

Jay D. Weiner, #182247  
jweiner@rosettela.com  
Rosette, LLP  
1415 L St. Suite 450  
Sacramento, CA 95814  
(916) 353-1084

Attorney for Intervenor The Klamath Tribes

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
MEDFORD DIVISION

KLAMATH IRRIGATION DISTRICT,

Plaintiff,

v.

UNITED STATES BUREAU OF  
RECLAMATION; DAVID  
BERNHARDT, Acting Secretary of the  
Interior, in his official capacity; BRENDA  
BURMAN, Commissioner of the Bureau  
of Reclamation, in her official capacity;  
ERNEST CONANT, Director of the  
Mid-Pacific Region, Bureau of  
Reclamation, in his official capacity; and  
JEFFREY NETTLETON, in his official  
capacity as Area Manager for the  
Klamath Area Reclamation Office,

Defendants

SHASTA VIEW IRRIGATION DISTRICT,  
KLAMATH DRAINAGE DISTRICT,  
VAN BRIMMER DITCH COMPANY,  
TULELAKE IRRIGATION DISTRICT,  
KLAMATH WATER USERS  
ASSOCIATION, BEN DUVAL, and ROB  
UNRUH,

Plaintiffs,

v.

UNITED STATES BUREAU OF  
RECLAMATION; ERNEST CONANT, in

**Case No.: 1:19-cv-00451-CL (lead)**

Case No.: 1:10-cv-00531-CL

THE KLAMATH TRIBES' REPLY IN  
SUPPORT OF MOTION TO DISMISS FOR  
FAILURE TO JOIN A PARTY UNDER  
RULE 19

Request for Oral Argument

his official capacity as the Regional Director of the Mid-Pacific Region of the United States Bureau of Reclamation; JEFFREY NETTLETON, in his official capacity as the Area Manager of the Klamath Basin Area Office of the United States Bureau of Reclamation,

Defendants

### **REPLY IN SUPPORT OF MOTION TO DISMISS**

As the United States correctly recognizes in its response brief, “the Motions to Dismiss should be granted under the current state of the law in the Ninth Circuit.” Dkt. # 76 at 7. To distract the Court from this necessary conclusion, Klamath Irrigation District (“KID”) and Shasta View Irrigation District et al., (“Plaintiff Water Users”) (collectively, “Plaintiffs”) complain that the Klamath Tribes’ (“Tribes”) motion attempts to use sovereign immunity as a sword instead of a shield, suggesting that this is simply a game the Tribes are trying to play. Yet it is *Plaintiffs* who brought this action, forcing the Tribes to invoke their sovereign immunity to shield their critically endangered treaty resources from the potential impact of the Plaintiff’s claims. Plaintiffs efforts to cast themselves as victims is baseless. Dismissal is warranted.<sup>1</sup>

#### **I. Plaintiffs confuse the legal standard.**

In their response brief, Plaintiff Water Users improperly characterize the applicable legal standard and conflate two levels of analysis at issue in the Tribes’ motion. Subsection (a) of Rule 19 lays out the standard for determining when a party is “required” in an action, while subsection (b) lays out the standard for determining when a case should be dismissed because a “required” party cannot be joined. Plaintiff Water Users misleadingly ask the court to apply a

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<sup>1</sup> The Tribes also join, and incorporate by reference, the arguments submitted in the Hoopa Valley Tribe’s Reply to Plaintiffs’ responses, Dkt # 83, which apply with equal force to the Tribes’ treaty-protected interests in Klamath Basin resources that are implicated by Plaintiffs’ claims.

narrow approach to both steps of the analysis. Dkt #77 at 18; 23-26. That would be error.

### **1. Subsection (a)**

The Tribes' Motion to Dismiss showed that the analysis of whether a party is required under Rule 19 is identical to the analysis of whether that party is required under Rule 24(a). Dkt. #75 at 7-8. Plaintiff Water Users contest this point by citing two non-binding district court decisions for the proposition that dismissals under Rule 12(b)(7) are "disfavored." Dkt #77 at 19 (citing decisions from the federal district courts of Montana and D.C.). But this effort to change the subject is irrelevant to the inquiry of whether a party is "required" under subsection (a). Rather, courts agree that that the "'significantly protectable interest' requirement under Rule 24(a) and the 'legally protected interest' requirement under Rule 19(a) involve the same considerations." *Quechan Indian Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, No. CV07-0677-PHX-JAT, 2007 WL 2023487, at \*5 (D. Ariz. July 12, 2007). *See also MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 390 (2d Cir. 2006); 4 James Wm. Moore et al., *Moore's Federal Practice—Civil*, § 19.03(3)(f)(i) (3d ed. 2006) ("Indeed, the operative language of the two Rules is identical because the Rules were revised to emphasize their interrelationship....").

Because this court already determined that the Tribes are a required party, the only issues before the Court on this Motion are those identified in subsection (b) of Rule 19: whether the Tribes "cannot be joined" and "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

### **2. Subsection (b)**

Irrespective of whether dismissal under subsection (b) is "disfavored" in some contexts, courts are abundantly clear that dismissals are effectively obligatory when sovereign immunity is

implicated. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) (“where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign”); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) (“we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs”); *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014). Plaintiffs offer nothing to countermand this conclusion.

**II. Plaintiffs’ renewed attempt to construe the Tribes’ interest as being limited to their adjudicated water rights remains unavailing.**

After unsuccessfully making the same argument in opposition the Tribes’ Motion to Intervene, Plaintiffs again attempt to construe the Tribes’ interest in this case as being exclusively tied to water rights adjudicated by the State of Oregon. Dkt #77 at 21; Dkt #82 at 12-16. As the Tribes’ have repeatedly explained, however, and as this Court has recognized, the Tribes’ interest in this action is in fact grounded in their treaty-protected rights to harvestable populations of C’waam (Lost River sucker) and Koptu (shortnose sucker), and to other critical treaty resources in the Klamath Basin, including Southern Oregon/Northern California Coast coho salmon (SONCC coho). *See Op. and Order* (Nov. 6, 2019) (“Order on Intervention”), Dkt. #61 at 4 (“It is undisputed that the Klamath Tribes have federally protected treaty rights to water *and* fishing, giving them an interest in the water contained in Upper Klamath Lake and water released for instream purposes”) (emphasis added); Dkt. #29 at 10-11; Dkt. #50 at 3-5; and Dkt. #75 at 3-4. Both the Tribes’ water rights and the Endangered Species Act (“ESA”) are among the tools the Tribes have and will continue to use to protect their treaty-based interests. But the rights adjudicated to the Tribes in the Klamath Basin Adjudication (“KBA”) do not define the extent of the Tribes’ treaty-based and legally protectable interest in the survival and eventual

recovery of the C'waam and Koptu, and in other natural resources of the Klamath Basin. *See Klamath Tribe Claims Comm. v. United States*, 97 Fed. Cl. 203, 212-213 (2011). The Ninth Circuit has made plain that a tribe's treaty-based interest in a fishery is precisely the sort of interest Rule 19 is designed to protect. *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999).

