

KLAMATH IRRIGATION DISTRICT

6640 K.I.D. Lane · Klamath Falls, Oregon 97603 · (541) 882-6661

SUBMITTED TO

Office of the National Ombudsman

U.S. Small Business Administration

Attn: Tiffany Younger Banks, Case Management Specialist

Key Documents from the Record

Twenty-eight documents — twenty-five drawn from the exhibit compilation accompanying the Klamath Irrigation District's memorandum, plus three supplemental items. Each is captioned with its source, and every page from the compilation carries its exhibit and page reference so it can be located in the full record.

SUBMITTED BY	Gene Souza, Executive Director
ENTITY	Klamath Irrigation District, a special government district
DATE	August 2026
FULL RECORD	Exhibits 1–36, approx. 1,043 pages, in three volumes

All documents are contained in this file. No external links are used.

What This Record Shows

1 Federal attorneys contracted for the curtailment six months before farmers were told anything.

On 29 September 2000 the Department of Justice opened an expert-witness agreement captioned “Matter — Klamath Project Curtailment of Water.” Deliveries were halted on 6 April 2001 — in a water year when Upper Klamath Lake stood above its long-term average and, by the week of the shutoff, near full pool. The expert retained under that agreement had told a federal task force that he worked for Mr. Anderson and the Bureau of Indian Affairs, and a Solicitor’s Office note of February 2000 reports Bob Anderson pressing DOJ to release his funding.

[Documents 1–4](#)

2 The science behind the curtailment was bought for tribal litigation, and did not survive independent review.

The same expert was retained under agreements captioned to water-rights adjudications worth more than \$850,000, pressed forward by Robert T. Anderson, then Counselor to the Secretary of the Interior, who appears by name in the funding records, for work he described as directly related to the United States’ reserved water rights claims. The National Research Council later found significant shortcomings in that work and concluded it was not likely to contribute effectively to sound decision making.

[Documents 5–8](#)

3 The downstream tribal rights were never filed in the adjudication that would have decided them.

The United States never asserted Winters rights for the Yurok and Hoopa Valley Tribes in Oregon’s general adjudication — a proceeding federal litigation had already kept from concluding for two decades — while asserting those same rights everywhere else. Interior’s own Solicitor later described ESA compliance as a “proxy” for the duty to the tribes. No statute created that regime, and the districts’ suit challenging it was dismissed without any ruling on the merits.

[Documents 9–16](#)

4 When Interior corrected itself, the correction was withdrawn — with Anderson back at the Solicitor’s Office — and the litigation continues.

Interior found in 2021 that water stored in priority for the Project is not available for re-allocation. That finding was withdrawn eleven weeks later and rescinded again in 2025. In between, deliveries went to zero, and water was borrowed for a ceremonial flow event in a year when no water at all was available to non-“A” contractors. The Tribe’s June 2026 complaint still refuses any quantification of its rights.

[Documents 17–28](#)

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Contents

What happened — and when it was arranged

1. Ex. 9 at 13 DOJ Form ENRD-236, 29 September 2000
2. UKL chart Upper Klamath Lake mean daily elevation, water year 2001
3. Ex. 9 at 6 Klamath River Basin Fisheries Task Force minutes, 1997
4. Ex. 9 at 8 Scott Bergstrom, DOI Office of the Solicitor, to DOJ, 3 February 2000

Who paid for the science, and what it was for

5. Ex. 9 at 9 Interagency Agreement AG6K000029, Department of Justice and Bureau of Indian Affairs
6. Ex. 9 at 10 DOJ Form ENRD-236, 18 February 2000
7. Ex. 9 at 11 Dr. Thomas Hardy to Department of Justice, 7 September 2000

The science did not hold up

8. Miller at 8 Miller Ecological Consultants, review of Hardy Phase I, 20 June 2001

The rights it served were never filed — and were asserted anyway

9. Ex. 18 at 6 Interior Solicitor memorandum, 14 January 2021
10. Ex. 6 at 5 Regional Solicitors Nawi and Peterson, 9 January 1997

The forum was kept from deciding

11. Ex. 1 at 22 Ninth Circuit, United States v. Adair (1983)
12. Ex. 5 at 5 Oregon Department of Justice to Water Resources Department, 18 March 1996
13. Ex. 6 at 11 Regional Solicitors Nawi and Peterson, 9 January 1997

The adjudication decided — and was disregarded

14. Ex. 13 at 5 Corrected Partial Order of Determination, Claims 671–673 (2014)
15. Ex. 11 at 21 Joint Biological Opinion, Klamath Project Operations, 31 May 2013

And no forum in which to challenge it

16. Ex. 35 at 9 Ninth Circuit, Klamath Irrigation District v. USBR (2022)

Interior agreed, then withdrew

17. Ex. 21 at 2 Secretary Bernhardt to Nathan R. Rietmann, 16 January 2021
18. Ex. 23 at 1 Secretary Haaland, 8 April 2021

What the farmers received

19. Ex. 16 at 10 Klamath Project districts to Solicitor Jorjani, 16 July 2020
20. Ex. 25 at 7 Reclamation to the Yurok Tribe, 2022 Annual Operations Plan, 11 April 2022
21. Ex. 26 at 6 Klamath Project 2022 Annual Operations Plan
22. Ex. 26 at 7 Klamath Project 2022 Annual Operations Plan

