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**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

**MEDFORD DIVISION**

THE KLAMATH TRIBES, a federally recognized Indian Tribe,

Plaintiff,

v.

UNITED STATES BUREAU OF RECLAMATION,

and

UNITED STATES FISH AND WILDLIFE SERVICES

Defendants.

KLAMATH WATER USERS ASSOCIATION,

Defendant-Intervenor.

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

**THE KLAMATH TRIBES' RESPONSE TO U.S. BUREAU OF RECLAMATION'S PARTIAL OBJECTIONS TO FINDINGS AND RECOMMENDATIONS**

Judge: Honorable Mark D. Clarke

**TABLE OF CONTENTS**

## INDEX OF AUTHORITIES

### Cases



### Statutes

## INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 72 and this Court's Minute Order of October 24, 2023 (ECF 65), Plaintiff the Klamath Tribes ("the Tribes") hereby submit this consolidated response to the objections filed by Defendant United States Bureau of Reclamation ("Reclamation") (ECF 66) and Intervenor-Defendant Klamath Water Users Association ("KWUA") (ECF 67) (collectively "Defendants") to the proposed Findings and Recommendation (ECF 58) ("F&R") Magistrate Judge Clarke entered on the parties' cross-motions for summary judgment in this case. Defendants' objections restate the same arguments that were presented to Magistrate Judge Clarke[1] and that were properly rejected in the F&R. Thus, in addition to this response, the Tribes formally incorporate herein by reference their Motion for Summary Judgment (ECF 24) and Reply Brief in support of that motion (ECF 40). Magistrate Judge Clarke correctly found that there were no procedural reasons to dismiss the Tribes' claims brought under the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA"), that the Tribes were entitled to summary judgment on the merits of those claims, and that Defendants' cross-motions for summary judgment on those claims should be denied. ECF 58. Defendants disagree with Magistrate Judge Clarke's conclusions, but they fail to establish any factual or legal errors in the F&R. The Court should therefore adopt the F&R in full, grant the Tribes' motion for summary judgment, and deny Defendants cross-motions for summary judgment.

## BACKGROUND

As the Court is aware, the c'waam (Lost River sucker) and koptu (shortnose sucker) are two critically endangered species of existential importance to the Klamath Tribes. *Klamath Tribes*

[1] KWUA makes a belated attempt to present one wholly new argument to this Court regarding the Tribes' compliance with the Endangered Species Act's 60-day notice requirement. *See* ECF 67 at 17-18. That argument should be rejected as procedurally barred and substantively meritless. *See infra.* at 14-15.

*v. United States Bureau of Reclamation*, 537 F.Supp. 3d 1183, 1184-85 (D. Or. 2021). *See also Klamath Irrigation District v. United States Bureau of Reclamation*, 48 F. 4th 934, 939 (9th Cir. 2022). Found only in the Upper Klamath Basin, the few remaining members of these species grow older and closer to death with each passing year, raising the stakes for the Klamath Tribes when it comes to Reclamation's annual management decisions that impact the fish's ability to spawn and rear new young who will hopefully survive long enough to replace the aging adult members of the c'waam and koptu populations and stave off extinction. While Defendants strive to paint this case as a vestige of a prior operating regime and illustrative only of Reclamation's good faith efforts to make the best of a bad situation, the fact remains that the ESA is clear: when faced with a choice between protecting an endangered species and dedicating scarce resources to other interests, the needs of the endangered species must come first. Nor is this merely an academic question. Reclamation's maintenance of the minimum conditions in Upper Klamath Lake ("UKL") identified by the U.S. Fish and Wildlife Service ("USFWS") in its biological opinions are one of the very few things standing between the c'waam and koptu and their erasure from this planet.

Reclamation's decision in 2022 to take a bad situation for the fish and make it worse by choosing to provide too much water to the Project too early in the year violated the ESA, as Magistrate Judge Clarke correctly identified. In the process, Reclamation also violated NEPA. The declaratory relief the Tribes seek is vital to curb Reclamation from committing such an affront the next time it is faced with these competing demands – something that may occur again as soon as this spring. Contrary to Defendants' objections, there are no procedural bars to this Court entering the declaratory relief the Tribes need for the preservation of the c'waam and koptu. And such relief is warranted for the reasons set forth in Magistrate Judge Clarke's F&R and the Tribes' prior briefing in the matter. Nothing in Defendants' objections undercut the validity of Magistrate Judge

Clarke's recommendations on the merits of the Tribes' claims, and the Court should adopt the F&R in its entirety.

## ARGUMENT

### I. The Court should reach the merits of this case.

The Court has jurisdiction over this case. The mootness doctrine does not apply because this case plainly meets the "capable of repetition, yet evading review" exception to mootness. Nor should the Complaint be dismissed under the ESA's 60-day notice rule, as the Tribes provided statutorily sufficient notice.

#### *A. This case is not moot.*

Although the 2022 TOP is no longer in effect, that alone does not make this case moot. The burden of demonstrating mootness is "heavy" and it is borne solely by Defendants. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1993). Here, Defendants have failed to meet their burden, as this case involves a matter that will nearly certainly recur, and which by its very nature will escape review if this Court does not apply the "capable of repetition, yet evading review" exception to the mootness doctrine.