Plaintiffs' invocation of the Tribes' temporary inability to make a call against Plaintiffs in favor of the Tribes' senior water rights is thus entirely beside the point. *See* Dkt. #82 at 24; Dkt. #77 at 8. It is true that the Tribes have stipulated to temporarily waive enforcement of the water rights recognized for them in the administrative phase of the KBA against water users (such as Plaintiffs) with priority dates prior to 1908. But Plaintiffs put more weight on this stipulation than it can bear. The stipulation will lapse upon completion of the KBA. *See* Dkt. #43 at 13. Moreover, by its own terms it does not "extend to rights under statutes of general applicability, including the Endangered Species Act." No-Call Stipulation at § 15.3.3.<sup>2</sup> The stipulation, therefore, does not negate or diminish the Tribes' legally protectable interest in this case.

Plaintiffs also argue that the Tribes can have no legal interest in maintaining the status quo because the status quo is unlawful. Dkt. #77 at 17; Dkt #82 at 2, 27. The lawfulness of the status quo, most particularly with the manner in which Reclamation currently approaches compliance with its ESA obligations, however, is precisely the question that Plaintiffs' claims raise on their merits. Dkt. #77 at 15 ("Plaintiffs seek to ensure that Reclamation acts within its authority and to confirm that the ESA does not increase Reclamation's legal authority or separately authorize Reclamation to use water for ESA purposes in the manner of the Action.");

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<sup>2</sup> The "no-call" stipulation is included in the ACFFOD's Partial Order of Determination for Water Right Claims 622, which is available at [https://www.oregon.gov/OWRD/programs/WateRights/Adjudications/KlamathAdj/KBA\\_ACFOD\\_04938.PDF](https://www.oregon.gov/OWRD/programs/WateRights/Adjudications/KlamathAdj/KBA_ACFOD_04938.PDF).

Dkt. #82 at 2 (“KID asks the Court for declarations concerning the lawfulness of the processes through which Reclamation is currently choosing to meet its ESA and other legal obligations.”). They cannot presume success on the merits to vitiate the Tribes’ interest in this litigation and allowing them to do so would thwart the purpose of Rule 19.

**III. Plaintiffs ignore the *practical* impacts of the relief they request on the Tribes’ interest.**

Rule 19(a) requires joinder of a person when disposition of the action may “*as a practical matter impair or impede the person's ability to protect the interest.*” Fed. R. Civ. Proc. Rule 19(a) (emphasis added.) Plaintiffs ignore the practical dimension of the inquiry by insisting that their requested relief will not *legally* prevent Reclamation from protecting the Tribes’ interests. Dkt #82 at 3-4 (“KID, however, does not seek to have this Court adjudicate Reclamation’s obligations to Intervenors. Rather, KID seeks a judgment declaring that, whatever obligations Reclamation may have, it cannot satisfy those obligations in a manner that violates the law”); 17-20 (offering five ways Reclamation can honor the Tribes’ treaty rights other than by invoking the authority of the ESA); Dkt. #77 at 16 (“None of Plaintiffs’ claims, on their face or in their practical effect, seek to invalidate or limit federally reserved fishing or water rights, or is otherwise ‘aimed’ at the Tribes’ actions or interests”).

The Tribes’ treaty-based interests, however, are at least partially protected by Reclamation’s current approach to complying with its ESA obligations. *See* Dkt. #29 at 12; Dkt. #4-6; and Dkt. #50 at 9-10.<sup>3</sup> Were the Court to rule in Plaintiffs’ favor on the merits and find

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<sup>3</sup> The Tribes do not believe that Reclamation’s current approach to ESA compliance is *sufficiently* protective of the C’waam or Koptu or adequate to fully discharge Reclamation’s obligations under the ESA. *See* Klamath Tribes’ Comments to USFWS, January 25, 2019 (attached hereto as Exhibit 1); *Klamath Tribes v. Reclamation*, No. 18-CV-03078-WHO, 2018 WL 3570865 (N.D. Cal. July 25, 2018) (Klamath Tribes sued Reclamation under the ESA for providing inadequate lake levels to protect C’waam and Koptu); *Yurok Tribe, et al. v. United States Bureau of Reclamation, et al.*, United States District Court for the Northern District of California, Case No. 3:14-cv-04405-WHO (filed July 31, 2019) (Yurok Tribe is currently suing Reclamation for failure to provide sufficient instream

Reclamation's current approach to ESA compliance to be illegal, Reclamation could well become even more constricted in its interpretation of its ESA duties than at present, such as in order to avoid additional costs that a victory here by the Plaintiffs might otherwise entail. Indeed, given the extremely precarious condition of both species, *any* change to the status quo that risks leaving less water in Upper Klamath Lake for the biological needs of the C'waam and Koptu would directly impair the Tribes' interest. As a practical matter, therefore, disposition of this action on its merits risks impairing the Tribes' ability to protect their treaty-based interests in the C'waam and Koptu.

KID's invocation of *California ex rel. Lockyer v. United States*, 450 F.3d 436 (9th Cir. 2006), does not change this conclusion. *See* Dkt. #82 at 28. Indeed, in *Lockyer*, the Ninth Circuit *rejected* the argument that the interests of the proposed intervenors in that case would not be impaired because they have "other means" to protect them. 450 F.3d 436, 443 (9th Cir. 2006). The Court distinguished the case from *United States v. Alisal Water Corp.*, 370 F.3d 915, 918 (9th Cir. 2004), where the Court held that "litigation would not impair the creditor's interests because the district court had set up a separate process for approving claims against the debtor that was sufficient to protect the proposed intervenor's interests." *Lockyer*, 450 F.3d at 442. By contrast, in *Lockyer*, the proposed intervenors had "no alternative forum where they can mount a robust defense" against the plaintiff's action. *Id.* Similarly here, there is no separate forum that will allow the Tribes to defend against Plaintiff's claims that Reclamation lacks independent authority under the ESA to dedicate the waters of the Klamath Basin to in-lake and instream uses that provide vital protections to precarious treaty resources.

#### **IV. Plaintiffs' reliance on *Makah* is misplaced.**

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flows to protect endangered salmon). But Reclamation's current approach does afford the species at least *some* additional protection over Reclamation's prior action. *See* Klamath Tribes' Comments to USFWS, January 25, 2019, at 2.

Plaintiffs invoke *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990), for the proposition that the Tribes' motion should be denied because Plaintiffs' claims merely challenge procedural mechanisms Reclamation has employed rather than any substantive rights enjoyed by the Tribes. *See* Dkt. #77 at 16-17; Dkt. #82 at 26-27. This is not so. In *Makah*, the Ninth Circuit held that tribes with competing treaty rights to Columbia River salmon were required parties in a challenge to federal regulations allocating the ocean harvest of migrating Columbia River salmon. 910 F.2d at 559. In addition to challenging ocean harvest quotas for salmon, the plaintiff in that case challenged the procedural process by which the federal agency arrived at the quotas. *Id.* The court held that other tribes with an interest in the fishery were not required parties to the "narrow" procedural process claims because those claims only provided for prospective relief, and all of the tribes had an equal interest in a lawful process. *Id.*

This case does not involve narrow procedural process claims like those at issue in *Makah*, however. Instead, Plaintiffs' claims here are broad attacks on the authority of the federal government under the ESA to provide protection for the Tribes' treaty resources by allocating the waters of the Klamath Basin among in-lake, instream, and consumptive needs. Further, contrary to the construction Plaintiffs attempt to put on them, the claims here do not ask for only prospective relief. Plaintiffs specifically seek declarations that Reclamation's *existing* operations are unlawful. *See* Dkt. #70 at 17:57; Dkt. #73 at ¶77. Finally, unlike the tribes in *Makah* that had an equal interest in a lawful procedure, as this Court has already recognized, the Tribes here have a "personal interest" in defending Reclamation's authority under the ESA. Dkt. #61 at 6. Plaintiffs' reliance on *Makah* is therefore misplaced.