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Contents (continued)

The government reversed again

23. Ex. 29 at 1 Secretary Burgum memorandum, 10 February 2025

The ruling that stands — and the litigation that continues on a three-year cadence

24. Ex. 32 at 26 Ninth Circuit, Yurok Tribe v. Klamath Water Users Ass'n, 17 June 2026
25. Ex. 32 at 39 The same opinion, thirteen pages later
26. DOJ ENRD U.S. Department of Justice — published statement on the Klamath Project
27. Ex. 30 at 7 Joint Case Management Statement, Dkt. 1200, 12 June 2026
28. Ex. 31 at 7 Yurok Tribe Second Supplemental Complaint, 15 June 2026

Case name: "Matter — Klamath Project Curtailment of Water." \$5,200.00. Signed six months before deliveries were halted on 6 April 2001.

U.S. Department of Justice

ENRD Request, Authorization and Agreement for Fees and Expenses of Witnesses

Part 1 Request

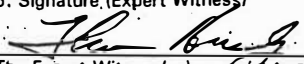
1. Name/Title of Recommending Official James Clear		1a. Signature Electronically signed by Kevin Kidwell for James Clear		2. Date 10/29/2000	
3. Person to be contacted		4. Case Name : Matter -- Klamath Project Curtailment of Water			
a. Name : Judith Rabinowitz		5. DJ File Number : 90-1-2-10086/1			
b. Telephone : (415) 744-6486		6. District : Oregon		7. Docket Number :	
8. Section IRS	9. Attorney Location San Francisco, CA		10. Contract Type Original		
11. Reason for Request Expert Testimony required on behalf of U.S.			12. Funding Source FEW		
13. Expert Name Thomas Hardy	14. Expertise Hydrology		15. Rates Per Hour	16a. Preparation \$130.00	16b. Testimony
17. Mailing Address Dr. Thomas Hardy Watershed Systems Group, Inc. 1656 University Drive Logan, UT 84341			18. Tax Information Tax Identification Number : 87-0560247		
			19. Phone : (435) 797-3127 20. Fax : 8-435-797-1185		
21. Anticipated Trial Date			22. Total Estimated S.O.W. Cost : \$5,200.00 Full Funding Reminder : Expert Witnesses are not entitled to advance payments		
23. Additional Information / Comments (Statement of Work attached, includes expense detail) The discontinued form OBD-47 with original attorney and recommending official authorizing signatures is maintained in the DOJ official contract file. The authorized funded amount shown in Part II, Item 2, shall NOT be exceeded without authorization and written modification of the Contract by the Government.					

ORIGINAL

Part II - Witness Authorization

1. Date : 09/29/2000		6. OBL Month : 0009	
2. Authorized Amount : \$ 5,200.00		7. SOC : 1157	
3. YREGDOC : 2000 - 01 - 40218		8. Approved by : Electronically signed by Terri Cahill	
4. Cost Center : 0361960413	5. FY : 2000	9. Approved on: 09/29/2000	

