IN THE UNITED STATES DISTRICT COURT

FOR THE 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,

Defendant-Intervenor.

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

FINDINGS AND RECOMMENDATION

CLARKE, United States Magistrate Judge:

This case comes before the Court on three motions for summary judgment: one from Plaintiff, the Klamath Tribes ("Tribes"), *see* Pl.'s Mot. Summ. J., ECF No. 24 ("Pl.'s Mot."); one from Defendant, the United States Bureau of Reclamation ("Reclamation"), *see* Def.'s Mot. Summ. J., ECF No. 32 ("Recl. Mot."); and one from Defendant-Intervenor, Klamath Water

Users Association ("KWUA"), *see* Def.-Intervenor's Mot. Summ. J., ECF No. 29 ("KWUA Mot."). This case involves the limited water supply of the Klamath River during a drought year and Reclamation's obligations under the Endangered Species Act ("ESA").

In 2022, Reclamation made operational decisions during a drought year that affected lake elevations in the Upper Klamath Lake ("UKL"). UKL is critical habitat for two sucker species: the C'waam (Lost River sucker) and Koptu (shortnose sucker).[1] The central question in this case is whether Reclamation violated the ESA by allocating water for irrigation purposes when Reclamation knew it could not comply with its ESA obligations to the suckers in UKL. The answer to this question is yes. Courts have repeatedly determined that irrigators' rights are subservient to Reclamation's obligations under the ESA and the Tribes' fishing and water rights. For the reasons that follow, Plaintiff's Motion for Summary Judgment should be GRANTED, Reclamation's Motion for Summary Judgment should be DENIED, and KWUA's Motion for Summary Judgment should be DENIED.

BACKGROUND

The history of the Klamath Basin and litigation over Reclamation's operation of the Klamath Project is long and complex. What follows is by no means a full account of the history of the region and its people.[2]

I. The Klamath Basin

The Klamath Basin encompasses approximately 12,000 square miles of "interconnected rivers, canals, lakes, marshes, dams, diversions, wildlife refuges, and wilderness areas" in

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[1] Throughout this Findings and Recommendation ("F&R"), the Court refers to these species interchangeably as "suckers," "sucker fish," and "C'waam and Koptu."

[2] The factual background that follows is nearly identical to the factual background in the Court's F&R regarding the Tribes' challenge to Reclamation's operation of the Klamath Project during 2021. *See Klamath Tribes v. U.S. Bureau of Reclamation*, No. 1:21-cv-00556-CL (D. Or. filed Apr. 13, 2021).

southern Oregon and northern California. *In re Klamath Irrigation Dist.*, 69 F.4th 934, 938 (9th Cir. 2023) (quoting *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 938 (9th Cir. 2022)). UKL is a large, shallow freshwater lake in southern Oregon. *Id.*; *Klamath Irrigation Dist.*, 48 F.4th at 938. UKL drains into the Link River and, "[f]rom there, water flows into and through Lake Ewauna to the Klamath River, which then proceeds southwest into California and eventually joins the Trinity River near the Pacific coast." *In re Klamath Irrigation Dist.*, 69 F.4th at 938. In recent years, drought conditions have led to "critically dry" conditions in the Klamath Basin, including in UKL. *Klamath Irrigation Dist.*, 48 F.4th at 938–39 (citing *Baley v. United States*, 942 F.3d 1312, 1323–24 (Fed. Cir. 2019)).

The waters of the Klamath Basin are home to several species of fish that are listed as endangered or threatened pursuant to the ESA. *See id.* at 939; *see also Baley*, 942 F.3d at 1324. These species include the Lost River sucker (*Deltistes luxatus*), the shortnose sucker (*Chasmistes brevirostris*), and a cohort of coho salmon (*Oncorhynchus kisutch*) known as the Southern Oregon/Northern California Coast ("SONCC") evolutionary significant unit ("ESU")[3]. AR 3710.[4] Although not listed under the ESA, chinook salmon are also found in the waters of the Klamath Basin. Chinook salmon are a primary prey species for the Southern Resident killer whale (*Orcinus orca*), which is listed as endangered under the ESA. AR 3710.

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[3] "A salmon stock will be considered a distinct population, and hence a 'species' under the ESA, if it represents an evolutionary significant unit (ESU) of the biological species. The stock must satisfy two criteria to be considered an ESU: (1) It must be substantially reproductively isolated from other nonspecific population units; and (2) it must represent an important component in the evolutionary legacy of the species." Notice, Policy on Applying the Definition of Species under the ESA to Pacific Salmon, 56 Fed. Reg. 58,612 (Nov. 20, 1991).

[4] Unless indicated otherwise, all citations to the administrative record in this F&R are to the administrative record in *Klamath Tribes v. U.S. Bureau of Reclamation, et al.*, No. 1:22-cv-00680-CL (*KT II*). Any citations to the administrative record in *Klamath Tribes v. U.S. Bureau of Reclamation*, No. 1:21-cv-00556-CL (*KT I*) will be marked as KT I AR. The Court uses the last three or four digits of a document's Bates number.

A. Suckers

The Lost River sucker (C'waam) and the shortnose sucker (Koptu) are endemic to the Upper Klamath Basin. AR 3506. UKL is the largest remaining continuous habitat for endangered suckers in the Upper Klamath Basin. AR 3508. These suckers inhabit freshwater lakes for most of their lives but must migrate to tributary streams for spawning and rearing. AR 3502, 3506. Spawning occurs each year from February through May. AR 3502–03. When suckers spawn, fertilized eggs quickly settle within the top few inches of the gravel substrate until those eggs hatch a week later. AR 3503. Larvae then drift downstream to UKL beginning in April and ending by July, with the peak occurring in mid-May. AR 3504. In mid-July, the larvae transform into juveniles and mature in UKL before returning to UKL tributaries to spawn as adults. AR 3505–06. All shortnose suckers spawn in UKL tributaries. AR 3508. Most Lost River suckers spawn in UKL tributaries, but some also spawn in springs discharging into UKL. AR 3508–10. Hydrologic conditions can limit the suckers' successful migration to spawning habitats. AR 3502.

In 1988, the United States Fish and Wildlife Service ("USFWS") listed the Lost River sucker and the shortnose sucker as endangered under the ESA. *See* Final Rule, Determination of Endangered Status for Shortnose Sucker and Lost River Sucker, 53 Fed. Reg. 27,130 (July 18, 1988).[5] In 2012, USFWS designated UKL and its tributaries as critical habitat for the suckers. *See* Final Rule, Designation of Critical Habitat for Lost River Sucker and Shortnose Sucker, 77 Fed. Reg. 73,740 (Dec. 11, 2012); *see also Baley*, 942 F.3d at 1324 n.12 ("The Lost River and

[5] The United States Fish and Wildlife Service ("USFWS") is the consulting agency for terrestrial and freshwater species, such as the shortnose and Lost River suckers, and the National Marine Fisheries Service ("NMFS") is the consulting agency for marine and anadromous species, such as the SONCC coho salmon. *See Baley*, 942 F.3d at 1324.

shortnose suckers' only habitat is [UKL] and nearby [Klamath] Project waters." (citations omitted)).

The suckers' populations have declined in the years since they were listed under the ESA. In 2014, abundance estimates for adult spawning suckers were roughly 108,000 for the Lost River sucker and 19,000 for the shortnose sucker. AR 3510. In 2018, those estimates dropped to roughly 40,000 for the Lost River sucker and 7,000 for the shortnose sucker. *Id.* There has been no evidence of significant numbers of new individuals joining the adult spawning populations since the late 1990s and there have been sharp declines in population sizes. *Id.* The suckers that have spawned in the 1990s are now well beyond the average survival age past maturity. AR 3501, 3511. Few juveniles survive their first year, and capture of individuals between the ages of two and six is "exceedingly rare." AR 3510. In other words, the existing suckers are aging without younger suckers to survive them once they die.

B. Salmon

The Klamath Basin is also home to SONCC coho salmon. SONCC coho salmon in the Klamath River are part of an ESU that ranges "from coastal streams and rivers between Cape Blanco, Oregon, and Punta Gorda, California" and includes SONCC coho salmon from several hatcheries. Final Rule, Listing Determinations for 16 ESUs of West Coast Salmon, 70 Fed. Reg. 37,160, 37,176 (June 28, 2005). During their three-year lifespan, SONCC coho salmon adults typically migrate from the ocean and into bays and estuaries towards their freshwater spawning grounds, where they die after spawning. AR 3775. SONCC coho salmon fry and juveniles rear in freshwater for about fifteen months before migrating to the ocean. *Id.*[6]

[6] *See Baley*, 942 F.3d at 1324 n.13 ("SONCC coho salmon are anadromous fish, meaning they hatch in fresh water, migrate to the ocean where they are reared and reach mature size, and eventually complete their life cycle by returning to the fresh-water place of their origin to spawn." (citations and quotation marks omitted)).

In 1997, the National Marine Fisheries Service ("NMFS") listed the SONCC coho salmon as threatened under the ESA. *See* Final Rule, Threatened Status for SONCC ESU of Coho Salmon, 62 Fed. Reg. 24,588 (May 6, 1997). In 1999, NMFS designated critical habitat for the SONCC coho salmon and included most of the Klamath River below Iron Gate Dam in the designation. *See* Final Rule, Designated Critical Habitat for Central California Coast and SONCC Coho Salmon, 64 Fed. Reg. 24,049 (May 5, 1999). In the 1940s, estimated abundance of SONCC coho salmon ranged from 150,000 to 400,000 naturally spawning fish. *See* Final Rule, 62 Fed. Reg. at 24,059. In 1997, SONCC coho salmon numbered approximately 10,000 naturally produced adults. *Id.* Today, most independent populations of the SONCC coho salmon ESU are "at high risk of extinction" because they are below or likely below the minimum number of adults needed for survival of a population. AR 3776. Various factors contributed to the decline in the SONCC coho salmon population, including: diseases, dams, wetlands loss, droughts and climate change[7], water withdrawals and diversions, and severe flood events exacerbated by land use practices. AR 3777, 3807.

Additionally, although not listed under the ESA, chinook salmon are found in the waters of the Klamath Basin. Chinook salmon are a primary prey species for the Southern Resident killer whale, which NMFS listed as endangered under the ESA in 2005. *See* Final Rule, Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. 69,903 (Nov. 18, 2005); *see also* AR 3933–35, 3949. Southern Resident killer whales occur throughout the coastal waters off Washington, Oregon, and Vancouver Island and are known to travel as far south as central California and as far north as southeast Alaska. AR 3930. As of December 2018, the Southern

[7] "Of all the Pacific salmon species, coho salmon are likely one of the most sensitive to climate change due to their extended freshwater rearing. Additionally, the SONCC coho salmon ESU is near the southern end of the species' distribution and many populations reside in degraded streams that have water temperatures near the upper limits of thermal tolerance for coho salmon." AR 3778.

