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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
MEDFORD DIVISION

KLAMATH TRIBES, Plaintiff, v. UNITED STATES BUREAU OF RECLAMATION, UNITED STATES FISH & WILDLIFE SERVICE, Defendants, and KLAMATH WATER USERS ASSOCIATION, Defendant-Intervenor.	Case No.: 1:22−cv−00680−CL **U.S. BUREAU OF RECLAMATION'S OBJECTIONS TO FINDINGS AND RECOMMENDATION (ECF 58)**

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Pursuant to Federal Rule of Civil Procedure 72 and the Court's Minute Order of October 24, 2023 (ECF 65), Defendant United States Bureau of Reclamation ("Reclamation") hereby submits its objections to the proposed Findings and Recommendation ("F&R," ECF 58) entered on the parties' cross-motions for summary judgment in the above-captioned case.[1] Contrary to the F&R, this Court should dismiss the complaint in its entirety as moot without proceeding further. In addition to being moot, the Klamath Tribes' ("the Tribes") Endangered Species Act ("ESA") claims against Reclamation are subject to dismissal for failure to comply with the Act's notice provision. Even if the Court were to consider the merits of the Tribes' ESA claims, it should grant summary judgment to Reclamation on those claims as well as on the Tribes' claims under the National Environmental Policy Act ("NEPA").

I. Introduction

Water year 2022 was the third consecutive year of a record-setting drought in the Upper Klamath Basin. As the year began, Reclamation forecasted that there simply was not going to be enough water in the system to fully, and simultaneously, implement its scheduled operations to meet its countervailing ESA obligations to listed suckers in Upper Klamath Lake ("UKL") and listed salmon in the Klamath River, even if Reclamation authorized no irrigation water for the Klamath Project. Reclamation therefore had no choice but to adaptively manage operations through the spring and summer period of that year, which it did through in-season temporary operating procedures (the "2022 TOP"). Before implementing the 2022 TOP, Reclamation met and conferred with the U.S. Fish & Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") on how those operations might affect suckers and salmon, respectively.

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[1] This case – referred to as "*Klamath Tribes II*" – is related to Case No.: 1:21-cv-00556-CL (ECF 109) ("*Klamath Tribes I*"). Reclamation is submitting separate partial objections to the F&R issued in that case.

Temporary by design, the 2022 TOP was in place from April 15, 2022 to September 30, 2022, when it permanently expired.

Under the 2022 TOP, Reclamation used releases from UKL, as necessary, to supplement flows in the Klamath River for salmon to meet the minimum levels in accordance with NMFS' biological opinion ("BiOp") and incidental take statement ("ITS"), while foregoing certain other requirements. At the same time, recognizing that UKL would not meet the April/May boundary conditions for sucker spawning or the July elevation for sucker rearing under the FWS BiOp and ITS, Reclamation sought to provide added safeguards for suckers through the TOP by increasing the minimum elevation that the FWS BiOp and ITS otherwise required, including provisions that further raised UKL elevations due to actual inflows exceeding those forecasted, and reducing the magnitude of the flushing flow required for salmon in the Klamath River under the NMFS BiOp and ITS, as a full flushing flow would have significantly reduced UKL elevation and the countervailing requirements of both BiOps could not be fully met simultaneously. Ultimately, under the 2022 TOP, Reclamation authorized a Project irrigation delivery of approximately 62,000 acre feet ("AF"). For reference, the maximum possible Project irrigation allocation is 350,000 AF when sufficient water is available.

The instant suit challenges these temporary operations in 2022, though they ceased more than a year ago. The Tribes take issue with the Project irrigation allocation under the TOP, arguing that Reclamation should have further protected suckers by delaying the start of irrigation until later in the season and authorizing less water to be diverted from UKL for irrigation. The Tribes also argue that Reclamation failed to adequately analyze the TOP in accordance with NEPA. These attacks on the 2022 TOP are purely academic at this point, however. The TOP is obsolete, the drought of 2020-2022 abated in 2023, and Reclamation has resumed operations

under its long-term operations plan. FWS has replaced the BiOp and ITS that were in effect in 2022, and Reclamation is set to replace its long-term operations plan in October 2024 following new ESA Section 7 consultations with FWS and NMFS. The new long-term operations plan is scheduled to coincide with significant changes to the physical landscape for the Project that are expected to have occurred by 2024 from the scheduled removal of four dams along the Klamath River (Copco No. 1, Copco No. 2, Iron Gate, and JC Boyle).

The F&R implicitly finds that the Tribes' complaint is moot, but it recommends that this Court apply the exception to mootness for actions that are capable of repetition yet evading judicial review. The F&R presumes that TOPs are likely to continue to be necessary and that they will continue to raise the same issues that are presented in this case. This Court should not adopt these presumptions. Putting aside that the 2022 TOP did not, in fact, repeat in the most recent spring and summer period of 2023, if another TOP does become necessary in the future, it will not be a repeat of the 2022 TOP. Initially, the new FWS BiOp and ITS require Reclamation to reinitiate ESA consultation with FWS if UKL boundary conditions cannot be met. This is a fundamental shift that ensures a different process will be used for any future TOP from the informal meet and confer process under the 2020 BiOp and ITS that was used for the 2022 TOP, and to which the Tribes object. In effect, the reinitiated FWS ESA consultation on Klamath Project operations and new FWS BiOp and ITS have redressed the Tribes' ESA claims in this case. Indeed, the Tribes have conceded that the superseding BiOp and ITS are "functionally equivalent to the relief the Tribes sought against USFWS" in Count III of their complaint. ECF 40 at 31. On that basis, the Tribes have "voluntarily dismiss[ed] Count III of [their] complaint against defendant USFWS." *Id.*; *accord* ECF 58 at 22. This Court should dismiss the Tribes' ESA claims against Reclamation as well.

Additionally, the management approach of a future TOP should not be presumed. The factual and legal environment at the Klamath Project Reclamation is dynamic and constantly evolving. Managing this dynamic system does not lend itself to a fixed, singular, and predictable approach, but rather requires carefully tailored adjustments that respond to changing inflows and other circumstances. The suggestion that one temporary operations plan would be a duplicate of another is not borne out by facts or history. Looking back at the three-year drought from 2020 to 2023, Reclamation implemented three TOPs that were distinctly different from one another. Looking forward, any future TOPs will be shaped by the new FWS BiOp and ITS now in place and, after 2024, by a new long-term operations plan that will coincide with dam removal.

