SOMACH SIMMONS & DUNN, PC
A Professional Corporation
PAUL S. SIMMONS, ESQ. (Or. Bar 971386)
BRITTANY K. JOHNSON, ESQ. (Cal. Bar 282001)
*Pro Hac Vice*
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: (916) 446-7979
Facsimile: (916) 446-8199
psimmons@somachlaw.com
bjohnson@somachlaw.com

Attorneys for Defendant-Intervenor
KLAMATH WATER USERS ASSOCIATION

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MEDFORD DIVISION

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| THE KLAMATH TRIBES, a federally recognized Indian Tribe,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES BUREAU OF RECLAMATION,<br><br>and<br><br>UNITED STATES FISH AND WILDLIFE SERVICE,<br><br>Defendants. | Case No. 1:22-CV-00680-CL<br><br>KLAMATH WATER USERS ASSOCIATION'S OBJECTIONS TO FINDINGS AND RECOMMENDATION<br><br>Judge: Honorable Michael J. McShane |
| KLAMATH WATER USERS ASSOCIATION,<br><br>Defendant-Intervenor. | |

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## I. INTRODUCTION

Simply put, 2021 and 2022 were extremely dry years, that followed another dry year in 2020. Not enough water flowed into Upper Klamath Lake (UKL) to recover what the U.S. Bureau of Reclamation (Reclamation) was told to release downstream to the Klamath River for another listed species. Reclamation adaptively managed where it could under the applicable biological opinions issued by the U.S. Fish and Wildlife Service (FWS) for endangered sucker species, and the National Marine Fisheries Service (NMFS) for threatened coho salmon. And agriculture, refuges, and wildlife in the Klamath Basin were devastated.

In spite of this devastation, Reclamation did what it could to adaptively manage the limited water supply while avoiding jeopardy to listed species. After **zero** Project water was diverted in 2021, Reclamation allocated a modest amount of water for the Klamath Reclamation Project (Project) in its temporary operation plan for 2022 (2022 TOP). Even after no Project diversions the prior year, it was impossible for Reclamation to meet the April 1 UKL elevation target of 4142.0 feet under the then-applicable 2020 FWS biological opinion (2020 FWS BiOp). So, Reclamation prioritized protection of the minimum UKL elevation for the end of September of 4138.0 feet. Reclamation's operation of the Project under the 2022 TOP maintained the UKL elevation well above this minimum, maintained minimum instream flows in the Klamath River for salmonid species, and provided some water for Project irrigation.

Plaintiff Klamath Tribes (Plaintiff) argues this balancing of water supply needs in the third year of drought violated the Endangered Species Act (ESA), primarily because the Project got something instead of nothing. The Magistrate Judge mostly agreed in the Findings and Recommendation (F&R), overlooking unquestionable jurisdictional defects in order to find that the Project should not have received any water in a year like 2022.

The Court should not adopt the F&R. First, the case is unequivocally moot, and Plaintiff's purposed 60-day notice is plainly deficient. And if the Court finds there is jurisdiction, Plaintiff did not show a violation of Section 7 or Section 9 of the ESA. The ESA requires an action agency to avoid jeopardy to listed species or adverse modification to their critical habitat. It is not a mandate to provide the most habitat possible at all times. The F&R impermissibly confuses these standards. The 2020 FWS BiOp analyzed the effects of Project operations to endangered sucker species when UKL stays above 4138.0 feet. That is what happened in 2022. Defendant-Intervenor Klamath Water Users Association (KWUA) respectfully requests that the Court decline to adopt the F&R, conduct a de novo review, and grant summary judgment in favor of KWUA and the Federal Defendants.

## II. PROCEDURAL HISTORY

On March 10, 2022, Plaintiff sent a letter to a counselor in the Department of the Interior, requesting consultation on 2022 operations. 2022 AR at BOR001260-61. Reclamation adopted the 2022 TOP on April 9, 2022. 2022 AR at BOR001528-33. On April 14, 2022, Plaintiff sent another letter titled "Supplemental Notice of Violations of Endangered Species Act" to the Acting Reclamation Commissioner and the FWS Director. 2022 AR at BOR001253-58. Plaintiff filed its complaint, challenging the lawfulness of the 2022 TOP, on May 9, 2022. Compl., ECF No. 1.

The complaint includes four claims for relief. In the First Claim under the ESA citizen suit provision, Plaintiff alleges that Reclamation violated Section 9 of the ESA by authorizing Project diversions contrary to its own water allocation formula and failing to comply with the incidental take statement (ITS) in the 2020 FWS BiOp. Compl. ¶¶ 59-72, ECF No. 1. In the Second Claim under the ESA citizen suit provision, Plaintiff alleges that Reclamation violated its

duty under Section 7 of the ESA not to jeopardize the continued existence of listed species or adversely modify their critical habitat by implementing the 2022 TOP. *Id.* ¶¶ 73-79. In the Third Claim, Plaintiff alleges that FWS violated Section 7 of the ESA by failing to rescind the ITS in the 2020 FWS BiOp in response to Reclamation's actions in 2022. *Id.* ¶¶ 80-87. In the Fourth Claim, Plaintiff alleges that Reclamation violated the National Environmental Policy Act (NEPA) by failing to adequately analyze the environmental impacts of 2022 operations. *Id.* ¶¶ 88-94. Ultimately, Plaintiff abandoned the Third Claim against FWS and clarified that it was no longer seeking injunctive relief. Pl.'s Reply at 18 n.12, 30-31,[1] ECF No. 40.

