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

Attorney for Plaintiff
The Klamath Tribes

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MEDFORD DIVISION

THE KLAMATH TRIBES,
a federally recognized Indian Tribe,

Plaintiff,

v.

UNITED STATES BUREAU OF RECLAMATION,

Defendant,

KLAMATH WATER USERS ASSOCIATION,

KLAMATH IRRIGATION DISTRICT,

Defendant-Intervenors.

Case No.: 1:21-CV-00556-CL

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 TRIBES' CONSOLIDATED REPLY BRIEF IN SUPPORT OF ITS MOTIONS FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4
INTRODUCTION 6
BACKGROUND 7
ARGUMENT 12
I. Rule 19 Does Not Require the Dismissal of Either of the Klamath Tribes' Suits. 13
A. No Rule 19 Inquiry is Necessary as There is No Motion to Dismiss on Rule 19 Grounds Pending Before the Court. 13
B. The Fact that Neither the Hoopa Valley Tribe nor the Yurok Tribe Have Appeared to Seek Rule 19 Dismissal is Dispositive. 13
C. The interests of all the Klamath Basin Tribes are aligned in *KT III*. 17
II. Neither *KT II* nor *KT III* is Moot. 18
A. The Expiration of the 2021 and 2022 TOPs Does Not Prevent This Court from Granting Effective Declaratory Relief Where Another TOP is Already in Place and Additional TOPs Are Reasonably Anticipated. 19
B. The Capable of Repetition Yet Evading Review Exception Defeats Defendants' Mootness Arguments. 22
III. The Klamath Tribes Provided Adequate 60-Day Notice to Reclamation of the Claims Filed in Both *KT II* and *KT III*. 23
A. *KT II* 24
B. *KT III* 27
IV. The Klamath Tribes Voluntarily Dismiss Their Claim Against USFWS in *KT III*. 30
V. 2021 Suit ESA Merits. 31
VI. Reclamation's Adoption and Implementation of the 2022 TOP Violates Sections 7 and 9 of the ESA. 36
VII. Reclamation Has Not Established that It Acted Reasonably when It Declined to Prepare a New NEPA Analysis for its 2022 TOP. 43
CONCLUSION 46
CERTIFICATE OF COMPLIANCE 47
CERTIFICATE OF SERVICE 47

TABLE OF AUTHORITIES

Cases

Alabama v. U.S. Army Corps of Engineers, 441 F. Supp. 2d 1123 (N.D. Ala. 2006) 28, 29
Alsea Valley All. v. Lautenbacher, 2006 WL 8460501 (D. Or. Apr. 25, 2006) 25
Alto v. Black, 738 F.3d 1111 (9th Cir. 2013) 18
Animal Def. Council v. Hodel, 840 F.2d 1432 (9th Cir. 1988) 43, 45
Arizona Cattle Growers Ass'n v. U.S. Fish and Wildlife, Bureau of Land Management, 273 F.3d 1229 (9th Cir. 2001) 36
Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166 (9th Cir. 2002) 22
Cascadia Wildlands v. Scott Timber Co., 328 F. Supp. 3d 1119 (D. Or. 2018) 25, 26
Church of Scientology v. U.S., 506 U.S. 9 (1992) 19
Clinton v. Babbitt, 180 F.3d 1081 (9th Cir. 1999) 14
Coal. for a Sustainable Delta v. Fed. Emergency Mgmt. Agency, 812 F. Supp. 2d 1089 (E.D. Cal. 2011) 42
Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496 (9th Cir. 1991) ... 15
Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985) 18, 21
Diffenderfer v. Cent. Baptist Church of Miami, 404 U.S. 412 (1972) 18, 21
Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs, 932 F.3d 843 (9th Cir. 2019) 14, 15, 18
Forest Guardians v. U.S. Forest Service, 329 F.3d 1089 (9th Cir. 2003) 22
Friends of the Clearwater v. Dombeck, 222 F.3d 552 (9th Cir. 2000) 43
Hallstrom v. Tillamook Cnty., 493 U.S. 20 (1989) 26
Hawksbill Sea Turtle v. Federal Emergency Management Agency, 126 F.3d 461 (3rd Cir. 1997) 26
Hoopa Valley Tribe v. National Marine Fisheries Service, 230 F. Supp. 3d 1106 (N.D. Cal. 2017) 9
In re Palmdale Hills Property, 654 F.3d 868 (9th Cir. 2011) 18
Klamath Irrigation District v. U.S. Bureau of Reclamation, 48 F.4th 934 (9th Cir. 2022) ... passim
Klamath Tribes v. Bureau of Reclamation, 537 F. Supp. 3d 1183 (D. Or. 2021) 24
Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206 (9th Cir. 1999) 8, 16, 37
Klamath-Siskiyou Wildlands Ctr. v. MacWhorter, 797 F.3d 645 (9th Cir. 2015) 26, 27, 30
Makah Indian Tribe v. Verity, 910 F.2d 555 (9th Cir. 1990) 14
Minidoka Irrigation Dist. v. Department of Interior, 406 F.3d 567 (9th Cir. 2005) 24
Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 36
Northwest Forest Resources Council v. Glickman, 82 F.3d 825 (9th Cir. 1996) 16
NRDC v. Zinke, 347 F. Supp. 3d 465 (E.D. Cal. 2018) 42
Nw. Env't Def. Center v. Gordon, 849 F.2d 1241 (9th Cir. 1988) 21
Or. Nat. Res. Council Action v. U.S. Forest Serv., 445 F. Supp. 2d 1211 (D. Or. 2006) 43
Our Children's Earth v. Leland Stanford Junior University, No. 13-cv-00402-EDL, 2015 WL 12745786 (N.D. Cal. 2015 Dec. 11, 2015) 40, 41

Pacific Coast Fed'n of Fishermen's Ass'ns v. Bureau of Reclamation, 426 F.3d 1082 (9th Cir. 2005).....16, 32
Pacific Coast Fed'n of Fishermen's Ass'ns v. Bureau of Reclamation, No. Civ.C02-2006 SBA, 2006 WL 798920 (N.D. Cal. March 27, 2006).....32
Protect Our Water v. Flowers, 377 F. Supp. 2d 844 (E.D. Cal. 2004).....41
Pyramid Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364 (9th Cir. 1989).....21
San Carlos Apache Tribe v. U.S., 463 U.S. 545 (1983).....27, 28, 29
San Luis & Delta-Mendota Water Authority v. U.S. Dept. of the Interior, 870 F. Supp. 2d 943 (E.D. Cal. 2012).....23
Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911).....19
Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515 (9th Cir. 1998) 24, 26, 27
Tenn. Valley. Auth. v. Hill, 437 U.S. 153 (1978).....8, 37
United States v. Oregon, 913 F.2d 576 (9th Cir. 1990).....16
United States v. Washington, 86 F.3d 1499 (9th Cir. 1996).....16
Wishtoyo Foundation v. United Water Conservation Dist., No. CV 16-3869-DOC (PLAx), 2017 WL 6940510 (C.D. Cal. Dec. 1, 2017).....42
Yuba River Citizens League v. Nat'l Marine Fisheries Serv., 629 F. Supp. 2d 1123, 1131 (E.D. Cal. 2009).....41
Yurok Tribe v. Reclamation, No. 3:19-cv-04405-WHO (N.D. Cal).....passim
Yurok Tribe v. U.S. Bureau of Reclamation, 231 F. Supp. 3d 450 (N.D. Cal. 2017).....9, 116

Statutes

16 U.S.C. § 1531.....7
16 U.S.C. § 1536.....6, 38, 40
16 U.S.C. § 1538.....6, 39
16 U.S.C. § 1540.....23, 26, 29
40 CFR 1508.1(q)(3)(ii).....46
42 U.S.C. § 4321.....6

Rules

Fed. R. Civ. P. 19(a).....14
Fed. R. Civ. P. 19(b).....14, 15
Federal Rule of Evidence 803(8)(B).....42, 43

INTRODUCTION

The Klamath Tribes ("Tribes") submit this consolidated reply to the responses and cross-motions timely filed by the Defendant United States Bureau of Reclamation ("Reclamation") and Defendant U.S. Fish and Wildlife Service ("USFWS") (collectively "Federal Defendants") (Case No. 1:21-cv-00556-CL ("*KT II*") ECF No. 87) and Defendant-Intervenor Klamath Water Users Association ("KWUA") (*KT II* ECF No. 85), as well as Amici Curiae Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources ("PCFFA") (*KT II* ECF No. 88-1) to the Tribes' Motions for Summary Judgment (*KT II* ECF No. 80; Case No. 1:22-cv-00680-CL ("*KT III*") ECF No. 24).[1] For the reasons set forth in the Tribes' opening briefs and this reply, there is no genuine dispute that Reclamation's 2021 and 2022 Temporary Operating Procedures ("TOP") adversely modified C'waam and Koptu's critical habitat in violation of Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), resulted in the unpermitted take of C'waam and Koptu in violation of Section 9 of the ESA, 16 U.S.C. § 1538, and thereby jeopardized their continued existence, also in violation of ESA Section 7. Nor is there any dispute that USFWS abdicated its responsibility to reinitiate consultation with Reclamation regarding the 2022 TOP and that Reclamation violated the National Environmental Protection Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.,* when it unreasonably decided not to conduct a new NEPA analysis for the 2022 TOP. The Tribes respectfully request that this Court grant its Motions for Summary Judgment in their entirety pursuant to Federal Rule of Civil Procedure 56 and concomitantly deny Federal

[1] The Tribes filed separate briefs in each case. Federal Defendants, KWUA, and the amici filed identical briefs in both suits responding to the Tribes' motions and (in the case of Federal Defendants and KWUA) brought cross-motions for summary judgment of their own. Because of the overlapping nature of the arguments made by the responding parties and amici, the Tribes file this single consolidated reply/response in both cases rather than filing distinct briefs in each. For the reader's convenience, the Tribes will cite only to the ECF entries in *KT II* when it references other parties' briefing herein.

Defendants' and KWUA's cross-motions.[2] The Tribes note that, for the reasons discussed in Section IV, infra, they are voluntarily dismissing their claim against USFWS in *KTIII*.

BACKGROUND

Federal Defendants would have the Court believe that Reclamation is merely a helpless bystander as a hydrologic and biological catastrophe unfolds in the Klamath Basin ("Basin"). But this is not so. Reclamation had a catalyzing role in the chain of events that have led us inexorably to this point, facilitating and then turbocharging the century-plus era of intensive agricultural development, wetland destruction, and human engineering that have decimated the species and habitats that provided material and spiritual sustenance to the Basin's Indigenous peoples for millennia. Today, Reclamation's daily management decisions about how the Basin's water is to be allocated necessarily reflect conscious choices about who will pay the highest price and who may be able to eke out another year of survival.

