



KLAMATH WATER USERS ASSOCIATION, )  
 KLAMATH IRRIGATION DISTRICT, )  
 )  
 Defendant-Intervenors. )

---

KLAMATH TRIBES, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 UNITED STATES BUREAU OF RECLAMATION )  
 and UNITED STATES FISH AND WILDLIFE )  
 SERVICE, )  
 )  
 Defendants, )  
 )  
 KLAMATH WATER USERS ASSOCIATION, )  
 )  
 Defendant-Intervenor. )

---

Case No.: 1:22-cv-00680-CL

**FEDERAL DEFENDANTS’  
 COMBINED OPPOSITION  
 TO PLAINTIFF’S MOTION  
 FOR SUMMARY JUDGMENT  
 (ECF 24) AND CROSS-  
 MOTION FOR SUMMARY  
 JUDGMENT**

Pursuant to the Scheduling Orders in the related cases above,<sup>1</sup> Defendants United States Bureau of Reclamation (“Reclamation”) and United States Fish and Wildlife Service (“FWS”) (collectively “Federal Defendants”) hereby oppose Plaintiff Klamath Tribes’ (“the Tribes”) motions for summary judgment and cross-move for summary judgment. To increase efficiency and avoid duplication, and in accordance with the Orders granting the Tribes’ unopposed motions for word enlargement, Federal Defendants are submitting a single brief of no more than 35,000 words that includes their combined oppositions and cross-motions for summary judgment in both matters. *Klamath Tribes I* (ECF 79, 81); *Klamath Tribes II* (ECF 23, 25). Concurrently, Federal Defendants are supplementing the administrative record in *Klamath Tribes II*, which also corrects the document and Bates numbering from the previous record supplement, KT II ECF 22.

---

<sup>1</sup> See Case No.: 1:21-cv-00556-CL (ECF 78) (“*Klamath Tribes P*”); Case No.: 1:22-cv-00680-CL (ECF 21) (“*Klamath Tribes IP*”).

**TABLE OF CONTENTS**

	<b>PAGE</b>
I. Introduction.....	1
II. Statutory Background .....	4
A. Endangered Species Act .....	4
1. Substantive and Procedural Duties Under Section 7(a)(2) .....	4
2. Prohibition Against Take Under Section 9 .....	5
3. Reinitiation of Consultation Under Section 7(a)(2).....	5
4. Agency Action During Consultation Under Section 7(d).....	6
5. ESA’s Citizen Suit Provision to Enjoin Ongoing ESA Violations.....	7
B. National Environmental Policy Act.....	7
C. Administrative Procedure Act.....	8
III. Factual Background .....	10
A. The Klamath Project and Reclamation’s Competing ESA Obligations for Affected Species in UKL and the Klamath River.....	10
B. Recent Proliferation of Competing Litigation Regarding Reclamation’s ESA Section 7(a)(2) Compliance on Klamath Project Operations Brought by the Yurok Tribe, Hoopa Valley Tribe, Klamath Tribes, and Project Water Users, Respectively .....	11
C. Severe Drought Conditions Required In-Season Adaptive Management of Klamath Project Operations.....	19
1. Water Year 2021 .....	20
2. Water Year 2022.....	21
IV. Argument .....	24
A. <i>Klamath Tribes I</i> and <i>Klamath Tribes II</i> Should Be Dismissed .....	24
1. The Tribes Fail to Address Joinder of All Required Parties Under Federal Rule 19 and Controlling Circuit Precedent.....	24
2. Both Cases Are Jurisdictionally Moot.....	25

3.	Both Cases Were Filed Without Complying with the ESA’s Mandatory 60-Day Notice Requirement, 16 U.S.C. § 540(g)(2)(A)(i)	300
4.	The Tribes’ Claim Against FWS in <i>Klamath Tribes II</i> Is Moot and Otherwise Nonjusticiable.....	344
B.	Should the Court Reach the Merits, Federal Defendants Are Entitled to Summary Judgment in <i>Klamath Tribes I</i> .....	40
1.	The Tribes Fail to Show the 2021 TOP Violated ESA Section 9.....	443
2.	The Tribes Fail to Show the 2021 TOP Violated ESA Section 7.....	47
C.	Should the Court Reach the Merits, Federal Defendants Are Entitled to Summary Judgment in <i>Klamath Tribes II</i> .....	48
1.	Federal Defendants Are Entitled to Summary Judgment on the Tribes’ ESA Claims .....	48
2.	Federal Defendants Are Entitled to Summary Judgment on the Tribes’ NEPA Claims .....	54
a.	Reclamation’s DNA Fully Complied With NEPA .....	54
b.	The Tribes’ NEPA Argument Does Not Account for the Totality of Reclamation’s Analysis .....	60
D.	The Tribes’ Requested Injunctive Relief Is Unjustified .....	663
V.	Conclusion .....	66

## TABLE OF AUTHORITIES

CASE	PAGE
<i>Alabama v. U.S. Army Corps of Eng'rs</i> , 441 F. Supp. 2d 1123 (N.D. Ala. 2006) .....	47
<i>Alsea Valley All. v. Lautenbacher</i> , No. CV 05-6376-AA, 2006 WL 8460501 (D. Or. Apr. 25, 2006).....	31
<i>Am. Cargo Transp. v. United States</i> , 625 F.3d 1176 (9th Cir. 2010) .....	26
<i>Arizonans for Off. English v. Arizona</i> , 520 U.S. 43 (1997) .....	25
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997) .....	7, 37
<i>Burke v. Barnes</i> , 479 U.S. 361 (1987) .....	27
<i>Cetacean Cmty. V. Bush</i> , 386 F.3d 1169 (9th Cir. 2004) .....	8
<i>City of Santa Clarita v. U.S. Dep't of Interior</i> , No. CV02-00697 DT, 2006 WL 4743970 (C.D. Cal. Jan. 30, 2006) .....	40
<i>Conyers v. Reagan</i> , 765 F.2d 1124 (D.C. Cir. 1985).....	27
<i>Ctr. for Biological Diversity v. Everson</i> , 435 F. Supp. 3d 69 (D.D.C. 2020).....	64
<i>Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.</i> , 698 F.3d 1101 (9th Cir. 2012).....	37
<i>Ctr. for Env't Sci., Accuracy &amp; Reliability v. Cowin</i> , No. 1:15-CV-01852 LJO BAM, 2016 WL 8730760 (E.D. Cal. Mar. 4, 2016) .....	31
<i>Ctr. for Env't Sci., Accuracy &amp; Reliability v. Nat'l Park Ser.</i> , 1:14-CV-02063-LJO-MJS, 2016 WL 4524758 (E.D. Cal. Aug. 29, 2016) .....	32, 33, 35
<i>Defenders of Wildlife v. Norton</i> , 239 F. Supp. 2d 9 (D.D.C. 2002).....	65
<i>Defs. of Wildlife v. Bureau of Ocean Energy Mgmt.</i> , 684 F.3d 1242 (11th Cir. 2012) .....	6
<i>Defs. of Wildlife v. Flowers</i> , 414 F.3d 1066 (9th Cir. 2005) .....	6, 37
<i>Defs. of Wildlife v. Zinke</i> , 856 F.3d 1248 (9th Cir. 2017).....	37
<i>Diffenderfer v. Cent. Baptist Church of Miami</i> , 404 U.S. 412 (1972).....	25, 27
<i>Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs</i> , 932 F.3d 843 (9th Cir. 2019).....	16, 17, 24

*Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789 (9th Cir. 1999)..... 25

*El Rescate Legal Servs. v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742 (9th Cir. 1991) ..... 37

*Fox v. Palmas Del Mar Props.*, 620 F. Supp. 2d 250 (D.P.R. 2009) ..... 7

*Friends of Animals v. Ashe*, 51 F. Supp. 3d 77 (D.D.C. 2014)..... 31

*Friends of Merrymeeting Bay v. Topsham Hydro Partners Ltd. P’ship*,  
No. 2:11-cv-37-GZS, 2013 WL 145623 (D. Me. Jan. 14, 2013) ..... 27

*Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000)..... passim

*Grand Canyon Trust v. U.S. Bureau of Recl.*, 691 F.3d 1008 (9th Cir. 2012) ..... 8

*Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123 (D. Haw. 2000) ..... 37

*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987)..... 7, 26, 27

*Hallstrom v. Tillamook Cnty.*, 493 U.S. 20 (1989)..... 30, 31, 32

*Hoopa Valley Tribe v. Nat’l Marine Fisheries Serv.*,  
230 F. Supp. 3d 1106 (N.D. Cal. 2017) ..... 12, 25

*Idaho Sporting Cong. v. Alexander*, 222 F.3d 562 (9th Cir. 2000) ..... 8, 54

*In re: Operation of the Missouri River Sys. Litig.*, 363 F. Supp. 2d 1145 (D. Minn. 2004)..... 47

*Klamath Irrigation Dist. v. Or. Water Res. Dep’t*, 321 Or. App. 581 (Or. Ct. App. 2022)..... 17

*Klamath Irrigation Dist. v. U.S. Bureau of Recl.*, 489 F. Supp. 3d 1168 (D. Or. 2020) ..... 16

*Klamath Irrigation Dist. v. U.S. Bureau of Recl.*,  
No. 18-CV-03078-WHO, 2018 WL 3570865 (N.D. Cal. July 25, 2018)..... 12

*Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022) ..... 17, 24

*Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*,  
No. 1:21-CV-00504-AA, 2022 WL 1210946 (D. Or. Apr. 25, 2022) ..... 18

*Klamath Tribes v. U.S. Bureau of Recl.*, 537 F. Supp. 3d 1183 (D. Or. 2021)..... passim

*Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008)..... 9

*Lone Rock Timber Co. v. U.S. Dep’t of Interior*, 842 F. Supp. 433 (D. Or. 1994)..... 32

*Los Angeles Cnty. v. Davis*, 440 U.S. 625 (1979)..... 26

*Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)..... 38

*Marsh v. Or. Nat. Res. Council*, 490 U.S. 360 (1989)..... 9

*Mills v. Green*, 159 U.S. 651 (1895)..... 25

*Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193 (D. Or. 2003)..... 31

*Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024 (9th Cir. 2010)..... 9

*Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800 (9th Cir. 1999)..... 7

*N. Alaska Env't Ctr. v. U.S. Dep't of the Interior*, 983 F.3d 1077 (9th Cir. 2020)..... 54, 55

*Native Fish Soc’y v. NMFS*, 992 F. Supp. 2d 1095 (D. Or. 2014)..... 37

*Nat’l Ass’n of Home Builders v. Salazar*, 827 F. Supp. 2d 1 (D.D.C. 2011)..... 25, 26

*Or. Nat. Desert Ass’n v. Sabo*, 854 F. Supp. 2d 889 (D. Or. 2012)..... 27

*Or. Nat. Res. Council Action v. U.S. Forest Serv.*, 445 F. Supp. 2d 1211 (D. Or. 2006)..... 55

*Or. Nat. Res. Council v. Allen*, 476 F.3d 1031 (9th Cir. 2007)..... 37, 38

*Or. Wild v. Connor*,  
 No. 6:09-CV-00185-AA, 2012 WL 3756327 (D. Or. Aug. 27, 2012)..... 32

*Pac. Coast Fed’n of Fishermen’s Ass’ns v. Gutierrez*, 606 F. Supp. 2d 1122 (E.D. Cal. 2008).. 38

*Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410 (9th Cir. 1990). 5, 38

*Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agric.*,  
 499 F.3d 1108 (9th Cir. 2007)..... 9

*River Runners for Wilderness v. Martin*, 593 F.3d 1064 (9th Cir. 2010)..... 9

*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989)..... 7

*San Luis & Delta-Mendota Water Auth. V. Jewell*, 747 F.3d 581 (9th Cir. 2014)..... 8, 9

*Spencer v. Kemna*, 523 U.S. 1 (1998)..... 27

*Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83 (1998)..... 40

*Stop H–3 Ass’n v. Dole*, 740 F.2d 1442 (9th Cir. 1984) ..... 55

*Sw. Ctr. for Biological Diversity v. U.S. Bureau of Recl.*,  
143 F.3d 515 (9th Cir. 1998)..... 30, 31, 32, 33

*Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997 (9th Cir.) ..... 8

*Yurok Tribe v. U.S. Bureau of Recl.*, 231 F. Supp. 3d 450 (N.D. Cal. 2017) ..... 12, 15, 25

*Yurok Tribe v. U.S. Bureau of Recl.*,  
19-cv-04405-WHO, 2020 WL 2793945 (N.D. Cal. May 29, 2020) ..... 14, 15, 16, 42, 56, 65

**STATUTES**

5 U.S.C. § 702..... 30, 36, 37

5 U.S.C. § 704..... 35

5 U.S.C. § 706..... 8

5 U.S.C. § 706(1) ..... 9

16 U.S.C. § 1531(b) ..... 64

16 U.S.C. § 1532(3) ..... 64

16 U.S.C. § 1532(6) ..... 63

16 U.S.C. § 1533 ..... 63

16 U.S.C. § 1533(c) ..... 63

16 U.S.C. § 1533(d) ..... 5, 64

16 U.S.C. § 1536(a)(2)..... 4, 47, 64

16 U.S.C. § 1536(b) ..... 53, 64

16 U.S.C. § 1536(b)(3)(A)..... 4

16 U.S.C. § 1536(b)(4)(C)(i)-(ii) ..... 5

16 U.S.C. § 1536(d) ..... 6, 7

16 U.S.C. § 1536(o)(2) ..... 5, 46

16 U.S.C. § 1538..... 64

16 U.S.C. § 1538(a)(1)(B)-(C)..... 5

16 U.S.C. § 1540(g)(1)(A)..... 7, 26

16 U.S.C. § 1540(g)(2)(A)(i) ..... 7, 30

28 U.S.C. § 1442(a)(1)..... 18, 23

42 U.S.C. § 4321 ..... 7

42 U.S.C. § 4342..... 7

**RULES**

Federal Rule of Civil Procedure 19 ..... 2

**FEDERAL REGULATIONS**

40 C.F.R. § 1501.3 ..... 8

40 C.F.R. § 1501.6 ..... 8



40 CFR § 1501.5 ..... 8  
 50 C.F.R. § 223.203 ..... 64  
 50 C.F.R. §402.12 ..... 53  
 50 C.F.R. § 402.14 ..... 4, 53  
 50 C.F.R. §402.14(c)..... 53  
 50 C.F.R. § 402.14(i) ..... 5  
 50 C.F.R. § 402.14(i)(4)..... 37  
 50 C.F.R. § 402.14(i)(5)..... 5  
 50 C.F.R. § 402.15(a)..... 4, 39  
 50 C.F.R. § 402.16 ..... 6  
 50 C.F.R. § 402.16(a)..... 6, 39

**FEDERAL REGISTER**

51 Fed. Reg. 19,926 (June 3, 1986) ..... 6  
 53 Fed. Reg. 27,130 (July 18, 1988)..... 10  
 62 Fed. Reg. 24,588 (May 6, 1997) ..... 10  
 64 Fed. Reg. 24,049 (May 5, 1999) ..... 10  
 69 Fed. Reg. 76,673 (Dec. 22, 2004)..... 10  
 70 Fed. Reg. 69,903 (Nov. 18, 2005)..... 10  
 77 Fed. Reg. 73,740 (Dec. 11, 2012) ..... 10  
 84 Fed. Reg. 44,976 (Aug. 27, 2019)..... 40

## I. Introduction

In 2021 and 2022, the Upper Klamath Basin experienced severe droughts of historic proportions, beyond the realm of those experienced in the 40-year period of record on which Reclamation had planned its long-term operation of the Klamath Project. The unanticipated drought conditions were so severe that it was impossible for Reclamation to meet all of its competing Endangered Species Act (“ESA”) obligations for listed fish species in Upper Klamath Lake (“UKL”) and the Klamath River, even without providing any irrigation deliveries. Because Reclamation’s planned operations were simply not attainable in the spring/summer periods of those years, Reclamation was required to adaptively manage operations during those time periods through temporary operating procedures (“TOP”). After conferring with FWS and the National Marine Fisheries Service (“NMFS”), Reclamation was required to make difficult decisions in each TOP that best met its competing legal obligations and were guaranteed not to satisfy all tribes and stakeholders. As this Court observed in spring 2021, “[t]he impact that mother nature will have on the Upper Klamath Lake will be extensive; impacting tribes, farmers, fisherman, the C’waam and Koptu living in the lake, the downstream salmon and their ocean predators, [and] the families living in communities supported by fishing and irrigation.”