Resident killer whale population dropped to 74 whales, the lowest number in over 30 years. AR 3927. The survival rates for Southern Resident killer whales strongly correlate with coast-wide availability of Chinook salmon. AR 3929. Chinook salmon in the Klamath River can constitute a sizable percentage of the salmon that Southern Resident killer whales encounter in coastal waters off northern California and southern and central Oregon. AR 3944–46. Unlike coho salmon, Chinook salmon typically spawn in larger waterways such as the mainstem Klamath River and large tributaries. AR 3949. Low flow years and elevated water temperatures may increase risks of disease to adult Chinook salmon that enter the Klamath River. AR 3953.

II. The Klamath Tribes

The Klamath Tribes ("the Tribes"), a federally recognized Indian tribe, consist of three peoples who traditionally inhabited the region that now comprises parts of southern Oregon and northern California: the Klamath, the Moadoc, and the Yahooskin Band of Snake Indians[8]. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4638 (Jan. 28, 2022); *see also* Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707 (the "1864 Treaty"); *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119, 121 (1938) ("In 1864, [the Tribes] held by immemorial possession more than 20,000,000 acres located within what now constitutes Oregon and California."). "Since time immemorial, the Klamath Tribes utilized the water and fish resources of the Klamath Basin for subsistence, cultural, ceremonial, religious, and commercial purposes." *Klamath Irrigation Dist.*, 48 F.4th at 939 (citing *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983)); *see also In re Klamath Irrigation Dist.*, 69 F.4th at 938 ("The river and its fisheries are integral to the

[8] The people of the Yahooskin Band of Snake Indians are also known as the Yahooskin-Paiute. *See Klamath Tribal History*, KLAMATH TRIBES, https://klamathtribes.org/history (last visited Aug. 27, 2023).

Tribes' existence."). The C'waam (Lost River sucker) and Koptu (shortnose sucker) play a "central role in the Tribes' cultural and spiritual practices, and they were once the Tribes' most important food-fish." *Klamath Irrigation Dist. v. United States Bureau of Reclamation*, 489 F. Supp. 3d 1168, 1173 (D. Or. 2020) (citation omitted); *see also* AR 3535 ("Migrating suckers were a historically important food source for the Klamath Tribes and were harvested in large numbers during the spring months.").

In 1864, the United States and the Tribes "entered into a treaty whereby the Tribes ceded their interests in millions of acres of land and retained a reservation of approximately 800,000 acres abutting UKL and several of its tributaries." *Klamath Irrigation Dist.*, 48 F.4th at 939. The Tribes retained "the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits[.]" 1864 Treaty, art. 1, 16 Stat. 707. "In view of the historical importance of hunting and fishing, and the language of Article I of the 1864 Treaty, ... one of the 'very purposes' of establishing the Klamath Reservation was to secure to the Tribe[s] a continuation of [their] traditional hunting and fishing lifestyle." *Adair*, 723 F.2d at 1409.

The Tribes' fishing and water rights include "the right to prevent other appropriators from depleting the streams['] waters below a protected level" and "the right to certain conditions of water quality and flow to support all life stages of [the C'waam and Koptu.]" *Klamath Irrigation Dist.*, 48 F.4th at 939–40 (citations omitted); *Baley*, 942 F.3d at 1322. "These rights 'necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights.'" *Klamath Irrigation*

Dist., 48 F.4th at 939 (quoting *Adair*, 723 F.2d at 1414). These rights survived the termination of the Tribes' former reservation. *Kimball v. Callahan*, 493 F.2d 564, 569 (9th Cir. 1974).[9]

III. The Klamath Project

A. History

The Reclamation Act of 1902 "laid the groundwork for a vast and ambitious federal program to irrigate the arid lands of the western states." *Baley*, 942 F.3d at 1319 (citation omitted); *see also* The Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (codified, as amended, at 43 U.S.C. § 371 *et seq.*). "Prior to passage of the Reclamation Act, at least part of the Klamath Basin was not arid land, but wetlands or marshes that were subsequently drained and converted to farmland pursuant to the Klamath Project." *Baley*, 942 F.3d at 1319 n.7. Historically, the wetlands functioned as crucial habitat for sucker larvae and juveniles. AR 3524.

In 1905, Congress authorized the Secretary of the Interior to advance the Klamath River Basin Project ("Klamath Project" or "Project"). *See Klamath Irrigation Dist.*, 489 F. Supp. 3d at 1175 (discussing origins and history of the Klamath Project). The Klamath Project is "a series of complex irrigation works in the region" that Reclamation operates "in accordance with state and federal law, except where state law conflicts with superseding federal law." *In re Klamath Irrigation Dist.*, 69 F.4th at 938 (citations omitted).[10] Between 1889 and 1971, approximately 70

[9] In 1953, Congress "instructed the Secretary of the Interior to recommend legislation for the withdrawal of federal supervision over certain American Indian tribes," including the Klamath Tribes. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 408 (1968); *see also* H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953). In 1954, Congress passed the Klamath Termination Act, which became fully effective in 1961. *Kimball*, 493 F.2d at 567. "The express purpose of this Act was to terminate federal supervision over the Klamath Tribe of Indians, to dispose of federally owned property acquired for the administration of Indian affairs, and to terminate the provision of federal services to the Indians solely because of their status as Indians." *Id.* The Klamath Tribes regained their status as a federally recognized Indian tribe in 1986. *See* Klamath Indian Tribe Restoration Act of 1986, Pub. L. No. 99–398, 100 Stat. 849. However, the Tribes never regained their reservation land base. *See Baley*, 942 F.3d at 1322–23 (discussing Reservation history).

[10] Both Oregon and California follow the doctrine of prior appropriation of water rights. *Baley*, 942 F.3d at 1320. Under this doctrine, "diversion and application of water to a beneficial use constitute an appropriation, and entitle the appropriator to a continuing right to use the water, to the extent of the appropriation, but not beyond that

percent of the original wetlands surrounding UKL were diked, drained, or significantly altered. AR 3508. The once "superabundant" suckers began to decline around the turn of the twentieth century "concurrent with the significant destruction and degradation of their habitat." AR 3509. The creation of physical structures that are part of the Klamath Project—such as dams, canals, and diversion points—altered the nature of the suckers' habitat both upstream and downstream. AR 3540. Loss and alteration of habitats, including spawning and rearing habitats, were major factors leading to the listing of both sucker species and continue to be significant challenges to recovery. AR 3521. Barriers that limit or prevent access to spawning habitat were identified as threats when the sucker species were listed. AR 3522.

B. Current Operations at UKL

UKL functions as one of three reservoirs that Reclamation operates for the purpose of storing water for delivery to the Klamath Project's service area. AR 4146. UKL is the Klamath Project's primary storage reservoir. AR 3447. Since 1921, Reclamation has released water from UKL for irrigation, wildlife refuge purposes, hydropower generation, flood control, and instream flows to support downstream fish needs. AR 4228. The Klamath Project's irrigated land area is about 200,000 acres, with most of that acreage receiving water diverted from the Klamath River system. AR 3451. Most irrigation water deliveries occur between April and October, although water is diverted year-round for use within the Klamath Project. *Id.*

The total volume of water in UKL at elevation 4143.30 feet above sea level, considered to be full pool, is approximately 849,000 acre-feet ("AF"). AR 3448. Of this total volume,

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reasonably required and actually used. The appropriator first in time is prior in right over others upon the same stream." *Id.* (quoting *Arizona v. California*, 298 U.S. 558, 565–66 (1936)). "[T]he doctrine provides that rights to water for irrigation are perfected and enforced in order of seniority, starting with the first person to divert water from a natural stream and apply it to a beneficial use[.]" *Id.* (citing *Montana v. Wyoming*, 563 U.S. 368, 375–76 (2011)). "Once such a water right is perfected, it is senior to any later appropriators' rights and may be fulfilled entirely before those junior appropriators get any water at all." *Id.* (citing *Montana v. Wyoming*, 563 U.S. at 376).

approximately 562,000 AF is "usable storage" or "active storage" when UKL is at full pool. AR 3447. The active storage is the water between the elevations of 4136.00 and 4143.30 feet. *Id.* The Link River Dam at the outlet of UKL controls the lake's elevation. *Id.* Water is diverted at the A Canal on the southeast end of UKL or locations just downstream of the Link River Dam. AR 3451. The water taken includes both "live" flow, or water at the rate flowing into or through UKL at a specific time, and stored water behind the Link River Dam. *Id.*

C. Reclamation's Duties

In operating the Klamath Project, Reclamation has the "nearly impossible" task of balancing multiple, often competing interests in the Klamath Basin. *Klamath Irrigation Dist.*, 48 F.4th at 940 (quoting *Klamath Irrigation Dist.*, 489 F. Supp. 3d at 1173). Three of those interests are directly implicated here: Tribal water and fishing rights, Reclamation's obligations under the ESA, and Reclamation's contracts with individual irrigators and irrigation districts.

First, Reclamation must operate the Project "consistent with the federal reserved water and fishing rights of the Klamath, Hoopa Valley, and Yurok Tribes that predated the Project and any resulting Project rights." *Id.* at 941. The Klamath Tribes' senior, non-consumptive rights include "the right to prevent other appropriators from depleting the streams['] waters below a protected level" and "the right to certain conditions of water quality and flow to support all life stages of [the Lost River sucker and the shortnose sucker]." *Baley*, 942 F.3d at 1322 (citation omitted); *Klamath Irrigation Dist.*, 48 F.4th at 939–40, 943 (citations omitted). The rights of downstream Tribes, such as the Yurok Tribe and Hoopa Valley Tribe, also require Reclamation to maintain specific instream flows in the Klamath-Trinity River in California. *In re Klamath Irrigation Dist.*, 69 F.4th at 938. "At the bare minimum, the Tribes hold rights to an amount of water that is at least equal, but not limited to, the amount necessary to fulfill Reclamation's ESA

responsibilities." *Id.* (citations and quotation marks omitted); *see also Baley*, 942 F.3d at 1337 ("At the bare minimum, the Tribes' rights entitle them to the government's compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy."). The Tribes' rights "necessarily carry a priority date of time immemorial." *Klamath Irrigation Dist.*, 48 F.4th at 939 (quoting *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983)).

Second, Reclamation must operate the Klamath Project in a manner consistent with its obligations under the ESA, which includes maintaining specific elevation levels in UKL and instream flows in the Klamath River. *In re Klamath Irrigation Dist.*, 69 F.4th at 938; *Klamath Irrigation Dist.*, 48 F.4th at 940–41. As discussed in greater detail below, the ESA "requires federal agencies to consult with specified federal fish and wildlife agencies to ensure that 'any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence' of any species listed for protection under the Act 'or result in the destruction or adverse modification of' the species' critical habitat." *Klamath Irrigation Dist.*, 48 F.4th at 940 (citations omitted). Reclamation develops operating procedures through consultation with USFWS and NMFS "to ensure that its operations do not jeopardize the existence of fish species protected by the ESA, including the Lost River sucker, the shortnose sucker, and the SONCC coho salmon." *Id.* at 940–41.

