamath Tribes and the Yurok Tribe, signed the KBRA. As negotiated, the KBRA provided for an annual fixed irrigation supply for the Klamath Project from Upper Klamath Lake and the Klamath River, and a commitment by the respective tribes, subject to certain conditions and considerations, to not exercise their senior water rights to curtail agreed-upon diversions by the Klamath Project.

Shortly after execution of the KBRA, Reclamation requested that NMFS finalize its opinion on Project operations from 2008 to 2010, consistent with the same RPA proposed when the 2008 consultation was suspended. Five days later, NMFS issued a jeopardy BiOp with a two-part RPA, providing for fall-winter flow variability and increased spring flows in average and wetter years. Additionally, the RPA specified minimum flows anticipated to be observed at Iron Gate Dam from March through September, ranging from 805 cfs (July) to 1,325 cfs (April), increasing under wetter conditions. Reclamation conditionally accepted NMFS' BiOp, based in part on its determination that compliance with the RPA could cause water levels in Upper Klamath Lake to be lower than those analyzed in USFWS' 2008 BiOp.

Reclamation deliberated on various paths forward, ultimately arriving at the plan to develop a "coordinated proposed action" in collaboration with the Services, the tribes, and Klamath Project water users. This collaborative process, which began in 2010, was largely facilitated by existing working relationships established during negotiation of the KBRA. In December 2012, following three years of

collaborative technical discussions, Reclamation released a BA, to which USFWS and NMFS responded in May 2013 with a "joint" non-jeopardy BiOp.[21]

The 2012 BA and 2013 BiOp incorporated a novel operational regime that included an "Environmental Water Account" for the Klamath River, a "UKL Reserve" for Upper Klamath Lake, and a fixed "Project Supply" for irrigation. These operational rules had been coded into the programming logic of a hydrologic model, called the Klamath Basin Planning Model (KBPM). The KBPM was developed by a technical team that included hydrologists and scientists who represented Reclamation, the Services, the tribes, and Project water users.

The central purpose of the KBPM was to test new operational concepts in the context of historical hydrology, and to facilitate agreement on operations that would produce acceptable outcomes among the multiple parties. Notably, each of the parties that contributed to development of the KBPM and its novel operational regime set aside several legal considerations that were anticipated at the time to eventually be resolved through the enactment of the KBRA into federal law, including state water law, water supply contracts, federal authorizations, federal tribal trust obligations, and necessary refuge water supplies.

Reclamation had previously developed and used models to evaluate the effects of different proposed actions in response to various hydrologic conditions, and thus impacts to listed species. The major difference was that the KBPM presented a proposed action that departed from basic actions required for serving the Klamath Project, as defined by Congress and embedded in contracts between Reclamation and water users within the Project.

The 2012 BA (as elaborated in the logic code of the KBPM) contained various formulaic means of governing the operation of water storage in, and outflows from, Upper Klamath Lake, which were crafted to achieve mutually agreeable, or at least acceptable, hydrologic outcomes among the parties involved. Therefore, beyond simply being used as a predictive model for evaluating operational alternatives, the KBPM established formulaic rules for operating the Project intended to achieve agreed-upon outcomes, including various frequencies of monthly lake levels (to the hundredth of an inch), daily river flows at Iron Gate Dam (to the cfs), and a water supply for the Project, including the refuges, that was "locked in" (to the AF), at the beginning of the agricultural season.

In practice, attempting to manage the Klamath Project – really the entire upper Klamath Basin – on a daily basis based on a series of set formulas has proven to be operationally challenging, and in some cases impossible, in addition to being unsatisfactory to many affected stakeholders, including Klamath Basin Tribes and water users. In short, the KBPM has proven unworkable because factors that are beyond Reclamation's control influence hydrology, the status of the listed species, and their critical habitat, including fish disease dynamics in the Klamath River and water quality in Upper Klamath Lake.

The novel approach to operating the Project contained in the 2012 BA was predicated in part on the assumption that the formulaic logic of KBPM would eventually be replaced with an operational regime governed by the KBRA.[22] While the proposed action in the 2012 BA did not represent the KBRA, it was intended as a step in transitioning toward operations anticipated to occur under the KBRA.

[21] In addition to coho salmon, the 2013 BiOp also analyzed the effects of project operations on the southern Distinct Population Segment (DPS) of green sturgeon (*Acipenser medirostris*) and the southern DPS of Pacific eulachon (*Thaleichthys pacificus*).

[22] The 2012 BA also expressly acknowledged that project operations would likely also need to change following the State of Oregon's issuance of the Findings of Fact and Order of Determination in the Klamath Basin Adjudication.

In January 2016, without any action by Congress to authorize the agreement, the KBRA expired on its own terms. In July and November 2016, the Hoopa Valley and the Yurok tribes respectively, along with other parties, filed litigation against the United States in the U.S. District Court for the Northern District of California. The plaintiffs alleged that Reclamation had failed to reinitiate consultation after the amount of "incidental take" of coho – as measured by disease rates in Chinook salmon – in both 2014 and 2015 exceeded the take limit in NMFS' portion of the 2013 BiOp.

In January 2017, Reclamation reinitiated consultation with the Services. In February 2017, the court ordered that, pending completion of Section 7(a)(2) consultation, Reclamation provide two types of pulse flows ("surface and deep flushing flows" and "emergency dilution flows") in the Klamath River intended to mitigate a disease affecting juvenile salmon, while otherwise complying with the 2013 BiOp, including conditions necessary to protect suckers in Upper Klamath Lake.[23] This was a noteworthy development, in that the 2012 BA was based in part on an anticipated settlement and were now being used as a starting point for defining additional measures. From this point further, the balance achieved through negotiations was no longer possible and any improvement in supply for one party necessitated actions that would be perceived as reductions for others.

The pulse flows the court directed were based on four technical memoranda prepared by USFWS, and a resulting guidance document prepared by the Yurok, Karuk, and Hoopa Valley tribes in January 2017, which provided measures intended to mitigate the effects of *Ceratanova shasta* infection rates in coho salmon and Chinook salmon below Iron Gate Dam.

In December 2018, Reclamation issued a new BA for the proposed period of April 2019 through March 2024, which built off the KBPM, but that included approximately 50,000 AF of additional water designated for release to the Klamath River during the spring-summer period, for use in producing, at the very least, a "surface flushing flow" at Iron Gate Dam of 6,030 cfs for 72 hours.[24] The proposed action also included a "UKL control logic", intended to result in end-of-season elevations that cause Upper Klamath Lake to refill the subsequent year, in order to allow both a flushing flow and provide adequate water surface elevations in the lake for suckers. In March 2019, NMFS and USFWS issued separate non-jeopardy opinions on the 2018 BA.[25]

In July 2019, the Yurok Tribe and other parties filed litigation in the U.S. District Court of Northern California challenging NMFS' 2019 BiOp and Reclamation's compliance with the National Environmental Protection Act. In September 2019, the plaintiffs amended their complaint, further alleging that Reclamation and NMFS' analysis was based on erroneous technical data (on available coho habitat), derived from the Phase II Hardy Report.

In response to the erroneous data related to available coho habitat, in November 2019, Reclamation formally requested reconsultation with NMFS and USFWS on Klamath Project operations.

In February 2020, Reclamation transmitted a final BA on project operations from April 2020 through March 2024, requesting completion of the consultation by the end of March, though acknowledging that additional time for the consultation would benefit all interested parties.

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[23] *Yurok Tribe v. U.S.*, 231 F.Supp.3d 450, 490 (N.D. Cal. Feb. 8, 2017).

[24] Reclamation clarified and amended the proposed action multiple times during the consultation, as further described in 2.1.

[25] In addition to suckers, coho salmon, the southern DPS of North American green sturgeon, and the southern DPS of Pacific eulachon, NMFS 2019 BiOp also considered the effects of project operations on the southern resident DPS of killer whales (*Orcinus orca*).

After further discussions among the parties, in March 2020, Reclamation, NMFS, the Yurok Tribe, Klamath Project water users, among other parties agreed to a stipulated stay in the litigation, which was approved by the district court, based on Reclamation following the Interim Operations Plan pending completion of ongoing consultation. The Interim Operations Plan adds approximately 40,000 AF to the volume of water from Upper Klamath Lake designated for release to the Klamath River during the spring and summer period to the 2018 BA, as amended. Based on the agreed upon extended reconsultation, Reclamation also withdrew its February 2020 BA.

The practical result for 2020 was that Reclamation made 155,000 AF of water available from Upper Klamath Lake for irrigation purposes within the Project during the spring-summer season (approximately one-third the historical demand), while simultaneously releasing approximately 407,000 AF to the Klamath River to achieve designated flows at Iron Gate Dam, amidst inflows to the lake of approximately 360,000 AF.

2.3 DIRECTION FROM THE SECRETARY OF THE INTERIOR

In July 2020, Secretary of the Interior David Bernhardt, accompanied by Reclamation's Commissioner Brenda Burman, traveled to Klamath Falls, to meet with Klamath Project water users, tribal leaders, elected officials, and staff from Reclamation, USFWS, and the U.S. Geological Survey. During their visit, Secretary Bernhardt and Commissioner Burman committed to begin implementing long-term solutions that more reliably meet the water needs of the Klamath Basin.

Following the Secretary and Commissioner's visit to Klamath Falls, legal counsel for the Klamath Water Users Association and Klamath Irrigation District separately wrote the Secretary, requesting that the Department of Interior's Office of the Solicitor review various legal issues related to Reclamation's operation of the Klamath Project. In response, the Secretary directed the Office of the Solicitor to review certain legal issues surrounding the Project.

In identical letters sent to Klamath Water Users Association and Klamath Irrigation District, dated November 12, 2020, the Secretary furnished a copy of the Office of Solicitor' preliminary findings, indicating that Reclamation's discretion in operating the Klamath Project is likely constrained by the contracts providing water to districts and individuals within the Project. Based on this initial review, the Secretary directed Reclamation, in coordination with the Office of the Solicitor, to review the contracts and other legal authorities governing the Project. Further, the Secretary directed Reclamation to "determine what portion of water in the Project is segregable, and thus set aside for irrigation purposes and unavailable for other purposes." Such analysis, presented herein, requires proper contextualization of the ESA among and along with all federal responsibilities and obligations.

CHAPTER 3 - LEGAL CONTEXT OF REASSESSMENT

Chapter 3 summarizes pertinent legal principles, regulatory definitions, and judicial decisions that provide the context for this reassessment.

3.1 DEFINING THE AGENCY ACTION

An agency's proposed actions are the subject of any BA. Within the context of ESA Section 7(a)(2) consultation, the term "action" is defined as all activities or programs of any kind authorized, funded or carried out, in whole or in part, by a federal agency.[26] It is Reclamation, not the Services, that defines the proposed action at issue for consultation[27], and those actions should be defined precisely. It is the action agency that first evaluates the potential effects of its actions on listed species and their habitat, and provides this, and other information, to the Services.[28] The Services then conduct their own analyses and provide their opinion as to whether the agency's proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.[29]

3.2 NON-DISCRETIONARY ACTIONS NOT SUBJECT TO CONSULTATION

A federal agency must have discretion over an "action" for ESA Section 7(a)(2) to apply to agency actions.[30] Not all agency actions are discretionary. Discretion may not only be constrained or limited in some manner by legal authorities, but also, as a practical matter, by physical conditions beyond the agency's control (e.g., rainfall).

Where there is no discretion, an agency has no duty to consult.[31] An agency may still exercise independent judgment, but lack some degree of discretion.[32] For example, Reclamation has a responsibility to prevent civil works from damage and destruction, whatever the cause, so that they continue to serve their congressionally authorized purposes. Those actions, albeit subject to independent judgment (i.e., the exact manner to which they occur), are nonetheless non-discretionary.

The authorized purposes of the facilities and the project can further limit Reclamation's discretion in some respects. Congress establishes the purposes for which federal reclamation projects may be used.

Overall, ESA Section 7(a)(2) cannot serve to override a federal statute or contract mandating agency action by subjecting such action to further conditions.[33] Nor does ESA Section 7(a)(2) require an agency to consult on non-federal actions for which the agency has no means of control or discretion over.

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[26] 50 CFR §402.02.
[27] 50 CFR §402.14(c)(l).
[28] *Id*.
[29] 16 U.S.C. §1536(b); 50 CFR §402.14(g).
[30] 50 CFR §402.03; *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).
[31] *Id*. at 665 ("the ESA's requirements would come into play only when and action results from the exercise of agency discretion"); *see also Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004) ("where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect.") Further, the Supreme Court has recognized that the legal causation argument in *Public Citizen* supports "the reasonableness of the FWS's interpretation of §7(a)(2) as reaching only discretionary agency actions." *Nat'l Assoc. of Home Builders*, 551 U.S. at 665.
[32] *Id*. at 668 ("while [an agency] may exercise some judgment in determining [an agency action], the statute does not grant it discretion ...").
[33] *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992).

3.3 ANALYTICAL FRAMEWORK – LEGAL AUTHORITIES AND CONSTRAINTS

Reclamation derives authority for operation of the Klamath Project from the Act of February 9, 1905, which authorized Reclamation to raise and lower water levels in Lower Klamath and Tule lakes, and any waterbodies connected therewith, in carrying out a federal reclamation project in accordance with the Reclamation Act of 1902.[34] In their natural condition, these lakes and the connected waterbodies were interstate navigable waterways, over which Congress has the exclusive right to regulate under the Commerce Clause of the U.S. Constitution.

Congress did not place any requirements, conditions, or other express constraints on this authority over changing water levels, except as generally exist under the Reclamation Act of 1902. From an operational standpoint, the Reclamation Act of 1902 includes two substantive conditions on Reclamation's authority. First, Section 6 provides in part that "title to and the management and operation of the reservoirs and works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress".[35] Second, Section 8 provides that Reclamation, in developing federal reclamation projects, "shall proceed in conformity with" "the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation".[36] Section 8 also protects pre-existing water rights, including reserved water rights.[37] Reclamation's discretion in operating the Klamath Project is constrained by these express congressional directives.

In accordance with Section 6 of the Reclamation Act of 1902, Reclamation must operate the Klamath Project consistent with other federal laws, including, for example, the ESA.[38] Under Section 8, Reclamation must also comply with state law on the control, appropriation, use, and distribution of water in connection with the Klamath Project, provided such state laws are consistent with directives of Congress. Both these mandates confine Reclamation's discretion in operating the Klamath Project. Reclamation has no discretion – except as otherwise directed by Congress – to comply with state law in acquiring and exercising water rights in connection with a federal reclamation project.[39] Lastly, as the Klamath River is an interstate stream, Congress' directive in Section 8 regarding protecting vested rights necessarily pertains to Reclamation's administration of the Klamath Project.

Reclamation's discretion may further be limited by the United States' contracts with non-federal entities for water from the Klamath Project, as well as contracts for transfer of operation and maintenance of federal facilities to non-federal entities. Reclamation has a legal obligation to water users within the Klamath Project to operate the Project consistent with the contracts between the United States and them. These contracts generally furnish a water supply from the Project and provide for operation and maintenance of Project facilities by non-federal entities, subject to certain terms and conditions that vary by contract. There are also a limited number of contracts between the United States and water users with rights predating the Klamath Project, which Reclamation is also obligated to operate in accordance with.

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[34] 33 Stat. 714.

[35] 32 Stat. 389, 43 U.S.C. §498.

[36] 32 Stat. 390; 43 U.S.C. §383.

[37] *Id.* ("nothing herein shall in any way affect any right of any State or of the Federal government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof"); *United States v. Truckee-Carson Irrig. Dist.*, 649 F.2d 1286, 1298 (9th Cir. 1981), *modified*, 666 F.2d 351 (9th Cir. 1982), a*ff'd in part and rev'd in part on other grounds sub nom*.

[38] Section 10 of the 1902 Act, 43 U.S.C. § 373, also directs the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper" to ensure that Project operations conform to applicable laws. *See United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 212 (9th Cir. 1989); *Truckee-Carson Irr. Dist. v. Secretary*, 742 F.2d 527 (9th Cir. 1984), *cert. denied*, 472 U.S. 1007 (1985).

[39] *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 291-2 (1958). *Also see Hennings v. Oregon*, 50 Ore. App. 121 (Or. Ct. App. 1981) (water must be used for the purpose set out in the permit or certificate).

Reclamation, as an agency of the United States, serves as trustee for tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights. This trust responsibility extends to three federally recognized tribes in the Klamath Basin – the Klamath, Yurok, and Hoopa Valley tribes – and further limits Reclamation's discretion in operating the Klamath Project.[40]

Pursuant to *Winters v. United States* and subsequent case law applying it (the "*Winters* Doctrine"), the establishment of Indian reservations such as those of the Klamath, Yurok, and Hoopa Valley tribes (or other federal reservations such as national parks or national wildlife refuges) implicitly reserves sufficient water to accomplish the purposes of those reservations.[41] These tribal water rights, although unadjudicated in certain respects, are nonetheless senior in priority to the water rights associated with the Klamath Project.[42] Reclamation has an obligation to operate the Klamath Project and manage water resources (including storage and diversions) consistent with the tribes' senior water rights.[43]

3.4 ENVIRONMENTAL BASELINE

The environmental baseline includes the past and present impacts of all federal actions or other human activities in the action area.[44] The environmental baseline also includes the anticipated impact of all proposed federal projects in the action area that have already undergone ESA consultation.[45] Finally, the ESA's consultation requirements are not retroactive to facilities constructed or under construction prior to its enactment.[46] The statutory definition of environmental baseline also includes present impacts, meaning ongoing impacts, of state, tribal, local and private actions affecting the species at the same time as the consultation in progress.[47]

The fact that Reclamation maintains a federal facility that was constructed prior to the ESA for its congressionally authorized purpose is not an action subject to consultation. The continued presence of a dam, canal, drain, or other civil works structure cannot reasonably be said to cause modification to the land, water, or air within the meaning of Section 7(a)(2) of the ESA. Similarly, federal contracts that existed prior to enactment of the ESA, which limit or otherwise do not provide Reclamation some degree of discretion, are part of the environmental baseline.[48]

Impacts attributable to environmental baseline may affect the species, but the effects of environmental baseline are not attributable to an agency's proposed action. However, the environmental baseline, cumulative effects, and the effects of the proposed action are all considered by the Services when they conduct their jeopardy and adverse modification analyses under Section 7(a)(2).[49]

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[40] *Patterson*, 204 F.3d at 1214.
[41] 207 U.S. 564, 576-77 (1908); *see also Cappaert v. U.S.*, 426 U.S. 128, 139 (1976) (*Cappaert*); *Arizona v. California*, 373 U.S. 546, 597-602 (1963).
[42] *Baley*, No. 18-1323 at 51.
[43] *Patterson*, 204 F.3d at 1214; *Kandra v. U.S.*, 145 F. Supp. 2d 1192 (D. Or. 2001). *See also* Secretary of the Interior, Order No. 3335, "Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries" (Aug. 20, 2014).
[44] 50 CFR §402.02.
[45] *Id*.
[46] 6 U.S.C. §1536(c)(l). The date for this exemption is November 10, 1978, the date of the ESA amendments.
[47] USFWS, *Endangered Species Consultation Handbook*, p. 4-22 (1998) (describing environmental baseline as "an analysis of the effects of past and ongoing human and natural factors leading to the current status of the species, its habitat (including designated critical habitat) and ecosystem... The baseline includes State, tribal, local and private actions already affecting the species or that will occur contemporaneously with the consultation in progress.")
[48] *See e.g.*, *id*. at p. 4-26 ("ongoing effects of the existing dam are already included in the Environmental Baseline and would not be considered an effect of the proposed action under consultation").
[49] 50 CFR. 402.14(g)(4).

CHAPTER 4 - BRIEF DESCRIPTION OF THE KLAMATH PROJECT

Chapter 4 provides a brief description of the Klamath Project in the Klamath Basin of southern Oregon and northern California.

Pursuant to Section 2 of the Reclamation Act of 1902, Reclamation initiated surveys of the Klamath Basin beginning in October 1903.[50] In a report dated November 2, 1903, Reclamation's engineer, John T. Whistler, identified the potential feasibility of an irrigation project serving approximately 200,000 acres. Additional surveys were conducted during the summer of 1904, and based on that information, the Secretary of the Interior subsequently withdrew over 1.1 million acres of public lands in late 1904.

On February 9, 1905, Congress passed an act, subsequently signed into law by President Theodore Roosevelt, providing that:

> *The Secretary of the Interior is hereby authorized in carrying out any irrigation project that may be undertaken by him under the terms and conditions of the national reclamation act and which may involve the changing of the levels of Lower or Little Klamath Lake, Tule or Rhett Lake, and Goose Lake, or any other body of water connected therewith, in the States of Oregon and California, to raise or lower the level of said lakes as may be necessary to dispose of any lands which may come into the possession of the United States as a result thereof by cession of any State or otherwise under the terms and conditions of the national reclamation act.*[51]

Following enactment of this law, a board of consulting engineers convened in Klamath Falls to inspect the proposed works. This board ultimately produced a report to Reclamation's Chief Engineer, dated May 1, 1905, recommending authorization of a project for reclamation and irrigation of 236,401 acres – approximately 180,000 acres of which was then inundated by Tule and Lower Klamath lakes – at an estimated cost of $4.4 million.

The Director of the U.S. Geologic Survey referred the board's report to Secretary of the Interior, who subsequently authorized the Project on May 15, 1905. Accordingly, the authorized purpose of the Klamath Project is to provide a water supply for approximately 230,000 acres of irrigable land and to reclaim lands within the former beds of Tule and Lower Klamath lakes. Accomplishment of this purpose includes the authorized incidental purposes of power and flood control.[52]

Four days after the project's authorization, on May 19, 1905, Reclamation filed a notice with the State of Oregon, pursuant to state law, of its intentions to appropriate and utilize "all the waters of the Klamath Basin, constituting the entire drainage basins of the Klamath River and Lost River, and all of the lakes, streams and rivers supplying water thereto or receiving water therefrom..."[53] This notice forms the basis for all water rights in the State of Oregon in connection with the Klamath Project. Similar water right notices were also filed in California, in accordance with California law.

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[50] 32 Stat. 388; 43 U.S.C. §411.
[51] 33 Stat. 714.
[52] Regarding flood control, *see* "Authority for Construction of Works to Protect Tulelake Area, including Coppock Bay Lands, from Flooding – Tulelake Division, Klamath Project", Leland O. Graham, Reg. Counsel, U.S. Bur. of Reclamation (Sept. 18, 1947); "Authorization of Construction of Certain Flood Protection Works, Klamath Project", Leland O. Graham, Reg. Counsel, U.S. Bur. of Reclamation (Oct. 8, 1948). Regarding the incidental authorization for power development, *see* "Klamath Power Determination", Michael L. Connor, Comm., U.S. Bur. of Reclamation (May 17, 2013).
[53] Act of Feb. 22, 1905, Or. Gen. Laws, 1905, Ch. 228.

After letting contracts in late 1905, Reclamation began construction on the project's "Main Canal" (i.e., A Canal) in March 1906, and the first deliveries to a small portion of the project began in May 1907. Work proceeded slowly in the first few years due to unexpectedly high construction costs, scarcity of local labor and materials, and limited funds available from the Reclamation Fund.

In the fall of 1910, in accordance with the Act of June 25, 1910[54], a board of engineers of the U.S. Army examined and reported on the Klamath Project. Based on the board's recommendation, President William Howard Taft approved the project as feasible and practicable on January 5, 1911.

Reclamation continued construction of the Klamath Project over the subsequent decades, adding new facilities and extending the service area as engineering obstacles were resolved. Land was gradually uncovered and drained of water. By the early 1960s, construction of the Project was largely complete with facilities to serve the current service area of approximately 230,000 acres, including 47,000 acres within two national wildlife refuges.

In its entirety, the Klamath Project now consists of a complex network of storage and conveyance works including three large dams and associated reservoirs, four smaller diversion dams, 675 miles of canals and laterals, 545 miles of drains, and over 50 separate pumping plants.

The Project's three storage reservoirs – Upper Klamath Lake, Clear Lake, and Gerber – have a combined active storage capacity of approximately 1,180,000 AF. Under the 2018 BA, Reclamation manages the storage and release of water from these reservoirs according to a number of considerations, as described in Chapter 3.3.

Upper Klamath Lake is the Project's primary water source, with over 560,000 AF of storage capacity and a tributary area of over 3,700 square miles. Regulation of storage and releases from the lake is controlled by Link River Dam. There is no volume of storage in Upper Klamath Lake designated exclusively for storing flood flows, although there are specific "flood control elevations" under the 2018 BA, which vary according to current and projected hydrologic conditions and the specific time of year.

Similar in size, Clear Lake Reservoir has a storage capacity of approximately 527,000 AF and a drainage area of approximately 700 square miles. Reclamation has designated 153,000 AF of this capacity exclusively for flood control purposes at all times, meaning the reservoir's storage capacity for irrigation purposes cannot exceed 374,000 AF. Between October 1 and the end of February, exclusive flood control storage increases to 177,000 AF, reducing the space available for storing water for irrigation purposes to 350,000 AF or less.

Lastly, constructed by Reclamation in 1925, Gerber Dam, on Miller Creek, tributary to the Lost River, forms a reservoir with 94,270 AF of active storage capacity for a tributary area of 230 square miles. Under current operating procedures, there is no storage capacity in Gerber Reservoir designated exclusively for flood control purposes; however, stored water is periodically released as necessary to avoid flooding the Tule Lake area.

Reclamation has contractually assigned operation and maintenance responsibility for most of the Project's works to three separate irrigation districts, while retaining responsibility for seven facilities – Link River Dam, Clear Lake Dam, Gerber Dam, the Lost River Diversion Channel, the Lost River Improved Channel, the P Canal, and the Klamath Straits Drain.

Reclamation has also entered into contracts with 150 separate entities (e.g., ditch companies, irrigation districts, drainage districts, improvement districts) and individuals to use water from the Klamath Project. These contracts differ in the source, quantity, time period, and other conditions on the use of the project water. Certain contracts afford Reclamation some degree of discretion over the use of

[54] 36 Stat. 835.

water by the entity or individual party to the contract; however, this discretion is often limited or confined, as more fully discussed in Chapter 5, below.

CHAPTER 5 - SPECIFIC OPERATION ACTIONS AND ASSESSMENT OF CONSULTATION REQUIREMENT

Chapter 5 presents the findings of the reassessment relative to the need for ESA Section 7(a)(2) consultation for operational actions associated with the Klamath Project, with particular regard to agency discretion. The technical and legal bases for these determinations are presented individually for thirteen "actions" that are either identified for ESA Section 7(a)(2) consultation by Reclamation, or for inclusion in Reclamation BA's Environmental Baseline. A specific recommendation is presented for each action considered.

Notably, inclusion of a given action in the BA environmental baseline only means that the federal government has no discretion to consult under ESA Section 7(a)(2) and does not necessarily assert that related non-federal actions are compliant with the ESA (e.g., Section 9 of the ESA), nor does it resolve all of Reclamation's legal obligations in connection with operating the Klamath Project.

5.1 STORING TRIBUTARY INFLOW

The act of storing water, at the most basic level, entails regulating outflow from a reservoir to a rate less than instantaneous tributary inflow. When outflow is less than inflow, the surface elevation on a reservoir will increase as water is actively stored. The act of storing water is always evidenced by increasing water surface elevations.[55]

Reclamation's authorization from Congress is to vary water levels in Upper Klamath Lake and connected waterbodies "as may be necessary to dispose of any lands which may come into the possession of the United States as a result thereof by cession of any State or otherwise under the terms and conditions of the national reclamation act".[56] As storing water involves raising the water level in Upper Klamath Lake, this act is within Reclamation's discretionary authority. However, the *purpose* of storing water is non-discretionary, in that Congress expressly provided the purpose this act is to serve (i.e., an "irrigation project" undertaken by the Secretary "under the terms and conditions of the national reclamation act").

Reclamation's discretion in storing water in Upper Klamath Lake is further confined by state law. As Upper Klamath Lake lies exclusively within the State of Oregon, in accordance with both the Act of February 9, 1905 and Section 8 of the Reclamation Act of 1902, Reclamation must follow Oregon law in acquiring and exercising water rights in connection with storing water in Upper Klamath Lake, to the extent not inconsistent with federal law.[57]

The United States' water rights for storing water in Upper Klamath Lake are part of the Klamath Basin Adjudication, which is an ongoing process in accordance with Oregon law to determine federally reserved and pre-1909 (state-based) water rights to water from the Klamath River and Upper Klamath Lake and its tributary streams.[58] The United States waived its sovereign immunity under the McCarran Amendment and the State of Oregon had jurisdiction to compel the United States to participate in these still-ongoing proceedings.[59] Reclamation accordingly submitted its claims in regard to storing water in

[55] When the water surface elevation of a reservoir remains constant (i.e., unchanged), inflow is equal to outflow. In this situation, releases will necessarily consist entirely of tributary inflow and reflect the remainder of whatever amount of inflow is not otherwise being consumed and/or diverted. These allocations are a simple mass-balancing exercise, and therefore non-discretionary.
[56] 33 Stat. 714.
[57] *Id*.; 32 Stat. 390, 43 U.S.C. §383. *See also Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 291-2 (1958).
[58] *See* Or. Rev. Stat. §539.021; *U.S. v. Oregon.*, 774 F.Supp. 1568 (D. Or. 1991), *aff'd*, 44 F.3d 758 (9th Cir. 1994).
[59] 43 U.S.C. §666; *U.S. v. Oregon*, 774 F.Supp. at 1578 ("The system of adjudicating water rights used by the State of Oregon results in the ultimate adjudication of all claims and a characterization of the priority of those claims relative to one another, and is therefore comprehensive within the meaning of the McCarran Amendment").

Upper Klamath Lake, and these claims have been administratively determined, as set forth in the State of Oregon's 2014 Amended and Corrected Findings of Fact and Order of Determination (ACFFOD).

Although still subject to ongoing judicial review – and notwithstanding and necessarily reserving the United States' rights to make exceptions to the ACFFOD and duly litigate these issues – the ACFFOD is legally enforceable absent a court-ordered stay.[60] Having waived its sovereign immunity in participating in the Klamath Basin Adjudication, the United States is legally bound by the ACFFOD and its determinations with respect to the United States' relative rights to store water in Upper Klamath Lake to the extent not inconsistent with federal law, including federal reserved water rights.

The ACFFOD places operational and volumetric constraints on the storage of water in Upper Klamath Lake, limiting active storage to between the water surface elevations of 4,136 feet and 4,143.3 feet above sea level, equating to a total volume of 486,830 AF based on Reclamation's 1998 bathymetry.[61] To the extent Reclamation stores water in Upper Klamath Lake it must do so in a manner consistent with the ACFFOD.

Reclamation's discretion in storing water in Upper Klamath Lake is subject to the United States' trust obligations to and reserved water rights of the Klamath Tribes.[62] The Bureau of Indian Affairs, on behalf of the Klamath Tribes, claimed in the Klamath Basin Adjudication various water rights in the upper basin, including for lake levels in Upper Klamath Lake, based on the Klamath Tribes' reserved water rights recognized in the Tribes' 1864 treaty with the United States. The priority date of these rights is time immemorial.[63] These water rights are determined and quantified in the ACFFOD.[64] Exercise of the Klamath Tribes' right to certain water levels in Upper Klamath Lake at various times of the year is the subject of stipulated agreement between the United States, the Klamath Tribes, and water users within the Project, which remains in effect and currently prevents the Tribes' right from being exercised so as to curtail Klamath Project diversions.[65]

Reclamation's discretion in diverting and storing water in Upper Klamath Lake is further subject to the United States' trust obligation to the Yurok and Hoopa Valley tribes.[66] These tribes have rights, reserved by a series of nineteenth century executive orders, to take fish within their reservations in California.[67] These reservations encompass the right to water in the Klamath River sufficient to protect the purposes of the reservation – e.g., the right to harvest fish for ceremonial, subsistence, and commercial purposes in order to support a moderate standard of living.[68]

Reclamation has a legal obligation to protect the federal reserved rights of the Yurok and Hoopa Valley tribes, even if unquantified, to the extent of its discretion to do so.[69] As noted previously, these non-consumptive instream flow rights are senior to the water rights of the Klamath Project.[70] Given the interstate nature of the Klamath River, these rights necessarily encompass water in the mainstem of the Klamath River, including water flowing from the State of Oregon into the State of California, comprised

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[60] Or. Rev. Stat. §539.130(4).
[61] KBA ACFFOD 07060 and 07117.
[62] *Patterson*, 204 F.3d at 1214. *See also U.S. v. Adair*, 723 F.2d 1394, 1415 (9th Cir. 1983).
[63] *U.S. v. Adair*, 478 F. Supp. 336, 350 (D.Or. 1979); *U.S. v. Adair*, 723 F.2d 1394, 1414-15 (9th Cir. 1983)
[64] *See* KBA ACFFOD 04938 through 04946. *See also Baley*, No. 18-1323 at 48 (affirming the Court of Federal Claims' holding that the Klamath Tribes' implied water rights include water in Upper Klamath Lake).
[65] *See* KBA ACFFOD 04982 through 04990. Notwithstanding this stipulated agreement, Reclamation recognizes its legal obligation to protect the treaty rights of the Klamath Tribes to the extent of its discretion to do so. *Patterson*, 204 F.3d at 1214. *See also Adair*, 723 F.2d at 1411.
[66] *Patterson*, 204 F.3d at 1214.
[67] U.S. Department of the Interior, Office of the Solicitor, Opinion of Oct. 4, 1993, M-36979.
[68] *Id*. *See also U.S. v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986).
[69] *Baley*, No. 18-1323 at 53.
[70] *Id*.

in part of natural outflow from Upper Klamath Lake.[71] In diverting and storing tributary inflow into Upper Klamath Lake, Reclamation must account for the senior rights of the Yurok and Hoopa Valley tribes.[72]

Reclamation's discretion over the act of storing water in Upper Klamath Lake is also influenced by the contracts between the United States and Klamath Project water users. To the extent Reclamation otherwise has discretion, its contracts appear, subject to varying terms and conditions, to obligate Reclamation to store water to make it available for later irrigation use.

Lastly, Reclamation's discretion over storing water is limited by physical conditions. Reclamation has no control over the actual amount of tributary inflow to Upper Klamath Lake. This condition is dependent upon both natural factors (e.g., precipitation) and the actions of other non-federal entities and individuals (e.g., upstream water users). Likewise, Reclamation has no control on all the sources of outflow from the lake, both natural and human-caused. This includes not only evaporation and seepage, as well as diversions over which Reclamation has no control.

Given these physical conditions, it is critical to properly define the scope of this action. While there is always some level of inflow to Upper Klamath Lake, there is not always inflow available to store. The only tributary inflow available to store is water subject to appropriation. When tributary inflow is diverted to beneficial use under valid existing rights or otherwise consumed, it is not available for appropriation. In this case, there is no action by Reclamation to store or not store water, since water is not physically available.

As a simple example, if 1,000 cfs of water is flowing into Upper Klamath Lake at any given time, and 500 cfs is simultaneously being consumed and/or diverted for beneficial use under valid existing rights, Reclamation's discretion with respect to storing water is limited to the remaining 500 cfs. Reclamation can either store all, some, or none of the 500 cfs of water but has no discretion over the other 500 cfs consumed and/or diverted outside the agency's control.

Likewise, the scope of Reclamation's action is diverting all, some, or none of that remaining 500 cfs into storage, or conversely releasing (i.e., bypassing) it to the Klamath River. The only options are either to store or release tributary inflow.

Taking this example one final step further, if 1,000 cfs is flowing into Upper Klamath Lake at any given time, while 500 cfs is simultaneously being consumed and/or diverted for beneficial use, and 1,000 cfs is being released from Link River Dam, Reclamation's action with respect to storing or not storing water is still limited to the same 500 cfs of tributary inflow that is subject to appropriation. The other 500 cfs being released from Link River Dam in this scenario must necessarily be coming from water previously stored. Storing water is distinct from the act of releasing stored water (*see* 5.1.2).

Consult on this action. Although Reclamation's discretion is confined in a number of substantive legal and physical respects, the agency nevertheless has discretion over the act of storing water in Upper Klamath Lake. Given the presence of listed species in Upper Klamath Lake and the Klamath River, Reclamation can likely exercise its discretion over storing water in Upper Klamath Lake

[71] *Id*. at 49-50 (acknowledging that Iron Gate Dam "controls the water of the Klamath River that flows to it from Upper Klamath Lake" and holding that the Yurok and Hoopa Valley tribes "have an implied water right that includes the Klamath River and the flows therein as controlled by the Iron Gate Dam"). *See also* 43 U.S.C. §398 (providing that nothing in the Reclamation Act of 1902, 32 Stat. 388, "shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or waters thereof").

[72] *See* 43 U.S.C. §398. Note that Upper Klamath Lake was, in its natural condition, a settling basin, which filled with water before overflowing down the Klamath River. This water constituted part of the flows in the river in California, which existed at the time of the establishment of their respective reservations, to which the Yurok and Hoopa's rights are necessarily appurtenant to.

in a manner that benefits listed species. Consultation on this action should be confined to the act of either storing or not storing (i.e., bypassing) tributary inflow that is otherwise subject to appropriation, consistent with the constraints on Reclamation's discretion.

5.1.1 Releasing Stored Water

The act of releasing stored water from Upper Klamath Lake – that is, tributary inflow previously diverted and stored in priority – is physically and legally distinct from the act of storing water.[73] Releasing stored water entails releasing more water than is simultaneously flowing into a reservoir. When outflow is more than inflow, the surface elevation on the reservoir will decrease as stored water is actively released. Decreasing water surface elevations in a reservoir is always indicative of stored water being released.

Reclamation's general authorization from Congress is to vary water levels in Upper Klamath Lake in connection with carrying out a federal irrigation project.[74] As releasing stored water involves lowering the water level in Upper Klamath Lake, this act is within Reclamation's authority. Operation of Upper Klamath Lake as a storage reservoir is also within Reclamation's express authority under Section 6 of the Reclamation Act of 1902.[75]

Congress confined Reclamation's discretion in carrying out this authority, expressly requiring that the agency comply with state law in the "control, use, appropriation, or distribution of water used in irrigation".[76] As Upper Klamath Lake lies exclusively within the State of Oregon, Reclamation must follow Oregon law when releasing stored water from the lake to the extent not inconsistent with the purposes of the Klamath Project and other applicable federal law.

The United States waived its sovereign immunity under the McCarran Amendment based on the stated scope of the Klamath Basin Adjudication as described by the Ninth Circuit Court of Appeals in *United States v. Oregon*, 44 F.3d 758 (1994). Accordingly, the United States filed claims in the Klamath Basin Adjudication to its rights with respect to the use of stored water in Upper Klamath Lake, as well as, claims for other rights.[77] While the Klamath Basin Adjudication necessarily did not encompass rights to live flow and stored water appropriated and used in California, including federally reserved tribal rights to water in the Klamath River, water diverted and stored in Upper Klamath Lake occurs solely in the State of Oregon.

Under the ACFFOD, Reclamation holds the right to store water in Upper Klamath Lake; however, the ACFFOD recognizes a difference between the right to store water and the right to use stored water from the lake.[78] Specifically, "the United States is the owner of a right to store water in Upper Klamath Lake to benefit the separate irrigation rights recognized for the Klamath Reclamation Project".[79] The ACFFOD finds that, except for federally owned lands, the districts and individual landowners that are party to the Klamath Basin Adjudication hold the legal interest in the water rights associated with the

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[73] *See* KBA ACFFOD 07083 to 07084.
[74] 33 Stat. 714.
[75] 32 Stat. 389, 43 U.S.C. §498.
[76] 43 U.S.C. §383. Note, however, that Section 6 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. §498 serves as a limitation on Section 8, in the event state law conflicts with federal law.
[77] As a McCarran Amendment proceeding, the Klamath Basin Adjudication is necessarily a comprehensive, general stream adjudication in which the rights of all competing claimants are adjudicated. *See U.S. v. Or. Water Resources Dept.*, 774 F.Supp. at 1578 ("The system of adjudicating water rights used by the State of Oregon results in the ultimate adjudication of all claims and a characterization of the priority of those claims relative to one another, and is therefore comprehensive within the meaning of the McCarran Amendment. If the United States is dissatisfied with the outcome of this adjudication, it has resort to the appellate courts of the State of Oregon and the United States Supreme Court if its objections are properly preserved.").
[78] KBA ACFFOD 07083 to 07085.
[79] *Id*. at 07084.

Klamath Project for applying water appropriated from the Klamath River (in Oregon) and Upper Klamath Lake to beneficial use.[80] This includes the right to use both "live flow" (i.e., tributary inflow) and stored water.[81]

To the extent Reclamation releases water previously appropriated and stored in priority from Upper Klamath Lake for a beneficial use, including in the State of California, the use must be consistent with the ACFFOD or applicable federal law. The authorized use for stored water in Upper Klamath Lake under the ACFFOD is designated as irrigation and related purposes, on certain specified places of use within the Klamath Project.[82]

Using stored water that is otherwise subject to the beneficial use by Klamath Project beneficiaries to augment or otherwise produce instream flows in the Klamath River, either in Oregon or California, is not authorized under the ACFFOD. Reclamation therefore cannot release water previously stored in priority and otherwise required for beneficial use by Klamath Project beneficiaries from Upper Klamath Lake for the specific purposes of producing instream flows in the Klamath River either in Oregon or California.

This is not to say that Reclamation is barred from releasing stored water for anything other than beneficial use within the Klamath Project. A clear example is flood control operations. When observed or anticipated inflows to Upper Klamath Lake may cause water surface elevations to exceed designated maximum operating levels, Reclamation must release stored water to make space available to ensure public safety and integrity of Project facilities. This act, however, is non-discretionary, since Reclamation has a responsibility to maintain civil works so they continue to serve their congressionally authorized purposes.[83]

Reclamation may also have discretion to release stored water not otherwise needed for beneficial use within the Klamath Project. For example, even if there is no risk of flooding, there are situations and circumstances when Upper Klamath Lake is effectively full (i.e., water surface elevation near 4,143.3 feet), with a stored water supply in excess of the anticipated beneficial needs within the Klamath Project. As the owner and operator of the reservoir, in accordance with Section 6 of the Reclamation Act of 1902, Reclamation has the discretion to release excess or surplus stored water.[84] This discretion is a function of managing storage levels in Upper Klamath Lake.

Reclamation's contracts with water users within the Klamath Project also to some extent limit the agency's discretion to determine when and in what amounts there is stored water in excess or surplus to their potential beneficial use. Likewise, Reclamation's trust obligations to the Klamath Tribes may limit Reclamation's discretion to release stored water that is otherwise surplus to the needs to Klamath Project, in order to maintain certain hydrologic conditions in Upper Klamath Lake.

However, Reclamation's discretion over the act of releasing water *previously stored in priority* is unaffected by the United States' trust obligation to the Yurok and Hoopa Valley tribes.[85] Again, the act of

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[80] KBA ACFFOD 07075 to 07082 ("The beneficial users of water appropriated pursuant to the May 19, 1905 Notice hold a legal interest in rights recognized based on this appropriation for the purpose of beneficial use"); 07085 (regarding the United States' interest in beneficial use within LKNWR and TLNWR).

[81] KBA ACFFOD 07061. "Live flow", as described in the ACFFOD and used herein in characterizing water in the Klamath River and Upper Klamath Lake within the State of Oregon, is water in a natural waterbody that is not being stored or otherwise used for beneficial purposes (e.g., instream flows) and is therefore subject to appropriation under any valid water right (regardless of priority, unless a water rights "call" is in effect).

[82] *See* KBA ACFFOD 07057 to 07059, and 07062 to 07066.

[83] 43 U.S.C. §498.

[84] *Id*.

[85] *See infra* n. 72. This statement is not to suggest that the Klamath Basin Adjudication altered or affected the reserved rights of the Yurok and Hoopa Valley tribes in any manner. *See Baley*, No. 18-1323 at 53-54. The tribes'

storing tributary inflow is distinct from the act of releasing previously stored water, and the Yurok and Hoopa Valley tribe appear to have a right to water from the Klamath River, including water flowing from Oregon into California, including water that flows into and then out of Upper Klamath Lake. But that water is different than water previously stored in priority through the operation of a dam constructed after the establishment of the tribes' reservations. There is a tribal trust obligation to the Yurok and Hoopa with respect to the former, but not the latter, discretionary action. This interpretation of federal and state law has been provided to Reclamation by the Department of Interior's Office of the Solicitor.[86]

These circumstances preclude releases of water previously stored in priority in Upper Klamath Lake for satisfying the Yurok and Hoopa Tribes' federally reserved water right. Absent a specific federal law, water previously stored in priority for the Klamath Project is bound by ACFFOD and must be released in accordance with its terms.

This interpretation is logically consistent because the act of storing water reduces the live flow of the Klamath River in California, to which the Yurok and Hoopa Valley tribes have reserved rights. But the act of releasing water that was stored previously and in priority from Upper Klamath Lake does not *reduce* the live flow otherwise available to meet the rights of the Yurok and Hoopa Valley tribes. Therefore, releasing previously stored water does not generally adversely affect these tribes' rights, though the act of storing tributary inflow obviously may.

Consult on this action. Although Reclamation's discretion is limited in regard to releasing stored water from Upper Klamath Lake – limited by federal and state law, contractual obligations, and trust obligations – this authority can be exercised in a manner that benefits listed species in the Klamath River, Upper Klamath Lake, or possibly both, and should therefore be consulted on.

5.1.2 Establishing Target Lake Levels

Designating and operating Upper Klamath Lake to target water surface elevations is an inherent part of Reclamation's authority to vary lake levels under the Act of February 9, 1905.[87] As discussed in sections 5.1.1 and 5.1.2, raising or lowering Upper Klamath Lake is a function of either storing water or releasing stored water. To the extent Reclamation has discretion over those two acts, the agency likewise has discretion to establish and attempt to operate to target lake levels, subject to all the legal and physical constraints discussed previously.

The limitations on Reclamation's discretion over storing water and releasing stored water in Upper Klamath Lake indicate that Reclamation will not be able to predetermine and operate to exact water surface elevations in the lake (i.e., to the hundredth of an inch on a given day). Reclamation may be able to indirectly influence that value, for example by either storing more or less tributary inflow, to the extent it is available, but Reclamation cannot control all the conditions that determine how much water is stored at any given time. Reclamation can use forecasts to make assumptions about inflows to the lake, and make management decisions accordingly, but actual inflows and consumptive losses will influence storage operations and thus lake levels. Reclamation likewise lacks absolute control over how much water is diverted from the lake for beneficial use. Reclamation's various contracts and other legal interests may give Reclamation the ability to influence this value on an individual basis, but such a right does not exist across the entire Project, or for non-Project diversions from Upper Klamath Lake, as a matter of either

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rights were not subject to the Klamath Basin Adjudication and the Yurok and Hoopa Valley tribes did not forfeit their reserved water rights by not participating in the adjudication. *Id*. However, having not presented any claim to a right to store and use stored water from a reservoir that lies solely in Oregon, the United States, including Reclamation, cannot now maintain that such a right exists, at least under Oregon law.

[86] *See* memo. from Daniel Jorjani, Principal Dep. Solicitor, Dept. of the Interior, to David Bernhardt, Sec., Dept. of the Interior, "Use of Water Previously Stored in Priority for Satisfaction of Downstream Rights" (January 14, 2021).

[87] 33 Stat. 714.

federal or state law.[88] These factors beyond Reclamation's control will necessarily influence the lake's water surface level to some degree.

Consult on this action. Reclamation, as the owner of the right to store water in Upper Klamath Lake, has the right and discretion to establish predetermined levels that it then attempts to operate the lake to. However, Reclamation's rights, along with its physical capacities, do not afford the agency discretion to cause absolute fixed water surface elevations in Upper Klamath Lake. Reclamation can influence the lake's water surface elevation, through the acts of storing water, bypassing tributary inflow, releasing stored water, and exercising any discretion that it may have under contract or otherwise over the beneficial use of water from the lake. But the agency cannot *guarantee* exact lake levels.

Despite these constraints, assuming that designating and attempting to operate to target water surface elevations in Upper Klamath Lake can potentially benefit listed species in the lake and/or the Klamath River, Reclamation has an obligation to consult on this action.

5.1.3 Establishing Minimum Release Rates

Reclamation's authority in connection with the Klamath Project includes varying water levels in both Upper Klamath Lake and the Klamath River, among other waterbodies.[89] There is no express congressional directive providing for minimum release rates from Upper Klamath Lake to the Klamath River; nevertheless establishing such minimums may be incidental to varying water levels in the lake and/or river. Establishing minimum releases from Upper Klamath Lake is therefore within Reclamation's authority, but whether it is in the agency's discretion will depend on the circumstances.

Depending on what the minimum levels are, actually providing these releases from Upper Klamath Lake over the course of a year will be a function of releasing either tributary inflow or, to the extent the former is unavailable, stored water.

Reclamation's discretion to establish minimum release rates from Upper Klamath Lake to the Klamath River is confined in the same manner and to the same degree that Reclamation's discretion to store water and release stored water is confined. There are times when the limitations on Reclamation's discretion to do either such action will limit Reclamation's ability to provide minimum releases from Upper Klamath Lake.

Do not consult on this action. Reclamation has authority to establish minimum release rates from Upper Klamath Lake to the Klamath River, but it does not have discretion to provide minimum flows at all times. Reclamation can designate and attempt, within its discretion, to provide minimum releases – and to the extent it does so, this would be an action the agency must consult on. But Reclamation cannot *guarantee* certain minimum flows being released at all times from Upper Klamath Lake, at least not under existing water rights associated with the Klamath Project.

5.1.4 Coordinating Project Diversions

As previously noted, Reclamation's authority in operating the Klamath Project is to vary water levels in Upper Klamath Lake (and connected waterbodies) "as may be necessary to dispose of any lands which may come into the possession of the United States as a result thereof by cession of any State or

[88] 43 U.S.C. §383; KBA ACFFOD 07083. Regarding the discretion afforded Reclamation under the various contracts between the United States and Klamath Project water users has been addressed by the Office of the Solicitor. *See* memo. from Daniel Jorjani, Principal Dep. Solicitor, Dept. of the Interior, to David Bernhard, Sec., Dept. of Interior "Analysis of Klamath Project contracts to determine discretionary authority in accordance with the November 12, 2020 Letter of the Secretary of the Interior, and Use of Water Previously Stored in Priority for Satisfaction of Downstream Federally Reserved Rights" (Jan. 14, 2021).
[89] 33 Stat. 714.

otherwise under the terms and conditions of the national reclamation act".[90] Coordinating the delivery of live flow and stored water from Upper Klamath Lake for irrigation and other beneficial uses within the Klamath Project is clearly part of carrying out this authority.

Diversions to the Klamath Project of both live flow and stored water from Upper Klamath Lake, occurring solely in the State of Oregon, are subject to Oregon law, with which Reclamation must comply under Section 8 of the Reclamation Act of 1902 (even if the ultimate place of use is within California).[91] Reclamation's discretion in coordinating the diversion of live flow and stored water from Upper Klamath Lake for beneficial use within the Klamath Project is therefore limited by the ACFFOD.

The ACFFOD places certain limitations on the volume, rate, location and timing of diversions of live flow and stored water from Upper Klamath Lake.[92] Reclamation's discretion to coordinate deliveries is necessarily confined to these limitations specified in the ACFFOD.

In addition to these quantitative limits, the ACFFOD recognizes a difference in the ownership interests in Klamath Project water rights. Specifically, the ACFFOD finds that, except for federally owned lands, the districts and individual landowners hold the legal interest in the water rights associated with the Project for diverting and beneficially using both live flow and stored water from Upper Klamath Lake.[93] The United States' interest is limited to using the water available from the Project for beneficial irrigation purposes within Tule Lake and Lower Klamath National Wildlife Refuges, as well as re-using return flows captured within Project boundaries for beneficial use.[94]

Therefore, the water rights for the Klamath Project, by themselves, limit Reclamation's discretion to determine the volume, rate, location and timing of diversions of live flow and stored water from Upper Klamath Lake for beneficial use within the Project. Water rights notwithstanding, specific contracts between the United States and water users within the Project may afford Reclamation some degree of discretion over the manner and extent to which water is beneficially used.[95] Likewise, contracts and other rights, such as the United States' real property interests, may also provide Reclamation with some degree of control over the facilities used to divert and deliver water to beneficial users within the project.

Even with respect to federally owned lands within Lower Klamath National Wildlife Refuge (LKNWR) and Tule Lake National Wildlife Refuge (TLNWR; collectively the Refuges), the ACFFOD does not give Reclamation the discretion to determine the volume, rate, and timing of diversions from Upper Klamath Lake and the Klamath River to the Refuges. Under the ACFFOD, Reclamation owns and exercises the right to store water in Upper Klamath Lake to "benefit the separate irrigation rights recognized for the Klamath Reclamation Project..."[96] USFWS was the claimant and is designated by the ACFFOD as the holder of the rights to use the water from the Klamath Project, including both live flow in the Klamath River and stored water from Upper Klamath Lake, for irrigation of lands within both Refuges.[97] Reclamation's role is essentially limited to providing space for storage of water in Upper Klamath Lake for the purpose of satisfying the separate rights of USFWS and other beneficial users within the Klamath Project.

In addition to the 1905 water right for irrigation purposes, the ACFFOD recognizes that USFWS holds separate federal reserved water rights for both LKNWR and TLNWR to divert live flow from the Klamath River for the purpose of waterfowl conservation.[98] These water rights vary in priority date,

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[90] *Id*.
[91] 43 U.S.C. §383.
[92] *See* KBA ACFFOD 07155 to 07160, and 07284 to 07287.
[93] KBA ACFFOD 07061 and 07075.
[94] KBA ACFFOD 07083 to 07085.
[95] *See infra* n. 88.
[96] KBA ACFFOD 07084.
[97] KBA ACFFOD 07118 and 07127.
[98] *See* KBA ACFFOD 03715 to 03744 and 03786 to 03819.

ranging from December 31, 1925, to September 2, 1964.[99] Similar to the irrigation rights for the Project, the ACFFOD specifies the maximum volume that can be used in a given year, the location and maximum rate of diversions, and the period of allowable use (year-round) under these reserved rights.[100] Stored water in Upper Klamath Lake is not an authorized source of water for these reserved rights within TLNWR and LKNWR.[101]

USFWS has also applied and been granted permission by the State of Oregon to temporarily transfer an irrigation water right appurtenant to 2,831 acres above Upper Klamath Lake for use on up to 4,105 acres within LKNWR.[102] The current approved transfer expires at the end of 2021.[103] The priority date for this water right is September 13, 1920. Under the State's final order approving the transfer, USFWS can divert from the Klamath River to LKNWR via the Ady Canal up to 11,206 AF between April 1 and October 1, at the maximum rate of 30.87 cfs (CFS).[104] USFWS has an application before the State to permanently transfer this water right to LKNWR.

Both Reclamation and USFWS are agencies of the United States Government. Under the Act of September 2, 1964[105] and the 1976 amendments to the National Wildlife Refuge System Administration Act of 1966[106], Congress has conferred upon USFWS all administrative control over LKNWR and TLNWR. Under the ACFFOD, USFWS is the "holder" of the water rights under the Klamath Project appurtenant to the refuges, as well as the federal reserved rights associated with the executive orders or legislative acts establishing these Refuges.[107] Given these authorities, USFWS, not Reclamation, controls whether these water rights are exercised.

Reclamation and USFWS could potentially enter into a memorandum of agreement or something similar, which would specify the parameters under which USFWS would exercise its right to use water for irrigation purposes under the Klamath Project, as well as any or all of the other water rights appurtenant to LKNWR. Reclamation and USFWS have entered into such agreements in the past, but of temporary duration. There is no such agreement currently in place.

Reclamation's other legal interests, for example its control over the Klamath Straits Gates, as described in section 5.2.5, may give Reclamation some indirect influence over the amount, rate, and timing of beneficial use within LKNWR, but Reclamation has neither authority nor discretion to make a fixed determination of the amount of water diverted to LKNWR.

Do not consult on this action. The ACFFOD does not afford Reclamation with the right to determine the volume, rate, location, or timing of water available for beneficial use of water within the Klamath Project, including LKNWR and TLNWR. Under Section 8 of the Reclamation Act of 1902, the ACFFOD is controlling in this matter and states that "the right of beneficial use of water in the Project is held by the beneficial users. This applies to the right to the use of both live flow and stored water".[108]

As noted above, Reclamation's contracts or other legal interests, including real property interests, may afford Reclamation some degree of discretion over the exercise of water rights within the Klamath Project for beneficial use; however, there is no such blanket discretion across the entire project as a matter of federal or state law. To the extent individual contracts or agreements provide Reclamation with such

[99] KBA ACFFOD 03728-03729, 03739, 03743, 03797, 03803, and 03805.
[100] *Id*.
[101] *Id*.
[102] Or. Water Res. Dept., "Final Order Approving Temporary Changes of Use and Points of Diversion", Transfer Application No. T-12642 (Aug. 8, 2017).
[103] *Id*.
[104] *Id*.
[105] Act of June 2, 1964, Pub. L. 88-567, 78 Stat. 851.
[106] Act of Feb. 27, 1976, Pub. L. 94-223, 90 Stat. 199.
[107] *Infra* n. 96 and 97.
[108] 43 U.S.C. §383; KBA ACFFOD 07061.

discretion for particular areas or parts within the project, Reclamation should consult on those specific contracts or agreements.

5.1.5 Flood Control Operating Criteria

Flood control operations with respect to Upper Klamath Lake generally entail releasing water as necessary to prevent water surface elevations from increasing above levels determined to potentially pose a threat to flooding surrounding lands. Under current operations, Reclamation has designated end-of-month "flood control elevations" for Upper Klamath Lake (see Table 1, below), which are interpolated to a daily value for operational purposes.

Table 1. Current Upper Klamath Lake flood control elevations (in feet above sea level, USBR datum) for the last day of each month, varying by dry or wet year type. A year is characterized as "wet" any time the current NRCS inflow forecast for Upper Klamath Lake for March through September exceeds 710,000 AF.

Month	Water Surface Elevation (ft)	
	Dry Year	Wet Year
April through June	4143.3	4143.3
July through September	4143.1	4143.1
October	4141.4	4141.4
November	4141.6	4141.6
December	4141.8	4141.8
January	4142.3	4142.0
February	4142.7	4142.4
March	4143.1	4142.8

Reclamation anticipates that actual Upper Klamath Lake water surface elevations will differ to some degree from the designated flood control elevations. Reclamation employs professional judgment in evaluating hydrologic conditions, snowpack, weather forecasts, public safety, and other facts into designating the water surface elevations PacifiCorp should attempt to achieve on a daily basis.

The responsibility to maintain civil works structures so they continue to serve their congressionally authorized purposes is inherent in the authority to construct them, and is, therefore, non-discretionary. Maintenance of the structure could only cease if Congress were to de-authorize the structure or terminate this responsibility. Therefore, the requirement to maintain the structure, and to not let it be damaged and compromised during extreme hydrologic events, is non-discretionary and not subject to ESA consultation. However, the manner (how and when) flood control operations occur may be subject to Section 7(a)(2) consultation if the procedures (as opposed to the results) could affect listed species or designated critical habitat, and the agency has latitude for discretion.

Consult on this action. Because flood control operations on Upper Klamath Lake entails increasing or decreasing releases from Upper Klamath Lake (of both stored water and live flow), which could affect listed species and their critical habitat, both in the lake and the river, Reclamation should consult on this action. Reclamation's latitude to adjust flood control operating criteria for the benefit of listed species will necessarily be limited by what sound engineering and other considerations the agency deems prudent and necessary for structural integrity of civil works and public safety.

5.1.6 Making Water Rights Calls

As previously noted, the ACFFOD in the Klamath Basin Adjudication is legally enforceable as a matter of state law, absent a judicial stay in its enforcement.[109] In the ACFFOD, the water rights for the Klamath Project have a priority date of May 19, 1905.[110] In accordance with the doctrine of prior appropriation as it exists in the State of Oregon, when the amount of live flow available for appropriation in Upper Klamath Lake and the Klamath River is insufficient to meet the actual irrigation demands within the Project, a call may be made on the Klamath Project water rights. When a call is made, the State of Oregon, through its Water Resources Department, will then investigate and if it determines that a shortage in fact exists, it will regulate the diversions of other water users from the same source with junior water rights (i.e., with a priority date after May 19, 1905).[111]

In the State of Oregon, with respect to the water rights determined for the Klamath Project in the Klamath Basin Adjudication, the regulation of junior water rights holders is intended to increase the amount of live flow available at the point of diversion for the senior water right holder making a call. In order for the call to remain valid and effective, the senior water rights holder must then put the additional live flow to beneficial use.[112] A senior water rights holder cannot bypass or otherwise not beneficially use the live flow made available at the point of diversion as a result of a call on their behalf. If that were to occur, the water rights holder presumably has no lawful basis for making the call.

A valid call on water rights may be made by the holder (i.e., owner) of the water right. The ACFFOD recognizes that the United States owns the right to store water in Upper Klamath Lake, and the districts and individual landowners within the Klamath Project hold the interest in applying water, both stored and live flow, to beneficial use for irrigation and the related purposes designated in the ACFFOD.[113] Outside TLNWR and LKNWR, the United States' interest in the water rights is limited to: 1) the right to store water in Upper Klamath Lake, and 2) the right to re-use water previously appropriated and applied to beneficial use (i.e., "return flows") for another beneficial use.[114]

Accordingly, both the United States (Reclamation and/or USFWS) and the districts and individual landowners within the Klamath Project that were party to the Adjudication can make a call on the water rights associated with the project. But regardless of who makes a call, the determination of whether that call is valid and the extent to which the diversions of other water users will be curtailed is at the State of Oregon's discretion.

Reclamation has discretion over the decision whether or not to make a call on Klamath Project water rights. This right is not exclusive to Reclamation; other entities and individuals may also make a call on their own or in conjunction with Reclamation.

Whether there is an actual shortage in the live flow available at the point or points of diversion for the calling water right is a factual matter, which the State of Oregon will determine in accordance with state law. In accordance with Section 8 of the Reclamation Act of 1902, Reclamation must follow state law with respect to the control, appropriation, distribution and use of water in operating the Klamath Project, to the extent not in conflict with federal law.[115]

The additional water made available at the point of diversion as a result of a call must be beneficially used, to the extent the water user's capacity, or else there is no valid basis for the call. Likewise, state law confers upon the State of Oregon jurisdiction to determine when a call is futile in the

[109] Or. Rev. Stat. §539.130(4).
[110] KBA ACFFOD 07056.
[111] Or. Admin. R. §690-250-0100.
[112] *See* Or. Admin. R. §690-250-0020.
[113] *Infra* n. 93 and 94.
[114] *Id*.
[115] 43 U.S.C. §383.

sense of an inadequate amount of water, or no water, reaching the senior water rights holder making the call.[116] Unless the State makes such a determination, *some* additional water must be assumed to be reaching the point or points of diversion. Accordingly, Reclamation can make its own determination about how much additional water is available for diversion and beneficial use within the Klamath Project as a result of a call, but it cannot determine that *no* additional water is available. The authority for that determination lies with the State of Oregon and Reclamation must follow Oregon law in this regard.

Consult on this action. Reclamation has discretion to make a water rights call in the event of a shortage. While the water resulting from a call must be beneficially used, which Reclamation has no interest in except as conferred by contract, the process of making a call and the water resulting from a call may benefit listed species. For example, a water rights call, if enforced, would result in additional inflow to Upper Klamath Lake, which, when used to meet instantaneous irrigation demands within the Klamath Project, could delay or reduce the amount of stored water used within the Project, thereby leaving more water in Upper Klamath Lake. This additional water remaining in storage, albeit for the purpose of beneficial use within the Klamath Project, could benefit listed species in the lake.

5.2 OPERATION OF THE KLAMATH AND LOST RIVERS

This section discusses Reclamation's discrete actions in connection with operating Klamath Project facilities in connection with the Klamath and Lost rivers.

5.2.1 Establishing Minimum River Flows

Reclamation's authority in connection with the Klamath Project includes varying water levels in the Klamath River, among other waterbodies.[117] There is no express congressional directive providing for minimum flows in the Klamath River at any particular location but establishing such minimums may nonetheless be incidental to varying water levels in the river. Establishing minimum flows in the Klamath River is therefore within Reclamation's authority, but whether it is in the agency's discretion will depend on the circumstances. Depending on the rate and measured location of the minimum flows, actually achieving these flows may require water from Upper Klamath Lake, the Lost River Diversion Channel, and/or the Klamath Straits Drain.

Reclamation's discretion over releasing water from Upper Klamath Lake is generally limited to the decision to store and not store tributary inflow from Upper Klamath Lake, as discussed in sections 5.1.1 and 5.1.2. During extreme hydrologic conditions, Reclamation may be required to release stored water from Upper Klamath Lake to protect civil works and public safety, but these conditions are highly unpredictable in advance. There may also be, at times, stored water in Upper Klamath Lake surplus or excess to the needs of the Klamath Project, and Reclamation may have some discretion to release stored water in these instances, which could potentially help support designated flows in the Klamath River. But this situation is dependent on hydrology and other conditions beyond Reclamation's control.

Reclamation can use inflow forecasts and other information to make estimates but will never be able to predict in advance the exact timing, rate, and volume of inflow to Upper Klamath Lake over any given period – and likewise, the exact volume and rate at which water will be released. Reclamation therefore cannot make an absolute commitment to achieving minimum flows in the Klamath River with water from Upper Klamath Lake.

The Lost River Diversion Channel and the Klamath Straits Drain both operate to release water to the Klamath River and can materially contribute to the river's cumulative flow. Likewise, operation of the Klamath Straits Gates can influence the amount of water diverted from the Klamath River through the Ady Canal owned and operated by Klamath Drainage District. These facilities can be operated, as

[116] *Infra* n. 111.
[117] 33 Stat. 714.

Reclamation's discretion allows, either independently or in conjunction with Upper Klamath Lake, to potentially contribute to river flows.

Do not consult on this action. Reclamation has the authority but lacks the discretion to guarantee absolute fixed minimum flows in the Klamath River. Reclamation can designate target flows in the Klamath River, minimum or otherwise, and then exercise its discretion, particularly over storing water in Upper Klamath Lake, in a manner that attempts to achieve flows – and to the extent it does so, this would be an action the agency must consult on. But Reclamation cannot ***guarantee*** certain flows at all times, regardless of the hydrologic conditions and other factors beyond Reclamation's control. Reclamation should therefore not consult on fixed minimum flows in the Klamath River.

As opposed to absolute minimums, establishing "target" flows in the Klamath River, including target minimums, that Reclamation exercises its discretion attempting to produce, would appear to be within the agency's authority and discretion.

5.2.2 Diverting Water Through and Into the Lost River Diversion Channel

Reclamation constructed the Lost River Diversion Dam and Channel between 1910 and 1912. The dam operates to raise the water surface in the Lost River to a level necessary to facilitate gravity drainage to the Klamath River via the eight-mile-long Lost River Diversion Channel.

The Lost River Diversion Channel was originally constructed to a capacity of approximately 250 cfs. In 1930, Reclamation enlarged the channel's capacity to 1,200 cfs. In 1950 Reclamation redesigned and further enlarged the channel to the current capacity of approximately 3,000 cfs.

Throughout the year all Lost River flows, including any flood control releases from Clear Lake or Gerber reservoirs, that reach Lost River Diversion Dam, up to the capacity of the diversion channel (3,000 cfs), are diverted to the Klamath River (unless first diverted for irrigation). When flows in the Lost River are in excess of the diversion channel's capacity, the water is spilled over Lost River Diversion Dam to the lower Lost River, where it then flows into the Tule Lake Sumps. The Lost River Diversion Dam was designed for a maximum overflow of 10,000 cfs.

Operation of the Lost River Diversion Channel is integral to one of the basic purposes of the Klamath Project – to reclaim lands within the former 96,000-acre bed of Tule Lake. That purpose stems from Reclamation's authority under the Act of February 9, 1905.[118]

Tule Lake, now having been largely reclaimed by Reclamation, has primarily been homesteaded by small-family farms. Smaller portions of the lakebed have formed into cities and towns. A large portion is dedicated as a national wildlife refuge. Two other national monuments also partly lie within the reclaimed area. Oher public works, like schools, state and federal highways, have been constructed within the reclaimed area.

Reclamation has, over the last century, undertaken a comprehensive scheme for draining and homesteading Tule Lake, and to a lesser extent, Lower Klamath Lake, building the facilities to achieve this result through appropriations from Congress. Reclamation has no discretion to now undo this work, in terms of allowing Tule and Lower Klamath lakes to refill. The discretion to reflood Tule Lake, to the extent it exists, lies with Congress.

Consult on this action. Reclamation is solely responsible for operation and maintenance of the Lost River Diversion Channel, in accordance with its authority under the Act of February 9, 1905. But, having now constructed this facility and reclaimed an area formerly inundated by Tule Lake pursuant to the authority and with the appropriations provided by Congress, Reclamation has no discretion over maintaining the facility and protecting the reclaimed area from reflooding.

[118] 33 Stat. 714

Any potential discretion over diverting live flow from the Lost River to the Klamath River is largely limited by the physical conditions that govern channel operations. The Lost River Diversion Channel and the associated diversion dam on the Lost River have no material storage capacity. Flows cannot be withheld and then released in some manner that possibly benefits listed species or their critical habitat in the Klamath River. The rate of discharges from the Lost River Diversion Channel into the Klamath River cannot be materially altered, given the design and functional operation of the diversion channel, absent electing to bypass diversion of water from the Lost River, allowing it to flow down to the Tule Lake Sumps (*see* 5.4). Given the presence of listed species in the Tule Lake Sumps, this action may have some benefit to listed species. Altering the rate and amount of water diverted from the Lost River to the Klamath River through the Lost River Diversion Channel may also affect flows in the Klamath River.

Reclamation also has some discretion over the other primary use of the Lost River Diversion Channel – diverting water from the Klamath River and Upper Klamath Lake. Reclamation exclusively owns and operates this facility. Reclamation can adjust gate positions and water levels in the channel to influence diversions otherwise made consistent with state law.

Given the potential for operation of the Lost River Diversion Channel to benefit listed species both in the Tule Lake Sumps and potentially the Klamath River, including designated critical habitat, Reclamation should consult on this action.

5.2.3 Opening and Closing the Klamath Straits Gates

In conjunction with Reclamation's plans to drain and potentially homestead lands underlying Lower Klamath Lake, in 1907 the United States entered into an agreement with the California Northeastern Railway and Southern Pacific companies to construct and maintain a railroad embankment across the northern end of Lower Klamath Lake, extending from the Northwest Quarter of Section 26 to the Northwest Quarter of Section 1, in Township 40 South, Range 8 East, Willamette Meridian.

Additionally, the 1907 agreement required the railroad to construct a concrete control structure in the southern end of the railroad embankment at the Klamath Straits, the original channel connecting the Klamath River to Lower Klamath Lake. This concrete structure, constructed in 1912, has five gated openings, approximately five feet wide, collectively referred to herein as the Klamath Straits Gates. Diversions from the river through these gates flow into the Ady Canal, which is operated by the Klamath Drainage District and provides deliveries to approximately 55,500 acres of public (LKNWR) and private land in the Lower Klamath Lake.

Operation of the Klamath Straits Gates has and continues to be under Reclamation's exclusive control. However, Reclamation has a contract with the Klamath Drainage District to keep these gates closed, "barring acts of God, unavoidable accidents or other causes beyond the control of the United States".[119] The contract provides that the gates will be opened at the district's request, when "necessary in connection with the reclamation of lands within the district boundaries, or when this is determined to be necessary by the United States in connection with the reclamation and use of lands in California".

In its original state, Lower Klamath Lake was an interstate navigable waterway, with regular ferry traffic between California and Oregon. The Act of February 9, 1905, 33 Stat. 714, authorizes Reclamation to raise or lower water levels in Lower Klamath Lake and to homestead the area so reclaimed to the extent feasible. Reclamation entered into the 1907 agreement with the railroad for this purpose. This agreement required the railroad to include a concrete structure in the embankment, the Klamath Straits Gates, for which Reclamation still owns and has exclusive control over.

Given Reclamation's authority to raise or lower water levels in Lower Klamath Lake, and therefore to control the Klamath Straits Gates, Klamath Drainage District contracted with the United States in 1917 to have these gates closed. This contract generally provides that the gates will remain

[119] Contract No. Ilr-402c, dated April 28, 1943, article 28(a).

closed at all times unless opened at the request of the district or the discretion of the United States for purposes of reclaiming federal lands in and around Lower Klamath Lake.

Reclamation originally had discretion over reclaiming Lower Klamath Lake and the surrounding marshes. Congress later directed, in the Act of September 2, 1964, that the remaining federally owned lands in and around Lower Klamath be reserved as refuges for migratory birds.[120] As discussed in section 5.1.5, USFWS now has administrative jurisdiction over lands within LKNWR and their use as a matter of federal law. Reclamation's interest in the area is limited to operation and maintenance of Klamath Project facilities.

USFWS requires the Klamath Straits Gates to be open in order to be able divert and convey water to LKNWR. This is true for the refuge's water rights in connection with the Klamath Project, as well as federally reserved water rights for refuge purposes. USFWS has a 1940 agreement with Klamath Drainage District to use the Ady Canal for this purpose.[121] A 1977 agreement between USFWS and Reclamation, addressing each agency's administrative responsibilities in LKNWR, recognizes that the right to use the Ady Canal to deliver water to LKNWR is exclusively administered by USFWS.[122]

Possibly consult on this action. Reclamation has discretion to open and close the Klamath Straits Gates under its authority to vary water levels in Lower Klamath Lake; however, this discretion is materially limited by the United States' contract with Klamath Drainage District, as well as USFWS' administrative jurisdiction over both LKNWR and the United States' right to use the Ady Canal to deliver water to LKNWR. To the extent Reclamation proposes to open and close the Ady Straits Gates, to the extent not constrained by USFWS' administrative jurisdiction over these lands, Reclamation's discretion may afford some capacity to benefit listed species, in which case there is an obligation to consult on this action.

5.2.4 Pumping and Discharging Water from the Klamath Straits Drain

The Klamath Straits Drain is an eleven-mile-long earthen canal with four pumping plants, which conveys excess drainage and runoff from the Lower Klamath Lake area to the Klamath River. The drain was originally built in the mid-1940s, as supplemental works to a joint Reclamation-USFWS construction program that built Pumping Plant D, the Tule Lake Tunnel, the P Canal, and much of the refuge infrastructure.

As originally constructed, the drain had just two pumping plants (designated E and F), each with two pumps with a combined capacity of approximately 200 cfs. An additional pump was added at both plants E and F in the late 1940s, increasing the drain's capacity from 200 to 300 cfs. Then in the 1970s, the drain's capacity was doubled to 600 cfs, with the construction of two new pumping plants (EE and FF), also with three pumps each.

The volume of water pumped to the Klamath River through the Klamath Straits Drain over the last decade has been roughly one-third the historical average (from approximately 90,000 AF annually to 35,000 AF). The amount pumped through the drain has only exceeded 100,000 AF twice in the last 20 years. Prior to 2000 it occurred in more than half of all years.

A major factor in this reduction is the decreased amount of drainage coming from LKNWR. Prior to 2000, the refuge on average discharged over 50,000 AF annually into the Klamath Straits Drain; since then that figure has been about 13,000 AF. This change has been particularly evident in the last decade, during which the refuge has drained less than 1,000 AF annually, except under special arrangements.

[120] Pub. L. 88-567, 78 Stat. 851.
[121] Agreement dated May 25, 1940, between the United States, Secretary of the Interior, and Klamath Drainage District.
[122] Reclamation Contract No. 7-07-20-W0089, dated August 2, 1977.

Reclamation and Klamath Drainage District are party to a 1947 contract, providing that Reclamation shall operate and maintain the Klamath Straits Drain and make it "available at all times for the proper drainage of the District lands".[123] Further, the agreement provides that water in the drain must be maintained at a level to provide adequate drainage, "as determined by the Secretary", for all district lands.[124] These obligations on the United States expressly terminate if and when operation and maintenance of the drain is transferred to an organization of water users or the district.

Reclamation and USFWS also have a 1946 agreement pertaining to Reclamation's operation of the Klamath Straits Drain.[125] The agreement generally requires Reclamation to "remove from [LKNWR] all water brought through the Tule Lake tunnel which it necessary to remove in order to permit the efficient carrying on of [USFWS'] functions".[126]

The Klamath Basin Adjudication addresses to some extent the United States' rights with respect to the kinds of "return flows" captured and controlled through a facility like the Klamath Straits Drain. The ACFFOD finds that the United States holds a legal interest in water rights connected to the Klamath Project for the purpose of re-use of return flows.[127]

Consult on this action. Reclamation discretion over operation of the Klamath Straits Drain is influenced by Reclamation's 1947 contract with the Klamath Drainage District, as well as the 1946 agreement with USFWS. These agreements require Reclamation to operate the drain to dispose of water that these entities discharge into it. Reclamation therefore has no discretion over the amount of water conveyed through the drain to the Klamath River. Reclamation has discretion, however, to determine how these return flows are subsequently used. This act is within Reclamation's authority over varying water levels in Lower Klamath Lake and connected waterbodies, and the ACFFOD recognizes that this right exclusively belongs to the United States. Reclamation can designate and use these return flows for supporting instream flows in the Klamath River, which can potentially benefit listed species. Therefore, Reclamation has an obligation to consult on this action.

5.3 OPERATION OF CLEAR LAKE AND GERBER RESERVOIRS

This section discusses Reclamation's discrete actions in connection with Clear Lake and Gerber reservoirs.

5.3.1 Storing Tributary Inflow

Reclamation's authority to construct, operate, and maintain Clear Lake and Gerber reservoirs stems from the Act of February 9, 1905, as a primary purpose of these reservoirs is to aid in the draining and homesteading of Tule Lake.[128] Congress did not confine Reclamation's discretion in carrying out this law, except as generally limited by the Reclamation Act of 1902.[129]

Following authorization of the Klamath Project by the Secretary of the Interior on May 15, 1905, Reclamation gave notice, for and on behalf of the United States of America, of its intentions to appropriate the waters of the Lost River and its tributaries by notices and postings in the states of Oregon and California in the manner authorized by the customs and laws of these states. As previously discussed, on May 19, 1905, Reclamation filed a notice with the Oregon State Engineer, in accordance with Oregon law, to "utilize ... [a]ll of the waters of the Klamath Basin in Oregon, constituting the entire drainage

[123] Reclamation Contract No. Ilr-402d, article 10, dated October 11, 1947.
[124] *Id*.
[125] Reclamation Contract No. Ilr-1371a, article 9, dated June 28, 1946.
[126] *Id*.
[127] KBA ACFFOD 07083.
[128] 33 Stat. 714.
[129] 32 Stat. 388.

basins of the Klamath River and Lost River, and all of the lakes, streams, and rivers supplying water thereto or receiving water therefrom, including ... all their tributaries". This notice provides "[t]hat the United States intends to use the above described waters in the operation of works for the utilization of water in the State of Oregon under the provisions of [the Reclamation Act of 1902]".