It is of course true that water year 2022 is over, and Reclamation has yet again attempted to revert to operating the Klamath Project ("Project") under the same Interim Operations Plan ("IOP") whose failures necessitated the 2022 TOP (as well as those in 2021 and 2023) and remains (as Reclamation has been continuously since 2020) in ESA consultation with USFWS and the National Marine Fisheries Service ("NMFS") regarding Project management. Still, these other actions do not mean that there is no longer a live controversy over the 2022 TOP. To the contrary, hydrological realities, the precarious condition of the c'waam (Lost River sucker) and koptu (shortnose sucker), the insistent and competing demands Reclamation faces for water in Upper

Klamath Lake ("UKL"), and Reclamation's persistent yet unsuccessful efforts to operate the Project under the IOP mean that the Tribes remain at great risk of being subject to the same actions in the future. This case therefore satisfies the "capable of repetition, yet evading review" exception to the mootness doctrine.

As its name indicates, this exception has two prongs: that a challenged action is of too short a duration to allow for completion of judicial review and that the action is nonetheless capable of repetition while evading such review. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016). As Magistrate Judge Clarke correctly recognized, and as Defendants implicitly concede, the duration of the 2022 TOP was indeed too short to allow for the completion of judicial review of challenges to it. ECF 58 at 25.[2] The "evading review" portion of the test is therefore satisfied.

The "capable of repetition" prong is met as well Reclamation has repeated its practice of using TOPs in each of 2021, 2022, and 2023, and is already faced with conditions that may necessitate another TOP in 2024. *See* Curtailment Letter (Dec. 15, 2023), attached hereto as Exhibit A (announcing changes to its current winter operations because "[t]he Klamath Basin is experiencing abnormally dry conditions" that threaten to "impact Reclamation's ability to ensure full compliance with [ESA] requirements"). Reclamation nonetheless argues that "the Tribes are not likely to be subjected to the same action again." ECF 66 at 11. But as Magistrate Judge Clarke correctly identified in response to this same argument from Reclamation, *see* ECF 58 at 25-26, Reclamation's opinion regarding what constitutes the "same action" is fundamentally flawed. For the Tribes to be subjected to the same action in a future year, Reclamation does not necessarily have to adopt an *identical* plan. Rather, even if a future plan is not identical to the 2022 TOP, the

[2] All citations to ECF documents are to their ECF rather than any internal pagination.

Tribes will still be subject to the "same action" so long as Reclamation is faced with conditions that require allocation of an undersupply of water and chooses yet again not to meet the minimum requirements for c'waam and koptu. As Magistrate Judge Clarke aptly stated, "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 [c'waam and koptu's] critical life functions." ECF 58 at 26. This is especially so where Reclamation continues to attempt to implement the same IOP that required it to promulgate TOPs in 2021, 2022, 2023, and where Reclamation is already facing conditions that may require it to deviate from the IOP for the fourth consecutive year during the spring/summer period in 2024.

Reclamation nonetheless urges this Court to adopt its myopic view of what constitutes the "same action" that Magistrate Judge Clarke correctly rejected, emphasizing that water allocation decisions are "highly fact-specific and dynamic." ECF 66 at 11. But irrespective of how "fact-specific" or "dynamic" annual water allocation decisions might be, Reclamation's argument misses the point. For the purposes of this case, the "same action" that will recur stems from a single factual predicate—drought conditions that create an undersupply of water. *See*, *e.g.*, *Ctr. for Envtl. Sci. v. Cowin*, No. 1:15-CV-01852-LJO-BAM, 2016 WL 1267572, at *6 (E.D. Cal. Mar. 31, 2016).[3] The next time there is an undersupply of water, Reclamation will necessarily have to make water allocation decisions that pose the risk of causing UKL elevation to drop below the necessary

[3] In its objections, Reclamation cites to *3 of this case for the proposition that the Tribes' claims are moot. ECF 66 at 15. Nothing on this page of the unpublished opinion speaks to mootness at all. Nor does the case as a whole support Reclamation's construction of it. Rather, the court found that the plaintiff there satisfied first prong of the "capable of repetition" mootness exception (that the challenged conduct was of too short a duration to fully litigate prior to its expiration), and set a supplemental briefing schedule as to the second prong after making a preliminary finding that similar drought conditions as those that triggered the initial complaint were likely to recur. *Ctr. for Envtl. Sci.* 2016 WL 1267572, at *6-7.

elevations for the c'waam and koptu's survival. Magistrate Judge Clarke was entirely correct to so find. ECF 58 at 26. [4]

Defendants cite several Ninth Circuit decisions they assert stand for the proposition that USFWS' issuance of a new biological opinion (BiOp) in 2023 automatically renders the Tribes' claims moot. ECF 66 at 15; ECF 67 at 16.[5] Yet none of these cases – *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008 (9th Cir. 2012); *Forest Guardians v. U.S. Forest Service*, 329 F.3d 1089 (9th Cir. 2003); *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996); and *Idaho Dep't of Fish and Game v. Nt'l Marine Fisheries Service*, 56 F.3d 1071 (9th Cir. 1995) – are so categorical. In *Grand Canyon Trust*, the Ninth Circuit dismissed as moot several claims predicated on an assertion that a since-replaced BiOp was itself violative of the ESA. 691 F.3d at 1015 1017. Here, by contrast, the Tribes have not challenged the *validity* of USFWS' BiOp, as the plaintiffs did in *Grand Canyon Trust*, but rather Reclamation's failure to abide by it. *Grand Canyon* therefore provides nothing to undercut the accuracy of Magistrate Judge Clarke's F&R.

