Jay D. Weiner (OSBA No. 182247)
Rosette, LLP
1415 L St. Suite 450
Sacramento, California 95814
Telephone: (916) 353-1084
Facsimile: (916) 353-1085
jweiner@rosettelaw.com

Attorney for Plaintiff
The Klamath Tribes

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MEDFORD DIVISION

THE KLAMATH TRIBES, a federally recognized Indian Tribe, Plaintiff, vs. UNITED STATES BUREAU OF RECLAMATION Defendant.	Case No.: 1:21-CV-00556 **MOTION FOR TEMPORARY RESTRAINING ORDER AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION** **Request for Oral Argument**

MOTION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Fed. R. Civ. Proc. 65, the Klamath Tribes ("Tribes") move for a temporary restraining order to stop Defendant United States Bureau of Reclamation ("Reclamation") from taking endangered C'waam (Lost River Sucker, *Deltistes luxatus*) and Koptu (shortnose sucker, *Chasmistes brevirostris*), jeopardizing their continued existence, and adversely modifying their critical habitat all in violation of the Endangered Species Act, 16 U.S.C. §§ 1536, 1538.

Counsel for the Tribes notified counsel for Defendant on April 12, 2021, that the Tribes intended to file the present motion. Decl. of Jay Weiner in Supp. of Mot. for TRO and Prelim. Inj. ¶ 3. Counsel for the Tribes met and conferred in good faith with Defendant's counsel regarding this motion by telephone on April 13, 2021, but were unable to resolve the dispute. *Id*. ¶ 5. Defendant's counsel authorized counsel for the Tribes to inform the Court that the Defendant's counsel is available for a hearing on the Tribes' motion as early as Thursday, April 15, 2021, but would appreciate the Court not setting a hearing any earlier than that (and preferably later) in order to afford Defendant an opportunity to provide the Court with a preliminary written response to the Tribes' moving papers prior to the hearing. *Id*. The Tribes are amenable to an April 15, 2021 hearing though the Tribes would not find it appropriate to wait any later given the exigency of the situation. *Id.*

Included as part of the 2020 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") issued by the United States Fish and Wildlife Service ("USFWS") regarding Reclamation's operation of the Klamath Project ("Project"), was an Incidental Take Statement ("ITS") allowing Reclamation's Project operations to commit incidental take of C'waam and Koptu so long as it complied with the terms and conditions of the ITS. Reclamation has been and remains severely out of compliance with those terms and conditions, particularly in its failure to maintain certain minimum water elevations ("boundary conditions") in Upper Klamath Lake ("UKL") that USFWS set in the ITS. Reclamation's failure to comply with the boundary conditions has therefore vitiated the protection from take liability the ITS conferred, yet its take of C'waam and Koptu continues unabated. Through its same non-compliant actions, Reclamation is jeopardizing the continued existence of

the C'waam and Koptu and adversely modifying their critical habitat in violation of 16 U.S.C. § 1536(a)(2).

The Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, requires a prospective plaintiff to provide the Secretary of the Interior and any other prospective defendant with 60 days' notice of their ESA violation(s) prior to bringing suit. 16 U.S.C. § 1540(g)(2)(a)(i). The Tribes provided the Secretary and Defendant Reclamation with the required notice ("60 Day Notice") on February 12, 2021, but Reclamation has failed to cure its violations since that time and has, in fact, only compounded them. Today is the first day the Tribes are entitled to file suit against Reclamation to remedy the violations identified in the 60 Day Notice and they have done so concomitant with the filing of this motion. Every second that Reclamation fails to comply with the terms of its ITS and operates the Project out of compliance with the boundary conditions irreparably injures the Tribes by the bringing the C'waam and Koptu, two culturally and spiritually essential treaty-protected Tribal resources, closer to extinction. A temporary restraining order is necessary to avoid irreparable harm to these endangered species pending this Court's resolution of the Tribe's motion for preliminary injunction, which the Tribes file concurrently herewith.

Specifically, the Tribes move for a temporary restraining order directing Reclamation to do the following:

1. Immediately reduce releases from UKL to a rate not to exceed 400 cubic feet per second of water ("cfs") and maintain that rate until UKL exceeds an elevation of 4,141.3 feet;
2. Once UKL has achieved an elevation above 4,141.3 feet, manage UKL releases such that UKL elevations are maintained UKL at or above 4,141.3 feet through May 31, 2021;

3. Manage UKL releases such that UKL elevations are maintained at or above 4,140.5 feet through July 15, 2021;
4. Manage UKL releases such that UKL elevations are maintained at or above 4,138.25 feet for all of September 2021;
5. Manage UKL releases such that UKL elevations are maintained above 4,138.0 feet at all times for the rest of water year 2021;
6. Beginning at the start of water year 2022, manage UKL releases to ensure UKL elevations are maintained at levels that comply with *all* of the Terms and Conditions included in the Incidental Take Statement ("ITS") issued to Reclamation by USFWS in the 2020 BiOp, including maintaining a minimum elevation 4,142.0 feet in April and May, until such time as the current consultation among Reclamation, USFWS, and the National Marine Fisheries Service ("NMFS") is complete and USFWS and NMFS issue one or more new BiOps and ITSs.

("Tribe's Equitable Relief Request").

The following memorandum of points and authorities, and declarations filed concurrently herewith, support the Tribes' motion.

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Dated: April 13, 2021

Respectfully submitted,

ROSETTE, LLP

s/ Jay D. Weiner

Jay D. Weiner (OSBA No. 182247)
Rosette, LLP
1415 L St. Suite 450
Sacramento, California 95814
Telephone: (916) 353-1084
Facsimile: (916) 353-1085
jweiner@rosettelaw.com

Attorney for Plaintiff
The Klamath Tribes

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

C'waam and Koptu are two treaty-protected fish of the utmost cultural and spiritual importance to the Klamath Tribes. They are also critically endangered. 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). Once numbering in the hundreds of thousands, barely 30,000 C'waam and fewer than 4,000 Koptu adults remain among the reproducing populations of these species today.

The impacts from a century of agricultural development around their critical habitat in UKL, Reclamation's management of the Klamath Irrigation Project ("Project"), and the effects of climate change on the hydrology of the Klamath Basin, have combined to drive these species to the brink of extinction. USFWS' 2020 BiOp analyzed Reclamation's operation of the Project, which includes the manipulation of UKL elevations to meet the various needs of endangered C'waam and Koptu, Project irrigators, the threatened Evolutionarily Significant Unit ("ESU")[1] of Southern Oregon/Northern California Coast ("SONCC") coho salmon, and unlisted Chinook salmon. The 2020 BiOp established several boundary conditions that Reclamation is obligated to follow in order to benefit from the protection from "take" liability under the Section 9 of the ESA, 16 U.S.C. § 1538, afforded by that BiOp's ITS. Reclamation promptly violated one of those boundary conditions in the spring of 2020. On April 1, 2021, it violated another one. It currently

[1] ESU is a NMFS designation for a distinct population segment (as that term is used in the ESA, 16 U.S.C. § 1532(16)) of a salmon species. *See* 2016 5-Year Review: Summary & Evaluation of Southern Oregon/Northern California Coast Coho Salmon at 1 (available at https://repository.library.noaa.gov/view/noaa/17026) (last visited April 13, 2021).

remains in violation of that condition and without immediate course correction is likely to remain in violation of one or more of those boundary conditions for the foreseeable future—thus jeopardizing the C'waam and Koptu and threatening the very imminent possibility of extinction. A temporary restraining order is necessary to prevent the irreparable harm the Tribes will continue to suffer from the injuries Reclamation is inflicting on C'waam and Koptu through its failure to comply with the terms and conditions of the 2020 BiOp.

II. BACKGROUND

The Tribes are a federally recognized Indian tribe possessing governmental authority over their members and Indian lands and consist of three peoples who traditionally inhabited lands that now comprise parts of Southern Oregon and Northern California: the Klamath, the Moadoc, and the Yahooskin Band of Snake Indians. The Tribes' headquarters are in Chiloquin, Oregon, in the heart of the Upper Klamath Basin.