Also in support of the operations of Clear Lake and Gerber reservoirs, Reclamation posted five specific notices of appropriation of water from the Lost River and its tributaries on behalf of the United States. The posting on the Lost River for Clear Lake Reservoir was made on December 19, 1904, and filed for record in Modoc County, California, on December 28, 1904.[130] This notice provided that the "water is to be used for irrigation, domestic, power, mechanical, and other beneficial uses in and upon lands situated in Klamath (Oregon) and Modoc (California) counties..."[131]

The posting on Miller Creek for Gerber Reservoir was made on March 5, 1905, and was recorded on March 18, 1905, in Klamath County, Oregon.[132] As filed, this notice provided for "... all the unappropriated waters of Miller Creek, both surface and underflow, and more specifically stated as amounting to one thousand cfs ... for irrigation, domestic, power, mechanical, and other beneficial uses ... in Klamath County..."[133]

The water rights associated with the Klamath Project to water from the Lost River and its tributaries remain unadjudicated in either California or Oregon.

The exercise and use of these rights are nonetheless governed by California and Oregon law, as applicable, in accordance with Section 8 of the Reclamation Act of 1902, to the extent not in conflict with federal law.[134] Reclamation also has contracts with certain entities for providing stored water from these reservoirs for irrigation and related purposes.

As previously discussed, the act of storing water, at the most basic level, entails regulating outflow from a reservoir to a rate less than instantaneous tributary inflow. When outflow is less than inflow, the surface elevation on a reservoir will increase as water is actively stored. The act of storing water is always evidenced by increasing water surface elevations.

Reclamation has discretion over the act of storing water in both Clear Lake and Gerber reservoirs. The water rights were claimed on behalf of the United States, and the United States owns these reservoirs, including both the facilities that impound them and the underlying land. Storing and/or bypassing tributary inflow to the reservoirs is a function of managing storage levels in the reservoir.

Although the United States' rights remain unadjudicated, in storing and/or bypassing tributary inflow, Reclamation must comply with the respective laws of the states of Oregon and California regarding the control, appropriation, use and distribution of water used in irrigation. Reclamation cannot therefore exercise this right in a manner inconsistent with its claims, as provided in the various notices and posting relative to the rights to water from the Lost River and its tributaries.

Nonetheless, Reclamation must at times bypass tributary inflow from these reservoirs for flood control purposes, either in connection with the reservoirs themselves or for operation of the Lost River Diversion Channel (and protection of Tule Lake) (*see* 5.2.2). These releases can affect water levels in the reservoir as well as the Tule Lake Sumps. If discharged through the Lost River Diversion Channel, these releases can also affect flows in the Klamath River. The releases are non-discretionary in that Reclamation must protect federal facilities and carry out the purposes of the Klamath Project, including

[130] Modoc Co. records, *Water Rights*, vol. 2, p. 15.
[131] *Id*.
[132] Klamath Co. records, *Water Rights*, vol. 11, p. 192.
[133] *Id*.
[134] 43 U.S.C. §383.

reclaiming Tule Lake. Reclamation may, however, some discretion in how exactly these releases are made.

The United States' contractual obligation to Klamath Project water users may also influence the manner in which Reclamation exercises its discretion over storing and/or bypassing tributary inflow to Clear Lake and Gerber reservoirs.

The tribal trust obligations of the Yurok, Hoopa Valley, and Klamath Tribes do not extend to water stored in Clear Lake and Gerber reservoirs, since the water in the Lost River did not physically reach the Klamath River prior to the Klamath Project and therefore this water is necessarily not part of the rights reserved by the United States on behalf of these tribes. Therefore, Reclamation's discretion in storing water from Clear Lake and Gerber reservoirs is not influenced by these obligations.

Consult on this action. As designated critical habitat for endangered shortnose and Lost River suckers, Reclamation's act of storing water in Clear Lake and Gerber reservoirs can potentially benefit listed species in these reservoirs, and therefore there is an obligation to consult on this action.

5.3.2 Releasing Stored Water

The act of releasing stored water entails releasing more water than is simultaneously flowing into a reservoir. When outflow is more than inflow, the surface elevation on a reservoir will decrease as stored water is actively released. Decreasing water surface elevations in a reservoir is always indicative of stored water being released.

Reclamation's discretion over releasing water from Clear Lake and Gerber reservoirs is also governed by federal and state law. Reclamation must comply with Oregon and California law, as applicable, releasing and using stored water from Clear Lake and Gerber reservoirs. The various rights the United States has claimed in connection with these reservoirs all are for the purpose of utilizing the stored water for irrigation and related purposes within the Klamath Project, as so stated. Reclamation's claimed rights on behalf of the United States do not include the use of water for purposes other than as enumerated in the various notices and postings.

Reclamation's contractual obligations also influence how Reclamation releases stored water from Clear Lake and Gerber reservoirs. Reclamation has no obligation to deliver water to entities or individuals except under contract with the United States.

Consult on this action. In releasing water from the reservoirs for flood control purposes (which is non-discretionary), Reclamation may nonetheless have some discretion over *how* this operation occurs, and that discretion may be exercised in a manner that potentially benefits listed species, including in the Klamath River.

5.4 OPERATION OF THE TULE LAKE SUMPS

The Tule Lake Sumps (Sump 1A and 1B) are diked portions of the original lake that are now used to store and dispose of excess drainage and runoff. The sumps are also within the boundaries of the Tule Lake National Wildlife Refuge (TLNWR). Reclamation designed and built the dikes surrounding the sumps the 1940s, as part of a joint construction program with the USFWS. Excess drainage and runoff in the sumps is pumped into the Tule Lake Tunnel via Pumping Plant D. Reclamation has transferred operation and maintenance responsibilities for Pumping Plant D to the Tulelake Irrigation District, subject to rules and regulations issued by Reclamation, which generally specify the water surface elevations to be maintained in the sumps for refuge and flood control purposes.[135]

[135] Reclamation Contract No. 14-06-200-5954, dated September 10, 1956. U.S. Bur. of Reclamation, *Rules and Regulations for Operation and Maintenance of Klamath Project Works Transferred to Tulelake Irrigation District under Contract No. 14-06-200-5954* (rev. Feb. 21, 1984).

Reclamation has established minimum elevations for Sump 1A, notwithstanding Reclamation has no direct control over inputs to the lake (from numerous non-point sources), and that operation of the main outlet (Pumping Plant D) has been transferred to Tulelake Irrigation District. While Reclamation assumes that these levels can reasonably be met based on historical operations, it may not be possible to maintain Tule Lake Sump 1A elevations during excessively dry periods.

The Tule Lake Sumps constitute the remnants of Tule Lake. Congress authorized Reclamation to raise and lower water levels of Tule Lake. Reclamation lacks some physical control over this condition, not being able to control all inflows (at least downstream the Lost River Diversion Channel). Reclamation also lacks complete control and therefore discretion over operation of Pumping Plant D, the only outlet from the sumps besides natural evaporation, transpiration, and seepage.

Reclamation's agreement with USFWS does not further confine Reclamation's discretion over operation of the sumps, recognizing that these are Klamath Project facilities under Reclamation's administrative responsibility.

Consult on this action. Although limited in some respects, Reclamation has discretion over the water levels in the Tule Lake Sumps, as the remnant waterbodies of Tule Lake. Although not designated critical habitat for Lost River and shortnose suckers, both species are present in the Tule Lake Sumps. Reclamation cannot ***guarantee*** that certain levels in the Sumps, due to factors outside of Reclamation's control (e.g., evaporation). But to the extent Reclamation elects to establish target levels in the Tule Lake Sumps, this discretion can be exercised in a manner that benefits listed species. This action should be consulted upon accordingly.

CHAPTER 6 - APPLICATION OF ENVIRONMENTAL BASELINE

Review of the specific operational actions described in Chapter 5 was performed in accordance with the goals of this reassessment: ensuring compliance with law and regulation; defining the scope of Reclamation's proposed actions; correcting attributing actions to the appropriate entity; excluding non-discretionary actions from the consultation; and properly characterizing the environmental baseline.

The effects of actions over which Reclamation has no discretion – even though those actions may occur within the service area or involve existing facilities of the Klamath Project – cannot reasonably be characterized as an agency action causing impacts to the species or modification of species' habitat within the meaning of the ESA. Those effects are not an agency action subject to consultation. Rather they are activities or conditions that exist overarching, alongside, or in the background of operation of the Klamath Project, and are therefore properly attributable to the environmental baseline. It is only the agency's discretionary actions that are subject to consultation.

A hypothetical example serves to illustrate this situation. If Reclamation were to propose an agency action of, among others in connection with the Klamath Project, storing tributary inflow in Upper Klamath Lake, it is the act of storing tributary inflow that Reclamation must consult on. Reclamation does not need to extend this act to consulting on Upper Klamath Lake being at designated water surface elevations to a hundredth of an inch under certain hydrologic conditions at certain times of the year, because that action necessarily entails conditions, events, and non-federal actions beyond Reclamation's control (e.g., rain, runoff, diversions).

Similarly, if Reclamation proposes to bypass and release tributary inflow from Upper Klamath Lake under certain conditions, it is the releases from Upper Klamath Lake that the agency must consult on. Reclamation does not need to extend this action to consulting on daily designated flows occurring in the Klamath River approximately forty miles downstream of the Klamath Project, particularly through four private hydroelectric facilities, because that subsequent condition, although influenced by Reclamation's action, is beyond Reclamation's discretionary control.

Reclamation recognizes that the existence of the Klamath Project has altered hydrologic conditions in the Klamath Basin. That alteration, however, has occurred within the context of a congressionally authorized project maintained for congressionally authorized purposes. The ESA Section 7(a)(2) consultation process is not the proper venue to address affects related to the continued presence of Reclamation structures or the activities or conditions outside the scope of the agency's discretion. Those effects are more properly and efficiently addressed through collaborative efforts among all agencies and parties causing impacts to listed species in the Klamath Basin. Reclamation continues to honor its commitment to address those impacts attributable to the environmental baseline, but through collaborative, locally supported processes, such as demonstrated in the KBRA.

CHAPTER 7 - SUMMARY OF FINDINGS AND REGIONAL DECISION

The U.S. Bureau of Reclamation, California-Great Basin Region, has performed this thorough reassessment of actions associated with its continuing operation of the Klamath Project, in southern Oregon and northern California. These actions were critically evaluated for the purpose of facilitating consultation with USFWS and NMFS under Section 7(a)(2) of the ESA. This comprehensive reassessment permitted careful consideration of previously proposed Reclamation actions to:

- verify compliance with law and regulation;
- clearly define the scope of the actions;
- correctly attribute actions to the appropriate agency;
- ensure non-discretionary actions were excluded from consultation; and
- properly characterize the environmental baseline.

Application of the above criteria resulted in a determination that there are at least eleven operational actions in connection with the Klamath Project that are properly considered subject to ESA consultation at this time. (Note that other actions, including administration of certain contract provisions) may also be subject to ESA consultation by Reclamation.) Reclamation will verify or re-evaluate the effects of these actions and will conduct ESA consultation *only if* the *manner* ("how" or "when") of performing the action may affect listed species or designated critical habitat. They are:

Operation of Upper Klamath Lake:

1. Storing Tributary Inflow
2. Releasing Stored Water
3. Establishing Target Lake Levels
4. Flood Control Operating Criteria
5. Making Water Rights Calls

Operation of the Klamath and Lost Rivers:

6. Diverting Water Through and Into the Lost River Diversion Channel
7. Lost River Diversion Channel Operations
8. Control of the Klamath Straits Gates
9. Klamath Straits Drain Operations

Operation of Clear Lake and Gerber Reservoirs

10. Storing Tributary Inflow
11. Releasing Stored Water

Further at this time, Reclamation anticipates not consulting on four operational actions pursuant to Section 7(a)(2) of the ESA. They are:

1. Establishing Minimum Release Rates from Upper Klamath Lake

2. Coordinating Project Diversions from Upper Klamath Lake
3. Establishing Minimum River Flows in the Klamath River
4. Establishing Minimum Water Levels in Tule Lake Sump 1A.

Reclamation has the authority but lacks the discretion to ***guarantee*** absolute fixed minimum releases from Upper Klamath Lake, flows in the Klamath River, or water surface elevations in Tule Lake Sump 1A. Reclamation can designate target releases from Upper Klamath Lake, target flows in the Klamath River, and target water levels in Tule Lake Sump 1A, minimum or otherwise, and then exercise its discretion – and to the extent it does so, this would be an action the agency must consult on. But Reclamation cannot produce pre-determined flows, lake levels, or sump levels at all times, regardless of the hydrologic conditions and other factors beyond Reclamation's control. Reclamation should therefore not consult on fixed releases from Upper Klamath Lake, flows in the Klamath River, and water levels in Tule Lake Sump 1A.

Again, as opposed to absolute flows or levels, establishing "target" releases from Upper Klamath Lake, flows in the Klamath River, and water levels in Tule Lake Sump 1A, including target minimums, would appear to be within the agency's authority and discretion, and should be consulted on if proposed by Reclamation.

The recommendations provided in this reassessment reflect a thorough and comprehensive review of Reclamation's continuing operations of the Klamath Project. Actions recommended for inclusion in future consultations vary significantly from the far-reaching scope of actions included in past BAs. The broad reach of past consultations appears to have been the result of a number of factors, including:

1. Pre-existence of FERC minimum release requirements from Iron Gate Dam under PacifiCorp's 1956 license for operation of the Klamath Hydroelectric Project (FERC license no. 2082), which could never be met by PacifiCorp except with volumes supplied by the Klamath Project;
2. Reclamation's assumption, prior to issuance of the ACFFOD, that Reclamation unilaterally owned the water rights in connection with the Klamath Project, including the interest in beneficial use of the water;
3. An attempt to negotiate proposed actions for BAs that were agreeable to all stakeholders and attempted to "balance" competing needs and respective rights within the basin, through the form of a Section 7(a)(2) consultation but also in the context of anticipated enactment of a basin-wide settlement; and
4. A view of agency action that was overly broad, especially in light of intervening court decisions.

This latter point was the largest single determining factor in this reassessment. It is clear, based on applicable authorizing legislation, applicable water rights at issue (both adjudicated and unadjudicated), and the physical conditions in the Klamath Basin that Reclamation's discretion to regulate water surface levels in Upper Klamath Lake and flows in the Klamath River – for the benefit of endangered species or otherwise – is narrower than the scope of Reclamation's recent consultations. Reclamation has (and currently still is under the Interim Operations Plan) attempted to manage the Klamath Project in a manner that achieves pre-determined hydrologic conditions throughout the entire Klamath Basin, based on effects associated with operation of the Klamath Project, as well as other federal, state, and private actions over which Reclamation has no discretionary control.

Klamath Basin, based on effects associated with operation of the Klamath Project, as well as other federal, state, and private actions over which Reclamation has no discretionary control.

Accordingly, and for the reasons stated herein, it is recommended that consultation be limited to actions consistent with the analysis and determinations stated above.

Principal Author:

GEORGE DRISCOLL Digitally signed by GEORGE DRISCOLL Date: 2021.01.15 07:16:05 -08'00' 1/15/21

George Moss Driscoll — Date
Senior Water Contracts Specialist
Klamath Basin Area Office

Through:

JEFFREY NETTLETON Digitally signed by JEFFREY NETTLETON Date: 2021.01.15 08:01:48 -08'00'

Jeffrey Nettleton — Date
Area Manager
Klamath Basin Area Office

Through:

JEFFREY PAYNE Digitally signed by JEFFREY PAYNE Date: 2021.01.15 08:20:19 -08'00'

Jeffrey T. Payne — Date
Deputy Regional Director
California-Great Basin Region

Concurrence:

☒ Concur ☐ Non-Concur

Ernest A Conant Digitally signed by Ernest A Conant Date: 2021.01.15 08:42:34 -08'00'

Ernest A. Conant — Date
Regional Director
California-Great Basin Region

Quality Control Reviewers

Jeffrey L. Nettleton
Area Manager
Klamath Basin Area Office

Jared L. Bottcher
Deputy Area Manager
Klamath Basin Area Office

Kristen Hiatt
Chief, Environmental Compliance Branch
Klamath Basin Area Office

Product Development Team

Ray Sahlberg
Regional Water Rights Officer
California-Great Basin Region

Steven R. Palmer
Special Assistant
California-Great Basin Region, Bay-Delta Office

THE SECRETARY OF THE INTERIOR
WASHINGTON

JAN 16 2021

Mr. Nathan R. Rietmann
Rietmann Law, P.C.
1270 Chemeketa Street, NE
Salem, OR 97301

Dear Mr. Rietmann:

In response to my letter dated November 12, 2020, the Bureau of Reclamation (Reclamation) and the Department of the Interior's Office of the Solicitor have completed their review and analysis of Reclamation's obligations surrounding the Klamath Project. What has become evident from this reassessment is that project operations have come to suffer from a tortured consultation history, owing to several factors that include:

1. Pre-existence of Federal Energy Regulatory Commission (FERC) minimum release requirements from Iron Gate Dam under PacifiCorp's 1956 license for operation of the Klamath Hydroelectric Project (FERC license no. 2082);

2. Reclamation's assumption, prior to issuance of the "Amended Corrected Findings of Fact and Order of Determination" (ACFFOD), that Reclamation unilaterally owned the water rights in connection with the Klamath Project, including the interest in beneficial use of the water;

3. An attempt to negotiate proposed actions for Biological Assessments that were agreeable to all stakeholders and attempted to "balance" competing needs and respective rights within the basin, through the form of a section 7(a)(2) consultation but also in the context of anticipated enactment of a basinwide settlement; and

4. A view of agency action that was overly broad, especially in light of intervening court decisions.

Through these processes, Klamath Project operations for water supply, endangered species, and Tribal trusts have become substantially conflated. While this approach reflects a practical compromise made in light of several uncertainties, the outcome is an operating plan that no longer allows for inspection of any individual piece for compliance, creates confusion, and begets litigation and discord to no one party's service.

Enclosed to this letter are three documents. The first is a Reclamation decision document intended for guiding upcoming consultation processes and is modeled after a similar reassessment document developed by the U.S. Army Corps of Engineers regarding consultation on the Rio Grande.[1] The next two documents are memoranda from the Office of the Solicitor that inform the Reclamation decision document.[2] The key findings of this analysis include the following:

(a) Considerable limitations exist to Reclamation's discretion to conduct section 7 Endangered Species Act (ESA) consultation on most contracts in the Klamath Project. However, this lack of obligation does not confer compliance by water users within the Klamath Project with the ESA. Additionally, the consideration of discretion with respect to section 7 consultations does not consider Reclamation's obligations to operate the project in accordance with senior Tribal water rights.

(b) Areas of Federal discretion in the general management and operational activities, as outlined in the legislation authorizing the Klamath Project, will require continued consultation under section 7 of the ESA. This is particularly the case with respect to the action of either storing or bypassing tributary inflows to Upper Klamath Lake, and in the subsequent management of supplies stored previously and in priority.

(c) Operations of Upper Klamath Lake are subject to Federal and State law, including the ACFFOD and senior rights of Tribes in the Klamath Basin. While said Tribal rights are either in the process of being adjudicated or have not yet been quantified, they are definitively senior to the Klamath Project. Reclamation has an obligation to take actions within its discretionary authority to protect them, and satisfaction of these rights would supersede those of the Klamath Project.

(d) Water stored previously and in priority on behalf of the Klamath Project is not available for re-allocation for the purpose of meeting these in-stream flow rights, even if they are senior to the entity that previously stored those supplies. Accordingly, future consultation of the Klamath Project with respect to ESA-listed species in the Klamath River shall exclude management of flows stored previously and in priority in Upper Klamath Lake.

(e) Reclamation's decisions to store inflow to Upper Klamath Lake and to later make it available for the Klamath Project may be guided or limited, to the extent that the Secretary of the Interior determines that they are needed for meeting trust obligations to the Klamath Tribes prior to the finalization of the ACFFOD.

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[1] Reassessment of U.S. Bureau of Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act, U.S. Bureau of Reclamation, January 2021.

[2] Analysis of Klamath Project contracts to determine discretionary authority in accordance with the November 12, 2020 Letter of the Secretary of the Interior, January 14, 2021, and Use of Water Previously Stored in Priority for Satisfaction of Downstream Federally Reserved Rights, January 14, 2021.

I believe these findings present an opportunity to harmonize the operation of the Klamath Project with the requirements of Federal and State law, to parse out operational requirements for discussion and resolution, and to place a more appropriate burden of water management for declining aquatic species on the Klamath Project. Settlement, including actions that are outside the bounds of the Klamath Project, is likely still needed in the Klamath Basin, and this determination is made with the intention that it corrects for certain baseline legal requirements as an entry point to the next steps in those discussions.

Sincerely,

Secretary of the Interior

Enclosures

Oregon
Kate Brown, Governor

Water Resources Department
North Mall Office Building
725 Summer St NE, Suite A
Salem, OR 97301
Phone (503) 986-0900
Fax (503) 986-0904
www.Oregon.gov/OWRD

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF A DISPUTE BETWEEN THE U.S. BUREAU OF RECLAMATION AND THE KLAMATH IRRIGATION DISTRICT Klamath Irrigation District *Petitioner*, Bureau of Reclamation *Reservoir Owner*.	)	**ORDER REGARDING RELEASE OF WATER STORED UNDER DETERMINED CLAIM KA 294**

To: The U.S. Bureau of Reclamation
Jared Bottcher, Acting Area Manager
6600 Washburn Way
Klamath Falls, OR 97603-9365

NOTICE: This is a Final Order other than contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080 you may either petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, shall be deemed denied.

I. RELEVANT AUTHORITIES

A. Regulation of Determined Claims

Pending a hearing on the Amended and Corrected Findings of Fact and Order of Determination[1] (ACFFOD) in the Klamath County Circuit Court, "the division of water from the stream involved in the appeal shall be made in accordance with the order of the Director."[2]

[1] The ACFFOD is the Director's order of determination regarding claims filed in the Klamath Adjudication and is currently under review in the Klamath County Circuit Court.
[2] ORS 539.170.

The rules of the Commission authorizing the distribution of Determined Claims in the ACFFOD are provided in Oregon Administrative Rules (OAR) Chapter 690 Division 250.[3]

A "reservoir" includes a modified natural lake such as Upper Klamath Lake (UKL), in which water is collected for beneficial use or purpose.[4] "Legally stored water" means any "water impounded in a reservoir under the provisions of an established right to store water."[5] "Use of legally stored water is governed by the water rights, if any, which call on that source of water" with use further limited to that amount of water that may be put to beneficial use without waste. "Any legally stored water released in excess of the needs of the water rights calling on that source of water shall be considered natural flow" which, in the absence of a water exchange, may be diverted according to the next water right in priority or becomes part of the natural stream and is subject to reappropriation.[6]

Water rights for the beneficial purpose of irrigation authorize use of legally stored water or natural flow which may be diverted according to the instantaneous rate of diversion measured in cubic feet per second (cfs) specified in the right, up to the amount that may be put to a beneficial use without waste.[7] Water not immediately put to beneficial use is left in the watercourse where the next person in priority may divert their instantaneous rate. In this way, the maximum beneficial use of the water by users according to relative priorities may be made.[8]

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[3] The rules of the Water Resources Commission are adopted pursuant to ORS 540.145 which authorizes the Water Resources Commission to adopt rules to "secure the equal and fair distribution of water in accordance with the rights of the various users" which rules "shall apply to all water rights that have been established * * * "[u]nder an order of the Commission or the Water Resources Director in proceedings for the determination of relative rights to the use of water * * *."

[4] OAR 690-250-0010(13). Modifications of the outlet of UKL along with the construction of the Link River Dam around 1916 allow the UKL to be operated and managed as a reservoir between the elevations of 4,136 and 4,143.3.

[5] OAR 690-250-0010(10).

[6] OAR 690-250-0150(4); *Jones v. Warmsprings*, 162 Or 186, 195 (1939) (Water discharged to the natural stream with no intent to recapture it becomes part of the natural stream and is subject to reappropriation.).

[7] OAR 690-250-0010(3); *Cookinham v. Lewis*,58 Or 484 (1911)(Explaining the process for appropriating water for storage and the subsequent beneficial use of stored water.); *Bennett v. City of Salem*, 192 Or 531, 543 (1951)(An appropriator is never entitled to divert more water than is actually put to beneficial use, reasonable transmission losses excepted); *In re Water Rights of Deschutes River and Tributaries*, 134 Or 623, 644 (1930)("The right of a prior appropriator is paramount, and the right is limited to such an amount of water as is reasonably necessary for such use and project as may be fairly within contemplation at the time the appropriation is made."); *Tudor v. Jaca*, 178 Or 126, 143 (1945) *citing Bolter v. Garrett*, 44 Or 204 (1904) for the proposition that the use of water appropriated "must not only be beneficial to the lands of the appropriator, but it must also be reasonable in relation to the reasonable requirements of subsequent appropriators."

[8] *Benz v. Water Resources Comm'n*, 94 Or App 73, 81 (1988) *citing Jones v. Warmsprings Irrigation District*, 162 Or 186, 198 (1939) for the proposition that a junior appropriator's water right cannot be exercised until the senior appropriator's right has been satisfied such that "a party who has a prior right to a certain quantity of water from a watercourse is entitled to the water only to the extent needed or used for that purpose," such that the next person in priority may take their right as they are entitled to it.

A right to use water for irrigation purposes is also limited to a total volumetric duty (measured in acre-feet per acre (AF)) that constitutes the total quantity of water that may be diverted during an irrigation season.[9]

B. Injunctive Relief Against Action of the Watermaster

"Any person who may be injured by the action of any watermaster may appeal to the circuit court for an injunction. The injunction shall only be issued in case it can be shown at the hearing that the watermaster has failed to carry into effect the order of the Water Resources Commission or decrees of the court determining the existing rights to the use of water."[10]

II. FINDINGS OF FACT

A. Klamath Irrigation District v. Oregon Water Resources Department, Thomas Byler, Danette Watson, Case No. 20CV17922

1. On April 3, 2020, the Oregon Water Resources Department (Department) received a written notice from the Klamath Irrigation District (KID) asserting a dispute between the KID and the U.S. Bureau of Reclamation (Bureau) regarding the distribution of water stored in UKL. KID asserted that the Bureau was not distributing water stored under Determined Claim KA 294 to those entitled to use water pursuant to Determined Claim KA 1000 but was instead releasing water from UKL pursuant to the Endangered Species Act and federal tribal trust responsibilities. The notice requested that the watermaster take charge of UKL reservoir and ensure that stored water is not released through the Link River Dam except to meet the needs of state-recognized water rights calling on that source.[11]

2. On May 14, 2020, the KID filed a petition in Marion County Circuit Court seeking injunctive relief under ORS 540.740 claiming that the watermaster did not carry the ACFFOD into effect by failing to stop the Bureau from releasing water from UKL except to satisfy state-recognized water rights. *Klamath Irrigation District v. Oregon Water Resources Department, Thomas Byler, Danette Watson* (20CV17922).

3. On October 13, 2020, the Marion County Circuit Court ordered the Watermaster District 17, "pursuant to ORS 540.740" to:

> * * * immediately stop the distribution, use and/or release of Stored Water from the UKL without determining that the distribution, use and/or release is for a permitted purpose by users with existing water rights of record or determined claims to use the Stored Water in UKL.

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[9] OAR 690-250-0010(12)(defining "rate" and "duty" of water for irrigation); OAR 690-250-0010(9)(definition of "irrigation season").

[10] ORS 540.740.

[11] On April 17, 2020, KID filed a Petition for Alternative Writ of Mandamus in the Marion County Circuit Court. *KID v. WRD* (20CV15606). The court issued an Alternative Writ of Mandamus commanding the Department to take charge of UKL and distribute water, pursuant to ORS 540.210, to the extent it had not already done so. This case was dismissed on May 12, 2020. The Department continues to dispute the application of ORS 540.210 and does not concede it is an appropriate authority for the actions KID seeks.

The term "existing water rights of record" has the meaning provided in ORS 540.045(4). The term "determined claim" has the meaning provided in Section 1, chapter 445, Oregon Laws 2015 (which is published in the Oregon Revised Statutes as a note following ORS 539.170).

4. On October 14 and 15, 2020, the Watermaster District 17 investigated and considered the best available information to determine whether legally stored water from UKL was passing through the Link River Dam. On October 15, 2020, the Watermaster District 17 determined that legally stored water was not passing through the Link River Dam.[12]

5. On January 22, 2021, the OWRD issued a determination on the status of releases from UKL through the Link River Dam and concluded that legally stored water was not passing through the Link River Dam.

6. On February 23, 2021, the OWRD issued a second determination concluding that legally stored water was not passing through the Link River Dam.

7. On March 30, 2021, the OWRD issued a third determination concluding that legally stored water was not passing through the Link River Dam.

B. State Water Rights Calling on Stored Water in UKL

8. The Bureau's Klamath Project ("Project") was established in accord with federal legislation and state legislation in 1902 and 1905, respectively. The Bureau built and owns the facilities, known as the works in the Project area. UKL is a modified natural lake and is one of the three reservoirs in the Project which also comprises eight dams, five major pumping plants, 19 canals, and other works.

9. Among other authorities, the Bureau operates the Project pursuant to the Reclamation Act of 1902 (ch. 1093,32 Stat.388, and acts amendatory thereof and supplementary thereto) as well as other federal laws and regulations, including but not limited to the Endangered Species Act of 1973 (ESA) (16 U.S.C. §§1531-1544, 87 Stat. 844, as amended.).

10. The Bureau is the sole owner of Determined Claim KA 294. KA 294 provisionally authorizes the Bureau to store a maximum annual volume of 486,828 AF of water in UKL between elevations 4,136 feet and 4,143.3 feet, relative to the Bureau's Klamath Basin Datum.

[12] Also, on October 15, 2020, the Department filed a Notice of Appeal in the Oregon Court of Appeals (Case No. A174754) which was ultimately dismissed on the grounds that the October 2020 Order was not final for purposes of appeal. Respondents also moved for a stay from the Circuit Court, which was also denied. Respondent also sought relief from the Oregon Supreme Court which was denied (Case No. S068104).

11. The volume of water stored in UKL above elevation 4,136 feet is estimated based on an elevation capacity curve, or rating, provided by the Bureau, and using the weighted mean lake level as reported by the United States Geological Survey (USGS). The most recent rating provided by the Bureau indicates the maximum storage volume for KA 294 (486,828 AF) is met when the lake elevation is at 4,142.48 feet.[13]

12. The Link River Dam is a federally owned dam located on the Link River. The storage and release of water pursuant to KA 294 from UKL is through the Link River Dam, which is operated, in part, by PacifiCorp pursuant to permits issued by the Federal Energy Regulatory Commission.

13. KA 294 is the only state-recognized right which authorizes the appropriation and storage of water in UKL for subsequent beneficial uses.[14] KA 1000 is the only state-recognized water right that authorizes the beneficial use of water stored pursuant to KA 294.

14. The KID and 20 other Klamath Project Water Users (together the KPWU) and the Bureau are co-owners of Determined Claim KA 1000. KA 1000 provisionally authorizes the diversion of natural flow from UKL and water stored in UKL pursuant to KA 294 for beneficial use by the KPWU both upstream and downstream of the Link River Dam.[15] KA 1000 does not specify what amount of water must be taken from natural flow as opposed to stored water and does not prohibit the taking of water from both sources simultaneously.

15. Pursuant to KA 1000, KID may divert up to 1,150 cfs (subject to beneficial use without waste) through the A Canal for irrigation during the irrigation season March 1 through October 31, with a priority date of May 19, 1905.

16. Downstream of the Link River Dam, and pursuant to KA 1000, there are 34 authorized points of diversion from the Klamath River. The majority of these diversions have an authorized season of use from March 1 to October 31 and two irrigation districts also maintain an additional season of use from November 1 to February 28. These 34 points of diversion have a total authorized instantaneous maximum diversion rate of 1,572.51 cfs.

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[13] The weighted mean lake level of UKL is monitored and reported by the USGS. Four separate lake stage gages are operated and maintained by the USGS, and the data from each gage are entered into an equation to calculate the weighted mean lake elevation. The provisional lake elevation data are available at the website: https://waterdata.usgs.gov/or/nwis/uv/?site_no=11507001&agency_cd=USGS

[14] KA 622 is not considered a right to store water; rather this Determined Claim authorizes monthly lake levels in the UKL for the beneficial purpose of establishing and maintaining a healthy and productive habitat to preserve and protect the Klamath Tribes' hunting, fishing, trapping and gathering rights on former reservation lands. The lake level right has a priority date of time immemorial, but pursuant to an agreement between the Klamath Project Water Users, the Klamath Tribes, the United States Bureau of Indian Affairs, and the Department, this right is subordinated to August 9, 1908.

[15] KA 1000 erroneously refers to KA 293, but this is a typographical error.

C. The Department's Method for Determining Water Stored in UKL Pursuant to KA 294

1. Calculating Storage Release

17. The equation the Department is using to calculate stored water releases is:

{eqn 1} Storage Release = Link River Flow – (UKL Inflows - UKL Diversions $_{KA1000}$)

with the storage release in excess of water rights then calculated as:

{eqn 2} Excessive Storage Release = Storage Release – Downstream Diversion $_{KA1000}$

If either equation results in a zero or negative value, then no storage release unrelated to water rights is occurring.

Description of the variables used in the equation:

Link River flow data are available from a USGS stream gage (USGS 11507500) operated on the river.

UKL inflows represent the total amount of natural flow coming into the lake from surface water, groundwater, and precipitation. Some of these inflows are measured directly (e.g., Wood and Williamson River stream gages) while others must be estimated (e.g., groundwater inflows) as explained below.

UKL Diversions R_{KA1000} **R:** The largest UKL Diversion, the A Canal, is monitored by a gage accessible at this link: https://www.usbr.gov/pn-bin/wyreport.pl?site=acho&parameter=qj&head=yes There are 12 authorized points of diversion from UKL above the Link River Dam included in KA 1000. Additionally, there are 10 state-certificated water rights and 8 non-KA 1000 determined claims each exceeding 1 cfs for the use of natural flow from UKL. These 18 non-KA 1000 water rights and determined claims have a combined total of 23 authorized points of diversion from UKL. Because the majority of these points of diversion do not have measuring devices installed, their diversion rates are estimated using the authorized diversion rate on the determined claim or water right.[16]

Downstream Diversions R_{KA1000} R: Gages monitor three of the KA 1000 diversions below UKL; the Lost River Diversion Channel (LRDC), the North Canal, and the Ady Canal. There are 34 authorized points of diversions identified under the KA 1000 below the Link River Dam and approximately 61 other diversions from the Klamath River downstream of the Link River Dam not associated with KA 1000. The ungaged diversions and individual pump diversions are currently estimated. As of April 6, 2021, there are minimal amounts of water diversion occurring below Link River Dam.

[16] Efforts are underway to develop a more sophisticated mechanism of estimating these numerous smaller users that divert water directly from UKL, including inventorying each POD and working with the landowner to install measuring devices.

2. Calculating Inflows

18. To manage the water rights and determined claims and distinguish between natural flow and stored water, the Department must quantify gross inflows to UKL, which as of the date of this order it has calculated, using the best information available to it.

19. Stream tributaries constitute one component of inflow that contributes to UKL. Tributary inflows include the Williamson River, Wood River, Sevenmile Creek, Crystal Creek, Thomason Creek, and Fourmile Creek. These streams and their tributaries are listed as sources on KA 294.[17]

20. Groundwater contributions and direct precipitation are also estimated inflows that contribute to UKL.

3. Calculating Inflows in Relation to Outflows

21. The Department reconciles the total UKL inflow estimate against the change in UKL contents and the outflows based on a water balance of the lake performed periodically, expressed as the following equation:

{eqn 2} Reconciled UKL Inflows = Change in UKL Contents + UKL outflows

Adjustments to the estimated un-gaged inflow components are made based on this reconciliation to ensure the UKL water balance is satisfied.

Description of the variables used in the equation:

The **change in UKL contents** is based on contents derived from the USBR elevation capacity table using the average UKL elevation from four USGS lake level gages.

UKL outflows consist of lake evaporation, outflows through the Link River and A Canal, and 23 other authorized diversions greater than 1 cfs directly from UKL. Lake evaporation is currently estimated using weather station data from two nearby AgriMet sites.[18] Flow through the Link River and A Canal is measured with gages. The other diversions from the UKL are currently estimated.

---

[17] Gaged inflow streams include the Williamson and Wood Rivers, and Sevenmile Creek. On November 5, 2020, the Department issued a FINAL ORDER MEASURING DEVICES to the Bureau requiring installation of measuring devices on Sevenmile Creek, Thomason Creek, Fourmile Creek, and Crystal Creek. On December 30, 2020, the Bureau requested reconsideration of this order, and on February 23, 2021, the Department notified the Bureau that it is reconsidering its order. At the time of the issuance of this order, the Department is working with the Bureau to evaluate the viability of installing gages on Crystal Creek and Fourmile Creek.

[18] The Department estimates evaporation by a Penman-Monteith equation that uses weather data from two USBR AgriMet weather stations just north and south of UKL. Evaporation estimates are adjusted for local lake conditions based on comparisons of the Penman-Montieth derived estimates with concurrent evaporation data on UKL from a study completed by USBR in 2015.

22. The evaporation estimate is charged against the storage account, thus increasing the accounting of what has been stored since the beginning of the year, and decreasing the amount remaining to be stored under the 486,828 acre-foot storage limit in KA 294.

23. As of the date of this order, and based on the best information available to it, the Department calculates that inflows to UKL exceed water passing Link River Dam and no stored water is passing through the Link River Dam.

D. The Bureau's Plan for Discharging Stored Water from UKL

24. On March 12, 2021, the Bureau issued a letter to the KPWU and provided a copy of the letter to the Watermaster District 17. OWRD understands the letter to confirm the Bureau's conclusion that:

    a. The Bureau is required to operate the Project in accordance with Biological Opinions (BiOps) issued by the National Marine Fisheries Service in 2019 and the U.S. Fish and Wildlife Service in 2020 as provided in its Interim Operation Plan; and

    b. That these BiOps require certain water surface elevations in UKL and require release of water into the Klamath River below Iron Gate Dam in California and, as a result and based on the best available information on water availability, water is currently unavailable from the UKL and the Klamath River for irrigation purposes within the Klamath Project.

    c. The Bureau directed the KPWU to delay diversions of water from UKL and the Klamath River until further notice. The Bureau stated that the delay would extend at least through April 15, 2021.

25. Estimated forecast inflows into UKL during April indicate that inflows into UKL will decrease significantly relative to inflow values observed over the winter and early spring.

III. CONCLUSIONS

1. As of the date of this order, and according to the best information available to it, the Department concludes that legally stored water is not passing through the Link River Dam.

2. The Department has cause to believe that the Bureau will, at some near future date, release legally stored water through the Link River Dam to comply with the Bureau's federal tribal trust obligations and ESA obligations.

3. Based on the anticipated inflows into UKL during April, the Department believes that legally stored water will constitute a portion of the waters passing the Link River Dam.

4. While it remains in effect, the order of the Marion County Circuit Court dated October 13, 2020, compels the watermaster to comply with its directives.

IV. DISCUSSION

The Department is obligated to comply with the Marion County Circuit Court order dated October 13, 2020 while it remains in effect. Notwithstanding the order's directive, the Department has identified no source of state law that authorizes the watermaster to prohibit the distribution, use or release of stored water from UKL as directed in the October 13, 2020 order.

The rules of the Water Resources Commission contained in OAR Chapter 690 Division 250 apply to distribution of water in accordance with the ACFFOD. "Use of legally stored water is governed by the water rights, if any, which call on that source of water" but the rule does not preclude the possibility that other authorities may also govern.[19]

With regard to regulation of surface water pursuant to a complaint of water shortage or unlawful use, the "watermaster may begin regulation if investigation reveals a valid complaint of water shortage or unlawful use."[20] In this case, the contemplated release of stored water through the Link River Dam may reveal a valid complaint of water shortage, but the Marion County Circuit Court demands an order before the Department's investigation is completed. In this case, it is also not clear that every release of stored water other than "for a permitted purpose by users with existing water rights of record or determined claims to use the Stored Water in UKL" is thereby "unlawful."

ORS 540.740 directs that any person "who may be injured by the action of any watermaster" appeal to the circuit court for an injunction. The injunction, "shall only be issued in case it can be shown at the hearing that the watermaster has failed to carry into effect the order of the Water Resources Commission or decrees of the court determining the existing rights to the use of water." In this case, there is neither an order of the Water Resources Commission nor a decree of the court determining the existing rights to the use of water. Notwithstanding whether there is injury,[21] the statute does not support the action demanded by the Marion County Circuit Court.

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[19] OAR 690-250-0150(4).

[20] OAR 690-250-0100(2).

[21] This order is not intended to waive respondents' assertion that the Circuit Court lacks any evidence that KID has standing under ORS 540.740 or has established injury within the meaning of ORS 540.740 or any other defense.

V. ORDER

1. The Bureau is ordered to immediately preclude or stop the distribution, use or release of stored water from the UKL, in excess of amounts that may be put to beneficial use under KA 1000 downstream of the Link River Dam.

2. For the purposes of this order, the term "existing water rights of record" has the meaning provided in ORS 540.045(4). The term "determined claim" has the meaning provided in Section 1, chapter 445, Oregon Laws 2015 (which is published in the Oregon Revised Statutes as a note following ORS 539.170).

3. Nothing in this order alters, relieves or releases any person, state, or federal agency from any and all rights, duties or obligations arising from other sources of law including without limitation other state laws or rules, federal laws and related federal agency regulations, federal or state court orders, or contracts.

DATED this 6th day of April, 2021.

THOMAS M. BYLER, Director
Oregon Water Resources Department

THE SECRETARY OF THE INTERIOR
WASHINGTON

APR 08 2021

Memorandum

To: Deputy Solicitor – Indian Affairs[1]
Principal Deputy Assistant Secretary – Water and Science
Principal Deputy Assistant Secretary for Fish and Wildlife and Parks
Principal Deputy Assistant Secretary – Indian Affairs
Senior Counselor to the Secretary

From: Secretary

Subject: Withdrawal of Klamath Project-Related Memoranda, Letters, and Analyses

On January 20, 2021, President Biden signed Executive Order (EO) 13990, entitled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," 86 Fed. Reg. 7037 (Jan. 25, 2021). EO 13990 affirms the new administration's commitment to organize and deploy the full capacity of its agencies to combat the climate crisis, increasing resilience to the impacts of climate change; protecting public health; conserving our lands, waters, and biodiversity; and delivering environmental justice. Among other things, the EO directs agencies to "immediately review and, as appropriate and consistent with applicable law, take action to address" certain regulations or other agency actions that conflict with national objectives set forth in the EO. The Biden-Harris administration has also made clear its commitment to respect Tribal sovereignty and self-governance and to fulfill Federal trust and treaty responsibilities to Tribal Nations through regular, meaningful, and robust consultation.

The Klamath Basin in southern Oregon and northern California is facing one of the worst drought years in 4 decades. Water flowing from the Upper Klamath Lake and in the Klamath River is critically important to communities in this region, including farmers and ranchers, sport and commercial fishermen, and multiple Tribes in the Klamath Basin that depend on these waters, fisheries, and other natural resources for their livelihoods. Given the dire and unprecedented drought conditions that we are facing, we know that difficult decisions will need to be made in the coming days and weeks to address water shortages. Through this memorandum, I am directing each of you to work collaboratively, across our agency and across the Federal Government, and with our State, local, Tribal, and community partners to identify steps that can be taken to minimize the impacts of upcoming water allocation decisions and develop a long-term plan to facilitate conservation and economic growth in the Klamath Basin.

[1] The Principal Deputy Solicitor is recused from this matter.

Consistent with these principles, I hereby withdraw the following memoranda, letters, and analyses related to the Bureau of Reclamation's Klamath Project issued during the previous administration:

- August 19, 2020, Memorandum to File re: "Reclamation Decision on Yurok Tribe's Request for Boat Dance Flows," to the extent it may have precedential effect on future operations.
- October 28, 2020, Memorandum from Carter L. Brown, Associate Solicitor – Division of Water Resources and Lance C. Wenger, Regional Solicitor – Pacific Southwest to Daniel H. Jorjani, Solicitor re: "An Updated Review of Legal Issues concerning the United States Bureau of Reclamation Operation of the Klamath Project" (Solicitor Jorjani signed and concurred on October 29, 2020).
- November 12, 2020, Letters from David Bernhardt to Paul Simmons, Klamath Water Users Association, and Nathan Rietmann, Rietmann Law PC, respectively, re: "Klamath Project Water Contracts and the Endangered Species Act."
- January 2021 Reassessment of U.S. Bureau of Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act.
- January 14, 2021, Memorandum from Solicitor to Secretary re: Analysis of Klamath Project contracts to determine discretionary authority in accordance with the November 12, 2020, Letter of the Secretary of the Interior.
- January 14, 2021, Memorandum from Solicitor to Secretary re: "Use of Water Previously Stored in Priority for Satisfaction of Downstream Rights."
- January 16, 2021, Letters from David Bernhardt to Paul Simmons, Klamath Water Users Association, and Nathan Rietmann, Rietmann Law PC, respectively, re: completion of analysis based on November 12, 2020, letter (enclosing January 14, 2021, memoranda and January 2021 reassessment).

These documents were issued without government-to-government consultation with affected Tribes and do not reflect the current administration's goals for long-term water recovery and economic restoration in this region. The documents also conflict with longstanding Departmental positions and interpretation of governing law and should not be relied upon for any purpose. My directive is made under the authority of section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), 209 DM 3.2, and other applicable authorities.[2]

[2] A 2018 Operations Plan and 2020 Interim Operations Plan (IOP) currently govern Klamath Project operations and serve as the basis for a negotiated stay of proceedings in *Yurok Tribe, et al. v. U.S. Bureau of Reclamation, et al.*, Civ. No. 3:19-cv-04405-WHO (N.D. Cal.). The IOP, the terms of which were agreed upon by the parties to the litigation (including the Klamath Water Users Association, representing Klamath Project irrigators), is intended to remain effective through September 2022. The majority of the memoranda being withdrawn here, in contrast, was intended to guide the ongoing Endangered Species Act consultation, which is not expected to reach completion until 2022. Reclamation has informed interested parties that it is evaluating operations under the IOP in 2021 in light of extreme drought conditions and has not otherwise altered operations or sought to change the 2018 Operations Plan and/or 2020 IOP based on the new analyses.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

KLAMATH IRRIGATION DISTRICT, Petitioner, v. **OREGON WATER RESOURCES DEPARTMENT**, *an agency of the state of Oregon*, **THOMAS BYLER**, *in his official capacity as Director of Oregon Water Resources Department*, and **DANETTE WATSON**, *in her official capacity as Watermaster for the Oregon Water Resources Department*, Respondents.	Case No. 20CV17922 GENERAL JUDGMENT **ORS 20.140 - State fees deferred at filing**

On October 13, 2020, the Court ruled on petitioner's second claim for an injunction under ORS 540.740 and issued an Order memorializing the Court's final decision on that claim. A copy of the Order is attached hereto and incorporated herein for the convenience of the Court and the parties.

On May 26, 2021, this matter came before the Court on respondents' Motion for Summary Judgment on Petition to Compel Agency Action, which was the first claim for relief in the Complaint. Nathan R. Rietmann, Attorney at Law, appeared for petitioner. Senior Assistant Attorney General Darsee Staley appeared for respondents.

Having reviewed the submissions and heard the arguments of the parties, and being fully informed in the premises, the Court issued its ruling from the bench on the first claim, granting respondents' Motion for Summary Judgment, designating petitioner as the prevailing party on

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

the first claim, and directing the parties to prepare a general judgment. For the reasons set forth by the Court on the record:

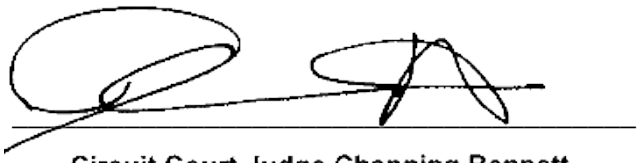
IT IS HEREBY ADJUDGED

1. The first claim is dismissed; and

2. Petitioner is designated as the prevailing party on the first claim; and

3. The order dated October 13, 2020 constitutes the Court's final ruling on the second claim.

Signed: 6/14/2021 10:23 AM



Circuit Court Judge Channing Bennett

Submitted by: Darsee Staley
Senior Assistant Attorney General
Attorneys for Respondents

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

STATE OF OREGON
Marion County Circuit Courts
OCT 13 2020
FILED

Verified Correct Copy of Original 10/13/2020.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

KLAMATH IRRIGATION DISTRICT,

Petitioner,

v.

OREGON WATER RESOURCES DEPARTMENT, *an agency of the state of Oregon,* **THOMAS BYLER,** *in his official capacity as Director of Oregon Water Resources Department,* and **DANETTE WATSON**, *in her official capacity as Watermaster for the Oregon Water Resources Department*

Respondent.

Case No. 20CV17922

ORDER GRANTING PETITIONER'S PARTIAL MOTION FOR SUMMARY JUDGMENT AS TO COUNT 2

THIS MATTER came before the Court on the *Complaint for Declaratory and Injunctive Relief* ("Complaint") filed by Petitioner Klamath Irrigation District ("KID") on May 14, 2020. The Second Claim for Relief set forth in the Complaint sought an injunction pursuant to ORS 540.740 against Danette Watson, in her official capacity as the Oregon Water Resources Department's Watermaster for District 17. On May 29, 2020, Petitioner KID filed a "*Petitioners' Motion for Partial Summary Judgment"* on its Second Claim for Relief as well as supporting declarations. On June 10, 2020, Respondent Watson filed her "*Response to Motion for Summary Judgment and Cross-Motions for Judgment (Injunction Claim)"* and supporting declarations. On June 12, 2020, Petitioner KID filed a "*Motion for Temporary Restraining Order*" and supporting declarations. Both parties thereafter made written submissions in support and opposition to the Motion for Temporary Restraining Order, which they also directed at the cross-motions for summary judgment on Petitioners' Second Claim for Relief. Oral Arguments were held on June 18, 2020. The Court issued a preliminary opinion on July 30, 2020.

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The Court invited and received additional briefing and held further Oral Argument on August 27, 2020. The Parties subsequently filed additional briefings which were accepted and reviewed by the Court. The Court issued its Amended Opinion letter on September 30, 2020. A copy of the Court's September 30, 2020 Amended Opinion Letter is attached hereto and is incorporated herein by reference.

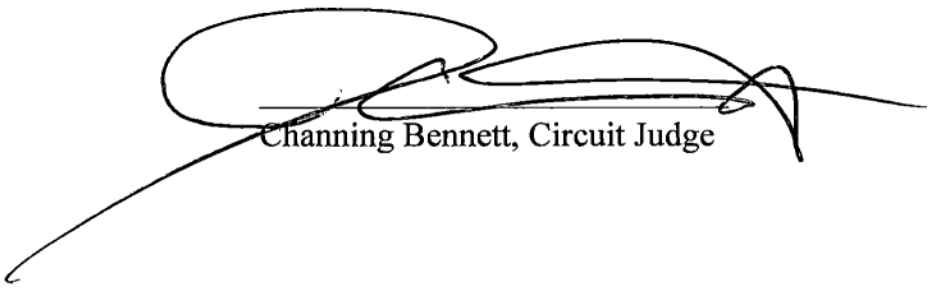
NOW, THEREFORE, IT IS HEREBY ORDERED:

Accordingly, pursuant to ORS 540.740, Watson is ordered to immediately stop the distribution, use and/or release of Stored Water from the UKL without determining that the distribution, use and/or release is for a permitted purpose by users with existing water rights of record or determined claims to use the Stored Water in the UKL.

The term "existing water rights of record" has the meaning provided in ORS 540.045(4). The term "determined claim" has the meaning provided in Section 1, chapter 445, Oregon Laws 2015 (which is published in the Oregon Revised Statutes as a note following ORS 539.170).

IT IS SO ORDERED.

DATED this 13th day of October, 2020.



Channing Bennett, Circuit Judge

CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OR 97309-0869

CHANNING BENNETT
Circuit Court Judge
PHONE: (503) 588-7950
FAX: (503) 588-5115

Verified Correct Copy of Order - 10/13/2020
Verified Correct Copy of Order - 10/2/2020

STATE OF OREGON
Marion County Circuit Courts
OCT 02 2020
FILED

October 2, 2020

AMENDED OPINION

Nathan Rietmann
Attorney at Law
nathan@rietmannlaw.com

Darsee Staley
Assistant Attorney General
darsee.staley@doj.state.or.us

Sent via email only

Re: KID v. Oregon Water Resources Department, et al
Case No.: 20CV17922

Counsel:

This matter came before the court for hearing on June 18, 2020 on Petitioner Klamath Irrigation District's (KID) Motions for Temporary Restraining Order (TRO) and Motion for Partial Summary Judgment; and Respondents' Oregon Water Resources Department (OWRD), Byler and Watson's Cross Motion for Summary Judgment. The Court reviewed the Motions, Responses and Replies of each of the respective parties and had the benefit of oral argument by counsel. At the beginning of oral argument, Petitioner opted to forego hearing on the TRO as it was wholly subsumed by the Motion for Partial Summary Judgment. The Court issued an Opinion Letter on August 18, 2020 and later invited the parties to present comment and/or additional arguments related to the Opinion, the proposed forms of order, and proposed form of limited judgment. Oral argument was held on August 27, 2020 and the parties provided supplemental briefings both before and after the second oral argument. Having reviewed the pleadings with attached affidavits; heard oral argument; heard oral argument on the court's preliminary opinion; reviewed the court's file and being fully advised on the premises, for the reasons more fully articulated below, Petitioners Motion for Partial Sum Judgment is GRANTED; and Respondents' Cross Motion for Summary Judgment is DENIED.

Verified Correct Copy of Original 10/13/2020
Verified Correct Copy of Original 10/2/2020

FINDING OF FACTS AND CONCLUSIONS OF LAW

This case involves the distribution and use of Stored Water in the Upper Klamath Lake Reservoir (UKL). Stored Water in the UKL is the property of the People of the State of Oregon. See ORS 536.007(12) and ORS 537.110.

The UKL and Link River Dam, one of several dams which control water in the UKL, are part of the United States Bureau of Reclamation's (the "Bureau") Klamath Project as established by Federal and State Law. The Bureau contracts with the State of Oregon, through the OWRD, to manage the Klamath Project. The Bureau has a right to store water in the UKL but does not have an established right or an OWRD issued permit or license allowing for the use of Stored Water in the UKL. See ORS 537.147. Stored Water is a separate and distinct water source under Oregon law. See inter alia ORS 537.336(4), ORS 537.143, and ORS 537.147. ORS 536.007 defines the word "person" to include "the federal government and any agency thereof." Thus, the Bureau is a "person" required to obtain a permit in order to use stored water in the UKL pursuant to 537.147

Petitioner KID is an Irrigation District and quasi-municipal corporation organized under ORS Chapter 545. Plaintiff KID has a secondary use permit, issued by OWRD, allowing the use of Stored Water in the UKL, for Irrigation, a beneficial use. KID, and the members it serves, have a property interest in the Stored Water retained in the UKL. Respondents argue that because Petitioners did not assert at the time of filing, that they have been denied any portion of their permitted allocation of water, they lack standing to challenge the Respondents' release of Stored Water for the unpermitted use by the Bureau.

Respondents' position presents the problem of allowing the Respondents' conduct to escape judicial review. The Respondents' argue that Petitioner only has standing if there is available water at the time Petitioner is permitted to use the water (throughout the irrigation season) and they are deprived of their share of the available water. Respondent correctly states that Petitioner is only entitled to their allotment of water, if water is available. However, the logical conclusion of Respondents' position is that if they allow release to the Bureau, who has no established right or permit to use the Stored Water, and there is no water left for irrigation, then Petitioner has not been deprived of their seasonal allotment because there was no water available at the time of need. Simply stated, Respondents' position is that Petitioners, who have at minimum a beneficial interest, must stand without recourse, while officials of the State of Oregon allow release of Stored Water, contrary to statute, potentially leaving little to nothing for irrigation use. KID, and the landowners it serves, have an established water right (more fully described below) and a secondary use permit, to use Stored Water in the UKL. The Respondents release of Stored Water from the UKL for use by the Bureau, without an established right, permit or license to use the Stored Water, constitutes a Waste.

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Petitioner has standing to challenge Respondents' Waste of Stored Water in which Petitioner has a permitted, beneficial interest.

In 20cv15606, Klamath Irrigation District v. Oregon Water Resources Department, et al, KID filed for an Alternative Writ of Mandamus asking this Court to Order OWRD to take exclusive charge of the UKL pursuant to ORS 540.210. KID asserted, as they do in the instant litigation, that Respondents were allowing the Bureau to use Stored Water from the UKL via release through the Link River Dam, with no established right to do so. KID asserted that the Bureau's unpermitted use of Stored Water in the UKL impaired KID's right to use Stored Water. After hearing, the Alternative Writ of Mandamus was allowed. On April 23, 2020, OWRD, Byler and Watson confirmed that they had complied with the court's Order and took exclusive charge of the UKL pursuant to ORS 540.210. Having taken exclusive charge of the UKL, ORS 540.210 requires OWRD to take charge for the "purpose of dividing or distributing the water therefrom in accordance with the respective and relative rights of the various users of water from the ditch or reservoir and shall continue the work until the necessity therefore shall cease to exist." See ORS 540.210(2)

Notwithstanding having exclusive charge of the UKL and a statutory duty to divide or distribute water from the UKL "in accordance with the respective and relative rights of the various users of water from the . . . reservoir. . ." Respondents' continued to allow the Bureau to use Stored Water from the UKL despite having failed to determine whether the Bureau had any right to the use of the Stored Water. The instant suit was brought when KID was notified that the Bureau was planning to and did release large volumes of Stored Water from the UKL without an established right to use that water. KID has asserted that the Bureau has NO established or permitted right to use the Stored Water in the UKL. The Respondents have not rebutted this assertion as required by ORCP 47C. Nor have Respondents determined the respective and relative rights of the various users of UKL waters, despite a clear statutory duty to do so.

The parties agree that Natural Flow and Stored Water is scarce in the Klamath Basin and all acknowledge that water rights in the Klamath Basin has been the subject of voluminous and vigorous litigation in both State and Federal Courts for more than a century. There is no dispute that KID holds a secondary use permit. KID asks this Court to order that the Amended and Corrected Finding of Fact and Order of Determination (ACCFOD) adjudication, which is currently pending approval in the Klamath Co Circuit Court, is the final determination of the respective and relative rights of the various water users of the UKL. Despite arguing in 20cv15606 and through summary judgment in the instant case that the ACCFOD does not apply and should not be considered or imposed by this Court, at oral arguments, on August 27, 2020, after issuance of the Court's Preliminary Opinion, Respondents have reversed their position

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and agree that the ACCFOD is binding on all parties to this dispute. Accordingly, the Court adopts the ACCFOD as binding on this dispute to determine the respective and relative rights of the various users.

All water within the state from all sources of water supply belongs to the public. ORS 537.110. Subject to existing rights, and except as otherwise provided in ORS chapter 538, all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise. ORS 537.120. Unless specifically exempted, all beneficial uses of water require a permit for appropriation. ORS 537.130. The Water Rights Act allows for the issuance of limited licenses to use or store surface or ground water. ORS 537.143. The Water Rights Act also allows for issuance of a permit to use stored water. ORS 537.147. No party has provided this court with law or fact which allows the Bureau the right to use Stored Water in the UKL without a permit or license. To the contrary, ORS 540.720 provides "No person shall use without authorization water to which another person is entitled, or willfully waste water to the detriment of another. The possession or use of such water without legal right shall be prima facie evidence of the guilt of the person using it."

Despite taking exclusive charge of the UKL pursuant to 540.210, Respondents have failed to determine the respective and relative rights of the various users of Stored Water retained in the UKL. Respondents have thus far refused to apply the ACCFOD agreement despite agreeing that it does, in fact, determine the respective and relative priority for dividing and distributing water in the UKL. The ACCFOD has been binding on the Petitioners and Respondents since 2013.

Despite having taken exclusive control of the UKL pursuant to ORS 540.210, as required by order of this Court in 20cv15606, and knowing that the ACCFOD was binding on the parties to this dispute, Respondents have wrongfully allowed the release of Stored Waters from the UKL for uses by the Bureau without Respondents determining whether the Bureau had a right, permit, or license to appropriate the Stored Water in the UKL.

Respondents asserted at oral argument on August 27, 2020 that pursuant to ORS 540.045(3), the unpermitted release of Stored Water by the Bureau converted the Stored Water to Natural Flow and thus made the release permissible. That position is logically flawed and ignores the plain reading of ORS 540.045(3) and the plain requirements of the Oregon Water Rights Act. ORS 540.045(3) reads:

> "For purposes of regulating the distribution or use of water, any stored water released in excess of the needs of water rights calling on that stored water shall be considered natural flow, unless the release is part of a water

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exchange under the control of, and approved by, the watermaster."

ORS 540.045(3) clearly describes situations where Stored Water is released as part of a regulated distribution or use. If Stored water is distributed pursuant to , an established, permitted or licensed right, but is not wholly consumed by the parties with and established, permitted or licensed right, then the excess Stored Water becomes part of the natural flow of the Stream. Nothing in ORS 540.045(3) can be read to allow OWRD or a Watermaster to allow the distribution or release of Stored water to any party who does not have an established right, permit or license to use the Stored Water. The Court has reviewed the entirety of the Oregon Water Rights Act and has been unable to identify any opt-out provision that would allow Respondents to allow the distribution or use of water to any party, including the Federal Government, without an established right, permit or license to use Oregon Water.

Respondents' failure to prevent the Bureau from using Stored Water in the UKL, without an established right, permit or license, is a deprivation of a precious resource belonging to the People of Oregon. Respondents' failure is also an infringement of property rights of established users, permittees and licensees. Respondent Watson has been fully apprised of and is aware of these facts. Despite actual knowledge, Watson has allowed the release of Stored Water through the Link River Dam for use by the Bureau without an established right, permit or license to use the Stored Water in the UKL. Watson has failed to carry into effect the ACCFOD and this Court's prior Order.

At oral argument on August 27, 2020, Respondents asserted that this Court's order implied duties, responsibilities, and abilities that Watson, the Watermaster, is not legally authorized to exercise or to assert control over areas and parties outside of her jurisdiction. To the Contrary, this Order finds that Watson is in violation of her duties for her willful failure to carry out her duties as Watermaster to apply the ACCFOD, to perform her duties under ORS 540.210 pursuant to this Court's prior order in 20cv15606, and ultimately failed to prevent the Bureau from using the Stored Water in the UKL without an established right, permit or license. The Watermaster has a statutory duty and authority to enforce those duties pursuant to ORS Chapter 540. No more. No less. What is not present in ORS Chapter 540 is any provision that allows the Watermaster to simply fail or refuse to perform the duties given her by the legislature.

Accordingly, pursuant to ORS 540.740, Watson is ordered to immediately stop the distribution, use or release of Stored Water from the UKL without first determining that the distribution, use or release is for a permitted purpose by users with an established right, license or permit to use the Stored Water in the UKL.

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Attached, please find the Court's proposed form of Order. The parties may submit objections or proposed revisions on or before October 9, 2020 at 5pm. As previously discussed, determination of summary judgment on Count 2 is not appropriate for entry of a limited judgment, because the parties are identical and the same factual and legal issues are present and remain at issue in Count 1.

Very truly yours,

Channing Bennett
Circuit Court Judge

mh

eC: Peter Frost, Esquire
Karl Anuta, Esquire

CERTIFICATE OF READINESS

This proposed **GENERAL JUDGMENT** is ready for judicial signature because:

1. [ ] Each party affected by this order or judgment has stipulated to the order or judgment, as shown by each opposing party's signature on the document being submitted.

2. [X] Each party affected by this order or judgment has approved the order or judgment, as shown by each party's signature on the document being submitted or by written confirmation of approval sent to me.

3. [ ] I have served a copy of this order or judgment on each party entitled to service and:

a. [ ] No objection has been served on me.

b. [ ] I received objections that I could not resolve with a party despite reasonable efforts to do so. I have filed a copy of the objections I received and indicated which objections remain unresolved.

c. [ ] After conferring about objections, [role and name of objecting party] agreed to independently file any remaining objection.

4. [ ] Service is not required pursuant to subsection (3) of this rule, or by statute, rule, or otherwise.

5. [ ] This is a proposed judgment that includes an award of punitive damages and notice has been served on the Director of the Crime Victims' Assistance Section as required by subsection (5) of this rule.

6. [ ] Other:

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

DATED June 10, 2021.

s/ Darsee Staley

DARSEE STALEY #873511
Senior Assistant Attorney General
Trial Attorney
Tel (971) 673-1880
Fax (971) 673-5000
Darsee.Staley@doj.state.or.us
Of Attorneys for State of Oregon

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

CERTIFICATE OF SERVICE

I certify that on June 10, 2021, I served the foregoing **GENERAL JUDGMENT** upon the parties hereto by the method indicated below, and addressed to the following:

Nathan R. Rietmann
Rietmann & Rietmann, LLP
1270 Chemeketa St. NE
Salem, OR 97301
Attorneys for Klamath Irrigation District

___ HAND DELIVERY
___ MAIL DELIVERY
___ OVERNIGHT MAIL
_X_ SERVED BY EMAIL

s/ Darsee Staley
DARSEE STALEY #873511
Senior Assistant Attorney General
Trial Attorney
Tel (971) 673-1880/Fax (971) 673-5000
Darsee.Staley@doj.state.or.us
Of Attorneys for Oregon Water Resources Department, Thomas Byler and Danette Watson

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

United States Department of the Interior

BUREAU OF RECLAMATION
Klamath Basin Area Office
6600 Washburn Way
Klamath Falls, OR 97603-9365

IN REPLY REFER TO:

KO-300
2.2.4.22 (WTR-4.00)

APR 11 2022

VIA ELECTRONIC MAIL AND USPS

Honorable Joe James, Chairman
Yurok Tribe
P.O. Box 1027
Klamath, California 95548-1027

Subject: Klamath Project 2022 Annual Operations Plan and Water Supply Availability

Dear Chairman James:

This letter is to inform you that the Bureau of Reclamation (Reclamation) has released the enclosed Klamath Project (Project) 2022 Annual Operations Plan (Plan) which provides further information regarding the available Project water supply during the 2022 spring/summer irrigation season (April 15 through September 30[1]).

In late February, Reclamation initiated the meet and confer provisions of Term and Condition (T&C) 1A of National Marine Fisheries Services (NMFS) *Section 7(a)(2) Biological Opinion, and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response* (NMFS 2019 BiOp) issued on March 29, 2019, and T&C 1c of the U.S. Fish and Wildlife Service (USFWS; collectively the Services) *Biological Opinion on the Effects of the Proposed Interim Klamath Project Operations Plan, effective April 1, 2020, through September 30, 2022, on the Lost River and Shortnose Sucker issued on April 10, 2020* (USFWS 2020 BiOp; collectively the BiOps). Since that time, Reclamation has engaged in the meet and confer process and has coordinated with stakeholders including Klamath Basin Tribes (Yurok, Hoopa Valley, Karuk, Klamath, , and Quartz Valley tribes, and Resighini Rancheria), the Klamath Water Users Association, Project irrigation and drainage districts, the Services, Oregon Water Resources Department, Bureau of Indian Affairs, PacifiCorp, and leadership from the Department of the Interior and the Department of Commerce regarding potential actions Reclamation can take to adaptively manage Project operations in response to the ongoing extreme drought, now in its third consecutive year, afflicting the Klamath Basin.

As a result of the historically dry hydrologic conditions, competing needs and multiple federal legal requirements, Reclamation has determined that the Project Supply allocation from UKL and the Klamath River for the 2022 spring/summer irrigation season will be insufficient to provide full deliveries to

[1] It is recognized that although the operating season and water year ends on September 30 of each year, final spring/summer irrigation diversions continue until mid-November to finish crop productions.

Repayment and Settlement Contractors ("A" Contractors) and at this time no water will be available for other Project contractors.

As described in the Plan, and as a result of the extensive meet and confer process, Reclamation determined it is necessary to make temporary adjustments to the Interim Operations Plan for the 2022 spring/summer operating season resulting in the 2022 Temporary Operating Procedures (2022 TOP). Under the 2022 TOP, which is informed by the Natural Resource Conservation Service forecast and real-time hydrological and biological data, Reclamation has determined that it will adaptively manage the Project Supply, as described further below, in a manner that will maintain the UKL at or above an end-of-season minimum water surface elevation of 4,138.15 feet. The Project Supply volume will be dependent on subsequent inflows to UKL and it is currently estimated that approximately up to 62,000 acre-feet (AF) of water will be available for delivery to the Project from UKL and the Klamath River. Irrigation deliveries will be initiated on or about April 15 and the Project Supply will be adaptively managed through a collaborative effort with Project contractors and the Services. The total diversions through the bypass valve at the A Canal headworks for the purpose of priming the A Canal and C Canal systems, which is currently estimated to be a total of approximately 650 AF, will be considered as part of the Project Supply.

Reclamation will continue to coordinate with the Services, Tribes, and Project irrigation and drainage districts throughout the remainder of the 2022 operating season regarding hydrologic conditions and Klamath Project operations.

The 2022 Annual Operations Plan and updated information regarding current water conditions and Project supplies will be posted on the Klamath Basin Area Office website (www.usbr.gov/mp/kbao/), as the information becomes available.

If you have any questions or concerns regarding this letter, please contact me at (541) 880-2588 or aheck@usbr.gov.

Sincerely,

Alan C. Heck, Jr.
Acting Area Manager

Enclosure

IDENTICAL LETTERS SENT TO:

Honorable Joe Davis, Chairman
Hoopa Valley Tribe
P.O. Box 1348
Hoopa, CA 95546-1348

Honorable Russell "Buster" Attebery, Chairman
Karuk Tribe
P.O. Box 1016
Happy Camp, CA 96039-1016

Honorable Don Gentry, Chairman
The Klamath Tribes
P.O. Box436
Chiloquin, OR 97624-0436

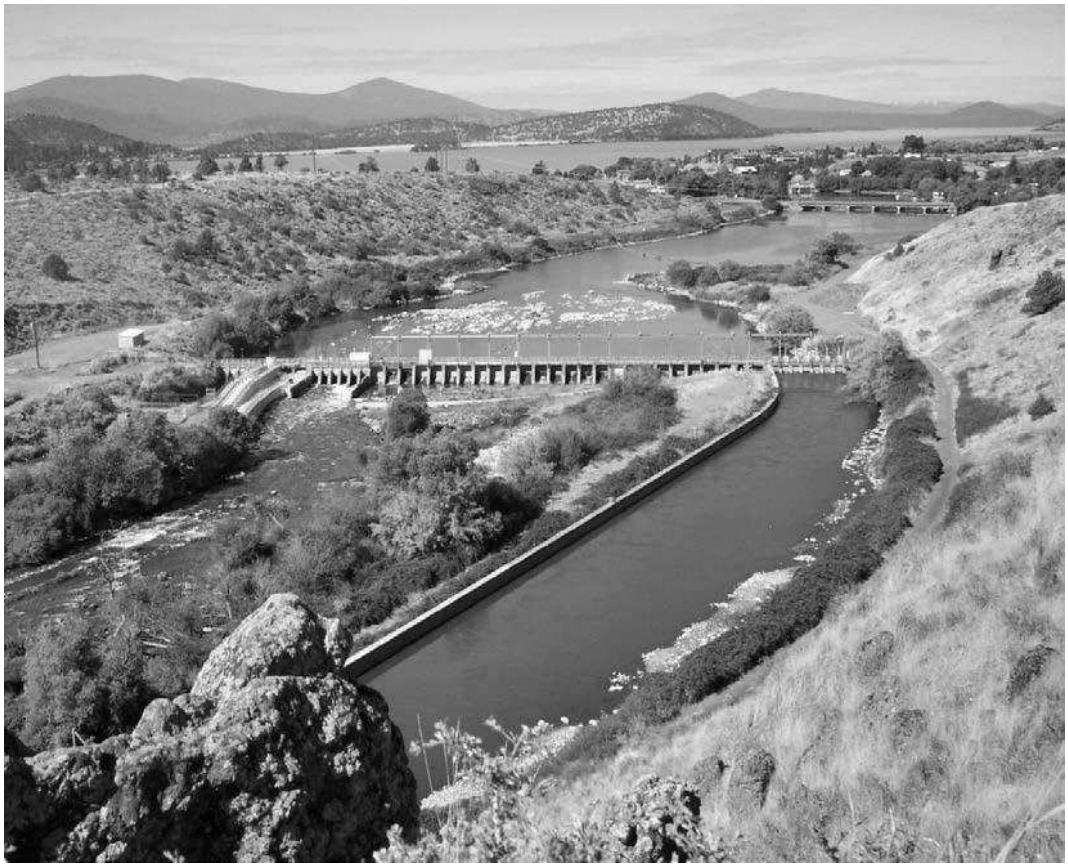
Megan Rocha, Executive Director
Resighini Rancheria
P.O. Box 529
Klamath, CA 95548

Honorable Harold Bennett, Chairman
Quartz Valley Tribe
13601 Quartz Valley Road
Fort Jones, CA 96032

BUREAU OF RECLAMATION

2022 Annual Operations Plan

Klamath Project, Oregon-California
Interior Region 10 - California-Great Basin



Mission Statements

The U.S. Department of the Interior protects and manages the Nation's natural resources and cultural heritage; provides scientific and other information about those resources; and honors its trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated Island Communities.

The mission of the Bureau of Reclamation is to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public.

Introduction

The Bureau of Reclamation's (Reclamation) Klamath Project (Project) delivers water for irrigation and related purposes to approximately 230,000 acres in southern Oregon and northern California. This 2022 Operations Plan (Plan) describes Project operations that are anticipated to occur between April 15 and September 30, 2022[1] (as further described below), based upon current and projected hydrologic conditions.

This Plan necessarily reflects and accounts for the ongoing extreme drought conditions for the third consecutive year afflicting the Klamath Basin. Inflows to the Project's reservoirs are among the lowest on record, and these extraordinary conditions compel Reclamation to take exceptional measures in operating the Project this year.

Specifically, Reclamation has determined that hydrologic conditions are currently preventing and will continue to prevent Reclamation from operating the Project consistent with the conditions anticipated to occur for species listed as threatened or endangered under the Endangered Species Act (ESA) in Upper Klamath Lake (UKL), Gerber and Clear Lake reservoirs, and the Klamath River, as specified in the National Marine Fisheries Service's (NMFS) *Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion, and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response* (2019 NMFS BiOp), issued on March 29, 2019, and the U.S. Fish and Wildlife Service's (USFWS; collectively Services) *Biological Opinion on the Effects of the Proposed Interim Klamath Project Operations Plan, effective April 1, 2020, through September 30, 2022, on the Lost River and Shortnose Sucker* (2020 USFWS BiOp), issued on April 10, 2020.

Under Term and Condition (T&C) 1A of the 2019 NMFS BiOp and T&C 1c of the 2020 USFWS BiOp, Reclamation is required to meet and confer with the Services in the event that hydrologic conditions in UKL and the Klamath River are anticipated to fall outside the scope of certain "boundary conditions" analyzed by the Services in their respective BiOps. Reclamation is further required to coordinate with the Services on the causative factors for such conditions and identify corrective actions and means by which Reclamation may adaptively manage to protect ESA listed species.

Consistent with the T&Cs in the Services' BiOps, Reclamation has been conferring with the Services since the process was initiated on February 25, 2022, on observed and anticipated hydrologic conditions and corresponding Project operations. Reclamation has engaged in the meet and confer process and has coordinated with stakeholders including Klamath Basin Tribes (Yurok, Hoopa Valley, Karuk, Klamath, Quartz Valley tribes and Resighini Rancheria), the Klamath Water Users Association, Project irrigation and drainage districts, the Services, Oregon Water Resources Department, the Bureau of Indian Affairs, PacifiCorp, and leadership from the Department of the Interior and the Department of Commerce. As a result, Reclamation determined it was necessary to make temporary adjustments to the 2020 IOP to adaptively manage operations for the remainder of water year 2022 as further described below, to address immediate and temporary competing needs,

[1] It is recognized that although the operating season and water year ends on September 30 of each year, final spring/summer diversions continue until mid-November to finish crop productions.

including the needs of all threatened and endangered species, in a reasonable and balanced manner informed by real-time hydrological and biological data.

2022 Project Operations

Amidst the current extraordinary hydrologic conditions, Reclamation must operate the Project based on real-time monitoring and forecasting information. The information that Reclamation will use to guide Project operations will include observed hydrologic conditions, inflow forecasts, and biological monitoring related to ESA-listed species and their designated critical habitat. Reclamation will continue to coordinate Project operations with the Services, and any deviations from the general operations described below will be addressed as they arise, in conference with the Services.

As a result of the historically dry hydrologic conditions, competing needs and multiple federal legal requirements, Reclamation has determined that the Project Supply allocation from UKL and the Klamath River for the 2022 spring/summer irrigation season will be insufficient to provide full deliveries to Repayment and Settlement Contractors ("A" Contractors) and at this time no water will be available for other Project contractors.

As in previous years, Reclamation retains discretion to update or amend this plan as conditions change or as information continues to become available. Reclamation will communicate substantive changes to the Plan to stakeholders in writing, which may affect previously estimated allocations among other material aspects of operations.

Upper Klamath Lake & Klamath River

Upper Klamath Lake

For the reasons previously described, Reclamation has determined that meeting the specific UKL water surface elevations identified as "boundary conditions" in the 2020 USFWS BiOp is not obtainable in 2022. Specifically, the UKL water surface elevation is currently below 4,142.0[2] feet (ft) and projections indicate that it: 1) is unlikely to reach 4,142.0 ft in April or May and 2) is likely to be less than 4,140.5 ft by July 15.

Reclamation currently projects that the UKL water surface elevation will not exceed 4,140.5 ft by July 15, even without Project deliveries or releasing a Surface Flushing Flow (SFF) in the Klamath River.

UKL will be operated such that water surface elevations will remain at or above 4,138.15 ft., exceeding the 2020 USFWS BiOp end of season minimum elevation of 4,138.00 ft. Reclamation will seek to augment UKL elevation in the event that favorable hydrology manifests through the summer, as described below.

[2] All elevations in this document are per Reclamation's established datum.

Klamath River

For the Klamath River, Reclamation has determined that the Environmental Water Account (EWA) distribution is expected to meet the expenditure rates identified in T&C 1A of the 2019 NMFS BiOp between March 1 and September 30, 2022, based on observed and projected river releases from UKL (for meeting Iron Gate Dam target flows).

Reclamation is not anticipating or proposing deviations to the minimum Klamath River target flows at Iron Gate Dam, analyzed in the 2019 NMFS BiOp, which consist of flows of 1,325 cubic feet per second (cfs) during the month of April; 1,175 cfs in May; 1,025 cfs in June; 900 cfs in July and August; and 1,000 cfs in September.