The case then proceeded to summary judgment briefing. Federal Defendants lodged an administrative record on August 18, 2022. ECF No. 19. Federal Defendants supplemented the administrative record on November 18, 2022, and January 17, 2023. ECF Nos. 22, 31, 31-1. Plaintiff filed its motion for summary judgment. ECF No. 24. Federal Defendants filed a cross-motion for summary judgment and opposition to Plaintiff's motion. ECF No. 32. KWUA also filed a cross-motion and opposition (KWUA Opp'n) in addition to the Declaration of Brad Kirby in Support of KWUA's Opposition and Cross-Motion, providing written testimony on 2020, 2021, and 2022 Project operations (Kirby Decl.). ECF Nos. 29, 30. Plaintiff filed a reply in support of its motion, ECF No. 40, and KWUA and Reclamation filed replies in support of their respective cross-motions, ECF Nos. 43, 45. In its reply, Plaintiff confirmed it is no longer seeking injunctive relief. Pl.'s Reply at 18 n.12, ECF No. 40.

On September 11, 2023, Magistrate Judge Clarke issued his F&R. ECF No. 58. The Magistrate Judge found that:

[1] When citing to documents on the Court's docket, KWUA refers to ECF pagination.

(1) the case is not moot because the Court can still provide effective declaratory relief; there remains a possibility that Reclamation's water allocation decisions will cause UKL elevations to drop in future drought years, and because the "capable of repetition, yet evading review" exception applies, F&R at 24-26, ECF No. 58;

(2) Plaintiff has standing because at the time the complaint was filed, the 2022 TOP was in effect, and that is enough to establish standing, *id.* at 26-27;

(3) Plaintiff's 60-day notice was adequate because the March 10, 2022, letter mentions the parties' litigation history and Plaintiff's most recent challenge, and Reclamation should have understood the alleged violations of the ESA, *id.* at 27-30;

(4) the case should not be dismissed under Federal Rule of Civil Procedure 19 (Rule 19) for failure to join required absent tribes, *id.* at 30-33;

(5) Reclamation's operation of the Project under the 2022 TOP violated Section 7 of the ESA because Reclamation allocated water for Project irrigators and did not take "all steps necessary" to keep UKL elevations as high as possible, *id.* at 37-41;

(6) Reclamation violated Section 9 of the ESA because Reclamation could not plausibly comply with Term & Condition (T&C) 1c of the ITS in the 2020 FWS BiOp when it allocated water for irrigation in 2022, *id.* at 41-44; and

(7) Reclamation's "Determination of NEPA Adequacy" in 2022 did not comply with NEPA's requirement to take a "hard look" at the environmental impacts of its actions, *id.* at 45-51.

Based on these findings, the Magistrate Judge recommends granting Plaintiff's motion for summary judgment and denying Federal Defendants' motion for summary judgment and KWUA's motion for summary judgment. F&R at 52, ECF No. 58. Further, the Magistrate Judge recommends granting specific declaratory relief. *Id.*

The Magistrate Judge also included an important finding related to the parties' stipulation and the Court's order approving the stipulation that certain issues would not be litigated in this case, and that failure to assert these issues would not constitute a waiver or preclusion of raising the issues in other litigation. F&R at 21-22, ECF No. 58 (citing Stipulation and Order, ECF No. 28). KWUA fully supports this finding and requests that this Court repeat the finding in any order reviewing the F&R.

KWUA respectfully disagrees with the Magistrate Judge's findings and recommendation to reject KWUA's arguments that (1) Plaintiff does not have standing to challenge the 2022 TOP, (2) that Plaintiff's complaint should be dismissed under Rule 19 for failure to join necessary parties, and (3) that NEPA does not apply to Project operations. F&R at 26-27, 30-33, 50-51, ECF No. 58. KWUA does not present objections to the F&R on those issues. KWUA does object to the Magistrate Judge's findings and recommendation that (1) this case is not moot, (2) Plaintiff provided adequate notice, (3) Plaintiff proved a violation of Section 7 of the ESA, and (4) Plaintiff proved a violation of Section 9 of the ESA. *See id.* at 21-24. For the reasons explained below, the Court should not adopt the F&R, and based on a de novo review, should issue an order grating KWUA's motion for summary judgment.

## III. STANDARD OF REVIEW

A party may file specific written objections to a magistrate judge's proposed findings and recommendations on a dispositive motion. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2).

