

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@rosettela.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,

v.

UNITED STATES BUREAU OF
RECLAMATION,

and

UNITED STATES FISH AND WILDLIFE
SERVICE

Defendants.

KLAMATH WATER USERS ASSOCIATION,

Defendant-Intervenor.

Case No. 1:22-cv-00680-CL

**THE KLAMATH TRIBES' MOTION FOR
SUMMARY JUDGMENT AND
MEMORANDUM OF LAW IN SUPPORT**

Judge: Honorable Mark D. Clarke

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INTRODUCTION

The C’waam (Lost River sucker) and Koptu (shortnose sucker) are in crisis. These two treaty-protected species of fish, listed as endangered under the Endangered Species Act (“ESA”), 16 U.S.C. § § 1531, *et seq.*, are of existential importance to the Klamath Tribes (“Tribes”) and once numbered in the millions, supporting the Tribes’ material and cultural needs for millennia. Now, fewer than 3,500 adult Koptu remain in existence on the face of the planet alongside fewer than 27,000 adult C’waam, and these adults are rapidly approaching the end of their expected life span. In 2022, for the third consecutive year, operational decisions made by the U.S. Bureau of Reclamation (“Reclamation”) disrupted the spawning of an important group of C’waam who reproduce on the east side of Upper Klamath Lake (“UKL”), and dramatically restricted the amount of rearing habitat available in UKL for the entirety of this year’s class of spawned C’waam and Koptu. The net effect of these decisions is to ensure yet another year in which no young fish survive long enough to begin to replace the remaining geriatric adult fish who are at ever greater risk of death and of losing the biological capacity to spawn even if they survive another year. This is how extinction happens.

The ESA and an unbroken line of case law make clear that the needs of endangered species must take precedence over economic and other interests when they conflict. Yet in 2022, Reclamation did the exact opposite. It responded to the historically dry conditions across the Klamath Basin by adopting a Temporary Operations Plan (“2022 TOP”) that gave Klamath Project (“Project”) irrigators “approximately 50,000 acre-feet” of water Reclamation’s own water allocation formula would have denied them. [2022 AR Index #121 at Bates BOR000122]. Had Reclamation followed its own rules, the Project would have gotten “less than 1,000 acre-feet”¹

¹ Reclamation also releases hundreds of thousands of acre-feet of water from UKL each year to support Klamath River flows to benefit a subpopulation of threatened Southern Oregon/Northern California Coast coho salmon

with the rest of that water available to benefit the C’waam and Koptu as mandated by the U.S. Fish and Wildlife Service (“USFWS”) in its 2020 Biological Opinion (“2020 BiOp”) addressing Reclamation’s ESA obligations to those fish. *Id.* Reclamation’s arbitrary and capricious decision violates the ESA.

USFWS recognized the damage Reclamation’s 2022 TOP (and Reclamation’s choices in how it managed the Project in 2021) would continue to inflict on the C’waam and Koptu. Yet it did not exercise the authority it possesses to curb Reclamation’s conduct. This arbitrary and capricious decision by USFWS violates the Administrative Procedures Act (“APA”), 5 U.S.C. § § 701, *et seq.* And Reclamation’s failure to prepare an Environmental Assessment (“EA”) or Environmental Impact Statement (“EIS”) in connection with its adoption of the 2022 TOP violates the National Environmental Policy Act (“NEPA”), 42 U.S.C. § § 4321, *et seq.* The Klamath Tribes are therefore entitled to summary judgment on all four causes of action brought in this suit.

Although there is a significant body of technical and legal information that will be presented and discussed below to demonstrate why the Tribes are entitled to prevail on each of these claims, these causes of action boil down to four straightforward propositions:

- 1) By adopting and implementing the 2022 TOP, Reclamation has violated its duty under Section 7 of the ESA to avoid jeopardizing the C’waam and Koptu by either compromising their continued ability to survive as species or their chances of recovering to the point they can come off the endangered species list, or by destroying or adversely modifying their critical habitat;

(“SONCC”). [2022 AR Index #119 at Bates BOR003744]. (An acre-foot is a common measure of water volume and refers to the volume of water necessary to cover an acre of land (an area roughly the size of a football field) one foot deep in water.) Those releases are not at issue in this case.

- 2) Reclamation has illegally “taken” (as that term is defined under Section 9 of the ESA) endangered C’waam and Koptu by operating the Project out of compliance with the conditions established by USFWS that would otherwise immunize Reclamation from take liability;
- 3) USFWS has arbitrarily and capriciously failed to exercise its authority under the ESA to stop Reclamation from committing these violations of Section 7 and Section 9; and
- 4) Reclamation has violated NEPA by failing to produce an appropriate environmental analysis in connection with its adoption of the 2022 TOP.

It also bears noting that this case shares certain factual and conceptual similarities with a separate suit the Tribes have filed in this Court in 2021 challenging Reclamation’s compliance with its ESA obligation in managing the Project in 2020 and 2021. *Klamath Tribes v. U.S. Bureau of Reclamation*, No. 1:21-cv-00556-CL (“*KT II*”). The briefing schedules of these two cases have been set to run in parallel and, particularly in the background sections, there are portions of this memorandum and the one the Tribes have filed in support of its motion for summary judgment in this other case that are virtually, if not entirely, the same. Yet the key factual underpinnings of the claims the Tribes present in this case—and the arguments made in support of them—differ materially from those in the 2021 suit. In addition, USFWS is a defendant here but is not named in the 2021 suit, and the Tribes present a NEPA claim here that lacks an analogue in the 2021 suit as well. Thus, despite some overlap, each suit must therefore be considered on its own merits.

STATEMENT OF RELIEF REQUESTED

This motion seeks a declaration that Reclamation violated Section 7 and Section 9 of the ESA by: (1) jeopardizing the continued existence of the C’waam and Koptu; (2) adversely

modifying their critical habitat; and (3) committing “take” of endangered species outside the terms and conditions of the 2020 BiOp’s ITS that would otherwise immunize Reclamation from take liability. Reclamation committed these ESA violations through its operation of the Project in 2022, when it placed the needs of Project irrigators ahead of those of the C’waam and Koptu. This motion also seeks a declaration that USFWS violated the APA by failing to rescind or modify its ITS in light of the actions Reclamation proposed to take under the 2022 TOP. Further, this motion seeks a declaration that Reclamation violated NEPA by inappropriately relying on previously prepared environmental compliance documents rather than preparing a new EA or EIS to properly analyze the environmental impacts of the 2022 TOP.

STATEMENT OF THE ISSUES TO BE DECIDED

A. Whether Reclamation violated Section 7 of the ESA by jeopardizing the C’waam and Koptu and adversely modifying their critical habitat through its Project operations under the 2022 TOP.

B. Whether Reclamation violated Section 9 of the ESA by taking C’waam and Koptu while out of compliance with the USFWS 2020 BiOp and its ITS during Reclamation’s operation of the Project pursuant to the 2022 TOP.

C. Whether USFWS’ failure to rescind or modify the 2020 BiOp and ITS in response to Reclamation’s adoption of the 2022 TOP was arbitrary and capricious in violation of the APA.

D. Whether Reclamation violated NEPA by not completing a proper NEPA analysis of the environmental impacts of the 2022 TOP.

STANDARD OF REVIEW

Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

The moving party bears the initial burden of “identifying portions of the record which demonstrate the absence of any genuine issue of material fact.” *Bennet v. Spear*, 5 F.Supp.2d 882, 885 (D. Or. 1998) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986)). On summary judgment, the Court must view the evidence and inferences drawn from the evidence in the light most favorable to the non-moving party. *Id.* (citing *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1284 (9th Cir. 1982)). Once the moving party meets its burden, “the burden shifts to the opposing party to present specific facts [beyond those alleged in the non-moving party’s pleadings] showing there is a genuine issue for trial.” *Id.* (Citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

BACKGROUND

I. The Klamath Tribes and the C’waam and Koptu

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 the region that now comprises parts of Southern Oregon and Northern California: the Klamath, the Moadoc, and the Yahooskin Band of Snake Indians. *See* 87 Fed. Reg. 4636, 4638 (Jan. 28, 2022). The Tribes’ headquarters are in Chiloquin, Oregon, in the heart of the Upper Klamath Basin.

As the Ninth Circuit recently recounted in a case that had its genesis in this Court, the Tribes have relied for millennia on the natural resources of the Klamath Basin, including fish and water, for subsistence, cultural, ceremonial, religious, and commercial purposes. *Klamath Irrigation District v. United States Bureau of Reclamation* (“*KID*”), 48 F.4th 934, 939 (9th Cir. 2022). “Time and again, we have affirmed the critical importance of the Klamath Tribe’s water and fishing rights in the Klamath Basin and its distributaries.” *Id.* C’waam and Koptu have played a particularly central role in the Tribes’ cultural and spiritual practices, and they were

once the Tribes' most important food-fish. *See id.*; *see also Klamath Tribes v. United States Bureau of Reclamation* (“*KT I*”), 2018 WL 3570865, at *1 (N.D. Cal. July 25, 2018) (C’waam and Koptu are “revered by the Klamath Tribes for their cultural, spiritual, and economic significance.”).

A fundamental aspect of the Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, October 14, 1864 (“1864 Treaty”), 16 Stat. 707 at Art. 1, in which the Tribes ceded millions of acres of their aboriginal territory, was the Tribes’ retention of its rights to trap, hunt, and gather within the 800,000 acres of land the Tribes reserved for themselves, and to fish in its lakes and streams. *KID*, 48 F.4th at 939. Indeed, “one of the very purposes of establishing the Klamath Reservation was to secure to the Tribe[s] a continuation of [their] traditional hunting and fishing lifestyle.” *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1983) (internal quotations omitted). These treaty rights survived the termination of the Tribes’ former reservation. *Kimball v. Callahan*, 493 F.2d 564, 569 (9th Cir. 1974).