Surface Flushing Flow

Consistent with *Section 1.3.2.6.4 Disease Mitigation and Habitat Flows* of the NMFS 2019 BiOp, Reclamation is anticipating, to the extent possible under the UKL surface elevations and hydrologic conditions, implementation of a SFF on or around April 15, 2022. Releases at Link River Dam from UKL would be managed to produce a target flow event exceeding 4,200 cfs for approximately 24 hours at Iron Gate Dam. Reclamation will strive to maximize the peak flows during the SFF. Table 1 below indicates approximate peak flows proposed for the 2022 SFF event given current projections.

Table 1. Approximate targeted Surface Flushing Flow Rates (cfs) if implemented on or Around April 15 under the Natural Resource Conservation Service 50 percent Upper Klamath Lake Inflow Exceedance Forecast.

	April 15	April 16	April 17
Peak Flow (cfs)	4,200	3,200	4,050

To reduce potential effects to ESA-listed species (i.e., endangered Lost River and shortnose sucker populations) present in UKL and to address the duration that UKL is below fill trajectories, Reclamation will attempt to coincide the SFF with a hydrologic event. Further, Reclamation will implement accelerated ramp down rates during the SFF event. Reclamation will coordinate with the Services to monitor and integrate real-time conditions to ensure that peak SFF discharges (*see* Table 1) would be commensurate with the maximum discharge capability of Link River Dam and PacifiCorp's dams in the hydroelectric reach on days 1 and 3 for no less than 24 hours unless a greater magnitude can be achieved over a shorter duration.

Although Reclamation's analysis indicates that the SFF should not result in human health and safety and/or property concerns, if such concerns are encountered during implementation of the SFF event, it will be halted immediately.

Project Supply

Reclamation has determined that it will adaptively manage the Project Supply[3], as described further

[3] Project Supply is the volume of water available from UKL and the Klamath River for lands within the Klamath Project boundaries not served by the Lost River Basin (i.e., Clear Lake and Gerber reservoirs).

below, in a manner that will maintain the UKL at or above an end-of-season minimum water surface elevation of 4138.15 ft. The Project Supply volume will be dependent on subsequent inflows to UKL and is currently estimated at approximately up to 62,000 AF as a result of projected hydrologic conditions which currently align with as a result of the April 1, Natural Resource Conservation Service (NRCS) 50 percent UKL inflow forecast, trajectories observed in water year 2021, and borrowing up to 20,000 AF from PacifiCorp reservoirs.

Distribution

Irrigation deliveries will be initiated on or about April 15 and the Project Supply will be adaptively managed through a collaborative effort with Project contractors and the Services in a manner that will ensure UKL water surface elevations do not recede below 4,138.15 ft. at the end of the operating season. The actual available Project Supply will be dependent on observed inflows and UKL elevations during the spring/summer period. This adaptive management approach will require continual monitoring of all operational parameters and projections, and frequent communication with Project contractors and the Services to ensure that Project deliveries, coupled with releases to the Klamath River, do not cause UKL to be at any time reduced below elevation 4,138.15 ft.

Further, if observed cumulative UKL inflows and/or UKL elevations for any given operational week exceed expectations, the following action may be taken, as situationally appropriate. Increased volumes would be split, with 50 percent to remain in UKL to assist in providing a buffer in the end of season UKL elevation, with the remaining 50 percent to be distributed as Project Supply for irrigation use and/or refuge purposes, according to contract priorities.

In the event that observed inflows or UKL elevations do not materialize as forecasted, net inflow volumetric shortfalls will be calculated, and diversions for Project purposes would be reduced to a rate allowing UKL elevations to remain above 4,138.15 ft. If it is projected that a reduction in, or cessation of, Project diversions is insufficient to ensure a minimum UKL elevation of 4,138.15 ft., Reclamation would confer with NMFS to determine if a temporary reduction in releases from UKL could be instituted.

As the above distribution criteria for forecasted inflows is based on real-time observations, Reclamation would continue to monitor hydrologic conditions in coordination with the Services and conduct any additional environmental analysis as deemed appropriate.

Reclamation will continue to coordinate with the Services and Project contractors on Project diversions to address unforeseen circumstances that may arise this year. The estimated available water supply is tracked daily, with updates regarding remaining Project Supply to Project water users occurring approximately every week during the irrigation season or as needed. If the Project Supply must be curtailed, Reclamation will provide notification in writing.

Reclamation will also be coordinating with Project contractors on the need for a Project Drought Plan. Until such time that Reclamation releases a Drought Plan, adaptive management and resulting deliveries made to irrigators will occur in line with contractual priorities. To the extent that districts who are entitled to the supply decide not to split evenly or if otherwise all districts mutually agree to allocate the available supply (as defined by Reclamation in the Plan or as modified in subsequent plans) in a different manner of priority outside the contractual priorities, it is incumbent upon the districts

to carefully document such agreement and communicate it to Reclamation.

Canal Charging

No Project supply was available in 2021, therefore selected canals are being charged slowly before irrigation diversions occur. The longer charging period is allowing for additional monitoring to ensure canals remain in safe operating condition. The Klamath Irrigation District began priming the A Canal and C Canal systems to provide an extended period of re-saturating the earthen lining, which had been dry since the 2020 irrigation season. From March 1 through the April 15 start of Project deliveries, it is estimated that 644 AF will have been diverted into the A Canal, a quantity that will be considered as Project Supply.

PacifiCorp Borrow

Reclamation will work with PacifiCorp to borrow likely 15,000 AF, but up to 20,000 AF of water from their hydroelectric project reservoirs downstream of UKL to assist with implementation of the late summer 2022 Yurok Tribe's Ceremonial Boat Dance flow event. The borrowed water would be *paid back* so that PacifiCorp's downstream reservoirs can be returned to normal operating levels. Details on the *PacifiCorp pay back* would be determined through further coordination and agreement between Reclamation, the Services, and PacifiCorp with agreements to be finalized prior to fall 2022.

Real-Time Management

The real-time management approach consists of close monitoring and reporting of observed hydrologic conditions and will occur to assist Reclamation, the Services, and other affected parties in determining if further adaptive management actions are needed in response to evolving environmental conditions. Overall, using real-time monitoring and forecasting information, Reclamation will continue to meet and confer with the Services as necessary while updating and receiving input from affected Klamath Basin parties on the dynamic hydrologic conditions allowing timely action on opportunities to reduce risk to ESA-listed species, meet tribal trust responsibilities, and uphold contractual water supply obligations.

Clear Lake Reservoir

The estimated water supply available from Clear Lake Reservoir is based on several factors, including current hydrologic conditions and projected inflows for April through September, the end of September minimum elevation analyzed in the 2020 USFWS BiOp, as well as the rate and volume of irrigation releases and non-beneficial losses (e.g., evaporation and seepage). The estimated available water supply is tracked daily, with updates to Project water users occurring approximately every two weeks during the irrigation season or as needed.

As of April 6, 2022, the water surface elevation in Clear Lake Reservoir was 4,522.08 ft, representing a total volume of 59,400 AF of stored water. The end of September minimum water surface elevation in Clear Lake Reservoir analyzed under the 2020 USFWS BiOp is 4,520.60 ft. With the anticipated inflows and estimated evaporation and seepage rates, Reclamation estimates there will be no Project water available from Clear Lake Reservoir during the 2022 spring/summer irrigation

season. The average historic Project demand from Clear Lake Reservoir is approximately 35,000 AF, with a range of up to approximately 40,000 AF.

Gerber Reservoir

Similar to Clear Lake Reservoir, the estimated Project water supply available from Gerber Reservoir is based on several factors, including current hydrologic conditions, projected inflows for April through September, the end of September minimum elevation analyzed under the 2020 USFWS BiOp, as well as the rate and volume of irrigation releases and non-beneficial losses (e.g., evaporation and seepage). The estimated available water supply is tracked daily, with updates to Project water users provided approximately every two weeks during the irrigation season or as needed.

The water surface elevation of Gerber Reservoir, as of April 6, 2022, was 4,806.99 ft, representing a total volume of 11,413 AF of stored water. The end of September minimum water surface elevation in Gerber Reservoir analyzed in the 2020 USFWS BiOp is 4,798.10 ft. With the anticipated rates of evaporation and seepage, Reclamation estimates there will be approximately 7,000 AF of Project water available from Gerber Reservoir during the 2022 spring/summer irrigation season.

Lost River

Natural runoff and return flows in the Lost River may also be available at certain times for irrigation use within the Project. Diversions from the Lost River during the spring-summer irrigation season are not included in the calculation of the Project Supply available from UKL and the Klamath River. As such, the Project water supply from the Lost River is primarily constrained by the physical availability of water, primarily from return flows. Reclamation does not estimate the available supply from the Lost River during the spring/summer irrigation season, but rather allows Project water users to divert the supply as it becomes available, consistent with the terms of their respective contracts.

Other Operational Considerations

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Reclamation has entered into cooperative agreement #R21AC10334 with the Klamath Project Drought Response Agency (KPDRA); a joint powers state entity in Oregon and California organized in 2018 and comprised of representatives of Project districts. Their primary function is to work with Reclamation to administer programs to align water supply and demand on the Project pursuant to the Klamath Basin Water Supply Enhancement Act of 2000 (114 Stat. 2221) as amended (132 Stat. 3886 and 134 Stat. 976).

Reclamation is providing up to $20 million in funding to the KPDRA to administer a land idling "no irrigation" program in which irrigators will contract with the KPDRA to receive monetary compensation in lieu of Project water. Reducing demand for Project water in this way is expected to contribute to aligning Project Supply with demand.

Any additional programs administered by Reclamation and the KPDRA under the cooperative agreement are subject to Reclamation approval, which would be conditioned on the ability of the proposed program to align Project water supply and demand, available funding, and other considerations.

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Reclamation supports voluntary transfers of Project water as a means of promoting flexibility in managing water supplies and maximizing Project benefits. Accordingly, subject to its approval as described below, Reclamation will allow transfers of Project water, within the limits of applicable federal and state law.

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Water transfers within the Project will also be contingent, in part, upon the ability to accurately measure corresponding water use, on both the transferring and receiving lands, in order to ensure that the amount of water used does not exceed the associated total available duty.

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irrigation systems such as sprinklers or gated pipes, and employing "deficit" irrigation techniques, where water is applied at less than the full consumptive use demand of a particular crop type. Reclamation encourages Project water users to employ all available tools to conserve water and keep demands at a minimum, especially when water shortages exist.

To assist in on-field conservation efforts, Reclamation operates AgriMet stations in the Klamath Basin, which use site-specific weather data to estimate evapotranspiration (i.e., crop water use) for various crop types typically grown within the Project. This information can be used to identify the required amount of water to apply to a crop based on current weather conditions and growth stage. AgriMet crop water use charts for the Klamath Basin are updated each morning, and can be found online at:

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Lower Klamath National Wildlife Refuge Deliveries

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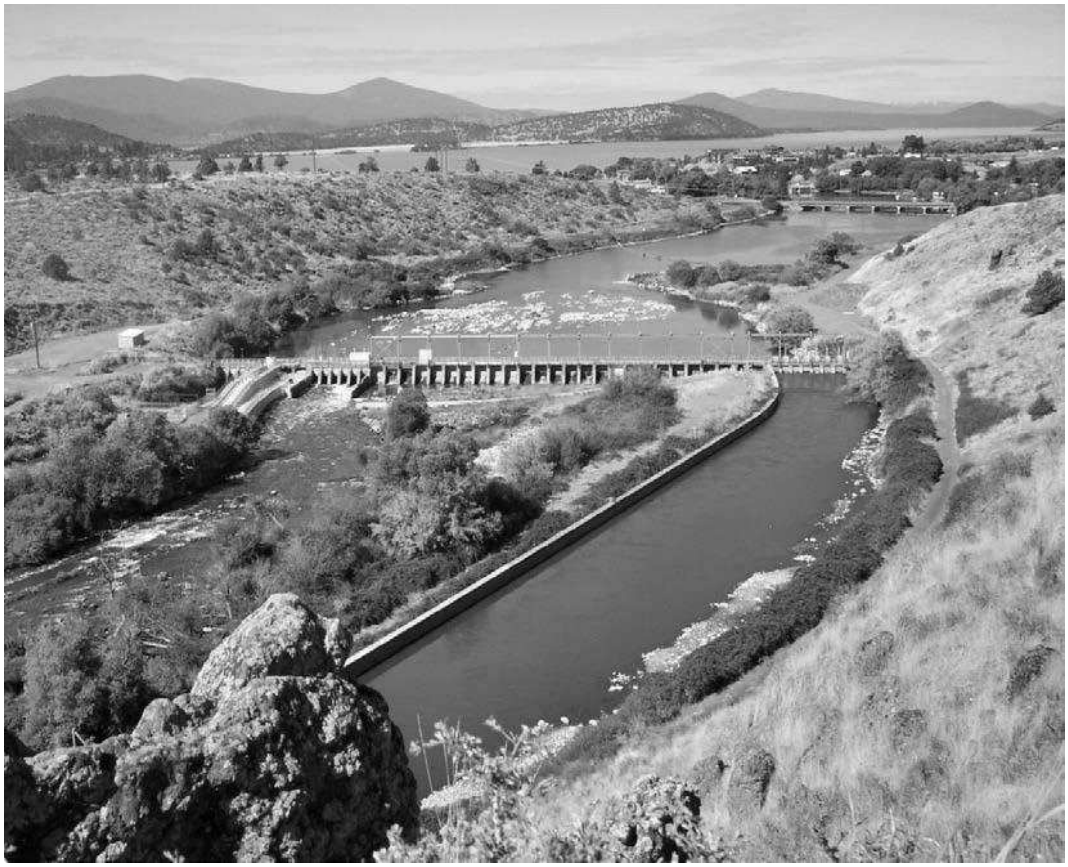
Voluntary transfers, exchanges, or other arrangements can also make water available to LKNWR. Subject to these conditions, LKNWR, including Area K, can use any portion of Project Supply, when available to the rest of the Project, through November 30.

Any water rights transferred to LKNWR pursuant to Oregon or California law, such as those water rights originally appurtenant to the Agency Lake and Barnes Ranch properties upstream of UKL, are separate from the water available to LKNWR from UKL under the Project Supply. USFWS has administrative responsibility over the exercise of these non-Project water rights.

BUREAU OF RECLAMATION

2022 Annual Operations Plan

Klamath Project, Oregon-California
Interior Region 10 - California-Great Basin



Mission Statements

The U.S. Department of the Interior protects and manages the Nation's natural resources and cultural heritage; provides scientific and other information about those resources; and honors its trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated Island Communities.

The mission of the Bureau of Reclamation is to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public.

Introduction

The Bureau of Reclamation's (Reclamation) Klamath Project (Project) delivers water for irrigation and related purposes to approximately 230,000 acres in southern Oregon and northern California. This 2022 Operations Plan (Plan) describes Project operations that are anticipated to occur between April 15 and September 30, 2022[1] (as further described below), based upon current and projected hydrologic conditions.

This Plan necessarily reflects and accounts for the ongoing extreme drought conditions for the third consecutive year afflicting the Klamath Basin. Inflows to the Project's reservoirs are among the lowest on record, and these extraordinary conditions compel Reclamation to take exceptional measures in operating the Project this year.

Specifically, Reclamation has determined that hydrologic conditions are currently preventing and will continue to prevent Reclamation from operating the Project consistent with the conditions anticipated to occur for species listed as threatened or endangered under the Endangered Species Act (ESA) in Upper Klamath Lake (UKL), Gerber and Clear Lake reservoirs, and the Klamath River, as specified in the National Marine Fisheries Service's (NMFS) *Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion, and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response* (2019 NMFS BiOp), issued on March 29, 2019, and the U.S. Fish and Wildlife Service's (USFWS; collectively Services) *Biological Opinion on the Effects of the Proposed Interim Klamath Project Operations Plan, effective April 1, 2020, through September 30, 2022, on the Lost River and Shortnose Sucker* (2020 USFWS BiOp), issued on April 10, 2020.

Under Term and Condition (T&C) 1A of the 2019 NMFS BiOp and T&C 1c of the 2020 USFWS BiOp, Reclamation is required to meet and confer with the Services in the event that hydrologic conditions in UKL and the Klamath River are anticipated to fall outside the scope of certain "boundary conditions" analyzed by the Services in their respective BiOps. Reclamation is further required to coordinate with the Services on the causative factors for such conditions and identify corrective actions and means by which Reclamation may adaptively manage to protect ESA listed species.

Consistent with the T&Cs in the Services' BiOps, Reclamation has been conferring with the Services since the process was initiated on February 25, 2022, on observed and anticipated hydrologic conditions and corresponding Project operations. Reclamation has engaged in the meet and confer process and has coordinated with stakeholders including Klamath Basin Tribes (Yurok, Hoopa Valley, Karuk, Klamath, Quartz Valley tribes and Resighini Rancheria), the Klamath Water Users Association, Project irrigation and drainage districts, the Services, Oregon Water Resources Department, the Bureau of Indian Affairs, PacifiCorp, and leadership from the Department of the Interior and the Department of Commerce. As a result, Reclamation determined it was necessary to make temporary adjustments to the 2020 IOP to adaptively manage operations for the remainder of water year 2022 as further described below, to address immediate and temporary competing needs,

[1] It is recognized that although the operating season and water year ends on September 30 of each year, final spring/summer diversions continue until mid-November to finish crop productions.

including the needs of all threatened and endangered species, in a reasonable and balanced manner informed by real-time hydrological and biological data.

2022 Project Operations

Amidst the current extraordinary hydrologic conditions, Reclamation must operate the Project based on real-time monitoring and forecasting information. The information that Reclamation will use to guide Project operations will include observed hydrologic conditions, inflow forecasts, and biological monitoring related to ESA-listed species and their designated critical habitat. Reclamation will continue to coordinate Project operations with the Services, and any deviations from the general operations described below will be addressed as they arise, in conference with the Services.

As a result of the historically dry hydrologic conditions, competing needs and multiple federal legal requirements, Reclamation has determined that the Project Supply allocation from UKL and the Klamath River for the 2022 spring/summer irrigation season will be insufficient to provide full deliveries to Repayment and Settlement Contractors ("A" Contractors) and at this time no water will be available for other Project contractors.

As in previous years, Reclamation retains discretion to update or amend this plan as conditions change or as information continues to become available. Reclamation will communicate substantive changes to the Plan to stakeholders in writing, which may affect previously estimated allocations among other material aspects of operations.

Upper Klamath Lake & Klamath River

Upper Klamath Lake

For the reasons previously described, Reclamation has determined that meeting the specific UKL water surface elevations identified as "boundary conditions" in the 2020 USFWS BiOp is not obtainable in 2022. Specifically, the UKL water surface elevation is currently below 4,142.0[2] feet (ft) and projections indicate that it: 1) is unlikely to reach 4,142.0 ft in April or May and 2) is likely to be less than 4,140.5 ft by July 15.

Reclamation currently projects that the UKL water surface elevation will not exceed 4,140.5 ft by July 15, even without Project deliveries or releasing a Surface Flushing Flow (SFF) in the Klamath River.

UKL will be operated such that water surface elevations will remain at or above 4,138.15 ft., exceeding the 2020 USFWS BiOp end of season minimum elevation of 4,138.00 ft. Reclamation will seek to augment UKL elevation in the event that favorable hydrology manifests through the summer, as described below.

[2] All elevations in this document are per Reclamation's established datum.

Klamath River

For the Klamath River, Reclamation has determined that the Environmental Water Account (EWA) distribution is expected to meet the expenditure rates identified in T&C 1A of the 2019 NMFS BiOp between March 1 and September 30, 2022, based on observed and projected river releases from UKL (for meeting Iron Gate Dam target flows).

Reclamation is not anticipating or proposing deviations to the minimum Klamath River target flows at Iron Gate Dam, analyzed in the 2019 NMFS BiOp, which consist of flows of 1,325 cubic feet per second (cfs) during the month of April; 1,175 cfs in May; 1,025 cfs in June; 900 cfs in July and August; and 1,000 cfs in September.

Surface Flushing Flow

Consistent with *Section 1.3.2.6.4 Disease Mitigation and Habitat Flows* of the NMFS 2019 BiOp, Reclamation is anticipating, to the extent possible under the UKL surface elevations and hydrologic conditions, implementation of a SFF on or around April 15, 2022. Releases at Link River Dam from UKL would be managed to produce a target flow event exceeding 4,200 cfs for approximately 24 hours at Iron Gate Dam. Reclamation will strive to maximize the peak flows during the SFF. Table 1 below indicates approximate peak flows proposed for the 2022 SFF event given current projections.

Table 1. Approximate targeted Surface Flushing Flow Rates (cfs) if implemented on or Around April 15 under the Natural Resource Conservation Service 50 percent Upper Klamath Lake Inflow Exceedance Forecast.

	April 15	April 16	April 17
Peak Flow (cfs)	4,200	3,200	4,050

To reduce potential effects to ESA-listed species (i.e., endangered Lost River and shortnose sucker populations) present in UKL and to address the duration that UKL is below fill trajectories, Reclamation will attempt to coincide the SFF with a hydrologic event. Further, Reclamation will implement accelerated ramp down rates during the SFF event. Reclamation will coordinate with the Services to monitor and integrate real-time conditions to ensure that peak SFF discharges (*see* Table 1) would be commensurate with the maximum discharge capability of Link River Dam and PacifiCorp's dams in the hydroelectric reach on days 1 and 3 for no less than 24 hours unless a greater magnitude can be achieved over a shorter duration.

Although Reclamation's analysis indicates that the SFF should not result in human health and safety and/or property concerns, if such concerns are encountered during implementation of the SFF event, it will be halted immediately.

Project Supply

Reclamation has determined that it will adaptively manage the Project Supply[3], as described further

[3] Project Supply is the volume of water available from UKL and the Klamath River for lands within the Klamath Project boundaries not served by the Lost River Basin (i.e., Clear Lake and Gerber reservoirs).

below, in a manner that will maintain the UKL at or above an end-of-season minimum water surface elevation of 4138.15 ft. The Project Supply volume will be dependent on subsequent inflows to UKL and is currently estimated at approximately up to 62,000 AF as a result of projected hydrologic conditions which currently align with as a result of the April 1, Natural Resource Conservation Service (NRCS) 50 percent UKL inflow forecast, trajectories observed in water year 2021, and borrowing up to 20,000 AF from PacifiCorp reservoirs.

Distribution

Irrigation deliveries will be initiated on or about April 15 and the Project Supply will be adaptively managed through a collaborative effort with Project contractors and the Services in a manner that will ensure UKL water surface elevations do not recede below 4,138.15 ft. at the end of the operating season. The actual available Project Supply will be dependent on observed inflows and UKL elevations during the spring/summer period. This adaptive management approach will require continual monitoring of all operational parameters and projections, and frequent communication with Project contractors and the Services to ensure that Project deliveries, coupled with releases to the Klamath River, do not cause UKL to be at any time reduced below elevation 4,138.15 ft.

Further, if observed cumulative UKL inflows and/or UKL elevations for any given operational week exceed expectations, the following action may be taken, as situationally appropriate. Increased volumes would be split, with 50 percent to remain in UKL to assist in providing a buffer in the end of season UKL elevation, with the remaining 50 percent to be distributed as Project Supply for irrigation use and/or refuge purposes, according to contract priorities.

In the event that observed inflows or UKL elevations do not materialize as forecasted, net inflow volumetric shortfalls will be calculated, and diversions for Project purposes would be reduced to a rate allowing UKL elevations to remain above 4,138.15 ft. If it is projected that a reduction in, or cessation of, Project diversions is insufficient to ensure a minimum UKL elevation of 4,138.15 ft., Reclamation would confer with NMFS to determine if a temporary reduction in releases from UKL could be instituted.

As the above distribution criteria for forecasted inflows is based on real-time observations, Reclamation would continue to monitor hydrologic conditions in coordination with the Services and conduct any additional environmental analysis as deemed appropriate.

Reclamation will continue to coordinate with the Services and Project contractors on Project diversions to address unforeseen circumstances that may arise this year. The estimated available water supply is tracked daily, with updates regarding remaining Project Supply to Project water users occurring approximately every week during the irrigation season or as needed. If the Project Supply must be curtailed, Reclamation will provide notification in writing.

Reclamation will also be coordinating with Project contractors on the need for a Project Drought Plan. Until such time that Reclamation releases a Drought Plan, adaptive management and resulting deliveries made to irrigators will occur in line with contractual priorities. To the extent that districts who are entitled to the supply decide not to split evenly or if otherwise all districts mutually agree to allocate the available supply (as defined by Reclamation in the Plan or as modified in subsequent plans) in a different manner of priority outside the contractual priorities, it is incumbent upon the districts

to carefully document such agreement and communicate it to Reclamation.

Canal Charging

No Project supply was available in 2021, therefore selected canals are being charged slowly before irrigation diversions occur. The longer charging period is allowing for additional monitoring to ensure canals remain in safe operating condition. The Klamath Irrigation District began priming the A Canal and C Canal systems to provide an extended period of re-saturating the earthen lining, which had been dry since the 2020 irrigation season. From March 1 through the April 15 start of Project deliveries, it is estimated that 644 AF will have been diverted into the A Canal, a quantity that will be considered as Project Supply.

PacifiCorp Borrow

Reclamation will work with PacifiCorp to borrow likely 15,000 AF, but up to 20,000 AF of water from their hydroelectric project reservoirs downstream of UKL to assist with implementation of the late summer 2022 Yurok Tribe's Ceremonial Boat Dance flow event. The borrowed water would be *paid back* so that PacifiCorp's downstream reservoirs can be returned to normal operating levels. Details on the *PacifiCorp pay back* would be determined through further coordination and agreement between Reclamation, the Services, and PacifiCorp with agreements to be finalized prior to fall 2022.

Real-Time Management

The real-time management approach consists of close monitoring and reporting of observed hydrologic conditions and will occur to assist Reclamation, the Services, and other affected parties in determining if further adaptive management actions are needed in response to evolving environmental conditions. Overall, using real-time monitoring and forecasting information, Reclamation will continue to meet and confer with the Services as necessary while updating and receiving input from affected Klamath Basin parties on the dynamic hydrologic conditions allowing timely action on opportunities to reduce risk to ESA-listed species, meet tribal trust responsibilities, and uphold contractual water supply obligations.

Clear Lake Reservoir

The estimated water supply available from Clear Lake Reservoir is based on several factors, including current hydrologic conditions and projected inflows for April through September, the end of September minimum elevation analyzed in the 2020 USFWS BiOp, as well as the rate and volume of irrigation releases and non-beneficial losses (e.g., evaporation and seepage). The estimated available water supply is tracked daily, with updates to Project water users occurring approximately every two weeks during the irrigation season or as needed.

As of April 6, 2022, the water surface elevation in Clear Lake Reservoir was 4,522.08 ft, representing a total volume of 59,400 AF of stored water. The end of September minimum water surface elevation in Clear Lake Reservoir analyzed under the 2020 USFWS BiOp is 4,520.60 ft. With the anticipated inflows and estimated evaporation and seepage rates, Reclamation estimates there will be no Project water available from Clear Lake Reservoir during the 2022 spring/summer irrigation

season. The average historic Project demand from Clear Lake Reservoir is approximately 35,000 AF, with a range of up to approximately 40,000 AF.

Gerber Reservoir

Similar to Clear Lake Reservoir, the estimated Project water supply available from Gerber Reservoir is based on several factors, including current hydrologic conditions, projected inflows for April through September, the end of September minimum elevation analyzed under the 2020 USFWS BiOp, as well as the rate and volume of irrigation releases and non-beneficial losses (e.g., evaporation and seepage). The estimated available water supply is tracked daily, with updates to Project water users provided approximately every two weeks during the irrigation season or as needed.

The water surface elevation of Gerber Reservoir, as of April 6, 2022, was 4,806.99 ft, representing a total volume of 11,413 AF of stored water. The end of September minimum water surface elevation in Gerber Reservoir analyzed in the 2020 USFWS BiOp is 4,798.10 ft. With the anticipated rates of evaporation and seepage, Reclamation estimates there will be approximately 7,000 AF of Project water available from Gerber Reservoir during the 2022 spring/summer irrigation season.

Lost River

Natural runoff and return flows in the Lost River may also be available at certain times for irrigation use within the Project. Diversions from the Lost River during the spring-summer irrigation season are not included in the calculation of the Project Supply available from UKL and the Klamath River. As such, the Project water supply from the Lost River is primarily constrained by the physical availability of water, primarily from return flows. Reclamation does not estimate the available supply from the Lost River during the spring/summer irrigation season, but rather allows Project water users to divert the supply as it becomes available, consistent with the terms of their respective contracts.

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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

YUROK TRIBE, et al.,

Plaintiffs,

v.

U.S. BUREAU OF RECLAMATION, et al.,

Defendants.

Case No. 19-cv-04405-WHO

ORDER ON MOTIONS FOR SUMMARY JUDGMENT, MOTIONS TO STRIKE, AND MOTION TO STAY

Re: Dkt. Nos. 1027, 1029, 1039, 1040, 1043, 1044, 1057, 1058, 1069

Before me is the latest set of motions in a case that, at its core, involves the limited water supply of the Klamath River and the important, often-competing interests of the people and wildlife who depend on it. Pending are four motions for summary judgment: one from defendant the United States; another from the Institute for Fisheries Resources, Pacific Coast Federation of Fishermen's Associations, and the Yurok Tribe (collectively, "the plaintiffs"); a third from crossclaim-defendant and counterclaimant Oregon Water Resources Department ("OWRD"); and a final motion from crossclaim-defendant and counterclaimant Klamath Water Users Association ("KWUA"). The parties have also filed related motions to strike and a motion to stay.

The arguments boil down to a central question: Must the United States Bureau of Reclamation ("the Bureau" or "Reclamation") comply with an OWRD order prohibiting it from releasing water from Upper Klamath Lake? This implicates three primary issues: (1) whether the OWRD Order is preempted by the Endangered Species Act ("ESA"); (2) whether OWRD violated the intergovernmental immunity doctrine in issuing the Order; and, relatedly, (3) whether OWRD exceeded its authority in doing so. The material facts are not in dispute and these legal questions suitable for summary judgment.

Answering the first question is ultimately all that is needed. The OWRD Order is

preempted by the ESA because it stands as an obstacle to the accomplishment and execution of Congress's purpose and objective in enacting in ESA: protecting and restoring endangered species. Summary judgment is GRANTED in favor of the United States and plaintiffs on the first cause of action in the United States' crossclaim: (1) the Bureau must comply with the ESA in operating the Klamath Project ("the Project") and (2) the OWRD Order is preempted by the ESA and thus violates the Supremacy Clause.

Summary judgment is DENIED with respect to KWUA's counterclaim, because the Bureau must comply with the ESA in operating the Project. Summary judgment is also DENIED regarding OWRD's counterclaim, in that the ESA applies to the Bureau's operation of the Klamath Project. To the extent that OWRD's counterclaim seeks an injunction requiring the federal government to provide OWRD with information about the Project's operations, OWRD has not shown that it has standing to pursue this form of injunctive relief, which further supports denying its summary judgment motion.

BACKGROUND

Much like the Klamath River, the history of the Klamath Project and litigation over its operations is long and winding. What follows is by no means a complete account of that history, but provides the information necessary to understanding the issues at hand.

I. THE KLAMATH PROJECT

The Klamath River originates in the high desert of Oregon, flows into California, through the Yurok Reservation, and into the Pacific Ocean. In 1905, pursuant to the general provisions of the Reclamation Act of 1902 (which provided for the construction and operation of water projects throughout the western United States), the Secretary of the Interior authorized the Klamath Project ("the Project") spanning parts of Oregon and California. *See* Stip. Docs. [Dkt. No. 1025] at 3744.[1] Today, the Project "consists of an extensive series of canals, pumps, diversion structures, and dams capable of routing water to approximately 230,000 acres of irrigated land in the upper

[1] The parties stipulated to the authenticity of nearly 200 documents for the purposes of summary judgment. *See* Dkt. No. 1025. When citing to those documents, I will reference the last three or four digits of the Bates number stamped in the upper right corner of each page.

Klamath River Basin." *Id*. at 2434.

Upper Klamath Lake ("UKL") is central to the Project's operation, serving as its primary storage feature. *See Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1230 (N.D. Cal. 2001). The lake is "relatively shallow and has limited storage capacity" of approximately 562,000 acre-feet of water. Stip. Docs. at 2291. It also loses water each year through evaporation. *See id*. at 6281. "As a result, [UKL] cannot store large quantities of spring runoff and lacks storage capabilities in wet years to carryover volumes that could help meet all water needs in subsequent dry years." *Id*. at 2291. Put simply, UKL water is in relatively short supply.

The Bureau is tasked with administering the Klamath Project, in part by managing the water levels in UKL and distributing water from it. The Link River Dam (which is owned by the Bureau and operated by another entity, PacifiCorp) allows for the regulation of UKL elevations and controlled releases into the Klamath River. *See* USA Mot. for Summ. J. ("USA MSJ") [Dkt. No. 1027] 11:20-23.

II. THE BUREAU'S OPERATIONS OF THE PROJECT

Operation of the Project is no simple task. As evidenced by the number of parties in this litigation, there are numerous stakeholders who rely on the water that flows through the Klamath Project, including irrigators, Tribes, and wildlife. The Bureau must take a number of considerations into account as it distributes water from UKL.

A. The Endangered Species Act

At the heart of this case is the ESA, which provides that "all federal departments and agencies shall seek to conserve endangered species and threatened species." 16 U.S.C. § 1531(c)(1). Two provisions of the ESA are at issue. The first is section 7(a)(2), which provides:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.

Id. § 1536(a)(2). In other words, as a federal agency, the Bureau must ensure that any action that it takes is not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its habitat.[2] *See id.* "Action" is defined broadly to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies in the United States," and expressly includes "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02.

If an agency believes an action "may affect" a listed species or critical habitat, the agency typically must engage in a formal consultation process with either the United States Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS"), depending on the species. *See id.* § 402.14(a), (b); 402.01(b). The agency must provide certain information, including the purpose, duration, timing, and components of the proposed action, along with "the best scientific and commercial data available or which can be obtained . . . for an adequate review of the effects that an action may have upon listed species or critical habitat." *Id.* § 402.14(c), (d). The consultation process culminates with the issuance of a written biological opinion ("BiOp") that includes the FWS or NMFS's opinion on the likelihood that the proposed action will "jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat." *Id.* § 402.14(h). If the consulting agency opines that the proposed action *will* cause such jeopardy, the BiOp "shall include reasonable and prudent alternatives, if any." *Id.*

Although an agency is "technically free to disregard the Biological Opinion and proceed with its proposed action . . . it does so at its own peril (and that of its employees)." *Bennett v. Spear*, 520 U.S. 154, 170 (1997). That is because of the second ESA provision at issue in this case, section 9. *See id.*

Section 9 makes it unlawful for "any person" to "take" any member of an endangered or threatened species. *See* 16 U.S.C. § 1538(a)(1)(B), (C), (G); *see also id.* § 1533. "Take" is also

[2] KWUA challenges section 7(a)(2)'s applicability to the specific action taken by the Bureau at issue in this case. KWUA Mot. for Summ. J. ("KWUA MSJ") [Dkt. No. 1044] 61:15-80:16. I do not find its argument convincing, for reasons I later explain.

defined broadly, and "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id*. § 1532(19). "Harm," in turn, "means an act which actually kills or injures fish or wildlife," and "may include significant habitat modification or degradation" that does so "by significantly impairing essential behavior patterns" such as breeding, feeding, or sheltering. 50 C.F.R. § 222.102; *see also id.* § 17.3. The word "person" as used in section 9 is similarly broad, and includes "any officer, employee, agent, department, or instrumentality of the federal government." 16 U.S.C. § 1532(13).

If the FWS or NMFS determines after the consultation process that an agency's proposed action will not cause jeopardy but will result in "incidental take"—"takings that result from, but are not the purpose of, carrying out an otherwise lawful activity"—it may issue an incidental take statement ("ITS") providing the federal agency safe harbor from section 9 liability. *See* 50 C.F.R. §§ 402.14(i), 402.02; 18 § 1536(b)(4), (o). The ITS specifies the amount or extent of permissible take. 50 C.F.R. § 402.14(i). If the federal agency stays within that limit, the take is not prohibited by the ESA. *Id*. If that limit is exceeded, however, the agency "must reinitiate consultation immediately." *Id*.

Finally, the ESA provides for civil and criminal penalties for any person who knowingly violates the Act. *See* 16 U.S.C. § 1540(a), (b). So, if an agency ignores a BiOp, it and its employees are liable for the "take" of an endangered or threatened species, opening the door for "substantial civil and criminal penalties." *See Bennett*, 520 U.S. at 170. As a result, the Supreme Court has recognized, a BiOp has a "virtually determinative effect." *Id*.

For decades, the Bureau has consulted with the FWS and NMFS over its operation of the Klamath Project to determine its impact on ESA-listed species and critical habitats. *See* USA MSJ at 18:10-13. Four of those species are relevant to this set of motions. First are two species of fish—the shortnose sucker and the Lost River sucker—which the FWS designated as endangered in 1988. *See* 53 Fed. Reg. 27130 (July 18, 1988). Their habitat, including UKL and its tributaries, was designated as critical in 2012. 77 Fed. Reg. 73739 (Dec. 11, 2012). The next species is the SONCC coho salmon, listed as threatened since 1997. 62 Fed. Reg. 24588 (May 6, 1997). Most of the Klamath River downstream of another dam, Iron Gate Dam in California, is designated as

its critical habitat. 64 Fed. Reg. 24049 (May 5, 1999); *see also* USA MSJ at 19:8-10. The final affected species is the Southern Resident killer whale, which is also designated as endangered and relies on Chinook salmon—whose habitat includes the Klamath River—as its primary prey. *See* 70 Fed. Reg. 69903 (Nov. 18, 2005); *see also* USA MSJ at 19:10-12.

A simplified summary of the Project's impacts on these species is this: BiOps have determined that operating the Project adversely affects the suckers by lowering expected elevations of UKL, thereby decreasing the quantity and quality of their habitat; and the salmon (and thus, the Southern Resident killer whale) by reducing flows into the Klamath River, increasing the water temperature, and lowering dissolved oxygen levels. *See, e.g.*, Stip. Docs. at 1125-27, 1699-1723. The reduced water flows have also been found to increase risks to coho salmon associated with the *C. shasta* parasite. *Id*. at 1703-04. To comply with the operative BiOps, the Bureau must therefore strike a balance between ensuring that sufficient water remains in UKL for the sucker fish, while providing sufficient downstream flows in the Klamath River for the salmon (and by proxy, the killer whale).

B. Tribal Water Rights[3]

Since time immemorial, the Yurok Tribe has lived and fished on the Klamath River in northern California. Pls.' Mot. for Summ. J. ("Pls.' MSJ") [Dkt. No. 1029] 3:22-4:4; *see also* James Decl. ¶ 3. The river is the Yurok Tribe's "lifeblood"; it provides Yurok people food and economic opportunities, and is central to their culture. James Decl. ¶¶ 5, 18. The present-day Yurok Reservation extends for one mile on either side of the river, beginning at its mouth at the Pacific Ocean and extending approximately 45 miles upstream. *Id*. ¶ 4.

The Yurok Tribe holds federal reserved water rights, which include, but are not limited to, sufficient water to support its fishery. *See Baley v. United States*, 942 F.3d 1312, 1321-23 (Fed.

[3] So that it is abundantly clear: As the federal defendants, plaintiffs, and Klamath Tribes stipulated, and I ordered in lifting the stay to litigate the first cause of action presented in United States' crossclaim (and any new counterclaim), and have since reiterated, "[t]his is not a water rights adjudication or quantification case." *See* Dkt. Nos. 951, 961. None of the Tribes, nor the United States, waived their sovereign immunity for the purpose of adjudicating or quantifying water rights. *See* Dkt. Nos. 951, 1093, 1094. Any references to water rights in this Order are to provide context necessary to understanding the motions at hand. In no way should those references be interpreted as an adjudication or quantification of water rights.

Cir. 2019); *Parravano v. Babbitt*, 70 F.3d 539, 541 (9th Cir. 1995). The Hoopa Valley Tribe, whose reservation constitutes a nearly 12-mile square at the confluence of the Klamath and Trinity Rivers, also holds federal reserved water rights, as do the Klamath Tribes. *See Baley*, 942 F.3d at 1321-23. Courts have recognized the Tribes' rights to "prevent other appropriators from depleting the streams' waters below a protected level in any area" where their non-consumptive right applies, and to take fish from the waters on their reservations. *See id*. at 1321-22. The Ninth Circuit has also recognized that "[a]t the bare minimum, the Tribes' rights entitle them to the government's compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy." *See id*. at 1337.

C. Oregon Water Law

Section 8 of the Reclamation Act provides:

> Nothing in this act shall be construed as affecting or intended to affect or in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state or of the federal government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383.

The applicable state law here is Oregon's, as it is home to UKL. Under Oregon law, all waters within the state may be appropriated for beneficial use, subject to existing and already-vested rights. Or. Rev. Stat. § 537.120. The Oregon Water Code, enacted in 1909, required all users seeking new water rights to obtain a permit or license from OWRD, while expressly preserving water rights vesting prior to 1909. *See id*.; *see also* §§ 536.007(11), 539.010; *United States v. Oregon*, 44 F.3d 758, 764 (9th Cir. 1994) (describing the law). Any disputes over the parameters or priorities of the pre-1909 rights are settled through a process called a "general stream adjudication," carried out by the OWRD director. *See* Or. Rev. Stat. §§ 539.200, 539.005; *see also Oregon*, 44 F.3d at 764 ("Upon petition by a claimant, or on its own initiative, the Oregon Water Resources Department may commence the adjudication of the rights of all claimants to a river or stream."). At the end of the adjudication process, OWRD makes "findings of fact and an

order of determination determining and establishing the several rights to the waters of the stream." Or. Rev. Stat. § 539.130. It files those findings and order in state circuit court, which then reviews the OWRD's determinations. *See id.* §§ 539.130, 539.150. While that review is pending, the OWRD order remains in effect and the water divided accordingly. *Id.* § 539.170.

Almost a half-century ago, in 1975, Oregon began adjudicating Klamath Basin surface water rights in the still-ongoing Klamath Basin Adjudication ("KBA"). OWRD Mot. for Summ. J. ("OWRD MSJ") [Dkt. No. 1043] 4:14-15; USA MSJ at 14:7-11. After much litigation and many administrative proceedings, on February 28, 2014, OWRD issued an Amended and Corrected Findings of Fact and Order of Determination ("ACFFOD") that provisionally determined the water rights claimed in the KBA. *See* Stip. Docs. at 3679-87. The ACFFOD remains under review in circuit court, meaning OWRD's determinations remain in effect.

Two of OWRD's determinations in the ACFFOD are most relevant here. First, OWRD determined that the Bureau owns a water right, known as "KA 294," to store 486,828 acre-feet of water in UKL to benefit irrigators. *Id.* at 3790-93, 3824. OWRD also determined that the Bureau and "beneficial users" (who "hold a legal interest in the water right for the purpose of beneficial use") co-owned another right, "KA 1000," which "provisionally authorizes the diversion of natural flow from UKL and water stored in UKL pursuant to KA 294 for beneficial use." *See id.* at 431, 3789-93, 3793.[4] The latter right "does not specify what amount of water must be taken from natural flow as opposed to stored water and does not prohibit the taking of water from both sources simultaneously." *Id.* at 431.[5]

Oregon law also divides the state into water districts that are each managed by a watermaster appointed by the OWRD director. Or. Rev. Stat. §§ 540.010, 540.020. Watermasters must "investigate and respond to all complaints of water shortages or unlawful use." Or. Admin. R. 690-250-0100. If the investigation reveals a valid complaint, the watermaster may begin to

[4] The Bureau has entered into several contracts regarding the delivery of water to irrigators throughout the Project. *See, e.g.,* Stip. Docs. 7836-67, 7786-7824.

[5] Oregon law defines "legally stored water" as "[a]ny water impounded in a reservoir under the provisions of an established right to store water." Or. Admin. R. 690-250-0010(10)

regulate the water "in accordance with the relative rights or rotation agreements of the appropriators involved in the complaint or shortage." *Id.* If the dispute involves a reservoir, the watermaster "shall then take exclusive charge" of the reservoir to divide and distribute the water according to the relative and respective water rights of the various users, as determined by OWRD, the circuit court, or any contract between the users. Or. Rev. Stat. § 540.210.

III. THE OWRD ORDER

Amid severe drought conditions in 2020, the Bureau did not fully allocate Project water to irrigators, but continued to release water from UKL in an effort to comply with the ESA. *See* USA MSJ at 25:20-24 ("In drought years, however, such as have occurred in 2020, 2021, and 2022, Reclamation has not been able to fully and simultaneously meet the UKL elevations for suckers and Klamath River flows for SONCC coho salmon described in the Project BiOps, even with reduced deliveries or no deliveries for Project irrigation."). In April of that year, the Klamath Irrigation District ("KID") filed a notice of dispute with OWRD, requesting that it "take charge of Upper Klamath Lake Reservoir" and "ensure that stored water is not released out of UKL through the Link River Dam except to meet the needs of secondary water rights holders calling upon the source until the irrigation season" ended in October. Stip. Docs. at 707. OWRD took charge of UKL on April 16, 2020, and issued a notice of dispute and investigation to the Bureau, PacifiCorp, and KID. *Id.* The next day, KID filed a petition for alternative writ of mandamus in Marion County Circuit Court, which ordered OWRD to take charge of UKL "for the purpose of dividing or distributing the water therefrom in accordance with the respective and relative rights of the various users of water." *Id.*

On April 23, 2020, OWRD issued an interim order prohibiting the Bureau from releasing stored water from UKL "except in accordance with the relative and respective state law rights calling upon the stored water unless and until" it provided OWRD certain information about the timing and release of that water. *Id.* at 708.

KID then sued OWRD in Marion County Circuit Court, seeking an injunction under a state law provision that allows injunctive relief when "the watermaster has failed to carry into effect the order of the Water Resources Commission or decrees of the court determining the existing rights

to the use of water." *Id*. at 237-38. The court granted partial summary judgment in KID's favor and ordered the watermaster to "immediately stop the distribution, use and/or release of stored water from the UKL without determining that the distribution, use and/or release is for a permitted purpose by users with existing water rights of record or determined claims to use the stored water in the UKL." *Id*. at 238.

OWRD began monitoring the releases from UKL and did not observe any releases of stored water between mid-October 2020 and April 2021. *Id*. at 429-30, 434. In mid-March 2021, the Bureau sent KID and OWRD a letter, notifying them that "water is currently unavailable from Upper Klamath Lake (UKL) and the Klamath River for irrigation purposes within the Klamath Project." *Id*. at 447. The letter further stated that given the "critically dry hydrologic conditions," the Bureau anticipated that "it likely will not be possible to simultaneously satisfy the requirements" for designated UKL water levels and Klamath River flows as required by its interim operations plan and the related BiOps. *Id*. This letter, along with forecast water conditions, gave OWRD "cause to believe that the Bureau will, at some near future date, release legally stored water through the Link River Dam to comply with the Bureau's federal tribal trust obligations and ESA obligations." *Id*. at 434.

Pursuant to the state court's order, on April 6, 2021, OWRD issued the order that brings us here today. *Id*. at 427-36 ("OWRD Order" or "the Order"). It ordered the Bureau to "immediately preclude or stop the distribution, use or release of stored water from the UKL, in excess of amounts that may be put to beneficial use under KA 1000 downstream of the Link River Dam." OWRD Order at 436. It also noted that "[n]othing in this order alters, relieves or releases any person, state, or federal agency from any and all rights, duties or obligations arising from other sources of law including without limitation other state laws or rules, federal laws and related federal agency regulations, federal or state court orders, or contracts." *Id*. According to OWRD, the first excerpt was included "to comply with the court's injunction" and the second "to avoid ordering Reclamation to violate federal law." OWRD MSJ at 9:3-16.

On July 2 and July 28, 2021, OWRD issued notices to the Bureau concluding that legally stored water had passed through the Link River Dam in violation of the Order. Stip. Docs. 223-31

("July 2 Notice"), 210-20 ("July 28 Notice"). The first notice stated that if the violation were not corrected within one day, the Bureau "may be subject to further agency action or any other lawful remedy." July 2 Notice at 230. The second said that OWRD would "continue to monitor conditions in the UKL" but did not impose any sanction. *See* July 28, 2021 at 218.

OWRD has appealed the circuit court's injunction. The appellate court granted OWRD's request for a stay of the Order in December 2021. *See KID v. OWRD*, No. A176270 (Or. Ct. App. Dec. 17, 2021). The underlying appeal is still pending. OWRD MSJ at 9:19-25.

IV. PROCEDURAL HISTORY

Prior to the issuance of the OWRD Order, this case focused on a 2019 BiOp and consultation process between the Bureau and NMFS, which the plaintiffs sued the Bureau and NMFS over in July 2019. Dkt. No. 1. In March 2020, after the Bureau reinitiated the consultation process and developed an interim operating plan ("Interim Plan"), the parties (which included intervenor KWUA) stipulated to stay the litigation until September 30, 2022, so long as the Bureau operated the Project in accordance with the Interim Plan. Dkt. No. 908.

In September 2021, the federal defendants, plaintiffs, and Klamath Tribes requested that I lift the stay so that the United States could file a crossclaim challenging the OWRD Order. Dkt. No. 961. KWUA also sought to lift the stay, but without such constraints. *Id.* I then lifted the stay for the limited purpose of litigating the federal defendants' crossclaim, the plaintiffs' supplemental complaint, and any crossclaim arising from the federal defendants' crossclaim. *Id.* The stay was lifted in accordance with parameters proposed by the United States, the plaintiffs, and the Klamath Tribes—namely, that "[t]his is not a water rights adjudication or quantification case," and that neither the United States nor the Tribes had waived sovereign immunity for the purpose of adjudicating or quantifying water rights. *See* Dkt. Nos. 951-1 ¶ 7, 961. I also allowed the federal defendants to bifurcate their crossclaim so that the ESA-related questions were litigated prior to any discussion of tribal water rights. *See* Dkt. Nos. 951 ¶ 10, 961.

The first part of the federal government's crossclaim against OWRD and KWUA seeks declaratory relief that:

(1) The OWRD Order is "invalid because OWRD lacks jurisdiction to issue orders

impinging upon Reclamation's satisfaction of its obligations under the federal ESA";

(2) The Bureau's "operation of the Klamath Project, including the exercise of its rights to store water in UKL for irrigation use, is subject to compliance with the ESA";

(3) "complying with the ESA may require Reclamation to release water from UKL regardless of the water's classification under state law"; and

(4) to the extent that the OWRD Order "would forbid Reclamation from making releases of water deemed to have been 'stored' in UKL for this federal purpose," it is "contrary to the ESA and therefore preempted under the Supremacy Clause of the United States Constitution."

USA Cross-cl. [Dkt. No. 963] 40:10-25. It also seeks a permanent injunction against enforcement of the OWRD Order "that would limit and/or prevent Reclamation from operating the Project in conformance with federal law." *Id*. at 41:23-26.

As anticipated, both KWUA and OWRD filed counterclaims of their own against the United States. KWUA's seeks, in relevant part, declaratory relief that:

(1) "The ESA neither authorizes nor requires Reclamation to curtail, or direct the curtailment of, storage, diversion, and delivery of water for irrigation in the Project to benefit ESA-listed species"; and

(2) "Reclamation does not otherwise have an obligation under the ESA to release water from UKL that have the characteristic of stored water in order to benefit ESA-listed fish species."

KWUA Countercl. [Dkt. No. 988] 37:21-25.

OWRD's counterclaim seeks a permanent injunction either;

(1) "[R]equiring Reclamation to provide OWRD with sufficiently detailed information to establish that the quantity of particular releases through the Link River Dam are required by the ESA and, therefore, preempt Oregon law"; or

(2) "[G]ranting a permanent injunction requiring Reclamation to cease releasing stored water through the Link River Dam for any uses that are not expressly allowed in its water rights permit, if the court agrees with KWUA that the ESA does not apply."

OWRD Countercl. [Dkt. No. 1021] 12:8-14.

The United States and plaintiffs separately moved for summary judgment on the first cause of action in the United States' crossclaim, which KWUA and OWRD countered with their own

motions seeking summary judgment on their respective counterclaims. Dkt. Nos. 1027, 1029, 1043, 1044. KID moved both to stay and to delay judgment on the United States' and plaintiffs' motions. Dkt. Nos. 1040, 1041-3. The State of California sought to participate as amicus.[6] Dkt. No. 1057. The Hoopa Valley Tribe joined as a crossclaimant subject to the litigation's limitations. Dkt. No. 1094. The Klamath Tribes also responded to the motions. Dkt. Nos. 1070, 1071.

With that context and history in mind, I turn to the parties' arguments.

LEGAL STANDARD

Summary judgment on a claim or defense is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the non-moving party's claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to identify "specific facts showing that there is a genuine issue for trial." *Id.* at 324. The party opposing summary judgment must then present affirmative evidence from which a jury could return a verdict in that party's favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986).

On summary judgment, the court draws all reasonable factual inferences in favor of the non-movant. *Id.* at 255. In deciding a motion for summary judgment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* However, conclusory and speculative testimony does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp.,* 594 F.2d 730, 738 (9th Cir. 1979).

[6] California's unopposed motion for leave to file an amicus curiae brief and appear as amicus curiae is GRANTED, as it has an interest in the issues presented, including the scope of state authority to regulate water in federal Reclamation projects and the amount of water in California portions of the Klamath River. *See* Dkt. No. 1057; *see also NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) ("District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved."). I have considered California's position in deciding these motions.

DISCUSSION

I. MOTION TO STAY

Intervenor KID moves to stay any decisions on the United States' and plaintiffs' summary judgment motions until the Oregon court completes its decades-pending review in the KBA. *See* KID Mot. to Stay [Dkt. No. 1040] 24:14-16. In so arguing, KID invokes five abstention doctrines. *See generally id.* None of the other parties join KID's motion; the United States, plaintiffs, and Klamath Tribes expressly oppose, KWUA only "emphasizes that the stay motion would not be a basis for staying" its own counterclaim, and OWRD does not appear to take any position. *See* Dkt. Nos. 1060, 1064, 1068, 1071.

KID's motion is DENIED. "Abstention from the exercise of federal jurisdiction is the exception, not the rule," and KID has not shown "exceptional circumstances" warranting abstention here. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). The overarching flaw in KID's argument is that, unlike the KBA, the summary judgment motions do not seek to quantify or adjudicate Oregon water rights. That was made clear when the stay was lifted for the litigation of the crossclaim and resulting counterclaims. *See* Dkt. No. 951-1 ¶ 7 ("This is not a water rights adjudication or quantification case."). Resolution of the KBA will not answer the federal questions at the core of the United States' crossclaim, which are whether the OWRD Order is preempted by the ESA and whether OWRD had authority under section 8 of the Reclamation Act to issue it.

It is also worth noting that the KBA has been pending since the mid-1970s, with no clear end in sight. *See* KWUA Resp. [Dkt. No. 1060] 3:1-3 ("It is most likely the stay would extend through at least the end of the decade, not including any subsequent appellate review and proceedings on remand after appeal."). KID thus attempts to delay, for an uncertain but likely significant period of time, the resolution of critical issues impacting stakeholders that need timely resolution given the limited water supply at hand.

Although "abstention doctrines may, in various circumstances, permit or require the federal court to stay or dismiss the federal action in favor of the state court litigation," KID has not shown that abstention is warranted under any of the five doctrines that it invokes. *See Exxon*

Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 282 (2005). Briefly:

Abstention under *Brillhart v. Excess Insurance Company of America*, 316 U.S. 491 (1942) is inapplicable, as the United States notes, because the crossclaim seeks both declaratory and injunctive relief that are independent of one another. *See Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 840 (9th Cir. 2017) ("So long as the suit seeks more than merely declaratory relief . . . the entire action should be analyzed under the *Colorado River* framework."); *American Bankers Mgmt. Co., Inc. v. Heryford*, 885 F.3d 629, 633 (9th Cir. 2018) ("In addition to declaratory relief, however, [plaintiff] seeks injunctive relief that is independent of, but related to, the requested declaratory relief. *Brillhart* does not apply in such circumstances.").

Abstention under *Younger v. Harris*, 401 U.S. 37 (1971) is unavailable because the "unnecessary conflict between state and federal governments" that it seeks to avoid is inherently implicated when the federal government sues a state agency, as the United States has done in its crossclaim. *See United States v. Morros*, 268 F.3d 695, 707 (9th Cir. 2001) (describing "the policy objective behind *Younger* abstention" as "to avoid unnecessary conflict between state and federal governments") (citations and quotation marks omitted). The Ninth Circuit made this clear in *Morros*, where the United States filed a complaint in federal district court alleging that a Nevada law, as applied by the state engineer, was preempted under the Supremacy Clause. *See id.* at 699. As the court wrote:

> *We hold* that *Younger* is inapplicable here for an even more basic reason. Whether it is labeled "comity," "federalism," or some other term, the policy objective behind *Younger* abstention is to avoid unnecessary conflict between state and federal governments. Like the Third, Fifth, and Eleventh Circuits, we believe this policy lacks force where the United States is a litigant. . . . By the time the United States brings suit in federal court against a state, any attempt to avoid a federal-state conflict would be futile. . . . When asserting a superior federal interest against a state, the forum of choice for the federal government is the federal court.

Id. at 707-08 (citations omitted) (emphasis added). *Morros*—which is a holding from the Ninth Circuit and not, as KID contends, dicta—is on point. *See* KID Mot. to Stay at 21:7-11. *Younger* abstention is not available.

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) also does not apply, primarily because constitutional adjudication cannot be avoided by a state ruling. *See Wolfson v.*

Brammer, 616 F.3d 1045, 1066 (9th Cir. 2010) (citation omitted). As the Ninth Circuit has stated,

> *Pullman* abstention is appropriate only where (1) there are sensitive issues of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open; (2) constitutional adjudication could be avoided by a state ruling; and (3) resolution of the state law issue is uncertain.

Id. (citation and quotation marks omitted). Any adjudication by the Oregon court in the KBA will determine Klamath Basin water rights, which does not resolve the Supremacy Clause question at the heart of the crossclaim. Whether the OWRD Order is preempted by the ESA is an entirely separate issue.

Under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), courts may "decline to rule on an essentially local issue arising out of a complicated state regulatory scheme." *Morros*, 268 F.3d at 705. For *Burford* to apply, the following showing must be made:

> [F]irst, that the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court; second, that federal issues could not be separated easily from complex state law issues with respect to which state courts might have special competence; and third, that federal review might disrupt state efforts to establish a coherent policy.

Knudsen Corp. v. Nevada State Dairy Comm'n, 676 F.2d 374, 377 (9th Cir. 1982). Again, *Morros* settles the issue:

> [T]his case does not revolve around "complex state law issues," such as who is entitled to how much water. Rather, it revolves around whether state law conflicts with federal law, which is plainly not an issue "with respect to which state courts might have special competence." This is a preemption case, and, as we stated in *Knudsen*, "*Burford* abstention is particularly inappropriate when the plaintiff's claim is based on preemption, because abstaining under *Burford* would be an implicit ruling on the merits."

268 F.3d at 705. As in *Morros*, the United States' crossclaim poses a question of preemption. It expressly does not consider the quantification or adjudication of water rights—in other words, "who is entitled to how much water." *See id*. *Burford* does not support abstention here.

KID does not challenge these or any other arguments from the United States and plaintiffs regarding the majority of the preemption doctrines upon which it relies. *See* KID Reply [Dkt. No. 1088] 26:1-28:14. Instead, it focuses its response on whether abstention is appropriate under the *Colorado River* doctrine. *See id*.

In *Colorado River*, the Supreme Court made clear that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule" and can be justified "only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." 424 U.S. at 813 (citation omitted). The Ninth Circuit has identified eight factors for courts to consider in determining whether to stay a matter under *Colorado River*:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Seneca Ins. Co., 862 F.3d at 841-42 (citation omitted). This is "not a mechanical checklist; indeed, some may not have any applicability to a case." *Id*. at 842 (citation and quotation marks omitted). Instead, courts must "examine them in a pragmatic, flexible manner with a view to the realities of the case at hand." *Id.* (same). The presumption is in favor of federal jurisdiction; "[a]ny doubt as to whether a factor exists should be resolved against a stay, not in favor of one." *Id*. at 842 (citation omitted).

Ninth Circuit law clearly forecloses *Colorado River*'s application here. The court has "repeatedly emphasized that a *Colorado River* stay is inappropriate when the state court proceedings will not resolve the entire case before the federal court." *United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1204 (9th Cir. 2021). It has also noted that "the requirement of 'parallel' state court proceedings implies that those proceedings are sufficiently similar to the federal proceedings to provide relief for *all* of the parties' claims." *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 n.4 (9th Cir. 1993) (emphasis added). The United States' crossclaim asserts that the ESA preempts the OWRD Order and that OWRD lacked the authority to issue it. These issues—and thus, the crossclaim—will not be resolved by the KBA, which will determine the nature and scope of water rights within the state of Oregon.

KID misconstrues the crossclaim, arguing that the Bureau "seeks to establish for itself the

most senior water right in UKL via a declaration that it may use stored water from UKL for its preferred environmental purposes, and may not be regulated by OWRD in doing so." KID Reply at 27:5-13. This is belied by the express agreement from the federal government (along with the plaintiffs and Tribes) that "[t]his is not a water rights adjudication or quantification case." *See* Dkt. Nos. 951-1 ¶ 7, 961. This limitation has guided the litigation of the United States' crossclaim and continues to do so. No matter how KID attempts to cast the crossclaim, it does not seek an adjudication or quantification of water rights. Instead, it raises constitutional questions about the OWRD Order. This proceeding is not parallel with the KBA; a stay under *Colorado River*—or any of the other abstention doctrines proffered by KID—is not warranted.

II. MOTIONS FOR SUMMARY JUDGMENT[7]

[7] KID moves to strike as irrelevant references to reserved water rights in the United States' and plaintiffs' summary judgment motions, references to and photographs of dead salmon in the plaintiffs' motion, and the entirety of the James and Spain declarations proffered by the plaintiffs. Dkt. No. 1039. The motion is DENIED. Although the adjudication or quantification of water rights is not at issue, mere reference to those rights does not ask for such action. The only substantive argument made regarding water rights is from the United States, which contends that the Tribes' reserved water rights provides an additional source of discretion subjecting the Bureau to section 7(a)(2) of the ESA. *See* USA MSJ at 66:22-67:24. Twice in its motion the United States specified the "limited purposes" for which it discusses tribal water rights, none of which run afoul to the limited parameters of this litigation. *See id*. at 16 n.7, 67 n.24. Similarly, the references to the dead salmon in the plaintiffs' motion and declarations provide information about the events leading up to this litigation. And regardless, none of the contested material factored into my consideration of the motions at hand.

The plaintiffs move to strike portions of KWUA's summary judgment motion and two accompanying declarations. Dkt. No. 1069. Specifically, they challenge section V.D of KWUA's motion, which they contend seeks rulings on the Yurok Tribe's federal reserved water right and thus exceeds the Tribe's waiver of sovereign immunity. *See id*. The motion is GRANTED in part. KWUA goes beyond the United States' argument that the water rights may provide the Bureau the discretion necessary to trigger section 7(a)(2) by contemplating: (1) whether there are any federal reserved water rights to fish; (2) the priority date of any tribal water rights compared to other water rights; (3) whether the location of instream flow rights would limit the Tribes' rights; (4) the KBA's consideration of water rights; and (5) how the ACFFOD findings would play out "in an adjudication of water rights for flows in California." *See* KWUA MSJ at 88:25-92:15. Despite KWUA's attempts to frame this as a hypothetical—by stating that "this issue is not being determined in this case, but it would be a disputed issue in a proper water right proceeding"—KWUA effectively asks me to adjudicate or quantify the Tribes' water rights, which is expressly off-limits. *See id*. at 91:4-5. Section V.D is STRICKEN, with the exception of section V.D.6, which argues against the United States' point without veering into adjudication of water rights.

As far as the plaintiffs' objections to KWUA's declarations, the parties have objected to several pieces of evidence submitted with the motions. Unless otherwise noted in this Order, I did not rely on the disputed evidence in my analysis, rendering the objections moot.

There is significant overlap between the four motions for summary judgment before me. They present three primary issues, the first of which resolves the motions: Is the OWRD Order preempted by the ESA? The first cause of action in the United States' crossclaim seeks declaratory judgment that it is. This question is central to the motions for summary judgment from the United States and the plaintiffs, and answering it necessarily entails a determination of whether the Bureau's operation of the Klamath Project is subject to compliance with the ESA. The latter issue is at the heart of KWUA's first counterclaim and cross-motion for summary judgment.

The other two issues are whether OWRD violated the doctrine of intergovernmental immunity when it issued the Order and whether OWRD exceeded its authority in doing so. Although the United States, the plaintiffs, and OWRD stake out their positions, I need not decide the scope of OWRD's authority to determine whether the Order is valid. I explain why below.

A. PREEMPTION

The Supremacy Clause grants Congress "the power to preempt state law." *Arizona v. United States*, 567 U.S. 387, 399 (2012). It can do so either expressly or implicitly. *See id*. At issue is a form of implied preemption referred to as conflict preemption—the well-established principle that "state laws are preempted when they conflict with federal law." *See id*. (citation omitted). Conflict preemption "includes cases where compliance with both federal and state regulations is a physical impossibility and those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. at 399-400 (citing in part *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The latter is referred to as "obstacle preemption." *United States v. California*, 921 F.3d 865, 879 (9th Cir. 2019) (citations omitted). To determine whether it exists, "the Supreme Court has instructed that we employ our judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id.* (citations and quotation marks omitted).

The Ninth Circuit recently reiterated guiding principles of the implied preemption analysis. *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201,

1211 (9th Cir. 2020). First among them is that "the purpose of Congress"—evidenced by the text and structure of the statute at issue—"is the ultimate touchstone in every preemption case." *Id*. at 1211 (citations omitted). Second, courts must "start with the assumption that historic police powers of the states are not preempted unless that was the clear and manifest purpose of Congress." *Id*. at 1212 (citation and quotation marks omitted). Taken together, "a high threshold must be met before a court will conclude that a federal law has impliedly preempted a state law." *Id*. (same).

The federal government and the plaintiffs argue that the OWRD Order conflicts with the ESA and is thus preempted. USA MSJ at 48:5-50:4; Pls.' MSJ at 31:14-34:5. My analysis is two-fold. First, I must consider Congress's purpose in enacting the ESA and then, whether the Bureau's compliance with the ESA and OWRD Order is physically impossible or whether the Order stands as an obstacle to the accomplishment of Congress's goals.

1. KID's Rule 56(d) Motion

First, a procedural issue. Along with its opposition, KID filed a request under Federal Rule of Civil Procedure 56(d) seeking to extend the hearing date on the United States' and plaintiffs' motions by 90 days so that it could pursue discovery of facts that it contends are essential to opposing summary judgment on the United States' crossclaim. Dkt. No. 1041-3. The United States and plaintiffs opposed the request, KWUA filed a statement of non-opposition, and the Klamath Tribes took no position. Dkt. Nos. 1063, 1067, 1071, 1072. It does not appear that OWRD directly addressed KID's motion.

Under Rule 56(d), if a non-moving party "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition," the court may defer considering the motion or allow time for discovery. Fed. R. Civ. P. 56(d). To obtain such relief, the party must show that: "(1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment." *InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 662 (9th Cir. 2020) (citation omitted). The party must also show that it has "pursued discovery diligently in the past and that additional discovery would prevent summary judgment." *Huynh v.*

Quora, Inc., 508 F. Supp. 3d 633, 642 (N.D. Cal. 2020) (citations omitted).

KID's motion is DENIED. It has not shown that the facts that it seeks are essential to opposing summary judgment, nor has it pursued discovery diligently in the past. KID asks for a laundry list of discovery, spanning 10 topics and nearly a dozen categories of documents in addition to depositions, requests for admissions, and interrogatories. *See* Dkt. No. 1041-3 at 8:12-9:21. The sought-after information centers on any efforts the Bureau made to find alternative ways that it could comply with both the OWRD Order and the ESA, including any attempts to reinitiate the ESA consultation process, acquire additional water rights, or obtain water from other river systems. *See id*. at 8:13-26. KID argues that this information is essential to countering whether the OWRD Order made it physically impossible for the Bureau to comply with the ESA or stood as an obstacle to carrying out Congress's objectives. *See id*. at 1:11-2:6.

"[P]reemption is predominately a legal question, resolution of which would not be aided greatly by development of a more complete factual record." *Atay v. Cnty. of Maui*, 842 F.3d 688, 698 (9th Cir. 2016) (citation and internal modification omitted). Even if the information KID seeks is relevant, it could make the same argument about alternative methods of compliance without relying on discovery from the government. For example, it could have brought in an expert testifying to the feasibility of diverting water from other river systems, or the availability of other water rights or licenses to the Bureau. Either may have shown a dispute of material fact so as to avoid summary judgment. Moreover, at least some of the documents sought do not appear relevant to this stage of the litigation—for example, "any and all" of the Bureau's "official policy documents" regarding state and tribal water rights. *See* Dkt. No. 1041-3 at 9:5-6. And it is not clear that others—i.e., "[i]nternal communications regarding the purchase or potential purchase of UKL water from the Oregon irrigators"—actually exist. *See id*. at 9:9-10.

KID also did not diligently pursue discovery of this information, and misconstrues the record in arguing that I "fully refused to allow KID to conduct any discovery in this action." *See id*. at 2:15-3:23. When I allowed KID to intervene more than a year ago, I stated that once it had reviewed the administrative record, it should specify to the United States the categories of documents or interrogatories it sought, meet and confer to determine what documents should or

could be disclosed, and come to the court with any issues. Dkt. No. 983. It appears that KID made one attempt to do this, providing emails that show efforts to discuss discovery with the federal government in December 2021. *See* Lisieski Decl. [Dkt. No. 1041-4] Exs. A-D. KID then filed a letter seeking discovery in mid-February, a request I denied because KID failed to follow the ordered procedure and because its requests were overbroad and would delay resolution of the then-forthcoming summary judgment motions. Dkt. Nos. 1007, 1013. KID was not precluded from conducting discovery in this matter. Instead, it made only one dilatory attempt to do so. And although I noted in denying KID's request that any party could file a Rule 56(d) motion in response to the motions for summary judgment, that one attempt at discovery before filing that motion hardly represents a diligent pursuit supporting 56(d) relief. *See* Dkt. No. 1013.

For these reasons, KID's request to delay deciding these motions is DENIED. I turn now to the merits of the parties' arguments.

2. Congressional Purpose

In *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978), the Supreme Court thoroughly considered the purpose of the ESA, an analysis that is helpful here. When Congress passed the ESA, it was "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority*, 437 U.S. at 180. "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Id*. at 184. "This," the Court wrote, "is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id*.

The Court cited several ESA provisions that "indicated the seriousness with which Congress viewed this issue": the prohibition on "[v]irtually all dealings with endangered species," including their taking, possession, transportation, and sale; the "extensive power" granted to the Secretary of the Interior to develop regulations and programs preserving endangered and threatened species; and the encouragement of citizen involvement, by way of allowing individuals to petition the Secretary to list species as endangered or threatened, and by allowing civil suits to compel ESA compliance. *See id*. at 180-81 (citations omitted). The Court also pointed to section 9's express bar on the "take" of endangered species (along with the broad definition of "take") and

the legislative history behind section 7, which "reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." *Id*. at 184-85. In all, the Court wrote, "examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Id*. at 174.

I see no reason to depart from the Supreme Court's extensive analysis. The text and structure of the ESA make clear that Congress's purpose in enacting the ESA was to prioritize the preservation and recovery of endangered and threatened species. The Ninth Circuit has recognized the same. *See, e.g., National Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018) ("One of the ESA's central purposes is to conserve species."); *Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 550-51 (9th Cir. 2016) ("The purpose of the ESA is to ensure the recovery of endangered and threatened species, not merely the survival of their existing numbers."). That intent is the "ultimate touchstone" guiding my preemption analysis. *See Volkswagen*, 959 F.3d at 1211.

3. Compliance

The question for the purposes of preemption is whether it is physically impossible for the Bureau to comply with both the ESA and the OWRD Order, or whether the Order stands as an obstacle to the accomplishment and execution of Congress's purpose in enacting the ESA. *See Arizona*, 567 U.S. at 399-40.

KWUA's counterargument (and argument in favor of summary judgment on its own counterclaim) presents an issue that must be addressed first. KWUA contends that the agency action at issue is the use of stored water in UKL and that under the controlling legal authority, the Bureau has no discretion to use that water for purposes other than irrigation—meaning section 7(a)(2) does not apply, so the ESA does not preempt the OWRD Order. *See* KWUA MSJ at 61:15-88:4. This argument depends on whether a more than 20-year-old decision from the Ninth Circuit—*Klamath Water Users Protective Association. v. Patterson*, 204 F.3d 1206 (9th Cir. 1999), *amended on denial of rehearing*, 203 F.3d 1175 (9th Cir. 2000)—remains the controlling law on whether the ESA applies to the Klamath Project. It does.

Patterson arose from a dispute between Klamath Basin irrigators, the Bureau, and PacifiCorp over a contract governing the management of the Link River Dam. 204 F.3d at 1209. The case primarily presented a question of contract law: were the irrigators third-party beneficiaries to the contract between the Bureau and PacifiCorp's predecessor. *Id*. That question is not relevant here.

What is relevant, however, is the court's rejection of the irrigators' claim that PacifiCorp did not have a legal duty to operate the dam in compliance with the ESA. *See id*. at 1213. The court noted that the ESA retroactively applied to a contract "so long as the federal agency retains some measure of control over the activity." *See id*. So, the court wrote, because the Bureau "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." *Id*. The court further noted that the ESA's requirements "override the water rights of the irrigators." *Id*. It then held that the district court "did not err in concluding that Reclamation has the authority to direct dam operations to comply with the ESA." *Id*.

KWUA tries to write this off as dicta, arguing that the decision centered on the contract dispute and that the Ninth Circuit addressed the ESA only in passing. *See* KWUA MSJ at 57:8-58:5. I disagree. The Ninth Circuit devoted a separate section of the *Patterson* opinion to the application of the ESA, citing multiple cases in its analysis of whether the ESA retroactively applied to the contract at issue. *See* 204 F.3d at 1213. As part of that analysis, the court considered the ESA's application to actions by a federal agency. *See id*. And the court expressly held that the district court did not err in concluding that the Bureau could direct dam operations to comply with the ESA. *See id*. ("Accordingly, we hold . . ."). This is not, as KWUA asserts, a statement "made casually and without analysis" or "uttered in passing," or "merely a prelude to another legal issue that commands the panel's full attention." *See* KWUA MSJ at 57:19-58:5 (citing *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001)). And even if it *were* dicta, I find *Patterson* persuasive, given the court's unequivocal statements about the ESA. *See* 204 F.3d at 1209 ("Operation of the dam is also subject to the requirements of federal statutes, such as the Endangered Species Act."), 1213 ("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.").

Patterson is far from the only case where courts have recognized that the ESA applies to the Bureau's operation of the Klamath Project. The Ninth Circuit reiterated this as recently as September of 2022. *See Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 940 (9th Cir. 2022) ("Reclamation is also responsible for managing the Klamath Project in a manner consistent with its obligations under the ESA."); *see also Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 508 (Fed. Cir. 2011) ("In light of its dual purposes of serving agricultural uses and providing for the needs of wildlife, the Klamath Project is subject to the requirements of the Endangered Species Act.").

KWUA contends that the issue is not whether the Bureau is subject to the ESA, but instead whether the Bureau has the discretionary authority to take the specific action at issue—which KWUA asserts is the use of stored water in UKL for purposes other than irrigation—thus triggering section 7(a)(2). *See* KWUA MSJ at 60:5-11, 63:13-64:2, 73:14-20. It argues that the Reclamation Act only authorizes the Bureau to operate the Klamath Project for "reclamation" purposes—the irrigation of reclaimed land—and does not grant it the discretion to take action on behalf of endangered species. *Id*. at 64:5-76:13. According to KWUA, no other authority, including the Bureau's water rights under Oregon law and its contracts with Project beneficiaries, grant it this discretion either. *See id*. at 76:14-88:4.

In support, KWUA relies on *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007), where the Supreme Court held that section 7(a)(2) "covers only discretionary agency actions and does not attach to actions . . . that an agency is required by statute to undertake once certain specified triggering events have occurred." The issue in *Home Builders* was discord between section 7(a)(2) of the ESA and section 402(b) of the Clean Water Act, the latter of which required the Environmental Protection Agency ("EPA") to transfer certain permitting powers to state authorities upon a showing that nine enumerated criteria were met. *See* 551 U.S. at 649. The Court considered whether section 7(a)(2)'s consultation requirement "effectively operates as a tenth criterion on which the transfer of permitting power under the

[Clean Water Act] must be conditioned." *Id*. The Court held that it did not, because the Clean Water Act provision *required* transfer once the specified criteria were met, eliminating any discretion by the EPA and thus, failing to trigger section 7(a)(2). *See id*. at 669, 673. KWUA reads *Home Builders* as rejecting the lower court's finding that "the ESA acts as an overriding statute that provides independent authority or a separate requirement for federal agencies to protect (or not jeopardize) species." KWUA MSJ at 40:6-13.

According to the Ninth Circuit, "[t]he real question after *Home Builders* is what counts as a non-discretionary action, to which section 7(a)(2) does not apply." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 639 (9th Cir. 2014). The court has distinguished *Home Builders* based on the specificity of the mandate at issue. In *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 928 (9th Cir. 2008), the court noted that unlike in *Home Builders*, where the Clean Water Act provision affirmatively mandated a specific action that conflicted with the ESA, Congress had imposed "broad mandates which do not direct agencies to perform any specific nondiscretionary actions, but rather, are better characterized as directing the agencies to achieve particular goals." The *Jewell* court affirmed this distinction. *See* 747 F.3d at 640 ("We distinguished *NWF* from *Home Builders* on the basis of the specificity of the mandate in question. . . . The Water Authority has not pointed us to any statutory obligation that Congress has imposed on Reclamation that is both mandatory and inconsistent with its obligations under the ESA.").

KWUA has not pointed to any sufficiently specific statutory obligation that Congress has imposed on the Bureau that is both mandatory and inconsistent with its obligations under the ESA. In arguing that the Klamath Project is a single-use project authorized only for "reclamation" purposes, KWUA relies on a combination of federal and state statutes, Interior Department opinions, and the ACFFOD's interpretation of the Project's purpose. *See id*. at 64:17-67:17. But under *National Wildlife Federation* and *Jewell*, it must be Congress who imposes the mandate on the Bureau. Even if the federal statutes that KWUA invokes—the Reclamation Act of 1902 or the 1905 Congressional authorization of the Project—clearly stated that the Klamath Project was authorized for irrigation purposes only (a question I need not decide), KWUA has not identified

any provision that is as specific as the Clean Water Act provision in *Home Builders*, mandatory, and inconsistent with the Bureau's obligations under the ESA. *See Jewell,* 747 F.3d at 640.