*Forest Guardians* involves a bizarre fact pattern where a 1998 biological assessment (BA) was construed as having superseded a 1999 BiOp. 329 F.3d at 1095-96. The Ninth Circuit recognized this situation seemed "implausible" given that the relevant BiOp post-dated the issuance of the BA. *Id.* at 1096. However, it accepted the Forest Service's explanation that the earlier document in fact managed to supersede the latter. *Id.* Against this backdrop, the panel mooted out plaintiffs' ESA section 9 claim on the ground that it was predicated on an incidental

[4] For other record and case law citations on this "same action" point, the Tribes respectfully refer the Court to their reply brief in support of their summary judgment motion, where the Tribes addressed Reclamation's identical argument. ECF 40 at 19-22.

[5] The 2023 USFWS BiOp replaced the 2020 USFWS BiOp in place when the 2021 TOP was promulgated. But the two BiOps analyze the same underlying Reclamation action (the 2020 IOP) and contain materially similar assumptions and analytic frameworks. Compare generally 2022 AR 117 and 2022 AR 134.

take statement issued as part of the superseded 1999 BiOp. *Id.*[6] And it found plaintiffs' ESA section 7 claim moot because it construed that challenge as being based on assumptions contained in the superseded 1999 BiOp which were absent from the (now controlling) 1998 BA's analytic framework. *Id.* Nothing so abstruse is occurring in this case, where Reclamation continues to attempt to implement the same action that underpinned both the 2020 and 2023 USFWS BiOps, where the material assumptions and conditions of both BiOps remain the same, and where the other operative ESA document governing Reclamation's operation of the Klamath Project – the 2019 NMFS BiOp – remains completely unchanged.

In *Ramsey v. Kantor*, the Ninth Circuit recognized that challenges to an ocean "harvest plan" were mooted when the harvest plan was no longer in effect. 96 F.3d at 445-46. The court found that in promulgating future harvest plans, NMFS would be "basing its ruling on different criteria or factors[,]" and therefore the "capable of repetition, yet evading review" exception did not apply. *Id.* at 446. Here, by contrast, the same overarching criteria and factors remain in play, and we are heading toward the 2024 spring/summer period for which Reclamation is already forecasting potential challenges in meeting its ESA obligations. *See* Exhibit A.

*Idaho Dep't of Fish and Game* ("*IDF&G*") is even less helpful to Defendants' mootness arguments. As in *Grand Canyon Trust*, *IDF&G* involved a direct challenge to the *legality* of a consulting agency's BiOp (in that case NMFS') rather than (as here) an action agency's *compliance* with it. 56 F.3d at 1072. Even more significantly, the *IDF&G* court declined to apply the "capable of repetition yet evading review" standard to avoid finding mootness because the BiOp that replaced the originally challenged one was intended to run for five years, a duration the court found

[6] Because the 1998 BA had concluded that the challenged action would not adversely affect listed species (and thus did not trigger the preparation of a BiOp), it did not include an incidental take statement (unlike the 1999 BiOp, which had, the noncompliance with which was the gravamen of plaintiffs' section 9 claim). *Id.*

sufficient to allow for judicial review. *Id.* at 1075. The *IDF&G* court found the fact pattern before it therefore distinguishable from the one underpinning the Ninth Circuit's ruling in *Greenpeace Action,* where a challenged plan was followed by a short-term plan that wasn't in place for enough time to allow for judicial review. *Id.* But *Greenpeace Action* is the far better analogy to the Tribes' case. *See* 14 F.3d at 1329-1330. Here, the replacement USFWS BiOp covered only a nine-month period (and has since been replaced by a materially identical short-term BiOp intended to last only 12 months), and the "major issue" is whether Reclamation provides the necessary conditions in UKL to discharge its ESA obligations to the C'waam and Koptu. The contrast drawn by the *IDF&G* court between the facts before it and *Greenpeace Action* therefore bolsters rather than undercuts the Tribes' position and the correctness of the F&R.

As illustrated by the foregoing, Defendants have presented nothing to this Court to countermand Magistrate Judge Clarke's determinations in the F&R. The Tribes' claims are not moot.[7]

***B. The Tribes complied with the ESA's 60-day notice requirement.***

Magistrate Judge Clarke was correct to find that the Tribes satisfied the ESA's 60-day notice requirement prior to bringing this suit. The F&R properly rejected Defendants' efforts to construe those requirements more rigidly than Circuit precedent mandates and they offer nothing new to compel a different conclusion. Defendants' arguments asking this Court now to miss the forest for the trees should be similarly rejected.