Third, "Reclamation maintains contracts with individual irrigators and the irrigation districts that represent them, under which the United States has agreed to supply water from the Klamath Project to the irrigators, 'subject to the availability of water.'" *Id.* at 940. These irrigators rely on water deliveries and make investments in crops based upon expected water deliveries. *Klamath Irrigation Dist.*, 489 F. Supp. 3d at 1175. "Delayed access to or decreased amounts of water cause 'long-reaching damages' to the irrigators' businesses." *In re Klamath*

Irrigation Dist., 69 F.4th at 939. The irrigators' rights are "subservient" to the Tribes' rights and Reclamation's ESA responsibilities. *Id.*

IV. The Present Dispute

A. 2019 BiOps

In December 2018, Reclamation sent a biological assessment ("2018 BA") to USFWS and NMFS detailing Reclamation's internal assessment of the effects on listed species of Reclamation's proposed operation of the Klamath Project from April 1, 2019, to March 31, 2029. AR 4085. With respect to Klamath River flows, the 2018 BA included an Environmental Water Account ("EWA") with a minimum of 400,000 AF of water in UKL to support minimum average daily flows at Iron Gate Dam on the Klamath River for the benefit of downstream salmon. AR 3735. The 2018 BA provided approximately 50,000 AF within the EWA for surface flushing flows[11] or another manner that NMFS determines best meets the needs of SONCC coho salmon. AR 3748. The 2018 BA also provided for an additional volume of 20,000 AF within the EWA for enhanced May/June flows available under certain conditions. AR 3748–51.

In March 2019, USFWS and NMFS each issued a biological opinion (the "2019 USFWS BiOp" and the "2019 NMFS BiOp") and concluded that the 2018 BA was not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. Each BiOp included an incidental take statement ("ITS") exempting anticipated

[11] The purpose of a surface flushing flow is to disturb surface sediment along the river bottom and disrupt the life cycle of a worm that is a host to the *C. shasta* parasite central to salmonid disease dynamics in the Klamath River. AR 1037. In 2016, the Hoopa Valley Tribe and the Yurok Tribe filed separate suits against Reclamation and NMFS alleging that Klamath Project operations violated the ESA with regard to SONCC coho salmon because the metric for measuring allowable incidental "take" of salmon due to Klamath Project operations—specifically, the proliferation of the *C. shasta* parasite causing salmonid disease—had been exceeded. Each Tribe was granted summary judgment in early 2017, and Reclamation was ordered to establish a 50,000 AF reserve of water to be used to provide additional flows in the Klamath River for salmon as long as those flows did not impact protections for suckers in UKL. *See Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, 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).

incidental takes caused by otherwise lawful Klamath Project operations in accordance with the BiOp's specified terms and conditions. These BiOps were intended to cover the operational period from April 1, 2019, to March 31, 2024. *See* AR 3708.

The 2019 NMFS BiOp noted that the implementation of the 50,000 AF of EWA reserved for downstream salmon needs "must not result in impacts to suckers in UKL outside of those analyzed by USFWS" and that, "if Reclamation believes implementation of this volume may result in impacts to suckers outside of those analyzed by USFWS, Reclamation will coordinate with [USFWS and NMFS]." AR 3748. Additionally, under the 2019 NMFS BiOp, NMFS can request that Reclamation be flexible in its deployment of the 20,000 AF of EWA to maximize benefits to the SONCC coho salmon. AR 3750. However, in being flexible, "Reclamation will not provide alternative distributions to the default rules outlined above that result in impacts to suckers outside of those analyzed in USFWS' 2019 Opinion." AR 3751.

B. 2020 IOP and 2020 USFWS BiOp

1. <u>2020 IOP</u>

In March 2020, Reclamation issued an Interim Operations Plan ("2020 IOP") as part of an agreement with the Yurok Tribe and KWUA.[12] AR 3440. Under the 2020 IOP, Reclamation planned to operate the Klamath Project consistent with its 2018 BA with two primary exceptions. First, Reclamation included a 20,000 AF "enhancement" to the EWA to be released from UKL during May and June when certain hydrologic conditions were met. AR 3690, 3700. Of this amount, 10,000 AF would come from water that otherwise would have remained in UKL and

[12] In 2019, the Yurok Tribe, the Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources filed a complaint in the Northern District of California challenging the adequacy of 2019 NMFS BiOp and Reclamation's compliance with Section 7 and NEPA. *Yurok Tribe, et al. v. U.S. Bureau of Reclamation, et al.*, No. 3:19-cv-04405-WHO (N.D. Cal. filed Jul. 30, 2019). The court granted the parties' stipulation to stay the case. AR 3440.

10,000 AF would come from water that otherwise would have been available to irrigators. *Id.* Second, Reclamation provided a base "augmentation" of the EWA by 40,000 AF in water years meeting certain hydrologic conditions. AR 3689, 3699. Of this 40,000 AF of EWA augmentation water, 17,000 AF would come from UKL storage volume and 23,000 AF would come from water that otherwise would have been available to irrigators. *Id.*

The 2020 IOP specifically stated that, if the release of 40,000 AF of EWA would likely cause UKL elevations to drop below 4,142.0 feet in April or May, "Reclamation will coordinate with the Services ... to best meet the needs of ESA-listed species as well as coordinate and obtain input from Yurok and other affected Klamath River Basin Tribes through government-to-government consultation on how to manage water." AR 3690, 3700. Additionally, if the release would likely cause an annual minimum below 4,138.0 feet in a given water year, "Reclamation will coordinate with [USFWS and NMFS] ... to ensure the annual minimum elevation in that water year is achieved as well as coordinate and obtain input from the Yurok and other affected Tribes through government-to-government consultation on how to manage water in a way that best meets the needs of Federally-listed species." *Id.*

2. <u>2020 USFWS BiOp</u>

In April 2020, USFWS issued another biological opinion ("2020 USFWS BiOp") in response to the 2020 IOP and formal consultation with Reclamation. AR 3438, 3444. The 2020 USFWS BiOp concluded that the 2020 IOP was not likely to jeopardize the continued existence of the Lost River sucker and the shortnose sucker or to result in the destruction or adverse modification of the suckers' critical habitat. AR 3422. However, the USFWS noted that it anticipated incidental take of the suckers as well as adverse effects to their designated critical

habitat to result from implementing the 2020 IOP. *Id.* The 2020 USFWS BiOp was intended to cover the operational period from April 1, 2020, to September 30, 2022.[13] *Id.*

The 2020 USFWS BiOp included an ITS. As part of the terms and conditions, Reclamation had to take corrective actions to ensure UKL elevations were managed within the scope of the 2020 IOP. AR 3650. Term and Condition 1c ("Term 1c") required Reclamation to monitor UKL elevations for any the following boundary conditions:

- 2 consecutive years in which UKL surface elevations fall below 4142 ft (1262.48 m) in April or May; or any year in which UKL surface elevations fall below 4142 ft (1262.48 m) in April or May when EWA Augmentation is provided
- UKL surface elevations below observed elevations in 2010 in April or May
- UKL surface elevations below 4138.00 ft (1,261.26 m) at any time
- More than one water year when UKL surface elevations drop below 4,138.25 ft (1,261.4 m) in September
- Any year with UKL surface elevations less than 4,140.0 ft (1,261.9 m) by July 15, more than 1 year when surface elevations fall below 4140.5 ft (1,262.0 m) by July 15, or more than 2 years when surface elevations fall below 4140.8 ft (1,261.1 m) by July 15

Id. USFWS noted that "[c]onditions outside these bounds may result in greater adverse effects than analyzed in this BiOp and exceedance of the take anticipated in the [ITS]." *Id.* Term 1c required Reclamation to determine the causative factors of any decrease in UKL elevations projected to fall outside the above conditions and to determine whether those causative factors are within the scope of the 2020 IOP and the effects analyzed in the 2020 USFWS BiOp. *Id.* Term 1c also required Reclamation to immediately consult with USFWS concerning the causes and to adaptively manage and take corrective action. *Id.*

[13] The 2018 BA and 2020 IOP were initially scheduled to last until September 30, 2022, but have been extended for another two years, through October 2024. USFWS has issued a replacement for its 2020 BiOp and ITS that analyzes the effects of extending the 2018 BA and 2020 IOP. *See* AR 0132–36.

C. 2020 and 2021 Water Years

Unprecedented drought conditions in the Klamath Basin began during water year 2020[14] and continued into water year 2021[15]. KT I AR 5549. In April 2021, Reclamation noted that "[c]ritically dry and extraordinary hydrologic conditions in the Klamath River Basin will prevent full simultaneous satisfaction of requirements for ESA-listed species in [UKL] and the Klamath River as specified in the [2018 BA and 2020 IOP] and the BiOps, even without water deliveries to the Klamath Project[.]" *Id.* Because of these extreme conditions, Reclamation prepared temporary operating procedures ("2021 TOP") after coordinating with USFWS and NMFS regarding hydrologic conditions and the development of the temporary operations. KT I AR 5548–49.[16] Reclamation determined that "meeting the specific lake elevation required under the [2020] USFWS BiOp for larval rearing habitat is not obtainable in 2021." KT I AR 5549. In 2021, Reclamation did not attempt a surface flushing flow for the benefit of downstream salmon.[17] AR 5467.

D. 2022 TOP

Water year 2022 presented a third consecutive year of severe drought. By the end of January 2022, cumulative inflows to UKL were the fourth lowest in the 42-year period of record. AR 2199. On February 25, 2022, Reclamation initiated the BiOps' meet and confer provisions to

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[14] October 1, 2019, to September 30, 2020.

[15] October 1, 2020, to September 30, 2021.

[16] For more information about the 2021 TOP, see the concurrently filed F&R in *Klamath Tribes v. U.S. Bureau of Recl.*, Case No. 1:21-cv-00556-CL (*KT I*).

[17] Reclamation argues its ability to meet its competing ESA obligations for suckers and salmon was impaired when the Klamath Drainage District ("KDD") began diverting water from the Klamath River in contravention of Reclamation's prior notifications to Klamath Project water users that no water was available for diversion. *See* Def.'s Mot. 21 n.6, ECF No. 32 (citing KT I AR 0140). The United States filed a complaint against KDD in 2022, *see United States v. Klamath Drainage Dist.*, Case No. 1:22-cv-00962-CL (D. Or. filed Jul. 5, 2022), and the Court resolves the parties' cross-motions for summary judgment in a concurrently filed Opinion and Order.

"determine the causative factors for potentially falling outside 'boundary conditions' of the BiOps" and to "collaborate on the development of an operational path forward for managing available water supplies for the remainder of the 2022 water year." AR 1946. Between February 25 and April 9, Reclamation held weekly coordination meetings with the Services. AR 1528. Reclamation also "engaged components of the Departments of the Interior and Commerce, Klamath Basin Tribes, Project water users, and other key stakeholders to discuss possible adaptive management actions that could be implemented to best meet the requirements of the ESA, tribal trust responsibilities, and contractual obligations." AR 1529.

