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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
MEDFORD DIVISION

KLAMATH TRIBES, Plaintiff, v. UNITED STATES BUREAU OF RECLAMATION, Defendant,	Case No.: 1:21-CV-00556-CL **FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT (ECF 87)**

KLAMATH WATER USERS ASSOCIATION, KLAMATH IRRIGATION DISTRICT,

Defendant-Intervenors.

KLAMATH TRIBES,

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

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT (ECF 32)

Pursuant to the Scheduling Orders in the related cases above,[1] Defendants United States Bureau of Reclamation ("Reclamation") and United States Fish and Wildlife Service ("FWS") (collectively "Federal Defendants") hereby submit this reply in support of their cross-motions for summary judgment. To increase efficiency and avoid duplication, and in accordance with the Orders granting Klamath Tribes' ("the Tribes") unopposed motions for word enlargement on their consolidated opposition and reply brief, Federal Defendants are submitting a single brief that addresses both matters. *Klamath Tribes I* (ECF 79, 81); *Klamath Tribes II* (ECF 23, 25).

[1] *See* Case No.: 1:21-cv-00556-CL (ECF 78) ("*Klamath Tribes I*"); Case No.: 1:22−cv−00680−CL (ECF 21) ("*Klamath Tribes II*").

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I. Introduction

The Klamath Tribes' ("the Tribes") complaints suffer from several fatal defects, the central one being that the Tribes are pursuing claims that are moot. There is no dispute that the Tribes seek to challenge temporary operating procedures ("TOP") for the Klamath Project that are expired and have no legal effect, and that the Tribes seek to base their legal challenges to the TOPs on alleged non-adherence to a U.S. Fish & Wildlife Service ("FWS") biological opinion ("BiOp") and incidental take statement ("ITS") that are also expired, and without legal effect. In response to Federal Defendants' cross-motion for summary judgment, the Tribes expressly disavow all of their previously requested injunctive relief, implicitly conceding that it is moot. *KT II* ECF 40 at 18 n.12.[2] The Tribes also agree to voluntarily dismiss their sole claim against FWS (*i.e.*, Count III in *Klamath Tribes II*) in another implicit concession of mootness. *Id*. at 30-31. The Tribes resist, however, conceding that their claims against the U.S. Bureau of Reclamation ("Reclamation") are similarly moot, maintaining that a declaratory judgment on the defunct TOPs, BiOp, and ITS could still provide them with effective relief of a live controversy. That is not so. There is no live controversy over these expired documents and the requested declaratory judgment would provide no meaningful relief in the real world. The cases are moot, and they should be dismissed accordingly.

[2] The Tribes filed a single, consolidated brief that addresses both *KT I* and *KT II*. *See KT I* ECF 91; *KT II* ECF 40. For simplicity, Federal Defendants will cite herein only to the version that was filed in *KT II*. Federal Defendants note that the Tribes used a different nomenclature to refer to their two complaints than Federal Defendants did. Whereas Federal Defendants used "*Klamath Tribes I*" and "*Klamath Tribes II*," the Tribes used "*Klamath Tribes II*" and "*Klamath Tribes III*." The Tribes do not explain the basis for their nomenclature; however, it would appear that they count the prior case, *Klamath Tribes v. U.S. Bureau of Recl.*, No. 18-CV-03078-WHO, 2018 WL 3570865 (N.D. Cal. July 25, 2018), as "*Klamath Tribes I*." To maintain consistency with their opening brief, Federal Defendants will continue to use "*Klamath Tribes I*" and "*Klamath Tribes II*" herein to refer to the Tribes' two currently pending complaints.

The Tribes' complaints also raise potential Federal Rule 19 concerns, which the Tribes attempt to avoid by arguing that this Court lacks the authority to dismiss the complaints on such grounds *sua sponte*. That is incorrect. The Court has the authority to consider dismissal on Rule 19 grounds *sua sponte* should it deem it appropriate to do so. In addition, dismissal of the Tribes' Endangered Species Act ("ESA") citizen suit claims in both cases is required because the Tribes failed to comply with the provision's mandatory notice requirement. There can be no genuine dispute that the Tribes provided notice of their intent to challenge the 2021 TOP in *Klamath Tribes I before* the TOP had even been adopted, and that the Tribes filed suit against the 2022 TOP in *Klamath Tribes II* after waiting just 25 days from providing notice, rather than the full, and requisite 60 days. Thus, the Tribes' notice in *Klamath Tribes I* was premature, and its complaint was premature in *Klamath Tribes II*. Dismissal of both complaints is required, as compliance with the notice requirement is strictly construed. Mootness, Federal Rule 19, and inadequate notice are independent bases for dismissing without proceeding to the merits.

Even if the Court does proceed to the merits, the Tribes offer nothing to show that the Court erred when it previously concluded in *Klamath Tribes I* that their claims were substantively deficient. *Klamath Tribes v. U.S. Bureau of Recl.*, 537 F. Supp. 3d 1183, 1184 (D. Or. 2021) ("*Klamath Tribes I*"). The Tribes identify no legal support for their claim that Reclamation violated the ESA by not leaving more water in Upper Klamath Lake ("UKL") to favor ESA-listed suckers at the expense of Klamath River flows for ESA-listed Southern Oregon/Northern California Coast ("SONCC") coho salmon and Southern Resident killer whales (which prey on Klamath River Chinook salmon), because there is none. The record shows that, in accordance with the conferral procedure set forth in the (now expired) FWS BiOp and ITS, Reclamation, in conference with FWS and the National Marine Fisheries Service ("NMFS"),

addressed immediate and temporary competing needs and balanced the risks to all listed species through the 2021 TOP a reasonable manner informed by real-time hydrological and biological data. The following year, Reclamation developed the 2022 TOP after similarly adhering to the conferral procedure. The record shows that there was no management action Reclamation could have taken to meet the required FWS BiOp/ITS elevations in UKL for suckers in spring/summer 2022. Further, Reclamation correctly determined that prior compliance documents prepared in accordance with the National Environmental Policy Act ("NEPA") addressed the environmental impacts of the 2022 TOP.

For the reasons set forth in Federal Defendants' opening brief and below, the Court should dismiss the Tribes' challenges to the expired 2021 and 2022 TOPs. In the alternative, the Court should grant summary judgment to Federal Defendants on those challenges.

II. Argument

A. *Klamath Tribes I* and *Klamath Tribes II* Should Be Dismissed

1. The Court Can Dismiss Both Complaints on Rule 19 Grounds

In their opening brief, Federal Defendants advised the Court of controlling Circuit authority that directly concerns the Klamath Project, ESA compliance, and potential impacts to tribal interests relevant to Federal Rule of Civil Procedure 19. KT II ECF 32 at 16-17, 24-25. That authority arose from successful motions to dismiss on Rule 19 grounds that the Tribes themselves filed in this Court. *Klamath Irrigation Dist. v. U.S. Bureau of Recl*., 489 F. Supp. 3d 1168 (D. Or. 2020), *aff'd*, 48 F.4th 934 (9th Cir. 2022).

The Tribes respond that this Court should disregard the authority and Rule 19 because only a missing purportedly necessary and indispensable party itself – here, the Yurok Tribe or the Hoopa Valley Tribe – can seek dismissal on Rule 19 grounds. The Tribes claim this is "dispositive." KT II ECF 40 at 13. That is a misstatement of the law. "As a general matter any

party may move to dismiss an action under Rule 19(b)," and "[a] court with proper jurisdiction may also consider *sua sponte* the absence of a required person and dismiss for failure to join." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 861 (2008). Indeed, Federal Rule 12(b)(7) authorizes "a party" to raise a Rule 19 defense, and Federal Rule 12(c) similarly authorizes "a party" to move for judgment on the pleadings after the pleadings are closed, including on Rule 19 grounds. *See, e.g.*, *Jaffer v. Standard Chartered Bank*, 301 F.R.D. 256, 259 (N.D. Tex. 2014). Thus, contrary to the Tribes' assertion, neither the fact that the Yurok Tribe and Hoopa Valley Tribe have not raised Rule 19 objections here, nor the fact that no motion for dismissal on Rule 19 grounds has been filed by a party prevents this Court from dismissing the Tribes' complaints if it determines doing so would "prevent injustice and future litigation stemming from absent parties with a material interest in a suit." *Id.* (citations omitted).

On the substance of the Rule 19 issue, the Tribes make no claim that they adequately represent the Yurok Tribe's or the Hoopa Valley Tribe's interests in *Klamath Tribes I*, and they could not credibly make any such claim, as their complaint squarely asks the Court to prioritize the needs of suckers in UKL over those of salmon in the Klamath River when those respective needs conflict. Indeed, the Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources – which the Tribes describe as "frequent and longstanding litigation partners of the Yurok Tribe" (KT II ECF 40 at 16) – have appeared before this Court as *amicus curiae* to urge the Court to reject the Tribes' claims in *Klamath Tribes I* as contrary to law and damaging to their interests in Klamath River salmon. KT II ECF 34-1. Thus, accepting the Tribes' claims has the potential to impair the Hoopa Valley Tribe's sovereign interests in its reserved fishing and associated water rights, and the Hoopa Valley Tribe cannot be joined without its consent – the same conditions that the Ninth Circuit concluded warranted dismissal in

Klamath Irrigation District, 48 F.4th 934. The same rationale would apply to the Yurok Tribe, which is located along the Klamath River in California and is similarly situated to the Hoopa Valley Tribe. *See, e.g.*, *Yurok Tribe v. U.S. Bureau of Recl*., 231 F. Supp. 3d 450, 481 (N.D. Cal. 2017) ("*Yurok I*"); *Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv*., 230 F. Supp. 3d 1106, 1137 (N.D. Cal. 2017).