The 60-day notice requirement is intended to allow agencies "an opportunity to review their actions and take corrective measures if warranted." *Sw. Ctr. For Biological Diversity v. U.S.*

[7] While the Tribes chose not to challenge the Magistrate Judge's recommendation on the merits of their summary judgment motion, that does not change the fact that issuance of the declaratory judgment the Tribes sought through that motion would still have provided the Tribes meaningful relief in regard to Reclamation's capable-of-repetition actions. The Tribes' substantive claims therefore were not procedurally mooted for that reason either.

*Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998). In this Circuit, the requirement is considered "jurisdictional," and parties seeking to bring a citizen suit must "strictly comply." *Id.* Still, the notice does not have to "describe every detail of every violation; it need only provide enough information that the defendant can identify and correct the problem." *Klamath-Siskiyou Wildlands Ctr. v. MacWhorter*, 797 F.3d 645, 651 (9th Cir. 2015) (citation omitted). In determining whether the requirement has been satisfied, the court must focus on the "overall sufficiency" of the notice. *Id.* In addition to the notice itself, a reviewing court may look to circumstantial evidence such as the behavior of the recipient agency to determine whether the agency "understood or reasonably should have understood the alleged violations." *Id.* That is, while the *requirement* of providing notice must be strictly construed, the manner and content in which the required notice must be provided by a prospective plaintiff may be evaluated with more sensitivity to the context and pre-existing relationship between or among the parties involved. Defendants' "hypertechnical" approach to the 60-day notice question here is of a piece with the approach rejected by Judge Aiken in *Cascadia Wildlands v. Scott Timber Co.*, 328 F. Supp. 3d 1119, 1129-30 (D. Or. 2018).

Here, the Magistrate Judge properly recognized that the Tribes' March 10, 2022, letter satisfied the 60-day requirement. ECF 58 at 29-30. In that letter, the Tribes specifically drew Reclamation's attention to its ESA obligations and even warned that it would likely be "necessary" for Reclamation to make "no water deliveries this year to Klamath Project irrigators" in order to comply with its ESA obligations. 2022 AR 43 at BOR001260. Because Reclamation was specifically informed that withholding water from irrigators would be "necessary" in order to comply with the ESA, Reclamation was plainly on notice that failure to deviate from this instruction may result in a citizen suit under the ESA.

This is especially so in light of the prior litigation between the Tribes and Reclamation regarding the management of UKL and Reclamation's compliance (or lack thereof) with USFWS BiOps, the ongoing dialogue between the parties, and the Tribes' "longstanding advocacy" for the c'waam and koptu. *See Cascadia Wildlands*, 328 F.Supp. 3d at 1130. The Tribes' March 10 letter incorporated by reference letters the Tribes sent the previous year, and explicitly stated that because drought conditions were similar to 2021, the Tribes "could largely just cut and paste the text of the letters we sent to the Bureau of Reclamation last March and April to explain our fears and concerns as we head into the spring/summer period of this year." 2022 AR 43 at BOR001260. The cross-reference to the letters preceding the 2021 suit coupled with the 60-day notice the Tribes sent in 2021 undeniably put Reclamation on notice that another lawsuit would occur if Reclamation did not comply with its ESA obligations to the c'waam and koptu in 2022. Reclamation resists the relevance of the 2021 Notice letter to this inquiry, ECF 66 at 22-23, but can provide no authority in support of its position.

Reclamation also argues that the March 10 letter was "procedurally" deficient because it was an "anticipatory or pre-violation notice." ECF 66 at 21. KWUA makes a similar argument. ECF 67 at 19. This is a distorted characterization of the letter. Though the letter was primarily forward-looking, it nonetheless clearly provided notice of the alleged violations. The letter even said that withholding water from Project irrigators would likely be a "necessary" step in order for Reclamation to comply with the ESA. Thus, Reclamation could not reasonably claim that it was unaware of any potential liability associated with allocating water to the irrigators while not maintaining the necessary conditions for c'waam and koptu in UKL.

Moreover, contrary to Reclamation's argument, *see* ECF 66 at 21, the "weight of authority" does *not* hold that anticipatory notices are insufficient as a matter of law. Rather, as this district

has expressly recognized, "neither the statute nor the case law supports a bright-line rule against anticipatory notice of future violations." *Cascadia Wildlands*, 328 F. Supp. 3d at 1131. Rather, as the Tribes explained in their summary judgment briefing before Magistrate Judge Clarke, ECF 40 at 25-26, even wholly anticipatory notices may be compliant with the ESA's 60-day requirement. Properly interpreted, considering the purposes of the ESA, allowing "pre-violation" notices makes perfect sense. After all—as recognized in *Cascadia Wildlands*—the ESA was enacted largely to resolve issues "*before* harm to a species occurs." *Id.* at 1131 (emphasis in original) (citation omitted). This purpose would be frustrated if pre-violation notice was deemed invalid. So long as the notice sufficiently informs the agency of the alleged ESA violation, it is valid. The Tribes cleared that bar here.