In sum, this Court should declare the case moot and proceed no further. The Court should not apply the exception to mootness simply because another drought or TOP is possible or even reasonably likely. The F&R's suggestion that any future TOP is likely to raise the same issues as this case is belied by the discrete legal challenges that have been brought against each of the TOPs that were implemented during the drought of 2020 to 2022 and overlooks the impacts that the new FWS BiOp and ITS and Reclamation's forthcoming new long-term operations plan – which will be in accordance with new FWS and NMFS BiOps – will have on any future TOPs.

Though the Court need not proceed beyond a finding of mootness, dismissal also is warranted due to noncompliance with the ESA's notice provision. Here, the Tribes filed suit just 25 days after having provided a notice of violation, short of the statutorily mandated 60 days. The F&R recommends that this Court look to an earlier letter that the Tribes sent to Reclamation to find compliance with the notice provision; however, that letter did not meet the statutory notice requirement, which is strictly construed and does not allow for substantial compliance.

For these reasons, this Court should dismiss the complaint without reaching the merits of the Tribes' claims. However, even if the Court should reach the merits, it should grant summary judgment to Reclamation. Reclamation conferred with FWS on the proposed operations under the 2022 TOP in accordance with the then-applicable term and condition ("Term 1c") of the FWS ITS. The F&R appears to interpret FWS' response to Reclamation as a disapproval of the TOP, which it was not. Further, Reclamation's Determination of NEPA Adequacy ("DNA") complied with NEPA by evaluating the proposed action against the existing NEPA analyses and determining that they encompassed the 2022 TOP.

II. Standard for District Court's Review of Findings and Recommendation

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C); *accord* Fed. R. Civ. P. 72(b)(3). For any portions of the proposed findings or recommendations that are objected to, this Court "shall make a de novo determination." *Id*. This Court may receive further evidence or recommit the matter to the magistrate judge with instructions. *Id*.; *United States v. Bernhardt*, 840 F.2d 1441, 1444 n.2 (9th Cir. 1988).

III. Objections to Findings and Recommendation

A. The Complaint Should Be Dismissed

1. The Complaint Is Moot

a. No Exception to Mootness Applies Here

Implicitly, the F&R concludes that this case is moot. The F&R recommends, however, that this Court apply the exception to mootness for actions capable of repetition yet evading review. ECF 58 at 25-26.

This Court should not apply the exception under the facts of this case. As the F&R notes, the 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*. at 25 (citing *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016)). Here, even if the TOP was too short in duration to be fully litigated prior to its expiration, the Tribes are not likely to be subjected to the same action again. The 2022 TOP was developed to respond to the particular circumstances that were present at the time. It has since expired under its own terms, and it therefore will not be re-instituted. *See Native Vill. of Nuiqsut v. Bureau of Land Mgmt*., 9 F.4th 1201, 1210 (9th Cir. 2021) (explaining that, in NEPA cases, when the environmental report at issue 'has been superseded, and the federal agencies will rely' on a new and different report 'for the near future,' the case is moot and the exception for actions capable of repetition yet evading review does not apply).

The F&R suggests Reclamation argues too narrowly that this case is moot simply because any future TOP will not be the "same action" as the expired 2022 TOP. ECF 58 at 26. The F&R suggests the "same action" prong is satisfied notwithstanding the expiration of the TOP by taking a broader reading of the dispute presented, opining that there is "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." *Id*. Reclamation's argument is not so narrow, and the issue presented in this case is not so broad as the F&R suggests. Reclamation does not argue simply that any future TOP would be a new action; it argues that any future TOP would be a new action that is highly fact-specific and dynamic, and therefore difficult to predict. *See People for Ethical Treatment of Animals v. Gittens*, 396 F.3d 416, 424 (D.C. Cir. 2005) (claims are not "capable of repetition" if they are "highly fact-specific"). Moreover, it is not accurate to suggest that all TOPs have

"cause[d] UKL elevation boundaries to drop below" BiOp and ITS boundary conditions, that the dispute presented in this case is so broad, and that such a broad characterization of the dispute satisfies the "same action" prong of the mootness exception. *See id*. at 422 (finding that the relevant "wrong" capable of repetition "must be defined in terms of the precise controversy it spawns," rather than a generalized or speculative future harm).

The Tribes' claim in this case is not that the 2022 TOP operations caused UKL to be below the April 1, 2022 spawning elevation for suckers under the FWS BiOp and ITS, or caused any other FWS BiOp and ITS elevation for suckers to be missed. Operations under the 2022 TOP did not begin until after UKL was already below the April 1 spawning elevation and there was simply not going to be enough water in the system to meet the remaining FWS BiOp and ITS boundary conditions regardless of any authorized Project irrigation diversions. The Tribes' claim in this case is narrow, focusing on the fact that the 2022 TOP operations increased the amount of the Project irrigation allocation and made the allocation available earlier in the season than otherwise would have been the case under Reclamation's long-term operations plan,[2] given that UKL would already miss FWS BiOp and ITS boundary conditions for suckers. Those claims are unique to the 2022 TOP and do not apply to any other TOP.

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[2] Reclamation's long-term plan for operating the Klamath Project from 2019 to 2024, including what UKL elevations and Klamath River flows were expected based on the observed period of record, is referred to as the 2018 Plan. In 2020, Reclamation supplemented the 2018 Plan with an Interim Operations Plan ("IOP"), which provided additional water for the Klamath River under certain specified conditions. FWS provided Reclamation with a BiOp and ITS in 2020 that analyzed the effects of supplementing the 2018 Plan with the IOP. FWS replaced the 2020 BiOp and ITS in January 2023 with new ones that addressed the effects of extending the 2018 Plan/IOP through September 30, 2023. In September 2023, FWS replaced the January 2023 BiOp and ITS with new ones that address the impacts of extending the 2018 Plan/2020 IOP through October 2024.