On March 1, 2022, Reclamation notified Klamath Project irrigators that the start of the irrigation season would be delayed until at least April 8, 2022, due to dry conditions. AR 1934. Reclamation advised irrigators that Reclamation was in the process of meeting and conferring with the Services and other affected stakeholders, and that "[t]he outcome of this process presently remains uncertain with final irrigation volumes dependent on hydrologic conditions between now and April 1." AR 1935.

By the end of March, year-to-date UKL inflows were the lowest in the entire period of record. AR 1654, 1658. UKL's elevation dropped below 4,141.0 feet. *Id.* The suckers thus faced a second consecutive year of UKL elevations dropping below those observed in April and May 2010, a possibility considered implausible under the 2020 USFWS BiOp. *See* AR 3555 ("The probability that lake elevations less than those observed in 2010 occurs at least twice in the 3-year term is 0.1% and is therefore discountable.").

On April 9, 2022, Reclamation reported to USFWS that:

> Current hydrologic modeling suggests that, regardless of Reclamation's actions, extreme drought conditions will prevent UKL elevation from reaching 4,142.0 feet (ft) in April and May, the elevation described in the USFWS 2020 BiOp as necessary for

> adequate ESA-listed Lost River sucker spawning habitat at shoreline springs. Similarly, even without operation of the Project or provision of a Surface Flushing Flow (SFF) in the Klamath River, but for without a substantial improvement in projected dry hydrologic conditions, UKL surface elevations will also not meet or exceed an elevation of 4,140.5 ft prior to July 15, as required in the USFWS 2020 BiOp.
>
> Based on this information, Reclamation has determined that meeting the specific UKL elevations from April 1 through July 15, as required under the 2020 USFWS BiOp for endangered sucker spawning and larval rearing habitat, is not obtainable in 2022. However, Reclamation modeling does indicate that UKL elevations at the end of the 2022 season will be above the required 4,138.0 ft elevation.

AR 1529. Reclamation and the Services determined that "the causative factors for Reclamation's inability to simultaneously meet[] boundary conditions specified in each BiOp are primarily the result of consecutive critically dry years and extraordinary hydrologic conditions." *Id.*

Reclamation's temporary operating procedures ("2022 TOP") "primarily focus[ed] on ... allowing for a limited volume of water for Project purposes, and ensuring that UKL remain[ed] above the required end of season elevation prescribed by the USFWS 2020 BiOp." AR 1529–30. Reclamation explained that "[t]he 2022 TOP recognizes and attempts to reconcile the exigent needs of the threatened and endangered species as well as affected tribal and irrigation communities with respect to a very limited amount of water available for the 2022 spring/summer operating season." AR 1530. Reclamation "acknowledge[d] that the 2022 TOP is unlikely to satisfy all groups but believe[d] that the 2022 TOP represents a good-faith effort, developed collaboratively, to meet as many of the competing needs as is practicable under the circumstances." *Id.*

Under the 2022 TOP, Reclamation allocated 62,000 AF for the Project's irrigation supply. AR 1532. Reclamation's deliveries would begin on April 15, and Reclamation would

"adaptively manage the Project Supply through a collaborative effort with Project contractors and the Services." *Id.* The 2022 TOP stated that "[d]eliveries would be adaptively managed in a manner that would ensure UKL water surface elevations do not recede below 4,138.15 [feet]" and that "[t]he actual available Project Supply would be dependent on observed inflows and UKL elevations during the spring/summer period." *Id.* Any increase in UKL volumes that exceeded expectations would be split in half, with fifty percent remaining in UKL to provide a buffer for end-of-season UKL elevation, and the other fifty percent to be distributed for irrigation use or refuge purposes. AR 1533. Any shortfall in projected volumes would result in a reduction of irrigation diversions to ensure UKL remained above 4,138.15 feet. *Id.* The elevation boundary of 4,138.15 feet acted "[a]s a safeguard against over drafting below the absolute minimum of 4[,]138.0 [feet] described in the [2020 USFWS] BiOp[.]" AR 0123.

On April 11, 2022, USFWS responded to Reclamation's proposed 2022 TOP. AR 1434. USFWS "recognize[d] the exceptional and unprecedented drought conditions that the Klamath Basin continues to experience in 2022" and noted that "[t]he hydrologic conditions observed this year represent an ongoing natural disaster that is beyond the control of Reclamation." *Id.* USFWS explained that its "internal analysis comport[ed] with Reclamation's conclusion that current and projected hydrologic conditions this year will preclude attainment of the 4142.0 [feet] 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." *Id.* USFWS also acknowledged that a surface flushing flow for the benefit of downstream salmon was "likely necessary" but would "preclude any change of UKL reaching or exceeding 4140.5 [feet] through July 15." AR 1435. USFWS determined that failure to meet this elevation "[would] greatly reduce larval sucker rearing habitat in UKL this year" and

"encourage[d] Reclamation to take any available steps to maintain UKL elevation as high as possible through July 15." *Id.* USFWS also noted that Reclamation's elevation boundary of 4,138.15 feet "does not avoid the biological impacts to suckers that missing the earlier season elevations creates" but nevertheless "will reduce the risk of catastrophic impacts to adult suckers by lessening the likelihood of poor water quality and affording adults access to water quality refugia if water quality conditions deteriorate." *Id.*

By mid-July 2022, Reclamation had delivered roughly 60,000 AF of water to Klamath Project irrigators. AR 0122–23.

PROCEDURAL HISTORY

In May 2022, the Tribes filed the instant action for declaratory and injunctive relief. *See* Compl. ¶ 7, ECF No. 1. The Tribes asserted three claims against Reclamation for violations of Section 7 and Section 9 of the ESA as well as a violation of NEPA. *Id.* ¶¶ 59–79, 88–94. The Tribes also asserted a claim against USFWS for a violation of the APA. *Id.* ¶¶ 80–87.

In January 2023, the parties stipulated that the following issues are not being litigated in this case—in the district court and in any court of appeal, through and including the entry of a final judgment or order of dismissal—and these issues will not be resolved by any decision or order on the merits or by any final judgment in this matter: whether Reclamation has discretion to curtail, or direct the curtailment of, storage, diversion, and delivery of irrigation water for the Klamath Project for the purpose of benefitting ESA-listed species; whether Reclamation has discretion to release water stored in Upper Klamath Lake for purposes other than irrigation and domestic use; whether any orders issued by the Oregon Water Resources Department to Reclamation in 2020 and 2021 are lawful and enforceable; and whether or how Section 9 of the ESA, 16 U.S.C. § 1538, applies to actions that KWUA asserts are nondiscretionary. The parties

agree not to argue that KWUA's failure to assert any of the issues or defenses above in the disposition of this action precludes KWUA from raising any such issues in other litigation. *See* Order, ECF No. 28.

In February 2023, the Tribes voluntarily dismissed their claim against USFWS. *See* Pl.'s Resp. 30, ECF No. 40. The Tribes also represented that they are no longer seeking injunctive relief. *See id.* at 18 n.12.

LEGAL STANDARD

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file, if any, show "that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Substantive law on an issue determines the materiality of a fact. *T.W. Elec. Servs., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Whether the evidence is such that a reasonable jury could return a verdict for the non-moving party determines the authenticity of the dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the non-moving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324. "Where the parties file cross-motions for summary judgment, the court must consider each party's evidence, regardless under which motion the evidence is offered." *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532 (citing *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001)).

The Administrative Procedures Act ("APA") allows the reviewing court to set aside a final agency action only if it is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law." 5 U.S.C. § 706(2)(A). "A decision is arbitrary and capricious if the agency 'has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *O'Keeffe's, Inc. v. U.S. Consumer Product Safety Comm'n*, 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). An agency action is also arbitrary and capricious if the agency fails to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Review under the APA is "searching and careful." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2004). The court must ensure that the agency took a "hard look" at the environmental consequences of its proposed action. *Oregon Nat. Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). However, the court may not substitute its own judgment for that of the agency. *Ocean Advocates*, 402 F.3d at 858. It must presume the agency acted properly and affirm the agency when "a reasonable basis exists for its decision." *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000).

DISCUSSION

The Court's discussion proceeds in four parts: (1) jurisdiction; (2) joinder; (3) the Endangered Species Act; and (4) the National Environmental Policy Act. For the reasons that follow, Plaintiff's Motion for Summary Judgment should be GRANTED, Reclamation's Motion

for Summary Judgment should be DENIED, and KWUA's Motion for Summary Judgment should be DENIED.

I. Jurisdiction

The parties raise three jurisdictional issues. First, Reclamation and KWUA argue that this case is moot. *See* Recl. Mot. 25–30, ECF No. 32; KWUA Mot. 23–24, ECF No. 29. Second, KWUA argues that the Tribes do not have standing to seek declaratory relief. *See* KWUA Mot. 21–23, ECF No. 29. Third, Reclamation and KWUA argue that the Tribes failed to comply with the ESA's 60-day notice requirement. *See* Recl. Mot. 33–34, ECF No. 32; KWUA Mot. 24–27, ECF No. 29. The Court addresses each argument in turn.

A. Mootness

Reclamation and KWUA argue this case is moot. *See* Recl. Mot. 25–30, ECF No. 32; KWUA Mot. 23–24, ECF No. 29. The Tribes argue: (1) the case is not moot because the declaratory relief the Tribes seek concerns a substantial controversy that warrants the issuance of a declaratory judgment; and (2) even if the case is moot, Reclamation's conduct is readily capable of repetition while evading review. *See* Pl.'s Resp. 18–23, ECF No. 40.

A federal court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (citation omitted). "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (citations omitted). The central question of a mootness challenge is "not whether the precise relief sought at the time the [action] was filed is still available," but "whether there can be any effective relief." *West v. Sec'y of Dep't of Transp.*, 206

F.3d 920, 925 (9th Cir. 2000) (quotation marks omitted). The party asserting mootness carries the "heavy burden" of demonstrating that the controversy is moot. *Adarand Constr., Inc. v. Slater*, 528 U.S. 216, 222 (2000) (quotation marks omitted).

An exception to mootness exists for cases that are "capable of repetition, yet evading review." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016). This exception "applies only in exceptional situations, where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.*

The "capable of repetition, yet evading review" exception applies to Reclamation's water allocation decisions made pursuant to the 2022 TOP. First, the duration of the 2022 TOP is too short to be fully litigated prior to its expiration.[18] Reclamation's operation of the Klamath Project pursuant to the 2022 TOP occurred for less than a year and ended on September 30, 2022. "[A] period of two years is too short to complete judicial review[.]" *Kingdomware*, 579 U.S. at 170.

