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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
MEDFORD DIVISION

KLAMATH TRIBES,

Plaintiff,

v.

**UNITED STATES BUREAU OF
RECLAMATION,**

Defendant.

Case No.: 1:21-cv-00556-CL

**UNITED STATES BUREAU
OF RECLAMATION'S
OPPOSITION TO MOTIONS
FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY
INJUNCTION (ECF 2, 7)**

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Pursuant to the Court’s Minute Order of April 16, 2021 (ECF 12), the United States Bureau of Reclamation (“Reclamation”) hereby opposes the Klamath Tribes’ (“Tribes”) Motions for Temporary Restraining Order (ECF 2) and Preliminary Injunction (ECF 7).¹ As explained below, the motions should be denied because, as a threshold matter, this Court lacks subject matter jurisdiction to grant the requested relief due to the Tribes’ failure to comply with the notice requirement in the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g)(2)(A)(i), which establishes a jurisdictional bar to suit unless written notice of each alleged ESA violation has been provided at least 60 days prior to filing suit.² The Court’s lack of subject matter jurisdiction requires that the Tribes’ motions be denied without further consideration of the requests for emergency injunctive relief.³

¹ Citations herein to documents filed on the Court’s ECF system will refer to the ECF pagination in the top margin of the cited document, rather than to a document’s internal pagination.

² In addition, the Tribes’ motion for a temporary restraining order should be denied as a threshold matter because it requests relief beyond what is allowable under Rule 65(b) and is superfluous to the Tribe’s motion for preliminary injunction, which is being heard simultaneously. Rule 65(b) provides that temporary restraining orders are “not to exceed 14 days . . . unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension.” Fed. R. Civ. P. 65(b)(2). However, the Tribes’ motion for temporary restraining order requests a mandatory injunction dictating Upper Klamath Lake (“UKL”) elevations for “the rest of water year 2021” until “the start of water year 2022.” ECF 2 at 3-4; 2-1 at 3. Such relief could not be granted as a temporary restraining order. The Tribes’ motion for preliminary injunction requests the identical relief, and is being heard at the same time as the Tribes’ motion for temporary restraining order. *Compare id. with* ECF 7 at 3-4; *see also* ECF 2 at 3 (Tribes requesting a temporary restraining order “pending this Court’s resolution of the Tribe’s motion for preliminary injunction”).

³ In prior litigation before this Court, Project water users argued that water stored in UKL under Oregon state-law based water rights is immune from the ESA and cannot be released—or retained in storage—to meet the ESA’s requirements. On the motion of limited intervenors Klamath Tribes and Hoopa Valley Tribe, the Court granted dismissal of those lawsuits for failure to join the Tribes as necessary and indispensable parties due, among other things, to the effect the requested relief would have on those Tribes’ interests. *Klamath Irrigation Dist. v. U.S. Bureau of Recl.*, 489 F. Supp. 3d 1168 (D. Or. 2020), *appeal docketed*, No. 20-36009 (9th Cir. Nov. 19, 2020). Although the United States did not join in those motions and asserted that the

In addition to the lack of jurisdiction, the Tribes otherwise fail to satisfy the heightened requirements for the extraordinary request that they make of this Court to enter a mandatory injunction that would alter, rather than preserve, the status quo, and increase adverse impacts to species protected under the ESA and their critical habitat in the process.

I. Introduction

The Tribes make a truly extraordinary request of this Court, namely to order a departure from ongoing Klamath Project operations – on an emergency basis and in the context of an historic drought – to favor certain species over other species, all of which are listed under the ESA, at a time when there is simply not enough water in the Klamath Basin to fully meet the needs of all listed species simultaneously under natural conditions. Indeed, Reclamation has not authorized any diversions for irrigation from UKL to yet begin due to the severe drought, which is the worst on record. *See* ECF 24-5. Thus, insofar as the Tribes seek an immediate deviation from ongoing operations, they ask the Court to override months of extensive collaboration between dedicated professionals under extraordinarily challenging circumstances and

United States is generally the only required and indispensable defendant in Administrative Procedure Act (“APA”) litigation challenging federal agency action, it acknowledged that *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs* (“*Dine Citizens*”), 932 F.3d 843 (2019), *cert. denied*, 141 S. Ct. 161, 207 L. Ed. 2d 1098 (2020), was controlling authority under the current state of the law in the Ninth Circuit and supported dismissal of the complaints. The same holds true in the current case; while the United States remains of the position that it is generally the only required and indispensable defendant in APA litigation, *Dine Citizens* likely supports denial of the Klamath Tribes’ motions for emergency injunctive relief, given that the Yurok Tribe’s and the Hoopa Valley Tribe’s sovereign interests in their federal reserved fishing and associated water rights could be impaired by the requested relief.

The undersigned counsel for Reclamation have conferred with counsel for the Yurok Tribe and, based on those discussions, understand that, should the case proceed beyond the current motions for emergency injunctive relief, the Yurok Tribe intends to file a motion to intervene for the limited purpose of moving to dismiss on the grounds that Yurok is a necessary and indispensable party that cannot be joined due to their sovereign immunity. *See* 4/21/2021 email from Amy Cordalis to Robert Williams (copy attached as Ex. A).

reapportion water between upstream and downstream ESA-listed species, to the purported benefit of certain species over others.

The request should be denied because this Court lacks subject matter jurisdiction to grant it. The Tribes have not complied with the notice requirement in the ESA, 16 U.S.C. § 1540(g)(2)(A)(i), which establishes a jurisdictional bar to suit unless written notice of any alleged ESA violation has been provided at least 60 days prior to filing suit. The Tribes provided no notice at all of the alleged violation of ESA Section 7 asserted in their motions for provisional injunctive relief. And providing *prospective* notice of a *potential* violation of ESA Section 9, as the Tribes have done here, does not comport with the ESA's notice requirement, and hence does not confer jurisdiction to entertain their claim based on Section 9. The motions should be denied for lack of jurisdiction alone, without reaching the factors for emergency injunctive relief.

Moreover, the Tribes cannot carry their heavy burden to justify their extraordinary request. The Tribes are not likely to prevail on the merits of their claims because the water shortages being experienced in the Basin are the result of extreme natural hydrology, and not any unlawful action by Reclamation. At bottom, there is simply not enough water for all affected interests due to severe drought, and Reclamation is in the difficult position of trying to account for and manage these competing interests consistent with the requirements of the ESA. Reclamation's 2018 operations plan contemplates that, in times of shortage, it will manage operations in coordination with the consulting agencies and relevant stakeholders, and Reclamation has done just that.

Over the last several months, Reclamation has coordinated extensively with the expert agencies charged with administering the ESA – the U.S. Fish & Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) – to manage operations at Link River Dam in

an attempt to best meet the needs of all affected ESA-listed species in the face of a drought of historic proportions: Lost River and shortnose suckers, Southern Oregon/Northern California Coast (“SONCC”) coho salmon, and the Southern Resident killer whale. *See* ECF 24-17; 24-7. Generally speaking, water released from Link River Dam (located at the southern end of UKL) flows into the Klamath River. Salmon populations in the river and, in turn, killer whales in the ocean, are affected by downstream flows in the Klamath River, which in turn are affected by Project operations at Link River Dam, particularly the stretch between UKL and Iron Gate Dam. Diverting or releasing water from UKL through Link River Dam to increase Klamath River flows for salmon lowers UKL levels for suckers, a potentially detrimental impact. Thus, the Lost River and shortnose suckers have countervailing needs to those of the SONCC coho salmon and killer whale.