**V. Plaintiffs cannot credibly dispute that the United States cannot adequately represent the Tribes' interests.**



In granting the Tribes' motion to intervene, this Court correctly recognized that the United States cannot adequately represent the Tribes' interest in this case. Dkt. #61 at 6. Plaintiffs have adduced nothing that requires that conclusion to be revisited.<sup>4</sup> Moreover, Reclamation has now conceded it cannot adequately represent the Tribes in this case. Dkt. #76 at 3. Should there have been any lingering question as to whether the Tribes' interests would be adequately represented by the United States, this concession should end the discussion.

Nevertheless, Plaintiffs insist that a "unity of interest" exists between the United States and the Tribes, such that the Tribes are not necessary parties because their interests will be adequately represented by the United States. Dkt. #77 at 23; *see also* Dkt. #82 at 32. This position is not credible. As this Court recognized in granting the Tribes' motion to intervene, the United States faces multiple competing obligations, both to the different tribes in the Klamath Basin and as between the tribes and water users such as Plaintiffs, which it seeks to balance. *See* Dkt. #61 at 6. The Tribes' paramount objective, by contrast, is in fully protecting its treaty-based fishing rights, which the Tribes themselves held prior to existence of the United States and preserved for themselves through treaty. *See United States v. Winans*, 198 U.S. 371, 381 (1905)

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<sup>4</sup> Plaintiff Water Users have specifically requested such reconsideration in their response brief. Dkt. #77 at 32. Motions for reconsideration pursuant to rule 54(b) are disfavored and "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *McDowell v. Calderon*, 197 F.3d 1253, 1254 (9th Cir. 1999) (*per curiam*) (internal quotation and citation omitted). Furthermore, "[a] motion for reconsideration 'may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.'" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (*quoting Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). Even if the Court could construe the Plaintiffs' opposition as a request for reconsideration under Rule 54, the request should be denied because Plaintiff Water Users do not present a "highly unusual circumstances" nor raise any arguments or evidence that they could not have raised in response to the Tribes' Motion to Intervene. *See* Dkt. #29 at 16.

(“the treaty was not a grant of rights to the Indians, but a grant of right from them -a reservation of those not granted”).

Plaintiffs’ citations to *Nevada v. United States*, 463 U.S. 110 (1983), and to the McCarran Amendment, 43 U.S.C. § 666 are inapposite. *Nevada* is about whether the US is conflicted, *ab initio*, in asserting tribal claims in a state court adjudication alongside those of other parties (such as a Reclamation project). 463 U.S. at 142. Contrary to Plaintiffs’ suggestions, *see* Dkt. #77 at 25-26, Dkt. #82 at 32, it does not speak to the positional differences between the United States and the Tribes on the facts of this case, which is not an adjudication case but rather goes directly to the application of the ESA to Reclamation’s decisions about how the finite waters of the Klamath Basin are to be allocated among multiple competing parties, to all of whom the United States owes various duties. And *Nevada* certainly cannot stand in meaningful counterpoint to the United States’ own concession that it cannot adequately represent the Tribes’ interests here.

Plaintiffs’ reliance on the McCarran amendment is no better placed. KID claims that the McCarran Amendment in fact waives the Tribes’ sovereign immunity to *this* suit. Dkt. #82 at 42. Plaintiff Water Users recognize the fallacy of this argument. Dkt. #77 at 15 (“the issues this suit tenders are not, by the terms of [P]laintiffs’ pleading, an adjudication of property rights qua property rights; rather, the suit tenders . . . questions of statutory interpretation and administrative review”). It is also squarely precluded by the logic of the United States Supreme Court’s holding in *Dugan v. Rank*, 372 U.S. 609, 617-618 (1963). This case is neither a general stream adjudication nor a “proper case” seeking to administer a decree resulting from a general stream adjudication. *S. Delta Water Agency v. U.S., Dep’t of Interior, Bureau of Reclamation*, 767 F.2d 531, 541 (9th Cir. 1985). KID’s argument is therefore baseless.

For similar reasons, Plaintiff Water Users are on no firmer ground for their comparatively more modest assertion that the McCarran Amendment's waiver of both federal and tribal for sovereign immunity means that federal and tribal interests in reserved water rights are presumptively so similarly situated as to allow the United States to adequately represent the Tribes in this action. Dkt. #77 at 31. This case is simply not a water rights suit implicating the McCarran Amendment, so that statute offers no support for the proposition that the United States is a presumptively adequate representative for the Tribes. Moreover, even were such a presumption to be applied in the manner advocated by Plaintiff Water Users, the United States' own concession in its response brief would be more than sufficient to rebut any such presumption.

In a final attempt to avoid the necessary conclusion that the United States cannot adequately represent the Tribes' interest in this case, Plaintiff Water Users also argue that "there is no indication that Reclamation is not 'willing to make' all necessary arguments" because the "only argument that Hoopa identifies is that Reclamation purportedly declined Hoopa's request that Reclamation file a motion to dismiss under Rule 12(b)(7), and that it "might" oppose such a motion." Dkt. #77 at 26. The Tribes, however, identified in their Motion to Intervene other potential arguments that Reclamation might not make. Dkt #25 at 18 ("The Tribes' interests in the C'waam and Koptu and its treaty-based rights could potentially be better protected if Reclamation simply condemned junior water rights, such as plaintiffs' (whether for ESA reasons or otherwise). The arguments the Tribes might make on that front (were the Tribes participating in this litigation on the merits), would very likely not be arguments that Reclamation would be willing to make given the financial liability to the United States. Reclamation therefore cannot adequately represent the Tribes' interests"). Plaintiffs' arguments are again unavailing.

**VI. Dismissal would not deprive the Plaintiffs of a forum for their claims.**

Plaintiffs assert that if this action is dismissed, they have no forum in which to bring their claims. Dkt. #77 at 32; Dkt. #82 at 36-37. But this is not true. Plaintiff Water Users concede that they can bring their claims in the federal court of claims but complain that such a forum would be costly. *Id.* But cost is not a relevant factor in the Rule 19(b) analysis. Additionally, if KID truly seeks administration of its water rights as it says, Dkt. #82 at 34 (“KID is seeking declaratory relief regarding the proper administration of the water rights of KID and Reclamation set forth in ACFOD”), it can follow the procedure for the administration of water rights set forth under Oregon law. Or. Rev. Stat. Ann. § 540.010 *et seq.* There is no basis to deny the Tribes’ motion on this ground.

**VII. Plaintiffs cannot invoke the public rights exception.**

In a final attempt to avoid the necessary conclusion that these consolidated cases need to be dismissed with prejudice, Plaintiffs rely heavily on *Makah* to argue that the public rights exception applies when a suit is brought under the Administrative Procedure Act. Dkt. #77 at 34; Dkt. #82 at 37-38. But *Makah* pre-dated three cases that each refused to apply the exception when the claim is “a private one focused on the merits of [the plaintiff’s] dispute rather than on vindicating a larger public interest,” *Hull*, 305 F.3d at 1026 (9th Cir. 2002); *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) or when “the litigation *threatens* to destroy an absent party’s legal entitlements.” *Dine Citizens*, 932 F.3d at 860 (emphasis original).