Once one of the most vibrant and bountiful ecosystems in North America, the Basin is now facing a reckoning. The conflict between the demands of agriculture (including, but not limited to, those of Klamath Project Irrigators ("Irrigators")) and species such as the C'waam and Koptu, Southern Oregon/Northern California Coast coho salmon ("coho"), and Chinook salmon, and the Tribes who revere and depend on them, is longstanding. Species and tribes have long gotten the rawer end of that deal. With the listing of several of these species under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, the Basin's balance of power began to shift somewhat. Unfortunately, this power shift came only when those species were already perilously close to being eradicated from their natural homes in the Basin and in the case of the C'waam and Koptu,

[2] The Klamath Irrigation District ("KID") intervened as a defendant in *KT II* but not *KT III*, and joined KWUA's motion and response in that case. *KT II*, ECF No. 84. Because KID advances no arguments of its own, this brief will speak only of KWUA when it responds to Defendant-Intervenors' arguments.

the only homes they have on the face of the planet. Tragically, as climate change has exacerbated the effects of ecological despoilation and the Basin has suffered through multiple consecutive years of historically poor water conditions, the conflicts between fish and Irrigators have not abated—while conflicts directly between and among the species themselves have intensified dramatically.

Water demand—for the C'waam and Koptu lifecycle imperatives of spawning, rearing, and surviving in Upper Klamath Lake; for the needs of coho and Chinook to do the same in the Klamath River; and for the survival of Irrigators and the local economies they support—consistently outstrips available supply. Reclamation is responsible for managing that limited supply consistent with the biological opinions ("BiOps") issued by USFWS regarding the effects of Reclamation's operation of the Klamath Project ("Project") on C'waam and Koptu; the BiOps issued by the National Marine Fisheries Service ("NMFS") regarding the effects of Reclamation's operation of the Project on the coho and also on the Southern Resident Killer Whale, for whom Klamath River Chinook are a prey species; and with its contracts and other legal obligations to Irrigators. This is not an easy job. But in such a situation Congress has already provided the agency with the direction it must take. The ESA mandates that the needs of listed species are afforded the highest priority. *Tenn. Valley. Auth. v. Hill*, 437 U.S. 153, 184 (1978) (noting Congress enacted the ESA "to halt and reverse the trend toward species extinction, whatever the cost"). When the requirements of a biological opinion are in conflict with the needs of Irrigators, the needs of the irrigators must yield. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) (holding that ESA requirements "override the water rights of the Irrigators").

Courts have yet to be called on to speak so clearly about what happens when the requirements of BiOps are in direct conflict with each other. This is not because courts lack the jurisdiction, authority, or competence to do so. ESA suits are a regular feature of court dockets,

particularly within the territory encompassed by the Ninth Circuit Court of Appeals. Rather it is because in the half century of the ESA's existence, conflicts directly between or among the core needs of listed species, as identified in BiOps, have been mercifully few, if any, and a body of jurisprudence on how to address them has yet to be created. The Basin, unfortunately, is now in the vanguard.

USFWS, in 2008, and NMFS, in 2010, issued BiOps with "conflicting provisions" that "complicated Reclamation's ability to meet the needs of ESA-listed species and critical habitat and meet the demands of the [Project]." 2021 AR Index #2 at Bates 001004. In 2013, USFWS and NMFS issued the Basin's first (and to date only) combined BiOp. *Id.* at Bates 001004-05. That BiOp was intended to remain in place until 2024. *Id.* at Bates 001004. After successful litigation in 2017 by the Hoopa Valley and Yurok Tribes against NMFS and Reclamation over Reclamation's operation of the Project, *Hoopa Valley Tribe v. National Marine Fisheries Service*, 230 F. Supp. 3d 1106 (N.D. Cal. 2017); *Yurok Tribe v. U.S. Bureau of Reclamation*, 231 F. Supp. 3d 450 (N.D. Cal. 2017) (*YT I*), and unsuccessful litigation in 2018 by the Tribes against USFWS and Reclamation over Reclamation's operation of the Project, No. 18-cv-03078-WHO, 2018 WL 3570865 (N.D. Cal. July 7, 2018), Reclamation developed a new proposed action ("2018 PA") which it incorporated into its 2018 Biological Assessment ("2018 BA") upon which USFWS and NMFS based the separate BiOps they each issued in 2019. 2021 AR Index #29 at Bates 001763.

In November 2019, Reclamation, NMFS, and USFWS reinitiated consultation again after errors were discovered in the data underpinning the 2019 NMFS BiOp. *Id.* Barely two months later, in January 2020, the Yurok Tribe again sued NMFS and Reclamation. KWUA intervened in that case as a defendant as well. *Yurok Tribe v. Reclamation*, No. 3:19-cv-04405-WHO, ECF No. 32 (*YT II*). The Yurok Tribe, KWUA, Reclamation, and NMFS proceeded to negotiate a stay

agreement, build around a so-called Interim Operations Plan ("IOP"), that the parties intended to govern Reclamation's operation of the Project until September 30, 2022, while Reclamation, USFWS, and NMFS remained in ongoing consultation toward a longer-duration Project operational plan. *Id.*, ECF No. 907. A central piece of the IOP was an increase in the volume of water released from Upper Klamath Lake ("UKL") to support salmon flows in the Klamath River. Specifically, The IOP made upward adjustments to the Environmental Water Account ("EWA") created under the 2019 NMFS BiOp.[3] The minimum volume assigned to the EWA every year is 400,000 acre-feet of water ("AF"). The IOP calls for augmentation to the EWA of 40,000 AF, which is on top of a 20,000 AF increase to the EWA that had been made in late 2019. *Id.* ECF No. 907-1 at 2-3.[4] Some of this water was to come from the share that otherwise would have been available to Irrigators. *Id.* The rest was taken from the volume that otherwise would have remained in UKL to protect C'waam and Koptu against imminent extinction. *Id.*[5]

In an effort to ameliorate the impacts of the loss of this additional EWA water to the C'waam and Koptu, the IOP purported to condition the availability of the 40,000 AF on Reclamation's ability to maintain UKL at or above an elevation of 4,142.0 feet in any year in which the EWA was to be augmented. *Id.* at 4. This condition, however, was a weak one,[6] particularly as compared to the protections the IOP contained for cabining the impacts to Project

[3] The EWA is amount of water that must be released from UKL between March and September every year to support salmon flows in the Klamath River.
[4] At the time the IOP was negotiated, the Tribes were not a party to the case, having only appeared as an Amicus Curiae in order to caution the court to cabin any additional relief the Yurok Tribe might secure for salmon—an outcome the Tribes did not oppose—in a manner that did not harm the C'waam and Koptu. *YT II*, ECF No. 916 at 5.
[5] To be clear, the Irrigators' water is largely sourced from UKL as well and is capable of supporting C'waam and Koptu needs in UKL until such time as it is released or diverted.
[6] "In the event PacifiCorp is unable to provide the water, and/or if modeling shows that implementation of the 40,000 AF of EWA augmentation releases is likely to result in UKL elevations below 4,142.0 feet in April or May, despite good faith efforts to rearrange the 40,000 AF of EWA releases within reasonable bounds, Reclamation will coordinate with the Services and PacifiCorp to best meet the needs of ESA-listed species…." *YT II*, ECF No. 907-1 at 4.

irrigators.[7] The IOP also proposed dropping the lowest elevation to which Reclamation was allowed to run UKL below the level where the 2019 USFWS BiOp had set it, thus reducing the critical water buffer that protects adult C'waam and Koptu from adverse water quality events and predators. *See id.* at 4-5; 2021 AR Index #1 at 000155.

Because of the significant departure the IOP represented from the 2018 PA, Reclamation reinitiated a whirlwind consultation with USFWS, which produced an entirely new BiOp (the "2020 BiOp") exactly two weeks from the date Reclamation transmitted the IOP to USFWS. *See generally* 2021 AR Index #20 (Reclamation's IOP) and Index #29 (USFWS' 2020 BiOp).[8] In an effort to limit the damage the IOP threatened to cause the C'waam and Koptu in the 2020 BiOp's Incidental Take Statement ("ITS"), USFWS included the condition that Reclamation could not provide any EWA augmentation water under the IOP if UKL would drop below elevation 4,142.0 feet in April or May. 2021 AR Index #29 at Bates 001973. As explained in the Tribes' opening brief, Reclamation promptly violated the IOP by doing just that. *KT II*, ECF No. 80 at 27-28.

The conflict among listed species in the Basin soon spilled out into the open. When Reclamation belatedly cut off EWA augmentation water in May 2020, the Yurok Tribe sought a preliminary injunction to compel them to release more water even though UKL had already dropped below elevation 4,142.0 feet. *YT II*, ECF. No 909 at 3. The Tribes intervened in *YT II* specifically to oppose that request because of the damage being done to C'waam and Koptu spawning and rearing habitat. *Id.*, ECF No. 916 at 10-17. The court denied the Yurok Tribe's

[7] "With respect to the above coordination and ensuing management of 40,000 AF of EWA augmentation releases and consequences for Upper Klamath Lake elevations, there can be no effect on Project irrigation supplies/water availability (e.g., no change in quantity, rate, timing) other than [the specific 23,000 AF share the Project was to contribute to augment the EWA] in Project Supply during the spring-summer period." *Id.* at 4-5.
[8] Because the IOP's departures from the 2018 PA were wholly beneficial to salmon, NMFS saw no need to reconsult, and the 2019 NMFS BiOp remained (and remains) in effect. 2021 AR Index #31 at 002012-13.

motion, identifying the risks their request posed to C'waam and Koptu as a major reason for doing so. *Id.*, ECF No. 924 at 8-9.

As described in the Tribes' complaint and opening summary judgment brief in *KT II*, ECF No. 1 at 20-26, ECF No. 80 at 30-34, this interspecies conflict continued into 2021, recurred in 2022, *see KT III*, ECF No. 24 at 40, n.12, and remains horrifyingly persistent. The Tribes, other tribes in the Klamath Basin, Reclamation, and Irrigators are now routinely faced with a suite of awful options. But they are indeed options, not iron laws of nature. In managing the Basin's waters, Reclamation makes discretionary choices, literally every single day of the year, about where to direct the Basin's limited water supplies—particularly between keeping more of it in UKL or releasing it to the Klamath River. When Reclamation cannot simultaneously comply with the conditions of both USFWS and NMFS' BiOps, it must make discretionary choices about how to adapt. These choices must be guided by, and within the parameters dictated by, the law.

In *KT II*, the conflict is directly between the needs of the endangered C'waam and Koptu in UKL and threatened salmon in the Klamath River. Because of how Reclamation chose to manage that conflict in 2021, the case may be resolved by recourse to traditional ESA principles and does not necessarily require the Court to base its ruling on the Tribes' argument that the ESA mandates the prioritization of endangered species over threatened ones when their needs collide. But that is a reasonable construction of the ESA's language and intent, and the Court could provide important clarity for Reclamation's management of the Project with a ruling on that ground. The fact that the question is novel or that the existence of the interspecies conflicts giving rise to it is extraordinarily painful is not a reason for this Court not to answer it. *KT III* presents the much more traditional ESA conflict, one between listed species and Irrigators uses.