Recognizing that “[c]ritically dry and extraordinary hydrologic conditions in the Klamath River Basin will prevent full simultaneous satisfaction of requirements for ESA-listed species in [UKL] and the Klamath River” “even without water deliveries to the Klamath Project (Project),” Reclamation has prepared Temporary Operating Procedures (“TOP”) to manage operations in spring and summer 2021 through the drought (April 15 through September 30). *See* ECF 24-17 at 2-3; 24-7 at 2-3. Currently, Reclamation’s operations at Link River Dam are supporting the minimum Klamath River flows specified in Reclamation’s 2018 operations plan, which NMFS concluded in a biological opinion (“BiOp”) were not likely to jeopardize the continued existence of the SONCC coho salmon or the Southern Resident killer whale or destroy or adversely modify any designated critical habitat. Though Reclamation’s TOP do not propose deviations from minimum Klamath River flows analyzed in the NMFS BiOp, in an attempt to preserve UKL elevations regarding suckers according to the elevations analyzed in FWS’ BiOp, Reclamation

has made the implementation of a surface flushing flow in the Klamath River (designed to reduce the risks of disease to salmon) conditional and extended the window for potential implementation of a such flow to later in the season (*i.e.*, June 1). ECF 24-17 at 4; 24-7 at 4. Reclamation has acknowledged that the TOP are “unlikely to satisfy all groups but believes that the TOP represent a good-faith effort, developed collaboratively, to meet as many of the competing needs as is practicable” in this dire water year. *Id.* at 5. “Reclamation will continue to monitor hydrologic conditions relative to operation of the Project and coordinate further with the Services as new information becomes available.” *Id.*⁴

Reclamation’s actions and operations demonstrate a firm commitment to best meet the requirements of the ESA for all species under current severe drought conditions, and the Court should decline the Tribes’ extraordinary request to upset this delicate balance. In 2018, the Tribes sought a preliminary injunction against Reclamation to alter Klamath Project operations based on claimed violations of ESA Section 9 and 7, and it was denied for failure to satisfy the requisite factors. *Klamath Tribes v. U.S. Bureau of Recl.*, No. 18-cv-03078-WHO, 2018 WL 3570865 (N.D. Cal. July 25, 2018). Here again, the Tribes ask this Court to grant an emergency preliminary injunction based on claims that are not likely to succeed, and without showing that

⁴ Reclamation’s ability to meet ESA requirements is further impaired by the fact that, on April 15, 2021 the Klamath Drainage District (“KDD”) began making unauthorized irrigation diversions from the Klamath River in contravention of the TOP and Reclamation’s prior notifications to Project water users that irrigation water was not available for diversion. *See, e.g.*, ECF 24-12; ECF 24-13. As a consequence of KDD’s unauthorized diversions, which remain ongoing, Reclamation to date has had to increase releases from UKL contemplated under the TOP by a commensurate amount to maintain Klamath River minimum flows consistent with NMFS’ BiOp, thereby causing additional decreases in UKL elevations contrary to FWS’ BiOp. On April 16, 2021, Reclamation advised KDD that “[a]ny diversions, including charging canals in preparation for delivery of water to irrigators, is contrary to the direction given by Reclamation to Project irrigators, including KDD, and in violation of federal law.” ECF 24-15 at 2. Reclamation is currently evaluating all available enforcement options regarding these unauthorized diversions.

the requested relief would prevent likely irreparable harm. In addition, unlike before, here the Tribes ask the Court to grant relief that is likely to increase harms to ESA-listed species that depend on Klamath River flows.

The Court should not issue an injunction that lessens protections for certain listed species in an attempt to bolster protections for others. Indeed, last spring it was the Yurok Tribe in California that went to court in the midst of a severe drought to seek a temporary restraining order – over the Klamath Tribes’ objections – compelling Reclamation to make additional releases from UKL for coho salmon protection, which Reclamation had declined to make in order to preserve UKL elevations for the protection of suckers. The court declined Yurok’s request, observing that:

[W]ater in the UKL is dangerously low, threatening endangered suckers. Water allocated to irrigation has been significantly reduced. [] That requires the Bureau to exercise its discretion under the Interim Plan to address these competing needs, especially those of all [ESA-listed] species, in a reasonable and informed way. The Yurok Tribe may disagree with the Bureau’s decision, but that disagreement does not provide grounds to lift the stay.

Yurok Tribe v. U.S. Bureau of Recl., No. 19-cv-04405-WHO, 2020 WL 2793945, at *5 (N.D.

Cal. May 29, 2020) (internal citation omitted). This year, the roles are reversed, with the

Klamath Tribes coming to this Court to request additional water for suckers over salmon.

However, because this year, similar to last, Reclamation has addressed immediate and temporary competing needs and balanced the risks to all listed species in a “reasonable manner informed by real-time hydrological and biological data” through the TOP and in conference with NMFS and FWS (ECF 24-17 at 7-10 & ECF 24-7 at 7-10), the result here should be the same as in *Yurok Tribe*. The Tribes understandably would prefer that more water be left in UKL for suckers, but they cannot show Reclamation is acting unlawfully by apportioning water between suckers on the one hand, and salmon and killer whales on the other hand, to best meet ESA requirements for

all species under these unprecedented drought conditions.

Reclamation stands ready to continue to coordinate with the Tribes and affected stakeholders to manage the Project through this dire water year. The public interest favors orderly collaboration among Klamath Basin tribes and stakeholders, not repeated motions for emergency court-ordered Project operations.

II. Statutory Background: the Endangered Species Act

A. Section 7(a)(2) Duties and the Consultation Process

ESA Section 7(a)(2) directs each federal agency (“action agency”) to insure, in consultation with the appropriate consulting agency, that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of” a listed species or destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). If formal consultation is required, the consulting agency must prepare a BiOp “detailing how the agency action affects the species or its critical habitat,” *id.* § 1536(b)(3)(A), and stating whether the action is likely to “jeopardize the continued existence of” a listed species or destroy or adversely modify its critical habitat, *id.* § 1536(a)(2); 50 C.F.R. § 402.14. After receiving the consulting agency’s BiOp, the action agency “shall determine whether and in what manner to proceed with the action in light of its section 7 obligations” and the BiOp. 50 C.F.R. § 402.15(a). Where a BiOp concludes that the proposed action is not likely to jeopardize a listed species or destroy or adversely modify its critical habitat, the action agency may reasonably rely on the BiOp and proceed with the action in compliance with the ESA. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415-16 (9th Cir. 1990).

