Jeremiah D. Weiner (CSBA No. 226340)
Simon W. Gertler (CSBA No. 326613)
Rosette, LLP
1415 L St., Suite 450
Sacramento, CA 95814
Telephone: (916) 353-1084
Facsimile: (916) 353-1085
jweiner@rosettelaw.com
sgertler@rosettelaw.com

Attorneys for Defendant Intervenors The Klamath Tribes

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

YUROK TRIBE, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES,

Plaintiff,

vs.

UNITED STATES BUREAU OF RECLAMATION and NATIONAL MARINE FISHERIES SERVICE,

Defendants.

and

KLAMATH WATER USERS ASSOCATION,

Intervenor-Defendant.

Case No. 3:19-cv-04405-WHO

Related Cases: No. C16-cv-06863-WHO
No. C16-cv-04294-WHO

THE KLAMATH TRIBES' OPPOSITION TO THE YUROK TRIBE'S MOTION TO LIFT STAY AND FOR TEMPORARY RESTRAINING ORDER

Hearing Date: May 22, 2020
Time: 10:00 AM
VIA ZOOM
Judge: William H. Orrick

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I. INTRODUCTION

The Klamath Tribes ("Tribes") wish it were true that the relief the Yurok Tribe[1] requests [Dkt. #909] would avoid irreparable harm to the critically endangered C'waam (Lost River sucker, *Deltistes luxatus*) and Koptu (shortnose sucker, *Chasmistes brevirostris*) [*See* Dkt. #909-1 at 19]. Unfortunately, in the face of the extraordinarily dry conditions facing the Klamath Basin this year, and the operational decisions that the Bureau of Reclamation ("Reclamation") has made to date, irreparable harm to the C'waam and Koptu is precisely what the Yurok Tribe's requested relief will cause. A flushing flow of nearly 50,000 acre feet of water ("AF") was released from Upper Klamath Lake ("UKL") in late April and early May to meet Klamath River salmon needs as set forth in the 2019 National Marine Fisheries Service ("NMFS") Biological Opinion ("BiOp") analyzing the effects of Reclamation's operation of the Klamath Irrigation Project ("Project") on species under its purview. This decision, along with extremely low inflows and the mid-April commencement of irrigation deliveries at an unexpectedly high volume, have combined to dramatically decrease the elevation of UKL over the past month. As it stands, Reclamation will have to manage UKL with great care to avoid violating key boundary condition set forth in the 2020 United States Fish and Wildlife Service's ("USFWS") BiOp evaluating Reclamation's operation of the Project from 2020-2022 that are necessary to protect the C'waam and Koptu. Under these circumstances, forcing the additional UKL releases the Yurok Tribe presently seeks would be inimical to these species' needs. Consequently, the Klamath Tribes intervened in this litigation to protect the C'waam and Koptu and oppose the instant motion [Dkt. #911 and 912].

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[1] Following the convention adopted by plaintiffs in the instant motion, [Dkt. #909 at 2] this brief refers to the plaintiffs collectively as "the Yurok Tribe."

II. BACKGROUND

Even prior to intervention, the Tribes were not strangers to this case. On February 7, 2020, the Tribes filed an amicus brief [Dkt. #55] regarding the motion for injunctive relief that the Yurok Tribe presently seeks to have reinstated [Dkt. 909 at 3]. In that amicus brief, the Tribes expressed their support for adequate Klamath River flows for salmon needs but also their acute concern for two critical treaty resources, the C'waam and Koptu, whose very survival as a species hangs by a narrow thread [Dkt. #55 at 2]. The Tribes therefore requested that any injunction that might issue be carefully tailored to avoid decreasing elevations in UKL in a manner that would create conditions harmful to the C'waam and Koptu [*Id.* at 7]. At the time, that step appeared adequate to assert and protect the Tribes' interests in this litigation.

Subsequent events have changed the state of play. Prior to the hearing on the Yurok Tribe's then-pending motion, the Yurok Tribe, the federal defendants, and intervenor-defendant Klamath Water Users Association entered into a stipulation which included the Yurok Tribe's withdrawal of its motion for injunctive relief and a stay of this litigation [Dkt. #907 at 4-5]. The Court approved this stipulation on March 27, 2020, the same day it was filed [Dkt. #908]. The stipulation calls for Reclamation to operate the Project consistent with the terms of an Interim Operations Plan (Interim Plan) that was apparently deemed acceptable by the parties to the stipulation, which did not include the Klamath Tribes [*See* Dkt. #907 at 4].