Since time immemorial, the Tribes' members have continuously used the resources of the Klamath Basin, including the C'waam and Koptu, for subsistence, cultural, ceremonial, religious, and commercial purposes. Decl. of Donald C. Gentry in Supp. of Compl. and Mot.s for TRO and Prelim. Inj. ("Gentry Decl.") ¶ 4. The Tribes possess federally reserved water rights in the Klamath Basin to preserve, protect, and exercise their treaty-guaranteed rights to hunt, fish, trap, and gather.

C'waam and Koptu play a central role in the Tribes' culture and spiritual practices, are essential to the way of life of the Tribes' members, and the Tribes have a fundamental responsibility to protect them. *Id*. ¶¶ 4-5. Once one of the most important food-fish in the Upper Klamath Lake region, C'waam and Koptu were caught by the thousands as a mainstay of the Klamath Tribes' diet. But the development of the Project and other agriculture in the Klamath Basin has wrought havoc on these fish. *Id.* ¶¶ 5-6.

UKL and its tributaries comprise the most important habitat for the continued existence of the C'waam and Koptu. UKL is especially critical to the conservation and recovery of the C'waam and Koptu because it provides the most habitat. *See* 2020 BiOp § 6.3.2.1.[2] It is also home to the last genetically intact reproducing population of Koptu in existence (Smith et al. 2020 at 14.). But UKL is also a primary source of water for the Project. Reclamation controls the elevation of UKL through oversight of the operation of the Link River Dam, located on the Lake's southern end. *Id.* § 4.2. Before construction of the Link River Dam in 1921, UKL elevations varied between roughly 4,140 and 4,143 feet above sea level ("ft"), with a mean annual variation of approximately two ft. Since 1921, however, after Reclamation dredged a natural reef that formed a barrier between UKL and the Link River and constructed the Link River Dam, UKL elevations have varied annually over a range of approximately six ft, from 4,137 to 4,143 ft. These substantial drops in UKL elevation levels deprive C'waam and Koptu of habitat and expose them to increased risk of predation and the effects of poor water quality. *See id.* §§ 6.3.2.1, 7.3.1.5, 7.3.1.6.

Due to their dwindling numbers, the Tribes suspended fishing for C'waam and Koptu in 1986 (two years before USFWS listed them as endangered) and redoubled their efforts to ensure the conservation and recovery of these important species. Gentry Decl. ¶ 6. The Tribes are now limited to catching and releasing just two fish every year for ceremonial purposes, and a generation of tribal members has grown up knowing C'waam and Koptu only through the annual ceremonies and stories told by their elders, not through their own experience of harvesting, preparing, sharing, and consuming these vital components of their cultural existence. *Id.* ¶¶ 6-7.

Between 2001 and 2015, the number of surviving C'waam decreased by 55-66% and

[2] A copy of the 2020 BiOp is attached as Ex. 1 to the Tribes' Req. for Judicial Notice in Supp. Supp. of Compl. and Mot.s for TRO and Prelim. Inj. ("RJN").

surviving Koptu by 76-78%. *See* 2020 BiOp § 6.3.3.1; Decl. of Mark Buettner in Supp. of Mot.s for TRO and Prelim. Inj. ("Buettner Decl.") ¶ 4. These population declines have accelerated yet further. In 2016, there were approximately 108,000 C'waam and 19,000 Koptu adults in Upper Klamath Lake (UKL). Buettner Decl. ¶ 5. By 2019, in the wake of a significant fish kill event in 2017, population estimates were approximately 40,000 C'waam and 7,000 Koptu. *Id*. This represents a 63% reduction for both C'waam and Koptu in that three-year period. *Id*.

Over the past two years, the populations of both species have continued to drop. There are now only approximately 4,830 UKL spawning C'waam adults (3,240 females and 1,590 males) and approximately 25,890 river spawning C'waam adults (15,330 females and 10,560 males) left in existence. *Id*. ¶ 7. The current status of the Koptu population is even more alarming. There are only approximately 3,940 remaining adults (2,460 females and 1,480 males) in UKL. *Id.* 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*. ¶ 8. 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 the oldest age ever recorded for members of that species. *Id*. If the current adverse recruitment conditions persist, the C'waam will likely be extirpated from their most important habitat of UKL and its tributaries in less than a decade and the Koptu within as few as 2-3 years. *Id*. And both species are at continual risk that a catastrophic single-year die-off could drive them toward extirpation even sooner. *Id*. ¶¶ 9-11.

Since 1989, Reclamation's operation of the Project has been subject to a series of biological opinions issued by USFWS evaluating the effects of its operations on the C'waam and Koptu, and (since 1999) by NMFS, evaluating its effects on the SONCC coho salmon ESU among other species. On March 29, 2019, a protracted, multi-year ESA Section 7 reconsultation process

regarding Project operations concluded when USFWS and NMFS issued separate but coordinated BiOps regarding Reclamation's 2019-2024 Klamath Project Operations Plan ("Plan"). On July 31, 2019, the Yurok Tribe filed an ESA suit in the Northern District of California challenging the adequacy of the Plan and the 2019 NMFS BiOp. On November 13, 2019, in response to the discovery of errors in certain data sets provided to Reclamation and NMFS that was used for the analysis in the 2019 NMFS BiOp, Reclamation again formally reinitiated consultation with the Services. 2020 BiOp § 2.2. On March 27, 2020, the Northern District of California court stayed the Yurok Tribe's suit pursuant to a joint stipulation of the parties after they negotiated an Interim Operations Plan ("IOP") to govern Reclamation's operation of the Project until the end of the renewed reconsultation process, which is slated to conclude by the end of September 2022. IOP at 3.[3]

Under the IOP, Reclamation planned to operate consistent with the Plan as analyzed in the separate 2019 USFWS and NMFS BiOps, with the exception of an "augmentation" to the Environmental Water Account ("EWA") when certain conditions were met. IOP at 2. The EWA is a volume of water to be released from UKL to support flows in the lower river for salmon needs and was set at a minimum of 400,000 acre-ft of water ("AF") in the Plan. *See* 2019 NMFS BiOp § 1.3.2.6.3.[4] The IOP proposed augmenting the EWA by 40,000 AF in years when the Natural Resources Conservation Service April 1 inflow forecast for UKL resulted in a calculated "UKL Supply" (as that term was defined in the Plan) that met or exceeded 550,000 AF and was equal to or less than 950,000 AF. IOP at 3. Of this 40,000 AF of new augmentation water, 23,000 AF was

[3] A copy of the IOP is attached as Ex. 2 to the Tribes' RJN.
[4] (available at https://media.fisheries.noaa.gov/dam-migration/19-03-29_nmfs_biop_klamath_project_operations.pdf) (last visited April 13, 2021)

to come from water that otherwise would have been allocated to Project Supply, and 17,000 AF was to come from water that otherwise would have remained in UKL to support C'waam and Koptu needs. *Id.* 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 decided in October of 2019 to use to "enhance" the EWA in certain water years. *Id.* at 3.[5] In other words, since the issuance of the 2019 USFWS BiOp regarding Reclamation's Plan, Reclamation committed to taking an additional 27,000 AF of water from C'waam and Koptu needs.

The 2019 NMFS BiOp also called for a surface flushing flow to occur in the spring, which involved releasing a significant percentage of the regular EWA allocation from UKL to "disturb surface sediment along the river bottom and disrupt the life cycle of *Manayunkia speciosa* (a polychaete), which is a secondary host for the *Ceratonova shasta* parasite central to salmonid disease dynamics in the Klamath River." 2019 NMFS BiOp § 1.3.2.6.4. This operation was carried over into the IOP. IOP at 2. The 2019 NMFS BiOp contains an important caveat, however, which is that this surface flushing flow cannot "result in impacts to suckers in UKL outside of those analyzed by USFWS; if Reclamation believes implementation of this volume may result in impacts to suckers outside of those analyzed by USFWS, Reclamation will coordinate with the Services." *Id.*

Recognizing that the IOP's modifications to the Plan would likely have additional impacts on C'waam and Koptu, Reclamation formally requested ESA Section 7 consultation with USFWS on the IOP on March 27, 2020. Two weeks later, on April 10, 2020, USFWS issued the 2020 BiOp,

[5] A water year is measured from October 1 to September 30. *See* 2020 BiOp § 4.3.3.

superseding its 2019 BiOp. NMFS concurred in USFWS' opinion without amending its own 2019 BiOp. That BiOp included an ITS, ostensibly immunizing Reclamation from liability for incidental take. But the ink was barely dry on the 2020 BiOp when Reclamation violated one of its critical terms and conditions to the detriment of the C'waam and Koptu during their peak spawning season. Reclamation has committed a similar violation this year, and presently remains non-compliant with important terms and conditions of that ITS, actively and illegally exacerbating the conditions that risk the extirpation of the C'waam and Koptu in UKL.