ARGUMENT

I. Rule 19 Does Not Require the Dismissal of Either of the Klamath Tribes' Suits.

A. No Rule 19 Inquiry is Necessary as There is No Motion to Dismiss on Rule 19 Grounds Pending Before the Court.

"Failure to join a party that is required under Federal Rule of Civil Procedure 19 is a *defense* that may result in dismissal under Federal Rule of Civil Procedure 12(b)(7)." *Klamath Irrigation District v. U.S. Bureau of Reclamation*, 48 F.4th 934, 943 (9th Cir. 2022) (emphasis added) ("*KID II*").[9] While both the United States and KWUA wave in the general direction of Rule 19 in their response briefs, *see KT II*, ECF No. 87 at 33-34 (United States); *KT II*, ECF No. 85 at 35 (KWUA), neither has actually brought a motion to dismiss on this ground. Nor have the Hoopa Valley or Yurok Tribes sought intervention pursuant to Federal Rule of Civil Procedure 24 in order to bring a dismissal motion of their own on Rule 19 grounds. Dismissal under Rule 19 is discretionary and is not based on lack of subject matter jurisdiction (which can be raised at any time or addressed *sua sponte* by the Court). Rule 19 is therefore not properly before the Court and the Court should decline to address the issue.

B. The Fact that Neither the Hoopa Valley Tribe nor the Yurok Tribe Have Appeared to Seek Rule 19 Dismissal is Dispositive.

A person or entity is a "required party" and "must be joined" if feasible if either "in that [party]'s absence, the court cannot accord complete relief among existing parties"; or if "that [party] claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party]'s absence may . . . as a practical matter impair or impede the [party]'s ability to protect the interest" or "leave an existing party subject to a substantial risk of incurring

[9] As it is a defense, the Tribes had neither the obligation nor the occasion to address the Rule 19 issue in previous filings as no party has previously raised it. Thus, Federal Defendants' suggestion that the Tribes have ducked this issue is baseless. *KT II*, ECF No. 87 at 34 ("The Klamath Tribes have made no attempt to…demonstrate why dismissal for failure to join the absent tribes is not required under circuit precedent.").

double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1). Under Rule 19, if the party "who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). Federal Defendants suggest that this case cannot proceed because "the requested relief may impair the sovereign interests[,] . . . fishing and associated water rights," of the Hoopa Valley and Yurok Tribes. ECF No. 87 at 33. KWUA goes one step further, arguing that "the Hoopa Valley Tribe, and other California tribes are required parties" because "it is undeniable that [they] hold fishing rights and assert water rights." ECF No. 85 at 35. The Federal Defendants' suggestion and KWUA's assertion are both self-serving and unconvincing.

The Rule 19 inquiry "is a practical one, and fact specific." *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843, 851 (9th Cir. 2019) (internal citation omitted) (*Dine*). In addition, the moving party (of which there is none here) "has the burden of persuasion in arguing for dismissal." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). Further, the inquiry involves two distinct steps, each of which is fact-specific and includes several factors that must be considered. First, the Court must determine that the absent party is "necessary" to the suit. Fed. R. Civ. P. 19(a). To determine whether an absent party is necessary, the Court must consider (1) whether complete relief can be accorded without the presence of the party; or (2) whether the absent party's claims are legally protected in the subject of the suit such that a decision in its absence will (a) impair or impede its ability to protect that interest or (b) expose present parties to the risk of multiple or inconsistent obligations by reason of that interest. *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999).

Second, and only if the court finds that the facts presented support such a necessary party finding and that the party cannot be joined, the court must then consider whether the party is indispensable such that in "equity and good conscience" the suit should be dismissed. *Confederated Tribes of Chehalis Indian Reservation v. Lujan,* 928 F.2d 1496, 1498 (9th Cir. 1991). That consideration involves looking at four factors: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Fed. R. Civ. P. 19(b). In the absence of a Rule 19 motion, and the full development of the arguments and facts required to address the two-part, four-factor test, the Court has not been provided with the necessary means of carrying out this inquiry and should decline to do so *sua sponte*.

Further, the most salient fact here is that neither the Hoopa Valley Tribe nor the Yurok Tribe have sought leave to intervene in this case to seek Rule 19 dismissal. Their decision not to do so materially distinguishes the present situation from those before the courts in *Dine* and *KID II*. In both of those cases, one or more indispensable but non-joinable parties moved to intervene and to dismiss, *See Dine*, 932 F.3d at 847-48; *KID II*, 38 F.4th at 938, and both courts found the indispensable but non-joinable parties had met their burden under Rule 19 to warrant dismissal *Dine*, 932 F.3d at 858; *KID II*, 38 F.4th at 948.

Federal Defendants and KWUA are purporting to speak for the absent tribes by raising the Rule 19 issue essentially on their behalf (though, again, not actually moving for dismissal on that basis). To allow these parties to invoke Rule 19 on behalf of absent tribes who have themselves

chosen not to appear would turn Rule 19 from an appropriately protective shield of indispensable, non-joinable parties' interests into the sort of tactical weapon that multiple KWUA member districts, represented by the same counsel as KWUA here, specifically complained about (incorrectly in that case) to this court in *KID I*. *KID I*, ECF No. 77 at 37-38. This Court should flatly decline the invitation.

To the extent the foregoing does not conclude the Rule 19 inquiry, however, the Tribes further note that there is no colorable argument that the absent tribes have lacked notice of these proceedings or have had insufficient time to consider whether they should intervene in either of the pending suits to seek dismissal.[10] The undersigned shared a copy of the docketed complaint and motion for a temporary restraining order in *KT II* with counsel for the Yurok Tribe on April 13, 2021, the same day they were filed, and with counsel for the Hoopa Valley Tribe the following day. Declaration of Jay Weiner (February 13, 2023). PCFFA and the Institute for Fisheries Resources ("IFR"), frequent and longstanding litigation partners of the Yurok Tribe,[11] have appeared as *amici curiae* in both of the Tribes' pending actions and are represented by counsel who also serves as co-counsel for the Yurok Tribe in pending litigation in the Northern District of California. *Compare KT II* ECF No. 33-1; *KT III* ECF No. 33-5; *YT II*, ECF No. 1101. Yurok Tribe senior water policy and technical analyst Michael Belchik has filed declarations in support of both of the amicus briefs PCFFA/IFR have filed in this case. *KT II* ECF No.s 33-1 and 88-4. It can therefore be fairly inferred that the Yurok Tribe is fully aware of these cases and has chosen not

[10] Timeliness is "the threshold requirement" for intervention as of right under Rule 24(a). *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990). "[A]ny substantial lapse of time weighs heavily against intervention." *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996). Permissive intervention under Rule 24(b) has a similar timeliness requirement. *See Northwest Forest Resources Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996). Given these requirements, the Tribes submit that the window within which the absent tribes could have moved to intervene has closed.

[11] *See*, *e.g.*, *YT II*, No. 3:19-cv-04405-WHO; *YT I*, 231 F. Supp. 3d 450 (N.D. Cal. 2017); *Pacific Coast Fed'n of Fishermen's Ass'ns v. Bureau of Reclamation,* 426 F.3d 1082 (9th Cir. 2005) ("*PCFFA*"), *Patterson*, 204 F.3d 1206.

to intervene in them. The Hoopa Valley Tribe is also no stranger to Rule 19 practice, not least as evidenced by its intervention in *KID I*. It has assessed its interests in other contexts to counsel in favor of intervention as a party rather than intervention to seek Rule 19 dismissal, as it recently did in pending litigation in the Northern District of California involving many of the same parties who have appeared in the instant cases. *See YT II*, ECF No. 1091.

Federal Defendants and KWUA should not be allowed to substitute their own judgment for those of the Hoopa Valley or Yurok Tribes, and the Rule 19 arguments should be rejected.

C. The Interests of All the Klamath Basin Tribes are Aligned in *KT III*.

Even assuming *arguendo* that the Hoopa Valley and Yurok Tribes are required parties who cannot be joined, *KT III* is not susceptible to Rule 19 dismissal as the Tribes can adequately represent the absent Hoopa Valley and Yurok Tribes' interests because, for the purposes of this specific case, those interests are aligned with the Tribes' interests. In *KT III*, the Tribes challenge Reclamation's decision in the 2022 TOP to provide water to Klamath Project irrigators in a manner that violated Reclamation's own water allocation formula and seek a declaration that Reclamation's prioritization of irrigation needs over those of listed species violated the ESA. *KT III* ECF No. 24 at 7-8. The vindication of the principle that the needs of listed species must be accorded paramount importance, which lies at the heart of the Tribes' claims in *KT III*, serves the interests of all three tribes in ensuring the perpetuation of the fish species to which they have treaty rights.

The Yurok Tribe (joined by PCFFA and IFR) recently sought leave to file a supplemental complaint in *YT II*, making a similar argument about the appropriate prioritization of listed species' needs over those of Irrigators. *See YT II*, ECF No. 1101 at 55 (requesting the court to "[i]ssue an injunction prohibiting Reclamation from allocating water for irrigation that would draw down

UKL to levels that would prevent Reclamation from simultaneously meeting the needs of all ESA-listed species"). The alignment of all the Basin's tribes' interests on this point differentiates this situation from those at issue in *Dine* and *KID I and II*, where none of the existing parties shared a similar identity of interests. *See Dine*, 932 F.3d at 855-56; *KID II*, 48 F.4th at 944-45. And given this alignment of interests, dismissal of *KT III* on Rule 19 grounds is unwarranted. *See Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013) (holding that Tribe's absence did not preclude complete relief).

II. Neither *KT II* nor *KT III* is Moot.

"The party asserting mootness has a heavy burden to establish that there is no effective relief remaining for a court to provide." *In re Palmdale Hills Property*, 654 F.3d 868, 874 (9th Cir. 2011). Relying heavily on the United States Supreme Court's decision in *Diffenderfer v. Cent. Baptist Church of Miami*, 404 U.S. 412 (1972) (per curiam) and its progeny, Federal Defendants and KWUA attempt to meet this burden by arguing that *KT II* and *KT III* should be dismissed on mootness grounds because the 2021 and 2022 TOPs have expired. *KT II* ECF No. 87 at 34; *KT II* ECF No. 85 at 29-32. Specifically, they assert that because these TOPs have expired, the Tribes are not suffering any ongoing legal violations or injuries on their account. *KT II* ECF No. 87 at 34; *KT II* ECF No. 85 at 32.

Federal Defendants and KWUA's arguments ignore that there remains in both suits a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Conyers v. Reagan,* 765 F.2d 1124, 1128 (D.C. Cir. 1985) (cleaned up). The declaratory relief the Tribes seek[12] is therefore

[12] As Reclamation is not currently operating the Project under the 2021 or 2022 TOPs, the Tribes are no longer seeking injunctive relief related to those operations.

sufficient to defeat these mootness arguments. *See also Church of Scientology v. US*, 506 U.S. 9, 12 (1992) (dismissal on mootness grounds is appropriate only when a court has no ability to grant "any effectual relief whatever"). Dismissal on mootness grounds is also unwarranted because the conduct the Tribes complain of in regard to the two TOPs is readily capable of repetition while evading review. Indeed, this is precisely the sort of situation—where a party controls both the duration and the character of a challenged action—that the capable of repetition yet evading review doctrine was created to address. *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515-16 (1911).