Accordingly, and contrary to KID’s suggestion, Dkt. #82 at 38, whether a plaintiff is a public entity does not control whether the exception applies. The focus, rather, is on the nature of the relief sought. Despite their protestations to the contrary, Plaintiffs seek here to vindicate the private rights of their members and, in doing so, threaten the Tribes’ treaty-based rights.

Additionally, KID's attempt to liken this action to a civil rights action that "seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms" is unavailing when the remedies it proposes include Reclamation purchasing and leasing its members' water rights. Dkt. #82 at 19-20.

Nor can *Makah* itself bear the weight Plaintiffs attempt to place upon it. In that case, the Ninth Circuit differentiated between claims brought by the Makah Tribe that had the net effect of seeking to reallocate fishing quotas among tribes – which it found to be properly dismissed under Rule 19 – and those claims seeking to ensure that the United States complied with a specifically applicable statutory scheme in the future – which it found to have been improperly dismissed. 910 F.2d at 559. Plaintiffs seek to construe their current claims as analogous to the latter category not the former. But in fact, they are seeking a reallocation of the waters of the Klamath Basin away from Reclamation's identified ESA purposes and in their favor instead. Nor are they directly challenging the 2019 Biological Opinion that governs Reclamation's operation of the Project on the ground that it fails to comply with the ESA. Rather, they are asserting their parochial view that in its efforts to comply with one applicable law (the ESA), Reclamation has violated another (the Reclamation Act, or perhaps the ACCFOD). This is not "relief that would affect only the future conduct of the administrative process[,]" *id.*, but is instead an attempt to fundamentally rework the protection of critically endangered species throughout the Klamath Basin. The public rights exception does not apply in these circumstances.

### **VIII. CONCLUSION**

The Tribes are a required party. The Tribes' sovereign immunity makes joinder infeasible, however, and the case cannot proceed without the Tribes in equity and good conscience. The court should therefore grant the Tribes' motion and dismiss these consolidated

cases in their entirety with prejudice.

Dated: March 27, 2020.

s/ Jay D. Weiner  
Jay D. Weiner, #182247

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing will be e-filed on March 27, 2020, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

s/ Jay D. Weiner

Jay D. Weiner

# Exhibit 1



# The Klamath Tribes

January 25, 2019

Mr. Paul Souza  
Regional Director, Pacific Southwest Region  
U.S. Fish & Wildlife Service  
2800 Cottage Way  
Sacramento, CA 95825

**RE: Comments of the Klamath Tribes on Reclamation's December 21, 2018, Biological Assessment**

**By E-mail**

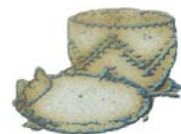
Dear Mr. Souza:

As you are well aware, the condition of the C'waam (Lost River sucker, *Deltistes luxatus*) and Koptu (shortnose sucker, *Chasmistes brevirostris*), two critical, treaty-protected resources of the Klamath Tribes, grows ever more precarious, most acutely in their critical habitat in Upper Klamath Lake (UKL). The degradation of that habitat and the longstanding failure to recruit meaningful numbers of juveniles into the adult spawning population of the species has left them on the brink of extinction. Every effort must therefore be undertaken to avoid further jeopardy to the C'waam and Koptu and to begin to put them on a path toward recovery. For these reasons, the Klamath Tribes submit the following comments regarding the Proposed Action (PA) evaluated in the Biological Assessment (BA) that the Bureau of Reclamation (Reclamation) transmitted to your agency on December 21, 2018. In light of the United States' treaty and trust obligations to the Klamath Tribes, as well as its independent legal duties under the Endangered Species Act (ESA), we expect that you will give our comments serious consideration and take them into account as the Fish and Wildlife Service (Service) consults with Reclamation and the National Marine Fisheries Service and prepares a new Biological Opinion (BiOp) for the Klamath Project (Project).

The C'waam and Koptu have been essential to the spiritual, cultural and material wellbeing of the Tribes for millennia. Despite their having been listed as endangered under the ESA in 1988 (two years after the Tribes voluntarily suspended their harvest of these fish in order to conserve the diminishing populations), the condition of both species has continued to decline almost

501 Chiloquin Blvd. ~ P.O. Box 436 ~ Chiloquin, Oregon

(541) 783-2219 ~ Fax (541) 783-3706





unremittingly. Presently, best estimates indicate that there are only perhaps 40,000 C'waam and 8,000 Koptu extant. As the Service and Reclamation know, there has not been substantial recruitment of new juveniles into the spawning C'waam population for 27 years, and into the Koptu population for 20. The surviving adults are nearing their maximum life expectancy, and are at ever increasing risk of becoming incapable of successful spawning as they senesce. Moreover, following on from the die-off event that occurred in 2017, spawning runs in 2018 at both shoreline springs in UKL and in the Williamson River were substantially lower than previous years, which strongly suggests higher average annual mortality rates for the ageing C'waam and Koptu. To put it plainly, these species are in crisis.

The Klamath Tribes appreciate that aspects of Reclamation's new BA are mildly improved over the 2012 BA and the 2013 BiOp, particularly in the minimum UKL elevations identified as the lower bounds of the so-called "Central Tendency," which are set incrementally higher than those that marked the lower bound approved by the 2013 BiOp. But these newer elevations are still insufficiently robust, given the critical role UKL levels play in the successful spawning and rearing of young C'waam and Koptu in the spring and early summer, as well as in the ability of older juveniles and adults to withstand and find refuge from the poor water quality conditions that so often occur in UKL during the summer and early fall. In light of the dire conditions facing the species, the hydrology of the Klamath Basin trending in a markedly drier direction over the past decade, and the poor water quality conditions that routinely afflict UKL during the summer months, a far more protective approach than the one set forth in the BA is necessary to ensure that Reclamation's continued operation of the Project complies with the ESA and does not lead to the extirpation of the C'waam, the Koptu, or both.

Reclamation's new BA falls short of adequately protecting the species on multiple fronts, notably by the manner in which Project water deliveries are prioritized over fundamental species needs. This is evidenced most plainly in the way the BA, and underlying PA, shift the risk of forecasting error from the Project to the species. On page 3-2 (pdf page 44)<sup>1</sup>, the BA acknowledges that "[a]s a consequence of limited storage in UKL, Reclamation must base its various water management decisions each year on stream inflow forecasts issued by the Natural Resources Conservation Service (NRCS) between January and June." Yet despite the fact that "NRCS UKL inflow forecasts are seasonal volumetric estimates and actual observed inflow volumes and timing can vary substantially from the forecasted inflow," 4-7 (61), Reclamation proposes to establish a baseline volume for the annual Project supply that cannot be decreased (but can be increased) as of April 1 of each year irrespective of whether actual inflows track the NRCS forecasts. *See* 3-2 (44); 4-13 (67); 4-21 (75); Appendix 4-70 (82). In other words, if actual inflows after April 1 come in below the NRCS forecasts, the Project remains protected and the C'waam and Koptu in UKL must bear the risk of the shortfall. Nor is this merely an academic concern. As the BA itself identifies, actual inflows have come in below NRCS forecasts inflows in 20 of the 36 years of the period of record (1981-2016), including for four of the first six years since the issuance of the 2013 BiOp, sometimes by 20-30% or more. *See* 4-7 to 4-8 (61-62). Indeed, the new BA acknowledges that the maximum over-forecasting error for its period of record is as high as 37% above actual inflows, as

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<sup>1</sup> For ease of reference, the BA will henceforth be cited by internal pagination followed by the pdf page number in parentheses, for example: 3-2 (44). A similar convention will be used for citing to the BA Appendices. So, for example "Appendix 4-61 (73)" means page 61 of Appendix 4, located on page 73 of the Appendices pdf.

compared to a maximum error of 32% under the 2013 BiOp. *See* 4-7 (61). This is a change in precisely the wrong direction.