If a party files objections, the court must make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. *Id.*

## IV. OBJECTIONS

This Court is aware of the regulatory framework of the applicable biological opinions and the operational decisions leading to the filing of the complaint in the 2021 case. *Klamath Tribes v. U.S. Bureau of Reclamation*, 537 F. Supp. 3d 1183, 1185-87 (D. Or. 2021) (*Klamath Tribes*). A complete background and history of Project operations from 2020 through 2022 is detailed in KWUA's Opposition, ECF No. 29, and paragraphs 12-37 of the Kirby Declaration, ECF No. 30. KWUA incorporates and adopts its Opposition and Reply briefs in full here, including all arguments, in support of these Objections. Specifically, for purposes of its objection to the finding on mootness, KWUA repeats several key facts here, and then proceeds to explain its objections to the F&R.

### A. The Biological Opinion in Effect in 2022 Has Been Superseded by a New Biological Opinion with Different Terms

In 2020, Reclamation adopted an "Interim Operations Plan" (Interim Plan) for the Project. 2022 AR at BOR003440-41. Reclamation consulted with FWS, and FWS issued the 2020 FWS BiOp on the Interim Plan. 2022 AR at BOR003422-687. The 2020 FWS BiOp reached the conclusion that operation of the Project under the Interim Plan would not jeopardize the existence of the endangered sucker species that inhabit UKL. 2022 AR at BOR003422-23.

In 2022, it was literally impossible for the Project to be operated as the Interim Plan had contemplated because of minimal precipitation, very little runoff, limited carryover storage in UKL, and releases from UKL required to meet Iron Gate minimum flows due to lower accretions between Link River Dam and Iron Gate Dam than previous years. Kirby Decl. ¶¶ 25-29, 33, ECF No. 30. It quickly became apparent that Reclamation would not be able to meet the UKL

elevations anticipated in the 2020 FWS BiOp and the minimum release for Klamath River flows required under the NMFS 2019 biological opinion. As a result, on April 9, 2022, Reclamation issued a 2022 Temporary Operations Plan (2022 TOP). 2022 AR at BOR001528-33. The 2022 TOP was a temporary, one-time operations plan that Reclamation stated was adopted due to "[e]xtraordinary hydrologic conditions." 2022 AR at BOR001528. The 2022 TOP is no longer in effect. 2022 AR at BOR001531 (stating the 2022 TOP will be "administered April 15 through the end of the water year on September 30, 2022[], at which time Reclamation would revert back to the fall/winter operating procedures of the [Interim Plan]").

Moreover, the 2020 FWS BiOp that was in effect in 2021 has been superseded by a new FWS biological opinion issued on January 13, 2023 (2023 FWS BiOp). 2022 AR at BOR005501-771. Plaintiff's claims in this case directly concern Reclamation's compliance with T&C 1c in the 2020 FWS BiOp. *See, e.g.*, Compl. ¶¶ 66-67, ECF No. 1; *see also* Pl.'s Reply at 34-38, ECF No. 40. T&C 1c in the 2020 FWS BiOp provides that if elevations fall outside the boundary conditions, "Reclamation shall determine the causative factors of this decrease and determine whether these factors are within the scope of the proposed action" and "immediately consult with the Service concerning the causes to adaptively manage and take corrective actions." 2022 AR at BOR003659. This provision of the terms and conditions in the ITS no longer exists. The 2023 FWS BiOp does not include this language. 2022 AR at BOR005735-36. Instead, Reclamation must meet with FWS and NMFS monthly prior to the key dates for the boundary conditions to ensure Reclamation is able to meet or exceed the lake elevations, and if during the meet and confer process Reclamation determines that UKL elevations cannot be attained, "Reclamation shall immediately reinitiate consultation with the Service." *Id.*

**B. This Case Is Moot Because Future Decisions on Project Operations Will Be Made Under Different Terms of a Different Biological Opinion**

Both KWUA and Reclamation argued that Plaintiff's claims for declaratory relief are moot because the 2022 TOP expired and the 2020 FWS BiOp has been superseded. KWUA Opp'n at 31-32, 34-39, ECF No. 29; KWUA Reply at 10-14, ECF No. 43. The Magistrate Judge found that Plaintiff's claims for declaratory relief fall within the "capable of repetition, yet evading review" exception because the duration of the 2022 TOP was too short to be fully litigated prior to its expiration and "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." F&R at 26, ECF No. 58. The mootness analysis in the F&R is incorrect and omits the critical fact that the 2020 FWS BiOp is no longer in effect, and specifically that the ITS terms and conditions in the 2023 FWS BiOp are materially different that the ITS terms and conditions in the 2020 FWS BiOp in effect in 2022.