Despite the plain conflict between the upriver and downriver tribes in *Klamath Tribes I*, the Tribes nonetheless claim to adequately represent the Yurok Tribe and Hoopa Valley Tribe in *Klamath Tribes II*. KT II ECF 40 at 17-18. To the extent that the upriver and downriver tribes share a common legal position in *Klamath Tribes II* that the ESA requires prioritization of listed species over Project irrigation allocation, that is where their potential agreement in the litigation ends, as the Tribes' claims in *Klamath Tribes I* plainly demonstrate. Under Ninth Circuit precedent, it is doubtful that such partial unity of interest would suffice. *See Klamath Irrigation District*, 48 F.4th at 945 (rejecting argument that existing party could represent absent tribes' interest where that party and the tribes "share an interest in the ultimate outcome of this case for very different reasons").

Should the Court find that Rule 19 precedent compels dismissal of *Klamath Tribes I* or *Klamath Tribes II* here, there would be no need to proceed further.

2. Both Cases Are Moot

In their opposition, the Tribes disavow all their previously requested injunctive relief because "Reclamation is not currently operating the Project under the 2021 or 2022 TOPs." *KT II* ECF 40 at 18 n.12. Thus, the Tribes implicitly concede that their complaints are moot to the extent that they seek injunctive relief. To avoid dismissal, therefore, the Tribes can rely only on their requested declaratory relief. The Tribes cannot avoid mootness merely by requesting

declaratory relief, however. There must be a "live controversy" for a court to award declaratory relief. *Burke v. Barnes*, 479 U.S. 361, 364 (1987); *see also Conyers v. Reagan*, 765 F.2d 1124, 1127 (D.C. Cir. 1985) (the fact that a plaintiff "also seek[s] declaratory relief does not affect [the Court's] mootness determination"). The Tribes argue that, even though the challenged TOPs have expired, there is still a "substantial controversy . . . of sufficient immediacy and reality" to be resolved by a declaratory judgment. KT II ECF 40 at 18. Not so. There is no controversy over the expired TOPs, as the unique hydrological conditions that prompted them have passed and they are inoperative, no longer guiding Project operations. *See, e.g.*, *Rio Grande Silvery Minnow v. Bureau of Recl.*, 601 F.3d 1096, 1113 (10th Cir. 2010) ("to the extent that the Environmental Groups seek a declaration that [superseded BiOps] are legally infirm due to Reclamation's failure to consult using the full scope of its discretion, we are not situated to issue a *present* determination with real-world effect because those [BiOps] no longer are operational—for all material purposes, they no longer exist").

Indeed, the Tribes do not actually seek any relief from the 2021 or 2022 TOPs themselves, as they are expired, nor do they seek any relief to purportedly remediate past injuries that they allegedly caused. Rather, the Tribes seek anticipatory relief from "the prospect of yet more TOPs." *Id*. at 20. The Tribes are short on details, but they evidently want this Court to prospectively dictate in a declaratory judgment how Reclamation may allocate water in any future TOP, based on the Court's adjudication of the 2021 and 2022 TOPs.[3] That would be in

[3] As Federal Defendants demonstrated in their opening brief, the Tribes must pursue their ESA claims against Reclamation under the Act's citizen suit provision, which does not provide a waiver of sovereign immunity to review wholly past violations. Rather, the ESA authorizes a cause of action "to enjoin any person . . . who is alleged *to be in violation* of any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1)(A) (emphasis added); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found*., 484 U.S. 49, 58-59 (1987) (holding that the phrase "to be in violation" in the nearly identical citizen suit provision in

appropriate. *See*, *e.g.*, *Rio Grande Silvery Minnow*, 601 F.3d at 1112 (finding "concerns about whether Reclamation will appropriately consult with the FWS in response to changing water-demand conditions are far too speculative to support a claim for declaratory relief" because "[a]ny such relief would amount to an advisory opinion regarding the scope of Reclamation's discretion and such an opinion would clearly be improper"); *see also Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, No. 04–3096–PA, 2007 WL 1072112, at *5 (D. Or. Apr. 3, 2007) ("Plaintiffs also argue that declaratory relief would be helpful to 'ensure that the [new] BiOp complies with the law and does so in a timely manner' and that declaratory relief would 'clarify and settle' defendants' legal obligations. I agree with defendants, however, such justifications are so vague as to make Article III's 'case or controversy' requirement meaningless. Courts should not micromanage an agency's procedures under the guise of judicial review").

The Tribes cannot show that declaratory judgments against the expired 2021 or 2022 TOPs would actually provide them with "effective relief" of a live controversy. The Tribes' request for declaratory relief in *Klamath Tribes I* is for the Court to "adjudge and declare that Reclamation has violated the ESA by unlawfully taking C'waam and Koptu, destroying and adversely modifying their critical habitat, and jeopardizing their continued existence through Project operations." *Klamath Tribes I*, ECF 1 at 31, ¶ A. Similarly, in *Klamath Tribes II* the Tribes request that the Court "adjudge and declare that Reclamation has violated the ESA by unlawfully taking C'waam and Koptu, destroying and adversely modifying their critical habitat, and jeopardizing their continued existence through its adoption of the 2022 Ops Plan and its

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the Clean Water Act only permits a plaintiff to bring a suit "to enjoin or otherwise abate an ongoing violation" and noting that "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past"). In their opposition, the Tribes offer no defense of their inability to present claims that the 2021 and 2022 TOPs – which are expired and without legal effect – are still "in violation" of the ESA.

authorization of the diversion of improperly calculated Project Supply beginning on April 15, 2022." *Klamath Tribes II*, ECF 1 at 34, ¶ A. The Tribes further request that the Court declare that the Determination of NEPA Adequacy ("DNA") prepared for the 2022 TOP "is inadequate to legally satisfy Reclamation's NEPA obligations." *Id*., at ¶ 94. The Tribes' contention that such judgments regarding expired TOPs would provide them with "effective relief" is wholly conclusory and inadequate. *See Rio Grande Silvery Minnow*, 601 F.3d at 1112 (finding the plaintiffs' challenges to BiOps superseded by a new BiOp were moot in part because "any declaration that the [superseded BiOps] were insufficient due to Reclamation's failure to fully consult would be wholly without effect in the real world"). Similarly, any declaration here that the expired 2021 and 2022 TOPs were insufficient would have no effect in the real world.

The gravamen of the Tribes' complaints appears to be that the 2021 and 2022 TOPs caused incidental takes of suckers that was not exempted under the 2020 FWS ITS; however, "[i]f the amount or extent of taking specified in the incidental take statement is exceeded," the appropriate recourse is to reinitiate consultation. 50 C.F.R. § 402.16(a)(1); *id*. § 402.14(i)(4). The Tribes' complaints do not even request an order compelling reinitiation of consultation, however, and such a request would be moot in any event given that Reclamation reinitiated and completed a new consultation with FWS on January 13, 2023 on extending the 2018 Plan/2020 IOP through October 2024.[4] *See Rio Grande Silvery Minnow*, 601 F.3d at 1112 ("a consultation injunction would be meaningless because the federal agencies already have consulted"); KT II

[4] The new BiOp contains FWS' analysis of the effects of an additional nine months of Project operations under the 2018 Plan/2020 IOP, through September 30, 2023. The limited term of the BiOp is in response to the continued rapid decline of both sucker species in the Upper Klamath Basin and concerns about the impacts of continued drought. KT II AR 134 at BOR 005521. Reclamation intends to reinitiate consultation to analyze the effects of operating under the 2018 Plan/2020 IOP between October 1, 2023 and September 30, 2024.

AR 134. Similarly, regarding the NEPA claim in *Klamath Tribes II*, the Tribes complain that the 2022 DNA did not adequately consider the environmental impacts of the 2022 TOP, yet they concede that Reclamation "is not currently operating the Project under the 2021 or 2022 TOPs." KT II ECF 40 at 12.

The Tribes attempt to show a live controversy by asserting that "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." KT II ECF 40 at 23. But Reclamation will always be subject to multiple, potentially competing requirements at the Klamath Project. Being generally subject to competing demands for water is not, and cannot be, the standard for a live controversy. *See Rio Grande Silvery Minnow*, 601 F.3d at 1111 ("allegations of legal wrongdoing must be grounded in a concrete and particularized factual context; they are not subject to review as free-floating, ethereal grievances"). Accepting the Tribes' proposed standard would defy basic mootness, ripeness, ESA, and Administrative Procedure Act ("APA"), 5 U.S.C. § 702, principles. *See, e.g.*, *id.* at 1112 (noting that "the duty to consult is not itself an ongoing agency action subject to challenge" and a plaintiff "cannot challenge the scope of consultation untethered from the federal agencies' efforts to develop a biological opinion") (citation omitted).