Compounding the risk to the species posed by this April 1 “lock in” is the use of a 50% exceedance threshold to calculate the Project Supply. Reclamation explains that “[a] 50% exceedance value represents median hydrological conditions.” 3-4 (46). In other words, on a month-to-month basis from March to June, the Project Supply is calculated as though inflows to UKL will occur at or above an average level. *See* Appendix 4-69 to -70 (81-82). This choice might not be unreasonable if the Project Supply volume could fluctuate up or down as actual inflows are gaged from April to June, or if a more conservative threshold, such as an 80% exceedance figure, were used to protect UKL elevations – and hence the C’waam and Koptu – against over-forecasting error. But, as proposed by Reclamation in the BA, the lock-in does neither. Nor does it even effectively serve the purpose Reclamation invokes to justify it. Reclamation claims that this April 1 lock-in is necessary “[t]o provide early season certainty to Project water irrigators.” 4-21 (75). Yet Reclamation also acknowledges that “*delivery* of the ‘fixed’ Project Supply is not guaranteed; Reclamation retains discretion to curtail deliveries from UKL to comply with unforeseeable legal requirements and hydrologic conditions as necessary.” *Id.* (Emphasis in original.) Reclamation does not identify what sort of hydrologic conditions might trigger such reductions, which provides insufficient clarity to either the Klamath Tribes or Project irrigators – and should also be problematic for the Service as it prepares the new BiOp.

As demonstrated by the 2018 irrigation season, when Reclamation did not even set the Project Supply until mid-June, irrigators have the capacity to adapt to uncertain hydrologic conditions, certainly better than the C’waam and Koptu do. This is even more true now that Reclamation has the authority to spend \$10 million per year to mitigate impacts to irrigators from water scarcity. *See* Section 4308(b) of S. 3021 (P.L. 115-270). As the Klamath Tribes conveyed to Reclamation in our November 30, 2018, comments on their initial summary of the PA (which are incorporated herein by reference), a sounder approach would be to allow the estimated Project supply to remain tied to actual inflows through the final June 1 NRCS inflow forecast. In that way, water allocation decisions could be made based on actual, near-real time hydrology rather than on forecasts that often can be wrong despite the best good-faith efforts of the forecasters. Conversely, the danger of over-forecasting was amply demonstrated in 2016 and 2017, when NRCS forecasting errors contributed to Reclamation missing a series of UKL elevation thresholds set under the 2013 BiOp. Tying the final Project Supply volume to June 1 actual inflows would also properly incentivize Project irrigators to make the sort of strategic and conservative planting decisions consistent with the downward hydrologic trend of the past decade. The sooner the Project arrives at a *sustainable* water budget, the better off everyone in the Klamath Basin will be. In light of the foregoing, the inclusion of the April 1 lock-in in the Service’s new BiOp would be highly arbitrary.

The BA further privileges irrigators above endangered species by directly pitting the needs of the C’waam and Koptu on the one hand against those of the Southern Oregon/Northern California Coast (SONCC) coho salmon on the other, while simultaneously maximizing Project deliveries. This is plainly evidenced by Reclamation’s explanation of the UKL “Control Logic,” which “was added to the [Klamath Basin Planning Model] in order to control UKL releases to the river and the Project based on UKL elevation....” Appendix 4-59 (71). This Control Logic provides for adjustments to UKL releases to maintain the Lake above the low-end elevation parameters devised by Reclamation (the lower bound of the Central Tendency). But the effect of

curtailment of UKL releases during the irrigation season are born only by the downstream river flows – and hence, the downstream species – rather than Project irrigators, whose supplies cannot be reduced during the spring/summer season. *See* Appendix 4-61 (73) and Appendix 4-69 to -70 (81-82). Moreover, when the Environmental Water Account (EWA), which operates to ensure adequate river flows below Iron Gate Dam [IGD] for the benefit of SONCC coho and other species, is “overspent” (i.e. when more water is released to the river than the EWA budget would otherwise support), “UKL storage will be utilized to continue meeting IGD targets,” rather than having the Project absorb the overage through reduced deliveries. 4-26 (78). *See also* Appendix 4-124 to -125 (136-137). This approach is inconsistent with the mandates of the ESA, which require the needs of the species to be the highest priority. *See TVA v. Hill*, 437 U.S. 153, 174 (1978).

Reclamation’s proposed flow allocation procedures are also problematic in light of the changing hydrology of the Klamath Basin. As the BA itself recognizes, “changes in snowpack have resulted in reduced baseflow, which in turn has contributed to higher temperatures during summer and fall and reduced spawning habitat in many watersheds, throughout the Pacific Northwest.... The effects of climate change on reduced baseflows will likely be amplified in the Klamath Basin as irrigation related withdrawals have increased in tributaries....” 6-62 (200). Yet Reclamation simultaneously discounts the import of this fact, asserting that “there is currently a lack of reliable forecasting tools available to precisely quantify the influence of global climate change on local hydrologic conditions.” 3-4 (46). On this basis, Reclamation opts to exclude the effects of climate change from the BA’s impact analysis. *Id.* *See also* 6-3 (141). This failure to seriously grapple with the effects of climate change is a fundamental flaw in the BA, and the Service must meaningfully address the effects of climate change on the C’waam and Koptu as it prepares the new BiOp.<sup>2</sup>

Reclamation’s approach to uncertainty when it comes to climate change also stands in stark contrast to Reclamation’s decision to rely on questionable bathymetry data. Reclamation acknowledges that “specific concerns have been raised regarding the accuracy of the UKL bathymetric layer utilized in the [Klamath Basin Planning Model (KBPM)] to model this PA.” 3-5 (47). But it rejects those concerns on the ground that its bathymetry data “is the best information currently available and it is unclear to what extent (if any) a revised bathymetric surface will have on the existing capacity curves.” *Id.* As will be discussed further below, Reclamation’s reliance on this questionable bathymetric data imposes an additional source of risk on the C’waam and the Koptu when it comes to their ability to have access to and avoid overcrowding in important water quality refugia during the summer months. But the key point here is that Reclamation has selectively cherry-picked the data it chooses to rely on, relying on uncertain data when it redounds to the Project’s benefit (such as with the bathymetry) and discounting it when it does not (such as with climate change or – as discussed further below – the link between UKL elevations and water quality). As it pertains specifically to the bathymetry, Reclamation instead should have used a more accurate bathymetric layer that was available to it, one prepared by the Bureau of Indian Affairs’ contractor Cardno. As a federal family product, the Service should have access to the Cardno

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<sup>2</sup> Reclamation suggests that the effects of climate change are included in the BA “to some extent, given that trends expected to be continue into the future have been observed in the Pacific Northwest over the past several decades (Mote 2003).” 4-5 (59). But this statement elides the fact that conditions in the Basin have been trending markedly drier of late and that the best available science on climate change indicates that we are entering a period of accelerated warming and diminishing snowpack whose effects may well outstrip the preceding decades. *See, e.g.,* Mote 2018.

bathymetry as well and ought to utilize it in the preparation of the new BiOp. But more broadly, the Service, as it prepares the new BiOp, cannot allow expediency to trump the ESA's mandate that the benefit of the doubt must go to the species. *See, e.g., Conner v. Buford*, 848 F.2d 1441, 1454 (9<sup>th</sup> Cir. 1988), *cert. denied* 489 U.S. 1012 (1989).

