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KLAMATH WATER USERS ASSOCIATION

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 **KLAMATH WATER USERS ASSOCIATION'S RESPONSE IN OPPOSITION TO THE KLAMATH TRIBES' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF KWUA'S CROSS-MOTION FOR SUMMARY JUDGMENT** Magistrate Judge: Honorable Mark D. Clarke

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MOTION

Defendant-Intervenor Klamath Water Users Association (KWUA) moves that this Court issue summary judgment in its favor and dismiss Plaintiff Klamath Tribes' complaints in Case No. 1:21-cv-00556-CL and Case No. 1:22-cv-00680-CL. The Court lacks jurisdiction over the subject matter of Plaintiff's complaints, Plaintiff has failed to join all parties necessary for final determination, Plaintiff lacks standing, and Plaintiff's claims are moot. In the alternative, Plaintiff's claims fail on the merits.

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Scheduling Order ECF No. 21, Defendant-Intervenor KWUA files this memorandum in opposition to Plaintiff Klamath Tribes' Motion for Summary Judgment and Memorandum of Law in Support (ECF No. 24) and in support of KWUA's Cross-Motion for Summary Judgment filed in this matter, Case No. 1:22-cv-00680-CL (the 2022 Case).

For the Court's information, and in the interest of avoiding redundancy, KWUA is filing a near identical response and cross-motion for summary judgment in Case No. 1:21-cv-00556-CL (the 2021 Case), the *only* differences being in these two preliminary paragraphs.[1]

I. INTRODUCTION

In these cases, Plaintiff objects to decisions affecting the depth of the 80,000-acre (125 square mile) Upper Klamath Lake (UKL) by a few inches during parts of 2021 and 2022. Those decisions, according to Plaintiff, violated provisions of the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, 16 U.S.C. §§ 1531-1544 (ESA), and in the case of the 2022 Case, the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 42 U.S.C. § 4321 *et seq.* (NEPA).

UKL is the primary water storage reservoir for the Klamath Project (Project). During the 2021 and 2022 irrigation seasons (March 1 through September 30), Project diversions were prohibited (2021) or severely limited (2022) when less than 20 percent of irrigation need was met. Over the same period, well over a million acre-feet (AF) was released to flow down the Klamath River. During the irrigation season, Klamath River flows were artificially augmented by water that had been stored in UKL during high runoff periods.

[1] KWUA refers to the docket entries for this case as "2022 ECF No. []" and the docket entries for the 2021 Case as "2021 ECF No. []." KWUA refers to the administrative record for both cases and will lead with "2021 AR" or "2022 BOR_AR" or "2021 FWS_AR" for identification.

Plaintiff's claims, raised in both the 2021 Case and 2022 Case, essentially advocate that Reclamation should have "done something" about two endangered fish species, and insist that limiting irrigation diversions is something Reclamation can do: the Project is a knob that can be turned. That legal assumption is in dispute, as discussed later, but the Project knob is chronically, increasingly, turned, resulting in more and more water in UKL and the Klamath River, with no identifiable benefit to populations of listed species. The type of operations requested by Plaintiff demand that UKL levels be managed to the 0.1 inch or the 0.01 inch. This is an unmanageable task, given that Reclamation cannot control all the conditions that determine how much water is in UKL, the largest lake in the State of Oregon, at any given time.

Plaintiff's 2021 and 2022 complaints should both be dismissed in their entirety. The Court lacks subject matter jurisdiction to address the issues raised in both complaints. The 2021 Temporary Operations Plan (2021 TOP) and the 2022 Temporary Operations Plan (2022 TOP) no longer exist (e.g., the 2022 TOP sunset date was September 30, 2022), and neither will ever control Project operations again. There is an ongoing reinitiated consultation that will result in a new Biological Opinion (BiOp) for endangered suckers to support future Reclamation action.

Plaintiff lacks standing because this Court cannot issue a decision that will redress an alleged injury, which pertains solely to the 2021 TOP and 2022 TOP. Likewise, both cases are moot. Moreover, in the 2022 Case, Plaintiff has failed to satisfy the jurisdictional pre-requisite of a valid 60-day notice of intent to sue under the ESA citizen suit provision. Plaintiff does not even attempt to meet its jurisdictional burden in the pending motions. Further, as a threshold matter, Plaintiff's motions do not acknowledge, let alone distinguish, the Ninth Circuit Court of Appeal's decision in a case that originated in this Court, *Klamath Irrigation Dist., et al. v.*

U.S. Bureau of Reclamation, 48 F.4th 934 (9th Cir. 2022) (*KID*), which points to dismissal of the case altogether. For these reasons, the Court need not address the merits of Plaintiff's claims.

On the merits, Plaintiff's ESA Section 7, ESA Section 9, and NEPA claims similarly fail. Plaintiff alleges that Reclamation jeopardized the continued existence of listed species but fails to consider or apply the applicable legal standard for reviewing Reclamation's actions. Plaintiff also alleges that Reclamation caused unauthorized "take" of the species through habitat modification but offers no evidence at all that any such take—authorized or not—occurred at any time in either 2021 or 2022.

A core defect underlying Plaintiff's claims in these cases is the recurring observation that UKL elevations were, or were allowed to be, outside a "boundary condition." That term has no meaning under the ESA. It relates only to hydrologic model results that the U.S. Fish and Wildlife Service (FWS) reviewed in preparing a BiOp in 2020. A hydrologic condition outside those model outputs does not inevitably cause take, result in jeopardy, or result in destruction or adverse modification of critical habitat.

The most striking thing about the motions, however, is what they do not acknowledge. That is, the problem for endangered sucker populations is *not* a lack of spawning habitat or rearing habitat or adult access to specific portions of UKL. Sucker populations in UKL are declining because of a lack of recruitment. Larval fish, of which there are millions upon millions each year, do not survive to become reproducing adults. The adult population is old and getting smaller, there having been no major years of recruitment success for three decades. The last year of strong recruitment was a low water, low UKL elevation year.

Thus, even if the cases were not moot, there is no order this Court can issue that would benefit sucker populations, because manipulations of UKL's elevations do not translate to population increases.

In the 2022 Case, Plaintiff objects to Reclamation's decision to afford an extremely modest amount of water for irrigation and claims a violation of NEPA. NEPA does not apply to diversion and use of irrigation water in the Project, an activity that was authorized nearly seven decades before NEPA was enacted. Indeed, this Court has reached that same conclusion in previous litigation.

II. BACKGROUND

A. UKL and the Klamath Project

The Klamath Basin occupies about 10 million acres in south-central Oregon and northern California. 2022 FWS_AR at Bates FWS000376; 2021 AR at Bates 001014 (map of Klamath Basin). In the uppermost watershed, various rain- and snowmelt-fed streams flow into UKL. UKL is a naturally occurring lake in south-central Oregon. It lies to the west and south of the former reservation of the Klamath Tribes. 2022 FWS_AR at Bates FWS000436; 2021 AR at Bates 005267. Beginning in the latter 19th century, areas on the northern and western periphery of the lake were reclaimed for agricultural use by diking. 2022 BOR_AR at Bates BOR004227; 2022 FWS_AR at Bates FWS000438; 2021 AR at Bates 000145. Similarly, upland areas on the former reservation were made available for farming and ranching. 2022 FWS_AR at Bates FWS000438; *see* 2021 AR at Bates 000145. In all, there are about 200,000 acres of ranches or farms upstream or immediately adjacent to UKL. 2022 BOR_AR at Bates BOR003815; 2021 AR at Bates 000325. These agricultural lands are not part of the Project. *Id.*

The natural outlet of UKL was on the southern end, where water would flow over a reef when water levels in the lake were above the reef. 2022 FWS_AR at Bates FWS000410;

2021 AR at Bates 000157. In late winter and spring when runoff was relatively high, the lake would surcharge such that levels were relatively higher than other times of year and would lower as water spilled over the reef and runoff declined. 2022 BOR_AR at Bates BOR003558; 2022 FWS_AR at Bates FWS009848; 2021 AR at Bates 000157.

The Project area lies to the south and east of UKL. 2022 BOR_AR at Bates BOR004140 (map of Project lands); 2021 AR at Bates 005269. The Project is a reclamation project authorized in 1905 by the Act of February 9, 1905, 58 Pub. L. 66, 33 Stat. 714, codified at 43 U.S.C. § 601, under the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, codified as 43 U.S.C. § 372 *et seq*. In general, at the Project, Reclamation constructed irrigation works and contracted with individuals or irrigation districts who agreed to repay allocated construction costs and reimburse ongoing operations costs; in exchange, these entities receive water delivered through Project facilities or facilities they themselves constructed. *See* 2022 BOR_AR at Bates BOR004104-10; 2021 AR at Bates 001774, 001776. The Project's irrigated land area is about 200,000 acres, roughly equal to what it was 80 years ago, with most of that acreage receiving water diverted from the Klamath River system. 2022 BOR_AR at Bates BOR004148; 2022 FWS_AR at Bates FWS008733; 2021 AR at Bates 001774. Water is diverted from the Klamath system at A Canal on the southeast end of UKL or locations just downstream of Link River Dam. 2022 BOR_AR at Bates BOR003451; 2021 AR at Bates 001774. The water taken includes both "live" flow (i.e., water at the rate flowing into or through UKL at a specific time) and stored water that has been collected behind Link River Dam for subsequent use. 2022 BOR_AR at Bates BOR003451; 2021 AR at Bates 001774. The irrigated lands produce about $400 million in annual economic value for family farms and rural communities in the region. Declaration of Brad Kirby in Support of Klamath Water Users Association's Response

in Opposition to The Klamath Tribes' Motion for Summary Judgment and Memorandum in Support of KWUA's Cross-Motion for Summary Judgment (Kirby Decl.) ¶ 9.[2]

Water diversions through the Project are also the water source for two National Wildlife Refuges, the Tule Lake National Wildlife Refuge (TLNWR) and the Lower Klamath National Wildlife Refuge (LKNWR). 2022 BOR_AR at Bates BOR003480; 2021 AR at Bates 001764, 001802.