Under the Interim Plan, Reclamation proposed "augmenting" the Environmental Water Account ("EWA") in certain water years by 40,000 AF, 23,000 AF of which was to come from water that otherwise would have been allocated to Project Supply, and 17,000 AF of which was to come from water that otherwise would have remained in UKL to support C'waam and Koptu lifecycle needs [Dkt. #909-5 at 2]. This EWA augmentation water would be in addition to 20,000 AF of water (coming in equal proportion from water that would otherwise have gone to Project

Supply and water that otherwise would have remained in UKL) that Reclamation had decided in October of 2019 to use to "enhance" the EWA in certain water years [*Id.* at 3]. In other words, since the issuance of the 2019 USFWS BiOp regarding Reclamation's proposed plan to operate the Project between 2019 and 2024, Reclamation has committed to taking an additional 27,000 AF of water away from C'waam and Koptu needs.

Recognizing that the reallocation of water that would otherwise have remained in UKL would have impacts to C'waam and Koptu beyond the scope of those analyzed in the 2019 USFWS BiOp concerning the effects of Project operations on species including the C'waam and Koptu, Reclamation committed as a condition of providing EWA augmentation in any water year that "UKL elevation will not drop below 4142.0 feet during the months of April and May in that water year" [*Id.* at 6]. More specifically, the Interim Plan provides that if "implementation of the 40,000 AF of EWA augmentation releases is likely to result in UKL elevations below 4,142.0 feet in April or May, despite good faith efforts to rearrange the 40,000 AF of EWA releases within reasonable bounds, Reclamation will coordinate with the Services and PacifiCorp to best meet the needs of [Endangered Species Act ("ESA")[2]]-listed species as well as coordinate and obtain input from Yurok and other affected Klamath River Basin Tribes through government-to-government consultation on how to manage water" [Dkt. #909-5 at 4]. In other words, if an elevation of 4142.0 feet is not maintained during April and May, none of the EWA augmentation water is guaranteed [*See also* Dkt. #909-7 at 4-5 and n.2]. The same is true if EWA augmentation releases threaten to cause UKL elevations to drop below 4,138.0 feet at any point:

> If modeling shows that implementation of the EWA augmentation releases is likely to result in an annual minimum below 4,138.0 feet in a given water year, Reclamation will coordinate with the Services and PacifiCorp to ensure the annual minimum elevation in that water year is achieved as well as coordinate and obtain input from the Yurok and other affected Tribes through government-to-government consultation on how to manage water in a way that best meets the

[2] 16 U.S.C. §§1531 *et seq.*

needs of Federally-listed species.

[*Id.*]. USFWS necessarily incorporated these conditions into the analysis conducted as part of the BiOp it released on April 10, 2020, evaluating Reclamation's operations plan for the Project as modified by the Interim Plan: Biological Opinion on the Effects of the Proposed Interim Klamath Project Operations Plan, effective April 1, 2020, through September 30, 2022, on the Lost River Sucker and the Shortnose Sucker ("2020 BiOp").[3]

The availability of EWA augmentation water is determined based on the Natural Resources Conservation Service (NRCS) April 1 forecast of inflows into UKL during the year's irrigation season [*Id*. at 2]. This April 1 forecast is also used to set the Project Supply for the water year [2020 BiOp § 4.3.2.4.2]. This year, the UKL Supply based on the NRCS April 1 forecast projected inflows at 364,000 AF, which led to a calculated UKL Supply of 557,000 AF (7,000 AF above the level triggering EWA augmentation) and the concomitant requirement for Reclamation to maintain UKL above an elevation of 4142.0 during April and May [Decl. of Mark Buettner (May 18, 2020) ("Buettner Decl.") ¶ 7; Dkt. 909-5 at 2, 4]. Unfortunately, 2020 is an exceptionally poor water year, and the NRCS April 1 forecast has proven to be significantly overinflated [*Id.*]. (An even incrementally more accurate forecast would not have triggered the provision of EWA augmentation water or the hard floor of 4142.0 feet for UKL during April and May.) Yet after UKL reached an elevation above 4142.0 feet during the first week of April, and despite the terms of the Interim Plan, Reclamation failed to maintain UKL above an elevation of 4142.0 feet thereafter, predominantly as a consequence of a significant flushing flow released under the terms of the 2019 NMFS BiOp, as well as the commencement of irrigation deliveries

[3] The 2020 BiOp concluded that Reclamation's operation of the Project would not jeopardize the C'waam or Koptu or adversely modify their critical habitat. The Tribes strongly disagree with these conclusions, but that does not alter the Tribes' position in the matter at hand. In fact, it only underscores the critical importance of ensuring that the minimum boundary conditions set by USFWS in that BiOp are maintained.