The Tribes "must direct [their] attack against some particular 'agency action' that causes it harm." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). The Tribes "cannot seek *wholesale* improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made."

Id. at 891; *see also Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) ("While a single step or measure is reviewable, an on-going program or policy is not, in itself, a 'final agency action' under the APA") (citation omitted); *Am. Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 102 (D.D.C. 2000) ("[C]ourts have repeatedly refused to entertain the type of programmatic attack on the general day-to-day operations of the agency that the plaintiffs are waging here") (citation omitted). "Such broad review of agency operations is just the sort of 'entanglement' in daily management of the agency's business that the Supreme Court has instructed is inappropriate." *Del Monte Fresh Produce N.A. v. United States*, 706 F. Supp. 2d 116, 119 (D.D.C. 2010); *accord Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66-67 (2004) (explaining that the limitation of final agency action in the APA is intended to: (1) "protect agencies from undue judicial interference" and (2) "avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve"). In short, even if the Tribes were to show a past violation of the ESA, they cannot show that a declaratory judgment to that effect would provide "effective relief" for the violation. The Tribes may not challenge Project operations in general.

Because the Tribes cannot show any effective relief remains for a live, concrete dispute, they can avoid dismissal only if an exception to the mootness doctrine applies. In invoking the capable of repetition exception, the Tribes essentially ask this Court to presume that any future TOP will be the same as the 2021 and 2022 TOPs; that Reclamation will allocate water in the same ways and commit the same alleged ESA and NEPA violations. KT II ECF 40 at 20. The Tribes ignore, however, that the water supply, with changing hydrology and weather conditions, varies from year-to-year and that one cannot presume that the same conditions underlying a particular operations plan will continue to prevail. They also ignore that Reclamation does not always take a singular approach to competing demands. For instance, the Tribes emphasize the

likelihood of surface flushing flows in the future in accordance with NMFS' BiOp and ITS, which could lower elevations in UKL. *Id*. However, Reclamation sacrificed a flushing flow entirely in 2021 to preserve UKL elevations for suckers[5] and made only an exceptionally low irrigation allocation of 33,000 AF that year. KT II AR 125 at BOR005467. The Tribes also ignore that, in 2022, Reclamation: (1) reduced the magnitude of the flushing flow in the Klamath River, which kept an additional 20-25 thousand AF of water in UKL; and (2) increased the end of season UKL elevation to 4,138.15 feet, which exceeded the FWS 2020 BiOp and ITS end of season boundary condition of 4,138.00 feet by approximately 10,230 AF, as an added protection for UKL elevations. KT II AR 127 at BOR005477; 129 at BOR005479. These facts contradict the Tribes' proposed presumption that any future TOP will favor salmon over suckers.

The Court can take further guidance from the TOP that Reclamation adopted for the period of January to April 2023 ("winter 2023 TOP"). The winter 2023 TOP is fundamentally distinct from both the 2021 TOP and the 2022 TOP, considering and adapting to this year's particular conditions. Whereas the Tribes complain that the 2021 and 2022 TOPs did not propose reductions to minimum flows for salmon in the Klamath River required per NMFS' BiOp and ITS, the winter 2023 TOP includes adaptive management provisions that have done just that in an attempt to reach an elevation of 4,142 feet in UKL by April 1 for the express benefit of sucker spawning.[6] In short, the winter 2023 TOP is certainly not the "same action" as

[5] At the same time the Tribes complain that the 2021 TOP favored salmon over suckers, they bely that complaint by candidly asserting that "Reclamation's decision in 2021 not to provide a surface flushing flow had devastating consequences for salmon that year." KT II ECF 40 at 33 n.23.

[6] Shortly after Reclamation adopted the 2023 winter TOP, the plaintiffs in *Yurok Tribe v. U.S. Bureau of Recl*., No. 3:19-cv-04405-WHO (N.D. Cal.) ("*Yurok II*") challenged it via a supplemental complaint alleging violations of ESA requirements for SONCC coho salmon. The plaintiffs have indicated that they will move for a preliminary injunction on their supplemental

either the 2021 TOP or the 2022 TOP, and the fact that it was issued does not show that the defunct TOPs continue to present a concrete, live controversy in need of judicial resolution or that the capable of repetition exception to the mootness doctrine exists. In fact, Reclamation adopted the winter 2023 TOP with the basic goal of refilling UKL so that scheduled operations under the 2018 Plan/2020 IOP can resume, without need for another TOP this spring/fall.

Nor can the Tribes show that future TOPs are likely to subject them to the same legal violations that they allege in their complaints. Importantly, the Tribes do not contend that Reclamation cannot lawfully adopt *any* future TOP; rather, they complain of the particular adaptive management decisions to allocate available water that Reclamation made in the 2021 and 2022 TOPs. The Tribes' central claim is that Reclamation "exploit[ed] a meet-and-confer process" (KT II ECF 40 at 30) that was included in Term and Condition 1c ("Term 1c") of FWS'

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claims on March 22, 2023. Their requested injunction would, in pertinent part, "prohibit[] 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." *Id*., ECF 1101 at ECF 55 of 56, ¶ D. As of the date of this filing, Reclamation has not announced whether there will be an irrigation allocation at the Klamath Project for the spring/summer period of 2023, however Reclamation has advised Project water users that no water will be available for diversion until at least May 1, 2023.

Additionally, Federal Defendants wish to advise the Court that, after Federal Defendants submitted their opening brief in the cases before this Court, on February 6, 2023, the *Yurok II* court issued its summary judgment ruling in phase one of the United States' crossclaim against the Oregon Water Resources Department ("OWRD") and Klamath Water Users Association ("KWUA"), granting summary judgment to the United States and enjoining the April 6, 2021 order served by OWRD on Reclamation forbidding it from releasing stored water from UKL for non-irrigation (i.e., ESA) purposes. The court also granted summary judgment to the United States on the counterclaim filed against it by KWUA, which contended that some or all aspects of Klamath Project operations are not subject to compliance with the ESA. *Yurok Tribe v. U.S. Bureau of Recl.*, No. 19-CV-04405-WHO, 2023 WL 1785278 (N.D. Cal. Feb. 6, 2023). Though the stay of litigation has expired, the plaintiffs' original claims in *Yurok II* have not been revived at this time.

ITS,[7] when extreme drought conditions would not allow Reclamation to fully and simultaneously maintain the operational conditions for suckers, salmon, and killer whales as set forth in the 2018 Plan/2020 IOP, regardless of any authorized irrigation deliveries. In *Klamath Tribes I*, the Tribes allege that Reclamation adaptively managed Project operations through this meet and confer process to favor Klamath River flows for salmon over UKL elevations for suckers via the 2021 TOP, when suckers should have been favored over salmon. In *Klamath Tribes II*, the Tribes allege that Reclamation adaptively managed Project operations via the 2022 TOP to favor irrigation over UKL elevations for suckers. This Term 1c does not exist in the current ITS, however. While the new ITS continues to anticipate adaptive management under certain circumstances to ensure that Reclamation meets the boundary conditions, the Tribes concede that, unlike the old ITS, the new ITS provides that, "if Reclamation cannot manage the available water supply to meet the applicable boundary conditions, it must immediately reinitiate consultation with USFWS." KT II ECF 40 at 30.

As explained below (*infra* § II.A.4), the Tribes effectively concede that issuance of the new superseding ITS requirement to reinitiate consultation when Reclamation is unable to meet the boundary conditions moots their sole claim against FWS. The Tribes state that they are willing to voluntarily dismiss the claim because "this new [ITS] requirement is functionally equivalent to the relief the Tribes sought against USFWS." KT II ECF 40 at 31. The Tribes fail to explain, however, why this new ITS requirement is not also functionally equivalent to the

[7] Term 1c required Reclamation to "monitor UKL elevations to determine if there is a projected or realized progressive decrease in the elevation that would fall outside of the boundary conditions for the effects analysis." KT I AR 29 at 001973. If elevations lower than the boundary conditions occurred, Reclamation was required to "determine the causative factors of this decrease and determine whether these factors are within the scope of the proposed action and the effects analyzed in this BiOp." *Id*. Additionally, Reclamation was to "immediately consult with the Service concerning the causes to adaptively manage and take corrective actions." *Id*.

relief they seek against Reclamation, as it eliminates the potential for Reclamation to repeat the legal violations that are alleged, as explained above. The Tribes assert in a footnote that the new FWS BiOp and ITS include the same boundary conditions for suckers in UKL as the previous BiOp (KT II ECF 40 at 22 n.16); however, even if true, that does not prevent the complaints from being moot. The complaints do not challenge the boundary conditions themselves, and there is no live application of those boundary conditions by Reclamation before the Court. Rather, as explained above, the Tribes' complaints challenge Reclamation's past water allocation decisions in the 2021 and 2022 TOPs, made via the (now-nonexistent) Term 1c. While it is always possible that extreme drought conditions can persist or reoccur in the future and necessitate new TOPs, the Court should not presume this, nor how those conditions will affect operations, nor how Reclamation will allocate the available water in any future TOP. *See, e.g.*, *Noem v. Haaland*, 41 F.4th 1013, 1017 (8th Cir. 2022) (noting that, "[i]n arbitrary-and-capricious review, even small factual differences can matter," and holding that challenge to agency's denial of July 4 fireworks permit was not capable of repetition, even though state applicant intended to reapply, because the circumstances surrounding each application "are likely to be different") (citation omitted). This Court can presume, however, that Reclamation will not make future allocation decisions by way of Term 1c, as it ceases to exist. *See Nat'l Min. Ass'n v. U.S. Dep't of Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001) ("The old set of rules, which are the subject of this lawsuit, cannot be evaluated as if nothing has changed. A new system is now in place"); *Forest Guardians v. U.S. Forest Serv*., 329 F.3d 1089, 1096 (9th Cir. 2003) (finding that, even where an ESA challenge is not to the BiOp itself, "the validity of the challenge necessarily rises or falls with the validity of the [BiOp]," and that, accordingly, ESA Section 7 and 9 challenges to permits were moot where they had been issued in accordance with a BiOp

and ITS that had been superseded); *Ramsey v. Kantor*, 96 F.3d 434, 446 (9th Cir. 1996) (holding that the same rule of mootness applies where an agency "would no longer be relying on the particular biological opinion that was being challenged, but rather upon a new opinion" and "where an agency will be basing its ruling on different criteria or factors in the future").