"A case or controversy exists justifying declaratory relief only when 'the challenged government activity . . . is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may be a substantial adverse effect on the interests of the petitioning parties.' " *Headwaters, Inc., v. Bureau of Land Mgmt., Medford Dist.*, 893 F.2d 1012, 1015 (9th Cir. 1989) (*Headwaters*) (citation omitted); *see also Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007) (*Lohn*) (explaining the rule that a "case is not moot if declaratory relief would nevertheless provide meaningful relief"). The "capable of repetition, yet evading review" exception to mootness exists when there is a "reasonable expectation that the same complaining party will be subject to the same injury again" and the injury is a "type inherently limited in duration such that it is likely always to become moot

before federal court litigation is completed." *Lohn*, 511 F.3d at 965 (internal quotations and citation omitted).

The F&R focuses on the 2022 TOP, and KWUA maintains that the expiration of the 2022 TOP renders the case moot. A declaration that operation of the Project pursuant to the 2022 TOP violates the ESA provides no meaningful relief. The 2022 TOP is not a "continuing and brooding presence" casting an "adverse effect" on the parties. *See Headwaters*, 893 F.2d at 1015. It is expired, and the specific hydrologic conditions necessitating its adoption are no longer in existence.

However, the F&R completely omits any mention or analysis of the **expiration** of the 2020 FWS BiOp, which unequivocally renders the case moot. As explained above, Reclamation's compliance with T&C 1c in the 2020 FWS BiOp is central to the analysis of Reclamation's compliance with ESA Section 7. Under Ninth Circuit case law, substantive violations of ESA Section 7 are evaluated under the standard enounced in *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410 (9th Cir. 1990) (*Pyramid Lake*). An action agency's reliance on a FWS biological opinion will satisfy its Section 7 substantive obligation "if a challenging party can point to no 'new' information—i.e., information the Service did not take into account—which challenges the opinion's conclusions." *Id.* at 1415. The ITS in the 2020 FWS BiOp is also central to the analysis of Reclamation's compliance with ESA Section 9 because 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).

That critical term—T&C 1c in the 2020 FWS BiOp—no longer exists. Under the ITS in the 2023 FWS BiOp, there is no "adaptive management" if Reclamation is not able to maintain

UKL elevations at 4142.0 feet on April 1 or other key elevations. Rather, in that circumstance, Reclamation must immediately reinitiate consultation with FWS. 2022 AR at BOR005735-36.

The Ninth Circuit has held in multiple cases that a claim in an ESA case for declaratory relief is moot when the agency will base "its rulings on different criteria or factors in the future." *See Ramsey v. Kantor*, 96 F.3d 434, 445-46 (9th Cir. 1996) (finding the case moot when the federal appellees used a different method of calculating the baseline period for future harvesting under the applicable biological opinion); *Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1071, 1075 (9th Cir. 1995) (finding the capable of repetition exception does not apply when the agency is relying on a new biological opinion in the future); *see also State Dep't of Fish & Game v. Fed. Subsistence Bd.*, 62 F.4th 1177, 1184 (9th Cir. 2023) (listing cases and explaining "where the agency will base future decisions on a new report with different facts and analysis, we have found that there is no reasonable expectation of repetition").

These cases are dispositive. The 2023 FWS BiOp includes "different criteria or factors" for evaluating Reclamation's compliance with the ESA under different hydrological conditions. Ninth Circuit precedent is clear that under these circumstances, the declaratory relief claims are moot, and the Court does not have authority to decide the case.

**C. Plaintiff Did Not Comply with the Jurisdictional Requirement to Provide Notice**

Plaintiff's ESA claims are brought under the citizen suit provision. Compl. ¶¶ 61, 72, 76, ECF No. 1. This provision allows any person to commence a civil suit to "enjoin any person, including the United States and any other governmental instrumentality . . . who is alleged to be in violation of any provision of this [Act]." 16 U.S.C. § 1540(g)(1)(A). A prerequisite to filing suit under these provisions is compliance with the 60-day notice requirement proscribed by statute, which states that "[n]o action may be commenced . . . prior to sixty days after written

notice of the violation has been given to the Secretary, and to any alleged violator of such provision." *Id.* § 1540(g)(2)(A)(i).

The notice requirement is jurisdictional, and failure to strictly comply with the provisions of the statute acts as a total bar to a suit under the ESA. *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998) (*Sw. Ctr. for Biological Diversity*). Plaintiff failed to comply with the notice provision in two manners: Plaintiff did not provide notice to the Secretary, and Plaintiff failed to wait sixty days before commencing this action.

**1. Plaintiff Did Not Give Notice to the Secretary of the Interior as Required by Statute**

Plaintiff claims that both its March 10, 2022, and April 14, 2022 letters satisfy the notice requirement. However, there is a fatal flaw with both of these letters: neither is addressed to the Secretary of the Interior. The statute provides that "written notice of the violation" must be "given to the Secretary." 16 U.S.C. § 1540(g)(2)(A)(i). There were many recipients of the March 10, 2022, and April 14, 2022 letters in the Department of the Interior and the Department of Commerce, but the Secretary of the Interior was not one of them.[2] 2022 AR at BOR001253, 1258, 1260-61.