Second, there is a reasonable expectation that the Tribes will be subject to the same action again. Recurring drought conditions will remain a "brooding presence" over the Klamath Basin in the foreseeable future. *Nat. Res. Def. Council v. McCarthy*, 231 F. Supp. 3d 491, 498 (N.D. Cal. 2017) (quoting *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 893 F.2d 1012, 1015 (9th Cir. 1989)). "From 2000 through 2022, the [western United States] faced the driest 23-year period in more than a century and one of the driest periods in the last 1,200 years. And the situation is expected to grow more severe in future years." *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1811 (2023). Annual average temperatures in the Upper Klamath Basin are expected to continue rising in the next two decades. AR 3518. Stressful temperature conditions for suckers already "occur with regularity" and "[c]limate change ... is likely to make high stress

[18] Reclamation concedes that the 2021 TOP is too short in its duration to be fully litigated, but argues that it is not reasonable to expect that the Tribes will be subjected to the same action again. *See* Recl. Mot. 27–28, ECF No. 32.

events more common." AR 3518. Drought emergencies have been declared in Jackson County and Lake County this summer.[19]

KWUA emphasizes that the 2022 TOP was unique and there is no indication that Reclamation will adopt an identical plan in subsequent years. KWUA Reply 8–9, ECF No. 43. Similarly, Reclamation argues that even if severe drought conditions continue in the Klamath Basin that necessitate future TOPs, each TOP is a separate and distinct agency action. Recl. Mot. 29, ECF No. 32. These arguments miss the forest for the trees. Reclamation need not adopt an identical plan in the future for there to be a reasonable expectation that the Tribes will be subject to the same action again. *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174 (9th Cir. 2002) (finding a controversy capable of repetition where there is "a reasonable expectation that [the parties] will again litigate the issue"). In other words, there remains a reasonable expectation that Reclamation's water allocation decisions during recurring drought conditions will cause UKL elevation boundaries to drop below the levels necessary to sustain the suckers' critical life functions.

In sum, the Tribes' claims for declaratory relief fall within the "capable of repetition, yet evading review" exception to mootness.

B. Standing

KWUA argues that the Tribes do not have standing to seek declaratory relief because the Tribes' claims lack redressability. KWUA Mot. 21–23, ECF No. 29. The Tribes argue their injuries are redressable because those injuries are not tethered to the 2022 TOP's expiration. Pl.'s Reply 21 n.15, ECF No. 40.

"At all stages of litigation, a plaintiff must maintain a personal interest in the dispute. The doctrine of standing generally assesses whether that interest exists at the outset, while the

[19] Or. Exec. Order No. 23-15 (June 26, 2023), https://www.oregon.gov/gov/eo/eo-23-15.pdf (last visited Aug. 27, 2023); Or. Exec. Order No. 23-13 (May 25, 2023), https://www.oregon.gov/gov/eo/eo-23-13.pdf (last visited Aug. 27, 2023).

doctrine of mootness considers whether it exists throughout the proceedings." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021). When evaluating whether a plaintiff has standing, a court looks at the facts as they existed at the time the complaint was filed. *See Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency*, 38 F.4th 34, 56 (9th Cir. 2022).

To establish standing, a plaintiff must show: (1) it has suffered an "injury in fact," (2) that the injury is "fairly traceable" to the conduct at issue in the plaintiff's claim, and (3) that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Ctr. for Biological Diversity v. Exp.-Import Bank of the U.S.*, 894 F.3d 1005, 1012 (9th Cir. 2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). To establish redressability, a plaintiff must show that the relief sought is both: (1) substantially likely to redress the claimed injuries, and (2) within the court's power to award. *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020). "Redress need not be guaranteed, but it must be more than 'merely speculative.'" *Id.* (citation omitted).

KWUA argues that, because the 2022 TOP is no longer in effect, declaratory relief would not redress the Tribes' injuries that, according to KWUA, "are history." KWUA Mot. 21, ECF No. 29. This argument fails because, at the time the Tribes filed their complaint, they no doubt had standing to seek declaratory relief that was substantially likely to redress their claimed injuries. At the time the Tribes filed their complaint, court-ordered relief was possible given that the 2022 TOP was in effect. That was enough for the Tribes to have standing.

C. ESA 60-Day Notice Requirement

Reclamation and KWUA argue that the Tribes failed to comply with the ESA's 60-day notice requirement. *See* Recl. Mot. 33–34, ECF No. 32; KWUA Mot. 24–27, ECF No. 29. The Tribes argue that their notice was timely. *See* Pl.'s Resp. 27–30, ECF No. 40.

Under the ESA, "[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 purpose of this sixty-day notice provision is to give agencies "an opportunity to review their actions and take corrective measures if warranted." *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998) (citation omitted). The sixty-day notice requirement is jurisdictional. *Id.* (citation omitted). "A failure to strictly comply with the notice requirement acts as an absolute bar to bringing suit under the ESA." *Id.* (citation omitted).

"To provide proper notice of an alleged violation, a would-be plaintiff must '[a]t a minimum ... provide sufficient information ... so that the [notified parties] could identify and attempt to abate the violation.'" *Klamath-Siskiyou Wildlands Ctr. v. MacWhorter*, 797 F.3d 645, 651 (9th Cir. 2015) (quoting *Sw. Ctr. for Biological Diversity*, 143 F.3d at 522) (alterations in original). However, the would-be plaintiff "is not required to list every specific aspect or detail of every alleged violation. Nor is the citizen required to describe every ramification of a violation." *MacWhorter*, 797 F.3d at 651 (citation omitted). Instead, the analysis turns on the "overall sufficiency" of the notice. *Id.* (citations omitted). "A reviewing court may examine both the notice itself and the behavior of its recipients to determine whether they understood or reasonably should have understood the alleged violations." *Id.* (citations omitted).

On March 10, 2022, the Tribes requested government-to-government consultation with Reclamation, USFWS, NMFS, and the U.S. Bureau of Indian Affairs:

> As you are well aware, 2022 is shaping up to be just as poor a water year as 2021. Indeed, we could largely just cut and paste the text of the letters we sent to the Bureau of Reclamation last March and April to explain our fears and concerns as we head into the spring/summer period of this year. *See* Klamath Tribes letters to Reclamation of March 15, 2021; March 31, 2021, and April 5, 2021. 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).

AR 1260. On April 14, 2022, the Tribes sent Reclamation a "supplemental notice letter" and wrote:

> Despite the Tribes' warnings [on March 10, 2022], Reclamation issued the 2022 Plan, in which it determined that up to 62,000 acre-feet of water ("AF") should be allocated for Project irrigation deliveries in the 2022 spring/summer season. Compounding this injury, and unlike the prior two years where Reclamation delayed the start of irrigation deliveries, the 2022 Plan purports to allow Project diversions to commence on April 15, 2022, directly as C'waam and Koptu are attempting to access their spawning grounds, particularly the vital subset of C'waam who spawn within Upper Klamath Lake ("UKL"). Privileging irrigation in this way directly conflicts with Reclamation's obligations to the C'waam and Koptu, as well as to other ESA-protected species. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) ("[T]he Irrigators' rights to water are subservient to the ESA.").
>
> ...
>
> [I]nstead of corrective actions, Reclamation chose to deviate even further from the USFWS BiOp requirements by authorizing the release of tens of thousands of AF for Project irrigation. This decision is entirely arbitrary, capricious, and not in accordance with law.

AR 1254–55. The Tribes advised Reclamation that its planned operation of the Klamath Project in accordance with the 2022 TOP would violate Section 7 and Section 9 of the ESA. AR 1257. The Tribes also referenced their 2021 challenge to Reclamation's operation of the Klamath Project. AR 1255.

Here, the Tribes' notice was timely. For years, the Tribes have engaged in consultation with Reclamation over its operation of the Klamath Project and the needs of the C'waam and Koptu in UKL. The Tribes' March 10 letter mentions the parties' litigation history and specifically references the Tribes' most recent legal challenge in which the Tribes alleged that

Reclamation's operation of the Klamath Project under the 2021 TOP violated Section 7 and Section 9 of the ESA. Reclamation cannot plausibly claim that it did not have sufficient information to identify and attempt to abate the alleged violation. The Tribes' March 10 letter contained sufficient information such that Reclamation should have understood the alleged violations of the ESA. As such, the Tribes' notice complied with the ESA's sixty-day requirement.

II. Joinder

Reclamation and KWUA argue that this case should be dismissed under Federal Rule of Civil Procedure 19 for failure to join required absent tribes who cannot be joined due to sovereign immunity. Recl. Mot. 24–25, ECF No. 32; KWUA Mot. 27, ECF No. 29. The Tribes respond that dismissal is not appropriate because: (1) there is no motion under Federal Rule of Civil Procedure Rule 12(b)(7) before the Court; and (2) neither the Hoopa Valley Tribe nor the Yurok Tribe have appeared to seek Rule 19 dismissal. Pl.'s Resp. 13–17, ECF No. 40.

"Failure to join a party that is required under Federal Rule of Civil Procedure 19 is a defense that may result in dismissal[.]" *Klamath Irrigation Dist.*, 48 F.4th at 943. "Rule 19 is designed to protect the interests of absent parties, as well as those ordered before the court, from multiple litigation, inconsistent judicial determinations or the impairment of interests or rights." *CP Nat'l Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 911 (9th Cir. 1991). To determine whether dismissal is warranted under Rule 19, a court engages in a three-part inquiry and examines: (1) whether the absent party must be joined; (2) whether joinder of that party is feasible; and (3) if joinder is infeasible, whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. *Klamath Irrigation Dist.*, 48 F.4th at 943 (citing Fed. R. Civ. P. 19). The inquiry is a practical and fact-specific one designed to avoid the harsh results of rigid application. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (citations omitted). The absence of required parties under Rule 19 is an "issue

that can be properly raised at any stage in the proceeding." *Bonneville Power*, 928 F.2d at 911–12.[20]

A. Rule 19(a)

Under Rule 19(a), a party is a "required party" and must be joined if:

> (A) in that [party's] absence, the court cannot accord complete relief among existing parties; or (B) that [party] claims an interest relating to the subject of the action and ... disposing of the action in [their] absence may: (i) as a practical matter impair or impede the [that party's] ability to protect the interest ... or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1); *Klamath Drainage Dist.*, 48 F.4th at 943. Additionally,

> [a]lthough an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, our case law makes clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted.

Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affairs, 932 F.3d 843, 852 (9th Cir. 2019). In *Klamath Irrigation District*, the Ninth Circuit noted that "a suit ... that seeks to amend, clarify, reprioritize, or otherwise alter Reclamation's ability or duty to fulfill the requirements of the ESA implicates the Tribes' long-established reserved water rights." *Klamath Drainage Dist.*, 48 F.4th at 943–44.

Here, downstream tribes, such as the Hoopa Valley Tribe and the Yurok Tribe, are required parties. As a practical matter, resolution of the issues presented in this case may impact the downriver tribes' ability to protect their long-established reserved water rights. For instance, the downstream tribes' rights require Reclamation to maintain specific instream flows in the

[20] "Before 2007, parties that are now called 'required' under Rule 19 were referred to as 'necessary,' and parties without whom the litigation could not, in good conscience, continue, were referred to as 'indispensable.'" *Diné Citizens*, 932 F.3d at 851 n.5.