Today, Link River Dam provides operable water storage and controlled release of water to the Klamath River. Link River Dam was constructed in the early 1920s under a contract between Reclamation and the California-Oregon Power Company (now PacifiCorp). 2022 FWS_AR at Bates FWS008760; 2021 AR at 001881. Installation of the dam involved removal or lowering of the reef at UKL's outlet, and construction of the dam, which allows for both raising and lowering of the lake level. 2022 FWS_AR at Bates FWS001090; 2021 AR at 001881.

Some water in UKL is diverted at A Canal, a Project feature on the east side of UKL just upstream of Link River Dam. Water is also released from Link River Dam to the Klamath River. Some of that water is diverted at other Project diversion structures. Water released from UKL also flows down the Klamath River and provides flows for fisheries including coho salmon, a threatened species under the ESA. 2022 BOR_AR at Bates BOR004116; 2021 AR at Bates

[2] As discussed in section III below, the scope of review is not identical for all of Plaintiff's claims for relief. The contention that Reclamation violated Section 9 is an ordinary civil action. In other claims, review is based on the administrative record of an agency decision. However, the Ninth Circuit has found that in cases alleging non-compliance with Section 7 of the ESA, extra-record evidence can be permissible. *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005) (*Wash. Toxics Coal.*) (allowing evidence outside the administrative record in a review of ESA Section 7 claims); *see also W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2011) ("we may consider evidence outside the administrative record for the limited purposes of reviewing Plaintiffs' ESA claim"). And even where review is otherwise limited to an administrative record, there is an exception, and non-record evidence is admissible where necessary to explain technical terms and complex subjects. *Sw. Ctr. for Biological Diversity v. United States*, 100 F.3d 1443, 1450 (9th Cir. 1996).

001767. Exhibit A to the Kirby Declaration, a water balance diagram, illustrates the sources of inflow and outflow of water to UKL.

The total volume of water in UKL at elevation 4143.30 feet, considered to be full pool, is approximately 849,000 AF. 2022 BOR_AR at Bates BOR003727; 2021 AR at Bates 001771. Of this total volume, approximately 500,000 AF is "usable storage," also referred to as "active storage." 2022 BOR_AR at Bates BOR003727; 2021 AR at Bates 001770. The active storage is the water between approximately elevation 4136.00 and 4143.30 feet. *Id.* These two terms relate to the volume that can be controlled by operation of Link River Dam. The volume in UKL below active storage, usually referred to as "dead storage," is the volume that is not capable of being released by operation of Link River Dam or diverted at A Canal. The lowest UKL surface elevation in the past 30 years was in September of 1994, when the elevation was 4136.80 feet. 2022 FWS_AR at Bates FWS011357; 2021 AR at Bates 001118.

B. Endangered Suckers

The Lost River sucker (C'waam) and the shortnose sucker (Koptu) are endemic to UKL and its tributaries. 2022 BOR_AR at Bates BOR004187; 2021 AR at Bates 001829. These species inhabit freshwater lakes for most of their lives but spawn predominantly in tributary streams. 2022 BOR_AR at Bates BOR003502; 2021 AR at Bates 001830. Sucker eggs generally hatch in gravel in the tributaries, and the larvae float or swim downstream to UKL, where they grow and mature before returning to the tributaries to spawn. 2022 BOR_AR at Bates BOR004188; 2021 AR at Bates 001892. All shortnose suckers spawn in tributaries of UKL. 2022 BOR_AR at Bates BOR004188; 2021 AR at Bates 001825. Approximately 84 percent of Lost River sucker spawning occurs in the upstream tributaries of UKL, but springs discharging into UKL also provide some areas suitable for spawning by Lost River suckers. 2022 BOR_AR at Bates BOR003502; 2021 AR at Bates 001825. Suckers spawn each year,

generally during February through May. 2022 BOR_AR at Bates BOR003503; 2021 AR at Bates 001826.

The FWS listed the Lost River and shortnose sucker species as endangered in July 1988. 53 Fed. Reg. 27130 (July 18, 1988). The grounds for the listing included: (a) construction of the Chiloquin Dam on the Sprague River upstream of UKL; (b) diversion of larvae into unscreened irrigation facilities; (c) the construction of a railroad along the east shore of UKL that filled spring-fed spawning areas; (d) decreases in water quality caused by timber harvesting, dredging activities, removal of riparian vegetation, and livestock grazing (in areas tributary to UKL); (e) disease and predation caused by introduction of exotic fishes; (f) hybridization of the sucker populations; and (g) late-summer die-offs in UKL. *Id.* The listing notice did not include UKL elevations as being among the seven factors negatively affecting the Lost River and shortnose sucker species.

Although UKL elevations were not, in the listing decision, among the factors identified as causing the decline of the species, with time, various parties and ultimately FWS asserted that Reclamation should consult under Section 7 about effects of the operation of the Project on endangered suckers, including effects of UKL surface elevations as they may relate to suckers. Consistent with ESA Section 7(a)(2), Reclamation completed biological assessments (BAs) describing its "proposed action" and FWS rendered its BiOp in accordance with ESA Section 7(a)(3).

Finally, although sucker populations in UKL are at significant risk, there are other populations of the species, such as at Clear Lake, that are not believed to be at risk. 2022 BOR_AR at Bates BOR004197; 2021 AR at Bates 001837. For UKL suckers, the federal government is conducting a massive effort to sustain the species. This consists of collecting

juvenile fish in UKL tributaries and rearing them in ponds for varying numbers of years, then placing them back in UKL. The goal is to bypass the recruitment problem until longer-term solutions are identified and implemented. 2022 BOR_AR at Bates BOR004185; 2021 AR at Bates 001925-26.

C. Applicable Law

1. ESA

Section 7(a) of the ESA imposes substantive and procedural requirements on federal agencies proposing to undertake certain actions or projects. *See* 16 U.S.C. § 1536(a)(2)-(3). Section 7 applies to agency actions "in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03; *see also id.* § 402.16.

Substantively, Section 7(a)(2) of the ESA requires action agencies to ensure that any discretionary action or project they authorize, fund, and carry out "is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of critical habitat designated for such species. 16 U.S.C. § 1536(a)(2). Section 7(a) of the ESA also imposes a procedural requirement on action agencies to consult with the FWS and NMFS (collectively, "Services") on the potential impacts of a proposed action on endangered and threatened species and their critical habitat. *Id.* § 1536(a)(2), (3); *see also* 50 C.F.R. §§ 402.10-402.16; *Sierra Club v. Babbitt*, 65 F.3d 1502, 1504-05 (9th Cir. 1995) (describing federal action agencies' procedural and substantive obligations under ESA Section 7).

Formal consultation results in the issuance of a BiOp that analyzes the effects of the proposed action and includes the consulting agency's conclusion as to whether the proposed action likely will or will not jeopardize the continued existence of the listed species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(h)(2), (3). If it

is determined that listed species will be jeopardized or designated critical habitat adversely affected, then the consulting agency must include in its BiOp reasonable and prudent alternatives (RPAs) that, if followed by the action agency, would avoid jeopardizing the listed species or destroying or adversely modifying critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

Where a BiOp determines that a proposed action, or the implementation of any RPA, will result in incidental take of a listed species but not violate the action agency's substantive Section 7(a)(2) obligation to avoid jeopardy, the consulting agency must include an Incidental Take Statement (ITS) with its BiOp. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1); *see also Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, BLM*, 273 F.3d 1229, 1239 (9th Cir. 2001) (*Ariz. Cattle Growers*). An ITS specifies the amount or extent of incidental take permitted and includes measures to minimize "take." 16 U.S.C. § 1536(b)(4)(C)(i)-(ii); 50 C.F.R. § 402.14(i)(1)(i)-(ii). While Section 9 of the ESA generally disallows take absent authorization that can occur through various mechanisms (see 16 U.S.C. § 1538(a)(1)(B) [general take prohibition], 16 U.S.C. § 1539 [mechanisms for permitting take by non-federal entities]), take consistent with an ITS is permissible. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(5); *see also Ariz. Cattle Growers*, 273 F.3d at 1239.

Issuance of a BiOp concludes formal consultation. 50 C.F.R. § 402.02. After receipt of a BiOp, the action agency determines how to proceed considering its substantive obligations under the ESA. *Id.* § 402.15(a).

An action agency must reinitiate consultation under certain circumstances, including if an ITS limit is exceeded and if new information reveals that the action may affect a listed species or

adversely affect habitat in a manner not previously considered. 50 C.F.R. §§ 402.14(i)(4), 402.16(a)-(b).

Section 9 of the ESA prohibits the "take" of any fish or wildlife that is listed as an endangered species. 16 U.S.C. § 1538(a)(1)(B). "Take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect . . . ." *Id.* § 1532(19). The implementing ESA regulations further defined "harm" to mean "an act which actually kills or injures wildlife. Such act may include 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(c)(3). "Harass" 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.* § 17.3(c). As stated above, a take that is consistent with the terms and conditions of an ITS is exempt from liability under Section 9. 16 U.S.C. § 1536(o)(2).