Instead, the Congressional mandate within the Reclamation Act is broad, like those in *National Wildlife Federation* and *Jewell*. Congress granted the Secretary of the Interior the authority to "*perform any and all acts* and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act into full force and effect." 43 U.S.C. § 373 (emphasis added). KWUA attempts to explain away this provision by focusing on the authority to enact rules and regulations, but overlooks the broad authority to perform "any and all acts" to carry out the Act itself. *See* KWUA MSJ at 70:9-21. It also ignores another provision authorizing and directing the Secretary to "use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act." *See id*.; *see also* 43 U.S.C. § 491. Taken together, these provisions show that Congress granted the Secretary of Interior—and by proxy, the Bureau—a broad mandate that did not direct the Bureau "to perform any specific nondiscretionary actions" but instead is "better characterized as directing [the Bureau] to achieve particular goals." *See National Wildlife Fed'n*, 524 F.3d at 928. This is unlike the specific provision of the Clean Water Act that was inconsistent with the ESA in *Home Builders*.

The Ninth Circuit has held that the Bureau must comply with the ESA in operating the Klamath Project. *See Patterson*, 204 F.3d at 1213; *Klamath Irrigation Dist.*, 48 F.4th at 940. This alone answers the question. But even considering the narrower view of agency action set forth by KWUA, KWUA has not identified a specific mandate from Congress, imposed on the Bureau, that is inconsistent with its obligations under the ESA. Instead, Congress gave the Bureau a broad mandate in carrying out the Reclamation Act, meaning it has discretion in deciding how to do so.[8] Under *Home Builders*, that discretion means that section 7(a)(2) applies.

It is worth noting that KWUA does not appear to directly challenge the Bureau's obligations under section 9 of the ESA. *See generally* KWUA MSJ. At most, KWUA cites cases

[8] Because I find that the Bureau has discretion under the Reclamation Act, I need not address the other potential sources of discretionary authority that the United States and plaintiffs assert.

that focus on section 9, without attacking the Bureau's section 9 obligations with respect to the matter at hand. *See generally id*. Whether in the form of section 9, section 7(a)(2), or both, the Bureau must comply with the ESA in operating the Klamath Project—including when it releases stored water from UKL.

This brings me to the final question in the preemption analysis, which is whether it is physically impossible for the Bureau to comply with both the ESA and the OWRD Order, or whether the latter stands as an obstacle to the accomplishment and execution of Congress's purpose and objective in enacting the ESA. *See Arizona*, 567 U.S. at 399-40.

This question is relatively easy to answer. At the least, the Order poses an obstacle to the accomplishment and execution of Congress's purpose and objective in enacting the ESA, which is to preserve and restore endangered species, "whatever the cost." *See Tennessee Valley Authority*, 437 U.S. at 184. The April 6, 2021, Order mandates that the Bureau "immediately preclude or stop the distribution, use or release of stored water from the UKL, in excess of amounts that may be put to beneficial use under KA 1000 downstream of the Link River Dam." OWRD Order at 436. In the same breath, the Order states that:

> Nothing in this order alters, relieves or releases any person, state, or federal agency from any and all rights, duties or obligations arising from other sources of law including without limitation other state laws or rules, federal laws and related federal agency regulations, federal or state court orders, or contracts.

Id. The conflict is apparent on the face of the Order itself, which simultaneously prohibits the Bureau from distributing, using, or releasing certain amounts of stored water, while still binding the Bureau (a federal agency) to its duties arising from other sources of law (the ESA). *See id.* The Order acknowledges this tension:

> The Department has cause to believe that the Bureau will, at some near future date, release legally stored water through the Link River Dam *to comply with the Bureau's* federal tribal trust obligations and *ESA obligations*.

Id. at 434 (emphasis added). By preventing the Bureau from releasing the stored water, the OWRD Order stands as an obstacle to the accomplishment and execution of Congress's purpose and objective in enacting the ESA. As if there was any doubt, the subsequent notices of violations further prove this. *See* July 2 Notice; July 28 Notice.

It is also worth noting that OWRD "agrees, as it must, that the Supremacy Clause of the U.S. Constitution makes federal law the rule of decision when state law and federal law directly conflict." OWRD MSJ at 12:6-8. Moreover, OWRD "does not dispute that it lacks authority to prevent Reclamation from complying with the Endangered Species Act," and notes that it issued the April 6, 2021, Order "because the Marion County Circuit Court issued an injunction requiring OWRD to do so." *Id*. at 1:22-25. The agency's acknowledgment that its own Order must give way to the ESA supports my finding.

The OWRD Order conflicts with the ESA, at least because it poses an obstacle to the accomplishment and execution of Congress's purpose and objective in enacting the ESA: protecting and restoring endangered species. If the Bureau complies with the Order, it cannot release downstream flows, jeopardizing the coho salmon and Southern Resident Killer Whale and violating either section 7(a)(2) or section (9) of the ESA. If the Bureau carries out its obligations under the ESA, then it violates the Order. This meets the "high threshold" described in *Volkswagen*. *See* 959 F.3d at 1212. The ESA preempts the OWRD Order.

KID, which also argues against preemption, does not make a compelling counterpoint. The inclusion of an express preemption provision in the ESA (voiding certain state laws or regulations that apply "with respect to the importation or exportation of, or interstate or foreign commerce in" endangered or threatened species) "does not foreclose the application of ordinary implied preemption principles." *See* KID Oppo. [Dkt. No. 1041] 50:9-51:22; 16 U.S.C. § 1535(f); *National Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 731 (9th Cir. 2016). Under those principles, the Congressional purpose behind the ESA is clear and the OWRD Order stands in the way of the accomplishment and execution of that purpose, meaning it is preempted. KID's other arguments—that the federal government and plaintiffs improperly rely on BiOps rather than the ESA as the preemptive law, that the OWRD Order is not an obstacle to accomplishing the ESA because section 7 prescribes a consultation process "with only a general end result," and that the United States must show that compliance with the current BiOps and OWRD is "impossible"—are either straw man arguments or misconstrue the applicable law. *See id*. at 51:23-71:19.

Nor am I swayed by KWUA's argument that summary judgment should be denied because the United States "has not demonstrated (or even discussed) that it was physically impossible" for the Bureau to comply with both the ESA and the OWRD Order on the days in which OWRD found that the Bureau violated the Order. *See* KWUA MSJ at 97:16-28. *Arizona* describes two forms of conflict preemption: "cases where compliance with both federal and state regulations is a physical impossibility *and* those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See* 567 U.S. at 399-400 (citations and quotation marks omitted) (emphasis added). The United States and plaintiffs have shown, based on the OWRD Order and subsequent notices of violation, that the Order stands as an obstacle to Congress's purposes and objectives in enacting the ESA. They need not show that both forms of conflict preemption occurred in order to prevail on summary judgment.

Summary judgment is GRANTED on preemption grounds in favor of the United States and the plaintiffs on the federal government's crossclaim. The Bureau must comply with the ESA in operating the Klamath Project, and the OWRD Order is preempted under the Supremacy Clause. KWUA's motion for partial summary judgment is DENIED for the same reasons, as the Bureau's use of stored water in UKL is subject to the same ESA obligations. To the extent that OWRD's motion relies on KWUA's argument about ESA compliance, it too is DENIED.

B. INTERGOVERNMENTAL IMMUNITY

The United States and plaintiffs also argue that the OWRD Order is invalid under the Supremacy Clause because it violates the doctrine of intergovernmental immunity. USA MSJ at 45:1-16; Pls.' MSJ at 17:20-24.

"The doctrine of intergovernmental immunity arose from the Supreme Court's decision in *McCulloch v. Maryland*, 17 U.S. 316 (1819), which established that 'the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.'" *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010). As the Supreme Court recently noted, the doctrine has evolved over time, and is now understood "as

prohibiting state laws that *either* regulate the United States directly *or* discriminate against the federal government or those with whom it deals (e.g., contractors)." *United States v. Washington*, 142 S. Ct. 1976, 1984 (2022) (citation and internal modifications omitted) (emphasis in original).

The focus here is on the former: direct regulation. "It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides clear and unambiguous authorization for such regulation." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (citations and quotation marks omitted); *see also Blackburn v. United States*, 100 F.3d 1426, 1435 (9th Cir. 1996) ("states may not directly regulate the federal government's operations or property"). In other words, unless Congress has clearly and unambiguously authorized state regulation of the federal government, direct regulation will violate the intergovernmental immunity doctrine. *See Washington*, 142 S. Ct. at 1984 ("We will find that Congress has authorized regulation that would otherwise violate the federal government's intergovernmental immunity only when and to the extent there is a clear congressional mandate.") (citation and quotation marks omitted).

The argument from the United States and the plaintiffs is twofold. First, they contend that the OWRD Order directly regulates the federal government by restricting the Bureau's ability to release water from UKL for any purposes other than irrigation. *See* USA MSJ at 45:9-12; *see also* Pls.' MSJ at 17:17-19. Next, they argue that Congress has not clearly and unambiguously authorized any such regulation by OWRD. USA MSJ at 47:9-25; Pls.' MSJ at 22:10-24:18.

The arguments related to intergovernmental immunity center on whether section 8 of the Reclamation Act functions as clear, unambiguous authorization from Congress allowing such regulation by OWRD. Although the parties generally agree that OWRD has some amount of authority to regulate the Project, they dispute how far that authority extends.

The federal government contends that OWRD's authority under section 8 is limited, as "the United States has consented through section 8 only to adhere to the requirements of state law with respect to the acquisition and use of water rights for Project purposes, including particularly irrigation." USA MSJ at 47:9-12. But, it contends, "[t]his consent is unrelated to the separate domain of ESA compliance" and does not authorize OWRD "to regulate the Project in this area."

Id. at 47:12-14.

The plaintiffs make a similar point, arguing that "Reclamation can distribute Klamath Project water for irrigation in accordance with state-determined water rights, but section 8 does not give OWRD a significant role in controlling overall operation of Reclamation projects." Pls.' MSJ at 21:22-22:1. Like the federal government, the plaintiffs concede that "[s]ection 8 allows OWRD to determine the relative priority of state-based water rights in distributing water for irrigation from the Project, and Reclamation must conform to these priorities in distributing water for the Project." *Id*. at 22:17-19; *see also* Pls.' Reply [Dkt. No. 1065] 20:21-23 ("It is undisputed this language [in section 8] gives OWRD authority to regulate water used in irrigation."). But, they argue, that authority does not apply here "because OWRD is applying its state water law to prohibit the release of flows required by the ESA." Pls.' Reply at 21:15-17.

According to OWRD, section 8's "own terms provide that the Reclamation Act does not affect each state's right to regulate water within [its] own borders." OWRD MSJ at 19:18-20. It further argues that it could issue the Order as part of its "authority and duty to regulate water users' respective rights" in certain contexts, including when a senior water rights holder makes a "call" for water during shortages or when a dispute arises between water users. *See id*. at 14:16-20. OWRD contends that the only question is "where the line is drawn between OWRD's lawful regulation of the Klamath Project and Reclamation's independent obligations under the Endangered Species Act, which are not subject to state law." *See id*. at 14:4-7.

Having found that the ESA preempts the OWRD Order, I see no compelling reason to determine whether the Order is also invalid under the intergovernmental immunity doctrine. Preemption and intergovernmental immunity both concern the Supremacy Clause. Ruling on both would be redundant and reach farther than is necessary to answer the question underlying this phase of the litigation: whether the Bureau must follow the OWRD Order. As posed by the parties, the arguments related to intergovernmental immunity go beyond the OWRD Order itself and explore the scope of OWRD's authority under section 8 of the Reclamation Act. I need not define the parameters of that authority to resolve whether the OWRD Order is invalid under the Supremacy Clause. It is because it is preempted.

At oral argument, most of the parties conceded that if the Order was preempted, there was no need to delve into intergovernmental immunity. Only the plaintiffs advocated otherwise, suggesting that KID's arguments on conflict preemption could speak to the meaning of section 8, which would then implicate the intergovernmental immunity doctrine. But my decision is based on obstacle preemption, which does not require a determination of KID's arguments about whether it is physically impossible for the Bureau to comply with both the ESA and the OWRD Order. And I see no other reason why I must rule on intergovernmental immunity—or any other arguments regarding OWRD's authority to issue the Order—along with preemption. Any decision about OWRD's authority under section 8 would have implications far more reaching than the Order at hand, as it would shape the dynamics between state and federal agencies in the operation of Reclamation projects across the United States. I do not need to go that far in resolving the current dispute.

It is, however, worth briefly addressing the remainder of OWRD's counterclaim. It seeks two forms of injunctive relief: (1) an injunction "requiring Reclamation to provide OWRD with sufficiently detailed information to establish that the quantity of particular releases through the Link River Dam are required by the ESA and, therefore, preempt Oregon law"; or (2) an injunction "requiring Reclamation to cease releasing stored water through the Link River Dam for any uses that are not expressly allowed in its water rights permit, if the court agrees with KWUA that the ESA does not apply." OWRD Countercl. at 12:8-14. As I have explained, I do not agree with KWUA that the ESA does not apply, which leaves the injunction that would require certain information from the Bureau.

OWRD has not identified any law requiring the Bureau to give it the information that it desires. It points to section 8 of the Reclamation Act and two state administrative rules directing the watermaster to "investigate and respond to all complaints of water shortages or unlawful use based on a review of appropriate records and performance of field inspections" and allowing the OWRD director to "investigate to determine if a violation" of statutes, rules, orders, permit conditions, or standards occurred. *See* OWRD Reply [Dkt. No. 1086] 6:4-19 (citing Or. Admin. R. 690-250-0100(1); 690-260-0020(1)). But neither of the cited provisions obligate the Bureau (or

any water user, for that matter) to provide OWRD with the information it seeks. They only stand for the proposition that OWRD may investigate alleged violations, and that the watermaster's review is based on records and inspections. They are not, as OWRD asserts, evidence of "Reclamation's legal obligation to comply with [its] information requests." *See id*. at 6:20-23.

As a matter of comity, it makes sense for the Bureau to cooperate with OWRD in providing information reasonably requested. Indeed, the Bureau is doing so. *See* USA Reply [Dkt. No. 1072] 16:19-26, Ex. 1. But OWRD has not shown that it was injured by the Bureau's failure to provide the sought-after information because it has not shown that it was legally entitled to that information. It has not shown a concrete and particularized injury that is "actual and imminent, not conjectural or hypothetical," as required to establish standing for injunctive relief. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). OWRD "bears the burden of showing that [it] has standing for each type of relief sought." *Id*. The agency has not shown that it has standing to pursue an injunction requiring the Bureau to provide information about releases through the Link River Dam. This too supports denying OWRD's motion for summary judgment.

CONCLUSION

The United States' and plaintiffs' motions for summary judgment are GRANTED: the ESA preempts the OWRD Order. The OWRD Order is invalid under the Supremacy Clause. To the extent that OWRD attempts to enforce its Order, it is ENJOINED from doing so.

KWUA's motion for summary judgment is DENIED; the Bureau is required to comply with the ESA in operating the Project. OWRD's motion for summary judgment is DENIED for the same reasons, and also because it has not shown that it has standing to pursue the information-seeking injunctive relief.

IT IS SO ORDERED.

Dated: February 6, 2023

William H. Orrick
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: KLAMATH IRRIGATION DISTRICT, _____ KLAMATH IRRIGATION DISTRICT, *Petitioner,* v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, MEDFORD, *Respondent,* U.S. BUREAU OF RECLAMATION; OREGON WATER RESOURCES DEPARTMENT, *Real Parties in Interest.*	No. 22-70143 D.C. No. 1:21-cv-00504-AA OPINION

Petition for a Writ of Mandamus

Argued and Submitted November 18, 2022
San Francisco, California

Filed June 5, 2023

Before: Richard R. Clifton and Bridget S. Bade, Circuit Judges, and M. Miller Baker,* Judge.

Opinion by Judge Clifton;
Dissent by Judge Baker

SUMMARY**

Mandamus / Water Rights

The panel denied a petition for writ of mandamus brought by Klamath Irrigation District ("KID") to compel the district court to remand KID's motion for a preliminary injunction to the Klamath County Circuit Court in Oregon in a case involving a dispute over the allocation of water within the Klamath Basin.

In 1975, Oregon began the Klamath Basin Adjudication ("KBA"), a general stream adjudication comprising both administrative and judicial phases. During the administrative phase, the Oregon Water Resources Department determined claims to water rights in Upper Klamath Lake and portions of the Klamath River within Oregon. Nearly forty years later, the Oregon Water Resources Department entered an Amended and Corrected Findings of Fact and Final Order of Determination ("ACFFOD"), which provisionally recognized the

* The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

determined claims, in the Klamath County Circuit Court for confirmation. The Yurok and the Hoopa Valley Tribes of California (the "Tribes") did not participate in the KBA, but the Federal Circuit in related litigation concluded that their rights were protected even though they were not adjudicated.

In 2021, KID filed a motion for a preliminary injunction in state court seeking to stop the Bureau of Reclamation from releasing water from Upper Klamath Lake in accordance with its Endangered Species Act ("ESA") responsibilities and the Tribes' rights. Reclamation removed the case to federal district court under the federal officer removal statute, and KID moved to remand. The district court declined to remand, reasoning that the McCarran Amendment's waiver of sovereign immunity did not apply because KID's motion for a preliminary injunction did not seek to adjudicate or administer ACFFOD rights; rather, it sought to re-litigate federal issues—namely, Reclamation's authority to release water in compliance with the ESA and tribal rights.

The panel considered the five factors in *Bauman v. U.S. District Court*, 557 F.3d 813, 817 (9th Cir. 2004), in determining whether mandamus was warranted. The panel began with the third factor—clear error as a matter of law—because it was a necessary condition for granting the writ of mandamus. KID alleged that the district court's remand denial was clearly erroneous under the doctrine of prior exclusive jurisdiction, which provides that when a court is exercising *in rem*, or *quasi in rem*, jurisdiction over a *res*, a second court will not assume *in rem*, or *quasi in rem*, jurisdiction over the same *res*. The panel held that the doctrine of prior exclusive jurisdiction did not apply here. The KBA did not adjudicate Reclamation's ESA obligations or the Tribes' senior rights, so the Klamath

County Circuit Court did not have jurisdiction over the rights challenged by KID's motion. The panel held that KID's other assertion—that the Klamath County Circuit Court had prior exclusive jurisdiction because its motion seeks to enforce rights determined in the ACFFOD—was undermined by *Klamath Irrigation District v. U.S. Bureau of Reclamation (KID II)*, 48 F.4th 934 (9th Cir. 2022). The panel rejected KID's attempt to circumvent *KID II,* the Tribes' rights, and the effect of the ESA by characterizing the relief it sought as an application of the ACFFOD. The panel expressed no views on the merits of KID's underlying motion for preliminary injunction, and concluded only that the district court did not err in declining to remand the motion for preliminary injunction to the state court.

The panel held that it need not consider the remaining *Bauman* factors because the third factor was dispositive, but that KID's petition did not satisfy them in any event.

Dissenting, Judge Baker wrote that the mandamus petition filed by KID presented an important question involving jurisdictional first principles: Does a comprehensive state court *in rem* water-rights proceeding have prior exclusive jurisdiction over a *quasi in rem* motion to enforce a decree governing rights to *in-state* water when the Bureau of Reclamation asserts defenses based on the reserved rights of *out-of-state* Indian tribes and the preemptive effect of ESA? He would hold that because the Klamath County Circuit Court had prior exclusive jurisdiction over the order that KID's motion sought to enforce, the district court necessarily committed a clear error of law in failing to remand. He would grant the mandamus petition and send KID's motion back to state court.

COUNSEL

Nathan R. Rietmann (argued), Rietmann Law P.C., Salem, Oregon; John P. Kinsey and Christopher A. Lisieski, Wanger Jones Helsley P.C., Fresno, California; for Petitioner.

John L. Smeltzer (argued), Thomas K. Snodgrass, Robert P. Williams, and William B. Lazarus, Attorneys; Todd Kim, Assistant Attorney General; Environment and Natural Resources Division, United States Department of Justice; Washington, D.C.; Michael Gheleta, Supervising Attorney; Office of the Solicitor, United States Department of the Interior; Washington, D.C.; for Real Party in Interest United States Bureau of Reclamation.

Denise G. Fjordbeck and Nichole DeFever, Assistant Attorneys General; Benjamin Gutman, Solicitor General; Ellen F. Rosenblum, Attorney General of Oregon; Office of the Oregon Attorney General; Salem, Oregon; Real Party in Interest Oregon Water Resources Department.

OPINION

CLIFTON, Circuit Judge:

Disputes over the allocation of water within the Klamath Basin in southern Oregon and northern California, particularly during the recent period of severe and prolonged drought, have prompted many lawsuits in this and other courts. In this episode, Klamath Irrigation District ("KID") petitions for a writ of mandamus to compel the district court to remand KID's motion for preliminary injunction to the Klamath County Circuit Court in Oregon. The motion had originally been filed by KID in that Oregon court but was removed to federal district court by the U.S. Bureau of Reclamation ("Reclamation"), a federal agency within the U.S. Department of Interior. Reclamation was identified by KID as the respondent for KID's motion.

A requirement for obtaining mandamus relief is a determination by us that the district court's order was clearly erroneous as a matter of law. We conclude that the district court's order was not clearly erroneous. As a result, we deny the petition and decline to issue the writ.

I. Background

A. The Klamath Basin and Klamath Project

The Klamath Basin encompasses approximately 12,000 square miles of "interconnected rivers, canals, lakes, marshes, dams, diversions, wildlife refuges, and wilderness areas" in southern Oregon and northern California. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation* (*KID II*), 48 F.4th 934, 938 (9th Cir. 2022). Upper Klamath Lake is a large freshwater lake in the Klamath Basin in Oregon that drains into the Link River. *Klamath Irrigation Dist. v. Or.*

Water Res. Dep't (*Or. Water Res. Dep't*), 518 P.3d 970, 973 (Or. Ct. App. 2022). From there, water flows into and through Lake Ewauna to the Klamath River, which then proceeds southwest into California and eventually joins the Trinity River near the Pacific coast.

Since time immemorial, Indigenous Peoples, including the Yurok and the Hoopa Valley Tribes of California (the "Tribes"), have depended upon the waters of the Klamath Basin and the traditional fisheries therein. *Id.*; *see also KID II*, 48 F.4th at 939–40 (citing *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983); *Parravano v. Babbitt*, 70 F.3d 539, 541–43 (9th Cir. 1995)); *Baley v. United States*, 942 F.3d 1312, 1321–22 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 133 (2020).

Pursuant to the Reclamation Act of 1902, 43 U.S.C. §§ 371–390h, Reclamation operates the Klamath River Basin Project (the "Klamath Project"), a series of complex irrigation works in the region, in accordance with state[1] and federal law, except where state law conflicts with superseding federal law. 43 U.S.C. § 383; *KID II*, 48 F. 4th

[1] Both Oregon and California follow the doctrine of prior appropriation. *See Irwin v. Phillips*, 5 Cal. 140, 146 (1855) (California); *Teel Irrigation Dist. v. Or. Water Res. Dep't*, 919 P.2d 1172, 1174 (Or. 1996) (Oregon). The doctrine provides that water rights are "perfected and enforced in order of seniority, starting with the first person to divert water from a natural stream and apply it to a beneficial use (or to begin such a project, if diligently completed)." *Montana v. Wyoming*, 563 U.S. 368, 375–76 (2011) (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 98 (1938); *Arizona v. California*, 298 U.S. 558, 565–66 (1936); Wyo. Const. art. 8, § 3). "Once such a water right is perfected, it is senior to any later appropriators' rights and may be fulfilled entirely before those junior appropriators get any water at all." *Id.* at 376.

at 940–41. In doing so, Reclamation balances various interests, three of which are relevant to the instant motion.

First, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, Reclamation must maintain specific water levels in Upper Klamath Lake and instream flows in the Klamath River. *KID II*, 48 F.4th at 940–41; *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999), *cert. denied*, 531 U.S. 812 (2000); *Yurok Tribe v. U.S. Bureau of Reclamation*, No. 19-cv-04405-WHO, 2023 WL 1785278, at *5–6 (N.D. Cal. Feb. 6, 2023); *Baley*, 942 F.3d at 1323–25 (explaining the obligations).

Second, the Tribes' senior, non-consumptive rights compel Reclamation to maintain specific instream flows in the Klamath-Trinity River in California. *Patterson*, 204 F.3d at 1213–14; *KID II*, 48 F.4th at 941. The river and its fisheries are integral to the Tribes' existence. *E.g.*, *KID II*, 48 F.4th at 940 (citing *Parravano*, 70 F.3d at 542); *Yurok Tribe*, 2023 WL 1785278, at *6. Indeed, "one of the central purposes" behind the establishment of the Tribes' reservations was protecting the traditional fisheries. *KID II*, 48 F.4th at 940 (citing *Parravano*, 70 F.3d at 542, 546); *see also* S. Rep. No. 100-564, at 14–15 (1988). "At the bare minimum," the Tribes hold rights to an amount of water that is at least equal, but not limited to, the amount necessary to fulfill Reclamation's ESA responsibilities. *Baley*, 942 F.3d at 1336–37; *Yurok Tribe*, 2023 WL 1785278, at *6; *Or. Water Res. Dep't*, 518 P.3d at 973–974.

Finally, Reclamation also contracts with KID, a quasi-municipal Oregon irrigation district, to supply water "subject to [its] availability" to KID's irrigators. *KID II*, 48 F.4th at 940 (citation omitted); *Or. Water Res. Dep't*, 518

P.3d at 972. Delayed access to or decreased amounts of water cause "long-reaching damages" to the irrigators' businesses.

KID and other irrigation districts in the region are members of the Klamath Water Users Association ("KWUA"), a non-profit organization that represents irrigation districts within the Klamath Project. *See Klamath Irrigation Dist. v. United States*, 75 Fed. Cl. 677, 687 (2007), *vacated on other grounds*, 635 F.3d 505 (Fed. Cir. 2011); *see also Member Districts*, Klamath Water Users Ass'n, https://kwua.org/member-districts/ (last visited March 17, 2023).

B. The Klamath Basin Adjudication

In 1909, Oregon enacted the Water Rights Act, Or. Rev. Stat. ch. 537, which provided that all waters of the state belong to the public and rights existing before the Act's effective date must be determined. In 1975, Oregon began the Klamath Basin Adjudication ("KBA"), a general stream adjudication comprising both administrative and judicial phases. *Baley*, 942 F.3d at 1321. During the lengthy administrative phase, the Oregon Water Resources Department ("OWRD") determined claims to water rights in Upper Klamath Lake and portions of the Klamath River within Oregon. *Or. Water Res. Dep't*, 518 P.3d at 973. Nearly forty years later, the agency entered an Amended and Corrected Findings of Fact and Final Order of Determination ("ACFFOD"), which provisionally recognized the determined claims, in the Klamath County Circuit Court for confirmation. *Id.* While the judicial phase of the KBA is pending, the ACFFOD rights are enforceable. *See* Or. Rev. Stat. §§ 539.130, 539.170.

The Tribes did not participate in the KBA, but the Federal Circuit concluded in related litigation that their rights are protected even though they were not adjudicated because "there is no need for a state adjudication to occur before federal reserved rights are recognized[.]" *Baley*, 942 F.3d at 1340–41 (citing *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1272 (9th Cir. 2017)). Under the ACFFOD, Reclamation has the right to store water in Upper Klamath Lake, and KID has the right to use a specific amount of water for irrigation. However, KID's rights are subservient to the Tribes' rights and Reclamation's ESA responsibilities. *Patterson*, 204 F.3d at 1213 (the Tribes' senior rights "carry a priority date of time immemorial"); *Baley*, 942 F.3d at 1340 (quoting *Agua Caliente Band*, 849 F.3d at 1272) ("[S]tate water rights are preempted by federal reserved rights."). Because "Reclamation cannot distribute water that it does not have[,]" water may not be available to KID, "for example, due to drought, a need to forego diversions to satisfy prior existing rights, or compliance with other federal laws such as the Endangered Species Act." *KID II*, 48 F.4th at 940 (citation omitted).

C. The Present Dispute

A severe, prolonged drought has reduced the amount of water available in southern Oregon and northern California, saddling Reclamation with the "'nearly impossible' task of balancing multiple competing interests in the Klamath Basin." *Id.* at 938–40 (quoting *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation* (*KID I*), 489 F. Supp. 3d 1168, 1173 (D. Or. 2020)). In several federal lawsuits, KID and similarly situated parties have repeatedly and unsuccessfully challenged Reclamation's authority to release water to satisfy tribal rights and comply with the ESA. *See, e.g.*, *KID*

I, 489 F. Supp. 3d 1168, *aff'd*, *KID II*, 48 F.4th 934; *Patterson*, 204 F.3d 1206; *Baley*, 942 F.3d 1312; *Yurok Tribe*, 2023 WL 1785278; *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001).

In 2021, KID filed a motion for a preliminary injunction in the Klamath County Circuit Court seeking to stop Reclamation from releasing water from Upper Klamath Lake in accordance with its ESA responsibilities and the Tribes' rights. Due to the drought, such releases could delay access to, or limit the amount of, water available to satisfy KID's ACFFOD-determined allotment. Reclamation subsequently removed the action to federal district court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), on the grounds that KID's motion implicated issues of federal law and Reclamation planned to assert federal defenses. KID moved for remand on the basis that the Klamath County Circuit Court had prior exclusive jurisdiction over the rights determined in the ACFFOD. The district court declined to remand, reasoning that the McCarran Amendment's waiver of sovereign immunity did not apply because KID's motion for preliminary injunction did not seek to adjudicate or administer ACCFOD rights; rather, it sought to re-litigate federal issues—namely, Reclamation's authority to release water in compliance with the ESA and tribal rights. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, No. 1:21-cv-00504-AA, 2022 WL 1210946, at *4–5 (D. Or. Apr. 25, 2022). KID then filed a petition for writ of mandamus in this court, seeking to compel the district court to remand its motion for preliminary injunction to the Klamath County Circuit Court.

II. Discussion

We have authority to issue a writ of mandamus under 28 U.S.C. § 1651. Mandamus is an "extraordinary" remedy limited to "extraordinary causes." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)).

Our court has long considered the following factors, commonly called *Bauman* factors, in determining whether mandamus is warranted: (1) whether the petitioner has "no other adequate means, such as a direct appeal," to attain the desired relief, (2) whether "[t]he petitioner will be damaged or prejudiced in a way not correctable on appeal," (3) whether the "district court's order is clearly erroneous as a matter of law," (4) whether the order makes an "oft-repeated error, or manifests a persistent disregard of the federal rules," and (5) whether the order raises "new and important problems" or legal issues of first impression. *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 1977). We do not mechanically apply the *Bauman* factors. *Cole v. U.S. Dist. Ct.*, 366 F.3d 813, 817 (9th Cir. 2004). As such, "[a] showing of only one factor does not mean the writ must be denied, nor does a showing of all factors mean that the writ must be granted." *In re Mersho*, 6 F.4th 891, 898 (9th Cir. 2021). ''Mandamus review is at bottom discretionary—even where the *Bauman* factors are satisfied, the court may deny the petition." *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1099 (9th Cir. 1999).

A. Clear Error

We begin with the third factor—clear error as a matter of law—because it is "a necessary condition for granting a writ of mandamus." *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011). Clear error is a deferential standard, requiring a

"firm conviction" that the district court "misinterpreted the law" or "committed a clear abuse of discretion." *In re Perez*, 749 F.3d 849, 855 (9th Cir. 2014).

Here, KID contends that the district court's denial of its motion to remand was clearly erroneous under the doctrine of prior exclusive jurisdiction, which "holds that when one court is exercising *in rem* [or *quasi in rem*] jurisdiction over a *res*, a second court will not assume *in rem* [or *quasi in rem*] jurisdiction over the same *res*." *Chapman v. Deutsche Bank Nat'l Trust Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011) (citation and internal quotations omitted); *State Engineer v. South Fork Band of the Te-Moak Tribe*, 339 F.3d 804, 811, 814 (9th Cir. 2003) (establishing that *quasi in rem* jurisdiction is sufficient for the doctrine of prior exclusive jurisdiction to bar concurrent state and federal proceedings). According to KID, the Klamath County Circuit Court had *in rem* jurisdiction over the ACFFOD (the *res*), and KID's motion for preliminary injunction could not be adjudicated "without determining the extent and effect of the rights" in that order.

The doctrine of prior exclusive jurisdiction does not apply here, however. The KBA did not adjudicate Reclamation's ESA obligations or the Tribes' senior rights, *Baley*, 942 F.3d at 1323, 1340–41, so the Klamath County Circuit Court did not have jurisdiction over the rights challenged by KID's motion. *Cf. United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1160–61 (9th Cir. 2010) (noting that the doctrine of prior exclusive jurisdiction did not bar a state court from exercising jurisdiction over an appeal of a state engineer's grant of water rights in a river, even though a federal district court had previously adjudicated rights in the same river, because the engineer's ruling was based on state law and did not affect the federally adjudicated rights).

OWRD has affirmatively taken the position in this matter that the ACFFOD does not adjudicate the challenges presented by KID's motion and the Klamath County Circuit Court's jurisdiction does not extend to those issues. It so stated in the answering brief that it filed in this case.[2] As noted above, *supra* page 9, it was OWRD that determined claims and prepared the ACFFOD that remains in effect while the judicial phase proceeds in Klamath County Circuit Court.

Reliance by the dissent on *State Engineer*, 339 F.3d 804, is misplaced. Dissent at 32–34. There, we determined that a removed action was *quasi in rem* because the parties' rights in the *res* (a river) served as the basis of jurisdiction, even though the action was brought against the defendants personally. *State Engineer*, 339 F.3d at 811. Because the action was *quasi in rem*, the doctrine of prior exclusive jurisdiction applied to bar concurrent state and federal actions, and remand to the state court was thus necessary. *Id.* at 811, 814. The state court in *State Engineer* had jurisdiction over the tribe's rights because the rights were governed by state law and subject to the state's general stream adjudication. *Id.* at 807–08.

Here, however, the Klamath County Circuit Court did not have jurisdiction over the Tribes' rights implicated by KID's motion because the Tribes' rights at issue were not

[2] OWRD's different stance before the Federal Circuit in *Baley*, 942 F.3d 1312, is irrelevant. The Federal Circuit rejected the agency's arguments. *Baley*, 942 F.3d at 1340–41. Before our court, the agency has reconsidered that losing position.

governed by Oregon law and were not subject to the KBA.[3] [4] *See Baley*, 942 F.3d at 1323, 1340–41. The McCarran Amendment, 43 U.S.C. § 666, "waives the United States' sovereign immunity for the limited purpose of allowing the Government to be joined as a defendant in a state adjudication [or administration] of water rights." *United States v. Adair*, 723 F.2d 1394, 1400 n.2 (9th Cir. 1983). It does not "authorize private suits to decide priorities between the United States and particular claimants[.]" *Metro. Water*

[3] The fact that, as the dissent notes, Dissent at 36–37, state courts *can* have jurisdiction to adjudicate federal reserved water rights is irrelevant here because neither the KBA nor the Klamath County Circuit Court exercised jurisdiction over the Tribes' rights. *Baley*, 942 F.3d at 1321, 1341 (observing that the Yurok and Hoopa Valley Tribes "did not participate in the Klamath Adjudication" in Oregon state court). A fair reading of *United States v. Oregon*, 44 F.3d at 770—and all other relevant federal litigation regarding the KBA to date—belies the dissent's assertion that we held "the McCarran Amendment 'required' Reclamation to submit federal water-rights claims to the jurisdiction of the Klamath County Circuit Court [on behalf of the Yurok and Hoopa Valley Tribes, both of which are located outside of Oregon's borders.]" Dissent at 25–26. Rather, we held simply that the KBA is "the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment." *Oregon*, 44 F.3d at 770. That case did not involve out-of-state parties.

[4] The dissent's observation, Dissent at 28–29, 29 n.9, that Reclamation acknowledged in an internal assessment that the ACFFOD barred water releases "to augment or otherwise produce instream flows in the Klamath River," which would preclude compliance with the ESA and the Tribes' rights, is irrelevant. As the Northern District of California recently explained in response to OWRD's attempt to stop Reclamation's water releases for non-ACFFOD rights and obligations, Reclamation *must* comply with the ESA. *Yurok Tribe*, 2023 WL 1785278, at *14–19. The court also held that OWRD's order, which directed Reclamation to stop releasing water for non-ACFFOD-determined rights, was preempted by the ESA and therefore violated the Supremacy Clause. *Id.*

Dist. v. United States, 830 F.2d 139, 144 (9th Cir. 1987), *aff'd sub nom. California v. United States*, 490 U.S. 920 (1988). Nor does it expand a state court's subject matter jurisdiction or empower a state to adjudicate rights beyond its jurisdiction, which, at bottom, is what KID's motion for a preliminary injunction seeks to do. *See United States v. Dist. Ct. for Eagle Cnty.*, 401 U.S. 520, 523 (1971); *Baley*, 942 F.3d at 1341 (explaining that the Tribes' "rights are federal reserved water rights not governed by state law" and that "states have the ability to adjudicate rights in a water or river within their jurisdiction, but they cannot adjudicate water rights in another state").

The dissent's focus on *in rem* jurisdiction because the water is stored in Upper Klamath Lake is not entirely misplaced, Dissent at 32–38, but it seems myopic for two reasons.[5]

[5] The dissent cites OWRD and U.S. Department of Justice documents indicating that OWRD noticed and adjudicated federal reserved rights for federal properties in northern California as part of the KBA. *E.g.*, Dissent at 25 n.1, 26 n.5, 35. However, neither party entered these documents into the record, nor discussed them in the briefs. As a general rule, "we rely on the parties to frame the issues for decision[.]" *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). This "rule reflects our limited role as neutral arbiters of legal contentions presented to us, and it avoids the potential for prejudice to parties who might otherwise find themselves losing a case on the basis of an argument to which they had no chance to respond." *United States v. Yates*, 16 F.4th 256, 270–71 (9th Cir. 2021).

Nevertheless, even if these documents were in the record, the fact remains that the KBA did not adjudicate the Tribes' rights—nor did it need to. *Baley*, 942 F.3d at 1323, 1340–41 ("[T]here is no need for a state adjudication to occur before federal reserved rights are recognized[.]"). The Tribes' rights take precedence over KID's

First, under the dissent's logic, Dissent at 34–35, a state could control all surface water within its borders by damming outflows, thereby attaining *in rem* jurisdiction over the pooled resource, which is essentially the position KID takes here.[6] Such a result is antithetical to the Supreme Court's interpretation of the term "river system" within the McCarran Amendment to mean one "within the particular State's jurisdiction[,]" which confines a state's adjudication to its own borders.[7] [8] *See Eagle Cnty.*, 401 U.S. at 523.

ACFFOD rights under both the doctrine of prior appropriation, *Patterson*, 204 F.3d at 1213 (providing that the Tribes' senior rights "carry a priority date of time immemorial"), and as federal reserved rights, *Baley*, 942 F.3d at 1340 (quoting *Agua Caliente Band*, 849 F.3d at 1272) ("[S]tate water rights are preempted by federal reserved rights.").

[6] KID advanced this position at oral argument. *See* United States Court of Appeals for the Ninth Circuit, *22-70143 Klamath Irrigation District v. USDC-ORM*, YouTube (Nov. 18, 2022), https://youtu.be/EAVWqqx VTy4 (view minutes 14:18–16:16).

[7] Caselaw does not support the dissent's interpretation of the McCarran Amendment as geographically indifferent "to the location or nature of federal interests with asserted 'water rights' to an in-state 'river system or other source.'" Dissent at 45 n.23. We have never held that a state's adjudication could operate extraterritorially without the participation of impacted parties hundreds of miles away entirely within another state.

[8] The dissent's conclusion that Reclamation should have asserted the Tribes' reserved rights in an out-of-state proceeding because it holds their rights in trust, Dissent at 25–26, 26 n.3, ignores this limit on the McCarran Amendment's waiver of sovereign immunity. As the Supreme Court explained in relation to the Colorado River in *Eagle County*, 401 U.S. at 523, "[n]o suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States." The dissent ignores the Supreme Court's admonition and instead advocates for such an all-encompassing

Second, the dissent overlooks the forum shopping at the heart of KID's petition. KID and other similarly situated parties have not succeeded in previous federal lawsuits. *See, e.g.*, *KID I*, 489 F. Supp. 3d 1168, *aff'd*, *KID II*, 48 F.4th 934, 947; *Patterson*, 204 F.3d 1206, 1213–14;[9] *Baley*, 942 F.3d 1312;[10] *Yurok Tribe*, 2023 WL 1785278, at *6; *Kandra*, 145 F. Supp. 2d 1192.

By filing its underlying motion in state court, KID sought to litigate in a new forum, one it presumably hoped would be less concerned with the commands of the ESA and the rights of parties not before the court.[11] With this perspective, it might fairly be said that KID seeks to deny other affected

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interpretation of the KBA here. But a "river system" within the McCarran Amendment "must be read as embracing one within the particular State's jurisdiction." *Id.* at 523.

[9] Based on tax records, *Kandra*, 145 F. Supp. at 1201, and other litigation documents, we infer that the *Patterson* plaintiff—the Klamath Water Users Protective Association ("KWUPA")—is the same entity as KWUA, which is the business name of the Klamath Basin Water Users Protective Association ("KBWUPA"). KID is a member of KBWUPA/KWUA. *See supra* page 9.

Regardless of whether KWUPA is the same entity as KBWUPA/KWUA, the fact remains that, in *Patterson*, the plaintiff invoked its state contract rights to challenge Reclamation's authority to manage the Klamath Project in accordance with the ESA and tribal trust obligations. This legal theory sounds familiar to us.

[10] KID was a party in *Baley* until, following the trial and post-trial briefing, KID and the other irrigation districts voluntarily dismissed their claims before the court ruled against the remaining individual plaintiffs. *Baley*, 942 F.3d at 1318.

[11] To be clear, we do not insinuate that the Klamath County Circuit Court would necessarily rule in KID's favor. Rather, we mean only that KID seems to be seeking a new umpire because it has repeatedly struck out in multiple federal courts.

entities a meaningful forum and remedy. The dissent does not alleviate these concerns, offering only the possibility of eventual review by the Supreme Court, after years of misdirection of the water that is the subject of these claims. Dissent at 39–40.

KID's other assertion—that the Klamath County Circuit Court had prior exclusive jurisdiction because its motion seeks to enforce rights determined in the ACFFOD—is undermined by *Klamath Irrigation District v. U.S. Bureau of Reclamation* (*KID II*), 48 F.4th 934 (9th Cir. 2022).[12] There, we rejected KID's characterization of its suit as an administration of ACFFOD-determined rights and concluded that it was instead an Administrative Procedure Act challenge to Reclamation's authority to release water in compliance with the ESA and federal reserved water rights. *Id.* at 947. Here, we similarly reject KID's attempt to circumvent our prior decision, the Tribes' rights, and the effect of the ESA by characterizing the relief it seeks as an application of the ACFFOD.[13]

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[12] We do not cite *KID II* for a preclusive effect, as the dissent alleges. Dissent at 40 n.19, 42 n.21. As we explain, that case illustrates KID's framing of its legal theory as a McCarran Amendment "administration," when it actually sought to outmaneuver the force of the ESA and the Tribes' rights through an enforcement of the ACFFOD. Here, KID attempts another end-run around the same federal rights under the guise of the McCarran Amendment.

[13] We are not persuaded by the dissent's proposal to apply removal precedent to determine whether KID's petition is an "administration" under the McCarran Amendment. Dissent at 43 (citing *Bell v. Hood*, 327 U.S. 678 (1946) (nonexistence of a cause of action is not a proper basis for a jurisdictional dismissal); *Jefferson County v. Acker*, 527 U.S. 423 (1999) (colorable federal defense is sufficient to invoke federal question

We do not reach the merits of KID's motion for preliminary injunction, as the dissent charges. Dissent at 39–40, 43. "We recognize that, at times, 'jurisdiction is so intertwined with the merits that its resolution depends on the resolution of the merits.'" *Orff v. United States*, 358 F.3d 1137, 1150 (9th Cir. 2004) (quoting *Careau Grp. v. United Farm Workers*, 940 F.2d 1291, 1293 (9th Cir. 1991)). "But that is not the case here." *Id.* Our determination that the Klamath County Circuit Court did not have prior exclusive jurisdiction over the rights KID seeks to re-litigate does not depend on the merits of KID's motion for preliminary injunction "as the resolution of one does not depend on the resolution of the other." *Id.*

Further, we have never held that *any* issue implicating federal reserved water rights *always* goes to the merits of such issue and precludes a jurisdictional analysis. The dissent relies on inapposite cases to support this proposition. Dissent at 23, 39–40 (citing *United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1984); *Eagle Cnty.*, 401 U.S. at 526; *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). These cases merely note that properly preserved issues implicating the amount and scope of federal reserved rights in state adjudications are reviewable by the Supreme Court after final judgment from the state court. *See Eagle Cnty.*, 401 U.S. at 525–26; *Colo. River*, 424 U.S. at 813; *Oregon*, 44 F.3d at 768–70.

Again, we express no views on the merits of KID's underlying motion for preliminary injunction. We only conclude that the Klamath County Circuit Court did not have

jurisdiction under the federal officer removal statute)). Both cases are inapposite as neither deal with the McCarran Amendment, stream adjudications, or any analogous issues to those before our Court.

prior exclusive jurisdiction over the rights KID seeks to re-litigate. As such, the district court did not err in declining to remand the motion for preliminary injunction to the state court.

B. Remaining Bauman *Factors*

We need not consider the remaining *Bauman* factors because "the absence of the third factor, clear error, is dispositive." *Burlington N. & Santa Fe Railway v. Dist. Ct.*, 408 F.3d 1142, 1146 (9th Cir. 2005). KID's petition does not satisfy them, in any event. The district court's order did not "manifest[] a persistent disregard of the federal rules," nor did it raise legal issues of first impression. *Bauman*, 557 F.2d at 655.

KID has "other adequate means" to attain its desired relief, *id. at* 654, as its underlying motion for preliminary injunction has simply been removed to the district court. Nothing prevents KID from seeking substantive relief before the district court, because, contrary to the dissent's characterization, Dissent at 39–40, 43, we neither adjudicate the merits of KID's motion, nor direct the district court on the merits. KID may also seek interim injunctive relief from the district court.

Finally, KID will not be "damaged or prejudiced in a way not correctable on appeal" by litigating the underlying motion before the district court. *Bauman*, 557 F.2d at 654. KID's lack of success in previous federal lawsuits and related litigation does not make the Klamath County Circuit Court the proper forum by default. While the dissent expresses concern that any eventual appellate relief would be inadequate because KID's members may suffer a loss of water rights in the interim, Dissent at 46, the dissent's approach would threaten to impose exactly the same

deprivation on the Tribes, whose rights take precedence under both federal and state law over those asserted by KID. *See Patterson*, 204 F.3d at 1209, 1214; *Baley*, 942 F.3d at 1340; *Kandra*, 145 F. Supp. 2d at 1197, 1204; *Parravano*, 70 F.3d at 541–42, 545; *see also Agua Caliente Band*, 849 F.3d at 1272.

Accordingly, we do not conclude that this is an "exceptional" situation "amounting to a judicial usurpation of power or a clear abuse of discretion" that would justify the "extraordinary remedy" of mandamus. *See In re Holl*, 925 F.3d 1076, 1082 (9th Cir. 2019).

KID's petition for a writ of mandamus is **DENIED**.

BAKER, Judge, dissenting:

"[B]earing in mind the ubiquitous nature of Indian water rights in the [W]est," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 811 (1976), and that "in stream adjudications . . . each water rights claim by its very nature raises issues *inter se* as to all such parties for the determination of one claim necessarily affects the amount available for the other claims," *Nevada v. United States*, 463 U.S. 110, 140 (1983) (cleaned up), the mandamus petition filed by the Klamath Irrigation District (KID) presents an important question involving jurisdictional first principles: Does a comprehensive state court *in rem* water-rights proceeding have prior exclusive jurisdiction over a *quasi in rem* motion to enforce a decree governing rights to *in-state* water when the United States Bureau of Reclamation asserts defenses based on the reserved rights of *out-of-state* Indian tribes and the preemptive effect of the Endangered Species Act (ESA)?

In holding that the Klamath County (Oregon) Circuit Court lacks such prior exclusive jurisdiction, the majority gives four reasons. I respectfully disagree as to each.

First, the majority contends that because the Yurok and Hoopa Valley Tribes (the Tribes) are California-based, the Oregon state court lacks authority to adjudicate their rights to in-state water in the first instance. Opinion at 16–17. But as explained below, Oregon unquestionably has the power to adjudicate the rights of the Tribes and other out-of-state claimants to water within its borders through *in rem* proceedings, even as its exercise of such authority must respect federal reserved rights and interstate water rights. The irony of today's decision is that *we* may not pass judgment on the Klamath County Circuit Court's jurisdiction as a matter of *state* law.

Second, the majority observes that the decree governing the *res* (rights to stored water in Upper Klamath Lake in Oregon) did not adjudicate Reclamation's federal law defenses. *Id.* at 13–14. But what matters here is that KID's *quasi in rem* motion asserts rights under that decree, over which the state court has prior exclusive jurisdiction. The Bureau's defenses are irrelevant.

Third, the majority concludes that Reclamation's defenses defeat KID's motion. *Id.* at 14–15, 15 n.4, 16 n.5, 22. It's settled law, however, that questions concerning tribal reserved rights and other federal defenses in comprehensive water-rights proceedings "go to the merits," *United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994), and that state courts are presumptively competent to adjudicate those "federal questions which, if preserved, can be reviewed" in the Supreme Court "after final judgment by the [state] court." *United States v. Dist. Ct. in and for County of Eagle*,

401 U.S. 520, 526 (1971). Even if the Bureau's defenses are well-founded as the majority contends, that has no bearing on the state court's jurisdiction, which we must presume exists as a matter of state law.

Finally, the majority holds that the federal sovereign immunity waiver of the McCarran Amendment, 43 U.S.C. § 666(a), does not apply here because permitting KID to obtain relief under the decree would interfere with "the Tribes' rights" and the preemptive "effect of the ESA." Opinion at 19. Once again, the majority conflates the merits with jurisdiction. We should instead hold that KID's assertion of a *colorable* claim to enforce the decree governing the *res* suffices to trigger the Amendment's waiver under the test applied by the Supreme Court in analogous jurisdictional contexts. *Cf. Bell v. Hood*, 327 U.S. 678, 682–83 (1946).

Because the Klamath County Circuit Court has prior exclusive jurisdiction over the order that KID's motion seeks to enforce, the district court necessarily committed a clear error of law in failing to remand. We should grant the mandamus petition and send KID's motion back to state court where it belongs.

I

In 1975, the Oregon Water Resources Department (OWRD) commenced a general stream adjudication (the Klamath Basin Adjudication, or KBA). *See United States v. Oregon*, 44 F.3d at 762. In so doing, OWRD sought to ascertain "the relative rights of the various claimants to the waters" of the Klamath Basin. ORS § 539.021(1). Under Oregon law, a general stream adjudication determines all water rights vested or initiated before February 24, 1909, including—of critical importance here—reserved federal

rights. *See* ORS § 539.010(7) (authorizing OWRD to "adjudicate federal reserved rights for the water necessary to fulfill the primary purpose of the reservation").

"[P]roceedings adjudicating" water rights in Oregon are "in rem," *Masterson v. Pac. Live Stock Co.*, 24 P.2d 1046, 1048 (Or. 1933), meaning that the KBA is "directly against the property"—in this instance, water rights in Upper Klamath Lake—"and [involves] an adjudication against all mankind equally binding upon everyone," *Linn County v. Rozelle*, 162 P.2d 150, 156 (Or. 1945). And because the KBA is against the world, "person[s] . . . claim[ing] legal title to a water right [were required to] file a claim in the adjudication or lose the right." *Klamath Irrigation Dist. v. United States*, 227 P.3d 1145, 1166 (Or. 2010); *see also* ORS § 539.210 (same); *Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 447–48 (1916) (same). Accordingly, OWRD provided notice of the KBA to federal users in both Oregon *and* California.[1]

Even though we held that the McCarran Amendment "required" Reclamation to submit federal water-rights claims to the jurisdiction of the Klamath County Circuit

[1] In 1996, OWRD gave notice "to the United States Attorney General claiming a federal reserved right or a right to the use of the waters of the Klamath River and its tributaries, diverted in Oregon and used within Klamath, Jackson, and Lake Counties, Oregon[,] *and Modoc and Siskiyou Counties, California*," that it would receive proofs of claim between October 1, 1996, and January 31, 1997, from "all parties claiming rights to the use of waters of the Klamath River or any of its tributaries." KBA order at Appendix H-2 (emphasis added), *available at* https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathAdj/KBA_APP_133626.PDF. Reclamation "uses" water by releasing it from Upper Klamath Lake for the benefit of the California-based Tribes.

Court, *United States v. Oregon*, 44 F.3d at 770, the Bureau[2] failed to file any such claim on behalf of the Tribes, to whom the government owes trust obligations. *See Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 549 (1983);[3] *cf. Nevada v. United States*, 463 U.S. at 143–44 (explaining that an Indian tribe's water rights were lost because the government failed to assert them in "a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to," as "water adjudications are more in the nature of *in rem* proceedings").

In 2014, OWRD filed a decree (the KBA order)[4] that provisionally governs water rights in Upper Klamath Lake, including the rights of federal properties in California,[5]

[2] Under the Reclamation Act, absent superseding federal law, the Bureau must "comply with state law in the 'control, appropriation, use, or distribution of water.' " *California v. United States*, 438 U.S. 645, 674–75 (1978) (quoting 43 U.S.C. § 383); *see also id*. at 675 ("The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law.").

[3] Thus, the majority's contention that the "Tribes' rights at issue . . . were not subject to the KBA," Opinion at 14–15, is incorrect. *Reclamation* is subject to the KBA and holds the Tribes' rights in trust.

[4] The parties call the KBA order the "ACFFOD," shorthand for "Amended and Corrected Findings of Fact and Final Order of Determination."

[5] The Justice Department explains that "[i]f the administrative findings and conclusions [in the KBA order] are ultimately sustained by the state circuit court, they will approve numerous significant federal reserved rights and state appropriative rights for a national park, national forests, wilderness areas, wild and scenic rivers, wildlife refuges, Indian reservations, and the Klamath Reclamation Project encompassing

pending a final adjudication by the state court. *See* ORS § 539.170; *see also Lewis*, 241 U.S. at 455 ("[I]t is within the power of the state to require that, pending the final adjudication, the water shall be distributed according to [OWRD]'s order, unless a suitable bond be given to stay its operation."). Under Oregon law, the "Klamath County Circuit Court has exclusive subject matter jurisdiction to review the KBA order." *TPC, LLC v. Or. Water Res. Dep't*, 482 P.3d 121, 129 (Or. App. 2020).

On March 29, 2021, KID moved for a preliminary injunction in the Klamath County Circuit Court,[6] arguing

200,000 acres in southern Oregon *and northern California*." U.S. Dep't of Justice, Environment & Natural Resources Division, *ENRD Accomplishments Report Fiscal Year 2013*, at 74 (emphasis added), https://www.justice.gov/sites/default/files/enrd/legacy/2015/04/13/ENRD_Accomplishments_Report_2013_2.pdf. One of the national wildlife refuges that DOJ referred to is the Tule Lake National Wildlife Refuge, located entirely in Northern California. *See Kandra v. United States*, 145 F. Supp. 2d 1192, 1196 (D. Or. 2001) ("Two national wildlife refuges, the Lower Klamath and Tule Lake National Wildlife Refuges, depend on the [Klamath Reclamation] Project for water and receive large quantities of return irrigation flows and other Project waters.").

[6] Earlier, KID sued Reclamation in Oregon district court seeking relief under the Administrative Procedure Act (APA). *See Klamath Irrigation Dist. v. Bureau of Reclamation*, No. 1:19-cv-451-CL, Dkt. No. 70 (D. Or.) (KID's second amended complaint for declaratory and injunctive relief). After the Klamath and Hoopa Tribes then intervened to seek dismissal, the district court dismissed the suit in 2020 for lack of jurisdiction. The court reasoned that the Tribes were required parties, *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 489 F. Supp. 3d 1168, 1176–81 (D. Or. 2020) (*KID I*), and that sovereign immunity—which they did not waive—prevented their joinder, *id.* at 1181–82. While its appeal to our Court was pending, KID filed its motion in the Klamath County Circuit Court. We later affirmed the district court's dismissal.

that Reclamation's ongoing water releases violate the KBA order, which provides that the United States only owns the right to *store* water. Pet. 66[7] (citing KBA order, Pet. 109); *see also* KBA order, Pet. 121 (providing that "[t]he United States also holds a separate right for storage of water in Upper Klamath Lake *for the benefit of the irrigation rights recognized in this Partial Order of Determination*") (emphasis added).[8]

KID's motion also contends that Reclamation's right to store water does not give the Bureau any right to *use* that water, quoting *Cookinham v. Lewis*, 114 P. 88, 91 (Or. 1911), for the proposition that a primary storage right "does not include the right to divert and use [. . .] stored water, which must be the subject of the secondary permit." Pet. 66; *see also* KBA order, Pet. 122 ("[T]he right to store water is distinct from the right to use stored water . . . ."). The motion asserts that the KBA order instead grants "KID and other water right holders" the "secondary right to beneficially use" the water stored by the Bureau. Pet. 66 (citing KBA order, Pet. 121–22).

The motion further argues that KID's "secondary water rights to *stored water* in [Upper Klamath Lake] reservoir cannot be 'called' or curtailed by any water rights—even

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Klamath Irrigation Dist. v. U.S. Bureau of Reclamation, 48 F.4th 934 (9th Cir. 2022) (*KID II*).

[7] This citation, and others in the same form, refers to the ECF page number in the upper right corner of KID's mandamus petition and attached exhibits, e.g., "(66 of 1311)."

[8] I recount KID's allegations in some detail because, as discussed below, these allegations are highly relevant to whether it has asserted a *colorable* claim that Reclamation water distributions violate the KBA order.

senior water rights—[downstream] *in the Klamath River*." Pet. 67 (emphasis in original and citing various Oregon statutes and authorities). Indeed, the motion explains that Reclamation *admits* that the KBA order bars the Bureau from "releas[ing] water previously stored in priority and otherwise required for beneficial use by Klamath Project beneficiaries from Upper Klamath Lake for the specific purposes of producing instream flows in the Klamath River either in Oregon or California." Pet. 64 (quoting Bureau of Reclamation, *Reassessment of U.S. Bureau of Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act*, Jan. 2021, Pet. 174).[9] Nevertheless, the motion claims that the agency is distributing "vast quantities of stored water" out of the lake "to provide enhanced instream flows in the Klamath River in California." *Id*. at 67.

Anticipating defenses likely to be raised by Reclamation, KID's motion asserts that the Bureau's trust obligations to the Tribes "afford no water rights to use stored water in [Upper Klamath Lake], *as neither Tribe (nor Reclamation on their behalf) has ever claimed a water right in [Upper Klamath Lake] in the Klamath Adjudication*." Pet. 60 (emphasis added).[10] Similarly, the motion argues that the

[9] That same statement from Reclamation explains that the KBA order "*preclude[s] releases of water previously stored in priority in Upper Klamath Lake for satisfying the Yurok and Hoopa Tribes' federally reserved water right.*" Pet. 175 (emphasis added).

[10] If Reclamation forfeited the Tribes' rights by not filing a claim on their behalf in the KBA, they would not lack a remedy for the government's breach of its trust obligations. *See* 28 U.S.C. § 1505 (Indian Tucker Act providing for jurisdiction in the Court of Federal Claims for claims by tribes against the United States); *cf. Nevada v. United States*, 463 U.S. at

ESA does not override the agency's Reclamation Act obligation to comply with state law in distributing water from Upper Klamath Lake. Pet. 77–80.[11]

Finally, KID's motion includes declarations from several of its farmer and rancher members, irrigators who depend on the water of Upper Klamath Lake. One explains that "[f]arming involves significant up-front costs with long delays before the crops actually result in revenue." Pet. 294. All the declarants assert that they face the risk of bankruptcy

144 n.16 ("In this case, the Tribe, through the Government as their representative, was given adequate notice and a full and fair opportunity to be heard. If, in carrying out their role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties."); *see also id*. at 145 (Brennan, J., concurring) ("I join the Court's opinion on the understanding that it reaffirms that the Pyramid Lake Paiute Tribe has a remedy against the United States for the breach of duty that the United States has admitted.").

[11] The majority contends that "KID's rights are subservient to the Tribes' rights and Reclamation's ESA responsibilities." Opinion at 10 (citing *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999)). But the administrative adjudication phase of the KBA was then ongoing, prompting us to qualify our holding: The KBA "*will . . . decide*[]" "questions of relative amounts and priorities, at least within the State of Oregon . . . . Our decision in this case . . . relate[s] only to questions involving the Bureau's operation and management of the [Klamath Basin] Project, *and not to the relative rights of others not before the court to the use of the waters of the Basin*." *Patterson*, 204 F.3d at 1214 n.3 (emphasis added). KID was not a party to *Patterson*, and to what extent its rights under the KBA order are "subservient" to the Tribes' rights and Reclamation's ESA responsibilities when the Bureau failed to assert a claim on the Tribes' behalf is precisely the question raised by KID's motion. In any event, even if KID were bound by *Patterson*, it could not have asserted any claim in that action to enforce the KBA order, which OWRD only first issued in 2013 (some 14 years after our ruling in *Patterson*).

or liquidating assets because of Reclamation-induced water shortages. Pet. 86–100; Pet. 293–310. For example, one states that "[w]ithout the water KID and I own rights to, I cannot grow crops, and therefore cannot generate revenue to pay debt and maintain the business." Pet. 93. The effects from "water shortages in a particular year can impact not only year-to-year crops, but crops that require a longer-term investment and commitment." Pet. 294.

Citing the federal officer removal statute, 28 U.S.C. § 1442(a)(1), the Bureau removed KID's motion to the district court. Reclamation's removal notice admits that KID's motion seeks to bar the Bureau's releases of water from Upper Klamath Lake to the extent such releases "*conflict with state-based water rights determined in the* [*KBA order*]." Pet. 353 (emphasis added). The notice expressly identifies two federal "defenses" to KID's claims, "senior federal reserved Tribal fishing and water rights" and "sovereign immunity." Pet. 354.

KID then moved to remand, arguing that the prior exclusive jurisdiction doctrine applies here. Under that doctrine, even if removal were otherwise proper,[12] the district court nevertheless lacked jurisdiction if KID's motion is *in rem* or *quasi in rem*, because the state court proceeding is *in rem*. *See Goncalves ex rel. Goncalves v. Rady Child.'s Hosp. San Diego*, 865 F.3d 1237, 1253 (9th Cir. 2017) ("If both courts exercise either *in rem* or *quasi in rem* jurisdiction, then the courts may be simultaneously

[12] *See State Eng'r of State of Nev. v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nev.*, 339 F.3d 804, 809 (9th Cir. 2003) ("Section 1442 . . . merely allows the federal government to remove a case to federal district court; it does not determine whether the court has jurisdiction to hear it.").

exercising jurisdiction over the same property, in which case the prior exclusive jurisdiction doctrine applies and the district court is precluded from exercising jurisdiction over the *res*.").

The district court denied the remand motion, reasoning that "KID seeks to reach beyond the limited waiver of the McCarran Amendment to litigate federal issues, most notably Reclamation's release of water to satisfy the instream water rights of the Yurok and Hoopa Valley Tribes and the co-extensive demands of the ESA." Pet. 1263. Because "KID's motion for preliminary injunction does not come within the McCarran Amendment's waiver . . . the KBA [does not] possess exclusive jurisdiction over the claim." *Id*. KID then filed its mandamus petition.

II

It's undisputed that the Klamath County Circuit Court has *in rem* jurisdiction over rights to the stored water (the *res*) of Upper Klamath Lake in Oregon. It's similarly undisputed that the KBA order provisionally governs Reclamation's distributions from that *res* pending a final adjudication by the state court. As described above, and as the Bureau admitted in its notice of removal, *see* Pet. 353, KID's motion manifestly seeks to enforce that order.

This case is therefore much like *State Engineer*, where we held that to determine whether a removed action encroached upon prior exclusive jurisdiction of a state court, a district court must "look behind the form of the action to the gravamen of a complaint and the nature of the right sued on." 339 F.3d at 810 (cleaned up). As in *State Engineer*, "[t]here can be no serious dispute that [KID's motion] was brought to enforce a decree"—the KBA order—"over a res"—i.e., the rights to the stored waters of Upper Klamath

Lake. *Id*. at 811. "Given the zero-sum nature of the resource, any party's unlawful diversion of water from the [lake] necessarily affects other users." *Id.* Thus, the district court cannot adjudicate KID's and Reclamation's "personal claims to [the] property without disturbing the first court's jurisdiction over the res." *Id*. While KID's motion "is brought only against the [Bureau] personally," because "the parties' interests in the property"—the KBA order—"serve as the basis [for] jurisdiction," the motion "is *quasi in rem*, and the doctrine of prior exclusive jurisdiction fully applies." *Id*. (cleaned up); *see also Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958) (defining *quasi in rem* actions as including those in which "the plaintiff [seeks] to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons");[13] *Penn Gen. Cas. Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935) (if "two suits are in rem or quasi in rem, . . . the court first assuming jurisdiction over

[13] In a *quasi in rem* action, "the basis of jurisdiction is the defendant's interest in property, real or personal, which is within the court's power, as distinguished from in rem jurisdiction in which the court exercises power over the property itself, not simply the defendant's interest therein." *Black's Law Dictionary* 794 (6th ed. 1990). Applied here, the basis of jurisdiction over KID's *quasi in rem* motion is the KBA order, which adjudicated the parties' interests and over which the Klamath County Circuit Court has continuing exclusive jurisdiction. *See TPC*, 482 P.3d at 129; *cf. United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013, 1014 (9th Cir. 1999) (a federal district court had prior exclusive jurisdiction "over the water rights in question when it adjudicated the Alpine and Orr Ditch Decrees and . . . continued to retain such jurisdiction," and "to construe these Decrees so that the district court does not retain exclusive jurisdiction would render the retention of jurisdiction a nullity").

the property may maintain and exercise that jurisdiction to the exclusion of the other").

The majority, however, offers in essence four reasons why the prior exclusive jurisdiction doctrine does not apply here. I consider each in turn.

A

Although not expressed as such, the majority implies that the Klamath County Circuit Court lacks jurisdiction *ab initio* insofar as Reclamation defends its water distributions based on the reserved rights of the California-based Tribes. Opinion at 16 (averring that a state may not "adjudicate rights beyond its jurisdiction, which, at bottom, is what KID's motion for a preliminary injunction seeks to do") (citing *Eagle County*, 401 U.S. at 523, and *Baley v. United States*, 942 F.3d 1312, 1341 (Fed. Cir. 2019)). *Eagle County* observed that the term "river system" in the McCarran Amendment "must be read as embracing one *within the particular State's jurisdiction*," for "[n]o suit by any State could possibly encompass all of the water rights" in an entire interstate river system such as the Colorado River. 401 U.S. at 523 (emphasis added).[14]

The Klamath County Circuit Court's exercise of jurisdiction over the Tribes' claims is consistent with *Eagle County*, however, because the water in question is inside Oregon. As to " 'property within its limits,' " a state "possess[es] the *power* to provide for the adjudication of titles to [property] not only as against residents, *but as*

[14] Citing this observation, in *Baley* the Federal Circuit simply asserted—with no analysis to speak of—that the Klamath County Circuit Court lacked the power to adjudicate the rights of the California-based Tribes to water stored in Oregon. *See* 942 F.3d at 1341.

against nonresidents, who might be brought into court by publication." *Am. Land Co. v. Zeiss*, 219 U.S. 47, 61 (1911) (emphasis added) (quoting *Arndt v. Griggs*, 134 U.S. 316, 320 (1890)). Such an *in rem* "procedure established by the state . . . is binding upon the federal courts." *Arndt*, 134 U.S. at 321. Oregon has established such a procedure for water rights, and it specifically confers jurisdiction to "adjudicate federal reserved rights." ORS § 539.010(7).

That Oregon cannot subject the Tribes to *in personam* jurisdiction is irrelevant because the KBA is *in rem*. *See* 4A C. Wright & A. Miller, *Federal Practice & Procedure* § 1070 (4th ed. 2022 update) ("The fact that the court cannot obtain jurisdiction over the person of all defendants or claimants to the property is considered irrelevant to whether in rem or quasi-in-rem jurisdiction is constitutionally permissible."); *see also Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 453 (2004) (same); *Arndt*, 134 U.S. at 320–21 (same). And because the KBA is *in rem*, as described above, OWRD—after giving notice—exercised its authority under state law to adjudicate the reserved rights of federal properties in *both* Oregon and California in the KBA order.[15]

[15] Invoking the party-presentation rule, *see United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020), the majority contends that because KID did not cite OWRD's notice to federal users in California or the Justice Department's public acknowledgment that the KBA order governs water rights of federal properties in California, we should ignore those documents, Opinion at 16 n.5, even though they bear directly on KID's contention that the order adjudicated water rights, including federal reserved rights, "as against the whole world," Pet. 25 (quoting *Goncalves*, 865 F.3d at 1254); *see also* Pet. Reply at 21 n.2 (arguing "Reclamation's suggestion that California tribes who did not participate in the [KBA] may still claim water rights in [Upper Klamath Lake] is

That a state court's exercise of *in rem* jurisdiction in the context of water rights requires it to respect federal reserved rights and other limits on its authority such as interstate compacts does not mean that it lacks *power* in the first instance to determine those constraints. The Supreme Court has repeatedly emphasized that states have "plenary control" over water within their borders, *California v. United States*, 438 U.S. at 657–58 (quoting *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163–64 (1935)), even as this "total authority" is subject to "the reserved rights or navigation servitude of the United States," *id*. at 662; *cf*. *Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 54 n.12 (Colo. 1999) ("The availability of water arising in Colorado for beneficial use in Colorado is limited by the delivery requirements of the interstate compacts and equitable apportionment decrees to which Colorado is a party."); *Mississippi v. Tennessee*, 142 S. Ct. 31, 41 (2021)

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wrong" because an "in rem proceeding . . . determines rights in particular property against the entire world").

Post-*Sineneng-Smith*, however, we have recognized that "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Does v. Wasden*, 982 F.3d 784, 793 (9th Cir. 2020) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)). KID's mandamus petition squarely raises the *issue* of whether the KBA order is effective against the world, and just as we may consider cases not cited by the parties bearing on that issue, we may also sua sponte take judicial notice of relevant public records. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) ("[A] court may take judicial notice of matters of public record . . . .") (cleaned up); *Where Do We Go Berkeley v. Cal. Dep't of Transp.*, 32 F.4th 852, 858 n.2 (9th Cir. 2022) (sua sponte taking judicial notice). Thus, the majority sua sponte takes judicial notice of a public document in an attempt to link KID to the Klamath Water Users Association. Opinion at 9, 18 n.9.

("When a water resource is shared between several States, each one has an interest which should be respected by the other.") (cleaned up).[16]

Not only does the Klamath County Circuit Court have the power to adjudicate *inter se* the water rights of all claimants to the waters of Upper Klamath Lake, but *we* also lack the prerogative to opine on the state-law limits of that court's exercise of such authority. *See San Carlos Apache Tribe*, 463 U.S. at 561 (stating that whether state courts have jurisdiction over Indian water-rights issues "is a question . . . over which the state courts have binding authority" and that where, as here, a state court has taken jurisdiction, federal courts "must assume, until informed otherwise, that—at least insofar as state law is concerned—such jurisdiction exists"). As far as we are concerned, the only relevant question is "whether there is a federal bar to the assertion of state jurisdiction" by the Klamath County Circuit Court. *Id*. The only such bar raised here by Reclamation is sovereign immunity, discussed below.

B

According to the majority, the second reason the Klamath County Circuit Court lacks prior exclusive jurisdiction over KID's motion is because "[t]he KBA [order] did not adjudicate Reclamation's ESA obligations or the Tribes' senior rights . . . ." Opinion at 13 (citing *United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1160–61 (9th

[16] The Klamath River Basin Compact governs the equitable apportionment of water between Oregon and California users in the Klamath Basin. *See* ORS § 542.620. That compact, while otherwise binding in the KBA, *see id*. Art. XII.A., expressly excludes reserved federal rights, including tribal rights, from its scope. *See id*. Arts. X, XI.

Cir. 2010)). Along the same lines, the majority attempts to distinguish *State Engineer*, contending that while the state court there "had jurisdiction over the tribe's rights because the rights were governed by state law and subject to the state's general stream adjudication," here the Klamath County Circuit Court "did not have jurisdiction over the Tribes' rights implicated by KID's motion because the Tribes' rights at issue were not governed by Oregon law and were not subject to the KBA." *Id*. at 14–15.

Whether the KBA order adjudicated the Bureau's federal *defenses*, however, is irrelevant because the prior exclusive jurisdiction doctrine turns on "*the nature of the right sued on*." *State Eng'r*, 339 F.3d at 810 (emphasis added); *cf. Hanson*, 357 U.S. at 246 n.12 (noting that in a *quasi in rem* action "the plaintiff [seeks] to secure a pre-existing *claim* in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons") (emphasis added). The *KBA order* is the source of KID's asserted water rights, and under state law the Klamath County Circuit Court has prior exclusive jurisdiction to enforce and interpret it. *TPC*, 482 P.3d at 129.

The majority's reliance on *Orr Water Ditch* is therefore misplaced. In that case, we held that the district court with prior exclusive jurisdiction over a Nevada water-rights decree lacked jurisdiction over an Indian tribe's attempt to enforce water rights based on "state law" *rather than* "the Tribe's rights under the [federal] decree." 600 F.3d at 1160. Here, by contrast, KID's motion asserts rights under the KBA order, over which the state court does have jurisdiction, and prior exclusive jurisdiction to boot. Moreover, whereas we had authority in *Orr Water Ditch* to opine on the district court's jurisdiction, we have no such authority as to the Klamath County Circuit Court.

C

The majority's third reason for holding that the state court lacks jurisdiction over KID's motion is that Reclamation did not "need" to assert any claim on behalf of the Tribes in the KBA to avoid forfeiture because their rights are "not governed by Oregon law" and "take precedence over KID's." Opinion at 14–15, 16 n.5, 22. Similarly, the majority contends that the Bureau's ESA obligations preempt the KBA order that KID seeks to enforce. *Id*. at 15 n.4.

In so holding, the majority errs by putting "the merits cart before the jurisdictional horse." *Bean v. Matteucci*, 986 F.3d 1128, 1137 (9th Cir. 2021) (Rawlinson, J., dissenting). In *United States v. Oregon*, we held that "concerns" over "federal reserve[d] water rights" "*go to the merits*." 44 F.3d at 770 (emphasis added). We explained that "in administering water rights the State is compelled to respect federal law regarding federal reserved rights and to the extent it does not, its judgments are reviewable by the Supreme Court." *Id.* (citing *Eagle County*, 401 U.S. at 525–26); *see also Eagle County*, 401 U.S. at 526 ("All . . . questions" in state water rights adjudications "going to the merits," "including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed here after final judgment by the [state] court."); *Colo. River*, 424 U.S. at 813 (same).[17] Thus, the

[17] The majority hints that Oregon courts might tolerate "years of misdirection of the water" before the Supreme Court could step in. Opinion at 19. But under Our Federalism, *cf. Younger v. Harris*, 401 U.S. 37, 44 (1971), "[s]tate courts are adequate forums for the vindication of federal rights," *Burt v. Titlow*, 571 U.S. 12, 19 (2013), for they, "as much

majority's determination that Reclamation's federal defenses are meritorious[18] is irrelevant to whether the state court has *jurisdiction* to decide KID's motion to enforce the decree, including those defenses.[19] As a matter of *state* law, we must presume that "such jurisdiction exists." *San Carlos Apache Tribe*, 463 U.S. at 561.

D

Finally, the majority contends that the Klamath County Circuit Court lacks prior exclusive jurisdiction as a matter of *federal* law because the McCarran Amendment does not apply to KID's motion. Opinion at 14–15, 19. That statute

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as federal courts, have a solemn obligation to follow federal law," *San Carlos Apache Tribe*, 463 U.S. at 571. In any event, "[a]ny state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." *Id*.

[18] In the face of the majority's blanket endorsement of Reclamation's defenses, the only thing left for the district court to do on remand is to enter summary judgment for the Bureau—if it doesn't first dismiss for lack of jurisdiction if the Tribes intervene, as in *KID I*.

[19] The majority's charge that KID is guilty of forum shopping is similarly irrelevant to the actual issue before us, as there is no "forum shopping exception" to the prior exclusive jurisdiction doctrine. Insofar as the majority applies preclusion by another name, *see* Opinion at 11, 20, and 21 (characterizing KID's motion as an attempt to "re-litigate" Reclamation's federal defenses), it fails to explain—putting aside the failure of the government to even raise that defense, *cf*. *Sineneng-Smith*, 140 S. Ct. at 1579—how the requirements of preclusion are satisfied here. Finally, even if preclusion might otherwise operate as a *merits* bar to KID's motion to enforce the KBA order, that would still not deprive the Klamath County Circuit Court of its prior exclusive *jurisdiction* to adjudicate the merits, including any preclusion defense asserted by the Bureau.

waives federal sovereign immunity as to "any suit (1) for the adjudication" or "(2) for the administration" "of rights to the use of water of a river system or other source . . . ." 43 U.S.C. § 666(a).

To begin with, it is undisputed that the KBA order is an "adjudication" of water rights as to Upper Klamath Lake under the McCarran Amendment, as the order provisionally determined "all of the rights of various owners on a given stream," *Dugan v. Rank*, 372 U.S. 609, 618 (1963) (quoting S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951)), including the relative rights of KID and the United States. We have held that where, as here, "there has been such an adjudication and a decree entered, then one or more persons who hold adjudicated water rights can" sue to "administer" such rights under the statute. *S. Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985) (quoting *United States v. Hennen*, 300 F. Supp. 256, 263 (D. Nev. 1968)).

