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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
MEDFORD DIVISION

KLAMATH TRIBES,

Plaintiff,

v.

**UNITED STATES BUREAU OF
RECLAMATION,**

Defendant.

) Case No.: 1:21-cv-00556-CL
)
) **UNITED STATES BUREAU OF**
) **RECLAMATION'S**
) **SUPPLEMENTAL BRIEFING IN**
) **OPPOSITION TO MOTIONS FOR**
) **TEMPORARY RESTRAINING**
) **ORDER AND PRELIMINARY**
) **INJUNCTION (ECF 2, 7)**
)
)

As requested by the Court, the Bureau of Reclamation (“Reclamation”) submits this briefing “to address the Bureau’s obligation to consult with the Services when it could not simultaneously stay within the boundaries of the Terms and Conditions of the 2019 NMFS BiOp and the 2020 USFWS BiOp.” In short, Terms 1c and 1A of the Services’ Incidental Take Statements (“ITSs”) require informal conferral, which should not be mistaken for formal reinitiated consultation under Endangered Species Act (“ESA”) Section 7(a)(2), 16 U.S.C. § 1536(a)(2). It is widely known that Reclamation is already engaged in formal reinitiated Section 7 consultations on the Project. ECF 7 at 12. Reclamation has fulfilled all procedural requirements in the ITSs, which are what the Klamath Tribes’ claims are based upon, and, as such, the Court should not order any additional procedure.

The Tribes’ true complaint here is not an alleged failure to complete procedure. Rather, the Tribes disagree with the amount of water that Reclamation is allocating to suckers in Upper Klamath Lake (“UKL”) for spring/summer 2021 in the Temporary Operating Procedures (“TOP”). This is a *technical and scientific* disagreement with the outcome of procedure, not a claim that procedure was not undertaken. The Tribes do not ask the Court to compel procedure. Rather, they ask this Court to overrule Reclamation and install a different technical plan of operations for the Klamath Project – one that provides a greater allocation of water to suckers and a lesser allocation to salmon and killer whales – in place of Reclamation’s TOP. Notably, the Tribes’ operations plan has not undergone any sort of review by the Services on its likely effects to listed species or critical habitats, despite the fact that it would admittedly increase the likelihood of harms to listed coho salmon and killer whales. The law does not support substituting the Tribes’ un-reviewed operations plan for Reclamation’s.

I. Reclamation Has Completed All Applicable Procedural Requirements for the TOP

The Court asked: “What does the obligation to consult with the Services require of the Bureau? Did the Bureau meet these obligations? Did the Bureau have an obligation to reinitiate formal consultation?” The short answers are that Reclamation was not required to complete formal

reinitiated consultation and met its procedural obligations for the TOP under the Services' ITSs.

The answers to the questions are evident from the plain language and context of the Services' ITSs. Term and Condition 1c ("Term 1c") of the FWS ITS states, in pertinent part:

T&C 1c. Take Corrective Actions to Ensure UKL Elevations Are Managed within the Scope of the Proposed Action

The bounds to the hydrological conditions expected under this BiOp are described in the Effects of the Action (section 8). Conditions outside these bounds may result in greater adverse effects than analyzed in this BiOp and exceedance of the take anticipated in the Incidental Take Statement. Based on the POR, these conditions are extremely unlikely to occur during the term of this BiOp. As the irrigation season progresses from March 1 – September 30, Reclamation shall monitor UKL elevations to determine if there is a projected or realized progressive decrease in the elevation that would fall outside of the boundary conditions for the effects analysis (as described in Section 7.1): [. . .]

If a progressive decrease in elevations that is projected to fall outside the conditions outlined above is identified, Reclamation shall determine the causative factors of this decrease and determine whether these factors are within the scope of the proposed action and the effects analyzed in this BiOp. Reclamation shall immediately *consult* with the Service *concerning the causes to adaptively manage and take corrective actions*.

ECF 3-1 at 230 (emphasis added).

Term and Condition 1A ("Term 1A") of the NMFS ITS states, in pertinent part:

1A. Take Actions to Ensure EWA Distribution and IGD Flows Are Managed within the Scope of the Proposed Action

[. . .]

Based on monitoring, if Reclamation determines any of the thresholds listed above have not been met or EWA spending and/or IGD flows are expected to potentially fall outside the thresholds listed above, Reclamation shall immediately notify NMFS and consult with the Services to determine the causative factors. If EWA spending and/or IGD flows have not yet fallen outside the thresholds listed above and NMFS determines that causative factors are not due to extraordinary hydrologic conditions, Reclamation, *in consultation with* the Services, shall *determine and take in-season corrective actions* including adjustments to avoid falling outside the thresholds listed above. [. . .]

ECF 24-2 at 283-84 (emphasis added).

As noted above, FWS used the word "consult" in this instance to refer to "adaptively manag[ing] and tak[ing] corrective actions." ECF 3-1 at 230. Similarly, NMFS used "consult" in

reference to “determin[ing] the causative factors” and “determin[ing] and tak[ing] in-season corrective actions.” ECF 24-2 at 284. In these contexts, “consult” is used in the ordinary sense, meaning to confer, discuss, and coordinate. It is not used as a term of art mandating the completion of formal reinitiated consultation under ESA Section 7(a)(2). Indeed, FWS recently explained that “T&C 1c of the Service’s BiOp requires Reclamation *to coordinate* with the Service and take corrective actions if elevation levels in UKL fall outside of the stated boundary conditions.” ECF 24-8 at 2 (emphasis added). Similarly, NMFS recently explained that “Reclamation notified NMFS in January and *consulted* with the Services to determine the causative factors. Reclamation has *met* with the Services extensively since February to determine and implement in-season corrective actions consistent with the IOP and the Biological Opinions. In addition, Reclamation has *coordinated* with the Services, Tribes, and water users and evaluated water management approaches considering the needs of threatened and endangered species.” ECF 24-6 at 2 (emphasis added). NMFS’ use of the words “consulted,” “met,” and “coordinated” underscores that “consult” in Term 1A is not a mandate to complete formal Section 7(a)(2) reinitiated consultation.