*Klamath Tribes v. U.S. Bureau of Recl.*, 537 F. Supp. 3d 1183, 1184 (D. Or. 2021) (“*Klamath Tribes I*”).

In the midst of 2021’s historic drought, the Klamath Tribes moved this Court for a temporary restraining order and preliminary injunction to block implementation of the 2021 TOP and require that more water be left in UKL for ESA-listed suckers, at the expense of Klamath River flows for ESA-listed Southern Oregon/Northern California Coast (“SONCC”) coho salmon and Southern Resident killer whales (which prey primarily on Klamath River Chinook

salmon). This Court correctly denied the Tribes' requests after concluding that the Tribes were not likely to prevail on the merits of their claims that the TOP violated the ESA. *Id.* Undeterred by the Court's ruling, however, the Tribes filed a second lawsuit challenging Reclamation's TOP for 2022 ("*Klamath Tribes II*").

The 2021 TOP and the 2022 TOP each have expired under their own terms, however, and Reclamation has moved on to the challenges of water year 2023 and beyond. While Reclamation is moving forward, the Klamath Tribes persist in looking backwards, seeking a summary judgment ruling on the lawfulness of the expired TOPs from 2021 and 2022. The Tribes' challenges are not justiciable for a host of reasons. First, the Tribes have not addressed whether all required parties have been joined to its lawsuits in accordance with Federal Rule of Civil Procedure 19 and controlling Ninth Circuit precedent that specifically concerns the Klamath Project. This Court recently dismissed challenges to Klamath Project operations under Rule 19, and the Ninth Circuit has affirmed. Second, the Tribes' challenges are jurisdictionally moot, as the challenged TOPs are null and void, and no relief against either TOP is appropriately available. In fact, not only do the Tribes challenge TOPs that are expired, they assert legal claims that are premised on a FWS biological opinion ("BiOp") and incidental take statement ("ITS") that are also expired and were replaced on January 13, 2023. *See* Biological Opinion on the Effects of the Proposed Interim Klamath Project Operations Plan, effective January 13, 2023, through September 30, 2023, on the Lost River Sucker and the Shortnose Sucker. KT II AR 134. Third, the Tribes cannot avail themselves of the ESA's citizen suit provision to challenge the TOPs because they failed to satisfy the statute's mandatory prerequisite to judicial review of providing 60 days' advance notice of their claims prior to filing suit. Lastly, the Tribes do not state a justiciable claim for relief against FWS for violating the ESA in *Klamath Tribes II*, as

FWS' duty here was simply to advise Reclamation who, as the action agency, bore responsibility to ensure that its actions met the requirements of the ESA. Each of these threshold defects independently warrants dismissal of the Tribes' claims.

However, even if the Court were to reach the merits of the Tribes' claims, it should grant summary judgment to Federal Defendants. The Court previously found that the Tribes' claims in *Klamath Tribes I* lacked merit. 537 F. Supp. 3d 1183. As noted above, the 2021 TOP were emergency in-season measures necessitated by severe drought conditions that had not been anticipated when Reclamation originally prepared its planned operations in 2018 (or augmented them in 2020) and FWS and NMFS prepared their respective BiOps and ITSs on those planned operations. This Court correctly found that, under the difficult circumstances presented, the 2021 TOP reflected a reasonable balancing of Reclamation's competing ESA obligations for listed species consistent with the meet and confer provisions of the BiOps and ITSs. In the following water year, 2022, Reclamation was again confronted with severe drought that made it impossible to fully and simultaneously meet its competing ESA obligations for all listed species, regardless of any irrigation deliveries. As such, Reclamation was again required to make difficult decisions in a new TOP that was virtually guaranteed not to satisfy all tribes and stakeholders, but which was developed after following the procedures set forth in the BiOps and ITSs and was supported by the prior compliance documents prepared in accordance with the National Environmental Policy Act ("NEPA").

Given that the TOPs are expired, it is evident that what the Tribes effectively seek from this Court is an advisory opinion that will constrain Reclamation's future operation plans for the Klamath Project. Courts are not vested with jurisdiction to issue advisory opinions, however. Rather than looking backwards to expired and outdated temporary measures, the more

productive exercise is to focus attention and resources on present and future operations for the Project. As the Court is aware, Reclamation has been engaged in reinitiated ESA consultation such a long-term plan since 2019, which it expects to conclude in October 2024 to take into account the scheduled removal of four hydroelectric dams on the Klamath River. *See generally* KT II AR 132 to 136.

For the foregoing reasons, the Court should dismiss the Tribes' challenges to the expired 2021 and 2022 TOPs. In the alternative, the Court should grant summary judgment to Federal Defendants on those challenges.

## **II. Statutory Background**

### **A. Endangered Species Act**

#### **1. Substantive and Procedural Duties Under Section 7(a)(2)**

ESA Section 7(a)(2) directs each federal agency ("action agency," here, Reclamation) to insure, in consultation with the appropriate consulting agency (here, FWS and NMFS), 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 a proposed action is likely to adversely affect listed species, formal consultation is required and 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).

## **2. Prohibition Against Take Under Section 9**

ESA Section 9 prohibits “take” of members of an endangered species, and that prohibition can be extended to threatened species by regulation. 16 U.S.C. §§ 1538(a)(1)(B)-(C), (G); 1532(19); 1533(d). However, if a consulting agency determines through Section 7 consultation in a BiOp that a proposed federal agency action is not likely to cause jeopardy even though it is reasonably certain to result in take, it will issue an 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).

## **3. Reinitiation of Consultation Under Section 7(a)(2)**

After Section 7 consultation has been completed, the ESA’s implementing regulations provide that the consultation must be reinitiated if “discretionary Federal involvement or control over the action has been retained or is authorized by law” and any of the following triggering circumstances occur:

- (1) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or

(4) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16(a).

The duty to reinitiate consultation lies solely with the action agency, as the consulting agency “lacks the authority to require the initiation of consultation.” *Def. of Wildlife v. Flowers*, 414 F.3d 1066, 1070 (9th Cir. 2005) (citation omitted). This is true with regard to commencing consultation in the first instance as well as reinitiating a completed consultation. *Id.*; see also 51 Fed. Reg. 19,926, 19,956 (June 3, 1986) (preamble to the reinitiation of consultation regulation, 50 C.F.R. § 402.16, stating that consulting agencies lack the “authority to require Federal agencies to reinitiate consultation if they choose not to do so”); Endangered Species Consultation Handbook at 2-11 (“the Services’ can not [sic] require Federal agencies to reinitiate consultation if they choose not to do so”); see also *id.* at 2-5 (“[t]he action agency is responsible for reinitiating consultation should their actions result in exceeding the level of incidental take”). The consulting agency’s duty is limited to requesting that the action agency reinitiate consultation if the consulting agency believes a triggering event has occurred. 50 C.F.R. § 402.16(a).

While an action agency completes reinitiated consultation on its action, the BiOp and ITS on that action can remain operative pending completion of the reinitiated consultation. *Def. of Wildlife v. Bureau of Ocean Energy Mgmt.*, 684 F.3d 1242, 1252, n.4 (11th Cir. 2012).

#### **4. Agency Action During Consultation Under Section 7(d)**

The ESA states that, “[a]fter initiation of consultation,” but before the conclusion of consultation, an action agency must not make “any irreversible or irretrievable 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).

This requirement under Section 7(d) is separate and distinct from the requirements of Section 7(a)(2). *See id.*

### **5. ESA’s Citizen Suit Provision to Enjoin Ongoing ESA Violations**

The ESA includes a citizen suit provision that provides, in relevant part, 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). The phrase “to be in violation” only permits a plaintiff to bring a suit “to enjoin or otherwise abate an ongoing violation.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 58-59 (1987); *accord Fox v. Palmas Del Mar Props.*, 620 F. Supp. 2d 250, 262 (D.P.R. 2009) (dismissing ESA citizen suit claim based on past alleged violations).

The ESA’s citizen suit provision only authorizes claims for alleged violations of the ESA that are being committed by an action agency. The provision does not authorize claims that a consulting agency is violating the ESA while it is acting in its capacity as a consulting agency. *See* 16 U.S.C. § 1540(g)(1)(A); *Bennett v. Spear*, 520 U.S. 154, 174 (1997).

### **B. National Environmental Policy Act**

NEPA, 42 U.S.C. § 4321 *et seq.*, is a statute which “provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions.” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (*per curiam*) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). NEPA is a procedural statute, and “does not mandate particular results.” *Id.* NEPA established the Council on Environmental Quality (“CEQ”), which promulgates implementing regulations. 42 U.S.C. §



4342; *see also* *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1004 (9th Cir.), *cert. denied*, 142 S. Ct. 713 (2021).

Under CEQ regulations, an agency must determine the appropriate level of NEPA review for a given action. 40 C.F.R. § 1501.3. If it is unclear whether an action constitutes a major federal action, an agency may prepare an Environmental Assessment (“EA”) to determine whether an Environmental Impact Statement (“EIS”) is required. 40 CFR § 1501.5. If the agency determines an EIS is not required, it may issue a Finding of No Significant Impact (“FONSI”). 40 C.F.R. § 1501.6. Where a FONSI is issued, the EA/FONSI is the governing NEPA analysis. *Id.* Courts also have upheld the use by federal agencies of non-NEPA documents to determine “whether new information or changed circumstances require the preparation of a supplemental EA or EIS.” *Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000).

### **C. Administrative Procedure Act**

In the event that the Court reaches the merits of any of the Tribes’ claims, they are subject to review under the standards of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. *San Luis & Delta-Mendota Water Auth. V. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014); *Grand Canyon Trust v. U.S. Bureau of Recl.*, 691 F.3d 1008, 1016 (9th Cir. 2012) (“We review Reclamation and FWS’s compliance with the ESA . . . under the standard set forth in the APA”) (citation omitted); *Cetacean Cmty. V. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004) (“no provision of NEPA explicitly grants any person or entity standing to enforce the statute, but judicial enforcement of NEPA rights is available through the APA”) (citation omitted). Thus, for purposes of the Tribes’ motions for summary judgment here, the Tribes must show on the merits either that an agency action was “unlawfully withheld or unreasonably delayed” or was

“arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(1), (2)(A). To do so, the Tribes must overcome the APA’s standard of review, which is “highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.” *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007) (citation omitted); *accord Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc).

The Ninth Circuit has forcefully affirmed the narrow and deferential nature of the APA standard, noting that it sets a “high threshold” to establish that agency action or inaction is unlawful. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1067 (9th Cir. 2010) (per curiam) (citation omitted); *see also McNair*, 537 F.3d at 988 (overturning prior jurisprudence that had “shifted away from the appropriate standard of review”). The Court’s role is “not to make its own judgment” on the matters considered and resolved by the agency, as the standard of review “does not allow the court to overturn an agency decision because it disagrees with the decision.” *River Runners*, 593 F.3d at 1070; *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (“[A]n agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive”). “Where the agency has relied on ‘relevant evidence [such that] a reasonable mind might accept as adequate to support a conclusion,’ its decision is supported by ‘substantial evidence.’” *Jewell*, 747 F.3d at 601 (citation omitted). Courts must uphold a reasonable agency action “even if the administrative record contains evidence for and against its decision.” *Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1036 (9th Cir. 2010) (citation omitted).

### **III. Factual Background**

#### **A. The Klamath Project and Reclamation's Competing ESA Obligations for Affected Species in UKL and the Klamath River**

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 of suckers 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).

Additionally, the SONCC coho salmon and the Chinook salmon inhabit the Klamath River and its tributaries in California. In 1997, NMFS listed the SONCC coho salmon 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 salmon, and the species are impacted similarly by flows 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. 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 and SONCC coho salmon and their critical habitats as well as killer whales. 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 beginning at Iron Gate Dam. Diverting or releasing water from UKL through Link River Dam to increase Klamath River flows for salmon lowers UKL levels, a potentially detrimental impact for suckers. In short, the Lost River and shortnose suckers can have countervailing needs to those of the SONCC coho salmon and killer whale, depending on water supply in a given year.

**B. Recent Proliferation of Competing Litigation Regarding Reclamation's ESA Section 7(a)(2) Compliance on Klamath Project Operations Brought by the Yurok Tribe, Hoopa Valley Tribe, Klamath Tribes, and Project Water Users, Respectively**

The Klamath Tribes' instant complaints are two of many that have been filed by competing interests in recent years regarding Reclamation's ESA compliance at the Klamath Project, as water has become an increasingly scarce resource in the Klamath Basin. The Klamath Tribes, the Hoopa Valley and Yurok Tribes, and Project water users have all initiated legal actions against Reclamation seeking more water for suckers, salmon, and irrigation, respectively, in this District and elsewhere. Some of this litigation remains ongoing as of the date of this filing.

The recent spate of Klamath Project ESA litigation began in 2016 when the Hoopa Valley Tribe and the Yurok Tribe filed separate suits against Reclamation and NMFS alleging that Klamath Project operations were violating the ESA with regard to SONCC coho salmon because the metric for measuring allowable incidental "take" of salmon due to Project operations

(i.e., *C. shasta* disease) had been exceeded. The *C. Shasta* parasite is central to salmonid disease dynamics in the Klamath River. Each Tribe was granted summary judgment in early 2017, and Reclamation was ordered to establish a 50,000 acre-feet (“AF”) reserve of water to be used to provide additional flows in the Klamath River for salmon – with the caveat that providing such flows not impact protections for suckers. *Hoopa Valley Tribe v. Nat’l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106 (N.D. Cal. 2017); *Yurok Tribe v. U.S. Bureau of Recl.*, 231 F. Supp. 3d 450 (N.D. Cal. 2017) (“*Yurok I*”).

In summer 2018, the Klamath Tribes filed their own suit against Reclamation in the same court, alleging ESA violations regarding impacts from Project operations on suckers and requesting “a preliminary injunction requiring [Reclamation] to maintain [UKL] elevations at or above certain minimums during the irrigation season of 2018 and through the resolution of th[e] litigation.” *Klamath Tribes v. U.S. Bureau of Recl.*, No. 18-CV-03078-WHO, 2018 WL 3570865, at \*9 (N.D. Cal. July 25, 2018). The court denied the motion, finding that the Tribes had not shown that their requested injunction was justified. *Id.* The Tribes subsequently dismissed their complaint.

