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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
MEDFORD DIVISION

THE KLAMATH TRIBES,
a federally recognized Indian Tribe,

Plaintiff,

vs.

UNITED STATES BUREAU
OF RECLAMATION

Defendant

Case No. 1:21-cv-00556CL

**THE KLAMATH TRIBES’ (“TRIBES”)
SUPPLEMENTAL BRIEF IN SUPPORT
OF MOTIONS FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

The Tribes submit this brief in compliance with the Court’s Order of April 26, 2021.

I. Reclamation has not successfully discharged its consultation obligations.

Consultation is a central concept of the Endangered Species Act (“ESA”), which directs each federal 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). “Consultation” has informal and formal components. 50 C.F.R. §§ 402.13 (informal), 402.14 (formal). “Informal consultation is an optional process that includes all discussions,

correspondence, etc., between the Service^[1] and the Federal agency... designed to assist the Federal agency in determining whether formal consultation... is required.” *Id.* § 402.02. Formal consultation must follow unless the appropriate Service determines in writing “that the action is not likely to adversely affect listed species or critical habitat.” *Id.* § 402.13(c). Formal consultation generally results in the publication of a biological opinion (“BiOp”). *Id.* § 402.14.

As one of the two agencies tasked with administering the ESA, it is self-evident that when USFWS employs a term in a BiOp that is defined by the ESA, it does so intentionally. Term and Condition (“T&C”) 1c of the 2020 BiOp’s Incidental Take Statement (“ITS”) requires Reclamation to “consult with the Service” regarding any potential deviation from the boundary conditions identified therein. ECF 3-1 at 230. At a minimum, therefore, T&C 1c requires that Reclamation engage in informal consultation per 50 C.F.R. § 402.13. It is clear Reclamation knows how to do this. Reclamation and USFWS have previously engaged in informal consultation when Reclamation’s operation of the Klamath Project (“Project”) deviated from the terms and conditions USFWS established in an ITS. Under the 2013 Project BiOp,² for example, Reclamation was obligated to meet monthly minimum Upper Klamath Lake (“UKL”) elevations levels, known as thresholds. Over a period of years, Reclamation missed a series of these thresholds but each time “identified the reasons for missing thresholds and whether they were within the scope of the BiOp, and then consulted with [US]FWS. [US]FWS accepted the Bureau’s determination after consultation on each occasion, also concluding that conditions still operated within those analyzed by the 2013 BiOp.” *Klamath Tribes v. United States Bureau of Reclamation*, No. 18-CV-03078-

¹ USFWS and NMFS are the two “Services” tasked with administering the ESA. 50 C.F.R. § 402.01(b).

² Available at <https://www.fws.gov/klamathfallsfwo/news/2013%20BO/2013-Final-Klamath-Project-BO.pdf> (last accessed April 29, 2021).

WHO, 2018 WL 3570865, at *14 (N.D. Cal. July 25, 2018 (internal citations omitted)). This informal consultation and attainment of agency concurrence is also exactly what Reclamation did with NMFS regarding Reclamation's Interim Operations Plan (IOP) for the Project last year and Temporary Operations Plan (TOP) this year. *See* ECF 24-4 at 2-3; ECF 24-6 at 2. Because NMFS found that the IOP changes were beneficial to salmon, ECF 24-4 at 2-3, and that the TOP was also consistent with the requirements of the 2019 NMFS BiOp, ECF 24-6 at 2-3, formal consultation between Reclamation and NMFS did not become necessary.

Reclamation's engagement with USFWS over the IOP is also instructive. Since that plan reduced by 0.25 feet both the end-of-season UKL elevation and the year-round absolute minimum elevation, *see* ECF 24-3 at 192 & ECF 3-1 at 230, Reclamation requested formal consultation with USFWS. This resulted, only two weeks later, in the issuance of the 2020 BiOp, complete with a new ITS, reflecting USFWS' evaluation of the effects of the IOP on the C'waam and Koptu.

This year, however, and despite the TOP proposing even more significant deviations from minimum UKL elevations than what had been proposed in the IOP, Reclamation did not similarly request formal consultation. ECF No. 24-8 at 2. Nor did it obtain USFWS concurrence in the TOP through informal consultation like Reclamation had from NMFS. *See* ECF 24-8 at 2 (USFWS "recognizes that the [TOP]...represents *Reclamation's interpretation* of the corrective actions needed...") (emphasis added). In fact, USFWS specifically described Reclamation's efforts as something less than consultation. ECF 24-8 at 2 (USFWS "acknowledges that Reclamation did *meet and confer* with the Service in recent months to address low UKL elevations and potential corrective actions.") (emphasis added). "Confer" is another term with particular ESA connotations. 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10(c). USFWS' deliberate use of this term further illustrates that Reclamation's engagement with USFWS over the TOP did not amount even to

informal consultation. This does not comply with Reclamation's consultation obligations under the ESA and T&C 1c.

Since Reclamation is currently acting outside the scope of the 2020 BiOp's effects analysis, *id.*, formal consultation is necessary. *See* 50 C.F.R. § 402.14(i)(4). And while Reclamation and the Services are currently engaged in formal consultation (and have been since the fall of 2019) over the operation that is to replace the 2019-2024 Proposed Action that formed the underlying basis of the 2019 NMFS and USFWS BiOps, *see* ECF 3-1 at 18, that formal consultation has not extended to Reclamation's operation of the Project under the TOP. ECF 24-7 at 2 ("Reclamation has been *coordinating* with the Services since early 2021 on hydrologic conditions and the development of the temporary operations.") (emphasis added). Reclamation has not complied with its consultation obligations.

II. Even had Reclamation's consultation been procedurally adequate, it was substantively defective.

T&C 1c requires Reclamation to consult with USFWS "to adaptively manage and take corrective actions." ECF No. 3-1 at 230. Any ambiguity as to the meaning of "corrective actions" is resolved by looking at the T&C's title: "Take Corrective Actions to Ensure UKL Elevations Are Managed within the Scope of the Proposed Action." T&C 1c requires consultation to result in corrective actions such that Reclamation manages UKL elevations within the scope of the 2020 BiOp's effects analysis. As USFWS pointedly observed, the TOP completely ignored one of the critical boundary conditions USFWS had set in the 2020 BiOp, and disregarded the vast majority of those boundary conditions it did acknowledge. ECF 24-8 at 3. This is not corrective action.

III. Timeline for reconsultation.

The Tribes are less well situated than the federal government to address how long the necessary formal consultation to rectify this situation might take. In 2020, as noted above,

Reclamation and USFWS completed full formal consultation in two weeks. The circumstances of this water year, and the egregious departure from the USFWS' boundary conditions the TOP represents, could make the consultation process run longer this time. Too, depending on the outcome of that consultation, further informal consultation with NMFS might be needed.

As the foregoing makes clear, however, Reclamation is in derogation of its consultation obligations, is operating the Project outside the scope of the 2020 BiOp's effects analysis, and is therefore not entitled to shelter under the protection from take liability that might otherwise be afforded by the 2020 BiOp's ITS. *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1108 (9th Cir. 2012) ("When reinitiation of consultation is required, the original biological opinion loses its validity, as does its accompanying incidental take statement, which then no longer shields the action agency from penalties for takings."). Given Reclamation's legal vulnerability, it seems likely that Reclamation and USFWS (and, if necessary, NMFS) would proceed expeditiously. The Court could also facilitate that process by ordering periodic status conferences on an appropriate schedule to require Reclamation to provide updates about the status of the reconsultation efforts.

Respectfully submitted this 29th day of April, 2021.

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