So the question is whether KID's motion is a McCarran Amendment "administration." We have held that "[t]o administer a decree is to execute it, to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language." *Id.* (quoting *Hennen*, 300 F. Supp. at 263). As detailed above, KID's motion manifestly seeks to enforce the KBA order, resolve conflicts as to its meaning, and construe and interpret its provisions. Indeed, Reclamation's notice of removal expressly acknowledges that KID's motion alleges that the Bureau's ongoing water releases "*conflict with state-based water rights determined in the* [*KBA order*]," Pet. 353 (emphasis added), and thereby

tacitly admits that KID's motion is a McCarran Amendment "administration."[20]

For its part, the majority "reject[s]" what it portrays as KID's "characteriz[ation] [of] the relief it seeks as an application of the [KBA order]" because that characterization "circumvent[s] our prior decision [in *KID II*], the Tribes' rights, and the effect of the ESA." Opinion at 19.[21] In substance, my colleagues appear to conclude that

[20] Because KID's motion seeks to enforce the KBA order, the majority's assertion that KID's motion is a mere "private suit[] to decide priorities between the United States and particular claimants" (and thus outside the McCarran Amendment), Opinion at 15 (quoting *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 144 (9th Cir. 1983)), misses the mark. In *Metropolitan Water District*, a water district brought an APA action challenging the Interior Department's enlargement of the boundaries of an Indian reservation that resulted in the tribe's assertion of increased water rights in a then-ongoing water rights adjudication between Arizona and California under the Supreme Court's original jurisdiction. 830 F.2d at 140–42. We held that the McCarran Amendment was inapplicable because the water district's APA action was not a "general adjudication" to determine "the rights of all claimants on a stream." *Id*. at 144 (citing *Dugan*, 372 U.S. at 617–18). The KBA, however, *is* indisputably such a general adjudication, and KID's motion seeks to enforce its rights under the order provisionally governing that adjudication.

[21] In *KID II*, we held that KID's separate APA suit in the district court challenging Reclamation's water releases was not a McCarran Amendment "administration" and thus was outside the scope of the sovereign immunity waiver. 48 F.4th at 947. We expressly recognized, however, that the KBA "*was* a McCarran Amendment case." *Id.* at 946 (emphasis in original). *KID II* therefore does not control whether KID's motion—which seeks no relief under the APA and was originally filed in the KBA—is an "administration" for purposes of the Amendment. Tellingly, Reclamation does not argue that *KID II* is issue preclusive here.

KID's motion is not a McCarran Amendment "administration" because Reclamation's federal defenses are meritorious.[22]

In so reasoning, the majority requires KID to "win [its] case before [it] can" litigate its motion in state court. *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). But in analogous contexts, the Supreme Court applies a simple test that we should employ here: If the party invoking jurisdiction asserts (as applicable) a colorable claim or defense on the merits, that suffices for jurisdiction to attach, even if the merits claim or defense ultimately fails. *See, e.g.*, *Bell*, 327 U.S. at 682–83 (holding that an asserted federal claim triggers federal question jurisdiction unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous"); *Jefferson County, Ala. v. Acker*, 527 U.S. 423, 431 (1999) ("To qualify for removal" under the federal officer removal statute, a removing officer need only "raise a colorable federal defense," as the official need not "win his case before he can have it removed.") (quoting *Willingham*, 395 U.S. at 407).

Thus, a valid *defense* does not oust a district court of federal question jurisdiction if a complaint asserts a colorable federal claim. *See, e.g.*, *S. New England Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 132 (2d Cir. 2010) ("[W]hether a plaintiff has pled a jurisdiction-conferring

[22] Insofar as the majority also implies that the McCarran Amendment does not apply merely because Reclamation's federal defenses are "not governed by Oregon law," Opinion at 14–15, that interpretation renders the Amendment useless as such defenses by definition are *never* "governed by state law," *id*. at 14. The entire point of the statute is to allow state courts "to determine federal reserved rights . . . ." *Colo. River*, 424 U.S. at 809.

claim is a wholly separate issue from whether the complaint adequately states a legally cognizable claim for relief on the merits."); 13D Wright & Miller, *Federal Practice & Procedure: Jurisdiction* § 3564 (3d ed. Apr. 2022 update) ("Jurisdiction is not lost because the court ultimately concludes that the federal claim is without merit.").

Rather than asking whether KID's motion can *prevail* against the government's ESA and reserved water rights defenses as the majority does, we should ask—consistent with the Supreme Court's approach in other jurisdictional contexts—whether KID's motion asserts a *colorable* McCarran Amendment administration claim. Just as Reclamation's assertion of "colorable" federal defenses in its notice of removal permitted the Bureau to invoke the federal officer removal statute here, *Acker*, 527 U.S. at 431, I would correspondingly hold that KID's assertion of a colorable motion to enforce the KBA order is an "administration" that implicates the Amendment's waiver of sovereign immunity—whether or not that motion states a legally cognizable claim for relief on the merits.

Because "jurisdictional rules should be clear," *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002), we should adopt the easily administered, bright-line test of *Bell v. Hood* for McCarran Amendment purposes. Doing so would allow the Amendment to perform its function of clearing the way for state courts to adjudicate the merits of "collision[s]" between "private [water] rights and [the] reserved rights of the United States" "in unified proceedings" that avoid "piecemeal adjudication of water

rights in a river system." *Colo. River*, 424 U.S. at 813 (quoting *Eagle County*, 401 U.S. at 526).[23]

III

For the reasons explained above, the Klamath County Circuit Court has prior exclusive jurisdiction to decide KID's motion. The district court therefore committed a clear error of law in failing to remand that motion. *See Chapman v. Deutsche Bank Nat'l Tr. Co.*, 651 F.3d 1039, 1044 n.1 (9th Cir. 2011) (stating that "if the [prior exclusive jurisdiction] doctrine applies, it is legal error for a district court not to remand, dismiss, or stay federal proceedings on account of the state court's prior exercise of jurisdiction").

KID's right to mandamus relief based on this error "is clear and indisputable," *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 381 (2004) (cleaned up), satisfying a prerequisite for mandamus relief set forth by both the Supreme Court and this Court. *See id.*; *see also Bauman v. U.S. Dist. Ct. for N. Dist. of Cal.*, 557 F.2d 650, 654–55 (9th Cir. 1977) (outlining "five specific guidelines" governing mandamus relief, the third of which is that the "district

[23] Reclamation also argues (essentially in the alternative) that the McCarran Amendment's waiver does not extend to the Bureau's defenses to KID's motion based on the reserved rights held in trust for the out-of-state Tribes. Reclamation Response at 27–37. Reclamation characterizes KID's claims implicating those defenses as "interstate disputes." *Id*. at 27.

The McCarran Amendment, however, is facially indifferent to the location or nature of federal interests with asserted "water rights" to an in-state "river system or other source" subject to a comprehensive state court adjudication. *See* 43 U.S.C. § 666(a). For that reason, the KBA order adjudicated water rights in Upper Klamath Lake as to federal properties in Oregon *and* California. *See above* notes 1, 15 and accompanying text, and 16.

court's order is clearly erroneous as a matter of law"); *In re Walsh*, 15 F.4th 1005, 1008 (9th Cir. 2021) (characterizing the third *Bauman* factor, clear error as a matter of law, as "a necessary condition for granting a writ of mandamus") (quoting *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011)).

From that error, it also necessarily follows that KID has "no other adequate means," such as a direct appeal, to obtain the relief it seeks. *Cheney*, 542 U.S. at 380; *Bauman*, 557 F.2d at 654 (identifying this factor as the first mandamus consideration). Because the Klamath County Circuit Court has prior exclusive jurisdiction, no other forum can provide relief. Although an appeal in the ordinary course could eventually provide relief, it would be inadequate, because in the meantime KID's irrigator members would suffer loss of their water rights. *See* Pet. 86–100; Pet. 293–310. And apart from the injuries identified by KID's declarants described above, loss of opportunities to *use* water rights by its nature is akin to environmental injuries that we have characterized as irreparable. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (loss of opportunities to "view, experience, and utilize" undisturbed areas of a national forest was irreparable injury). KID's petition thereby satisfies *Bauman*'s second mandamus consideration: that "[t]he petitioner will be damaged or prejudiced in a way not correctable on appeal." 557 F.2d at 654.

KID has therefore shown its entitlement to mandamus relief under the first three factors of the *Bauman* balancing test. *See In re Williams-Sonoma, Inc.*, 947 F.3d 535, 538–40 (9th Cir. 2020) (granting writ of mandamus when first three *Bauman* factors were satisfied but fourth and fifth factors were not and explaining that "[t]he balance of the factors weighs in favor of granting the writ of mandamus"); *United*

States v. Tillman, 756 F.3d 1144, 1153 (9th Cir. 2014) (same); *Hernandez v. Tanninen*, 604 F.3d 1095, 1101–02 (9th Cir. 2010) (same, and noting that district court order was "particularly injurious" to petitioner's interests); *cf. Miller v. Gammie*, 335 F.3d 889, 895 (9th Cir. 2003) (en banc) (finding third factor dispositive where first two factors supported mandamus and last two did not).[24]

As "[n]ot every factor is needed for granting a writ of mandamus," *Walsh*, 15 F.4th at 1008, and "rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable," *Hernandez*, 604 F.3d at 1099, I would grant KID's petition based on its showing that the district court clearly erred as a matter of law and that KID has no other adequate remedy in view of the irreparable injury its irrigator members will suffer from the delay occasioned by an appeal in the ordinary course.

As the district court usurped the prior exclusive jurisdiction of the Klamath County Circuit Court to resolve *all* questions regarding the scope of the KBA order that KID seeks to enforce, including whether Reclamation forfeited the reserved rights of the Tribes by not asserting a claim on their behalf and whether the ESA preempts that order, this is a textbook case warranting mandamus relief. *Cf. Cheney*, 542 U.S. at 380 (mandamus is reserved for "exceptional circumstances amounting to a judicial usurpation of power") (cleaned up). I therefore respectfully dissent from the denial of the writ.

[24] The last two *Bauman* factors are "(4) [t]he district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules"; and "(5) [t]he district court's order raises new and important problems, or issues of law of first impression." 557 F.2d at 655.

THE SECRETARY OF THE INTERIOR

WASHINGTON

February 10, 2025

Memorandum

To: Solicitor

From: Secretary

Subject: Recission of April 8, 2021, Secretarial "Withdrawal of Klamath Project-Related Memoranda, Letters, and Analyses" and Examination of Legal Developments

In 2020, Secretary of the Interior David L. Bernhardt directed the Office of the Solicitor to conduct a comprehensive analysis of the legal requirements for consultation pursuant to Section 7 of the Endangered Species Act, 16 U.S.C. 1536 et seq., pertaining to the Bureau of Reclamation's operations in the Klamath Basin. In response, the Office of the Solicitor issued a series of memoranda in late 2020 and early 2021, which analyzed this topic and established a framework to harmonize the operations of the Klamath Project with the requirements of Federal and State law. Simultaneously, Reclamation conducted a reassessment of Klamath Project operations to facilitate compliance with the Endangered Species Act. Secretary Bernhardt further wrote two letters which conveyed those memoranda and analyses and enunciated a vision for discussions with stakeholders to correct imbalances within the Klamath Basin in accordance with the law.

Those memoranda and letters were:

- October 28, 2020, Memorandum from Carter L. Brown, Associate Solicitor – Division of Water Resources and Lance C. Wenger, Regional Solicitor – Pacific Southwest to Daniel H. Jorjani, Solicitor re: "An Updated Review of Legal Issues concerning the United States Bureau of Reclamation Operation of the Klamath Project" (Solicitor Jorjani signed and concurred on October 29, 2020).
- November 12, 2020, Letters from David Bernhardt to Paul Simmons, Klamath Water Users Association, and Nathan Rietmann, Rietmann Law PC, respectively, re: "Klamath Project Water Contracts and the Endangered Species Act."
- January 2021 Reassessment of U.S. Bureau of Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act.
- January 14, 2021, Memorandum from Solicitor to Secretary re: Analysis of Klamath Project contracts to determine discretionary authority in accordance with the November 12, 2020, Letter of the Secretary of the Interior.
- January 14, 2021, Memorandum from Solicitor to Secretary re: "Use of Water Previously Stored in Priority for Satisfaction of Downstream Rights."
- January 16, 2021, Letters from David Bernhardt to Paul Simmons, Klamath Water Users Association, and Nathan Rietmann, Rietmann Law PC, respectively, re: completion of analysis based on November 12, 2020, letter (enclosing January 14,

2021, memoranda and January 2021 reassessment).

On April 8, 2021, Secretary of the Interior Debra Haaland rescinded those memoranda, letters, and analyses by memorandum titled "Withdrawal of Klamath Project-Related Memoranda, Letters, and Analyses."

By this memorandum, I am vacating Secretary Haaland's April 8, 2021, rescission of those memoranda, letters, and analyses. I am further directing you to conduct a review of legal developments during the past four years and to issue updated versions of those documents at the earliest opportunity. This action is taken pursuant to the authority of Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262) and other applicable authorities.

BRIEFING MEMORANDUM FOR THE SECRETARY

From: **Gregory Zerzan, Acting Solicitor**

Date: **May 14, 2025**

Subject: **Klamath Updated Analysis of Endangered Species Act Obligations**

Background

For generations the federal government has made various commitments to the people and wildlife of the Klamath River basin. For the Indian tribes in the area, it made treaties and reserved lands, to help protect ancestral hunting and fishing rights as well as the ability to celebrate traditional ceremonial practices. For farmers and irrigators, it constructed the Klamath Irrigation Project and entered water-supply contracts to provide water to nourish their crops. Later, through the Endangered Species Act, the United States made commitments to protect the various wildlife and aquatic species in the region from threatened extinction. These multiple and at times conflicting commitments have proven difficult to keep, leading to conflict and litigation that has spanned decades.

The Department of the Interior's efforts to balance these competing interests has in recent times borne some fruit. To fulfill ancestral fishing rights, the Department has launched a hatchery program to supplement declining wild populations. However, questions regarding water rights and the protection of species have continued to vex the federal government. Thankfully, in recent times the U.S. Congress has passed legislation that helps to clarify how these various claims are to be managed and thus informs the Department's approach.

On February 10, 2025, the Secretary of the Interior rescinded the April 2021, withdrawal of certain analyses of the discretionary authority possessed by the Bureau of Reclamation for Endangered Species Act ("ESA") purposes and permissible uses of stored water. The Secretary further directed the Solicitor to update the reinstated analyses in light of legal developments since January 2021. This memo explains how the Department is to proceed with fulfilling the federal government's commitments. While this analysis directs the Department to manage resources in the Klamath River basin in the most fair and equitable manner possible consistent with the law, it does not in any way diminish the United States' trust authorities and responsibilities to local Tribes nor the valid and longstanding legal rights of irrigators. While this memo addresses how the Department will approach these at-times conflicting commitments, consistent with recent law and judicial precedent, it does not resolve them. It will continue to be the duty of the United States to attempt to fulfill all of the commitments it has made to its citizens.

The issues of discretionary authority and availability of stored water for downstream purposes are distinct, though interrelated, and are addressed separately below.

Discretionary Authority

On October 31, 2020, the Solicitor's Office completed an analysis of Reclamation's obligations to consult under Section 7 of the Endangered Species Act, 16 U.S.C. 1536, on its operations of the Klamath Project. On November 20, 2020, the Secretary endorsed this analysis and stated that its conclusions mandated a reassessment of the environmental baseline for the Project and a

its conclusions mandated a reassessment of the environmental baseline for the Project and a determination of what portion of Project water is segregable and, thus, set aside solely for irrigation and unavailable for other uses. ("2020 Analysis").

In response to the direction of the 2020 Analysis, on January 14, 2021, the Solicitor provided a memorandum to the Secretary titled "Analysis of Klamath Project contracts to determine discretionary authority in accordance with the November 12, 2020, Letter of the Secretary of the Interior ("Discretion Analysis"). As stated in the Discretion Analysis, "if a contract provides Reclamation with discretionary authority to take action that could benefit species listed under the ESA, Reclamation must consult under ESA Section 7 on the impacts of that action. However, if a contract does not provide discretionary authority, Reclamation must include the impacts of the action in the environmental baseline of the consultation."

The Discretion Analysis was intended to implement direction from the Secretary to assess the degree of discretionary authority possessed by Reclamation and inform Reclamation as it implemented its January 2021 Reassessment of Klamath Project operations. The Discretion Analysis focuses on provisions in contracts between Reclamation and Klamath Project irrigators that affect the degree of discretionary authority possessed by Reclamation to take action that could benefit ESA listed species to determine whether specific provisions provide Reclamation with sufficient discretionary authority to engage in ESA Section 7 consultation.

Since 2021, there have been several major legal developments that impact the 2020 Analysis and Discretion Analysis, as discussed below.

Klamath Basin Water Agreement Support Act, Pub. L. No. 118-246

On January 4, 2025, the Klamath Basin Water Agreement Support Act ("Act") was enacted into law. This statute contains general catch-all provisions which respectively provide that

> "(1) Compliance. – In implementing the amendments made by this section, the Secretary of the Interior shall comply with …
>
> > (B) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); and (C) all other applicable laws" and
>
> "(2) Effect. – None of the amendments made by this section –
>
> > (A) modify any authority or obligation of the United States with respect to any Tribal trust or treaty obligation of the United States;
> > (B) create or determine any water right; or
> > (C) affect any water right or water right claim in existence on the date of enactment of this Act."

The statute also includes the following specific mandate:

> "(g) Keno and Link River Dams. – The Secretary of the Interior shall comply with the terms of the agreement entitled '2016 Klamath Power and Facilities Agreement' ('Agreement'), including Attachment A to the Agreement."

Attachment A to the Agreement in turn provides in relevant part that "(Reclamation) shall comply with the following provisions related to Link River Dam on Upper Klamath Lake and Keno Dam and Keno development." Section 1 of the Agreement then requires that "Reclamation shall operate Link River Dam to provide water for diversion for the Klamath Reclamation Project, and consistent with existing contracts between Klamath Reclamation Project contractors and Reclamation and for flood control and subject to Applicable Law."

The statutory provisions and the Agreement incorporated by reference make clear that the Act does not affect the general applicability of the ESA or the rights of the tribes and other water rights holders. The Act also does not disturb the general applicability limitation on ESA Section 7, which makes clear that Section 7 only applies when an agency retains discretionary authority to act to benefit listed species. *See National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007) ("*Home Builders*") ("[ESA Section] 7(a)(2)'s no jeopardy duty covers only discretionary agency actions[.]").

The Act shows a clear and specific mandate from Congress to Reclamation to (1) operate the Project for the purposes of providing water for irrigation and conducting flood control and (2) provide water for the Project in accordance with the contracts between Reclamation and the irrigators. The Act uses "shall" to require Reclamation to comply with the Agreement, specifically including reference to Attachment A. Attachment A to the Agreement then uses "shall" in two places: first to require Reclamation to comply with its provision regarding operation of Link River Dam, then again in the provision specific to Link River Dam to require Reclamation to "operate Link River Dam to provide water for diversion for the Klamath Reclamation Project, and consistent with existing contracts[.]"

These statutory mandates clearly direct Reclamation to operate Link River Dam, the critical facility for the Klamath Project, for water diversion to the Project consistent with existing contracts and flood control. The unequivocal language does not provide Reclamation the discretion to divert water for other uses if to the detriment of the Klamath Reclamation Project contractors. For example, Reclamation cannot operate the Project *both* to provide sufficient water to fully meet contractual requirements *and* to meet requirements imposed by the Biological Opinions prepared under ESA Section 7 if doing so would impair the mandated purposes of the Act.

Past examples of Reclamation trying to manage multiple demands for water are illustrative of the clarity provided by the Act. In 2021, Reclamation prohibited water diversions for irrigation because the Biological Opinions required that all but a de minimis amount of water be used for ESA purposes. In 2022, Reclamation was found to have violated the ESA by providing a small Project allocation.[1] The attempt to balance competing interests is now clearly resolved in favor of the Project contractors. Under *Home Builders*, if Reclamation cannot both comply with the specific mandates of the Act and take action – provide water to benefit ESA listed species – then ESA Section 7 does not apply. 551 U.S. at 669.

To the degree that ESA Section 7 has any application to the Klamath Project, it is constrained by the contracts themselves (see below re: *NRDC v. Haaland*) and the 2025 Act's mandate that the contract terms control. Reclamation must provide water for diversion by the Project consistent

[1] *Klamath Tribes v. United States Bureau of Reclamation*, 2023 U.S. Dist. LEXIS 198398 (D. Ore. 2023).

with the contracts. If a particular contract is non-discretionary, Reclamation lacks the discretionary authority to alter its performance under that contract in order to benefit listed species. Having no discretionary authority, Reclamation lacks the duty to consult under ESA Section 7 on the effects of that contract and must include the effects of that contract in the environmental baseline.

Language in the preceding portions of the Act does not change this analysis. In subsection (d) "Restoration Activities", the Act provides that "[t]he Secretary may" carry out projects which benefit fish and aquatic resources and restore habitats. Use of the word "may" makes clear that this statutory provision is permissive, rather than mandatory. In contrast, Congress' direction that the Secretary "shall" operate Link River Dam according to the terms of the '2016 Klamath Power and Facilities Agreement' establishes that water delivery for irrigation purposes and flood control are the primary purposes of the Project. Subsection (d) is therefore properly read as empowering the Secretary to use the Klamath Project for the designated other purposes *only if* those other purposes do not impose upon the rights of the Klamath contractors.

Subsection "(e) Goals" modifies subsection (d) described above, as well as Section (2)(b) in the underlying Klamath Basin Water Supply Enhancement Act, to enunciate the goals of the programs authorized by (b) and (d). Nothing in subsection (e) or in the subsections that it modifies establishes a mandatory duty to take action to benefit wildlife.

"If the statutory language is clear, that is the end of our inquiry." *A-1 Ambulance Service, Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir. 2000). The Act states unequivocally that the Secretary of the Interior "shall comply with the terms of" the Agreement and Attachment A of the '2016 Klamath Power and Facilities Agreement'. Attachment A requires Reclamation to operate Link River Dam to deliver water for irrigation purposes and to adhere to its contracts with Project irrigators. Under *Home Builders*, those statutory provisions deprive Reclamation of the discretion needed to trigger ESA Section 7.

Natural Resources Defense Council v. Haaland

If Reclamation must engage in ESA Section 7 consultation on portions of Klamath Project operations, consultation must adhere to the Ninth Circuit decision in *NRDC v. Haaland*, 102 F.4th 1045 (9th Cir. 2024). This case is the latest relevant development in a long line of litigation challenging Reclamation's Section 7 consultations on the implementation of the executed water delivery contracts with a group of irrigators (the Sacramento River Settlement Contractors) in California's Sacramento Valley on ESA-listed fish species. *Id.* at 1056 – 1063. Plaintiffs contended that the contracts between Reclamation and these irrigators provided Reclamation with sufficient discretionary authority to take actions that could benefit Chinook salmon, and that consultation was therefore required. *Id.* at 1062. This contention was rejected in *NRDC v. Norton*, 236 F. Supp. 3d 1198 (E.D. Cal. 2017), in which the District Court conducted a detailed examination of the contract terms and found that they did not provide Reclamation with sufficient discretion to implement the contracts in a manner that would benefit Chinook salmon. *NRDC v. Haaland*, 102 F.4th at 1063. Notably, the 2020 Analysis and Discretion Analysis rely heavily on *NRDC v. Norton* and its interpretation of contractual provisions similar to those found in Klamath Project contracts. 2020 Analysis, 3, 9; Discretion Analysis, 3 – 5.

In *NRDC v. Haaland*, the Ninth Circuit rejected Plaintiffs' assertions and upheld *NRDC v. Norton*. It first cited *Environmental Protection Information Center v. Simpson Timber Co.* for the holding that "once the agency has entered into a legally binding agreement, it has such discretion [to benefit ESA-listed species] only to the extent permitted by the agreement's terms." 255 F.3d 1073, 1082 (9th Cir. 2001) (*EPIC*). It then cited *Sierra Club v. Babbitt* for the holding that "Reclamation retained discretion under the Settlement Contracts only to the extent the contracts themselves give it the power to 'implement measures that inure to the benefit of the protected species.'" 65 F.3d 1502, 1509 (9th Cir. 1995). These are two of the main cases relied upon by the 2020 Analysis for the same holdings.

NRDC v. Haaland then examined several provisions in the Settlement Contracts at issue to determine whether they provided Reclamation with sufficient discretionary authority to require consultation. Three of those provisions are especially relevant to the Klamath Project contracts considered in the Discretion Analysis.

The first two relevant provisions of the Settlement Contracts are Articles 3(i) and 3(h), which waive liability for the United States for shortages of water because of legal obligations and "errors in operation, drought, or unavoidable causes," respectively. *NRDC v. Haaland*, 102 F.4th at 1075 – 1076. Plaintiffs had argued that "Article 3(i) allows Reclamation to reduce the water it provides to the Settlement Contractors if necessary to meet legal obligations." *Id.* at 1075. The Ninth Circuit disagreed, stating "this provision does not give Reclamation discretion to alter the Settlement Contract to benefit a listed species. Rather, this is a force majeure clause that limits Reclamation's liability for damages in the event legal obligations are imposed on Reclamation that require it to breach the Settlement Contracts by reducing the diversion of water." *Id.* The Court reached a similar conclusion after examining Article 3(h), finding that it was simply a limitation of Reclamation's liability, not a license for Reclamation to "alter the amount of water diverted at its discretion." *Id.* at 1076. The Court then drove home the point, citing *Home Builders* for the holding that "[t]he duty to comply with mandatory legal obligations is not a source of discretion." 551 U.S. at 669. *NRDC v. Haaland*, 102 F.4th at 1076. The analyses of liability waivers in Klamath Project contracts in the 2020 Analysis and Discretion Analysis comport with the analysis in *NRDC v. Haaland*: the Klamath Project liability waivers have similar terms and must, therefore, be read as force majeure clauses which do not impart sufficient discretion to allow Reclamation to take action to benefit ESA-listed species. 2020 Analysis, 7; Discretion Analysis, 2 – 3.

The third relevant contractual provision analyzed in *NRDC v. Haaland* is Article 9(a), which provided that the contract constituted the full agreement between the parties as to quantities of water that could be diverted for beneficial use. 102 F.4th at 1076 – 1077. Plaintiffs argued that the reference to beneficial use imparted discretionary authority to Reclamation to determine what amount of water was reasonable for beneficial use. *Id.* The Court disagreed, finding that the provision simply confirmed the quantity and allocation of water without giving Reclamation the discretion to make adjustments. This is consistent with the conclusions in the 2020 Analysis and Discretion Analysis that portions of the Klamath contracts tying the quantity and timing of water delivered to beneficial use do not provide Reclamation with discretionary authority to take actions that could benefit listed species and therefore do not trigger a requirement to consult.

Other cases and legal positions are subject to the Klamath Basin Water Agreement Support Act and *NRDC v. Haaland.*

Since 2021, several cases have addressed application of the ESA to the Klamath Project.[2] However, all but one of these cases pre-date enactment of the Klamath Basin Water Agreement Support Act and *NRDC v. Haaland.* Their applicability to questions regarding the extent of Reclamation's discretionary authority for ESA Section 7 purposes is limited, at best, in light of these two developments.[3] Furthermore, all but one of these cases omit the searching inquiry into contractual terms necessitated by the Klamath Basin Water Agreement Support Act and *NRDC v. Haaland.*[4]

Of special importance is the excessive reliance that all of the Klamath cases decided after 2021 place upon *Klamath Water Users Protective Association v. Patterson*, 204 F.3d 1206 (9th Cir. 1999) (*Patterson*), or its progeny or, directly or indirectly, on a 1995 vintage opinion from the Regional Solicitor, Pacific Southwest Region. *Patterson* found that Reclamation had discretionary authority to operate Link River Dam for ESA purposes and that the ESA overrides the water rights of the irrigators. 204 F.3d at 1213. The limitations of *Patterson* were noted in the 2020 Analysis, which explained that *Patterson* pre-dates the Supreme Court's decision in *Home Builders* and thus "does not perform the necessary searching inquiry into the extent of Reclamation's discretion at the Klamath Project, nor does it conduct a detailed analysis of the contracts between Reclamation and the irrigators." 2020 Analysis, 8. These limitations in *Patterson* changed to fundamental flaws with enactment of the 2025 Act and its specific mandates that Reclamation operate the Project for irrigation purposes and adhere to the contracts. *Patterson*, therefore, does not define the parameters of ESA Section 7's applicability, nor does it determine whether certain aspects of Project operations are non-discretionary and whose effects must, therefore, be included in the environmental baseline. As the 2020 Analysis notes, *Patterson* stands for the simple proposition that Reclamation must meet the requirements of the ESA.[5] The mandates of the 2025 Act and the carefully reasoned decision in *NRDC v. Haaland* drive home the point that this simple proposition is all that can be read into *Patterson.*

The 1995 Regional Solicitor opinion[6] was cited extensively in *KID v. Reclamation*, for a description of various aspects of Klamath Project operations and Reclamation's asserted ESA and other obligations in the Basin. 48 F.4th 934, 939 - 941 (9th Cir. 2022). This opinion does not

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[2] *Yurok Tribe v. Bureau of Reclamation*, 19-cv-04405-WHO (N.D. Cal. 2023), appeal Nos. 23-15499 and 23-15521 pending; *United States v. Klamath Drainage District*, 2023 U.S. Dist. LEXIS 16171 (D. Ore. 2023), *affirmed* 2025 U.S. App. LEXIS 1347 (9th Cir. 2025), petition for en banc review pending (*U.S. v. KDD*); *Klamath Irrigation District v. U.S. Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022) (*KID v. Reclamation*); *KID v. U.S. District Court*, 69 F.4th 934 (9th Cir. 2023); *Klamath Tribes v. Bureau of Reclamation*, 2023 U.S. Dist. LEXIS 198400 (D. Ore. 2023); and *Klamath Tribes v. Bureau of Reclamation*, 2023 U.S. Dist. LEXIS 198398 (D. Ore. 2023). The Ninth Circuit decision in *U.S. v. KDD* is the sole case decided after enactment of the 2025 Act and, since it does not address the Act, does not affect the analysis of this memorandum.

[3] It should be noted that the regulatory definitions of "effects of the action" and "environmental baseline" were subject to minor clarifying changes in 2024, however these changes do not impact this analysis.

[4] The exception is *U.S. v. KDD*, 2023 U.S. Dist. LEXIS 16171.

[5] To the degree that the 2020 Analysis stated that *Patterson* could be read to require a duty to consult on Project operations as a whole, that statement must be reassessed in light the 2025 Act and this memorandum.

[6] 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); Regional Solicitor, Pacific Southwest Region; July 25, 1995.

analyze the issue of discretionary authority. Its lack of relevant analysis is not surprising given that this opinion is dated July 25, 1995, and thus pre-dates *Sierra Club* and subsequent caselaw establishing the need to determine whether contractual provisions restrain Reclamation's discretionary authority. Its conclusions regarding Reclamation's ESA Section 7 obligations are inaccurate, as noted in the 2020 Analysis and driven home by the 2025 Act and *NRDC v. Haaland*. For these reasons, the 1995 Regional Solicitor opinion is hereby withdrawn.

Stored Water

Use of stored water to satisfy downstream tribal needs was the subject of a memorandum titled "Use of Water Previously Stored in Priority for Satisfaction of Downstream Rights" and issued on January 14, 2021 ("Stored Water Analysis").[7] It concluded that:

> Reclamation must determine how best to satisfy its trust obligation to the Yurok and Hoopa Tribes, who hold senior, but unquantified, rights on the Klamath River. Reclamation satisfies that trust obligation by providing water that would be available in the tribal fishery, absent the project. Project storage, then, would be delivered pursuant to Reclamation's other obligations, and most importantly, the [2014 Amended and Corrected Findings of Fact of the Final Order of Determination in the Klamath Basin Adjudication ("ACFFOD")]. Therefore, water previously stored in priority would not be available to draw upon to supplement the natural flow of the river.

Stored Water Analysis, 5. Since issuance of this memorandum, there have been only a limited number of legal developments which affect its conclusion and underlying analyses.

Klamath Basin Water Agreement Support Act, Pub. L. No. 118-246.

As discussed above, the Klamath Basin Water Agreement Support Act included a general provision specifying that none of its provisions modify the tribal trust or treaty obligations of the United States or affect any water right, as well as a specific mandate that Reclamation operate the Project to provide water for the Project irrigators pursuant to their contracts. These provisions provide several key inputs to the Stored Water Analysis. First, Congress clearly conveyed its intent for the Project to be operated to provide water for irrigation consistent with the contracts by using the word "shall" to create a specific mandate to comply with the 2016 Klamath Power and Facilities Agreement and Attachment A to the Agreement. In the general provision, Congress highlighted the importance of tribal and other water rights, which necessarily include the right of Reclamation to store water in Upper Klamath Lake and the right of the irrigators to use that stored water as affirmed in the ACFFOD.[8] However, Congress did not specifically create an obligation to use stored water to satisfy downstream tribal rights. As discussed below, the lack of a specific Congressional mandate to use stored water to satisfy downstream tribal rights is critical.

Enactment itself of this statute is relevant to the stored water issue. The 2025 Act is the latest in a line of statutory provisions which specifically authorize and appropriate funds for different

[7] While the 2020 Analysis briefly addressed the ACFFOD and stored water issue, it did not analyze Reclamation's authority to use stored water for downstream purpose and is therefore of limited utility on this issue.
[8] ACFFOD Claim KA 294 provides that the United States has a right to store 486,828 acre/feet of water on behalf of Klamath Project irrigators and that the irrigators have a right to use that amount.

facets of Klamath Project facilities and operations. *See, e.g.*, Pub. L. 106-498, 114 Stat. 2221; Pub. L. 115-270, Sec. 4308; Pub. L. 116-191, Sec. 1, 134 Stat. 976. The Klamath Project was created to allow irrigation using water stored behind Link River Dam. As the Supreme Court explained in *Nebraska v. Wyoming*, "if storage water is not segregated, those who have not contracted for the storage supply will receive at the expense of those who have contracted for it a substantial increment to the natural flow supply..." 325 U.S. 589, 639-640 (1945). Enactment of these statutes, including as recently as 2025, show clear Congressional intent for the Project to continue to operate for irrigation purposes using stored water.

Read together, these statutory provisions and enactment of the Act itself support the conclusion of the Stored Water Analysis: the United States has a general trust obligation to the downstream tribes, but a specific duty to operate the Project to provide water to the Project irrigators in accordance with their water rights and contracts. The United States meets these trust obligations by providing natural flow to the downstream tribes, while stored water is reserved for use by the Project irrigators.

Additional Judicial Decisions

The most instructive judicial decision is that of the Supreme Court in *Arizona v. Navajo Nation*, 599 U.S. 555, 561 (2023). This case involved the nature and extent of the United States' obligations to take affirmative measures to provide water to the Navajo Nation. In an especially salient holding, the court stated that "[t]he Federal Government owes judicially enforceable duties to a tribe 'only to the extent it expressly accepts those responsibilities.'" *Arizona v. Navajo Nation*, 599 U.S. at 564 *citing United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011). While Congress has expressed its intent to protect the rights of downstream tribes in the 2025 Act, it did not define those rights, nor did it expressly accept a duty to provide stored water to satisfy those rights. Without such an express acceptance, there is no duty to use water stored in Upper Klamath Lake to satisfy downstream tribal rights.

None of the Klamath specific court decisions explicitly state that the United States has an obligation to use stored water for the benefit of downstream tribes.[9] Relevant here is the Supreme Court's admonition that "[w]hether the Government has expressly accepted such obligations 'must train on specific rights-creating or duty-imposing' language in a treaty, statute, or regulation. *Navajo Nation*, 537 U.S., at 506. That requirement follows from the separation of powers principles. As this Court recognized in *Jicarilla*, Congress and the President exercise the 'sovereign function' of organizing and managing the 'Indian trust relationship.' 564 U.S., at 175." *Arizona v. Navajo Nation*, 599 U.S. at 564. Given the Supreme Court's words and the lack of a statutory mandate to use stored water to satisfy tribal rights, it would be unwarranted to read into any of the existing judicial decisions an enforceable duty to use stored water in a manner contrary to that addressed in the Stored Water Analysis.

Previous Office of the Solicitor Analysis

On March 21, 2024, a Regional Solicitor provided a memorandum to the Bureau of Reclamation Regional Director titled "Bureau of Reclamation Authority to Release Water from Klamath

[9] See Footnote 1 supra for a list of cases decided since 2021 and *KID v. U.S. District Court*, 69 F.4th 934 (9th Cir. 2023).

Project for Yurok Boat Dance Ceremony." ("Boat Dance Memorandum"). This memorandum was issued as part of a settlement of litigation regarding the authority of Reclamation to provide water for the biennial Boat Dance conducted by the Yurok Tribe. The Department acknowledges its general trust obligations to the Yurok and other tribes, including the general obligation to support important tribal religious and cultural practices such as the Boat Dance. However, the Boat Dance Memorandum did not identify a statute or similar mandate which specifically establishes a right to use stored water, as required under *Arizona v. Navajo Nation*. The Boat Dance Memorandum must be read to conform to the analysis in this memorandum and the Stored Water Analysis. During each year that the Department is required to provide Boat Dance flows to the Yurok Tribe, the Department will need to engage in a specific analysis to determine how to provide Boat Dance flows while remaining consistent with this memorandum and the Stored Water Analysis.

Conclusions and follow-on actions

Secretary Burgum directed the Office of the Solicitor to review legal developments during the last four years and issue updated versions of the 2020 Analysis, Discretion Analysis, Stored Water Analysis, and other specified documents. As discussed above, the major legal developments since 2021 are consistent with those analyses. Those analyses remain valid, as updated and modified by this memorandum.

The Klamath Basin Water Agreement Support Act created specific mandates for Reclamation to operate the Project to deliver water for irrigation and flood control and act consistently with existing contracts. If Reclamation cannot simultaneously obey these mandates and comply with ESA Section 7, Reclamation does not have a duty to comply with Section 7. *Home Builders*, 551 U.S. at 669. These mandates thus change the fundamental legal and operational paradigm in the Klamath Basin, which was predicated on the understanding of ESA application embodied in *Patterson* and the 1995 Regional Solicitor's opinion. This shift requires Reclamation, in coordination with the Office of the Solicitor, to reassess its approach to Project operations and align those operations with the requirements of the 2025 Act.

Given the fundamental changes in the legal landscape created by enactment of the 2025 Act and the decision in *NRDC v. Haaland*, the Office of the Solicitor will work with the United States Department of Justice to encourage its approach be consistent with this memorandum.

PATTI A. GOLDMAN (WSBA #24426) (*pro hac vice*)
KRISTEN L. BOYLES (CSBA #158450)
NICOLAS E. WEDEKIND (WSBA #58651) (*pro hac vice*)
Earthjustice
810 Third Avenue, Suite 610
Seattle, WA 98104
Ph: (206) 578-5868
pgoldman@earthjustice.org
kboyles@earthjustice.org
nwedekind@earthjustice.org

AMY CORDALIS (CSBA #321257)
562 A Street
Ashland, OR 97520
Ph: (541) 915-3033
acordalis@ridgestoriffles.org

Attorneys for Plaintiff Yurok Tribe

[Additional Counsel Listed on Signature Page]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

YUROK TRIBE, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES,

Plaintiffs,

v.

U.S. BUREAU OF RECLAMATION, and NATIONAL MARINE FISHERIES SERVICE,

Defendants,

and

KLAMATH WATER USERS ASSOCIATION, THE KLAMATH TRIBES, and KLAMATH IRRIGATION DISTRICT,

Intervenor-Defendants.

Case No. 3:19-cv-04405-WHO

Related Cases: No. C16-cv-06863-WHO
No. C16-cv-04294-WHO

JOINT CASE MANAGEMENT STATEMENT

CASE MANAGEMENT CONFERENCE
DATE: June 16, 2026
TIME: 2:30 pm
LOCATION: Zoom Webinar
JUDGE: Hon. William H. Orrick

UNITED STATES OF AMERICA,

Cross-Claimant,

YUROK TRIBE, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES,

and

HOOPA VALLEY TRIBE,

Joined Cross-Claimants,

v.

KLAMATH WATER USERS ASSOCIATION, and OREGON WATER RESOURCES DEPARTMENT,

Crossclaim-Defendants,

and

KLAMATH IRRIGATION DISTRICT,

Intervenor-Defendant.

KLAMATH WATER USERS ASSOCIATION,

Counterclaimant,

v.

UNITED STATES OF AMERICA,

Counterclaim-Defendant.

OREGON WATER RESOURCES DEPARTMENT,

Counterclaimant,

v.

UNITED STATES OF AMERICA,

Counterclaim-Defendant.

Pursuant to the Court's May 29, 2026, Order, Dkt. No. 1196, undersigned counsel for the parties have met and conferred about the best way to proceed with this litigation. This Joint Case Management Statement first presents a joint statement on areas of agreement and then includes separate party statements and proposed litigation schedules.

JOINT CASE MANAGEMENT STATEMENT

1. Filing the Second Supplemental Complaint and Responsive Pleadings

On May 29, 2026, the Court granted Plaintiff Yurok Tribe's Motion for Leave to File the Second Supplemental Complaint. Dkt. No. 1196. Plaintiff Yurok Tribe sent a 60-day notice to Federal Defendant Bureau of Reclamation on April 13, 2026, seeking a declaration that the 2026 Annual Operations Plan is unlawful. That 60-day notice period ends June 12, 2026. Plaintiffs Pacific Coast Federation of Fishermen's Associations ("PCFFA") and Institute for Fisheries Resources ("IFR") sent a similar 60-notice to Federal Defendants on April 15, 2026. That 60-day notice period ends June 14, 2026. Plaintiff Yurok Tribe plans to file the Second Supplemental Complaint on June 15, 2026, which is after both 60-day notice periods will have run. The Second Supplemental Complaint will substantially conform to the version lodged with Plaintiff's reply brief, Dkt. No. 1194 at 11–58, except for minor changes described in Plaintiffs' separate statement below.

The parties agree to deferral of answers to the Second Supplemental Complaint until after the Court resolves the upcoming motions (described below).

2. Joinder and Intervention

PCFFA/IFR have filed a motion seeking joinder in the Second Supplemental Complaint as plaintiffs. Dkt. No. 1191. No party opposes joinder.

Hoopa Valley Tribe consents to joinder as a party on the condition that, by doing so, it does not waive its sovereign immunity or consent to adjudicate: (1) any aspect of its water rights, including quantification, priority dates, purposes of the reservation, sources of water, and scope of the rights; (2) the relative priority of the federal reserved water rights of any Klamath Basin Tribes with respect to each other; and/or (3) a breach of trust claim against the United States. The Hoopa Valley Tribe does not consent to any suit, crossclaim, or counterclaim against it by any party or any other person or entity that intervenes in this case or seeks to present a claim in this or any other court.

Other parties have intervened in earlier phases of this litigation. The parties agree that all existing parties should have an opportunity to be heard as parties on the upcoming motions regarding the Second Supplemental Complaint, if they so choose, without needing to file additional motions to intervene. The Yurok Tribe qualifies its agreement to party status on the condition that the parties stay within the limitations on the Tribe's waiver of sovereign immunity, which preclude litigation of any aspect of the Tribe's federal reserved water rights. Specifically:

> The Tribe waives its sovereign immunity for the limited purpose of resolving the issues presented in this supplemental complaint; specifically, whether the 2026 Annual Operations Plan is unlawful because the Bureau has discretionary involvement and control to provide flows to the Klamath River to sustain salmon, which requires it to ensure its operation of the Klamath Project as a whole complies with the ESA, and because the Bureau must but has not completed reinitiated consultation before implementing the 2026 Annual Operations Plan. The Tribe reserves all other rights of sovereign immunity and does not consent to adjudicate: (1) any aspect of its water rights, including quantification, priority dates, purposes of the reservation, sources of water, and scope of the rights; (2) the relative priority of the federal reserved water rights of any Klamath Basin Tribes with respect to each other; and/or (3) a breach of trust claim against the United States. The Tribe does not consent to any suit, crossclaim, or counterclaim against it by any party or any other person or entity that intervenes in this case or seeks to present a claim in this or any other court.

Second Supplemental Complaint paragraph 18.

All parties consent to the participation as *amicus curiae* of *amici* who participated as *amici* in earlier phases of this litigation. Federal Defendant consents on the condition that any amicus filings comply with all applicable rules and principles.

3. Page Limits

The parties propose the following page limits:

Plaintiffs' joint motion for summary judgment and request to take judicial notice	50 pages
Federal defendant's and Defendant-Intervenor KWUA and KID's combined oppositions and cross-motions	50 pages per party
Plaintiffs' joint combined oppositions and replies	40 pages
Federal defendant's and Defendant-Intervenor KWUA and KID's replies	15 pages per party

4. Combined Cross-Motions and Oppositions/Replies

The parties agree that each party will combine its opposition brief with its cross-motion (for Defendants) or its reply brief (for Plaintiffs). The page limit for any brief will comply with local rules and, for any combined brief, will be the combined page limit allowed under N.D. Cal. L.R. 7-2 & 7-3, as stated in the table above. Any party may request an enlargement of page limits pursuant to local rule for good cause shown.

SEPARATE PARTY STATEMENTS AND PROPOSED BRIEFING SCHEDULES

PLAINTIFFS' SEPARATE STATEMENT

1. The Second Supplemental Complaint

Plaintiff Yurok Tribe has made revisions to the Second Supplemental Complaint lodged with the Court with their reply brief in support of their motion for leave to file the Second Supplemental Complaint. Dkt. No. 1194. The revisions clarify that the Second Supplemental Complaint is not presenting a facial challenge to this Administration's legal memoranda

purporting to change longstanding legal priorities to water in the Klamath Basin, and to drop the Department of the Interior as a defendant since no claims are asserted as to the Department as a whole. Defendant-intervenors' quotations from the lodged Second Supplemental Complaint are not in the Second Supplemental Complaint that will be filed on June 15, 2026.

The Second Supplemental Complaint alleges that the Bureau of Reclamation's 2026 Annual Operations Plan is unlawful because it prioritizes irrigation deliveries over compliance with the Endangered Species Act ("ESA") and that the Bureau is unlawfully implementing the 2026 Plan without reinitiating and completing reinitiated consultation as required because it deviates from the National Marine Fisheries Service's 2024 Biological Opinion on the Bureau's 2024–2029 Klamath Project Operations Plan.

2. Administrative Records

Plaintiffs do not believe that briefing and resolution of the claims in the Second Supplemental Complaint must await the filing of any administrative records. The Second Supplemental Complaint presents claims under the ESA's citizen suit, 16 U.S.C. § 1540(g)(1)(A), not the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 161–62 (1997) (the APA provides a cause of action for challenging biological opinions because they fall outside the ESA's citizen suit provision).

The Ninth Circuit has held that ESA claims for failing to comply with Section 7(a)(2)'s consultation requirements are not limited to administrative records. *See Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1030, 1034 (9th Cir. 2005) (ESA consultation claims not limited to administrative records); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481, 497–98 (9th Cir. 2011) (allowing submission of extra-record evidence because ESA consultation claims are not limited to an administrative record). While the APA's arbitrary and capricious standard of

review applies to ESA citizen suits, its limitation of review to an administrative record does not. *Id.* at 481, 497–98. Local Rule 16-5, therefore, is inapplicable here.

In the Yurok Tribe's 2016 lawsuit seeking reinitiation of consultation when *C. shasta* infection rates exceeded the limit on allowable take in the 2013 Biological Opinion's incidental take statement, federal defendants argued that review was limited to the administrative record. This Court disagreed. It refused to hold the Yurok Tribe's motion for summary judgment in abeyance until an administrative record could be filed or to limit review to the administrative record based on this Circuit precedent. *See Yurok Tribe v. Bureau of Reclamation*, No. 16-cv-6863-WHO, Dkt. No. 41 (N.D. Cal. Dec. 13, 2016); *Yurok Tribe v. Bureau of Reclamation* 231 F. Supp. 3d 450, 455 (N.D. Cal. 2017).

Delaying briefing to allow the parties to review and cite to an administrative record would only serve to delay resolution of this chapter of this case. Federal Defendant and Defendant-Intervenors have had notice of the evidentiary and technical basis for Plaintiffs' claims since April 13, 2026, when Plaintiff Yurok Tribe sent its comprehensive and heavily documented 60-day notice. Moreover, the core documents have already been filed with the Court or soon will be. The 2026 Annual Operations Plan, and most other relevant documents are subject to judicial notice. Plaintiffs plan to file a request to take judicial notice of relevant government documents supporting their motion for summary judgment. The pertinent documents are not voluminous. Plaintiff Yurok Tribe submitted five pertinent documents with Plaintiff's motion for leave to file the Second Supplemental Complaint, and Plaintiffs plan to submit approximately 10 additional documents in support of their joint motion for summary judgment. In addition, the irrigation contracts and other historical documents are part of the voluminous administrative records spanning roughly 200,000 pages that have been filed in this case. Dkt.

Nos. 61–524, 527–686, 688–822, 825–905. While Federal Defendants had indicated that they are collecting the administrative record for the 2024 biological opinion, Dkt. No. 1187 at 3–4, Plaintiffs have not challenged the 2024 biological opinion, and the Second Supplemental Complaint presents no claims against NMFS, the author of the 2024 biological opinion.

The Federal Defendant has indicated that it can file what it characterizes as the administrative record by July 14, 2026. The parties will, therefore, have an opportunity to review and incorporate this administrative record into their final briefs on the dispositive motions. To the extent, Federal Defendants may object to any extra-record evidence submitted by Plaintiffs, they can make objections in their principal briefs and Fed. R. Civ. P. 56(d) should control.

3. Bifurcation

Plaintiffs oppose bifurcation of litigation of the first and second causes of action. Plaintiffs strongly oppose bifurcation as it would complicate and prolong litigation over the Second Supplemental Complaint.

Plaintiffs are ready to file their joint summary judgment motion on both causes of action on June 17, 2026, the day after the case management conference. Their motion will argue that the two causes of action are inextricably intertwined. Specifically, the illegal prioritization of irrigation over the ESA led to the 2026 Annual Operations Plan's deviations from the 2024 Biological Opinion and its incidental take statement and hence the obligation to reinitiate consultation.

Federal Defendant and Defendant-Intervenors have agreed to brief any justiciability arguments they plan to make either in their oppositions to Plaintiffs' Motion for Summary Judgment or in cross-motions to dismiss. That is the orderly way for briefing to proceed. Their request to defer briefing and resolution of the first cause of action because they believe it is not

justiciable is reminiscent of the argument the federal defendants made in *Yurok Tribe v. Bureau of Reclamation*, No. 16-cv-6863-WHO, Dkt. No. 19 at 5 (N.D. Cal. Dec. 13, 2016). They asked the Court to hold Plaintiffs' (Yurok Tribe, PCFFA, and IFR's) motion for summary judgment in abeyance until the Court first resolved a motion to dismiss. This Court denied the request and instead allowed both motions to proceed concurrently. Dkt. No. 41 at 3. For the same reasons, the Court should deny the request for bifurcation and allow all parties to present their arguments in an orderly, comprehensive, and expeditious manner. This approach is also consistent with the Court's Standing Order 7 limiting parties to one summary judgment motion.

4. Plaintiffs' Proposed Briefing Schedule

Plaintiffs submit the following briefing schedule to allow the case to be briefed, argued, and decided during the 2026 spring-summer irrigation season, which runs through September 30, 2026. As this Court has previously recognized, there is a need to move expeditiously to resolve competing claims to scarce water in the Klamath Basin. In granting the Yurok Tribe leave to file an earlier supplemental complaint, this Court underscored the need to move forward efficiently and promptly to resolve competing claims by the many stakeholders who depend on the increasingly scarce water supply in the Klamath Basin. Dkt. No. 1112 at 2–3. Similarly, in lifting the stay to allow filing of the United States' crossclaim, this Court explained that:

> The stakes here are high. The water supply in the Klamath River Basin is increasingly limited. The people and wildlife who depend on that water—for food, jobs, culture, and habitat—feel the effects daily. As such, I believe it especially important to ensure that all parties are fully heard in a timely way on issues that may affect water allocation in 2022.

Order Granting Requests to Stay, Dkt. No. 961 at 5 (Sept. 30, 2021). The issues and urgent need for a resolution remain; only the line-up of the parties and the water year have changed.

Plaintiffs oppose the schedule proposed by Federal Defendant and Defendant-Intervenors

KWUA and KID because it would make it difficult, if not impossible, for the case to be submitted and decided before the end of the spring-summer irrigation season. In particular, Plaintiffs believe six weeks for Federal Defendant's and Defendant-Intervenors' principal briefs is excessive and will unduly delay resolution of this matter.

In the absence of an agreement among the parties, the local rules could control the schedule with the parties having the ability to seek extensions as appropriate. In the alternative, Plaintiffs propose the following briefing schedule:

June 17, 2026	Plaintiffs' Joint Motion for Summary Judgment, brief in support, and request to take judicial notice
June 19, 2026	Klamath Tribes' and Hoopa Valley Tribe's briefs on the Motion for Summary Judgment
July 7, 2026	Federal Defendant's and Defendant-Intervenors KWUA and KID's Combined Oppositions to Plaintiffs' Motion for Summary Judgment, any Cross-Motions to Dismiss or for Summary Judgment
July 14, 2026	Amicus Briefs
July 21, 2026	Plaintiffs' Joint Oppositions to Cross-Motions and Reply Brief
July 28, 2026	Federal Defendant's and Defendant-Intervenors KWUA and KID's Reply Briefs
August 12, 2026	Oral Argument

DEFENDANT BUREAU OF RECLAMATION'S AND DEFENDANT-INTERVENORS' COMBINED STATEMENT

1. The Second Supplemental Complaint

Federal Defendant Bureau of Reclamation ("Reclamation") and Defendant-Intervenors Klamath Water Users Association ("KWUA") and Klamath Irrigation District ("KID") deny the allegations in the Proposed Revised Second Supplemental Complaint currently lodged at Dkt.

No. 1194, and specifically deny that Reclamation has breached any duty to reinitiate ESA consultation.

In Defendant-Intervenors' view, this case presents a narrow question of application of the 2024 Biological Opinion to Reclamation's 2026 operations, not revision of legal priorities that Plaintiffs describe. The 2024 Biological Opinion applies to 2026 Klamath Project operations, and the 2026 Annual Operations Plan falls within the scope of the effects analyzed in that opinion. The single alleged deviation Plaintiffs identify falls well within the scope of Reclamation's adaptive management discretion, had at most a *de minimis* effect on river flows—and a still smaller effect on irrigation deliveries—and was promptly addressed by Reclamation in response to Plaintiffs' 60-day notice. The 2026 AOP provides a woefully inadequate water supply for Project agricultural lands, and water users are actively managing through shortage for the remainder of the season.

The First Cause of Action alleges that the 2026 Plan is contrary to law because "Interior and the Bureau's revisionist legal priorities violate the ESA" and "seeks vacatur of the 2026 [AOP] because it is based on an unlawful revision of legal priorities to water." Dkt. No. 1194 at 35, 47 (¶¶ 78 and 111 of First Cause of Action in Revised Second Supplemental Complaint). Plaintiffs' allegations notwithstanding, Defendants assert that the 2026 Annual Operations Plan does not apply the Updated analysis or the Bureau's Reassessment Report. The Reassessment Report states that Reclamation will revise its future operations plans for the Klamath Project consistent with the Report and complete reinitiated ESA consultation on any revised operating criteria before implementing those criteria. Dkt. No. 1183-4 at 7.

Accordingly, Federal Defendants and Defendant-Intervenors KWUA and KID may contest whether Plaintiffs have Article III standing to challenge the Updated Analysis and

Bureau's Reassessment Report, including on grounds of lack of ripeness. Relatedly, Defendants intend to argue that the Court lacks jurisdiction over Plaintiffs' first cause of action on the grounds that it fails to state a claim cognizable under the ESA citizen suit cause of action, 16 U.S.C. § 1540(g). In the event the Court does not bifurcate litigation of Plaintiffs' two supplemental claims (as proposed below), Federal Defendants and Defendant-Intervenors plan to present such justiciability arguments either in cross-motions for summary judgment or motions to dismiss.

2. Bifurcation

Based on the Proposed Revised Second Supplemental Complaint currently lodged at Dkt. No. 1194, Defendants propose to bifurcate adjudication of the First and Second Causes of Action pursuant to Fed. R. Civ. P. 42(b) or the court's inherent case management authority and request that the Court proceed now only on the Second Cause of Action and stay the First Cause of Action and all issues involving Reclamation's Reassessment Report. The legal analysis in the Reassessment has not been operationalized, and there is no agency action incorporating or implementing the Reassessment that is ripe for adjudication. The Second Cause of Action presents a discrete, procedural question — whether Reclamation was required to complete reinitiated ESA Section 7(a)(2) consultation before implementing the 2026 Annual Operations Plan. That question does not depend on the Reassessment Report, and can be resolved during the current irrigation season, which runs through November 30, 2026. Bifurcation thus serves judicial economy from both directions: it spares the parties and the Court from briefing issues that may never require decision while allowing Plaintiffs to proceed expeditiously on the claim that actually concerns the 2026 season. Accordingly, Federal Defendants and Defendant-Intervenors KWUA and KID propose that the Court bifurcate litigation on the second

supplemental complaint to allow summary judgment motion practice only on Plaintiffs' second cause of action.

3. Administrative Record

Federal Defendants assert that both claims in the Second Supplemental Complaint must be resolved based on consideration of Reclamation's administrative record on the 2026 Annual Operations Plan, even if admissible extra-record evidence is also considered by the Court. Reclamation is preparing an administrative record for the 2026 Annual Operations Plan. That record will include documents from the Bureau of Reclamation's administrative record for its 2024 ESA consultations on Klamath Project Operations from October 1, 2024 through Sept. 30, 2029, in order to establish Reclamation's reasonable reliance on that 2024 consultation for its 2026 Project operations.

As noted above, Plaintiffs disagree that an agency administrative record is a necessary precursor to judicial review of their claims. However, Defendants believe that Plaintiffs' proffer of extra-record evidence to prove the merits of their claims raises a serious risk of error in precluding the correct application of the Administrative Procedure Act's standard of review, 5 U.S.C. § 706(2), and a final determination of Plaintiffs' claims as a matter of law. *See, e.g., Western Watershed Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011) (applying APA arbitrary and capricious standard to ESA citizen suit claim).[1] Moreover, while the caselaw Plaintiffs cite allows a Court to consider materials outside an agency administrative record, that precedent does not hold that an agency administrative record is irrelevant or dispensable. *See, e.g., White v. U.S. Army Corps of Engineers*, Case No. 22-cv-06143-JSC, 2024 WL 24322 *5

[1] Federal Defendants will make any objections seeking to limit judicial review to the Bureau of Reclamation's administrative record (and a narrow universe of extra-record evidence), or any other grounds to object to admissibility, in the body of their cross-motion per L.R. 7-3.

(N.D. Cal. 2024) (holding only that the Court is not limited to the administrative record); *Cf. Int'l Tech. & Univ. Found. v. Wasc Senior Coll. & Univ. Comm'n*, No. 25-cv-08277-PCP, 2026 WL 710396, at *7 n.2 (N.D. Cal. Mar. 13, 2026) ("Because ITU's common-law due-process claim is quasi-administrative in nature, it is governed by the procedures set forth in Civil Local Rule 16-5 for review on an administrative record.").

In the event the Court allows Plaintiffs to immediately move for summary judgment, Federal Defendants propose to file Reclamation's administrative record by July 14, 2026. Such a deadline affords Reclamation significantly less time to prepare an administrative record than ordinarily allowed. The usual litigation schedule under N.D. Cal. L.R. 16-5 would allow Reclamation 90 days—in this case until September 14, 2026—to file its administrative record, with summary judgment briefing only commencing thereafter.

Federal Defendants are unduly prejudiced by Plaintiffs' proposal to brief their motions for summary judgment before the Bureau of Reclamation files an agency administrative record *and* without full disclosure by Plaintiffs of the extra-record evidence supporting their claims. Plaintiffs' expedited approach denies Reclamation a fair opportunity to defend against Plaintiffs' claims, especially should Plaintiffs' extra-record evidence require Defendants to develop and present rebuttal technical analyses in an unreasonably short period of time. Federal Defendants' concerns are heightened in the event Plaintiffs proffer extra-record evidence not provided in their ESA notice letter dated April 13, 2026. In the event Plaintiffs file motions for summary judgment that rely upon extra-record evidence, Federal Defendants reserve the right to move the Court under Fed. R. Civ. P. 56(d) to stay briefing of summary judgment, to seek leave to take discovery of any proffered expert opinions, and/or to rely upon their own extra-record evidence.

Defendants maintain that Plaintiffs' claims are entirely dissimilar to the Yurok Tribe's 2016 reinitiation claim and do not justify the expedited schedule Plaintiffs urge on the Court or account for the preparation and filing of an administrative record. In 2016, the applicable biological opinion required reinitiation of consultation if C. shasta disease levels met or exceeded a specified threshold, and disease levels at that time far exceeded that threshold. Accordingly, the urgency Plaintiffs seek to attach to this litigation is not present in the way the Court found it to be in 2016. This year does not present the same urgency.

In order to comply with their July 14 proposed deadline for expeditiously filing the Bureau of Reclamation's administrative record—and unless the Court instructs otherwise—Federal Defendants plan to manually lodge Reclamation's administrative record with the Court on a flash or disc drive containing an index and Bates-numbered PDF files (and a limited amount of native format data) and to provide that same electronic information to the other parties via electronic filesharing. The Court has previously denied leave to manually file an electronic copy of Federal Defendants' administrative records in this case. ECF No. 42. Though Federal Defendants anticipate an administrative record containing significantly fewer documents than presented in 2020, Federal Defendants nonetheless propose manual filing again because ECF-filing their last administrative records in 2020 was unduly burdensome insofar as it required over 800 individual ECF filings (each with multiple subparts) made over several weeks. ECF Nos. 61 – 524; 527 – 686; 688 – 822; 825 – 905. Further, access to record documents in those hundreds of individual docket entries proved much more difficult to navigate than a single, lodged administrative record containing the index and all record documents. The federal administrative records previously lodged with the Court apply to expired or superseded federal actions and are largely inapplicable to the Bureau of Reclamation activity from 2024 to present that requires an

administrative record from Reclamation to document its operational decisions challenged in the supplemental claims. Federal Defendants clarify that the National Marine Fisheries Service will not file an administrative record.

4. Defendants' and Defendant-Intervenors KWUA and KID's Proposed Briefing Schedule

In the event the Court determines to allow the immediate commencement of summary judgment briefing, notwithstanding the schedule set forth in L.R. 16-5, Federal Defendants' and Defendant-Intervenors KWUA and KID submit the Proposed Briefing Schedule below. This schedule will allow for a timely decision by the Court, while also affording the parties a more reasonable period of time to brief technically and legally complicated issues, allow for adequate review by multiple federal agencies, and for Defendants' opening summary judgment briefs to address an administrative record to be lodged on July 14.

June 17, 2026	Plaintiffs' Joint Motion for Summary Judgment
July 28, 2026	Federal Defendants' and Defendant-Intervenors KWUA and KID's combined oppositions to Plaintiffs' Summary Judgment Motion and any cross-motions to dismiss or for summary judgment
August 18, 2026	Plaintiffs' joint combined opposition to cross-motions and reply brief
Sept. 9, 2026	Federal Defendants' and Defendant-Intervenors KWUA and KID's reply briefs
no later than 7 days after the principal brief of the party being supported is filed.	Amicus briefs
At Court's prerogative	Oral argument

Dated: June 12, 2026.

Respectfully submitted,

s/ Patti A. Goldman
PATTI A. GOLDMAN (WSBA #24426) (*pro hac vice*)
KRISTEN L. BOYLES (CSBA #158450)
NICOLAS E. WEDEKIND (WSBA #58651) (*pro hac vice*)
Earthjustice
810 Third Avenue, Suite 610
Seattle, WA 98104
Ph: (206) 578-5868
pgoldman@earthjustice.org
kboyles@earthjustice.org
nwedekind@earthjustice.org

s/ Amy Cordalis
AMY CORDALIS (CSBA #321257)
562 A Street
Ashland, OR 97520
Ph: (541) 915-3033
acordalis@ridgestoriffles.org

s/ Gregory C. Loarie
GREGORY C. LOARIE (CSBA #215859)
1 Sansome Street, Suite 1700
San Francisco, CA 94104
Ph: (415) 217-2000
gloarie@earthjustice.org

Attorneys for Plaintiff Yurok Tribe

s/ Glen H. Spain (with permission)
Glen H. Spain (CSBA #88097)
P.O. Box 11170
Eugene, OR 97440-3370
Ph: (541).521-8655
fish1ifr@aol.com

Attorney for Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources

s/ John H. Martin (with permission)
JOHN H. MARTIN (CO Bar #32667)
U.S. Department of Justice
Environment and Natural Resources Division
Wildlife and Marine Resources Section
999 18th Street, North Terrace Suite 600
Denver, CO 80202
Tel: 303-319-5359
john.h.martin@usdoj.gov;

ROBERT P. WILLIAMS (SBN 474730 (DC))
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7611
Washington, D.C. 20044-7611
Ph: (202) 305-0206 | Fax: (202) 305-0275
robert.p.williams@usdoj.gov

THOMAS K. SNODGRASS (CO Bar #31329)
Senior Attorney
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Ph: (303) 844-7233 | Fax: (303) 844-1350
thomas.snodgrass@usdoj.gov

Attorneys for Federal Defendants

s/ Brittany Johnson (with permission)
BRITTANY JOHNSON (CSBA #282001)
MAX BRICKER (CSBA #350150)
Somach Simmons & Dunn, P.C.
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Ph: (916) 446-7979, Fax: (916) 446-8199)
bjohnson@somachlaw.com
mbricker@somachlaw.com

Attorneys for Defendant-Intervenor
Klamath Water Users Association

s/ Nathan Rietmann (with permission)
NATHAN RIETMANN (OR #53630)
Rietmann Law, LLC
1270 Chemeketa Street NE
Salem, Oregon 97301
Ph: (503) 551-2740
nathan@rietmannlaw.com

Attorney for Defendant-Intervenor Klamath Irrigation District

s/ Jeremiah D Weiner (with permission)
JEREMIAH D WEINER (CSBA #226340)
DANIEL RAY (admitted *pro hac vice*)
Rosette, LLP
Attorneys at Law
1415 L Street, Suite 450
Sacramento, California 95814
Mobile: (916) 216-2225
jweiner@rosettelaw.com
dray@rosettelaw.com

Attorneys for Intervenor Klamath Tribes

s/ Thane D. Somerville (with permission)
THOMAS P. SCHLOSSER, WSBA 6276
THANE D. SOMERVILLE, WSBA 31468
Morisset, Schlosser, Jozwiak & Somerville
811 First Avenue, Suite 218
Seattle, WA 98104
Tel: 206-386-5200
t.schlosser@msaj.com
t.somerville@msaj.com

Attorneys for Hoopa Valley Tribe

PATTI A. GOLDMAN (WSBA #24426) (*pro hac vice*)
KRISTEN L. BOYLES (CSBA #158450)
NICOLAS E. WEDEKIND (WSBA #58651) (*pro hac vice*)
Earthjustice
810 Third Avenue, Suite 610
Seattle, WA 98104
Ph: (206) 578-5868
pgoldman@earthjustice.org
kboyles@earthjustice.org
nwedekind@earthjustice.org

AMY CORDALIS (CSBA #321257)
562 A Street
Ashland, OR 97520
Ph: (541) 915-3033
acordalis@ridgestoriffles.org

[Additional Counsel Listed on Signature Page]

Attorneys for Plaintiff Yurok Tribe

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

YUROK TRIBE,

Plaintiff,

v.

U.S. BUREAU OF RECLAMATION,

Defendant.

YUROK TRIBE, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES,

Plaintiffs,

v.

U.S. BUREAU OF RECLAMATION, and NATIONAL MARINE FISHERIES SERVICE,

Defendants,

Case No. 3:19-cv-04405-WHO

Related Cases:
No. C16-cv-06863-WHO
No. C16-cv-04294-WHO

YUROK TRIBE'S SECOND SUPPLEMENTAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Endangered Species Act Case

Judge William H. Orrick

and

KLAMATH WATER USERS ASSOCIATION, THE KLAMATH TRIBES, and KLAMATH IRRIGATION DISTRICT,

Intervenor-Defendants.

UNITED STATES OF AMERICA,

Cross-Claimant,

YUROK TRIBE, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES,

and

HOOPA VALLEY TRIBE,

Joined as Cross-Claimants,

v.

KLAMATH WATER USERS ASSOCIATION, and OREGON WATER RESOURCES DEPARTMENT,

Crossclaim-Defendants,

and

KLAMATH IRRIGATION DISTRICT,

Intervenor-Defendant.

KLAMATH WATER USERS ASSOCIATION,

Counterclaimant,

v.

UNITED STATES OF AMERICA,

Counterclaim-Defendant.

OREGON WATER RESOURCES DEPARTMENT,

Counterclaimant,

v.

UNITED STATES OF AMERICA,

Counterclaim-Defendant.

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INTRODUCTION

1. Ever since salmon were listed as threatened under the Endangered Species Act ("ESA"), defendant U.S. Bureau of Reclamation (the "Bureau") has recognized that it has a legal duty to operate the Klamath Project, a massive federal reclamation project that diverts large quantities of water for irrigation, in compliance with Section 7(a)(2) of the ESA. That means the Bureau must ensure, in consultation with the National Marine Fisheries Service ("NMFS"), that it is providing sufficient flows in the Klamath River to support ESA-listed salmon. This has been the position across administrations, until now.

2. Under the federal government's longstanding understanding of its legal obligations, the Bureau developed a 2024–2029 Klamath Project Operations Plan, incorporated into a NMFS 2024 Biological Opinion (or "2024 BiOp"). That plan, like its predecessors, requires Klamath River flows to sustain salmon by reducing disease risks and providing habitat for young salmon to rear, grow, and out-migrate to the ocean.

3. The Bureau has issued a 2026 Annual Operations Plan, which prioritizes water deliveries for irrigation over Klamath River flows for salmon to comply with the ESA. To implement the 2026 Plan, the Bureau has deviated from the 2024 Biological Opinion by abandoning and altering the required formulas for setting the irrigation allocation and determining Klamath River flows. Under the 2026 Annual Operations Plan, the Bureau has provided less water to the Klamath River than required under the 2024 Biological Opinion and has allocated more water for irrigation than allowed under that Opinion.

4. This action challenges the 2026 Annual Operations Plan on two grounds. First, the 2026 Plan unlawfully elevates irrigation deliveries over Klamath River flows. This action seeks a declaration that this reordering of legal priorities is unlawful under the ESA and binding court precedent. Under the law, the Bureau has extensive discretionary involvement and control

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over operation of the federal Klamath Project and its administration of federal contracts with irrigation districts to provide Klamath River flows to benefit salmon. Under ESA Section 7(a)(2) and its implementing regulations, the Bureau must ensure that its operation of the Klamath Project, as a whole, avoids jeopardizing the survival and recovery of listed salmon or adversely modifying salmon critical habitat. No statute removes the Bureau's discretion and authority to operate the Klamath Project to benefit listed salmon. Similarly, the Bureau's contracts with irrigators make water delivery subject to water availability and the Bureau's compliance with the ESA. The Yurok Tribe asks the Court to declare that the 2026 Annual Operations Plan's elevation of irrigation as a priority over Klamath River flows for ESA compliance is unlawful because it lacks any legal basis, runs counter to the ESA, the terms of the federal irrigation contracts, and a series of binding court decisions.

5. This action also seeks a declaration that the Bureau has a legal obligation to reinitiate consultation and complete the reinitiated consultation before implementing the 2026 Annual Operations Plan for two overlapping reasons. First, in order to prioritize and increase irrigation deliveries under the 2026 Annual Operations Plan, the Bureau has abandoned and significantly altered the methodology for apportioning available water that is mandated by the 2024 Biological Opinion and the limit on the allowable amount of take of listed salmon imposed in the Biological Opinion's incidental take statement. Second, under the 2026 Plan, the Bureau has allocated more water for irrigation than allowed under the 2024 Biological Opinion, the terms and conditions of the incidental take statement, and the limit on the amount of allowable take. Both deviations have resulted in changes in Klamath Project operations that were not analyzed in the 2024 Biological Opinion. Because the Bureau adopted the 2026 Annual Operations Plan without reinitiating or completing reinitiated consultation as required, the Yurok

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Tribe asks the Court to vacate the 2026 Annual Operations Plan prospectively, which will revert the Bureau's operation of the Klamath Project during the remainder of this water year to the terms set out in the 2024 Biological Opinion.

JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

6. This action is brought pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g)(1)(A). Pursuant to ESA, 16 U.S.C. § 1540(g)(2)(A), plaintiff Yurok Tribe sent a 60-day notice to the Bureau on April 13, 2026. Sixty days have passed, and the Bureau has not eliminated the ESA violations laid out in the 60-day notice. This Court has jurisdiction pursuant to 16 U.S.C. § 1540(g)(1), and 28 U.S.C. §§ 1331 and 1362, and has authority to provide declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

7. Venue is proper in this Court under 28 U.S.C. § 1391(e) because the Yurok Tribe is located in the district and many of the events and consequences of the defendant's violations of law occurred or will occur in this district.

8. This case is properly assigned to the San Francisco/Oakland Division under Civil L.R. 3-2(c) because the Yurok Tribe is located in Humboldt and Del Norte counties, and a substantial part of the events or omissions which give rise to this action occurred in Humboldt and Del Norte counties through which the lower Klamath River flows.

PARTIES

A. Plaintiff Yurok Tribe

9. The Yurok Tribe is a sovereign, federally recognized Indian Tribe. Since time immemorial, the Yurok Tribe has lived and fished on the Lower Klamath River in Northern California. An 1855 Executive Order set aside the Reservation as a permanent homeland for the Yurok Tribe. The Yurok Tribe reserved its aboriginal water rights in the creation of the Yurok Reservation. The Executive Order that created the Reservation vested in federal law the Yurok

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Tribe's federal reserved fishing and water rights. *Parravano v. Babbitt*, 70 F.3d 539, 541 (9th Cir. 1995); *Baley v. United States*, 942 F.3d 1312, 1337, 1340–41 (Fed. Cir. 2019).

10. The Yurok Reservation extends for one mile on each side of the Klamath River in Northern California from the mouth at the Pacific Ocean approximately 45 miles upriver.

11. The Tribe's fishing rights are integral to the Yurok way of life. The Klamath River and its fishery are "not much less necessary to the existence of the [Yurok] than the atmosphere they breathe[.]" *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

12. The Yurok Tribe has federal reserved water rights that include, but are not limited to, sufficient water to support its fishery. The Yurok Tribe's federal reserved water rights have been held to be senior to and have priority over the Bureau's and any irrigators' rights to use water from the Klamath Project for irrigation. *Baley v. United States*, 942 F.3d at 1323, 1335, 1341; *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999).

13. The Tribe and its members rely on salmon as a healthy food source. Fishing for salmon provides food and economic opportunities for Yurok families, many of whom have annual incomes far below the poverty line. Fishing is also the fabric of the community, bringing people together to connect with each other and their heritage, and to anchor themselves to their fishing culture.

14. The Bureau's operation of the Klamath Project has diminished Klamath River flows and harmed the Yurok Tribe's fishery. Tragedy struck in 2002 when Project water deliveries led to a massive outbreak of fish disease that killed as many as 78,000 returning adult salmon before they could spawn. The dead salmon washed up on the Yurok Reservation. The

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2002 adult fish kill is one of the darkest events in Yurok history. It contributed to the shut down or curtailment of most of the Tribal fishery from 2005 through 2006.

15. Tragedy struck again in 2014 and 2015 when monitoring revealed 81% and 91% infection rates in sampled out-migrating juvenile salmon of *C. shasta*, a fish disease in juvenile salmon that is often fatal. The salmon that survived to return as adults in 2016 and 2017 came back in near-record low numbers, again shutting down the commercial Tribal fishery, leading to another fishery disaster. In 2017, the Yurok Tribal Council also closed its fall subsistence fishery. 2017 was the first time in history that Yurok Tribal members did not fish on the Klamath River. From 2017 to the present, *C. shasta* has continued to plague the River and the Tribal commercial fishery has been closed.

16. The Bureau's implementation of biological opinions and Klamath Project operations plans that have been developed to comply with the ESA has reduced the harm to the Yurok Tribe's fishery from water withdrawals from the Klamath Project and has supported, in part, the Tribe's federal reserved water rights for its fishery, which have not yet been adjudicated or quantified, but which vested in federal law upon establishment of the Reservation.

17. Pursuant to the Yurok Tribal Code, which requires that any waiver of sovereign immunity be in writing and authorized by the Yurok Tribal Council, the Yurok Tribal Council has adopted a resolution approving the following limited waiver of sovereign immunity for the purposes of this supplemental complaint. The Tribe waives its sovereign immunity for the limited purpose of resolving the issues presented in this supplemental complaint; specifically, whether the 2026 Annual Operations Plan is unlawful because the Bureau has discretionary involvement and control to provide flows to the Klamath River to sustain salmon, which requires it to ensure its operation of the Klamath Project as a whole complies with the ESA, and because

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the Bureau must but has not completed reinitiated consultation before implementing the 2026 Annual Operations Plan. The Tribe reserves all other rights of sovereign immunity and does not consent to adjudicate: (1) any aspect of its water rights, including quantification, priority dates, purposes of the reservation, sources of water, and scope of the rights; (2) the relative priority of the federal reserved water rights of any Klamath Basin Tribes with respect to each other; and/or (3) a breach of trust claim against the United States. The Tribe does not consent to any suit, crossclaim, or counterclaim against it by any party or any other person or entity that intervenes in this case or seeks to present a claim in this or any other court.

18. The Yurok Tribe has been and will continue to be harmed by the Bureau's disregard of its full ESA Section 7(a)(2) duties and elevation of irrigation deliveries over Klamath River flows for ESA compliance in operating the Klamath Project. The 2026 Annual Operations Plan has unlawfully reduced flows needed to sustain salmon in the Klamath River and comply with the federal ESA. The Yurok Tribe has been and will continue to be harmed when flows in the Klamath River fall short of what is required by the federal ESA.

B. Federal Defendant

19. Defendant United States Bureau of Reclamation is an agency of the United States Department of the Interior that operates federal water projects throughout the United States. It operates the Klamath Project.

BACKGROUND

I. THE KLAMATH PROJECT HAS LED TO THE DECLINE OF KLAMATH RIVER FISHERIES.

A. The Klamath Project

20. Congress authorized construction and development of the Klamath Project in 1905, pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, which authorized the

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Secretary of the Interior to raise or lower Upper Klamath Lake levels as may be necessary to operate the irrigation project under the terms and conditions of the Reclamation Act of 1902, 43 U.S.C. §§ 372, *et seq*.

21. The Klamath Project is located in Southern Oregon and Northern California. Various facilities, including dams, diversions, canals, and pumping stations, were built in the Upper Klamath Basin in Oregon and California between 1906 and 1966 as part of the Klamath Project, which included a federal hydroelectric project, partially within the Project footprint. The Project facilities extended downstream to Iron Gate Dam in California, which blocked all fish passage upstream.