Later in 2018, Reclamation completed a new proposed operations plan to guide Project operations between 2019 and 2024 (“2018 Plan”). KT I AR 1.<sup>2</sup> With regard to Klamath River flows, the 2018 Plan included an Environmental Water Account (“EWA”) with a minimum of 400,000 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. KT I AR 1 at 000080; KT

---

<sup>2</sup> Citations to the administrative records here will follow this format: KT I AR document number at Bates page number(s) and KT II AR document number at Bates page number(s).

I AR 2 at 001024. In key locations of the Klamath River, habitat availability is limited under the minimum flows, ranging from 40-60 percent of maximum available habitat for critical life stages of coho and Chinook salmon. KT I AR 2 at 001142, 001245. 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 salmon needs. *Id.* at 001037-40. The objective of a 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. The surface flushing flow provision in the 2018 Plan 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. KT I AR 1 at 00302-05.

In early 2019, FWS and NMFS each issued a BiOp on Reclamation’s proposed 2018 Plan, as modified during the consultations, each concluding that the Plan was not likely to jeopardize the continued existence of listed species under their jurisdiction or to destroy or adversely modify designated critical habitat. Each BiOp was accompanied by an ITS exempting anticipated incidental takes caused by otherwise lawful Project operations in accordance with the specified terms and conditions. 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.” KT I AR 2 at 001165. 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 001238-65. Therefore, adverse effects on Chinook salmon would be expected to result in adverse effects to killer whales.

Shortly after the 2018 Plan and the 2019 BiOps and ITSs were issued, the Yurok Tribe filed a new complaint in July 2019 challenging the Plan and NMFS’ BiOp and ITS. *Yurok Tribe v. U.S. Bureau of Recl.*, Civ. No. 3:19-cv-04405-WHO (N.D. Cal.) (“*Yurok IP*”). The complaint alleges, among other claims, that the Plan and BiOp fail to provide sufficient flows in the Klamath River for the SONCC coho salmon and that the ITS exempts an excessive amount of incidental take of the species as a result of Project operations. The complaint asks the court to order Reclamation to provide greater flows for the Klamath River. In October 2019, the Yurok Tribe moved for a preliminary injunction; however, in March 2020, the parties – including the Klamath Water Users Association (“KWUA”), a defendant-intervenor – agreed to stay the case out of deference to Reclamation’s second reinitiated ESA consultation on a new long-term operations plan to supersede the 2018 Plan, and contingent on Reclamation’s supplementation of the 2018 Plan with an interim operations plan (“2020 IOP”) that provided additional Klamath River flows via “augmentation” of the EWA in certain specified conditions. *See* KT I AR 19, 20. Though the consultation was initially expected to be completed by September 30, 2022, as of the date of this filing the 2018 Plan, as supplemented by the 2020 IOP, remains operative along with the 2019 NMFS BiOp and ITS. Reclamation has extended the 2018 Plan/2020 IOP through October 2024, at which time it anticipates having completed reinitiated consultation with

NMFS and FWS on a new long-term operations plan, which will take into account the scheduled removal of four hydroelectric dams on the Klamath River. *See* KT II AR 132 to 136.

In light of the changes to the 2018 Plan via the 2020 IOP, FWS issued a replacement BiOp in April 2020 for its previous 2019 BiOp, which analyzes the effects of the changed operations on suckers and their designated critical habitat. KT I AR 29. FWS' 2020 BiOp 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 a replacement ITS along with its new BiOp, which exempts incidental takes of suckers caused by Project operations that are consistent with the specified terms and conditions. Chief among those conditions is operating the Project to avoid 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 001973. The FWS BiOp was initially set to expire on September 30, 2022; however, Reclamation and FWS subsequently agreed to extend it until it was replaced by a new BiOp and ITS on January 13, 2023. *See* KT II AR 134.

In May 2020, the Yurok Tribe returned to court in *Yurok II* to again seek additional flows for salmon in the Klamath River. The Yurok Tribe moved to lift the stay of litigation and for entry of a temporary restraining order compelling additional releases from UKL. The Klamath Tribes intervened and opposed the Yurok Tribe's motions. The court denied the motions. *Yurok*



*Tribe v. U.S. Bureau of Recl.*, No. 19-cv-04405-WHO, 2020 WL 2793945, at \*5 (N.D. Cal. May 29, 2020). Insofar as *Klamath Tribes I* challenges the 2021 TOP for providing releases from UKL to the Klamath River for salmon, it is in tension with the Yurok Tribe’s pending complaint in *Yurok II* as well as the NMFS BiOp and ITS.

Meanwhile, as tribes based in California and Oregon were filing competing lawsuits against Reclamation in attempts to secure more water for salmon and suckers, respectively, Project water users were filing their own lawsuits against Reclamation to limit Reclamation’s ESA compliance at the Klamath Project for both species, if not cease it entirely. In spring 2019, the Klamath Irrigation District (“KID”) and KWUA filed separate complaints in this Court, variously alleging that Reclamation’s storage of water in UKL under Oregon state-law-based water rights is immune from ESA compliance and/or that stored water 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.

This Court dismissed those complaints, however, after the Klamath Tribes – joined by the Hoopa Valley Tribe – intervened for the limited purpose of moving to dismiss the cases for failure to join all necessary and indispensable parties under Rule 19. *Klamath Irrigation Dist. v. U.S. Bureau of Recl.*, 489 F. Supp. 3d 1168 (D. Or. 2020). The Klamath Tribes argued that they – along with the Hoopa Valley Tribe, which is located on the Trinity River, a major tributary of the Klamath River in California – were necessary parties who could not be joined to the litigation due to their sovereign immunity. Although the United States did not join in the Tribes’ motions and asserted that the United States is generally the only required and indispensable defendant in APA litigation challenging federal agency action, it acknowledged that *Dine Citizens Against Ruining Our Env’t v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019), *cert. denied*, 141 S.

Ct. 161 (2020), was controlling authority in the Ninth Circuit and supported dismissal of the complaints. The Ninth Circuit recently affirmed this Court's dismissal of the complaints. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022). On January 11, 2023, the Ninth Circuit denied the water users' requests for rehearing and rehearing *en banc*.

Separately, KID also has been pursuing litigation to halt Reclamation's ESA compliance at the Klamath Project in state court. In May 2020, KID filed suit against the Oregon Water Resources Department ("OWRD") seeking an injunction directing the OWRD Watermaster to stop Reclamation from diverting water from UKL for Klamath River flows to sustain salmon. Pursuant to that claim, on October 13, 2020, the Marion County Circuit Court filed a written order requiring OWRD's Watermaster to immediately stop the distribution, use and/or release of Stored Water from UKL without determining that it is for a permitted purpose by users with existing water rights of record or determined claims to use the Stored Water in UKL. Reclamation was not a party to the case; however, and the court's order and letter opinion did not consider Reclamation's obligations under federal law, such as the ESA, or the effect of the court's order on those obligations. As directed by the court, OWRD issued an order to Reclamation in April 2021 prohibiting Reclamation from releasing any stored water from UKL for non-irrigation purposes. In July 2021, OWRD issued Reclamation two notices of violation of the April order while Reclamation was implementing its planned operations in accordance with the 2018 Plan/2020 IOP and the NMFS BiOp and ITS. OWRD appealed the Circuit Court's summary judgment ruling, and the Oregon Court of Appeals recently reversed, finding that Reclamation was a necessary and indispensable party to the case. *Klamath Irrigation Dist. v. Or. Water Res. Dep't*, 321 Or. App. 581 (Or. Ct. App. 2022). That opinion is not yet a final

appellate judgment, however, as KID filed a petition for review with the Oregon Supreme Court on December 24, 2022.

In September 2021, the court in *Yurok II* lifted the stay of litigation for the limited purpose of allowing the United States to pursue a crossclaim against OWRD and KWUA challenging OWRD's April 6, 2021 order and subsequent violation notices on various grounds, including federal preemption under the ESA. OWRD and KWUA each have filed counterclaims against the United States relating to Reclamation's ESA compliance at the Klamath Project. The parties have filed extensive cross-motions for summary judgment, among other motions, and the court heard oral argument on those motions on December 7, 2022. A summary judgment decision is expected prior to the start of the 2023 irrigation season.<sup>3</sup>

Lastly, KID also has moved against Reclamation to halt ESA releases by filing a motion for preliminary injunction in the Klamath Basin Adjudication ("KBA") on March 29, 2021. The KBA is a general stream adjudication in the Klamath County Circuit Court of Oregon that is in the 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 water that has been stored in UKL is immune from the ESA's requirements or that Reclamation cannot use such water for ESA purposes or to be consistent with federal reserved tribal water and fishing rights without an Oregon state water right to do so. The United States removed the motion from the state court 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 motion back to state court, which Judge Aiken denied. KID then

---

<sup>3</sup> Though the stay of litigation in *Yurok II* otherwise expired under its own terms on September 30, 2022, the case is presently proceeding only on the United States' crossclaim and the counterclaims by OWRD and KWUA.

filed for a writ of mandamus in the Ninth Circuit compelling remand to state court. Argument on the mandamus petition was heard on November 18, 2022, and a decision is pending.

**C. Severe Drought Conditions Required In-Season Adaptive Management of Klamath Project Operations**

As explained above, the 2018 Plan contains Reclamation's planned operations for the Klamath Project for the years 2019-2024, including UKL elevations and Klamath River flows, and that Plan has been supplemented by the 2020 IOP. FWS issued a BiOp and ITS in 2020 that addressed the effects of the 2018 Plan as supplemented by the 2020 IOP on suckers. NMFS issued a BiOp and ITS in 2019 on the 2018 Plan and subsequently determined that the 2020 IOP would result in effects consistent with its effects analysis in the 2019 BiOp. Reclamation began operating the Klamath Project in accordance with the 2018 Plan/2020 IOP, FWS' 2020 BiOp and ITS, and NMFS' 2019 BiOp and ITS in March 2020.<sup>4</sup>

The planned operations under the 2018 Plan/2020 IOP and, in turn, the applicable BiOps and ITSs, assumed hydrological conditions would be within those observed in the period of record for the Klamath Basin, which spans some 40 years.<sup>5</sup> As it would turn out, however, hydrological conditions in 2021 and 2022 were outside the realm of conditions previously experienced in the period of record, thwarting full and simultaneous implementation of the planned operations.

---

<sup>4</sup> The 2018 Plan/2020 IOP were initially scheduled to last until September 30, 2022, but have been extended for another two years, through October 2024, and FWS has issued a replacement for its 2020 BiOp and ITS that analyzes the effects of extending the 2018 Plan/IOP. *See generally* KT II AR 132 to 136.

<sup>5</sup> The period of record used by Reclamation and, in turn, the Services to assess potential effects of Project operations on listed species in UKL based on past hydrological conditions, spanned from October 1, 1980 to November 30, 2019. KT II AR 29 at BOR001869.

## 1. Water Year 2021

Water year 2020 ushered in severe drought conditions in the Klamath Basin, which continued into 2021. Reclamation observed in early 2021 that “[c]ritically dry and extraordinary hydrologic conditions in the Klamath River Basin [would] prevent full simultaneous satisfaction of requirements for ESA-listed species in [UKL] and the Klamath River” “even without water deliveries to the Klamath Project.” KT I AR 153 at 005546. Given these extreme conditions, Reclamation prepared temporary measures (the 2021 TOP) to adaptively – and temporarily – manage operations in spring and summer of that year (April 15 through September 30). KT I AR 153. Reclamation implemented the 2021 TOP following months of coordination with FWS and NMFS regarding hydrologic conditions and the needs of listed species.

Under the 2021 TOP, Reclamation’s operations at Link River Dam supported the minimum Klamath River flows specified in the 2018 Plan/2020 IOP and analyzed in the NMFS BiOp and ITS. *Id.* at 005543. Though the TOP did not propose deviations from minimum Klamath River flows, Reclamation endeavored to simultaneously protect suckers in UKL by making the implementation of a surface flushing flow in the Klamath River (designed to reduce the risks of disease to salmon) conditional and extending the window for potential implementation of such a flow to later in the season (*i.e.*, June 1) than otherwise would have been the case. *Id.* at 005547. Implementing such a flow requires the release of a significant volume of water from UKL and would have lowered UKL elevations further beyond the boundary conditions set forth in the 2018 Plan/2020 IOP and analyzed in the 2020 FWS BiOp and included in the ITS. Reclamation acknowledged that the TOP were “unlikely to satisfy all groups but . . . the TOP represent[ed] a good-faith effort, developed collaboratively, to meet as many of the competing needs as is practicable.” *Id.* at 005545.

The TOP explained that Reclamation would use “real-time monitoring and forecasting information [and] meet and confer with the Services to quickly act on opportunities to reduce risk to listed 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.” *Id.* at 005544. Ultimately, Reclamation made the difficult decision in accordance with the 2021 TOP to not implement a flushing flow for salmon protection in 2021, even though NMFS’ BiOp and ITS otherwise called for such a release.<sup>6</sup> KT II AR 125 at BOR005467. The flushing flow was sacrificed to preserve UKL elevations for suckers. The 2021 TOP expired under its own terms on September 30, 2021.

## 2. Water Year 2022

Water year 2022 presented a third consecutive year of severe drought. By the end of January 2022, cumulative inflows to UKL for the water year (starting October 1, 2021) were the fourth lowest in the period of record. KT II AR 93 at BOR002199. On February 25, 2022, Reclamation initiated meet and confer procedures with USFWS and NMFS pursuant to the

---

<sup>6</sup> Reclamation’s ability to meet its competing ESA requirements for suckers and salmon was further impaired by the fact that, on April 15, 2021, the Klamath Drainage District (“KDD”) began diverting water 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.*, KT I AR 140. 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.” KT I AR 159 at 005653. KDD did not comply with Reclamation’s directions to cease diverting. KT I AR 163. As a consequence of KDD’s unauthorized diversions, maintaining Klamath River minimum flows consistent with NMFS’ BiOp and ITS required Reclamation to increase releases from UKL by a commensurate amount, thereby causing additional decreases in UKL elevations contrary to FWS’ BiOp and ITS. Ultimately, KDD singlehandedly diverted virtually the entire allocation that Reclamation proposed for Klamath Project irrigation water in 2021, leaving no irrigation water for other Project users. The United States has initiated legal action against KDD regarding its unauthorized diversions, and that litigation is currently in the discovery phase. *United States v. Klamath Drainage Dist.*, No. 1:22-cv-00962-CL (D. Or.).

respective BiOps and ITSs to determine causative factors for potentially falling outside of the boundary conditions for UKL and “to collaborate on the development of an operational path forward for managing available water supplies for the remainder of the 2022 water year” in the event that Reclamation was unable to simultaneously, and fully, comply with the terms and conditions of both Services’ BiOps and ITSs. KT II AR 86 at BOR001946.

Reclamation held weekly coordination meetings with the Services throughout the month of March as hydrologic conditions continued to deteriorate. “To ensure clear and transparent communication, Reclamation . . . also engaged components of the Departments of the Interior and Commerce, Klamath Basin Tribes, Project water users, and other key stakeholders to discuss possible adaptive management actions that could be implemented to best meet the requirements of the ESA, tribal trust responsibilities, and contractual obligations.” KT II AR 57 at BOR 001529. By the end of that month, year-to-date UKL inflows would prove to be the lowest of any year in the entire period of record. KT II AR 66 at BOR001654.