Finally, although both Defendants refer to the fact that the March 10 letter was not addressed to the Secretary of the Interior, only KWUA actually makes the argument that this fact provides an independent basis for concluding that the Tribes' failed to comply with the 60-day notice requirement. But this argument is both procedurally and substantively infirm. As a procedural matter, it has been waived for failure to raise it earlier in the proceedings. It is well-established that "[i]ssues raised for the first time in objections to the magistrate judge's recommendation are deemed waived." *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996); *see also Greenhow v. Sec. of Health and Human Services*, 863 F.2d 633, 638 (9th Cir. 1988) ("We do not believe that the Magistrates Act was intended to give litigants an opportunity to run one version of their case past the magistrate, then another past the district court."), *overruled on other grounds by United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992).[8] While the Court may

[8] To the extent Reclamation can be viewed as suggesting this argument as well despite merely referencing that the Secretary was not the formal addressee of the Tribes' March 10 or April 14 letters in footnotes in its brief, ECF 66 at 20 n.4, 21 n.5, arguments that are not made "specifically and distinctly," such as an argument made "in a terse one-sentence footnote," are deemed waived. *Recycle for Change v. City of Oakland*, 856 F.3d 666, 673 (9th Cir. 2017).

nonetheless have some discretion to consider an argument not raised before the Magistrate Judge, this case is not remotely comparable to the only authority cited by KWUA for that proposition, ECF 67 at 17 n. 2, which involved a pro se criminal defendant. *Brown v. Roe*, 279 F.3d 742, 745 (9th Cir. 2002). Indeed, the *Brown* court specifically relied on both the pro se status of the litigant and the "relatively novel claim under a relatively new statute" as a primary reason for choosing to depart from the standard rule that issues not raised before the magistrate judge are waived. *Id.* Here, by contrast, KWUA (and the United States) are represented by experienced counsel and the late argument they are seeking to advance is neither novel nor implicating a new statute. The Court should decline KWUA's invitation to exercise whatever discretion it may possess to consider this belated argument.

Substantively, even were the Court inclined to consider the argument, the contention has no merit because there is no basis for concluding that the Secretary did not receive notice of the alleged ESA violations, irrespective of the formal addressee of the Tribes' March 10 letter.[9] Reclamation's failure to assert in its objection that she did not receive notice (while simultaneously noting in footnotes that the Tribes' letter was not addressed to the Secretary) should be viewed as dispositive on this point, as the Department of the Interior would be the custodian of any such information. Magistrate Judge Clarke was correct to find that the Tribes complied with the 60-day notice requirement. The Court should adopt this conclusion.

## II. The Tribes are entitled to summary judgment on all claims.

[9] The letter was addressed to the Secretary's counselor responsible for representing the Secretary in the Klamath Basin, as well as copied to two different Assistant Secretaries of Interior among others. 2022 AR 43 at BOR001261. This is therefore not a case where a notice letter was sent only to regional or field officials, representatives of other federal departments or agencies, or to non-federal prospective defendants. The three cases cited by KWUA in support of its argument on this point are therefore all readily distinguishable.

On the merits, the Court should adopt the F&R's conclusions in their entirety. Reclamation violated Sections 7 and 9 of the ESA. It also violated NEPA. Magistrate Judge Clarke was correct, and Defendants' arguments to the contrary should be rejected.

### *A. Reclamation violated the ESA*

Congress enacted the ESA in 1973 with the intent "to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). Section 7 of the ESA requires federal agencies to ensure that their actions do not jeopardize the continued existence of an endangered species or threaten to destroy or adversely modify their habitat; and Section 9 prohibits anyone (including federal agencies) from the unpermitted "take" of a listed species, with the term "take" defined broadly. *See* 16 U.S.C. § 1536(a)(2), 16 U.S.C. § 1538(a)(1)(B). Reclamation violated both provisions.

#### 1. Section 7

The administrative record may be voluminous and complicated, but the core facts are not in dispute.[10] Section 7 of the ESA prohibits jeopardizing a listed species or adversely modifying its critical habitat. 16 U.S.C. § 1536(a)(2). The Tribes' assert that Reclamation's decision in 2022 to provide more UKL water to Project irrigators than Reclamation's own water allocation formula allowed, and to start doing so early in a spring where the c'waam and koptu were already suffering from a third consecutive year of drought and from UKL conditions worse than those USFWS determined to be minimally protective of their needs, violated these Section 7 commands. *See* ECF 24 at 34-39; ECF 40 at 36-40. In ruling for the Tribes on their ESA Section 7 claim, Magistrate Judge Clarke agreed, noting that in 2022 "severe drought conditions were not an excuse for

[10] No party to this case asserts that there are any genuine issues of materials fact rendering summary judgment inappropriate. The extensive factual background of this matter is recounted in the F&R, ECF 58 at 2-21, and also set out in the Tribes' summary judgment brief. ECF 24 at 9-34.

Reclamation to abandon its ESA obligations to the [c'waam and koptu] in UKL and instead allocate water for Klamath Project irrigators." ECF 58 at 39.