A. The Expiration of the 2021 and 2022 TOPs Does Not Prevent This Court from Granting Effective Declaratory Relief Where Another TOP is Already in Place and Additional TOPs Are Reasonably Anticipated.

Federal Defendants and KWUA would have the Court accept that the 2021 and 2022 TOPs were each distinct and discrete aberrations unconnected from Reclamation's ongoing efforts to operate the Project under the IOP. *KT II*, ECF No. 87 at 37 ("a TOP is not a routine action that is scheduled to reoccur on a regular basis. To the contrary, the 2018 Plan/IOP anticipates that the planned operations – consistent with BiOp and ITS requirements – will be implemented without TOPs"); *see also KT II* ECF No. 85 at 32. In reality, however, Reclamation has yet to successfully operate the Project consistent with the IOP. Rather, it violated the IOP in 2020, resorted to TOPs in 2021 and 2022, *KT III*, ECF No. 24 at 27-28, and is currently operating the Project under a third TOP with the prospect of a fourth on the horizon for this spring. *See* Klamath Project January 2023 Temporary Operating Procedure ("2023 Winter TOP") (available at https://www.usbr.gov/mp/kbao/docs/klamath-project-january2023top01262023.pdf) (last

accessed February 13, 2023).[13] With Reclamation insisting on keeping the as-yet-unimplementable IOP in place through at least October of 2024, *KT II*, ECF No. 87 at 23, the prospect of yet more TOPs is far from speculative.[14]

Implicitly conceding that point, Federal Defendants assert that "[i]t is not reasonable to assume that a future TOP will apportion water in any given way, much less the same way as either the 2021 or the 2022 TOP." *KT II*, ECF No. 87 at 38. Yet Reclamation carried over the prioritization of coho needs over C'waam and Koptu needs from the 2021 TOP to the 2022 TOP. *Compare* 2021 AR Index #153 at Bates 005543 ("Deviations to minimum Iron Gate flows are not proposed") *with* 2022 AR Index #54 at Bates BOR001405 ("Reclamation is not anticipating or proposing deviations to the minimum Klamath River target flows at Iron Gate Dam."). The 2021 TOP also included a section addressing the conditions under which a so-called surface flushing flow could be released from UKL. 2021 AR Index #153 at Bates 005543. In the 2023 Winter TOP, Reclamation already forecasts what certain elements of the next 2023 TOP might contain, including "a surface flushing flow, with the timing, volume, duration, and triggers subject to consideration of UKL elevation and predicted inflows…." 2023 Winer TOP at 7. Because Reclamation builds each TOP from the rubble its management decisions and a given year's hydrology have made of the IOP, common and recurring features are almost inevitable, and it is unreasonable for Federal

[13] The Klamath Tribes respectfully request the Court take judicial notice of the 2023 Winter TOP pursuant to Federal Rule of Evidence 201.

[14] In contrast to the very concrete likelihood of future TOPs, Federal Defendants indulge in their own speculation by avoiding a discussion of Reclamation's ongoing efforts to operate the Project under the IOP and pointing instead to some future successor operational plan when considering the likelihood of recurrence of the challenged actions. *KT II*, ECF No. 87 at 38-39 ("[G]iven the uncertainty surrounding the form (or existence) of any future operations plan, BiOps, ITSs, and TOPs, and any claimed ESA or NEPA violations, it is not reasonable to proceed with adjudicating the Tribes' challenges to the 2021 TOP and 2022 TOPs on the assumption that the Tribes will be subjected to those same actions in the future."). But Reclamation has already extended the life of the IOP, which was originally scheduled to expire on September 30, 2022, to October 31, 2024. 2022 AR Index #133 at Bates BOR005498. There are, therefore, a minimum of two more spring/summer periods before any successor operation will be in place, assuming Reclamation holds to its 2024 deadline better than it has to its 2022 deadline.

Defendants to pretend otherwise. Thus, the declaratory relief the Tribes seek in the instant actions is vital for constraining Reclamation from repeating its illegal actions, including as soon as this coming spring, while it continues to try to operate the Project under the IOP.[15]

This situation is thus a far cry from *Diffenderfer* and *Conyers*, where the Supreme Court held the suits at issue in those cases moot. Rather, the appropriate analogy is to cases such as *Nw. Env't Def. Center v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988), and *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 368 (9th Cir. 1989). In both of those cases, the Ninth Circuit recognized that where a single-season operation had adverse effects on a species of fish, the complained of conduct was susceptible to being remedied, despite the conclusion of the challenged operation, by ensuring that the fish received sufficient water and spawning opportunities in a future year. As the Ninth Circuit explained:

> [W]here the violation complained of may have caused continuing harm and where the court can still act to remedy such harm by limiting its future adverse effects, the parties clearly retain a legally cognizable interest in the outcome. In deciding such a case the court is not merely propounding on hypothetical questions of law, but is resolving a dispute which has present and future consequences. The fact that the alleged violation has itself ceased is not sufficient to render a case moot. As long as effective relief may still be available to counteract the effects of the violation, the controversy remains live and present.

Gordon, 849 F.2d at 1245. Here, Reclamation's actions under the 2021 and 2022 TOPs devastated the entire 2021 and 2022 years' classes of baby C'waam and Koptu. The declaratory relief the Tribes seek is vital to ensure that Reclamation does not adopt TOPs that repeat these tragedies in the future, but instead gives these endangered fish better opportunities to spawn and

[15] Because the Tribes' injuries remain redressable, KWUA's argument that the expiration of the TOPs deprives the Tribes of standing, *KT II* ECF No. 85 at 29-31, also fails.

rear baby fish who can perpetuate the continued existence of these species. The Tribes' suits are therefore not moot.[16]

B. The Capable of Repetition Yet Evading Review Exception Defeats Defendants' Mootness Arguments.

To the extent the Court is inclined to pursue the mootness inquiry further, dismissing either *KT II* or *KT III* on mootness grounds is also unwarranted because Reclamation's actions are capable of repetition while evading judicial review. There are two prongs to the "repetition/evasion" test: an otherwise potentially moot case escapes dismissal if "(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to [the challenged action] again." *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002) (internal citation and quotation marks omitted). There is no meaningful dispute that the 2021 and 2022 TOPs satisfy this first prong. Surveying its own jurisprudence, the *Badgley* court observed that "a regulation in effect for less than a year satisfied [this aspect of the test] because a year is not enough time for judicial review." *Id.* As does a challenged action of two years in duration. *Id.* at 1173. The 2021 and 2022 TOPs were each in effect for a period of six months or less. Indeed, Federal Defendants effectively concede that the Tribes' suits satisfy the first prong of the repetition/evasion test. *KT II*, ECF No. 87 at 36. But they contest the second prong.[17] They are wrong.

Contrary to Federal Defendants' arguments, and as discussed above, the 2021 and 2022 TOPs are not one-off aberrations. Rather, recourse to TOPs is a regular—at this point perhaps even

[16] The issuance of a new USFWS BiOp ("2023 BiOp") on January 13, 2023, does not change the analysis. The 2018 PA and IOP remain the action Reclamation consulted on, and the new ITS in USFWS' 2023 BiOp maintained the same boundary conditions for 2023 that Reclamation would have been subject to under the 2020 BiOp's ITS. The 2023 BiOp therefore does not moot the Tribes' claims in the way the Ninth Circuit found the issuance of new ESA documents did in *Forest Guardians v. U.S. Forest Service*, 329 F.3d 1089, 1095-96 (9th Cir. 2003).

[17] KWUA's mootness arguments fail to address the repetition/evasion exception at all. *KT II*, ECF No. 85 at 31-32.

a defining—feature of Reclamation's attempts to operate the Project under the IOP. The recurrent use of TOPs in 2021 and 2022 means that "there is a reasonable expectation that the same complaining party would be subjected to the same action again." *San Luis & Delta-Mendota Water Authority v. U.S. Dept. of the Interior*, 870 F. Supp. 2d 943, 960 (E.D. Cal. 2012). This factor "is potentially dispositive of the application of the capable of repetition but evading review exception." *Id.* (internal citation and quotation marks omitted) As the court observed in that case, "[a]lthough no party can predict exactly when Federal Defendants might again have the opportunity and motivation to exercise the discretion challenged in this case, the possibility remains, and past conduct indicates a reasonable expectation that the conduct may be repeated." *Id.* at 964.

Reclamation is still subject to the multiple, potentially competing requirements of the ITS issued by USFWS in its 2023 BiOp authorizing the limited incidental take of C'waam and Koptu, the ITS issued by NMFS in its still-operative 2019 BiOp, authorizing the limited incidental take of coho and Chinook salmon, and the demands of Project irrigators. Moreover, the hydrology of the Klamath Basin remains challenging, and Reclamation has acknowledged—as noted above—that without extraordinary efforts or a dramatic improvement in conditions, it may yet again be required to operate under a TOP rather than the IOP during the spring/summer period of 2023. It is therefore entirely reasonable to expect that the challenged conduct will be repeated. The Tribes' suits thus satisfy the repetition/evasion test and are not subject to dismissal on mootness grounds.

III. The Klamath Tribes Provided Adequate 60-Day Notice to Reclamation of the Claims Filed in Both *KT II* and *KT III*.

Federal Defendants argue that the Tribes failed to adhere to the ESA's 60-day notice provision for citizen suits, 16 U.S.C. § 1540(g), before bringing suit in both 2021 and 2022. *KT II*, ECF No. 87 at 39. As compliance with the ESA's notice requirement is jurisdictional in this

Circuit, *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998), they assert that this alleged failure means both suits must be dismissed. *Id.* at 42. But the Tribes have in fact complied with the Notice requirements for both suits.

A. KT II

This Court has already determined that the Tribes complied with the ESA's notice requirements in *KT II*. ECF No. 53 at 8-9.[18] That ruling, therefore, is the law of the case, *Minidoka Irrigation Dist. v. Department of Interior*, 406 F.3d 567, 573 (9th Cir. 2005), and Federal Defendants have not shown—nor could they—that any of the exceptions to that doctrine apply.[19] The court is therefore precluded from revisiting the issue. *Id.* KWUA has appropriately recognized this situation by challenging only the Tribes' compliance with the ESA's 60 Day Notice requirement as to *KT III*. *KT II*, ECF No. 85 at 32.

Should the Court nevertheless choose to engage substantively with Federal Defendants' arguments as to the 60-day notice in *KT II*, it should reject them. Federal Defendants characterize the Tribes' notice letter of February 12, 2021 ("2021 Notice"), as an "anticipatory or pre-violation notice" for an alleged violation "that could occur on April 1 of that year." ECF No. 87 at 40. This matters, they claim, because "[t]he weight of authority holds" that "anticipatory or pre-violation notice letters do not satisfy the ESA's notice requirement." *Id.* But Federal Defendants are incorrect that the Tribes' notice was anticipatory, and they are wrong that dismissal is required even if it were.