On April 9, 2022, Reclamation reported to FWS that:

Current hydrologic modeling suggests that, regardless of Reclamation’s actions, extreme drought conditions will prevent UKL elevation from reaching 4,142.0 feet (ft) in April and May, the elevation described in the USFWS 2020 BiOp as necessary for adequate ESA-listed Lost River sucker spawning habitat at shoreline springs. Similarly, even without operation of the Project or provision of a Surface Flushing Flow (SFF) in the Klamath River, but for without a substantial improvement in projected dry hydrologic conditions, UKL surface elevations will also not meet or exceed an elevation of 4,140.5 ft prior to July 15, as required in the USFWS 2020 BiOp.

Based on this information, Reclamation has determined that meeting the specific UKL elevations from April 1 through July 15, as required under the 2020 USFWS BiOp for endangered sucker spawning and larval rearing habitat, is not obtainable in 2022. However, Reclamation modeling does indicate that UKL elevations at the end of the 2022 season will be above the required 4,138.0 ft elevation.

KT II AR 57 at BOR001529. With respect to Klamath River conditions, Reclamation further explained that projected releases to the river could “fall outside the thresholds identified in T&C 1A” of the NMFS BiOp and ITS during the 2022 spring/summer season and that a full flushing flow “as required by the 2019 NMFS BiOp [was] unattainable.” *Id.* Collectively, and in accordance with the terms and conditions of the Services’ respective BiOps and ITSs, Reclamation, FWS, and NMFS determined that “the causative factors for Reclamation’s inability to simultaneously meet[] boundary conditions specified in each BiOp [were] primarily the result of consecutive critically dry years and extraordinary hydrologic conditions.” *Id.*

Given the dire hydrologic conditions, Reclamation determined that temporary adjustments to scheduled operations under the 2018 Plan/2020 IOP were again warranted for 2022. The 2022 TOP “primarily focus[ed] on reshaping the required [flushing flow] event [for the Klamath River], allowing for a limited volume of water for Project purposes, and ensuring that UKL remain[ed] above the required end of season elevation prescribed by the USFWS 2020 BiOp.” *Id.* at BOR001529-30. Reclamation explained that the 2022 TOP “recognizes and attempts to reconcile the exigent needs of the threatened and endangered species as well as affected tribal and irrigation communities with respect to a very limited amount of water available for the 2022 spring/summer operating season.” *Id.* at BOR001530. As with the 2021 TOP, Reclamation “acknowledge[d] that the 2022 TOP [was] unlikely to satisfy all groups but believe[d] that the 2022 TOP represent[ed] a good-faith effort, developed collaboratively, to meet as many of the competing needs as is practicable under the circumstances.” *Id.*

With regard to Project irrigation, Reclamation determined that, with spring/summer UKL boundary conditions unattainable regardless of any irrigation deliveries, and with no authorized irrigation deliveries having been provided to Project users in 2021, it would include a limited



irrigation allocation in the 2022 TOP of approximately 62,000 AF of water (out of a maximum possible total irrigation allocation of 350,000 AF). *Id.* at BOR 001532. This initial allocation was subject to actual conditions, with half of any realized increase in forecasted volumes to be retained in UKL to assist in providing a buffer in the end of season UKL elevation, and the remaining half to be distributed as Project Supply for irrigation use and/or refuge purposes. *Id.* at BOR001533. Any shortfall in projected volumes would result in a reduction in diversions for Project purposes to ensure UKL elevations remained above 4,138.15 feet at all times through the end of season. *Id.* As an added protection for UKL elevations, Reclamation increased the end of season elevation through the 2022 TOP to 4,138.15 feet, which exceeded the FWS 2020 BiOp and ITS end of season boundary condition of 4,138.00 feet by approximately 10,230 AF. *Id.* Reclamation also reduced the magnitude of the flushing flow in the Klamath River required by NMFS' BiOp, which kept an additional 20-25 thousand AF of water in UKL. KT II AR 127 at BOR005477; 129 at BOR005479. The 2022 TOP expired on September 30, 2022.

#### **IV. Argument**

##### **A. *Klamath Tribes I and Klamath Tribes II* Should Be Dismissed**

##### **1. The Tribes Fail to Address Joinder of All Required Parties Under Federal Rule 19 and Controlling Circuit Precedent**

While as noted above (*supra* § III.B) the United States' position is that it is generally the only required and indispensable defendant in APA litigation, controlling Ninth Circuit authority supports dismissal of complaints challenging agency action where, as here, granting the requested relief may impair the sovereign interests of an absent tribe that cannot be joined due to sovereign immunity. *Dine Citizens*, 932 F.3d 843; *Klamath Irrigation Dist.*, 48 F.4th 934. Here, granting the Klamath Tribes' requested relief has the potential to impair the Hoopa Valley Tribe's sovereign interests in its reserved fishing and associated water rights, and Hoopa Valley

cannot be joined without its consent. The same rationale would apply to the Yurok Tribe, which is located along the Klamath River in California and is similarly situated to the Hoopa Valley Tribe. *See, e.g., Yurok I*, 231 F. Supp. 3d at 481; *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1137.

The Klamath Tribes have made no attempt to distinguish their present cases from *Dine Citizens* and *Klamath Irrigation District*, or to otherwise demonstrate why dismissal for failure to join the absent tribes is not required under circuit precedent. Should the Court find that Rule 19 precedent compels dismissal here, there would be no need to proceed further.

## 2. Both Cases Are Jurisdictionally Moot

As the Supreme Court has explained, “[t]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.” *Mills v. Green*, 159 U.S. 651, 653 (1895). That is because Article III limits a federal court’s jurisdiction to “cases or controversies.” *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797 (9th Cir. 1999) (en banc). A plaintiff must maintain a live case and standing throughout litigation to preserve federal jurisdiction. *Id.* A case is moot when the issues no longer involve a live case or controversy with respect to which the court can appropriately provide meaningful relief. *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 72 (1997).

Here, there is no live case or controversy over the 2021 or 2022 TOPs. It is beyond dispute that each TOP has expired under its own terms and that each is inoperative and devoid of any legal force or effect. As neither TOP is governing Project operations, neither TOP can be causing any ongoing legal violations or injury to the Tribes. Given these indisputable facts, the Tribes’ challenges to the 2021 TOP and 2022 TOP are moot. *See, e.g., Diffenderfer v. Cent. Baptist Church of Miami*, 404 U.S. 412, 414–15 (1972) (per curiam); *Nat’l Ass’n of Home*

*Builders v. Salazar*, 827 F. Supp. 2d 1, 7 (D.D.C. 2011) (“Ample precedent demonstrates that a lawsuit seeking declaratory and injunctive relief is moot when the challenged policy is withdrawn”). Expiration of the TOPs has “completely and irrevocably eradicated the effects of the alleged violation[s]” of the ESA and NEPA that the Tribes allege occurred while they were in effect. *Am. Cargo Transp. v. United States*, 625 F.3d 1176, 1179 (9th Cir. 2010) (quoting *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979)).

No judicial relief is appropriately available against the expired TOPs. It is unclear whether the Tribes even still request any injunctive relief, as their summary judgment motions make no reference to it. The Tribes have not amended their complaints, however, to remove their requests for injunctive relief. Insofar as the Tribes do seek injunctive relief, it is not authorized under the ESA’s citizen suit provision, which 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.” 16 U.S.C. § 1540(g)(1)(A) (emphasis added); *see also Gwaltney*, 484 U.S. at 58-59 (holding that the phrase “to be in violation” in the nearly identical citizen suit provision in the Clean Water Act only permits a plaintiff to bring a suit “to enjoin or otherwise abate an ongoing violation” and noting that “the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past”). Here, the TOPs are inoperative, and they therefore cannot be causing any ongoing ESA violation to enjoin.

Indeed, as noted above, the Tribes’ theory is that the 2021 TOP and the 2022 TOP violated the ESA during the respective times that they were implemented, and each of the Tribes’ complaints seeks, in part, a declaration “that Reclamation *has violated* the ESA.” *See Klamath Tribes I*, ECF No. 1 at 31, ¶ A (emphasis added); *Klamath Tribes II*, ECF No. 1 at 34, ¶ A (emphasis added). The ESA’s citizen suit provision does not authorize relief for wholly past

violations, however. *Gwaltney*, 484 U.S. 59; *see also Friends of Merrymeeting Bay v. Topsham Hydro Partners Ltd. P'ship*, No. 2:11-cv-37-GZS, 2013 WL 145623, at \*5-6 (D. Me. Jan. 14, 2013) (declining to issue injunctive relief to remedy past takings where the plaintiff's ESA Section 9 claim had become moot by the subsequent issuance of an ITS).

The Tribes may not avoid mootness by requesting declaratory relief. A court may grant declaratory relief only in the case of a “live controversy.” *Burke v. Barnes*, 479 U.S. 361, 364 (1987). Here, there is no live controversy over either the 2021 TOP or the 2022 TOP, as noted above. A declaration from this Court opining on the legality of TOPs that have expired and are inoperative would be purely advisory, and therefore inappropriate. *See Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (“[Federal courts] are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong”); *Diffenderfer*, 404 U.S. at 414–15 (issuing a declaratory judgment that a repealed statute is unconstitutional and an injunction against its application would “of course [be] inappropriate now that the statute has been repealed”). Indeed, the Article III case or controversy requirement applies to declaratory judgments, and the fact that a plaintiff “also seek[s] declaratory relief does not affect [the Court’s] mootness determination.” *Conyers v. Reagan*, 765 F.2d 1124, 1127 (D.C. Cir. 1985).

Though a “limited exception” to mootness exists in “extraordinary circumstances” where an action is capable of repetition and evading judicial review, that exception does not apply here. *Or. Nat. Desert Ass’n v. Sabo*, 854 F. Supp. 2d 889, 911 (D. Or. 2012) (citations omitted). The exception applies where: “(1) the duration of the challenged action is too short to be fully litigated before it ceases; and (2) there is a reasonable expectation that the plaintiffs will be subjected to the same action again.” *Id.* (citations omitted). Here, while the TOPs likely satisfy the first criterion (although the Tribes did avail themselves of emergency preliminary review of

the 2021 TOP), the second criterion is not satisfied because it is not reasonable to expect that the Tribes will be “subjected to the same action again.”

Initially, a TOP is not a routine action that is scheduled to reoccur on a regular basis. To the contrary, the 2018 Plan/2020 IOP anticipates that the planned operations – consistent with BiOp and ITS requirements – will be implemented without TOPs. TOPs are unscheduled in-season actions that are required only if extreme conditions prevent implementation of scheduled operations. Indeed, the TOPs in 2021 and 2022 were neither expected nor scheduled; they were emergency stop-gap measures implemented because unanticipated drought conditions of historic proportions had arisen in each of those specific years that would not allow Reclamation to fully and simultaneously maintain the competing operational conditions set forth in the 2018 Plan/2020 IOP as originally planned, regardless of any irrigation deliveries. Thus, while there is always a chance that TOPs could become necessary in any water year, given that weather and hydrology can never be predicted with perfect certainty, for purposes of mootness here, the 2021 and 2022 TOPs should not be viewed as routine actions that will be reinstated. Rather, the expectation should be that the operations set forth in the 2018 Plan/2020 IOP will be implemented (without TOPs) as long as hydrological conditions are within the realm of those experienced in period of record for the Klamath Basin, upon which the 2018 Plan/2020 IOP operations are based. KT II AR 132 at BOR005490 (terms and conditions 1a and 1c of the Services’ respective BiOps allow for coordination between Reclamation and the Services “in years in which conditions outside of Reclamation’s control necessitate operational adjustments” and that “Reclamation anticipates that the meet and confer process, between now and October 2024, would be applied to not only address any severe drought conditions, but also to account for

unanticipated operational conditions leading up to and associated with the Klamath River Renewal Corporation's dam removal").

In addition, even if severe drought conditions do continue or return and require TOPs to be implemented in the future, those TOP will not be "the same actions" that the Tribes challenge here. Indeed, in challenging the 2021 TOP and the 2022 TOP in separate lawsuits, the Tribes implicitly acknowledged that each TOP was a separate and discrete action. Any future TOP would be a similarly separate and distinct agency action from the 2021 and 2022 TOPs, implemented in response to the particular hydrology that year, the status and needs of listed species, and consistent with the governing BiOps and ITSs. It is not reasonable to assume that a future TOP will apportion water in any given way, much less the same way as either the 2021 or the 2022 TOP.

To that end, it also should not be assumed that the Tribes' legal challenges to a future TOP would be the same as those to either the 2021 TOP or the 2022 TOP. The Tribes' present claims allege that the 2021 TOP and 2022 TOP each ran afoul of FWS' 2020 BiOp and ITS, but as noted above, FWS has just replaced that BiOp and ITS. KT II AR 134. Reclamation remains engaged in reinitiated ESA consultation with the Services on the next long-term operations plan for the Klamath Project beyond October 2024 that will include consideration of significant changes to the Project with removal of four dams on the mainstem Klamath River. Any future TOPs implemented during that timeframe will be influenced by that new operations plan, whatever conclusions the Services reach in their superseding BiOps, and whatever terms and conditions the Services include in any accompanying ITSs. In short, given the uncertainty surrounding the form (or existence) of any future operations plan, BiOps, ITSs, and TOPs, and any claimed ESA or NEPA violations, it is not reasonable to proceed with adjudicating the

Tribes' challenges to the 2021 TOP and 2022 TOPs on the assumption that the Tribes will be subjected to those same actions in the future.

In sum, the Tribes' challenges to the expired 2021 and 2022 TOPs are jurisdictionally moot, and they should be dismissed accordingly. The exception to mootness for actions capable of repetition yet evading review does not apply here because it is not reasonable to assume that the Tribes will be subjected to the same action as either the 2021 TOP or the 2022 TOP in the future. The Court may not provide relief intended to remedy future harm the Tribes allege as a result of future Project operations, which will be based on distinct hydrological conditions, include different operating criteria, and be subject to a different FWS BiOp and, after October 2024, a different NMFS BiOp.

**3. Both Cases Were Filed Without Complying with the ESA's Mandatory 60-Day Notice Requirement, 16 U.S.C. § 1540(g)(2)(A)(i)**

*Klamath Tribes I* and the Tribes' ESA claims in *Klamath Tribes II*<sup>7</sup> should be dismissed for the additional reason that the Tribes failed to comply with the ESA's mandatory notice requirement. The ESA states, in relevant part, that "[n]o 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." 16 U.S.C. § 1540(g)(2)(A)(i). Compliance with the notice provision is strictly construed, and the Tribes' failure to strictly comply with the notice requirement prohibits adjudication of 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"); *Sw.*

---

<sup>7</sup> The Tribes' failure to comply with the ESA's notice requirement in *Klamath Tribes II* would not affect their NEPA claims or their claim against FWS, which is asserted under the APA, 5 U.S.C. § 702.

*Ctr. for Biological Diversity v. U.S. Bureau of Recl.*, 143 F.3d 515, 520 (9th Cir. 1998) (citing *Hallstrom*, 493 U.S. at 31).