III. ARGUMENT

The same general legal standards govern temporary restraining orders and preliminary injunctions. Fed. R. Civ. P. 65; *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977). To be entitled to such extraordinary relief, the Tribes must show: 1) that they are likely to succeed on the merits of their claims; 2) that they are likely to suffer irreparable harm in the absence of preliminary relief; 3) that the balance of equities tips in their favor; and 4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). *See also Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1135 (9th Cir. 2011) (serious questions on the merits coupled with irreparable harm can provide alternate support for issuance of a preliminary injunction). Congress has determined that the third and fourth prongs of this test are inherently satisfied when the ESA is violated. *Cottonwood Envtl. Law Ctr. v. Forest Serv.*, 789 F.3d 1075, 1090 (9th Cir. 2015) (quoting *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) ("In Congress's view, projects that jeopardized the continued existence of endangered species threatened incalculable harm: accordingly, it decided that the balance of hardships and the public interest tip heavily in favor of endangered species."); *Nat'l Wildlife Fed'n v. NMFS*, 886 F.3d 803, 817 (9th Cir. 2018) ("NWF"); *Oregon Nat. Desert Ass'n v. Kimbell*, No. CIV 07-1871-

HA, 2009 WL 1663037, at *1 (D. Or. June 15, 2009) (applying standard to request for temporary restraining order). Ordinarily, therefore, only be the first two prongs of the test would be at issue here.

This case presents a wrinkle, however, in that Reclamation's management of the Project has put the needs of multiple listed species directly in conflict; as a result, the injunctive relief required to protect and preserve the C'waam and Koptu from extinction will have unavoidable (though less dire) consequences for the Interior Klamath Diversity Strata ("IKDS")[6] populations of the threatened SONCC coho salmon ESU. There appears to be no extant caselaw controlling how a court should proceed in regard to the applicability of the third and fourth prongs of the *Winter* test in this situation. But courts have recognized that "if a species is listed as endangered, it is entitled to greater legal protections than a species that is listed as threatened." *Center for Biological Diversity v. Everson*, 435 F.Supp.3d 69, 93 (D.D.C. 2020); *see also Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1142-1143 (9th Cir. 2001) (structure of ESA illustrates congressional intent "to provide incremental protection to species in varying degrees of danger"). Where, as here, the needs of species listed as endangered on the one hand are pitted against the needs of a species listed only as threatened, and then only as part of an ESU rather than throughout its entire range, the Tribes submit that the balance of hardships and public interest continue to tip decisively in favor of the endangered species, consistent with Congress' structuring of the ESA and the principles articulated in cases such as *Cottonwood*.

Should the Court nonetheless wish to specifically consider the latter two prongs of the

[6] This term includes the several populations of the SONCC coho salmon ESU that use the Klamath River and its tributaries, including the Shasta, Scott, Salmon, Upper Klamath, Middle Klamath populations. Buettner Decl. ¶ 22.

Winter test under these circumstances, the Tribes satisfy these two prongs as well. The Tribes Equitable Relief Request seeks carefully crafted relief that protects the C'waam and Koptu while reducing the impacts to the IKDS populations of the SONCC coho salmon ESU below Iron Gate Dam. The alternative, Reclamation's perpetuation of its current course of action, which simply privileges the needs of those salmon above those of the more critically endangered C'waam and Koptu in clear violation of the terms and conditions of the 2020 BiOp, is fundamentally inequitable. Nor can it be in the public interest to favor the needs of members of a handful of the 40 different populations of an ESU occurring over a wide geographical area (i.e., the IKDS populations of the SONCC coho salmon)[7] at the expense of the continued viability of the last few breeding populations of two species on the face of the planet (i.e., the C'waam and Koptu).

Because the Tribes satisfy all four prongs of the *Winter* test and the Tribes are suffering immediate and irreparable loss each moment that Reclamation persists in releasing large volumes of water from UKL while out of compliance with the 2020 BiOp and outside the safe harbor of its ITS, the Court should grant the Tribes' Equitable Relief Request as set forth in its Motion. The effect of doing so would be to move Reclamation back into conformity with the minimum boundary conditions USFWS determined in the 2020 BiOp were necessary to provide for the minimum needs of the C'waam and Koptu (in other words, to protect them from the possibility of imminent extirpation in UKL), and require Reclamation to keep UKL elevations at or above those levels until Reclamation, USFWS, and NMFS complete the protracted consultation process they have been engaged in for the past 18 months. At core, this relief merely compels Reclamation to abide by the terms and conditions of the ITS that it should have – but has not – been obeying

[7] Buettner Decl. ¶¶ 22, 47.

already, and does so in a manner that mitigates the irreparable harm the Tribes are suffering by better protecting the C'waam and Koptu while remaining sensitive to the needs of the IKDS populations of the SONCC coho salmon ESU and of Chinook salmon in the Klamath River. It is narrowly tailored and modestly crafted, and entirely warranted to remedy the harm Reclamation's illegal operation of the Project is causing to the Tribes. It should therefore be granted.

A. The Tribes are likely to succeed on the merits of their claims.

The ESA recognizes a cause of action "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of th[e ESA] or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1)(A). Reclamation is currently in violation of Sections 7 and 9 of the ESA.

1. Reclamation is violating ESA Section 9.

Section 9 of the ESA prohibits Reclamation from "taking" a listed species[8] unless the take occurs incidentally to and not as the object of an action[9] and is done in compliance with the terms and conditions of an ITS. 16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1536(a)(2). Committing take while in violation of the terms and conditions of an ITS, however, vitiates the ITS' protections and gives rise to liability for unpermitted take under Section 9 of the ESA. *See Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife, BLM*, 273 F.3d 1229, 1239 (9th Cir.2001) ("if the terms and conditions of the Incidental Take Statement are disregarded and a taking does occur, the action agency or the applicant may be subject to potentially severe civil and criminal penalties under

[8] "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).
[9] "Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.02.

Section 9."); *Nw. Env't Def. Ctr. v. United States Army Corps of Engineers*, Case No. 3:18-CV-00437-HZ, 2019 WL 2372591 at *9 (D. Or. June 5, 2019) (to prevail on a Section 9 claim, "Plaintiffs must demonstrate the Corps' operation … violates the terms and conditions of the ITS and, therefore, the ITS does not shelter the Corps from liability for the takings … in the course of operating the Project."); *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 629 F. Supp. 2d 1123, 1131 (E.D. Cal. 2009) ("if the terms of the ITS are violated, any taking (incidental or otherwise) is directly prohibited by section 9.").

Reclamation is currently taking C'waam and Koptu through its operation of the Project, and it has been doing so despite repeated, ongoing violations of the terms and conditions of the ITS USFWS issued as part of the 2020 BiOp. Reclamation is therefore violating Section 9.

i. The terms and conditions of the ITS are essential for the preservation of the C'waam and Koptu.

In the 2020 BiOp, USFWS found that Reclamation's operation of the Project pursuant to the IOP would lead to incidental take of both C'waam and Koptu and would have adverse effects on their critical habitat. It also concluded that this would not jeopardize the C'waam and Koptu.[10] 2020 BiOp § 10. USFWS therefore issued an ITS sheltering Reclamation's operation of the Project pursuant to the IOP from take liability so long as the 2020 BiOp's assumptions remained accurate,

[10] To "jeopardize" a species is to "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. The Tribes dispute the accuracy of the 2020 BiOp's no-jeopardy finding, and do not waive any claim they might have in regard to that conclusion or related to the compliance (or lack thereof) of the 2020 BiOp with the mandates of the ESA, including the sufficiency of any minimum boundary conditions set by the 2020 BiOp to preserve basic life cycle needs of the C'waam and Koptu. The Tribes rely on those boundary conditions here because they are the irreducible minimum conditions USFWS set for Reclamation's operation of the Project and reflect USFWS' interpretation of Reclamation's obligations under the ESA.

and Reclamation remained in compliance with the terms and conditions of the ITS. *Id*. § 11. The ITS noted that the 2020 BiOp's "assumptions and sideboards should be monitored throughout the term of this BiOp to determine if they are valid; otherwise ongoing Project operations could be outside the scope of this BiOp." *Id*. § 11.1.