B. Section 9 Prohibition against Take

Section 9 of the ESA prohibits “take” of members of a listed species without

authorization. 16 U.S.C. §§ 1538(a)(1)(B)-(C), (G); 1532(19); 1533(d).⁵ The take prohibition is not absolute. If a consulting agency's BiOp concludes that the proposed action is not likely to cause jeopardy but is reasonably certain to result in take, it issues an incidental take statement ("ITS") to the action agency that specifies the amount or extent of the anticipated take and any reasonable and prudent measures it "considers necessary or appropriate" to minimize the impact of the take. *Id.* § 1536(b)(4)(C)(i)-(ii); 50 C.F.R. § 402.14(i). The ESA states that "any taking that is in compliance with the terms and conditions specified in [the ITS] . . . shall not be considered to be a prohibited taking of the species concerned." 16 U.S.C. § 1536(o)(2); *see also* 50 C.F.R. § 402.14(i)(5); *Bennett v. Spear*, 520 U.S. 154, 170 (1997) ("the Biological Opinion's Incidental Take Statement constitutes a permit authorizing the action agency to 'take' the endangered or threatened species so long as it respects the Service's 'terms and conditions'"); *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1034 (9th Cir. 2007).

C. Reinitiation of Section 7 Consultation

Following completion of consultation, an action agency may be required to reinitiate consultation under certain circumstances. 50 C.F.R. § 402.16. When an action agency reinitiates consultation, the BiOp and ITS do not automatically lose their force and validity. *Defs. of Wildlife v. Bureau of Ocean Energy Mgmt.*, 684 F.3d 1242, 1252, n.4 (11th Cir. 2012).

D. Agency Action During Consultation Pursuant to Section 7(d)

"After initiation of consultation," but before conclusion of consultation, action agencies may proceed with an action provided that they do not make "any irreversible or irretrievable

⁵ As explained below, the default under the statute is that take prohibition extends only to species listed as endangered, however the statute allows the prohibition to be extended to species listed as threatened. 16 U.S.C. § 1533(d). Relevant here, NMFS has done so with a rule that extends the take prohibitions of Section 9(a)(1) to listed West Coast salmonid species, including SONCC coho salmon, except as specifically limited by that regulation. 50 C.F.R. § 223.203.

commitment of resources” that would foreclose “the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2).” 16 U.S.C. § 1536(d). Section 7(d) imposes a different statutory obligation than Section 7(a)(2), and it carries separate and distinct responsibilities. *See id.*

E. ESA’s Citizen Suit Provision for Ongoing Violations

The ESA includes a citizen suit provision that provides a cause of action “to enjoin any person . . . who is alleged to be *in violation* of any provision of this chapter or regulation issued under the authority thereof,” provided that adequate notice of the violation has been given at least 60 days prior to suit. 16 U.S.C. § 1540(g)(1)(A), (g)(2)(A)(i) (emphasis added); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 58-59 (1987) (the phrase “to be in violation” only permits a plaintiff to bring a suit “to enjoin or otherwise abate an ongoing violation”); *accord Fox v. Palmas Del Mar Properties*, 620 F. Supp. 2d 250, 262 (D.P.R. 2009) (dismissing ESA citizen suit claim based on past alleged violations).

III. Factual Background

A. The Klamath Project and ESA-Listed Species in the Klamath Basin

The Klamath Project is a complex federal water management project located in southern Oregon and northern California operated by Reclamation. The main source of water used in the Project comes from UKL, a shallow naturally-occurring lake located in Oregon. Due to its size and depth, the lake has limited capacity. UKL is inhabited by populations of the endangered shortnose sucker and the largest remaining population of the endangered Lost River sucker. FWS listed both species as endangered throughout their range in 1988. 53 Fed. Reg. 27,130 (July 18, 1988). In 2012, FWS designated UKL and its tributaries as critical habitat for the species. 77 Fed. Reg. 73,740 (Dec. 11, 2012). These species are significant to the Tribes, which

hold reserved fishing and water rights associated with the suckers (and other fish species) in UKL and its tributaries.

In addition, several species of anadromous fish inhabit the Klamath River and its tributaries, including SONCC coho salmon and Chinook salmon. In 1997, NMFS listed the SONCC coho salmon under the ESA as threatened. 62 Fed. Reg. 24,588 (May 6, 1997). NMFS designated critical habitat for SONCC coho salmon in 1999 and included most of the Klamath River below Iron Gate Dam in the designation. 64 Fed. Reg. 24,049 (May 5, 1999). Chinook salmon, though not listed under the ESA, are a primary prey species for the Southern Resident killer whale, listed as endangered. 70 Fed. Reg. 69,903 (Nov. 18, 2005); 69 Fed. Reg. 76,673 (Dec. 22, 2004). Habitat needs of Chinook salmon are similar to those of SONCC coho and the species are impacted similarly by flows in the Klamath River. SONCC coho salmon and Chinook salmon are significant to the Yurok and Hoopa Valley Tribes, which also hold reserved fishing and water rights associated with these and other fish species in the Klamath River.

FWS is the ESA consulting agency for most freshwater species, including the two species of suckers in UKL. NMFS is the ESA consulting agency for most marine and anadromous species, including the SONCC coho salmon and the killer whale.

B. ESA Consultations on Klamath Project Operations and Recent Litigation Against Reclamation Brought by the Yurok Tribe, by the Klamath Tribes, and by Project Water Users

Dating to the early 2000s, Reclamation has completed a series of ESA Section 7 consultations with NMFS and FWS on successive operations plans for the Klamath Project after determining that those plans were likely to adversely affect suckers, SONCC coho salmon, killer whales, and their critical habitats. In recent years, the Klamath Tribes and the Yurok Tribe each have gone to court separately to seek greater water allocations for suckers and salmon,

respectively. In 2017, the Yurok Tribe brought suit against Reclamation alleging that it was violating the ESA by operating the Project without having completed a reinitiated consultation on the effects of Project operations after the metric for measuring incidental “take” of SONCC coho salmon due to *C. shasta* disease was exceeded. *Yurok Tribe v. U.S. Bureau of Recl.*, 231 F. Supp. 3d 450 (N.D. Cal. 2017) (*Yurok I*). The court granted summary judgment to the Yurok Tribe and issued a court-ordered injunctive flow plan that required Reclamation to ensure that Klamath Project operations provided additional flows in the Klamath River under certain conditions for the benefit of SONCC coho salmon until Reclamation completed reinitiated ESA Section 7 consultation on the effects of Project operations, without impacting protections for sucker fish.

In summer 2018, while reinitiated ESA consultation was ongoing, the Klamath Tribes brought suit in the same court against Reclamation seeking “a preliminary injunction requiring the Bureau to maintain Upper Klamath Lake elevations at or above certain minimums during the irrigation season of 2018 and through the resolution of th[e] litigation” based on alleged violations of ESA Sections 9 and 7. *Klamath Tribes*, 2018 WL 3570865 at *9. The court denied the motion, finding that:

The mandatory injunction sought would be an extraordinary remedy. While I am transferring the case to the District of Oregon, I considered the motion because of the serious allegations of imminent harm. On this record, the scientific evidence is very much in dispute, and I cannot conclude that the Klamath Tribes are likely to prevail on the merits nor that the sucker fish are suffering irreparable injury as a result of the lake elevation levels. The motion is DENIED.

Id. Subsequently, the Tribes voluntarily dismissed their complaint.

