SOMACH SIMMONS & DUNN, PC
A Professional Corporation
PAUL S. SIMMONS, ESQ. (Or. Bar 971386)
RICHARD S. DEITCHMAN, ESQ. (Or. Bar 154839)
BRITTANY K. JOHNSON, ESQ. (Cal. Bar 282001)
Pro Hac Vice
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: (916) 446-7979
Facsimile: (916) 446-8199
psimmons@somachlaw.com
rdeitchman@somachlaw.com
bjohnson@somachlaw.com

Attorneys for Defendant-Intervenor
KLAMATH WATER USERS ASSOCIATION

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MEDFORD DIVISION

THE KLAMATH TRIBES, a federally recognized Indian Tribe, 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 **KLAMATH WATER USERS ASSOCIATION'S REPLY IN SUPPORT OF KLAMATH WATER USERS ASSOCIATION'S CROSS-MOTIONS FOR SUMMARY JUDGMENT** Magistrate Judge: Honorable Mark D. Clarke

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Defendant-Intervenor Klamath Water Users Association (KWUA) has moved this Court for summary judgment in its favor and to dismiss Plaintiff Klamath Tribes' ("Plaintiff" or "Tribes") complaints in Case No. 1:21-cv-00556-CL (2021 Case) and Case No. 1:22-cv-00680-CL (2022 Case). 2021 ECF No. 85; 2022 ECF No. 29 (collectively, "KWUA's Cross-Motions"). KWUA hereby replies in support of its Cross-Motions.[1] Both the 2021 Case and 2022 Case should be dismissed because the Court lacks jurisdiction over the subject matter of Plaintiff's complaints, Plaintiff has failed to join all parties necessary for final determination, Plaintiff lacks standing, and Plaintiff's claims are moot. In the alternative, Plaintiff's claims fail on the merits.

I. INTRODUCTION

The Tribes' 2021 and 2022 complaints should be dismissed in their entirety. The Tribes' latest brief[2] is merely the most recent example of the Tribes' contention that Reclamation is not doing enough for sucker species, without tying the grievances to the applicable legal standards to prove Endangered Species Act (ESA) or National Environmental Policy Act (NEPA) violations. The Tribes grossly oversimplify the showing that is necessary to prove the claims alleged under ESA Section 7(a)(2) and Section 9. Under the Tribes' theory of the case, if Reclamation cannot maintain certain lake elevations—no matter how historic the drought or whether the Klamath Project (Project) actually diverts water or not—Reclamation is in violation of the ESA.

It is not that simple. Plaintiff must first meet the jurisdictional requirements for its claims, and then must prove its claims under the applicable legal standards for jeopardy and take.

[1] This brief responds to arguments relevant to both the 2021 Case and the 2022 Case. KWUA is filing an identical brief in each case.

[2] Klamath Tribes' Consolidated Reply Brief in Support of its Motions for Summary Judgment and Opposition to Defendants' Cross-Motions for Summary Judgment, 2021 ECF No. 91; 2022 ECF No. 40 (Pl.'s Reply).

It has done neither. Instead, Plaintiff relies on the repeated tactic of blaming the Project when it can, and other listed species when it cannot blame the Project. This is without reference to any purported causal link between diversion or Project irrigation water and the survival of the sucker species in Upper Klamath Lake (UKL), or actual beneficial impact that either Reclamation or this Court may provide in performing some action or issuing some ruling that is favorable to the Tribes.

The simple fact is that 2021 and 2022 were extremely dry years, that followed another dry year in 2020. Not enough water flowed into UKL to recover what Reclamation was told to release to the Klamath River for another listed species. Reclamation adaptively managed where it could under the applicable biological opinions (BiOps). And agriculture, refuges, and wildlife in the Klamath Basin were devastated. This does not mean Reclamation was in violation of the ESA or NEPA.

KWUA's Cross-Motions largely dispose of both the Tribes' opening and responding briefs. Nonetheless, KWUA replies herein to further rebut issues raised in Plaintiff's Reply to support dismissal of both the 2021 Case and 2022 Case.

Plaintiff's Reply does not get around the fatal jurisdictional defects that exist with both cases challenging expired administrative determinations. First, Plaintiff's Reply does not meaningfully attempt to address KWUA's standing argument, and instead, the Tribes elect to be silent on the threshold constitutional issue.

Second, the Tribes' complaints are textbook cases for mootness. The subject federal actions have expired and there is no reason to believe that any future Project operations plan, including for the upcoming 2023 irrigation season will replicate the 2021 Temporary Operations Plan (2021 TOP) or the 2022 Temporary Operations Plan (2022 TOP). The common sense

reason for that conclusion is that the 2021 TOP and 2022 TOP were based on the unique hydrology for each individual year. Moreover, the 2021 TOP and 2022 TOP derive from agency decisions, including the BiOps of the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) that will not be the same in 2023. The "capable of repetition yet evading review" exception to mootness cannot apply because Klamath Basin hydrology by its very nature is different every year.

Third, Plaintiff's Reply does not have an answer for the deficient ESA citizen suit notice for the 2022 Case.