Although harsh in some circumstances, strict compliance with the notice requirement is necessary. "[A] district court may not disregard these requirements at its discretion." *Hallstrom v. Tillamook Cty.*, 693 U.S. 20, 31 (1989). The statute provides that notice must be provided to

[2] KWUA did not raise the argument that the Secretary was not correctly notified to the Magistrate Judge. However, this Court has discretion to consider objections based on arguments that were not raised to the Magistrate Judge. *Brown v. Roe*, 279 F.3d 742 (9th Cir. 2002). And a party can raise a jurisdictional challenge at any time. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) (citations omitted) ("The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.").

the Secretary. Failure to notify the Secretary results in dismissal of the action. *See Ctr. of Envtl. Sci., Accuracy & Reliability v. Sacramento Reg'l Cty. Sanitation Dist.*, No. 1:15-cv-01103 LJO BAM, 2016 U.S. Dist. LEXIS 72840, at *16-18 (E.D. Cal. June 3, 2016) (noting the lack of implementing regulations and dismissing the case for lack of actual notice to the Secretary). Although there are many officials addressed or copied on the letter, Plaintiff's notice must be given to the "Secretary." *See Save the Yaak Committee v. Block*, 840 F.2d 714, 721 (9th Cir. 1988) (finding the letters, even if providing requisite notice of a violation, must be sent to the "correct person, the secretary, as required," and that the FWS regional director and other copied state and federal legislators were not the correct recipient); *Sw. Ctr. for Biological Diversity*, 143 F.3d at 522 n.3. Plaintiff's ESA claims should be dismissed for insufficient notice to the Secretary as required by statute.

**2. Plaintiff Did Not Provide Adequate Notice Prior to Filing the Complaint**

The F&R concludes that based on the March 10, 2022, and April 14, 2022 letters, Plaintiff complied with the notice requirement because the March 10 letter contained "sufficient information such that Reclamation should have understood the alleged violations of the ESA." F&R at 30, ECF No. 58. There is a significant flaw in this reasoning: the March 10, 2022 letter was sent before the 2022 TOP was adopted. Moreover, it does not identify specific ESA violations and only requests consultation on operations.

Plaintiff admitted that the March 10, 2022 notice letter does not identify violations of Section 7 or Section 9 of the ESA and instead expresses a desire to engage in consultation regarding Reclamation's 2022 plans for Project operations. Pl.'s Reply at 29 ("[i]n its letter on March 10, 2022 ('2022 Notice'), the Tribes requested immediate consultation with Reclamation" and "the 2022 [n]otice does not expressly mention litigation"). Plaintiff did not distinguish the 2022 Notice letter from the notice in *Sw. Ctr. for Biological Diversity*, 143 F.3d at 520, which

the Ninth Circuit found to be substantively insufficient. In both cases, the purpose of the letter was to consult regarding Reclamation operations.

Moreover, Plaintiff's claims very clearly challenge the 2022 TOP. *See, e.g.*, Compl. ¶ 72, 2022 ECF No. 1 ("Klamath Tribes are entitled to a declaration that by adopting the 2022 Ops Plan Reclamation has lost the right to shelter under the 2020 BiOp's ITS"); *id.* ¶ 79 ("Klamath Tribes are entitled to a declaration that the 2022 Ops Plan violates Section 7 of the ESA"). When Plaintiff sent its March 10, 2022 notice letter (or its letters in 2021), the 2022 TOP did not exist. Thus, the 2021 notice letter could not have possibly provided adequate notice to Reclamation of alleged violations of the ESA that would result by adopting or implementing the 2022 TOP. *See Nat. Res. Def. Council v. Norton*, No. 1:05-cv-01207 LJO-EPG, 2016 U.S. Dist. LEXIS 145788, at *50-58 (E.D. Cal. Oct. 20, 2016) (finding plaintiffs' sixty-day notice letter from 2008 referring to ongoing ESA violations did not provide sufficient notice to file supplemental complaint alleging ESA violations based on Reclamation's reliance on a consultation completed in 2015). And the April 14, 2022 letter was sent only 26 days before the filing of the complaint on May 9, 2022. This, of course, does not comply with the necessary 60-day waiting period.

The F&R incorrectly concludes that the March 10, 2022 letter could have provided notice for an agency action yet to be adopted. The March 10, 2022, and April 14, 2022 letters are insufficient to provide notice to Reclamation of its alleged violations of the ESA. Therefore, Plaintiff has failed to provide notice under 16 U.S.C. § 1540(g)(2)(A), and as such, is jurisdictionally barred from bringing its ESA claims.

### D. Plaintiff Did Not Show That Reclamation Violated Section 7 of the ESA Under the Relevant Standard

The F&R finds that Reclamation violated its ESA Section 7 obligations because Reclamation allocated a small amount of water to the Project after it did not meet the April 1 boundary condition for UKL. F&R at 38-39, ECF No. 58. The F&R acknowledges that "severe drought conditions during 2022 made it impossible for UKL elevation levels to reach 4,142 feet." *Id.* at 39. However, the Magistrate Judge did not think this was an "excuse." The F&R states that "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." *Id.* The F&R concludes that "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." *Id.* at 41.