Building on principles articulated in *Tenn. Valley Auth. v. Hill*, 437 U.S. at 184 , and *Klamath Irrigation District v. U.S. Bureau of Reclamation*, 69 F. 4th 934, 939 (9th Cir. 2023), and distinguishing between what may be permissible when Reclamation allocates a limited water supply solely between or among listed species and what may be permissible when it allocates such as limited supply as between listed species on one hand and Project irrigators on the other, Magistrate Judge Clarke explained that "Reclamation's ESA obligations required it to take all steps necessary to avoid jeopardizing the [c'waam and koptu], even if that meant allocating no water to Project irrigators…." ECF 58 at 39. This is so not because the fish have an abstract entitlement to the water, but because of "the abundance of evidence in the record linking decreased elevation levels in UKL to the [c'waam and koptu's] population decline. *Id.* at 40-41. Where Reclamation disregarded USFWS' admonition "to take any available steps to maintain UKL elevations as high as possible through July 15" in light of the already-poor conditions facing the species, and instead pushed an unjustified amount of water out of UKL for Project irrigators in contravention of Reclamation's own water allocation formula, Magistrate Judge Clarke was entirely correct to find that "Reclamation's actions violated Section 7 of the ESA." *Id.* at 40.

Reclamation identifies three reasons that Magistrate Judge Clarke's well-reasoned assessment of the Tribes' Section 7 claim should be set aside by this Court. It suggests that Magistrate Judge Clarke misinterpreted the thrust of the letter USFWS sent Reclamation on April 11, 2022, in response to Reclamation's transmission of the 2022 TOP to USFWS. ECF 66 at 27. It contends Magistrate Judge Clarke paid insufficient attention to the fact that the TOP committed to maintaining a slightly increased end-of-season UKL elevation level. *Id.* at 28. And it wants to

quibble about whether the correct Project allocation was 36,000 acre-feet of water (AF) rather than zero (this despite that the actual allocation Reclamation made was 62,000 AF and that, as Reclamation notes, "the TOP also made that irrigation allocation available earlier in the season…than otherwise would have been the case" under Reclamation's regular operating protocol). *Id*. The Court should credit none of these arguments, all of which ultimately hinge on the question of whether Reclamation's decision to allocate extra, early water to the Project can be construed as a "corrective" action under the terms of the USFWS BiOp's Incidental Take Statement.

The corrective action question lies at the core of this case since (contrary to KWUA's tortured effort to reframe the Tribes' actual claims as some sort of *sub rosa* attack on the USFWS BiOp itself, *see* ECF 67 at 21-23[11]), if Reclamation was unable to meet the USFWS BiOp's baseline UKL elevations requirements for c'waam and koptu, Reclamation had "to adaptively manage" the situation "and take corrective actions" to mitigate the harm to the species in order to remain compliant with its substantive ESA obligations (and to be able to continue to shelter under the USFWS BiOp's Incidental Take Statement). 2022 AR 117 at BOR003650. Acknowledging that the Ninth Circuit has made clear that the irrigators' needs are "subservient" to those of the c'waam and koptu (and other listed species in the Klamath Basin), *Klamath Water Users Protective Ass'n. v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999), Reclamation itself concedes that it "must meet ESA requirements before it may fulfill irrigation obligations." ECF 66 at 27. But that is not what it actually did in 2022.

[11] Magistrate Judge Clarke properly rejected this argument when it was presented to him. ECF 58 at 40-41. KWUA offers nothing new in its objection to warrant accepting it now.

Reclamation is not wrong to posit that increasing the end of season elevation target is potentially corrective.[12] But there is no plausible way to similarly construe the allocation of extra, early water to Project irrigators – especially in the face of USFWS' request in its April 11 letter for "Reclamation to take any available steps to maintain UKL elevation as high as possible through July 15." 2022 AR 52 at BOR001435. Nor would protecting both early season and end-of-season elevations be redundant. The minimum end-of-season elevation requirement is intended to protect adult c'waam and koptu from avian predation while they seek refuge from the adverse water quality events that so frequently plague UKL during the summer. 2022 AR 117 at BOR003561-62. As Magistrate Judge Clarke recognized, however, protecting early season elevations is important for the surviving adults to be able to spawn and rear the next generation of fish to perpetuate the species. ECF 58 at 39-40. While the irrigation water Reclamation provided was not itself the difference between Reclamation's ability to meet the minimum BiOp requirements and its failing to do so, Reclamation would have the Court overlook the fact that as UKL elevations decrease below those minimums, spawning and rearing conditions continue to worsen, *see* 2022 AR 117 at BOR003555-58, which is precisely why USFWS's April 11 letter sought Reclamation's commitment to maximize the potential July 15 elevation. Reclamation's inappropriate provision of irrigation water, particularly starting so early in the season, was thus the antithesis of a corrective action. Magistrate Judge Clarke was right to find so. ECF 58 at 43.

Without disputing that Reclamation indeed gave the Project more water than Reclamation's allocation formula warranted, both Reclamation and KWUA also argue that Magistrate Judge Clarke inaccurately characterized the appropriate size of that allocation. ECF 66 at 28; ECF 67 at

[12] As 2023 illustrated, however, there can be significant daylight between Reclamation's identification of an end-of-season elevation target and its actual ability to meet it. *See* U.S. Bureau of Reclamation's Notice Regarding 2023 Annual Operations Plan, filed as Dkt. 1163-1 in *Yurok Tribe v. Bureau of Reclamation*, Case No. 3:19-cv-04405-WHO (September 7, 2023), and attached hereto as Exhibit B.