[18] *Klamath Tribes v. Bureau of Reclamation*, 537 F. Supp. 3d 1183, 1188 (D. Or. 2021).
[19] "[T]he law of the case doctrine is subject to three exceptions that may arise when (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Minidoka Irrigation Dist.*, 406 F.3d at 573 (internal quotations and citation omitted).

Federal Defendants squarely presented their anticipatory notice argument to Judge McShane at the preliminary injunction phase of this case. *KT II*, ECF No. 25 at 22-23. Contrary to Federal Defendants' efforts to gloss Judge McShane's ruling in their instant brief, *see KT II*, ECF No. 87 at 41, Judge McShane in fact rejected their position on the ground that the 2021 Notice was not simply anticipatory:

> Plaintiff's notice letter was forward-facing and primarily focused on the potential threats to the C'waam and Koptu this year, [but] the letter also noted Plaintiff's belief that Reclamation failed to comply with T&C 1c in 2020. Instead, it delivered both augmentation water and irrigation water to Project users during April and May while UKL dropped and then remained below elevation 4142.0 feet. . .. The rest of the notice letter outlines Plaintiff's assertion that the Bureau would be *in further violation* of T&C 1c if Upper Klamath Lake fell below 4142 in April or May 2021.

KT II, ECF No. 53 at 8 (internal quotations and citations omitted) (emphasis added).

Moreover, a wholly anticipatory notice is not a fatal defect. The lead case Federal Defendants cite in support of their assertion of fatality is the unpublished decision *Alsea Valley All. v. Lautenbacher*, 2006 WL 8460501, at *2 n.2 (D. Or. Apr. 25, 2006), a decision authored by Judge Aiken of this court. Twelve years later, however, Judge Aiken considered the question afresh in *Cascadia Wildlands v. Scott Timber Co.*, 328 F. Supp. 3d 1119 (D. Or. 2018) and reached the opposite conclusion. Judge Aiken's reasoning is particularly germane here:

> Having reviewed the relevant authorities, I conclude that neither the statute nor the case law supports a bright-line rule against anticipatory notice of future violations. 'Congress' overriding purpose in enacting the ESA indicates that it intended to allow citizen suits to enjoin an imminent threat of harm to protected wildlife.' *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 785 (9th Cir. 1995). Legislative history indicates that Congress intended to make injunctions available in order to increase the likelihood conflicts would be resolved '*before* harm to a species occurs,' *Id.* at 786 (quoting S. Rep. No. 97-418, at 24 (1982) *reprinted in* 1982 U.S.C.C.A.N. at 1411 (emphasis in *Forest Conservation Council*)). In *Colorado Environmental Coalition*, the district court considered whether a notice of intent to sue can be effective as to an act that has not yet occurred. 819 F.Supp.2d at 1219-20. The court noted that the ESA *only* permits citizen suits for *prospective* relief, and then reasoned that '[a]llowing a legal action

> to be brought under the ESA that challenges future agency actions is inconsistent with a rule that pre-suit notice under the ESA cannot challenge future agency actions.' *Id.* at 1220. 'Instead, the determinative question ... is whether the notice sent by Plaintiffs contained a sufficient description of the challenged activities, thus sufficiently putting DOE on notice.' *Id.* I find the District of Colorado's analysis and conclusion persuasive and adopt them here…. [I]n the context of the history of litigation in between the parties in this case, [the challenged notice] provided sufficient information to put Scott Timber and the relevant governmental agencies on notice regarding the specific violation of the ESA asserted here.

Cascadia Wildlands, 328 F. Supp. 3d at 1131-32. The 2021 Notice, particularly when read in context of the ongoing communication between the Tribes and the United States over Project operation issues in 2020 and 2021 and the Tribes' 2018 suit in *KT I*, should be construed as similarly sufficient to satisfy the requirements of 16 U.S.C. § 1540(g).

This is not an argument that the Tribes only complied with the Notice requirement functionally; the content of the Tribes' letters satisfy the substantive requirements of the statute. While Federal Defendants are correct that the ESA's 60-day notice requirement must be strictly construed and is not susceptible to equitable exceptions, the cases that they cite[20] do not support the rigid interpretation that they draw from them.[21] A "hypertechnical approach to the pre-suit notice requirement is not supported by the statutory text or the case law." *Cascadia Wildlands*, 328 F. Supp. 3d at 1130. Strict adherence to the *timing* of a notice is necessary, but "there is no express requirement in the statute pertaining to the *content* of a notice letter." *Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 126 F.3d 461, 472 (3rd Cir. 1997) (internal citation and quotation marks omitted) (emphasis original). "At a minimum . . . [a plaintiff is] obligated to

[20] *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 31 (1989); *Sw. Ctr. for Biodiversity*, 143 F.3d at 520.
[21] *Hallstrom* is actually a Clean Water Act ("CWA") case, though since that Act has a 60-day notice requirement analogous to the one in the ESA, courts have treated it as important authority in the ESA context. The Ninth Circuit has noted, though, when comparing the two statutory schemes, that "[u]nlike the citizen suit statutory provision in the CWA, the ESA's notice provision has no implementing regulation. Accordingly, to the degree that the CWA implementing regulation might be thought to require more specific notice than would be required under the statute, standing alone, we are not bound to adopt that more demanding requirement." *Klamath-Siskiyou Wildlands Ctr. v. MacWhorter*, 797 F.3d 645, 650 (9th Cir. 2015) ("*MacWhorter*").

provide sufficient information of a violation so that the Secretary or Reclamation could identify and attempt to abate the violation." *Sw. Ctr. For Biological Diversity*, 143 F.3d at 522. The Tribes have done so.

MacWhorter is instructive on this point. In that case, the Ninth Circuit surveyed its ESA 60-day notice jurisprudence and analyzed decisions where the court had found adequate notice and where it had not. 797 F.3d at 651-53. It concluded that the unifying theme was whether a plaintiff had "specifically alleged a geographically and temporally limited violation of the ESA" rather than a more generalized grievance insufficient to allow the challenged agency to identify and have the opportunity to correct that alleged violation. *Id.* at 653. As Judge McShane correctly concluded, the 2021 Notice accomplished precisely that. *KT II*, ECF No. 53 at 8.

B. KT III

Contrary to Federal Defendants' and KWUA's arguments, the Tribes also strictly adhered to the ESA's notice requirements for citizen suits in *KT III*. Federal Defendants contend that the Tribes provided a 60-day notice letter on April 14, 2022, and filed suit 25 days later. ECF No. 87 at 42. KWUA recognizes what Federal Defendants ignore, that the April 14 letter builds off the letter the Tribes sent on March 10, 2022, more than 60 days before the Tribes' filed *KT III*. *KT II*, ECF No. 85 at 34-35. KWUA argues, however, that the March 10 letter was deficient and thus that the court lacks jurisdiction to consider *KT III*. *Id.* These arguments also fail.

i. The *2021* Notice Provides Adequate Notice of the *KT III* Claims

The 2021 Notice is itself sufficient to provide Reclamation notice of the ESA violations the Tribes allege in *KT III*. Sixty-day notice letters do not have set sell-by dates. In *San Carlos Apache Tribe v. U.S.*, for example, that tribe sent the Secretary of the Interior a letter in 1997 regarding the perilous status of several endangered species on the reservation. 272 F. Supp. 2d

860, 871 (D. Ariz. 2003). The letter asserted that the drawdown of a lake that same year would place engendered species at imminent risk, thereby constituting an unlawful taking, and jeopardized the species' continued existence through adverse habitat modification. *Id.* at 872.

The tribe only brought suit in 1999, however, and defendants sought dismissal, arguing that the 1997 letter did not provide the requisite notice for a lawsuit in 1999. *Id.* The court disagreed, recognizing that "the drawdown problem at San Carlos Lake was not a new problem arising in 1997" but one the tribe had brought to the Federal defendants' attention even before its 1997 letter. *Id*. at 873. The *San Carlos* court recognized that the tribe's complaint that defendants failed to properly manage and regulate the storage and release of water in the lake "reache[d] beyond the mere emergency situation faced in 1997." *Id.* Thus, the fact that the tribe's notice was focused most specifically on an immediate threat in 1997 did not "make the notice inadequate for the purpose of challenging the ongoing operation of the Reservoir." *Id.* Instead, "[i]t was the ongoing operation of the dam and the repeated drawdowns of the Lake that [the tribe was] challenging." *Id.*; *see also Alabama v. U.S. Army Corps of Engineers*, 441 F. Supp. 2d 1123, 1130 (N.D. Ala. 2006) (rejecting defendant's argument that suit seeking TRO for 2006 interim operating plan that was developed after plaintiff sent notice letter in 2004 did not meet ESA's 60-day notice requirement because the 2004 letter "was challenging the *ongoing* operation" of the project and negotiations over the ongoing operation of the project since 1990 provided defendants notice of plaintiff's intent to seek compliance with the ESA) (emphasis in original).

Here, *KT III* similarly relates to Reclamation's ongoing operation of the Project. While the 2022 TOP differed from the 2021 TOP in the *manner* in which it violated the ESA, the gravamen of the Tribes' ESA claims in both suits is that Reclamation's adverse modification of critical C'waam and Koptu habitat under the TOPs causes jeopardy and unpermitted take. *San Carlos*

therefore stands for the proposition that with the 2021 Notice alone the Tribes complied with 16 U.S.C. § 1540(g) before bringing *KT III.* This is especially true since the Tribes are not challenging new agency actions as Reclamation claims. ECF No. 87 at 43. Instead, as discussed above in section II.A, the IOP is still the operative action on which Reclamation has consulted with USFWS.

ii. The Klamath Tribes' Letter of March 10, 2022, is Independently Sufficient to Satisfy the Notice Requirement

In its letter on March 10, 2022 ("2022 Notice"), the Tribes requested immediate consultation with Reclamation, USFWS, NMFS, and the Bureau of Indian Affairs because:

> In short, unless there is a miraculous transformation in precipitation over the next three weeks, hydrologic conditions coupled with Reclamation's longstanding management of the Klamath Project (Project) will have once again created conditions where there will simply not be enough water to meet the needs of both the C'waam and Koptu in the Upper Basin and the needs of anadromous species in the Klamath River. **This is true even if there are no water deliveries this year to Klamath Project irrigators, which is unfortunately likely to be a necessary (but not sufficient step) for Reclamation to do everything it can to comply with its obligations under the Endangered Species Act (ESA).**

2022 AR Index #43 at Bates BOR001260 (emphasis added). While the 2022 Notice does not expressly mention litigation, it provided sufficient notice under the statute as it informed Reclamation that if it failed to comply with the terms and conditions of the 2020 BiOp in 2022, those deviations would violate the ESA.