The F&R errors in several ways. It accepts the argument that the Project should have received a zero allocation if Reclamation had followed the "formula" when this is not true. Like Plaintiff, it ignores the relevant legal standard for proving substantive violations of Section 7 of the ESA under the standard in *Pyramid Lake*, and it ignores that Reclamation considered the effects of its action, adaptively managed the Project, and avoided jeopardy based on the information in the 2020 FWS BiOp.

#### 1. The Project Was Not the Cause of April and July Boundary Conditions Missed in 2022, and the Project Allocation Procedures Allow for Adaptive Management and Adjustment Based on June 1 Hydrologic Information

The hydrologic reality is that to the extent the "boundary conditions" were missed in 2022, Project diversions were not the cause. *See* KWUA Opp'n at 37, ECF No. 29; *see also* Kirby Decl. ¶ 37, ECF No. 30. Based on UKL inflow and the planned releases for the Klamath

River, it was never feasible in March or April 2022 to reach 4142.0 feet. And based on UKL inflow and planned releases to the Klamath River between March 1 and July 15, 2022, Project diversions did not have a material impact on achieving the July 15 boundary condition. *Id.* The reflex to blame agriculture in the F&R for alleged harm to sucker species in UKL does not work when the driver of operations in these difficult years was flows in the Klamath River for salmon.

Moreover, the F&R focuses on the "water allocation formula" under the Interim Plan and concludes that Reclamation deviated from the formula because the allocation should have been zero. F&R at 40, ECF No. 58. This is not accurate. Reclamation's operational approach includes an operational model that regulates releases from UKL storage with consideration of recent hydrologic conditions. Reclamation seeks to allocate a Project Supply on April 1 without later reductions, and allows the possibility of an increase in subsequent May 1 and June 1 allocations. Kirby Decl. ¶ 32, ECF No. 30. Based on the June 1 forecast, calculated Project Supply would have been 36,000 acre-feet. *Id.* ¶ 33. Reclamation also adaptively managed the 2022 water year, modifying several elements to the Interim Plan, including a surface flushing flow for the Klamath River, while protecting the minimum UKL elevation of 4138.0 feet. *Id.* ¶¶ 31-37. The actual observed end of September 2022 elevation was 4138.71 feet, well above the minimum. *Id.* ¶ 36.

**2. Plaintiff Focused Solely on Lake Levels and Did Not Present Evidence that Shows Reclamation's Reliance on the 2020 FWS BiOp and Its Adaptive Management Provision Was Unreasonable**

The core complaint of Plaintiff's Section 7 claim is that Reclamation lacked the "ability to comply . . . with the boundary conditions USFWS set forth in the 2020 BiOp as necessary to protect [suckers]." *See, e.g.*, ECF No. 24 at 35. "Boundary conditions" are not a proxy for "jeopardy," in the same way that a term and condition in an ITS is a proxy for "take." "Boundary conditions" are not derived from scientific analysis of critical habitat. They are

outputs of the hydrologic modeling that Reclamation performs to estimate Project operations under various conditions, and the boundary conditions in the 2020 FWS BiOp are the expression of a very low probability UKL elevation at any given time based on model runs using historic hydrology. 2022 AR at BOR003549. It is not enough to show that the lake was not at a certain level on a certain day to prove a substantive violation of Section 7 of the ESA.

Rather, an action agency's reliance on a FWS biological opinion will satisfy its Section 7 substantive obligation "if a challenging party can point to no 'new' information—*i.e.*, information the Service did not take into account—which challenges the opinion's conclusions." *Pyramid Lake*, 898 F.2d at 1415. Reclamation relied on the critical information in the 2020 FWS BiOp that it is necessary to operate UKL to stay above 4138.0 feet to avoid adverse impacts to listed sucker species. 2022 AR at BOR003650. This elevation was protected in the 2022 TOP while providing the Project with a minimal allocation after a zero allocation the prior year. That is, Reclamation's operation was consistent with the critical assumptions for the effects analysis in the 2020 FWS BiOp that "[a]ny deviation from the formulaic approach intended to improve conditions for ESA-listed species cannot create adverse effects greater than was analyzed in" the biological opinion, which included the minimum September elevation. 2022 AR at BOR003551.

Plaintiff does not explain whether Reclamation's reliance on the 2020 FWS BiOp was reasonable or whether there was new information Reclamation did not take into account. Instead, Plaintiff remains focused on "boundary conditions" and whether Reclamation met them under historic drought conditions. These arguments are tailored to the standard for reinitiation of consultation, not jeopardy. *See* 50 C.F.R. § 402.16. To the extent that compliance with "boundary conditions" in the FWS BiOp is an issue under *Pyramid Lake*, Reclamation complied

with the process in T&C 1c when it could not maintain the boundary conditions due to drought conditions. ECF No. 32 at 48-53.