21. Even if this were so (and a fair reading of the F&R indicates that it is not),[13] it would not change the underlying accuracy of the F&R because there is no dispute that Reclamation provided the Project irrigation water above and beyond what it should have at a time when it was incapable of meeting the minimum elevation requirements of the USFWS BiOp. That is precisely the anti-corrective action discussed above that demonstrates Reclamation's liability for the Tribes' claims.

Moreover, both Defendants mischaracterize the F&R on this point. Magistrate Judge Clarke correctly grasped the fact that at the time Reclamation began allowing Project irrigators to take UKL water, Reclamation's allocation formula dictated a zero AF allocation to the Project for 2022. ECF 58 at 40.[14] Defendants' contention that on *June 1*, the allocation formula would have called for a 36,000 AF allocation ignores the fact that *no* irrigation water should have been available prior to that point and yet Reclamations 2022 TOP authorized the commencement of agricultural diversions on *April 15*. *See* 2022 AR 57 at BOR001532. (It also ignores the fact that Reclamation told Project irrigators in July of 2022 that the June 1 volume calculated by the allocation formula was 29,000 AF, 2022 AR 121 at BOR000122, not 36,000 AF and certainly not the 62,000 AF Reclamation actually authorized under the 2022 TOP. 2022 AR 57 at BOR001532.) It certainly provides no basis for rejecting the F&R.

**2. Section 9**

[13] Reclamation correctly explains that its allocation formula provides for the potential recalculation of the volume of water for the Project on April 1, May 1, and June 1 of each year. ECF 66 at 28. Magistrate Judge Clarke's references to the Project being entitled to no water in 2022 are both made in the context of faulting Reclamation for prioritizing irrigator needs over the c'waam and koptu's and beginning to provide irrigation water when the Project allocation in fact should have been zero under the allocation formula (i.e. prior to June 1). ECF 58 at 39 ("Reclamation's ESA obligations required it to take all steps necessary to avoid jeopardizing the [c'waam and koptu], *even if* that meant allocating no water to Project irrigators for a second consecutive year.") (emphasis added); *id.* at 40 ("However, the fact that Reclamation reduced surface flushing flows to the Klamath River [an event that occurred in April 2022] does not help explain why Reclamation *increased* the irrigation allocation that would otherwise have been set at zero for the year.") (emphasis in original). He clearly did not misapprehend the mechanics of the Project allocation.

[14] Reclamation acknowledges as much. ECF 66 at 28 ("the April 1, 2022 Natural Resources Conservation Service forecast would have set the initial irrigation allocation at zero"). The Tribes provided a more expansive discussion of Reclamation's allocation formula in their summary judgment brief. ECF 24 at 29-30.

Defendants' challenges to Magistrate Judge Clarke's analysis of Reclamation's liability for violating Section 9 of the ESA are no better grounded. Section 9 of the ESA prohibits Reclamation from taking any listed species unless the taking is within the safe harbor provision of an Incidental Take Statement ("ITS"). 16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1536(a)(2). By subjecting the c'waam and koptu spawning and rearing in UKL during the spring and summer of 2022 to materially worse conditions by improperly release extra, early irrigation water, the antithesis of a corrective action, Reclamation forfeited the protection of the USFWS BiOp's ITS. Magistrate Judge Clarke appropriately found so, ECF 58 at 43-44, and Reclamation's only argument now to the contrary is predicated on the contention that it took appropriate corrective measures. ECF 66 at 29. As discussed above, it did not. Any take Reclamation committed in its operation of the Project under the 2022 TOP therefore violated Section 9. *See Arizona Cattle Growers' Ass'n. v. United States Fish and Wildlife Service*, 273 F.3d 1229, 1239 (9th Cir. 2001).

While KWUA once again wishes to argue that the Tribes failed to prove take, ECF 67 at 25-27, Magistrate Judge Clarke correctly rejected this contention, ECF 58 at 43-44, and KWUA offers nothing new at this stage of the proceedings. The harm to the c'waam and koptu was not merely "rhetoric," as KWUA claims. *See* ECF 67 at 23. Rather, it is the only rational conclusion that can be drawn from the voluminous administrative record, which included USFWS' opinion that lower UKL elevations will correlate to "reduced spawning durations" and result in more vulnerable larvae. *See* 2022 AR 117 at BOR003643. As discussed above, Reclamation's improper and early provision of irrigation water directly subjected c'waam and koptu to worse spawning and rearing conditions than they otherwise would have faced in UKL. Particularly given how close both species are to the brink of extinction and the age of the remaining surviving adults, any diminution in the opportunity to spawn and rear baby fish constitutes a significant impairment of

essential behavior patterns. There is more than enough inferential evidence to support a finding of take, as Magistrate Judge Clarke correctly concluded. ECF 58 at 43-44. KWUA claims it is not asking for a "bring a dead fish to court" standard. ECF 67 at 26. Yet its challenge to Magistrate Judge Clarke's determination that the Tribes proved take would have the Court close its eyes to all else.