Klamath-Trinity River in California. *In re Klamath Irrigation Dist.*, 69 F.4th at 938. Such rights will no doubt be affected by a decision as to whether Reclamation can authorize irrigation diversions when drought conditions make it impossible for Reclamation to meet its ESA-obligations to all ESA-listed species in UKL and the Klamath River. The Court also notes that the Yurok Tribe has filed its own lawsuit challenging the adequacy of 2019 NMFS BiOp and Reclamation's compliance with Section 7 and NEPA with respect to salmon in the Klamath River. *See, e.g., Yurok Tribe v. U.S. Bureau of Reclamation*, 593 F. Supp. 3d 916, 921–22 (N.D. Cal. 2022). There is no question here that the downstream tribes are required parties. And there is no question that joinder is infeasible because the downstream tribes cannot be joined due to their sovereign immunity. *Klamath Irrigation Dist.*, 48 F.4th at 948; *see also Diné Citizens*, 932 F.3d at 856 ("Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe." (citation omitted)).

B. Rule 19(b)

To determine whether a suit should proceed among the existing parties in the absence of a required party that cannot be joined, a court considers: "(i) potential prejudice, (ii) possibility to reduce prejudice, (iii) adequacy of a judgment without the required party, and (iv) adequacy of a remedy with dismissal." *Klamath Drainage Dist.*, 48 F.4th at 947 (citing Fed. R. Civ. P. 19(b)). When a required party is immune from suit, there may be "very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014) (quoting *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994)). "[T]here is a 'wall of circuit authority' in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity—'virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.'" *Diné Citizens*, 932 F.3d at 857 (quoting *White*, 765 F.3d at 1028) (alteration in

original). However, in many of these cases, the required tribes supported Rule 19 dismissal by being named as defendants and moving to dismiss, by intervening for the limited purpose of moving to dismiss, or by appearing as amici.[21] Three recent cases are particularly illustrative.

In *Diné Citizens*, a coalition of conservation organizations sued the U.S. Department of the Interior over its reauthorization of coal mining activities on land reserved to the Navajo Nation. 932 F.3d at 847; *see also Klamath Drainage Dist.*, 48 F.4th at 944. The Navajo Transitional Energy Company ("NTEC"), a corporation wholly owned by the Navajo Nation which owned the mine at issue, intervened in the action for the limited purpose of moving to dismiss under Rule 19 and Rule 12(b)(7). *Diné Citizens*, 932 F.3d at 847. NTEC argued that it was a required party but could not be joined due to tribal sovereign immunity. *Id.* at 847–48. The Ninth Circuit agreed with NTEC and affirmed the district court's dismissal under Rule 19. *Id.* at 853–58, 861.

Similarly, in *Deschutes River Alliance*, a conservation organization sued the Portland General Electric Company ("PGE") over a hydroelectric project that PGE co-owned and co-operated with the Confederated Tribes of the Warm Springs Reservation of Oregon. *Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1156 (9th Cir. 2021). PGE moved to dismiss under Rule 19 for failure to join the Confederated Tribes as a required party. *Id.* at 1158. The Confederated Tribes, appearing as amicus before the district court, argued in support of PGE's motion. *Id.* The Ninth Circuit held that the Confederated Tribes' sovereign immunity required the dismissal of the lawsuit. *Id.* at 1163.

Lastly, in *Klamath Irrigation District*, several irrigation districts and individual water

[21] *See, e.g.*, *White*, 765 F.3d at 1022 (affirming district court's dismissal under Rule 19 for failure to join in a case where a tribal organization was named as defendant); *Backcountry Against Dumps v. Bureau of Indian Affairs*, 2022 WL 15523095, at *1 (9th Cir. Oct. 27, 2022) (affirming district court's dismissal under Rule 19 for failure to join in a case where the Indian tribe intervened for the limited purpose of moving to dismiss); *Maverick Gaming LLC v. United States*, --- F. Supp. 3d ----, 2023 WL 2138477, at *1 (W.D. Wash. Feb. 21, 2023) (dismissing plaintiff's claims under Rule 12(b)(7) and Rule 19 for failure to join in a case where an Indian tribe intervened for the limited purpose of moving to dismiss); *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245 (D. Or. 2017) (same).

users sued Reclamation over its operation of the Klamath Project. *Klamath Drainage Dist.*, 48 F.4th at 938. The case concerned Reclamation's operation of the Klamath Project in compliance with the ESA and the water rights of the Hoopa Valley Tribe and Klamath Tribes. *Id.* The irrigators argued that Reclamation's operation of the Klamath Project violated the APA and the Reclamation Act because distributing water to fulfill the tribes' reserved water rights deprived the irrigators of water they claimed was lawfully appropriated to them in a state adjudication proceeding. *Id.* The Hoopa Valley Tribe and Klamath Tribes intervened and moved to dismiss under Rule 19 and Rule 12(b)(7). *Id.* The Ninth Circuit affirmed this Court's dismissal of the action because the tribes were required parties who could not be joined due to their sovereign immunity and the case in equity and good conscience should not have proceeded in their absence. *Id.* at 948.

Here, no downstream tribe has been named or intervened as a defendant, intervened for the limited purpose of moving to dismiss under Rule 19, or appeared as amicus in support of Defendants' arguments. Under the facts and circumstances of this case, and applying the Rule 19(b) factors, the case in equity and good conscience can proceed in the downstream tribes' absence.

The first factor, prejudice, "largely duplicates the consideration that made a party [required] under Rule 19(a)." *Diné Citizens*, 932 F.3d at 857. "[P]rejudice to any party resulting from a judgment militates toward dismissal of the suit." *Makah Indian Tribe*, 910 F.2d at 560 (emphasis omitted). The Tribes claim that Reclamation violated the ESA when it allocated water for irrigators while drought conditions made it impossible for Reclamation to meet its obligations to ESA-listed species in UKL and the Klamath River. This case implicates the downstream tribes' long-established reserved water rights. *See Klamath Irrigation Dist.*, 48 F.4th at 943–44 ("[A] suit ... that seeks to amend, clarify, reprioritize, or otherwise alter Reclamation's ability or duty to fulfill the requirements of the ESA implicates the Tribes' long-established reserved water

rights.”). However, any prejudice to the downstream tribes is mitigated by the fact that these tribes have not sought to intervene or otherwise appear in this case to seek Rule 19 dismissal. The downstream tribes are well familiar with and directly involved in ongoing disputes concerning the Klamath Project. *See, e.g.*, *Yurok Tribe v. U.S. Bureau of Reclamation*, --- F. Supp. 3d ----, 2023 WL 1785278, at *7–8 (N.D. Cal. Feb. 6, 2023). Given the downstream tribes' familiarity and involvement with the issues presented in this case, the Court is wary of permitting Reclamation or KWUA to speak for the downstream tribes in their absence and, in effect, use their sovereign immunity as a shield.[22] Accordingly, the first factor weighs against dismissal.

The second factor, the court's ability to shape relief so as to avoid prejudice, weighs against dismissal. “In cases involving competing claims to finite natural resources, courts have found that there is no way to shape relief to avoid prejudice.” *Klamath Drainage Dist.*, 48 F.4th at 948 (citations omitted). As this Court has previously noted, “there is no way this prejudice can be lessened because this case involves conflicting and mutually exclusive interests in finite natural resources.” *Klamath Drainage Dist.*, 489 F. Supp. 3d at 1182. Here, however, the Tribes do not ask the Court to withhold water from downstream salmon in the Klamath River so that the water may remain in UKL for the benefit of suckers. The Klamath Tribes' and downstream tribes' interests do not necessarily conflict under the facts of this case.

The third factor, adequacy of a judgment without the required party, also weighs against dismissal. “A judgment rendered in [the tribe's] absence would be adequate and would not create conflicting obligations, because it is Federal Defendants' duty, not [the tribe's], to comply with NEPA and the ESA.” *Diné Citizens*, 932 F.3d at 858. Here, a judgment in favor of the Tribes would not necessarily complicate Reclamation's ability to comply with the ESA as to both the

[22] *Cf. Fireman's Fund Ins. Co. v. Nat'l Bank of Coops.*, 103 F.3d 888, 896 (9th Cir. 1996) (observing that a district court has discretion to consider the timeliness of a Rule 12(b)(7) motion “if it appears that the defendant is interposing that motion for its own defensive purposes, rather than to protect the absent party's interests”).

suckers in UKL and downstream salmon in the Klamath River. The central question in this case is whether Reclamation can allocate water for irrigation when Reclamation knows it cannot meet its obligations to ESA-listed species. This case, unlike the Tribes' 2021 case, does not pit ESA-listed species against each other. As such, a judgment in favor of the Tribes will not necessarily complicate Reclamation's ability to comply with the ESA as to both the suckers in UKL and the salmon in the Klamath River.

The fourth and final factor, whether the Tribes would have an alternative remedy if the suit were dismissed, does not weigh in favor of or against dismissal. The Ninth Circuit has regularly held that "the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Id.* Here, however, the downstream tribes have not intervened or otherwise appeared to seek dismissal for failure to join a required party. Without direct input from the downstream tribes, and because the downstream tribes are well familiar with litigation concerning the Klamath Project, the Court will not assume that they wish to do so.

In sum, the Rule 19(b) factors as applied to the facts and circumstances of this case weigh against dismissal. There are circumstances in which Rule 19 dismissal is appropriate even when a required but absent tribe does not participate in the litigation. *See, e.g., Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1153 (9th Cir. 2002). However, and as mentioned, a court's inquiry is a practical and fact-specific one designed to avoid the harsh results of rigid application. *Makah Indian Tribe*, 910 F.2d at 558. There is no bright line rule for resolving this issue, and the Court does not apply one here. Under the facts and circumstances presented in this case, the Court finds that the case in equity and good conscience can proceed in the downstream tribes' absence.

III. Endangered Species Act

First, the Tribes argue Reclamation violated Section 7 of the ESA because Reclamation improperly allocated water to Klamath Project irrigators. Pl.'s Mot. 34–39, ECF No. 24. The

Tribes assert that the needs of the endangered suckers should take precedence over water diversions for Project irrigators. *Id.* at 41–42. Second, the Tribes argue Reclamation committed unpermitted take of the suckers in violation of Section 9 of the ESA when Reclamation failed to comply with the terms and conditions of the 2020 USFWS BiOp's ITS. *See id.* at 39–42. Reclamation and KWUA argue the 2021 TOP and Reclamation's operation of the Klamath Project did not violate Section 7 or Section 9. *See* Recl. Mot. 48–54, ECF No. 32; *see also* KWUA Mot. 32–38, ECF No. 29.

Congress enacted the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§ 1531–1544, "to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 184 (1978). The purposes of the ESA are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species[.]" 16 U.S.C. § 1531(b).