In *Klamath Tribes I*, the Tribes provided a purported notice letter dated February 12, 2021, for alleged violation of the ESA that could occur on April 1 of that year. KT I AR 119 at 004685 (arguing that “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). The weight of authority holds, however, that anticipatory or pre-violation notice letters do not satisfy the ESA’s notice requirement. See *Alsea Valley All. v. Lautenbacher*, No. CV 05-6376-AA, 2006 WL 8460501, at \*2 n.2 (D. Or. Apr. 25, 2006) (“I reject the argument that notice of potential suit given before issuance of the challenged final agency action complies with the ESA’s notice requirement”); *Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193, 1205–06 (D. Or. 2003) (“because the agency had not acted on the petition at the time of notice, plaintiffs could not have given the Secretary notice of an unlawful action. Thus, I dismiss claim two of plaintiffs’ complaint for failure to give notice as required under § 1540(g)(2)(C)”); *Ctr. for Env’t Sci., Accuracy & Reliability v. Cowin*, No. 1:15-CV-01852 LJO BAM, 2016 WL 8730760, at \*5 (E.D. Cal. Mar. 4, 2016) (“To the extent the Notice Letter refers to anticipatory violations, those violations are not actionable”); *Friends of Animals v. Ashe*, 51 F. Supp. 3d 77, 84–85 (D.D.C. 2014) (“One particularly common pitfall is providing ‘pre-violation notice,’ that is, when a plaintiff gives notice of an impending violation of the ESA—but before that violation has actually occurred. Courts dismiss on this ground, finding that pre-violation notice is inadequate under the statute (and *Hallstrom*’s strict interpretive approach)” (collecting cases)), *aff’d*, 808 F.3d 900 (D.C. Cir. 2015).



In its ruling on the Tribes' motion for temporary restraining order and preliminary injunction in *Klamath Tribes I*, this Court found that the Tribes had satisfied the notice requirement notwithstanding that their notice was anticipatory. 537 F. Supp. 3d at 1188. The Court essentially reasoned that the Tribe's notice was satisfactory because, as a practical matter, the "notice letter provided sufficient information for Defendant to know exactly what the alleged violation would be" and time to cure the alleged violation. *Id.* This overlooks that "citizen suit notice requirements cannot be avoided by employing a flexible or pragmatic construction and that plaintiff's suit must be dismissed where plaintiff had not strictly complied with the notice requirements." *Sw. Ctr. for Biological Diversity*, 143 F.3d at 520 (citing *Hallstrom*, 493 U.S. at 31). In *Hallstrom*, the Supreme Court ruled that a "flexible or pragmatic construction" was precluded even if the defendants will "actually accomplish the objective that the citizen was attempting to stop" within the 60-day period. 493 U.S. at 26, 30.

Indeed, the Ninth Circuit has overruled prior authority that "permit[ted] district courts to interpret the 60-day notice requirement 'pragmatically' and allow 'substantial compliance' with it." *Ctr. for Env't Sci. Accuracy & Reliability v. Nat'l Park Serv.*, 1:14-CV-02063-LJO-MJS, 2016 WL 4524758, at \*10 (E.D. Cal. Aug. 29, 2016) (citation omitted). As a court in this District has observed, "[w]hile 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.'" *Or. Wild v. Connor*, No. 6:09-CV-00185-AA, 2012 WL 3756327, at \*4 (D. Or. Aug. 27, 2012) (citation omitted); accord *Lone Rock Timber Co. v. U.S. Dep't of Interior*, 842 F. Supp. 433, 440 n.3 (D. Or. 1994) ("Dismissal is mandatory. The court may not stay the action for 60 days while plaintiffs file the required notice") (citation omitted).

Thus, here the Tribes cannot demonstrate compliance with the ESA's notice requirement by showing that, as a practical matter, their letter achieved the purposes of the notice requirement. The Tribes were required to strictly comply with the notice provision, and they failed to do so in providing pre-violation notice. There is no equitable exception to the ESA's 60-day notice requirement, even when harm is alleged to be imminent. The Tribes' complaint in *Klamath Tribes I* therefore should be dismissed.<sup>8</sup>

The Court also should dismiss the Tribes' ESA claims in *Klamath Tribes II* for failure to comply with the notice requirement. There, the Tribes provided a purported ESA 60-day notice letter dated April 14, 2022, but then filed their new complaint just 25 days later, on May 9, 2022. KT II AR 43; KT II ECF 1. The Tribes' failure to provide 60 days' advance notice before filing suit plainly bars consideration of their ESA claims. The Tribes styled their letter as a

---

<sup>8</sup> In addition to objecting to the Tribes' notice as anticipatory, Reclamation also objected on the grounds that it was substantively deficient, articulating only an alleged violation of ESA Section 9 and not a violation of Section 7. The Court need not reach that issue here, as the notice was anticipatory – and therefore deficient – with respect to both a Section 9 claim and a Section 7 claim. However, if the Court does reach the issue, it should find that the Tribes' Section 7 claim is barred because notice was substantively insufficient. The Court previously rejected Reclamation's objection to the substance of the Tribes' notice, finding that their letter “mentions a perceived Section 7 violation.” *Klamath Tribes I*, 537 F. Supp. 3d at 1187. However, Federal Defendants submit that, strictly construing the letter, it did not fulfill the Tribes' “obligat[ion] to provide sufficient information of a violation so that the Secretary or Reclamation could identify and attempt to abate the violation.” *Sw. Ctr. for Biological Diversity*, 143 F.3d 522 (citation omitted). The letter sets out in detail only a potential future violation of Section 9, and in its conclusion, the letter appears to reference only an intention to sue on such a violation. KT I AR 119 at 004685-87 (“If Reclamation proceeds with a Project management decision that results in UKL elevation dropping below 4,142.0 feet during April or May of this water year, it can longer claim the protection of the ITS, and the Klamath Tribes will hold Reclamation accountable as authorized under the ESA, including by seeking an injunction against unlawful Project operations”). The letter includes only a passing reference to a possible future Section 7 violation. The letter also provided no notice of the “procedural” violation of the ITS that now forms a basis of their Section 9 claim. *See Ctr. for Env't Sci. Accuracy & Reliability*, 2016 WL 4524758, at \*8 (ESA notice letter that “repeatedly and specifically references Section 7(a)(2), contains repeated allegations concerning the failure to consult, and never mentions Section 7(a)(1)” would not permit a claim under Section 7(a)(1)).

“Supplemental Notice”; however, that cannot excuse their failure to meet the statutory mandate of 60 days’ notice. In fact, the Tribes’ styling of the letter as a “supplemental notice” is puzzling, as supplementing the allegations that were set forth in their previous notice letter – which related solely to the 2021 TOP – would not provide notice of an intent to file an entirely new lawsuit to challenge an entirely separate agency action (the 2022 TOP). Rather than providing supplemental notice of its challenge to the 2021 TOP, the letter was intended to provide notice of a new challenge to the 2022 TOP. KT I AR 43 at BOR001261 (“We implore you to rescind *the 2022 Plan* and operate the Project *this year* consistent with the law”) (emphasis added). The letter is deficient for that purpose, however, as the Tribes provided only 25 days’ notice before filing its new complaint in *Klamath Tribes II*. The Tribes cannot forever avoid the ESA’s 60-day notice requirement for challenges to new agency actions by styling notice letters as supplements to a prior notice that concerned a prior agency action. In fact, here the prior notice was, itself, deficient.

In sum, *Klamath Tribes I* should be dismissed in its entirety because it alleges ESA citizen suit claims that were improperly noticed anticipatorily. The Tribes’ ESA citizen suit claims against Reclamation in *Klamath Tribes II* should be dismissed because the Tribes provided only 25 days’ notice and not the required 60. The Tribes’ remaining claims in *Klamath Tribes II* should be dismissed for the other reasons set forth in Section IV.A.

#### **4. The Tribes’ Claim Against FWS in *Klamath Tribes II* Is Moot and Otherwise Nonjusticiable**

The Tribes did not name FWS as a Defendant in *Klamath Tribes I*, but added FWS as a Defendant in *Klamath Tribes II*. Adding FWS as a defendant was improper, however, as the Tribes have no justiciable claim for relief against FWS, and it is unclear what relief, if any, the Tribes even seek against FWS.

The Tribes do not call upon FWS to defend the merits of its BiOp or ITS. Rather, the Tribes complain of FWS' reaction (or lack thereof) to Reclamation's proposed 2022 TOP during the meet and confer process that occurred under Term and Condition 1c ("Term 1c") of the ITS. At the same time that the Tribes argue FWS did not support Reclamation's plan to implement the TOP, they argue that FWS somehow became responsible for it. For instance, the Tribes assert that FWS did not "approve or endorse the efficacy of" the 2022 TOP or provide a concurrence in it (KT I ECF 80 at 33, 37), and the Tribes acknowledge that FWS advised Reclamation that it was "deeply concerned about the impacts that missing" the April/May and July 15 UKL elevations called for by the 2020 BiOp [would] have on suckers, which would "greatly reduce larval sucker rearing habitat in UKL [that] year." KT II AR 52 at BOR001435. The Tribes further acknowledge that FWS explained that its concerns were magnified by the fact that, in the two preceding years, suckers had "experienced suboptimal conditions due to drought conditions" and that "they, and the Klamath Tribes for whom these fish are sacred, [would] feel those impacts more acutely [that] year." *Id.* The Tribes also acknowledge that FWS cautioned Reclamation that it "cannot rely upon improved hydrology next year, and the dire condition of sucker populations in UKL means that substantive steps must be taken in the future to provide for the survival and recovery of these fish." *Id.* Lastly, the Tribes acknowledge that FWS urged Reclamation "to take any available steps to maintain UKL elevation as high as possible through July 15." *Id.*

While the Tribes allege that this response by FWS shows that the 2022 TOP failed to comply with the ESA, they also accuse FWS of failing to object to the TOP. Putting aside the inconsistency of the Tribes' argument, they identify no ESA violation by FWS or any live "final agency action" taken by FWS that might be reviewable under the APA, 5 U.S.C. § 704. The

Tribes assert that FWS “took no steps to reinitiate consultation” (KT II ECF 24 at 43); however, as this Court noted in *Klamath Tribes I*, 537 F. Supp. 3d at 1191, Reclamation has been engaged in formal reinitiated consultation with FWS and NMFS on a long-term operations plan for the Klamath Project since November 2019. The Tribes themselves acknowledge that Reclamation reinitiated such consultation in fall 2019. KT I ECF 80 at 21. In addition, as noted above, Reclamation completed reinitiated consultation with FWS and received a new BiOp and ITS on January 13, 2023 on extension of the 2018 Plan/2020 IOP through October 2024. KT II AR 134. While the Tribes’ complaint tellingly does not request an order compelling FWS to reinitiate consultation with Reclamation, such a request would be moot in any event given that reinitiated consultation has already been completed. To the extent that the Tribes’ complaint seeks any relief at all against FWS, it asks the Court to “hold unlawful and set aside USFWS’ 2020 USFWS BiOp’s ITS *as applied to the 2022 Ops Plan.*” KT II ECF 1 at 34 ¶ C (emphasis added). This request is moot given that the 2022 TOP are expired. Setting aside the inoperative ITS as applied to the inoperative TOP would not resolve any live controversy.

The Tribes also complain that FWS did not “rescind or modify the 2020 BiOp and ITS” (KT II ECF 24 at 45); however, the Tribes identify nothing in the ESA or its implementing regulations that required, or would have even authorized, FWS to take such action. Essentially, this argument is a reformulation of the Tribes’ basic claim that FWS failed to reinitiate consultation with Reclamation. Beyond being moot, this claim is not justiciable because it is premised on an alleged failure by FWS to exercise authority that FWS has not been granted under the ESA.<sup>9</sup> FWS has no authority to compel Reclamation to either initiate consultation in

---

<sup>9</sup> Though the Tribes plead their claim against FWS under the APA, 5 U.S.C. § 702, (KT II ECF 1 at ¶ 87), the APA does not give rise to a freestanding claim for an “APA violation” here. Rather, the APA only provides a waiver of sovereign immunity and a standard of review for alleged

the first instance or reinitiate a prior consultation. *See Flowers*, 414 F.3d at 1070 (consulting agency “lacks the authority to require the initiation of consultation” under the ESA) (citation omitted); Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act at 2-11 (“the Services can not [sic] require Federal agencies to reinitiate consultation if they choose not to do so”).

Rather, the authority to reinitiate consultation and, hence, any duty to do so, is held solely by the action agency. *Def. of Wildlife v. Zinke*, 856 F.3d 1248, 1264 (9th Cir. 2017) (“[t]he ESA’s implementing regulations require *an action agency* to reinitiate formal consultation with the consulting agency”) (emphasis added); *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1040 (9th Cir. 2007) (“*the action agency* must reinitiate consultation with the FWS”) (emphasis added); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1108 (9th Cir. 2012) (same); *accord Native Fish Soc’y v. NMFS*, 992 F. Supp. 2d 1095, 1103 (D. Or. 2014) (same); *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1130 (D. Haw. 2000) (same); 50 C.F.R. § 402.14(i)(4) (ESA consultation regulation stating that, “[i]f during the course of the action the amount or extent of incidental taking . . . is exceeded, *the Federal [action] agency* must reinitiate consultation immediately”) (emphasis added); 51 Fed. Reg. at 19,954 (explaining that “Paragraph (i)(4) requires *the Federal [action] agency* or the applicant to immediately request reinitiation of formal consultation if the specified amount or extent of incidental take is

---

violation of *the ESA*, not a claim for violation of the APA itself. 5 U.S.C. § 702 (providing right to review to persons suffering legal wrong because of final agency action taken “within the meaning of a relevant statute”); *see El Rescate Legal Servs. v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 753 (9th Cir. 1991). The Tribes must plead their claim under the APA because the ESA’s citizen suit provision does not authorize a claim against FWS here, as the consulting agency, for allegedly violating the ESA. *Bennett*, 520 U.S. at 174. Thus, in short, the Tribes must identify a live final agency action allegedly taken by FWS in violation of the ESA to state a claim for relief under the APA.

exceeded”) (emphasis added); Consultation Handbook at 2-5 (“[t]he action agency is responsible for reinitiating consultation should their actions result in exceeding the level of incidental take”) (emphasis added). Congress itself has stated that the action agency bears any duty to reinitiate consultation. H.R. Rep. No. 97-567 at 27 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2807, 2827 (“If the specified impact on the species is exceeded, the Committee expects that *the Federal [action] agency* or permittee or licensee will immediately reinitiate consultation . . .”) (emphasis added).

The Tribes’ claim against FWS is based on the premises that “after the issuance of the biological opinion, USFWS has an independent duty to ensure that Reclamation’s actions in the operation of the Project do not violate the ESA’s prohibitions against jeopardy and adverse modification” and that FWS has “independent obligations to reinitiate consultation.” KT II ECF 1 at 29 ¶ 81; ECF 24 at 42. As explained above, these premises are erroneous. Section 7 places the duty to avoid jeopardizing listed species, and thus to consult, on the action agency. *See also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 568–69 (1992) (“Whereas in other contexts the ESA is quite explicit as to the Secretary’s controlling authority . . . with respect to consultation the initiative, and hence arguably the initial responsibility for determining statutory necessity, lies with the agencies, *see* § 1536(a)(2) (“*Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any” funded action is not likely to jeopardize endangered or threatened species*”) (emphasis added by Supreme Court) (internal citation omitted); *Pyramid Lake*, 898 F.2d at 1415-16 (action agencies are responsible for meeting the substantive requirements of ESA Section 7(a)(2)); *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Gutierrez*, 606 F. Supp. 2d 1122, 1188-89 (E.D. Cal. 2008) (“the ultimate responsibility for compliance with the ESA falls on the action agency”) (citations omitted); *Allen*, 476 F.3d at

1033 (“If *the action agency* concludes that its proposed action may affect listed species or critical habitat, it must initiate consultation with the FWS . . .”) (emphasis added).