Finally, the Court cannot proceed to adjudicate the 2021 Case and 2022 Case because Ninth Circuit precedent requires dismissal. There are necessary parties to these lawsuits which challenge Project operations, and those parties cannot be joined due to sovereign immunity. Contrary to the Tribes' suggestion, KWUA and the Federal Defendants have properly raised Federal Rule of Civil Procedure (FRCP) 19 issues.

If the Court decides that Plaintiff has overcome each of these threshold issues, and that it does have jurisdiction, Plaintiff's Reply provides nothing to save its ESA and NEPA claims on the merits. The Tribes continue to ascribe legally insignificant importance to modeled boundary conditions from the FWS BiOp and fail to acknowledge the lack of evidence (or even try to present actual admissible evidence) in support of their ESA claims. This strategy disregards empirical reality: the problem for endangered sucker populations is not a lack of spawning habitat or rearing habitat or adult access to specific portions of UKL, but rather sucker populations in UKL are declining because of a lack of recruitment. Larval fish, of which there are millions upon millions each year, do not survive to become reproducing adults. The adult

population is aging and getting smaller, there having been no major years of recruitment success for three decades. The last year of strong recruitment was a low water, low UKL elevation year.

With respect to the Tribes' NEPA claim, Plaintiff's Reply fails to overcome the fact that NEPA does not apply to diversion and use of irrigation water in the Project, an ongoing activity that started nearly seven decades before NEPA's enactment.

For all these reasons, the Court should deny Plaintiff's motion for summary judgment and grant KWUA's cross-motions.

II. ARGUMENT

A. The Court Lacks Jurisdiction Over All of Plaintiff's Claims

1. The Tribes Fail to Prove Standing for All Claims

The Tribes lack standing because all claims pertain to Reclamation's adoption and implementation of the 2021 TOP and 2022 TOP. 2021 ECF No. 80 at 6-7; 2022 ECF No. 24 at 8. There is no dispute that neither the 2021 TOP nor the 2022 TOP is in effect. To establish standing, a plaintiff must demonstrate it has suffered an "injury in fact," that the injury is "fairly traceable" to the defendant's conduct, and that "it is likely, as opposed to merely speculative, that *the injury will be redressed by a favorable decision*." *Ctr. for Biological Diversity v. Exp.-Import Bank of the United States*, 894 F.3d 1005, 1012 (9th Cir. 2018) (*Exp.-Import Bank*) (internal citations omitted, emphasis added).

Plaintiff's Reply includes a one sentence footnote addressing KWUA's constitutional standing argument, which summarily declares that "the Tribes' injuries remain redressable," so Plaintiff has standing. Pl.'s Reply at 21 n.5. But a plaintiff has the duty to prove standing not just as of filing pleadings or in a cursory argument in a footnote, but at all "successive stages of the litigation." *Exp.-Import Bank*, 894 F.3d at 1012.

Plaintiff does not even try to establish that a declaratory judgment would redress its alleged injuries and could not plausibly do so. The 2021 TOP and 2022 TOP were temporary, one-time operations plans that Reclamation stated were adopted due to "[e]xtraordinary hydrologic conditions." 2022 BOR_AR at Bates BOR001493; 2021 AR at 005552. A declaration by this Court that Reclamation violated the law in 2021 or 2022 has no bearing on future rights, nor could it remedy alleged past injuries. *See Clear Connection Corp. v. Comcast Cable Communs. Mgmt, Ltd. Liab. Co.,* 501 F. Supp. 3d 886, 898 (E.D. Cal. 2020) (*Clear Connection Corp.*) ("declaratory relief is inappropriate [when a plaintiff] seeks to redress past wrongs, not declare future rights" (internal citation omitted)).

Even if Reclamation operates the Project pursuant to one or more TOPs for 2023 or in the future, any future TOP would be a separate and distinct agency action from the 2021 TOP and 2022 TOP—based on various factors, including but not limited to hydrology for the given year, updates to the FWS BiOp, the NMFS BiOp, and other factors. Plaintiff fails to meet its burden to prove standing, and the declaratory relief sought relating to the 2021 TOP and 2022 TOP would fail to redress any cognizable Article III injury. *See Magassa v. Wolf*, 487 F. Supp. 994, 1009 (W.D. Wash. 2020) (*quoting Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 107 (1998)) (*"*Mere 'psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.' ").

2. These Lawsuits Concern Expired Administrative Determinations, and All the Claims Are Moot

All of the Plaintiff's claims are wholly in the past, and thus the claims are all now moot. Plaintiff argues that "[t]he declaratory relief [they] seek is vital to ensure that Reclamation does not adopt [future] TOPs" that they believe will be unlawful, and that the "capable of repetition yet evading review" exception to mootness applies. Pl.'s Reply at 21-22. Plaintiff's two

lawsuits challenge administrative decisions (the 2021 TOP and 2022 TOP) that have both expired; those two administrative decisions were temporary deviations from a BiOp that has been replaced; and both decisions were based on unique facts and circumstances to the given year, including circumstances in Klamath Basin hydrology that were unique for the time of adoption of the administrative decisions. For these reasons, this Court cannot provide the Tribes "meaningful relief," thus "a declaratory judgment concerning the lawfulness of Reclamation's past conduct has no relation to Reclamation's future conduct and [the declaration] would be an improper advisory opinion. *All. for the Wild Rockies v. Burman*, 499 F. Supp. 3d 786, 790-91, 794 (D. Mont. 2020) (*Burman*).