A. Section 7

Section 7 is "the heart of the ESA." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). It requires federal agencies to ensure any action they authorize, fund, or carry out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitats." 16 U.S.C. § 1536(a)(2). An action jeopardizes the continued existence of a species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. Recovery means "improvement in the status of listed species to the point at which listing is no longer appropriate under the [ESA]." *Id.* Destruction or adverse modification means "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." *Id.*

Each agency contemplating an action likely to affect a listed species must first confer with a consulting agency before taking the action. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). If a proposed action is likely to adversely affect listed species, formal consultation is required and the consulting agency must prepare a BiOp "detailing how the agency action affects the species or its critical habitat," 16 U.S.C. § 1536(b)(3)(A), and stating whether the action is likely to "jeopardize the continued existence of" a listed species or destroy or adversely modify its critical habitat, *id.* § 1536(a)(2); 50 C.F.R. § 402.14(h)(iv). "The purpose of consultation is to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species or adversely modify its critical habitat and, if so, to identify reasonable and prudent alternatives that will avoid the action's unfavorable impacts." *Karuk Tribe of Cal. v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012). After receiving the consulting agency's BiOp, the action agency "shall determine whether and in what manner to proceed with the action in light of its [S]ection 7 obligations" and the BiOp. 50 C.F.R. § 402.15(a). "A federal agency cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a [consulting agency's] biological opinion must not have been arbitrary or capricious." *Pyramid Lake Paiute Tribe*, 898 F.2d at 1415.

As mentioned, the Tribes argue Reclamation violated Section 7 of the ESA because Reclamation improperly allocated water to Klamath Project irrigators. Pl.'s Mot. 34–39, ECF No. 24. The Tribes specifically argue that Reclamation did not follow the 2018 BA's allocation formula. *Id.* at 36. The Tribes also contend that Reclamation should have done everything possible to increase the odds of the suckers' survival instead of prioritizing water for irrigators. *Id.* at 37. Reclamation argues adequate spawning conditions were not going to be available regardless of Reclamation's actions. *See* Recl. Mot. 52, ECF No. 32.

Here, Reclamation's decision to allocate water for irrigation purposes when Reclamation knew it could not meet its ESA obligations to the suckers was an action that jeopardized the continued existence of the suckers and adversely modified their critical habitat. Reclamation's actions particularly interfered with the suckers' spawning and rearing. "Higher seasonal UKL elevations are important to provide habitat for larval, juvenile and adult [suckers]." AR 3632. In 2022, the suckers faced a third consecutive year in which shoreline spawning would be disrupted by low and decreasing water levels. AR 0578. There is no question that severe drought conditions during 2022 made it impossible for UKL elevation levels to reach 4,142 feet. *See* AR 1434 ("[C]urrent and projected hydrologic conditions this year will preclude attainment of the 4142.0 [feet] 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.").

However, severe drought conditions were not an excuse for Reclamation to abandon its ESA obligations to the suckers in UKL and instead allocate water for Klamath Project irrigators. The Ninth Circuit has repeatedly determined that irrigators' rights are "subservient" to the Tribes' rights and Reclamation's ESA responsibilities. *See, e.g., In re Klamath Irrigation Dist.*, 69 F.4th at 939. Unlike the Tribes' claims in 2021, this case does not involve Reclamation's equal obligations under the ESA as to multiple listed species with conflicting needs during a drought year. Here, Reclamation's ESA obligations required it to take all steps necessary to avoid jeopardizing the suckers, even if that meant allocating no water to Project irrigators for a second consecutive year. *Cf. Tenn. Valley Auth.*, 437 U.S. at 184 ("The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost."). USFWS warned Reclamation that failure to meet certain UKL elevation levels "[would]

greatly reduce larval sucker rearing habitat in UKL this year" and "encourage[d] Reclamation to take any available steps to maintain UKL elevation as high as possible through July 15." AR 1435. In its 2022 TOP, Reclamation set a minimum elevation boundary of 4,138.15 feet "[a]s a safeguard against over drafting below the absolute minimum of 4[,]138.0 [feet] described in the [2020 USFWS] BiOp[.]" AR 0123. Reclamation noted that 4,138.15 feet is only "approximately 10,230 AF above the USFWS 2020 BiOp end of season minimum elevation requirement of 4,138.00 [feet]." AR 1414. But instead of taking steps to maintain UKL elevations as high as possible, Reclamation decided to allocate 62,000 AF of water to Klamath Project irrigators. By mid-July, Reclamation had delivered roughly 60,000 AF of water to Klamath Project irrigators. AR 0122–23. Reclamation's actions violated Section 7 of the ESA.

The Court also notes that, in allocating 62,000 AF for the Project's irrigation supply, Reclamation deviated from the 2018 BA's water allocation formula. Reclamation acknowledges that following the formula "would not have produced any irrigation allocation" but nevertheless emphasizes that the 2022 water year required adaptive management measures. Recl. Mot. 50, ECF No. 32. Reclamation stresses that, as part of its adaptive management, it also reduced the magnitude of the surface flushing flow in the Klamath River. *Id.* at 51. However, the fact that Reclamation reduced surface flushing flows to the Klamath River does not help explain why Reclamation *increased* the irrigation allocation that would have otherwise been set at zero for the year. Reclamation's claim that its decision was met with opposition and resistance from Project irrigators is of no consequence. *See id.* As discussed above, the irrigators' rights are subservient to Reclamation's ESA responsibilities.

Lastly, KWUA argues that elevation levels "have no biological significance" and the major factors behind the suckers' population decline are unrelated to elevation levels in UKL. *See* KWUA Mot. 28–32, ECF No. 29. This argument ignores the abundance of evidence in the

record linking decreased elevation levels in UKL to the suckers' population decline. *See, e.g.*, AR 3632 ("Higher seasonal UKL elevations are important to provide habitat for larval, juvenile and adult [suckers]."); 3634 ("For UKL, the proposed action was designed to provide lake levels that provide availability of important habitats, which is often a result of managing water. Specifically, end of season targets are higher, providing more habitat in summer and fall than under previous operations."); 3643 ("At elevations between 4141.4 [feet] and 4142 [feet], we would expect reduced spawning durations for female suckers by approximately 20%[.] If we assume that spawning duration is directly proportional to eggs deposited, these elevations would result in take of approximately 20% of the reproductive output of the shoreline springs spawning population."); 3643–44 ("More extreme elevations, similar to those observed in 2010, would be expected to result in 14% fewer females spawning and a 36% reduction in duration on the spawning grounds[.]"). The 2020 USFWS BiOp's ITS listed "dewatering of spawning habitat" as a cause of take that would kill sucker eggs and could result in a 14% reduction in the number of spawning females and a 36% reduction in duration of spawning. AR 3637. Simply put, the record does not support KWUA's argument.

In sum, Reclamation violated Section 7 of the ESA when Reclamation knew it could not comply with its ESA obligations to the suckers in UKL but nevertheless allocated and distributed roughly 60,000 AF of water to Klamath Project irrigators.

B. Section 9

Section 9 of the ESA prohibits any "take" of a listed species. 16 U.S.C. § 1538(a)(1)(B). Take means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). USFWS defines harm in the context of take as "an act which actually kills or injures wildlife" that "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.

USWFS defines harassment in the context of take as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." *Id.*

If a consulting agency determines that a proposed action is not likely to jeopardize the continued existence of a listed species, but the action is reasonably certain to result in a take of some listed species, the consulting agency provides an incidental take statement ("ITS") along with the BiOp. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(7). A take that occurs in compliance with an ITS is exempt from liability under Section 9. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i). Take can be expressed as a change in habitat affecting the species. *Center for Biological Diversity v. Bernhardt,* 982 F.3d 723, 748 (9th Cir. 2020). "The purpose of the incidental take statement is, at least in part, to specify the amount of take that may occur, and include triggers that indicate non-compliance with the statement and require re-consultation with [the consulting agency]." *Id.*

The Tribes argue Reclamation committed unpermitted take of the suckers because it failed to comply with the terms and conditions of the 2020 USFWS BiOp's ITS. *See* Pl.'s Mot. 39, ECF No. 24. Reclamation argues that it followed the procedures set forth in Term 1c because it coordinated with USFWS. *See* Recl. Mot. 52–53, ECF No. 32. KWUA asserts the Tribes have not offered evidence of any take. *See* KWUA Mot. 34–38, ECF No. 29.

Here, Term 1c required Reclamation to monitor UKL elevations for various boundary conditions including "[two] consecutive years in which UKL surface elevations fall below 4142 [feet] in April or May; or any year in which UKL surface elevations fall below 4142 [feet.]" AR 3650. If UKL elevations dropped below these levels, Term 1c required Reclamation to: (1) determine the causative factors of any decrease, (2) determine whether those factors are within the scope of the proposed action and the effects analyzed in the BiOp, and (3) immediately

consult with USFWS to "adaptively manage and take corrective actions." AR 3650. In April 2022, Reclamation and the Services determined that "the causative factors for Reclamation's inability to simultaneously meet[] boundary conditions specified in each BiOp are primarily the result of consecutive critically dry years and extraordinary hydrologic conditions." AR 1529.

No plausible reading of Term 1c, however, supports the conclusion that allocating 62,000 AF of water for Project irrigators instead of trying to keep that water in UKL qualifies as a "corrective action." Nor can Reclamation claim to have taken subsequent "corrective action" to fix a problem that Reclamation aggravated when it allocated water to Project irrigators while knowing there was not enough water to meet the needs of the suckers in UKL. By the end of March, year-to-date UKL inflows were the lowest in the entire period of record and UKL's elevation dropped below 4,141.0 feet. AR 1654, 1658. Between 2020 and 2022, UKL elevations were below an elevation of 4,142.0 feet for three consecutive years. AR 2235. However, by mid-July 2022, Reclamation had allowed roughly 60,000 AF of water to be diverted for irrigation purposes. AR 5485–86. As mentioned, Reclamation acknowledges that following the 2018 BA's water allocation formula "would not have produced any irrigation allocation[.]" Recl. Mot. 50, ECF No. 32. Reclamation's ESA obligations to the suckers take precedence over any water allocation to Project irrigators. *See In re Klamath Irrigation Dist.*, 69 F.4th at 939 (noting that irrigators' rights are "subservient" to the Tribes' rights and Reclamation's ESA responsibilities). As such, Reclamation's decision violated Section 9 of the ESA.

KWUA argues that the Tribes have not offered evidence of any take. *See* KWUA Mot. 34–38, ECF No. 29. The definition of "harm" in the context of take includes "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. The

definition of harassment in the context of take is "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." *Id.* The record demonstrates that Reclamation's operation of the Klamath Project under the 2022 TOP has significantly impaired and disrupted the suckers' spawning behavior. *See, e.g.*, AR 3643 ("At elevations between 4141.4 [feet] and 4142 [feet], we would expect reduced spawning durations for female suckers by approximately 20%[.] If we assume that spawning duration is directly proportional to eggs deposited, these elevations would result in take of approximately 20% of the reproductive output of the shoreline springs spawning population."); 3643–44 ("More extreme elevations, similar to those observed in 2010, would be expected to result in 14% fewer females spawning and a 36% reduction in duration on the spawning grounds[.]"). The 2023 USFWS BiOp acknowledged that "impacts to embryos and pre-swim-up larvae are expected to increase as surface elevations in UKL go below 4,142.00 [feet] during April and May." AR 5641. The 2023 USFWS BiOp also recognized that, "[w]hen lake elevation is below 4,140.8 [feet,] ... larvae [are] more vulnerable to starvation, predation, and entrainment at the outlet of the lake[.]" AR 5643. Even if the precise number of suckers taken is difficult to determine, it is beyond question that the suckers' spawning behaviors have been impaired. The Tribes need not literally bring a dead fish before this Court to show that Reclamation's operation of the Klamath Project under the 2022 TOP has harmed the suckers. As such, KWUA's argument is unavailing.