The species are also not afforded the benefit of the doubt because the BA also fails to specifically analyze the possible effects of multiple consecutive dry years on the C'waam and Koptu. Reclamation's UKL effects analysis purports to "evaluate[] the effect of lake surface elevations resulting from the PA on the habitat associated with each life history stage in UKL and [to contain] a discussion of other aspects of the PA, like incidental entrainment of fish and maintenance activities of water infrastructure, that may impact suckers." 7-2 (218). But the analysis is the product of KBPM model runs, which necessarily are built on the KBPM's period of record (1981-2016). While there are several dry years included in that period of record, there is no cycle that includes a five-in-seven (potentially going on six-in-eight if the 2019 water year continues along the very poor trend line with which it has begun) dry year cycle such as the Basin has experienced since 2012. This is a potentially significant factor because of the cumulative toll that multiple consecutive dry years can take on the C'waam and Koptu. It has been noted (Perkins et al. 2000) that C'waam and Koptu captured in assessments the spring after die-off events (such as occurred in 2017) had a high incidence of afflictions such as parasitic and bacterial infections, cysts, and ulcers. With an acutely aging and markedly diminished population and no recruits ready to replace fish that die off (such as was available to prevent an extinction-level event from occurring as a consequence of the poor water years of the early/mid-1990s), there is a particular need to analyze the PA to ensure that it does not drive the species to extinction under circumstances that a more robust population could have survived.<sup>3</sup> The BA contains no such analysis, merely noting that "[i]t is anticipated that results of dry conditions can be managed through real-time management decisions within the PA." 7-40 (256). There is no explanation of what these "real-time management decisions" might entail, and instead an acknowledgment that "[i]mplementation of the proposed action will not exactly replicate the modeled results [upon which the effects analysis is based], and [that] actual IGD flows and UKL elevations will differ during real-time operations." 4-6 (60). Nor does the BA explain how "population level impacts...as a result of prolonged periods of limited habitat... [which] are only anticipated during extreme or consecutive low inflow conditions to UKL (e.g. the early 1990s)[,]" 7-40 (256), can be mitigated given the species' straitened circumstances. A far more robust analysis is necessary, and the Service should conduct one as it prepares the new BiOp.

The BA also fails to identify specific performance measures that would allow for an ongoing assessment of whether the assumptions built into the PA, *see* 4-6 (60), are being borne out in practice. Because the PA is based on modeling that is a simplification and simulation of complex ecologic and/or hydrologic processes there is concern that implementation of the PA may not perform as intended. Statistical techniques should be developed and applied to evaluate PA performance. The incorporation of performance evaluation measures into the BiOp to determine if

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<sup>3</sup> The present poor condition of both species is also a reason why Reclamation's attempt to gloss over many of the impacts that the Project's operation will have on the C'waam and Koptu as being coextensive with what it treats as the "Environmental Baseline[,]" *see* 6-1 (139) and 7-40 (256), is inappropriate. Reclamation is presently faced with two species much closer to the brink of extinction than they have been in the past. Thus the effects of its actions, even if nominally similar to past actions, need to be analyzed differently. The BA has not meaningfully done so.

implementation of the PA provides the expected lake levels and river flows are therefore essential as well.

The PA does not adequately consider opportunities for real-time management based on prevailing hydrologic and ecological conditions. For example, if real-time water quality monitoring conditions on UKL indicate that an early and large algae bloom is occurring, Reclamation should be obligated to maintain UKL levels higher in the early summer to offset the potential of severely poor water quality conditions later in the season. (The relationship between UKL elevations and water quality is addressed more fully below.) The incorporation of real-time management mechanisms into the BiOp would be valuable.

The BA also purports to rely on specific Conservation Measures to ameliorate some of the impacts of the PA on the C'waam and Koptu. *See* 4-46 (100). Among these measures are a "Sucker Captive Rearing Program" and "Sucker Monitoring and Recovery Program Participation[.]" 4-47 to -48 (101-102). The Klamath Tribes strongly agree that a robust captive rearing program, along with other work to break through the recruitment bottleneck, is essential (though not, standing alone, sufficient) to prevent the extinction of the C'waam and Koptu. The funding commitment of \$300,000 per year set forth by Reclamation in the BA (4-47 (101)), however, is too small to make the kind of difference necessary to prevent jeopardy to the species. Additional federal resources – to support the captive rearing efforts of both the Service and the Klamath Tribes – are therefore necessary. In a similar vein, the Klamath Tribes appreciate Reclamation's ostensible commitment to participating in the monitoring and recovery program. That commitment is belied, however, by Reclamation's decision this past fall to strip from the Klamath Tribes the grant money the Tribes rely upon to continue our nearly three-decade old water quality data collection program. This lack of support will cripple our ability to understand water quality trends and the impacts of lake level management and restoration activities on the C'waam and Koptu. The Klamath Tribes believe that the conservation measures and associated funding described in the BA are inadequate to mitigate for negative impacts of Project operations related to lake level management and entrainment. The Service should insist on firmer and more substantial commitments as part of the new BiOp if Reclamation wishes to rely on conservation measures to mitigate the adverse effects to the species caused by its operation of the Project. To be clear, the Klamath Tribes support in concept both of the Conservation Measures identified above. But they must be real and not mere illusory promises.

Ultimately, in light of the foregoing – including the uncertainty regarding the effects of climate change, the accuracy of the UKL bathymetry, and the accuracy of the KBPM itself, *see* 3-5 (47), and when coupled with the inordinately precarious condition of the C'waam and Koptu as species – a more conservative approach to managing UKL than the one set forth in the BA is necessary. As we previously explained to Reclamation in our comments of November 30, 2018, the Klamath Tribes believe that the most appropriate way to afford the species the protections to which they are legally entitled, while still balancing the needs of all Project stakeholders, is to identify minimum elevations pegged to C'waam and Koptu life cycle needs below which UKL would simply not be allowed to drop. The Tribes believe that the best available science supports setting these enforceable UKL elevation targets at the Conservation Levels ("CLs") that the Tribes have previously shared with Reclamation and the Service, which fill UKL every spring and restrict elevations to no lower than 4139.5 feet in the fall months. The elevations identified by Reclamation

as the lower bounds of the Central Tendency, by contrast, are insufficiently protective of the species' needs.