22. Before construction of the Klamath Project, Upper Klamath Lake ("UKL") was a naturally occurring lake that flowed into the Klamath River. A rock reef with steep rapids called Klamath Falls formed the natural barrier at the foot of the lake. Each winter, the lake would rise naturally as it accumulated water, and that water would be released throughout the following spring and summer. Construction of the Klamath Project entailed chiseling down the rock reef and creating Link River Dam at the foot of the lake in 1917 to allow the Bureau to control and access the water in the lake. It also allowed the Bureau to draw the lake down below levels that would have occurred naturally.

23. The Project did not substantially increase the lake's maximum capacity. It created the ability to lower lake levels below natural levels and change the timing of flows from the lake to the Klamath River.

24. Agricultural development around Upper Klamath Lake, which included draining portions of lakes and converting thousands of acres from wetlands to agriculture, significantly reduced the amount of water available for flows in the Klamath River. The Klamath Project

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provides irrigation water to approximately 230,000 acres of agricultural land in the Upper Klamath Basin each year, as well as to four national wildlife refuges within its boundaries.

25. In 2023 and 2024, four dams on the Klamath River in Oregon and California were removed in the largest salmon restoration project in world history and the largest dam removal project in U.S. history. The removal of the dams made available hundreds of miles of historic salmon spawning grounds that had been inaccessible to salmon for nearly 100 years. As part of dam removal, title to and control over Keno Dam was transferred to the Bureau in 2024. The removal of the dams changed the ESA compliance point from the former Iron Gate Dam, which was removed, to Keno Dam.

B. The Klamath Project Led to the Decline of Klamath River Fisheries.

26. The Klamath River originates in an arid high desert region in Oregon and flows into California and through the Yurok Reservation into the Pacific Ocean. Before the Klamath Project, the Klamath River supported the third largest salmon runs in the continental United States and many other thriving fisheries. Several species of anadromous fish still inhabit the Klamath River and its tributaries, including spring and fall-run chinook and coho salmon.

27. Coho salmon have on average a three-year life cycle, spending half their lives in fresh water and half in salt water. After the eggs hatch in the winter, the coho fry spend up to 18 months in freshwater. They typically out-migrate to the sea between mid-February and mid-June. The Klamath Project has altered the natural hydrograph and dramatically reduced the spring flows that supported juvenile coho salmon rearing and the out-migration of the year-old salmon to the Pacific Ocean. At about three years old, adult coho salmon return in September through December to spawn and die in the same stream where they were born.

28. In 1997, NMFS listed Southern Oregon/Northern California Coast ("SONCC") Coho Salmon as threatened under the ESA. Endangered and Threatened Species; Threatened

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Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24588 (May 6, 1997). In 1940, SONCC Coho Salmon, a population that includes Klamath River coho salmon, were estimated to range between 150,000 and 400,000 naturally spawning fish annually. By the 1970s, this coho salmon population had become very depressed with naturally producing adults declining to approximately 10,000. The California portion of the population had by then declined to six percent or less of its abundance during the 1940s. NMFS identified agricultural development and water withdrawals for irrigation as major activities responsible for the decline of SONCC Coho Salmon. *Id.* at 24592–93.

29. NMFS designated critical habitat for SONCC Coho Salmon in 1999 and included most of the Klamath River in Northern California in the designation. Designated Critical Habitat; Central California Coast and Southern Oregon/Northern California Coasts Coho Salmon, 64 Fed. Reg. 24049 (May 5, 1999). NMFS found that irrigation water withdrawals and dam operations were "[a]ctivities that may require special management considerations" for SONCC Coho Salmon. *Id.* at 24059.

30. In its five-year status review completed in 2024, NMFS found that SONCC Coho Salmon continue to be at risk of extinction and their condition has declined since the last status review. Five-Year SONCC Coho Salmon Review at 76–77 (2024).

31. The Bureau's operation of the Klamath Project determines the amount, timing, and rate of water flow in the Klamath River available to support salmon. The Bureau's operation of the Klamath Project has diminished Klamath River flows needed to sustain healthy salmon populations. In 2002, water withdrawals for Klamath Project irrigation contributed to historic low flows and the spread of a deadly fish disease that caused the largest fish kill on American soil, killing as many as 78,000 returning adult salmon before they could spawn. In more recent

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years, limited flows in the spring have resulted in a high percentage of out-migrating juvenile salmon being infected by *C. shasta* and dying. In 2014 and 2015, *C. shasta* infection rates in sampled fish reached 81% and 91% respectively. In 2021, *C. shasta* spore were high fish mortalities were found in sampling, with over 90% mortalities in critical weeks in May. Elevated *C. shasta* infections and mortalities have become the greatest threat to juvenile salmon survival.

II. THE ENDANGERED SPECIES ACT'S REQUIREMENTS

A. The Duty to Engage in Consultation and to Avoid Jeopardy and Adverse Modification of Critical Habitat

32. Section 7(a)(2) of the ESA prohibits agency actions that may jeopardize the survival and recovery of a listed species or adversely modify its critical habitat:

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

16 U.S.C. § 1536(a)(2).

33. ESA consultation regulations promulgated jointly by NMFS and the Fish and Wildlife Service define "action" broadly to encompass "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02.

34. Under the ESA consultation regulations, Section 7(a)(2) applies to all actions "in which there is discretionary Federal involvement or control." *Id.* § 402.03.

35. Section 7(a)(2) establishes an interagency consultation process to assist federal agencies in complying with their duty to avoid jeopardy to listed species or destruction or adverse modification of their critical habitat. Under this process, a federal agency proposing an action that "may affect" a listed species, including salmon, must prepare and provide to the

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appropriate expert agency a description of the proposed action, its effects, and relevant scientific evidence. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

36. Where the agency proposing the action determines that an action "may affect" protected salmon but is "not likely to adversely affect" the species, it may attempt "informal consultation" with NMFS. 50 C.F.R. §§ 402.13, 402.14(b)(1). An agency's "not likely to adversely affect" determination becomes final and terminates consultation only when NMFS concurs in writing in the determination. 50 C.F.R. §§ 402.13, 402.14(b)(1).

37. For actions that may adversely affect a listed species or critical habitat, a formal consultation with the expert fish and wildlife agency is required. 50 C.F.R. § 402.14. At the conclusion of a formal consultation, the expert fish and wildlife agency issues a biological opinion assessing the effects of the action on the species and its critical habitat, determining whether the action is likely to jeopardize the continued existence of the species or adversely modify its critical habitat and, if so, offering a reasonable and prudent alternative that will avoid jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)–(h).

B. The Prohibition on Take of Listed Species and Incidental Take Statements

38. Section 9 of the ESA prohibits "take" of endangered species by any person, which includes federal agencies. 16 U.S.C. § 1538(a)(1). "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 16 U.S.C. § 1532(19). NMFS has defined "harm" to include "significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102.

39. The ESA makes the take prohibition applicable to species listed as endangered, like Southern Resident Killer Whales, which depend on salmon, including from the Klamath River, as their primary food source. NMFS has extended the take prohibition to threatened

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salmon, including SONCC Coho Salmon. 50 C.F.R. § 223.203(a); Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units (ESUs), 65 Fed. Reg. 42422 (July 10, 2000).

40. If a federal action undergoing consultation will result in the take of a listed species, the biological opinion must include an "incidental take statement" that specifies the amount and extent of incidental take of listed species that may occur without causing jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The incidental take statement provides a safe harbor, insulating activities from take liability that are undertaken in compliance with the incidental take statement's terms and conditions. 16 U.S.C. § 1536(o)(2); *see* 16 U.S.C. § 1536(b)(4)(C). An incidental take statement also serves as a check on the biological opinion's assumptions and conclusions and provides for monitoring. 50 C.F.R. § 402.14(i)(3). It must set out a "trigger" that specifies an unacceptable level of take that, if exceeded, invalidates the safe harbor and requires the agencies to immediately reinitiate consultation. *Id.* § 402.14(i)(4).

41. The ESA consultation regulations provide:

> (a) Reinitiation of consultation is required and shall be requested by the Federal agency, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:
>
> (1) If the amount or extent of taking specified in the incidental take statement is exceeded; [or]
>
> (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion. . . .

50 C.F.R. § 402.16(a)(1), (3). If either of these triggers is met, action agencies, like the Bureau, have a duty to reinitiate consultation with the expert fish and wildlife agency.

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III. LONGSTANDING PRECEDENT HOLDS THAT THE BUREAU'S ESA SECTION 7(A)(2) OBLIGATIONS TAKE PRECEDENCE OVER WATER DELIVERIES FOR IRRIGATION.

42. The Bureau constructed the Klamath Project, owns and operates Link River Dam and Keno Dam, and makes water deliveries from the Klamath Project for irrigation in accordance with federal contracts.

43. The Ninth Circuit held more than 25 years ago, and subsequent cases have confirmed, that the Bureau must ensure that its operation of the Klamath Project complies with Section 7(a)(2).

44. In 1999, the Ninth Circuit upheld the Bureau's authority to direct PacifiCorp, which operated Link River Dam under federal contract, to release flows to the Klamath River to meet the Bureau's ESA 7(a)(2) obligations. The Court held that the Bureau's ESA responsibilities take precedence over water deliveries for irrigation:

> 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.

Patterson, 204 F.3d at 1213.

45. *Patterson*'s holding has withstood the test of time. In this case, resolving a crossclaim brought by the United States, joined by the Yurok Tribe and Hoopa Valley Tribe, this Court held that *Patterson* remains the controlling law on whether the ESA applies to the Klamath Project and that the Bureau's ESA responsibilities take precedence over water deliveries for irrigation. *See Yurok Tribe v. U.S. Bureau of Reclamation*, 654 F. Supp. 3d 941 (N.D. Cal. 2023), *appeals pending*, Nos. 23-15499 & 23-15521 (9th Cir.).

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46. Another district court also recently reaffirmed and applied the legal priorities confirmed in *Patterson*. In *Klamath Tribes v. U.S. Bureau of Reclamation,* 2024 WL 472047, No. 1:22-cv-00680-CL, *4–5 (D. Or. Feb. 7, 2024), the district court held that the Bureau's 2022 Temporary Operations Plan violated both Section 7 and Section 9 because it allocated approximately 60,000 acre-feet of water to irrigation beyond what was allowed under the controlling 2019 Biological Opinion.

47. Other cases have reinforced the Bureau's obligation to operate the Klamath Project, as a whole, to meet the requirements of Section 7(a)(2).

48. In *Baley*, Klamath Basin irrigators brought a Fifth Amendment takings case based on the Bureau's 2001 restrictions on irrigation deliveries to comply with the ESA. The Federal Circuit rejected the Klamath irrigators' Fifth Amendment takings claim because their water rights are subordinate to the senior federal reserved water rights of the Yurok Tribe and other Klamath Basin Tribes, and "[a]t the bare minimum, the Tribes' rights entitle them to the government's compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy." 942 F.3d at 1337.

49. In *Klamath Irrigation District v. U.S. Bureau of Reclamation (KID v. Bureau of Reclamation)*, 48 F.4th 934 (9th Cir. 2022), *cert. denied*, 144 S.Ct. 342 (2023), irrigation districts challenged the 2019–2024 Klamath Project Operations Plan, seeking to prevent the Bureau from limiting the amount of water available for irrigation to provide Klamath River flows for salmon. The Ninth Circuit upheld the dismissal of the case under Rule 19 for failure to join Klamath Basin Tribes as indispensable parties because "the Tribes' water rights are 'at a minimum coextensive with Reclamation's obligations to provide water for instream purposes under the ESA,'" and the lawsuit seeking to "reprioritize or otherwise alter Reclamation's ability or duty to

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fulfill the requirements of the ESA implicates the Tribes' long-established reserved water rights." *Id.* at 943–44 (quoting district court opinion).

50. *In re Klamath Irrigation Dist.* (*In re KID*), 69 F.3d 934, 941–43 (9th Cir. 2023), *cert. denied,* 144 S.Ct. 552 (2024), upheld removal to federal court of a lawsuit seeking to enjoin the Bureau from providing ESA flows to the Klamath River based on irrigators' water rights determined in the Klamath Basin Adjudication. The Ninth Circuit refused to remand the case to state court because the adjudication neither adjudicated nor governs the Yurok Tribe's federal reserved water rights or the Bureau's ESA obligations. *Id.* at 941–42.

IV. INTERIOR AND THE BUREAU HAVE ADOPTED LEGAL ANALYSES PURPORTING TO REVERSE THE LONGSTANDING LEGAL PRIORITIES TO WATER IN THE KLAMATH BASIN.

51. In 2020–2021 during the Trump administration's first term, the Solicitor of Interior issued several memoranda purporting to find a basis to reorder the legal priorities to water in the Klamath Basin, including by giving priority to irrigation deliveries over ESA compliance. The Bureau never implemented the reordered priorities because Secretary Deb Haaland rescinded the memoranda after the change in administrations.

52. In February 2025, Secretary of Interior Doug Burgum directed the Solicitor of Interior to reinstate the legal analyses from the first Trump administration. Mem. from Secretary Doug Burgum to Solicitor (Feb. 10, 2025) (rescinding withdrawal of 2020–2021 ESA analyses).

53. In May 2025, the Acting Interior Solicitor released an updated analysis of the Bureau's ESA obligations, in which he concluded that water deliveries for irrigation are nondiscretionary and take precedence over water releases to the Klamath River to comply with the ESA. Acting Solicitor's Klamath Updated Analysis of Endangered Species Act Obligations (May 14, 2025) ("Updated Analysis").

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54. The Updated Analysis acknowledges that the Bureau has authority and discretion to operate the Klamath Project to benefit listed fish species and therefore must ensure that its operation of the Project complies with Section 7(a)(2). But the Updated Analysis supports confining the reach of Section 7(a)(2) so that the Bureau's Section 7(a)(2) obligations extend only to water that is available after meeting the demands of Klamath Basin irrigators. As to the Bureau's contracts with Klamath irrigators, the Updated Analysis claims that the Bureau lacks discretion or authority to use water that irrigators seek under their contracts to benefit salmon in the Klamath River, departing from the language of the contracts and judicial decisions construing their terms. In these ways, the Updated Analysis purports to reverse longstanding precedent holding that the ESA takes priority over irrigation.

55. In January 2026, the Bureau issued a report concluding that water releases for irrigation and fulfillment of Klamath irrigation contracts are nondiscretionary and must be met before releasing water to comply with the ESA. Report on Reassessment for Conforming Operations of Klamath Project to Legal Requirements (Jan. 2026). This report states that the new legal priorities will be incorporated into a new operations plan and ESA consultation for the 2027 water year. Before doing so, the Bureau adopted the 2026 Annual Operations Plan, which prioritizes water deliveries for irrigation over Klamath River flows for salmon to comply with the ESA.

V. DEVELOPMENT OF THE 2024–2029 OPERATIONS PLAN AND 2024 BIOLOGICAL OPINION

56. In the early years after the SONCC Coho Salmon listing, the Bureau operated the Klamath Project under annual plans and acknowledged that these plans were actions subject to Section 7(a)(2), although it consulted on only some of these annual plans. *See Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228 (N.D. Cal. 2001)

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(Bureau violated Section 7(a)(2) by failing to consult on annual plan). The Bureau then began developing and consulting on long-term operations plans. The Bureau conforms its annual operations to the long-term operations plan and relies on biological opinion on the long-term plan to meet its Section 7(a)(2) obligations.

57. Early ESA litigation over the Bureau's operation of the Klamath Project focused on the necessity of providing minimum flows to support salmon. *See, e.g.*, *Pac. Coast Fed'n of Fishermen's Ass'ns v. Bureau of Reclamation,* 426 F.3d 1082 (9th Cir. 2005) (biological opinion's reasonable and prudent alternative was unlawful because it provided only a portion of the minimum flows deemed biologically necessary to avoid jeopardy to coho salmon). Subsequent biological opinions have required that minimum flows be met in each month of the year, and NMFS's findings of no-jeopardy and incidental take statements have relied on the minimum flows being met.

58. The 2013 Biological Opinion also called for disease management flows to reduce *C. shasta* infections and mortalities in out-migrating juvenile salmon, which had become the primary threat to juvenile SONCC Coho Salmon survival in the Klamath Basin. The necessary flows failed to materialize in 2014 and 2015 and *C. shasta* infection rates in sampled juvenile fish skyrocketed to 81% and 91%. In a related case, this Court held that the Bureau had a legal duty to reinitiate consultation because *C. shasta* infection rates exceeded the 2013 Biological Opinion's incidental take statement limit on allowable take of 49%, which was equivalent to the highest incidence of reported *C. shasta* infections when the 2013 Biological Opinion was issued. This Court issued an injunction requiring disease management flows to reduce the incidence of *C. shasta* upon finding that: "Plaintiffs have demonstrated that flushing flows and emergency

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dilution flows would reduce *C. shasta* rates among Coho salmon." *Yurok Tribe v. U.S. Bureau of Reclamation*, 231 F. Supp. 3d 450, 479, 483–84, 489 (N.D. Cal. 2017).

59. The reinitiated consultation ultimately led to the 2019 NMFS Biological Opinion, concluding that the 2019–2024 Klamath Operations Plan would not jeopardize SONCC Coho Salmon survival and recovery or adversely modify coho salmon critical habitat. NMFS based its conclusion on the mandatory minimum flows, higher spring flows, and a required surface flushing flow in the winter-spring months to flush out the worms that host the *C. shasta* parasites.

60. The Yurok Tribe, along with Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources, filed this lawsuit challenging the 2019 Biological Opinion, alleging that the flows were insufficient to meet the needs of juvenile salmon. This Court approved a stipulated stay of the litigation contingent on the Bureau operating the Klamath Project under an Interim Operations Plan providing augmented spring flows to benefit juvenile salmon. *See* Stipulation to Stay Litigation (Mar. 27, 2020) and Attached Interim Operations Plan. ECF No. 908.

61. The Bureau developed a new operations plan for 2024–2029 that accounts for dam removal. Iron Gate Dam had been the compliance point for Klamath River flows, but it was removed, along with three other Klamath River dams, in 2023 and 2024. Keno Dam is the new compliance point for water released from Upper Klamath Lake to provide flows in the Klamath River.

62. The 2024–2029 Operations Plan adheres to a series of formulas for determining the agricultural allocation and Klamath River flows. The formulas depend on hydrologic conditions, meaning how wet or dry the Klamath Basin is, and on water levels in Upper Klamath

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Lake. These variables are calculated on a daily basis to ensure operations adapt to changing conditions. 2024 BiOp at 19–26.

63. In its consultation on the 2024–2029 Operations Plan, NMFS analyzed the effects of allocating water under the new formulas. NMFS concluded that operating the Klamath Project in strict compliance with the new formulas would not lead to jeopardy to threatened SONCC Coho Salmon or endangered Southern Resident Killer Whales that depend on salmon prey or adversely modify salmon critical habitat. The 2024 Biological Opinion and its incidental take statement require that the Bureau must adhere to the new formulas in allocating water for irrigation and determining Klamath River flows for the no-jeopardy conclusion to remain valid and for the Bureau and Klamath irrigators to be insulated from take liability.

VI. THE 2026 ANNUAL OPERATIONS PLAN DEVIATES FROM THE 2024 BIOLOGICAL OPINION.

64. In early April, without consulting with the Yurok Tribe, the Bureau released an Annual Operations Plan for the 2026 water year. The 2026 Plan prioritizes increasing irrigation deliveries. It calls for lowering river flows that provide habitat for listed species so that water deliveries for irrigation can come as close as possible to providing 350,000 acre-feet this water year and for storing additional water to achieve that amount of water for irrigation next year. 2026 Annual Operation Plan at 1, 3. To achieve this goal, the Bureau has deviated from the 2024 Biological Opinion's formulas for setting the irrigation allocation and for determining Klamath River flows.

65. On April 6, 2026, the Bureau announced an initial 2026 Klamath Project water supply allocation of 221,000 acre-feet from Upper Klamath Lake. The Bureau's press release announcing the agriculture allocation states that "[t]he allocation reflects ongoing efforts to maximize available supplies in a year shaped by warm storms, limited snowpack, and

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constrained spring inflows." Bureau of Reclamation Press Release (Apr. 6, 2026). The press release quotes Acting Bureau of Reclamation Commissioner Scott Cameron: "Even in a year with unpredictable water conditions, Reclamation's priority remains the same: deliver as much water as possible to the Klamath Project[.] . . .We are working closely with our partners to make sure every available acre-foot truly supports producers and the communities that depend on Klamath Basin agriculture." *Id.*

66. The initial allocation volume of 221,000 acre-feet from UKL is larger than what is allowed under the 2024 Biological Opinion. Under the 2024 Biological Opinion, an initial allocation is made in April, which serves as a floor. If forecasts allow, the allocation can be increased through June. Under the 2026 Annual Operations Plan, the Bureau locked in an agriculture allocation based on forecasts that might not, and in fact did not, materialize. Inflows into Upper Klamath Lake have since worsened. The June 1, 2026 forecasts do not support the agriculture allocation made in April under the 2024 Biological Opinion's rules.

67. The Bureau's implementation of the 2026 Annual Operations Plan reduced Klamath River flows from what would have been required under the 2024 Biological Opinion beginning in early March 2026. By way of example, under the 2024 Biological Opinion, the flows for March 9–18, 2026, would have been between 935–940 cubic feet per second ("cfs"), but instead the Bureau only delivered between 750–760 cfs, a deficit of more than 150 cfs.

68. The Bureau has not completed reinitiated consultation on the 2026 Annual Operations Plan, despite its abandonment of the required formulas for setting the agricultural allocation and Klamath River flows and operations this water year that deviate from what was considered in the 2024 Biological Opinion.

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CAUSES OF ACTION

ALLEGATIONS COMMON TO BOTH CAUSES OF ACTION

69. Plaintiffs reallege each and every allegation set forth in this complaint.

70. The ESA directs that the Bureau, like other federal agencies,

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

16 U.S.C. § 1536(a)(2).

71. The ESA consultation regulations promulgated jointly by NMFS and the Fish and Wildlife Service define "action" broadly to encompass "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02.

72. The federal government authorized, funded, and built the Klamath Project. It owns and operates both Link River Dam and Keno Dam, which control releases from Upper Klamath Lake for irrigation and Klamath River flows. It entered into contracts with irrigation districts for water deliveries from the Klamath Project, subject to contract terms that give the Bureau authority to limit water deliveries when water is unavailable due to drought and compliance with federal legal obligations. The Bureau operates the Klamath Project to prevent floods, maintain Upper Klamath Lake levels for endangered fish needs, provide Klamath River flows for salmon, and release water to support federal wildlife refuges.

73. The ESA consultation regulations provide: "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03.

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74. The Bureau's operation of the Klamath Project, as a whole, is an action over which the Bureau has discretionary involvement and control and is subject to ESA Section 7(a)(2).

FIRST CAUSE OF ACTION

THE 2026 ANNUAL OPERATIONS PLAN IS UNLAWFUL BECAUSE IT PRIORITIZES IRRIGATION OVER ESA COMPLIANCE CONTRARY TO THE ESA AND BINDING COURT PRECEDENT.

75. The 2026 Annual Operations Plan is unlawful because it prioritizes irrigation deliveries over Klamath River flows for salmon to comply with the ESA. The Yurok Tribe seeks a declaration that prioritizing irrigation over ESA compliance in operating the Klamath Project is unlawful. Further, the Yurok Tribe seeks vacatur of the 2026 Annual Operations Plan prospectively because it is based on an unlawful revision of legal priorities to water.

76. In 1999, the Ninth Circuit held that the Bureau has authority to operate the Klamath Project to meet ESA Section 7(a)(2) requirements and that the Bureau's ESA obligations override water deliveries for irrigation. *Patterson*, 204 F.3d at 1213. *Patterson* remains controlling law. The long-settled legal priority to water in the Klamath Basin has guided the Bureau's operation of the Klamath Project ever since and has been confirmed in recent cases.

77. The Bureau adopted the 2026 Annual Operations Plan, which prioritizes water deliveries for irrigation over Klamath River flows for salmon to comply with the ESA. This reprioritization has led to a larger agricultural allocation and reduced Klamath River flows than required under the 2024–2029 Operations Plan and 2024 Biological Opinion. The Bureau's elevation of irrigation deliveries over full ESA compliance is unlawful.

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A. No Statute Removes the Bureau's Discretion to Operate the Klamath Project to Benefit Listed Salmon.

78. No statute removes the Bureau's discretion and authority to operate the Klamath Project to avoid extinction and promote the recovery of Klamath River salmon. Under the Reclamation Act of 1902 and the 1905 Act authorizing aspects of the Klamath Project, the Bureau has long operated the Klamath Project for multiple purposes, including ESA compliance, and courts have consistently rejected irrigators' arguments that the Bureau must operate the Project solely for irrigation. The 2025 Klamath Basin Water Agreement Support Act cannot be read to silently override decades of precedent, particularly when it expressly directs the Bureau to comply with the ESA in implementing the Act.

1. The Supreme Court Has Held That Section 7(A)(2) Is Inapplicable Only Where a Statute Deprives the Agency of Any Power to Benefit Listed Species.

79. In *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666–67 (2007), the Supreme Court held that ESA Section 7(a)(2) does not apply to actions that an agency is required by statute to take. *Home Builders* addressed the Clean Water Act mandate that the Environmental Protection Agency ("EPA") transfer water permitting authority to states under nine exclusive statutory criteria that left no room to ensure the transfer would avoid jeopardizing endangered species. *Id.* at 662–64. The Supreme Court avoided an irreconcilable conflict between the two statutes by applying the ESA discretionary control regulation to harmonize them. *Id.* at 665. It construed that regulation to mean that Section 7(a)(2) applies "to all actions in which there is discretionary Federal involvement or control" that can be exercised to benefit endangered species, but not where a statute mandates that the agency take a specific action and leaves it no power to avoid jeopardizing endangered species. *Id.* at 665, 667, 669.

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80. Since *Home Builders,* the Ninth Circuit has confirmed, including in two *en banc* decisions, that federal agencies are subject to Section 7(a)(2) when they have "some discretion to influence or change the activity for the benefit of a protected species." *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012) (en banc); *Nat. Res. Def. Council v. Jewell,* 749 F.3d 776, 779, 783, 785 (9th Cir. 2014) (en banc) (Section 7(a)(2) applies unless another legal obligation strips the agency of all discretion to benefit the listed species); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928 (9th Cir. 2008) (Section 7(a)(2) applies to operation of the Federal Columbia River Power System because no statute mandates specific, immutable actions); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 640 (9th Cir. 2014) (Section 7(a)(2) applies to operation of the Central Valley Project because no statute imposes inconsistent mandatory obligations).

81. In resolving the crossclaim in this case, this Court held that an Oregon Water Resources Department order prohibiting the release of "stored water" to the Klamath River was preempted by the ESA, which required such releases and takes priority. *Yurok Tribe v. U.S. Bureau of Reclamation*, 654 F. Supp. 3d at 968–69. This Court rejected the Klamath Water Users Association's counterclaim, which argued that the Reclamation Act of 1902 authorized the Bureau to operate the Klamath Project only for irrigation. *Id.* at 966–67.

82. Section 10 of the Reclamation Act gives the Bureau broad authority, including to take "any and all acts" that "may be necessary and proper" for operating reclamation projects. 43 U.S.C. § 373. Under this authority, the Bureau has substantial discretion over operational decisions, including to provide for the needs of endangered species. *See, e.g.*, *Jewell*, 747 F.3d at 639–40 (discretion to comply with ESA). Moreover, the 1905 Act required to construct and operate the Klamath Project authorized raising and lowering Upper Klamath Lake levels as may

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be necessary, without imposing any mandates to exercise this authority solely for the benefit of irrigators. Act of Feb. 9, 1905, ch. 567, 33 Stat. 714. These laws do not limit management of the Klamath Project to irrigation as the Project's only purpose.

83. While Section 8 of the Reclamation Act requires the Bureau to appropriate water for irrigation from reclamation projects in accordance with state water law, this direction gives way when inconsistent with other congressional directives. *California v. United States*, 438 U.S. 645 (1978). Conflict preemption principles control. Because the ESA requires certain flows to prevent extinction and promote recovery of Klamath River salmon, it overrides state water law that might be read to preclude such flows.

2. Nothing in the 2025 Klamath Basin Water Agreement Support Act Exempts Irrigation Deliveries from ESA Section 7(a)(2).

84. In early 2025, Congress enacted the Klamath Basin Water Agreement Support Act, Pub. L. No. 118-246, 138 Stat. 2933 (Jan. 4, 2025) ("2025 Act"), a noncontroversial act that moved through committee by unanimous consent. The 2025 Act gives the Interior authority to pursue restoration activities to reduce fish entrainment, to reduce harm to aquatic resources from Klamath Project storage and diversion facilities, and to "restore habitats in the Klamath Basin watershed, including Tribal fishery resources held in trust." 2025 Act, § 2(a); *see also id.* § 2(e) (Act's goal includes protection, preservation, and restoration of Klamath River Tribal fishery resources).

85. It also contains the following provision, Section 2(g):

> KENO AND LINK RIVER DAMS—The Secretary of the Interior shall comply with the terms of the agreement entitled "2016 Klamath Power and Facilities Agreement" ('Agreement'), including Attachment A to the Agreement.

The Act offers no description of the 2016 Klamath Power and Facilities Agreement's terms, nor does it offer any indication that this direction might overrule *Patterson* and fundamentally

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change the legal priorities to water in the Klamath Basin. To the contrary, the 2025 Act provides that Interior "shall comply with" the ESA and all other applicable laws in implementing the Act, *id.* § 2(b)(1)(B)–(C), and that none of the Act's amendments "modify any authority or obligation of the United States with respect to any Tribal trust or treaty obligation of the United States" or create, determine, or affect any water right. *Id.* § 2(b)(2).

86. The 2016 Agreement referenced in the 2025 Act anticipated some operational changes resulting from removal of four Klamath River dams. Specifically, the United States would own and operate Keno Dam, which would be the compliance point for ESA flows to the Klamath River, and the United States would have full operational control over releases of water from Link River Dam for Klamath River flows because PacifiCorp would cease to play a role after dam removal. The 2016 Agreement contains the following provision:

> Link River Dam
>
> Upon assumption of operational responsibility for Link River Dam, Reclamation shall operate Link River Dam to provide water for diversion for the Klamath Reclamation Project, and consistent with existing contracts between Klamath Reclamation Project contractors and Reclamation, and for flood control and subject to Applicable Law.
>
> Keno Dam and Development
>
> Following transfer of the Keno Facility from PacifiCorp pursuant to the Amended KHSA, Reclamation shall operate such facility to maintain water levels upstream of Keno Dam to provide for diversion and canal maintenance and flood control consistent with [the PacifiCorp contract] and historic practice and subject to Applicable Law. Covered Contractors shall not bear any costs associated with operation or maintenance of the Keno Facility.

2016 Agreement, § II(A)(3)(a)–(b). Attachment A § 1 to the Agreement contains similar language.

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87. The 2025 Act does not elevate water diversions for irrigation over ESA compliance. Instead, it requires the Bureau to comply with the ESA in implementing the Act. 2025 Act § 2(b)(1)(B); *see also id.* § (2)(b)(2)(A)–(C).

88. Nor does anything in the 2016 Agreement suggest that it was purporting to give legal priority to irrigation deliveries over water releases to the Klamath River to comply with the ESA. The 2016 Agreement was negotiated against the backdrop of the longstanding legal priorities established in *Patterson* and the Bureau's prioritization of the ESA over irrigation in keeping with those legal priorities. Moreover, the Agreement expressly provides that Public Agency Parties, which include Interior, "shall comply with all applicable legal authorities, including . . . [the] Endangered Species Act." *Id.* § IV(A)(1); *see also id.* § IV(A)(3)(a) (nothing in the Agreement "shall be construed to affect or limit the authority or obligation of any Party to fulfill its constitutional, statutory, and regulatory responsibilities, or comply with any judicial decision"); *id.* § IV(A)(3)(k) ("[n]othing in this Agreement is a determination of rights to water.").

89. By expressly making the Bureau's operation of Link River Dam and Keno Dam subject to the ESA, the 2016 Agreement reflects the fact that the Bureau's water releases are not confined to irrigation. The 2025 Act likewise mandates that the Bureau comply with the ESA. Its incorporation of the Agreement, therefore, imposes no specific, mandatory obligation confining the Klamath Project to the delivery of water for irrigation that precludes applicability of ESA Section 7(a)(2).

90. The 2025 Act directs the Secretary to comply with the 2016 Agreement **and** the ESA. The 2016 Agreement authorizes the Secretary to operate Link River Dam and Keno Dam to provide water for deliveries consistent with the Klamath irrigation contracts but also "subject

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to Applicable Law." 2016 Agreement, § II(A)(3)(a); *see also id.* 2016 Agreement, § II(A)(3)(b) (Keno Dam operations similarly subject to applicable law). Neither the 2025 Act's reference to the 2016 Agreement nor the Agreement itself contains the type of clear mandate for a specific, immutable action that is required to eliminate the discretionary involvement and control that the Bureau has long exercised over Klamath Project operations and to confine operation of a massive government project developed with public resources to the sole benefit of irrigators. Neither can the 2025 Act or 2016 Agreement be fairly read to elevate the irrigation contracts over applicable law, which has long been understood to give priority to ESA compliance over irrigation deliveries under Klamath contracts.

B. The Klamath Irrigation Contracts Preserve Ample Authority for the Bureau to Reduce Contract Deliveries to Protect ESA-Listed Salmon.

1. Longstanding Precedent Limits Water Availability Under Klamath Irrigation Contracts When Necessary to Comply with the ESA.

91. Interior has entered into contracts with irrigation districts to supply water from the Klamath Project subject to the terms of the contracts.

92. The Klamath irrigation contracts are subject to later congressional enactments and contain provisions that limit the amount of water available for irrigation when necessary to comply with the ESA. *Patterson*, 204 F.3d at 1213.

93. The Klamath Irrigation District ("KID") and Tule Irrigation District ("TID") are the primary beneficiaries of the Klamath Project. Their contracts have priority over later contracts, which apply to excess water not needed under the KID and TID contracts. The later contracts were authorized by the Warren Act, 43 U.S.C. §§ 523–525, or subsequent leases. If there is insufficient water for the KID and TID contracts due to droughts or ESA compliance, the later lower priority contracts are not entitled to water deliveries. *See Baley v. United States*, 134 Fed. Cl. 619, 626–32 (2017).

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94. The KID and TID contracts contain provisions that the Ninth Circuit has construed to leave ample room for the Bureau to comply with Section 7(a)(2). First, the KID and TID contracts are expressly subject to modification to conform to the Reclamation Act "and all acts amendatory thereof or supplementary thereto." 1956 TID Contract ¶ 1; *accord* 1954 KID Contract ¶ 1(c), ¶ 6. *O'Neill v. United States*, 50 F.3d 677, 683–84 (9th Cir. 1995), read similar language to contemplate changes in the law occasioned by the ESA's passage. While the ESA altered the amount of water available for irrigation under the contract, "[t]here is nothing in the contract that precludes such a shift." *Id.* at 686.

95. Second, the KID and TID contracts contain water shortage clauses that provide:

> On account of drought or other causes, there may occur at times a shortage in the quantity of water available in Project reservoirs and, while the United States will use all reasonable means to guard against such shortage, in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising therefrom and the payments to the United States provided for herein shall not be reduced because of any such shortages.

KID Contract ¶ 26; TID Contract ¶ 26. *O'Neill* held that the phrase "drought, or any other causes" in a similar shortage clause unambiguously "contemplates the effects of subsequent Congressional mandates," including the ESA, and "an unavailability of water resulting from the mandates of valid legislation constitutes a shortage by reason of "any other causes." *O'Neill*, 50 F.3d at 682–84; *accord Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998) (the Bureau may reduce the amount of water available for irrigation deliveries if necessary to comply with the ESA); *Patterson*, 204 F.2d at 1213 (followed *O'Neill* in upholding the Bureau's contract modification to meet its ESA compliance obligations to SONCC Coho Salmon).

96. Third, the TID contract authorizes the Bureau to apportion the available water supply in times of shortages. The TID contract's apportionment clause provides that the Bureau "may apportion" the available water supply "[i]n the event a shortage of water available from the

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Klamath Project arises as a result of drought or other unavoidable causes." 1956 TID Contract ¶ 33(c); *see United States v. Klamath Drainage Dist*., 2023 WL 5899910, No. 1:22-cv-00962-CL, *12–15 (D. Or. Sept. 11, 2023), *aff'd*, 2025 WL 262346 (9th Cir. 2025) (under authority to prorate deliveries in times of shortage and contractor's obligation to comply with the Bureau's rules and regulations, the Bureau had authority to reduce water deliveries under its operation plans developed to meet its ESA obligations). Most other Klamath contracts contain similar water shortage and apportionment clauses.

97. The Klamath irrigation contracts are subject to the availability of water. The Bureau "cannot distribute water that it does not have" due to drought or compliance with federal laws like the ESA. *KID v. Bureau of Reclamation*, 48 F.4th at 940.

2. NRDC v. Haaland Did Not Overturn Legal Precedent Holding That the Amount of Water Available for Irrigation Contracts Is Determined by ESA Section 7(A)(2).

98. *Natural Resources Defense Council v. Haaland* (*NRDC v. Haaland*), 102 F.4th 1045 (9th Cir. 2024), does not support exempting Klamath contract deliveries from the Bureau's obligations to ensure its operation of the Klamath Project complies with Section 7(a)(2).

99. *Haaland* concerned the Bureau's discretion to change the terms of a renewed contract, not whether the Bureau has discretion to ensure that its operation of the reclamation project as a whole—there the Central Valley Project—would avoid jeopardizing the survival and recovery of listed species. The Bureau had conducted a two-track consultation, consulting first on its plan for operating the Central Valley Project, which assumed full deliveries of water under the contracts, and second on the contract renewals, which tiered to the programmatic biological opinion. *Haaland* held that the Bureau did not need to reinitiate consultation on the renewed settlement contracts based on new information because the Bureau lacked discretion to add contract terms benefiting listed salmon to the renewal contracts, which already obligated the

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Bureau to comply with the biological opinion resulting from the Section 7(a)(2) consultation on the contract renewals. 102 F.4th at 1075.

100. In contrast, the Klamath contracts expressly give the Bureau authority to reduce water deliveries when needed to comply with the ESA. The Ninth Circuit in *O'Neill* held that a shortage clause materially identical to the ones in the key Klamath contracts allows the Bureau to reduce irrigation to comply with the ESA. *O'Neill*, 50 F.3d at 683–84.

101. *Haaland* is also inapposite because it addressed "settlement contracts" that resolved disputes over the exercise of pre-Central Valley Project water rights through privately owned diversion structures. In contrast, the Klamath water supply contracts are analogous to those at issue in *O'Neill* with clauses like those *O'Neill* held "unambiguously" excuse nonperformance where the Bureau cannot make full water deliveries consistent with its ESA obligations. *Id.* at 681–83. *Haaland* does not purport to narrow or overrule *O'Neill*. It never even cites *O'Neill*.

102. Nothing in *Haaland* addresses, let alone overrides, the Bureau's obligation to ensure that its operation of the Klamath Project, as a whole, complies with Section 7(a)(2). The case has no bearing on the very different terms in the Klamath contracts. And as a panel decision, *Haaland* does not and cannot overrule *O'Neill* and *Patterson*, let alone do so *sub silentio*.

****

103. The 2026 Annual Operations Plan is contrary to law because it elevates irrigation over Klamath River flows for ESA-listed salmon. The Bureau has extensive discretionary involvement and control over the Klamath Project, a massive irrigation project constructed with federal funds, built and owned by the United States, and operated pursuant to federal contracts

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with irrigation districts. No statute confines operation of the Klamath Project to irrigation to the exclusion of providing sufficient Klamath River flows to comply with the ESA, and the federal irrigation contracts leave the Bureau discretion and the authority to determine how much water is available for irrigation after satisfying federal ESA obligations. Prioritizing irrigation over the Klamath River flows needed to avoid jeopardy violates the ESA, *Patterson* and its progeny, the terms of the Klamath irrigation contracts, and the Ninth Circuit's constructions of those terms as allowing the Bureau to reduce water deliveries when necessary to comply with the ESA. The Bureau has ample discretion and authority to operate the Klamath Project to ensure sufficient water is released to the Klamath River to avoid jeopardy to listed salmon and adverse modification of salmon critical habitat.

SECOND CAUSE OF ACTION

THE BUREAU HAS VIOLATED ITS LEGAL OBLIGATION TO COMPLETE REINITIATED CONSULTATION BEFORE IMPLEMENTING THE 2026 ANNUAL OPERATIONS PLAN.

104. Under the ESA consultation regulations, reinitiation of Section 7(a)(2) consultation is required if the action "is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion." 50 C.F.R. § 402.16(a)(3). Reinitiation of consultation is also required "[i]f the amount or extent of taking specified in the incidental take statement is exceeded." *Id.* § 402.16(a)(1).

105. The Bureau has a legal obligation to reinitiate consultation and complete the reinitiated consultation before implementing the 2026 Annual Operations Plan because the 2026 Plan deviates from the 2024 Biological Opinion in significant ways that cause effects to listed salmon and salmon critical habitat that were not analyzed in the 2024 Biological Opinion. The Bureau also has a legal obligation to reinitiate consultation and complete reinitiated consultation

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before implementing the 2026 Annual Operations Plan because the 2026 Plan exceeds the amount of take allowed in the 2024 Biological Opinion's incidental take statement.

A. Critical Requirements of the 2024 Biological Opinion

106. The Bureau adopted its 2024–2029 Klamath Project Operations Plan upon obtaining a no-jeopardy biological opinion from NMFS concluding that the 2024–2029 Plan is not likely to jeopardize the continued existence of SONCC Coho Salmon or Southern Resident Killer Whales or adversely modify salmon critical habitat.

107. The 2024–2029 Klamath Project Operations Plan made two significant changes from prior operations plans. First, Iron Gate Dam had been the compliance point for Klamath River flows. With the removal of Iron Gate and three other Klamath River dams, the compliance point moved to Keno Dam. 2024 BiOp at 7, 19. Second, Klamath River flow releases are now based on an Operations Index, which also is a key determinant of the agricultural allocation.

108. The Operations Index is obtained by averaging the Normalized Wetness Index, which is a calculation of how wet or dry the basin is, and Upper Klamath Lake Status ("UKL Status"), which is a calculation of how full or empty the lake is on that date. These variables are calculated every day and vary with hydrologic conditions and UKL levels. 2024 BiOp at 19–26.

109. The Normalized Wetness Index ("NWI") is a calculation that analyzes key variables to assess how wet or dry the basin is compared to the period of record (1981–2023) that was used in the 2024 Biological Opinion's analysis. The NWI is normalized (scaled) from 0 to 1, with 0 representing the driest conditions in the period of record and 1 representing the wettest. The NWI incorporates variables such as snowpack, precipitation levels, UKL inflow for the last 30 days, and UKL inflows over longer periods of time. Different variables can have different

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weights at different times of year. For example, in the March timeframe, snowpack is a primary driver of the NWI. 2024 BiOp at 19–23.

110. The UKL Status index is an indication of the lake level for a specific date compared to the 1981–2023 period of record. It is also expressed as a number between 0 and 1, with zero representing the lowest lake level recorded for a specific date, and 1 being the highest. 2024 BiOp at 24–25.

111. The NWI and UKL Status indices are averaged to calculate the Operations Index, which is the main variable that guides Klamath River flows and also shapes the agricultural allocation of water from the Klamath Project. 2024 BiOp at 25–26.

112. The Operations Index is used to calculate daily Keno Release Target Flows at Keno Dam. These flows are the amount of flow that will be provided above baseline minimum flows, called River Base Flows, which are the lowest flows that will be released at Keno Dam to the Klamath River under the 2024 Biological Opinion.

113. Keno Release Target Flows are determined through the use of an additional variable called the Keno Multiplier, which is similarly a number between 0 and 1. The daily Operation Index is associated with a particular Keno Multiplier value, which is determined in a look-up table (2024 BiOp at 28). The River Base Flow minimum for a given month is multiplied by the identified Keno Multiplier, as determined by the corresponding daily Operations Index. This calculation (River Base Flow multiplied by Keno Multiplier) is then added to the River Base Flow for the given month. The result is the daily Keno Release Target Flow, which is the flow that will be released from Keno Dam above the baseline minimums. Klamath River flows will be at baseline minimums only when the Operations Index is 0 because the Keno Release Multiplier is then also 0 in the look-up table. 2024 BiOp at 27. The Keno Multiplier changes

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throughout the year and provides for the magnitude and variability of flows to support salmon needs. 2024 BiOp at 27–29.

114. A key feature of this system is its ability to adjust to current conditions on a daily basis. The Operations Index rises and falls with hydrologic conditions and lake levels, and thus Keno Release Target Flows rise and fall depending on hydrologic conditions and lake levels. In this way, the 2024 Biological Opinion allows river flows to fluctuate to reflect the natural range of variability under which salmon evolved. Wetter years or periods of the year lead to above-minimum river flows, while drought conditions can lead to near-minimum flows during the driest months of the year. But even in drought years, spring flows will often be higher than the minimum flows.

115. The 2024 Biological Opinion depends on the interaction of all its parts. The Operations Index, along with the corresponding Keno Multiplier, determine the Keno Release Target Flows computation and how much water will be released through Keno Dam to the Klamath River. The Operations Index is also the main factor in setting the agricultural allocation.

116. Agricultural deliveries and Klamath River releases generally draw down the lake in the spring and summer. As lake levels decline, the UKL Status index declines, which reduces the Operations Index. At some point, declines in the lake levels and Operations Index will lead to lower river flows to compensate for less water availability.

117. To analyze such a complex operational scheme, the Bureau and NMFS relied on a technique called hindcasting in which they used actual inflow and hydrologic data from the past 40 years to analyze the range of river flows and lake levels that would result from implementation of the 2024–2029 Operations Plan. The 2024 Biological Opinion analyzed the

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magnitude, duration, and frequency that would have occurred under its rule set had it been implemented under the conditions that existed over each of the past 40 years.

118. NMFS analyzed the river flow outputs from the Klamath Basin Planning Model ("KBPM"), which incorporates the operating rules in the 2024–2029 Operations Plan. 2024 BiOp at 18–19. The 2024 Biological Opinion's incidental take statement requires adherence to the parameters and metrics in the KBPM in implementing the operating rules, and specifically in setting the agricultural allocation and Keno Release Target Flows. 2024 BiOp at 267 (Incidental Take Statement Term and Condition 1A). The incidental take statement's limit on the amount of allowable take also requires strict adherence to the minimum base flows and the Keno Release Target Flow calculations. 2024 BiOp at 261.

B. The Bureau Must Reinitiate Consultation Because the 2026 Annual Operations Plan Deviates from What Was Analyzed in the 2024 Biological Opinion.

119. In April 2026, the Bureau released its 2026 Annual Operations Plan, which prioritizes water deliveries for irrigation over Klamath River flows to support salmon and comply with ESA Section 7(a)(2).

120. The 2026 Annual Operations Plan deviates from the 2024 Biological Opinion's formula for setting the irrigation allocation. It calls for lowering Klamath River flows that provide habitat for listed species to come as close as possible to providing 350,000 acre-feet for agricultural purposes this water year and for storing additional water to achieve that level of irrigation deliveries in the next water year. 2026 AOP at 1, 3.

121. On April 6, 2026, the Bureau announced the initial 2026 Klamath Project water supply allocations, which include 221,000 acre-feet from Upper Klamath Lake. The Bureau's press release states that "[t]he allocation reflects ongoing efforts to maximize available supplies in a year shaped by warm storms, limited snowpack, and constrained spring inflows." Bureau of

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Reclamation Press Release (April 6, 2026). The press release quotes Acting Bureau of Reclamation Commissioner Scott Cameron: "Even in a year with unpredictable water conditions, Reclamation's priority remains the same: deliver as much water as possible to the Klamath Project[.] . . .We are working closely with our partners to make sure every available acre-foot truly supports producers and the communities that depend on Klamath Basin agriculture." *Id.*

122. The initial allocation volume of 221,000 acre-feet from Upper Klamath Lake is larger and fixed earlier in the season than would have been allowed under the 2024 Biological Opinion. Under the 2024 Biological Opinion, the agricultural allocation is not locked in until June. An initial allocation is made in April that serves as a floor. If actual conditions and subsequent forecasts allow, the allocation can be increased into June. Under the 2026 Annual Operations Plan, the Bureau locked in an agricultural allocation based on forecasts that might not materialize. The water year has since become drier than the early spring forecasts, meaning the Bureau allocated more water to agriculture than would have been provided under the 2024 Biological Opinion.

123. The 2026 Annual Operations Plan has reduced river flows from what would have been required under the 2024 Biological Opinion. While the 2026 Annual Operations Plan incorporates the 2024 Biological Opinion's River Base Flows, the Bureau reduced the Keno Multiplier, which in turn reduced Keno Release Target Flows. Based on its deviation from the Keno Release Target Flows mandated in the 2024 Biological Opinion, the Bureau has provided less water for Klamath River flows than would have been provided had it adhered to the 2024 Biological Opinion's mandatory requirements. For example, using the Keno Multiplier, the flows for March 9–18, 2026, would have been between 935–940 cfs, but instead the Bureau only delivered between 750–760 cfs, a deficit of more than 150 cfs.

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124. The 2024 Biological Opinion did not analyze the operations being implemented this year. It concluded that a very different operations scenario would not jeopardize the continued existence of threatened SONCC Coho Salmon or adversely modify their critical habitat, not the operations that are unfolding this year. Simply being in the range of the lowest flows analyzed in the period of record does not mean salmon are experiencing the conditions anticipated in the 2024 Biological Opinion's analysis. NMFS analyzed the Keno Release Target Flows that would have been released under the formulas and rule set embodied in the 2024–2029 Operations Plan. The flow regime analyzed in the 2024 Biological Opinion provided Keno Release Target Flows above minimums where hydrological conditions dictate under the formula during the spring salmon rearing period. Under the 2026 Annual Operations Plan, the Bureau deviated from the required formula and provided lower spring Keno Release Target Flows. NMFS did not analyze the lower spring Keno Release Target Flows released under the 2026 Annual Operations Plan. Merely maintaining Klamath River flows near the minimum River Base Flows is insufficient to align with the 2024 Biological Opinion's analysis, which predicated its no-jeopardy and adverse modification findings on the full flow regime and importantly on Klamath River flows that vary with water availability and often exceed minimum baseflows, particularly in the spring months.

125. The Bureau has also locked in a higher initial agricultural allocation in April than NMFS analyzed in its 2024 Biological Opinion. By allocating more water for irrigation than allowed under the 2024 Biological Opinion, the Bureau is essentially creating a deficit. Both the lake and the river will have less water at various times in the water year than would have otherwise been the case.

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126. The 2026 Annual Operations Plan is altering operations in ways that cause effects to salmon that were not anticipated, let alone analyzed, in the 2024 Biological Opinion, obligating the Bureau to reinitiate consultation and to complete the reinitiated consultation before implementing the 2026 Plan. 50 C.F.R. § 402.16(a)(3).

C. The 2026 Annual Operations Plan Will Cause Take in Excess of the Limit on Take in the Incidental Take Statement.

127. The Bureau has a legal obligation to reinitiate Section 7(a)(2) consultation because the 2026 Annual Operations Plan will result in take of listed salmon in excess of that allowed in the incidental take statement. 50 C.F.R. § 402.16(a)(1). The limit on take functions as a check on the accuracy of the biological opinion's conclusions. *Yurok Tribe v. U.S. Bureau of Reclamation*, 231 F.Supp.3d at 472.

128. The 2024 Biological Opinion's incidental take statement explained that the proposed action will result in take through increased disease risks, habitat reductions, elevated water temperatures, reduced water quality, and decreased smolt outmigration with lower spring flow volumes. 2024 BiOp at 260. NMFS could not quantify take in terms of individual salmon because of the difficulty in finding dead or injured salmon, limited data, and the interconnected nature of multiple phenomenon affecting salmon survival. *Id.* NMFS accordingly used flow as a surrogate because the various ways the Klamath Project operations will take salmon are inextricably linked to flow, and flows can be monitored and quantified.

129. Specifically, the incidental take statement uses three surrogates as the limit on the amount of allowable take of SONCC Coho Salmon, including the River Base Flows and Keno Release Target Flows. Both of these flow surrogates must be met or exceeded, except for *de minimis* short-term shortfalls due to emergencies, stream gage error, and maintenance, which are limited to 48 hours in duration. *Id.* at 29–30, 261. The incidental take statement explained:

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"Given that Keno Dam is the new compliance point for Klamath River flows under the proposed action, NMFS uses the calculated daily average Keno Release Target Flows as surrogates for the amount or extent of incidental take to coho salmon as a result of the effects" *Id.* at 260–61. The incidental take statement further explains:

> The incidental take expected and analyzed in this Opinion reflects the Keno Release Model operations; thus, operations that result in deviations from the model's rules, parameter settings, or outputs could result in changes to flows, lake elevations, or other physical conditions and cause more take than has been analyzed.

Id. at 267–68.

130. To implement the 2026 Annual Operations Plan, the Bureau reduced the Keno Multiplier parameter (used to calculate Keno Release Target Flows), and provided more water for the initial agricultural allocation, compared to what would have been provided under the 2024 Biological Opinion's rules. These deviations from the 2024–2029 Operations Plan have reduced Keno Release Target Flows below those required in the 2024 Biological Opinion and incidental take statement.

131. The incidental take statement requires that the calculated daily average Keno Release Target Flows (above the daily average River Base Flows) shall be met or exceeded. Because these daily Keno Release Target Flows have not consistently been met, the amount or extent of allowable incidental take of coho salmon has been exceeded.

132. Additionally, the 2026 Annual Operations Plan deviates from the 2024 Klamath Basin Planning Model rules and parameter settings. The incidental take statement has a binding term and condition (1A) that requires that Klamath Project operations will not deviate from the parameters and settings in the Klamath Basin Planning Model and specifically from its Keno Release Daily Target calculations and its Project Supply calculations. The Bureau has deviated from this mandate and exceeded the limit on allowable take: (1) by setting the agricultural

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allocation based on the 2026 Annual Operations Plan's prioritization of irrigation, instead of the prescribed metrics specified in the incidental take statement; and (2) by altering the Keno Multiplier in ways that reduced the required Keno Release Target Flows.

133. The deviations from the Keno Release Target Flows violate the limit on take of listed salmon in the incidental take statement. That limit on allowable take serves as a check on whether the 2024–2029 Operations Plan is being implemented as intended and having the effects assumed in the 2024 Biological Opinion. Exceeding the amount of allowable take has eliminated the basis for the 2024 Biological Opinion's jeopardy and adverse modification conclusions and requires reinitiation of Section 7(a)(2) consultation. 50 C.F.R. § 402.16(a)(1). The Bureau has a legal obligation to reinitiate consultation and to complete the reinitiated consultation before implementing the 2026 Annual Operations Plan. It has not done so.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court:

A. Declare that the 2026 Annual Operations Plan is unlawful because it elevates water deliveries for irrigation over Klamath River flows to support salmon and comply with the ESA;

B. Declare that the Bureau's prioritization of irrigation over ESA compliance is unlawful because it lacks any statutory basis and violates ESA Section 7(a)(2), *Patterson* and its progeny, the terms of the Klamath irrigation contracts, and the Ninth Circuit's constructions of them;

C. Declare that the Bureau violated its legal obligation to reinitiate and complete reinitiated consultation before implementing the 2026 Annual Operations Plan;

D. Vacate the 2026 Annual Operations Plan prospectively;

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E. Award plaintiff attorneys' fees and costs under the ESA, 16 U.S.C. § 1540(g)(4); and

F. Grant plaintiffs such further and additional relief as the Court may deem just and proper.

DATED this 15th day of June 2026.

Respectfully submitted,

s/ Patti A. Goldman
PATTI A. GOLDMAN (WSBA #24426) (*pro hac vice*)
KRISTEN L. BOYLES (CSBA #158450)
NICOLAS E. WEDEKIND (WSBA #58651) (*pro hac vice*)
Earthjustice
810 Third Avenue, Suite 610
Seattle, WA 98104
Ph: (206) 578-5868
pgoldman@earthjustice.org
kboyles@earthjustice.org
nwedekind@earthjustice.org

s/ Amy Cordalis
AMY CORDALIS (CSBA #321257)
562 A Street
Ashland, OR 97520
Ph: (541) 915-3033
acordalis@ridgestoriffles.org

s/ Gregory C. Loarie
GREGORY C. LOARIE (CSBA #215859)
1 Sansome Street, Suite 1700
San Francisco, CA 94104
Ph: (415) 217-2000
gloarie@earthjustice.org

Attorneys for Plaintiff Yurok Tribe

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Filed	Document Description	Page	Docket Text
06/17/2026	156		FILED OPINION (MARY M. SCHROEDER, RONALD M. GOULD and RYAN D. NELSON) We deny KID's motion to take judicial notice (Dkt. No. [25]) because the documents on which judicial notice is requested are either duplicative of those already in the record or are irrelevant to our analysis. We also deny KID's motion to certify questions of law to the Oregon Supreme Court (Dkt. Nos. [116] & [117]) because no questions of state law remain relevant to the appeal. AFFIRMED. Opinion by Judge Gould; Dissent by Judge R. Nelson. FILED AND ENTERED JUDGMENT. [12954483] [23−15499, 23−15521] (MM)
	156 Opinion	2	
	156 Post Judgment Form **DOCUMENT COULD NOT BE RETRIEVED!**		

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YUROK TRIBE; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; HOOPA VALLEY TRIBE, *Plaintiffs-Appellees*, v. U.S. BUREAU OF RECLAMATION, *Defendant-counter-claimant-cross-claimant-Appellee*, NATIONAL MARINE FISHERIES SERVICE, *Defendant-Appellee*, v. KLAMATH WATER USERS ASSOCIATION, *Defendant-counter-claimant-cross-claimant-Appellant*,	No. 23-15499 D.C. No. 3:19-cv-04405-WHO OPINION

KLAMATH TRIBES; KLAMATH IRRIGATION DISTRICT,

Intervenor-Defendants-Appellees,

v.

OREGON WATER RESOURCES DEPARTMENT,

Cross-claim-defendant-Appellee.

YUROK TRIBE; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; HOOPA VALLEY TRIBE,

Plaintiffs-Appellees,

v.

U.S. BUREAU OF RECLAMATION; KLAMATH WATER USERS ASSOCIATION,

Defendants-counter-claimants-cross-claimants-Appellees,

No. 23-15521

D.C. No. 3:19-cv-04405-WHO

NATIONAL MARINE FISHERIES SERVICE,

Defendant-Appellee,

KLAMATH TRIBES,

Intervenor-Defendant-Appellee,

v.

KLAMATH IRRIGATION DISTRICT,

Intervenor-Defendant-Appellant,

v.

OREGON WATER RESOURCES DEPARTMENT,

Cross-claim-defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted June 12, 2024
Submission Vacated October 24, 2024
Resubmitted June 17, 2026
San Francisco, California

Filed June 17, 2026

Before: Mary M. Schroeder, Ronald M. Gould, and Ryan D. Nelson, Circuit Judges.

Opinion by Judge Gould;
Dissent by Judge R. Nelson

SUMMARY*

Environmental Law

The panel affirmed the district court's holding that the Endangered Species Act ("ESA") applies to the Bureau of Reclamation's operation of the Klamath Project, a very large water management initiative in Northern California and Southern Oregon that provides water for irrigation and for wildlife refuges.

In response to the listing of two endangered species of suckers, and consecutive critically dry years in the Klamath Basin, the Bureau began to consult with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service. The result of the most recent consultations required the Bureau to maintain water levels in Upper Klamath Lake and to provide minimum stream flows in the Klamath River.

Appellants, the Klamath Irrigation District ("KID") and the Klamath Water Users Association, argued that the

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

district court erred in determining that the ESA applied to the Bureau of Reclamation's operation of the Klamath Project, allowing releases from Upper Klamath Lake for ESA compliance purposes.

The panel held that Section 7(a)(2) of the ESA—which requires all federal agencies to engage in consultation to "insure that any action authorized, funded, or carried out by such agency (. . . an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species"—applies to the Bureau's operations related to the Klamath Project. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999), continues to govern as controlling precedent for Klamath Basin litigation.

The panel further held that the district court's decision was not a "judicial taking" of KID's water rights because determining whether the ESA applied to the Klamath Project is not an adjudication of water rights.

Finally, the panel held that the district court had jurisdiction to decide the federal appellees' crossclaim seeking to confirm the Bureau of Reclamation's authority to operate the Klamath Project in compliance with the ESA because the doctrines of prior exclusive jurisdiction and *Colorado River* abstention did not apply.

Judge R. Nelson dissented. He agreed with the majority's analysis of the judicial taking and *Colorado River* abstention issues, but he would hold that ESA § 7's obligations are not triggered by the contractual obligations in this case. Under *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), and *National Resources Defense Council v. Haaland*, 102 F.4th 1045 (9th

Cir. 2024), the generalized holding in *Patterson* that the ESA applies to the Klamath Project is no longer good law. He would hold that no statutory provision or contract provided agency discretion sufficient to trigger the ESA.

COUNSEL

Patti A. Goldman (argued) and Kristen L. Boyles, Earthjustice, Seattle, Washington; Anna K. Stimmel, Earthjustice, San Francisco, California; Amy C. Cordalis, Ridges to Riffles Indigenous Conservation, Ashland, Oregon; Thomas P. Schlosser and Thane D. Somerville, Morisset Schlosser Jozwiak & Somerville, Seattle, Washington; for Plaintiffs-Appellees.

John L. Smeltzer (argued), Kevin McCardle, Robert P. Williams, Kaitlyn Poirier, and Thomas K. Snodgrass, Attorneys, Environment & Natural Resources Division; Todd Kim, Assistant Attorney General; United States Department of Justice, Washington, D.C.; Megan J. Walline, Office of General Counsel, National Oceanic and Atmospheric Administration; Washington, D.C.; Lance C. Wenger, Solicitor's Office, United States Department of the Interior, Washington, D.C.; Brittany K. Johnston (argued) and Paul S. Simmons, Somach Simmons & Dunn, Sacramento, California; Maximilian C. Bricker, Somach Simmons & Dunn, Boulder, Colorado; for Defendant-Appellee and Defendants-counter-claimant-cross-claimant-Appellants.

Nathan R. Rietmann (argued), Rietmann & Kim LLP, Salem, Oregon; Jeremiah D. Weiner (argued), Rosette LLP, Sacramento, California; John P. Kinsey and Nicolas R.

Cardella, Wanger Jones Helsley PC, Fresno, California; for Intervenor-Defendants-Appellees.

Denise G. Fjordbeck and Carson L. Whitehead, Assistant Attorneys General; Benjamin Gutman, Solicitor General; Ellen F. Rosenblum, Attorney General; Oregon Office of the Attorney General, Salem, Oregon; for Cross-claim-defendant-Appellee.

David E. Filippi and Merissa A. Moeller, Stoel Rives LLP, Portland, Oregon; Wade C. Foster, Stoel Rives LLP, Boise, Idaho; Norman M. Semanko, Parsons Behle & Lahtimer, Boise, Idaho; Paul L. Arrington, Idaho Waters, Boise, Idaho; Wade Noble and Meghan Scott, Noble Law Office, Yuma, Arizona; Lawrence E. Martin, Halverson Northwest Law Group, Yakima, Washington; for Amici Curiae Oregon Water Resources Congress, National Water Resources Association, Oregon Farm Bureau Federation, Family Farm Alliance, Idaho Water Users Association, Agribusiness and Water Council of Arizona, and Washington State Water Resources Association.

Meredith E. Nikkel, Samuel Bivins, and Nicolas Chapman, Downey Brand LLP, Sacramento, California, for Amici Curiae Association of California Water Agencies and California Farm Bureau Federation.

Paul S. Weiland and Brian Ferrasci-O'Malley, Nossaman LLP, Irvine, California; Marcus M. Henderson, Counsel, Klamath Falls, Oregon; Margaret E. Long, Prentice Long PC, Redding, California; for Amici Curiae Siskiyou, Modoc, and Klamath Counties.

Tara Mueller and Daniel M. Fuchs, Deputy Attorneys General; Tracy L. Winsor, Senior Assistant Attorney General; Rob Bonta, California Attorney General; Office of

the California Attorney General, Oakland, California; for Amicus Curiae State of California.

OPINION

GOULD, Circuit Judge:

In this case, the most recent in a litany of cases regarding water distribution in the Klamath Basin, we must decide whether the Endangered Species Act ("ESA") applies to the Bureau of Reclamation's operation of the Klamath River Basin Project ("Klamath Project"), a very large water management initiative in Northern California and Southern Oregon that provides water for irrigation and for wildlife refuges. We hold that it does.

The Klamath Project was authorized in 1905 under the Bureau of Reclamation's authority under the Reclamation Act and it distributes water throughout the Klamath Basin. Upper Klamath Lake is the major storage reservoir of the project and also provides habitat for two endangered species of suckers, and its downstream flows in the Klamath River provide habitat for threatened salmon species, which in turn affects the food supply for endangered whales that feed on the salmon. In response to the listing of these endangered species and consecutive critically dry years in the Klamath Basin, the Bureau of Reclamation began to consult with the National Marine Fisheries Service ("NMFS") (collectively, the "Federal Appellees"), and the U.S. Fish and Wildlife Service ("FWS") to ensure that Klamath Project operations would not jeopardize the continued existence of these species. Relevant to this appeal, the result of the most recent

consultations required the Bureau of Reclamation to maintain minimum water levels in Upper Klamath Lake and to provide minimum stream flows in the Klamath River.

After a complex procedural history, this case arises from the district court's resolution of a crossclaim brought by Federal Appellees that sought to confirm the Bureau of Reclamation's authority to operate the Klamath Project in compliance with the ESA. The district court confirmed this authority and concluded that the ESA applies to the Bureau of Reclamation's operation of the Klamath Project.

On appeal of this decision, Appellants, the Klamath Irrigation District ("KID") and the Klamath Water Users Association ("KWUA") contend that the district court erred in determining that the ESA applied to the Bureau of Reclamation's operation of the Klamath Project, allowing releases from Upper Klamath Lake for ESA compliance purposes. KID makes two additional arguments on appeal: First, KID contends that the district court's decision amounts to a "judicial taking" of KID's water rights. Second, KID contends that the federal district court did not have jurisdiction to decide the claim.

We note the important competing interests of the parties at stake in this case and the limited supply of water in the Klamath Basin. The Tribal Appellees have long relied on sufficient water to sustain fisheries and support the subsistence Tribal fishing rights guaranteed to them by treaty. The irrigators have similarly relied on the same Klamath Basin water for agricultural production since the beginning of the twentieth century. And the Bureau of Reclamation has long sought to manage the distribution of water in accordance with these competing interests and its obligations under federal law.

In this context we conclude that Appellants' arguments are without merit. We affirm the district court's decision and hold that: (1) the ESA applies to the Bureau of Reclamation's operations related to the Klamath Project; (2) the district court's decision was not a "judicial taking" of KID's water rights because determining whether the ESA applies to the Klamath Project is not an adjudication of water rights; and (3) the federal district court had jurisdiction to determine this issue because the doctrines of prior exclusive jurisdiction and *Colorado River* abstention do not apply.

I. FACTS AND PROCEDURAL HISTORY

A

Disputes over allocation of water within the Klamath Basin in Southern Oregon and Northern California have been the subject of many lawsuits in our Court and others. The Klamath Basin encompasses about 12,000 square miles of interconnected rivers, canals, lakes, marshes, dams, diversions, wildlife refuges, and wilderness areas. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 938 (9th Cir. 2022) (*KID II*).

The Klamath Project is a large water-management initiative that was authorized by the Secretary of the Interior in 1905 pursuant to the Reclamation Act of 1902 and by the 1905 Oregon Act, which provided a procedure governing the appropriation of water for irrigation purposes in Oregon. *See Baley v. United States*, 942 F.3d 1312, 1319–20 (Fed. Cir. 2019). The Klamath Project is managed and operated by the Secretary of the Interior, through the Bureau of Reclamation. *See Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 508 (Fed. Cir. 2011). Before the Klamath Project was created, the Upper Klamath River was dominated by three shallow lakes and wetlands. To create arable lands suitable

for agriculture and food production, the Bureau of Reclamation drained large areas of wetlands and two of the large lakes in order to construct a network of dams, canals, and drains. In doing so, the Bureau of Reclamation reconfigured Upper Klamath Lake, a natural lake at the headwaters of the Klamath River, to serve as the primary water storage reservoir. The Klamath Project has "dual purposes," providing water to about 240,000 acres of irrigable crop lands for agricultural uses and providing water for wildlife needs to several national wildlife refuges, including the Lower Klamath and Tule Lake National Wildlife Refuges. *Klamath Irrigation Dist.*, 635 F.3d at 508.

In 1917, the Bureau of Reclamation authorized a public utility company to construct a hydroelectric dam, the Link River Dam, to regulate flows through Upper Klamath Lake. Water is delivered for the Klamath Project through the A Canal, which diverts water from Upper Klamath Lake above the Link River Dam, and through diversion structures on the Klamath River in Oregon below the Link River Dam. Klamath River water that is not diverted for Project or other use flows downstream into California and then out into the Pacific Ocean.

B

Water rights in the Klamath Basin are based on the doctrine of prior appropriation, which generally means that the "first in time [is the] first in right" so long as the user maintains beneficial use of the water. *Arizona Power Auth. v. Morton*, 549 F.2d 1231, 1233 (9th Cir. 1977); *see also Klamath Irrigation Dist. v. United States*, 227 P.3d 1145, 1150 (Or. 2010).

In 1905, the United States gave notice in accord with Oregon law of its intent to appropriate for the Klamath

Project "[a]ll of the waters of the Klamath Basin . . . constituting the entire drainage basin[] of the Klamath River," *Baley*, 942 F.3d at 1320, and gave similar notice to appropriate the Klamath Basin waters in California. The development and use of the Klamath Project perfected the United States' water rights under Oregon law with the priority date of 1905. *Id*. at 1320–21.

But, these rights were and are subject to preexisting rights for Klamath Basin Tribes, including the Klamath Tribe, the Yurok Tribe, and the Hoopa Valley Tribe. Under federal law, the establishment of a Federal Indian reservation reserved rights to unappropriated water for the purposes of the reservation. These rights are often referred to as *Winters* rights. *See Winters v. United States*, 207 U.S. 564, 576–77 (1908). These rights vest no later than the date of the reservation creation and are "superior to the rights of future appropriators." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The Klamath Tribe holds instream senior water rights for tribal fisheries in Upper Klamath Lake and its tributaries, and the Yurok and Hoopa Valley Tribes hold instream senior water rights for tribal fisheries in the Klamath River in California. *See Baley*, 942 F.3d at 1335–39.

In 1975, the Oregon Water Resources Division ("OWRD") initiated a general adjudication of the rights of all Klamath Basin water users in the Klamath Basin Adjudication. *See United States v. Oregon*, 44 F.3d 758, 762–64 (9th Cir. 1994). In 2014, OWRD issued an "Amended and Corrected Findings of Fact and Order of Determination" ("ACFFOD"), that provisionally determined the water rights of various users. While the ACFFOD is subject to ongoing judicial review in the Klamath County

Circuit Court (the "Klamath Basin Adjudication"), the ACFFOD remains in full force pending review.

The United States in the Klamath Basin Adjudication did not assert *Winters* rights on behalf of the Yurok and Hoopa Valley Tribes, both of whom have rights that are senior to other users, and that are at least coextensive to the water flows required by the ESA, meaning that these Tribes have a senior right to water sufficient to preserve fish species because of the Tribal subsistence fishing rights guaranteed to them by treaty. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213–14 (9th Cir. 1999); *Baley*, 942 F.3d at 1335–41. We have affirmed that Oregon state courts lack jurisdiction to adjudicate the rights of these California Tribes. *See In re Klamath Irrigation Dist.*, 69 F.4th 934, 941–42 (9th Cir. 2023). The ACFFOD, however, did confirm the instream *Winters* rights of the Klamath Tribe. *See Hawkins v. Haaland*, 991 F.3d 216, 221 (D.C. Cir. 2021). The adjudication of Tribal water rights was explicitly reserved for phase two of this litigation in the district court.

The ACFFOD did not determine the relative rights and priorities to Klamath Project water among users. Instead, the users' relative rights and priorities are governed by federal contracts or leases that specify the terms and conditions for the supply of Klamath Project water, including repayment obligations for construction, maintenance, and operation costs. *See Baley v. United States*, 134 Fed. Cl. 619, 627–33 (Fed. Cl. 2017). There are four main types of contracts.

First, the Bureau of Reclamation entered repayment contracts under the Reclamation Act with KID and another irrigation district. Those contracts were amended in 1954 and provide that the irrigation districts would assume responsibility for the care and maintenance of canals and

other irrigation works and would ultimately be responsible for delivering Project water to their members. However, the contracts contained a shortage clause, providing that the irrigation districts may not make deliveries when the Bureau of Reclamation notifies the districts that the parties are not entitled to water because of nonpayment or for "other reasons," which include shortages caused by droughts or "other reasons."

Second, the Bureau of Reclamation also entered into water-delivery and repayment contracts with many irrigators and individuals under the 1911 Warren Act, which allowed the Bureau of Reclamation to provide water to some users outside of the Klamath Project area when the Bureau of Reclamation determines there is excess "storage or carrying capacity." 43 U.S.C. §§ 523-24. Third, the Bureau of Reclamation entered into one settlement contract with the Van Brimmer Ditch Company to compensate it for the private company's pre-existing right to divert water from the Lower Klamath Lake, which had been drained to create the Project, and promised to deliver the same amount of water to the company. *Baley*, 134 Fed. Cl. at 632.

Fourth, the United States leases land within the Lower Klamath and Tule Lake National Wildlife Refuges for agricultural use. These leases specify that the United States cannot be held liable for damages if "irrigation water is not available." *Id.*

Apart from the one settlement contract, the contracts do not specify or guarantee a specific amount of water to be delivered to an irrigation district or individual water user. Instead, the contracts provide terms for an equitable allocation of available water. *Id.* at 627–33.

C

In addition to serving as a storage reservoir for the Klamath Project, Upper Klamath Lake provides habitat for endangered suckers (the Lost River sucker and the shortnose sucker), that are found only in Upper Klamath Lake and the surrounding Klamath Basin waters. *See* 53 Fed. Reg. 27,130 (July 18, 1988) (listing the Lost River sucker and shortnose sucker as endangered); *see also* 77 Fed. Reg. 73,740, 73,762-68 (Dec. 11, 2012) (designating Upper Klamath Lake as critical habitat for the suckers). Upper Klamath Lake's downflow into the Klamath River also provides habitat for threatened Southern Oregon/Northern California Coast coho salmon ("SONCC coho salmon"). *See* 62 Fed. Reg. 24,588 (May 6, 1997) (listing SONCC coho salmon as threatened); *see also* 64 Fed. Reg. 24,049 (May 5, 1999) (designating the Klamath River as critical habitat for SONCC coho salmon).[1]

The Bureau of Reclamation has long interpreted its operations of the Klamath Project in a manner to comply with the mandates of the ESA. After the listing of the two suckers and SONCC coho salmon, the Bureau of Reclamation, in accordance with Section 7(a)(2) of the ESA, began consulting with the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") to determine whether Klamath Project operations would jeopardize these species. *See Patterson*, 204 F.3d at 1209–10; *see also* 16 U.S.C. § 1536(a)(2). In 2001, after a

[1] While not listed under the ESA, the Klamath River also provides spawning habitat for chinook salmon, whose populations are declining from the same threats that impact coho salmon. *See Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995); *Baley*, 942 F.3d at 1336. Chinook salmon are also a primary food source for the engendered Southern Resident killer whale. *See* 70 Fed. Reg. 69,903 (Nov. 18, 2005) (listing the killer whale as endangered).

forecasted "critical dry" year for Upper Klamath Basin, the Bureau of Reclamation requested Biological Opinions ("BiOps") from FWS and NMFS regarding the species at issue. *See Baley*, 942 F.3d at 1323–24. The BiOps concluded that planned Klamath Project operations were likely to jeopardize the continued existence of the suckers and the SONCC coho salmon and then identified reasonable and prudent alternatives to maintain minimum water levels in Upper Klamath Lake and in the Klamath River downstream to preserve the species.[2] *Id.* at 1324–25.

Since 2001, the Bureau of Reclamation has periodically revised Klamath Project operations to respond to changed circumstances and new information. As relevant here, in 2019, the Bureau of Reclamation completed an ESA consultation with FWS and NMFS for proposed Klamath Project operations through 2024 in response to consecutive years of drought and to incidental take of the SONCC coho salmon, and the Bureau of Reclamation developed a Klamath Project Operating Procedures Plan as a result of this consultation. This plan aimed to: (1) maintain Upper Klamath Lake water levels necessary to protect sucker habitat, (2) release Upper Klamath Lake water providing downstream flows necessary to protect salmon spawning habitat in the Klamath River, and (3) maximize irrigation water deliveries to Klamath Project users.

[2] When this determination was challenged by the Klamath Project users as a "taking" of Klamath Project water rights, the Federal Circuit found that no taking had occurred because the Project rights are subordinate to the Tribal rights that are "at least equal" in amount to the water "needed to satisfy the Bureau of Reclamation's ESA obligations." *Baley*, 942 F.3d at 1337–42.

D

This case has a complicated procedural history. The Yurok Tribe, the Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources (collectively, the "Yurok Plaintiffs") brought the initial lawsuit in 2019 in the Northern District of California, after the Bureau of Reclamation completed its 2019 ESA consultation. The Yurok Plaintiffs challenged the 2019 plan and assessment, contending that the consultations were arbitrary, capricious, and contrary to the ESA. KWUA and KID subsequently intervened. In March 2020, at the parties' request, the district court stayed the case, and the Bureau of Reclamation operated the Klamath Project under an Interim Plan to which the parties stipulated.

While the initial case was underway, KID brought several suits in state and federal courts, three of which are relevant to the current appeal. *First*, in March 2019, KID sued the Bureau of Reclamation in the United States District Court for the District of Oregon, seeking declaratory and injunctive relief. KID contended that the Bureau of Reclamation's operation of the Klamath Project pursuant to the 2019 plan was contrary to law because the plan permitted releases from Upper Klamath Lake to enhance Klamath River flows for ESA compliance purposes, without previously-decreed instream water rights for ESA compliance purposes. *See KID II*, 48 F.4th at 942. The district court dismissed that case for failure to join a required party based on the Tribes' sovereign immunity, and we affirmed. *See id.*

Second, in 2021, KID moved in Klamath County Circuit Court[3] for a preliminary injunction against the Bureau of Reclamation's management of water in Upper Klamath Lake, asking the court to enjoin the non-irrigation water releases from Upper Klamath Lake that were being released for ESA purposes. The United States removed the action to federal district court for the District of Oregon. *See In re Klamath Irrigation Dist.*, 69 F.4th at 937. KID petitioned our Court for a writ of mandamus to compel the district court to remand KID's motion for a preliminary injunction back to the Klamath County Circuit Court. We denied that petition. *See id.* at 940–42.