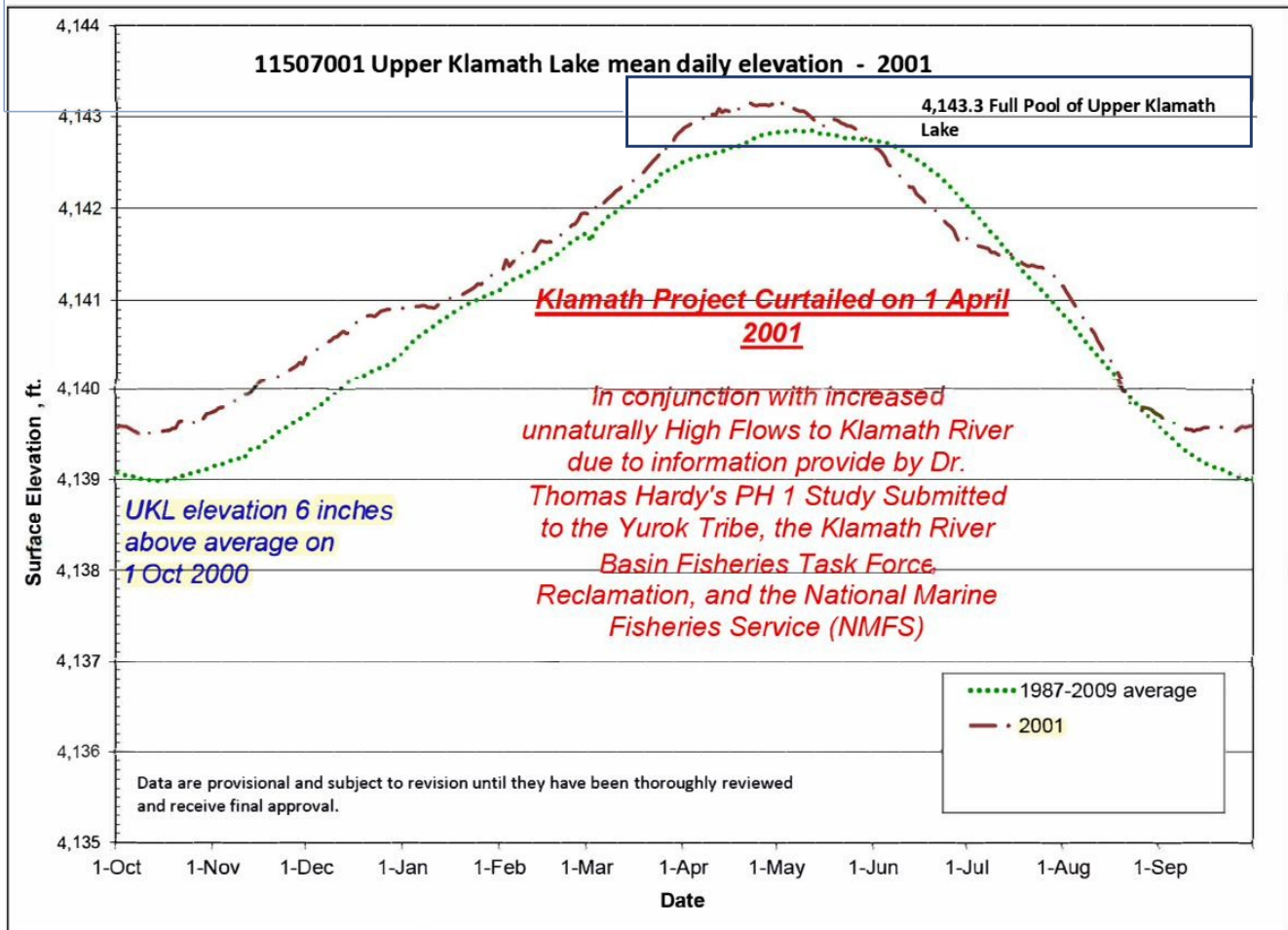
Part III - Witness Agreement

1. Witness Submit invoice to : USDOJ/ENRD Expert Witness Unit P.O. Box 685, Ben Franklin Station Washington, DC 20044		2. Auditors : (to be completed by Expert) a) None : b) Govt : c) Other (Name, City, State) :	
3. Signature (Government Attorney) Electronically signed by Kevin Kidwell for Judith Rabinowitz		4. Name/Title of Government Attorney Judith Rabinowitz, Attorney	Date 10/29/2000
5. Signature (Expert Witness) 		6. Name/Title of Expert Witness Thomas Hardy	Date 10/4/2000
The Expert Witness(es) agree(s) to perform the described services and appear as a witness/witnesses on behalf of the Government		All payments relating to this agreement shall be in accordance with the Prompt Payment Act.	

2. UKL CHART

Upper Klamath Lake mean daily elevation, water year 2001

USGS gage 11507001. Six inches above the 1987–2009 average on 1 October 2000, days after the curtailment contract was signed, and at or near full pool (4,143.3 ft) when deliveries were halted on 1 April 2001. Elevation reflects water held in storage, not water-year inflow. Supplemental figure; not part of the exhibit compilation.



Dr. Hardy: "I was already under contract with DOJ... But I work for Mr. Anderson and the Bureau of Indian Affairs."

adjudication which by law has to have every affected user included in these adjudications. That's what we are facing up in Oregon. The case has been in litigation for about 15 or 16 years. Now we are finally down to the point where claims have been filed by the United States and by all the private interests involved in the case. There are several types of claims. Claims that the United States has made on behalf of Tribes are two different types: one, instream flow claims that are largely above Upper Klamath Lake (UKL) to maintain fisheries habitat in Sprague, Williamson and other rivers.

Secondly, claims have been made to waters and certain lake levels in UKL in order to preserve habitat for the fish that are also listed under the Endangered Species Act. There is also a biological opinion by the FWS that addresses the minimum lake level for Klamath lake.

Thirdly, the United States filed claims on behalf of the Klamath Project the irrigation district claiming water for irrigation purposes. There are other claimants that are not associated with the irrigation district. They are also before the court and they are also part of this alternative dispute resolution process that Martha Pagel and the State of Oregon are spearheading. That process is set up by the State and has a three year time frame. They are very firm in terms of adhering to this three year time frame. Its parallel to the actual litigation and adjudication time frame that's being conducted before the Oregon Department of Water Resources. The litigation is ongoing, but most of the energy is being devoted to the actual negotiation in an attempt to resolve the issue by consensus. The problem we face is that one year from now the State of Oregon is obligated to report to an administrative judge here as to what its views are with respect to water rights claimed by the United States, the Tribes, and every other claimant involved in the adjudication. As part of the process, we are hopeful we'll have a settlement proposal to offer to the administrative law judge, in lieu of litigating the claims. Such a proposal would lay out first what the stream flows are that can be agreed on in the rivers above UKL. Then secondly, on the lake level and how the irrigation district would be dealt with as well as the other water users. In order to do that, we are going to need to study and obtain funding for water supply augmentation projects. There is a study group considering those alternatives. We have picked seven to eight of those out of that process and are trying to move those along on an accelerated basis.