In late 2018, Reclamation completed a proposed operations plan to guide Project operations for the five-year period 2019-2024 (“2018 Plan”). ECF 24-1. With regard to Klamath River needs, the 2018 Plan includes an Environmental Water Account (“EWA”) with a

minimum of 400,000 acre-feet (“AF”) of water to be used to support minimum average daily flows at Iron Gate Dam on the Klamath River (407,000 in even numbered years), namely 1,000 cubic feet per second (“cfs”) in March, 1,325 cfs in April, 1,175 cfs in May, and 1,025 cfs in June. ECF 24-2 at 133. Habitat availability is limited under the minimum flows, ranging from 40-60 percent of maximum available. *Id.* at 146, 249. In addition, the 2018 Plan provides approximately 50,000 AF within the EWA (in years with March 1/April 1 EWA less than 576,000 AF) that can be shaped as a “surface flushing flow” or in another manner that NMFS determines best meets SONCC coho needs. *Id.* at 41-44. The objective of the surface flushing flow is to disturb surface sediment along the river bottom and disrupt the life cycle of *Manayunkia speciose* (a worm species), which is a secondary host for the *C. Shasta* parasite central to salmonid disease dynamics in the Klamath River. *Id.* at 42. The surface flushing flow provision was based on an acknowledgement that there is empirical evidence that such flows are effective in reducing densities of the *C. shasta* host and may reduce *C. shasta*-induced salmon mortality.

In early 2019, NMFS issued a BiOp concluding that Reclamation’s 2018 Plan, as modified during the consultation, was not likely to jeopardize the continued existence of the SONCC coho salmon or the killer whale or destroy or adversely modify critical habitat for SONCC coho salmon (the action area does not include critical habitat for the Southern Resident killer whale). The BiOp was accompanied by an ITS exempting anticipated incidental takes caused by Project operations. *Id.* at 269-284. In reaching its conclusions, NMFS analyzed the effects of the 2018 Plan, including the minimum average daily flows at Iron Gate Dam, which depend on releases from UKL. NMFS’ conclusion of no jeopardy and no adverse modification also relied in part on the Plan’s provision of surface flushing flows. NMFS determined that

“[t]he increase in frequency of surface flushing flows (*i.e.*, at least 6,030 cfs for 72 hours) is expected to somewhat disrupt the life cycle of *C. shasta* in the mainstem Klamath River . . . in May to mid-June.” *Id.* at 170. NMFS’ analysis of effects of the proposed action on Southern Resident killer whales was based on an analysis of effects of the proposed action on Chinook salmon, which are a primary prey species of killer whales, in the Klamath River. *Id.* at 242-269. Therefore, adverse effects on Chinook salmon would be expected to result in adverse effects to killer whales.

In July 2019, the Yurok Tribe filed suit challenging Reclamation’s 2018 Plan and NMFS’ 2019 BiOp and ITS for failing to ensure sufficient flows in the Klamath River for the SONCC coho salmon and for allowing excessive take of the species from Project operations, among other claims. *Yurok Tribe v. U.S. Bureau of Recl.*, et al., Civ. No. 3:19-cv-04405-WHO (N.D. Cal.) (*Yurok II*). The Yurok Tribe’s complaint seeks declaratory and injunctive relief mandating that Project operations produce greater flows in the Klamath River. Yurok filed for a preliminary injunction in October 2019 compelling such flows; however, in March 2020 the parties agreed to stay the litigation out of deference to a second reinitiated ESA consultation on a long term operations plan to supersede the 2018 Plan, and contingent on Reclamation’s implementation of a 2020 interim operations plan (“2020 IOP”) that supplements the 2018 Plan by providing additional Klamath River flows via “augmentation” of the EWA under certain circumstances. *See* ECF 3-2. The reinitiated consultation remains ongoing, with a targeted completion date of September 2022.

In April 2020, FWS issued a replacement BiOp for its 2019 BiOp, analyzing the effects of Reclamation’s operation of the Project on suckers pursuant to the 2018 Plan, as supplemented by the 2020 IOP. ECF 3-1. FWS concluded that operating the Project consistent with various

specified “boundary elevations” in UKL was not likely to jeopardize the continued existence of suckers or destroy or adversely modify their critical habitat. FWS issued Reclamation an ITS along with its no jeopardy BiOp, which exempts incidental takes of suckers caused by Project operations that are consistent with the operations analyzed. Chief among those operations was avoiding UKL surface elevations below: (1) 4,142 feet in April or May in consecutive years or any year in which EWA augmentation is provided under the 2020 IOP, or below the corresponding April or May elevations observed in 2010 (which was a particularly dry year and is considered a benchmark in the BiOp); (2) 4,140.0 feet by July 15 in any year, 4140.5 feet by July 15 in more than one year, or 4140.8 feet by July 15 in more than 2 years; (3) 4,138.25 feet in September in more than one water year; or (4) 4,138.00 feet at any time. *Id.* at 213.

In May 2020, the Yurok Tribe moved to lift the stay of litigation in *Yurok II* and for entry of a temporary restraining order to compel additional releases from UKL for SONCC coho salmon. *Yurok Tribe*, 2020 WL 2793945. The Klamath Tribes were granted intervention as a defendant to oppose Yurok’s request, which was denied. Insofar as the Tribes’ present complaint in this Court seeks to curtail releases from UKL, leading to reduced Klamath River flows, it is in conflict with the Yurok Tribe’s complaint in *Yurok II*, which seeks to compel *additional* releases from UKL, and *greater* river flows than called for under the 2018 Plan.⁶ On

⁶ In addition, insofar as the above-captioned complaint and the complaint in *Yurok II* seek to compel additional water to meet the requirements of the ESA, they are in conflict with litigation that has been initiated by the Klamath Irrigation District (“KID”) and by the Klamath Water Users Association, *et al.* (“KWUA”). As noted above, in the spring of 2019, KID and KWUA filed separate complaints in this Court contending that water stored in UKL under Oregon state-law based water rights is immune from the ESA and/or cannot be released—or retained in storage—to meet the ESA’s requirements without an Oregon state water right or compensation to the water users. The Court dismissed those complaints in September 2020 pursuant to Federal Rule 19. *Klamath Irrigation Dist.*, 489 F. Supp. 3d 1168 (presently on appeal). Separately, on March 29, 2021, KID moved for a preliminary injunction against Reclamation in the Klamath Basin Adjudication (“KBA”), a general stream adjudication in Oregon state court that is in the

April 19, 2021, KWUA, a Defendant-Intervenor in *Yurok II*, filed motions to lift the stay of litigation and for partial summary judgment on Yurok's ESA claims challenging Reclamation's compliance with ESA Section 7(a)(2)'s no jeopardy and no destruction or adverse modification of critical habitat standards. A motions hearing has tentatively been set for May 26, 2021.