Indeed, these claims would not apply to the TOP that Reclamation implemented for the period January to April 2023 ("winter 2023 TOP"). That TOP was implemented expressly to ensure that UKL did, in fact, fill to the required April 1 elevation of 4,142 feet for the protection of sucker spawning, considering and adapting to the particular conditions present at the time. The winter 2023 TOP endeavored to accomplish this by allowing reductions to minimum flows for salmon in the Klamath River required per NMFS' BiOp and ITS. This was just the type of management approach the Tribes complain in *Klamath Tribes I* that Reclamation did *not* take in the 2021 TOP. Though the Tribes have challenged the 2021 TOP and 2022 TOP operations (in separate suits), they have not challenged the winter 2023 TOP. To the contrary, the winter 2023 TOP operations drew a distinct legal challenge from the plaintiff parties in *Yurok Tribe v. U.S. Bureau of Recl.*, No. 3:19-cv-04405-WHO (N.D. Cal.) ("*Yurok II*") by way of a supplemental complaint and preliminary injunction motion contending that the operations allegedly failed to meet ESA requirements for salmon in the Klamath River.[3]

The distinct legal claims asserted in *Klamath Tribes I*, *Klamath Tribes II*, and *Yurok II* reflect concrete differences between the TOPs. In 2021, Reclamation supported minimum salmon flows in the Klamath River but sacrificed a flushing flow for salmon altogether to preserve UKL elevations for suckers and made only an exceptionally low Project irrigation allocation of 33,000 AF (compared to a maximum possible allocation of 350,000 AF in years when sufficient water is available). KT II AR 125 at BOR005467. By contrast, under the 2022 TOP, Reclamation supported minimum river flows for salmon and implemented a flushing flow

[3] The plaintiffs subsequently withdrew their motion in response to Reclamation's 2023 annual operations plan, which announced an intention to operate the Project consistent with a September 30, 2023 end of season UKL elevation of 4,139.2 feet, which is higher than that required by the FWS BiOp and ITS and therefore expected to provide additional safeguards for required salmon flows in the winter and to help ensure adequate lake levels into the next year.

for salmon protection, but reduced it in magnitude and duration from the levels required by the NMFS BiOp and ITS to keep an additional 20-25 thousand AF of water in UKL to preserve lake elevations for suckers. Reclamation authorized a Project irrigation allocation of 62,000 AF but, as an added protection for UKL elevations, increased the minimum UKL elevation above what the FWS 2020 BiOp and ITS required so that an additional 10,230 AF would remain in UKL. KT II AR 127 at BOR005477; 129 at BOR005479. Reclamation also provided in the 2022 TOP for the even sharing between UKL and Project irrigation of any inflows that exceeded those forecasted, which resulted in the retention of significant additional water in UKL as of September 30, 2022. The differences in the winter 2023 TOP are described above.

The factual differences between the three TOPs and the legal claims asserted against them in *Klamath Tribes I*, *Klamath Tribes II*, and *Yurok II* belie the F&R's proposed presumption that any future TOP is reasonably likely to subject the Tribes to the same issues as the 2022 TOP. Just as the 2022 TOP and winter 2023 TOP were not repeats of the 2021 TOP or of each other, this Court should not presume that any future TOP is likely to be a repeat of the instant challenge to the 2022 TOP. *See Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 951 (D.C. Cir. 2005) ("Courts have 'interpreted 'same action' to refer to particular agency policies, regulations, guidelines, or recurrent identical agency actions'") (citation omitted); *Reid v. Hurwitz*, 920 F.3d 828, 840 (D.C. Cir. 2019) (claims are capable of repetition when the legal controversy is "fixed, knowable in advance, and thus predictably repeatable") (Katsas, J., dissenting). Here, the management direction of a future TOP is neither fixed nor reasonably knowable in advance, and therefore is not predictably repeatable.

The F&R also overlooks that any future TOP will differ from the 2022 TOP because it will be subject to a new FWS BiOp and ITS. The Ninth Circuit has held that, where a BiOp and

ITS have been replaced, a challenge to an agency action that relied on the superseded BiOp and ITS becomes moot. *See, e.g., Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017 (9th Cir. 2012); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1096 (9th Cir. 2003); *Ramsey v. Kantor*, 96 F.3d 434, 446 (9th Cir. 1996). By analogy here, the Tribes' challenge to the 2022 TOP operations is moot because those operations relied on a FWS BiOp and ITS that have been replaced. The new FWS BiOp and ITS require Reclamation to reinitiate ESA consultation with FWS if UKL boundary conditions cannot be met. Reinitiated consultation is a fundamental shift from the informal meet and confer process under the 2020 BiOp and ITS to which the Tribes object; it ensures a different process for any future TOP than the one that was used for the 2022 TOP. The use of this new process is enough to render the exception to mootness inapplicable in this case. *See Ctr. for Env't Sci. v. Cowin*, No. 115CV01852LJOBAM, 2016 WL 1267572, at *3 (E.D. Cal. Mar. 31, 2016) (holding that an ESA challenge to a salinity barrier was moot and that the exception to mootness for actions capable of repetition yet evading review did not apply where the barrier had been removed, even though drought conditions were expected to continue and there was a reasonable chance that additional barriers could be installed in the future, because the plaintiff's chief complaint was that the approval process for installation of the barrier had utilized the ESA's emergency consultation procedures, rather than the standard consultation process, and it was unlikely that emergency consultation procedures would be used for future salinity barriers). Indeed, the status and needs of suckers, as determined through consultation with FWS, as well as those for salmon consistent with NMFS determinations, can be expected to shape the management decisions in any future TOP, along with the hydrology presented at the time.

Lastly, the F&R overlooks that Reclamation's long-term operations plan is set to be replaced in October 2024. While the contours of the new long-term plan are unknown at this point, it will need to account for fluctuating hydrology as well as for significant changes to the Project that are expected to occur by 2024 following the removal of four hydroelectric dams on the Klamath River mainstem. Whatever its contours, the new operations plan along with the governing BiOps and ITSs can be expected to shape any future TOP issued under that framework in ways that are likely to differ from the 2022 TOP, rendering the mootness exception inapplicable here. *See Noem v. Haaland*, 41 F.4th 1013, 1017 (8th Cir. 2022) (noting that, "[i]n arbitrary-and capricious review, even small factual differences can matter," and holding that challenge to agency's denial of July 4 fireworks permit in one year was not capable of repetition, even though state applicant intended to reapply in the next year, because the circumstances surrounding each application "are likely to be different") (citation omitted).