In reply, Plaintiff claims that this case is analogous to Ninth Circuit cases where the court found challenges to a single-season operation were not moot based on the availability of effective relief that could counteract the effects of the alleged violation in the future. Pl.'s Reply at 21. However, the rulings in those cases turned on the continued possibility of granting the requested *injunctive* relief. *See Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 368-69 (9th Cir. 1989) (finding challenge to 1988 water releases was not moot because an equivalent amount of water could be stored for possible use for species the next year); *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988) (finding challenge to 1986 harvest quotas was not moot because of the possibility of injunctive relief for 1989 season when the 1986 year class of salmon returned). Here, it was not clear exactly what Plaintiff was requesting in the form of injunctive relief, as Federal Defendants point out. 2021 ECF No. 87 at 63-63. In its reply, Plaintiff clarifies that because "Reclamation is not currently operating the Project under the 2021 or 2022 TOPs, [Plaintiff] is no longer seeking injunctive relief related to those

operations."[3] Pl.'s Reply at 18 n.12. Because injunctive relief is not an issue in the 2021 or 2022 Case, these cases on single-season actions, which turned on available injunctive relief, do not save Plaintiff's 2021 Case and 2022 Case from being moot.

Plaintiff does 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. 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").

Furthermore, there is an entire new BiOp that did not exist at the time of the now-moot actions. Plaintiff does not avoid mootness by arguing that the 2023 BiOp contains the same boundary conditions as the 2020 BiOp. *See* ECF No. 91 at 22 n.16. In voluntarily dismissing its claim against FWS, Plaintiff admits that the incidental take statement (ITS) in the 2023 BiOp does not include the same meet-and-confer process as in the 2020 BiOp. *Id.* at 30. That is, Term & Condition (T&C) 1c in the 2020 FWS BiOp provides that if elevations fall outside the boundary conditions, "Reclamation shall determine the causative factors of this decrease and determine whether these factors are within the scope of the proposed action" and "immediately consult with the Service concerning the causes to adaptively manage and take corrective actions." 2022 BOR_AR at BOR003650.

Much of Plaintiff's arguments that Reclamation's operations adversely modified critical habitat in violation of ESA Section 7(a)(2) and caused take in violation of ESA Section 9 hinge

[3] This statement alone should be viewed as an admission that the case is moot.

on whether Reclamation complied with T&C 1c. *See* Pl.'s Reply at 34-38 (arguing Reclamation has been out of compliance with T&C 1c since April 2021 and therefore has no safe harbor from Section 9 take liability, and responding to Federal Defendant's argument that it did not violate Section 7 because it complied with T&C 1c). This provision of the terms and conditions in the ITS no longer exists. The 2023 FWS BiOp does not include this language. 2022 BOR_AR at BOR0005735-36. Instead, Reclamation must meet with FWS and NMFS monthly prior to the key dates for the boundary conditions to ensure Reclamation is able to meet or exceed the lake elevations, and if during the meet and confer process, Reclamation determines that UKL elevations cannot be attained, "Reclamation shall immediately reinitiate consultation with the Service." *Id.* Thus, Plaintiff would have this Court issue a purely advisory opinion on whether it complied with a term and condition that no longer exists. This is a textbook case of mootness.

In its reply, Plaintiff attempts to escape the conclusion that these cases are moot by pointing to an exception. Pl.'s Reply at 22-23. The capable of repetition yet evading review exception to mootness does not apply here because the Tribes fail to show that "there is a reasonable expectation that [they] will be subjected to [the injuries] again." *Burman*, 499 F. Supp. 3d at 793; *see also Ctr. for Envtl. Sci., Accuracy & Reliability v. Cowin*, No. 1:15-CV-01852-LJO-BAM, 2016 U.S. Dist. LEXIS 74896, at *10 (E.D. Cal. June 8, 2016) ("For the same reasons the Court found the 'capable of repetition yet evading review' exception does not apply here, this case does not present evidence of a 'continuing practice' that could be remedied by declaratory relief."). The 2021 TOP and the 2022 TOP were temporary, one-time plans that came and went. Reclamation ceased operating the Project pursuant to the 2021 TOP and

2022 TOP at the end of September of each year, those plans themselves were not identical,[4] and there are no indicia that Reclamation will readopt an identical plan in subsequent years. Indeed, Plaintiff asks the Court to take judicial notice of Reclamation's January 2023 Temporary Operating Procedure (2023 TOP). Pl.'s Reply at 19-20 & n.13. In the 2023 TOP, Reclamation proposes to reduce Klamath River flows up to 30 percent in order to meet UKL elevation 4142 feet by April 1. 2023 TOP at 1. This, of course, is an entirely different approach to operations based on the now operative 2023 FWS BiOp and current year's hydrology for the benefit of listed sucker species.[5]

For all these reasons, even if the Court were to agree that Reclamation violated the ESA and NEPA through its adoption and implementation of either the 2021 TOP or the 2022 TOP, a favorable declaratory judgment would provide zero effective or meaningful relief to the Klamath Tribes. Therefore, the Tribes' claims are moot.