The land cessions the United States extracted in the 1864 Treaty, however, opened the door to extensive non-Indian settlement in the Klamath Basin and the introduction of ever more intensive agricultural practices that have wrought havoc on the Basin’s ecosystem, with C’waam and Koptu paying the heaviest price. After bountifully sustaining the Tribes’ material and spiritual needs for thousands of years, their numbers dwindled precipitously over the second half of the 20th century. “From 1968 to 1985, [C’waam and Koptu] harvests in Upper Klamath Lake decreased from over 100,000 to 687 per year.” *KT I*, 2018 WL 3570865, at *2; *see also* [2022 AR Index #117 at Bates BOR003509 (describing precipitous decline in number of C’waam and Koptu)].

In 1986, the Tribes made the painful decision to voluntarily suspend all fishing for these two species in an effort to stave off the risk of extinction. *KTI*, 2018 WL 3570865 at *2. Since then, the Tribes have limited themselves to catching and releasing just two fish every year for ceremonial purposes. *Id.* This means a second generation of Tribal members is now growing up knowing C’waam and Koptu only through these annual ceremonies and the stories told by their elders and not through their own experience of harvesting, preparing, sharing, and consuming these vital components of their cultural and spiritual existence.

USFWS recognized the precarious condition of both species when it listed them under the ESA as endangered in 1988. 53 Fed. Reg. 27130 (July 18, 1988). And in 2012, USFWS designated UKL and its tributaries as critical habitat for the C’waam and Koptu. 77 Fed. Reg. 73,740 (Dec. 11, 2012). Yet despite a brief recovery period in the late 1980s and early 1990s, both the C’waam and Koptu have continued their longer-term spiral toward extinction. Simply put, the damage done to the Upper Klamath Basin’s once thriving ecosystem—and particularly to UKL—has made it nearly impossible over the last 25-30 years for young fish to survive long enough to replenish the aging and dying adults. Most of the adult C’waam are estimated to be approximately 30 years old, past their average life span of 17-22 years, and nearing their maximum observed lifespan of 40 years. 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 ages ever recorded for members of that species. *See* [2022 AR Index #117 at Bates BOR003511 (noting that “the fish . . . are well beyond the average survival past maturity”)]. There are currently not enough younger fish to assure the continued existence of the species after the death of the current generation of adults. And these adults are at ever increasing

risk of becoming incapable of successful spawning as they get older. *See id.* at [Bates BOR003510-11].

Moreover, a 2017 die-off event compounded by subsequent annual mortality has reduced the number of surviving adults of both species by roughly 75% in the past six years alone. In 2016, there were approximately 108,000 C'waam and 19,000 Koptu adults in UKL. [2022 AR Index #43 at Bates BOR001271]; *see also* [2022 AR Index #117 at Bates BOR003510]. By 2019, that C'waam population was thought to have dropped to maybe 40,000, alongside only 7,000 remaining Koptu. [2022 AR Index #43 at Bates BOR001271]. And currently there are only approximately 26,100 C'waam adults left in existence. Dkt. 1 at ¶32. The Koptu population numbers are even more alarming, with only approximately 3,350 remaining adults in UKL. *Id.*

The fish are therefore facing two simultaneous and reinforcing crises: baby C'waam and Koptu are not surviving long enough to mature into procreating adults, and the surviving adults are at risk of losing the ability to spawn baby C'waam and Koptu as they come closer and closer to the inevitable ends of their lives. Thus, the continued survival of the species is dependent on: (1) maximizing the opportunities for annual spawning; (2) ensuring sufficient rearing habitat in UKL for the larval and juvenile fish to have a chance of surviving long enough to join the adult population; and (3) giving the remaining adults the best possible opportunity to survive to spawn another year. Reclamation's water management decisions for UKL critically affect all three of these factors.

II. The Klamath Project and Reclamation's ESA Obligations

A. Development of the Project

Pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, and under the authority of the Reclamation Act of 1902, 43 U.S.C. § § 372 et seq., Congress authorized the construction and development of the Project in and around the Tribes' ancestral homelands and waters. Over

the course of the following century, the Project's infrastructure and operations have substantially modified the hydrology of the Klamath River Basin, and UKL in particular, in order to store, divert, and convey water for agricultural, municipal, and hydroelectric uses throughout what is now southern Oregon and northern California. [2022 AR Index #120 at Bates BOR004104-05, 004107]. The Project features several major dams, including the Link River Dam at the outlet of UKL, which controls the lake's elevation. Along with being critical habitat for the C'waam and Koptu, UKL is the primary source of water for Project irrigators. *See* [2022 AR Index #117 at Bates BOR003447-48]. Project facilities and farmland drained 70-80% of historical C'waam and Koptu habitat, leaving UKL as the only significant water body maintaining appreciable populations of these fish. *See id.* at [Bates BOR003509].

B. Reclamation's Obligation to Operate the Project Consistent with the ESA

1. Reclamation's Duties to Avoid (a) Jeopardy to the C'waam and Koptu's Survival and Recovery and (b) Destruction or Adverse Modification of their Critical Habitat

The ESA is a statutory scheme that relies on the careful application of many defined terms of art. ESA Section 7(a)(1), for example, obligates federal agencies to utilize their authorities to bolster the conservation of endangered and threatened species. 16 U.S.C. § 1536(a)(1). The ESA specifically defines the term "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which [ESA protection is] no longer necessary." 16 U.S.C. § 1532(3). An "endangered species" is one which "is in danger of extinction throughout all or a significant portion of its range" while a threatened species is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16

U.S.C. §§ 1532(6) and (20). The ESA sometimes speaks of endangered and listed species together, and when it does so it calls them “listed species.” 50 C.F.R. § 402.02.

Section 7(a)(2) of the ESA prohibits federal agency actions that are likely to jeopardize the survival and recovery of a listed species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). “Jeopardy” is another term of art under the ESA and is defined as engaging “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. “Recovery” is also defined in regulation, and means “improvement in the status of listed species to the point at which listing [under the ESA] is no longer appropriate....” *Id.* Courts have parsed these definitions carefully, with the Ninth Circuit making clear that “the jeopardy regulation requires [the] ... consider[ation of] both recovery and survival impacts.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008).

The proper interpretation of an agency’s Section 7(a)(2) obligations is further informed by the definition of the term “[d]estruction or adverse modification[,]” which “means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.” 50 C.F.R. § 402.02. An “action” refers to “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies....” *Id.* Reclamation’s continued operation of the Project is unquestionably an action subject to Section 7 of the ESA. *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999).

A federal agency undertaking an action is commonly known as the “action agency.” To assist the action agency, the ESA and its implementing regulations establish a thorough

interagency “consultation” process to facilitate compliance with the action agency’s obligations to avoid jeopardy and destruction or adverse modification of critical habitat. “Consultation” is another central concept of the ESA and has informal and formal components. 50 C.F.R. §§ 402.13 (informal), 402.14 (formal). The ESA does not mandate informal consultation, which “is an optional process that includes all discussions, correspondence, etc., ... designed to assist the Federal agency in determining whether formal consultation is required.” *Id.* at § 402.13. The ESA requires formal consultation for any action that may affect a listed species unless “the action is not likely to adversely affect listed species or critical habitat.” *Id.* at § 402.13(c).

To determine whether formal consultation is required, the action agency must prepare a “biological assessment” (“BA”), another ESA-defined term meaning the information assembled by the action agency identifying the listed species that may be affected by the proposed action and providing the action agency’s evaluation of the potential effects of the proposed action on those species. 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12. When a proposed action may adversely affect a listed species, the action agency must engage in formal consultation with the appropriate expert agency. 50 C.F.R. § 402.14(a)-(b). The “expert agency” is either USFWS or the National Marine Fisheries Service (“NMFS”) (or sometimes, as in the Klamath Basin, both), depending on the listed species at issue. The ESA assigns USFWS consultation responsibility in the case of freshwater fish, including the C’waam and Koptu, and terrestrial species, while NMFS has that responsibility in the case of marine species, including SONCC. 16 U.S.C. § 1532(15); 50 C.F.R. § 402.02.

As part of this formal consultation process, USFWS and/or NMFS must review the BA and apply its own expertise to assess both the direct “effects of the action” and the “cumulative effects” the action will have on listed species and their critical habitat. 50 C.F.R. § 402.14(g)(3)-

(4). This assessment is memorialized in a biological opinion (“BiOp”) issued by the expert agency. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h). A BA and BiOp must each incorporate, and be based on, the best scientific information available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

If the expert agency determines that the proposed action is likely to jeopardize or destroy or adversely modify the critical habitat of a listed species, it must propose one or more reasonable and prudent alternatives for the action agency to adopt to avoid those outcomes. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(2). The expert agency may also issue a no-jeopardy BiOp, which documents the expert agency’s determination that the action agency’s action is not likely to jeopardize a listed species or destroy or adversely modify its critical habitat. But while the issuance of a BiOp may demonstrate an action agency’s compliance with its procedural Section 7(a)(2) obligations, even the issuance of a no-jeopardy BiOp does not relieve the action agency of its substantive obligations to avoid jeopardy and the destruction or adverse modification of critical habitat in its implementation of the action. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

2. Reclamation’s Duty Not to Commit Unpermitted Take

Section 9 of the ESA bars the “take” of endangered species by any person, including federal agencies. 16 U.S.C. § 1538(a)(1). Again, there are multiple defined terms of art to flesh out this concept, starting with the statutory definition of “take” itself. “Take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” 16 U.S.C. § 1532(19). USFWS has defined “harm” within the meaning of “take” to include “an act which actually kills or injures wildlife... [including] significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including

breeding, feeding or sheltering.” 50 C.F.R. § 17.3. Harassment is defined as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.* USFWS has extended this take prohibition to C’waam and Koptu by virtue of listing them as endangered species. 53 Fed. Reg. 27130 (July 18, 1988). Reclamation’s operation of the Project unquestionably “takes” C’waam and Koptu. [2022 AR Index #120 at Bates BOR004265, BOR004317-18, BOR 4331-32]; [2022 AR Index #117 at Bates BOR003541-42, BOR003594, BOR003636, BOR003639-40]. Under the plain terms of the ESA, Reclamation’s actions are illegal. 16 U.S.C. § 1538(a)(1)(B) (“[I]t is unlawful for any person subject to the jurisdiction of the United States to ... take any species within the United States.”).