[*Id.*]. In fact, UKL elevations decreased from mid-April into May, dropping by more than 0.7 feet – from 4142.10 to 4141.38 feet – directly in the middle of C'waam spawning season, chasing many fish away from their spawning ground and leading to the desiccation of thousands of eggs [*Id.* ¶¶ 7, 9].

Hydrologic projections from early May to the present have demonstrated that without significant reductions in UKL releases and/or favorable inflows over the coming weeks, Reclamation will not be able to comply with the remainder of the minimum boundary conditions USFWS established in its 2020 BiOp, including keeping UKL above a minimum elevation of 4138.0 feet at all times [*Id.* ¶ 8]. Thus, the relief sought in the Yurok Tribe's instant motion would directly imperil the C'waam and Koptu.

III. ARGUMENT

A. The stay of this litigation should not be lifted.

The Yurok Tribe asserts that the Court should lift the stay it issued in this matter on March 27, 2020 [Dkt. #908] because Reclamation "has abdicated its responsibility to implement the Interim Plan." [Dkt. #909-1 at 8]. But the Yurok Tribe is wrong. Reclamation is in fact implementing the Interim Plan precisely as contemplated for a challenging water year such as the current one, where UKL elevations are under significant downward pressure.

As noted above, the Interim Plan treats the provision of EWA augmentation water and the maintenance of UKL at or above an elevation of 4142.0 feet during April and May as inextricably linked. The Yurok Tribe seeks to avoid this necessary conclusion by taking out of context a single statement from Reclamation's Finding of No Significant Impact ("FONSI")[4] on

[4] In issuing the FONSI, Reclamation persisted in its habit of evaluating its operation of the Project only through Environmental Assessments that invariably lead to the issuance of FONSIs. The Klamath Tribes strongly disagree that this approach complies with Reclamation's obligations under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, but that does not alter the Tribes' position in the matter at hand or the proper interpretation of the Interim Plan.

Reclamation's operation of the Project under the Interim Plan, issued April 22, 2020, [*see* Dkt. # 909-1 at 20-21],[5] to claim that the requirement to maintain UKL at or above an elevation of 4142.0 feet "applies only when the portion of the augmented flows that come from [UKL] causes a drop below" 4142.0 [*Id.* at 20].[6] Yet the Yurok Tribe ignores not only the rest of the paragraph from which it cherry picks its quotation, but the following paragraph as well, which specifically delineates the process Reclamation shall follow under the Interim Plan when (as is unfortunately the case this year) EWA augmentation water cannot be provided consistent with UKL remaining at or above an elevation of 4142.0 feet:

> When the 40,000 AF of EWA augmentation occurs, UKL elevations will be managed as described in USFWS's 2020 BiOp. The USFWS 2020 BiOp includes T&C 1c. that requires Reclamation to take corrective actions such that UKL elevations are managed within the scope of the analysis included therein. T&C 1c. outlines specific elevations of concern *(both for when the 40,000 AF augmentation occurs, and when it does not)* such that if the elevational criteria are triggered, Reclamation would determine the causative factors, further determine whether these factors are within the scope of the action and the effects analyzed, and immediately confer with the Service concerning the causes to adaptively manage and take corrective actions.

[Dkt. #909-7 at 7 (emphasis in original)]. The unprecedented decrease in UKL elevations during the middle of C'waam spawning season that occurred this year–and the concomitant desiccation of already-laid eggs and the reductions in time spent on spawning grounds by the few remaining adult C'waam who compromise the lakeside spawning community–falls outside the scope of the action and the effects analyzed in the 2020 BiOp [Buettner Declaration ¶ 7; *see also* 2020 BiOp at

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[5] The snippet from the FONSI the Yurok Tribe quotes is "when the 40,000 AF EWA augmentation is triggered, 17,000 AF from UKL would be utilized and UKL surface elevation would be maintained above 4142.00 ft through the end of May, to the extent possible, once this elevation has been achieved earlier in the spring." [Dkt. 909-1 at 20-21 quoting Dkt. #909-7 at 4].