3. The Tribes Failed to Provide an Adequate 60-Day ESA Notice Letter in the 2022 Case

As explained in KWUA's Cross-Motions, a prerequisite to file an ESA citizen suit is compliance with the 60-day notice requirement, which states 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 such provision." 16 U.S.C. § 1540(g)(2)(A). Plaintiff's Reply admits that the Tribes' March 10, 2022 notice letter does not identify violations of Section 7 or Section 9 of the ESA and instead expresses a desire to engage in consultation

[4] Plaintiff filed separate lawsuits challenging the 2021 TOP and 2022 TOP which highlights the unique factual circumstances raised by each.

[5] Predictably, the downstream tribe in California is preparing to challenge Reclamation's reduced releases for Klamath River flows in the 2023 TOP in litigation in the United States District Court for the Northern District of California. *Yurok Tribe, et al. v. U.S. Bureau of Reclamation, et al.*, No. 19-cv-04405-WHO (N.D. Cal. Feb. 27, 2023) (order granting motion for leave to file supplemental complaint).

regarding Reclamations 2022 plans for Project operations. Pl.'s Reply at 29 ("[i]n its letter on March 10, 2022 ('2022 Notice'), the Tribes requested immediate consultation with Reclamation" and "the 2022 [n]otice does not expressly mention litigation"). Plaintiff fails to distinguish the 2022 Notice letter from the notice in *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998), which the Ninth Circuit found to be substantively insufficient. In both cases, the purpose of the letter was to consult regarding Reclamation operations.

Plaintiff next tries to salvage its compliance with the notice requirement by asserting its notice letter for 2021 operations can serve as adequate notice for its 2022 Case and claiming "[s]ixty-day notice letters do not have set sell-by dates." Pl.'s Reply at 27. Plaintiff relies upon *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860 (D. Ariz. 2003) (*San Carlos*), in which the court found that a notice letter sent in 1997 could serve as the requisite notice for a 1999 lawsuit because it complained of the ongoing operation of the dam and the repeated drawdowns of the lake that plaintiffs in that case were challenging. *Id.* at 871-73. The defect in Plaintiff's attempt to analogize *San Carlos* and this case is that Plaintiff here is not challenging the ongoing operation of the Project; rather, the Plaintiff in this case is very clearly challenging the 2022 TOP. *See, e.g.*, Compl. ¶ 72, 2022 ECF No. 1 ("Klamath Tribes are entitled to a declaration that by adopting the 2022 Ops Plan Reclamation has lost the right to shelter under the 2020 BiOp's ITS); *id.* ¶ 79 ("Klamath Tribes are entitled to a declaration that the 2022 Ops Plan violates Section 7 of the ESA").

When Plaintiff sent its 2021 notice letter, the 2022 TOP did not exist. Thus, the 2021 notice letter could not have possibly provided adequate notice to Reclamation of alleged violations of the ESA that would result by adopting the 2022 TOP. *See Nat. Res. Def. Council v.*

Norton, No. 1:05-cv-01207 LJO-EPG, 2016 U.S. Dist. LEXIS 145788, at *50-58 (E.D. Cal. Oct. 20, 2016) (finding plaintiffs' sixty-day notice letter from 2008 referring to ongoing ESA violations did not provide sufficient notice to file supplemental complaint alleging ESA violations based on Reclamation's reliance on a consultation completed in 2015).

Both the 2021 notice letter and the March 10, 2022 notice letter are insufficient to provide notice to Reclamation of its alleged violations of the ESA. Therefore, Plaintiff has failed to provide notice under 16 U.S.C. § 1540(g)(2)(A), and as such, is jurisdictionally barred from bringing its 2022 Case.

4. FRCP 19 Dismissal is Warranted at this Stage of the Litigation

Plaintiff's Reply incorrectly implies that a FRCP 19 dismissal must be raised on a motion to dismiss under FRCP 12(b)(7). It is true that *Klamath Irrigation Dist., et al. v. U.S. Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022) (*KID*), arose when the Klamath Tribes and Hoopa Valley Tribe decided to block KWUA's and other irrigation parties' attempt to challenge Reclamation's actions relating to the Project and intervened for the limited purpose of filing motions to dismiss on the grounds that they were necessary parties who could not be joined to the lawsuit. But nothing in FRCP 12 or 19 limits the issue to a FRCP 12(b) motion. In fact, FRCP 12(h)(2) provides:

> When to Raise Others. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:
>
> (A) in any pleading allowed or ordered under Rule 7(a);
>
> (B) by a motion under Rule 12(c); or
>
> (C) at trial.

FRCP 12(h)(2).

KWUA pled affirmatives defenses in both the 2021 Case and 2022 Case for failure to join all parties necessary for final a determination in this action. *See* 2021 ECF No. 13-1 at 6; 2022 ECF No. 15 at 19. KWUA's assertion of this defense in its Cross-Motions is consistent with the timing for such a determination under FRCP 12(h)(2). As in *KID*, the Klamath Tribes' lawsuits "seek[] to amend, clarify, reprioritize, or otherwise alter Reclamation's ability or duty to fulfill the requirements of the ESA implicates the Tribes' long-established reserved water rights." 48 F.4th at 943-44. KWUA does not, as the Klamath Tribes assert, seek to "speak for the absent tribes by raising the Rule 19 issue essentially on their behalf . . . ." Pl.'s Reply at 15. Rather, KWUA merely seeks a ruling from the Court that the Klamath Tribes have failed to join parties necessary for a final determination of these cases. KWUA disagrees with the outcome in *KID,* but it is the law of the Ninth Circuit that the tribal entities with "long-established reserved water rights" are necessary parties to lawsuits like the 2021 Case and 2022 Case that challenge the operating procedures for the Project. That necessarily includes the downstream California tribes, who are not parties to this case. As a result, Plaintiff's complaints should be dismissed based on the Ninth Circuit's recent decision in *KID*.