In sum, the Tribes' complaints are moot because they do not present live controversies for this Court to adjudicate, and there is no effective relief for the Court to order. The mere possibility that there will be *any* new TOP between now and October 2024, when the 2018 Plan/2020 IOP are set to be replaced, presents neither a live controversy nor an exception to the mootness doctrine for actions capable of repetition yet evading review. The analysis of this exception to the mootness doctrine here should be whether Reclamation is likely to issue the *same TOP* as the 2021 or 2022 TOP and repeat the same alleged legal violations. These events should not be presumed. Just as the 2021 TOP was a separate and distinct agency action from the 2022 TOP (evidenced by the Tribes' filing of separate lawsuits), any future TOP would be a separate and distinct agency action from the 2021 and 2022 TOPs, developed in response to the particular hydrology at hand and taking into account the existing status and needs of listed species and the existing BiOps and ITSs.

3. The Tribes Filed Both Cases Without Complying with the ESA's Mandatory 60-Day Notice Requirement, 16 U.S.C. § 1540(g)(2)(A)(i)

Federal Defendants also explained in their opening brief that dismissal is required because the Tribes failed to comply with the ESA citizen suit's mandatory notice requirement prior to filing their complaints, which provides, in relevant part, that "[n]o action may be commenced . . . prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation." 16 U.S.C. § 1540(g)(2)(A)(i).

The Tribes respond that this Court is "precluded from revisiting the [notice] issue" in *Klamath Tribes I* because its ruling on the notice issue in the Tribes' motion for preliminary injunction is the law of the case. KT II ECF 40 at 24. The Tribes overlook, however, that, "[i]n general, . . . 'our decisions at the preliminary injunction phase do not constitute the law of the case.'" *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013) (citation omitted). "This is true for the reason that a preliminary injunction decision is just that: preliminary." *Id*. (citation omitted). Surely, the Tribes would not agree that this Court is precluded from revisiting the merits of their claims because it ruled in that same preliminary injunction decision that "the Klamath Tribes have not shown they are likely to succeed on the merits." *Klamath Tribes I*, 537 F Supp. 3d at 1192. Contrary to the Tribes' assertion, the Court may revisit the Tribes' compliance with the ESA's notice requirement at summary judgment.

The Tribes next offer a factually incorrect denial of the fact that they provided notice in *Klamath Tribes I* before the ESA violation they alleged had, in fact, occurred. It is beyond dispute that the Tribes provided a letter on or about February 12, 2021, which was *before* Reclamation adopted the 2021 TOP. KT I AR 119 at 004685 (notice letter arguing that "Reclamation *Will Be* in Violation of Section 9 of the ESA *if* it Allows UKL to Fall Below 4,142.0 Feet in April or May of 2021") (emphasis added). Thus, the Tribes' letter undeniably pre-dated the alleged violations that they ultimately challenged in their complaint. The Tribes attempt to avoid this reality by emphasizing that their letter also stated that Reclamation "would be in further violation" of Term 1c under the proposed 2021 TOP; "further violations" referring to separate operations implemented in the previous year, 2020. KT II ECF 40 at 25.

The Tribes miss the point, and do not show compliance with the notice requirement. The Tribes emphasize "further violation" when the pertinent clause is "*would be*," which underscores

that the Tribes provided notice of their intent to sue *before* the alleged violation they intended to challenge had occurred. The ESA's notice provision requires a prospective plaintiff to provide notice to the alleged violator of *the ongoing violation that he/she is going to challenge in court* if not remedied within 60 days. This requirement is especially salient where an agency is adaptively managing operations in the face of uncertain and changing hydrology. In *Klamath Tribes I*, the Tribes challenge Reclamation's adoption of the 2021 TOP. Thus, the Tribes were required to provide Reclamation with notice that its adoption of the 2021 TOP was "in violation" of the ESA, and then wait 60 days before filing suit if the alleged violations were not abated. The Tribes undeniably failed to do so, because Reclamation had not even adopted the 2021 TOP when the Tribes sent their purported notice letter. The Tribes' notice was plainly anticipatory as to the 2021 TOP. Including a reference to past alleged violations caused by separate operations in 2020 that are not challenged in the complaint cannot cure this defect. The Tribes may not do an end-run around the notice requirement by anticipatorily alleging in their letter that the 2021 TOP operations would be a violation because other violations had allegedly been committed in the past under separate 2020 operations.

The Tribes offer no real response to the weight of authority that holds that anticipatory or pre-violation notice letters do not satisfy the ESA's notice requirement. *See, e.g.*, *Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193, 1205–06 (D. Or. 2003) ("because the agency had not acted on the petition at the time of notice, plaintiffs could not have given the Secretary notice of an unlawful action. Thus, I dismiss claim two of plaintiffs' complaint for failure to give notice as required under § 1540(g)(2)(C)"); *Ctr. for Env't Sci., Accuracy & Reliability v. Cowin*, No. 1:15-CV-01852 LJO BAM, 2016 WL 8730760, at *5 (E.D. Cal. Mar. 4, 2016) ("To the extent the Notice Letter refers to anticipatory violations, those violations are not actionable"); *Friends*

of Animals v. Ashe, 51 F. Supp. 3d 77, 84–85 (D.D.C. 2014) ("One particularly common pitfall is providing 'pre-violation notice,' that is, when a plaintiff gives notice of an impending violation of the ESA—but before that violation has actually occurred. Courts dismiss on this ground, finding that pre-violation notice is inadequate under the statute (and [*Hallstrom v Tillamook County*, 493 U.S. 20 (1989)]'s strict interpretive approach)" (collecting cases)), *aff'd*, 808 F.3d 900 (D.C. Cir. 2015). The Tribes primarily observe that Judge Aiken changed her view on the propriety of pre-violation notice from *Alsea Valley All. v. Lautenbacher*, No. CV 05-6376-AA, 2006 WL 8460501, at *2 n.2 (D. Or. Apr. 25, 2006), to *Cascadia Wildlands v. Scott Timber Co*., 328 F. Supp. 3d 1119 (D. Or. 2018). This change in Judge Aiken's interpretation does not alter the underlying law or the weight of the authority on the insufficiency of pre-violation notices.

The Tribes also make an erroneous argument that the ESA's citizen suit provision only authorizes "challenges [t]o future agency actions" and, therefore, the notice requirement must allow for notice to be provided as to future agency actions. KT II ECF 25-26 (citing *Cascadia Wildlands*, 328 F. Supp. 3d at 1131-32). The ESA does not authorize challenges to future actions. Rather, as explained above, the ESA's citizen suit provision authorizes a plaintiff to bring a suit "to enjoin or otherwise abate an ongoing violation." *Gwaltney*, 484 U.S. at 58-59. Plainly, an agency action that lies in the future does not cause an ongoing violation. Thus, contrary to the Tribes' argument, it is entirely consistent for the ESA's notice provision to require citizens to provide notice of an ongoing violation before they may initiate suit to enjoin it if not abated after 60 days. The Tribes confuse the *available relief* under the ESA with the *agency actions* that are reviewable. The ESA authorizes injunctive relief, which is prospective, but it does not provide a sovereign immunity waiver for judicial review of future actions.

Consistent with ripeness principles, the ESA provides a sovereign immunity waiver to challenge actions that are ongoing.

The Tribes offer a second erroneous argument that, even though they filed their complaint in *Klamath Tribes II* just 25 days after sending their purported notice dated April 14, 2022, they nonetheless strictly complied with the requirement to wait 60 days prior to filing suit because the April 14, 2022 letter "buil[t] off" of a prior letter sent on March 10, 2022. KT ECF 40 at 27. This argument has no merit. The March 10 letter did not even purport to be an ESA notice of intent letter. The letter bears no title or subject heading line, and it states, in pertinent part, that "we respectfully request immediate government-to-government consultation with the United States regarding Reclamation's plans for its operation of the Project and its management of the Basin's limited water supply this year." KT II AR BOR001260. The letter says absolutely nothing about an intent to sue for alleged violations of the ESA. Simply stated, the March 10 letter wholly fails to meet the ESA's notice requirement under any standard. The very fact that the Tribes sent another letter on April 14 shows that the Tribes fully recognized that their March 10 letter was also noncompliant. If the March 10 letter had been compliant, then there would have been no need to send another letter on April 14. It is apparent that the Tribes sought to use the March 10 letter to avoid waiting 60 days to file suit after providing their actual notice letter on April 14. However, the March 10 letter was not a compliant notice letter, and it cannot excuse the Tribes' failure to wait the full 60 days or otherwise bootstrap the April 14 letter.