In sum, Reclamation violated Section 9 of the ESA when it failed to comply with Term 1c in operating the Klamath Project pursuant to the 2022 TOP.

IV. National Environmental Policy Act

The Tribes argue Reclamation failed to take a hard look at the impacts of its decision to deviate from the water allocation formula in setting a larger Project allocation than previous years. *See* Pl.'s Mot. 47, ECF No. 24. The Tribes also emphasize that Reclamation failed to consider the cumulative impact of its actions during consecutive drought years. *See id.* at 48. Reclamation argues it fully complied with NEPA because existing NEPA documents adequately assessed the environmental effects of the 2022 TOP. *See* Recl. Mot. 54–62, ECF No. 32. Separately, KWUA argues that Plaintiff's NEPA claim fails because diversion and delivery of water in the Klamath Project do not trigger NEPA. *See* KWUA Mot. 40–43, ECF No. 29.

"Congress enacted NEPA in recognition of 'the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth,' and other enumerated factors." *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1004 (9th Cir. 2021) (quoting 42 U.S.C. § 4331(a)). "NEPA establishes a 'national policy [to] encourage productive and enjoyable harmony between man and his environment,' and was intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321) (alteration in original). NEPA "does not mandate particular results, but simply prescribes the necessary process" to avoid "uninformed—rather than unwise—agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–351 (1989). Council on Environmental Quality ("CEQ") regulations guide federal agencies' compliance with NEPA. *See* 40 C.F.R. §§ 1500.1–1508.28.

"NEPA imposes procedural requirements designed to force agencies to take a 'hard look' at environmental consequences." *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005) (citation omitted). "Courts apply a 'rule of reason' standard in reviewing the adequacy of a NEPA document" to determine if it "contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 992 (9th Cir. 2004) (quoting *Churchill Cty. v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001)). However, while "a court must '[e]nsure that the agency has taken a hard look at environmental consequences,' a court cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" *Friends of the Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 913 (9th Cir. 2018) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

NEPA requires federal agencies to prepare an environmental impact statement ("EIS") in connection with "proposals for ... major Federal actions significantly affecting the quality of the human environment[.]" 42 U.S.C. § 4332(2)(C). The purpose of an EIS is to "ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and to "guarantee[] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson*, 490 U.S. at 349.

A federal agency may first prepare an environmental assessment ("EA") "to determine whether the environmental impact is significant enough to warrant preparation of an EIS." *Mountain Communities for Fire Safety v. Elliott*, 25 F.4th 667, 675 (9th Cir. 2022) (internal quotation omitted). An EA must "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact." *West*, 206 F.3d at

927 (quoting 40 C.F.R. § 1508.9(a)(1)). If the federal agency decides that an EIS is not necessary, that agency must prepare an explanatory Finding of No Significant Impact ("FONSI") to "briefly present ... why an action ... will not have a significant effect on the human environment." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1179–80 (9th Cir. 2008) (quoting 40 C.F.R. § 1508.13).

An agency may also use an existing NEPA analysis for a proposed action if it "determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives." 43 C.F.R. § 46.120(c). "The supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects." *Id.* A Determination of NEPA Adequacy ("DNA") "is an administrative convenience created by the [agency], and [is] not defined in NEPA or its implementing regulations issued by the Council of Environmental Quality." *S. Utah Wilderness All. v. Norton*, 457 F. Supp. 2d 1253, 1255 (D. Utah 2006) (citation omitted). "A DNA is not itself a NEPA document; it is not subject to public comment or consultation with other federal agencies." *N. Alaska Envtl. Ctr. v. U.S. Dept. of Interior*, 983 F.3d 1077, 1082 n.3 (9th Cir. 2020) (citing *S. Utah Wilderness All.*, 457 F. Supp. 2d at 1255). The Ninth Circuit has recognized a "limited role within NEPA's procedural framework" for non-NEPA documents to determine "whether new information or changed circumstances require the preparation of a supplemental EA or EIS." *Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000).

In 2020 and 2021, Reclamation issued EA/FONSIs for the 2020 IOP and the 2021 TOP. AR 1411. Reclamation did not prepare an EA or publish a FONSI for the 2022 TOP and instead issued a DNA. AR 1411–33. The DNA concluded that Reclamation's NEPA analysis for the

2020 IOP and 2021 TOP adequately assessed the environmental effects of the 2022 TOP and that Reclamation therefore did not need to complete a new NEPA analysis for the 2022 TOP. *Id.* at 1411. In its DNA, Reclamation considered the following questions:

> 1. Is the new proposed action a feature of, or essentially similar to, an alternative analyzed in the existing NEPA document?
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> ...
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> 2. Is the range of alternatives analyzed in the existing NEPA documents appropriate with respect to the new proposed action, given current environmental concerns, interests, and resources values?
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> ...
>
> 3. Is the existing analysis valid in light of any new information or circumstances?
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> ...
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> 4. Are the direct, indirect, and cumulative effects that would result from implementation of the new proposed action similar to those analyzed in the existing NEPA document?
>
> ...
>
> 5. Is the public involvement and interagency review associated with the existing NEPA document adequate for the current proposed action?

AR 1416–33. Reclamation answered each question in the affirmative. *Id.*

In answering the fourth question, Reclamation determined that "the direct, indirect, and cumulative effects related to the 2022 [proposed action] would be temporary and minor and are similar to those analyzed in the 2020 EA (Sections 4.1 through 4.10[)], the 2021 EA (Sections 4.3 through 4.10), and Section 4.11 of the 2020 EA, which covered a term of analysis through 2023." AR 1427. Reclamation made the following findings as to water resources and biological resources:

> *Water Resources*
> Due to the temporary nature of the 2022 [TOP], and considering that no reasonably foreseeable actions are known to Reclamation that would affect water resources beyond the past and present actions (included in the affected environment discussion in Section 3.1.1.1 of the 2020), and in consideration of the impacts of the alternatives considered, no anticipated cumulative impacts on

> Klamath River Basin water resources would occur outside those previously analyzed in the 2020 EA.
>
> *Biological Resources*
> Cumulative impacts as a result of Reclamation's implementation of the 2022 TOP are consistent with the discussion in Section 4.11 of the 2020 EA as impacts to biological resources experienced during the 2022 spring/summer operating period are likely to be temporary and minor. Actions impacting the discussed biological resources (see Section 4.4 of both the 2020 and 2021 EAs) would require a much longer implementation time frame to effectuate change and these effects are speculative beyond the period of analysis.

AR 1427–28.

"NEPA requires an agency to consider the cumulative impacts of a project." *Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989, 1000 (9th Cir. 2013) (citing 40 C.F.R. § 1508.27(b)(7)). A "cumulatively significant impact" is an impact on the environment that results from "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency ... or person undertakes such other actions." *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir. 2002) (citation omitted). "Reasonably foreseeable means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision." 40 C.F.R. § 1508.1(aa). Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *Kern*, 284 F.3d at 1075 (quoting 40 C.F.R. § 1508.27(b)(7)). "Consideration of cumulative impacts requires some quantified or detailed information; general statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Id.* (citing *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379–80 (9th Cir. 1998)) (cleaned up). "The cumulative impact analysis must be more than perfunctory; it must provide a

'useful analysis of the cumulative impacts of past, present, and future projects.'" *Id.* (quoting *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999)).

Here, the 2022 DNA references cumulative impacts but fails to provide the quantified or detailed information that NEPA requires. Reclamation asserts the 2020 EA "covers the full period" and the 2021 EA "adjusts for extreme drought." Recl. Reply 39, ECF No. 45. Reclamation argues that it "did not simply ignore that drought was continuing for another year" but instead "actively addressed the continuing drought by confirming that the minimum lake elevation analyzed in the [2021 EA] remained sufficient to support sucker populations through another forecast year of drought in 2022." Recl. Reply 36, ECF No. 45. Reclamation's focus on similar lake elevations each year is too narrow. The earlier EAs are no substitute for a more precise cumulative impact analysis of decreased elevations in UKL during three consecutive drought years. Additionally, Reclamation's statements in the 2022 DNA that "no anticipated cumulative impacts on Klamath River Basin water resources would occur outside those previously analyzed" and that "impacts to biological resources experienced during the 2022 spring/summer operating period are likely to be temporary and minor" fall short of NEPA's requirement of at least some quantified or detailed information. Reclamation's statements are devoid of "meaningful analysis or a statement of reasons" as to why there would be zero or minor impacts. *Ctr. for Biological Diversity*, 538 F.3d at 1223. Instead, these are the kind of "conclusory statements, based on 'vague and uncertain analysis'" that are insufficient to satisfy NEPA's requirements. *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 872 (9th Cir. 2020) (citation omitted); *see also Kern*, 284 F.3d at 1075.

KWUA argues separately that diversion and delivery of water in the Klamath Project does not trigger NEPA. *See* KWUA Mot. 40–43, ECF No. 29. But KWUA errs in focusing on

diversion and delivery of water as opposed to Reclamation's adoption and implementation of the 2022 TOP. Major federal actions triggering NEPA include an agency's "[a]doption of formal plans, such as official documents prepared or approved by Federal agencies, which prescribe alternative uses of Federal resources, upon which future agency actions will be based." 40 C.F.R. § 1508.1(q)(3)(ii). There is no question here that the 2022 TOP falls within this definition.

In sum, Reclamation failed to take a hard look at the environmental consequences of its actions.

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RECOMMENDATION

For the reasons above, Plaintiff's Motion for Summary Judgment (ECF No. 24) should be GRANTED, Reclamation's Motion for Summary Judgment (ECF No. 32) should be DENIED, and KWUA's Motion for Summary Judgment (ECF No. 29) should be DENIED. Plaintiff should be granted the following relief:

1. A declaration that Reclamation violated the ESA by unlawfully taking Lost River suckers and shortnose suckers, adversely modifying their critical habitat, and jeopardizing their continued existence through Reclamation's improper allocation of water for Klamath Project irrigators under the 2022 TOP.
2. A declaration that Reclamation's 2022 DNA failed to comply with the requirements of NEPA because it did not consider the cumulative impacts of decreased UKL elevations during three consecutive drought years.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1) should not be filed until entry of the district court's judgment or appealable order.

The Findings and Recommendation will be referred to a district judge. Objections to this Findings and Recommendation, if any, are due fourteen (14) days from today's date. *See* Fed. R. Civ. P. 72. Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

DATED this 11 day of September, 2023.

MARK D. CLARKE
United States Magistrate Judge