[6] The Yurok Tribe also tries to avoid the applicability of the 4142.0 requirement by claiming that UKL did not reach that elevation at all this spring. [Dkt. #909-1 at 21 (This spring, [UKL] levels would not have reached or maintained 4142.00 due to existing water conditions").] This is simply false. [Dkt. #909-7 at 13 ("UKL elevation in 2020 appeared to peak in early April at an elevation of approximately 4,142.10 ft…")].

§ 7.3.1.2]. Reclamation's consultation with the Services and the corrective actions identified have included the reduction in UKL releases which are the impetus for the Yurok Tribe's instant motion. [*See* Dkt. #909-1 at 8; Dkt. #909-7 at 14; Buettner Decl. ¶ 8]. This is consistent with, not in contravention of, the Interim Plan. A lifting of the stay is thus not warranted and the Yurok Tribe's motion to lift it should be denied.

B. The Yurok Tribe's requested relief would irreparably harm the C'waam and Koptu.

The Yurok Tribe claims that its requested injunction, ordering Reclamation to increase releases from UKL until a total of 23,000 AF have been added to flows below Iron Gate Dam, will avoid irreparable harm to C'waam and Koptu [Dkt. #909-1 at 19-21].[7] Again, the Tribes wish this were the case, not least because the Tribes continue to share the goal of ensuring appropriate conditions in the Klamath River to allow anadromous species to survive and thrive. But the Yurok Tribe's assertion is based on both a misreading of the Interim Plan (as discussed above) and a basic misunderstanding of the interplay among the Interim Plan, the 2020 BiOp, Reclamation's operational decision making, this year's inordinately dry conditions, and the biological and lifecycle needs of the C'waam and Koptu. The proposed injunction would in fact irreparably harm these two critically endangered species.

As a threshold matter, it bears pointing out that EWA releases this water year have *already* negatively impacted lakeshore-spawning C'waam. Given the fact that what had been a promising storage volume in UKL at the end of the 2019 water year was significantly diminished by large irrigation diversion in October and November 2019, a problem that was exacerbated by this year's terribly low inflows, Reclamation was almost inevitably going to struggle to maintain UKL at an elevation of 4142.0 feet [*See* Buettner Decl. ¶ 10 (showing that UKL dropped from an

[7] To date, roughly 9,000 AF of EWA augmentation water has been released despite UKL sitting far below 4142.0 feet. [Buettner Decl. ¶ 8]. Thus, the Yurok Tribe is seeking additional releases of approximately 14,000 AF, a volume that equates to roughly .15 feet of UKL elevation. [*Id.*]

elevation of 4139.61 feet on October 15, 2020 – a level that was roughly 110% of its average elevation on that date – to 4139.12 feet , or 81% of that date's average – by November 25, 2019)]. On March 30, 2020, UKL's elevation was 4141.96 feet, and it proceeded to rise slightly past 4142.0 feet over the following week, reaching an elevation of 4142.04 feet on April 6 and 4142.10 feet not long thereafter [*See Id.*; Dkt. #909-7 at 11]. By April 19, however, after the onset of Project deliveries, UKL had fallen to 4141.99 feet, outside the conditions of the Interim Plan [*See* Buettner Decl. ¶ 10].

At this point, Reclamation could perhaps have still engaged in some course correction to retain UKL at 4142.0 feet, such as by moderating irrigation deliveries. But instead, at the insistence of the Yurok Tribe and contrary to the spirit of this Court's 2017 injunction order that had provided that "[i]n no event shall the proposed [salmon] mitigation measures interfere with conditions necessary to protect the endangered" C'waam and Koptu, *Yurok Tribe v. United States*, 231 F.Supp.3d 450, 490 (N.D.Ca. 2017) ("*Yurok I*"), Reclamation released from UKL nearly 50,000 AF to provide a lower river flushing flow between April 22 and May 3, 2020. [Buettner Decl. ¶ 7]. UKL's elevation consequently plummeted to 4141.59 feet on April 27, 4141.41 feet on May 4, and 4141.38 on May 11, as Reclamation also began to release EWA augmentation water starting on May 3 [*Id.*]. This led directly to the desiccation of eggs and decrease in spawning encounters discussed above. [*Id.*]. To appreciate why this is such a catastrophic outcome, it is important to understand the dire condition of the C'waam and Koptu.