The Tribes also mistakenly argue, *post hoc*, that their prior letter from February 12, 2021 satisfied the notice requirement to challenge the 2022 TOP, even though it pre-dated the 2022 TOP by more than a year and is not even mentioned in the April 14, 2022 letter. KT II ECF 40

at 29.[8] In the Tribes' apparent view, as long as they have at one time provided notice of intent to challenge a Klamath Project operations plan, they are forever excused from waiting 60 days before filing a new lawsuit to challenge new Project operations plans because they can simply "build off of" the prior notice. KT ECF 40 at 28-29. The Court should reject this argument. The ESA says nothing about providing notice in such piecemeal fashion. If the Tribes' argument is accepted, it would grant them an enduring end-run around the statutory notice requirement. The statute requires a full 60 days between the notice and the complaint, and here the Tribes plainly failed to observe the requirement; their April 14 letter provided only 25 days' notice. As with the March 10 letter, the February 12, 2021 letter cannot excuse the Tribes' failure to wait the full 60 days or otherwise bootstrap the April 14 letter.

As Federal Defendants explained in their opening brief, the very notion that a "supplemental" notice letter could provide notice of a new lawsuit challenging a new action is a non sequitur, as a supplement completes or enhances something that already exists. Thus, here, the Tribes' April 14, 2022 notice could have, at most, supplemented their prior notice of intent to challenge the 2021 TOP. Such "supplemental" notice could not have eliminated the requirement

[8] To support this assertion, the Tribes go so far as to claim that "the Tribes are not challenging new agency actions" in *Klamath Tribes I* and *Klamath Tribes II*. KT II ECF 40 at 29. The Tribes offer no explanation for why they filed separate lawsuits if they truly believed they were somehow challenging a single agency action. Regardless, the 2021 TOP and the 2022 TOP are plainly separate and distinct agency actions under the test established by the Supreme Court in *Bennett v. Spear*, 520 U.S. 154 (1997). Each TOP is subject to judicial review in its own lawsuit precisely because it: (1) marked the consummation of Reclamation's decisionmaking process; and (2) were decisions from which legal consequences flowed. *Id*. at 177–79. The Tribes continue with their argument, asserting that "the IOP is still the operative action on which Reclamation has consulted with USFWS." KT II ECF 40 at 29. The Tribes' complaints do not challenge the 2018 Plan/2020 IOP, however. The complaints challenge in-season corrective actions that were taken via the 2021 TOP and 2022 TOP. The Court should disregard the Tribes' attempt to recast their complaints as challenges to the 2018 Plan/IOP.

to wait 60 days before filing a new lawsuit challenging the 2022 TOP, which was a new and separate agency action. KT I AR 43 at BOR001261.

The Tribes' reliance on *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 873 (D. Ariz. 2003), is misplaced, as the facts of that case were fundamentally different than those here. Initially, it is worth noting that, in *San Carlos Apache Tribe*, the federal defendants did not even challenge the sufficiency of the plaintiff's notice letter. Rather, the defendant intervenor water users challenged the plaintiff's 1997 notice as insufficient to reflect conditions in 1999, when the complaint was filed. The court found the notice letter was sufficient because:

> There was nothing unique about the 1997 drawdown or draining of the Lake. There was nothing unique about the 1997 operation of the Lake. *It was the ongoing operation of the dam and the repeated drawdowns of the Lake that Plaintiffs were challenging*. The drawdown or draining of the Lake in 1997, like any other drawdown or draining of the Lake in any other year, created a reasonable certainty of imminent harm to support a "taking" claim under Section 9 of the ESA.

Id. (emphasis added).

This does not describe the facts in *Klamath Tribes I* and *Klamath Tribes II*. The 2021 TOP and the 2022 TOP were each unique, in-season deviations from the scheduled operations. The Tribes challenge these unique operational decisions, not Reclamation's general ongoing operation of the Klamath Project under the 2018 Plan/2020 IOP. In short, *San Carlos Apache Tribe* does not establish that the Tribes may rely on a notice of intent to challenge the 2021 TOP (a notice that was itself anticipatory and inadequate) as notice of intent to file a future complaint challenging the 2022 TOP.

Ultimately, the Tribes resort to arguing that they substantially met the goals of the notice requirement, asserting that 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." KT ECF 40 at 29-30. That is a necessary, but not sufficient element of compliance with the notice provision, which is strictly construed. *Hallstrom*, 493 U.S. at 26, 30 (a "flexible or pragmatic construction" of citizen suit notice provisions was precluded even if the defendants will "actually accomplish the objective that the citizen was attempting to stop" within the 60-day period); *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Recl.*, 143 F.3d 515, 520 (9th Cir. 1998) ("citizen suit notice requirements cannot be avoided by employing a flexible or pragmatic construction and [a] plaintiff's suit must be dismissed where plaintiff had not strictly complied with the notice requirements") (citing *Hallstrom*, 493 U.S. at 31). The Tribes were not entitled to provide notice and then file their new complaint in *Klamath Tribes II* just 25 days later, even if the goals of the notice provision were substantially met. KT II AR 43; KT II ECF 1.

In sum, *Klamath Tribes I* should be dismissed in its entirety because it alleges ESA citizen suit claims that were improperly noticed anticipatorily. The Tribes' ESA citizen suit claims against Reclamation in *Klamath Tribes II* should be dismissed because the Tribes provided only 25 days' notice and not the required 60 days.

4. The Tribes Voluntarily Dismiss their Only Claim Against FWS

In their opening brief, Federal Defendants argued that the Tribes' sole claim against FWS (i.e., Count III in *Klamath Tribes II*), failed to state a justiciable claim for relief and was otherwise moot. KT II ECF 32 at 34-40. In response, the Tribes state that "the Tribes hereby voluntarily dismiss Count III of that complaint against defendant USFWS" because FWS' new ITS "is functionally equivalent to the relief the Tribes sought against USFWS." *Id*. at 31.

The Tribes did not invoke any rule of procedure for the dismissal; however, Federal Rule 41(a) governs voluntary dismissals. Relevant here, the rule provides that the Tribes may dismiss Count III without a court order by filing a stipulation of dismissal signed by all parties who have

appeared or, alternatively, by order of the Court "on terms that the court considers proper." Fed. R. Civ. P. 41(a)(1)(A)(ii), (a)(2). The Tribes have not approached Federal Defendants regarding a stipulation of dismissal; nevertheless, Federal Defendants are willing to so stipulate. However, at this juncture, Federal Defendants submit that the most prudent course is for the Court to dismiss Count III. Because Count III is the sole cause of action asserted against FWS, the Court should simultaneously dismiss FWS as a party to the litigation.

B. Should the Court Reach the Merits, Federal Defendants Are Entitled to Summary Judgment in *Klamath Tribes I*

As the Court is aware, and as the Tribes themselves have expressly acknowledged, in 2021, "there was simply not enough available water in the Upper Klamath Basin for Reclamation to be able to comply simultaneously with the terms of" FWS' BiOp, and NMFS' BiOp, even with "water deliveries for Project irrigators . . . almost completely cut off." KT I ECF 80 at 5. The Tribes assert that "punishing drought conditions" that year "pushed the needs of … species themselves into direct and unavoidable conflict" with one another. *Id*. In *Klamath Tribes I*, the Tribes essentially make an unprecedented request for this Court to declare that: (1) "the C'waam and Koptu's needs take precedence over a threatened species like the [SONCC] coho [salmon]" (KT I ECF 80 at 41), and also an endangered species of killer whale, which the Tribes ignore; and (2) Reclamation violated the ESA by not favoring the needs of the suckers over those of the salmon and killer whales. As this Court previously determined, however, this request lacks merit and is ill-advised:

> Plaintiffs ask this Court to limit the flow of water coming out of Upper Klamath Lake to the detriment of a threatened salmon population, an endangered Orca population that depends on salmon recovery, and irrigation interests. The Court declines to do so. Here, the Defendant Bureau, in coordination with expert agencies and all competing interests, is better equipped to serve the public interest than a judge with a law degree. And while the interim plan and decisions being made by the Bureau may result in the incidental taking of an endangered species, the Bureau has taken the appropriate steps under the Endangered Species Act to

> address the difficult drought situation that is presenting itself this year in the Klamath Basin.

Klamath Tribes I, 537 F. Supp. 3d at 1185.

The Tribes cannot show that this Court's prior determination was in error. In their opposition, the Tribes simply ask the Court to reverse itself. The Tribes now suddenly ignore the hydrologic conditions of 2021, Reclamation's competing ESA obligations under the NMFS BiOp and ITS, and the prior ruling of this Court, arguing that Reclamation automatically violated the ESA in 2021 because the FWS' ITS elevations in UKL were not met that spring/summer. The Court was fully aware, however, that "Upper Klamath Lake levels ha[d] fallen outside the scope of what was considered in the 2020 BiOp" when it ruled that the Tribes were not likely to succeed on the merits of their claims. *Id.* at 1192. The Court explained that:

> [T]he Bureau … continued to comply with the terms and conditions by engaging in ongoing consultation with the Services and creating the temporary operating procedures. The Bureau is also not responsible for the unprecedented drought this year. As a threshold matter, the Klamath Tribes have not shown they are likely to succeed on the merits.