In sum, the Court should dismiss this case as moot. The Court should not apply the exception to the mootness doctrine for actions that are capable of repetition yet evading review simply because there could be another drought or another TOP in the future. Experience from the 2021 TOP and winter 2023 TOP contradicts any presumption that a future TOP is likely to be a repeat of the 2022 TOP.

b. There Is No Meaningful Relief Available to Grant

This Court also should not apply the exception to mootness for actions that are capable of repetition yet evading review because there is no meaningful relief available to grant on the Tribes' claims. No injunctive relief is available, as the Tribes have expressly abandoned it. ECF 40 at 18 n.12. Moreover, the ESA would not authorize injunctive relief here in any case, as the Act provides a cause of action to enjoin or otherwise abate ongoing ESA violations, and here

there are none. 16 U.S.C. § 1540(g)(1)(A); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found*., 484 U.S. 49, 58-59 (1987).

As a practical matter, Reclamation has provided the Tribes with the appropriate remedy for their claims by completing reinitiated ESA consultation. "If the amount or extent of taking specified in the incidental take statement is exceeded," "[i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered," or "[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence," the recourse is to reinitiate consultation. 50 C.F.R. § 402.16(a)(2)(3), 402.14(i)(4). Since implementing the 2022 TOP, Reclamation has completed reinitiated ESA Section 7 consultation with FWS twice. Each time, FWS has issued a superseding BiOp that concluded Reclamation's proposed operation of the Klamath Project was likely to comply with ESA Section 7 by ensuring that suckers are not jeopardized and that their critical habitat is not adversely modified. FWS also has issued accompanying ITSs to exempt anticipated incidental take of suckers resulting from Project operations from take liability under ESA Section 9. The Tribes concede that the superseding BiOp and ITS that FWS issued in January 2023 was "functionally equivalent to the relief the Tribes sought against USFWS." ECF 32 at 31. On that basis, the Tribes have "voluntarily dismiss[ed] Count III of [their] complaint against defendant USFWS." ECF 40 at 31; *accord* ECF 58 at 22. The reinitiated consultation warrants dismissal of the ESA claims against Reclamation as well.

The F&R does not recommend any injunctive relief, solely a declaratory judgment that Reclamation "violated the ESA" and "failed to comply" with NEPA when it implemented the 2022 TOP. ECF 58 at 52. The F&R does not explain, however, how the recommended

declaration would have real world effect, and it would not. *Contra Rio Grande Silvery Minnow v. Bureau of Recl.*, 601 F.3d 1096, 1112 (10th Cir. 2010) ("any declaration that the [superseded BiOps] were insufficient due to Reclamation's failure to fully consult would be wholly without effect in the real world"). A declaration with no real-world effect would be an improper advisory opinion. *See id.*; *Spencer v. Kemna*, 523 U.S. 1, 18 (1998) ("[Federal courts] are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong").

The Tribes cannot show that declaratory relief is available on their claims simply because Reclamation has a continuing duty to meet the competing demands of suckers, salmon, and Project irrigators, or because they are concerned over how Reclamation might allocate water in any potential future TOP. *See Silvery Minnow*, 601 F.3d at 1112 (plaintiff's concerns over whether Reclamation would appropriately consult with FWS in the future were "far too speculative to support a claim for declaratory relief" because "[a]ny such relief would amount to an advisory opinion regarding the scope of Reclamation's discretion and such an opinion would clearly be improper"); *see also Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, No. 04–3096–PA, 2007 WL 1072112, at *5 (D. Or. Apr. 3, 2007) ("Plaintiffs also argue that declaratory relief would be helpful to 'ensure that the [new] BiOp complies with the law and does so in a timely manner' and that declaratory relief would 'clarify and settle' defendants' legal obligations. I agree with defendants, however, such justifications are so vague as to make Article III's 'case or controversy' requirement meaningless. Courts should not micromanage an agency's procedures under the guise of judicial review").

"[A]llegations of legal wrongdoing must be grounded in a concrete and particularized factual context; they are not subject to review as free-floating, ethereal grievances." *Silvery*

Minnow, 601 F.3d at 1111. Indeed, the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, only authorizes challenges to discrete agency actions that an agency is required to take. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66-67 (2004). Here, the action the Tribes challenge is implementation of the 2022 TOP. Those operations: (1) ceased more than a year ago; (2) have not been repeated; and (3) are not reasonably likely to be repeated.

In sum, the Court should not apply any exception to mootness for the additional reason that there is no meaningful relief the Court can grant to the Tribes on their claims. The Court should dismiss this case as moot and proceed no further.

c. This Case Can Be Dismissed Consistent with *United States v. Klamath Drainage District*

In *United States v. Klamath Drainage District*, No. 1:22-cv-00962-CL (D. Or.), the Klamath Drainage District ("KDD") argued that the complaint should be dismissed due to the expiration of the 2022 TOP. The district court correctly rejected this argument in its summary judgment ruling. *United States v. Klamath Drainage Dist*., No. 1:22-CV-00962-CL, 2023 WL 5899910, *11 (D. Or. Sept. 11, 2023), *appeal pending United States v. Klamath Drainage District*, No. 23-3404 (9th Cir.).

This Court can dismiss the Tribes' complaint here consistent with the court's rejection of KDD's mootness argument in *Klamath Drainage District* because *Klamath Drainage District* is fundamentally inapposite to this case. The instant case is a claim brought against a federal agency under the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1)(A), alleging that Reclamation violated the ESA in implementing the 2022 TOP. By contrast, *Klamath Drainage District* is a breach of contract action brought by the United States against KDD regarding a longstanding and continuing irrigation contract between Reclamation and KDD. Whereas the instant dispute is limited to, and dependent on, the 2022 TOP operations themselves, the United

States' breach of contract claim in *Klamath Drainage District* was not. Rather, *Klamath Drainage District* concerns a longstanding contract dispute that will persist absent judicial resolution, as it concerns Reclamation's authority to direct KDD's conduct under the contract that continues to govern the parties' relationship. Reclamation is certain to continue directing KDD's conduct in accordance with the contract. Thus, while the expiration of the 2022 TOP mooted the instant case, it did not affect the contract dispute that is presented in *Klamath Drainage District*. Because *Klamath Drainage District* presents an ongoing dispute over the continuing contract, the Court was able to grant meaningful injunctive relief to the United States on its claims. *See id*. at * 18. Here, by contrast, the Tribes' challenge to the expired operations is no longer live and there is no meaningful relief available to grant, as the 2022 TOP is not reasonably likely to repeat. *Supra* § III.A.1.