A century of Project operations has decimated the C'waam and Koptu and their critical habitat, leaving both species on the brink of extirpation from UKL and significantly increasing their chances of extinction [*See* Dkt. #55-2 ¶ 3]. Between 1968 and 1985, C'waam and Koptu harvests decreased from over 10,000 fish per year to just 687 [*Id.*]. Studies conducted in the mid-1980s confirmed that the numbers of adult C'waam and Koptu were perilously low [*Id.*]. In 1986,

due to a long downward trend in the health and abundance of both species and recognizing the threat of imminent extinction faced by these essential cultural and treaty resources, the Tribes voluntarily ceased harvesting C'waam and Koptu, with the limited exception of taking two fish per year for ceremonial purposes [Dkt. #55-1 ¶6]. USFWS listed the C'waam and Koptu as endangered species throughout their entire range in 1988, 53 Fed. Reg. 27,130 (July 18, 1988), and designated UKL and its tributaries as critical habitat for the C'waam and Koptu in 2012. 77 Fed. Reg. 73,740 (December 11, 2012).

Despite a brief recovery period in the late 1980s and early 1990s, both the C'waam and Koptu have continued their longer-term trend towards extinction [*See* Dkt. #55-2 ¶¶ 4-5]. The last major "recruitment" (that is, development of a cohort of juveniles into mature adults capable of spawning new young) into the C'waam population occurred in 1993 [Buettner Decl. ¶ 2]. C'waam and Koptu are both hearty, long-lived species, but the lack of successful recruitment is a massive impediment to the species' recovery. The C'waam and Koptu who remain are now largely older, similar-aged fish who are nearing the end of their natural life expectancy and reproductive viability [Dkt. #55-2 ¶ 6]. Most of the adult C'waam are estimated to be nearly 30 years old, past their average life span of 17-22 years, and nearing their maximum natural lifespan of 40 years [*Id*.]. Most of the individual Koptu are estimated to be in their late 20s as well, perhaps more than double the Koptu's average lifespan of 12-14 years, and nearing their maximum natural lifespan of 30 years [*Id*.].

This precarious state is exacerbated by the fact that population declines appear to have accelerated in the last couple of years for both species [*Id*. ¶ 5]. In 2016, there were approximately 108,000 C'waam and 19,000 Koptu adults in UKL [*Id*. (citing USFWS 2019 BiOp at 42)]. In 2019, population estimates were approximately 40,000 C'waam and 7,000 Koptu [*Id*.]. This represents a 63% reduction for both C'waam and Koptu over the last three years. USGS has

estimated annual adult survival rates of C'waam in 2017 at 62-65% compared to approximately 90% from 1999-2015 [*Id.*]. Koptu annual survival rates in 2017 were 61-68% compared to about 90% from 1999-2015 [*Id.*]. The Klamath Tribes and others collected over 700 dead adult C'waam and eight dead adult Koptu in 2017 alone [*Id.*]. These diminishing survival trends for both species appear to have persisted through 2018 and 2019 [Buettner Decl. ¶ 2]. The acuity of the crisis facing both species is severe.

Since neither C'waam nor Koptu have benefited from a major recruitment event in almost 30 years, there are currently not enough younger fish to assure the continued existence of the species after the death of the current generation of adults [*See* Dkt. #55-2 ¶¶ 8-9]. Given this recruitment bottleneck, captive rearing efforts (that is, efforts to collect naturally-born larvae and raise them in rearing ponds to ages and sizes that offer them the best opportunity to thrive and eventually reproduce after they are re-released into UKL and its environs) are a critical part of the strategy to keep the species from extinction [Buettner Decl. ¶ 3]. But the captive rearing efforts of both USFWS and the Tribes are still at nascent stages and require replenishment from the larvae that are naturally produced during each year's spawning season [*Id.*]. Keeping as many of the remaining adults alive as possible is therefore essential both for the continued existence and potential recovery of the species.

Reclamation's decisions regarding the quantity and timing of releases from UKL have an enormous impact on C'waam and Koptu, as various UKL elevations during each season are required to support essential C'waam and Koptu biological functions, to ensure sufficient high-quality habitat, and to mitigate the occurrence of harmful water quality events.