As with the 2021 Notice the *KT II* court approved, the 2022 Notice constituted a challenge to Reclamation's ongoing operation of the Project and the reasonable certainty of harm facing the C'waam and Koptu due to Reclamation's disregard of the terms and conditions of the 2020 BiOp. *San Carlos Apache Tribe*, 272 F. Supp. 2d at 873; *Alabama*, 441 F. Supp. 2d at 1130. The 2022 Notice thus provided sufficient information for Reclamation to identify and attempt to abate the

violation, particularly in light of the context of communication—and litigation—between the Tribes and Reclamation over the preceding two years. *MacWhorter*, 797 F.3d at 651.

IV. The Klamath Tribes Voluntarily Dismiss Their Claim Against USFWS in *KT III*.

The Tribes sued USFWS in *KT III* for its failure to rescind ESA coverage for Reclamation when Reclamation failed to meet the 2020 BiOp's minimum boundary conditions in 2022 and instead improperly favored Irrigator interests over endangered species in the 2022 TOP. ECF No. 1 at 29-31. The Tribes subsequently moved for summary judgment on that claim. *KT III*, ECF No. 24 at 8. On January 13, 2023, nearly two months after the Tribes filed their summary judgment motion, USFWS replaced the 2020 BiOp with the 2023 BiOp. *See* 2022 AR Index #134 at Bates BOR005501.

The key boundary conditions of—and hence Reclamation's substantive obligations under—the two BiOps are the same, which (as explained above) is part of why the Tribes' claims against Reclamation are not moot. *Compare* 2022 AR Index #117 at Bates BOR0036550 and 2022 AR Index #134 at Bates BOR005735. But the 2023 BiOp's ITS has a notable difference from the 2020 BiOp's ITS. Namely, rather than creating wiggle room for Reclamation to shirk its obligations to the C'waam and Koptu by exploiting a meet-and-confer process, the 2023 BiOp's ITS flatly provides that if Reclamation cannot manage the available water supply to meet the applicable boundary conditions, it must immediately reinitiate consultation with USFWS. 2022 AR Index #132 at Bates 005735-36 ("If during the meet and confer processes described here Reclamation determines that UKL elevations cannot be attained through changes in project operations for any reason, Reclamation *shall* immediately reinitiate consultation with the Service") (emphasis added).

As this new requirement is functionally equivalent to the relief the Tribes sought against USFWS in *KT III* [ECF No. 1 at 34], the Tribes hereby voluntarily dismiss Count III of that complaint against defendant USFWS.

V. Reclamation's Actions Under the 2021 TOP Violated Sections 7 and 9 of the ESA.

A. Section 7

Tellingly, Federal Defendants make no effort to argue that the conditions to which Reclamation's decisions subjected the C'waam and Koptu in 2021 did not adversely modify their critical habitat. Rather, they try to sidestep this reality by pointing to the fact that Reclamation could not have met the April, May, and July ITS conditions of the 2020 BiOp "regardless of irrigation diversions." *KT II*, ECF No. 87 at 56. Federal Defendants would like the Court to adopt Reclamation's fiction that it was a wholly passive bystander in 2021, making no discretionary decisions but merely those involuntarily forced on it by the year's poor hydrology. The truth is otherwise.

Reclamation made deliberate choices, authorizing additional irrigation releases that compromised UKL's ability to refill over the winter of 2020-2021 and deciding without explanation to prioritize salmon needs over those of C'waam and Koptu, without any mandatory legal obligation to do so under that year's water conditions. These are discretionary decisions, as Federal Defendants admit. *KT II*, ECF No. 87 at 51 ("Reclamation addressed immediate and temporary competing needs and balanced the risks to all listed species[.]"). The ESA's requirements therefore apply to, and limit, the exercise of such discretion.

Reclamation set itself on a dangerous course when it made a series of water allocation decisions at the end of the poor 2020 water year and into water year 2021 that discretionarily reduced the amount of water remaining in UKL overwinter to be available to support UKL

elevations during spring 2021. 2021 AR Index #78 at Bates 003146; Index #107 at Bates 004310-12. Furthermore, Federal Defendants' effort to focus on irrigation diversions ignores the fact that Reclamation chose to satisfy the needs of salmon in the Klamath River with water that otherwise would have been available in UKL to support the core biological needs of the C'waam and Koptu.

Amici assert that Reclamation did not actually favor salmon needs over C'waam and Koptu in 2021. *KT II*, ECF No. 88-1 at 26-27.[22] But they concomitantly acknowledge that Reclamation has consistently prioritized providing year-round river flows ahead of all other water needs in the Klamath Basin. *Id.* at 27 ("Reclamation and NMFS have treated these minimum flows as inviolate."). Amici suggest, *id.*, that this treatment stems from the Ninth Circuit's 2005 decision in *PCFFA*, 426 F.3d 1082, which struck down a core component of a 2002 NMFS BiOp because "the reasoning behind the agency's plan cannot be reasonably discerned." *Id.* at 1092. On remand, the district court issued an injunction requiring Reclamation "to limit Klamath Project *irrigation deliveries*" unless specified river flows could be met while Reclamation and NMFS reinitiated consultation and produced a new BiOp. *Pacific Coast Fed'n of Fishermen's Ass'ns v. Bureau of Reclamation*, No. Civ.C02-2006 SBA, 2006 WL 798920 at *8 (N.D. Cal. March 27, 2006) (emphasis added). Nowhere in this litigation were C'waam and Koptu needs considered, nor the possibility of direct conflict between their needs and those of salmon. *PCFFA* was framed as a salmon versus irrigators fight. The case therefore provides no basis for automatically prioritizing salmon needs over C'waam and Koptu needs, which is precisely what Reclamation chose to do in 2021.

[22] Amici point to Reclamation's decision not to provide a surface flushing flow or EWA augmentation in 2021 and its decision to cut off augmentation flows in 2020 mean that Reclamation could not have been prioritizing salmon. *KT II*, ECF No. 88-1 at 28-31. A flushing flow, however, is not a requirement of the 2019 NMFS BiOp if its release would "result in impacts to [C'waam and Koptu] outside of those analyzed by USFWS" in its BiOp. 2021 AR Index #2 at 001037. And 2021's hydrology was sufficiently poor that the IOP's conditions triggering the provision of augmentation water were not met.

Amici assert that those minimum flows are "mandatory" because they have been incorporated into subsequent NMFS BiOps. *KT II*, ECF No. 88-1 at 34. They offer no explanation—as there is none—for why those flows should be treated as more "mandatory" than the minimum UKL elevations required by the 2020 BiOp. Yet that is precisely what Reclamation did in the 2021 TOP, when it peremptorily declared that "[d]eviations to minimum [river] flows are not proposed." 2021 AR Index #153 at Bates 005543. There is not a single word in the record explaining Reclamation's reasoning for that choice despite the fact that the 2021 TOP acknowledges that the continued planned releases from UKL of water to maintain river flows would preclude Reclamation from meeting the July 15 minimum elevation condition of the 2020 BiOp. *Id.* at Bates 005542.

Federal Defendants attempt to argue away this flaw by asserting that "the reasons are evident[.]" *KT II*, ECF No. 87 at 53. For this post hoc rationalization, they offer that: 1) curtailment of "irrigation diversions" could not have achieved the April and May 2020 BiOp minimum boundary conditions, *id.* at 53-54, which is mathematically accurate but also a non sequitur; 2) the July 15 requirement could not be met "even without and Project deliveries or a Surface Flushing Flow (SFF) prior to July 15[,]" *id.*, which repeats the error of refusing to acknowledge the effects of the daily releases;[23] and 3) that deviating from the river releases "would have increased the likelihood of meeting the July 15 UKL elevation" but would not have guaranteed it and would have ensured that Reclamation missed the river minimums called for in the NMFS BiOp. *Id.* at 57.

[23] Reclamation's decision in 2021 not to provide a surface flushing flow had devastating consequences for salmon that year. Had Reclamation performed its duties more diligently and honestly analyzed the various options available to it, it could have had the opportunity to plan more effectively to balance the relative risks between moderating releases for daily flows and preserving water to provide a flushing flow without further exacerbating the damage it inflicted on C'waam and Koptu. It also bears note that a flushing flow is not a requirement of the 2019 NMFS BiOp if its release would "result in impacts to [C'waam and Koptu] outside of those analyzed by USFWS" in its BiOp. 2021 AR Index #2 at 001037.

Federal Defendant's own formulation illustrates that what Reclamation had before it was a *choice*—particularly in regard with the 2020 BiOp's July 15 requirement—not a set of circumstances wholly outside its control or over which it lacked discretion. This falls within the ambit of the ESA's requirements.

For the reasons set forth in the Tribes' opening brief and unrebutted by Federal Defendants,[24] Reclamation's decisions adversely modified C'waam and Koptu critical habitat and thereby jeopardized the continued—already precarious—existence of those species. *See KT II*, ECF No. 80 at 34-40.

B. Section 9

Federal Defendants do not contest that Reclamation committed take of C'waam and Koptu in 2021. Rather, they maintain that Reclamation complied with T&C 1c of the 2020 BiOp, and thus did not violate Section 9 because all take in 2021 was immunized under the 2020 BiOp's ITS. *KT II*, ECF No. 87 at 52. In support of this argument, Federal Defendants point to letters Reclamation received from NMFS and USFWS in response to Reclamation's request, 2021 AR Index #154 at Bates 005550, that those agencies confirm that Reclamation had satisfied T&C 1c and the analogous requirement of the NMFS BiOp, [25] and suggests that the agencies blessed Reclamation's actions. *KT II*, ECF No. 87 at 54-55. NMFS indeed concurred that Reclamation had complied with the requirement of its BiOp. 2021 AR Index #152 at Bates 005540. Yet, as the Tribes explained in their opening brief, *KT II*, ECF No. 80 at 32-33, USFWS did not agree that Reclamation's actions complied with the 2020 BiOp's T&C 1c.

[24] KWUA's substantive Section 7 and Section 9 arguments, which are the same as to the Tribes' claims in both *KT II* and *KT III* are addressed in Section VI below.
[25] That provision is called T&C 1a. 2021 AR Index #2 at Bates 001278-79.

Federal Defendants selectively quote from USFWS' letter to identify areas where USFWS agreed with Reclamation's specific characterizations of the events leading up to Reclamation's adoption of the 2021 TOP. *KT II*, ECF No. 54-55. But the USFWS letter's polite bureaucrat-speak is in fact damning of Reclamation's overall efforts. "The Service recognizes that the [2021 TOP] described in your memorandum represents *Reclamation's interpretation* of the corrective actions needed to address the spawning needs of adult suckers in UKL." 2021 AR Index #156 at Bates 005571 (emphasis added). "T&C 1c also requires that Reclamation maintain UKL surface elevations in April and May above those observed in 2010[], *though this provision is not addressed in the TOP*." *Id.* (emphasis added).