Id. This analysis still holds and entitles Federal Defendants to summary judgment.[9] Indeed, this analysis is in line with that of the Northern District of California, which reached a similar conclusion in the previous spring of 2020 in declining an interim request by the Yurok Tribe to lift the stay of litigation and order Reclamation to release

[9] The Tribes assert that, when "this Court ruled at the preliminary injunction stage that Reclamation had 'continued to comply with the terms and conditions[,]' . . . the record had not yet been produced and the Court primarily had only the competing representations of the parties to rely on [but that] [w]ith a full record the analysis is different." KT II ECF 40 at 35. Not so. The Court had been provided with FWS' April 14, 2021 letter to Reclamation regarding the 2021 TOP when it found that Reclamation had complied with the BiOp and ITS terms and conditions. The Court discussed that very FWS letter at some length in its ruling. *Klamath Tribes I*, 537 F. Supp. 3d at 1191. There is no merit to the Tribes' claim that the analysis is now somehow different because the administrative record has been filed.

more water from UKL to benefit salmon at the expense of UKL elevations for suckers. That court observed that:

> [W]ater in the UKL is dangerously low, threatening endangered suckers. Water allocated to irrigation has been significantly reduced. [] That requires the Bureau to exercise its discretion under the Interim Plan to address these competing needs, especially those of *all* [ESA-listed] species, in a reasonable and informed way. The Yurok Tribe may disagree with the Bureau's decision, but that disagreement does not provide grounds to lift the stay.

Yurok II, 2020 WL 2793945, at *5 (N.D. Cal. May 29, 2020) (internal citation omitted).

The Tribes appear to now suggest that Reclamation intentionally chose not to meet FWS BiOp and ITS requirements for suckers for no reason, when it could have done so. KT II ECF 40 at 31-36. That is simply not accurate.[10] There is nothing in the record that shows Reclamation could have met FWS BiOp and ITS elevations for suckers in UKL under the then-existing hydrologic conditions, much less that Reclamation could have done so without concomitantly failing to meet NMFS BiOp and ITS flows in the Klamath River. The Tribes appear to now shy away from the fact that they are asking that the Court declare that the needs of suckers take precedence over the needs of salmon; however, that is precisely what they request. The Tribes essentially argue that it was a violation of the ESA for Reclamation not to disregard Klamath River flows for salmon and killer whales in an "*attempt* to comply" with UKL boundary conditions for suckers (KT I ECF 80 at 44 (emphasis added)), even though curtailing UKL releases to the river would not have guaranteed that UKL BiOp and ITS boundary conditions for suckers were met but would have guaranteed that river minimum flows required in NMFS' BiOp and ITS were *not* achieved.

[10] The Tribes accuse Reclamation of having "authoriz[ed] additional irrigation releases that compromised UKL's ability to refill over the winter of 2020-2021" (KT ECF 40 at 31), but those operations were not part of the 2021 TOP – the action the Tribes actually challenge in their complaint – and they therefore are beyond the scope of this litigation.

The Tribes identify no legal support for this request, and there is none. The Tribes simply ignore that ESA Section 7(a)(2) expressly applies equally to species that are listed as threatened or endangered. 16 U.S.C. § 1536(a)(2) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of *any endangered species or threatened species* or result in the destruction or adverse modification of habitat of such species…") (emphasis added). This should be dispositive of the Tribes' Section 7 claim. The Tribes also ignore the fact that unpermitted take is prohibited of both suckers and SONCC coho salmon alike, and that there are endangered species on both sides of the equation, as the endangered Southern Resident killer whale depends on Chinook salmon from the Klamath River for its prey. *Id*. § 1533(d); 50 C.F.R. § 223.203. These points should be dispositive of any claim that incidental take of salmon and killer whales is more permissible than of suckers.

Indeed, as noted above, this Court previously determined that Reclamation had complied with Term 1c of the FWS ITS, and the Tribes fail to show the Court erred. Term 1c required Reclamation to, in pertinent part, "immediately consult with the Service concerning the causes" of any "projected or realized progressive decrease in [UKL] elevation that would fall outside of the boundary conditions for the [BiOp's] effects analysis," and "adaptively manage and take corrective actions." KT I AR 29 at 001973. As this Court previously determined, Reclamation did so. "To the extent that the Bureau was required to engage in informal consultation with USFWS, they have satisfied this burden by maintaining regular communication with the Services as they determined the causes for the low elevation of Upper Klamath Lake and developed temporary operating procedures to address the situation." *Klamath Tribes I*, 537 F. Supp. 3d at 1191. As Reclamation complied with the ITS, "any taking that is in compliance with the terms

and conditions specified in [the ITS] . . . shall not be considered to be a prohibited taking of the species concerned," and Reclamation did not violate Section 9 in operating the Project under the 2021 TOP. 16 U.S.C. § 1536(o)(2); *see also* 50 C.F.R. § 402.14(i)(5). The Tribes' assertion that "Federal Defendants do not contest that Reclamation committed take of C'waam and Koptu in 2021" (KT II ECF 40 at 34) is a mischaracterization that misses the mark in any event, as explained further below (*infra* § II.C.1).

The Tribes repeat their complaint that Reclamation did not adequately explain *why* it did not pursue different adaptive management approaches in an "attempt to comply" with UKL boundary elevations for suckers (KT II ECF 40 at 34-36); however, the ESA does not require Reclamation to provide an explanation of measures it did not pursue.[11] What is relevant are the measures that Reclamation actually pursued, and here the agency's path to the 2021 TOP is readily explained by the fact that curtailing UKL releases to the Klamath River would not have guaranteed that UKL boundary conditions for suckers were met but *would* have guaranteed that river minimum flows per NMFS' BiOp and ITS were not achieved.

In sum, this Court appropriately declined to rule that certain listed species take priority over others and retroactively second-guess the balancing of competing species' needs that took place following extensive collaboration between the relevant federal agencies under challenging circumstances. *Klamath Tribes I*, 537 F. Supp. 3d 1183. The Tribes identify no error in the Court's previous determination, and there is none. Indeed, in the history of the ESA, no court

[11] The Tribes' "failure to explain" argument comes close to, but stops short of repeating their claim that Term 1c required Reclamation to complete an entirely new formal consultation and receive a new BiOp and ITS before it could implement the 2021 TOP, an argument that this Court previously rejected. *Klamath Tribes I*, 537 F. Supp. 3d at 1191. Term 1c requires in-season conferral on how to best respond to changing hydrology and available water supply, not completion of a formal reinitiated consultation under ESA Section 7. *Id.*; *see also* 50 C.F.R. § 402.14.

has ever adopted the theory advanced by the Tribes here, much less granted the extraordinary relief the Tribes request based on that theory. *Id.*; *see also Yurok II*, 2020 WL 2793945. The Court should reaffirm its previous determination that the Tribes' claims lack merit.

C. Should the Court Reach the Merits, Federal Defendants Are Entitled to Summary Judgment in *Klamath Tribes II*

1. Federal Defendants Are Entitled to Summary Judgment on the Tribes' ESA Claims

In their opening brief, Federal Defendants explained that, though the Tribes argue that the 2022 TOP violated the terms and conditions of the FWS ITS, they cannot show that Reclamation failed to observe any procedure required by the ITS. Rather, as Reclamation did in 2021, it followed the procedure required in Term 1c of the FWS ITS to confer with FWS to determine the causative factors for the fact that UKL boundary conditions were not projected to be achieved in 2022. The agencies agreed that it was "primarily the result of consecutive critically dry years and extraordinary hydrologic conditions." KT II AR 57 at BOR001529.

The Tribes dispute that Reclamation followed the procedural requirements of the ITS (KT II ECF 40 at 38 n.27); however, they conflate the procedural requirement of Term 1c to confer with FWS – which Reclamation undoubtedly observed – with their disagreement with the resulting substantive adaptive management decisions that Reclamation made after observing the procedure. KT II AR 52 at BOR001434 (FWS stating that "[w]e acknowledge that, through the meet and confer process provided for under T&C 1c, Reclamation has made a good faith effort to address the ongoing drought and the likelihood that BiOp boundary conditions will not be fully met" for suckers in UKL). The Tribes disagree that Reclamation's adaptive management decisions in the 2022 TOP constituted appropriate "corrective action" within the meaning of

Term 1c. *Id*. at 37-38. That is a substantive disagreement, not an alleged procedural violation. The Tribes can identify no violation of procedure in adopting the 2022 TOP.