2. The Tribes Failed to Comply with the ESA's Mandatory 60-Day Notice Requirement

The Court does not need to reach the issue of compliance with the ESA's notice requirement if it dismisses on mootness grounds; however, if the Court does consider the notice requirement, it requires dismissal. The ESA states, in relevant part, that "[n]o action may be commenced . . . prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation." 16 U.S.C. § 1540(g)(2)(A)(i). Here, the Tribes provided Reclamation[4] with notice of its alleged violation on or about April 14, 2022, but then filed their complaint just 25 days later, on May 9, 2022, short of the mandatory 60 days. KT II AR 43; ECF 1. The Tribes' failure to wait the statutorily

[4] The letter also was not addressed to the Secretary of the Interior, despite the fact that the ESA states that violation notice must be provided "to the Secretary," 16 U.S.C. § 1540(g)(1)(c).

mandated 60 days from providing their notice to file suit bars this Court from considering their ESA claims.

The F&R recommends a finding that the Tribes complied with the notice requirement by way of an earlier letter they sent to Reclamation on March 10, 2022. ECF 58 at 29-30. The March 10 letter was procedurally and substantively inadequate for purposes of the notice requirement, however. Procedurally, the March 10 letter was deficient notice because it predated the 2022 TOP.[5] The weight of judicial authority holds that such an anticipatory or pre-violation notice does not satisfy the Act's notice requirement. *See Ctr. for Env't Sci., Accuracy & Reliability v. Cowin*, No. 115CV01852LJOBAM, 2016 WL 8730760, at *5 (E.D. Cal. Mar. 4, 2016); *Friends of Animals v. Ashe*, 51 F. Supp. 3d 77, 84–85 (D.D.C. 2014), *aff'd*, 808 F.3d 900 (D.C. Cir. 2015); *Alsea Valley All. v. Lautenbacher*, No. CV 05-6376-AA, 2006 WL 8460501, at *2 n.2 (D. Or. Apr. 25, 2006); *Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193, 1205–06 (D. Or. 2003).

Substantively, it is apparent from the March 10 letter's plain language that it was not even intended at the time to serve as an ESA violation notice. Rather, its aim was to "request immediate government-to-government consultation with the United States regarding Reclamation's plans for its operation of the Project and its management of the Basin's limited water supply this year." KT II AR BOR001260. The Tribes attempt to recast the March 10 letter as a violation notice for the 2022 TOP operations, relying on two sentences in the letter stating that "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

[5] Like the April 14 letter, the March 10 letter also was not addressed to the Secretary of the Interior, despite the fact that the ESA states that violation notice must be provided "to the Secretary," 16 U.S.C. § 1540(g)(1)(c).

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 . . . . *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 ESA. ECF 40 at 29 (emphasis added).

Such terse and general speculation that Reclamation would "likely" have to forego Project irrigation as a necessary but "not sufficient" step towards "do[ing] everything it can to comply with its obligations under" the ESA was far from the requisite notice that operations under the 2022 TOP were violating Sections 7 and 9 ESA. The letter did not identify, let alone detail, how the ESA was allegedly being violated, state that the Tribes intended to sue for such a violation, or explain how such an alleged violation should be cured to avoid litigation. This is not surprising given the letter was anticipatory and not drafted as an ESA violation notice. That the Tribes later sent a letter on April 14 that was actually styled as an ESA violation notice detailing their alleged legal violations shows they recognized that their March 10 letter had not already provided adequate notice. Had the March 10 letter done so, the April 14 violation notice would not have been necessary. The Tribes may not bootstrap their untimely April 14 notice around the statutorily mandated 60-day waiting period by referencing the earlier, insufficient March 10 letter.

Similarly, the Tribes may not evade the statutory notice requirement for the instant complaint by pointing to their February 12, 2021 notice of intent to challenge the 2021 TOP operations, which they did in *Klamath Tribes I*. ECF 40 at 29. The February 12, 2021 letter plainly did not address the operations under the 2022 TOP that are challenged in this case, which did not begin until more than a year later, on April 15, 2022. The Tribes' assertion that the 2021

and 2022 TOPs were both issued under the framework of the 2018 Plan/2020 IOP is irrelevant. *Id*. Operations under the 2018 Plan/2020 IOP are not part of this case. The instant challenge is to the 2022 TOP operations, and referencing Reclamation's "longstanding management of the Klamath Project" under the 2018 Plan/2020 IOP could not provide adequate notice of intent to challenge those 2022 TOP operations.

This is not a case where the Tribes provided notice of an alleged violation in 2021 and waited until 2022 to file suit. Here, the Tribes provided notice of one alleged violation in 2021, filed their complaint to challenge that alleged violation in *Klamath Tribes I*, and then a year later filed a new complaint challenging a new agency action based on different legal theories (*Klamath Tribes II*). The new complaint required its own notice. Again, that the Tribes provided a violation notice regarding the 2022 TOP in April 2022 shows they recognized at that time that their February 2021 letter had not somehow already done so. This Court should not allow the Tribes to use their February 2021 letter as an enduring end-run around the 60-day notice requirement for any future lawsuit the Tribes may seek to bring alleging that Reclamation must hold UKL to higher elevations during drought conditions to avoid jeopardizing listed suckers or adversely modifying their designated critical habitat.

The F&R finds that the March 10 letter should have provided "sufficient information such that Reclamation should have understood the alleged violations of the ESA" by "mention[ing] the parties' litigation history and specifically referenc[ing] 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." ECF 58 at 29-30.[6] However,

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[6] Though the F&R appears to rely solely on the Tribes' March 10 letter, it nonetheless quotes at some length from the Tribes' April 14 letter. ECF 58 at 29. This Court must disregard the April 14 letter, however, as it came less than 60 days before the complaint.

referencing litigation concerning operations other than the 2022 TOP operations fails to satisfy the notice requirement as to the 2022 TOP operations. Moreover, even if the March 10 letter substantially met the notice provision's goals, the Supreme Court has made it clear that citizen suit notice provisions like the ESA's are strictly construed and that a "flexible or pragmatic construction" of the requirement is precluded even if the defendants will "actually accomplish the objective that the citizen was attempting to stop" within the 60-day period. *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 26, 30 (1989); *accord Sw. Ctr. for Biological Diversity v. U.S. Bureau of Recl.*, 143 F.3d 515, 520 (9th Cir. 1998) ("citizen suit notice requirements cannot be avoided by employing a flexible or pragmatic construction and [a] plaintiff's suit must be dismissed where plaintiff had not strictly complied with the notice requirements") (citing *Hallstrom*, 493 U.S. at 31).