The ESA, however, provides a safety valve through which the appropriate expert agency may authorize a certain amount of take that occurs incidental to, and not as the direct object of, an action. 16 U.S.C. § 1536(o)(2). If the expert agency determines that a proposed action is not likely to cause jeopardy or to destroy or adversely modify critical habitat, but is still likely to cause take of individual members of a listed species, the agency must include in the BiOp issued at the conclusion of the consultation process an ITS (Incidental Take Statement) setting out conditions and limits on the manner and extent of incidental take that may occur without causing jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). Compliance with the terms and conditions of an ITS immunizes the action agency from liability for any incidental take that occurs during the course of the agency’s action. 16 U.S.C. 1536(o)(2); 16 U.S.C. § 1536(b)(4)(C). Further, “if the terms and conditions of the [ITS] are disregarded and a taking does occur, the action agency ... may be subject to potentially

severe civil and criminal penalties under Section 9.” *Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife, BLM*, 273 F.3d 1229, 1239 (9th Cir. 2001). This is because “if the terms of the ITS are violated, any taking (incidental or otherwise) is directly prohibited by section 9.” *S. Yuba River Citizens League v. Nat’l Marine Fisheries Serv.*, 629 F. Supp. 2d 1123, 1131 (E.D. Cal. 2009).

C. Reclamation’s ESA Consultation with USFWS and NMFS Regarding the Operation of the Project

Since 1989, Reclamation’s operation of the Project has been subject to a series of BiOps issued by the USFWS evaluating the effects of its operations on the C’waam and Koptu. *See* [2022 AR Index #120 at Bates BOR004119]. Since 1999, after the SONCC were listed as threatened under the ESA, (62 Fed.Reg. 24588, May 6, 1997), Reclamation has also consulted with NMFS—and NMFS has issued multiple BiOps—regarding the Project’s effects on species within its jurisdiction as well. *See id.*

As relevant here, on December 21, 2018, Reclamation sent a biological assessment (the “2018 BA”) to USFWS and NMFS, detailing Reclamation’s internal assessment of the effects on listed species of its proposed operation of the Project from April 1, 2019, to March 31, 2029. [2022 AR Index #120]. After reviewing the 2018 BA, USFWS and NMFS issued separate no-jeopardy BiOps on March 29, 2019 (the “2019 USFWS BiOp”² and the “2019 NMFS BiOp” respectively). These BiOps were intended to cover the operational period from April 1, 2019, to March 31, 2024.

In the fall of 2019, however, after discovering errors in the data set upon which the 2018 BA’s analysis of available SONCC habitat in the Klamath River was based, Reclamation again

² Reclamation did not include the 2019 USFWS BiOp as part of the Administrative Record it produced in this case. Given that the 2019 USFWS BiOp was very quickly superseded by the 2020 BiOp, and the 2020 BiOp is the operative USFWS document relevant to this action, the Tribes saw no need to move to supplement the record.

reinitiated formal consultations with the expert agencies. As a result of those errors, which had been carried over into the 2019 NMFS BiOp's analysis, Reclamation also soon found itself embroiled in litigation over the 2019 NMFS BiOp. *Yurok Tribe, et al. v. U.S. Bureau of Reclamation and National Marine Fisheries Service*, Case No. 3:19-cv-04405-WHO (N.D. Cal). On March 27, 2020, Reclamation entered into a settlement agreement with the Yurok Tribe, the Klamath Water Users Association, and NMFS centered around the promulgation of an Interim Operations Plan ("2020 IOP") that would modify aspects of the proposed action Reclamation and NMFS had evaluated in the 2018 BA and 2019 NMFS BiOp respectively. [2022 AR Index #118 at Bates BOR003688-89]. The 2018 BA and 2019 NMFS BiOp had identified a block of water Reclamation was supposed to release from UKL over the course of the spring/summer operating period to support salmon needs in the Klamath River. They called this the "Environmental Water Account" or "EWA." [2022 AR Index #119 at Bates BOR003742-43]. After the initial discovery of errors in the 2019 NMFS BiOp, Reclamation agreed to "enhance" the EWA in May and June with an additional volume of water. [2022 AR Index #118 at Bates BOR003690]. As part of the 2020 IOP, Reclamation agreed to add yet more water to the EWA ("EWA augmentation water") under certain hydrologic conditions, mainly by reallocating water that otherwise would have been available to Project irrigators or to support C'waam and Koptu life cycle functions in UKL. *Id.* at [Bates BOR003689-90].

Because these operational changes were intended to improve conditions for the SONCC, NMFS concluded that they did not change the no-jeopardy conclusion of the 2019 BiOp and that reinitiation of consultation was therefore not necessary ahead of Reclamation's implementation of the 2020 IOP. [2022 AR Index #116 at Bates BOR003043]. Because they imposed additional impacts on C'waam and Koptu outside the scope of those analyzed by USFWS in its 2019 BiOp,

however, Reclamation and USFWS initiated consultation regarding the 2020 2020 IOP on the same day that the settlement agreement was reached. [2022 AR Index #117 at Bates BOR003438]. That formal consultation concluded 14 days later, on April 10, 2020, when USFWS issued its 2020 BiOp to address Reclamation’s proposed plan for operating the Project under the 2020 IOP, which was intended to remain in place from April 1, 2020 to September 30, 2022. *Id.* at [Bates BOR003422].³

D. The 2020 BiOp’s Assumptions, Boundary Conditions and ITS

1. The Need to Maintain Certain UKL Elevations

The 2020 BiOp found that Reclamation’s plan to operate under the 2020 IOP would not cause jeopardy or destroy or adversely modify C’waam and Koptu critical habitat. *Id.* at [Bates BOR003624]. But USFWS cautioned that this no-jeopardy conclusion was predicated on several important assumptions. Notably, “[a] critical assumption of the effects analysis in this BiOp is that the hydrologic and water use conditions experienced in the [period of record⁴], which provided the basis for ... the [BiOp’s] effects analysis, will not change substantially over the term of this BiOp.” *Id.* at [Bates BOR003547]. Materially changed hydrological conditions would include the occurrence of “[h]igher frequencies of dry conditions than observed in the period of record that lead to lower lake levels generally[,]” and net inflows to UKL from its tributaries that deviate in magnitude, pattern, or sequence from those observed in the period of record. *Id.* at [Bates BOR003547-48].

³ Through an exchange of letters between Reclamation and USFWS dated September 30, 2022, the end date of that BiOp has now been extended to December 15, 2022.

⁴The “period of record” refers to the historical hydrologic data USFWS, NMFS, and Reclamation rely on to assess the potential effects of Reclamation’s Project operations on listed species under hydrologic conditions the agencies assume might reasonably be expected to occur during the period covered by the USFWS and NMFS BiOps. [2022 AR Index #117 at Bates BOR003546]. For UKL, that hydrologic data covers the period from October 1, 1980 to November 30, 2019. *Id.*

Consistent with its no-jeopardy conclusion, and as required by the ESA, USFWS issued Reclamation an ITS as part of the 2020 BiOp. The ITS shielded Reclamation from take liability so long as Reclamation remained in compliance with the ITS' terms and conditions. *Id.* at [Bates BOR003635-36]. To ground truth its assumptions, the 2020 BiOp identified several seasonally-based minimum elevation levels for UKL, denominated as “boundary conditions[,]” below which Reclamation should not allow UKL to drop. *Id.* at [Bates BOR003549-50]. USFWS did not expect these conditions to be violated during the 2020 BiOp's three-year term. *Id.* at [Bates BOR003549]. But if they were, USFWS would view that as evidence that “the effects of the proposed action [have gone] beyond the scope of what has been analyzed” in the 2020 BiOp. *Id.* Consequently, Term and Condition (“T&C”) 1c of the 2020 BiOp's ITS mandates that Reclamation obey the various boundary conditions in its management of UKL. *Id.* at [Bates BOR003650].

These boundary conditions include:

- Two consecutive years in which UKL surface elevations fall below 4142.0 feet in April or May;
- Any year in which UKL surface elevations fall below 4142.0 feet in April or May when EWA augmentation water is provided;
- UKL surface elevations in April or May that fall below the UKL elevations observed on the corresponding days in April or May of 2010;⁵
- UKL surface elevations below 4,138.0 feet at any time;
- More than one water year when UKL surface elevations drop below 4,138.25 ft in September; and
- Any year with UKL surface elevations less than 4,140.0 feet by July 15, or more than one year when surface elevations fall below 4,140.5 feet by July

⁵ Reclamation's management of the Project brought UKL into the 2010 spring/summer operating season at an extremely low level, and between the start of April and the end of May of that year, UKL never exceeded an elevation of 4,141.31 feet and dropped as low as 4,140.47 feet. *See* [2022 AR Index #22 at Bates BOR000577]. Recognizing the deleterious effects these low elevations had on C'waam and Koptu spawning and rearing, the 2020 BiOp therefore adopted the daily elevations observed in April and May of that year as a boundary condition to provide a secondary floor beneath the requirement of 4,142.0 feet in the event hydrologic conditions prevented UKL from ever reaching that elevation in a given spring.

15, or more than two years when surface elevations fall below 4,140.8 feet by July 15.

Id.

USFWS did not choose these boundary conditions arbitrarily. Rather each is tied to avoiding the adverse effects on C’waam and Koptu survival, life cycle functions, and critical habitat that stem from excessively low UKL elevations. USFWS determined that UKL elevations of at least 4,142.0 feet in April and May are vital. They ensure a set of shoreline gravel beds are covered with enough water for the C’waam who prefer to spawn there to be able to reach them and deposit eggs that will remain wet enough to survive. *See id.* at [Bates BOR003552-53].