Third, in 2020, KID filed suit in Marion County Circuit Court to compel OWRD to "take charge" of the water in Upper Klamath Lake under Oregon law and enjoin the Bureau of Reclamation's release of stored water for non-irrigation purposes. *See Klamath Irrigation Dist. v. Oregon Water Res. Dep't*, 518 P.3d 970, 974–95 (Or. Ct. App. 2022). In response to this lawsuit, OWRD issued an order on April 6, 2021, directing the Bureau of Reclamation to immediately stop the distribution of water in Upper Klamath Lake for ESA compliance purposes.

In response to the OWRD order, in June 2021, Federal Appellees moved to lift the stay in the original proceeding in the Northern District of California for the limited purpose of litigating a crossclaim by the United States and a supplemental complaint by the Yurok Plaintiffs against KID and KWUA. The district court lifted the stay on September 30, 2021 for this purpose. The crossclaim sought declaratory relief that the OWRD order was contrary to the ESA and was

[3] The Klamath County Circuit Court is the state court that is currently deciding the Klamath Basin Adjudication of water rights.

preempted under the Supremacy Clause. Federal Appellees also sought a permanent injunction against enforcement of the OWRD order. Alternatively, the crossclaim sought declaratory relief that the OWRD order was contrary to the federally-reserved senior water rights to support the Tribal fisheries of the Yurok and Hoopa Valley Tribes and was preempted by the Supremacy Clause and the Indian Commerce Clause.

The district court bifurcated the proceedings into two phases: phase one resolved only the ESA-related crossclaim; and phase two would then determine the extent of Tribal water rights. In February 2023, the district court granted summary judgment for the United States and the Yurok Plaintiffs on the ESA-related claim in phase one, which is the subject of this appeal. *See Yurok Tribe v. U.S. Bureau of Reclamation*, 654 F. Supp. 3d 941, 949 (N.D. Cal. 2023). On the merits, the district court held that because the ESA applied to the Bureau of Reclamation's operation of the Klamath Project, OWRD's order was preempted, and the district court enjoined OWRD from attempting to enforce it. *Id*. at 964–69. KWUA and KID timely appealed to our Court in April 2023.[4]

Before oral argument, we asked the parties to address the question of mootness because the OWRD order at issue in the original litigation had been withdrawn, and thus the only remaining relief sought was declaratory relief about whether

[4] OWRD subsequently withdrew its order, and KWUA moved in the district court under Federal Rule of Civil Procedure 54(b) for the entry of a final judgment on the declaratory relief granted in phase one. The district court entered final judgment on the declaratory relief on August 15, 2023. OWRD does not dispute on appeal that its order was preempted to the extent it conflicted with the ESA.

the ESA applies to the Bureau of Reclamation's operation of the Klamath Project. At oral argument before us in June 2024, KID urged us to certify questions to the Oregon Supreme Court regarding the Bureau of Reclamation's authority to use and control the water under Oregon law and subsequently filed a motion for certification of questions about Oregon water law to the Oregon Supreme Court.

In March 2025, at the Federal Appellees' request, we held the case in abeyance for 90 days to permit the Department of the Interior to update its federal guidance on the operation of the Klamath Project in relation to the ESA due to the change in Presidential Administrations. In May 2025, after the Department of the Interior issued new guidance and Federal Appellees withdrew their earlier legal position, Federal Appellees moved to dismiss the appeal for lack of jurisdiction because of mootness and moved to vacate the district court's judgment. Alternatively, Federal Appellees moved for a continued stay to enable the district court to consider a motion for voluntary dismissal. KID and KWUA also moved to dismiss the case and vacate the district court's judgment.

After briefing on mootness from the parties, we denied the motions to dismiss and the motion for a continued stay, concluding that the declaratory relief on whether the ESA applies to the Klamath Project would give the parties "meaningful relief," and presented a live controversy for us to decide. *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007). We have jurisdiction under 28 U.S.C. § 1291. We now hold that the ESA applies to the Bureau of Reclamation's operation of the Klamath Project.

II. STANDARD OF REVIEW

We review *de novo* a grant of summary judgment. *Lolli v. Cnty. of Orange*, 351 F.3d 410, 414 (9th Cir. 2003). A district court's construction or interpretation of a federal law, including the ESA, is a question of law that we review *de novo*. *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 555 (9th Cir. 2016).

III. DISCUSSION

A

We first address whether the Bureau of Reclamation has the authority to act in its operation of the Klamath Project to benefit protected species under the ESA. We hold that it does. The dissent concedes that the answer to this question must be "yes," yet it attempts to evade what it describes as a "truism" by misreading our precedent. Dissenting Op. at 42. The dissent misconstrues the direct issue on appeal here, which is whether the district court erred by granting declaratory relief on the question whether "[the Bureau of] Reclamation's operation of the Klamath Project, including the exercise of its rights to store water in [Upper Klamath Lake] for irrigation use, is subject to compliance with the ESA." Our case law supports that the answer to this question must be "yes."

1

We have recognized that Section 7 is the "heart of the ESA." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1019–20 (9th Cir. 2012) (en banc) (quoting *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011)). Section 7(a)(2) of the ESA requires all federal agencies to engage in consultation to "insure that any action authorized, funded, or carried out by such agency (. . . an

'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2).

It would be hard to overstate the importance of this ESA prohibition. As the Supreme Court has recognized, "[w]hen Congress passed the [ESA] in 1973, it was not legislating on a clean slate." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). Indeed, the ESA was born out of the environmental law movements of the 1960s and 1970s, and Congress had passed earlier, narrower, and less effective versions of the ESA in 1966 and 1969. *See id.* at 175–76. However, by 1973, Congress recognized that these prior Acts did not go far enough to protect endangered species and to stem hazards of extinction. *See id.* at 177 ("The dominant theme pervading all Congressional discussion of the proposed [Endangered Species Act of 1973] was the overriding need *to devote whatever effort and resources were necessary* to avoid further diminution of national and worldwide wildlife resources." (quoting Coggins, Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973, 51 N.D.L.Rev. 315, 321 (1975))). Greatly troubled by the "unknown uses that endangered species might have" and "the unforeseeable place such creatures may have in the chain of life on this planet," Congress in 1973 passed the ESA as we know it today with its broad and clear purpose of ensuring the conservation of endangered and threatened species, regardless of the cost. *Id.* at 178–80.

Section 7 is "a particularly good gauge of congressional intent" because the language of Section 7 changed from the earlier 1966 version, which had qualified the obligation of federal agencies to seek to preserve endangered species only

"insofar as is practicable and consistent with [the agencies'] primary purposes." *Id*. at 181. By contrast, the current version of the ESA mandates that all federal agencies must ensure that their actions will not detrimentally affect an endangered or threatened species, without reservation. *Id.* at 181–82. The broad applicability of Section 7 reflects "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.* at 185; *see also O'Neill v. United States*, 50 F.3d 677, 681 (9th Cir. 1995) ("[The] ESA was enacted in 1973 to 'halt and reverse the trend toward species extinction, whatever the cost.'" (quoting *Tenn. Valley*, 437 U.S. at 184)).

With this background in mind,[5] we turn to the ESA question before us now: whether Section 7(a)(2) of the ESA applies to the Bureau of Reclamation's operation of the Klamath Project. We hold that it does.

We have previously held that that the "ESA generally applies to" the Bureau of Reclamation's water contracts for water management within the Klamath Project. *See Patterson*, 204 F.3d at 1213. Although KID and KWUA urge us to conclude that *Patterson* is neither controlling nor good law, we disagree. *Patterson* continues to govern the

[5] If the dissent is contending that this portion of *Tennessee Valley Authority* is no longer good law, *see* Dissenting Op. at 46–47, *Home Builders* did not dispute or invalidate the legislative history of the ESA. *See* 551 U.S. at 670–71. Instead, this portion of *Home Builders* recognized that there was no contrary mandatory obligation from Congress on Tennessee Valley Authority that would implicitly repeal the ESA. *Id.* The *Home Builders* Court held that because there was no mandatory "statutory command" in the facts of *Tennessee Valley Authority*, the case supported the majority's conclusion that it involved a discretionary agency action. *Id.*.

ESA's applicability to the Klamath Project, and we discern no reason to deviate from that holding.

Patterson involved a dispute between Klamath Basin irrigators, the Bureau of Reclamation, and PacifiCorp over a contract governing the management of the Link River Dam within the Klamath Project. *Id*. at 1209. In *Patterson*, we addressed two primary issues: First, and irrelevant to this appeal, we determined whether the Klamath Basin irrigators (there, the plaintiffs) were third-party beneficiaries of the contract between the Bureau of Reclamation and PacifiCorp. *Id.* at 1210–12. Second, and relevant here, we affirmed the district court's grant of declaratory relief in favor of PacifiCorp when the district court held that the Bureau of Reclamation had the authority to direct Dam operations to comply with the ESA. *Id.* at 1213. We recognized that "when an agency, such as [the Bureau of] Reclamation, decides to take action, the ESA generally applies to the contract" and explicitly "h[e]ld that . . . [the Bureau of] Reclamation has the authority to direct Dam operations to comply with the ESA." *Id.*

Although KID and KWUA contend that this part of the *Patterson* opinion is mere dicta, we disagree. We devoted a separate section in the *Patterson* opinion to resolving the dispute as to whether the district court's *holding* that "the [i]rrigators' rights to water are subservient to the ESA" was correct and whether the ESA applied to the contracts. *Id.* Our language in *Patterson* explicitly said that we intended to make a holding of law. After careful examination of the issues and relevant precedent, we "h[e]ld" that the Bureau of Reclamation has authority over the Klamath Project and we repeatedly made unequivocal and binding statements that the Bureau Reclamation must comply with the ESA in operating the Link River Dam. *Id*.; *see also id.* at 1209 ("Operation

of the dam is also subject to the requirements of federal statutes, such as the Endangered Species Act."); *id.* at 1213 ("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."); *id.* ("[M]eet[ing] the requirements of the ESA. . . override the water rights of the [i]rrigators."). This reasoning was integral to the decision in *Patterson* and cannot be considered to be mere dicta. *See United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (per curiam) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense."). The format and content of the *Patterson* opinion persuade us that our holding that ESA applied to the Bureau of Reclamation's authority over the Link River Dam is not dicta and continues to bind our decisions, and we reaffirm that decision here.

After *Patterson*, we and other Circuits have continued to recognize that the ESA applies to the Bureau of Reclamation's operation of the Klamath Project, and that the rights of Klamath Project water users are subject to the requirements of the ESA. *See, e.g.*, *In re Klamath Irrigation Dist.*, 69 F.4th at 938 ("[U]nder the Endangered Species Act . . . , Reclamation must maintain specific water levels in Upper Klamath Lake and instream flows in the Klamath River."); *KID II*, 48 F.4th at 940 ("Reclamation is also responsible for managing the Klamath Project in a manner consistent with its obligations under the ESA."); *Baley*, 942 F.3d at 1323 ("As noted, the Klamath Project is subject to the requirements of the ESA. In addition, . . . the Ninth Circuit has declared the rights of Klamath Project water

users to be subservient to the requirements of the ESA."); *Klamath Irrigation Dist.*, 635 F.3d at 508 ("In light of its dual purposes of serving agricultural uses and providing for the needs of wildlife, the Klamath Project is subject to the requirements of the Endangered Species Act."). Thus, *Patterson* is still good law, and its holding continues to serve as controlling precedent for Klamath Basin litigation.

2

Section 7(a)(2) of the ESA applies to "agency actions." The ESA defines agency action as "any action authorized, funded, or carried out by [a federal] agency." 16 U.S.C. § 1536(a)(2). The implementing regulations limit Section 7's application to only actions "in which there is discretionary Federal involvement or control" to benefit a protected species. 50 C.F.R. § 402.03; *see also Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 977 (9th Cir. 2003).

Contending that the Bureau of Reclamation does not retain "discretion" to act for the benefit of protected species in this case, KWUA and KID urge us to conclude that *Patterson* is no longer controlling precedent based on two more recent cases: one from the Supreme Court (*Nat. Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007)) and one from our Circuit (*Nat. Res. Def. Council v. Haaland*, 102 F.4th 1045 (9th Cir. 2024)). We disagree with KWUA's and KID's interpretation of these cases, as well as the dissent's interpretation of these cases, and are not persuaded that either case affects *Patterson's* square holding that the ESA applies to the Klamath Project.

First, in *Home Builders*, the Supreme Court held that Section 7(a)(2) of the ESA applies only to discretionary agency actions and does not apply to actions that an agency

is required to undertake by a conflicting federal statute. 551 U.S. at 666–67. But, in *Home Builders*, the issue was whether Section 7(a)(2) of the ESA applied to the Environmental Protection Agency's ("EPA's") decision under Section 402(b) of the Clean Water Act to approve a state National Pollution Discharge Elimination System ("NPDES") permitting program. *Id.* Although the Supreme Court recognized that Section 7(a)(2) would apply to the decision because the NPDES approval decision was an "agency action," the Court also noted that complying with Section 7(a)(2) of the ESA would effectively amend or repeal Section 402(b) of the Clean Water Act because it would add an additional criterion to an otherwise "exclusive list." *Id.* at 662–64. Thus, the Court held that the non-discretionary "transfer of NPDES permitting authority" under Section 402(b) of the Clean Water Act was not subject to Section 7(a)(2) of the ESA. *Id.* at 673.

Even in *Home Builders*, the baseline assumption was that Section 7(a)(2) applies to an "agency action." But, *Home Builders* recognized a narrow exception to this rule: When another federal *statute* mandates an action that cannot be harmonized with the consultation requirement in Section 7(a)(2) of the ESA, then the federal agency has no discretion to consider the protection of listed species in carrying out the other incompatible *statutory* mandate. *See id*. at 666, 673. After *Home Builders*, "the real question . . . is what counts as a non-discretionary action, to which [Section] 7(a)(2) does not apply." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 639 (9th Cir. 2014).

In several cases arising after *Home Builders*, we have distinguished *Home Builders* and required compliance with the ESA's consultation provision when another federal statute did not require action that conflicted with the

consultation provision of the ESA. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928 (9th Cir. 2008) (distinguishing *Home Builders* from circumstances of "broad mandates which do not direct agencies to perform any specific nondiscretionary actions, but rather, are better characterized as directing the agencies to achieve particular goals"); *see also Jewell*, 747 F.3d at 640 (distinguishing *Home Builders* and concluding that there was no "statutory obligation that Congress has imposed on [the Bureau of] Reclamation that is both mandatory and inconsistent with its obligations under the ESA"); *Karuk Tribe*, 681 F.3d at 1024 ("[T]o avoid the consultation obligation, an agency's competing *statutory* mandate must require that it perform specific non[-]discretionary acts rather than achieve broad goals." (emphasis added)).

We have thus held, after *Home Builders*, that an agency retains discretion and the duty to comply with Section 7(a)(2) of the ESA unless the enabling legislation for the agency's action is both "*mandatory* and *inconsistent* with [the agency's] obligations under the ESA." *Jewell*, 747 F.3d at 640 (emphasis added). And even when a statute compels a certain action, we have held that the ESA still applies if the statute can be construed in harmony with the ESA's language. *See, e.g., San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation Dist.*, 49 F.4th 1242, 1247 (9th Cir. 2022); *see also Karuk Tribe*, 681 F.3d at 1024 ("An agency 'cannot escape its obligation to comply with the ESA merely because it is bound to comply with another statute that has consistent, complementary objectives' . . . The competing statutory objective need only leave the agency 'some discretion.'" (internal citation omitted)). By contrast, when a statute imposes a "broad mandate," the agency's actions are "discretionary" for purposes of Section 7(a)(2) of

the ESA because the agency retains at least some discretion to act for the benefit of listed species. *Nat'l Wildlife Fed'n*, 524 F.3d at 929; *see also Jewell*, 747 F.3d at 640; *Home Builders*, 551 U.S. at 665 (action is discretionary unless the enabling statute specifically prohibits the agency from considering "extrastatutory factors").

Here, there is no such conflict as was present in *Home Builders* because there is no statutory mandate in the Reclamation Act that imposes a specific and non-discretionary action conflicting with the ESA. The Reclamation Act authorizes and directs the construction of "irrigation works," but does not otherwise specify any mandates. *See* 43 U.S.C. § 411. Instead, the Reclamation Act gives the Secretary of the Interior a broad authority to "perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of [the Reclamation Act] into full force and effect." 43 U.S.C. § 373. Nothing in the Reclamation Act requires the Bureau of Reclamation to perform any specific non-discretionary activities in direct conflict with the ESA. Instead, the directives of the Reclamation Act are "better characterized" as provisions "directing [the Bureau of Reclamation] to achieve particular goals." *Nat'l Wildlife Fed'n*, 524 F.3d at 928. We conclude that the facts of this case are unlike those in *Home Builders*, and nothing in *Home Builders* affects our holding in *Patterson* that the ESA applies to the Klamath Project or renders that holding inapplicable to this case.

3

Next, KID and KWUA contend that our recent holding in *Haaland* confirms that the Bureau of Reclamation does not have "discretion" under the water contracts to release

water from Upper Klamath Lake to benefit endangered species. This contention is unpersuasive and misconstrues *Haaland*. *Haaland* did not retreat from this court's case law that the Bureau of Reclamation must comply with the ESA when operating the Klamath Project.

a

The relevant portion of *Haaland* involved three claims about the Bureau of Reclamation's renewal of "settlement contracts," or contracts that determined water delivery for users that had senior water rights pre-dating the United States' water rights on the Sacramento River within California's Central Valley Project. 102 F.4th at 1056. The "agency action" to which the consultation duty under Section 7(a)(2) of the ESA applied in that case was the Bureau of Reclamation's *execution* of the renewed settlement contracts. *Id*. at 1057. Two of the plaintiff's claims in *Haaland* argued that the Bureau of Reclamation violated its consultation duty under Section 7(a)(2) of the ESA when it renewed the contracts because it relied on later-invalidated BiOps and did not conduct a proper consultation. *Id.* at 1066–72. We upheld the renewal. *Id*.

In the third claim (described in the opinion as the fifth), which relates to the part of the opinion on which KID and KWUA rely, the plaintiff contended that the Bureau of Reclamation violated the ESA by *implementing* the settlement contracts because it did not reinitiate consultation in light of the new information about endangered or threatened species that was discovered after the Bureau of Reclamation had previously renewed the contracts. *Id*. at 1062. This factual distinction between execution and implementation matters in two ways.

First, under the ESA, the duty to reinitiate consultation arises *after* the agency has already engaged in formal or informal consultation under Section 7(a)(2). An agency must reinitiate consultation with the relevant wildlife agencies "where discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(a)(2). Stated another way, new relevant information may require reevaluation of the agency's position, but this assumes that the agency has already engaged in consultation under Section 7(a)(2) of the ESA.

Second, in making its claim based on the agency's failure to reinitiate consultation, the plaintiff in *Haaland* explicitly pled that the Bureau of Reclamation "retain[ed] discretionary federal involvement and control over the implementation of the [settlement] contracts," and that discretion created its duty to reinitiate consultation after learning of new evidence of impact on threatened or endangered species. Whether the Bureau of Reclamation had a discretionary duty to reinitiate consultation in implementing the settlement contracts *necessarily* turned on the terms of those contracts. *Id.* at 1075–77.

In reviewing the district court's ruling that the plaintiff did not state a claim upon which relief could be granted as to the reinitiation claim, the panel majority held that the contract provisions at issue did not give the Bureau of Reclamation discretion to take measures to benefit the endangered salmon species at issue. *Id.* at 1077; *but see id.* at 1081–83 (Gould, J. dissenting in part) (interpreting two contract provisions as giving the Bureau of Reclamation sufficient discretion to reinitiate consultation).

But there, the question at issue was explicitly framed under the terms of the contracts because we were determining whether the Bureau of Reclamation retained discretion under specific contract provisions to reinitiate consultation under the ESA in *implementing* the renewed settlement contracts after the original Section 7 consultation duty had previously been applied to the *execution* of the renewed contracts. *Id.* at 1058. In our holding, we relied on Ninth Circuit cases holding that when an agency no longer has federal control over a private action, there is no "discretion" to trigger duties under Section 7(a)(2) of the ESA. For example, in *Sierra Club v. Babbitt*, we held that Section 7(a)(2) did not apply to project action undertaken by a private party pursuant to a Right-of-Way ("ROW") that had been granted before the ESA was enacted because the federal agency no longer had discretion to impact the private party's execution of the project for the benefit of a protected species. 65 F.3d 1502, 1511–12 (9th Cir. 1995). Instead, the federal agency's involvement in the project ended when it issued the ROW. *Id.* at 1508–12. Similarly, in *Environmental Protection Information Center v. Simpson Timber Co.* ("*EPIC*"), we held that FWS did not retain sufficient discretionary control over an incidental take permit it had issued to a private company to compel FWS to reinitiate consultation for the benefit of species beyond the species specifically mentioned in the permit. 255 F.3d 1073, 1079–83 (9th Cir. 2001). There again, we looked at the terms of the specific agreements at issue to determine the scope of the agency's discretion. *Id*.

In contrast, the question here is broader than the question of reinitiation of consultation at issue in *Haaland*: In this case, we must decide whether the ESA applies to the Bureau of Reclamation's operation of the Klamath Project to

manage water levels within Upper Klamath Lake and releases to the Klamath River to protect endangered and threatened species. There is no issue of contract interpretation here.

In *Haaland*, there was no dispute that Section 7(a)(2) of the ESA applied to the Bureau of Reclamation's operation of the Central Valley Project. Nor could there have been. We recognized in *Haaland* that Congress enacted legislation stating explicitly that the Bureau of Reclamation must comply with federal law, including the ESA, when operating the Central Valley Project and the Bureau of Reclamation had long complied with the ESA in its operation of the Central Valley Project. *See* 102 F.4th at 1057 ("In 1992, Congress enacted the Central Valley Project Improvement Act (CVPIA) . . . , which required that the Secretary of the Interior operate the CVP in compliance with federal and state law."); *see also id.* at 1056 (recognizing the Bureau of Reclamation's "decades-long history of obtaining the necessary environmental approvals" to operate the Central Valley Project).

Moreover, two of the plaintiff's claims in *Haaland* were predicated on the assumption that the ESA applies to the Central Valley Project. The first of these claims contended that FWS acted arbitrarily and capriciously and violated its obligations under the ESA when it relied on a particular BiOp and did not correctly analyze the effects of the contract renewals on endangered species. *Id.* at 1065. We rejected that argument, not because the ESA did not apply to federal water management of the Central Valley Project, but because we determined on the merits that "FWS's consultation on the renewal of the Settlement Contracts considered the full scope of the proposed action before

determining that renewal of those Contracts would not likely adversely affect the delta smelt." *Id.* at 1071.

Similarly, the plaintiff's second claim was that the Bureau of Reclamation violated its duties under the ESA by relying on what the Bureau of Reclamation should have known was an inadequate consultation with FWS. *Id.* at 1071–73. We rejected that argument, again not because the ESA was inapplicable to the Central Valley Project, but because we determined on the merits that the consultation was adequate under the ESA. *Id.* And, although the dissent contends that these claims were the plaintiff's APA claims, and not its ESA claim, *see* Dissenting Op. at 48, this is a "distinction without a difference," *see* Dissenting Op. at 47, because all of the plaintiff's claims were premised on alleged violations of the ESA and the assumption that the ESA applied to the Central Valley Project. *See id.* at 1054. There is no meaningful difference as to whether the plaintiff alleged that the ESA was violated because the Bureau of Reclamation made conclusions the plaintiff contended were contrary to the ESA and therefore arbitrary under the APA, or because the plaintiff contended directly that the ESA required reinitiation of consultation duties; all these claims assumed that the ESA applied.

In sum, nothing in *Haaland* suggests that Section 7(a)(2) of the ESA does not apply to the Klamath Project.

b

Furthermore, under the parties' contracts in this case, the Bureau of Reclamation retains discretion because the vast majority of contracts here are premised on water availability; only one contract guaranteed a specific quantity of water to a particular water user; and the Bureau of Reclamation has

an ongoing obligation to determine water availability for Project users in the Klamath Project.[6]

Under these contracts, unavailability of water can be a result of either physical unavailability caused by an inadequate water flow, or by legal unavailability as, for example, when a legal obligation requires use of water for other purposes. *See O'Neill*, 50 F.3d at 682–84 (holding that "unavailability of water resulting from the mandates of valid [post-contract] legislation"—including the ESA—unambiguously "constitute[d] a shortage by reason of 'any other causes'" and excused contract performance); *see also Baley*, 134 Fed. Cl. at 627; *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998) (recognizing that an agency "can deliver less than a contractually agreed upon amount of water in order to comply with subsequently enacted federal law").

Our reasoning in *Haaland* that similar shortage provisions were not, in circumstances there, a source of discretion requiring reinitiation of consultation is specific to the nature of the contracts in *Haaland*, and the distinction from our case matters in important ways. In *Haaland*, the contracts at issue were settlement contracts resolving disputes between the Bureau of Reclamation and Sacramento River water users who had preexisting water rights pre-dating the federal Reclamation statutes and were senior to the rights held by the United States for the Central

[6] That the Bureau of Reclamation has non-discretionary duties in one contract to the Van Brimmer Ditch Company, which had preexisting rights, does not allow the Bureau of Reclamation to "ignore potential jeopardy risks" for endangered or threatened species within the entire Klamath Project. *Nat. Wildlife Fed'n*, 524 F.3d at 928; *see also Jewell*, 747 F.3d at 638–39.

Valley Project. 102 F.4th at 1056. Those contracts specifically "quantifie[d] the total amount of water that could be diverted annually" by the senior rights holders, and they contained shortage provisions for periods of reduced water supply. *Id.* at 1058. When those contracts were about to expire, the Bureau of Reclamation renewed the contracts. *Id.*

In seeking to dismiss the plaintiff's claim that the Bureau of Reclamation had to reinitiate consultation on the effect of the continued implementation of the renewed settlement contracts, the Bureau of Reclamation contended that these liability provisions did not give it the authority to alter the terms of the executed renewed settlement contracts on the stipulated diversions of water for the senior water rights holders. *Id.* at 1075–76. We agreed with that contention because the terms of the contracts did not give the Bureau of Reclamation discretion, *after the contracts had been executed*, to take *additional* measures that would benefit the endangered species. *Id.*

But here, as explained, most contracts in the Klamath Project are water supply contracts under which the Bureau of Reclamation has ongoing obligations to apportion water equitably. In cases with similar circumstances, we have held that shortage provisions unambiguously excuse the Bureau of Reclamation's obligations to furnish water when it is unavailable due to "the mandates of valid legislation" or other causes. *O'Neill*, 50 F.3d at 683–84; *see also Patterson*, 204 F.3d at 1213 (following *O'Neill* in construing Klamath Project contracts for purposes of whether the ESA applied). Finally, even in *Haaland*, we recognized that in the underlying agency action—the renewal of the settlement contracts—the Bureau of Reclamation "was obliged 'to engage in Section 7(a)(2) consultation prior to renewing the

[s]ettlement [c]ontracts.'" *Haaland*, 102 F.4th at 1061 (quoting *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 785 (9th Cir. 2014)).

Haaland's holding that the terms of the contracts at issue in that case did not give the Bureau of Reclamation sufficient discretion to require reinitiation of consultation when implementing the renewed settlement contracts does not bear on the question before us today, which is whether the ESA applies to the Klamath Project. Nothing in *Haaland* suggests that we should reevaluate *Patterson*, which held that that ESA applied retroactively to the Bureau of Reclamation's water contracts in the Klamath Project. Nor are we persuaded that recent case law compels a conclusion that the Bureau of Reclamation has no discretion to comply with the ESA in operating the Klamath Project. Indeed, precedent suggests, to the contrary: that the Bureau of Reclamation must comply with the ESA when operating the Klamath Project.[7]

B

Beyond the issue of whether the ESA applies to the Klamath Project, KID contends that the district court's ruling that the ESA preempts OWRD's order was a "judicial taking" of KID's property interests in its water rights. We disagree.

Four justices of the Supreme Court have recognized that a state court might cause a "judicial taking," if, as a matter

[7] Because the ESA applies to the Bureau of Reclamation's operation of the Klamath Project under existing case law, we do not consider the parties' alternative arguments as to Tribal water rights. We also decline to conclude that there was error in the district court's ruling striking KWUA's arguments about Tribal rights, because the district court explicitly reserved that issue for phase two of the litigation.

of adjudicating state-law property rights, it "declares that what was once an established right of private property no longer exists." *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010) (plurality opinion). Because such a claim has not been recognized by a majority of Justices on the United States Supreme Court, we question its availability. *Id.* at 733–45. But, even if such a claim was clearly recognized, it would not apply here. In deciding whether the ESA applies to the Bureau of Reclamation's operation of the Klamath Project, neither we nor the district court have adjudicated any water rights. No party has sought, nor have we or the district court ruled on any Tribal rights applicable here or on any other property rights beyond the question of the ESA's applicability. Our answer to the ESA question before us today does not adjudicate property rights. *See Patterson*, 204 F.3d at 1214 n.3 ("Our decision in this case and that of that district court relate only to questions involving the Bureau[] [of Reclamation's] operation and management of the Project, and not to the relative rights of others not before the court to the use of the waters of the Basin.").

C

Finally, KID's jurisdictional arguments that the federal courts are barred from deciding the crossclaim under the doctrines of prior exclusive jurisdiction and *Colorado River* abstention are without merit for the reasons stated below.

1

First, KID contends that the state court hearing the Klamath Basin Adjudication has "prior exclusive jurisdiction" that bars federal courts from deciding the Federal Appellees' crossclaim on the ESA's applicability to the Klamath Project. KID emphasizes that if "a state or

federal court has taken possession of property, or by its procedure has obtained jurisdiction over the same, then the property under that court's jurisdiction is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereign." *Sexton v. NDEX West, LLC*, 713 F.3d 533, 536 (9th Cir. 2013) (internal quotation marks and citations omitted).

We have previously rejected that argument. In its 2021 lawsuit, KID sought a preliminary injunction in state court to prevent the Bureau of Reclamation from releasing water from Upper Klamath Lake to comply with the ESA. After the United States removed the action to federal district court for the District of Oregon, KID petitioned our Court for a writ of mandamus seeking to remand the issue back to the state court because KID contended that the state court had prior exclusive jurisdiction. *See In re Klamath Irrigation Dist.*, 69 F.4th at 940. We rejected that argument and denied the writ of mandamus, holding that KID mischaracterized its lawsuit by claiming it was an administration of the Klamath Basin Adjudication. *Id.* at 944–45; *see also KID II*, 48 F.4th at 946–47 (recognizing that KID's lawsuit was properly understood to be a challenge under the Administrative Procedure Act to the Bureau of Reclamation's ESA authority). Although *In re Klamath Basin Irrigation District* does not bind us because it was decided under the more deferential "clear error" standard of review used for review of a petition for a writ of mandamus, we conclude that its reasoning is persuasive in resolving this case. *See In re Klamath Irrigation Dist.*, 69 F.4th at 941–44.

The doctrine of prior exclusive jurisdiction does not apply here because the question before us today—whether the Bureau of Reclamation's obligations under the ESA

apply to the Klamath Project—does not involve the adjudication or administration of any provisionally-determined water rights. In complying with the ESA, the Bureau of Reclamation is not claiming water rights, and the Klamath Basin Adjudication did not adjudicate the Bureau of Reclamation's ESA obligations.

The United States is participating in the Klamath Basin Adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666(a), which "waives the United States' sovereign immunity for the limited purpose of allowing the Government to be joined as a defendant in a state adjudication [or administration] of water rights." *United States v. Adair*, 723 F.2d 1394, 1400 n.2 (9th Cir. 1983). But the McCarran Amendment does not "authorize private suits to decide priorities between the United States and particular claimants[.]" *In re Klamath Irrigation Dist.*, 69 F.4th at 942 (citation omitted).

There is no dispute that the state court has jurisdiction to adjudicate the United States' water-rights claims against other claimants in Oregon and that the provisionally-determined rights decided in ACFFOD are enforceable under Oregon law, pending judicial review. *See Oregon*, 44 F.3d at 765–70; OR. REV. STAT. §§ 539.130(4), 539.170; *Hawkins*, 991 F.3d at 222. But, OWRD in the ACFFOD did not determine the Bureau of Reclamation's ESA obligations because those obligations are not governed by Oregon law. The state court reviewing the Klamath Basin Adjudication has no jurisdiction over the federal question whether the ESA applies or in determining the scope of the Bureau of Reclamation's obligations under federal law.

Because this case does not present an adjudication of water rights and because the doctrine of prior exclusive

jurisdiction cannot expand the subject matter jurisdiction of a state court to adjudicate issues beyond its jurisdiction, we hold that the doctrine of prior exclusive jurisdiction does not apply.

2

Second, KID contends that the district court abused its discretion when it denied KID's motion to stay based on the doctrine of *Colorado River* abstention. We conclude that this argument is without merit. Under the doctrine of *Colorado River* abstention, a federal court may decline to adjudicate federal water rights claims as against other claimants, where relative rights in a common source are being comprehensively adjudicated in a state-court McCarran Amendment proceeding. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 809–21 (1976). The question before us today and that was presented by the United States' crossclaim is whether and how the ESA applies to the Klamath Project. That question does not involve the establishment or adjudication of a federal water rights claim, and the ESA issue was not adjudicated in the Klamath Basin Adjudication. *See In re Klamath Irrigation Dist.*, 69 F.4th at 941. We hold that there is no reason for the district court to have abstained.[8]

IV. CONCLUSION

Following Ninth Circuit precedent in *Patterson* and its progeny, we affirm the district court's holding that the ESA

[8] We deny KID's motion to take judicial notice (Dkt. No. 25) because the documents on which judicial notice is requested are either duplicative of those already in the record or are irrelevant to our analysis. We also deny KID's motion to certify questions of law to the Oregon Supreme Court (Dkt. Nos. 116 & 117) because no questions of state law remain relevant to the appeal.

applies to the Bureau of Reclamation's operation of the Klamath Project. We therefore affirm the district court's ruling in phase one. We also hold that the district court's ruling did not constitute a "judicial taking" and that the district court had jurisdiction to decide the crossclaim.

AFFIRMED.

R. NELSON, Circuit Judge, dissenting:

I agree with the majority's analysis of the judicial taking and *Colorado River* abstention issues. But its answer to whether § 7 of the ESA applies here fails to reckon with Supreme Court and circuit precedent. The majority repeatedly asks whether the ESA applies to the Klamath Project. As a general matter, that is a truism. But the specific question—after *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), and *Natural Resources Defense Council v. Haaland*, 102 F.4th 1045 (9th Cir. 2024)—is whether the contracts allow the Bureau of Reclamation any non-discretionary duty. *Haaland*, which issued after briefing was complete, clarified how we are supposed to approach this analysis. It foreclosed finding discretion in contractual provisions that limit liability in the event of breach because of legal unavailability—nearly the majority's entire argument.

The majority fails to grapple with the terms of those contracts. And it acknowledges that one of these contracts does have non-discretionary duties. Maj. Op. at 35 n.6. Under a proper analysis of the contracts, which *Haaland* compels, a non-discretionary contractual duty imposes no ESA obligation. And since these contracts impose non-

discretionary duties, I would largely reverse the district court and remand for a proper analysis consistent with *Haaland*. As a result, I respectfully dissent.

I

A

Section 7(a)(2) of the ESA mandates that all federal agencies "'insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence' of any endangered or threatened species or result in the destruction of critical habitat." *Env't Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1075 (9th Cir. 2001) (quoting 16 U.S.C. § 1536(a)(2)). Over two decades ago, we held that because Reclamation "retain[ed] some measure of control" over the operation of the Link River Dam, "the ESA generally applies to" contracts like those here. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999). The *Patterson* holding that the ESA applies relied solely on the facts that "Reclamation retain[ed] authority to manage the Dam" and remained "the owner in fee simple of the Dam." *Id.*

But eight years later, the Supreme Court adopted a new legal framework to determine whether the ESA applies to agency action. In *Home Builders*, the Court explained that ESA § 7 "covers only discretionary agency actions and does not attach to actions . . . that an agency is *required* by statute to undertake once certain specified triggering events have occurred." 551 U.S. at 669. Heeding *Home Builders*, we have held that ESA § 7(a)(2) "is triggered so long as a federal agency retains 'some discretion' to take action for the benefit of a protected species." *Nat. Res. Def. Council v.*

Jewell, 749 F.3d 776, 784 (9th Cir. 2014) (quotation omitted) (*Jewell I*).

A year after the district court's order below, we also clarified that "once the agency has entered into a legally binding agreement, it has such discretion only to the extent permitted by the agreement's terms." *Haaland*, 102 F.4th at 1074. By reviewing the contractual terms of those binding agreements, we decided the agencies had no discretion. *Id.* In *Haaland*, environmental groups argued that contractual provisions limiting Reclamation's liability because of legal unavailability of water gave Reclamation discretion to act on behalf of endangered species. *Id*. We rejected that argument because acting in compliance with legal unavailability is not discretionary. Rather, "[t]he duty to comply with mandatory legal obligations is not a source of discretion." *Id.* at 1075–76 (citing *Home Builders*, 551 U.S. at 669). *Haaland*'s holding that legal obligations such as ESA § 7 do not equate to discretion undermines the majority's reasoning.

B

The majority argues that *Home Builders* and *Haaland* are inapplicable and relies instead on *Patterson*'s general holding that the ESA applies broadly to Reclamation's operation of the Klamath Project. That position is untenable. After *Home Builders* and *Haaland*, *Patterson* is clearly irreconcilable for the generalized proposition that Reclamation's control triggers ESA § 7 obligations in all circumstances relating to the Klamath Project.

In *Patterson*, among other things, the irrigators argued that Reclamation did not control the Link River Dam and the ESA did not apply to its operation. 204 F.3d at 1212–13. We held that Reclamation's operation of the dam constituted

agency action and so "the ESA generally applies to the contract." *Id.* at 1213.

Yurok and Federal Appellees focus on this conclusion in *Patterson* to argue that the ESA must apply to Reclamation's operation of the dam. But when "an intervening Supreme Court decision undermines an existing precedent" and "both cases are clearly on point," then "a three judge panel of this court may reexamine our precedent to determine its continuing authority." *Landreth v. C.I.R.*, 859 F.2d 643, 648 (9th Cir. 1988).

The general conclusion reached in *Patterson* and relied on by the majority does not account for intervening precedent in *Home Builders* and its progeny. In *Patterson*, we held "that the district court did not err in concluding that Reclamation has the authority to direct [Link River] Dam operations," the same dam here, "to comply with the ESA." 204 F.3d at 1213. But *Patterson* did not discuss the agency's discretion, only its ownership of and authority over the Dam. *Id.* And *Home Builders* compels us to determine whether the agency has sufficient discretion to act on behalf of endangered or threatened species despite Congressionally mandated action—here the congressionally authorized and approved contracts. *See Home Builders*, 551 U.S. at 669; *see also San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 639 (9th Cir. 2014) (*Jewell II*); *Haaland*, 102 F.4th at 1076 ("The duty to comply with mandatory legal obligations is not a source of discretion." (citing *Home Builders*, 551 U.S. at 669)). Because *Patterson* generally held that all Klamath Project operations are subject to ESA § 7 without discussion of the agency's specific discretion, we must revisit that portion of *Patterson* discussing the ESA's applicability considering *Home Builders*. To the extent that "[t]he reasoning or theory of" *Patterson* is

"clearly irreconcilable with the reasoning or theory" of *Home Builders*, that portion of *Patterson* is no longer good law. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003).

The majority emphasizes that *Home Builders* dealt with statutory mandates. Maj. Op. at 27 ("When another federal *statute* mandates an action . . . then the federal agency has no discretion to consider the protection of listed species in carrying out the other incompatible *statutory* mandate.") (emphasis in original). But whether the mandate is statutory or contractual is not the primary question. "The real question after *Home Builders* is what counts as a non-discretionary action, to which § 7(a)(2) does not apply." *Jewell II*, 747 F.3d at 639. "The agency lacks discretion only if another *legal* obligation makes it impossible for the agency to exercise discretion for the protected species' benefit," not just statutory obligations like the Reclamation Act. *Jewell I*, 749 F.3d at 784 (emphasis added). *Patterson* does not connect its holding that the ESA applies to the Link River Dam to any discussion of agency discretion as subsequently required by *Home Builders*. Under *Patterson*'s reasoning, mere control of the dam was enough to trigger ESA § 7. 204 F.3d at 1213; *see also* Maj. Op. at 24–26. In this sense, *Patterson*'s reasoning is "clearly irreconcilable with" the Supreme Court's reasoning in *Home Builders*. *Miller*, 335 F.3d at 893.

The problem is that in *Patterson* we generally concluded that the ESA applied to Link River Dam operations only because the ESA was enacted to "halt and reverse the trend toward species extinction, whatever the cost." 204 F.3d at 1213 (quoting *O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1997)). *Patterson* relied on *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1979), for this holding. But the majority fails to note that *Patterson*'s broad reliance on

Tennessee Valley Authority was disclaimed by the Supreme Court in *Home Builders*. 551 U.S. at 669–70. The Court noted that *Tennessee Valley Authority* "had no occasion to answer the question" whether the ESA applied after new ESA regulations were adopted. Since *Tennessee Valley Authority*, the EPA had adopted a regulation clarifying that ESA § 7 only applies to discretionary agency action. Plus, the agency action at issue in *Tennessee Valley Authority*, "while expensive, was also discretionary." *Id.* at 670. Thus, since *Home Builders*, application of ESA § 7(a)(2) hinges on the agency's discretion. And *Haaland* leaves no doubt that this framework applies that framework to contractual language.

The majority argues that *Haaland* is distinguishable because the agency action is different; in *Haaland* the action was Reclamation's "*execution* of the renewed settlement contracts" and here, the action is to calculate the sums to be released. Maj. Op. at 30–33. That is a distinction without a difference. Just as in *Haaland*, Reclamation "entered into a legally binding agreement," namely, the "executed contract[s.]" 102 F.4th at 1074. Therefore, Federal Appellees need to show agency discretion independent of legal unavailability in its calculation of who is to receive what amount of water. *See id.* at 1076 (finding contractual provisions do not "give Reclamation discretion *to take measures* that would *inure to the benefit*" of the protected species (emphases added)). Just like in *Haaland*, "whether the Bureau of Reclamation [has] a discretionary duty . . . *necessarily* turn[s] on the terms of [these] contracts." Maj. Op. at 31. And just as in *Haaland*, the majority "fails to explain how such compliance with mandatory legal obligations can be a source of discretion." 102 F.4th at 1076 n.12.

The majority casts *Haaland* as irrelevant because "there was no dispute that Section 7(a)(2) of the ESA applied to the Bureau of Reclamation's operation of the Central Valley Project." Maj. Op. at 33. It suggests that we rejected the plaintiff's claims in *Haaland* "because we determined on the merits that FWS's consultation on the renewal of the Settlement Contracts considered the full scope of the proposed action." *Id.* (quotation omitted). What the majority neglects to recognize is that this language comes from *Haaland*'s discussion of the plaintiff's APA claim, not its ESA claim. We rejected the ESA claim in *Haaland* because "the renewed Settlement Contracts [did] not give Reclamation the discretion to take measures that would benefit the" endangered species. 102 F.4th at 1077. The majority's suggested difference is unrelated to the question *Haaland* demands we answer (and which the majority thinks has no relevance here): whether the legally enforceable contracts give Reclamation discretion. *See id.* at 1074. Whether ESA § 7 is implicated at the contract renewal phase provides no guidance on whether § 7 is implicated under extant operative contracts.

The majority contends that "nothing in *Haaland* suggests that Section 7(a)(2) of the ESA does not apply to the Klamath Project." Maj. Op. at 34. But *Haaland* does suggest that "we must determine whether Reclamation retained some discretion to take measures that would inure to the benefit of a protected species," before deciding whether § 7's requirements apply based on case law pre-dating *Home Builders*. 102 F.4th at 1074. And the majority fails to conduct that analysis.

II

The majority argues that "[t]here is no issue of contract interpretation here." Maj. Op. at 33. But as even the dissent noted in *Haaland*, "[w]e look to the terms of the contract to determine whether the agency retains the power under the contract to impose measures to protect the species in question." 102 F.4th at 1082 (Gould, J., concurring in part and dissenting in part) (cleaned up). And these contracts do not provide the agency discretion.

A

The primary argument is that contractual provisions disclaiming liability during shortages give Reclamation discretion to act for the benefit of the suckers and salmon. These are best described as force majeure clauses. *See Haaland*, 102 F.4th at 1075. For instance, KID's 1954 contract explains that "[o]n account of drought or other causes, there may occur at times a shortage in the quantity of water available in Project reservoirs." In that circumstance, "in no event shall any liability accrue against the United States." Tulelake Immigration District's (TID) 1956 contract contains the same shortage provision to KID's. So too with the later-entered Warren Act contracts, which all disclaim liability for water shortages caused by drought or any "other cause."

These clauses, it is argued, trigger the ESA because they grant discretion to limit water-flow in the event of "legal unavailability." These provisions likely do disclaim *liability* for legal unavailability. *See O'Neill*, 50 F.3d at 684. But our precedent forecloses that disclaimers of liability based on shortages are sources of *discretion*.

In *Haaland*, 102 F.4th at 1075, we rejected this exact argument. We concluded that two materially identical contractual provisions did not create discretionary authority triggering review under ESA § 7(a)(2). First, "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." *Id.* And second, "[t]he United States assumes no responsibility . . . for or on account of . . . [a]ny damage . . . caused by a shortage of water" due to "errors in operation, drought, or unavoidable causes." *Id.* at 1076 (cleaned up).

We held that those provisions do "not give Reclamation discretion to alter the Settlement Contract to benefit a listed species." *Id.* at 1075. Instead, they address circumstances in which, because of an unavoidable shortage, Reclamation has "*no* discretion to act" at all. *Id.* at 1076.

As we explained, these provisions were "force majeure" clauses "that limit[] Reclamation's liability for damages in the event legal obligations are imposed on Reclamation that require it to breach the Settlement Contracts by reducing the diversion of water." *Id.* "[N]othing about" similar "provision[s] require[] the Bureau [of Reclamation] to take actions to protect" endangered species. *Jewell I*, 749 F.3d at 783; *see also Haaland*, 102 F.4th at 1075–76 (discussing the "similar shortage provision[s]" from *Jewell I*, 749 F.3d at 783). These provisions are "permissive" and "merely absolve the United States of liability if there is a water shortage." *Haaland*, 102 F.4th at 1075–76 (quoting *Jewell I*, 749 F.3d at 783). Under that same reasoning, these provisions do not provide Federal Appellees discretionary authority.

Nor does the majority's discussion of *O'Neill* support the proposition that these force majeure clauses give Reclamation discretion to act on behalf of the suckers and salmon. There is no friction between *Haaland* and *O'Neill*. In *O'Neill*, we answered whether a water service contract provision "which absolves the government of liability for water shortages due to drought or 'any other causes,' excuses the government from supplying the full contractual amount." 50 F.3d at 682. We held that "the contract's liability limitation is unambiguous and that an unavailability of water resulting from the mandates of valid legislation constitutes a shortage by reason of 'any other causes.'" *Id.* at 684.

Our decision in *Haaland* did not disturb *O'Neill*'s conclusion—we agreed that the government faces no liability under similar terms when there is a shortage because of legal unavailability. And *Haaland* confirms that the limitation-of-liability clauses do not grant discretion sufficient to trigger the ESA.

The *O'Neill* court construed the contracts before it. We did not answer "whether the district court should have decided if environmental statutes did, in fact, mandate the reduction in water." *Id.* at 682; *see also id.* at 687–89 (it was not an abuse of discretion to "decline[] to evaluate the merits of the Bureau's compliance with ESA").[1] Unlike *O'Neill*, we are tasked with answering the merits of ESA obligations. And the lack of liability for compliance with environmental

[1] Even if *O'Neill* had addressed the merits of the environmental claims when the district court did not, it would be distinguishable because the Central Valley Project Improvement Act was amended in 1992 to "elevate[] 'mitigation, protection, and restoration of fish and wildlife' to Project purposes on par with irrigation." *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 683 (9th Cir. 2012) (quotation omitted).

law does not equate to discretion sufficient to trigger ESA obligations.

The majority's discussion of these contracts does all it can to distinguish them from those in *Haaland* except look at the text of the contracts. Maj. Op. at 34–37. In *Haaland*, we held that contracts which provided 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" did "not give Reclamation discretion to alter the Settlement Contract to benefit a listed species." 102 F.4th at 1075. Compare that with the language of these contracts, which provide that if there is "a shortage in the quantity of water available in Project reservoirs," then, "in no event shall any liability accrue against the United States." The contract provisions mirror those in *Haaland*. The majority's failure to address the striking similarities between these contracts' plain text, while coming to a different conclusion than *Haaland*, undermines our precedent.

B

Beyond those with force majeure clauses, the other contracts fare little better. For example, Klamath Water Users Association highlights Reclamation's contract with the Van Brimmer Ditch Company. Even the majority recognizes this contract triggers non-discretionary duties. Maj. Op. at 35 n.6. Likewise, the Klamath Basin Irrigation District's Warren Act contract does not provide discretion when it allows Reclamation to "apportion the available surplus water supply among the District and others entitled, under existing and future contracts . . . to receive water from the Klamath Project." All that provision means is that, if there is a shortage, Reclamation can use available surplus

according to other contracts. It grants no discretion sufficient to trigger the ESA.

As for the equitable issue in the Klamath Drainage District contract, the Secretary still has no discretion to act in a way that would "inure to the benefit" of the suckers or salmon. *Haaland*, 102 F.4th at 1074. All the water prorated in times of shortage "shall" be prorated "between the district and others supplied therefrom." The Secretary can decide how to release the water, but the water releases must still only go to those supplied. No one could suggest that the suckers and salmon are "supplied therefrom" as contemplated by the contract. So the Secretary has no discretion under this provision to release water for the benefit of the suckers and salmon. The same is true for the 1956 TID agreement, which provides that "[i]n the event [of] a shortage of water" from the Klamath Project "as a result of drought or other unavoidable causes," the United States "may apportion the available supply" among those in TID or with equal priority rights. That apportionment between TID or those with equal priority rights is not discretionary in a way that would "inure to the benefit" of the suckers or salmon. *Haaland*, 102 F.4th at 1074.

The closest call on this issue are Reclamation's contracts with homesteaders. Federal Appellees explain that Reclamation's initial contracts with KID and TID started as "'Form A' agreements for homesteaders" which require that "in times of 'shortage,' Reclamation would furnish an 'equitable proportionate share' of available water." But Form A is not in the record. Instead, the parties point to a

case from the Federal Court of Claims, which purports to quote Form A:

> The quantity of water to be furnished hereunder shall be that quantity which may be applied beneficially in accordance with good usage in the irrigation of the land described in paragraph 2: *Provided*, That *in case of a shortage at any time the amount to be furnished shall be an equitable proportionate share*, as nearly as practical operations will permit, of the water actually available at the time for all of the area being watered from the same source of supply, such proportionate share to be determined by the project manager.

Id. (second emphasis added).

Even if we accept that this language is in Form A, it is unclear whether these contracts are current or enforceable. According to Federal Appellees, "Form A" is "supplement[ed]" by later agreements, including Reclamation's 1954 contracts (discussed above) with the Irrigation Districts. But Federal Appellees do not specify if the Form A agreements were incorporated into Reclamation's later contracts. And the Court of Federal Claims has concluded that the Form A agreements were "supplanted" by later contracts. *Baley v. United States*, 134 Fed. Cl. 619, 629 (2017), *aff'd*, 942 F.3d 1312 (Fed. Cir. 2019).

All this to say, whether the equitable language identified by Federal Appellees in Form A from *Baley* is current or enforceable is unclear. Accordingly, we should have, at

most, remanded to the district court to determine whether Form A is enforceable, what any current terms of Form A may be, whether Form A may affect Reclamation's other contracts, and whether Form A gives Reclamation discretion that implicates the ESA.

In the end, the majority has not shown that Reclamation "retains some discretion to take action for the benefit of a protected species." *Jewell I*, 749 F.3d at 784 (cleaned up). Thus, ESA § 7 obligations are not triggered by these contractual obligations, and we should have remanded if uncertain.

III

Under *Home Builders* and *Haaland*, the generalized holding in *Patterson* that the ESA applies to the Klamath Project is no longer good law. Under the proper legal analysis, no statutory provision or contract provides agency discretion sufficient to trigger the ESA. Because the majority misreads our precedent, I respectfully dissent.

Nos. 23-15499 and 23-15521 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YUROK TRIBE; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; HOOPA VALLEY TRIBE,
Plaintiffs-Appellees,
v.
U.S. BUREAU OF RECLAMATION; KLAMATH WATER USERS ASSOCIATION,
Defendants-counter-claimants-cross-claimants-Appellees,
NATIONAL MARINE FISHERIES SERVICE,
Defendant-Appellee,
KLAMATH TRIBES,
Intervenor-Defendant-Appellee,
v.
KLAMATH IRRIGATION DISTRICT,
Intervenor-Defendant-Appellant,
v.
OREGON WATER RESOURCES DEPARTMENT,
Cross-claim-defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California, San Francisco Division
Case No. 3:19-cv-04405-WHO
Hon. William H. Orrick

APPELLANT KLAMATH IRRIGATION DISTRICT'S CORRECTED PETITION FOR REHEARING EN BANC

Nathan R. Rietmann #053630
RIETMANN LAW, LLC
1270 Chemeketa Street NE
Salem, Oregon 97301
Phone: (503) 551-2740
nathan@rietmannlaw.com

Attorneys for Intervenor-Defendant and Appellant
KLAMATH IRRIGATION DISTRICT

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INTRODUCTION AND RULE 40 STATEMENT

Klamath Irrigation District ("KID") respectfully petitions for rehearing *en banc*. The divided panel held that the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, "applies" to the Klamath Project, which, as the dissent recognizes, is "a truism." Op. at 8, 41; Dissent at 42.[1] Through that truism, without any preemption analysis, the majority affirmed a declaratory judgment that the ESA preempts the Oregon Water Resources Department ("OWRD") from enforcing Oregon laws requiring water to be distributed according to the rights determined in a McCarran Amendment (43 U.S.C. § 666) adjudication, and not otherwise. Op. at 20–21; Or. Rev. Stat. §§ 539.170, 540.045; Or. Admin. R. 690-250-0150(4). It also affirmed the denial of Klamath Water Users Association's ("KWUA") counterclaim for a declaration that the ESA neither authorizes nor requires the Bureau of Reclamation ("Reclamation") to curtail the storage, diversion, and delivery of Project water for irrigation. 7-KWUA_ER-1657–68; 1-KID_ER-000004; Op. at 10, 41.

The divided panel's decision conflicts with Supreme Court precedent. It conflicts with *California v. United States*, 438 U.S. 645, 652, 674–79 (1978), because it permits Reclamation to distribute stored water from Oregon's Upper

[1] Citations to "Op." and "Dissent" refer to the slip opinion filed June 17, 2026 (majority at 1–41; R. Nelson, J., dissenting, at 42–55).

Klamath Lake ("UKL") in defiance of the state law and vested rights controlling under Section 8 of the Reclamation Act, 43 U.S.C. § 383. It conflicts with *Ickes v. Fox*, 300 U.S. 82, 94–95 (1937), and *Nevada v. United States*, 463 U.S. 110, 126 (1983), which hold project water rights are the landowners' property, the Government's interest being "at most nominal." And it conflicts with *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668–69 (2007), because it extends ESA Section 7, 16 U.S.C. § 1536, to action Reclamation has no authority or discretion to take. Fed. R. App. P. 40(b)(2)(A).

The majority's decision also conflicts with this Court's precedent. It conflicts with *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 212–13 (9th Cir. 1989), because it concludes that Reclamation's authority to use stored water without a water right arises from Section 10 of the Reclamation Act, which *Alpine Land* holds is governed by Section 8. Op. at 29. It conflicts with *United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994), which required the United States to adjudicate its Klamath water rights in the Klamath Basin Adjudication ("KBA"). The KBA denied the United States' claims to instream flows in the Klamath River, and the decision now grants exactly that use through a federal court outside the KBA. 12-KID_ER-002789, 002794. It conflicts with *Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995), because it treats the ESA as enlarging Reclamation's powers. And it conflicts with *Nat. Res. Def. Council v. Haaland*, 102 F.4th 1045, 1074–76 (9th Cir.

2024), because it holds standard form clauses materially identical to those *Haaland* construed as non-discretionary to be sources of ESA discretion and ignores the statutory mandate in Section 8 of the Reclamation Act. Op. at 35–37. Fed. R. App. P. 40(b)(2)(B).

The decision also conflicts with the D.C., Fifth, and Federal Circuits. The D.C. and Fifth Circuits hold that the ESA does not enlarge agency power beyond its enabling act. *Platte River Whooping Crane Critical Habitat Maint. Tr. v. FERC*, 962 F.2d 27, 33–34 (D.C. Cir. 1992); *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 299 (5th Cir. 1998). And it conflicts with *Baley v. United States*, 942 F.3d 1312, 1331 (Fed. Cir. 2019), because it holds that adjudicated rights *Baley* left intact "are governed by federal contracts." Op. at 13. Fed. R. App. P. 40(b)(2)(C).

The result transforms the ESA into a new source of federal authority, and the questions it presents are exceptionally important. Fed. R. App. P. 40(b)(2)(D). The KBA confirmed Reclamation's right to store water in UKL and determined the separate right to use that water belongs to KID and other irrigators. 9-KID_ER-001871; 9-KID_ER-001885–93. The decision nevertheless lets Reclamation release that water for instream use without a water right and curtail the adjudicated rights of KID landowners. The power to decide how a water right is exercised is the essence of owning it. *See Int'l Paper Co. v. United States, 282 U.S. 399, 407 (1931); Skinner v. Jordan Valley Irrigation Dist.*, 137 Or. 480, 491 (1931). The United States

concedes the irrigators own these rights. 8-KWUA_ER-1936–42; DktEntry 141 at 32 n.8. But now, once the ESA "applies," no adjudicated right in any federal-project reservoir is secure.

KID presents three questions: (1) whether the ESA grants Reclamation authority to use stored water that its enabling act and adjudicated rights withhold, contrary to *California*, *Ickes*, *Nevada*, *Home Builders*, and *Sierra Club*; (2) whether Section 8 is a statutory directive that deprives Reclamation of ESA Section 7 discretion under *Home Builders*, or whether standard shortage clauses supply that discretion, contrary to *Haaland*; and (3) whether the judgment overrides adjudicated water rights, contrary to *Nevada* and *Baley*, working an uncompensated taking, or decides nothing and is advisory.

STATEMENT

The KBA is Oregon's general stream adjudication of state and federal water rights in the Upper Klamath Basin under Or. Rev. Stat. Ch. 539 and the McCarran Amendment. 9-KID_ER-001757; 9-KID_ER-001760. Its Amended and Corrected Findings of Fact and Order of Determination ("ACFFOD") is enforceable pending judicial review in the Klamath County Circuit Court. Or. Rev. Stat. § 539.170. Reclamation's adjudicated water right is one of *storage* in UKL (Claim KA 294). 9-KWUA_ER-2222; 9-KWUA_ER-2231; 9-KWUA_ER-2253–54. The secondary

rights to *use* the stored water (Claim KA 1000) are owned by KID's landowners and other non-federal parties. 9-KWUA_ER-2231; 9-KWUA_ER-2255–57; 9-KWUA_ER-2245–47. Oregon law recognizes "[t]he right to store water is distinct from the right to use stored water." 9-KID_ER-001894; *accord* Cookinham v. Lewis, 58 Or. 484, 491–92 (1911); *Bridge Creek Ranch, LLC v. Or. Water Res. Dep't*, 329 Or. App. 568, 582 (2023).

Despite this, Reclamation released stored water to augment Klamath River flows. 1-KID_ER-000011. OWRD ordered it to stop, except in accordance with the state and federal water rights determined in the KBA. 1-KID_ER-000012. The district court declared the order preempted and enjoined its enforcement. 1-KID_ER-000036. It located Reclamation's discretion in Section 10 and held the order "poses an obstacle to the accomplishment and execution of Congress's purpose and objective in enacting the ESA." 1-KID_ER-000029–30. It disclaimed any need to determine "whether it is physically impossible for the Bureau to comply with both the ESA and the OWRD Order." 1-KID_ER-000035.

The OWRD order arose from state litigation in which KID obtained orders compelling OWRD to enforce Oregon law against Reclamation, orders the Oregon appellate courts set aside because Reclamation was an indispensable party immune from joinder. *Klamath Irrigation Dist. v. Or. Water Res. Dep't*, 321 Or. App. 581, 593, 518 P.3d 970, 978 (2022). After the parties appealed, OWRD withdrew its order

but KID's challenge to the withdrawal remains pending in state court. 1-KWUA_ER-0005; Fed. Br. 28 n.2. In January 2025, Congress enacted the Klamath Basin Water Agreement Support Act of 2024, Pub. L. No. 118-246, 138 Stat. 2933 ("2025 Act"), mandating that the Secretary "shall comply with" the 2016 Klamath Power and Facilities Agreement. The Federal Appellees placed the 2025 Act before the panel with Interior memoranda reinstating the Solicitor's 2021 conclusions that stored water is bound by the ACFFOD and that the contracts supply no ESA discretion. Dkt. 141 at 24–34; 8-KWUA_ER-1936–45. They withdrew their prior position and moved to dismiss and vacate. KID and KWUA did the same, and KID moved to certify the state-law questions to the Oregon Supreme Court. The panel denied the motions and affirmed over Judge R. Nelson's dissent. Op. at 20.

REASONS FOR GRANTING REHEARING EN BANC

I. By Treating the ESA as a Grant of Authority Reclamation Lacks, the Decision Conflicts with California, Ickes, and Nevada, and with This Court's Section 8 Precedents.

The majority located Reclamation's authority in Section 10. Op. at 29. But Section 10 only carries the Act's provisions into effect, and Section 8 is one of them. No statute, contract, or water right authorizes Reclamation to use water stored in UKL for instream purposes. That leaves the ESA obligation itself. An obligation is a duty, not a power. The majority never confronted this, and every step built on that

premise conflicts with Supreme Court and Ninth Circuit precedent. See Dissent at 42, 46–47.

A. Section 8 Mandates Compliance with State Water Law and Vested Water Rights

Section 8 of the Reclamation Act provides that "nothing in this Act shall be construed as affecting . . . the laws of any State . . . relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested rights acquired thereunder," and that the Secretary, "in carrying out the provisions of this Act, shall proceed in conformity with such laws." 43 U.S.C. § 383. Accordingly, Reclamation must comply with state law in appropriating, using, and distributing reclamation water, including operating project dams, unless a clear congressional directive is "directly inconsistent" with it. *California*, 438 U.S. at 668 n.21, 675, 678; *S. Delta Water Agency v. U.S. Dep't of Interior, 767 F.2d 531*, 538 (9th Cir. 1985). Project water is appropriated "not for the use of the government" but "for the use of the landowners," the United States remaining "simply a carrier and distributor of the water." *Ickes*, 300 U.S. at 94–95. Yet the majority purported to "reaffirm" *Patterson*'s statement that ESA requirements "override the water rights of the [i]rrigators." Op. at 25 (quoting *Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999)). *Patterson* itself disclaimed that reading. On denial of rehearing, Patterson added that "questions of relative amounts and priorities" of Basin water rights "will be decided"

in the KBA, and that its decision did not reach "the relative rights of others." 204 F.3d at 1214 n.3, *amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000). The adjudication to which Patterson reserved those questions has answered them against Reclamation. A decision that reserved the irrigators' rights to the KBA is no authority for overriding the KBA's determinations.

B. The ESA Confers No Authority Beyond an Agency's Enabling Act

It is blackletter law that "the statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act." *Sierra Club*, 65 F.3d at 1510 (quoting *Platte River*, 962 F.2d at 34). Last term the Supreme Court reaffirmed that "agencies are not required to analyze the effects of projects over which they do not exercise regulatory authority." *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 189 (2025) (citation omitted). The majority skipped the threshold authority question and derived Reclamation's power from the ESA's purpose of protecting species "regardless of the cost." Op. at 22. But *Home Builders* held that *TVA v. Hill*, the source of that language, "had no occasion to answer" whether Section 7 reaches non-discretionary action. 551 U.S. at 670–71. Since 1979, Section 7 "requires the action agency to avoid acts that will more likely than not jeopardize a species. No more,

and no less." *Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 70 F.4th 582, 595–96 (D.C. Cir. 2023).

C. Section 10 Supplies Neither Authority nor Discretion

The majority distinguished *Home Builders* on the ground that "there is no statutory mandate in the Reclamation Act that imposes a specific and non-discretionary action conflicting with the ESA," leaving the contracts as the only claimed source of discretion. Op. at 29, 34. *Home Builders* itself identified that mandate. The very passage confining Section 7 to discretionary action cited *California v. United States* for "a statutory requirement that federal operating agencies conform to state water usage rules." *551 U.S. at 668–69*. That requirement is Section 8, which the majority never cites, relying instead on Section 10, which it read to confer "a broad authority to 'perform any and all acts . . . necessary and proper for the purpose of carrying out the provisions of [the Reclamation Act].'" Op. at 29 (quoting 43 U.S.C. § 373). But Section 10 only reaches acts that carry out the Act's provisions, Section 8 among them, and *Alpine Land* sustained Section 10 rulemaking only "provided that the state law beneficial use standards mandated by section 8 are followed." 887 F.2d at 212–13. To avoid *Home Builders*, the majority also confined it to cases in which "another federal *statute* mandates an action." Op. at 27 (emphasis added). But the discretion inquiry turns on "another *legal*

obligation," statutory or not. Dissent at 46 (emphasis in original) (quoting *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014) (en banc)). Section 8 is such an obligation. It yields only to a "directly inconsistent" congressional directive. *California*, 438 U.S. at 668 n.21.

Section 10 cannot be that directive. A clause that exists to carry the Reclamation Act's provisions into effect cannot be directly inconsistent with one of those provisions. If it were, Section 8 would bind Reclamation only when it chose to be bound. That leaves ESA Section 7, and under Home Builders it cannot be. The Clean Water Act commanded that EPA "shall" approve a transfer meeting nine criteria, and the Court held that engrafting a Section 7 tenth criterion "would effectively repeal § 402(b)'s statutory mandate." 551 U.S. at 663–64. Section 8's command that the Secretary "shall proceed in conformity with" state law is no less mandatory. If ESA Section 7 cannot override "shall" in one federal statute it cannot override it in another.

D. The Adjudication Denied the Instream Use Reclamation Now Claims

The ACFFOD binds the United States no less than the Orr Ditch decree bound it in *Nevada*, which held that decree precluded the Government's later suit for additional fishery water. 463 U.S. at 119, 143–45. The majority acknowledges that "the provisionally-determined rights decided in ACFFOD are enforceable under Oregon law." Op. at 40 (citing *Hawkins v. Haaland*, 991 F.3d 216, 222 (D.C. Cir.

2021)). The KBA "is in fact the sort of adjudication Congress meant to require the United States to participate in." *U.S. v. Oregon*, 44 F.3d at 770. In the Adjudication, Reclamation claimed and received a right to store water in UKL "for agricultural irrigation, stockwater and domestic uses." 9-KID_ER-001870; 9-KID_ER-001894. The rights to use the stored water were determined to belong to KID's landowners and other Project water users. 9-KID_ER-001871; 9-KID_ER-001892. The instream claims the United States asserted as trustee for the Klamath Tribes were denied, and the Klamath County Circuit Court affirmed: "[t]he Tribes do not have reserved in-stream rights for completely off reservation waters such as those they seek on the Klamath River." 18-KID_ER-004513; 9-KWUA_ER-2145, 2150.

The United States agrees that once water is "stored pursuant to Oregon law, Reclamation is significantly constrained in its discretion to release that water for any purpose other than that which is directed by the ACFFOD." 8-KWUA_ER-1941. Despite this, the majority asserted that the ACFFOD "did not determine the relative rights and priorities to Klamath Project water among users," whose rights instead "are governed by federal contracts." Op. at 13. The record refutes it: the Adjudication determined that Reclamation owns the right to store and that KID and other users own the rights to use. 9-KID_ER-001894; 9-KID_ER-001871; 9-KID_ER-001892.

The majority decision also conflicts with *Baley*. There the Federal Circuit recited that "the parties do not dispute that plaintiffs have put Klamath Project water to beneficial use and that the United States acquired the pertinent water rights for plaintiffs' use and benefit." *Baley,* 942 F.3d at 1326–27. And it affirmed the Court of Federal Claims, which found that "[n]owhere do the contracts purport to alter or otherwise impact any landowner's water rights." Baley, 134 Fed. Cl. 619, 655–56 (2017). In 2010, before the ACFFOD issued and on the litigation assumption that the United States held title, the Oregon Supreme Court held that the United States holds the Project water right "for the use and benefit of the landowners." 227 P.3d 1145, 1164 (Or. 2010). What was property when the United States was assumed to hold title is more plainly property now that the Adjudication has placed title to the use of stored water in the water users. The decision below inverts this, treating the contracts as the source of the users' rights and their shortage clauses as discretion to override them. Op. at 13, 34–37. Under *Baley*, curtailing these rights for ESA purposes is compensable unless justified by senior water rights. 942 F.3d at 1341. Under the decision below, the same curtailment implicates no property at all. Recasting adjudicated property rights as creatures of contract conflicts with the Federal Circuit. Fed. R. App. P. 40(b)(2)(C).

E. Patterson Cannot Substitute for the Required Authority Inquiry

Patterson predates *Home Builders* by eight years and the ACFFOD by fifteen, and rested on the assumption that Reclamation held the Project water rights. 204 F.3d at 1213. It cannot serve as the *source* of Reclamation's authority to use stored water after *Home Builders*, *Haaland*, and the ACFFOD. The majority held *Patterson* survives and controls; the dissent concluded it does not. Op. at 23–26; Dissent at 44–47. A panel may set circuit precedent aside only when it is clearly irreconcilable with intervening higher authority. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). Only the en banc Court can restore uniformity.

F. An Action Reclamation Has No Authority to Take Cannot Preempt State Law or Supply ESA Discretion

Preemption and discretion both presuppose federal authority. The action given preemptive effect is Reclamation's use of stored UKL water for instream purposes. Preemption arises only if Reclamation has authority to make that use, and Sections A through D show it has none. An agency cannot hold Section 7 "discretion" to do indirectly what it lacks authority to do directly, and an act an agency has no power to take cannot displace the state law forbidding it.

The holding also fails on preemption's own terms. Congress enacted Section 8 "to avoid serious constitutional questions regarding its authority to override the States' regulation of waters within their borders." *Wild Fish Conservancy v. Jewell*,

730 F.3d 791, 797 (9th Cir. 2013) (citations omitted). Under Section 8, state water law binds Reclamation unless "directly inconsistent with clear congressional directives regarding the project," and a "congressional directive" means "a preemptive federal statute." *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1131–32 (9th Cir. 1998). Houston's conflict was sharper than the one claimed here: a federal statute barred releasing Friant Dam water, and California law required releases for fish. This Court still refused to find preemption because the state law "could be implemented in a way that is consistent with Congress' plan." *Id.* at 1132.

The same is true here. Section 7(a)(2) commands an outcome, not particular means. 16 U.S.C. § 1536(a)(2). Nothing in the record establishes that taking stored water owned by others, without acquiring and paying for the necessary rights, is the only means of avoiding jeopardy, so there is no direct conflict and nothing to preempt. For the same reason, no ESA "discretion" could arise. The decision below inverts *Houston* without engaging it. Rather than construe the laws to avoid conflict or require proof that compliance with both is impossible, it construed the law and assumed facts to manufacture conflict and discretion.

II. The Holding That Standard Shortage Clauses Supply ESA "Discretion" Conflicts with Home Builders and Haaland.

No authority to make the use means no discretion to make it. KWUA develops this conflict, and KID joins it. KWUA Pet., DktEntry 160. *Home Builders* rests on

the regulation confining Section 7 to "discretionary Federal involvement or control." 50 C.F.R. § 402.03; 551 U.S. at 666–69. En banc, this Court held that "Section 7(a)(2) consultation is required so long as the federal agency has 'some discretion' to take action for the benefit of a protected species." *Jewell*, 749 F.3d at 779 (citation omitted). Applying it, *Haaland* holds that once Reclamation "has entered into a legally binding agreement, it has such discretion only to the extent permitted by the agreement's terms." 102 F.4th at 1074. A shortage provision "does not give Reclamation discretion to alter the Settlement Contract to benefit a listed species" but is "a force majeure clause that limits Reclamation's liability." *Id.* at 1075. The Klamath clauses are materially identical. Dissent at 49–52. Yet the majority held they show Reclamation "retains discretion" because the contracts are "premised on water availability," while insisting "[t]here is no issue of contract interpretation here." Op. at 33–37.

The majority answered that Haaland involved contract "execution" rather than "implementation." Op. at 30–32. As the dissent explains, that is "a distinction without a difference." Dissent at 47–48. The majority acknowledged that at least one contract imposes non-discretionary duties, a concession irreconcilable with a categorical, Project-wide rule. Op. at 35 n.6. At minimum, the panel should have remanded for the contract-specific analysis *Haaland* requires. Dissent at 53–55.

III. The Panel's Declaration Either Adjudicates Water Rights or Adjudicates Nothing, and Either Conclusion Warrants Rehearing.

The judgment must either adjudicate water rights or adjudicate nothing. The majority insisted that "neither we nor the district court have adjudicated any water rights." Op. at 38. Yet the judgment was entered on a cause of action seeking a declaration that ESA compliance "may require Reclamation to release water from UKL regardless of the water's classification under state law." 1-KWUA_ER-0005, -0020; 1-KID_ER-000075–79. The majority elsewhere declared the users' rights "are governed by federal contracts." Op. at 13. A decision replacing adjudicated water rights with contracts does not avoid adjudicating them.

If the declaration authorizes Reclamation to devote stored water to instream use despite the determined claims, it takes from the adjudicated owners the power to decide how their rights are exercised. That transfer "declar[es] that what was once an established right of private property no longer exists." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010) (plurality). Taking water for fish is compensable. *Int'l Paper*, 282 U.S. at 407; *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 324 (2001). The declaration also intrudes on the Klamath County Circuit Court's exclusive review of the ACFFOD. The majority avoided that conclusion by relying on *In re*

*Klamath Irrigation Dis*t. (In re KID), 69 F.4th 934 (9th Cir. 2023), while conceding it "does not bind us," Op. at 39, and never engaging Judge Baker's dissent. *Id.* at 945–58 (Baker, J., dissenting).

If instead the declaration leaves every right intact, it resolves only an abstraction. Federal courts "lack power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). The OWRD order was withdrawn, the United States abandoned its crossclaim position, and the Federal Appellees, KID, and KWUA all moved to dismiss and vacate. Op. at 20. On the majority's own account, its declaration does nothing, and the required course was dismissal and vacatur. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950); Op. at 38, 41 n.8. But if the declaration gives the parties "meaningful relief," that can only be because it determines who may use the stored water. The panel cannot hold the controversy live because its declaration matters and defend the merits by insisting it does not. Op. at 20, 38.

IV. Whether ESA "Applicability" Overrides Adjudicated Water Rights Is Exceptionally Important for Every Reclamation Project in the West.

"It is probable that no problem . . . is more critical than that of scarcity of water." *Arizona v. California*, 373 U.S. 546, 552 (1963). A water right fixes the priority, place of diversion, place of use, purpose, and rate of use. Or. Rev. Stat. §§

537.130(2), 540.510(1), 540.610(1). The ESA prescribes none of this and confers no water right on the United States. What authority Reclamation actually holds, under its water rights and its contracts, is the question no majority of this Court has answered. Judge Nelson writes that the majority "fails to grapple with the terms of those contracts." Dissent at 42. Judge Baker would have required Reclamation's federal defenses to be tested against the Adjudication's determinations, in the forum that made them. *In re KID*, 69 F.4th at 945–58. Judge Bumatay would have granted rehearing in KID II on the completed Adjudication's significance. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation* (*KID II*), 48 F.4th 934, 950–52 (9th Cir. 2022), *reh'g denied (Jan. 11, 2023)* (Bumatay, J., dissenting). Three dissents in four years raise the same question. Only the full Court can answer it.

CONCLUSION

The petition for rehearing en banc should be granted.

DATED this 3rd day of August, 2026.

Respectfully submitted,

RIETMANN LAW LLC

s/ Nathan R. Rietmann

Nathan R. Rietmann, OSB #053630
1270 Chemeketa St. NE
Salem, Oregon 97301

(503) 551-2740
nathan@rietmannlaw.com
Attorneys for Appellant KID

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Certificate of Compliance for Petitions for Rehearing/Responses

9th Cir. Case Number(s): 23-15499, 23-15521

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 40-1, the attached petition for rehearing en banc is (select one):

[X] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and contains the following number of words: 4,134.

(Petitions and responses must not exceed 4,200 words)

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/ Nathan R. Rietmann Date August 3rd, 2026

Nos. 23-15499 and 23-15521 (Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YUROK TRIBE; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; HOOPA VALLEY TRIBE,
Plaintiffs/Joined Cross-Claimants/Appellees,

and

UNITED STATES OF AMERICA,
Cross-Claimant/Counterclaim-Defendant/Appellee,

and

KLAMATH TRIBES,
Intervenor-Defendant,

v.

KLAMATH WATER USERS ASSOCIATION,
Crossclaim-Defendant/Counter-Claimant/Appellant,

and

KLAMATH IRRIGATION DISTRICT,
Joined Crossclaim-Defendant/Appellant,

and

OREGON WATER RESOURCES DEPARTMENT,
Crossclaim-Defendant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:19-cv-04405-WHO
Hon. William H. Orrick

APPELLANT KLAMATH WATER USERS ASSOCIATION'S PETITION FOR REHEARING EN BANC

BRITTANY K. JOHNSON, ESQ. (Cal. Bar No. 282001)
MAXIMILIAN C. BRICKER, ESQ. (Cal. Bar No. 350150)
SOMACH SIMMONS & DUNN, P.C.
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: (916) 446-7979
bjohnson@somachlaw.com
mbricker@somachlaw.com
Attorneys for Crossclaim-Defendant/Counter-Claimant/Appellant
KLAMATH WATER USERS ASSOCIATION

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I. Federal Rule of Appellate Procedure 40 Statement

Rehearing en banc is warranted because the panel decision conflicts with the U.S. Supreme Court decision *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (*Home Builders*). Rehearing en banc is also warranted because the panel decision conflicts with this Court's precedent in *Natural Resources Defense Council v. Haaland*, 102 F.4th 1045 (9th Cir. 2024) (*Haaland*), issued after the briefing concluded in this case.