2. NEPA

NEPA establishes procedural requirements for federal agencies. Agencies proposing to take "major Federal actions significantly affecting the quality of the human environment" must first prepare an environmental impact statement (EIS) analyzing the potential environmental effects of the project. 42 U.S.C. § 4332(C); *cf. Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173, 1175 (9th Cir. 2016) (*Idaho Conservation League*) ("NEPA only requires the preparation of an EIS when a proposed federal action is major"). After consideration of the potential impacts, alternatives to the project, and any available impact mitigation measures, the agency determines whether to proceed with the project or an alternative, and whether to incorporate mitigation measures.

An Environmental Assessment (EA) is a tool used to decide whether an EIS is necessary. 43 C.F.R. § 46.300. An EA is a tool "to determine whether the environmental impact is 'significant enough to warrant preparation of an EIS.' " *Mountain Cmtys. for Fire Safety v. Elliot*, 25 F.4th 667, 675 (9th Cir. 2022). If the action agency determines that an EIS is not required and intends to proceed with the proposed action, it publishes a Finding of No Significant Impact. 43 C.F.R. § 46.325.

D. Interim Operations Plan and 2021 and 2022 Temporary Plans

In April of 2019, Reclamation completed a reinitiated ESA Section 7 consultation with the Services. 2022 BOR_AR at Bates BOR003708; 2021 AR at Bates 001763. Reclamation proposed an action for operation of the Project that it developed in discussion with the Services that was intended to result in non-jeopardy BiOps, and the Services each issued non-jeopardy BiOps. 2022 BOR_AR at Bates BOR003710, BOR003422; 2021 AR at Bates 001763. Reclamation then adopted and implemented the 2019-2024 Operations Plan for the Klamath Project (Operations Plan). 2022 BOR_AR at Bates BOR001587; 2021 AR at Bates 001763.

The Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources (collectively, "Yurok Tribe") filed a complaint in the Northern District of California challenging the adequacy of NMFS' 2019 BiOp and Reclamation's compliance with Section 7 and NEPA. *Yurok Tribe, et al. v. U.S. Bureau of Reclamation, et al.*, No. 3:19-cv-04405-WHO (N.D. Cal. filed Jul. 30, 2019). Ultimately, the parties entered into a stipulation to stay the case, which the court granted. 2022 BOR_AR at Bates 003440; 2021 AR at Bates 001763.[3]

[3] In late 2021, the stay was lifted, and parties have briefed ESA-related issues raised in a cross-complaint and counterclaim that were filed after the stay was lifted. This development is the basis for the stipulation and order described in section IV.A below.

The stay of the Yurok Tribe litigation was conditioned on compliance with the Interim Operations Plan (Interim Plan) attached to the stipulation. The Interim Plan was adopted on March 27, 2020, and to be in effect until the earlier of September 30, 2022, or the completion of the reinitiated consultation with the Services. The Interim Plan states that when certain hydrologic conditions are met, Reclamation will provide EWA "augmentation" flows of 40,000 AF. 2022 BOR_AR at Bates BOR003472; 2021 AR at Bates 001593. "The 40,000 AF of EWA augmentation would be comprised of 23,000 AF from Project Supply and 17,000 AF from volume within UKL." 2022 BOR_AR at Bates BOR003472; 2021 AR at Bates 001593. Because of the potential use of water from UKL to provide the additional water supply to provide the UKL augmentation flows, Reclamation again consulted with FWS and FWS issued a 2020 BiOp on the Interim Plan. 2022 BOR_AR at Bates BOR003422; 2021 AR at Bates 001745. The 2020 BiOp similarly reached a no-jeopardy conclusion on the Interim Plan. *Id.*

In both 2021 and 2022, it was literally impossible for the Project to be operated as the Interim Plan had contemplated. The Interim Plan purports to provide for a "consultation process that actively includes the participation of the Federal agencies, affected Tribes . . . and the irrigation community to find creative solutions to meet the needs of listed species." 2022 BOR_AR at Bates BOR003440; 2021 AR at Bates 001763.

In water year 2021 (October 2020 through September 2021), there was minimal winter precipitation. 2021 AR at Bates 007292. The resulting inflows from the tributaries of UKL had been extremely low to the point of setting many daily record lows, and the cumulative UKL net inflow for the water year beginning October 1, 2020, was among the lowest on record out of the last 41 years. 2021 AR at Bates 007242. Because there was very little runoff from the dry winter, limited carryover storage in UKL from 2020, and greater releases from UKL required to

meet Iron Gate minimum flows due to lower accretions between Link River Dam and Iron Gate Dam than previous years, the UKL elevation was at an extremely low level at the beginning of the irrigation season. 2021 AR at Bates 005389. With the terrible hydrology, it quickly became apparent that Reclamation would not be able to meet the UKL elevations anticipated in the 2020 BiOp and the minimum EWA release for Klamath River flows. As a result, on April 13, 2021, Reclamation issued a 2021 TOP. 2021 AR at Bates 005530. Overall, during the 2021 irrigation season, approximately 260,000 AF of water flowed into UKL. Kirby Decl. ¶ 19. Yet Link River Dam was operated to provide 400,000 AF of water for flow below Iron Gate Dam in the Klamath River. *Id.* In the meantime, for the first time ever, the A Canal and other Project facilities diverted zero water to Project contractors for irrigation.

There was also minimal winter precipitation in water year 2022 (October 2021 through September 2022). The minimal winter 2022 precipitation compounded by the low end of season 2021 lake levels because of Reclamation's management of UKL, resulted in a beginning March UKL elevation approximately 2.5 feet below full pool similar to 2021 and 1 foot lower than 2020. Kirby Decl. ¶ 25. On March 1, 2022, Reclamation sent a letter to Project contractors, notifying them that water from UKL and the Klamath River was unavailable at that time and instructing that all diversions cease immediately until further notice. 2022 BOR_AR at Bates BOR001931. At that time, the water surface elevation of UKL was at 4140.61 feet, equivalent to a storage volume of 323,385 AF. Kirby Decl. ¶ 25. The April and May 2020 BiOp "boundary condition" of a water level of 4142.0 feet equates to a storage volume of 444,018 AF, meaning that as of March 1, 2022, the lake needed 120,633 AF of additional water to meet the requirement. *Id.*

Based on inflow forecasts from the National Resources Conservation Service (NRCS), Reclamation's projections as of March 3, 2022, showed UKL not exceeding 4142.0 feet at any point in 2022, including April and May, which is the time that sucker spawning predominantly occurs. *See* 2022 BOR_AR at Bates BOR001860. Under the most optimistic forecast from NRCS, UKL was barely projected to eclipse 4141.5 feet, before an anticipated release of water for a surface flushing flow in the Klamath River caused a dramatic drop in lake levels of approximately a quarter foot. *Id.* At no point in March 2022 or later as conditions continued to deteriorate did Reclamation ever indicate any consideration of altering the amount of water to be released to the Klamath River. *See* 2022 BOR_AR at Bates BOR001623.

Despite all projections showing the lake failing to achieve 4142.0 feet by April 1, and further a significant likelihood that there would not even be sufficient inflows over the summer to match the amount to be released to the Klamath River, Reclamation continued operations specified in the Interim Plan during March, releasing 35,850 AF of water for supporting flows in the Klamath River at Iron Gate Dam. Kirby Decl. ¶ 28. During the same time, there was only 64,341 AF of inflow to UKL, meaning that more than half of the inflow was released rather than being stored in UKL to help achieve "boundary conditions." *Id.* The difference between the inflow and the volume released in the month of March equated to about 0.34 feet of increased water surface elevation on UKL. *Id.*

On March 17, 2022, Reclamation indicated that an announcement regarding the supply available for diversion to the Project was delayed and that an annual operations plan would be released following receipt of NRCS' April 1 inflow forecast. 2022 BOR_AR at Bates BOR001772. At that point, UKL had only increased to a water surface elevation of 4140.79 feet, meaning that UKL was still 105,863 AF short of achieving 4142.0 feet by April 1. Over the

intervening two weeks prior to April 1, the total inflows to UKL were 26,903 AF. Kirby Decl. ¶ 29. Due to the hydrology and river releases, at no point was it possible to meet the 4142.0 feet elevation under any circumstances (i.e., regardless of Project diversions). *Id.*

On April 11, 2022, Reclamation issued the 2022 TOP. 2022 BOR_AR at Bates BOR001616. The 2022 TOP provided that the Project supply would be "adaptively manage[d] . . . in a manner that will maintain the UKL at or above an end-of-season minimum water surface elevation of 4138.15 ft." 2022 BOR_AR at Bates BOR001405-06. Reclamation estimated that Project supply would be 62,000 AF based on then-existing forecasts. *Id.*[4]

FWS' 2020 BiOp contains two "boundary conditions" pertaining to the later summer and early fall period, when UKL reaches its annual low. The first condition is that UKL levels cannot drop below 4138.25 feet in September, and the second is that levels cannot fall below 4138.0 feet at any time. 2022 BOR_AR at Bates BOR003650. These conditions were fully satisfied in 2022, remaining above 4138.66 feet in September and never falling below 4138.6 feet during the remainder of the calendar year. Kirby Decl. ¶ 36. The actual observed end of September 2022 elevation was 4138.71 feet, far higher than the late season boundary condition of 4138.0 feet. *Id.*

E. This Litigation

Plaintiff filed the 2021 lawsuit on April 13, 2021, alleging violations of ESA Section 7 and Section 9 based on decisions that could affect UKL elevations. 2021 ECF No. 1 at 31-32.