After the adults lay their eggs, the baby C’waam and Koptu that are born (whether in UKL or upstream in its tributaries) first become larvae who drift into UKL, and then grow to become so-called “age-zero juveniles” over the course of their first several months of life. *Id.* at [Bates BOR003556]. These young fish have particular habitat needs. USFWS’ April/May and July 15 boundary conditions aim to ensure the consistent availability of at least a modicum of crucial nursery and rearing habitat in UKL for larval C’waam and Koptu. *Id.* at [Bates BOR003556-57]. USFWS’ July 15 and annual minimum elevation boundary conditions are also geared to provide core habitat for the age-zero juvenile C’waam and Koptu. *Id.* at [Bates BOR003558-59]. Additionally, water quality conditions are often very poor in UKL as the summer progresses, which can be stressful or lethal to young and old fish alike. *Id.* at [Bates BOR003613]. USFWS’ July 15 and annual minimum elevation boundary conditions also help ensure that the ever-aging adults have access to areas of better water quality without being at undue risk from being eaten by birds who tend to prey on fish in shallower water. *Id.* at [Bates BOR003561-62].

ITS T&C 1c also requires Reclamation to ascertain the cause of any progressive decrease in UKL elevations that might threaten its ability to comply with USFWS’ boundary conditions. Reclamation must also determine whether the cause(s) were contemplated as possibilities when it compiled the 2018 BA and when USFWS conducted its effects analysis for the 2020 BiOp. *Id.* at [Bates BOR003650]. T&C 1c also obligates Reclamation to “immediately consult with” USFWS about those causes, whatever they are, so Reclamation can “adaptively manage [for them] and take corrective actions.” *Id.*

2. Reclamation’s Water Allocation Formula

An important clarification is in order before turning to the substance of Reclamation’s water allocation formula. As noted in Section II.B above, Reclamation reinitiated formal consultation USFWS and NMFS in 2019 after discovering errors in the 2018 BA. In connection with that consultation, Reclamation prepared a new BA in 2020 (“2020 BA”), which it transmitted to the expert agencies. [2022 AR Index #118 at Bates BOR003688-89.] The Tribes included multiple citations to that 2020 BA in their complaint initiating this case, particularly when discussing Reclamation’s water allocation formula. Dkt. 1 at ¶¶ 3, 6, 40-44. In their answer to the complaint, the federal defendants aver that the 2018 BA rather than the 2020 BA is the operative document undergirding the USFWS’ 2020 BiOp, which was the controlling BiOp from that agency in 2022. Dkt. 11 at ¶ 3.

For two reasons, this is a distinction without a difference for purposes of the Tribes’ claims at issue in this suit. First, the relevant biological information and most of the water allocation formulas contained in the 2018 BA and the 2020 BA are identical. Second, the one relevant difference – how Reclamation is to calculate the spring/summer water supply available for Project irrigators each year – is a consequence of two changes Reclamation made to its

proposed action subsequent to its preparation of the 2018 BA. These changes related to the provision of EWA augmentation water under certain flow conditions and to its discovery of an error in the data it used for its planning model that it proposed to correct by subtracting a fixed volume (7,436 acre-feet (“AF”) of water to account for irrigation diversions at locations without dedicated water measurement devices (“ungaged diversions”)) from the amount it otherwise determines would be available for irrigation each year. Reclamation included the memos it sent to USFWS and NMFS regarding these issues as addenda to the 2018 BA it produced as part of its Administrative Record in this case. [2022 AR Index #120 at Bates BOR005088-5108]. And these adjustments to the allocation process were part of the proposed action USFWS evaluated in the 2020 BiOp. *See id.*; [2022 AR Index #117 at Bates BOR003463, BOR003473-75]. Consequently, the substance of the allegations in the Tribes’ complaint and the arguments made in this motion are unaffected by the complaint’s citations to the 2020 BA.

Turning to the water allocation formula itself, Reclamation manages the Project on a water year basis, each water year beginning on October 1 and concluding on September 30 of the following calendar year.⁶ [2022 AR Index #117 at Bates BOR003482]. The water year is divided into fall/winter and spring/summer operating periods. [*Id.* at Bates BOR003452-53]. Water conflicts in the Klamath Basin tend to arise during the spring/summer operating period, which has certainly been the case for the past three years. As set forth in the 2018 BA and analyzed in the 2020 BiOp, Reclamation’s method for allocating Klamath Basin water supplies among C’waam and Koptu, downriver salmon needs, and Project irrigators during the spring/summer operating period is mathematically complicated to calculate but is based on a straightforward series of formulas to divide the available water supply into three categories: (1) UKL Supply

⁶ For example, water year 2020 began on October 1, 2019, and concluded on September 30, 2020.

(essentially UKL’s seasonal water budget); (2) EWA (water released to the Klamath River for salmon needs); and (3) Project Supply (water available to Project irrigators). [2022 AR Index #120 at Bates BOR004156; 2022 AR Index #117 at Bates BOR003460].

The equation for calculating UKL Supply relies on three variables: (1) the amount of water physically in UKL at the end of February of a given year; (2) the amount of water the Natural Resources Conservation Service (“NRCS”) forecasts to flow into UKL from March 1 to September 30; and (3) a calculated end-of-September “UKL storage target.” The term “UKL storage target” is something of a misnomer, as it is not actually a management target to which Reclamation must operate; rather, it is a math equation. *See* [2022 AR Index #120 at Bates BOR004652-53]. Nonetheless, the UKL storage target figure is subtracted from variables (1) and (2) to arrive at UKL Supply volume. *See* [2022 AR Index #120 at Bates BOR004158-59, BOR004919-20; 2022; 2022 AR Index #117 at Bates BOR003460, BOR003462-63]. Stated another way:

$$\text{UKLSupply} = [\text{End of February UKL Storage}] + [50\% \text{ exceedance forecast UKL inflow for March through September}]^7 - [\text{End of September UKL Storage Target}].$$

[2022 AR Index #120 at Bates BOR004919]. Subtracting the UKL storage target prior to determining UKL Supply ensures a baseline amount of water in UKL for the C’waam and Koptu, as the bulk of UKL Supply is then essentially divvied up between EWA and Project Supply. [2022 AR Index #117 at Bates BOR003460].

Specifically, the EWA volume is calculated as a portion of UKL Supply, though it may never be set lower than 400,000 AF during each spring/summer period. *Id.* at [Bates

⁷ UKL Supply is recalculated at the start of April, May, and June. With each recalculation, the actual amount of observed UKL inflow in the preceding months is added to the end-of-February volume as applicable, and the NRCS forecasted period is reduced to the remaining months of the spring/summer period. EWA and Project Supply are similarly recalculated each month from the revised Project Supply figure. [2022 AR Index #117 at Bates BOR003462].

BOR003466]. Additionally, in even-numbered years, 7,000 AF is added to EWA for the Yurok Tribe's ceremonial Boat Dance, making the minimum EWA in those years 407,000 AF. *Id.* Project Supply is calculated by subtracting the EWA volume, and the Project's share of any EWA enhancement or augmentation, from the UKL Supply volume. *See* [2022 AR Index #118 at Bates BOR003689-90]. Finally, the 7,436 AF for ungaged diversions is subtracted too. [2022 AR Index #120 at Bates BOR004823-24, BOR004920-21, BOR005097-98, BOR005106-07]. Irrespective of the formula, however, Project Supply cannot exceed 350,000 AF per spring/summer period per year. *Id.* at [Bates BOR004823, BOR004920].

At core, this formula sets aside volumes of water for the C'waam and Koptu (by preemptively subtracting the UKL storage target from UKL Supply) and the salmon (EWA), while the Project Supply is what is left over. So Reclamation's own formula (consistent with the Endangered Species Act) requires the water needs of listed species to be addressed first. Only then can water be calculated as allocable to Project irrigators, and then only in compliance with the requirements of the 2020 BiOp's ITS (and those of the 2019 NMFS BiOp's ITS).

Another "key assumption" of the 2020 BiOp was that Reclamation would follow its water allocation formula. USFWS assumed that Reclamation would operate the Project "according to the description of the proposed action presented in [the 2018] BA[,]” which included the water allocation formula. [2022 AR Index #117 at Bates BOR003550]. In fact, USFWS expressly forbade Reclamation from “deviat[ing] from the formulaic approach” if the deviation “create[s] adverse effects greater than was [sic] analyzed in this BiOp, as is stated in the BA.” *Id.* at [Bates BOR003551]. These assumptions were “integral” to the 2020 BiOp's ITS. *Id.* at [Bates BOR003636].

III. Reclamation's Inability to Operate the Project Within the Terms of Interim Operations Plan in 2020 and 2021

The ink was barely dry on the 2020 BiOp when Reclamation violated one of USFWS' boundary conditions when it provided EWA augmentation water during late April and early May despite UKL elevation being below 4,142.0 feet. [2022 AR Index #94 at Bates BOR002235]. In 2021, Reclamation determined that the year's poor water supply would make implementing the IOP impossible and instead adopted a Temporary Operations Plan ("2021 TOP"), under which it again failed to comply with several of USFWS' boundary conditions. *See id.* at [Bates BOR002234-35]. The Tribes' *KT II* suit addresses the claims that arose from Reclamation's adoption and implementation of the 2021 TOP, and they are not separately advanced here. For present purposes, suffice it to say that 2020 and 2021 were both extremely poor water years that had devastating effects on the C'waam and Koptu. *See* [2022 AR Index #52 at Bates BOR001435].