There is a pretty good consensus between the irrigators and the Tribes of the United States and other affected users in the State of Oregon that certain projects such as raising UKL merit a hard look sooner rather than later. We are trying to get the BOR to study those projects. The problem is that the State of Oregon and the water users want to know that if we reach a settlement on the Oregon side of the border there are assurances that someone is not going to come back in six months, in a year, or in five years and say that more water is needed for tribal claims or require more water under the Endangered Species Act (ESA) for species proposed for listing. That is a reasonable question raised by the Oregon side. My response is to talk with folks within the DOI and get Thom Hardy on board to look at ideas that are already circulating as a result of your work and as a result of work done by the Tribes to provide an initial estimate of what Oregon's contribution to the mainstem should be. I would like to be in a position in about a year to propose a figure that could provide some level of certainty. We are not going to be able to write that in stone in one year, but I would like to be able to move a settlement forward on the Oregon side in two years and say what we expect your contribution to be and have a number based on Thom's work with you.

The Tribes have ideas about habitat improvement along the Sprague and Williamson rivers that will improve water quality flowing into Klamath Lake which will reduce the need to have a higher lake level. The FWS is interested in filling out the boundaries of the wildlife refuges particularly upstream of Klamath Lake. If we can acquire those properties, as anticipated, that will have a beneficial effect on water quality flowing into Klamath Lake as well. With all these water rights settlements that have gone before (there has been about 12 or 13 of them since the early 80's involving Indian water rights, BOR projects, and other interests) there is always an off-ramp. If we get to a point where some unforeseen circumstances arise and we need more water from Oregon, we are going to have to build in a mechanism that all bets are off and go back to court to adjudicate. In order to compensate for the lack of absolute certainty, we are going to have to build some flexibility into the number and the assurances so that Thom can get us a figure in two years, then as the work is going on, we can refine and make adjustments. If the State of Oregon comes back, or the private water users, or the Tribes say that is not enough and they want absolute certainty, then it will have to be resolved through litigation. In contrast to litigation, settlement possibilities will move along water augmentation and this would result in money to accomplish the projects.

Dr. Thomas Hardy (Utah State University): There is some confusion why the Department of Justice (DOJ) is involved. I was already under contract with DOJ, they used an existing contract. But I work for Mr. Anderson and the Bureau of Indian Affairs (BIA). The work needs to occur in two phases. Phase I is in the next few months. We are going to look at the historical context of flow in the basin. We can then make some flow recommendations that can be used within this year for water planning and give it to Mr. Anderson. First, we need to do a study to meet Mr. Anderson's needs under Oregon Alternative Dispute

Scott Bergstrom, DOI Office of the Solicitor, to DOJ, 3 February 2000

"the contractor has stopped work vitally needed... Bob Anderson and other DOI types hounding us to get this through asap."



United States Department of the Interior

OFFICE OF THE SOLICITOR
Division of Indian Affairs
1849 C Street N.W., Mail Stop 6456
Washington, D.C. 20240

Phone 202 208-6967
Fax 202 208-3490
Internet Scott_Bergstrom@ios.doi.gov

February 3, 2000

NOTE

To: Jim Clear, DOJ Indian Resources
Bob Bruffy (or DOJ Executive Officer)

From: Scott Bergstrom, DOI Solicitor's Office

Re: Klamath Interagency Agreement Modification

Please find enclosed five (5) original modifications to the existing Interagency Agreement between the Bureau of Indian Affairs and DOJ for Klamath River instream flow work. The modification adds funding to the existing Agreement. Jim - I understand from David Harder that you should have his okay via fax this morning (if not already).

Please expedite - the contractor has stopped work vitally needed to address scientific issues in the coming months pending completion of this Agreement, and David and I have Bob Anderson and other DOI types hounding us to get this through asap. If at all possible, please call myself or our secretaries for pick-up, today hopefully, after signing all five originals. Once the BIA contracting officer signs (which he insists must be after DOJ "accepts" the IA), I'll return an original to each of you (or, Jim, to David Harder). Please call my direct line - 208 5928 - if any questions. Thank you!

6067

INTER-AGENCY AGREEMENT
BETWEEN
SPECIAL LITIGATION COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE
AND
BUREAU OF INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR

PARTIES:

United States Department of Justice, Special Litigation Counsel (Justice Department), 601 Pennsylvania Avenue N.W., Washington, D.C. 20004 and United States Department of the Interior, Bureau of Indian Affairs (BIA), Director, Trust Responsibilities, 1849 C Street, MS-4559-MIB, Washington, D.C. 20240

PURPOSE

The material and testimony developed under this Inter-Agency Agreement (Agreement) will be used to support United States claims for water on behalf of the Hoopa Valley, Klamath and Yurok Tribes (Tribes) in administrative and potential legal proceedings which affect their fishery and associated water rights in the Klamath Basin, California and/or Oregon with regard to the development and implementation of the Klamath Project Operations Plan (KPOP). In order to assure that future use and development of tribal fishery and associated water rights are possible, non-Indian irrigation practices, as well as other water uses in the Klamath Basin, must be examined.

RECITALS

This Agreement is being entered into under the authority of 31 USC Section 1535 to inventory and evaluate previously conducted technical studies and to recommend additional studies to support water rights claims for the above referenced Tribes. The Justice Department will select a contractor or contractors who will provide the services described in the Scope of Work.