Conferring in-season on how to best respond to changing hydrology, as contemplated by the ITSs, is a fundamentally different exercise than completing a formal reinitiated consultation under ESA Section 7. Formal reinitiated consultation is typically a wholesale “back to the drawing board” that begins with the submittal of a biological assessment (“BA”) and involves the reanalysis of the agency action through the preparation of a new BiOp and, if applicable, ITS. *See* 50 C.F.R. § 402.14. If the Services want to refer to this type of wholesale reanalysis, they know how to refer to “reinitiation of consultation” pursuant to 50 C.F.R. § 402.16. *See* ECF 3-1 at 248; ECF 24-2 at 290.

That is not what Terms 1c and 1A required. Instead, they include a much narrower, informal conferral requirement and Reclamation fully discharged the requirement. Reclamation explained its compliance with the conferral requirements of Terms 1c and 1A in its opposition brief.

See ECF 30 at 25-29. To summarize, Reclamation began conferring with FWS and NMFS four months ago – in January 2021 – “to determine the causative factors for potentially falling outside BiOp ‘boundary conditions’, consistent with the *meet and confer* provisions of . . . T&C 1c.” ECF 24-17 & 24-7 at 2 (emphasis added). Through this conferral, Reclamation determined the key causative factors were drought and identified the TOP for Project operations for the 2021 spring/summer season “to address immediate and temporary competing needs, including the needs of all threatened and endangered species, in a reasonable manner informed by real-time hydrological and biological data.” *Id.* at 2-9.

Neither FWS nor NMFS stated in response that the TOP required formal reinitiated consultation. Rather, FWS acknowledged that the “unprecedented” hydrologic conditions this year are “rooted in natural causes and [were] not anticipated by the agencies” and “that Reclamation did meet and confer with the Service in recent months to address low UKL elevations and potential corrective actions.” ECF 24-8 at 2. Similarly, NMFS acknowledged that Reclamation had “taken actions to closely coordinate with the Services consistent with the process outlined in” Term 1A. ECF 24-6 at 3. Thus, Reclamation has followed the procedures specified by the Services by monitoring elevations, determining causative factors for any decrease, and conferring with FWS and NMFS to adaptively manage and take corrective actions. The Tribes disagree with the actions Reclamation has chosen, but this is a technical and scientific disagreement over the allocation made. No required procedure was overlooked, and a court may not impose additional requirements based on the Tribes’ technical disagreement with Reclamation’s decision. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 636 (9th Cir. 2014).

II. Reclamation Is Engaged in Formal ESA Consultations with the Services

As noted above, this is not a “failure to reinitiate” case and, in addition, the existing ITSs upon which the Tribes’ claims are based do not require reinitiation of consultation. Nonetheless, to

answer the Court's question as to whether consultation is ongoing, Reclamation has been engaged in formal reinitiated consultations with FWS and NMFS on a long-term operations plan for the Klamath Project since November 2019, which it expects to conclude by September 30, 2022. *See* Ex. A hereto at 3, lines 5-10 (Stip. to Stay Lit. in *Yurok II*). The 2021 TOP, which are in-season corrective actions developed within the framework of the existing operations plan (*see* ECF 25 at 16-19), will be considered in the ongoing consultation, as will the ongoing effects of the droughts of 2020 and 2021. For all of these reasons, and because the TOP themselves may need to be adjusted in-season due to fast-changing hydrology, it would not be appropriate or productive for this Court to order Reclamation to complete segmented consultations on just the TOP, which are set to soon expire (on September 30)). Due to the inherent complexities of the Klamath Project, the rapidly-changing hydrology, and the potential for further adjustments to the TOP, if the Court were to order Reclamation to complete segmented consultations with FWS and NMFS on just the TOP, it is unlikely that those consultations could be completed before TOP expire.¹

Contrary to the assertion of counsel for the Tribes at argument, Klamath Project consultations are typically measured in years, not days or even months. Though each consultation is unique, the default timeline for a formal consultation is 135 days, starting *from the Service's receipt of a BA from the action agency*, which takes time for the action agency to prepare at the outset, and adds to the 135-day timeline. In fact, even the 135-day timeline is routinely extended for complex actions. 16 U.S.C. § 1536(b); 50 C.F.R. §§ 402.12, 402.14(c), (e). The parties to *Yurok II* – the Yurok Tribe, Reclamation, NMFS, and Klamath Water Users' Association – expressly agreed that a consultation period of three years was appropriate and in the public interest given the complexities. *Id.* at 5.

¹ For example, the agencies are actively discussing the possibility of modifying operations under the TOP to account for rapidly changing conditions in hydrology and related biological conditions, including a potential reduced magnitude pulse flow that could begin to be implemented within the next several days.

Respectfully submitted this 29th day of April, 2021.

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CERTIFICATE OF SERVICE

I certify that on April 29, 2021, the foregoing was electronically filed with the Court's electronic filing system.

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