IV. Reclamation Responds to Another Poor Water Year in 2022 By Proposing a TOP that Abandons Its Water Allocation Formula In Order to Provide Irrigation Water to Project Irrigators at the Direct Expense of the C'waam and Koptu

Water Year 2022 offered no respite for the Klamath Basin. As early as November 2, 2021, Reclamation's internal projections suggested a third consecutive year of intense drought would once again challenge Reclamation's ability to satisfy the 2020 BiOp's spring boundary conditions while making the minimum river releases called for under the 2019 NMFS BiOp. [2022 AR Index #111 at Bates BOR002813]. By the end of January 2022, cumulative UKL inflows for the water year to date were the fourth lowest in the 40-plus year period of record. [2022 AR Index #93 at Bates BOR002199]. In a presentation to Klamath Basin stakeholders, including multiple Klamath Basin tribes and Project irrigators, on February 8, 2022, Reclamation

shared a series of water forecasts throwing into stark relief the likelihood of a third consecutive spring of conflict, both between species needs and among species and irrigators, and the third consecutive year in which Reclamation would be unable to implement the 2020 IOP according to its terms. *See* [2022 AR Index #92 at Bates BOR002156-62]. Notably, that presentation included as an assumption underpinning the projections that Project Supply would be calculated “in accordance with current BiOp policy[.]” *Id.* at [Bates BOR002164].

Three consecutive dry years of this magnitude were far outside the scope of the hydrologic conditions contemplated in the 2020 BiOp. On February 25, 2022, Reclamation initiated discussions with USFWS and NMFS related to spring/summer water management in the event it could not comply with the terms and conditions of both services’ BiOps. [2022 AR Index #86 at Bates BOR001946].⁸ On March 1, Reclamation notified Project irrigators that any start of the irrigation season would be delayed at least until April 8 because of dry conditions. [2022 AR Index #83 at Bates BOR001934-36]. Reclamation explained that, due to the “critically dry hydrologic conditions in the Upper Klamath Basin,” Project water deliveries for spring/summer 2022 were likely to be highly constrained, and that the ultimate size of any allocation would be “dependent on hydrologic conditions between now and April 1.” *Id.* at [Bates BOR001934-35]

By the end of March, year-to-date UKL inflows were the lowest in the entire period of record, lagging even those of 2021. [2022 AR Index #66 at Bates BOR001654]. UKL’s elevation was below 4,141.0 feet, *id.* at [Bates BOR001658], and it was clear that Reclamation would not be able to satisfy the requirements of both the USFWS and NMFS BiOps. *Id.* at [Bates

⁸ The Klamath Tribes dispute that the “meet-and-confer” process described by Reclamation in regard to the development of either the 2021 or the 2022 TOP complies with the consultation requirement set forth in T&C 1c of the 2020 BiOp’s ITS, and instead maintain that it further evidences Reclamation’s operation of the Project outside the scope of that ITS. That claim is squarely presented in *KT II*, and is not independently advanced here.

BOR001663]. Indeed, the C'waam and Koptu were likely facing a second consecutive year with UKL elevations dropping below those observed in April and May 2010, a possibility USFWS had specifically rejected as implausible in the 2020 BiOp. [2022 AR Index #117 at Bates BOR003555] (“The probability that lake elevations less than those observed in 2010 occurs at least twice in the 3-year term [of the 2020 BiOp] is 0.1% and is therefore discountable.”).

April arrived with Reclamation still scrambling to develop an operations plan for spring/summer 2022. *See* [2022 AR Index #60 at Bates BOR001613-17]. Problematically, the operations plan under development threatened to subordinate C'waam and Koptu needs to those of Project irrigators. That is, Reclamation proposed to depart from its normal water allocation formula in setting the Project Supply under the 2022 TOP, something it had not done in either 2020 or 2021 despite the poor water conditions in those years.⁹

Under Reclamation's normal formula, 2022 Project Supply should have been set at zero AF as of April 1. This is because April 1 UKL Supply was 410,000 AF and the EWA was set to its minimum Boat Dance-year volume of 407,000 AF. [2022 AR Index #47 at Bates BOR001498]. 410,000 AF minus 407,000 AF is 3,000 AF and the further subtraction of the 7,436 AF of ungaged diversions, *see id.* at [Bates BOR001495], would make the Project Supply a negative number, hence zero AF. Instead, Reclamation decided to use the fact that it could not fully comply with the majority of the 2020 BiOp boundary conditions as license to propose taking *all* of the available UKL Supply that was not required to maintain an elevation above the 2022 TOP's season low target of 4,138.15 feet and allocate it to the Project. [2022 AR Index #57

⁹ In its 2021 Operations Plan, Reclamation stated an intention to deviate from the formula with a goal of delivering more water to the Project. In practice, however, it did not do so and instead managed for spring/summer 2021 using a volume of 33,000 AF as Project Supply, which is precisely the number the formula determined. [2022 AR Index #52 at Bates BOR001435].

at Bates BOR001529-30]. Reclamation estimated that this would allow for a Project Supply of approximately 62,000 AF. *Id.* at [Bates BOR001532].

Reclamation itself acknowledged that this was a “non-standard operations plan” devised with the objective of providing a meaningful Project water supply.” [2022 AR Index #121 at Bates BOR000122]. As it reminded Project irrigators in July, after receiving complaints about the 2022 TOP’s adoption of a minimum UKL elevation management target of 4,138.15 feet rather than the 2020 BiOp’s absolute minimum elevation of 4,138.0 feet:

Had the formulaic approach described in the [2020 BiOp] been implemented to determine the Project Supply, it would have been less than 1,000 acre-feet based on the April 1 Natural Resources Conservation Service forecast. Based on their June 1 forecast, the supply would have increased to 29,000 acre-feet. By contrast, by instituting the adaptive management approach announced by Reclamation on April 11, 2022 and described in the 2022 Annual Operations Plan (Plan), the initial Project Supply was estimated at approximately 50,000 acre-feet.

Id.

Moreover, while 4,138.15 feet is slightly above the 2020 BiOp’s water year minimum elevation boundary condition of 4,138.0 feet, this elevation was not selected to provide any biological benefits to the C’waam and Koptu. Rather it was envisioned as a management buffer for Reclamation to avoid going below elevation 4,138.0 in light of Reclamation’s concerns about its ability to shut off water to Project irrigators after it authorized them to turn on their access to the water. [2022 AR Index #60 at Bates BOR001613] (“I am concerned that we will have a situation where positive control will be lost and the result is a run on the available water leaving everyone short. The lake level seems like the only controllable and instantly verifiable data point.”). *See also* [2022 AR Index #121 at Bates BOR000123] (“As a safeguard against over drafting below the absolute minimum of 4138.0 described in the BiOp, the operational minimum water surface elevation of 4138.15 was established.”).

Furthermore, unlike the 2021 TOP, which delayed the start date for Project deliveries to May 15 in an effort to provide a modicum of added protection for C’waam and Koptu spawning and rearing needs, *see* [2022 AR Index #94 at Bates BOR002234], the 2022 TOP authorized Project deliveries to commence on April 15, *see* [2022 AR Index #60 at Bates BOR001616], smack in the middle of C’waam spawning season, thus exacerbating the risk of skipped spawning and egg desiccation, and accelerating the reduction in nursery and rearing habitat available to larval C’waam and Koptu in UKL. (Reclamation recognized that operating pursuant to the 2022 TOP would leave only 7% of such potential habitat available. [2022 AR Index #47 at Bates BOR001503].)

Reclamation’s proposal for managing any so-called “surplus” UKL inflow (that is, inflows to UKL in volumes above what was being projected by NRCS on April 1) during under the TOP further illustrates Reclamation’s decision to privilege Project irrigators ahead of C’waam and Koptu needs. Rather than dedicating any unexpected inflows to shore up UKL elevations to reduce the gap between actual conditions and the 2020 BiOp’s boundary conditions, Reclamation proposed to split the “surplus” equally between UKL and Project Supply. [2022 AR Index #57 at Bates BOR001533]. Moreover, while Reclamation proposed to reduce Project allocations if actual inflows underperformed projections, it also acknowledged that curtailment of Project diversion could be “insufficient to ensure a minimum UKL elevation of 4,138.15” if hydrologic conditions were bad enough. *Id.* In such case, Reclamation proposed that it “would confer with NMFS to determine if a temporary reduction in releases from UKL could be instituted.” *Id.* This seems an almost insulting offer where NMFS had already made clear that it was open to no such change. [2022 AR Index #60 at Bates BOR001615].

V. USFWS Accedes to Reclamation’s Proposed 2022 TOP Despite Its Privileging Project Irrigators Over C’waam and Koptu

Reclamation transmitted its proposed 2022 operating procedures (which are materially identical to what was adopted in the 2022 TOP) to USFWS and NMFS for review on April 9, 2022. [2022 AR Index #56 (NMFS); Index #57 (USFWS)]. NMFS responded on April 10, 2022, indicating that it found the 2022 TOP to be consistent with and within the effects analysis of the 2019 NMFS BiOp. [2022 AR Index #56 at Bates BOR001527]. USFWS was less copacetic in its response memo of April 11, 2022. [2022 AR Index #52 at Bates BOR001434]. There, USFWS declared itself to be “deeply concerned about the impacts that missing” the April/May and July 15 UKL elevations called for by the 2020 BiOp will have on C’waam and Koptu, a failure which “will greatly reduce larval sucker rearing habitat in UKL this year....” *Id.* at [Bates BOR001435]. Particularly on the heels of last year, when the C’waam and Koptu:

experienced suboptimal conditions due to drought conditions . . . they, and the Klamath Tribes for whom these fish are sacred, will feel those impacts more acutely this year. We cannot rely upon improved hydrology next year, and the dire condition of sucker populations in UKL means that substantive steps must be taken in the future to provide for the survival and recovery of these fish.