These conditions and assumptions include that hydrologic conditions "will not change substantially over the term of th[e] BiOp" from those experienced "in the [period of record ("POR") [11]], which provided the basis . . . of the effects analysis. . .." *Id.* § 7.1.2. Among these unaccounted-for hydrological conditions would be the occurrence of "[h]igher frequencies of dry conditions than observed in the [POR] that lead to lower lake levels generally[,]" and Williamson River flows and net inflow to UKL that deviate in magnitude, pattern, or sequence from those observed in the POR. *Id.*

To ground truth its assumptions, the 2020 BiOp identified several real-world events, denominated as "boundary conditions", the occurrence of which would mean "the effects of the proposed action [have gone] beyond the scope of what has been analyzed" in the 2020 BiOp. *Id.* § 7.1.3. These include:

- Two consecutive years in which UKL surface elevations fall below 4142 ft (1,262.48 m) in April or May; or any year in which UKL surface elevations fall below 4142 ft (1,262.48 m) in April or May when EWA augmentation is provided[;]
- UKL surface elevations below observed elevations in 2010 in April or May[;][12]

[11] The period of record means historical hydrologic conditions as they occurred between 1981 and 2019, which provided the basis for Reclamation's development of the action that underpinned the IOP. 2020 BiOp § 4.

[12] Reclamation's management of the Project brought UKL into the spring/summer half of the 2010 water year at an extremely low level, and between the start of April and the end of May, UKL never exceeded an elevation of 4,141.31 ft and dropped as low as 4,140.47 ft. Recognizing the deleterious effects this had on C'waam and Koptu spawning, USFWS adopted the daily

- UKL surface elevations below 4,138.00 ft at any time[;]
- More than one water year when UKL surface elevations drop below 4,138.25 ft (1,261.34 m) at any time[; and]
- Any year with UKL surface elevations less than 4,140.0 ft (1,261.9 m) by July 15, more than 1 year when surface elevations fall below 4,140.5 ft (1,262.0 m) by July 15, or more than two years when surface elevations fall below 4,140.8 ft (1,261.1 m) by July 15[.]

Id.

Term and Condition 1c of the 2020 BiOp's ITS ("Take Corrective Action to Ensure UKL Elevations Are Managed Within the Scope of the Proposed Action") is the ITS provision most directly relevant to this suit. In mandates that Reclamation's management of UKL not breach the various boundary conditions identified in § 7.1.3 of the 2020 BiOp. It also requires Reclamation to "immediately consult with [USFWS] concerning the causes [of any projected breach of these conditions] to adaptively manage and take corrective actions." 2020 BiOp T&C 1c.

The minimum elevation requirements built into this condition of the ITS are not arbitrarily chosen. Rather each is tied to the adverse effects on C'waam and Koptu survival and life cycle functions and the availability of their critical habitat that stem from excessively low UKL elevations. April and May elevations of at least 4,142.0 ft are vital because they ensure adequate inundation of spawning substrate to provide for what USFWS determined to be a minimum baseline of spawning habitat, and therefore spawning activity. *See* 2020 BiOp § 7.3.1.1. If the spawning grounds are dry or barely damp, spawning opportunities are reduced, which is something neither species can afford given their low numbers and geriatric status. *Id*. In 2010, for instance, when the elevation of UKL was lower than 4,141.0 ft during much of spawning season, USGS monitoring showed that the amount of time spent at the spawning areas was at least 36% shorter

elevations observed in April and May of that year as their own boundary condition to provide a secondary floor beneath the requirement of 4,142.0 ft. Buettner Decl. ¶ 38.

for C'waam females and 20% shorter for males than in years when elevation levels were maintained above 4,142.0 ft. *Id*. And many fish simply skipped spawning that year altogether, with USGS data showing that 14% fewer C'waam females and 8% fewer males participated in spawning in 2010 than during years when UKL was kept above 4,142.0 ft during spawning season. *Id*.

The 2020 BiOp's emphasis on maintaining baseline UKL elevations through the spring and summer has other important biological benefits as well. 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. 2020 BiOp § 7.3.1.3. 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.* Larvae are especially dependent on emergent vegetation habitat located in wetland areas in and around UKL including Hanks Marsh, Shoalwater Bay, the Wood River Delta, the Upper Klamath National Wildlife Refuge, and the Williamson River Delta. Buettner Decl. ¶ 12. The Williamson River Delta is particularly important as it is the area of highest C'waam and Koptu larvae density and serves as a thoroughfare for larvae migrating into the UKL from spawning areas in the Williamson and Sprague Rivers. 2020 BiOp § 7.3.1.3.

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. 2020 BiOp § 7.3.1.4. Maintaining UKL at sufficient elevations to ensure access to all of these critical areas during the period from March to mid-July is therefore essential to the continued

existence of the C'waam and Koptu.

Moreover, 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 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. 2020 BiOp § 7.3.1.5. Dramatic changes to the Klamath River Basin's hydrology and the rise of agricultural activity within the area since the Project's inception have caused UKL to change from eutrophic to hypereutrophic, that is, from a lake with high nutrient levels to one that is excessively rich in them. Agricultural activities, livestock, grazing and timber harvesting have been the primary contributors to increased nutrient (primarily phosphorus) and sediment concentrations in UKL. Buettner Decl. ¶¶ 13-15. Nutrient overloading in UKL has been exacerbated by the draining of over 50,000 acres of wetlands in and adjacent to UKL, which has decreased the nutrient uptake capacity of UKL while simultaneously introducing additional phosphorous from wetland decay. *Id.* 16-17¶¶ 1.

Poor water quality conditions that are stressful or lethal to fish, including high pH, high un-ionized ammonia, and low dissolved oxygen ("DO"), occur every summer in UKL as a result of large cyanobacteria blooms and crashes. *Id*. ¶ 18. Specifically, increased nutrient input into UKL has resulted in large, harmful blue-green algae blooms that develop each May through mid-July, and sometimes again in late summer/early fall. *Id*. As algal biomass increases, pH levels in UKL rise, which directly stresses C'waam and Koptu. *Id*. ¶ 19. To compound this harm, the concentration of un-ionized ammonia in UKL spikes exponentially as the Lake's pH level increases. *Id*. Un-ionized ammonia is directly toxic to C'waam and Koptu, causing additional stress and mortality to the species. *Id*. Further, as algae respire at night, DO can drop to low levels leading to even greater cumulative stress and mortality to C'waam and Koptu. *Id*. ¶ 20. The

harmful effect of algal respiration on DO levels is especially pronounced in waters less than 3.3 ft deep. *Id*. ¶ 20.

"[W]ater quality poses the greatest threat to fish [in UKL] from July to mid-October, but especially late July and August." 2020 BiOp § 7.3.1.6. C'waam and Koptu must have good access to water quality refuge habitat in Pelican Bay and other tributary inflow areas like the mouth of the Williamson and Wood rivers if poor water quality conditions occur, and UKL elevations must be sufficient to protect them from predation from pelicans and other birds while they shelter there. *See id.* §§ 6.2.5; 7.3.1.5.

Fish Banks, the mouth of the Williamson River, and especially Pelican Bay serve as vital water quality refuges during summer months. *Id.* § 7.3.1.5. 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–one that allows for a minimum depth of three ft at the entrance to Pelican Bay–C'waam and Koptu are at extreme risk from predation from pelicans as they pass into this critical water-quality refuge. *Id.* Further, UKL elevations must be high enough to provide adequate amounts of sufficiently deep habitat to protect C'waam and Koptu from pelican predation and disease associated with overcrowding. *Id.* The inability to access critical water quality refuges puts the fish at much greater risk for mass mortality events. 2020 BiOp §6.2.5 ("Although adult suckers are hardier than juveniles and larvae, they are still susceptible to poor water quality, which can be associated with die-offs[.]").