B. Plaintiff's Claims Fail on the Merits Because Plaintiff Does Not Make the Required Showings Under Applicable Legal Standards

Plaintiff's Reply demonstrates continued denial or avoidance of the factors that actually limit sucker recovery in UKL. It makes sweeping conclusions, not backed by evidence, that certain Project activities have resulted in ESA violations. And Plaintiff grossly oversimplifies the showings required to prove Reclamation violated Section 7(a)(2) or Section 9. For these reasons, both Plaintiff's Section 7 and Section 9 claims fail.

1. Plaintiff Cannot Show a Substantive Section 7(a)(2) Violation Based on Lake Elevations Alone

As to Section 7, Plaintiff's Reply again fails to understand Reclamation's substantive Section 7(a)(2) obligation and the meaning of Project modeling in application of the ESA. The gravamen of the Klamath Tribes' Section 7 claims is that Reclamation has lacked the "ability to comply . . . with the boundary conditions USFWS set forth in the 2020 BiOp as necessary to protect [suckers]." *See, e.g.*, 2022 ECF No. 24 at 35. This argument does not speak to the standard enounced in *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410 (9th Cir. 1990) (*Pyramid Lake*), for demonstrating substantive violations of ESA Section 7(a)(2). Plaintiff does not explain whether Reclamation's reliance on the FWS BiOp was reasonable or whether there was new information Reclamation did not take into account. *See id.* at 1415. Instead, Plaintiff remains focused on "boundary conditions" and whether Reclamation met them under historic drought conditions. These arguments are tailored to the standard for reinitiation of consultation, not jeopardy. *See* 50 C.F.R. § 402.16. To the extent that compliance with "boundary conditions" in the FWS BiOp is an issue under *Pyramid Lake*, Federal Defendants have explained how Reclamation complied with T&C 1c.[6] 2021 ECF No. 85 at 48-53.

In response to KWUA's argument that "boundary conditions" are not biologically significant and do not create a jeopardy threshold, Plaintiff simply implies a connection between the hydrology of UKL and the amount of critical habitat. *See* Pl.'s Reply at 39. But the

[6] In its ruling denying Plaintiff's motion for temporary restraining order and preliminary injunction in the 2021 Case, this Court already found that Reclamation complied with the terms and conditions of the 2020 FWS BiOp, including T&C 1c, when operating under the 2021 TOP. 2021 ECF No. 53 at 14-16. Plaintiff claims now that the analysis is different based on a full record. 2021 ECF No. 91 at 35. It is inconsistent for Plaintiff to claim some aspects of the Court's 2021 ruling are law of the case, like the Court's ruling on the sixty-day notice, *see id.* at 24, while others, like the Court's ruling on T&C 1c, are not. The Court had a stipulated set of documents as well as judicially noticeable documents before it when ruling on Reclamation's compliance with T&C 1c. There is no reason to revisit the issue.

"boundary conditions" are not derived from scientific analysis of critical habitat; they are outputs of the hydrologic modeling that Reclamation performs to estimate Project operations under various conditions. 2022 BOR_AR at Bates BOR003549; 2021 AR at Bates 001872. As explained in KWUA's Cross-Motions, the boundary conditions in the current 2020 BiOp are the expression of a very low probability UKL elevation at any given time based on model runs using historic hydrology. 2022 BOR_AR at Bates BOR003549; 2021 AR at Bates 001872-73. Plaintiff relies on general arguments regarding the hydrology of UKL, without any evidence cited for the biological consequences of one lake elevation or another, and fails to show any causal linkage between UKL elevations and "jeopardy."

Moreover, Plaintiff makes no effort to engage with the actual scientific evidence presented in KWUA's Cross-Motions that the overwhelming limiting factor affecting the status of sucker species is lack of recruitment and not any issue related to UKL elevation. *See* KWUA Cross-Motions at 29-32. Indeed, Plaintiff does not refute the facts cited by KWUA, with support in the administrative record, that millions and millions of eggs are deposited each year during spawning season,[7] that there appears to be abundant larvae in the Williamson River and UKL and juveniles in UKL early in the summer, that shortnose suckers do not spawn in UKL at all, that approximately one-fifth of the total population of Lost River suckers spawns in UKL, and that there is vast habitat available to this species in tributaries, submerged macrophytes, and areas of UKL not affected by elevation 4138.0 feet. *See id.* Plaintiff's laser focus on 4142.0 feet in April as the means to show jeopardy ignores all this information.

[7] *See, e.g.,* BOR_AR at Bates BOR003615 ("implementation of proposed Project operations over the term of this BiOp is likely to create higher than natural surface water elevations in UKL in the spring as a result of water storage. These water levels are likely to support extensive amounts of moderate to high quality sucker spawning, rearing, and foraging habitat that will facilitate the annual production of ***millions*** of sucker eggs, embryos, larvae, and age-0 juveniles") (emphasis added).