As Reclamation recognized, UKL "elevation plays an important role in the availability of the [species'] shoreline spawning habitats." 6-7 (145). Reclamation defines the critical March-April minimum elevation below which there are negative effects for lakeshore spawning as 4,142 feet, *see* 6-10 (148), and identifies the Central Tendency lower bound for those months at 4,142.6 feet. Appendix 4-60 (72).<sup>4</sup> Reclamation is vague, however, in documenting how this elevation threshold was derived. The Klamath Tribes, by contrast, have previously provided an analysis of the effects of UKL levels on lakeshore spawning habitat and concluded negative effects occur at elevations below 4,143 feet. Specifically, at 4,143 feet, most of the spawning substrate at the shoreline spawning areas are inundated to a depth of at least one foot which is the minimum depth identified for sucker spawning (USBR 2002). Further, 44% of Ouxy Springs and 68% of Sucker Springs will be inundated to a depth of at least 2 feet (Reiser et al. 2001), which is the preferred depth for sucker spawning and which provides better protection against predation by the bald eagles and pelicans that are known to occur in these shoreline spawning areas (USFWS 2012). Reclamation's lower elevation levels reduce both the availability and quality of shoreline habitat, which is very limited even when UKL is at full pool (4,143.3 feet).

This problem persists through the end of May, where Reclamation has identified a lower Central Tendency bound of 4,142.1 feet, while the CLs posit 4,143 feet as the appropriately protective elevation. C'waam continue to spawn into May, and Reclamation's lower elevation would continue to restrict the available spawning habitat for the reasons discussed immediately above. The month of May is an important one as well because C'waam and Koptu embryos and pre-swim-up larvae are expected to be present in the gravel at the shoreline springs for approximately three weeks followings spawning and fertilization (Perkins and Scoppettone 1996). UKL elevations need to be maintained at a consistent level to avoid exposing embryos and larvae to air, which will kill them. Also, at shallower depths embryos are more vulnerable to being dislodged from the substrate by wave action, and dislodged embryos can be damaged by wave-caused turbulence and predation by birds and fish.

Larval suckers that drift down from the Williamson River spawning areas and those emerging from lakeshore springs occupy emergent vegetation habitat largely in May and June (Cooperman and Markle 2000, Burdick et al. 2009). Appropriate UKL elevations (4143 feet) are therefore necessary to ensure the availability of adequate larval habitat to protect the nascent fish from predators (Markle and Dunsmoor 2007) and to provide a diverse food supply (Cooperman and Markle 2004). Furthermore, with more emergent vegetation habitat available, more fish are also likely to be retained in important nursery areas and not face the risk of entrainment through wind-generated currents (Markle et al. 2009; USFWS 2008). Given the low population numbers of the species and the advanced age of the remaining spawners, efforts (such as the imposition of the CLs) must be taken to maximize the number of surviving embryos and larvae.<sup>5</sup>

<sup>4</sup> The BA treats all of the lower bounds, however, not as enforceable minima or even as rough management targets, but rather simply as guideposts for flow adjustments that are intended to "facilitate[] but ... not force the return of UKL to a trajectory in line with the adjusted central tendency." Appendix 4-61 (73). *See also* 4-13 (67). This state of affairs further underscores the need for appropriate, enforceable minima to be included as BiOp conditions.

<sup>5</sup> The Klamath Tribes recognize that the early season elevations identified above would need to be subject to Reclamation's flood control rule curves, and that Reclamation's ability to meet these elevations in certain circumstances

The vulnerability of embryos and larvae to dislodgment and desiccation is also why the CLs call for UKL to be held at 4,143 until June 15, by which point they have all emerged from the substrate and are freely swimming in the lake (Buettner and Scopettone 1990). Between June 15 and June 30, the CLs support a reduction in UKL elevation by a foot, to 4,142 feet. The BA, by contrast, contemplates an elevation drop of nearly 1.5 feet over the course of the month at the Central Tendency lower bound (and potentially as much as two feet depending on the hydrologic conditions), to an elevation of as low as 4,140.7 feet. *See* Appendix 4-60 (72). This elevation would significantly reduce both the amount and the depth of inundation of important emergent vegetation habitat for the C'waam and Koptu in both UKL and the Williamson River delta (Markle and Dunsmoor 2007; Reiser Testimony 2010). This again would increase the risk to the species.

The differences between the CLs and Reclamation's lower bounds for July show a similar pattern. In order to preserve sufficient habitat, the CLs prescribe an elevation of 4,141.5 feet on July 15, dropping to 4,141 feet on July 31. At the end of July, the CLs ensure adequate habitat for age-0 juveniles. For example, approximately 68% of the marsh edge habitat is available for juveniles at a depth of at least one foot, and 63% (1,660 acres) of the emergent wetland habitat at the Williamson River Delta is inundated. At the Central Tendency lower bound of 4139.7 feet,<sup>6</sup> however, less than 35% of the marsh edge habitat is similarly inundated, and less than 27% (710 acres) of the emergent wetland habitat at the Williamson River Delta is available, a significant reduction from the CLs. The CLs provide materially better habitat conditions for adult C'waam and Koptu during July as well, especially by virtue of making additional acreage available at depths of six feet or greater, which appear to be depths the species prefer (*see* Peck 2000; Reiser et al. 2001; Banish et al. 2009).

Along with the important habitat benefits, the May-July CLs are calculated to ameliorate the severity of UKL's water quality problems. As is commonly understood, water quality conditions in UKL are largely driven by large blooms and die-offs of the blue-green algae AFA from May through October. Climatic conditions (mainly temperature and wind) also have a strong influence on water quality, particularly because UKL is so shallow. But UKL elevations can have a particularized effect on in-lake water quality conditions as well. Some background is in order. Although there is variability from year to year in the magnitude and timing of blue-green algae blooms in UKL, there are generally two approximate phases for algal blooms in the lake system every year. The first is a period of active algal growth from May through mid-July, with high pH and the development of high algal biomass (Kann Testimony 2010). The second is a period of general bloom decline from mid-July through August (sometimes extending into September), when the algal biomass decomposes and can result in low dissolved oxygen (DO). In some years, there is an additional phase, bloom re-growth that occurs in August or September (Kann Testimony 2010).

During this initial growth phase (usually from May through mid-July), phosphorus (P) and light operate to influence algal biomass. Increased UKL elevations directly lower light availability to algae, which lowers growth rate and therefore delays and limits the actual size of the spring and

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may be constrained by real-world hydrologic conditions. But we believe that all of Reclamation's management decisions pertaining to the Project should be made with these elevation levels squarely in mind.

<sup>6</sup> It is also worth noting that this lower bound is even lower than the elevation the 2013 BiOp identified as the appropriate end-of-month threshold for July.

early summer algal blooms (Kann Testimony 2010). Increased UKL elevations also limit the biomass of the spring and mid-summer algal blooms through decreased bottom resuspension of sediments and increased dilution of internally recycled P entering the water column from the sediments. These mechanisms are implicitly included in a dynamic phosphorus algal biomass model (Walker Testimony 2010). These two direct positive effects of higher lake level with respect to water quality may then be enhanced by a feedback cycle whereby decreased algal growth decreases pH (which is directly related to algal biomass) which further reduces the release of P from either bottom or resuspended sediments reducing the potential for algae to achieve higher biomass levels. Moreover, the high pH produced by the blooms is a direct water quality stress on C'waam and Koptu and the reduction of pH through maintenance of higher UKL elevations is essential for the protection and enhancement of the C'waam and Koptu. In addition, high pH directly influences the fraction of total ammonia that is toxic to fish, and as such, predicted reductions in pH will further improve fish habitat through reductions in un-ionized ammonia. Finally, the amount of algal biomass (of which pH is a reflection) or organic matter produced during the initial bloom phase directly influences DO during the bloom decline period as oxygen is consumed during the decomposition of the organic material. Thus, as maximum algal biomass is reduced at higher lake elevation through P and light reduction during the growth phase, minimum DO during bloom decline will also improve (Kann Testimony 2010).