IV. Standards for Preliminary Injunctive Relief

A preliminary injunction is an extraordinary remedy, and the movant has the burden to prove by clear and convincing evidence that the remedy is appropriate. *See Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 442-43 (1974). In *Winter v. Natural Resources Defense Council*, the Supreme Court set out a four-factor test: “[a] plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” 555 U.S. 7, 20 (2008) (citations omitted). As to the third and fourth factors—the balance of equities and public interest—these factors “merge” when the federal government is a party to a preliminary injunction request. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

“[T]he already high standard for granting a preliminary injunction is further heightened

process of determining the existence, priority, and extent of competing water rights claims in the portion of the Basin located in Oregon. KID's motion contends that the ESA cannot require the use of water stored in UKL to meet its requirements, or that Reclamation can use water stored in UKL to be consistent with federal reserved tribal water and fishing rights, without an Oregon state water right to do so. As a civil proceeding seeking a judicial order against an agency of the United States involving significant issues of federal law, the United States properly removed the motion from the Klamath County Circuit Court of Oregon to this Court pursuant to 28 U.S.C. § 1442(a)(1), where it has been assigned to Judge Aiken. *Klamath Irrigation Dist. v. U.S. Bureau of Recl.*, Case 1:21-cv-00504-AA. On April 20, 2021, KID moved to remand its preliminary injunction motion back to state court, and oral argument has been set on KID's remand motion for May 20, 2021. The previously-scheduled hearing on KID's preliminary injunction motion in Judge Aiken's Court has been vacated in light of the motion for remand.

when the type of injunction sought is a ‘mandatory injunction.’” *Innovation L. Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1156 (D. Or. 2018) (citation omitted). A mandatory injunction goes “well beyond simply maintaining the status quo” and is “particularly disfavored” and “not issued in doubtful cases or where the injury complained of is capable of compensation in damages.” *Marlyn Nutraceuticals v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009) (citation omitted).

V. Argument

A. The Tribes’ Request for Injunctive Relief Should be Denied Because the Court Lacks Subject Matter Jurisdiction to Grant It

This Court lacks subject matter jurisdiction to entertain the Tribes’ motions for a temporary restraining order and a preliminary injunction because the Tribes have not strictly complied with the ESA’s notice provision, 16 U.S.C. § 1540(g)(2)(A), which is a jurisdictional prerequisite. Jurisdiction under the ESA citizen-suit provision is expressly limited by Section 11(g)(2), which provides “no action may be commenced . . . prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation.” *Id.* The Tribes must provide notice of each ESA violation alleged in their claims for relief because they are brought pursuant to the ESA’s citizen-suit provision, *id.* § 1540(g)(1)(A). *See* Compl. ¶¶ 74, 83.

Because the Tribes failed to comply with the notice requirement, the Court lacks subject matter jurisdiction to adjudicate their claims. *See Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 31 (1989) (interpreting analogous 60-day notice requirements under the Resource Conservation and Recovery Act as “mandatory conditions precedent to commencing suit”); *All. for the Wild Rockies v. U.S. Dep’t of Agric.*, 772 F.3d 592, 601-02 (9th Cir. 2014) (applying *Hallstrom* to the ESA’s nearly identical 60-day notice requirement); *Sw. Ctr. for Biol. Div. v. U.S. Bureau of*

Recl., 143 F.3d 515 (9th Cir. 1998).

Though the Tribes sent a purported 60-day notice letter on February 12, 2021 (ECF 5-1), that letter is deficient for two reasons. First, the letter does not mention any alleged violation of ESA Section 7, and hence failed to provide notice of the violation now alleged in Count II of the complaint and asserted in the Tribes' motions. *Compare* ECF 5-1 with Compl. ¶¶ 75-83 and ECF 7 at 30-33. Therefore, Section 7 claim is not properly before the Court and cannot form the basis for any provisional injunctive relief. *See Ctr. for Env't Sci. Accuracy & Reliability v. Nat'l Park Serv.*, No. 1:14-cv-02063-LJO-MJS, 2016 WL 4524758, at *8 (E.D. Cal. Aug. 29, 2016) (ESA notice letter alleging failure to consult under Section 7(a)(2) was not sufficient to support a claim under Section 7(a)(1)).

Second, while the Tribes' February 12, 2021 letter did mention a *potential* Section 9 violation that *could* occur on April 1 of this year, the notice was ineffective with regard to the Section 9 violation now alleged in Count I because it predated the alleged violation and merely speculated about whether a violation might occur in the future. *See* ECF 5-1 at 3 (alleging "Reclamation *Will Be* in Violation of Section 9 of the ESA if it Allows UKL to Fall Below 4,142.0 Feet in April or May of 2021") (emphasis added); ECF 2 at 26 (asserting that the Tribes' notice was provided in February because "[a]s early as the start of the 2021 calendar year, it was becoming clear that water year 2021 was shaping up to be historically poor" and that "Reclamation would need to manage deliberately to comply with the ITS condition requiring it to maintain UKL at or above 4,142.0 in April and May"). The anticipatory notice also failed to allege the "procedural" violation of the ITS that now forms a basis for the Section 9 claim advanced in the Tribes' motions. *Compare* ECF 5-1 with ECF 7 at 23-27. Numerous courts have found that anticipatory or pre-violation notice letters do not satisfy the ESA's notice

requirement. *See Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193, 1205–06 (D. Or. 2003); *Ctr. for Env’t Sci., Accuracy & Reliability v. Cowin*, No. 115-cv-01852-LJO-BAM, 2016 WL 8730760, at *5 (E.D. Cal. Mar. 4, 2016); *Friends of Animals v. Ashe*, 51 F. Supp. 3d 77, 84–85 (D.D.C. 2014), *aff’d*, 808 F.3d 900 (D.C. Cir. 2015); *Wild Fish Conservancy v. Nat’l Park Serv.*, 2013 WL 549756, *4 (W.D. Wash. 2013).

“The notice requirement provides agencies with ‘an opportunity to review their actions and take corrective measures if warranted.’” *All. for the Wild Rockies*, 772 F.3d at 601 (quoting *Sw. Ctr. for Biol. Diversity*, 143 F.3d at 520). An agency cannot “review” an action it has not yet taken or “correct” a situation that has not yet occurred. The Tribes assert that the Section 9 violation alleged in Count I began on April 1, 2021, and not before. The basis of the claim is that Reclamation is violating Section 9 because the elevation in UKL fell below 4,142.0 feet *in April* and Reclamation did not “immediately consult with [USFWS] concerning the causes to adaptively manage and take corrective action.” ECF 2 at 28; ECF 7 at 23-24, 27. The ESA is structured to require a plaintiff to give an agency 60 days to cure the violation at issue, but the Tribes have not given Reclamation that opportunity. The Tribes claim Reclamation could have adjusted its behavior before the violation occurred to avoid the low water elevation in April, but the Tribes acknowledge that historic drought conditions significantly and unexpectedly impacted the water levels in UKL in the months leading up to April. *See id.* at 26 (noting that “winter inflows . . . did not arrive as anticipated”); *id.* at 27 (“By the beginning of March, the projections were yet more dire. Water-year-to-date cumulative net inflows to UKL were the lowest ever in the POR . . .”). Thus, hydrology that post-dated the Tribes’ purported notice letter is critical to the current low lake elevation and their current Section 9 claim.