Indeed, the Ninth Circuit has overruled prior authority that "permit[ted] district courts to interpret the 60-day notice requirement 'pragmatically' and allow 'substantial compliance' with it." *Ctr. for Env't Sci. Accuracy & Reliability v. Nat'l Park Serv.*, 1:14-CV-02063-LJO-MJS, 2016 WL 4524758, at *10 (E.D. Cal. Aug. 29, 2016) (citation omitted). As a court in this District has observed, "[w]hile a 'strict construction of the 60-day notice requirement may appear to be inequitable and a waste of judicial resources, . . . it is inescapable that, in this situation courts 'lack authority to consider the equities.'" *Or. Wild v. Connor*, No. 6:09-CV-00185-AA, 2012 WL 3756327, at *4 (D. Or. Aug. 27, 2012) (citation omitted); *accord Lone Rock Timber Co. v. U.S. Dep't of Interior*, 842 F. Supp. 433, 440 n.3 (D. Or. 1994) ("Dismissal is mandatory. The court may not stay the action for 60 days while plaintiffs file the required notice") (citation omitted).

In sum, the Tribes were not entitled to provide notice of the alleged ESA violation that they challenge in this case and then file their complaint after waiting just 25 days instead of the statutorily mandated 60 days, even if they had substantially met the goals of the notice provision through other means. KT II AR 43; ECF 1. The Tribes' failure to comply with the ESA's notice requirement bars this Court from considering their ESA claims.

3. The Court Should Approve the Voluntary Dismissal of Count III

The Tribes have stated that they "hereby voluntarily dismiss Count III of that complaint against defendant USFWS" because FWS' new ITS "is functionally equivalent to the relief the Tribes sought against USFWS." ECF 40 at 31. The F&R acknowledges the Tribes' statement of dismissal (ECF 58 at 22), but it overlooks that either a stipulation of dismissal signed by all parties who have appeared or an order of the Court is necessary to effectuate the dismissal. Fed. R. Civ. P. 41(a)(1)(A)(ii), (a)(2).

Therefore, this Court should effectuate the dismissal of Count III by specifying in an order that the claim is dismissed pursuant to Federal Rule of Civil Procedure 41(a) and that, because Count III is the sole cause of action asserted against FWS, the agency is dismissed as a party to the litigation.

B. Should the Court Reach the Merits, It Should Grant Summary Judgment to Reclamation

As shown above, the Court should dismiss the complaint without reaching the Tribes' claims on the merits. Nonetheless, should the Court reach the merits, it should grant summary judgment to Reclamation.

1. The Court Should Grant Summary Judgment to Reclamation on the Tribes' ESA Claims

In essence, the F&R recommends a declaratory judgment that implementing the 2022 TOP violated Sections 7 and 9 of the ESA because it resulted in water being diverted from UKL

for irrigation while UKL was below the pertinent FWS BiOp and ITS boundary conditions for suckers. ECF 58 at 39-40. Though there is no dispute that required boundary conditions in UKL for suckers could not be met under the exceptional drought conditions that existed in the Klamath Basin in the spring and summer of 2022 irrespective of any irrigation diversions authorized under the 2022 TOP, the F&R finds that Reclamation was required to forego Project irrigation to hold UKL as close as possible to the boundary conditions. *Id*. The F&R noted that Reclamation must meet ESA requirements before it may fulfill irrigation obligations.

As an initial matter, even if the Tribes' ESA claims had merit, Reclamation already has provided the appropriate redress for them by completing reinitiated Section 7 consultation with FWS. *Silvery Minnow*, 601 F.3d at 1112; 50 C.F.R. § 402.16(a)(2)(3), 402.14(i)(4). Since Reclamation implemented the 2022 TOP, FWS has provided Reclamation with two successive BiOps concluding that proposed Project operations were not likely to jeopardize the continued existence of listed suckers or adversely modify their critical habitat, accompanied by ITSs exempting incidental take in compliance with the specified terms and conditions. Reclamation's completion of reinitiated consultation with FWS underscores that this Court should dismiss this case as moot and not apply the exception to mootness for actions capable of repetition yet evading review. *Supra* § III.A.1.b.

However, should the Court reach the merits of the Tribes' claims, Reclamation asks that it determine *de novo* whether Reclamation's operations under the TOP were reasonable "corrective actions" under Term 1c of the FWS ITS, given the circumstances.[7] The Ninth

[7] Term 1c required Reclamation to, in pertinent part, "immediately consult with the Service concerning the causes" of any "projected or realized progressive decrease in [UKL] elevation that would fall outside of the boundary conditions for the [BiOp's] effects analysis," and "adaptively manage and take corrective actions." KT I AR 29 at 001973.

Circuit has recognized that "Reclamation has the 'nearly impossible' task of balancing multiple competing interests in the Klamath Basin." *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 940 (9th Cir. 2022) (citing *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 489 F. Supp. 3d 1168, 1173 (D. Or. 2020)), *cert. denied Klamath Irrigation Dist. v. Bureau of Reclamation*, No. 22-1116, 2023 WL 7117010 (U.S. Oct. 30, 2023). Reclamation does not dispute that it must meet ESA requirements before it may fulfill irrigation obligations. In the case of the 2022 TOP, Reclamation submits that it met ESA requirements by apprising FWS of its proposed operations under the 2022 TOP in accordance with Term 1c of the FWS ITS and implementing the TOP as a reasonable corrective measure. Reclamation made its "nearly impossible" water allocation decision using its understanding of hydrologic conditions and professional judgment.

The F&R appears to interpret FWS' letter to Reclamation as a disapproval of the TOP, which it was not. ECF 58 at 43. The F&R overlooks FWS' statement that "[w]e acknowledge that, through the meet and confer process provided for under [Term 1c], Reclamation has made a good faith effort to address the ongoing drought and the likelihood that BiOp boundary conditions will not be fully met" for suckers in UKL. KT II AR 52 at BOR001434. Overlooking Reclamation's acknowledged "good faith effort," the F&R asserts that FWS "warned Reclamation that failure to meet certain UKL elevation levels '[would] greatly reduce larval sucker rearing habitat in UKL this year.'" ECF 58 at 39-40. The F&R does not acknowledge, however, that the cited language does not reference the TOP's planned Project irrigation allocation, which is what the Tribes challenge in this case. Rather, the letter indicates that FWS included the cited language in reference to the effects of Reclamation's planned attempt to meet ESA requirements for juvenile salmon in the Klamath River by providing a surface flushing flow

to reduce disease risk, coupled with poor hydrology. KT II AR 52 at BOR001434-35. The Tribes do not challenge Reclamation's actions relating a surface flushing flow under the 2022 TOP.