The CLs are also carefully calibrated to avoid exacerbating water quality problems that can occur when UKL elevations are too *high* during the summer months. Above certain elevations, increased water column stability can reduce both water reaeration and near-bottom light penetration, which can cause DO to drop and ammonia to increase to harmful levels. Lake levels also play an important role in mediating the effects of light, temperature, pH, and P on the timing and severity of the bloom/crash cycle and on the quantity of DO and ammonia available to affect the C'waam and Koptu in UKL. Thus, during the bloom decline period (usually late June to mid-July), lake elevations leading to the highest probability of water quality suitable for fish habitat requires optimizing lake elevation by taking into account the opposing effects of low and high lake levels (Kann Testimony 2010).

Reclamation, however, seems remarkably vested in avoiding the conclusion the UKL elevations can impact UKL water quality, repeatedly asserting in the BA that there is no demonstrable link between the two. *See* 6-35 (173); 6-36 (174); 7-16 (232); 7-35 (251). To reach this conclusion, Reclamation briefly discusses some of the more recent scientific analyses (Kann 2010, Walker 2010, Nielsen et al. 2017, Jassby and Kann 2010) that support the proposition that UKL elevations influence AFA bloom dynamics and associated water quality, but chooses to emphasize the older literature that it asserts does not support a linkage between lake level and water quality (NRC 2004, Morace 2007). *See* 6-35 to -36 (173-174). But the 2004 NRC Report on which Reclamation relies has been widely criticized. *See, e.g., Reassessing the Role of the National Research Council: Peer Review, Political Tool, or Science Court?*, 99 Cal. L. R. 465, 490-91 (2011). Moreover, the NRC itself did not view its report as the last word on the subject and instead placed caveats on its findings and encouraged additional future study (NRC 2004 at 45).

Nor can the Morace paper bear the weight Reclamation places on it. A careful examination of Morace's report shows that she did in fact identify lake level as an important explanatory variable of the variance in minimum DO at mid-North (an area of important C'waam and Koptu habitat) (Morace 2007 at 49), though Morace herself ignored this aspect of her findings, concluding



instead that her multivariate analysis models indicated that water temperature rather than lake levels showed the greatest correlation with water quality. Moreover, even if Morace had been correct in concluding that her research failed to uncover a statistically significant, strong correlations among water quality, lake level, and climatic factors, that does not stand for the proposition that these factors do not influence water quality. It is more likely that they all work in conjunction with each other to affect water quality. *See* Morace at 51. Consequently, the BA has failed to utilize the best available science, especially since it also pretends that Dr. Jacob Kann's recent work, which contains the most robust analysis to date of the role UKL elevations play in affecting the lake's water quality, simply does not exist. *See, e.g.*, 6-32 to -34 (174-176). That is plainly inappropriate. The CLs, by contrast, utilize strong science to provide necessary habitat and water quality benefits.

This is true in the late summer as well. In August, the CLs call for an elevation of 4,140.5 feet on the 15<sup>th</sup> and 4,140 feet at the end of the month, with an elevation of 4,139.5 on September 15. The lower bound of the Central Tendency at the end of August is 4,139 feet, dropping to 4,138.7 by the end of September. Appendix 4-60 (72). The Klamath Tribes appreciate that the Central Tendency elevations reflect an improvement over the thresholds countenanced by the 2013 BiOp, and is at least partially responsive to the C'waam's and Koptu's needs to be able to access important water quality refugia such as Pelican Bay, Fish Banks, and the Williamson River during the late summer to escape the worst of the effects of UKL's generally poor water quality at that time of year. *See* 6-15 (153). But this improvement is vitiated by the fact that, as touched on above, Reclamation used inaccurate bathymetric data for its analysis of water quality refugia habitat in Pelican Bay and Fish Banks. Based on physical depth measurement data collected by Adkins (1992) and recent verified electronic depth measurement data (Cardno 2015), the entrance to Pelican Bay is between one to two feet shallower (between 4,134.5 and 4,135.5 feet) than the 4,133.5 elevation figure Reclamation used in the BA. *See* 6-16 (154). This is a significant distinction as C'waam and Koptu need at least four feet of water depth at the mouth of Pelican Bay to avoid significant avian predation, particularly by white pelicans, and prefer habitat with a depth of six feet or greater. *See* 6-15 (153). Additional depth in Pelican Bay is also essential to mitigate the risk of overcrowding, which can lead to increased stress and disease (Wedemeyer et al. 1990). Particularly given the age and low abundance of the remaining C'waam and Koptu, the more conservative approach to avoiding mortality events is required.

There is also a gap between the fall CLs (4,140 feet on October 31, 4,140.5 on November 30 and 4,141 on December 31) and the lower bound of the Central Tendency (4,138.7 feet, 4139.2 feet, and 4140.2 feet respectively). *See* Appendix 4-60 (72). While the immediate life cycle needs of the C'waam and Koptu in these months are more tolerant of a comparatively wider range of elevations, the CLs nonetheless serve two important purposes in these months. First, they ensure that UKL elevations remain sufficiently robust to limit the risk of winter die-offs from low DO that can arise from extended snow-on-ice events. Ice-cover conditions can occur in UKL from November through March, lasting from a few weeks in most years to several months in the coldest winters. Low lake levels in winter could increase the risk of low DO levels because the depletion rate of DO in the water column increases as the depth decreases (Welch and Burke 2001). Second, they put UKL on a better trend line to refill ahead of the next spawning and irrigation seasons, which benefit both the species and Project irrigators. This sort of conservative late-season management approach is particularly warranted based on current trends, where Reclamation's running down of UKL during the fall of 2018 coupled with inflow conditions just below the 90% exceedance level has left

Reclamation in a position where it is currently forecast to fail to meet the February 2019 threshold set pursuant to the 2013 BiOp (*see* M. Skinner e-mail, 1/10/2019).

Thank you for this opportunity to provide these comments on the BA. We look forward to continuing to work with you and other Klamath Basin stakeholders to ensure that we can collectively emerge from this reconsultation process with a BiOp that complies with the Endangered Species Act by providing meaningful protection for the critically endangered C'waam and Koptu, as well as the SONCC coho salmon, and that provides a pathway for the Project to move to a genuinely sustainable footing going forward. We have been disappointed to date by Reclamation's failure to engage meaningfully with us in its preparation of the PA and BA, and we hope to have a more constructive and genuinely two-way dialogue with the Service as it digests these and other comments and moves forward with its preparation of the new BiOp. To that end, please consider this our formal request for a robust government-to-government consultation process, consistent with the obligations the United States owes the Klamath Tribes, regarding these comments and all other aspects of the preparation of the new BiOp.

Sincerely,

*/s/ Donald C. Gentry*

Donald C. Gentry, Chairman

Cc: Brenda Burman, Commission of Reclamation  
Barry Thom, Regional Administrator, National Marine Fisheries Service  
Senator Jeff Merkley  
Senator Ron Wyden  
Chairman Ryan Jackson, Hoopa Tribe  
Chairman Russell Attebery, Karuk Tribe  
Chairman Joe James, Yurok Tribe  
Bryan Mercier, Regional Director, Bureau of Indian Affairs