The panel decision, issued over Judge Nelson's dissent, elevates the broad language in *Klamath Water Users Protective Association v. Patterson*, 204 F.3d 1206 (9th Cir. 1999) (*Patterson*), above more recent, controlling precedents while purporting to distinguish *Home Builders* and *Haaland* on untenable grounds. What is left is an unworkable legal framework in the Ninth Circuit to determine a threshold legal question in cases under the Endangered Species Act (ESA): what is nondiscretionary agency action to which Section 7(a)(2) of the ESA (Section 7(a)(2)) does not apply?

As the dissent explains, in *Home Builders*, the Supreme Court "adopted a new legal framework to determine whether the ESA applies to agency action." Slip op. at 43 (Nelson, J., dissenting). The Ninth Circuit, applying *Home Builders*, held that Section 7(a)(2) applies to agency action "so long as a federal agency retains 'some discretion' to take action for the benefit of a protected species." *Nat.*

Res. Def. Council v. Jewell, 749 F.3d 776, 784 (9th Cir. 2014) (*NRDC v. Jewell*) (quotation marks omitted). "The agency lacks discretion only if *another legal obligation* makes it impossible for the agency to exercise discretion for the protected species' benefit." *Id.* (emphasis added) (citation omitted).

Haaland then "clarified how we are to approach this analysis" when the nondiscretionary agency action at issue is the implementation of an executed contract. Slip op. at 42 (Nelson, J., dissenting), Dkt No. 156-1. "[O]nce the agency has entered into a legally binding agreement, it has such discretion only to the extent permitted by the agreement's terms." *Haaland*, 102 F.4th at 1074.

Applying this framework, this Court in *Haaland* held that a contract provision disclaiming liability based on water shortages are not sources of discretion. 102 F.4th at 1075-76. Yet, when considering the same legal question—whether the U.S. Bureau of Reclamation (Reclamation) retained discretion under contract terms—and materially identical contract language, the panel majority reached the opposite conclusion and refused to follow *Haaland*.

Based on *Haaland* and other recent precedents, in 2025, the United States recognized the need to update its legal position on how the ESA applies to Klamath Project operations and specifically whether its contractual obligations are nondiscretionary after *Haaland*. The updated guidance reached the same conclusions as the dissent: that Reclamation did not retain discretionary authority

in its executed contracts to take actions that could benefit listed species. Mot. to Dismiss, Ex. B, at 4-6, Dkt. No. 142.

Based on the updated guidance, the United States and Klamath Water Users Association (KWUA) moved to dismiss these appeals as moot. Mots. to Dismiss, Dkt. Nos. 142, 145. The panel denied the motions to dismiss, finding a decision would "provide meaningful relief by affecting how [ ] scarce water will be allocated . . . regardless of any new position that Federal Appellees take regarding the application of the ESA . . . ." Order 4, Dkt. No. 153. The parties have not had an opportunity to brief this Court on the important ESA issues in this case since the updated guidance was issued.

Rehearing is necessary to ensure the uniformity of this Court's decisions that apply to all ESA cases and correct the irreconcilable outcomes between the rules announced in *Home Builders, Haaland*, and the other prior Ninth Circuit cases on which *Haaland* is based, and the rule announced by the panel decision based on *Patterson*.

II. Issues for Rehearing

1. Whether the panel decision conflicts with the U.S. Supreme Court's precedent in *Home Builders* by interpreting *Home Builders* to provide for a "narrow exception" that applies only when another statutory mandate makes it impossible for an agency to comply with Section 7(a)(2)?

2. Whether the panel decision reaffirming *Patterson*'s broad language that Klamath Project operations are subject to Section 7(a)(2) conflicts with the U.S. Supreme Court's precedent in *Home Builders*?

3. Whether the panel's ruling that it is unnecessary to interpret the terms of Reclamation's contracts to determine whether Section 7(a)(2) applies to Reclamation's operation and supervision of the Project to deliver water to its irrigation contractors conflicts with the legal standard and analysis announced in *Haaland*?

III. Background

The Klamath Reclamation Project stores, diverts, and delivers irrigation water for approximately 200,000 acres of farmland, as well as two prized national wildlife refuges. Agriculture is the cornerstone of the Klamath Basin community, supporting family farms, farm employees, agriculture support businesses, food production, and main street.

Reclamation owns and operates Link River Dam, which stores and releases water in Upper Klamath Lake in Oregon. Two endangered sucker species inhabit Upper Klamath Lake, and threatened coho salmon inhabit the downstream Lower Klamath River in California. Reclamation owns certain works that divert and deliver water to farms, but all of the diversion and delivery system is operated by non-federal parties.

After authorization of the Project in 1905, Reclamation entered into contracts providing the terms and conditions of water delivery. With one exception, all relevant contracts require the contractor to repay an allocated share of the cost of construction of Project works and ongoing operation and maintenance. The United States agreed in the contracts to store, divert, and deliver water to the contractors.

Initially, these contracts were between Reclamation and individual landowners but, over time, Reclamation contracted with irrigation districts and water distribution entities as they were formed. Although there are nearly 200 contracts, approximately 80% of the irrigated acres in the Project that use Upper Klamath Lake and Klamath River water are served under contract with seven districts, the terms of which are described in detail in KWUA's opening brief. KWUA Br. 37-51, Dkt. No. 20. Terms included in those districts' contracts are representative of Project contracts as a whole. 6-KWUA_ER-1312. All of the Project contracts are in the district court's record and in KWUA's excerpts of record, and many have identical terms.

This case has a complicated procedural history, most of which is recited in the panel decision. Slip op. at 17-20. In 2021, the Oregon Water Resources Department (OWRD) issued an order prohibiting Reclamation from releasing water stored in Upper Klamath Lake to the Klamath River for instream ESA

purposes. The United States challenged the order in district court, arguing that the ESA preempts the Oregon state laws which OWRD attempted to enforce by issuing the order. KWUA counterclaimed against the United States, seeking declaratory relief regarding the scope of Section 7(a)(2) as it applies to the storage, diversion, and delivery of water for irrigation from the Project. 7-KWUA_ER-1719-22.

The core issue is *what* does Section 7(a)(2) require with respect to Klamath Project operations, which involves multiple actions, by multiple federal and non-federal parties, under contracts executed decades ago. The district court did not answer this question, which requires careful analysis of what actions are and are not discretionary. Instead, the district court found that Reclamation has broad discretion to allocate water among competing uses, including instream uses in the Klamath River to support threatened coho salmon. 1-KWUA_ER-0010-43.

The panel decision affirmed the district court's judgment. The panel decision found that a broad statement in *Patterson* that "the ESA generally applies to" Reclamation's operation of Link River Dam is controlling precedent. Slip op. at 23-26. The panel decision also found that nothing in *Home Builders* or *Haaland* affects the holding from *Patterson* that the ESA applies to the Klamath Project. *Id.* at 26-29.

In his dissenting opinion, Judge Nelson explained that declaring that Reclamation must comply with the ESA when operating the Klamath Reclamation Project is a truism. Slip op. at 42 (Nelson, J., dissenting). It does not address the legal framework adopted in *Home Builders* and further defined in *Haaland* to evaluate whether Reclamation's contractual obligations are nondiscretionary agency actions to which Section 7(a)(2) does not apply. *Id.* at 42-43. After reviewing the contract terms as *Home Builders* and *Haaland* require, Judge Nelson concluded that no statutory provision or contract provides Reclamation with discretion sufficient to trigger the ESA. *Id.* at 49-55.

IV. Argument

The panel opinion misstates the law on Section 7(a)(2) after the Supreme Court's decision in *Home Builders* and the Ninth Circuit's cases that followed and applied *Home Builders*. Rehearing is also necessary because the panel opinion conflicts with Ninth Circuit precedent that contractual obligations can be the basis of nondiscretionary agency action if the agency does not retain discretion to act for the benefit of listed species. Given the impact that the ESA has on major infrastructure and water supply projects in the western United States, this Circuit must provide clear guidance on the scope of Section 7(a)(2) to district courts, federal agencies, and project proponents.

A. The Panel's Ruling Directly Conflicts with the Legal Framework Adopted by the Supreme Court in *Home Builders* and Previously Applied in Ninth Circuit Cases to Evaluate Agency Discretion Under Section 7(a)(2)

The panel decision conflicts with *Home Builders* in two significant ways. First, it misstates the legal standard: instead of heeding the "new legal framework," as the dissent rightly recognizes, slip op. at 43, the majority attempts to reformulate *Home Builders* into a "narrow exception" that requires an incompatible *statutory* mandate, *see* slip op. at 27. But this Circuit has already recognized that other "legal obligations," including contractual obligations, can be the reason an agency lacks discretion to act for the benefit of listed species under the ESA.

Second, the panel majority states that "*Patterson* continues to govern the ESA's applicability to the Klamath Project," and there is "no reason to deviate from that holding." Slip op. at 24. *Patterson*'s broad language on the applicability of the ESA cannot be squared with the *Home Builders* framework, and the reference to *Patterson* as good law conflicts with controlling Supreme Court precedent.

1. The Panel Decision Improperly Formulated *Home Builders* Into a Narrow Exception that Requires a Conflicting Statutory Mandate

The panel decision restated the *Home Builders* precedent as confirming that there is a "baseline assumption . . . that Section 7(a)(2) applies to an 'agency action[,]' " but that there is a "narrow exception to this rule." Slip op. at 27. The

panel majority formulated the "narrow exception" to require a statutory mandate: "When another federal *statute* mandates an action that cannot be harmonized with the consultation requirement in Section 7(a)(2) of the ESA, then the federal agency has no discretion to consider the protection of the listed species in carrying out the other incompatible *statutory* mandate." *Id.* (emphasis in original) (citing *Home Builders*, 551 U.S. at 666, 673).

That reading of *Home Builders* is manifestly incorrect. The Court in *Home Builders* held that the federal regulation interpreting Section 7(a)(2) to apply only to "actions in which there is discretionary Federal involvement or control[,]" 50 C.F.R. § 402.03, is a reasonable interpretation that reconciles the conflict between Section 7(a)(2)'s requirement not to jeopardize listed species and the "*many mandatory agency directives* whose operation it would implicitly abrogate or repeal if it were construed as broadly as the Ninth Circuit did below."[1] *Home Builders*, 551 U.S. at 664-69 (emphasis added). That regulatory interpretation

[1] *Home Builders* reversed the Ninth Circuit decision in *Defenders of Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946 (9th Cir. 2005) (*Defenders*). In *Defenders*, the Ninth Circuit held that the Section 7(a)(2) obligation "is an obligation in addition to those created by the agencies' own governing statute" and that the regulation on "discretionary Federal involvement or control" was properly interpreted to be "coterminous" with the statutory language on actions "authorized, funded, or carried out" by a federal agency. *Id.* at 964-67, 970. The Ninth Circuit denied rehearing and rehearing en banc, with six judges dissenting from the denial of rehearing en banc. *Defs. of Wildlife v. U.S. Env't Prot. Agency*, 450 F.3d 394 (9th Cir. 2006).

"harmonize[d]" the two competing statutes in that case "by applying [Section] 7(a)(2) to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates." *Id.* at 666.

"As the mandatory language of [Section] 402(b) [of the Clean Water Act] illustrates, not every action authorized, funded, or carried out by a federal agency is a product of that agency's discretion." *Home Builders*, 551 U.S. at 668. And the nondiscretionary obligation competing with Section 7(a)(2) need not be an "inconsistent" statutory obligation. *See* slip op. at 27-28. Any "mandatory agency directive" has the same effect in eliminating agency discretion. *See Home Builders*, 551 U.S. at 666.

Accordingly, when this Court, sitting en banc, considered the impact of *Home Builders* on its ESA jurisprudence in *NRDC v. Jewell*, it held that "Section 7(a)(2)'s consultation requirement is triggered so long as a federal agency retains 'some discretion' to take action for the benefit of a protected species." 749 F.3d at 784 (citing multiple Ninth Circuit cases). But the "agency lacks discretion" whenever "*another legal obligation* makes it impossible for the agency to exercise discretion for the protected species' benefit." *Id.* (emphasis added) (citation omitted).

That legal obligation need not derive from a statute. This Court has long recognized that an agency's nondiscretionary legal obligations can be rooted in a

contract or a permit. *See Env't Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1079-83 (9th Cir. 2001) (holding that an agency did not retain sufficient discretionary control over an incidental take permit issued to a private company to compel implementation of measures beyond those required by the permit); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1511-12 (9th Cir. 1995) (Section 7(a)(2) does not "apply to an agreement finalized before passage of the ESA where the federal agency currently lacks the discretion to influence the private activity for the benefit of the protected species"). This holding was most recently confirmed in *Haaland*, discussed in detail below.

The majority believed that *Home Builders* does not apply here "because there is no statutory mandate in the Reclamation Act that imposes a specific and non-discretionary action conflicting with the ESA." Slip op. at 29. That ruling conflicts with Supreme Court and Ninth Circuit precedent, which does not limit the source of an agency's nondiscretionary obligations to statutes.

2. The Panel Decision Erroneously Followed *Patterson* Despite the Intervening and Conflicting Precedents in *Home Builders* and *Haaland*

The panel decision heavily relies on this Court's pre-*Home Builders* decision in *Patterson* as controlling precedent, stating that *Patterson* "continues to bind our decision, and we reaffirm that decision here." Slip op. at 25. The Court in *Patterson* reviewed the declaratory judgment entered in the district court regarding

issues of contract law. The case concerned the respective rights of Reclamation, PacifiCorp, and Project irrigators under a 1956 Contract between Reclamation and Copco (the predecessor to PacifiCorp) that governed the management of Link River Dam.[2] *Patterson,* 204 F.3d at 1209-10. The declaratory relief addressed whether the irrigators had rights as third-party beneficiaries under the contract and whether PacifiCorp incurred liability to the irrigators for implementing Reclamation's directives regarding operations. *Id.* at 1210-13. As part of that analysis, the Court responded to the Project irrigators' argument that PacifiCorp, as a private company, did not have a legal duty under the 1956 Contract to operate the Dam to meet Reclamation's ESA obligations. *Id.* at 1213. The Court stated the following:

> 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.

[2] The contract has since expired. *Patterson*, 204 F.3d at 1209 (noting the 50-year term of the Copco contract from 1956 to 2006). Reclamation now operates Link River Dam based on the Klamath Power and Facilities Agreement, and Congress has mandated that Reclamation comply with that agreement. *See* Klamath Basin Water Agreement Support Act of 2024, Pub. L. No. 118-246, 138 Stat. 2933.

Id. at 1213. This passage has been quoted repeatedly in the many cases arising from water management in the Klamath Basin. *See* slip op. at 25-26.

The dissent rightly recognizes that the "general conclusion reached in *Patterson* and relied on by the majority does not account for intervening precedent in *Home Builders* and its progeny." Slip op. at 45 (Nelson, J., dissenting). Regardless of whether the passage is dicta, and especially under the *Home Builders* framework, ownership and control over federal infrastructure is not dispositive of the question whether Section 7(a)(2) applies to a federal agency action. Contemporary Section 7(a)(2) consultations involve, and by regulation, require careful determination of an agency's legal obligations and whether the agency retains discretion to act for the benefit of species. *See* 50 C.F.R. § 402.02 (defining "effects of the action" and "environmental baseline"); Final Rule, 89 Fed. Reg. 24,268 (Apr. 5, 2024) (responding to Comment 5 and explaining that the Services "will work closely with the Federal action agency to understand the scope of their discretion in a particular case to inform those aspects of a Federal agency activity or facility that are a part of the 'environmental baseline' " and stating that the Services generally "defer to the Federal action agency's supported interpretation of their authorities for purposes of identifying" nondiscretionary activities).

Rather than scrutinize the continued relevance of *Patterson*, the panel decision insulates the broad statements in *Patterson* from intervening Supreme

Court and the Ninth Circuit precedents. It also creates a unique and "controlling legal precedent for Klamath Basin litigation." This outcome warrants rehearing en banc to secure and maintain a uniform legal framework for the Circuit.

B. The Ninth Circuit's Precedent in *Haaland* Compels a Careful Analysis of Reclamation's Contracts with Irrigation Districts

After briefing concluded in this case, this Court issued its decision in *Haaland*. *Haaland* considered the question whether an agency retained discretion under an executed contract to take measures that would inure to the benefits of the species. 102 F.4th at 1074. "An agency has discretion to benefit listed species where it retains authority to negotiate contract terms . . . But once the agency has entered into a legally binding agreement, it has such discretion only to the extent permitted by the agreement's terms." *Id.* (citations omitted). The Court then carefully analyzed the six contract provisions under which plaintiffs claimed Reclamation had discretion to benefit endangered salmon species. *Id.* at 1075.

One term was the "shortage" provision, which provided that "no liability shall accrue against the United States" due to a shortage of water "because of actions taken by the Contracting Officer to meet legal obligations." *Haaland*, 102 F.4th at 1075. The Court in *Haaland* found that:

> this provision does not give Reclamation discretion to alter the Settlement Contract to benefit a listed species. Rather, this is a force majeure clause that limits Reclamation's liability for damages in the event legal obligations are imposed on Reclamation that require it to breach the Settlement Contracts by reducing the diversion of water . . .

> The duty to comply with mandatory legal obligations is not a source of discretion.

Id. at 1075-76 (citing *Home Builders*, 551 U.S. at 669); *see also Haaland*, 102 F.4th at 1076 (explaining that a similar liability-limiting provision "does not allow Reclamation to alter the amount of water diverted at its discretion"). Judge Gould, as the dissenting judge in *Haaland*, disagreed and would have held that the liability-limiting provision granted Reclamation the ability to modify the terms of the contract. *Id.* at 1082-83 (Gould, J., dissenting).

The Klamath Project contracts contain provisions that closely parallel the shortage provision in *Haaland*.[3] Yet, the panel decision here, authored by Judge Gould, fixed on *Patterson* and found that "*Haaland*'s holding that the terms of the contracts at issue in that case" precluded agency discretion "does not bear on the question before us today . . . ." Slip op. at 37. Notwithstanding its declaration that "[t]here is no issue of contract interpretation here," slip op. at 33, the majority opinion went on to interpret the provisions in the Klamath Project contracts

[3] *See, e.g.*, 11-KWUA_ER-2666 ("On account of drought or other causes, there may occur at times a shortage in the quantity of water available in Project reservoirs and, while the United States will use all reasonable means to guard against such shortage, in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising therefrom and the payments to the United States provided for herein shall not be reduced because of any such shortages"); *see also* 11-KWUA_ER-2627; 10-KWUA_ER-2488-89; 11-KWUA_ER-2553; 11-KWUA_ER-2737-38.

limiting liability in the event of shortage. The majority distinguished the outcome in *Haaland* as "specific to the nature of the contracts" in *Haaland*. *Id.* at 35-36.

The panel decision conflicts with Ninth Circuit precedent: it refuses to follow *Haaland* and "fails to grapple" with the contract terms. *See* slip op. at 42 (Nelson, J., dissenting). The bases on which the panel decision attempts to distinguish *Haaland* are not persuasive. For example, the panel majority states that *Haaland* focused on the execution of renewed settlement contracts. *Id.* at 30. *Haaland* involved a failure-to-reinitiate claim, that is, a claim that Reclamation should have reinitiated consultation as to the implementation of the water contracts in that case "in light of new, post-contract information regarding the ecological effects to the Chinook salmon." *Haaland*, 102 F.4th at 1062. And to determine "whether Reclamation erred by failing to reinitiate consultation with NMFS, [the court] must determine whether Reclamation retained some discretion to take measures that would inure to the benefit of a protected species." *Id.* at 1074 (citation modified). This, of course, is the same question to determine whether Section 7(a)(2) applies to the operation of the Klamath Project to deliver water under Reclamation's contracts with irrigation districts and water users.

When the United States considered this question in the updated guidance for the Klamath Project, and reviewed the Klamath Project contract provisions in light of the precedent in *Haaland*, the United States reached the conclusion that it did

not retain discretion under the contract terms. Mot. to Dismiss, Ex. B, at 4-6, Dkt. No. 142. Specific to the "shortage" provision, the United States reasoned in the updated guidance that "the Klamath Project liability waivers have similar terms [to the contracts in *Haaland*] and must, therefore, be read as force majeure clauses which do not impart sufficient discretion to allow Reclamation to take action to benefit ESA-listed species." *Id.* at 5.

The panel decision fails to conduct the analysis required by *Haaland.* *Haaland* requires a careful review of the contract terms to consider whether Reclamation retained the power in its contracts to implement measures for the benefit of protected species, which the United States performed in its updated guidance after briefing and argument concluded in this case. By refusing to analyze the relevant contract terms, the panel has created a conflict with Ninth Circuit precedent, and the full Court's consideration is necessary to maintain uniformity of the Circuit's ESA jurisprudence.

V. Conclusion

For the reasons set forth above, the Court should grant rehearing en banc.

Date: August 3, 2025

SOMACH SIMMONS & DUNN, PC

s/ Brittany K. Johnson
Brittany K. Johnson
Attorneys for Crossclaim-Defendant/ Counter-Claimant/Appellant
KLAMATH WATER USERS ASSOCIATION

48 F.4th 934
United States Court of Appeals, Ninth Circuit.

KLAMATH IRRIGATION DISTRICT, Plaintiff-Appellant,
and
Shasta View Irrigation District; Tulelake Irrigation District; Klamath Water Users Association; Klamath Drainage District; Rob Unruh; Van Brimmer Ditch Company; Ben Duval, Plaintiffs,
v.
UNITED STATES BUREAU OF RECLAMATION; Deb Haaland, Secretary of the Interior, in her official capacity; Camille Calimlim Touton, Commissioner of the Bureau of Reclamation, in her official capacity; Ernest Conant, Director of the Mid-Pacific Region, Bureau of Reclamation, in his official capacity; Jared Bottcher, in his official capacity as Acting Area Manager for the Klamath Area Reclamation Office, Defendants-Appellees,
Hoopa Valley Tribe; The Klamath Tribes, Intervenor-Defendants-Appellees.
Shasta View Irrigation District; Tulelake Irrigation District; Klamath Water Users Association; Klamath Drainage District; Rob Unruh; Van Brimmer Ditch Company; Ben Duval, Plaintiffs-Appellants,
and
Klamath Irrigation District, Plaintiff,
v.
United States Bureau of Reclamation; Deb Haaland, Secretary of the Interior, in her official capacity; Camille Calimlim Touton, Commissioner of the Bureau of Reclamation, in her official capacity; Ernest Conant, Director of the Mid-Pacific Region, Bureau of Reclamation, in his official capacity; Jared Bottcher, in his official capacity as Acting Area Manager for the Klamath Area Reclamation Office, Defendants-Appellees,
Hoopa Valley Tribe; The Klamath

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Argued and Submitted December 7, 2021 San Francisco, California

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Filed September 8, 2022

Synopsis

Background: Irrigation districts brought action against Bureau of Reclamation seeking declaratory judgment that Bureau's operating procedures for federal irrigation project, which Bureau adopted to fulfill obligations arising under Endangered Species Act (ESA) and tribal treaties, violated Administrative Procedure Act (APA) and Reclamation Act. The Hoopa Valley and Klamath Tribes intervened as of right, but then moved to dismiss. The United States District Court for the District of Oregon, Michael J. McShane, J., 489 F.Supp.3d 1168, dismissed for failure to join required parties. Irrigation districts appealed.

Holdings: The Court of Appeals, Wardlaw, Circuit Judge, held that:

[1] Tribes were required parties;

[2] Tribes could not be joined due to tribal sovereign immunity; and

[3] case could not proceed in equity and good conscience in the Tribes' absence.

Affirmed.

Bumatay, Circuit Judge, filed concurring opinion.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (20)

[1] **Federal Courts** Parties

Court of Appeals reviews a district court's decision to dismiss a case for failure to join a required party for abuse of discretion. Fed. R. Civ. P. 19.

3 Cases that cite this headnote

[2] **Federal Courts** Parties

Court of Appeals reviews de novo any legal questions underlying a district court's decision to dismiss a case for failure to join a required party. Fed. R. Civ. P. 19.

1 Case that cites this headnote

[3] **Federal Courts** Statutes, regulations, and ordinances, questions concerning in general

Court of Appeals reviews the proper interpretation of a federal statute de novo.

[4] **Indians** Appeal or other review

Court of Appeals reviews issues of tribal sovereignty de novo.

[5] **Federal Civil Procedure** Necessary Joinder

Under rule governing required joinder of parties, an absent party has no legally protected interest at stake in a suit only to enforce compliance with administrative procedures. Fed. R. Civ. P. 19(a)(1).

4 Cases that cite this headnote

[6] **Federal Civil Procedure** Necessary Joinder

Under rule governing required joinder of parties, an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted. Fed. R. Civ. P. 19(a)(1).

[7] **Federal Civil Procedure** Indians

Hoopa Valley and Klamath Tribes were required parties in irrigation districts' action against Bureau of Reclamation seeking declaratory judgment that Bureau's operating procedures for federal irrigation project, which Bureau adopted to fulfill obligations arising under

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Endangered Species Act (ESA) and tribal treaties, violated Administrative Procedure Act (APA) and Reclamation Act, where Tribes' water rights were at a minimum coextensive with Bureau's obligations to provide water for instream purposes under ESA, Tribes' water rights could have been impaired if irrigation districts were successful in their action, and Tribes were in active litigation over degree to which Bureau was willing to protect Tribes' interests in several species of fish. 5 U.S.C.A. § 551 et seq.; Endangered Species Act of 1973 § 2, 16 U.S.C.A. § 1531; 43 U.S.C.A. § 383; Fed. R. Civ. P. 19(a)(1)(B)(i).

7 Cases that cite this headnote
More cases on this issue

[8] **Federal Civil Procedure** Necessary Joinder

Under rule governing required joinder of parties, an absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit. Fed. R. Civ. P. 19.

13 Cases that cite this headnote

[9] **Federal Civil Procedure** Necessary Joinder

Under rule governing required joinder of parties, three factors are relevant to whether an existing party may adequately represent an absent required party's interests: (1) whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments; (2) whether the party is capable of and willing to make such arguments; and (3) whether the absent party would offer any necessary element to the proceedings that the present parties would neglect. Fed. R. Civ. P. 19.

11 Cases that cite this headnote

[10] **Federal Civil Procedure** Indians

Bureau of Reclamation, as named defendant, did not adequately represent the interests of Hoopa Valley and Klamath Tribes, and thus Tribes were required parties in irrigation districts' action seeking declaratory judgment that Bureau's operating procedures for federal irrigation project, which Bureau adopted to fulfill obligations arising under Endangered Species Act (ESA) and tribal treaties, violated Administrative Procedure Act (APA) and Reclamation Act, even though Bureau and Tribes shared an interest in ultimate outcome of case, where Tribes' primary interest was in ensuring the continued fulfillment of their reserved water and fishing rights, while Bureau's primary interest was in defending its action taken pursuant to ESA and APA. 5 U.S.C.A. § 551 et seq.; Endangered Species Act of 1973 § 2, 16 U.S.C.A. § 1531; 43 U.S.C.A. § 383; Fed. R. Civ. P. 19(a)(1)(B)(i).

5 Cases that cite this headnote
More cases on this issue

[11] **Federal Civil Procedure** Indians

Bureau of Reclamation, as named defendant, did not adequately represent the interests of Hoopa Valley and Klamath Tribes on the basis of the federal government acting as a trustee for the federal reserved water and fishing rights of Native American tribes, and thus Tribes were required parties in irrigation districts' action seeking declaratory judgment that Bureau's operating procedures for federal irrigation project, which Bureau adopted to fulfill obligations arising under Endangered Species Act (ESA) and tribal treaties, violated Administrative Procedure Act (APA) and Reclamation Act; a unity of some interests did not equal a unity of all interests, and the Bureau and Tribes shared an interest in the ultimate outcome of case for very different reasons. 5 U.S.C.A. § 551 et seq.; Endangered Species Act of 1973 § 2, 16 U.S.C.A. § 1531; 43 U.S.C.A. § 383; Fed. R. Civ. P. 19(a)(1)(B)(i).

7 Cases that cite this headnote
More cases on this issue

[12] **Indians** Status of Indian Nations or Tribes

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Indians Government of Indian Country, Reservations, and Tribes in General

Native American tribes are domestic dependent nations that exercise inherent sovereign authority.

1 Case that cites this headnote

[13] **Indians** Sovereign Immunity

Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe.

[14] **Indians** Sovereign Immunity

Tribal sovereign immunity is a necessary corollary to Indian sovereignty and self-governance.

2 Cases that cite this headnote

[15] **Indians** Water Rights and Management

United States Water rights

Water Law McCarran consent to adjudicate water rights of United States in state court

The McCarran Amendment's waiver of federal sovereign immunity for state general stream adjudications and administrations reaches federal water rights reserved on behalf of Native American tribes, but only controls in cases adjudicating or administering water rights. 43 U.S.C.A. § 666(a).

1 Case that cites this headnote

[16] **United States** Water rights

Water Law McCarran consent to adjudicate water rights of United States in state court

Assuming that the McCarran Amendment's waiver of federal sovereign immunity for state general stream adjudications and administrations extends to Native American tribes as parties, the Amendment does not waive sovereign immunity in every case that implicates water rights. 43 U.S.C.A. § 666(a).

2 Cases that cite this headnote

[17] **United States** Water rights

Water Law McCarran consent to adjudicate water rights of United States in state court

Under the McCarran Amendment's waiver of federal sovereign immunity for state general stream adjudications and administrations, an "administration" of water rights occurs after there has been a prior adjudication of relative general stream water rights, but not every suit that comes later in time than a related adjudication amounts to an administration under the Amendment. 43 U.S.C.A. § 666(a)(2).

1 Case that cites this headnote

[18] **Indians** Sovereign Immunity

The McCarran Amendment's waiver of federal sovereign immunity for state general stream adjudications and administrations did not waive tribal sovereign immunity of Hoopa Valley and Klamath Tribes that were required parties for irrigation districts' action seeking declaratory judgment that Bureau of Reclamation's operating procedures for federal irrigation project, which Bureau adopted to fulfill obligations arising under Endangered Species Act (ESA) and tribal treaties, violated Administrative Procedure Act (APA) and Reclamation Act; case was not an administration of previously-determined water rights but instead was an APA challenge to federal agency action. 5 U.S.C.A. § 551 et seq.; Endangered Species Act of 1973 § 2, 16 U.S.C.A. § 1531; 43 U.S.C.A. §§ 383, 666(a); Fed. R. Civ. P. 19(a)(1)(B)(i).

2 Cases that cite this headnote

[19] **Declaratory Judgment** Grounds of motion

Indians Sovereign Immunity

Irrigation districts' action seeking declaratory judgment that Bureau of Reclamation's operating procedures for federal irrigation project, which Bureau adopted to fulfill obligations arising under Endangered Species Act (ESA) and tribal

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treaties, violated Administrative Procedure Act (APA) and Reclamation Act could not proceed in equity and good conscience without the joinder of Hoopa Valley and Klamath Tribes, as required parties, due to tribal sovereign immunity, and thus dismissal of action was warranted, where irrigation districts claimed senior water rights but Tribes sought to preserve their reserved water rights in those same waters. 5 U.S.C.A. § 551 et seq.; Endangered Species Act of 1973 § 2, 16 U.S.C.A. § 1531; 43 U.S.C.A. §§ 383, 666(a); Fed. R. Civ. P. 19(b).

4 Cases that cite this headnote
More cases on this issue

[20] Federal Civil Procedure Nonjoinder in general

Prejudice to any party resulting from a judgment militates toward dismissal of the suit due to nonjoinder of a party. Fed. R. Civ. P. 19(b).

***937** Appeal from the United States District Court for the District of Oregon, Michael J. McShane, District Judge, Presiding, D.C. Nos. 1:19-cv-00451-CL, 1:19-cv-00531-CL

Attorneys and Law Firms

Christopher A. Lisieski (argued) and John P. Kinsey, Wanger Jones Helsley PC, Fresno, California; Nathan R. Rietmann, Rietmann Law PC, Salem, Oregon; for Plaintiff-Appellant Klamath Irrigation District.

Richard S. Deitchman (argued), and Paul S. Simmons, Somach Simmons & Dunn PC, Sacramento, California; Nathan J. Ratliff, Parks & Ratliff PC, Klamath Falls, Oregon; Reagan L.B. Desmond, Clyde Snow & Sessions PC, Bend, Oregon; for Plaintiffs-Appellants Shasta View Irrigation District, Tulelake Irrigation District, Klamath Water Users Association, Klamath Drainage District, Rob Unruh, Van Brimmer Ditch Company, and Ben Duval.

Thane D. Somerville (argued) and Thomas P. Schlosser, Morisset Schlosser Jozwiak & Somerville, Seattle, Washington, for Intervenor-Defendant-Appellee Hoopla Valley Tribe.

Rachel Heron (argued) and John L. Smeltzer, Attorneys; Jean E. Williams, Acting Assistant Attorney General; Environment and Natural Resources Division; United States Department of Justice, Washington, D.C.; for Defendants-Appellees.

Jeremiah D. Weiner (argued), Rosette LLP, Sacramento, California, for Intervenor-Defendant-Appellee Klamath Tribes.

Before: Kim McLane Wardlaw, Daniel A. Bress, and Patrick J. Bumatay, Circuit Judges.

Concurrence by Judge Bumatay

OPINION

WARDLAW, Circuit Judge:

***938** This appeal concerns the distribution of waters in the Klamath Water Basin by the Bureau of Reclamation, which owns and operates the Klamath Project, a federal irrigation project. Shasta View Irrigation District, Klamath Irrigation District, and other irrigators, farmers, and water users appeal the dismissal of their action challenging Reclamation's current operating procedures, which were adopted in consultation with other relevant federal agencies to maintain specific lake levels and instream flows to comply with the Endangered Species Act and to safeguard the federal reserved water and fishing rights of the Hoopa Valley and Klamath Tribes. The Districts contend that compliance with those procedures violates the Administrative Procedure Act and the Reclamation Act because distributing water to fulfill the Tribal reserved waters deprives the Districts of waters they claim were lawfully appropriated to the Districts in a state adjudication proceeding. The Hoopa Valley and Klamath Tribes intervened as of right, but then moved to dismiss this action on the ground that they are required parties who cannot be joined due to their tribal sovereign immunity. Because the district court properly recognized that a declaration that Reclamation's operating procedures are unlawful would imperil the Tribes' reserved water and fishing rights, we affirm its conclusion that the Tribes were required parties who could not be joined due to their sovereign immunity, and, that in equity and good conscience, the action should be dismissed.

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I.

A. The Klamath Water Basin

The Klamath Water Basin (the Klamath Basin) stretches from south-central Oregon to northern California, occupying approximately 12,000 square miles. The Klamath Basin consists of a complex network of interconnected rivers, canals, lakes, marshes, dams, diversions, wildlife refuges, and wilderness areas.

Upper Klamath Lake (UKL), a major lake within the Klamath Basin, is shallow and averages only about six feet of usable water storage when full. Drought conditions in past years have led to "critically dry" conditions in the Klamath Basin, including ***939** in UKL. *See Baley v. United States*, 942 F.3d 1312, 1323–24 (Fed Cir. 2019). This problem has only grown more severe with time. Recently, the Klamath Basin has experienced "multiple extremely dry years that unfortunately appear to be the new normal."

The waters of the Klamath Basin serve as a critical habitat for several species of fish that are listed as endangered pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1531–1544, including the Lost River sucker and shortnose sucker. UKL, which comprises 64,000 acres, serves as the largest remaining contiguous habitat for endangered suckers in the Upper Klamath Basin. Due to "changing water elevation in [UKL] and recurring water quality problems," U.S. Dep't of the Interior, Off. of the Solic., Opinion Letter on 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) (Letter from the Solicitor); the population of endangered suckers has significantly declined. *See generally* U.S. Dep't of the Interior, Fish and Wildlife Serv., Biological Opinion on the Effects of Proposed Klamath Project Operations from April 1, 2019, through March 31, 2024, on the Lost River Sucker and the Shortnose Sucker, Opinion Letter (Mar. 29, 2019). The U.S. Fish and Wildlife service projected in 2019 that, over the next decade, "the [sucker] population [could] be[come] so small that it is unlikely to persist without intervention."

B. The Tribes

1. *Klamath Tribes*

Since time immemorial, the Klamath Tribes have utilized the water and fish resources of the Klamath Basin for subsistence, cultural, ceremonial, religious, and commercial purposes. *See United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983). In 1864, the United States and the Klamath Tribes entered into a treaty whereby the Tribes ceded their interests in millions of acres of land and retained a reservation of approximately 800,000 acres abutting UKL and several of its tributaries. The Klamath Tribes also retained "the exclusive right of taking fish in the streams and lakes included in said reservation, and of gathering edible roots, seeds, and berries within its limits." Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, art. 1, Oct. 14, 1864, 16 Stat. 707 (the 1864 Treaty).

We have acknowledged that "[i]n view of the historical importance of hunting and fishing, and the language of Article I of the 1864 Treaty ... one of the 'very purposes' of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle." *Adair*, 723 F.2d at 1409 (quoting *United States v. New Mexico*, 438 U.S. 696, 702, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978)). The fish resources—particularly the *C'waam* (Lost River sucker) and *Koptu* (shortnose sucker)—of the Klamath Basin play an especially important role in the lives of the Klamath Tribes. "The Tribes' water right includes the right to certain conditions of water quality and flow to support all life stages of [these] fish." Letter from the Solicitor at 5 (citations omitted). These rights "necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights." *Adair*, 723 F.2d at 1414 (citations omitted).

Time and again, we have affirmed the critical importance of the Klamath Tribe's water and fishing rights in the Klamath Basin and its distributaries. *See, e.g., Adair*, 723 F.2d at 1411 (recognizing that the Tribe's fishing rights include "the right ***940** to prevent other appropriators from depleting the streams['] waters below a protected level").

2. *Hoopa Valley Tribe*

The Act of April 8, 1864, ch. 48, 13 Stat. 39, authorized the creation of the Hoopa Valley Reservation, which is

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located in northern California along the Klamath River and its largest tributary, the Trinity River, as a permanent homeland for the Hoopa Valley Tribe (Hoopa). We have long held that traditional fishing is one of the central purposes for which, like the Klamath Reservation, the Hoopa Valley Reservation was created. *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995) ("Our interpretation accords with the general understanding that hunting and fishing rights arise by implication when a reservation is set aside for Indian purposes."). Generations of Hoopa have relied on the water and fish resources provided by the Klamath River and the Trinity River, which flow from the UKL, for cultural, religious, practical, commercial, and ceremonial purposes. *See Parravano*, 70 F.3d at 542 (noting that "the Tribes' salmon fishery was 'not much less necessary to [their existence] than the atmosphere they breathed' ") (quoting *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (alteration in original).

C. The U.S. Bureau of Reclamation

The U.S. Bureau of Reclamation (Reclamation), a federal agency housed within the U.S. Department of the Interior, oversees water resource management. The Reclamation Act authorizes Reclamation to carry out water management projects in accordance with state law regarding the control, appropriation, use, and distribution of water for irrigation purposes, except where state law conflicts with superseding federal law. 43 U.S.C. § 383. In 1905, the United States Reclamation Service, the predecessor to the Bureau of Reclamation, filed a notice of appropriation with the Oregon State Engineer, indicating its intent to utilize the waters of the Klamath Basin in accordance with the Reclamation Act, and began construction of the Klamath River Basin Reclamation Project (the Klamath Project). Today, Reclamation manages the Klamath Project in accordance with state and federal law.

Reclamation has the "nearly impossible" task of balancing multiple competing interests in the Klamath Basin. *Klamath Irrigation Dist. v. United States Bureau of Reclamation*, 489 F. Supp. 3d 1168, 1173 (D. Or. 2020). First, Reclamation maintains contracts with individual irrigators and the irrigation districts that represent them, under which the United States has agreed to supply water from the Klamath Project to the irrigators, "subject to the availability of water." Letter from the Solicitor at 7. Simply put, Reclamation cannot distribute water that it does not have. "Water would not be available, for example, due to drought, a need to forego diversions to satisfy prior existing rights, or compliance with other federal laws such as the Endangered Species Act." *Id.*

Reclamation is also responsible for managing the Klamath Project in a manner consistent with its obligations under the ESA. The ESA "requires Reclamation to review its programs and utilize them in furtherance of the purposes of the [Act]." Letter from the Solicitor at 9. Specifically, the ESA, among other obligations, requires federal agencies to consult with specified federal fish and wildlife agencies to ensure that "any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence" of any species listed for protection under the Act "or result in the destruction or adverse modification of" the species' critical habitat. 16 U.S.C. § 1536(a)(2). Since the early 2000s, Reclamation ***941** has incorporated operating conditions developed through consultation with federal fish and wildlife agencies to ensure that its operations do not jeopardize the existence of fish species protected by the ESA, including the Lost River sucker, the shortnose sucker, and the Southern Oregon/Northern California Coast coho salmon. These conditions include maintaining minimum lake levels in UKL and minimum stream flows in the Klamath River downstream from the lake to benefit the fish.

Finally, Reclamation must operate the Project consistent with the federal reserved water and fishing rights of the Klamath, Hoopa Valley, and Yurok Tribes that predated the Project and any resulting Project rights. "The [P]roject's 1905 water rights are junior to the reserved water rights of the tribes ...." Letter from the Solicitor at 2.

D. The Klamath Basin Adjudication

In 1975, the State of Oregon convened the Klamath Basin Adjudication (KBA) to adjudicate the relative rights of use of the Klamath River and its tributaries in accordance with its general stream adjudication law. *See* Or. Rev. Stat.§ 539.005. Oregon law required that all parties file claims of water rights and subjected contested claims to an administrative review conducted by the Oregon Water Resources Department and then judicial review conducted by the county circuit court. *See id.* §§ 539.021, 539.100, 539.130. For the purposes of the adjudication, a party is "[a]ny person owning any irrigation works, or claiming any interest in the stream involved ..." *Id.* § 539.100. Parties filed claims beginning in 1990, and administrative hearings began in 2001. *Baley*, 942 F.3d. at 1321.

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In 2013, the Adjudicator issued findings of fact and an order of determination, and in 2014, the Adjudicator submitted the Amended Corrected Findings of Fact and Order of Determination to the Klamath County Court (the ACFFOD). *See* Amended Corrected Findings of Fact and Order of Determination, In the Matter of the Determination of the Relative Rights to Use of the Water of the Klamath River and Its Tributaries, Oregon Water Resources Dept. (Feb. 28, 2014).[1] In accordance with Or. Rev. Stat. § 539.150, the Klamath County Circuit Court is currently managing hearings to approve or modify the ACFFOD. While the court holds these hearings, the ACFFOD regulates water use in the Klamath Basin. Or. Rev. Stat. §§ 539.130, 539.170.

E. Present Dispute

1. *Biological Opinions and Operating Procedures*

Reclamation issued a Biological Assessment in 2018 following consultation with the Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the Services) pursuant to section 7(c) of the ESA, 16 U.S.C. § 1536(c). The Biological Assessment evaluated the potential effects of Reclamation's plan to manage the Klamath Project on federally listed fish species. Reclamation subsequently amended its proposed action and adopted the Services' 2019 Biological Opinions, which analyzed the impact of the Amended Proposed Action on the sucker fish endemic to UKL, listed as endangered under the ESA, and the Oregon/Northern California coho salmon, listed as threatened under the ESA. In the Amended Proposed Action, Reclamation confirmed that it would continue using the water in UKL for instream purposes, including to fulfill its obligations under the ESA and to the Tribes, necessarily limiting the amount of water ***942** available to other water users who hold junior rights to the Klamath Basin's waters.

2. *The Water Users*

Klamath Irrigation District (KID) and Shasta View Irrigation District (SVID) (collectively, the Districts) are special irrigation districts in Oregon formed to deliver irrigation water from UKL to their members. Additional water users who are parties to this action include other irrigation and drainage districts, farmers, and landowners whose land is served by the Klamath Project. All private property interests held by the water users are held in trust by the United States for the use and benefit of the landowners. *Baley*, 942 F.3d at 1321.

II.

On March 27, 2019, KID and other water users filed this action for declaratory and injunctive relief against the Bureau of Reclamation and its officials. Shortly thereafter, SVID and other water users also filed a complaint for declaratory and injunctive relief against Reclamation and its officials, alleging similar claims. All parties stipulated to consolidate the two cases. KID and SVID sought a declaration that Reclamation's operation of the Klamath Project pursuant to the 2019 Amended Proposed Action based on the Services' biological assessments was unlawful under the Administrative Procedure Act (APA). KID and SVID also sought to enjoin Reclamation from using water from UKL for instream purposes and limiting the amount of water available to the irrigation districts.

The Hoopa Valley and Klamath Tribes successfully moved to intervene as of right, arguing that they were required parties to the suit. KID and SVID then filed Second Amended Complaints (SACs) seeking declaratory relief only.

The Districts asked the court, *inter alia*, to "[d]eclare Defendants [sic] actions under the APA unlawful" and "for declaratory relief setting forth the rights of the parties' rights [sic] under the ACFFOD, the Reclamation Act and the Fifth Amendment ...." Specifically, the Districts' SACs alleged that Reclamation's Amended Proposed Action failed to abide by the ACFFOD because Reclamation intended to use water stored in UKL for its own instream purposes without a water right or other authority under the laws of the State of Oregon, in violation of the APA and Section 8 of the Reclamation Act. The SACs also alleged that Reclamation's actions violated the APA and Section 7 of the Reclamation Act, which requires Reclamation to acquire property rights, such as the right to use water under Oregon law, through Oregon's appropriation process or "by purchase or condemnation under judicial process," using the procedure set out by Oregon law. Although the Districts' claims are framed as procedural challenges, their underlying challenge is to Reclamation's authority and obligations to provide water instream to comply with the ESA, an obligation that is coextensive with the Tribes' treaty water and fishing rights.

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The Tribes moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(7) for failure to join a required party under Federal Rule of Civil Procedure 19, arguing that tribal sovereign immunity barred their joinder. In a well-reasoned opinion, the magistrate judge recommended that the district court grant the Tribes' motions and dismiss this case, and on September 25, 2020, the district court adopted the magistrate's decision in full. This timely appeal followed.

III.

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331. ***943** We have jurisdiction over the district court's final judgment dismissing Appellants' complaints pursuant to 28 U.S.C. § 1291.

[1] **[2]** **[3]** **[4]** We review a district court's decision to dismiss a case for failure to join a required party under Rule 19 for abuse of discretion, and we review any legal questions underlying that decision de novo. *See, e.g., Alto v. Black*, 738 F.3d 1111, 1125 (9th Cir. 2013). We review de novo both the proper interpretation of a federal statute, such as the McCarran Amendment, *see United States v. Tan*, 16 F.4th 1346, 1349 n.1 (9th Cir. 2021), and issues of tribal sovereign immunity, *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 991 (9th Cir. 2020).

IV.

Failure to join a party that is required under Federal Rule of Civil Procedure 19 is a defense that may result in dismissal under Federal Rule of Civil Procedure 12(b)(7). We engage in a three-part inquiry. We first examine whether the absent party must be joined under Rule 19(a). We next determine whether joinder of that party is feasible. Finally, if joinder is infeasible, we must "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

A.

[5] **[6]** A party is a "required party" and must be joined under Federal Rule of Civil Procedure 19 if:

> "(A) in that [party's] absence, the court cannot accord complete relief among existing parties; or (B) that [party] claims an interest relating to the subject of the action and ... disposing of the action in [their] absence may: (i) as a practical matter impair or impede the person's ability to protect the interest ... or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."

Fed. R. Civ. P. 19(a)(1).

> "Although an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, our case law makes clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted."

Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs., 932 F.3d 843, 852 (9th Cir. 2019), *cert. denied*, —— U.S. ——, 141 S. Ct. 161, 207 L. Ed. 2d 1098 (2020). In this case, the Districts argue that, as a result of the ACFFOD, Reclamation has neither a right nor any other legal authorization to use water stored in the UKL reservoir for instream purposes, a claim that, "as a practical matter," would impair Reclamation's ability to comply with its ESA and tribal obligations.

[7] We have long recognized that the Tribes have "federally reserved fishing rights." *See Parravano*, 70 F.3d at 541. Indeed, in *Adair* we held that the Klamath Tribe has "the right to prevent other appropriators from depleting the streams waters below a protected level." *Adair*, 723 F.2d at 1411. In addition, the Federal Circuit has held that both the Hoopa and Klamath Tribes "have [ ] implied right[s] to water to the extent necessary for them to accomplish hunting, fishing, and gathering." *Baley*, 942 F.3d at 1337 (citation omitted). We agree with the district court that our case law establishes that the Tribes' water rights are "at a minimum coextensive with Reclamation's obligations to provide water for instream purposes under the ESA." Thus, a suit, like this one, that seeks to amend, clarify, reprioritize, ***944** or otherwise alter Reclamation's ability or duty to fulfill the requirements of the ESA implicates the Tribes' long-established reserved water rights. The Districts' invocation of the APA does not alone render this suit merely procedural. Put simply, if the Districts are successful in their suit, the Tribes' water rights could be impaired, so the Tribes are required parties under Federal Rule of Civil Procedure 19(a)(1)(B)(i).

B.

The Districts argue that the Tribes are not required parties to this suit because the Tribes' interests are adequately represented by Reclamation. We disagree.

[8] **[9]** "[A]n absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit." *Dine Citizens*, 932 F.3d at 852 (quoting *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013)). Whether an existing party may adequately represent an absent required party's interests depends on three factors: (1) "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments;" (2) "whether the party is capable of and willing to make such arguments;" and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Id.* (quoting *Alto*, 738 F.3d at 1127–28).

Three years ago, in *Dine Citizens*, we addressed the application of Rule 19 when an absent tribe that cannot be joined due to sovereign immunity has a legally protected interest that would be impaired by a successful suit to set aside agency action under the APA. In *Dine Citizens*, a coalition of conservation organizations sued the U.S. Department of the Interior over its reauthorization of coal mining activities on land reserved to the Navajo Nation. *Dine Citizens*, 932 F.3d at 847. The lawsuit specifically challenged agency approval of a variety of changes and renewals to the Navajo Transitional Energy Company's (NTEC) leases and mining permits on the grounds that the agency's actions violated the requirements of the ESA. *Id.* at 849–50. NTEC, a corporation wholly owned by the Navajo Nation, intervened for the limited purpose of filing a motion to dismiss under Rule 12(b)(7) for failure to join a party required under Rule 19 due to that party's sovereign immunity. *Id.* at 850. The district court granted the motion to intervene, then dismissed the case, concluding that "NTEC had a legally protected interest in the subject matter of [the] suit, because the 'relief Plaintiffs [sought] could directly affect the Navajo Nation ... by disrupting its 'interests in [its] lease agreements ...." *Id.* (internal quotation marks and citations omitted). We agreed with the district court, holding that:

> although an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, our case law makes clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted.

Id. at 852. We concluded that "[a]lthough Federal Defendants ha[d] an interest in defending their decisions, their overriding interest ... must be in complying with environmental laws such as ... the ESA. This interest differs in a meaningful sense from [the tribe's] sovereign interest in ensuring [continued access to natural resources]." *Id.* at 855.

[10] Under *Dine Citizens*, Reclamation's and the Tribes' interests, though overlapping, are not so aligned as to make Reclamation an adequate representative of the Tribes. The Tribes' primary interest is in ensuring the continued fulfillment of ***945** their reserved water and fishing rights, while Reclamation's primary interest is in defending its Amended Proposed Action taken pursuant to the ESA and APA. While Reclamation and the Tribes share an interest in the ultimate outcome of this case, our precedent underscores that such alignment on the ultimate outcome is insufficient for us to hold that the government is an adequate representative of the tribes.

In *Dine Citizens*, we distinguished *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998) (per curiam), which the Districts cite heavily in support of their argument that the Tribes are adequately represented by Reclamation. In *Southwest Center*, we held that the government was an adequate representative of a tribe in a suit brought to stall the government from utilizing a newly built dam pending further environmental study. 150 F.3d at 1154–55. We concluded that the government and the tribe shared the same interest in "ensuring that the [dam was] available for use as soon as possible." *Id.* at 1154. *Dine Citizens* was distinguishable because "while Federal Defendants [in *Dine Citizens* had] an interest in defending their own analyses that formed the basis of the approvals at issue, [ ] they [did] not share an interest in the outcome of the approvals." *Dine Citizens*, 932 F.3d at 855 (emphasis omitted). The present action is analogous. While Reclamation has an interest in defending its interpretations of its obligations under the ESA in the wake of the ACFFOD, it does not share the same interest in the water that is at issue here.

[11] The Districts argue that Reclamation is an adequate representative of the Tribes because the federal government acts as a trustee for the federal reserved water and fishing rights of Native American tribes. The Districts contend that this relationship results in a "unity of interest." But a unity

of some interests does not equal a unity of all interests. As discussed above, Reclamation and the Tribes share an interest in the ultimate outcome of this case for very different reasons. Further, our case law has firmly rejected the notion that a trustee-trustor relationship alone is sufficient to create adequate representation. *See id.*

Further, outside of this case, the Tribes are in active litigation over the degree to which Reclamation is willing to protect the Tribes' interests in several species of fish. This fact further increases the likelihood that Reclamation would not "undoubtedly" make all of the same arguments that the Tribes would make in this case, and would materially limit Reclamation's representation of the Tribes' interests. For all of these reasons, Reclamation is not an adequate representative of the Tribes, so the Tribes are required parties to this suit under Federal Rule of Civil Procedure 19.[2]

V.

The Districts argue that even if the Tribes are required parties under Rule 19, the suit should proceed because the McCarran Amendment waives the Tribes' sovereign immunity. We disagree.

[12] **[13]** **[14]** Native American tribes are "domestic dependent nations that exercise ***946** inherent sovereign authority." *Michigan v. Bay Mills Indian Comm.*, 572 U.S. 782, 788, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014) (internal quotation marks and citations omitted). "Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe." *Dine Citizens*, 932 F.3d at 856 (quoting *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008)). "That immunity ... is a necessary corollary to Indian sovereignty and self-governance," *Bay Mills*, 572 U.S. at 788, 134 S.Ct. 2024 (internal quotation marks and citations omitted), and is critically important for the protection of tribal resources.

[15] **[16]** The McCarran Amendment waives the United States' sovereign immunity in suits:

> (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. § 666(a). While the McCarran Amendment "reach[es] federal water rights reserved on behalf of Indians," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 811–12, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the Amendment only controls in cases "adjudicati[ng]" or "administ[ering]" water rights. 43 U.S.C. § 666(a). Even assuming the McCarran Amendment's waiver of sovereign immunity extends to tribes as parties, *but see Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 567 n. 17, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983), the Amendment does not waive sovereign immunity in every case that implicates water rights.

[17] An "administration" of water rights under 43 U.S.C. § 666(a)(2) occurs after there has been a "prior adjudication of relative general stream water rights." *See South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985). However, not every suit that comes later in time than a related adjudication amounts to an administration under the Amendment. *Cf. id.* at 542 ("The McCarran Amendment was ... not an attempt to resolve the whole field of water rights litigation."); *San Luis Obispo Coastkeeper v. U.S. Dep't of the Interior*, 394 F. Supp. 3d 984, 995 (N.D. Cal. 2019), *aff'd*, 827 F. App'x 744 (9th Cir. 2020) ("In sum, the purpose of the McCarran Amendment is not to waive sovereign immunity whenever litigation may incidentally relate to water rights administered by the United States. It is for determining substantive water rights by giving courts the ability to enforce those determinations ....").

[18] The parties do not dispute that the Klamath Adjudication that resulted in the ACFFOD is an adjudication within the meaning of the McCarran Amendment. Indeed, we agree that the Klamath Basin Adjudication was a McCarran Amendment case. However, the parties disagree as to whether *this* case is an administration of that general stream adjudication within the meaning of the McCarran Amendment.

The Districts argue that this case is, in effect, an enforcement action to ensure that Reclamation complies with the terms of the ACFFOD. Reclamation and the Tribes disagree. Reclamation argues this suit is not an administration because the KBA is ongoing and the present suit is not one to administer rights that were provisionally determined in the administrative phase of that adjudication. The Klamath Tribes argue that this suit is not an administration because, rather

than requesting that the government administer the various ***947** water rights at stake in the KBA in relation to one another, here the Districts seek to define the relationship between certain of the Districts' KBA-determined rights in relation to Reclamation's *obligations* under the ESA and the Reclamation Act.

We conclude that this lawsuit is not an administration of previously determined rights but is instead an APA challenge to federal agency action—specifically, Reclamation's Amended Proposed Action and Reclamation's authority to release water from Upper Klamath Lake consistent with the ESA and the downstream rights of the Hoopa Valley and Klamath Tribes. The Klamath Tribes argue that the rights adjudicated to them and others in the KBA do not define the extent of the Tribes' treaty-based interests in the water and fish resources of Upper Klamath Lake or its distributaries. And because Hoopa are a *California*-based tribe, their rights were not adjudicated in the *Oregon* KBA, so those rights cannot be "administered" in this proceeding within the meaning of the McCarran Amendment.

VI.

[19] Having determined that the Tribes are required parties under Federal Rule of Civil Procedure 19 that cannot be joined due to sovereign immunity, we consider whether this case should proceed in equity and good conscience. We agree with the district court that it should not.

To determine whether a suit should proceed among the existing parties where a required party cannot be joined, courts consider (i) potential prejudice, (ii) possibility to reduce prejudice, (iii) adequacy of a judgment without the required party, and (iv) adequacy of a remedy with dismissal. Fed. R. Civ. P. 19(b). Here, we are up against "a wall of circuit authority" requiring dismissal when a Native American tribe cannot be joined due to its assertion of tribal sovereign immunity. *See Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021) (internal quotation marks and citation omitted). In *Deschutes*, we considered whether the Clean Water Act could abrogate tribal sovereign immunity such that a tribe could be joined as a defendant in a citizen suit against Portland General Electric (PGE) over a hydroelectric project that PGE and the tribe co-owned and co-operated. In holding that sovereign immunity barred the tribe's joinder, we stated:

> The balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity.... If the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor .... [T]here is a wall of circuit authority in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity—virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternative] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.

Id. (alteration in original) (internal citations and quotations omitted).

[20] "[P]rejudice to any party resulting from a judgment militates toward dismissal of the suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (emphasis omitted). Reclamation and the Tribes argue that if the Districts succeed in this suit, the government will be unable, as trustee of the Tribes' water rights, to operate consistent with those rights, and this will imperil tribal water rights. Specifically, Hoopa argues that the government's, and therefore the Tribes', water rights are senior to those of the irrigators, ***948** but a decision for the Districts on the merits in this suit could threaten that understanding.

In some circumstances, a court may lessen the prejudice to a nonparticipating party, and therefore push the balance against dismissal, if it provides protective provisions in its judgment, thoughtfully shapes the relief it grants, or takes other ameliorative measures. *See* Fed. R. Civ. P. 19(b)(2). The Districts argue that the district court can carefully craft its declaratory judgment to grant the Districts relief "without forestalling Reclamation's ability to acquire and use whatever water it needs to satisfy whatever obligations it has."

However, there is no way to shape relief to avoid the prejudice here because the Districts' claims and the Tribes' claims are mutually exclusive. The Districts seek a declaration that they hold senior water rights from UKL following the ACFFOD, and the Tribes seek to preserve their reserved water rights in those same waters. For example, fulfilling the Districts' irrigation needs in the spring and early summer would require restricting the water flows necessary to limit disease in fish during that same period. *See Hoopa Valley Tribe v. Nat'l Marine Fisheries Servs.*, 230 F. Supp. 3d 1106, 1146 (N.D. Cal. 2017) (entering an injunction to make additional flow available from April 1 through June 15 to mitigate disease

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impacts). In cases involving competing claims to finite natural resources, courts have found that there is no way to shape relief to avoid prejudice. *See Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168, 1187–88 (W.D. Wash. 2014) (finding no way to eliminate prejudice to absent tribes where tribal claimant sought exclusive authority to manage and harvest all of treaty resources to the exclusion of other tribes); *Makah*, 910 F.2d at 560 (finding no way to shape remedy where only "adequate" remedy would be at expense of absent tribes). We also find no such path forward here, so this case must be dismissed in equity and good conscience.

VII.

Because the Tribes are required parties under Federal Rule of Civil Procedure 19 who cannot be joined due to sovereign immunity, and because this case in equity and good conscience should not proceed in the Tribes' absence, we **AFFIRM** the district court's dismissal of this action.

BUMATAY, Circuit Judge, concurring:

Our precedent requires us to affirm here. In *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, we made it "clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted." 932 F.3d 843, 852 (9th Cir. 2019). Given *Dine Citizens*, I agree with the majority that the Hoopa Valley and Klamath Tribes are necessary parties, they are entitled to tribal sovereign immunity, and the Irrigation Districts' actions must be dismissed under Rule 19(b) of the Federal Rules of Civil Procedure.

Yet I write separately because the Klamath Irrigation District's arguments on the McCarran Amendment are much closer than the majority presents. While I ultimately agree that this case is not a McCarran Amendment case, the analysis requires more attention. I thus join the majority opinion except for Section V.

The McCarran Amendment is a "virtually unique federal statute." *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 571, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983). It waives federal sovereign immunity in "any suit" for the "adjudication" or "administration" of the "rights to the use of water of a river system or other source." ***949** 43 U.S.C. § 666(a). The Amendment recognizes the "highly interdependent" nature of water rights and the costs of "permitting inconsistent dispositions" of such rights among different proceedings. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 819, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). By stripping sovereign immunity, Congress sought to "avoid[the] piecemeal adjudication of water rights" and to encourage their resolution in "unified proceedings." *Id.*

And the Supreme Court has construed the Amendment to strip sovereign immunity over tribal water rights held as "reserved rights" by the federal government. *United States v. District Court for Eagle Cnty.*, 401 U.S. 520, 524, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971). Based on its text and underlying policy, the Court has held that the Amendment "reach[es] federal water rights reserved on behalf of Indians." *Colo. River Water Conservation Dist.*, 424 U.S. at 811, 96 S.Ct. 1236. Because of the "ubiquitous nature of Indian water rights," the Court observed that it would frustrate Congress's will to exclude those rights from water-rights suits. *Id.* So, at its core, the McCarran Amendment grants parties an opportunity to resolve competing water rights, including against reserved tribal water rights, in any suit for the adjudication or administration of certain water rights.

Given the unique nature of the McCarran Amendment, our Rule 19 adequacy analysis necessarily changes too. *See Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013) (Under Rule 19, we typically look to see whether an absent party's "interest will be adequately represented by existing parties to the suit."). As the Court emphasized, in McCarran proceedings, the federal government retains "responsibility [to] fully ... defend Indian rights" and to ensure that "Indian interests [are] satisfactorily protected." *Colo. River Water Conservation Dist.*, 424 U.S. at 812, 96 S.Ct. 1236. Thus, by consenting to join tribal water rights in water-rights adjudications, Congress entrusted the stewardship of those rights to the federal government. And so, in my view, Congress has determined that the federal government adequately represents reserved tribal water rights for Rule 19 purposes in McCarran proceedings.

Putting these pieces together, if a case falls within the scope of the McCarran Amendment, then sovereign immunity over reserved tribal water rights is stripped and the federal government becomes an adequate representative to fully defend those rights in court. Such a situation would render dismissal under Rule 19(b) unnecessary.

The important question here is, thus, whether the Irrigation Districts have brought a suit subject to the McCarran Amendment. I ultimately conclude that this case is not

a McCarran Amendment case because of the presence of the Hoopa Valley Tribe. The Hoopa Valley Tribe is a California-based tribe whose interest in the Klamath River was not adjudicated in the Klamath Basin Adjudication. And "[l]ogically, a court cannot adjudicate the administration of water rights" unless "those rights" were first determined elsewhere. *S. Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985). In other words, if the Hoopa Valley Tribe's rights to Klamath River water in Oregon were never adjudicated, then there would be nothing to "administ[er]" here.[1] 43 U.S.C. § 666(a)(2). As a result, this case ***950** cannot be a McCarran Amendment "administration" case.

But things are different with the Klamath Tribe. The Klamath Tribe is in Oregon and the Klamath Basin Adjudication did rule on its water rights. *See United States v. Oregon*, 44 F.3d 758, 769 (9th Cir. 1994). So if the Irrigation Districts seek to "execute [the Klamath Basin Adjudication], to enforce its provisions, to resolve conflicts as to its meaning, [or] to construe and to interpret its language," *S. Delta Water Agency*, 767 F.2d at 541 (simplified), as to the Klamath Tribe, then this case would be a McCarran Amendment "administration." I thus disagree with the majority's suggestion that Administrative Procedure Act challenges or cases involving Endangered Species Act obligations can never be McCarran Amendment cases. *See* Maj. Op. Section V.

For these reasons, I concur in the majority opinion except for Section V.

All Citations

48 F.4th 934, 113 Fed.R.Serv.3d 1255, 22 Cal. Daily Op. Serv. 9362, 2022 Daily Journal D.A.R. 9638

Footnotes

1 The ACFFOD may be found at https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_00001.PDF (last visited Aug. 9, 2022).

2 KID argues that "even if the Tribes are somehow necessary parties to the APA claims seeking to administer the rights found in the ACFFOD ... the Tribes clearly have no interest in whether KID's procedural due process rights are being violated." Thus, KID argues, the district court erred by failing to separately analyze the application of Rule 19 to KID's procedural due process claim. We disagree. Because the Tribes assert that they have senior water rights, a ruling on KID's procedural due process claim would necessarily implicate the Tribes' water rights for the same reasons discussed above.

1 The Klamath Irrigation District contends that the Hoopa Valley Tribe has no rights to Klamath River water in Oregon. That might be so, but that needed to be litigated in another water-rights proceeding—not here—for this action to be a McCarran "administration."

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THE NATIONAL ACADEMIES

REPORT IN BRIEF

December 2007

Fishes, Hydrology, and Ecology of the Klamath River Basin

The Klamath River basin in southern Oregon and northern California is the focus of a prominent conflict over competing uses for water in the American West. Management measures for the protection of threatened and endangered fish species in the basin that have left less water available for irrigation have increased tensions among farmers and other stakeholders and brought into question the scientific justification of these measures. Two National Research Council studies evaluate a series of federal scientific assessments and recommend scientifically justified approaches to the problem.

The Klamath River basin, spanning parts of southern Oregon and northern California, is a critical water resource for local residents and farms—as well as for two endangered and one threatened fish species. Regulatory actions resulting from a series of scientific assessments aimed at restoring these fish species have increased tensions among competing water users in the area since the late 1990s.

The Klamath River. SOURCE: W. L. Graf.

In 2001, the U.S. Bureau of Reclamation issued an analysis of a proposed operating regime for the Klamath Project, which diverts the basin's water for use in irrigation. The proposed regime could have resulted in reduced minimum water flows in the Klamath River and lower minimum water levels in Upper Klamath Lake. In response to this assessment, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service issued what are known as "biological opinions," which called for measures to increase the water flows and lake levels to protect threatened and endangered fish species. These measures effectively reduced the amount of water available for irrigation; the problem for irrigators was exacerbated by a very dry year in 2001.

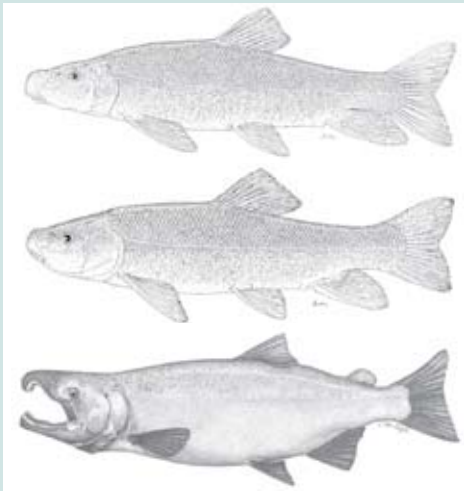
At the request of the U.S. Department of the Interior and the U.S. Department of Commerce, the National Research Council (NRC) convened a committee to assess the scientific support for increasing water flow and lake levels as a way to restore the fish populations. The committee's first (interim) report, *Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin: Interim Report* (2002), concluded that the available data did not justify the flow and water-level increases in the river and lake for protecting the fish species in the basin. The committee's final report, *Endangered and Threatened Fishes in the Klamath River Basin: Causes of Decline and Strategies for Recovery* (2004), recommended a broad approach to restoring the fish populations, by incorporating measures to address a multitude of contributing factors in the species' decline.

The NRC later convened a new committee at the request of the U.S. Department of the Interior to evaluate two new documents pertaining to the basin and its fishes. That

Threatened and Endangered Fishes in the Klamath River Basin

Three fish species lie at the heart of the Klamath River Basin conflict: the shortnose sucker (*Chasmistes brevirostris*), the Lost River sucker (*Deltistes luxatus*), and the coho salmon (*Oncorhynchus kisutch*). Once plentiful enough to support commercial fisheries, the shortnose sucker and Lost River sucker declined so much during the last half of the twentieth century that they were listed in 1988 as endangered under the federal Endangered Species Act. Although they spend most of their lives in lakes, fish of both species migrate or attempt to migrate into tributaries for spawning. Shortly after hatching, the young fish return to the lake, where they occupy shallow water at first and move to progressively greater depths as they mature.

The Klamath River's coho salmon population is part of the genetically distinct Southern Oregon/Northern California Coast population, which was listed as threatened in 1997. The coho salmon is an anadromous fish—it grows to adulthood in salt water but swims into freshwater streams to spawn. Juveniles spend the first 14-18 months of life in fresh water before migrating to the sea.



Lost River sucker (Top), shortnose sucker (Middle), coho salmon (Bottom). SOURCE: Drawn by A. Marciochi (coho salmon drawn by C. M. van Dyck). Copyright University of California Press.

Some of the factors that may have contributed to the decline of these species include: deterioration in water quality and degradation of spawning habitat in some areas, overfishing, introduction of exotic species, blockage of migration routes, and entrainment of fish in water-management structures. The threatened coho salmon also may be affected by changes in the seasonal water flow patterns, substantial warming of the main stem and tributaries, and continuing introduction of large numbers of hatchery-reared coho.

committee's report, *Hydrology, Ecology, and Fishes of the Klamath River Basin* (2007), evaluates the scientific assessments *Natural Flow of the Upper Klamath River* and *Instream Flow Phase II* (also known as *Hardy Phase II*). The committee's report also addresses the broader questions of the ecological needs of the basin's fishes and the importance of a comprehensive view of the basin's scientific needs.

History: Fish and Competing Water Uses in the Klamath River Basin

Federal Assessments

When species are listed as threatened or endangered under the Endangered Species Act, federal actions must be tailored to avoid causing harm to those species. The Act therefore requires that any action that could affect species listed as threatened or endangered have a scientific and technical justification to determine that it will not adversely affect those species. The burden for this justification falls mainly on the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, which have authority to issue biological opinions on proposed actions. If an action is judged to be harmful to the listed species, then the agency overseeing the action must deny the action or set conditions for its modification.

After the U.S. Bureau of Reclamation proposed an operating regime for the Klamath Project that could result in reduced minimum flows in the Klamath River and lower minimum water levels in Upper Klamath Lake, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service issued biological opinions on the proposal's potential implications for the basin's threatened and endangered fish species. The biological opinions concluded that lower flows and water levels would harm the listed species in the Klamath River basin and recommended that higher flows in the river and higher water levels in the lake be maintained for the benefit of the endangered and threatened fishes.

Federal agencies play several potentially conflicting roles in the management of the basin's water resources. While the U.S. Fish and Wildlife Service (of the Department of the Interior) and the National Marine Fisheries Service (of the Department of Commerce) are charged with protecting threatened and endangered species, the U.S. Bureau of Reclamation (of the Department of the Interior) is obligated to serve the needs of irrigators.

Competing Uses and Conflict

As with most water resources, the Klamath River basin supports a variety of water uses. Irrigation

water from the basin supports 220,000 acres of farmland; in addition to farmers, major stakeholders in the basin's water include commercial fishermen, Native Americans, conservationists, anglers, and hydropower producers.

In 2001, conflicts over the basin's water resources intensified when tighter restrictions on the use of water for irrigation coincided with a severe drought, severely impairing irrigated agriculture and causing substantial economic losses. The restrictions on water supply and the changes in water management were a source of great frustration to irrigators, causing many to bring into question the basis for the water management decisions.

Mass Mortality Events

Mass mortality events have affected several fish species in the basin. In 2002, about 30,000 migrating adult salmon were killed in the Klamath River by two common pathogens lethal to fish under stress. Most of the salmon killed were Chinook—which are not listed as endangered or threatened—but the event brought attention to the basin's ecological condition and intensified the controversy over the area's water operations.

Mass mortality events affecting suckers in Upper Klamath Lake have occurred for many decades. These are generally attributed to periodic algal blooms, which cause depletion of oxygen in the water. The authoring committee of the National Research Council report *Endangered and Threatened Fishes in the Klamath River Basin: Causes of Decline and Strategies for Recovery* (2004) found no relationship between water levels in Upper Klamath Lake and the frequency or severity of mass mortalities of suckers.

National Research Council Recommendations

The government asked the National Research Council to evaluate the federal assessments and biological opinions regarding water flows for Klamath River and lake levels for Upper Klamath Lake. The first report issued by the NRC, *Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin: Interim Report*, agreed with almost everything the opinions concluded, with two important exceptions. First, the NRC report found no clear scientific or technical support for the higher water-level or flow requirements. Second, the report also found no support for new operating practices that could have led to lower minimum water levels in Upper Klamath Lake or lower minimum flows of the Klamath River at Iron Gate Dam.

The second report issued by the NRC, *Endangered and Threatened Fishes in the Klamath River Basin: Causes of Decline and Strategies for Recovery*, concluded that, instead of focusing primarily on how water levels and flows affect the basin's threatened and endangered fish species, federal agencies should pay greater attention to other causes of harm to confront the root causes of the species' decline. The report identified several potentially effective initiatives to protect the fish, such as removing migration obstacles, improving habitat, and reducing summer water temperatures in the basin's tributaries. Both that report and a later report, *Hydrology, Ecology, and Fishes of the Klamath River Basin,* conclude that a more coherent, systematic, and comprehensive analysis of scientific and management needs for the basin should be conducted to identify the most important and urgent science needs to inform management decisions.

Recommendations Pertaining to the Natural Flow Study and Instream Flow Study

The most recent NRC report, *Hydrology, Ecology, and Fishes of the Klamath River Basin*, evaluates two recent studies that were designed to inform decision makers about the hydrology and fish ecology of the Klamath River basin. The first study, *Natural Flow of the Upper Klamath River* (here called the "Natural Flow Study") estimates the flows that would be observed if there were no agricultural development in the upper Klamath basin, in order to define the hydrologic conditions that supported the pre-development fish populations. The second study, *Instream Flow Phase II* (here called the "Instream Flow Study"), creates a model-based linkage between the hydrology and the resulting aquatic ecosystems that support the fish populations in the river.

The Natural Flow Study

Hydrology, Ecology, and Fishes of the Klamath River Basin concludes that the flows calculated in the Natural Flow Study are at best first approximations to useful estimates. Although the study does provide some basis for understanding natural flows in the basin, the NRC report identifies several fundamental shortcomings compromising the study's conclusions, including flaws in the construction and calibration of the model.

The Instream Flow Study

The estimates developed in the Natural Flow Study served as inputs to the Instream Flow Study, which investigates the relationship between water

flows and anadromous fish populations (including the threatened coho salmon). The most important outcome of the Instream Flow Study was that it indicated that increases in existing flows downstream from Iron Gate Dam probably would benefit fish populations. If these conclusions are borne out by future experimental studies, managers would be able to have greater confidence in the benefits of decisions to increase flows.

Hydrology, Ecology, and Fishes of the Klamath River Basin identifies some significant shortcomings of the Instream Flow Study, including the use of monthly data instead of daily, a lack of tributary analyses, and shortcomings in the study's experimental design. However, the report concludes that, despite these limitations, the flows recommended by the Instream Flow Study probably would have some beneficial effects on the suite of anadromous fishes in the Klamath River considered as a whole, although not necessarily for every species.

The Need for a Framework to Connect Science and Decision Making

Integrating science with effective decision making has been problematic in the Klamath River Basin as managers have struggled to deliver water to users, sustain downstream fisheries, and protect populations of threatened and endangered species. *Hydrology, Ecology, and Fishes of the Klamath River Basin* concludes that assessments including the Natural Flow Study and the Instream Flow Phase II are not likely to contribute effectively to sound decision making until political and scientific arrangements that permit more cooperative and functional decision making can be developed.

That report also identifies a need for a "big picture" perspective based on a conceptual model encompassing the entire Klamath River basin and its many components. It recommends that agencies, researchers, decision makers, and stakeholders together define basin-wide science needs and priorities to address the basin's science and management needs. When the science needs for the basin are better characterized, the individual studies necessary to create a sound science-based body of knowledge for decision makers and managers will be more easily identified.

A hopeful vision is that increased knowledge, improved management, and cohesive community action will promote recovery of the threatened and endangered fishes in the Klamath River Basin. Such an outcome could also provide a model for the nation.

Committee on Hydrology, Ecology, and Fishes of the Klamath River: Will Graf *(Chair)*, University of South Carolina; **Michael Campana**, Oregon State University; **George Mathias Kondolf**, University of California, Berkeley; **Jay Lund**, University of California, Davis; **Judith Meyer**, University of Georgia; **Dennis Murphy**, University of Nevada; **Christopher Myrick**, Colorado State University; **Tammy Newcomb**, Michigan Department of Natural Resources; **Jayantha Obeysekera**, South Florida Water Management District; **John Pitlick**, University of Colorado; **Clair Stalnaker**, U.S. Geological Survey (Retired); **Gregory Wilkerson**, University of Illinois; **Przemyslaw (Andy) Zielinski**, Ontario Power Generation; **David J. Policansky** *(Study Director)*, National Research Council.

Committee on Endangered and Threatened Fishes in the Klamath River Basin: William M. Lewis, Jr. *(Chair)*, University of Colorado; **Richard M. Adams**, Oregon State University; **Ellis B. Cowling**, North Carolina State University; **Eugene S. Helfman**, University of Georgia; **Charles D. D. Howard**, Consulting Engineer; **Robert J. Huggett**, Michigan State University; **Nancy E. Langston**, University of Wisconsin; **Jeffrey F. Mount**, University of California, Davis; **Peter B. Moyle**, University of California, Davis; **Tammy J. Newcomb**, Michigan Department of Natural Resources; **Michael L. Pace**, Institute of Ecosystem Studies; **J.B. Ruhl**, Florida State University; **Suzanne van Drunick** *(Project Director)* and **David J. Policansky** *(Associate Director and Senior Program Director for Applied Ecology)*, National Research Council.

This report brief was prepared by the National Research Council based on the committees' reports, *Hydrology, Ecology, and Fishes of the Klamath River Basin* (2007), *Endangered and Threatened Fishes in the Klamath River Basin: Causes of Decline and Strategies for Recovery* (2004), and *Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin: Interim Report* (2002). For more information or copies, contact the Board on Environmental Studies and Toxicology at (202) 334-3060 or visit http://nationalacademies.org/best. Copies of the reports are available from the National Academies Press, 500 Fifth Street, NW, Washington, D.C. 20001; (800) 624-6242; www.nap.edu.

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