The F&R also dismisses the fact that the 2022 TOP increased the annual minimum elevation in UKL to 4138.15 feet to benefit suckers (ECF 58 at 40), when FWS stated that it appreciated Reclamation having made this increase as a buffer to 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 deteriorated. KT II AR 52 at BOR001434-35.

Lastly, the F&R misapprehends the TOP as having allocated 62,000 AF to irrigation when the allocation "would have otherwise been set at zero for the year." ECF 58 at 40. In the absence of the 2022 TOP, there still would have been an irrigation allocation of 36,000 AF under the 2018 Plan/2020 IOP. ECF 30 at ¶ 33. While the April 1, 2022 Natural Resources Conservation Service forecast would have set the initial irrigation allocation at zero under the 2018 Plan/2020 IOP, that initial allocation – traditionally calculated on April 1 each year – is reassessed with each subsequent forecast on the first of the month through June 1. The hydrology in 2022 improved from April to June and therefore would have allowed the initial allocation to have been revised upwards to 36,000 AF. Thus, the 2022 TOP ultimately increased the irrigation allocation from 36,000 AF to 62,000 AF, not from zero to 62,000 AF. While the TOP also made that irrigation allocation available earlier in the season (commencing on April 15, which was delayed from the typical April 1 start date) than otherwise would have been the case under the 2018 Plan/2020 IOP (commencing in May), as noted above, the April 1 UKL boundary condition would not have been met regardless of any irrigation diversions.

With specific regard to the Tribes' ESA Section 9 claim, the ESA states that "*any taking* that is in compliance with the terms and conditions specified in [the ITS] . . . shall not be considered to be a prohibited taking of the species concerned." 16 U.S.C. § 1536(o)(2) (emphasis added). Thus, as long as Reclamation complied with the terms and conditions of the ITS, including the requirement of Term 1c to implement reasonable corrective measures, there was no violation of Section 9 regarding incidental take of listed suckers.[8]

2. The Court Should Grant Summary Judgment to Reclamation on the Tribes' NEPA Claims

The F&R concludes that Reclamation violated NEPA because its DNA regarding the 2022 TOP lacks quantification and does not contain a "precise cumulative impact analysis of decreased elevations in UKL during three consecutive drought years." ECF 58 at 50. The F&R applies a legally erroneous standard and should not be adopted by the Court. The DNA properly tiered back to the comprehensive analysis in the 2020-2023 EA and 2021 Supplemental Environmental Assessment ("EA"), which contained extensive analysis of the environmental impacts of Project operations, including operations under continued drought conditions, and contained analysis of whether conditions had changed such that new analysis was required. The recommendation that the Court find that a DNA must contain its own "precise" analysis of three

[8] To decide the Tribes' ESA Section 9 claim, the Court should not wade into the issue of what evidentiary proof is necessary to show whether, and to what extent, implementing the 2022 TOP resulted in incidental take of suckers. ECF 58 at 43. This Court can simply determine based on its review of the administrative record and the standard of review provided by the APA whether the 2022 TOP was a reasonable corrective measure in compliance with Term 1c or was instead "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with" Term 1c and, therefore, ESA Section 9. *Karuk Tribe of Cal. v. U.S. Forest Serv*., 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc) (agency's "compliance with the ESA is reviewed under the Administrative Procedure Act ('APA')"); 5 U.S.C. § 706; 16 U.S.C. §§ 1536(o)(2), 1538(a)(1)(B).

consecutive years of drought would impose a higher standard for tiering to existing analyses than is required by both caselaw and the NEPA implementing regulations.

A DNA is "not itself a NEPA document." *N. Alaska Env't Ctr. v. U.S. Dep't of the Interior*, 983 F.3d 1077, 1082 n.3 (9th Cir. 2020). However, a DNA operates within the NEPA framework, and such documents have a limited purpose: "determining whether new information or changed circumstances require the preparation of a supplemental EA or [Environmental Impact Statement ("EIS")]." *Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000). If "an agency determines that new information is significant, it must prepare a supplemental EA or EIS." *Id.* The Ninth Circuit has clarified that, in issuing a DNA, "[w]hen an agency takes the requisite 'hard look' and 'determines that the new impacts will not be significant (or not significantly different from those already considered), then the agency is in full compliance with NEPA.'" *Summit Lake Paiute Tribe of Nev. v. U.S. Bureau of Land Mgmt.*, 496 F. App'x 712, 715–16 (9th Cir. 2012), quoting *N. Idaho Comm'ty Action Network v. U.S. Dept. of Transp.*, 545 F.3d 1147, 1154–55 (9th Cir. 2008). Such determinations may only be set aside if they are arbitrary or capricious. *Id.*; *see also Oregon Nat. Res. Council Action v. U.S. Forest Serv.,* 445 F. Supp. 2d 1211, 1225 (D. Or. 2006) ("A court will uphold a decision not to supplement an environmental analysis if the decision is reasonable") (citation omitted). Here, the analysis in the DNA far exceeds this standard.