For these reasons, the 2020 BiOp established a July 15 boundary condition of 4,140.0 ft. But recognizing the cumulative toll years of poor water quality could take, it added a condition that July 15 elevations could not be allowed to drop below 4,140.5 ft for more than one year during

the BiOp's term. 2020 BiOp T&C 1c. Reclamation ran UKL below that elevation in July 2020, Buettner Decl. ¶ 42, making 4,140.5 ft the applicable boundary condition for July 15, 2021.

ii. Reclamation violated and continues to violate the ITS.

The ITS imposed both substantive and procedural obligations on Reclamation – to keep UKL above the various boundary conditions and to monitor whether USFWS' assumptions underpinning the BiOp were being borne out in practice and to consult immediately if it appeared they were not. Reclamation has violated both. Reclamation first violated T&C 1c in late April 2020, when it allowed UKL to drop below 4,142.0 ft despite providing EWA flushing flow and augmentation water. Reclamation made three distinct but interrelated decisions that caused it to violate this boundary condition of the 2020 BiOp. First, it authorized the commencement of agricultural deliveries in early April despite UKL hovering just barely above 4,142.0. ft. Buettner Decl. ¶ 22. Second, without consulting with USFWS, it forced 43,000 AF out of UKL in mid-April to provide for a surface flushing flow below Iron Gate Dam, *id*., despite the requirement of the 2019 NMFS BiOp that a surface flushing flow not occur without consultation with the Services if doing so would "result in impacts to the [C'waam and Koptu] outside those analyzed by USFWS[.]" 2019 NMFS BiOp § 1.3.2.6.4. Third, despite UKL already having dropped well below 4,142.0 ft because of the first two sets of releases, Reclamation nonetheless began releasing EWA augmentation water in late April and continued doing so until the end of the first week of May. Buettner Decl. ¶¶ 24, 26. The net effect of these decisions was to create the entirely unprecedented situation where UKL elevations actually *decreased* markedly from mid-April into May, dropping by more than 0.7 ft – from 4,142.10 to 4,141.38 ft – 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.[13] *Id*. ¶ 262. Through these actions, Reclamation both operated outside the effects analysis of the 2020 BiOp and actively violated the ITS by failing to maintain UKL at or above 4,142.0 ft during April and May in a year in which it released EWA augmentation water.

Yet despite the clear mandates of the 2020 BiOp, the legal jeopardy it faced due to the violation of T&C 1c in April and May 2020, and the precarious condition of the C'waam and Koptu, Reclamation's water management decisions throughout the remainder of water year 2020 and continuing into water year 2021 have created a situation where it has again violated T&C 1c. Prior to the conclusion of water year 2020, Reclamation increased its deliveries from UKL to Project irrigators by an additional 8,000 AF and delivered 4,000 AF from UKL to the Lower Klamath Wildlife Refuge. Buettner Decl., Ex. D, at 1-2. It then delivered roughly 9,500 AF from UKL to the Klamath Drainage District during the Fall/Winter period at the start of water year 2021, putting additional pressure on winter inflows to refill UKL ahead of the spring spawning season. *Id*. ¶ 28. But those inflows did not arrive as anticipated.

As early as the start of the 2021 calendar year, it was becoming clear that water year 2021 was shaping up to be historically poor. *Id*., Ex. E at 29-33, 35. By the start of February, that trend had worsened, and it was already apparent that Reclamation would need to manage deliberately to comply with the ITS condition requiring it to maintain UKL at or above 4,142.0 in April and May. *Id*., Ex. F at 32-36, 38-40. For these reasons, pursuant to 16 U.S.C. § 1540(g), the Klamath Tribes delivered their 60-day notice to Reclamation on February 12, 2021. *See* Gentry Decl., Ex. A.

[13] Although UKL elevations have infrequently experienced slight decreases during spawning season during the POR, most often due to the release of surface flushing flows, they have never decreased so sharply, quickly, and from such a low base, as Reclamation caused them to do in 2020. *See* 2020 BiOp § 7.3.1.1 at Table 7-2; Buettner Decl., Ex. C. at 41. The 2020 BiOp in fact specifically dismissed the possibility of a decrease this sudden and of this magnitude. 2020 BiOp § 7.3.1.2.

By the beginning of March, the projections were yet more dire. Water-year-to-date cumulative net inflows to UKL were the lowest ever in the POR, underperforming even the drought year of 1992 by nearly 6,000 AF. Buettner Decl., Ex. G at 40. Williamson River flows had set 28 individual mean daily record lows since the start of the water year. *Id.* at 26. UKL elevations were running well below historical averages. *Id.* at 45. And Reclamation's own projections illustrated that it would not be able to both provide a surface flushing flow and keep UKL at or above 4,142.0 ft in April and May. *Id.* at 47.[14]

The hydrology throughout March proved unremittingly bleak. The Williamson River set mean daily flow records lows every single day of the month but one. *Id*., Ex. H at 25. The Sprague River set 16 mean daily flow record lows of its own for the month. *Id.* at 22. Reclamation reported that the Wood River, too, had set 67 mean daily flow record lows since the start of the calendar year, including 24 in February and 28 in March. *Id.* at 30. UKL cumulative net inflows were now lagging 1992's by over 17,000 AF, and were nearly 60,000 AF worse than the third worst year-to-date mark of the POR, which belonged to 2020. *Id.* at 36. UKL elevations were trending disastrously low and were poised to intersect and potentially fall below the spring elevations experienced in 2010, *id.* at 42, elevations that were so poor for C'waam and Koptu spawning that USFWS had incorporated those elevations as an independent boundary condition of the ITS beneath the 4,142.0 ft mandate. 2020 BiOp T&C 1c.

[14] As noted above, the 2019 NMFS BiOp makes clear that a surface flushing flow is not to occur if it will cause impacts to C'waam and Koptu outside the effects analysis of the 2020 BiOp. 2019 NMFS BiOp § 1.3.2.6.5. The Tribes reminded Reclamation of this fact in a letter of March 15, 2021 and reiterated the point in a letter to Reclamation dated March 31, 2021. Gentry Decl., Ex.s B, C. In both letters, the Tribes also reminded Reclamation of its obligations to the C'waam and Koptu under the ESA and suggested steps Reclamation could take to comply with those obligations. *See*, *e.g.*, *id*., Ex. B at 4, Ex. C. at 4-5. The Tribes received no formal response to either letter. Gentry Decl. ¶ 8.

These flow conditions, particularly coming on the heels of the extraordinarily poor water year that was 2020, traduced a key assumption of the 2020 BiOp that the hydrology reflected in the 40-year period of record USFWS utilized to estimate the likely effects of Reclamation operation under the IOP on UKL elevations "represent the range and distribution of elevations that are reasonably likely to occur over the 3-year consultation term (April 1, 2020 – September 30, 2022)." 2020 BiOp § 7.2; *see also id.* §§ 11.2, 11.2.2.6. They also set the C'waam and Koptu up for failure during the 2021 spring spawning season, an outcome the species can ill afford. Yet despite this "progressive decrease in [UKL] elevations that is plainly projected to fall outside the conditions outlined" in T&C 1c., Reclamation did not "immediately consult with [USFWS] concerning the causes to adaptively manage and take corrective actions." *Id.* at T&C 1c; Buettner Decl. ¶ 27, 30-31. Instead, it remained on autopilot, mechanistically releasing large volumes of water from UKL each day to augment Klamath River flows below Iron Gate Dam as called for by the 2019 NMFS BiOp and keeping the elevation of UKL virtually static. *Id.* ¶ 31.