Congress included the consultation requirement in Section 7 to “assist Federal [action] agencies in complying with the requirements of section 7 and provide[] such agencies with advice and guidance from the Secretary [i.e., FWS] on whether an action complies with the substantive requirements of section 7.” 51 Fed. Reg. at 19,926; *see also id.* at 19,928, 19,953. Thus, “[f]ollowing the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service’s biological opinion.” 50 C.F.R. § 402.15(a). Nowhere does the statute or any implementing regulation state that *the Service* has the authority or duty to reinitiate consultation.

Consistent with the above authorities, the reinitiation of consultation regulation makes it clear that the limit and extent of the consulting agency’s legal authority is to *request* that the action agency reinitiate consultation. 50 C.F.R. § 402.16(a) (“Reinitiation of consultation is required and *shall be requested by* the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law . . .”) (emphasis added); *accord* 51 Fed. Reg. at 19,956 (1986 preamble to the reinitiation regulation stating that consulting agencies are limited to “request[ing] reinitiation when [they] believe[] that any condition described in this section applies”); Consultation Handbook at 4-64 (“When the action agency determines that one or more of the four conditions requiring reinitiation of formal consultation has occurred, consultation must be reinitiated. Similarly, if the Services recognize that any of these conditions have occurred, written advice is provided to the action agency of the need to reinitiate consultation”).



Most recently, the Services confirmed that the reference to “the Service” in their reinitiation regulation:

does not impose an affirmative obligation on the Service to reinitiate consultation if any of the criteria have been met. Rather, the reference here has always been interpreted by the Services to allow us to recommend reinitiation of consultation to the relevant Federal action agency if we have information that indicates reinitiation is warranted.

It is ultimately the responsibility of the Federal action agency to reinitiate consultation with the relevant Service when warranted. The same holds true for initiation of consultation in the first instance. While the Services may recommend consultation, it is the Federal agency that must request initiation of consultation.

84 Fed. Reg. 44,976, 44,980 (Aug. 27, 2019). Thus, as one district court concluded, “[t]o the extent that Plaintiffs’ failure to reinitiate claims are directed at Defendant Service, they must be dismissed” because “[u]nder the ESA, the ‘action agency’ in an ESA consultation process ‘has the primary responsibility for implementing section 7’s substantive commands’” and “the Service lacks any authority to require an action agency to reinitiate consultation.” *City of Santa Clarita v. U.S. Dep’t of Interior*, No. CV02-00697 DT, 2006 WL 4743970, at \*15 (C.D. Cal. Jan. 30, 2006) (citation omitted), *aff’d*, 226 F. App’x 748 (9th Cir. 2007), *opinion withdrawn and superseded/aff’d on denial of reh’g*, 249 F. App’x 502 (9th Cir. 2007).

In sum, the Tribes’ claim against FWS in *Klamath Tribes II* should be dismissed as moot because Reclamation and FWS have completed a new ESA consultation on Klamath Project operations and also because the Tribes cannot state a justiciable claim that FWS failed to exercise any authority to compel reinitiation of consultation.

**B. Should the Court Reach the Merits, Federal Defendants Are Entitled to Summary Judgment in *Klamath Tribes I***

Because the Court lacks subject matter jurisdiction for the reasons set forth above, it should not entertain the Tribes’ claims on the merits. *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). Nonetheless, should the Court reach the claims, it should reaffirm its previous finding that they lack merit.

The Tribes freely admit that they ask this Court to rule that “the C’waam and Koptu’s needs take precedence over a threatened species like the [SONCC] coho [salmon],” and to grant injunctive relief that would specifically favor suckers over salmon and killer whales. KT I ECF 80 at 41. As the Court previously recognized, however, this request lacks merit and is ill-advised:

Plaintiffs ask this Court to limit the flow of water coming out of Upper Klamath Lake to the detriment of a threatened salmon population, an endangered Orca population that depends on salmon recovery, and irrigation interests. The Court declines to do so. Here, the Defendant Bureau, in coordination with expert agencies and all competing interests, is better equipped to serve the public interest than a judge with a law degree. And while the interim plan and decisions being made by the Bureau may result in the incidental taking of an endangered species, the Bureau has taken the appropriate steps under the Endangered Species Act to address the difficult drought situation that is presenting itself this year in the Klamath Basin.

*Klamath Tribes I*, 537 F. Supp. 3d at 1185.

Indeed, imposing an injunction that lessens protections for certain listed species in an attempt to bolster protections for others would be, to Federal Defendants’ knowledge, unprecedented in the history of the ESA. It would inappropriately substitute the Court’s and the Tribes’ judgment for the months of extensive collaboration that took place between dedicated professionals at the federal agencies under extraordinarily challenging circumstances. The Tribes readily concede that, in 2021, “there was simply not enough available water in the Upper Klamath Basin for Reclamation to be able to comply simultaneously with the terms of” FWS’ BiOp, and NMFS’ BiOp, even with “water deliveries for Project irrigators . . . almost completely cut off.” KT I ECF 80 at 5. The Tribes further admit that “punishing drought conditions” in 2021 “pushed the needs of . . . species themselves into direct and unavoidable conflict” with one

another. *Id.* The Tribes effectively ask this Court to rule that Reclamation should have foregone BiOp and ITS requirements for SONCC coho salmon and killer whales for those of suckers and to impose an injunction mandating that Reclamation maintain UKL at those elevations specified in FWS' BiOp without making any exception for the competing requirements of the NMFS BiOp for Klamath River flows. KT I ECF 1 at 31 ¶¶ B-C.

However, in the previous spring of 2020, it was the Yurok Tribe in California who insisted that the ESA required more water to be released from UKL to protect salmon when Reclamation had declined to do so to preserve UKL elevations for suckers. The Yurok Tribe moved for a temporary restraining order – over the Klamath Tribes' objections – that would have compelled Reclamation to make additional releases from UKL to the Klamath River. The court declined the Yurok Tribe'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 I*, 2020 WL 2793945, at \*5 (internal citation omitted).

Here, the roles are reversed, with the Klamath Tribes requesting additional water for suckers over salmon. However, in 2021, similar to 2020, Reclamation 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 FWS and NMFS. KT I AR 153 at 005542. The Tribes plainly disagree with Reclamation's decision in the 2021 TOP and would prefer that more water had been left in UKL for suckers, but they cannot show that the 2021 TOP unlawfully apportioned 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 unprecedented drought conditions. As this Court aptly concluded previously when considering the Tribes' claims:

While Upper Klamath Lake levels have fallen outside the scope of what was considered in the 2020 BiOp, the Bureau ... continued to comply with the terms and conditions by engaging in ongoing consultation with the Services and creating the temporary operating procedures. The Bureau is also not responsible for the unprecedented drought this year. As a threshold matter, the Klamath Tribes have not shown they are likely to succeed on the merits.

*Klamath Tribes I*, 537 F Supp. 3d at 1192.

**1. The Tribes Fail to Show the 2021 TOP Violated ESA Section 9**

The Tribes allege that Reclamation violated ESA Section 9 while implementing the 2021 TOP because Reclamation did not comply with Term 1c of FWS' ITS. KT I ECF 80 at 43. Simply stated, this argument fails because Reclamation did, in fact, comply 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." KT I AR 29 at 001973. 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 took these steps and therefore satisfied Term 1c. In letters to FWS and NMFS, Reclamation explained that elevations in UKL were below the applicable boundary condition of 4,142.0 feet for April and May, and were not likely to meet subsequent boundary conditions listed in Term 1c "even without water deliveries to the Klamath Project." KT I AR 153 at 005541. 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 005542. 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) [were] the lowest within the forty-year period of record (1981-2020).” *Id.* As such, Reclamation 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 005542-49.

Most relevant here, the TOP did not propose deviations from operations at Iron Gate Dam to provide minimum Klamath River flows per the 2018 Plan; however, they did include adaptations to protect UKL conditions, namely making the implementation of a surface flushing flow – which otherwise would have been expected to be attempted – contingent on maintaining specified UKL elevation and tied to an evaluation of real-time management criteria, and delaying any irrigation diversions until May 15 at the earliest (unless a surface flushing flow had previously been implemented). *Id.* Ultimately, Reclamation sacrificed a flushing flow in 2021 to preserve UKL elevations for suckers and made only an exceptionally low irrigation allocation of 33,000 AF (virtually all of which was exhausted by the unauthorized diversions of a single Project user, KDD, as noted above (*supra* n.6)). KT II AR 125 at BOR005467.

The Tribes complain that Reclamation did not explain why the 2021 TOP called for maintaining Klamath River minimum flows per the NMFS BiOp and ITS, notwithstanding low UKL elevations; however, the reasons are evident. There can be no dispute that, due to the severe drought, UKL would not have achieved the boundary elevation of 4,142.0 feet in April or

May 2021, even if there were no irrigation diversions. KT I AR 153 at 005541-42.

Additionally, due to the drought, it was projected that UKL's elevation would 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" (*id.* at 005542). Conversely, the NMFS BiOp plainly lays out ESA requirements for listed SONCC coho salmon and killer whales, including maintaining minimum Klamath River flows. The Tribes freely admit that they were requesting that Reclamation reduce Klamath River flows below the NMFS BiOp and ITS minimums, even as it was uncertain that doing so would have even achieved UKL elevations for suckers. The Tribes merely argue that Reclamation should have "attempt[ed] to comply" with UKL boundary elevations for suckers. KT I ECF 80 at 44. Simply stated, it was entirely reasonable, and lawful, for Reclamation to decline to disregard ESA requirements for listed salmon and killer whales when doing so would not have even met UKL boundary conditions for listed suckers.

Indeed, in response to Reclamation's letter, FWS acknowledged that the "unprecedented" hydrologic conditions in 2021 were "rooted in natural causes and [were] not anticipated by the agencies." *See* KT I AR 156 at 005571. 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 had “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 corrective actions. KT I AR 152 at 005540. NMFS further acknowledged that the Upper Klamath Basin had experienced record low cumulative net inflows to UKL in 2021 and that the “critically dry and extraordinary hydrologic conditions in the Klamath River Basin [would] 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.* at 005539.

In sum, Reclamation complied with terms and conditions of FWS’ ITS, and the Tribes’ Section 9 claim therefore fails. *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 [UKL elevation] 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).

Reclamation satisfied the terms and conditions specified by FWS and NMFS by monitoring UKL elevations, determining causative factors for any decrease, and conferring with FWS and NMFS to identify adaptive management and corrective actions. Unprecedented drought conditions made it impossible to meet the April, May, and July UKL elevations in 2021, regardless of irrigation diversions. Reclamation “cannot control the weather,” and a court “cannot hold [it] responsible for the absence of rain.” *Alabama v. U.S. Army Corps of Eng’rs*, 441 F. Supp. 2d 1123, 1134, 1137 (N.D. Ala. 2006) (“[t]akes that result from acts of nature . . . cannot be blamed on the Corps”) (citations omitted); *see also In re: Operation of the Missouri River Sys. Litig.*, 363 F. Supp. 2d 1145, 1175 (D. Minn. 2004), *aff’d*, 421 F.3d 618 (8th Cir. 2005).

## **2. The Tribes Fail to Show the 2021 TOP Violated ESA Section 7**

Like the Section 9 claim, the Tribes’ Section 7 claim is based on low UKL elevations. This claim fails for much the same reason that the Tribes’ Section 9 claim fails. As noted above, the failure to meet planned UKL elevations in April or May was due to natural drought conditions, and simply could not be avoided. KT I AR 153. Thus, the failure to meet these elevations was 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 discretionary 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.

Here, Reclamation explained that the July 15 elevation was unlikely to be achieved regardless of any irrigation diversions or implementation of a surface flushing flow. KT I AR



153 at 005542. While curtailing UKL releases to the Klamath River would have increased the likelihood of meeting the July 15 UKL elevation, there was no guarantee that it would have been achieved, and conversely making the attempt would have guaranteed that Klamath River minimum flows per NMFS' BiOp and ITS were *not* achieved. Reclamation should not be found to have violated Section 7 because it failed to take action that would have been uncertain to achieve desired lake elevations for suckers, but likely would have failed to meet ESA obligations for SONCC coho salmon and killer whales.

In *Klamath Tribes*, the court rejected a similar claim by the Tribes, finding that they had “not shown a likelihood of success on their Section 7 jeopardy claim” and noting 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.

*Klamath Tribes*, 2018 WL 3570865, at \*14 (citations omitted). The same is true here. As noted above, Reclamation conferred with FWS to address low UKL elevations and potential corrective actions, and FWS did not reject Reclamation's determination of causative factors or opine that it was violating the ESA. *See* KT I AR 156.

**C. Should the Court Reach the Merits, Federal Defendants Are Entitled to Summary Judgment in *Klamath Tribes II***

**1. Federal Defendants Are Entitled to Summary Judgment on the Tribes' ESA Claims**

Instead of complaining of salmon flows, in *Klamath Tribes II* the Tribes complain of irrigation allocation. The Tribes expend many pages to present the basic argument that

Reclamation should not have authorized any irrigation deliveries in 2022 with UKL below the boundary condition(s) set forth in the FWS BiOp and ITS. The Tribes allege that allocating approximately 62,000 AF of water to irrigation that year violated Sections 9 and 7 of the ESA. KT II ECF 24 at 26, 29-30. The Tribes argue that irrigation deliveries to the Project instead should have been zeroed out.

The Tribes fail to identify any required procedure that Reclamation violated, however. Rather, as Reclamation did in 2021, it again dutifully followed the procedures outlined in Term 1c of the FWS ITS in 2022 prior to implementing the new TOP. As described above (*supra* § III.C.2), Reclamation met and conferred with FWS to determine the causative factors for the fact that UKL boundary conditions were not projected to be achieved in 2022, and the agencies determined that the causative factors were “primarily the result of consecutive critically dry years and extraordinary hydrologic conditions.” KT II AR 57 at BOR001529.