As to the Tribes' substantive disagreement with the 2022 TOP, the Tribes appear to rest their claims entirely on the fact that the 2022 TOP departed from the formula that was set forth in the 2018 Plan/2020 IOP for determining irrigation allocation. However, the very fact that the 2022 TOP departed from the formula in the 2018 Plan/2020 IOP cannot be an automatic violation of the ITS. Indeed, the Tribes tellingly do not claim that Reclamation violated the ESA in making departures from scheduled operations under the 2018 Plan/2020 IOP that benefitted UKL elevations for suckers. For instance, the Tribes ignore that Reclamation also adaptively managed to provide additional protections for UKL by reducing the magnitude of the flushing flow in the Klamath River, which resulted in the retention of an additional 20-25 thousand AF of water in UKL, and by raising the end of season UKL elevation above what was scheduled in the 2018 Plan/2020 IOP and required in the FWS BiOp and ITS, from 4,138.00 feet to 4,138.15 feet, which left approximately 10,230 AF more water in UKL than the FWS BiOp and ITS otherwise required. KT II AR 57 at BOR001533; 127 at BOR005477; 129 at BOR005479. At bottom, in spring/summer 2022, Reclamation simply could not have physically implemented the scheduled operations under the 2018 Plan/2020 IOP to simultaneously fulfill competing ESA requirements for suckers, salmon, and killer whales due to the severe drought conditions. Term 1c of the FWS ITS contemplated the potential need for adaptive management if scheduled operations were not achieving boundary conditions, and Reclamation adopted the 2022 TOP under the terms of the 2018 Plan/2020 IOP precisely for that reason.

Notwithstanding the adaptive management measures in the 2022 TOP that were intended to benefit suckers in UKL, the Tribes decry that the 2022 TOP allegedly "deliver[ed] extra, early

irrigation water" (*id*. at 38) compared to the 2018 Plan/2020 IOP. Notably, however, the Tribes do not contend that Reclamation was prohibited altogether from allocating *any* water for irrigation in 2022. To the contrary, the Tribes acknowledge that there would have been an irrigation allocation under default formula in the 2018 Plan/2020 IOP regardless of the 2022 TOP. KT II ECF 24 at 30. KWUA's declarant, Brad Kirby, states that this allocation would have been 36,000 AF based on the June 1 forecast. KT II ECF 30 at 13 ¶ 33 (Kirby Decl.).[12]

The Tribes make generalized claims that the additional irrigation allocation and the earlier start to irrigation diversions under the 2022 TOP violated the ESA because they "intensified the impacts" of those diversions on suckers and they maintain that Reclamation should have "com[e] as close as it could to meeting the 2020 BiOp's boundary conditions–even if it could not fully satisfy them." KT II ECF 40 at 38; KT II ECF 24 at 36. At bottom, however, the fact remains that FWS had concluded that "current and projected hydrologic conditions [in 2022] will preclude attainment of the 4142.0 ft. of elevation in UKL necessary to provide adequate habitat for shoreline spawning Lost River suckers, regardless of any proactive water conservation measures that Reclamation might take at this point in time." KT II AR 52 at BOR001434-35. The Tribes cannot show that either the irrigation allocation Reclamation authorized in the 2022 TOP or the date on which Reclamation authorized the irrigation season to begin caused FWS BiOp and ITS elevations in UKL for suckers to not be met during the time that the 2022 TOP was in effect (spring/summer 2022). The Tribes assert that FWS did not "affirm that Reclamation complied with T&C 1c or approve the 2022 TOP" (KT II ECF 40 at

[12] The initial irrigation allocation – traditionally calculated each year on April 1 – is reassessed with each subsequent Natural Resources Conservation Service forecast on the first of the month through June 1.

38); however, the Tribes cannot point to any conclusion by FWS that the 2022 TOP would violate Reclamation's obligations under the ESA.

KWUA argues that the Tribes "must prove that Reclamation *actually* killed or injured the C'waam or Koptu" to prevail on its Section 9 claims. KT II ECF 29 at, 36. KWUA asserts that these claims are not subject to record review under the APA, 5 U.S.C. § 706, but rather are "ordinary civil action[s]." *Id*. at 7 n.2, 18.[13] KWUA requests that the Tribes' summary judgment motion be denied for failure to produce such evidence, though KWUA does not suggest that the claims must be resolved via trial or evidentiary hearing. The Tribes respond with the sweeping assertion that "Federal Defendants have implicitly conceded that take occurred" under the 2022 TOP because they did not insist similarly to KWUA in their opening brief that the Tribes produce factual evidence of take in support of their Section 9 claim. KT II ECF 40 at 40. KWUA and the Tribes are both off target. Federal Defendants have made no such concession, as the complicated question of whether, and to what extent, implementation of the 2022 TOP caused incidental take of suckers is not something the Court needs to answer for the purposes of the Tribes' complaint.

As noted above, the Tribes' Section 9 claim raises the question of whether Reclamation complied with the terms and conditions of the FWS ITS in implementing the 2022 TOP, namely whether Reclamation's adaptive management decisions in the 2022 TOP constituted appropriate "corrective action" within the meaning of Term 1c. The Court can answer this question based on its review of the administrative record, in accordance with the record review principles of the APA, 5 U.S.C. § 706. The Court does not need to take the additional step of delving into the

[13] It is unclear precisely what KWUA intends by "ordinary civil action." The waiver of sovereign immunity to assert a cause of action against Reclamation for alleged violation of ESA Section 9 lies solely under the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1)(A).

complicated factual matter of whether, and to what extent, the 2022 TOP caused suckers to be incidentally taken in the spring/summer of 2022. If the Court finds that the 2022 TOP complied with the ITS, then the Tribes' claims fail and the Court need proceed no further. The Court does not need to determine factually whether the incidental take limit in the ITS was exceeded, as the Tribes' claim is not predicated on exceedance of the take limit. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(5). Again, the Tribes' claim is predicated on the ITS becoming inapplicable to the 2022 TOP due to alleged noncompliance of the TOP with the ITS.

Even if the Court were to find that the 2022 TOP was not an appropriate corrective action under the ITS based on its review of the record, there still would be no need for the Court to determine if take occurred. The appropriate recourse for a noncompliant 2022 TOP would have been for Reclamation to reinitiate consultation. 50 C.F.R. § 402.16(a)(1); *id*. § 402.14(i)(4). However, Reclamation has already undertaken and completed that action. As the Tribes seek no injunctive relief on their claims, there is no need for the Court to undertake a factual inquiry into take for purposes of an injunctive remedy. Nor is such an inquiry necessary for purposes of the Tribes' requested declaratory judgment which, as explained above, would provide no effective relief and is moot. Indeed, the Tribes fail to explain why they believe a declaratory judgment that take occurred is necessary, and why a declaration that the 2022 TOP failed to comply with the ITS would not be sufficient for their purposes here.

In sum, the Tribes' claims fail because there were no proactive measures Reclamation could have taken in 2022 to achieve the 4142.0 feet of elevation in UKL necessary to provide adequate habitat for shoreline spawning Lost River suckers and Reclamation followed the requisite procedures in adopting the 2022 TOP. The record shows that the Project operations scheduled under the 2018 Plan/2020 IOP could not have been implemented in 2022 due

primarily to consecutive critically dry years and extraordinarily dry hydrologic conditions. Federal Defendants have appropriately focused their merits arguments on Reclamation's compliance with the FWS ITS, as the Court does not need to determine factually whether or to what extent operations under the 2022 TOP may have caused incidental take to resolve the Tribes' claims in this case. Federal Defendants have made no concessions on the subject.

2. Federal Defendants Are Entitled to Summary Judgment on the Tribes' NEPA Claim

Even if the Court determines that the claim is not mooted by the expiration of the 2022 TOP, Reclamation fully complied with its obligations under NEPA by issuing its DNA. Reclamation took the requisite hard look at the environmental impacts of the 2022 TOP, evaluated the existing NEPA analyses for the Project – the 2020-2023 Environmental Assessment (2020-2023 EA) and the 2021 Supplemental EA – and reasonably concluded that the 2022 TOP did not require a Supplemental EA because the previous analyses encompassed the range of expected environmental impacts of the 2022 TOP. *See* KT II ECF 32 at 55-60. The Tribes assert that a Supplemental EA was required because the previous EAs did not account for the impact of cumulative years of drought or the timing of the initiation of Project water delivery. The Tribes are incorrect: the DNA evaluated the 2022 TOP, which included real-time adaptive management options focused on maintenance of minimum UKL elevations that were nearly identical to those analyzed in 2021. As the Tribes correctly point out, NEPA is a procedural statute that focuses on the quality of the decision-making process, not the outcome. Here, the Tribes contest Reclamation's decision but have not met their burden to show that Reclamation's NEPA process was insufficient.

"A court will uphold a decision not to supplement an environmental analysis if the decision is reasonable." *Or. Nat. Res. Council Action v. U.S. Forest Serv.*, 445 F. Supp. 2d 1211,

1225 (D. Or. 2006) (citing *Stop H–3 Ass'n v. Dole*, 740 F.2d 1442, 1463 (9th Cir. 1984)). This is a deferential standard, as an agency "need only articulate a rational connection between the facts it has found and its conclusions" in deciding not to proceed with supplementation. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 561 (9th Cir. 2000) (citation omitted); *see also Summit Lake Paiute Tribe of Nev. v. U.S. Bureau of Land Mgmt*, 496 F. App'x 712, 716 (9th Cir. 2012) (DNAs "will only be set aside if they are arbitrary and capricious") (citation omitted). Because the focus is on process rather than outcome, the court cannot "substitute [its] judgment for that of the agency." *Friends of the Clearwater*, 222 F.3d at 561 (citation omitted). If an agency takes the requisite hard look and "determines that the new impacts will not be significant (or not significantly different from those already considered), then the agency is in full compliance with NEPA and is not required to conduct a supplemental EA." *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp*., 545 F.3d 1147, 1154–55 (9th Cir. 2008) (discussing Department of Transportation's NEPA 'reevaluation' process) (citations omitted).