Spawning, which can begin as early as late February/early March, is the most critical biological function for C'waam and Koptu in April and May. Given the rarity of successful C'waam and Koptu recruitment and the age of the existing populations, providing suitable

spawning and rearing habitat to maximize the opportunities for reproduction and growth is essential to the species' continued survival [*See* Dkt. #55-2 ¶ 16]. During spawning season, one of two sub-populations of C'waam require shallow shoreline spawning sites with relatively clean, coarse substrate to protect their eggs [*Id.* ¶ 15].

The amount of available spawning habitat, and therefore spawning activity, is primarily influenced by UKL elevations, as that is what determines the area of spawning substrate which is inundated and the depth of water over such substrate. In 2010, for instance, when the elevation of UKL was lower than 4,141.0 feet during much of spawning season,[8] USGS monitoring showed that 14% fewer C'waam females and 8% fewer males participated in spawning than during years when UKL was kept above 4,142.0 feet during spawning season [Dkt. #55-2 ¶ 16]. The amount of time spent at the spawning areas in 2010 was at least 36% shorter for C'waam females and 20% shorter for males than in years when elevation levels were maintained above 4,142.0 feet [*Id.*]. The sharp reduction in UKL elevations that occurred this year seems to have had a similar effect in reducing the time spent in spawning areas [*See* Buettner Decl. ¶ 9].

USFWS established a condition in its 2020 BiOp prohibiting Reclamation from operating under the Interim Plan in a manner that would drop UKL to an elevation below 4142.0 feet in April and May of two consecutive years, below that elevation in April of May of any year in which Reclamation augments the EWA under the terms of the Interim Plan, below an elevation of

[8] While absolute elevations in UKL were lower in 2010 than have been experienced thus far this year, UKL was starting then from a considerably lower base that year and elevations trended consistently upward during April and May [Buettner Decl. ¶ 7]. Thus while the C'waam in UKL enjoyed access to less total spawning habitat in 2010 than they have in 2020, 2010 conditions did not lead to the desiccation of already laid eggs or the need to change spawning behavior mid-season as the decrease in UKL elevations during the spring on 2020 has done. [*Id.*] As noted above, this decreasing UKL trendline during peak spawning is literally unprecedented and represents a risky and uncontrolled experiment on an incredibly vulnerable and endangered species. It is already outside the scope of the analysis contained in the 2020 BiOp. [*Id.*] Exacerbating that experiment, as the Yurok Tribe's requested relief would do, moves in precisely the wrong direction.

4141.0 in April of any year, and below 4141.28 in May of any year. [2020 BiOp at §11.3.2 (T&C 1c); Buettner Declaration ¶ 7].[9] The reduction in UKL releases that Reclamation instituted beginning May 11 appears to have arrested the precipitous decline in UKL elevations. [Buettner Decl. ¶ 10]. But given how low UKL presently sits, granting the Yurok Tribe's requested relief would directly risk dropping UKL below the rock-bottom minimum boundary condition of 4141.28 on May 31 [*See* Buettner Decl. ¶ 8].

Compliance with the May 31 minimum is not the only 2020 BiOp boundary condition that the Yurok Tribe's requested relief could problematize. C'waam and Koptu larvae are present in UKL from late March through mid-July, with peak abundance occurring from mid-May through mid-June [*Id*. ¶ 4]. Larvae require shallow, near-shore and marsh edge habitat with emergent vegetation not only for food, but also for protection from predators as well as lake turbulence and currents, which can transport larvae out of UKL to perish in Project canals and other unsuitable habitat, a process known as entrainment. [*Id.*]. In addition, during July, surviving C'waam and Koptu larvae transform into juveniles. While juvenile C'waam and Koptu are less dependent on near-shore emergent vegetation habitat than larvae, they still rely on this habitat in addition to other near-shore areas, particularly those with rocky substrate. [*Id.* ¶ 5]. Maintaining UKL at sufficient elevations to ensure access to all these critical areas through this mid-July period is therefore essential to the continued existence of the C'waam and Koptu. [*Id.* ¶ 4]. USFWS established a condition in its 2020 BiOp prohibiting Reclamation from operating under the Interim Plan in a manner that would drop UKL to an elevation below 4140.0 feet on or before July 15 of any year.[10] 2020 BiOp at §11.3.2 (T&C 1c). Current projections show that even at the

[9] Because UKL has fallen below 4142.0 in 2020, Reclamation must maintain it above that elevation in 2021 irrespective of whether the EWA augmentation trigger is met next year. Managing UKL conservatively through 2020 is therefore also important tool to try to forestall or minimize future conflict in the Klamath Basin if next year proves to be another poor water year.