USFWS' inability to offer a more specific evaluation of Reclamation's efforts is likely because Reclamation failed to offer any explanation for how and why it chose to prioritize between the needs of the species and the respective conditions of the USFWS and NMFS BiOps, particularly regarding daily river releases. As discussed above, there is not a word of analysis in the administrative record. When this Court ruled at the preliminary injunction stage that Reclamation had "continued to comply with the terms and conditions[,]" *KT II*, ECF No. 53 at 16, the record had not yet been produced and the Court primarily had only the competing representations of the parties to rely on. With a full record the analysis is different.

> It is a basic principle of administrative law that the agency must articulate the reason or reasons for its decision . . . Although a decision of less than ideal clarity may be upheld if the agency's path may reasonably be discerned, we cannot infer an agency's reasoning from mere silence . . . Rather, an agency's action must be upheld, if at all, on the basis articulated by the agency itself.

PCFFA, 426 F.3d at 1091 (cleaned up). Because USFWS did not offer its own opinion on the adequacy of Reclamation's compliance with T&C 1c, 2021 AR Index #156 at Bates 005571, the Court can only determine the answer by looking to the justification Reclamation proffered:

"[c]ritically dry and extraordinary hydrologic conditions." 2021 AR Index #153 at 005541. Those conditions were certainly the paramount factor in why Reclamation could not simultaneously comply with the requirements of both USFWS' and NMFS' BiOp. But they were not the reason why Reclamation chose to prioritize daily river releases ahead of C'waam and Koptu spawning and rearing needs when it was forced into a choice between the two.

It is the Court's job to "carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." *Arizona Cattle Growers Ass'n v. U.S. Fish and Wildlife, Bureau of Land Management*, 273 F.3d 1229, 1236 (9th Cir. 2001) (internal citations and quotation marks omitted). Here, there is no discussion in the record of the role that prior and prospective releases from UKL for river flows plays in the situation Reclamation faced in April 2021, nor any evaluation of the comparative risks and benefits of approaching those river releases in any other manner when considering the competing needs of C'waam and Koptu and salmon. This "fail[ure] to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), renders arbitrary and capricious—and hence inadequate—Reclamation's attempt to comply with T&C 1c of the 2020 BiOp. From April 2021 on, therefore, Reclamation has been out of compliance with the 2020 BiOp's ITS, depriving it of the right to shelter under that BiOp's protection from take liability. *Arizona Cattle Growers Ass'n*, 273 F.3d at 1239.

VI. Reclamation's Actions Under the 2022 TOP Violated Sections 7 and 9 of the ESA.

Federal Defendants ignore an entire corpus of ESA law when they ask this Court to accept that Reclamation's decision in the 2022 TOP to privilege irrigator needs ahead of the C'waam and Koptu simply "represent[ed] a good-faith effort . . . to meet as many of the competing needs as is practicable under the circumstances." *KT II*, ECF No. 87 at 60 (internal

quotations omitted). This balancing-of-the-interests approach contravenes Congress' clear command that the needs of endangered species are "to be afforded the highest of priorities." *Tenn. Valley. Auth.*, 437 U.S. at 174. It also flouts the Ninth Circuit's holding in *Patterson* that the ESA's requirements take priority over the rights of Irrigators. *Patterson*, 204 F.3d at 1213.[26]

As explained in the Tribes' opening summary judgment brief in *KT III*, ECF No. 24 at 27-31, Reclamation expressly and deliberately crafted the 2022 TOP to increase the volume and accelerate the timing of water delivered for irrigation purposes in contravention of its own water allocation formula and at the direct expense of preserving incremental spawning and rearing benefits for C'waam and Koptu that could have been obtained from the retention of more water in UKL. *See* 2022 AR Index #117 at Bates BOR003553, BOR003557. Indeed, USFWS specifically implored Reclamation "to take any available steps to maintain UKL elevations as high as possible through July 15." 2022 AR Index #52 at BOR001435. Reclamation instead did precisely the opposite, allowing roughly 60,000 AF to be diverted out of UKL for Irrigators between April 15 and July 15, 2022 AR Index #121 at Bates BOR005485-86, because it apparently felt "compelled to . . . allocate a meaningful water supply to the Klamath Project." 2022 AR Index #52 at BOR001435.

Federal Defendants assert that this could not have violated Sections 7 or 9 of the ESA in the manner claimed by the Tribes because Reclamation "dutifully followed the procedures outlined in Term 1c of the [US]FWS ITS in 2022 prior to implementing the [2022] TOP." *KT II*, ECF No. 87 at 58. Yet it is implausible that a decision to deliver extra, early irrigation water constitutes a "corrective action[,]" which is a necessary component of T&C 1c's adaptive

[26] The continued vitality of this holding in *Patterson* was underscored last week in a summary judgment ruling issued by Judge William Orrick in *Yurok Tribe v. Bureau of Reclamation*, Case 3:19-cv-04405-WHO, ECF No. 1102 at 24 (N.D. Cal. Feb. 6, 2023).

management safety valve. 2022 AR Index #117 at Bates BOR003650 ("Reclamation *shall* immediately consult with the Service concerning the causes to adaptively manage and *take corrective actions*") (emphasis added).[27] Nor did USFWS affirm that Reclamation complied with T&C 1c or approve the 2022 TOP. Rather, the USFWS memo of April 11, 2022, upon which Federal Defendants place great weight, *see KT II*, ECF No. 87 at 59, inventories Reclamation's "efforts to date" to comply with T&C 1c and describes them as having been conducted in "good faith[.]" 2022 AR Index #52 at Bates BOR001434. It says nothing about the adequacy of Reclamation's corrective actions. Federal Defendants implicitly recognize as much when they offer only that "[US]FWS did not opine that the proposed operations under the 2022 TOP would violate Reclamation's obligations under the ESA to protect [C'waam and Koptu]." *KT II*, ECF No. 87 at 59.[28]

Federal Defendants have therefore failed to refute the Tribes' claims that by: 1) choosing to depart in the 2022 TOP from the 2018 BA's water allocation formula consulted on in the 2020 BiOp in order to make an improperly large Irrigation allocation and 2) 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). Moreover, by failing to comply with T&C 1c of the 2020 BiOp's ITS in 2022 and

[27] Federal Defendants' claim that "[t]he Tribes fail to identify any required procedure that Reclamation violated" in 2022 is spurious. *KT II*, ECF No. 87 at 58. To benefit from the safety valve afforded by T&C 1c, Reclamation's departure from the boundary conditions must have been both adaptive and corrective. The Tribes have plainly asserted that Reclamation violated the latter requirement—as well as the ESA's command to prioritize the needs to endangered species.

[28] Federal Defendants' contention that these actions could not have been a violation of the ESA because USFWS did not say they were, *KT II*, ECF No. 87 at 59, is also inconsistent with an argument they make elsewhere in their brief, where they spend several pages explaining their view of the limitations on USFWS' ability to require an action agency to consult or otherwise moderate its course of conduct. *Id.* at 45-49. Indeed, to quote Federal Defendants' brief, "Section 7 places the duty to avoid jeopardizing listed species . . . on the action agency." *Id.* at 47.

operating outside that BiOp's boundary conditions for the third consecutive year, Reclamation has forfeited the ability to shield any take committed in its operation of the Project from liability under Section 9, 16 U.S.C. § 1538(a)(1).

KWUA separately asserts that the Tribes' Section 7 claims in both *KT II* and *KT III* fail because they are a stealth attack on the 2020 BiOp itself rather than on Reclamation's management of the Project under the 2021 or 2022 TOPs and one the Tribes have adduced insufficient evidence to sustain. *KT II*, ECF No. 85 at 42. This argument is difficult to follow—if anyone is attacking the 2020 BiOp, it is KWUA, with its assertion that the 2020 BiOp's boundary conditions "have no meaning under the ESA, are not based on biological consideration, and merely reflect what they are—hydrologic model outputs." *Id.* at 41. But this is nonsense. As the Tribes explained in their opening summary judgment brief, *KT III*, ECF No. 24 at 22, and as the 2020 BiOp explains at greater length, 2022 AR Index #117 at BOR003552-64, the hydrology of UKL directly determines the amount and quality of critical habitat in and around UKL that the C'waam and Koptu can access for essential biological functions and is thus intimately linked with their continued survival. This is why USFWS incorporated these boundary conditions as specific elements of the ITS it issued Reclamation, conferring on them independent legal significance under the ESA. KWUA's claim that the Tribes have "incorrectly equate[d] 'boundary conditions' as a jeopardy threshold" is simply wrong. *KT III*, ECF. No. 85 at 41.

Reclamation's failure to meet those boundary conditions without simultaneously complying with the T&C 1c safety valve in both 2021 and 2022 means that its operation of the Project caused adverse biological effects outside the scope of those analyzed in the 2020 BiOp, particularly through reductions in available spawning and rearing habitat for the C'waam and Koptu. Given the age and dwindling numbers of surviving adult C'waam and, especially, Koptu,

Reclamation's improper allocation, impairing a year's opportunity for these aged fish to try to spawn and rear babies, jeopardizes the species. *See KT III*, ECF No. 24 at 37-38. Reclamation's improper allocation of water out of the critical C'waam and Koptu habitat of UKL at a time that directly and adversely affected C'waam and Koptu spawning and rearing are adverse modifications. *Id.* at 38. Both actions violate Section 7(a)(2), 16 U.S.C. 1536(a)(2).

KWUA also attacks the Tribes' Section 9 claims in both *KT II* and *KT III* on the ground that the Tribes have failed to produce evidence to demonstrate that Reclamation's violations of the 2020 BiOp's ITS actually caused take. This argument is hard to credit. As a threshold matter, Federal Defendants have implicitly conceded that take occurred by failing to raise this issue themselves, instead focusing their arguments on whether Reclamation acted in compliance with the 2020 BiOp's ITS. KWUA also questions whether the Tribes have identified the correct standard for proving take through habitat modification, which KWUA asserts requires demonstrating that harm to a listed species has occurred, not just harassment. *KT II*, ECF No. 85 at 42-45. Even if this is the standard, the Tribes have satisfied it.

"Harm" under the ESA means "an act which actually kills or injures fish or 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. KWUA relies heavily on a pair of cases, one of them unpublished, to assert that the Tribes have not adduced sufficient evidence of harm to prevail on their Section 9 claims. These cases, however, are both readily distinguishable from the facts in *KT II* and *KT III*.

In *Our Children's Earth v. Leland Stanford Junior University*, No. 13-cv-00402-EDL, 2015 WL 12745786 (N.D. Cal. 2015 Dec. 11, 2015), the court granted the defendant's motion

for partial summary judgment on two claims the plaintiff had brought asserting that the defendant's operation of a dam had sufficiently degraded the habitat of two listed species causing unpermitted take. *Id.* at *1. In reaching that conclusion, the court found that there was no evidence that either listed species actually inhabited the area affected by the dam, meaning that the habitat changes effected by the dam could not have caused harm to the species. *Id.* at *12-13. In *Protect Our Water v. Flowers*, 377 F. Supp. 2d 844 (E.D. Cal. 2004), the court rejected a reinitiation of consultation claim that was predicated on an allegation that the take trigger of an action agency's ITS had been exceeded. *Id.* at 874. That holding, too, was predicated on the court's determination that the listed species was not actually present in the action area, which meant that the plaintiff's demonstration of habitat modification was insufficient to show actual harm to a listed species. *Id.* at 873-74. Uncertainty about the presence of a listed species in proximity to degraded habitat is plainly not an issue in the Tribes' suits, because C'waam and Koptu incontrovertibly inhabit UKL, and Reclamation's operation of the Project under the 2021 and 2022 TOP's adversely modified C'waam and Koptu critical habitat.