The question before the Court on this NEPA claim is simple: whether Reclamation's decision not to issue a Supplemental EA, memorialized in the 2022 DNA, was rationally connected to the facts Reclamation found and conclusions it made. The DNA readily satisfies this standard. Reclamation collected the information available regarding the conditions it expected would be encountered in 2022, considered that information in the context of the two existing EAs, one which evaluated the "impacts to the species and the human environment" of the Project from April 2020 to March 2023, KT II AR 123 at BOR005369, and the other which supplemented that analysis due to critical drought conditions which "prevent[ed] full simultaneous satisfaction of requirements for ESA-listed species" even if no water was delivered to the Project. *Id*. The 2021 Supplemental EA incorporated the 2020-2023 EA by reference, and

both analyses share the same need for the proposal, the same geographic scope, the same legal authorities, the same related actions that influence the scope of alternatives, the majority of elements common to both alternatives, large portions of the No Action Alternative, and the same affected environment. *Id*. at BOR005370. As is discussed below, after carefully considering the factors unique to 2022, Reclamation rationally determined that a supplemental EA for 2022 was not warranted.

a. Reclamation Has Accounted for the Impacts of Continuing Drought

The Tribes assert that Reclamation has "studiously ignore[d] any consideration of the in-year and cumulative impacts that consecutive years of drought conditions and Reclamation's management decisions have had" on suckers. KT II ECF 40 at 44. In the very next paragraph, however, the Tribes concede that the 2021 Supplemental EA contemplated changes to Project operations in the face of extreme drought. *Id*. Accordingly, it is clear that the Tribes do not – and cannot – assert that Reclamation failed to consider extreme drought conditions in the existing environmental analyses on which the DNA relies. Instead, the Tribes level a narrower critique: that a third year of drought presents unique impacts that have not been analyzed. The Tribes' claim lacks merit.

Reclamation's management of the Project under the 2021 and 2022 TOP, as analyzed in the 2021 Supplemental EA and the 2022 DNA, respectively, both focused on maintaining a minimum lake elevation in UKL above the BiOp Boundary Condition of 4138.00 feet. *See, e.g.,* KT II AR 123 at BOR005404 (4138.30 with .30 buffer in 2021); KT II AR 53 at BOR001417 (4138.15 with .15 buffer in 2022; approximately 10,230 acre-feet above 4138.00). Reclamation likewise sought to achieve this objective under both actions through continuous monitoring of inflows, outflows, and projected precipitation, as well as the implementation of increased

coordination for adaptive management of water levels. KT II AR 123 at BOR005377; KT II AR 53 at BOR001418. Given these commonalities, Reclamation unsurprisingly and reasonably concluded that its analysis in the 2021 Supplemental EA covered the environmental effects of the 2022 TOP, as reviewed in the 2022 DNA.

The 2021 Supplemental EA includes extensive discussion of the impacts of differing lake levels on suckers under the 2021 TOP, which prioritized maintaining the annual minimum elevation of UKL. Reclamation also reviewed measures proposed under the 2021 TOP to support various sucker life stages – spawning, egg incubation, older juvenile, and adult – before it reached its conclusion. KT II AR 123 at BOR005403-04. The 2022 DNA similarly reviewed potential impacts of the 2022 TOP on biological resources such as the suckers and correctly determined that they are "expected to be similar to those described in Section 4.4.1 of the 2021 EA." KT II AR 53 at BOR001424. This is because in both analyses Reclamation projected that surface elevations would remain below the higher targets of 4,142 ft on May 31 and 4,140.5 on July 15, but above the minimum elevation of 4138.00, regardless of release schedule. *Id*. In fact, Reclamation designed the 2022 TOP to maintain UKL above the lowest elevation analyzed in the 2021 Supplemental EA. *Id*. at BOR001425. Accordingly, Reclamation determined that the impacts of the 2022 TOP fell within the range analyzed in the 2020-2023 EA and 2021 Supplemental EA. Reclamation did not simply ignore that drought was continuing for another year, but rather actively addressed the continuing drought by confirming that the minimum lake elevation analyzed in the 2021 Supplemental EA remained sufficient to support sucker populations through another forecast year of drought in 2022. NEPA did not require Reclamation to duplicate this analysis by preparing a redundant supplemental EA in 2022 to consider these same environmental effects.

b. Reclamation Adequately Considered the Effects of the Adaptive Management Process on Sucker Habitat and Spawning

In 2022, as in 2021, after determining that operations consistent with both BiOps were not possible due to extreme hydrological circumstances, Reclamation, after conferring with the Services, adaptively managed Project supply as anticipated in the terms and conditions of the BiOps, rather than the stricter formula and schedule for releases contemplated in the 2020-2023 EA. The Tribes do not assert that adaptive management itself is inappropriate, and have not challenged the 2021 Supplemental EA. Rather, the Tribes assert that a change to when irrigation would begin in 2022 compared to when it began in 2021 warranted preparation of a Supplemental EA. The Tribes are incorrect. The Tribes' emphasis on the timing of the start of the irrigation season is misplaced, because the 2022 TOP continued to utilize the adaptive management approach reviewed in the 2021 Supplemental EA, which allows Reclamation to protectively manage the Project supply and UKL elevation in light of changing conditions and to account for events such as the start of irrigation deliveries. Even more critically, regardless of when irrigation deliveries commenced in 2021 and 2022, the critical variable for purposes of Reclamation's analysis of the effect of Project operations on the suckers is UKL elevation. Here, the elevation range that Reclamation evaluated in the 2022 DNA as an effect of the 2022 TOP – and the timing of those elevations – fell entirely within the range of those reviewed in the 2021 Supplemental EA.

In fact, Reclamation's adaptive management strategy as analyzed in the DNA is nearly identical to the strategy that it analyzed in the 2021 Supplemental EA, notwithstanding the Tribes' arguments to the contrary. The Tribes make much of the fact that deliveries for irrigation

began on May 15 in 2021, but could have begun as early as April 15 in 2022.[14] KT II ECF 40 at 44-45. They also assert that Reclamation has baselessly assumed that the impacts to biological resources are the same no matter when irrigation begins and when the allocations increase. *Id.*, at 45. But again, the critical factor is not when irrigation deliveries began, but rather the effect of Project operations on UKL elevations. These effects are similar under both the 2021 and 2022 TOP, because the management regime focuses on maintenance of UKL elevations. While Reclamation proposed to start deliveries slightly earlier in 2022, it committed to closely monitor UKL elevation, as in 2021, in which real-time monitoring would allow for constant assurance that UKL elevation was maintained appropriately. KT II AR 53 at BOR001417. This adaptive management provided for the modification of Project supply based on "continual monitoring of all operational parameters and projections, and frequent communication with Project water users and the Services." *Id*. If projections showed that inflows were insufficient to maintain UKL at or above 4138.15 feet, diversions for Project purposes would be reduced up to, potentially, total cessation of delivery; if inflows were greater, they would be split evenly between UKL elevation and Project releases. *Id*. This approach is nearly identical to that which was implemented in 2021. Under both TOPs, regardless of adjustments to the timing and allocation of irrigation deliveries, the range of analyzed UKL elevations remained the same. *Id*., at 1420. Accordingly, Reclamation rationally determined that its analysis in the 2021 Supplemental EA remained applicable to the TOP proposed in 2022 and that impacts from that action fell within the range of

[14] While the presumptive start date in 2021 was May 15, the 2021 Supplemental EA indicated that "Project Supply may be made available prior to May 15 to begin charging Project canals and provide for limited deliveries if a [surface flushing flow] has already been implemented." KT II AR 123 at BOR005376. This underlines that, while the dates of Project supply release vary, the management system evaluated for each year does not.

conditions and impacts accounted for in the two existing EAs (one of which covers the full period, and the other which adjusts for extreme drought).

The Tribes have failed to meet their burden of showing that Reclamation has not articulated a rational connection between the facts it found and its conclusion that supplementation was not warranted. Indeed, the record illustrates that Reclamation carefully considered the impacts of continuing drought in 2022 and tailored its 2022 TOP accordingly.

III. Conclusion

For all the reasons set forth in Federal Defendants' opening brief and above, the Court should dismiss the Tribes' complaints. In the alternative, the Court should deny the Tribes' motions for summary judgment and enter summary judgment in favor of Federal Defendants.

Respectfully submitted this 13th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it consists of a consolidated reply brief addressing two related matters, and contains 13,540 words, inclusive of headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel. Previously, Federal Defendants did not oppose Plaintiff's request for a word count enlargement for its consolidated opposition and reply brief of up to 15,000 words "provided that they are granted commensurate page limit extensions to any extension granted to Plaintiff, if necessary." KT I ECF 90 at 3; KT II ECF 39. Federal Defendants have filed an unopposed motion for enlargement of the word limit simultaneously with this brief.

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CERTIFICATE OF SERVICE

I certify that on March 13, 2023, the foregoing was electronically filed with the Court's electronic filing system.

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