These releases, and Reclamation's failure to proactively address the interplay between the requirements of the 2020 BiOp and the 2019 NMFS BiOp when it has been clear they were likely to conflict this year, are ultimately the most significant contributors to the crisis facing the C'waam and Koptu this spring. The 2019 NMFS BiOp establishes a schedule of targeted minimum flows below Iron Gate Dam, which rely heavily on releases from UKL to be satisfied. 2019 NMFS BiOp §§ 1.3.2.4, 1.3.2.6.1. From the start of calendar year 2021 through April 8, 2021, Reclamation has released approximately 120,000 AF of water from UKL to support minimum flows below Iron Gate Dam, a volume of water that would be more than sufficient – had it instead been retained in UKL – for UKL to have reached 4,142.0 ft by April 1 and to have remained above that elevation throughout April and May. Buettner Decl. ¶ 31. During the spring/summer operating period, these

UKL release are accounted against the EWA, whose volume is established by an equation based on UKL inflows but which cannot be set below 400,000 AF. 2019 NMFS BiOp § 1.3.2.6.3. On current hydrologic trends, a 2021 EWA volume of 400,000 AF will exceed the total volume of water that Reclamation will retain in UKL during the March-September spring/summer 2021 Project operating season to meet basic C'waam and Koptu needs. *See* Buettner Decl. ¶ 34, Ex. C at 42.

This scenario, where Reclamation's prior management decisions and the unforgiving nature of a year's hydrology combine to create a situation where the core biological needs of the species (as identified for C'waam and Koptu in the 2020 BiOp, and the SONCC coho salmon ESU and Chinook salmon in the 2019 NMFS BiOps) are in direct conflict, is totally outside the scope of any scenario evaluated by either Service in connection with Reclamation's operation under the IOP. *Id*. ¶ 22. It has also been foreseeable for months, and Reclamation has done nothing about it.

Predictably, therefore, this conflict was exacerbated on April 1, 2021. That date is significant for both the 2020 BiOp and the 2019 NMFS BiOp, since April 1 triggers Reclamation's obligation to maintain UKL at or above 4,142.0 ft, as well as its obligation to increase the minimum flows below Iron Gate Dam called for by NMFS in its BiOp from 1,000 cubic ft per second (cfs) to 1,325 cfs, which can only be accomplished by a concomitant increase in releases from UKL. On April 1, UKL sat at an elevation of approximately 4,140.84 ft, nearly 14 inches (and 105,000 AF) below where the 2020 BiOp required it to be. *Id.* ¶ 32. Yet Reclamation mechanistically *increased the releases of water from the UKL that day* to satisfy the requirements of the 2019 NMFS BiOp, more than doubling their flow rate overnight from approximately 550 cfs on March 31 to over 1,300 cfs on April 1. *Id.* ¶ 33. Although release rates have moderated slightly since then they continue to run at an average rate of well above 1,000 cfs, depriving UKL of a minimum of

2,000 AF per day,[15] and UKL's elevation has flatlined or slightly decreased at precisely the time of year it should be increasing to maximize available spawning habitat. *Id.* ¶ 35. At this point, there is no real prospect of UKL rising anywhere close to 4,142.0 ft at any point in April or May,[16] and Reclamation is currently on track to violate both the separate requirement of maintaining UKL above the elevations it experienced in April and May of 2010[17] and this year's July 15 boundary condition.[18] Buettner Decl. ¶4 4, Ex. C at 43.

Nevertheless, Reclamation has taken and continues to take C'waam and Koptu through its operation of the Project. Its noncompliance with the 2020 BiOp's minimum boundary conditions in April and May of 2020 and again currently "have significantly impair[ed] essential behavior patterns" of the C'waam and Koptu, most acutely when it comes to their ability to "breed[]." 50 C.F.R. § 17.3; Buettner Decl. ¶ 36. Even without this deviation, USFWS recognized that, simply by Reclamation operating the Project within the assumptions, terms, and conditions of the 2020 BiOp, "take of adults, juveniles, and larval [C'waam] and/or [Koptu] is anticipated to occur in the form of collect [sic], capture, kill, and harm." 2020 BiOp § 11.2. While this anticipated take would normally fall within the protection of the safe harbor of the 2020 BiOp's ITS, Reclamation has forfeited that protection by its repeated non-compliance with the ITS' terms and conditions.

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[15] A continuous flow rate of 1 cfs amounts two roughly 2 AF per day.

[16] If all UKL releases were cut off immediately on the filing date of the Tribes' motion, given the elevation UKL sat at on April 12, 2021 (4,140.75 ft), it would take 45 days for UKL to reach 4,142.0 ft at the current rate of inflows. Buettner Decl. ¶ 42.

[17] On April 11, 2021, UKL sat at an elevation of 4,140.75 ft. Buettner Decl. ¶ 42. The corresponding 2010 daily minimum for that date is 4,140.64. *Id.* ¶ 38, Ex. A. By April 15, the corresponding 2010 elevation will be 4,140.76 ft. By April 30, that elevation rises to 4,141.0 ft, and it peaks on May 28 at 4,141.31 ft before declining slightly to 4,131.28 at month's end. *Id.*

[18] Reclamation's management of UKL in 2020 pushed elevations below 4,140.5 ft ahead of July 15 last summer, which means that 4,140.5 ft is now the July 15 floor for 2021. 2020 BiOp at T&C 1c.

The 2020 BiOp's ITS can no longer shelter Reclamation's take for an additional reason. As USFWS cautioned in T&C 1c, "[c]onditions outside [the range of hydrologic conditions anticipated in the BiOp[19]] may result in greater adverse effects than analyzed in this BiOp and exceedance of the take anticipated in the [ITS.]" And the back-to-back record-breaking dry years in the Klamath Basin the past two years have in fact been well outside the bounds of what the 2020 BiOp anticipated. Buettner Decl. ¶ 22. Again, however, Reclamation has failed to "immediately consult" and "adaptively manage and take corrective actions" as required by T&C 1c.

In light of the foregoing, there is no doubt that take of C'waam and Koptu is occurring and will continue to occur so long as Reclamation is releasing water from UKL, and that Reclamation is far outside the safe harbor of the ITS. The Tribes are likely to succeed on their claim that Reclamation is violating ESA Section 9.

2. Reclamation is violating Section 7 of the ESA by jeopardizing the C'waam and Koptu and adversely modifying their critical habitat.

Section 7 of the ESA prohibits agencies from jeopardizing the continued existence of endangered species or adversely modifying their critical habitat. 16 U.S.C. § 1536(a)(2). *See also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978) ("One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. … This language admits of no exception."). "Jeopardy" involves the direct or indirect reduction of a listed species' ability to survive and recover in the wild "by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. An "adverse modification" is "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the

[19] T&C 1c cross references § 8 of the 2020 BiOp in text that has been modified in these brackets. That cross reference is a typographical error as the Effects of the Action section is in fact § 7.

conservation of a listed species," such as alterations which "alter the physical or biological features essential to the conservation of a species . . . ." *Id.* Moreover, despite the issuance of a BiOp, the action agency (such as Reclamation in this case) retains an independent obligation "to insure that its actions will not jeopardize the continued existence of an endangered species or destroy or modify habitat critical to the existence of the species." *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359, 371 (5th Cir. 1976); *accord Tennessee Valley Auth. v. Hill*, 437 U.S. at 173.

In 2012, USFWS designated UKL and its tributaries as critical habitat for the C'waam and Koptu. 77 Fed. Reg. 73,740 (December 11, 2012). The 2020 BiOp recognizes that conditions outside of the assumptions identified above "may result in greater adverse effects than analyzed in this BiOp." § 11.3.2. Further, UKL "elevations that fall below 4,142 ft (1,262.5 m) between the end of March and the end of May would be expected to alter the spawning behavior of [C'waam] at the shoreline springs" § 11.2.2.6; "there could be take of larval suckers by increasing mortality rates when lake elevations fall below 4,140.0 ft" by July 15. *Id.*

As discussed above, Reclamation failed to maintain UKL at an elevation at or above 4,142.0 in April and May of 2020 when it provided EWA augmentation water, and has failed to maintain UKL at or above 4,142.0 in April of 2021, a second consecutive year when UKL has been below that elevation during the critical spring spawning season. This failure to maintain the minimum elevations required by the 2020 BiOp and its ITS has adversely modified C'waam and Koptu critical habitat in UKL by appreciably diminishing the availability of necessary spawning and rearing grounds. Buettner Decl. ¶ 37. It also directly caused the desiccation of eggs and larvae in 2020. Reclamation is at acute risk of repeating both these failings in 2021 given how it is currently managing UKL elevations and releases. *Id*. These impacts on spawning success are

severely consequential because both species are nearing the end of their natural life span, and potentially even closer to losing the ability to reproduce successfully. *Id.* ¶ 38.