The Justice Department, the Department of the Interior Solicitor's Office (Solicitor's Office) and the BIA Central Office will monitor the work of the contractor or contractors to assure that all material and work is technically and legally acceptable.

BIA INTERAGENCY AGREEMENT
NO: AG6K000029 MOD #1

Department of Justice

ENRD Request, Authorization and Agreement for Fees and Expenses of Witnesses

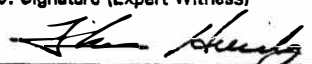
Part 1 Request

1. Title of Recommending Official James Clear		1a. Signature Electronically signed by Beverly Schutte for James Clear		2. Date 02/18/2000	
3. Person to be contacted		4. Case Name : Klamath River Basin Adjudication			
a. Name : David Harder		5. DJ File Number : 90-6-2-70			
b. Telephone : (303) 312-7328		6. District : Oregon		7. Docket Number :	
8. Section IRS	9. Attorney Location Denver, CO		10. Contract Type Original		
11. Reason for Request Expert Testimony required on behalf of U.S.			12. Funding Source Reimbursable Debtor Code : 0028 Client Agency : DOI BIA City : Washington, DC		
13. Expert Name Thomas B. Hardy	14. Expertise Hydrology Engineer	15. Rates Per Hour	16a. Preparation \$60.00	16b. Testimony	
17. Mailing Address Dr. Thomas B. Hardy Utah State University Contracts and Grants 2400 Old Main Hall Logan, UT 84322-2400		18. Tax Information Tax Identification Number : 87-6000528			
21. Anticipated Trial Date		19. Phone : (435) 797-3127 20. Fax : 1-435-797-3102			
		22. Total Estimated S.O.W. Cost : \$550,086.00 Full Funding Reminder : Expert Witnesses are not entitled to advance payments			
23. Additional Information / Comments (Statement of Work attached, includes expense detail) The discontinued form OBD-47 with original attorney and recommending official authorizing signatures is maintained in the DOJ official contract file. Agreement No. AG6K000029; Modification No. 6 X-Ref FY99-19065 ORIGINAL					

Part II - Witness Authorization

1. Date : 02/18/2000		6. OBL Month : 0002	
2. Authorized Amount : \$ 550,086.00		7. SOC : 2599	
3. YREGDOC : 2000 - 01 - 30018		8. Approved by : Electronically signed by Frits Geurtsen	
4. Cost Center : OB1595	5. FY : 2000	9. Approved on: 02/18/2000	

Part III - Witness Agreement

1. Witness Submit invoice to : USDOJ/ENRD Expert Witness Unit P.O. Box 685, Ben Franklin Station Washington, DC 20044		2. Auditors : (to be completed by Expert) a) None : b) Govt : c) Other (Name, City, State) :	
3. Signature (Government Attorney) Electronically signed by Beverly Schutte for David Harder		4. Name/Title of Government Attorney David Harder, Field Office Attorney	Date 02/18/2000
5. Signature (Expert Witness) 		6. Name/Title of Expert Witness Thomas B. Hardy	Date MARCH 7, 2000
The Expert Witness(es) agrees to perform the described services and appear as a witness/witnesses on behalf of the Government		All payments relating to this agreement shall be in accordance with the Prompt Payment Act.	

Dr. Thomas Hardy to Department of Justice, 7 September 2000

His work is "directly related to the United States' reserved water rights claims in the Klamath Basin General Stream Adjudication."

Watershed Systems Group, Inc.

1656 University Drive

Logan UT 84341

Telephone: 435-797-2824 (voice)

FAX: 435-797-1185

**ATTORNEY
WORK PRODUCT****Principals**

Craig Addley

Thomas Hardy

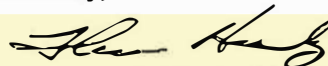
September 7, 2000

Dear Mr. Harder and Mr. MacFarlane:

You have asked me to provide you with a declaration in connection with litigation stemming from the Bureau of Reclamation's actions to ensure that the Klamath Irrigation Project in Oregon is operated in compliance with the Endangered Species Act and Reclamation's responsibilities to protect tribal trust resources. This litigation is directly related to the United States' reserved water rights claims in the Klamath Basin General Stream Adjudication before the Oregon Water Resources Department as well as the United States' ongoing efforts to quantify instream flow requirements for tribal trust resources below Iron Gate Dam. The declaration will be considered by the court to be my testimony.

It will take me 20 hours at a rate of \$130 per hour to complete the declaration. In addition, you will likely require 20 hours of my time for additional expert review and testimony. Thus, \$5,200 will cover my work to assist with this litigation.

Sincerely,



Dr. Thomas B. Hardy, Ph.D.

NOTE: Dr. Hardy at no time expressed his work would be to identify the critical habitat needs or biological needs for the coho salmon. His bias is clear in this statement to David Harder, Field Office Attorney.

Prepared for the Bureau of Reclamation, Klamath Falls, Oregon: "The INSE (1999) Phase 1 Report cannot be used, in my opinion, to identify ESA jeopardy, recovery, or sustained tribal harvest flows." Supplemental document; not part of the exhibit compilation.

system. Maintaining that productivity in the system and the ecological function of that productivity can be assessed using simple stream cross-section methodologies and appropriate ecological interpretation of the results. These simple cross section methods can provide information on physical changes in stream channel with flow volume and require only a short amount of time to apply. This physical descriptor of the stream channel could then be interpreted as to the biological implications of various flow regimes. These methods should have been given a higher priority especially since field data was available.