[10] The availability of an adequate minimum amount of accessible emergent vegetation habitat is

recently reduced rate of releases, Reclamation will have a difficult time keeping UKL elevations above this minimum. [Buettner Decl. ¶ 8].[11]

Reclamation's ability to accomplish this will be enhanced if it has a buffer of Project Supply water available deeper into the water year that it could potentially repurpose to support UKL elevations consistent with the terms of the 2020 BiOp. [*Id.*; 2020 BiOp at §4.3.2.4.2 ("It is important to note that delivery of the 'fixed' Project Supply is not guaranteed; Reclamation retains discretion to curtail deliveries from UKL to comply with legal requirements and hydrologic conditions as necessary")]. For this reason, the Yurok Tribe's claim that "restoration of the remaining 23,000 acre-feet portion of the augmented flows from the Klamath Project . . . would be neutral as to Upper Klamath Lake levels and can be managed to avoid harm to the endangered suckers," [Dkt. #909-1 at 20] is inaccurate. Any AF released in May for EWA flows is permanently lost to UKL. Any AF retained as a component of Project Supply is available to support UKL elevations until it is physically delivered, and such delivery could be curtailed if conditions warrant. Granting the Yurok Tribe's requested relief and forcing additional water out of UKL in May (and perhaps into June) will therefore directly diminish Reclamation's ability to meet the July 15 boundary condition, to the detriment of the C'waam and Koptu.

Poor water quality events that frequently occur in UKL during the summer are another consideration that must be borne in mind. While adult C'waam and Koptu prefer to move to the northern end of UKL from June to September where there is more abundant food, fewer

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sufficiently important that USFWS augmented this baseline condition with the requirement that Reclamation not operate under the Interim Plan in a manner that would drop UKL below an elevation of 4140.5 on or before July 15 in more than one year or below an elevation of 4140.8 on or before that date in more than two years. [2020 BiOp at §11.3.2 (T&C 1c)].

[11] These projections may even be overoptimistic as they use a 50% exceedance threshold to estimate inflows. [Buettner Decl. ¶ 8]. That is, they assume that inflows will be better than 50% of the water years in the period of record and worse than 50% of years – in other words, exactly average. Actual inflows this year to date have been significantly lower than that.

predators, and deeper water, they are often forced to migrate from this preferred habitat in July and August to escape areas of extremely poor water quality. [Buettner Decl. ¶ 6]. Fish Banks, the mouth of the Williamson River, and especially Pelican Bay serve as vital water quality refuges during summer months. [*Id.*]. To enter the Pelican Bay water-quality refuge, however, C'waam and Koptu must pass through a relatively shallow portion of UKL [*Id.*]. If UKL is not maintained at a sufficient elevation–enough to allow for a minimum depth of three feet at the entrance to Pelican Bay–C'waam and Koptu are not able to easily access this important refuge area. Moreover, avian predation is a significant risk to C'waam and Koptu when they are forced to traverse depths of less than six feet, and depths below 3.3 feet render the fish particularly vulnerable [*Id.*; 2020 BiOp at § 7.3.1.5]. Further, UKL elevations must be high enough to provide adequate amounts of sufficiently deep habitat in Pelican Bay and other important water quality refugia to protect C'waam and Koptu from pelican predation and disease associated with overcrowding. [*Id.*]. In light of the fact that the late summer period poses perhaps the greatest annual threat to adult C'waam and Koptu survival [*see* 2020 BiOp at § 7.3.1.5], USFWS established a condition in its 2020 BiOp prohibiting Reclamation from operating under the Interim Plan in a manner that would drop UKL to an elevation below 4138.0 feet at any point of the year, and below 4138.25 feet in September of more than one year. 2020 BiOp at §11.3.2 (T&C 1c). Granting the Yurok Tribe's requested relief will make Reclamation's already difficult challenge to maintain these elevations this year that much harder to meet, again to the direct detriment of the C'waam and Koptu.