The F&R incorrectly finds that Reclamation violated Section 7 of the ESA because it provided some water to the Project instead of none. This cannot be correct. Section 7 of the ESA does not require Reclamation to make things as difficult as possible for Project irrigators. It requires Reclamation to avoid jeopardy, which is what Reclamation did by maintaining UKL well above the minimum UKL elevation by the end of the irrigation season.

**E. Plaintiff Did Not Prove a Section 9 Take**

There are basic elements to a Section 9 citizen suit claim: harm, causation, and lack of incidental take coverage. Plaintiff provided no proof of harm under the legal standard for habitat modification. Plaintiff provided no proof that Reclamation's operation of the Project was the but-for and proximate cause of the alleged harm. And Plaintiff failed to show that Reclamation did not comply with the ITS in the 2020 FWS BiOp.

Instead of finding that Plaintiff failed to meet its burden of production, the F&R focused on lake elevations, not the regulatory definition of "harm." The F&R rejected the need for more proof, stating the "Tribes need not literally bring a dead fish before this Court." F&R at 44, ECF No. 58. This statement is telling and shows the focus was not on the law, but on Plaintiff's rhetoric on the threat to the species. If the Court finds there is jurisdiction after reviewing the mootness and notice arguments, it should not adopt the F&R's analysis of Plaintiff's Section 9 claim. A de novo review shows Plaintiff utterly failed to meet its burden of proof.

**1. Plaintiff Has the Burden of Proof by Preponderance of the Evidence on a Section 9 Claim**

Plaintiff's ESA Section 9 claims are not reviewed under the Administrative Procedure Act (APA) standard. They are enforcement actions that "require proof of harm and causation."

*Or. Nat. Desert Ass'n v. Kimbell*, 593 F. Supp. 2d 1217, 1220 (D. Or. 2009). At trial, Plaintiff has the burden of proving unlawful take by a preponderance of the evidence. *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 1999) (*Bernal*). Summary judgment is inappropriate if "a material question of fact exists as to whether [Reclamation] is in violation of the ESA" by committing take. *Stout v. U.S. Forest Serv.*, 869 F. Supp. 2d 1271, 1281 (D. Or. 2012). "Because [Plaintiff] bear[s] the burden of proof as to their Section 9 claim, to satisfy their initial burden in connection with [their] motion for summary judgment they must demonstrate, with affirmative evidence, that 'no reasonable trier of fact could find other than for [them].' " *Ctr. for Envtl. Sci. Accuracy & Reliability v. Nat'l Park Serv.,* No. 1:14-cv-02063-LJO-MJS, 2016 U.S. Dist. LEXIS 115940, at *96 (E.D. Cal. Aug. 29, 2016) (*quoting Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (*Soremekun*)) (emphasis added). The supporting evidence relating to "take" must be admissible. *Soremekun*, 509 F.3d at 984 (citing Fed. R. Civ. P. 56(e)).

Plaintiff did nothing to refute KWUA's evidence or otherwise meet its burden of proof on causation. To the contrary, Plaintiff acknowledges that extremely dry hydrologic conditions "have driven this crisis," and that UKL levels were "largely beyond Reclamation's control," ECF No. 24 at 35-36, n.10. And Plaintiff's citations to the administrative record merely show "generic" potential injuries to suckers from the Project, which is insufficient to make the required showing of actual harm, or causation, from 2021-22 Project operations. *See CESAR*, 2016 U.S. Dist. LEXIS 115940, at *94-96; *cf. Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1134 (D. Haw. 2000) (without a "conclusive determination" that "harm" has occurred, courts deny motions for summary judgment on Section 9 claims). Thus, because Plaintiff's "case presents a complete absence of evidence" that Reclamation's 2021-22 Project operations

"harmed" suckers, and Plaintiff "cannot establish a genuine dispute of material fact," the Court should deny the Plaintiff's motion for summary judgment on its Section 9 claim, and grant KWUA's motion for summary judgment for this reason alone. *See CESAR*, 2016 U.S. Dist. LEXIS 115940, at *96.

**2. A Habitat Modification Claim Requires Proof of Harm**

Plaintiff's theory of its Section 9 case is that "C'waam and Koptu incontrovertibly inhabit UKL" and "Reclamation's operation of the Project under the 2021 and 2022 TOP's adversely modified C'waam and Koptu critical habitat" by affecting lake elevations in a manner not contemplated by the biological opinion. *See* Pl.'s Reply at 41, ECF No. 40. There is no allegation of direct harm to eggs, larvae, or "baby" suckers (i.e., juveniles). *See e.g.*, *id.* at 37 (arguing Reclamation delivered irrigation water "at the direct expense of preserving incremental spawning and rearing benefits"). This is a harm-by-habitat-modification Section 9 claim,[3] but Plaintiff does not meaningfully address the applicable legal standard.

There is an entire body of case law interpreting what it means to show take by habitat modification. This includes the requirement that the habitat modification actually kill or injure wildlife. *Bernal*, 204 F.3d at 925 (citing *Babbitt v. Sweet Home Chapter of Comtys. for a Great Or.*, 515 U.S. 687 (1995)) (explaining that "[h]arming a species may be indirect, in that harm may be caused by habitat modification, but habitat modification does not constitute harm unless it 'actually kills or injures wildlife' " and that plaintiff "had the burden of proving by preponderance of the evidence that the proposed construction would harm a pygmy-owl by killing or injuring it").