CONCLUSIONS

The INSE (1999) report derives interim flows from methodologies that are outdated and not necessarily the best that could have been used for deriving interim instream flows. The methodologies in at least three of the five cases were applied with modifications with no basis for the changes in application or methodology. Little or no explanation is given as to why, after applying each individual methodology, the results of those were averaged to determine the minimum instream flows. There is no biological interpretation on the various flow regimes derived from each method. That interpretation should have been included in the report to determine what the implications were to the biological system, not just the hydrology of the system.

The INSE (1999) Phase 1 Report cannot be used, in my opinion, to identify ESA jeopardy, recovery, or sustained tribal harvest flows. There is not enough detail on methodology and there is no indication in the report as to expected population changes with flow that would be needed to justify those flow regimes. To determine those ESA issues and tribal issues, a much more detailed analysis needs to be conducted.

The methods applied in INSE (1999) were intended for simple planning level flow recommendation, not a complex monthly flow regime. None of the methodologies were intended or designed to look at different types of water years, for example, dry years versus wet years.

The application of the Phase 1 instream flows is based solely on hydrology and ignores water quality, which may be a larger issue in limiting in the system. Bovee (1982) states that it is appropriate to determine limiting factors, including water quality, as part of the development of the instream flow levels. This was not completed by INSE (1999) although they do note in many places within the document that water quality, especially sediment and temperature, are major impacts and major impediments to the survival of the species of interest. Without rectifying the water quality issues prior to implementations of the instream flows, it is likely that the limitations can still occur and that there would not be a population response from the fish in the system until those water quality issues are rectified.

The tribes “could have asserted storage rights in the KBA, [but] no such rights were asserted.” ESA compliance served “as a proxy” for the minimum duty to the tribes.

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*.

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.

"The Yurok and Hoopa Valley Tribes in California hold unadjudicated water rights which vested at the latest in 1891" — and "a specific statutory directive is not needed for Reclamation to manage irrigation deliveries to protect senior tribal water rights."

STIPDX-007352

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.

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.

1. “Stay” of State Proceedings.

At the time the United States filed this action in the district court in September of 1975 there was no contemporaneous state proceeding of any kind to adjudicate water rights in the upper Williamson River watershed. Some months after the United States filed its suit in federal court, however, the Oregon State Water Resources Director issued a notice announcing that on Sept. 1, 1976, he would “begin an investigation of the flow and use of waters of the Klamath River and its tributaries”¹⁴⁰⁵ Under the Oregon scheme for adjudicating water rights, such a notice of investigation is one of the prerequisites to a state court determination of water rights. In addition, the Water Resources Director, after investigation, must decide that the “facts and conditions justify” making a determination of water rights. See Or.Rev. Stat. 539.020 (1981). At the time the district court ruled on defendants’ motion to dismiss the federal suit, none of the preliminary steps in the Oregon adjudication had been completed.⁸

Of equal or greater importance to our decision in this case, however, is the fact that even at this time, some seven years after the Oregon Water Resources Director issued his notice of investigation, the state determination of water rights in the Klamath Basin has not proceeded beyond administrative investigation. Indeed, the information-gathering stage of the procedure is not yet complete. In effect, the state proceeding has been stayed during the pendency of this federal suit. See *San Carlos Apache Tribe of Arizona* at ___, 103 S.Ct. at 3215.⁹

2. Duplication and Waste of Judicial Resources That Would be Occasioned by Dismissal of the Federal Suit.

As the Supreme Court in *San Carlos Apache Tribe* warned, “in a particular case ... the federal suit at issue [may be] well enough along that its dismissal would itself constitute a waste of judicial resources and an invitation to duplicative effort.” At ___, 103 S.Ct. at 3215.¹⁰ It is our opinion that this case presents precisely such a situation. First, we note that the district court carefully tailored its exercise of jurisdiction to decide only the priority among water rights created under federal law. See *infra* Section 11(C)(1)(c); see also *Moses H. Gone Memorial Hospital v. Mercury Construction*, 103 S.Ct. at 941. Second, the contemporaneous state proceeding for adjudicating water rights was, and still is, nascent. Finally, the district court has taken evidence, heard extensive argument from all of the parties, and developed a multi-volumed record on which to base its decision of the water rights questions presented by this case. Both the individual defendants as well as the intervenor, State of Oregon, have been offered, and have taken, a full opportunity to participate in all aspects of this litigation. The district court’s determination of water rights is more than “well enough along,” it is complete. Given this factual setting, it is clear to us that neither the policies of the McCarran Amendment, nor the interest of wise judicial administration would be served by a decision from this court reversing and vacating the district court’s judgment without reaching the merits. See *San Carlos Apache Tribe*, at ___, 103 S.Ct. at 3214.

3. The District Court’s Adjudication of Indian Water Rights.

In its Pretrial Order, the district court carefully outlined the issues it would decide and those it would leave to subsequent state adjudication. The court limited its determination to ordering the priority among reserved water rights arising under federal law. The district court explicitly anticipated that “[a]ctual quantification of the [reserved] rights to use of the waters of the Williamson River and its tributaries within the [federal] litigation area will be left for judicial determination, consistent with the decree in this action, by the State of Oregon under the provisions of [the McCarran Amendment].”