Given that UKL elevations were projected to fall outside of boundary conditions set forth in the FWS BiOp and ITS, Reclamation developed adaptive management measures via the 2022 TOP in coordination with FWS and NMFS. KT II AR 86 at BOR001946. FWS responded to Reclamation’s proposed TOP on April 11, 2022, “recogniz[ing] the exceptional and unprecedented drought conditions that the Klamath Basin continue[d] to experience in 2022,” which “represent[ed] an ongoing natural disaster that [was] beyond the control of Reclamation.” KT II AR 52 at BOR001434. FWS further stated that “[w]e acknowledge that, through the meet and confer process provided for under T&C 1c, Reclamation has made a good faith effort to address the ongoing drought and the likelihood that BiOp boundary conditions will not be fully met” for suckers in UKL. *Id.* While FWS noted that it was “deeply concerned about the impacts that missing these requirements will have on both species this year, we understand that

*historically poor hydrology is the root cause for invoking the meet and confer process.” Id.*

(emphasis added). FWS did not opine that the proposed operations under the 2022 TOP would violate Reclamation’s obligations under the ESA to protect suckers. Rather, FWS explained that:

The Service has reviewed Reclamation’s assessment of current and projected hydrologic conditions, as well as the proposed 2022 Temporary Operating Procedures (TOP) resulting from this assessment. *The Service’s internal analysis comports with Reclamation’s conclusion that current and projected hydrologic conditions this year will preclude attainment of the 4142.0 ft. of elevation in UKL necessary to provide adequate habitat for shoreline spawning Lost River suckers, regardless of any proactive water conservation measures that Reclamation might take at this point in time.* Success of river spawning suckers, which includes the majority of Lost River suckers and all shortnose suckers in UKL, is unlikely to be greatly impacted by UKL elevation this year, as UKL tributary access is not elevation dependent. Reclamation also proposes to provide a surface flushing flow (SFF) to reduce disease risk for juvenile salmon in the Klamath River. *This action, which the Service acknowledges is likely necessary to achieve positive outcomes for threatened coho salmon this year, when coupled with poor hydrology, will preclude any chance of UKL reaching or exceeding 4140.5 ft. through July 15.* This will greatly reduce larval sucker rearing habitat in UKL this year, and the Service encourages Reclamation to take any available steps to maintain UKL elevation as high as possible through July 15. The TOP does, however, commit Reclamation to managing Project deliveries and river flows such that a buffered annual minimum elevation in UKL of 4138.15 ft. will be met, and the Service appreciates that Reclamation is intent on working to achieve this threshold. Though meeting this elevation does not avoid the biological impacts to suckers that missing the earlier season elevations creates, it will reduce the risk of catastrophic impacts to adult suckers by lessening the likelihood of poor water quality and affording adults access to water quality refugia if water quality conditions deteriorate.

*Id.* at BOR001434-35 (emphasis added).

The Tribes make much of the fact that the irrigation allocation Reclamation provided reflected a deviation from the formula set forth in the 2018 Plan/2020 IOP, which would not have produced any irrigation allocation; however, the very purpose and need for the 2022 TOP was that the scheduled operations under the 2018 Plan/2020 IOP could not be implemented as previously planned, thereby requiring adaptive management measures. As with the 2021 TOP,

Reclamation “acknowledge[d] that the 2022 TOP [was] unlikely to satisfy all groups but believe[d] that the 2022 TOP represent[ed] a good-faith effort, developed collaboratively, to meet as many of the competing needs as is practicable under the circumstances.” KT II AR 57 at BOR001530. Indeed, as part of its adaptive management, Reclamation also deviated from the planned operations to provide added protections for UKL by reducing the magnitude of the flushing flow in the Klamath River, which resulted in the retention of an additional 20-25 thousand AF of water in UKL, and raising the end of season UKL elevation specified in the FWS BiOp and ITS from 4,138.00 feet to 4,138.15 feet, which left approximately 10,230 AF *more* water in UKL than the FWS BiOp and ITS otherwise would have required. KT II AR 57 at BOR001533; 127 at BOR005477; 129 at BOR005479. As the Tribes acknowledge, the allocation of 62,000 AF of water for irrigation that they challenge here – out of a maximum total irrigation allocation of 350,000 AF, combined with the decision to leave an additional 10,230 AF of water in UKL above BiOp and ITS requirements – was met with opposition and resistance from Project irrigators as allegedly insufficient to meet their needs. KT II ECF 24 at 30.

Simply stated, Project irrigators plainly would have preferred more water for irrigation, and the Tribes plainly would have preferred more water left in UKL for suckers. The Tribes do not contend, however – and they cannot show – that providing the irrigation allocation was the reason UKL boundary conditions were not met or that the irrigation allocation was the difference between whether adequate spawning conditions were present in UKL or not. To the contrary, as FWS observed, “current and projected hydrologic conditions th[at] year [would] preclude attainment of the 4142.0 ft. of elevation in UKL necessary to provide adequate habitat for shoreline spawning Lost River suckers, *regardless of any proactive water conservation measures that Reclamation might take at this point in time.*” KT II AR 57 at BOR001529 (emphasis

added). At most, the Tribes contend that Reclamation should have zeroed out irrigation deliveries so that it could “com[e] as close as it could to meeting the 2020 BiOp’s boundary conditions—even if it could not fully satisfy them.” KT II ECF 24 at 36. However, adequate spawning conditions regrettably were not going to be available in 2022 regardless of Reclamation’s actions.<sup>10</sup> As such, the Tribes’ complaint regarding the timing of authorized irrigation diversions under the 2022 TOP (commencing on April 15, which was delayed from the typical April 1 start date) is misplaced. *Id.* at 31. The Tribes also disapprove of the 2022 TOP’s plan to apportion any surplus water between UKL and irrigation (*id.*); however, the Tribes make no showing that this planned apportionment actually had any effect on suckers.

Ultimately, there is no dispute that hydrologic conditions experienced in the Klamath Basin in 2022 were outside of those that were contemplated when Reclamation developed the 2018 Plan and the 2020 IOP and the Services prepared their respective BiOps and ITSs, and were also outside of Reclamation’s control. *Id.* at 35-36. That was precisely why Reclamation was compelled to adaptively manage the Project by implementing the 2022 TOP, the procedure contemplated by Term 1c of FWS’ ITS. The Tribes’ claim that, under these unanticipated circumstances, Reclamation had to complete an entirely new formal consultation and receive a new BiOp and ITS before it could implement the 2022 TOP ignores the very purpose and function of Term 1c. In *Klamath Tribes I*, this Court considered a similar argument by the Tribes and, in fact, expressly requested supplemental briefing on the question of Reclamation’s “obligation to consult with the Services when it could not simultaneously stay within the

---

<sup>10</sup> For this basic reason, the Tribes’ claim that FWS somehow violated the ESA in responding to Reclamation regarding Reclamation’s proposal to implement the 2022 TOP (KT II ECF 24 at 44-45) fails as a factual matter as well as a legal matter, as explained above (*supra* § IV.A.4).

boundaries of the Terms and Conditions of the 2019 NMFS BiOp and the 2020 USFWS BiOp.”

KT I ECF 48 at 1. The Court correctly rejected the Tribes’ argument, ruling that:

To the extent that the Bureau was required to engage in informal consultation with USFWS, they have satisfied this burden by maintaining regular communication with the Services as they determined the causes for the low elevation of Upper Klamath Lake and developed temporary operating procedures to address the situation. The Bureau is also engaged in formal reinitiated consultation with USFWS and NMFS and has been since November 2019.

*Klamath Tribes I*, 537 F. Supp. 3d at 1191.

The same was true in 2022. Reclamation followed the procedures in Term 1c. Term 1c requires in-season conferral on how to best respond to changing hydrology, not completion of a formal reinitiated consultation under ESA Section 7. *See* 50 C.F.R. § 402.14. Reclamation acknowledges the need for a new long-term operations plan for the Klamath Project that accounts for the possibility of unprecedented and prolonged drought conditions such as were experienced between 2020 and 2022, and it remains engaged in reinitiated consultation with the Services on such a plan. *Klamath Tribes I*, 537 F. Supp. 3d at 1191. This is an extraordinarily complicated task, further complicated by the planned removal of several hydroelectric dams on the Klamath River in the coming years, which is hoped to improve habitat conditions for salmon.<sup>11</sup> The Tribes’ request for the Court to enter injunctive and/or declaratory relief

---

<sup>11</sup> Though each ESA consultation is unique, Klamath Project consultations are often measured in years rather than days or even months. The default timeline under the statute to complete a formal consultation is 135 days, starting from the Service’s receipt of a biological assessment from the action agency, which itself takes time for the action agency to prepare at the outset and adds to the overall consultation timeframe. The default timeline is routinely extended for complex actions such as the Klamath Project, as is permitted under the statute. 16 U.S.C. § 1536(b); 50 C.F.R. §§ 402.12, 402.14(c), (e). The parties to *Yurok II* – the Yurok Tribe, Reclamation, NMFS, and Klamath Water Users’ Association – previously agreed that a consultation period of three years on an operations plan for the Project was appropriate and in the public interest given the complexities. *See* KT I ECF 48-1 at 3, lines 5-10.

regarding the outdated and expired temporary adaptive management measures that were included in the 2022 TOP should be denied.

## **2. Federal Defendants Are Entitled to Summary Judgment on the Tribes' NEPA Claims**

The Tribes seek a declaration that Reclamation violated NEPA when it issued a Determination of NEPA Adequacy (“DNA”) regarding the 2022 TOP for the Klamath Project. In the DNA, Reclamation determined that the existing 2020-2023 Environmental Assessment (“2020-2023 EA”) and 2021 Supplemental EA encompassed the hydrological conditions likely to be encountered in 2022, and that a supplemental EA was not warranted. Even if the Court determines that the Tribes’ claim is not moot, Reclamation complied with NEPA by taking a hard look at prior analyses and reasonably concluding that the potential impacts of the 2022 TOP had been previously considered and evaluated in its existing NEPA analyses.

### **a. Reclamation’s DNA Fully Complied With NEPA**

Reclamation complied with NEPA in issuing its 2022 DNA, which robustly analyzed the existing NEPA documents in the context of what new or changed circumstances may have existed.

A DNA “is not itself a NEPA document” subject to CEQ regulations, and it is “not subject to public comment or consultation with other federal agencies.” *N. Alaska Env’t Ctr. v. U.S. Dep’t of the Interior*, 983 F.3d 1077, 1082 n.3 (9th Cir. 2020) (citation omitted). However, the Ninth Circuit has recognized “a limited role within NEPA’s procedural framework” for “non-NEPA’ environmental evaluation procedures.” *Idaho Sporting Cong.*, 222 F.3d at 566.<sup>12</sup>

---

<sup>12</sup> The “non-NEPA” document at issue in *Idaho Sporting Cong.* was a Supplemental Information Report (“SIR”). Similar to a DNA, the SIR at issue was meant to “examine whether further environmental review and documentation [was] required.” 222 F.3d at 564; *see also N. Alaska Env’t Ctr.*, 983 F.3d at 1095 (describing a DNA as similar to a SIR and noting that a “DNA could suffice” where the sole question was whether a supplemental EIS was needed).

Specifically, “courts have upheld agency use of SIRs and similar procedures for the purpose of determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS.” *Id.* (emphasis added). In “condoning the use of” non-NEPA documents to document NEPA compliance, “once an agency determines that new information is significant, it must prepare a supplemental EA or EIS.” *Id.* “A court will uphold a decision not to supplement an environmental analysis if the decision is reasonable.” *Or. Nat. Res. Council Action v. U.S. Forest Serv.*, 445 F. Supp. 2d 1211, 1225 (D. Or. 2006), citing *Stop H-3 Ass’n v. Dole*, 740 F.2d 1442, 1463 (9th Cir. 1984). In making that reasonability analysis, “[t]he focus is on the quality of the agency’s decisionmaking process, not its outcome.” *Id.*, citing *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 561 (9th Cir. 2000) (an agency “need only articulate a rational connection between the facts it has found and its conclusions”).

In determining whether a supplemental EA was required for 2022, Reclamation considered five questions:

- 1) If the new proposed action was “a feature of, or essentially similar to, an alternative analyzed in the existing NEPA document?” KT II AR 53 at BOR001416.
- 2) If the “range of alternatives analyzed in the existing NEPA document [were] appropriate with respect to the new proposed action, given current environmental concerns, interests, and resource values?” *Id.* at BOR001417.
- 3) Whether the “existing analysis [is] valid in light of new circumstances?” *Id.* at BOR001418.
- 4) Whether the “direct, indirect, and cumulative effects that would result from the new proposed action [were] similar to those analyzed in the existing NEPA document?” *Id.* at BOR001427.
- 5) Whether “public involvement and interagency review associated with the existing NEPA document [were] adequate for the current proposed action?” *Id.* at BOR001429.

Reclamation answered each question in the affirmative. Over the course of 23 pages of analysis, Reclamation reviewed the existing NEPA analyses and the features of the 2022 TOP,



concluding that the potential impacts of the proposed action fell within the scope of the existing analyses, and no supplemental EA was required.

Reclamation first determined that the 2022 Annual Operations Plan “includes foundational features of and is essentially similar to components discussed in the 2020 and 2021 EA alternatives.” *Id.* at BOR001419. The 2020-2023 EA analyzed two alternatives which took the same foundational approach: minimum EWA allocations, boundary conditions for UKL to account for uncertainty in flows, and minimum surface levels in UKL for ESA compliance. *Id.*; *see also* KT II AR 121 at BOR005153-BOR005172. Similarly, the 2021 EA included those components, with technical adjustments to account for historic drought conditions. *Id.*; *see also* KT II AR 115 at BOR003054-BOR003059. The 2022 approach “follow[ed] the operational and real-time components included in the 2021 TOP [as] analyzed [in the] 2021 EA.” KT II AR 53 at BOR001417.

Reclamation further determined that “the range of alternatives described in both the 2020 and 2021 EAs are appropriate with respect to the 2022 TOP given ongoing environmental conditions, concerns, interests, and resources values.” *Id.* In the 2020 EA, Reclamation considered but eliminated from further consideration several alternatives “because they did not meet the purpose need of the action, were not consistent with Reclamation’s obligations for operating the Project, were not consistent with legal responsibilities under the ESA, and/or were in conflict with a stipulation to stay litigation” in *Yurok Tribe v. Bureau of Reclamation*, 3:19-cv-04405-WHO (N.D. Cal.). *Id.*, at BOR001417-001418; *see also* KT II AR 121 at BOR005153-BOR005172. The alternatives that Reclamation fully considered in the 2020 and 2021 EAs “reflected the most reasonable range of potential alternatives given the existing environmental concerns, interests, and resource values amidst ongoing dry hydrologic conditions and

requirements relative to [the] ESA and the existing Stay.” KT II AR 53 at BOR001418. With the continuation of extreme drought conditions in 2022, Reclamation determined that these same alternatives continued to represent the most reasonable range of potential alternatives. *Id.* Reclamation further determined that the 2022 TOP “falls within the range of alternatives previously evaluated,” given that the 2022 TOP only “included adjustments to elements from the 2020 IOP and 2021 TOP in order to meet as many of the competing water resource needs as is practicable under the existing natural circumstances.” *Id.* This determination followed from Reclamation’s conclusion discussed above that the 2022 TOP “includes foundational features of and is essentially similar to components discussed in the 2020 and 2021 EA alternatives.” *Id.* at BOR001416.

Next, Reclamation analyzed whether any new information or circumstances undercut the validity of prior analyses. *Id.* at BOR001418. Reclamation determined that the circumstances were fundamentally similar because “no new information since 2020 has become readily available and legal claims as well as environmental circumstances (relative to hydrologic conditions) remain consistent and similar to conditions experience in 2020 and 2021.” *Id.* Reclamation supported this conclusion by assessing the potential environmental impacts of utilizing the 2022 TOP across numerous resource categories: water resources (including surface water, water quality, and groundwater); biological resources (including fish, amphibians, mammals, plants, wetlands, riparian areas, recreation, and land use); and socioeconomic resources (including air quality, Indian trust resources, and environmental justice). Reclamation ultimately concluded that based on its “evaluation of the current environmental conditions, concerns, interests, and resources values, the implementation of the 2022 TOP is appropriate,” because there was no new information that would justify a supplemental EA relative to the

impacts on each of these resources that it had previously reviewed in its prior NEPA analysis in 2020 and 2021. *Id.* at BOR001427.