[3] Plaintiff's Reply notes that KWUA identified that *harm* is the proper standard to prove "take" via habitat modification, not *harassment*. Pl.'s Reply at 40, ECF No. 40. By then asserting, "even if this is the standard, the Tribes have satisfied it," and never raising *harassment* again, Plaintiff concedes that the *harm* standard controls whether "take" occurred in this case. *Id.*

It also includes the requirement that the habitat modification be "significant." 50 C.F.R. § 17.3 (harm 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") (emphasis added). "The word 'actually' before the words 'kills or injures' . . . makes it clear that habitat modification or degradation, standing alone, is not a taking pursuant to section 9. To be subject to section 9, the modification or degradation must be *significant*, must *significantly impair* essential behavioral patterns, and must result in *actual* injury to a protected wildlife species." *Ariz. Cattle Growers' Assn. v. U.S. Fish & Wildlife, BLM*, 273 F.3d 1229 (9th Cir. 2001) (quoting Final Rule, 46 Fed. Reg. 54748 (1981) (emphasis in original)); *see also Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1086-87 (D. Or. 2012); *United States v. W. Coast Forest Res. Ltd. Pship.*, Civil No. 96-1575-HO, 2000 U.S. Dist. LEXIS 19099, at *14 (D. Or. Mar. 10, 2000) ("Defendants correctly note, however, that this interference, alone, is not enough to satisfy the ESA. Rather plaintiff must also prove by a preponderance of the evidence that this interference will 'actually kill[] or injure[]' the owls") (internal citation omitted). This is the law of the ESA, and Plaintiff's Section 9 claim does not satisfy the harm standard.

The F&R finds that "it is beyond question that the suckers' spawning behaviors have been impaired" and that the "Tribes need not literally bring a dead fish" to court. F&R at 44, ECF No. 58. KWUA did not ask for a dead fish. KWUA argued that Plaintiff must show "actual" harm to the species from the UKL elevations that occurred ***in 2022***, which stayed well above the 4138.0 minimum, significance of the harm, and evidence that the Project was the but-for and proximate cause of the habitat modification. This evidence is not in the record.

**3. Plaintiff Never Addressed the Causation Requirement**

KWUA argued that Plaintiff must also prove causation. ECF No. 43 at 22-23; ECF

No. 29 at 42-44. "[I]t is well established that principles of proximate cause apply to [Section 9] claims." *Nat. Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 486-87 (E.D. Cal. 2018) (*Zinke*) (discussing the causation standards at length). Proof of harm also requires actual or "but for" causation. *See id.* at 488-92. Plaintiff did not address the elements of causation. That is, Plaintiff does not explain or prove that Reclamation's operation of the Project either actually or proximately caused the lower lake elevations that Plaintiff alleges adversely modified the suckers' habitat. In contrast, KWUA presented admissible evidence that Reclamation's operation of Link River Dam is not the only factor that affects lake elevations. Kirby Decl. ¶ 8, ECF No. 30. Indeed, there are about 200,000 acres of ranches or farms directly upstream or immediately adjacent to UKL that are not part of the Project, i.e., do not use Project water supply and divert from UKL or its tributaries. KWUA Opp'n at 13-14, ECF No. 29.

**4. Reclamation Complied with the ITS in the 2020 FWS BiOp**

Even if Plaintiff had produced admissible evidence on the required elements of "take," its claim still would not succeed because Reclamation complied with the ITS in the 2020 FWS BiOp. The F&R concludes that there is no "plausible reading" that Reclamation compiled with T&C 1c in the 2020 FWS BiOp because it allocated water to irrigation in 2022. F&R at 43, ECF No. 58. This is not the standard. Indeed, Reclamation followed the same process under T&C 1c in 2021 as it did in 2022, and the F&R found the 2021 process to be satisfactory. Federal Defendants addressed Reclamation's 2022 ITS compliance at length in its briefing, and KWUA incorporates those arguments here. *See* Fed. Defs.' Opp'n at 57-63, ECF No. 32. Plaintiff's Section 9 claim fails for this reason as well.

## V. CONCLUSION

For these reasons, the Court should not adopt the F&R. Instead, the Court should grant KWUA's motion for summary judgment because the case is moot, Plaintiff did not comply with

the jurisdictional notice provision for ESA citizen suits, and Plaintiff did not prove that Reclamation violated the ESA when operating the Project under the 2022 TOP.

SOMACH SIMMONS & DUNN, PC

DATED: November 15, 2023

By *s/ Brittany K. Johnson*
Brittany K. Johnson
Attorneys for Defendant-Intervenor
Klamath Water Users Association

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing will be e-filed on November 15, 2023, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

*/s Brittany K. Johnson*
Brittany K. Johnson