[4] Reclamation's operational approach includes an operational model that regulates releases from UKL storage with consideration of recent hydrologic conditions. Reclamation seeks to set an allocation on April 1 without later reductions, and the possibility of an increase in subsequent May 1 and June 1 allocations. Plaintiff asserts that the Project allocation should have been essentially zero, but that is based on the April 1 forecast. Based on the June 1 forecast, which is required to be considered under the 2020 BiOp, calculated Project supply would have been 36,000 AF under the default calculation in the Interim Plan. Kirby Decl. ¶ 33. In the meantime, as discussed above, under the meet and confer procedure of the Interim Plan, Reclamation adopted the 2022 TOP, recognizing that the combination of dry conditions and continued high releases to the Klamath River made it impossible to achieve the April-May boundary condition,

The 2021 lawsuit challenges the now inoperative 2021 TOP. Plaintiff filed the 2022 lawsuit on May 9, 2022, alleging violations of ESA Section 7 and Section 9, as well as NEPA associated with the now inoperative 2022 TOP. 2022 ECF No. 1 at 34-35. KWUA intervened as a defendant in both lawsuits. 2021 ECF No. 19 at 2; 2022 ECF No. 13 at 1.

III. STANDARD OF REVIEW

Summary judgment is proper if the movant shows "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).

Judicial review of administrative decisions under the ESA is governed by section 706 of the Administrative Procedure Act (APA), 5 U.S.C. § 706; *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990) (*Pyramid Lake*). Review of agency action under the APA is permitted to determine whether the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). "Although [the court's] inquiry must be thorough, the standard of review is highly deferential . . . . Where the agency has relied on relevant evidence such that a reasonable mind might accept as adequate to support a conclusion, its decision is supported by substantial evidence. Even if the evidence is susceptible of more than one rational interpretation, the court must uphold the agency's findings." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (*Jewell*) (internal quotation, citations, and alterations omitted).

Plaintiff's ESA Section 9 claims are not reviewed under the APA standard. They are enforcement actions that "require proof of harm and causation." *Or. Nat. Desert Ass'n v. Kimbell*, 593 F. Supp. 2d 1217, 1220 (D. Or. 2009). At trial, Plaintiff has the burden of proving unlawful take by a preponderance of the evidence. *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 925

(9th Cir. 1999) (*Bernal*). Summary judgment is inappropriate if "a material question of fact exists as to whether [Reclamation] is in violation of the ESA" by committing take. *Stout v. U.S. Forest Serv.,* 869 F. Supp. 2d 1271, 1281 (D. Or. 2012) (*Stout*). "Because [the Tribes] bear the burden of proof as to their Section 9 claim, to satisfy their initial burden in connection with [their] motion for summary judgment they must demonstrate, with affirmative evidence, that 'no reasonable trier of fact could find other than for [them].' " *Ctr. for Envtl. Sci. Accuracy & Reliability v. Nat'l Park Serv.,* No. 1:14-cv-02063-LJO-MJS, 2016 U.S. Dist. LEXIS 115940, at *96 (E.D. Cal. Aug. 29, 2016) (*quoting Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (*Soremekun*)) (emphasis added). The supporting evidence relating to "take" must be admissible. *Soremekun*, at 984 (citing Fed. R. Civ. P. 56(e)).

IV. ARGUMENT

A. Issues Not Being Litigated in these Cases

Plaintiff's allegations in these cases relate to diversion of water for irrigation in the Project, and federal agencies' decisions and actions pertaining to water management. KWUA takes the position that Reclamation does not have discretion to curtail, or direct the curtailment of, the storage, diversion, and delivery of water for irrigation to benefit threatened or endangered species. Reclamation's specific actions relative to the storage, diversion, and delivery of water from UKL and the Klamath River for irrigation are nondiscretionary. Thus, Section 7(a)(2) of the ESA does not require, let alone authorize, Reclamation to alter such actions to the detriment of irrigation water users. Further, nonfederal parties, to whom ESA Section 7(a)(2) does not apply, conduct the bulk of activity related to diversion and delivery of water.

KWUA would assert these arguments in this memorandum. However, the parties have stipulated, and the Court has ordered, that these issues are not being litigated in these cases

because they have recently been briefed, argued, and submitted for decision in other litigation involving these same parties and others.

On January 12, 2023 and January 13, 2023, the Court entered orders on the parties' stipulations in both cases (2021 ECF No. 83, 2022 ECF No. 28) which both provided as follows:

> The following issues are not being litigated in this case – in the district court and in any court of appeal, through and including the entry of a final judgment or order of dismissal – and these issues will not be resolved by any decision or order on the merits or by any final judgment in this matter: whether Reclamation has discretion to curtail, or direct the curtailment of, storage, diversion, and delivery of irrigation water for the Klamath Project for the purpose of benefitting ESA-listed species; whether Reclamation has discretion to release water stored in Upper Klamath Lake for purposes other than irrigation and domestic use; whether any orders issued by the Oregon Water Resources Department to Reclamation in 2020 and 2021 are lawful and enforceable; and whether or how Section 9 of the ESA, 16 U.S.C. § 1538, applies to actions that KWUA asserts are nondiscretionary. The parties agree not to argue that KWUA's failure to assert any of the issues or defenses above in the disposition of this action precludes KWUA from raising any of such issues in other litigation.

The orders approving the stipulations provide "[**t]he Parties support the inclusion of the language stated in [the paragraph quoted immediately above] in any decision, order, and/or judgment of the Court in this case**." (emphasis added).

Accordingly, KWUA does not argue below that Reclamation has no authority to determine an "allocation" or "Project Supply" for the Project. Rather, KWUA's arguments effectively assume that all relevant aspects of operation of the Project are subject to the substantive requirement of Section 7(a)(2) of the ESA. The arguments also assume that Reclamation would be considered to have proximately caused any take that may occur, even though KWUA maintains that nondiscretionary actions are not a proximate cause of take.

B. The Court Lacks Subject Matter Jurisdiction

Both the 2021 and 2022 lawsuits should be dismissed because the Court lacks subject matter jurisdiction. All of Plaintiff's claims relate to the 2021 TOP and 2022 TOP, both of

which no longer exist. Plaintiff's claims fail the redressability prong of Constitutional standing analysis. Additionally, the claims are moot. Further, in the 2022 lawsuit, Plaintiff fails to establish the jurisdictional requirement of serving a valid 60-day notice letter on the Defendants prior to filing suit. *See* 16 U.S.C. § 1540(g)(2)(A)(i).

1. Plaintiff Lacks Standing

The Klamath Tribes seek judicial declarations that: (1) Reclamation violated Section 7 of the ESA, (2) Reclamation violated Section 9 of the ESA, (3) (in the 2022 Case) FWS violated the APA, and (4) (in the 2022 Case) Reclamation violated NEPA. *See* 2021 ECF No. 80 at 6-7; 2022 ECF No. 24 at 7-8. All of these claims pertain to Reclamation's adoption and presumed implementation of the 2021 TOP and 2022 TOP. 2021 ECF No. 80 at 6-7; 2022 ECF No. 24 at 8. However, neither the 2021 TOP nor the 2022 TOP is in effect. The requested remedy would not redress the Klamath Tribes' alleged injuries, which are history. Thus, the Klamath Tribes lack standing.

To establish standing, a plaintiff must demonstrate it has suffered an "injury in fact," that the injury is "fairly traceable" to the defendant's conduct, and that "it is likely, as opposed to merely speculative, that *the injury will be redressed by a favorable decision*." *Ctr. for Biological Diversity v. Exp.-Import Bank of the United States*, 894 F.3d 1005, 1012 (9th Cir. 2018) (*Exp.-Import Bank*) (internal citations omitted, emphasis added). A plaintiff has the duty to prove standing not just as of filing pleadings, but at all "successive stages of the litigation." *Id.* at 1012. Furthermore, "a plaintiff must demonstrate standing separately for each form of relief sought." *Magassa v. Wolf*, 487 F. Supp. 3d 994, 1009 (W.D. Wash. 2020) (*Magassa*) (*citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)).

A declaratory judgment is a prospective form of relief. *Magassa*, 487 F. Supp. 3d at 1009. "A plaintiff who has standing to seek damages for a past injury, or injunctive relief for

a future injury, does not necessarily have standing to seek a declaratory judgment." *Blumenkron v. Hallova*, 568 F. Supp. 3d 1093, 1106 (D. Or. 2021) (*Blumenkron*) (*citing Mayfield v. United States*, 599 F.3d 964, 969 (9th Cir. 2010)). "Mere 'psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.' " *Magassa*, 487 F. Supp. 3d at 1009 (*quoting Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 107 (1998)); *see also Bras v. Cal. Pub. Utils. Comm'n*, 59 F.3d 869, 873 (9th Cir. 1995) (to have standing to seek declaratory relief, "it is insufficient for [a plaintiff] to demonstrate that he was injured in the past . . . ."); *Clear Connection Corp. v. Comcast Cable Communs. Mgmt, Ltd. Liab. Co.*, 501 F. Supp. 3d 886, 898 (E.D. Cal. 2020) (*Clear Connection Corp.*) ("declaratory relief is inappropriate [when a plaintiff] seeks to redress past wrongs, not declare future rights"). Finally, "a claim still lacks redressability if the plaintiff will nonetheless suffer the claimed injury if a court rules in its favor." *Exp.-Import Bank*, 894 F.3d at 1013.

Here, the complaints filed in April 2021 and May 2022 sought both injunctive and declaratory relief to remedy alleged injuries. *See* 2021 ECF No. 1 at 31; 2022 ECF No. 1 at 34. All the alleged injuries stem from Reclamation's adoption and implementation of the 2021 TOP and 2022 TOP. *See* 2021 ECF No. 80 at 6; 2022 ECF No. 24 at 8. It may be true that, at the time of filing their complaints, the Klamath Tribes had standing and their alleged injuries would have been "redressed by a favorable decision." *Exp.-Import Bank*, 894 F.3d at 1012. That, however, does not mean Plaintiff has standing to seek declaratory relief in 2023. *See Blumenkron*, 568 F. Supp. 3d at 1106.