Plaintiff also goes to great effort to connect Project irrigation to an alleged impact to suckers, by reference to the BiOp's "boundary conditions." Plaintiff's attempt to blame Project water users for poor hydrologic conditions is apparent when it admits the 2022 Case "presents the much more traditional ESA conflict, one between listed species and Irrigators uses." Pl.'s Reply at 12. Plaintiff could not say the same of its 2021 Case because the Project was not allowed to divert any water in 2021 (and thus Plaintiff must be honest about the conflicting regulatory or policy demands related to species in UKL and species in the lower Klamath River). *Id.* Plaintiff still fails to acknowledge the hydrologic reality that to the extent these "boundary conditions" were missed in 2022, Project diversions were not the cause. *See* KWUA Cross-Motions at 29; *see also* Declaration of Brad Kirby in Support of Klamath Water Users Association's Response in Opposition to the Klamath Tribes' Motion for Summary Judgment and Memorandum in Support of KWUA's Cross-Motion for Summary Judgment (2021 ECF No. 86; 2022 ECF No. 30) (Kirby Decl.) ¶ 37. Based on UKL inflow and the planned releases for the Klamath River, it was never feasible in March or April 2022 to reach 4142.0 feet. And based on UKL inflow and planned releases to the Klamath River between March 1 and July 15, 2022, Project diversions did not have a material impact on achieving the July 15 boundary condition. *Id.* Plaintiff's reflex to blame agriculture does not work when the driver of operations in these years was flows in the Klamath River for salmon.

2. Plaintiff Has Not Established the Basic Elements of Its Section 9 Claim

To be successful on the Section 9 claim, it is not enough for Plaintiff to claim that UKL elevations were too low in April, or any other month. There are basic elements to a Section 9 citizen suit claim, which include both harm to the listed species and causation. Plaintiff still does not provide the requisite proof to satisfy these elements. If the Court reaches the merits, the Section 9 claim should be denied.

a. Plaintiff Concedes that They Must Show "Harm" to Prove Take via Habitat Modification

Plaintiff's Reply notes that KWUA identified that *harm* is the proper standard to prove "take" via habitat modification, not *harassment*. Pl.'s Reply at 40. By then asserting, "even if this is the standard, the Tribes have satisfied it," and never raising *harassment* again, Plaintiff concedes that the *harm* standard controls whether "take" occurred in this case. *Id.*

b. A Habitat Modification Claim Requires Proof of Harm

As confirmed in its Reply, Plaintiff's theory of their Section 9 case is that "C'waam and Koptu incontrovertibly inhabit UKL" and "Reclamation's operation of the Project under the 2021 and 2022 TOP's adversely modified C'waam and Koptu critical habitat" by affecting lake elevations in a manner not contemplated by the BiOp. *See* Pl.'s Reply at 41. There is no allegation of direct harm to eggs, larvae, or "baby" suckers (i.e., juveniles). *See e.g.*, Pl.'s Reply at 37 (arguing Reclamation delivered irrigation water "at the direct expense of preserving incremental spawning and rearing benefits"). This is a harm-by-habitat-modification Section 9 claim, but Plaintiff still does not meaningfully address the applicable legal standard.

Plaintiff repeats the regulatory definition for "harm." Pl.'s Reply at 40 (citing 50 C.F.R. § 17.3). Yet, there is an entire body of case law interpreting what it means to show take by habitat modification. This includes the requirement that the habitat modification actually kill or injure wildlife.[8] *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 1999) (citing *Babbitt v. Sweet Home Chapter of Comtys. for a Great Or.*, 515 U.S. 687 (1995)) (explaining

[8] Instead of offering proof that speaks to the legal standard for harm, Plaintiff instead argues that cases cited by KWUA for the legal standard are "readily distinguishable" because in both cases, the respective courts based their holding on whether species were actually present in the area. 2021 ECF No. 91 at 40. KWUA cited these cases for a well-established legal standard that harm means an act that "actually kills or injures wildlife." It is not reasonable to interpret these cases to mean that application of the legal standard is "predicated" on whether species were present in the area.

that "[h]arming a species may be indirect, in that harm may be caused by habitat modification, but habitat modification does not constitute harm unless it 'actually kills or injures wildlife' " and that plaintiff "had the burden of proving by preponderance of the evidence that the proposed construction would harm a pygmy-owl by killing or injuring it").

It also includes the requirement that the habitat modification be "significant." 50 C.F.R. § 17.3 (harm may include "*significant* habitat modification or degradation where it actually kills or injures wildlife by *significantly* impairing essential behavioral patterns, including breeding, feeding or sheltering") (emphasis added). "The word 'actually' before the words 'kills or injures' . . . makes it clear that habitat modification or degradation, standing alone, is not a taking pursuant to section 9. To be subject to section 9, the modification or degradation must be *significant*, must *significantly impair* essential behavioral patterns, and must result in *actual* injury to a protected wildlife species." *Ariz. Cattle Growers' Assn. v. U.S. Fish & Wildlife, BLM*, 273 F.3d 1229 (9th Cir. 2001) (quoting Final Rule, 46 Fed. Reg. 54748 (1981) (emphasis in original)); *see also Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1086-87 (D. Or. 2012); *United States v. W. Coast Forest Res. Ltd. Pship.*, Civil No. 96-1575-HO, 2000 U.S. Dist. LEXIS 19099, at *14 (D. Or. Mar. 10, 2000) ("Defendants correctly note, however, that this interference, alone, is not enough to satisfy the ESA. Rather plaintiff must also prove by a preponderance of the evidence that this interference will 'actually kill[] or injure[]' the owls") (internal citation omitted). This is not an "invented standard," as Plaintiff suggests. It is the law of the ESA, and Plaintiff's Section 9 claim does not satisfy the harm standard.