There is no equitable exception to the ESA’s 60-day notice requirement, even when harm

is alleged to be imminent. *See Hallstrom*, 493 U.S. at 31 (holding that the “60–day delay requirements are mandatory preconditions to commencing suit” and “a district court may not disregard these requirements at its discretion”). The plain language of the statute – which states unequivocally that “no action may be commenced” – forbids a “flexible or pragmatic construction,” *id.* at 26, even if the defendants will “actually accomplish the objective that the citizen was attempting to stop” within the 60-day period, *id.* at 30; *Sw. Ctr. for Biol. Diversity*, 143 F.3d at 520 (citing numerous cases stating that courts should be strict in their interpretation of the 60-day rule as an absolute bar to suit). “While a ‘strict construction of the 60-day notice requirement may appear to be inequitable and a waste of judicial resources, . . . it is inescapable that, in this situation courts ‘lack authority to consider the equities.’” *Oregon Wild v. Connor*, No. 6:09-CV-00185-AA, 2012 WL 3756327, at *4 (D. Or. Aug. 27, 2012).

In sum, here the Tribes provided no notice of their intent to sue for alleged violation of ESA Section 7 per Count II of their complaint, and they failed to identify any presently-existing ESA Section 9 violation in the notice letter that they provided, per Count I of their complaint. Therefore, this Court lacks jurisdiction over these claims, and should deny the motions for temporary restraining order and preliminary injunction on that basis alone.

B. In Addition to the Lack of Jurisdiction, the Tribes Are Not Likely to Prevail on the Merits of their ESA Section 9 and 7 Claims

Because the Court lacks subject matter jurisdiction, it should not entertain the Tribes’ motions. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998) (“Without jurisdiction the court cannot proceed at all in any cause”) (citations omitted). Regardless, the Tribes are not likely to succeed on the merits of those claims. As the court noted in *Klamath Tribes*:

The Klamath Tribes must establish their likelihood of success on the merits under

the standards of the APA. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (stating that ESA claims reviewed “under the standards of the APA”). Review of agency action is permitted to determine whether the action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Agency action is “arbitrary and capricious if the agency has ... offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

2018 WL 3570865 at *9. The same deferential standard of review would apply to the Tribes’ claims here. And as before, the Tribes are not likely to overcome that standard by showing that the TOP “runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

1. The Tribes Are Not Likely to Show Reclamation is Violating ESA Section 9

The Tribes allege that Reclamation is violating ESA Section 9 because it has not complied with Term and Condition 1c (“Term 1c”) of FWS’ 2020 ITS. ECF 2 at 21 (Term 1c “is the ITS provision most directly relevant to this suit”). Simply stated, this argument is not likely to succeed because Reclamation has, in fact, complied with Term 1c. Term 1c requires Reclamation to “monitor UKL elevations to determine if there is a projected or realized progressive decrease in the elevation that would fall outside of the boundary conditions for the effects analysis.” ECF 3-1 at 230. If elevations lower than the boundary conditions occur, “Reclamation shall determine the causative factors of this decrease and determine whether these factors are within the scope of the proposed action and the effects analyzed in this BiOp.” *Id.* Additionally, “Reclamation shall immediately consult with the Service concerning the causes to adaptively manage and take corrective actions.” *Id.*

Reclamation has taken these steps and therefore has satisfied Term 1c. In letters to FWS and NMFS (*see* ECF 24-17 & 24-7), Reclamation has explained that elevations in UKL are now below the applicable boundary condition of 4,142.0 feet for April and May, and are not likely to meet subsequent boundary conditions listed in Term 1c “even without water deliveries to the Klamath Project.” *Id.* at 1-2. Reclamation began coordinating with FWS and NMFS in January 2021 “to determine the causative factors for potentially falling outside BiOp ‘boundary conditions’, consistent with the meet and confer provisions of . . . T&C 1c.” *Id.* at 2. Based on this coordination, Reclamation concluded that the key causative factors were “consecutive critically dry years and extraordinary hydrologic conditions.” *Id.* “Specifically, cumulative inflows into UKL for the 2021 water year (starting on October 1, 2020) are the lowest within the forty-year period of record (1981-2020).” *Id.* As such, Reclamation has identified, in coordination with the Services, the TOP for Project operations for the 2021 spring/summer operating season “to address immediate and temporary competing needs, including the needs of all threatened and endangered species, in a reasonable manner informed by real-time hydrological and biological data.” *Id.* at 2-9.⁷ Most relevant here, the TOP do not propose deviations from operations at Iron Gate Dam to provide minimum Klamath River flows per the 2018 Operations plan, however they do make implementation of a surface flushing flow – which would otherwise be expected to be attempted – contingent on maintaining specified UKL elevation and tied to an evaluation of real-time management criteria,⁸ and the TOP also do not

⁷ Reclamation has determined, consistent with ESA Section 7(d), that operating the Project pursuant to the TOP will not constitute an “irreversible or irretrievable commitment of resources” that could have “the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures” that would not violate the requirements of ESA Section 7(a)(2). 16 U.S.C. § 1536(d), (a)(2). *See* ECF 24-9.

⁸ The TOP explains that Reclamation will use “real-time monitoring and forecasting information [and] meet and confer with the Services to quickly act on opportunities to reduce risk to listed

authorize irrigation diversions until May 15 at the earliest (unless a surface flushing flow has previously been implemented). *Id.*

In response to Reclamation's letter, FWS acknowledged that the "unprecedented" hydrologic conditions this year are "rooted in natural causes and [were] not anticipated by the agencies." *See* ECF 24-8. With regard to the ITS, FWS noted that "T&C 1c of the Service's BiOp requires Reclamation to coordinate with the Service and take corrective actions if elevation levels in UKL fall outside of the stated boundary conditions." *Id.* FWS "acknowledge[d] that Reclamation did meet and confer with the Service in recent months to address low UKL elevations and potential corrective actions." *Id.* FWS further acknowledged that "extreme hydrologic conditions in water year 2021 will preclude Reclamation meeting any of the provisions of T&C 1c, with the exception of maintaining UKL elevation above 4138.0 ft., by simply expending the [EWA] to meet river flows and the ongoing effects of seepage and evaporation in UKL." *Id.* As noted above, the EWA was established in the 2018 Plan to meet the requirements of the ESA with regard to species dependent on Klamath River flows.

Similarly, NMFS acknowledged in a response to Reclamation's letter that Reclamation had notified NMFS in January that EWA spending could fall outside thresholds listed in Term and Condition 1A of NMFS' 2019 BiOp ("Term 1A"), and further acknowledged that Reclamation has "taken actions to closely coordinate with the Services consistent with the process outlined in" Term 1A to determine the causative factors and implement in-season

species. Reclamation, with input from the Services, will make the final determination on whether implementation of a [surface flushing flow] will occur based on professional judgement and balancing of risks to species. Key considerations that are expected to trigger a meet and confer process include, but are not limited to: (1) *Ceratanova shasta* (*C. shasta*) disease and water temperature; (2) sucker spawning and refugial habitat; (3) hydrologic considerations; (4) Project deliveries; and (5) water quality conditions inhibiting *C. shasta* transmission." ECF 24-17 at 4 & ECF 24-7 at 4.

corrective actions. *See* ECF 24-6 at 3. NMFS further acknowledged that the Upper Klamath Basin has experienced record low cumulative net inflows to UKL in 2021 and that the “critically dry and extraordinary hydrologic conditions in the Klamath River Basin will likely prevent Reclamation’s full, simultaneous satisfaction of requirements” for ESA-listed species in UKL and the Klamath River, as specified in the operations plan and analyzed by NMFS and FWS in their respective BiOps. *Id.*