In so limiting its exercise of jurisdiction, the district court avoided passing on questions of state water law and indeed ruled only on those questions involving application of the federal Indian law doctrine of reserved water rights. Far from improperly intruding on the role of the state court, we find that in exercising federal jurisdiction in this fashion the district court coordinated its adjudication of water rights with adjudication by the state court so as to

3. Caselaw Access Project — 723 F.2d 1394 (official reporter text) — <https://static.case.law/f2d/723/cases/1394-01.json>

4. Casemine — United States v. Adair, 723 F.2d 1394 — <https://www.casemine.com/judgement/us/5914c36fadd7b049347c669a>

STIPDX-007396

Martha Pagel, Director
 Page 5
 March 18, 1996

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 *Rezakowski 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).³⁷

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

³⁷ 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).

Reclamation "will continue to have authority to manage and operate the Project consistent with its obligations after completion of the adjudication."

STIPDX-007358

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. Warm Springs 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.

Corrected Partial Order of Determination, Claims 671–673 (2014)

Oregon's adjudication denied the only tribal claims to instream flows in the mainstem Klamath River: off-reservation claims "are outside the scope of the federal reserved water right doctrine as a matter of law. The claims must be denied for this reason."

STIPDX-003633

10. Opinion. The Proposed Order's "Opinion" section is replaced in its entirety as follows:

It is undisputed that the each of the river reaches claimed in Claims 671, 672 and 673 (as well as the equivalent portion of Claim 612) lies entirely outside the boundaries of the former Klamath Indian Reservation. OWRD concludes that off-reservation water right claims are outside the scope of the federal reserved water right doctrine as a matter of law. The claims must be denied for this reason. It is therefore unnecessary to reach the other legal issues raised in this case.

The statutes and rules governing this proceeding place limits on OWRD's ability to modify or delete factual findings made by the ALJ. OWRD therefore incorporates all of the Proposed Order's factual findings by reference (irrespective of whether those findings appear in the designated "Findings of Fact" section), despite the fact that most of the findings are not relevant given OWRD's determination of the off-reservation water right claim issue.

OWRD's conclusion with respect to off-reservation federal reserved water right claims is discussed in detail below.

A. The Claimants' claims for off-reservation water rights are not supported by the underlying principles of the federal reserved water right doctrine

As is described in detail below, there is no federal precedent in support of off-reservation federal reserved water rights. Nor is there any basis for expanding the federal reserved water right doctrine to include implied off-reservation federal reserved water rights.

The federal reserved water right doctrine is judge-made law. It determines whether a court should imply that the federal government intended to create a water right when reserving a specific piece of land for a specific purpose, notwithstanding the fact that neither Congress nor the executive branch explicitly created a water right to benefit that land.

Recognizing the origins of the doctrine, the United States Supreme Court has found that federal reserved water right claims require "careful examination," both "because the reservation [of water] is implied, rather than expressed" and because, "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." *United States v. New Mexico*, 438 US 696, 701-02 (1978).

Allowing implied off-reservation federal reserved water rights would be at odds with this admonition. Recognition of such rights would give the implied right in water a greater scope than the explicit right in land. A federal reservation of land has an explicitly defined, geographically limited scope. The primary purposes of that reservation of land apply only within the reservation's explicitly defined boundaries. Recognition of implied off-reservation federal reserved water

Weeks after the adjudication concluded: its effects “are uncertain at present and will likely remain uncertain for several years. Therefore, the proposed action is not modified based on the Findings of Fact and Order of Determination.”

STIPDX-004728

Findings of Fact and Order of Determination. The potential effects of the Findings of Fact and Order of Determination on management of water in the Klamath Basin, including the Reclamation’s Project operations, are uncertain at present and will likely remain uncertain for several years. Therefore, the proposed action is not modified based on the Findings of Fact and Order of Determination. In the future, when the consequences of the adjudication are understood, the proposed action will be modified if necessary in accordance with parties’ legal rights to beneficial use of water.

2.2 History of Consultation

This joint BiOp is the culmination of a multi-year collaborative effort among Reclamation, the USFWS, and the NMFS to develop a new proposed action for ongoing operations of the Project. The need to reconsult was identified in 2010 when the issuance of the NMFS’s 2010 jeopardy BiOp with a RPA combined with Project water use resulted in UKL levels that were lower than analyzed by the USFWS in its 2008 BiOp on the Project. Reclamation and the Services agreed that under certain hydrologic conditions, Reclamation was unable to meet the water needs of the Project and the Services’ BiOps, resulting in conflicting requirements that were difficult for Reclamation to meet with actions under its discretion. Because there was a need to have coordinated BiOps for the Project, the USFWS Pacific Southwest Regional Director, the NMFS Southwest Regional Administrator and Reclamation’s Mid Pacific Regional Director met in November 2010 with their respective field office managers and directed them to develop a new proposed action and joint BiOp. The goal of this directive was to ensure the development of a workable proposed action and a joint BiOp that would allow Reclamation to continue to operate the Project to store, divert, and convey water to meet authorized Project purposes and contractual obligations in compliance with applicable State and Federal law while meeting the conservation needs of affected listed species in a coordinated manner.