The 2022 TOP, like the 2021 TOP, was a temporary, one-time operations plan that Reclamation adopted due to "[e]xtraordinary hydrologic conditions." 2022 BOR_AR at Bates BOR001493; 2021 AR at 005552. Further, a declaration that Reclamation violated the law in the

decisions or operations associated with the 2021 TOP or 2022 TOP has no bearing on the Klamath Tribes' future rights, so, even if it could remedy past injuries, declaratory relief would still be inappropriate here. *Clear Connection Corp.*, 501 F. Supp. 3d at 898.

In sum, Plaintiff has not established that a declaratory judgment would redress its alleged injuries. Accordingly, the claims seeking declaratory relief lack redressability and the Plaintiff lacks standing to bring such claims.

2. All of Plaintiff's Claims Are Moot

Even if the Klamath Tribes had standing to seek relief for their alleged injuries earlier in the life of the respective cases, the claimed injuries were wholly in the past, and thus all the Klamath Tribes' claims are now moot.

"Mootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (internal quotation marks omitted). "To qualify as a case fit for federal court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Id.* at 67 (internal quotation marks and citations omitted). "A claim is moot when the issues presented are no longer live . . . . The basic question is whether there exists a present controversy as to which effective relief can be granted." *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 933 (9th Cir. 2008) (internal citations and quotation marks omitted); *see also All. for the Wild Rockies v. Burman*, 499 F. Supp. 3d 786, 790-91 (D. Mont. 2020) (*Burman*) (stating that courts retain jurisdiction over actions seeking declaratory relief only if granting such would "provide meaningful relief"). Claims are moot when a judicial declaration would "serve no purpose" or "accomplish nothing." *Burman*, at 791-92. A claim is moot when "a declaratory judgment concerning the lawfulness of

Reclamation's past conduct has no relation to Reclamation's future conduct and 'the declaration' would be an improper advisory opinion." *Id.* at 794.

Here, all of the Klamath Tribes' claims are specific to the 2021 TOP and 2022 TOP, respectively. *See* 2022 ECF No. 24 at 8 ("Whether Reclamation violated Section 7 . . . through its Project operations under the 2022 TOP . . . . Whether Reclamation violated Section 9 . . . during Reclamation's operation of the Project pursuant to the 2022 TOP . . . . Whether USFWS' failure to rescind or modify the 2020 BiOp and ITS in response to Reclamation's adoption of the 2022 TOP [violated] the APA . . . . Whether Reclamation violated NEPA by not completing a proper NEPA analysis of the environmental impacts of the 2022 TOP."); 2021 ECF No. 80 at 6 ("by adopting and implementing the 2021 TOP"). Operation of the Project under the 2021 TOP ended on September 30, 2021. 2021 AR at Bates 005553. Operation under the 2022 TOP ended on September 30, 2022. 2022 BOR_AR at Bates BOR001493-94.

Because the issues surrounding the 2021 TOP and 2022 TOP "are no longer live . . . there [no longer] exists a present controversy as to which effective relief can be granted." *Council of Ins. Agents*, 522 F.3d at 933 (internal quotation marks and citation omitted). The Court should dismiss these cases and deny the motions because all the Klamath Tribes' claims are moot.

3. Plaintiff Is Required to Have Provided 60-Day Notice of Alleged Violations of the ESA and Failed to Do So in the 2022 Case

In counts I and II of the Complaint in the 2022 Case, Plaintiff alleges violations of Sections 7 and 9 of the ESA, respectively. These claims are within the scope of the ESA citizen suit provision. 16 U.S.C. § 1540(g); 2022 ECF No. 1 ¶¶ 59-79. These provisions allow any person to commence a civil suit to "enjoin any person, including the United States and any other governmental instrumentality . . . who is alleged to be in violation of any provision of this [Act]." 16 U.S.C. § 1540(g)(1)(A). Citizen suit claims are restricted to substantive violations of

the ESA. *Bennett v. Spear*, 520 U.S. 154, 173 (1997). Lawsuits to compel agencies to comply with the substantive provisions of the ESA are properly brought under such provisions. *Wash. Toxics Coal.*, 413 F.3d at 1034.

A prerequisite to filing suit under these provisions is compliance with the 60-day notice requirement proscribed by statute, which states that "[n]o action may be commenced . . . prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of such provision." 16 U.S.C. § 1540(g)(2)(A). The notice requirement is jurisdictional and failure to strictly comply with the provisions of the statute acts as a total bar to a suit under the ESA. *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998) (*Sw. Ctr. for Biological Diversity*); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 721 (9th Cir. 1988).

For notice to be sufficient, plaintiffs must provide "sufficient information of a violation" that adequately informs the agency of the "particular grievance" against it. *Sw. Ctr. for Biological Diversity*, 143 F.3d at 521. The purpose of the 60-day notice provision is to put the agency on notice of any perceived violation of the ESA so they have time to review their actions and remedy them if necessary. *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 29 (1989). An agency must have the opportunity to resolve the alleged violations in a non-adversarial manner, as positions become hardened and compromise less likely once a suit is commenced. *Wash. Trout v. McCain Foods*, 45 F.3d 1351, 1354 (9th Cir. 1995).

Plaintiff filed its Complaint in the 2022 Case on May 9, 2022. 2021 ECF No. 1. *Less than thirty* days before that—specifically, on April 14, 2022—Plaintiff sent a letter to Reclamation and the Department of the Interior alleging various violations of the ESA in relation to the sucker species in UKL. 2022 BOR_AR at Bates BOR001253. Assuming Plaintiff would

rely on this letter as notice in satisfaction of the statute, such reliance would fail because 60 days had not passed when they filed their Complaint on May 9. Therefore, the April 14, 2022 letter was insufficient notice for both ESA claims brought in this action.

Plaintiff also sent a letter on March 10, 2022, to the same parties identified above and, in the April 14 notice, which appears to attempt to bootstrap the March 10 *date* into the April 14 notice. 2022 BOR_AR at Bates BOR001253 ("In my letter to Ms. Elizabeth Klein of March 10, 2022 . . . I referenced the letters I sent the Biden Administration in my capacity as Chairman of the Klamath Tribes . . . to illustrate the dangerous path the Tribes saw the Bureau of Reclamation heading back down this year . . . ."). However, the March 10, 2022 letter does not identify violations or alleged violations of either Section 7 or Section 9 of the ESA. 2022 FWS_AR at Bates FWS000335. Instead, the March 10 letter expresses the desire of Plaintiff to engage in consultation regarding Reclamation's plans for its operation of the Project and the Klamath Basin's water supply in 2022 with representatives from Reclamation, FWS, NMFS, and Indian Affairs. *Id.*

In *Sw. Ctr. for Biological Diversity*, the Ninth Circuit found that the substance of certain notice letters was insufficient to meet the statutory requirement, despite being sent 60 days prior to commencing suit. 143 F.3d at 520-21. As in this case, the plaintiffs in *Sw. Ctr. for Biological Diversity* sued Reclamation under ESA Section 7(a)(2) and Section 9, alleging Reclamation's operations jeopardized an endangered fish species, the Flycatcher, while also committing unpermitted take without a valid ITS. *Id.* at 519. The plaintiffs sent three notice letters, all within the proper statutory timeframe, but failed to specify in any of the letters that Reclamation's operations were harming the Flycatcher, which was the basis of the suit. *Id.* at 520-21. Instead, the court found that at most, the letter provided Reclamation with notice of

the plaintiffs' desire to consult regarding their operations, which was not sufficient information of a violation. *Id.* at 522. As in *Sw. Ctr. for Biological Diversity*, the March 10 letter is insufficient to provide notice to Reclamation of its alleged violations of the ESA. Therefore, Plaintiff has failed to provide notice subject to Section 1540(g)(2)(A) and as such, is jurisdictionally barred from bringing these claims.

C. Necessary Parties Have Not Been Joined

Recent Ninth Circuit precedent requires dismissal of these cases for failure to join required parties who cannot be joined due to sovereign immunity. *See KID*, 48 F.4th 938. In *KID*, the Ninth Circuit affirmed this Court's dismissal of two actions filed by various Project irrigation parties challenging Reclamation's operating procedures for the Project for failure to join the Hoopa Valley Tribe and Klamath Tribes, who could not be joined because of sovereign immunity. *Id.*

Plaintiff's requested relief in these cases would directly affect water that is in UKL and whether it will stay in UKL, be released to flow in the Klamath River to California, or be available for irrigation in the Project and use on the National Wildlife Refuges. Although KWUA disputes various issues regarding the nature, location, and scope of downstream tribal rights, it is undeniable that tribes in California hold fishing rights and assert water rights. In *KID*, the Ninth Circuit found that "a suit, like this one, that seeks to amend, clarify, reprioritize, or otherwise alter Reclamation's ability or duty to fulfill the requirements of the ESA implicates the Tribes' long-established reserved water rights." 48 F.4th at 943-44. As a result, under the Ninth Circuit's recent ruling, the Hoopa Valley Tribe, and other California tribes are required parties. *Id.* at 938. The Hoopa Valley Tribe (and other California tribes) have not waived sovereign immunity and may not be joined. As a result, Plaintiff's complaints should be dismissed based on the Ninth Circuit's recent decision in *KID*.