c. Plaintiff Does Not Address the Causation Requirement

In its Cross-Motions, KWUA pointed out that Plaintiff must also prove proximate cause. 2021 ECF No. 43 at 35. "[I]t is well established that principles of proximate cause apply to [Section 9] claims." *Nat. Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 486-87 (E.D. Cal.

2018) (*Zinke*) (discussing the causation standards at length). Proof of harm also requires actual or "but for" causation. *See id.* at 488-92. Plaintiff did not address the element in causation in its reply. *See generally* Pl.'s Reply. That is, Plaintiff does not explain or prove that Reclamation's operation of the Project either actually or proximately caused the lower lake elevations that Plaintiff alleges adversely modified the suckers' habitat. In contrast, KWUA presented admissible evidence that Reclamation's operation of Link River Dam is not the only factor that affects lake elevations. Kirby Decl. ¶ 8. Indeed, there are about 200,000 acres of ranches or farms directly upstream or immediately adjacent to UKL that are not part of the Project, i.e., do not use Project water supply and divert from UKL or its tributaries. KWUA Cross-Motions at 5-6. Plaintiff did nothing in reply to refute these facts or otherwise meet their burden of proof on causation.

d. Plaintiff's Evidence is Inadmissible Hearsay

The Administrative Procedure Act's (APA) record review rules do not apply to a Section 9 claim. *Stout v. U.S. Forest Serv.*, 869 F. Supp. 2d 1271, 1276 (D. Or. 2012). Thus, the "evidence must be treated in a more traditional manner." *Zinke*, 347 F. Supp. 3d at 496. In response to KWUA's argument that Plaintiff's *only* form of evidence to support its "take" allegations is inadmissible, out-of-court statements from the administrative record, Plaintiff maintains that documents from the administrative record are admissible under the "public records" exception to hearsay under Federal Rule of Evidence 803(8). *See* Pl.'s Reply at 42. Plaintiff also dismisses KWUA's cited case, *Zinke*. *See* Pl.'s Reply at 42. Instead, Plaintiff cites two district court cases that predate *Zinke*: *Coal. for a Sustainable Delta v. Fed. Emergency Mgmt. Agency*, 812 F. Supp. 2d 1089 (E.D. Cal. 2011) (*Sustainable Delta*), and *Wishtoyo Found. v. United Water Conservation Dist.*, No. CV 16-3869-DOC (PLAx), 2017 U.S. Dist. LEXIS 213759 (C.D. Cal. Dec. 1, 2017). *Id.*

Sustainable Delta is a Section 7(a)(2) case against a federal agency in which the court took judicial notice of publicly available documents over the objections of the agency. 812 F. Supp. 2d at 1093-99. In so doing, the court noted that public records are subject to judicial notice to prove their existence and content, but not for the truth of the matter asserted therein, and cannot be used to create or resolve disputed issues of material fact. *Id.* at 1093. On the specific ruling on the BiOp, the court summarily stated that a BiOp is admissible under Rule 803(8). *Id.* at 1095.

The *Zinke* court explicitly chose to not follow this ruling from *Sustainable Delta*, noting the lack of detailed analysis and doubting that BiOps are admissible in their entirety. 347 F. Supp. 3d at 496 n.19 ("it seems a stretch to conclude that the Rule meant to sweep into evidence for the truth the entire contents of documents like a BiOp"). The *Zinke* court also expounded on the difficulties of using administrative record documents in a Section 9 case, noting that admissibility under hearsay exceptions in Rule 803(8) is a fact-specific inquiry. "While some records in the AR, such as tables recording water diversions . . . appear likely to qualify under 803(8)(A)(ii) . . . the application of 803(8) to other documents is not so obvious," especially where some documents contain hearsay within hearsay. *Id.* at 496.

The *Zinke* court's analysis of this issue is persuasive, and this Court should scrutinize the admissibility of statements from the record, as many of them constitute double hearsay. *See, e.g.*, 2022 ECF No. 24 at 17 (asserting that "Reclamation's operation of the Project unquestionably 'takes' C'waam and Koptu," citing the 2020 BiOp); 2022 BOR_AR at Bates BOR003639-40 (pages in the 2020 BiOp cited by the Tribes to support the above assertion, where Reclamation's statements rely on, if not merely restate, statements from third-party studies). Thus, because "both layers of hearsay would need to be addressed," *Zinke*,

347 F. Supp. 3d at 496, the Tribes have not shown why applicable hearsay exceptions apply. The Court should not accept the Tribes' evidence as categorically admissible.

e. Plaintiff Has Yet to Offer Evidence Under the Applicable Legal Standard that Reclamation Caused "Harm" to the Suckers Through 2021-22 Project Operations