### *B. Reclamation violated NEPA*

The Court should also accept Magistrate Judge Clarke's conclusion that Reclamation violated NEPA by failing to conduct an adequate assessment of the environmental impacts of the 2022 TOP.

Reclamation contends that Magistrate Judge Clarke applied an incorrect standard in evaluating the Tribes' NEPA claim and in concluding that Reclamation violated NEPA by conducting an inadequate analysis of the environmental effects of the 2022 TOP. ECF 66 at 29.[15] Specifically, Reclamation's objection is predicated on its contention that Magistrate Judge Clarke would require Reclamation to conduct a cumulative effects analysis in a Determination of NEPA Adequacy document ("DNA"), something Reclamation says NEPA does not require. *Id.* at 32-33. But this is not what Magistrate Judge Clarke did. Instead, he carefully examined both NEPA's requirements and Reclamation's use of a DNA to assess the adequacy of the pre-existing documents (a 2020 Environmental Assessment ("EA") and a 2021 Supplemental Environmental Assessment ("SEA")) upon which Reclamation intended to rely for NEPA coverage for the 2022 TOP in order to answer precisely the question Reclamation agrees is the relevant one: whether "the existing analyses adequately addressed the potential impacts of the proposed action and evaluated whether new circumstances required new analysis." ECF 66 at 33.

[15] KWUA does not object to the NEPA portion of the F&R. ECF 67 at 11.

Reclamation claims Magistrate Judge Clarke erred when he answered that question in the negative and found that the analysis in the EA and SEA did not properly account for the potential cumulative environmental effects of the 2022 TOP. ECF 58 at 49-50.[16] But the error is Reclamation's, as neither the 2020 EA nor the 2021 SEA could possibly have provided adequate cumulative effects analysis for the 2022 TOP because the conditions necessitating that TOP were, in Reclamation's own word, "exceptional[,]" ECF 66 at 26, and "unprecedented[.]" *Id.* at 33. While the UKL elevations anticipated under the 2022 TOP may themselves have been within the scope of the elevations contemplated in the 2020 EA or 2021 SEA, nothing in either of those documents nor in the DNA provide any meaningful analysis of the potential effects to the c'waam and koptu (or any other constituent part of the Klamath Basin's ecosystem) of being subject to three consecutive years of disruption to core spawning and rearing activities,[17] a series of hydrologic conditions far outside anything anticipated by either Reclamation or USFWS. *See* 2022 AR 117 at BOR00003615-16 ("[T]he function of [spawning and rearing] habitat would be adversely affected in years when lake levels are extremely low, which would diminish its ability to provide essential habitats to juvenile [c'waam and koptu]. However, such conditions are anticipated to be rare…making it unlikely it would occur [during the 2020-2023 period].")

Because the DNA itself also failed to analyze such potential cumulative effects (a task a DNA is not intended to handle and one the F&R do not require of it), Magistrate Judge Clarke concluded that Reclamation had not taken the "hard look" at its action that NEPA requires. ECF 58 at 50. *See also Oregon Nat. Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). This is

[16] The Tribes provided a more detailed discussion of the underlying 2020 EA and 2021 SEA in their summary judgment brief. ECF 24 at 45-48. The Tribes also responded at some length to Reclamation's defense before Magistrate Judge Clarke of its 2022 NEPA efforts – which largely mirrors its substantive NEPA arguments in the instant objections – in their summary judgment reply brief. ECF 40 at 45-48. Magistrate Judge Clarke fairly considered the arguments and determined that the Tribes had the better of them.

[17] As in 2022, UKL elevations had dropped below the minimum conditions identified in the USFWS BiOp during the April-July period in both 2020 and 2021. *See* 2022 AR 94 at BOR002234-25

not the application of an inappropriate standard. This is a straightforward application of the facts to the law, particularly considering the DNA's implausible assertion that "no new information or change in environmental…circumstances has occurred since 2020…." 2022 AR 53 at BOR001418. Reclamation's objection should be rejected, and the Court should adopt the F&R on this issue as well.

## CONCLUSION

C'waam and koptu continue to hover on the precipice of extinction. The declaratory relief sought by the Tribes and found warranted by Magistrate Judge Clarke in the F&R is a vital tool to curb Reclamation's illegal conduct and help forestall an irremediable catastrophe. Magistrate Judge Clark fully considered the arguments before him, authored fair and reasoned findings and recommendations, and nothing Defendants now proffer to the Court undercut the accuracy of the F&R. The Court should reject Defendants' objections, accept Magistrate Judge Clarke's F&R in full, deny Defendants' respective motions for summary judgment, and grant the Tribes' motion for summary judgment.

Respectfully submitted this 22nd day of December, 2023.

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 7,180 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

Respectfully submitted this 22nd day of December, 2023.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Response to U.S. Bureau of Reclamation's Partial Objections to Findings and Recommendations was e-filed on December 22, 2023, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

Dated: December 22, 2023

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