Id. USFWS therefore urged Reclamation “to take any available steps to maintain UKL elevation as high as possible through July 15.” *Id.*

Nonetheless, and without even broaching the fact that Reclamation’s authorization of an improperly large Project allocation with a mid-April start date would exacerbate the distance between the 2020 BiOp spring boundary conditions and actual 2022 UKL elevations, USFWS averred that Reclamation had “made a good faith effort to address the ongoing drought and the likelihood that BiOp boundary conditions will not be fully met for critically endangered [C’waam and Koptu] in [UKL].” [2022 AR Index #52 at Bates BOR001434] Similarly, USFWS ignored the exacerbating effects of the volume and timing of the 2022 TOP’s Project allocation

when it stated that “[t]he hydrologic conditions observed this year represent an ongoing natural disaster that is beyond the control of Reclamation.” *Id.* And nowhere in its response did USFWS address the continued viability of the 2020 BiOp or the validity of its ITS in light of hydrologic conditions having fallen far outside the scope of the 2020 BiOp’s effects analysis or in the face of Reclamation’s deliberate disregard of the water allocation formula upon which that analysis was also predicated.

Rather, USFWS simply acquiesced to the 2022 TOP. In fact, USFWS described itself as “encouraged” by Reclamation’s plan to “share 50% of any surplus volume above current projections with [C’waam and Koptu] by holding it in UKL,” and expressed its general desire to “work[] with Reclamation . . . to realize improved resource management to benefit [C’waam and Koptu], as well as meet the needs of salmon and agriculture.” *Id.* Reclamation construed this response as USFWS’ endorsement of Reclamation’s internal assessment that “the 2022 TOP meets Reclamation’s ESA responsibility not to jeopardize federally-listed species or destroy or cause adverse modification to their designated critical habitat.” [2022 AR Index #47 at Bates BOR001506-07].

VI. Reclamation’s Decision Not to Prepare an EA or EIS for the 2022 TOP

“NEPA imposes procedural requirements designed to force agencies to take a hard look at environmental consequences of their proposed actions.” *Bark v. United States Forest Service*, 958 F.3d 865, 868 (9th Cir. 2020) (cleaned up). Under NEPA, federal agencies must publish an EIS (Environmental Impact Statement) for any proposed action that will “significantly affect[] the quality of the human environment.” 42 U.S.C. § 4332(C). An agency may first prepare an EA (Environmental Assessment), however, “to determine whether the environmental impact is significant enough to warrant preparation of an EIS.” *Mountain Communities for Fire Safety v.*

Elliott, 25 F.4th 667, 675 (9th Cir. 2022) (internal quotation omitted) An EA must “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact.” 40 C.F.R. § 1508.9(a)(1).

An EA allows the action agency to make a reasoned determination of whether an EIS is necessary. 43 C.F.R. § 46.300. If the action agency determines that an EIS is not required and intends to proceed with the proposed action, it must publish a Finding of No Significant Impact (“FONSI”). 43 C.F.R. § 46.325. It may, however, utilize an existing NEPA analysis for a new proposed action, so long as it first “determines, with appropriate supporting documentation, that [the existing NEPA analysis] adequately assesses the environmental effects of the proposed action and reasonable alternatives.” 43 C.F.R. § 46.120(c). Specifically, Reclamation must evaluate “whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.” *Id.*

Reclamation’s operation of the Project pursuant to the 2022 TOP is indisputably a NEPA-triggering action. Reclamation, however, did not prepare an EA or publish a FONSI for its 2022 TOP. Instead, it issued a Determination of NEPA Adequacy (“DNA”). [2022 AR Index #53]. The DNA concluded that the NEPA analysis completed for the 2020 IOP and 2021 TOP (both EA/FONSIs) adequately assessed the environmental effects of the 2022 TOP as well and that Reclamation therefore did not need to complete a new NEPA analysis for the 2022 TOP. *Id.* at [Bates BOR001411].

ARGUMENT

I. Reclamation’s Adoption and Implementation of the 2022 TOP Violates Section 7 of the ESA By Jeopardizing the C’waam and Koptu and Adversely Modifying Their Critical Habitat Through the Creation of Materially Poorer Spawning and Rearing Conditions in Favor of an Improper Project Allocation

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The law reflects “a conscious decision by Congress to give endangered species priority over the primary missions of federal agencies.” *Id.* at 185 (internal quotations omitted). “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184. The obligation to avoid jeopardizing a listed species or destroying or adversely modifying its critical habitat, 16 U.S.C. §1536(a)(2), is the “heart” of the ESA. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011).

When Reclamation consulted with USFWS in 2020 on its operation of the Project, USFWS determined that the 2020 IOP would not jeopardize the C’waam or Koptu or destroy or adversely modify their critical habitat. [2022 AR Index #117 at Bates BOR003631-32 (jeopardy) BOR003635 (adverse modification)]. But these conclusions were based in at least part on the fact that the action being consulted on “include[ed] higher seasonal UKL elevations ... and greater certainty that expected elevations will be met compared to previous proposed actions.” *Id.* at [Bates BOR003632]. These “[h]igher seasonal UKL elevations are important to provide habitat for larval, juvenile and adult [C’waam and Koptu].” *Id.* This is why USFWS established the boundary conditions. *Id.* at [Bates BOR003650].

Recent Klamath Basin hydrologic conditions largely beyond Reclamation’s control—particularly three successive years of punishing drought far outside the scope of conditions contemplated by Reclamation’s 2018 BA or the 2020 BiOp—have compromised Reclamation’s ability to comply in 2022 with the boundary conditions USFWS set forth in the 2020 BiOp as

necessary to protect the C’waam and Koptu.¹⁰ But Reclamation has taken this difficult situation and volitionally made it worse. Had it adhered to the allocation formula it set out for itself in the 2018 BA and was a key aspect of its consultation with USFWS that led to the issuance of the 2020 BiOp, Reclamation could have managed the available water in 2022 with the goal of coming as close as it could to meeting the 2020 BiOp’s boundary conditions—even if it could not fully satisfy them—in order to ameliorate the adverse consequences such low water levels would have on the C’waam and Koptu.

Instead, vitiating one of the fundamental assumptions upon which the 2020 BiOp was predicated—that “Reclamation will operate the Klamath Project . . . according to the description of the proposed action presented in their BA” [2022 AR Index #117 at Bates BOR003550]—Reclamation has instead chosen to exacerbate the situation with the 2022 TOP by departing from its water allocation formula to confer water on Project irrigators that could otherwise have been available to stanch the shortfalls in available spawning and rearing habitat in UKL for the C’waam and Koptu. This is a very different situation than Reclamation allocating limited water supplies simply among the competing needs of listed species. *Cf. Klamath Tribes v. United States Bureau of Reclamation*, 537 F.Supp.3d 1183, 1192 (D. Or. 2021) (“The Bureau has taken proactive steps to keep Upper Klamath Lake levels as high as possible while complying with their obligations under the NMFS 2019 BiOp and the Interim Operative Plan, including temporarily suspending Project deliveries and diversions.”).¹¹

¹⁰ Shortages in water supply unquestionably have driven this crisis. But the manner in which Reclamation has gone about allocating water as between the needs of listed species in the Basin in prior years has worsened the impact of the drought on the C’waam and Koptu. The Klamath Tribes maintain that Reclamation’s prioritization of SONCC needs ahead of those of the C’waam and Koptu inverts the requirements of the ESA. But that claim is squarely presented in *KT II*, and is not independently advanced here.

¹¹ The question of whether Reclamation’s allocation of water as among the needs of different listed species comports with the ESA remains a live issue in that case.

The 2020 BiOp clearly articulated the adverse effects that would befall the C’waam and Koptu if the boundary conditions were not maintained. At the few shoreline springs where C’waam still spawn in UKL, available spawning habitat decreases sharply as water levels drop below an elevation of 4,142.0 feet. [2022 AR Index #117 at Bates BOR003553]. Moreover, 2022 was the third consecutive year in which shoreline spawning was disrupted by low and decreasing water levels. [2022 AR Index #22 at BOR000578]. The severity of the cumulative effects of repeated disruptions of spawning of this tenacious but fading group of C’waam and the dewatering of their spawning habitat—a possibility that was expressly dismissed in the 2020 BiOp, [2022 AR Index #117 at BOR003555]—have to date been analyzed by neither USFWS nor Reclamation. But in its communication with Reclamation regarding the proposed TOP, USFWS made clear that there would be “biological impacts.” [2022 AR Index #52 at Bates BOR001435]. Indeed, spawning detection data showed dramatic decreases in the number of C’waam attempting to reach their usual shoreline sites in 2021 and 2022. [2022 AR Index #33 and Bates BOR000982].

Biological impacts would also be felt through the loss of in-lake rearing habitat, which USFWS recognized would be “greatly reduce[d]” under the 2022 TOP. [2022 AR Index #52 at Bates BOR001435]. Decreasing water levels dramatically shrink the percentage of available rearing habitat necessary for the survival of larval C’waam and Koptu. [2022 AR Index #117 at Bates BOR003557-58.] The 2020 BiOp illustrates how more water in UKL directly creates more rearing habitat. *Id.* at [Bates BOR003557]. By authorizing the diversion of an over-inflated Project Supply, with a mid-April start date, the 2022 TOP directly chose to prioritize giving water to the Project instead of doing everything possible to increase the odds of survival of any members of the 2022 year-class of baby C’waam and Koptu.

These fish, and the Tribes who rely on them, cannot afford the loss of even a single year's spawning opportunity given the advanced age of the surviving C'waam and Koptu adults, the possibility that they will lose the ability to successfully spawn even before they die, the diminishing numbers of both populations, and the uncertainty of future water conditions in the Klamath Basin. *See* [2022 AR Index #117 at BOR003509-13]. In these circumstances, the elimination of a single year's opportunity for young fish to survive long enough to replenish the dwindling reproductive population of the species plainly "reduce[s] 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. It is difficult to imagine a starker example of jeopardy.