In short, Reclamation has satisfied the terms and conditions specified by FWS and NMFS by monitoring elevations, determining causative factors for any decrease, and consulting with FWS and NMFS to adaptively manage and take corrective actions. Reclamation continues to work diligently to remain in compliance with those terms. Unprecedented drought conditions have made it impossible to meet the April, May, and likely also the July UKL elevations in 2021 with or without irrigation diversions. Reclamation “cannot control the weather,” and a court “cannot hold [it] responsible for the absence of rain.” *In re: Operation of the Missouri River Sys. Litig.*, 363 F. Supp. 2d 1145, 1175 (D. Minn. 2004); *Alabama v. U.S. Army Corps of Eng’rs*, 441 F. Supp. 2d 1123, 1134 (N.D. Ala. 2006) (“[t]akes that result from acts of nature . . . cannot be blamed on the Corps”) (citations omitted). Because Reclamation complied with terms and conditions of FWS’s ITS, the Tribe’s Section 9 claim has no likelihood of success. *Cf. Klamath Tribes*, 2018 WL 3570865 at *11-12 (finding that the Tribes were not likely to prevail on an analogous claim that Reclamation had failed to comply with Term 1c of FWS’ 2013 ITS and was in violation of ESA Section 9 because “in each instance when thresholds were not met the Bureau has shown that it acted according to the T&C 1c and immediately consulted with FWS. [] FWS has not rejected the rationale provided by the Bureau when they failed to meet thresholds, and it continues to determine that the 2013 BiOp is still operative”); 16 U.S.C. § 1536(o)(2)

(ESA stating that “*any taking* that is in compliance with the terms and conditions specified in [the ITS] . . . shall not be considered to be a prohibited taking of the species concerned”) (emphasis added); *Bennett v. Spear*, 520 U.S. at 170.

2. The Tribes Are Not Likely to Show Reclamation is Violating ESA Section 7

Like the Section 9 claim, the Tribes’ ESA Section 7 claim is based on low UKL elevations. This claim is not likely to succeed for much the same reason that the Tribes’ Section 9 claim is not likely to succeed. As noted above, the failure to meet anticipated UKL elevations in April or May is due to natural drought conditions, and simply cannot be avoided. ECF 24-17 at 2 & ECF 7 at 2. Thus, the failure to meet these elevations is not a violation of ESA Section 7, which does not require federal agencies to prevent all harm to listed species, whatever the source, or require Federal agencies to correct for harms caused by factors outside the agencies’ control, like the weather. Instead, Section 7 requires Federal agencies to ensure that their *own* actions are not likely to cause jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2); *see also Alabama*, 441 F. Supp. 2d at 1134; *Missouri River*, 363 F. Supp. 2d at 1175. Reclamation has explained that the July 15 elevation is unlikely to be achieved regardless of any irrigation diversions or implementation of a surface flushing flow. ECF 24-17 at 2 & ECF 7 at 2. While granting the Tribes’ request to drastically curtail ongoing UKL releases to 400 cfs would increase the likelihood of meeting the July 15 elevation, there is no guarantee that this elevation would be achieved, and making the attempt would guarantee that Klamath River minimum flows are not met and override the delicate balance that dedicated professionals have worked for months to achieve. Reclamation should not be found to be violating Section 7 by failing to take action that would be uncertain to achieve desired lake elevations for suckers, but would likely increase disease risk for SONCC coho and Chinook salmon.

In *Klamath Tribes*, the court found that:

[T]he 2013 BiOp specifically included a procedure to minimize adverse impacts of the Project on sucker fish, and it accounted for potentially failing to meet elevation levels. When the elevation thresholds were not met, the Bureau identified the reasons for missing thresholds and whether they were within the scope of the BiOp, and then consulted with FWS. FWS accepted the Bureau's determination after consultation on each occasion, also concluding that conditions still operated within those analyzed by the 2013 BiOp. Without evidence that new information was not considered when the Bureau determined to continue operating under the 2013 BiOp for setting Upper Klamath Lake elevations, it is not likely their actions were arbitrary or capricious. The Klamath Tribes do not provide sufficient evidence that the no-jeopardy conclusion made by FWS was based on specific assumptions that have proven false. . . . Accordingly, the Klamath Tribes have not shown a likelihood of success on their Section 7 jeopardy claim.

Klamath Tribes, 2018 WL 3570865, at *14 (internal citations omitted). The same is true here.

As noted above, Reclamation has conferred with FWS to address low UKL elevations and potential corrective actions, and FWS has neither rejected Reclamation's determination of causative factors nor revoked the ITS. *See* ECF 24-8. The Tribes have not shown that FWS' no jeopardy and no adverse modification conclusions were based on specific assumptions that have proven false due to Reclamation's conduct.

C. The Tribes Fail to Satisfy the Irreparable Harm, Balance of Harms, or Public Interest Prongs

Because the Tribes are not likely to prevail on the merits of their claims, the Court need not proceed further to consider the remaining preliminary injunctive relief factors. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (*en banc*) ("Because it is a threshold inquiry, when a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three [*Winter* elements]") (citations and internal quotation marks omitted). Regardless, if the Court does consider those factors, the Tribes do not satisfy them. In *Winter*, the Supreme Court rejected the notion that a preliminary injunction could be issued "based only

on a possibility of irreparable harm.” 555 U.S. at 22. Rather, the movant must show that irreparable harm is *likely* to occur in the absence of the requested injunction. In addition, because the balance of harm and public interest factors are merged in this case and the Ninth Circuit has held that those merged factors are presumed to weigh in favor of protecting listed species, here the Tribes should be required to show not only that their requested relief is necessary to *prevent* irreparable harm that is likely, but also that such relief is not likely to *cause* harm to species listed under the ESA or designated critical habitat. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018). “When the issuance of a preliminary injunction, while preventing harm to one party, causes injury to the other, this factor does not weigh in favor of granting preliminary injunctive relief.” *New York v. Trump*, 490 F. Supp. 3d 225, 245 (D.D.C. 2020) (citations omitted). This is especially true where, as here, the movant does not seek a preliminary injunction to preserve the relative positions of the parties until the claims can be adjudicated on the merits, but rather to mandate a departure from the status quo pending adjudication on the merits. *Marlyn Nutraceuticals*, 571 F.3d at 878-79.

Here, the Tribes show neither that their preliminary injunction would prevent likely irreparable harm, nor that it would not cause harm to species listed under the ESA and/or designated critical habitat. The Tribes ask the Court to order Reclamation to immediately, and drastically, reduce releases from Link River Dam by more than 65 percent, from the current rate of 1,200 cfs to 400 cfs. *Id.* at 39. The Tribes assert that, unless releases for Klamath River flows are reduced as they request, suckers are likely to be harmed irreparably due to “diminished spawning opportunities and compromised rearing habitat” this spring, and poorer, more stressful, and potentially lethal water quality conditions this summer.” ECF 2 at 27-28. However, there is no dispute that, due to the severe drought, UKL will not achieve the boundary elevation of

4,142.0 feet in April or May, even if the requested injunction was granted and there were no irrigation diversions. ECF 2 at 30, 38; ECF 24-17 at 1-2 & ECF 7 at 1-2. Additionally, due to the drought, it is projected that UKL elevation will not exceed the July 15 boundary condition of 4,140.5 feet “even without any Project deliveries or a Surface Flushing Flow (SFF) prior to July 15” (ECF 24-17 at 2 & ECF 7 at 2) and, as noted above, it is uncertain whether severely reducing Klamath River minimums as requested would achieve this elevation.