KWUA's invented standard would have the Tribes show the Court a specific injured or dead fish before KWUA would acknowledge that a C'waam or Koptu has been harmed by Reclamation's operation of the Project under the 2021 and 2022 TOPs. *KT II*, ECF No. 85 at 45-46. But that is not the law. There is no bar to the Tribes meeting their burden through the use of circumstantial evidence. The 2023 BiOp recognizes "the continued rapid decline of both [C'waam and Koptu] in the Upper Klamath Basin in the last three years . . . ." 2022 AR Index #134 at Bates BOR005521. It identifies that "impacts to embryos and pre-swim-up larvae are expected to increase as surface elevations in UKL go below 4,142.00 ft. during April and May." *Id.* at Bates BOR005641. It also cautions that "[w]hen lake elevation is below 4,140.8 ft.,"

C'waam and Koptu larvae become "more vulnerable to starvation, predation, and entrainment . . . ." *Id.* at Bates BOR005643. These are all conditions Reclamation has created in UKL under the 2021 and 2022 TOPs, due in significant part to its choice to prioritize providing river flows over maintaining UKL elevations for C'waam and Koptu needs and through the authorization of an inappropriately large and early agricultural allocation in 2022. While "the *magnitude* of specific effects is difficult to determine[,]" *id.* (emphasis added), it defies plausibility to suggest, as KWUA would have it, that not a single C'waam or Koptu—egg, larva, juvenile, or adult—was injured or killed as a consequence of these conditions. Where Reclamation has forfeited the ability to shelter under the 2020 BiOp's ITS by failing to abide by its terms and conditions, *any* take violates Section 9. *Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 629 F. Supp. 2d 1123, 1131 (E.D. Cal. 2009) ("[I]f the terms of the ITS are violated, any taking (incidental or otherwise) is directly prohibited by section 9.").

In an effort to avoid this conclusion, KWUA argues that the court should exclude the BiOp from evidence as inadmissible hearsay. *KT II*, ECF No. 85 at 45. The lone case KWUA cites to support this proposition, *NRDC v. Zinke*, 347 F. Supp. 3d 465 (E.D. Cal. 2018), does not actually support it. At most, *NRDC* raises a question of admissibility, but only in dicta. *Id.* at 496 and n.19. By contrast, at least two district courts have specifically held that BiOps *are* admissible under the public records exception of Federal Rule of Evidence 803(8). *Coal. for a Sustainable Delta v. Fed. Emergency Mgmt. Agency*, 812 F. Supp. 2d 1089, 1095 (E.D. Cal. 2011); *Wishtoyo Foundation v. United Water Conservation Dist.*, No. CV 16-3869-DOC (PLAx), 2017 WL 6940510 at *13 (C.D. Cal. Dec. 1, 2017) ("Because NMFS produced the Biological Opinion while carrying out its section 7 duties . . . the Opinion can be presumptively admitted as a public record."). KWUA has offered nothing to demonstrate that the 2020 and 2023 USFWS BiOps are

untrustworthy and thus potentially susceptible to exclusion under Federal Rule of Evidence 803(8)(B). Consequently, the Court is free to consider them as evidence in support of the Tribes' claims and the Tribes have satisfied their burden of production.

VII. Reclamation Has Not Established that It Acted Reasonably when It Declined to Prepare a New NEPA Analysis for its 2022 TOP.

A decision not to supplement an Environmental Analysis ("EA") previously prepared pursuant to NEPA must be reasonable. *Or. Nat. Res. Council Action v. U.S. Forest Serv.*, 445 F. Supp. 2d 1211, 1225 (D. Or. 2006) (*ONRCA*). Reasonableness depends on the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the new information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data. *Id.* The focus of the reasonableness inquiry is on the quality of the agency's decision-making process, not its outcome. *Id.* at 1226; *see also Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 561 (9th Cir. 2000) (holding an agency must "articulate a rational connection between the facts it has found and its conclusions" when assessing whether to supplement an EA); *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988) (upholding agency decision not to supplement an Environmental Impact Statement ("EIS") where the agency "carefully considered the information, evaluated its impact, and supported its decision not to supplement its EIS with a statement of information").

Federal Defendants would have the court believe that conditions in 2022 that they elsewhere describe as "exceptional and unprecedented[,]" *KT II*, ECF No. 87 at 58, and as "unanticipated circumstances" that were "outside of those that were contemplated when Reclamation developed the 2018 Plan and the IOP," *id.* at 61, are—when it comes to the Tribes' NEPA claim—"fundamentally similar because no new information since 2020 has become readily

available and . . . environmental circumstances (relative to hydrologic conditions) remain consistent and similar to conditions experience [*sic*] in 2020 and 2021." *Id.* at 66. And they studiously ignore any consideration of the in-year and cumulative impacts that consecutive years of drought conditions and Reclamation's management decisions have had on C'waam and Koptu, and in fact characterize as "temporary and minor[,]" *id.* at 67-68, impacts that USFWS previously explained the fish "will feel . . . more acutely this year" (i.e. in 2022) than they already had in 2021. 2022 AR Index #52 at Bates BOR001435. This is not reasonable.

While Reclamation's 2021 Supplemental EA ("SEA") may have contemplated a scenario involving extreme drought, *KT II*, ECF No. 87 at 69-70,[29] neither the SEA nor the 2020 EA addressed the possible effects of a third consecutive year of compromised spawning and severely diminished rearing habitat on a species on the brink of extinction. Nor did they analyze how the 2022 TOP's modification of the Project Supply allocation formula might affect the available spawning and rearing habitat, or the additional impacts that might impose on the C'waam and Koptu. Federal Defendants contend that because deviations from the allocation formula were proposed in both the 2021 and 2022 TOPs, the analysis contained in the 2021 SEA is adequate to address the 2022 TOP as well. *Id.* at 71. They assert that "[t]he only difference between 2021 and 2022 is that the Tribes disagree with how Reclamation utilized that increased flexibility [in departing from the allocation formula] to adaptively manage a limited supply of water with competing needs." *Id.*

[29] Federal Defendants attempt to couch the 2020 EA as a document that "expressly contemplate[s] a scenario where extreme droughts like those of recent years would render the targets, buffers, and formulas unachievable." *KT II*, ECF No. 87 at 70. This is an inaccurate characterization. In April of 2020, when the 2020 EA was prepared, the Klamath Basin was on the front end of the recent string of extremely dry years, and the current conditions were as yet unanticipated. Indeed, the portion of the 2020 EA Federal Defendants quote in support of their claim, 2022 AR Index #121 at Bates BOR005169-70, addresses a situation where the provision of *augmentation* water, not baseline river flows, conflicts with the 2020 BiOp's requirement of keeping UKL from dropping below an elevation of 4,142.0 feet in April or May.

The Tribes certainly do disagree with Reclamation's management decisions. But that is not the legally salient factor here. Rather, it is precisely this difference in how Reclamation planned to use the water that renders the 2021 SEA inadequate to allow the 2022 Determination of NEPA Adequacy ("DNA") to be compliant with NEPA. There is no basis for Reclamation to assume that the environmental effects on "biological resources" (i.e. C'waam and Koptu) are the same when no initial irrigation allocation is provided and any potential start date is deferred (the alternative evaluated alongside the no-action alternative in the SEA, 2022 AR Index #123 at Bates BOR003081-82) and when an irrigation allocation is increased and authorized to commence smack in the middle of C'waam and Koptu spawning season (which is what the 2022 TOP contemplated, 2022 AR Index #54 at Bates BOR001406).

Yet Reclamation nonetheless purported to "determine[] that the existing analyses encompassed the conditions likely to be encountered in 2022." *KT II*, ECF No. 87 at 71. Contrary to Federal Defendants' claim, this is not "a hard look at the potential environmental impacts of the 2022 TOP and the sufficiency of the existing NEPA analysis." *KT II*, ECF No. 87 at 69. Rather, Reclamation's failure to consider this material difference between 2021 and 2022 illustrates a failure to carefully consider the information at hand. *Cf. Hodel*, 840 F.2d at 1439.

KWUA takes a different tack in responding to the Tribes' NEPA claim. Rather than trying to defend Reclamation's failure to prepare an appropriate NEPA document in connection with the promulgation of the 2022 TOP, it asserts that NEPA is simply inapplicable to Reclamation's operation of the Project to provide irrigation water. *KT II*, ECF No. 85 at 48. This is so, KWUA says, because "negative impacts of pre-existing operations" do not "trigger NEPA." *Id.*

KWUA's focus on the narrow question of the relationship between NEPA and the provision of irrigation water, however, attempts to obscure the fact that Reclamation's adoption of

the 2022 TOP is a *change* to pre-existing operations. And 40 CFR 1508.1(q)(3)(ii) makes clear that the adoption of a "plan" by a federal agency is a major action triggering NEPA. The 2022 TOP is indisputably such a plan. Reclamation certainly understood it as such when it prepared the DNA. For the reasons set forth above and in the Tribes' opening summary judgment brief, *KT III*, ECF No. 24 at 45-48, however, Reclamation failed to live up to its NEPA obligations and the Tribes are entitled to summary judgment on this claim.

CONCLUSION

What fundamentally cannot be forgotten is that the Basin is the only home the C'waam and Koptu have ever known, and the only one they have ever had. If they are killed off there, they will vanish from the face of the planet forever. That would be a cataclysm of unimaginable proportions for the Tribes and is an acute and particularized threat facing no other species in the Klamath Basin.

Reclamation's challenged 2021 and 2022 management decisions have directly exacerbated the risk of this now all too conceivable outcome. For the reasons set forth above, there are no genuine issues of material facts that Reclamation's decisions violated the ESA and NEPA. The Tribes are therefore entitled to the declaratory relief they have requested in order to help stave off the very extinction of the C'waam and Koptu.

Dated: February 13, 2023

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@rosettelaw.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 14,636 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 February 13, 2023.

Respectfully submitted this 13th day of February, 2023.

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@rosettelaw.com

Attorney for Plaintiff
The Klamath Tribes

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Consolidated Reply Brief in Support of Their Motion for Summary Judgment and Declaration of Jay Weiner Regarding Klamath Tribes' Consolidated Reply Brief in Support of its Motions for Summary Judgment were e-filed on February 13, 2023, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

Dated: February 13, 2023

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@rosettelaw.com

Attorney for Plaintiff
The Klamath Tribes