The deleterious effects of Reclamation's failure to maintain UKL at or above 4,142.0 ft in April and May when the 2020 BiOp requires it to do so extend past the physical act of spawning. C'waam and Koptu embryos and pre-swim-up larvae are present in the gravel at the shoreline springs for approximately three weeks followings spawning and fertilization. *Id*. ¶ 12. During this period, UKL elevations need to be maintained at a consistent level to avoid exposing embryos and larvae to air, which will kill them (as occurred in 2020). *Id*. 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. *Id*. This is an issue not only for UKL-spawning C'waam, but also larval C'waam and Koptu that drift down from the Williamson River spawning areas as well as those emerging from lakeshore springs who occupy emergent vegetation habitat in May and June. *Id*. Appropriate UKL elevations are therefore necessary to ensure the availability of adequate larval habitat to protect all these nascent fish from predators and to provide a diverse food supply. *Id*. Furthermore, with the additional emergent vegetation habitat available when elevations are maintained at the required levels, more fish are also likely to be retained in important nursery areas and not face the risk of entrainment through wind-generated currents. *Id*. Reclamation's management of UKL out of compliance with the 2020 BiOp in the spring of both 2020 and 2021 therefore directly threatens the viability of the entire class of fish who will be spawned in each year. *Id*. ¶ 39.

Nor will the effects of Reclamation's management decisions be cabined to this spring. On current trends, UKL is likely to remain below applicable boundary conditions of the 2020 BiOp through at least July 15, 2021. *Id*., Ex. C at 43. And the July 15 boundary condition is itself vital

to the survival of the remaining adult C'waam and Koptu. Mid-summer UKL elevations have a role to play in ameliorating UKL cyanobacterial bloom events, which create water quality conditions that put tremendous stress on both juvenile and adult C'waam and Koptu. *Id*. ¶ 46. Moreover, keeping UKL at or above 4,140.5 on July 15 this year is essential to ensuring that there is at least some ability for adult C'waam and Koptu to access critical water quality refugia like Pelican Bay in the late summer period when UKL water quality is generally at its worst. Buettner Decl. ¶ 42. Poor water quality conditions stressful or lethal to fish, including high pH, high un-ionized ammonia, and low dissolved oxygen, occur every summer in UKL as a result of large cyanobacteria blooms and crashes. *Id*. ¶ 18. As the 2020 BiOp explained, "water quality poses the greatest threat to fish [in UKL] from July to mid-October, but especially late July and August." § 7.3.1.6. C'waam and Koptu must have good access to water quality refuge habitat in Pelican Bay and other tributary inflow areas like the mouth of the Williamson and Wood rivers if poor water quality conditions occur, and UKL elevations must be sufficient to protect them from predation from pelicans and other birds while they shelter there. *See id.* § 6.2.5; § 7.3.1.5. Without adequate access to water quality refugia, the adult C'waam and Koptu are put at significantly heightened risk of another mass mortality like the one that occurred most recently in 2017, which is something that the species simply cannot afford in their precarious condition. Buettner Decl. ¶ 41.

These past, ongoing, and imminent adverse modifications of C'waam and Koptu critical habitat therefore directly and appreciably reduce the likelihood of the species' survival and recovery in the wild. As does Reclamation's ongoing violation of ESA Section 9, discussed above. This is most acutely true for the Koptu, whose remaining adults are both closer to the end of their expected lifespan and terrifyingly few in number. 2020 BiOp § 6.3.3.2; Buettner Decl. ¶ 7. The Tribes are likely to succeed on the merits of this Section 7 claim.

B. An injunction is necessary to avoid irreparable harm.

"In light of the stated purposes of the ESA in conserving endangered and threatened species and the ecosystems that support them, establishing irreparable injury should not be an onerous task for plaintiffs." *Cottonwood*, 789 F.3d at 1091. This sort of injury "can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Production Co. v. Village of Gambell, Alaska*, 480 US 531, 545 (1987). The Tribes need not demonstrate that an extinction-level event will ensue absent the relief requested. *See, e.g.*, *Nat'l Marine Wildlife Fed'n* 886 F.3d at 818. Rather, the required showing of harm must be informed by the purposes of the statute at issue. *Id.* at 803. Congress' "plain intent" in enacting the ESA was "to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth.*, 437 U.S. at 184. *See also Sierra Club v. Marsh*, 816 F.2d at 1383 (9th Cir. 1987). Because "[t]he ESA accomplishes its purpose" of conserving endangered species "in incremental steps, which include protecting the remaining members of a species," "[h]arm to those members is irreparable." *Nat'l Marine Wildlife Fed'n*, 886 F.3d at 803. "Once a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult." *FCC v. Rosboro Lumber*, 50 F.3d 781, 785 (9th Cir. 1995).

The Tribes plainly satisfy this standard. The harm Reclamation's actions are causing to the C'waam and Koptu, and thus to the Tribes' treaty-protected interest in those species, is paradigmatically irreparable. There are precious few adult C'waam and Koptu left in existence, and without recruitment these species will soon blink out. Buettner Decl. ¶¶ 7-8. Recruitment can only occur if there is successful spawning, and a class of young fish can survive long enough to reach sexual maturity. Yet Reclamation's operation of the Project in violation of the terms and conditions of its ITS have already consigned the species to a second consecutive year of diminished

spawning opportunities and compromised rearing habitat, since Reclamation has failed to maintain UKL at or above 4,142.0 ft in consecutive springs. *Id*. ¶ 50. Moreover, Reclamation is now poised to violate a separate boundary condition of its ITS, actively managing UKL below the historically low elevation levels UKL experienced in 2010. *Id.* ¶ 44. Without a swift and substantial decrease in the volume of water it is constantly releasing from UKL, Reclamation is at imminent risk of precluding the possibility of compliance with the July 15 minimum boundary condition as well, *id*., subjecting the entire UKL-residing populations of C'waam and Koptu (the latter being the last still-viable and genetically intact reproducing population of this species) to the high likelihood of poorer, more stressful, and potentially lethal water quality conditions this summer and compromising their ability to safely access vital water quality refuges. *Id*. ¶¶ 46, 51. Even though the Tribes are not required to point to an extinction-level event to demonstrate irreparable harm, this state of affairs certainly qualifies as such.

These harmful impacts to the C'waam and Koptu, critically endangered treaty- and ESA-protected resources, would amount to irreparable harm to the Klamath Tribes should the Court decline to grant the relief requested. The Tribes have a millennia-long relationship to the C'waam and Koptu. These species have sustained the Tribes' members materially, culturally, and spiritually, and the C'waam and Koptu continue to play a significant role in the Tribes' cultural, spiritual, and ceremonial practices. Gentry Decl. ¶¶ 4-5. The Tribes have already gone 35 years without being able to harvest a single C'waam or Koptu, and memories of their former abundance are beginning to fade from living memory. *Id.* ¶ 7. Any worsening of the already imperiled state of the C'waam and Koptu would only further impair the Tribes' and their members' ability to exercise their treaty and reserved sovereign rights and to participate in their cultural and spiritual practices. *Id.* ¶ 5. Indeed, it risks depriving them of their "ability to live as Klamath People in the

way [their] Creator intended." *Id.* This is exactly the irreparable harm Reclamation's actions are threatening to inflict. No amount of money can compensate for injuries of this sort. The Tribes readily satisfy this prong of the *Winter* test.

C. The balance of the equities and public interest support the issuance of an injunction.

When the federal government is a party to preliminary injunction request, the balance of equities and public interest factors "merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Moreover, in the context of ESA litigation, both of these factors are presumed to weigh in favor of the moving party. *Nat'l Marine Wildlife Fed'n.*, 886 F.3d at 817. As the Supreme Court has explained, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities . . .." *Tennessee Valley Auth.*, 437 U.S. at 193–95; s*ee also Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999).