A team of Federal resource managers was convened in early 2011 to establish an Agency Coordination Team. The Agency Coordination Team consists of hydrologists, biologists, managers from each agency, and support staff. The team met on over 25 occasions (see Table 2.1) and created a new paradigm and decision-making process for managing Reclamation’s Project in a manner that provides more certainty for Project water users, UKL elevations, and Klamath River flows than in the past.

The tribes' unquantified rights are "at a minimum coextensive with Reclamation's obligations... under the ESA" — making them required parties whose immunity bars suit.

Klamath Irrigation District v. United States Bureau of Reclamation, 48 F.4th 934 (2022)

113 Fed.R.Serv.3d 1255, 22 Cal. Daily Op. Serv. 9362, 2022 Daily Journal D.A.R. 9638

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\(a\)\(1\)\(B\)\(i\)](#).

Finding (d): water stored previously and in priority for the Klamath Project "is not available for re-allocation for the purpose of meeting these in-stream flow rights, even if they are senior."

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.

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.

STIPDX-000419



THE SECRETARY OF THE INTERIOR
WASHINGTON

APR 08 2021

Memorandum

To: Deputy Solicitor – Indian Affairs¹
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.

In the 2020 season 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.”

STIPDX-000556

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.

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).

STIPDX-000067

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 4,142.0² 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.

STIPDX-000109

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

STIPDX-000110

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

Secretary Burgum memorandum, 10 February 2025

Rescinding the April 2021 withdrawal of the Klamath Project memoranda and reopening examination of the Department's legal position.

Case: 23-15499, 05/14/2025, ID: 12929344, DktEntry: 141, Page 24 of 34



THE SECRETARY OF THE INTERIOR
WASHINGTON

February 10, 2025

Memorandum

To: Solicitor

From: Secretary

Subject: Recission of April 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,

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

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

U.S. Department of Justice — published statement on the Klamath Project

The Environment and Natural Resources Division states that litigation over Klamath operations is almost an annual event, and that Reclamation's ESA obligations may override delivery of water to Project irrigators. Citation card; not part of the exhibit compilation.

U.S. DEPARTMENT OF JUSTICE · ENVIRONMENT AND NATURAL RESOURCES DIVISION

“In light of the inability to store water in surplus years for use during shortage years, litigation regarding Klamath operations is almost an annual event, with the plaintiffs changing in relation to the Reclamation decision at issue.”

“Reclamation’s obligations to comply with ESA requirements may override the delivery of water to the Project irrigators.”

Source: “Klamath Project,” U.S. Department of Justice, Environment and Natural Resources Division, justice.gov/enrd/klamath-project (page last updated May 15, 2015). Text reproduced from the published page; this is a citation card, not a document image.

Plaintiffs cite their own 2016 action before the same court — Yurok Tribe v. Bureau of Reclamation, No. 16-cv-6863-WHO — as precedent for how the 2026 round should be briefed. Same plaintiffs, same court, ten years apart.

Case 3:19-cv-04405-WHO Document 1200 Filed 06/12/26 Page 7 of 19

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.

JOINT CASE MANAGEMENT STATEMENT

Case 3:19-cv-04405-WHO Document 1201 Filed 06/15/26 Page 7 of 44

1 2002 adult fish kill is one of the darkest events in Yurok history. It contributed to the shut down
2 or curtailment of most of the Tribal fishery from 2005 through 2006.

3 15. Tragedy struck again in 2014 and 2015 when monitoring revealed 81% and 91%
4 infection rates in sampled out-migrating juvenile salmon of *C. shasta*, a fish disease in juvenile
5 salmon that is often fatal. The salmon that survived to return as adults in 2016 and 2017 came
6 back in near-record low numbers, again shutting down the commercial Tribal fishery, leading to
7 another fishery disaster. In 2017, the Yurok Tribal Council also closed its fall subsistence
8 fishery. 2017 was the first time in history that Yurok Tribal members did not fish on the Klamath
9 River. From 2017 to the present, *C. shasta* has continued to plague the River and the Tribal
10 commercial fishery has been closed.

11 16. The Bureau's implementation of biological opinions and Klamath Project
12 operations plans that have been developed to comply with the ESA has reduced the harm to the
13 Yurok Tribe's fishery from water withdrawals from the Klamath Project and has supported, in
14 part, the Tribe's federal reserved water rights for its fishery, which have not yet been adjudicated

15 or quantified, but which vested in federal law upon establishment of the Reservation.

16 17. Pursuant to the Yurok Tribal Code, which requires that any waiver of sovereign
17 immunity be in writing and authorized by the Yurok Tribal Council, the Yurok Tribal Council
18 has adopted a resolution approving the following limited waiver of sovereign immunity for the
19 purposes of this supplemental complaint. The Tribe waives its sovereign immunity for the
20 limited purpose of resolving the issues presented in this supplemental complaint; specifically,
21 whether the 2026 Annual Operations Plan is unlawful because the Bureau has discretionary
22 involvement and control to provide flows to the Klamath River to sustain salmon, which requires
23 it to ensure its operation of the Klamath Project as a whole complies with the ESA, and because