With respect to water resources and UKL elevations in particular, Reclamation noted that, “as under the 2021 EA’s no action alternative (or 2020 IOP) it was analyzed that UKL surface elevations would be below the biological boundaries in 2021 as a result of critically dry hydrologic conditions.” *Id.* at BOR001419. Reclamation further noted that “[w]ith a SFF [surface flushing flow] occurring by April 15 and irrigation deliveries occurring near that date in 2021 (and again proposed in 2022), UKL surface elevation on May 31 [was] projected to be below 4,142 ft and below 4,140.5 on July 15, but stay above the end of season minimum levels of 4,138.00 ft” and that “[t]hese same conditions are expected to occur again under the 2022 TOP relative to the end of May, mid-July and end of season UKL elevations.” *Id.* Finally, Reclamation noted that “[i]mplementation of the 2022 TOP as described above relative to the SFF, would result in a reduced UKL elevation by 0.36 ft, while Reclamation’s Project Supply would be managed such that end of season UKL elevations would not go below 4,138.15 ft.” *Id.* Reclamation concluded that this “approach of managing Project Supply such that UKL remains above the end of season elevation of 4,138.0 ft was proposed and analyzed in the 2020 and 2021 EAs.” *Id.*

Next, Reclamation analyzed whether direct, indirect, and cumulative effects on resources that would arise from the 2022 TOP were similar to those impacts that were identified in the 2020-2023 EA and 2021 Supplemental EA. *Id.* at BOR001427. Reclamation considered this question across several domains (water resources, biological resources, recreation, land use, socioeconomics, air quality, Indian trust resources, and environmental justice), and determined that the “direct, indirect, and cumulative effects related to the 2022 PA would be temporary and

minor and are similar to those analyzed” in the 2020 and 2021 EAs. *Id.* With respect to water resources in particular, Reclamation concluded that the temporary nature of the TOP obviated the potential for any cumulative impacts beyond those previously reviewed:

Due to the temporary nature of the 2022 PA, and considering that no reasonably foreseeable actions are known to Reclamation that would affect water resources beyond the past and present actions (included in the affected environment discussion in Section 3.1.1.1 of the 2020), and in consideration of the impacts of the alternatives considered, no anticipated cumulative impacts on Klamath River Basin water resources would occur outside those previously analyzed in the 2020 EA.

*Id.*

Finally, Reclamation confirmed that the public involvement and interagency review associated with the 2020-2023 EA and 2021 Supplemental EA was adequate to encompass the current proposed action. *Id.* at BOR001429. Reclamation specifically described its extensive and ongoing public involvement and interagency review associated with the existing NEPA analyses, and with Klamath Project operations more generally. *Id.* “Anticipating continued dry hydrologic conditions in water year 2022,” Reclamation initiated held monthly hydrologic forecasting meetings with stakeholders (including the “Services, Klamath Basin Tribes ... Project contractors and representatives, the Bureau of Indian Affairs, PacificCorp, the Departments of the Interior and Commerce, and other affected parties.”). *Id.* In addition to those forecasting meetings, “Reclamation also specifically requested to meet with stakeholders” including the Klamath Basin Tribes to “coordinate in good faith on 2022 spring/summer operations in advance of critical decision points.” *Id.* There have been extensive and ongoing opportunities for public comment on the operations of the Klamath Project across the operational periods encompassed by the 2020-2023 EA, the 2021 Supplemental EA, and the 2022 DNA such that there is no special need for public input on the 2022 TOP.

This extensive analysis by Reclamation illustrates that the decision to issue a DNA rather than a Supplemental EA was reasonable and in compliance with NEPA. Reclamation took a hard look at the potential environmental impacts of the 2022 TOP and the sufficiency of the existing NEPA analyses. While the Tribes disagree with Reclamation's decision, NEPA is a procedural statute. The focus of judicial review is thus on the reasonability of Reclamation's process, not the result. Reclamation took a close look at whether significant changed circumstances existed in 2022, and through its DNA, determined that they did not.

**b. The Tribes' NEPA Argument Does Not Account for the Totality of Reclamation's Analysis**

Notwithstanding this extensive analysis, the Tribes assert that Reclamation acted unlawfully in determining that a supplemental EA was not needed in 2022. In support of their arguments, the Tribes highlight that: 1) Reclamation determined that prior NEPA analyses took into account similar Klamath River and UKL management components for calculating and managing water supply; 2) the 2022 TOP utilized similar modeling and water allocation formulas as in 2020 and 2021; and 3) Reclamation stated that no new information or change in environmental or legal circumstances warranted a supplemental EA. The Tribes contend with little in the way of actual analysis that these determinations from the 2022 DNA as not holding up to scrutiny.

The Tribes begin by noting that the 2020 EA was adopted in conjunction with the 2020 IOP, which compared two alternatives: a "no-action" alternative whereby a prior plan would be utilized, or the proposed alternative – the 2020 IOP. KT II ECF 24 at 46; *see also* KT II AR 121 AR at BOR005166, 5168. Both of those alternatives include a formulaic water allocation formula. *Id.*, at BOR005171. Accordingly, the Tribes assert that the 2022 TOP, which departs from the formula, cannot be tied to 2020 EA. KT II ECF 24 at 47. However, the 2020 EA, as

well as the 2021 Supplemental EA, each expressly contemplate a scenario where extreme droughts like those of recent years would render the targets, buffers, and formula unachievable. KT II AR 121 at BOR005169-70 (if conditions will cause UKL to fall too low, “Reclamation would coordinate with the Services and PacifiCorp to best meet the needs of ESA-listed species as well as coordinate and obtain input from affected Klamath River Basin Tribes through government-to-government consultation on how to manage water”); *see also* KT II AR 123 at BOR 005376-005377 (“instead of allocating a specific volume from UKL (i.e., Project Supply), Reclamation plans to make available all volume above a UKL elevation of 4,138.3 ft. Reclamation will coordinate with the Services throughout the spring/summer season on Project diversions to address unforeseen circumstances that may arise”). In fact, Reclamation produced a Supplemental EA in 2021 to further analyze the anticipated effects such extreme drought conditions would have, noting that “the 2021 drought is unprecedented and has required that Reclamation coordinate with the Services on an operational path forward.” KT II AR 123 at BOR005370. The argument that Reclamation’s prior NEPA analysis of this extreme hydrology does not apply to 2022 is unavailing.

In a similar vein, the Tribes next argue that because both 2020 EA alternatives utilize the same hydrologic record and the same Klamath Basin Planning Model, the 2020 EA does not evaluate the actual hydrologic conditions experienced in 2022. KT II ECF 24 at 47. This argument is difficult to understand. The 2022 DNA relies on both the 2020 and the 2021 EAs. KT II AR 53 at BOR001411. The Tribes do not contest the adequacy of 2021 Supplemental EA, which analyzed Project operations in the context of extreme drought; an extreme drought which has continued into 2022. Reclamation did not need to duplicate the analysis of these extreme

drought conditions already contained in the 2021 EA, which the Tribes disregard in making this argument.

Finally, the Tribes turn their attention to the alternatives discussed in the 2021 Supplemental EA, which analyzed the 2021 TOP, to argue that Reclamation did not adequately review the potential effects of the 2022 TOP. KT II ECF 24 at 47-48. However, the Tribes acknowledge that the 2021 Supplemental EA analyzed a departure from the strict water allocation formula in light of extreme drought. *Id.* (conceding that the 2021 TOP “did purport to depart from the regular water allocation formula”). This belies their assertion that the 2022 TOP have not been fully analyzed. The 2022 Supplemental EA evaluated an operations plan that accounted for extreme drought through increased flexibility in management. The only difference between 2021 and 2022 is that the Tribes disagree with how Reclamation utilized that increased flexibility to adaptively manage a limited supply of water with competing needs.

This disagreement does present a proper NEPA challenge. In fact, the Tribes appear to agree that the departure from the allocation formula in 2021 was acceptable because, in their view, it was “*more* rather than *less* protective” of C’waam farming. *Id.* (emphasis in original). The Tribes cannot have it both ways. Reclamation was confronted with a simple question: was a supplemental EA necessary for 2022, or did the existing NEPA analyses – which the Tribes do not challenge as insufficient – encompass the forecasted conditions and management regime in the 2022 TOP? Reclamation considered this question and reasonably determined that the existing analyses encompassed the conditions likely to be encountered in 2022. The Tribes’ argument is fundamentally a challenge to the wisdom of the action taken, not its underlying process, which is not a viable NEPA claim. The Tribes have not met their high burden to show that Reclamation acted arbitrarily or capriciously.

**D. The Tribes' Requested Injunctive Relief Is Unjustified**

Though the Tribes make no reference to injunctive relief in their summary judgment motions, their complaints request various injunctive relief that would mandate certain elevations in UKL. KT I ECF 1 at 31 ¶¶ A-C; KT II ECF 1 at 34 ¶¶ A-D. To the extent that the Tribes still seek such relief, it should be denied.

The Tribes do not show that their requested relief would redress (much less prevent) harms allegedly caused by the 2021 and 2022 TOPs, nor do they show that the requested relief would not cause harm to SONCC coho salmon and killer whales. To the contrary, the Tribes have freely admitted that their requested flows “are not ideal flow rates for salmon in the lower river” and would cause “unavoidable” impacts to SONCC coho salmon. KT I ECF 2 at 8, 29, 31. Those impacts have not undergone any sort of review by NMFS, nor has NMFS analyzed potential impacts to killer whales, which the Tribes ignore altogether. Granting the Tribes’ requested relief would likely eliminate the potential for a surface flushing flow, even though such flows were a basis for NMFS’ no jeopardy and no adverse modification conclusions for these species and critical habitat in its BiOp.

The Tribes attempt to justify adverse impacts to the SONCC coho salmon by arguing that they are entitled to less protection than suckers because the former are listed as threatened, whereas the latter are listed as endangered.<sup>13</sup> KT I ECF 80 at 41-42. This argument fails for

---

<sup>13</sup> At the time of listing pursuant to ESA Section 4, 16 U.S.C. § 1533, a species is designated as either endangered or threatened. 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). Though the SONCC coho salmon is listed as threatened, NMFS’ BiOp states that most of its 30 independent populations are “at high risk of extinction.” KT I AR 2 at 001065.



several reasons. First, it overlooks that ESA Section 7(a)(2) applies equally to species that are listed as threatened or endangered. 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). This should be dispositive of the Tribes’ argument. Neither the ESA nor the implementing regulations state that an action agency should subvert Section 7 obligations owed to a threatened species to those owed to an endangered species in the event of a conflict.<sup>14</sup> Second, the Tribes overlook that unpermitted take is prohibited of both suckers and SONCC coho salmon alike. In accordance with ESA Section 4(d), NMFS has extended the Section 9 take prohibition to the listed West Coast salmonid species, including SONCC coho salmon, except as specifically limited by that regulation. 16 U.S.C. § 1533(d); 50 C.F.R. § 223.203. Third, the Tribes overlook that there are endangered species on both sides of the equation, namely the Southern Resident killer whale, which depends on Chinook salmon from the Klamath River as its primary prey.

The Tribes’ case citations (KT I ECF 80 at 42) do not support their novel argument. Both cited cases are ESA Section 4 cases, which are readily distinguishable from the present cases, which concern ESA Sections 9 and 7. The Tribes’ first case, *Ctr. for Biol. Diversity v. Everson*,

---

<sup>14</sup> 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) (emphasis added). 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) (emphasis added). 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).

435 F. Supp. 3d 69 (D.D.C. 2020), was a Section 4 listing case, where the court was reviewing the Service's determination as to whether or not a single species met the criteria for being added to the list of species protected under the ESA. That analysis is entirely inapposite to the Tribes' argument here that water resources and risks of potential take, jeopardy, and adverse modification of critical habitat under ESA Sections 7 and 9 should be comparatively reallocated as between multiple species that already have been found to meet listing criteria under the ESA. The Tribes' second cited case, *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 13 (D.D.C. 2002), *vacated in part on other grounds*, 89 F. App'x 273 (D.C. Cir. 2004), was a Section 4 critical habitat designation case that is similarly inapposite to the Section 9 and 7 issues here. The opinion's statement that "[e]ndangered species are entitled to greater legal protection under the ESA than threatened species" was pure dicta, gratuitously included in the opinion's statutory background section. *Id.* at 13. In fact, the statement is doubly immaterial here, as the court was referring to the fact that the Section 9 take prohibition applies to threatened species only where the Secretary has extended it through a Section 4(d) rule, which NMFS has done in this case with respect to the SONCC coho salmon.

In sum, in the history of the ESA, no court has ever adopted the theory advanced by the Tribes here, much less granted the extraordinary type of relief the Tribes request based on that theory. *Contra Klamath Tribes*, 537 F. Supp. 3d 1183; *Yurok Tribe*, 2020 WL 2793945. Just as this Court and the *Yurok I* court have previously denied requests to compel operations to benefit certain listed species at the expense of others, this Court should deny the Tribes' present requests to curtail releases from UKL to benefit suckers at the expense of SONCC coho salmon and killer whales.

**V. Conclusion**

For all of the foregoing reasons, the Court should dismiss the complaints. However, in the alternative, the Court should deny the Tribes' motions for summary judgment and enter summary judgment in favor of Federal Defendants.

Respectfully submitted this 17th day of January, 2023.

TODD KIM  
Assistant Attorney General  
United States Department of Justice  
Environment & Natural Resources Division

s/ Robert P. Williams  
ROBERT P. WILLIAMS,  
District of Columbia Bar No. 474730  
Senior Trial Attorney  
Wildlife & Marine Resources Section  
Ben Franklin Station, P.O. Box 7611  
Washington, D.C. 20044-7611  
Tel: (202) 305-0206; Fax: (202) 305-0275  
Email: robert.p.williams@usdoj.gov

s/ David W. Gehlert  
DAVID W. GEHLERT, Trial Attorney  
Natural Resources Section  
999 18th Street, South Terrace, Suite 370  
Denver, CO 80202  
Tel: (303) 844-1386  
Email: David.Gehlert@usdoj.gov

s/ Mark J. Widerschein  
MARK J. WIDERSCHIEIN, Trial Attorney  
Natural Resources Section  
Ben Franklin Station, P.O. Box 7611  
Washington, D.C. 20044-7611  
Tel: 202-305-0481  
Email: Mark.Widerschein@usdoj.gov

***Attorneys for Federal Defendants***

### **CERTIFICATE OF COMPLIANCE**

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 21,997 words, inclusive of headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel. The Court previously approved a stipulation by the parties in this matter to a maximum of 35,000 words, per the Unopposed Motion for Word Count Enlargement Regarding Plaintiff's Motion for Summary Judgment, which was filed on November 18, 2022. *See Klamath Tribes II* (ECF 23, 25).

s/ Robert P. Williams  
ROBERT P. WILLIAMS,  
Senior Trial Attorney  
United States Department of Justice  
Environment & Natural Resources Division  
Wildlife & Marine Resources Section  
Ben Franklin Station, P.O. Box 7611  
Washington, D.C. 20044-7611

### **CERTIFICATE OF SERVICE**

I certify that on January 17, 2023, the foregoing was electronically filed with the Court's electronic filing system.

s/ Robert P. Williams  
ROBERT P. WILLIAMS,  
Senior Trial Attorney  
United States Department of Justice  
Environment & Natural Resources Division  
Wildlife & Marine Resources Section  
Ben Franklin Station, P.O. Box 7611  
Washington, D.C. 20044-7611