We find ourselves in more nuanced territory in this case, however, where Reclamation's actions and this year's hydrology in the Klamath Basin have combined to pit the needs of the C'waam and Koptu directly against those of the IKDS population of the SONCC coho salmon ESU. The injunctive relief the Tribes request will have the effect of reducing flows below Iron Gate Dam since there is simply not enough water currently in the system for Reclamation to maintain UKL at the elevations required for the C'waam and Koptu, while simultaneously hitting the daily minimum flow targets below Iron Gate Dam of 1,325 cfs in April and 1,175 cfs in May set forth in the 2019 NMFS BiOp. *Compare* 2020 BiOp T&C 1c; 2019 NMFS BiOp at Table 5; Buettner Decl. ¶¶ 44, 52. At present, Reclamation has autopiloted its way to favoring the latter,

providing the full minimum flows below Iron Gate Dam while depleting UKL. But that approach is fundamentally inconsistent with the congressional design of the ESA, which, in the event of such conflict, puts greater emphasis on the protection of endangered species than of threatened ones. *See*, *e.g.*, *Center for Biological Diversity v. Everson*, 435 F.Supp.3d at 93. The balance of hardships and public interest favor the C'waam and Koptu needs for this reason alone.

The specific nature of the Tribes' Equitable Relief Request further compels this conclusion. In making it, the Tribes unhappily accept the reality that Reclamation's choices in continually releasing large volumes of water from UKL to support flows below Iron Gate Dam have created a situation where there is no possibility of UKL reaching an elevation of 4,142.0 ft during April 2021 even if the Court ordered Reclamation to cease all UKL releases immediately. Buettner Decl. ¶ 43. Nor is UKL likely to be able to reach 4,142.0 ft during May 2021, even with such a sweeping injunction. *Id.* The odds have been stacked against the success of this year's spawning season already, and Reclamation's substantive liability under Sections 7 and 9 of the ESA will be addressed through the regular course of this litigation. But these circumstances are not a reason to consign the C'waam and Koptu to unprecedently poor conditions all summer or to worsen their already dire situation. The Tribes' Equitable Relief Request would ensure that Reclamation remains in compliance with the separate boundary condition of not allowing UKL to experience elevations in April and May below those to which the C'waam and Koptu were subjected in 2010, which it is on the verge of violating under its current practice. *Id.* ¶ 44. This additional increment of elevation, though still well below 4,142.0 ft, will at least moderately improve the availability of rearing habitat, and is sufficient to inundate important spawning habitat at Sucker Springs, Silver Building, and Ouxy Springs to a depth more conducive to successful spawning. *Id.* ¶ 45. And compliance with the July 15 minimum boundary condition is an important step toward affording

the C'waam and Koptu a fighting chance to survive the poor water conditions that are likely to occur in UKL this summer. *Id.* ¶ 46.

Moreover, the 400 cfs release limit itself is deliberately chosen because it improves UKL elevations while avoiding stranding fish, including C'waam, Koptu, and native redband trout, in the Link River below the Link River Dam. *See Id.* ¶¶ 47-49.[20] Releases of 400 cfs are also generally sufficient to provide flows of at least 650 cfs below Iron Gate Dam. Buettner Decl. ¶ 49. While those are not ideal flow rates for salmon in the lower river, they have been shown capable of providing adequate conditions for survival of juvenile salmon rearing and out-migrating the Lower Klamath River leading to future adult returns. For example, in 1992 flows were extremely low, but adult returns from this brood year were among the highest on record. *Id.* Water temperature during the spring months may be a more important factor than flows regarding disease and juvenile outmigration. *Id*. Moreover, this year many of the out-migrating salmon smolts have already moved downstream and therefore would not be affected by these flow reductions. *Id*.

In light of the relative conditions of the listed species, including but not limited to their different listing statuses, and the carefully crafted and narrowly tailored nature of the Tribes' requested relief, the balance of equities tips in favor of the C'waam and Koptu, and thus the Tribes, and the public interest favors granting the Tribes' Equitable Relief Request in furtherance of the national policy of preventing the extinction of endangered species. Prongs three and four of the *Winter* test both favor the Tribes.

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[20] Reclamation's Link River Fish Stranding Prevention and Salvage Plan sets 400 cfs as the March-November flow trigger for monitoring whether a fish standing assessment is necessary. The desired minimum flow for that time period is 300 cfs. Link River Fish Stranding Prevention and Salvage Plan at 5-6 (available at https://www.oregon.gov/owrd/programs/regulation/KlamathRegulation/2020%20KIDBOR/2011.04.04_Link%20R%20Fish%20Stranding%20Prevention%20Plan_draft.pdf) (last accessed April 13, 2021)).

D. The court should waive the bond requirement.

As the Ninth Circuit has recognized, a district court "has discretion as to the amount of security required, if any[,]" when granting a preliminary injunction. *Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011) (internal quotation marks and citation omitted). The exercise of the Court's discretion not to require a bond is particularly warranted here as a bond requirement would seriously compromise the Klamath Tribes' ability to pursue this litigation. *See People of State of Cal. ex rel. Van De Kamp v. Tahoe Regl. Plan. Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985), *amended*, 775 F.2d 998 (9th Cir. 1985) ("The court has discretion to dispense with the security requirement [of Fed. R. Civ. P. 65(c)], or to request mere nominal security, where requiring security would effectively deny access to judicial review"); Gentry Decl. ¶ 9. This would be a particularly disfavored outcome given that the Circuit has cautioned that "special precautions to ensure access to the courts must be taken where Congress has provided for private enforcement of a statute[.]" *People of State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325–26 (9th Cir.), amended, 775 F.2d 998 (9th Cir. 1985), such as is the case with the ESA. *See* 16 U.S.C. § 1540(g)(1).

A bond is also unnecessary here where the Tribes have demonstrated that they will succeed on the merits and the balance of hardships tips in their favor. *W. Watersheds Project v. Bernhardt*, 391 F. Supp. 3d 1002, 1026 (D. Or. 2019) ("The Court has considered the relative hardships and the likelihood of success on the merits and concludes that to require any security in this case would be unjust."); *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000) (citing *Scherr v. Volpe,* 466 F.2d 1027, 1035 (7th Cir.1972)) ("Because the Court finds that there is a strong likelihood of success on the merits by Plaintiffs, no bond is necessary"); *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 869 (N.D. Cal. 2018), *aff'd*, 950 F.3d

1242 (9th Cir. 2020), and *aff'd*, 950 F.3d 1242 (9th Cir. 2020) (quoting *Elliott v. Kiesewetter*, 98 F.3d 47, 60 (3d Cir. 1996) ("Where the balance of ... equities weighs overwhelmingly in favor of the party seeking the injunction, a district court has the discretion to waive the Rule 65(c) bond requirement."). Particularly since the Tribes' requested relief is narrowly tailored to avoid harm to the IKDS populations of the SONCC coho salmon ESU, there is no monetary injury that would flow from the issuance of the injunction. The Tribes seek to preserve the continued existence of two extremely vulnerable and critically important species from near-term extirpation in UKL and extinction while this litigation progresses and until a longer-term solution can be found. Under these circumstances, imposition of a bond would be unjust.

Should the Court nonetheless consider requiring a bond, only a nominal amount should be set. *Cf. Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002).

IV. CONCLUSION

The C'waam and Koptu are struggling to preserve their very existence as species. These fish are central to the Tribes' cultural and spiritual practices, and the Tribes have a treaty right to see them returned to harvestable levels. Reclamation's noncompliance with the terms and conditions of the ITS issued by the USFWS in the 2020 BiOp has vitiated that ITS' safe harbor protection, and Reclamation is currently in violation of the ESA, causing irreparable harm to the Tribes. Reclamation is at imminent risk of violating yet another boundary condition of its ITS, further worsening the precarious state of the C'waam and Koptu. For these reasons, the Klamath Tribes respectfully ask the Court to issue a temporary restraining order granting the Tribes' Equitable Relief Request.

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Respectfully submitted,

ROSETTE, LLP

/s/ Jay D. Weiner

Jay D. Weiner (OSBA No. 182247)
Rosette, LLP
1415 L St. Suite 450
Sacramento, California 95814
Telephone: (916) 353-1084
Facsimile: (916) 353-1085
jweiner@rosettelaw.com

Attorney for Plaintiff
The Klamath Tribes