Furthermore, given the vital role of UKL and the habitat it affords in the continued survival of the C'waam and Koptu, Reclamation's decision to authorize an improper Project Supply at the expense of supporting UKL elevations in the 2022 TOP made "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." *Id.* Indeed, by mid-July, Reclamation had delivered roughly 60,000 AF of water to Project irrigators, [2022 AR Index #121 at Bates BOR000122-23], water which otherwise would have been available to provide additional increments of emergent vegetative wetland habitat closer to what the boundary conditions mandated in UKL for this year's class of baby C'waam and Koptu. *See* [2022 AR Index #117 at Bates BOR003556-59]. This is adverse modification.

Irrespective of USFWS' failure to modify or rescind the 2020 BiOp and associated ITS in light of the effects of the 2022 TOP's Project allocation on C'waam and Koptu (an issue addressed further below), "[c]onsulting with [USFWS] . . . does not satisfy an agency's duty

under the Endangered Species Act. An agency cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species[.]” *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1993) (cleaned up). Rather, it retains a substantive obligation to do so.

Cottonwood Environmental Law Center v. U.S. Forest Service, 789 F.3d 1075, 1087 (9th Cir. 2015). By choosing to depart in the 2022 TOP from the water allocation formula set forth in the 2018 BA and consulted on in the 2020 BiOp to make an improperly large Project allocation, and by authorizing an early Project start date that intensified the impacts that the loss of that water from UKL would have on vital C’waam and Koptu life cycle functions, Reclamation has caused both jeopardy and adverse modification directly in violation of its substantive obligations under Section 7(a)(2), 16 U.S.C. § 1536(a)(2). The Tribes are entitled to a declaration to this effect.

II. Reclamation Has Committed and Continues to Commit Unpermitted Take of C’waam and Koptu in Violation of ESA Section 9 By Failing to Comply with the Terms and Conditions of the 2020 BiOp’s ITS in its Operation of the Project Under the 2022 TOP

Section 9 of the ESA prohibits Reclamation from taking a listed species unless the taking is within the safe harbor provision of an ITS. 16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1536(a)(2). USFWS issued Reclamation an ITS for its operation of the Project as part of the 2020 BiOp. 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 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.”).

The ITS USFWS issued as part of the 2020 BiOp imposed both substantive and procedural obligations on Reclamation. These “nondiscretionary” terms and conditions include T&C 1c, which requires Reclamation to: (1) “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”; (2) operate UKL consistent with the boundary conditions; and (3) “adaptively manage and take corrective actions[,]” including through “immediate[] consult[ation] with [USFWS,]” in the event that “a progressive decrease in [UKL] elevations that is projected to fall outside” the boundary conditions “is identified.” [2022 AR Index #117 at Bates BOR003650]. Reclamation’s violation of T&C 1c in 2022 has caused it to forfeit the ITS’ protection from take liability.¹²

Plainly, Reclamation has not operated UKL consistent with the 2020 BiOp’s boundary conditions, and in fact has not done so for all three of the years it has attempted to operate under the 2020 IOP framework. *See* [2022 AR Index #94 at Bates BOR002235]. Most notably, Reclamation failed to maintain UKL above elevation 4,142.0 feet between the end of March and the end of May in both 2020 and 2021, *id.*, and the 2022 TOP specifically disclaims both Reclamation’s ability and intent to do so in 2022. [2022 AR Index #54 at Bates BOR001403 (“Reclamation has determined that hydrologic conditions are currently preventing and will

¹² The Tribes also maintain that Reclamation committed unpermitted take in its adoption and implementation of the 2021 TOP. That is another claim squarely presented in the Tribes’ companion suit regarding Reclamation’s 2021 water management decisions, *KT II*, and is not independently advanced here, though some of the same facts are relevant to both actions.

continue to prevent Reclamation from operating the Project consistent with the conditions anticipated” by the 2020 BiOp)]. This means that UKL elevations were managed below an elevation of 4,142.0 feet in three consecutive years. The 2020 BiOp explicitly states that such a scenario “would fall outside the scope of this BiOp ... and therefore this incidental take statement.” [2022 AR Index #117 at Bates BOR003644]. Reclamation has thus lost the right to shelter under the ITS. *See Bennett v. Spear*, 520 U.S. 154, 170 (1997).¹³

The ITS did include a mechanism for Reclamation to continue to be shielded from take liability protection, as the 2020 BiOp contemplated the possibility of hydrologic conditions occurring that would render specific compliance impossible in individual situations. Thus USFWS’ inclusion of the third component of T&C 1c. But Reclamation has failed to properly abide by it. While Reclamation describes the 2022 TOP as its attempt to “adaptively manage operations” in light of the hydrologic conditions, [2022 AR Index #54 at Bates BOR001403], there is no plausible justification for how its decision to depart from the standard water allocation formula to push out an enlarged Project allocation with a mid-April start date constitutes “corrective actions.”

Reclamation attempts to elide this failure by glossing the 2022 TOP as its effort “to address immediate and temporary competing needs *including* the needs of all threatened and endangered species, in a reasonable and balanced manner informed by real-time hydrological and biological data.” *Id.* at [Bates BOR001403-04 (emphasis added)]. But this gives the game away—Reclamation is trying to balance the needs of the C’waam and Koptu on one hand against the needs of Project

¹³ To the extent the court accepts the Tribes’ Section 9 argument in *KT II*, that alone is dispositive of Reclamation’s inability to avoid take liability under the 2020 BiOp’s ITS, making the take Reclamation indisputably committed in its operation of the Project in 2022 violative of Section 9 for that reason alone. The argument presented here, however, is focused on Reclamation’s actions in devising and implementing the 2022 TOP and does not require an affirmative finding of liability in the 2021 suit to succeed.

irrigators on the other,¹⁴ and in the 2022 TOP has done so in a way that in fact prioritizes the provision of water to the Project ahead of the needs of the C’waam and Koptu. This is precisely what the ESA proscribes, instead mandating that the needs of the endangered species be given the highest priority, whatever the price. *Tenn. Valley Auth.*, 437 U.S. at 184 (emphasis added). Indeed, the Ninth Circuit has specifically held that the ESA’s prioritization of species needs over those of Project irrigators applies to the Klamath Project. *Klamath Water Users Protective Ass’n*, 204 F.3d at 1213. The most USFWS can say about Reclamation’s interpretation of its actions in the 2022 TOP is that Reclamation “made a good faith effort....” [2022 AR Index #52 at Bates BOR001434]. The ESA, and the precarity of the very existence of the C’waam and Koptu on the face of this planet, demand better. The Tribes are therefore entitled to a declaration that Reclamation has violated ESA Section 9, 16 U.S.C. § 1538, by committing take in its operation of the Project under the 2022 TOP without being entitled to rely on the protection of an ITS.

III. USFWS’ Failure to Rescind or Modify the 2020 BiOp’s ITS in Response to Reclamation’s 2022 TOP Was Arbitrary and Capricious

Under the ESA, both the action agency and the expert agency retain independent obligations to reinitiate consultation if new information emerges showing effects to a listed species that had not been considered in a BiOp or if the “action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion[.]” 50 C.F.R. §§ 402.16(a)(2) and (3). The hydrologic conditions the Klamath Basin has faced in 2020-2022, which Reclamation has described as “unprecedented[.]” [2022 AR Index #57 at Bates BOR001529], and “unique and challenging[.]” [2022 AR Index #121 at Bates BOR000122], and which USFWS has described as “exceptional and unprecedented[.]” [2022 AR

¹⁴ As NMFS acknowledged in its April 10 response to Reclamation, the 2022 TOP met Klamath River species needs according to the terms of the 2019 NMFS BiOp. [2022 AR Index #55 at Bates BOR001527].

Index #52 at Bates BOR001434], are far outside anything contemplated in the 2020 BiOp's effects analysis. Moreover, Reclamation's specific decision to depart from its water allocation formula in the 2022 TOP is indisputably an action that was not considered in the 2020 BiOp.

Nonetheless, USFWS took no steps to reinstate consultation or otherwise modify the 2020 BiOp and ITS in light of these changed conditions. This situation stands in stark contrast to 2020, when Reclamation proposed to modify the action evaluated in the 2018 BA (and USFWS' 2019 BiOp) by adopting the 2020 IOP. Then, Reclamation immediately requested formal consultation with USFWS, and the agencies coordinated on the issuance of a new BiOp and ITS in a span of 14 days. [2022 AR Index #117 at Bates BOR003438]. That 2020 BiOp was prepared and issued despite the fact that Reclamation, USFWS, and NMFS were simultaneously engaged in ongoing consultation about Project operations more generally. *Id.*; [2022 AR Index #118 at Bates BOR003699].

“A decision is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *O’Keeffe’s, Inc. v. U.S. Consumer Product Safety Comm’n*, 92 F.3d 940, 942 (9th Cir. 1996) (internal quotations omitted). It is also arbitrary and capricious if an agency neglects to “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotations omitted). Further, “[u]nexplained inconsistency between agency actions is a reason for holding an interpretation to be an arbitrary and capricious change.”

Organized Village of Kake v. U.S. Dept. of Agriculture, 795 F.3d 956, 966 (9th Cir. 2015) (cleaned up).