In its DNA, Reclamation considered five questions. The F&R focuses on the cumulative impacts component in which Reclamation evaluated whether "the direct, indirect, and cumulative effects that would result from implementation of the new proposed action [are] similar to those analyzed in the existing NEPA document?" ECF 58 at 48 (citing KT II AR 53 at BOR001416; BOR001427). Reclamation answered in the affirmative, finding that the effects of

the proposed action – the 2022 TOP – "would be temporary and minor and are similar to those analyzed" in the 2020 and 2021 EAs. KT II AR 53 at BOR001430 (citing § 4.4 of the EAs (*see e.g.,* KT II AR 121 at BOR005244-5248; KT II AR 123 at BOR005401-05405)). Reclamation did not merely state its conclusion and move on. Instead, it assessed whether the impacts of the proposed action had been assessed already across a number of categories, including water resources, biological resources, recreation, land use, socioeconomics, air quality, Indian trust resources, and environmental justice. Critically, as to biological resources, Reclamation determined that "[c]umulative impacts as a result of Reclamation's implementation of the 2022 TOP are consistent with the discussion in Section [4.4] of the 2020 EA as impacts to biological resources experienced during the 2022 spring/summer operating period are likely to be temporary and minor." *Id.*

Specifically, Section 4.4 of both EAs evaluated impacts of Project operations under drought conditions to biological resources, including to the suckers. *See, e.g.*, KT II AR 123 at BOR005401-05; KT II AR 121 at BOR005244-5248. The DNA therefore reasonably concluded that cumulative impacts of the 2022 TOP would be similar, given that Reclamation projected that, with continued drought conditions, UKL elevations would fall within the range of those previously reviewed. Indeed, both EAs evaluated cumulative impacts in the context of similar UKL boundary conditions and minimum elevations. KT II AR 53 at BOR001420. Reclamation certainly did not disregard continued drought in its DNA, and it acknowledged that "due to the ongoing dry hydrologic conditions in 2022 (as was experienced in 2021), and due to similarities in all alternatives previously analyzed, the analysis of impacts (e.g., reduced habitat availability) discussed in the 2021 EA are applicable to impacts anticipated in 2022." *Id.* at BOR001424. As to the suckers, it identified that impacts to juvenile spawning could occur, but that it didn't

"expect adverse impacts to older juvenile and adult suckers due to restriction of habitat in the preferred depths of suckers or due to restricted access to areas of improved water quality," because the elevation would be managed within the same boundaries analyzed in prior EAs, which allowed sufficient water to limit predation. *Id.* at BOR001424-1425. In light of this analysis, Reclamation rationally determined that "the 2022 TOP impacts at the end of September are within the range analyzed in the 2020 and 2021 EAs." *Id.* Following from this analysis, Reclamation did not identify new cumulative impacts to biological resources, because "[a]ctions 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." *Id.* at BOR001431.

In recommending that the Court find the DNA insufficient, the F&R cites 43 C.F.R. § 46.120(c), which authorizes agencies to use existing NEPA analyses for a new action, so long as it "determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives. 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." The F&R also cites to a series of cases regarding the necessity of a cumulative impacts analysis under NEPA. However, each case cited in the F&R relates to the requirement for a stand-alone cumulative impacts analysis in a NEPA document, such as an EA or EIS, not a DNA. *See, e.g., Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir. 2002) (evaluating the cumulative impacts analysis in an EIS and an EA); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998) (evaluating the cumulative impacts analysis in an EIS and Supplemental EIS); *Muckleshoot Indian Tribe v. US. Forest Serv.*, 177

F.3d 800, 810 (9th Cir. 1999) (evaluating the cumulative impacts analysis in an EIS). Each of these cited cases is inapposite, as there is no requirement that a DNA contain its own comprehensive cumulative impacts analysis.

Whether the DNA met the standards for what is required to be included in an EA or EIS is not the proper analysis. The question is instead whether the DNA itself was proper. To be a proper tiering document, the NEPA implementing regulations obligated Reclamation to determine that the existing analyses adequately assessed the potential impacts of the proposed action and evaluated whether new circumstances required new analysis. *See* 43 C.F.R. § 46.120(c). Further, under Ninth Circuit precedent, Reclamation's DNA complies with NEPA if it took the requisite hard look and determined that the new impacts of the Proposed Action would not be significantly different than those that were already analyzed. *See Summit Lake*, 496 F. App'x at 715–16.

Reclamation did exactly that. It analyzed whether the proposed action was adequately included within the pre-existing analyses, determining that it was. *See* KT II AR 53 at BOR001419-1420. It analyzed whether the range of alternatives assessed in the existing analyses remained sufficient given present environmental conditions. *Id.* at BOR001420-1421. It analyzed whether the existing analysis was still valid in light of new circumstances – for example, the persistence of severe drought. *Id.* at BOR001421-1430; *see also id*. at BOR001415 (noting that "the Klamath Basin continues to face unprecedented drought conditions for the third consecutive year."). Finally, and critically, it analyzed whether the direct, indirect, and cumulative impacts of the proposed action were similar to those previously analyzed. *Id.* at BOR001430-1432. It again answered in the affirmative.

After conducting this analysis, and specifically determining that the existing cumulative impacts analysis encompassed the 2022 TOP, Reclamation issued its DNA. To go further and conduct new analysis in a DNA, as the F&R suggests Reclamation should have done, would itself run afoul of NEPA. *See Idaho Sporting Cong.*, 222 F.3d at 566 (noting that "[i]n condoning the use of [Supplemental Information Reports ("SIRs")], however, we have repeatedly warned that once an agency determines that new information is significant, it must prepare a supplemental EA or EIS; SIRs cannot serve as a substitute."). The F&R errs in finding that the DNA was insufficient because it lacks a "precise" analysis, because a precise analysis is not required when tiering back to an existing analysis. Here, the Tribes do not challenge the sufficiency of the cumulative impacts analyses in the prior EAs. Yet, the F&R holds that the DNA itself should have contained its own cumulative impacts analysis, which would impose a legally erroneous standard beyond what even the Tribes sought. Reclamation rationally determined that the existing comprehensive EAs analyzed the potential impacts of the 2022 TOP and would not be "significantly different from those already considered," which is all that NEPA requires. *Summit Lake*, 496 F. App'x at 715–16. Accordingly, Reclamation complied with NEPA in issuing the DNA. The F&R's finding that a DNA must contain its own new analysis is unsupported by Ninth Circuit caselaw and the NEPA implementing regulations and should not be adopted by the Court.

IV. Conclusion

The Court should dismiss the complaint in its entirety as moot without proceeding further. However, should the Court not dismiss on mootness grounds, it should grant voluntary dismissal of Count III and dismiss FWS as a defendant from the case and also dismiss the ESA claims against Reclamation for failure to comply with the Act's notice requirement. Should the

Court not dismiss the ESA claims against Reclamation, it should enter summary judgment in favor of Reclamation on those claims as well as on the Tribes' NEPA claims.

Respectfully submitted this 15th day of November, 2023.

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CERTIFICATE OF SERVICE

I certify that on November 15, 2023, the foregoing was electronically filed with the Court's electronic filing system.

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