D. Plaintiff's Claims Fail on the Merits

1. The Section 7 Claims Fail

The Klamath Tribes allege that Reclamation has violated its substantive obligation under Section 7(a)(2) to avoid jeopardy to the sucker species and adversely modifying their critical habitat. 2021 ECF No. 80 at 34; 2022 ECF No. 24 at 39. The Section 7 claims lack merit and are based on a misunderstanding of Reclamation's obligations, Project modeling, and the continued denial or avoidance of the factors actually limiting sucker recovery in UKL.

a. Necessary Context for Consideration of the Section 7 Claims

As context for addressing Plaintiff's Section 7 claims, this section of this memorandum clarifies foundational facts about the 2020 ESA consultation for suckers and actual threats to the UKL populations of suckers.

i. Boundary Conditions Have No Biological Significance and Instead Reflect Outputs of a Hydrologic Model

The Klamath Tribes identify, and attach great significance to, "boundary conditions" representing certain UKL elevations during the year. *See, e.g.*, 2022 ECF No. 24 at 37. They allege that Reclamation has lacked the "ability to comply in 2022 with the boundary conditions USFWS set forth in the 2020 BiOp as necessary to protect [suckers]." *Id.* at 35.

These elevations, or boundary conditions, are not derived from scientific analysis and do not have a biological justification. The boundary conditions are based on the outputs of hydrologic modeling. 2022 BOR_AR at Bates BOR003549; 2021 AR at Bates 001872. UKL elevations outside the boundary may or may not have a meaningful effect on sucker populations. It is simply a matter that FWS did not ask or address other conditions. The boundary conditions in the current 2020 BiOp are the expression of a very low probability UKL elevation at any given time based on model runs using historic hydrology. 2022 BOR_AR at Bates BOR003549;

2021 AR at Bates 001872-73. This does not mean that they are a bright-line biologically based limit; they are simply the lowest modeled output elevation observed in the BiOp model run. *See* 2022 BOR_AR at Bates BOR003549; 2021 AR at Bates 001872. The boundary conditions, which are the basis for Plaintiff's motions, are not thresholds for take or jeopardy, or any other cognizable claim under the ESA.

Notwithstanding that reality, Plaintiff goes to great effort to connect Project irrigation diversions to farms and refuges with an alleged impact to suckers, derived solely in reference to "boundary conditions." To the extent certain "boundary conditions" were missed in 2022, irrigation and refuge diversions were not the cause. Kirby Decl. ¶ 37. To the contrary, it was the competing "requirements" in the opinion of another federal agency, namely NMFS's 2019 BiOp, that drove lake levels below "boundary conditions." *Id.* As explained above (*see* section II.D), at no point in March or April 2022 was it ever feasible for UKL to achieve the May 1 "boundary condition" of 4142.0 feet due to the release of water to support river flows based on the NMFS' BiOp nor could Project diversions be deemed to have had any material impact on achieving July 15, 2022 "boundary conditions" because altogether the cumulative inflow to UKL between March 1 and July 15, 2022, was 273,295 AF. *Id.* During the same period, 251,613 AF was released from UKL for purposes of meeting flows in the Klamath River. *Id.* Finally, UKL met any end-of-year "boundary conditions" by remaining above 4138.66 feet in September and never falling below 4138.6 feet any time during the calendar year. *Id.*

ii. The Overwhelming Limiting Factor Affecting the Status of the Sucker Species Is Lack of Recruitment, Not Spawning or Rearing Habitat or Any Issue Related to UKL Elevation

The Klamath Tribes focus almost exclusively on elevations in UKL as a proxy for the amount of spawning habitat that is available to sucker species. This omits crucial facts material to the status of the species: available spawning habitat in UKL is not a significant limiting factor

for populations of UKL Lost River suckers, and shortnose suckers do not spawn in UKL at all. 2022 BOR_AR at Bates BOR003517, BOR003608, BOR004188; 2021 AR at Bates 005273. These species mostly spawn in tributaries above UKL when the water temperature reaches 10 degrees Celsius (usually early April through mid-May). 2022 BOR_AR at Bates BOR004188-89; *see* 2021 AR at Bates 001933. There is a small population of Lost River suckers that does not spawn in the tributaries and spawns in known areas of UKL; this segment represents less than one-fifth of the total population of Lost River suckers in UKL. 2022 BOR_AR at Bates BOR003502; 2022 FWS_AR at Bates FWS001324; 2021 AR at Bates 001825. Moreover, based on best available science and empirical evidence, large mortality events (like those that occurred in 1995, 1996, and 1997) are more common during relatively higher UKL levels than relatively lower UKL levels. 2022 FWS_AR at Bates FWS011368; 2021 AR at Bates 005273. Independent experts that have reviewed the operational approach found no correlation between UKL elevations and fish kills. *See* 2022 FWS_AR at Bates FWS005691 ("Water level in Upper Klamath Lake shows no relationship to water quality conditions that result in mass mortality of adult suckers or other potentially adverse water-quality conditions."); 2021 AR at Bates 005273. Thus, the management focus on UKL elevations as a function of spawning habitat is misplaced, and the Klamath Tribes' assumed correlation between UKL elevations and availability of spawning habitat ignores the vast available habit to the species in the tributaries, submerged macrophytes, and areas of UKL that are not affected by UKL elevation of 4138.0 feet. 2022 BOR_AR at Bates BOR004228; 2022 FWS_AR at Bates FWS005691; *see* 2021 AR at Bates 005273-74.

According to the FWS' 2020 BiOp, there are 24.5 square miles (15,703 acres) of wetland habitat around UKL. While this area decreases as UKL elevations decrease, there is similarly no

evidence that an insufficiency of wetland habitats is the cause of failures of recruitment. In 2022, water levels in UKL remained above 4140.8 feet through late May, and 4140.4 feet through July 2. These water levels were considerably higher than the levels observed in 2021.

The limiting factor affecting the status of the species is not spawning habitat or areal extent of wetland vegetation; it is the survival of juveniles until they become reproducing adults. Recruitment refers to individuals within a population that survive and contribute to the spawning population. 2022 BOR_AR at Bates BOR004195-96; 2021 AR at Bates 001833. In tributaries and UKL itself (the sub-population of Lost River suckers), spawning occurs every year. At maturity, both species are highly fecund and will deposit a large number of eggs—tens of thousands. 2022 BOR_AR at Bates BOR004187-88; 2021 AR at Bates 001824. For the next life stage, there appears to be abundant larvae in the Williamson River and UKL as well as juveniles in UKL early in the summer. 2022 BOR_AR at Bates BOR004189; 2021 AR at Bates 001824-25. Past the juvenile stage, it has been observed over the past several decades that juvenile suckers tend not to make it through a first year of life. Juvenile fish tend to drop out of the system around August for reasons that have not been scientifically determined. 2022 BOR_AR at Bates BOR004191; 2021 AR at Bates 001828. It is likely that multiple factors are causing the lack of recruitment, and hypotheses include predation, water quality, disease, and entrainment. 2022 BOR_AR at Bates BOR004191 ("[i]t is likely that some combination of poor water quality, disease, parasites, loss of habitat, non-native species (fish and cyanobacteria), and predation interact to reduce annual survival of juveniles to near zero"); 2021 AR at Bates 001837. There are no empirical data or known connection between UKL elevations and recruitment events. 2022 FWS_AR at Bates FWS005669 ("Further research may show a relationship between inundation of the spawning area and larval recruitment. Present data

suggest, however, that any such relationship would be either weak or indirect. Thus, the connection does not appear to be especially important for the population."); 2021 AR at 005266. Notably, UKL saw the best recruitment event in the last 30 years during a level of low UKL elevations, demonstrating that there are variables other than lake elevation that relate to rearing and recruitment of year classes. 2022 FWS_AR at Bates FWS011368 ("1991 was a low lake level year and yet was also a year of good sucker production"); *see* 2021 AR at 005274.

b. The 2021 TOP and 2022 TOP Did Not Violate Section 7

Review of a claim that an action agency is not complying with its substantive ESA Section 7(a)(2) obligation is governed by the standard in *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410 (9th Cir. 1990) (*Pyramid Lake*). Under that standard, "[a]n action jeopardizes the continued existence of a species if it '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.' " *Id.* at 1415 (*quoting* 50 C.F.R. § 402.02).

An action agency determines how to proceed considering its substantive Section 7(a)(2) obligation after engaging in consultations with FWS before taking the action. *Pyramid Lake*, 898 F.2d at 1415. If it relies on FWS' BiOp, the action agency's decision to do so must not be arbitrary and capricious. *Id.* An action agency's reliance on a consulting agency's opinion "will satisfy its obligations under the [ESA] if a challenging party can point to no 'new' information—i.e., information [FWS] did not take into account—which challenges the opinion's conclusions." *Id.*

Whether Reclamation is in violation of its Section 7(a)(2) obligations under the *Pyramid Lake* standard is a different question than whether Reclamation must reinitiate consultation under

50 C.F.R. § 402.16. Under that ESA regulation, reinitiation of consultation is required if the amount or extent of take specified in the ITS is exceeded, or if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. *Id.* § 402.16(a)(2).

Here, the Klamath Tribes' sole basis for the Section 7 claims is that Reclamation failed to maintain UKL elevations as prescribed by the 2020 BiOp. *See* 2021 ECF No. 80 at 39; 2022 ECF No. 24 at 35-36. The Klamath Tribes do not allege that the 2020 BiOp was inadequate, or that Reclamation acted arbitrarily and capriciously by relying on it to fulfill its Section 7(a)(2) allegations. *See* 2022 ECF No. 24 at 6-7 (listing Plaintiff's claims); 2021 ECF No. 80 at 6-7 (listing Plaintiff's claims). The Klamath Tribes do not provide "new information" beyond that considered in the 2020 BiOp. *See generally* 2021 ECF No. 7 at 30-32.