By contrast, granting the Tribes’ injunction would likely cause increased harms to SONCC coho salmon and killer whales. The Tribes freely admit that “the needs of multiple listed species [are] directly in conflict” and that their requested injunctive relief cannot be granted without causing “unavoidable” impacts on the listed SONCC coho salmon by “reducing flows below Iron Gate Dam since there is simply not enough water currently in the system for Reclamation to maintain UKL at the elevations required for the C’waam and Koptu, while simultaneously hitting the daily minimum flow targets below Iron Gate Dam of 1,325 cfs in April and 1,175 cfs in May set forth in the 2019 NMFS BiOp.” ECF 2 at 16, 37. The Tribes concede that the flows they are asking this Court to order “are not ideal flow rates for salmon in the lower river.” *Id.* at 39; *see also* ECF 24-2 at 154, 177. Though the Tribes acknowledge the likely adverse impacts of granting their request on SONCC coho salmon, they ignore that the requested injunctive relief would likely have similar consequences to Chinook salmon based on the similar needs of these salmon species, and, in turn, result in adverse consequences to the endangered Southern Resident killer whale by adversely impacting its prey base. ECF 24-2 at 242-69. Indeed, curtailing releases to 400 cubic feet per second as requested would override the TOP by reducing Klamath River flows far below the minimum flows that NMFS concluded in its BiOp would avoid jeopardizing the continued existence of the SONCC coho salmon and the

killer whale and adversely modifying critical habitat. Additionally, granting the Tribes' request would further override the TOP by eliminating even the potential for a surface flushing flow this year, despite the fact that surface flushing flows were also a basis for NMFS' no jeopardy and no adverse modification conclusions for these species and critical habitat in its BiOp. As such, the Tribes' request would likely cause adverse effects to these species and to the Yurok and Hoopa Valley Tribes' interests in them, which does not serve the public interest.

The Klamath Tribes attempt to justify the adverse impacts to the SONCC coho salmon by offering the argument that coho salmon are entitled to less protection than suckers because the former are listed as threatened, whereas the latter are listed as endangered.⁹ ECF 2 at 8. This argument fails for several reasons. Principally, it overlooks the likely adverse impacts to killer whales, listed as endangered, and the fact that ESA Section 7(a)(2) requires federal agencies to equally avoid jeopardizing the continued existence of species listed as threatened as well as endangered, and to avoid destroying or adversely modifying *any* designated critical habitat. 16 U.S.C. § 1536(a)(2) ("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 . . . 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...") (emphasis added); *accord* 50 C.F.R. § 402.14(a) ("Each Federal agency shall review its actions at the earliest

⁹ A species is initially designated as either endangered or threatened at the time of listing pursuant to ESA Section 4, 16 U.S.C. § 1533. A species is listed as endangered if it "is in danger of extinction throughout all or a significant portion of its range," or threatened if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(6), (20). Once a species has been listed, its listing status can be changed from endangered to threatened or vice versa. *Id.* § 1533(c). NMFS' BiOp states that most of the 30 independent populations in the SONCC coho salmon ESU are "at high risk of extinction." ECF 24-2 at 70.

possible time to determine whether any action may affect *listed species* or critical habitat. If such a determination is made, formal consultation is required . . .”) (emphasis added). That the prohibitions of ESA Section 7 apply equally to endangered and threatened species and their critical habitats, and that the Tribes’ requested injunctive relief would likely result in adverse consequences to both the endangered Southern Resident killer whale and threatened SONCC coho salmon, should be dispositive of the Tribes’ argument. Neither the ESA nor the implementing regulations state that a BiOp and ITS for a threatened species are subservient to those for an endangered species in the event of a conflict.¹⁰

Beyond Section 7, the default under the statute is that the Section 9 take prohibition extends only to endangered species; however, the Tribes overlook the fact that the statute allows the take prohibition to be extended to threatened species, 16 U.S.C. § 1533(d), which NMFS has done with a rule that extends the take prohibitions of Section 9(a)(1) to listed West Coast salmonid species, including SONCC coho salmon, except as specifically limited by that regulation. 50 C.F.R. § 223.203. The Tribes make no contention that increased take of SONCC coho salmon resulting from their requested injunction would be exempted under Section 9. As noted above, the Tribes also overlook the fact that there are endangered species on both sides of the balance, and that their requested relief is likely to adversely affect not just the threatened SONCC coho salmon, but also the endangered Southern Resident killer whale. Klamath River

¹⁰ The plain language of the ESA states that it was enacted “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). The terms “conserve” and “conservation” mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” *Id.* § 1532(3). Once a species is designated as either endangered or threatened, statutory prohibitions help provide for the recovery of the species. *See, e.g., id.* §§ 1536(a)(2), 1538, 1533(d).

flows to ensure survival of SONCC coho salmon also apply to survival of Chinook salmon, and, in turn, the Southern Resident killer whale. NMFS concluded in its BiOp that the flows proposed in the 2018 Plan are not likely to jeopardize the continued existence of the Southern Resident killer whale as well as the SONCC coho salmon. Lastly, even if the harm from the proposed injunction would be “limited” to certain coho populations within the Klamath River basin (*see* ECF 7 at 15-16), the Tribes have not shown that the harm to those populations would not adversely affect the listed entity as a whole.

The cases that the Tribes rely on for their novel balancing of species harms argument are readily distinguishable as ESA Section 4 listing decisions and not ESA Section 7 or 9 decisions. ECF 2 at 16 (citing *Def. of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) and *Ctr. for Biol. Diversity v. Everson*, 435 F. Supp. 3d 69 (D.D.C. 2020)). In a Section 4 listing case, the court is reviewing a decision as to whether or not a singular species meets the criteria for being added to the list of species protected under the ESA, not a request to comparatively reallocate resources and potential take, jeopardy, and destruction or adverse modification of habitat between multiple species that have already been listed under the ESA, as the Tribes ask the Court to do here. The Section 4 listing cases cited by the Tribes have no application to their requested injunction. No court has ever adopted the theory advanced by the Tribes here, much less granted the extraordinary type of relief they are requesting based on that theory. *Contra Yurok Tribe*, 2020 WL 2793945. Just as the court denied the request of the Yurok Tribe to compel releases from UKL to the detriment of suckers last spring, this Court should deny the Tribes’ request to curtail releases from UKL to the detriment of SONCC coho salmon and killer whales.

CONCLUSION

For all the foregoing reasons, the Klamath Tribes' motions for temporary restraining order and preliminary injunction should be denied.

Respectfully submitted this 23rd day of April, 2021.

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CERTIFICATE OF SERVICE

I certify that on April 23, 2021, the foregoing was electronically filed with the Court's electronic filing system.

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