C. The Yurok Tribe cannot show that the balance of equities and the public interest favor its requested relief

The Yurok Tribe is correct when it states that the injunctive relief factors that consider the balance of equities and the public interest normally favor injunctive relief when ESA violations are at issue. [Dkt. # 909-1 at 9; *see also Tennessee Valley Authority v. Hill*, 437 U.S. 153, 185, 187-88

(1978)]. But all the cases the Yurok Tribe cites for that principle involve conflicts where the mandates of the ESA on the one hand are pitted against non-ESA interests on the other. [*See* Dkt. #909-1 at 9]. Here, by contrast, under this year's water conditions and with the UKL release decisions that have already been implemented, we are faced with the unfortunate situation of the needs of different listed species in direct conflict with each other.

As noted above, C'waam and Koptu are listed as endangered species throughout their entire range, while the Southern Oregon/Northern California Coast Coho salmon in the Klamath River are listed as threatened as part of an Evolutionarily Significant Unit. [62 Fed. Reg. 24,588 (May 6, 1997)]. Chinook salmon are not listed at all under the ESA, though they are an important prey fish for endangered Southern Resident Killer Whales. [*See* 2019 NMFS BiOp at §2.3.1.2.1]. To the extent that the needs of the species are to be balanced against each other, therefore, the Klamath Tribes submit that the balance of hardships and the public interest in fact favor the needs of the C'waam and Koptu given their more precarious condition. [*See* 2020 BiOp at §10.1.1 ("Because of a multi-decade lack of recruitment of LRS and SNS in UKL and the current old age of existing adults, both species will be at a high risk of extirpation without recruitment.")].

This Court has previously held that "hypothetical impact" to C'waam and Koptu does not preclude the issuance of injunctive relief for the benefit of salmon downstream, *Yurok I*, 231 F.Supp.3d at 485. But as demonstrated in Section III.B. above, the risk to C'waam and Koptu posed by the Yurok Tribe's requested relief in the instant motion is not hypothetical but rather acute and immediate. Also contrary to the situation in *Yurok I*, it is not the case in 2020 that "there are various management options that the Bureau can use to implement the injunctive flows while complying with its other obligations." 231 F.Supp.3d at 485. Reclamation certainly has both the authority and the duty to reduce irrigation deliveries if doing so is necessary to satisfy its legal obligations under both the 2020 BiOp and the 2019 NMFS BiOp. To that end, Reclamation has

already expressed its intention to reduce Project Supply from its originally set allocation of 140,000 AF to 80,000 AF (of which nearly 30,000 AF has already been delivered), and has scaled back the rate of irrigation deliveries since their spike in the third week of April. [Buettner Decl. ¶8]. But due to the operational decisions involving both the flushing flow and early-season irrigation deliveries that have already been made this year and the extremely low inflows to UKL, even an immediate and complete shut-off of irrigation deliveries would not necessarily make it possible for Reclamation to comply with the boundary conditions of the 2020 BiOp if additional EWA augmentation water is released [*Id.*]. Although hydrologic conditions have improved slightly in the past week, thanks to some wet weather and decreases in both Project diversions and other releases from UKL, the longer-term forecast calls for warmer and dryer conditions that will continue to make it difficult to ensure that the UKL boundary conditions of 4140.0 feet on July 15 and 4138.0 feet through the end of the water year are met [*Id.*]. To grant the Yurok Tribe's requested relief in this situation would be to abandon the do-no-harm-to-C'waam-and-Koptu principle this Court articulated in *Yurok I*, and the Yurok Tribe cannot show that either the balance of hardships or the public interest favors such an outcome.

IV. CONCLUSION

For the reasons set forth above, Reclamation has not deviated from or refused to implement the Interim Plan. Consequently, the Yurok Tribe's motion to lift the Court's stay on this action should be denied. Even were the stay to be lifted, for the reasons set forth above, the Yurok Tribe's requests for a temporary restraining order and preliminary injunction should be denied.

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Respectfully submitted this 18th day of May 2020.

/s/Jeremiah D. Weiner

Jeremiah D. Weiner (CSBA No. 226340)
Simon W. Gertler (CSBA No. 326613)
Rosette, LLP
1415 L St., Suite 450
Sacramento, CA 95814
Telephone: (916) 353-1084
Facsimile: (916) 353-1085
jweiner@rosettelaw.com
lchristian@rosettelaw.com

Attorneys for Defendant Intervenors The Klamath Tribes

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing will be e-filed on May 18, 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/Jeremiah D. Weiner

Jeremiah D. Weiner (226340)