Plaintiff incorrectly equates "boundary conditions" as a jeopardy threshold. As explained above, however, "boundary conditions" have no meaning under the ESA, are not based on biological consideration, and merely reflect what they are—hydrologic model outputs. Nothing in the 2020 BiOp, and nothing cited by Plaintiff, supports that not meeting a "boundary condition" will cause jeopardy. Plaintiff advances its argument based on generalities and, in fact, cites no evidence concerning the biological consequences caused by some lake elevation or another. Plaintiff's arguments relate only to hydrology, and not to a causal linkage of UKL elevations to create a "jeopardy" condition.

Reclamation developed Proposed Actions consisting of operation of the Project based on very specific operating criteria. *See* 2022 BOR_AR at Bates BOR003444; 2021 AR at Bates 001745. FWS consulted on those actions and concluded that they were not likely to result in jeopardy to suckers or destroy or adversely modify designated critical habitat. 2022 BOR_AR at

Bates BOR003422; 2021 AR at Bates 001745. Reclamation has operated based on the Proposed Actions. Plaintiff's true attack is on the 2020 BiOp, an attack that can only be based on the administrative record before FWS at the time of issuance of the BiOp. *Jewell*, 747 F.3d at 602. There is no direct challenge to the 2020 BiOp, and thus, it is reasonable for Reclamation to rely on the 2020 BiOp to fulfill its Section 7(a)(2) obligations. Plaintiff has provided no valid reason on how or why Reclamation is in violation of its Section 7(a)(2) obligation. Thus, the Section 7 claims fail on the merits.

2. The Section 9 Claims Fail

a. Plaintiff Has Not Offered Evidence of "Take," Let Alone Unauthorized "Take"

The Klamath Tribes assert that they are "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 2021 TOP and 2022 TOP without being entitled to rely on the protection of an ITS." 2022 ECF No. 24 at 42; *see also* 2021 ECF No. 80 at 42. The Klamath Tribes go to some lengths to establish that Reclamation took action that was outside the coverage of the ITS. *See* 2022 ECF No. 24 at 41 ("The ITS did include a mechanism for Reclamation to continue to be shielded from take liability protection . . . . But Reclamation has failed to properly abide by it."); 2021 ECF No. 80 at 43-44. But Plaintiff's accusations alone do not mean that any "take" occurred. In fact, the Klamath Tribes fail to prove that Reclamation committed unlawful take, let alone *any* take, in 2021 or 2022.

i. Plaintiff Misunderstands the Applicable Legal Standard Required to Prove "Take"

To prevail on their ESA Section 9 claim, the Klamath Tribes have the burden of proving by a preponderance that Reclamation is committing "take." *Protect Our Water v. Flowers*,

377 F. Supp. 2d 844, 880 (E.D. Cal. 2004) (*Protect Our Water*). They must also prove proximate cause. *Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1084 (D. Or. 2012).

To "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). In this case, the Klamath Tribes do not allege any direct mortality to a listed species. Rather, they allege that modifications to the quantity of specific habitats caused "take." *See, e.g.*, 2022 ECF No. 1 at 16 ("Below elevation 4,140.0 ft, less than 12% of potential UKL nursery habitat is accessible to the C'waam and Koptu, with the amount decreasing in tandem with lower lake levels."); *id.* at 26-27 ("Reclamation's authorization of diversions of Project Supply . . . have directly decreased and will continue to directly decrease UKL elevations which has and will continue to '*harm*' [and '*harass'*] C'waam and Koptu in violation of the ESA *due to 'significant habitat modification or degradation'* ."') (emphasis added). Thus, the issue here is whether Reclamation committed take via habitat modification.

In cases where plaintiffs allege "take" via habitat modification, courts look to whether "*harm"* occurred, not whether "*harassment"* occurred. *See Our Children's Earth v. Leland Stanford Junior Univ.*, No. 13-cv-00402-EDL, 2015 U.S. Dist. LEXIS 176517, at *17-19 (N.D. Cal. Dec. 11, 2015) (*Our Children's Earth*) (analyzing an alleged "take" via habitat modification—based on the operation of a dam—under a "harm" standard); *see also Wishtoyo Found. v. United Water Conservation Dist.*, No. CV 16-3869-DOC (PLAx), 2017 U.S. Dist. LEXIS 213759 (C.D. Cal. Dec. 1, 2017), at *60-62 (applying the "harm" standard where plaintiffs allege the operation of a dam caused "take" of listed species, because "harassment standards generally do not apply to a habitat modification case such as this one").

"Harm" means "an act which actually kills or injures wildlife. Such act may include 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. Without more, "mere habitat degradation is not always sufficient to equal harm." *Our Children's Earth*, 2015 U.S. Dist. LEXIS 176517, at *20 (quoting *Ariz. Cattle Growers*, 273 F.3d at 1238); *see also Wishtoyo Found.*, 2017 U.S. Dist. LEXIS 213759, at *64 ("habitat modification does not constitute harm unless it 'actually kills or injures wildlife' ") (citing *Bernal*, 204 F.3d at 924-25). Courts deny summary judgment motions involving claims of "take" via habitat modification when there is "no evidence that any actual death or injury to a [listed species] has occurred." *See Protect Our Water*, 377 F. Supp. 2d at 881.

In sum, the Klamath Tribes must prove "take" under the "harm" standard, meaning they must prove that Reclamation *actually* killed or injured the C'waam or Koptu. *Wishtoyo Found.*, 2017 U.S. Dist. LEXIS 213759, at *62-68.

ii. The Klamath Tribes Present No Evidence that "Harm" Occurred in 2021 or 2022

In their motions, the Klamath Tribes fail to offer evidence that Reclamation "harm[ed]" suckers *due to 2021 or 2022 Project operations*. For example, the Klamath Tribes' 2022 complaint and motion are devoid of any evidence that Reclamation's actions *in 2022* degraded the species' habitats—they present no proof of how much—or even *whether*—that 2022 Project diversions reduced UKL elevations. Even if the Klamath Tribes had presented such evidence, "mere habitat degradation is not always sufficient to equal harm," *Our Children's Earth*, 2015 U.S. Dist. LEXIS 176517, at *20, and they present no evidence that the alleged drop in UKL elevations "*actually kill[ed] or injure[d] wildlife* by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (emphasis added). Similar

to *Protect Our Water*, the Klamath Tribes have presented "no evidence that any actual death or injury to [the C'waam and Koptu] has occurred," and their mere allegation that take "has and will continue" to occur due to "decrease[d] UKL elevations," 2022 ECF No. 1 at 26, "does not suffice to demonstrate 'harm.' " 377 F. Supp. 2d at 881. Therefore, the Klamath Tribes fail entirely to meet their burden of proving that Reclamation "committ[ed] take in its operation of the Project *under the 2022 TOP* . . . ." 2022 ECF No. 24 at 42 (emphasis added).

iii. The Scant Evidence the Klamath Tribes Do Cite Is Inadmissible Hearsay that May Not Be Considered

Rather than proving that Reclamation committed "take" in 2021 or 2022, the Klamath Tribes assert generally that "Reclamation's operation of the Project unquestionably 'takes' C'waam and Koptu," citing only the administrative record. *See* 2022 ECF No. 24 at 17. The documents in the administrative record that the Klamath Tribes cite are Reclamation's December 2018 BA and FWS' April 2020 BiOp. *Id*. These documents, and the statements therein, constitute hearsay and are thus inadmissible. *See NRDC v. Zinke*, 347 F. Supp. 3d 465, 495-96 (E.D. Cal. 2018). KWUA objects to the hearsay.

iv. Even if the Cited Evidence Were Admissible, It Does Not Prove that "Take" Occurred

Assuming *arguendo* that the cited evidence is admissible, the Klamath Tribes nonetheless have failed to prove the allegation that Reclamation has violated Section 9 "by committing take in its operation of the Project *under the 2022 TOP* . . . ." or under "the 2021 TOP." 2022 ECF No. 24 at 42 (emphasis added); 2021 ECF No. 80 at 42. The Klamath Tribes' conclusory assertions that "Reclamation's operation of the Project unquestionably 'takes' C'waam and Koptu" cites Reclamation and FWS documents that analyzed take based on certain "Proposed Actions." *See* 2022 ECF No. 24 at 17; 2021 ECF No. 80 at 45.

Plaintiff cites to various pages of the 2022 TOP to support their claim that "take" occurred. Those statements are general and do not purport to describe what actually happened in 2022, let alone whether and how that event rose to the level of "take" by habitat modification. The Klamath Tribes have offered no evidence that Reclamation has committed "take" in 2021 or 2022 via habitat modification—they do not support their assertion with any affidavits, declarations, or other admissible materials that "harm" occurred. *See* Fed. R. Civ. P. 56(c). The only evidence the Klamath Tribes cite to support their allegation are documents from the administrative record, and those (1) are hearsay and thus inadmissible, and (2) do not support the conclusion that Reclamation committed "take" *in 2022*. Thus, there is no evidence that Reclamation's "operation of the Project under the 2022 TOP," 2022 ECF No. 24 at 42, "actually killed or injured" the suckers. 50 C.F.R. § 17.3. Similarly, there is no evidence that Reclamation's "operation of the Project under the 2021 TOP," 2021 ECF No. 80 at 42, "actually killed or injured" the suckers. 50 C.F.R. § 17.3.

Accordingly, the Klamath Tribes have failed to meet their burden of production because "a material question of fact exists as to whether [Reclamation] is in violation of the ESA" by committing take. *Stout*, 869 F. Supp. 2d at 1281. Therefore, this Court should deny the Klamath Tribes' motions on their Section 9 claims. *See* Fed. R. Civ. P. 56(c); *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000) ("If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything.").