USFWS' failure to reinitiate consultation and rescind or modify the 2020 BiOp's ITS in response to Reclamation's proposal of the 2022 TOP was arbitrary and capricious. Despite its independent obligation to avoid jeopardy to the C'waam and Koptu and the destruction or adverse modification of their critical habitat, 16 U.S.C. § 1536(a)(2), USFWS' response to Reclamation's proposal of the 2022 TOP was essentially to wring its hands. USFWS acknowledged that "[t]he hydrologic conditions observed this year represent an ongoing natural disaster that is beyond the control of Reclamation[.]" and that "[w]hile we are deeply concerned about the impacts that missing [the minimum UKL elevation conditions of the 2020 BiOp] will have on [the C'waam and Koptu] . . . , we understand that historically poor hydrology is the root cause for invoking the meet and confer process." [2022 AR Index #52 at Bates BOR001434].¹⁵

But USFWS' response memo failed to address the fact that Reclamation proposed to make a Project allocation in direct contravention of its water allocation formula. The response memo also failed to address the potential cumulative impacts the diversion of this water would have on the C'waam and Koptu on top of the effects of 2022's already poor hydrology. Additionally, the response memo failed to address the cumulative impacts on the C'waam and Koptu that the 2022 TOP would have when combined with the prior two years of poor hydrology, conditions which individually and collectively fell outside the scope of the effects analysis of the 2020 BiOp. Rather, after identifying the devastating impacts the 2022 Ops Plan would have on C'waam and Koptu by virtue of missing the spring and mid-summer boundary conditions, USFWS essentially closed its

¹⁵ A paradigmatic difference between a meet-and-confer process, which lacks independent legal existence under the ESA, and true formal consultation is that formal consultation must result in the issuance of a BiOp. 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(g)-(h).

eyes on 2022 and decided to look instead to some vague, hoped-for future:

We cannot rely upon improved hydrology next year, and the dire condition of sucker populations in UKL means that substantive steps must be taken in the future to provide for the survival and recovery of these fish. We look forward to working with Reclamation to take advantage of ongoing reinitiated consultation on Project operations and the impending expiration of [USFWS's] BiOp on September 30, 2022, to realize improved resource management to benefit suckers, as well as meet the needs of salmon and agriculture.

Id. at [Bates BOR001435].

USFWS' response represents an acute failure to consider important aspects of the problem. It articulates no rational connection between the facts found and the choice not to rescind or modify the 2020 BiOp and ITS or reinitiate formal consultation specifically regarding Reclamation's 2022 Project operations. It does "not properly account for [the] short-term, localized effects" that Reclamation's operations under the 2022 TOP would have on the C'waam and Koptu. *Bark v. U.S. Bureau of Land Management*, 643 F.Supp.2d 1214, 1234 (D. Or. 2009). It also fails to provide any reasoning whatsoever for USFWS' change in position from how it acted when Reclamation proposed the 2020 IOP (formal consultation and a new BiOp and ITS) and when Reclamation proposed the 2022 TOP (expressions of concern). It is therefore arbitrary and capricious, and the Klamath Tribes are entitled to a declaration to that effect.

IV. Reclamation's Failure to Prepare a New NEPA Analysis for the 2022 TOP Was Arbitrary and Capricious

The APA governs judicial review of a federal agency's compliance with its NEPA obligations. Reclamation chose to rely on pre-existing NEPA documents (namely EA/FONSIIs prepared in connection with its 2020 and 2021 Project operations plan) instead of preparing a new NEPA analysis in connection with its adoption of the 2022 TOP. [2022 AR Index #53 at Bates BOR001411]. As noted above, federal regulations permit this approach so long as the

agency determines that the prior documents “adequately assess[e] the environmental effects of the [new] proposed action. . . .” 43 C.F.R. § 46.120(c). Reclamation purported to make such a determination in connection with the 2022 TOP in the DNA it prepared on April 11, 2022, in conjunction with its adoption of the 2022 TOP.

In justifying this conclusion, Reclamation asserted that the 2022 TOP “includes foundational features of and is essentially similar to components discussed in the 2020 and 2021 [NEPA analyses] alternatives.” [2022 AR Index #53 at Bates BOR001416]. It found that the those prior NEPA analyses “took into account similar Klamath River and UKL management components to calculate and manage Project Supply during the spring/summer period.” *Id.* Additionally, Reclamation stated that the 2022 Ops Plan utilized the modeling and water allocation formula “similar to the [2020 and 2021 operations plans] . . . to develop reasonable projections for Project Supply allocations” *Id.* at [Bates BOR001417]. And it claimed that “no new information or change in environmental or legal circumstances has occurred since 2020, [and] impacts associated with implementing the 2022 PA have been found to fall within the bounds of analysis in the 2020 and 2021 EAs and respective FONSI.” *Id.* at [Bates BOR001418]. These statements do not hold up to scrutiny.

Reclamation prepared the 2020 EA in conjunction with Reclamation’s adoption of the 2020 IOP. That EA compared the effects of two alternatives, a “no action” alternative (by which Reclamation meant continuing to operate according to the proposed action set forth in the 2018 BA and evaluated in the 2019 NMFS BiOp and 2019 USFWS BiOp—[2022 AR Index #122 at Bates BOR003174, 003194]) and the proposed alternative (by which Reclamation meant operating the Project under the 2020 IOP—*see id.* at [Bates BOR003174]). Both alternatives assume Reclamation will follow its formulaic water allocation formula, which varies between the

alternatives only to the extent that the proposed alternative includes the EWA augmentation water identified in the 2020 IOP. *See id.* at [Bates BOR003186-89].

Because of these assumptions, the 2020 EA cannot be construed to have evaluated an operations plan that departed from the water allocation formula underpinning the 2020 BiOp in favor of providing a larger Project allocation. Moreover, both alternatives utilize the same period of record hydrologic data relied on in the 2020 BiOp, and the range and effects of hydrologic conditions that were projected to be experienced under either alternative were both determined by using the same Klamath Basin Planning Model. *Id.* at [Bates BOR003184]. Therefore, the 2020 EA cannot reasonably be construed as having evaluated the environmental effects of the actual hydrologic conditions experienced in the 2020-2022 period, which fell outside the scope of the 2020 BiOp's effects analysis.

Reclamation's inability to operate pursuant to the 2020 IOP in 2021 and its pivot to the 2021 TOP necessitated the preparation of a new NEPA analysis, the 2021 Supplemental Environmental Assessment re. Implementation of Klamath Project Temporary Operating Procedures April – September 2021, Klamath Project, Oregon/California, CGB-EA-2021-024 (April 14, 2021) ("SEA"). In the SEA, Reclamation again analyzed two alternatives. One was a "no action" alternative of operating again under the 2020 IOP, with Project Supply calculated pursuant to the regular water allocation formula with a mid-April start date for irrigation. [2022 AR Index#123 at Bates BOR003059]. The "proposed alternative" was Reclamation operating the Project under the 2021 TOP. *Id.* That operations plan did purport to depart from the regular water allocation formula. But it proposed to do so in a manner that was *more* rather than *less* protective of lakeshore C'waam spawning. That is, the contemplated departure was to calculate no specific volume of Project Supply and instead to adaptively manage in real time based on subsequent

inflows with a possible Project start date no earlier than May 15, 2021. *Id.* at [Bates BOR003081-82]. As Reclamation explained, “[u]nder the Proposed Action Alternative, the delay in the start of the irrigation season, as compared to the No Action Alternative, allows for UKL to continue to gain elevation, to the extent hydrologic conditions allow, during the spring months.” *Id.* at [Bates BOR003082].¹⁶ Thus the SEA also did not analyze the environmental effects of an operations plan that included a deviation from the regular water allocation formula to *increase* Project Supply with a mid-April start date. Nor did it account for the cumulative effects of consecutive years of “unprecedented” drought.

Neither the 2020 nor 2021 NEPA analysis considered the possibility that Reclamation would deviate from its water allocation formula to significantly increase the Project’s share of the limited available water *and* authorize such an early start to irrigation diversions, all under hydrologic conditions already outside the scope of the effects analysis of the 2020 BiOp. The 2022 TOP therefore resulted in effects to the human environment that were not adequately assessed in Reclamation’s prior NEPA compliance documents. Reclamation’s contrary finding in the DNA was arbitrary and capricious, an abuse of discretion, and not in accordance with NEPA requirements. Accordingly, the Klamath Tribes are entitled to a declaration that the DNA is inadequate to satisfy Reclamation’s NEPA obligations in regard to its adoption of the 2022 TOP.

CONCLUSION

Reclamation took a hard situation and made it significantly worse for the C’waam and Koptu by rigging the 2022 TOP to provide extra water to Project irrigators, in violation of the

¹⁶ It also bears noting that due to 2021’s disastrous hydrology and as a consequence of the Klamath Drainage District (“KDD”) diverting water contrary to Reclamation’s directives, Reclamation ultimately allowed no other diversions of Project Supply in 2021 and utilized the formulaic Project Supply volume of 33,000 AF in accounting for the water KDD took.

ESA. USFWS arbitrarily and capriciously abetted Reclamation in this effort. And Reclamation shirked its obligation under NEPA to take a hard look at the environmental impacts of its actions when it failed to prepare a proper environmental analysis in connection with its adoption of the 2022 TOP.

For all the reasons set forth above, the Klamath Tribes are entitled to their requested relief.

Respectfully submitted this 18th day of November, 2022.

ROSETTE, LLP

/s/Jay D. Weiner

Jay D. Weiner (OSB No. 182247)

Rosette, LLP

1415 L St. Suite 450

Sacramento, California 95814

Telephone: (916) 353-1084

Facsimile: (916) 353-1085

jweiner@rosettela.com

Attorney for Plaintiff

The Klamath Tribes

CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 14,470 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel. Counsel for all parties in this matter stipulated to a maximum of 15,000 words, per the Unopposed Motion for Word Count Enlargement Regarding Plaintiff's Motion for Summary Judgment, which was filed on November 18, 2022.

Respectfully submitted this 18th day of November, 2022.

ROSETTE, LLP

/s/Jay D. Weiner

Jay D. Weiner (OSB No. 182247)

Rosette, LLP

1415 L St. Suite 450

Sacramento, California 95814

Telephone: (916) 353-1084

Facsimile: (916) 353-1085

jweiner@rosettela.com

Attorney for Plaintiff

The Klamath Tribes

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Klamath Tribes' Motion for Summary Judgment and Memorandum of Law in Support was e-filed on November 18, 2022, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

Dated: November 18, 2022

ROSETTE, LLP

/s/Jay D. Weiner

Jay D. Weiner (OSB No. 182247)

Rosette, LLP

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Sacramento, California 95814

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Facsimile: (916) 353-1085

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Attorney for Plaintiff

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