Under the applicable standard, Plaintiff has failed to provide admissible evidence that Reclamation committed "take" when operating the Project in 2021 and 2022. While Plaintiff may have offered evidence that UKL elevations were below "boundary conditions" at the end of March in 2021 and 2022, *see* 2022 ECF No. 24 at 28, 40, Plaintiff offers no proof that the lower UKL levels "*actually* resulted in the death or injury" of suckers, *Protect Our Water v. Flowers*, 377 F. Supp. 2d 844, 880 (E.D. Cal. 2004) (emphasis added). Plaintiff acknowledges that extremely dry hydrologic conditions "have driven this crisis," and that UKL levels were "largely beyond Reclamation's control," 2022 ECF No. 24 at 35-36, n.10, yet continues to make unsubstantiated claims regarding the Project's impact on suckers. For instance, Plaintiff cites the 2023 BiOp to show that C'waam and Koptu populations have declined in the last three years, then attributes Reclamation's meager deliveries to agricultural users in the last three years as the cause, yet at no point cites an affidavit or declaration to support the allegation. *See* Pl.'s Reply at 42.

The Tribes argue that they have "satisfied their burden of production." Pl.'s Reply at 43. Because they have the burden of affirmatively demonstrating that "no reasonable trier of fact could find other than for [them]" on their Section 9 claim, however, the Tribes have fallen well short. *See Ctr. for Envtl. Sci. Accuracy & Reliability v. Nat'l Park Serv.*, No. 1:14-cv-02063-LJO-MJS, 2016 U.S. Dist. LEXIS 115940, at *96 (E.D. Cal. Aug. 29, 2016) (*CESAR*) (citing *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007)). Similar to *CESAR*, the Tribes' citations to the administrative record merely show "generic" potential injuries to suckers

from the Project, which is insufficient to show *actual* death or injury, or causation, *from 2021-22 Project operations*. *CESAR*, 2016 U.S. Dist. LEXIS 115940, at *94-96; *cf. Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1134 (D. Haw. 2000) (without a "conclusive determination" that "harm" has occurred, courts deny motions for summary judgment on Section 9 claims).

Thus, because the Tribes' "case presents a complete absence of evidence" that Reclamation's 2021-22 Project operations "harmed" suckers, the Tribes "cannot establish a genuine dispute of material fact," so the Court should deny the Tribes' motions for summary judgment and grant KWUA's Cross-Motions. *See CESAR*, 2016 U.S. Dist. LEXIS 115940, at *96.

3. Plaintiff's NEPA Claim in the 2022 Case Fails

Plaintiff's Reply overlooks the fact that Reclamation's subject action, Project operations for 2022, concerns diversion and delivery of water in the Project, which does not trigger NEPA. As explained in KWUA's Cross-Motions, "NEPA does not apply retroactively" (*citing Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234 (9th Cir. 1990)), and the operation of the Project for its originally authorized purpose of irrigation pre-dates NEPA. KWUA Cross-Motions at 40. In response, Plaintiff simply cites the NEPA regulation's general definitions for categories of "[m]ajor federal action" that would "*tend to*" (emphasis added) trigger NEPA. Pl.'s Reply at 46. The Tribes' simple argument is rebutted, however, by the binding Ninth Circuit case law set forth in KWUA's Cross-Motions at 41-42, chiefly that Ninth Circuit Courts have rejected claims that negative impacts of pre-existing operations trigger NEPA. Diversion and delivery of irrigation water in the Project is simply the ongoing operation of the Project in "respon[se] to changing conditions." *See Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173, 1175 (9th Cir. 2016).

Plaintiff's Reply fails to rebut the fact that *this Court* has already decided that Reclamation's "lowering of the water levels in [UKL]" (due to irrigation water deliveries) does not trigger NEPA because the Project pre-dates NEPA and "[e]ven if the lake level dropped below post-dam levels this year because of the drought, this would not be outside of the operational requirements of the Project." *Or. Nat. Res. Council v. U.S. Bureau of Reclamation*, Civil No. 91-6284-HO, 1993 U.S. Dist. LEXIS 7418, at *16-21 (D. Or. Apr. 5, 1993), aff'd, 1995 U.S. App. LEXIS 8020 (9th Cir. Apr. 7, 1995). Because only post-NEPA, ESA-induced changes to Project operations that can trigger NEPA, the Court should deny the Plaintiff's motion on the NEPA claim.

III. CONCLUSION

For all the reasons stated above, and for all those reasons stated in KWUA's Cross-Motions, KWUA respectfully requests that the Court grant summary judgment in its favor, deny Plaintiff's motion for summary judgment, and dismiss both cases.

SOMACH SIMMONS & DUNN, PC

DATED: March 13, 2023

By *s/ Brittany K. Johnson*
Attorneys for Defendant-Intervenor
Klamath Water Users Association

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 6,597 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

Respectfully submitted this 13th day of March 2023.

SOMACH SIMMONS & DUNN, PC

By *s/ Brittany K. Johnson*
Brittany K. Johnson
Attorneys for Defendant-Intervenor
Klamath Water Users Association

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing will be e-filed on March 13, 2023, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

s/ Brittany K. Johnson
Brittany K. Johnson