3. Plaintiff's Claim in the 2022 Case that FWS Failed to Rescind or Modify the 2020 BiOp Fails Because No Reinitiation Trigger Was Met, and Defendants Have Already Reinitiated Consultation

Plaintiff's claim in the 2022 Case that FWS is in breach of a duty to reinitiate consultation fails under 50 C.F.R. § 402.16(a). That regulation provides:

> Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:
>
> (1) If the amount or extent of taking specified in the incidental take statement is exceeded;
>
> (2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
>
> (3) If the identified 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; or
>
> (4) If a new species is listed or critical habitat designated that may be affected by the identified action.

There is no basis to conclude that trigger 402.16(a)(1), an exceedance of the amount or extent of take specified in the ITS, has been met. The ITS is at 2022 BOR_AR Bates BOR003635-66. Plaintiff's argument does not identify any exceedance of the amount or extent of take specific in the ITS, but rather just relies on broad generalizations that the water year has been "exceptional and unprecedented." Plaintiff further fails to identify "new information" not previously considered, which would trigger ruination under 402.16(a)(2) or factors resulting in a trigger under 402.16(a)(3) due to modification of the action that would affect listed species. In sum, although Plaintiff identifies generally 50 C.F.R. § 402.16(a), Plaintiff does not identify an actual reinitiation trigger under the regulation, and rather speaks in generalities regarding the impact of drought conditions on available water supply. No reinitiation trigger has been met and thus Plaintiff's claim against FWS fails.

Even if a reinitiation trigger has been met, Plaintiff's claims are moot (*see also* section IV.B.2 above). Defendants have reinitiated consultation and that process is ongoing. *See* 2022 FWS_AR at Bates FWS000286. Therefore, the claim is moot. *All. for the Rockies v. U.S. Dep't of Agric.,* 772 F.3d 592, 601 (9th Cir. 2014); *Native Fish Soc. v. NMFS*, 992 F. Supp. 2d 1095, 1115-16 (D. Or. 2014). The only appropriate remedy for this claim would

be to require Defendants to reinitiate, which they have already done. Thus, Plaintiff's claim fails.

4. Plaintiff's NEPA Claim in the 2022 Case Fails

In the 2022 Case, Plaintiff 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." 2022 ECF No. 24 at 8. Because Reclamation's actions concerning ongoing Project operation for Project purposes are not subject to NEPA, Reclamation had no obligation to perform *any* NEPA analysis. Thus, Plaintiff's argument fails.

a. Diversion and Delivery of Water in the Project Does Not Trigger NEPA

The operation of the Project for its originally authorized purpose of irrigation pre-dates NEPA, and thus Project operations for irrigation are not subject to NEPA. NEPA requires federal agencies to comply with its procedural requirements when they take "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C); *cf. Idaho Conservation League*, 826 F.3d at 1175 ("NEPA only requires the preparation of an EIS when a proposed federal action is major"). However, "NEPA does not apply retroactively," *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234 (9th Cir. 1990) (*Upper Snake River*), so projects constructed prior to NEPA's effective date are not subject to its requirements. *Delta Smelt Consol. Cases v. Salazar*, 686 F. Supp. 2d 1026, 1044-45 (E.D. Cal. 2009) (*Delta Smelt*).

Courts have rejected claims that negative impacts of pre-existing operations trigger NEPA. *Cty. of Trinity v. Andrus*, 438 F. Supp. 1368, 1388-89 (E.D. Cal. 1977) (*Trinity*) (Reclamation's preparation and implementation of a "Dry Year Operations Policy" did not trigger NEPA, *despite its adverse effects on a tribe and fishery*, because "[Reclamation] has

neither enlarged its capacity to divert water . . . nor revised its procedures or standards for releases into the Trinity River and the drawdown of reservoirs. It is simply *operating the Division within the range originally available* pursuant to the authorizing statute, in response to changing environmental conditions") (emphasis added); *Idaho Conservation League*, 826 F.3d at 1175-78 (the Army Corps of Engineers' adoption of a "Flexible Winter Power Operations" Plan did not trigger NEPA, *despite its "adverse effects on the kokanee salmon,"* because the Corps had previously operated the reservoir to lower water levels in the winter, and "reverting to the previous regime doesn't change the status quo") (emphasis added); and *Upper Snake River*, 921 F.2d at 233-35 (Reclamation's decision to reduce dam outflows during drought did not trigger NEPA, *despite drawing ire of sportsmen*, because it was "simply operating the facility in the manner intended. In short, [Reclamation is] *doing nothing new, nor more extensive, nor other than that contemplated when the project was first operational*. Its operation is and has been carried on and *the consequences have been no different than those in years past*") (emphasis added).

On the other hand, "if an ongoing project undergoes changes which themselves amount to 'major Federal actions,' the operating agency must prepare an EIS." *Upper Snake River*, 921 F.2d at 234.

Ninth Circuit courts have found a federal action to be "major" when an agency's *change* in operations of a pre-NEPA project significantly affects the environment, but not when an agency's *ongoing* operations of a pre-NEPA project significantly affects the environment. More specifically, when changes to pre-existing operations are driven by compliance with environmental statutes such as the ESA, the negative environmental impacts of irrigation water shortage can trigger NEPA. *See Westlands Water Dist. v. U.S. Dep't of the Interior, Bureau of*

Reclamation, 850 F. Supp. 1388, 1415-16 (E.D. Cal. 1994) (*Westlands*) ("it cannot be said . . . that the actions of [Reclamation] in implementing the CVPIA do not constitute 'major federal actions' beyond the scope of their normal operations . . . as a direct result of these *changes in air and water pollution, soil subsidence, and diminution of soil quality and the quantity of groundwater* [that] *will occur*") (emphasis added); *Delta Smelt*, 686 F. Supp. 2d at 1049-50 ("Here, in contrast to the 'routine' activities described in *Upper Snake River* and *Trinity* . . . Reclamation's decision to implement the RPA . . . [means that] the Projects' water delivery operations must be materially changed to restrict project water flows to protect the smelt. Reclamation's implementation of the BiOp is major federal action because," *inter alia*, it "may '*place greater demands upon alternative sources of water, including groundwater*' "). Courts have rejected claims that negative impacts of pre-existing operations trigger NEPA.

b. This Court has Already Decided this Issue in Favor of Defendants and KWUA

This Court and the Ninth Circuit have already decided that Reclamation's "lowering of the water levels in [UKL]" (due to irrigation water deliveries) does not trigger NEPA because the Project pre-dates NEPA and "even if the lake level dropped below post-dam levels this year because of the drought, this would not be outside of the operational requirements of the Project." *Or. Nat. Res. Council v. Bureau of Reclamation*, Civil No. 91-6284-HO, 1993 U.S. Dist. LEXIS 7418, at *16-21 (D. Or. Apr. 5, 1993) (*ONRC*), *aff'd*, 1995 U.S. App. LEXIS 8020 (9th Cir. Apr. 7, 1995).[5]

[5] Note that the appellate opinion for this case is unpublished and "may not be cited to or by the courts of this circuit except as provided by 9th Cir. R 36-3." 1995 U.S. App. LEXIS 8020, at *1. KWUA cites this opinion here in compliance with this rule to "show . . . the existence of a related case," since KWUA and Reclamation were parties to, and litigated this issue in, the *ONRC* litigation. *See* Ninth Circuit Rule 36-3(c)(ii); *Sorchini v. City of Covina*, 250 F.3d 706 (9th Cir. 2001) ("the factual purposes falling within [Circuit Rule 36-3(c)(ii)] exception will almost always involve one or both of the parties to the pending case. A prior disposition might show that the current defendant had [already litigated the issue]").

c. Irrigation Diversions Under the 2022 TOP Did Not Trigger NEPA

Here, irrigation diversions under the 2022 TOP did not trigger NEPA. Having been authorized under federal law in 1905, the Project pre-dates NEPA. *See* Act of February 9, 1905, 43 U.S.C. § 601. Similar to *Idaho Conservation League* and *Upper Snake River*, diversion and delivery of irrigation water is merely ongoing operations of the Project in "respon[se] to changing conditions." *Idaho Conservation League.*, 826 F.3d at 1175. Reclamation is not expanding Project facilities, *see Trinity*, 438 F. Supp. at 1388, and it is not effectuating a "*significant* or *long-term* change in operating policy," *Idaho Conservation League*, 826 F.3d at 1176 (emphasis added), and diversion of water for irrigation amounts to "operat[ing] a completed facility 'within the range originally available' to it." *Id.* at 1175 (quoting *Upper Snake River*, 921 F.2d at 234-35).

In sum, the Klamath Tribes erroneously allege that Reclamation violated NEPA by not preparing an EA or EIS based on irrigation diversions in 2022. It is only post-NEPA, ESA-induced changes to Project operations that can trigger NEPA. Thus, the Court should deny the Klamath Tribes' motion on the NEPA claim.

V. CONCLUSION

For all the reasons stated above, KWUA respectfully requests that the Court grant summary judgment in its favor, deny Plaintiff's motions for summary judgment, and dismiss both cases.

SOMACH SIMMONS & DUNN, PC

DATED: January 17, 2023

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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 13,284 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 20,000 words, per the Unopposed Motion for Word Count Enlargement Regarding Plaintiff's Motion for Summary Judgment, which was filed on November 18, 2022 (ECF No. 23).

Respectfully submitted this 17th day of January 2023.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing will be e-filed on January 17, 2023, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

s/ Richard S. Deitchman
Richard S. Deitchman