

**Nos. 23-15499 and 23-15521 (Consolidated)**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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YUROK TRIBE; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS;  
INSTITUTE FOR FISHERIES RESOURCES; HOOPA VALLEY TRIBE,  
*Plaintiffs/Joined Cross-Claimants/Appellees,*

and

UNITED STATES OF AMERICA,  
*Cross-Claimant/Counterclaim-Defendant/Appellee,*

and

KLAMATH TRIBES,  
*Intervenor-Defendant,*

v.

KLAMATH WATER USERS ASSOCIATION,  
*Crossclaim-Defendant/Counter-Claimant/Appellant,*

and

KLAMATH IRRIGATION DISTRICT,  
*Joined Crossclaim-Defendant/Appellant,*

and

OREGON WATER RESOURCES DEPARTMENT,  
*Crossclaim-Defendant.*

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On Appeal from the United States District Court  
for the Northern District of California  
No. 3:19-cv-04405-WHO  
Hon. William H. Orrick

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**APPELLANT'S OPENING BRIEF**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the nongovernmental corporate parties state as follows:

Klamath Water Users Association has no parent corporation or any publicly held corporation owning 10 percent or more of its stock.

Date: October 16, 2023

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## INTRODUCTION

The Klamath Reclamation Project stores, diverts, and delivers irrigation water for approximately 200,000 acres of farmland, as well as two prized national wildlife refuges. Agriculture is the cornerstone of the Klamath Basin community, supporting family farms, farm employees, agriculture support businesses, food production, and main street. The critical infrastructure that provides the water supply for this community is currently operated according to legal guidance that is obsolete.

The U.S. Bureau of Reclamation (Reclamation) owns and operates Link River Dam, which creates and controls storage in Upper Klamath Lake in Oregon. Two endangered sucker species inhabit Upper Klamath Lake, and threatened coho salmon inhabit the downstream Lower Klamath River in California. Reclamation owns certain works that divert and deliver water to farms, but all of the diversion and delivery system is operated by non-federal parties.

The chronic conflict in the Klamath Basin is rooted in the United States' policy for compliance with and formal consultations under Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2) (Section 7(a)(2)), for Klamath Project operations. The United States has maintained an entrenched position on how Section 7(a)(2) is applied—a position from generalized guidance from the 1990s. No matter what major event has occurred—a seminal Supreme

Court case, decisions of this Court applying that precedent, amendments to regulations, its own position in other litigation, or the completion of a decades-long water rights adjudication—the United States has not confronted its outdated guidance. In the meantime, in other litigation, the United States has asserted, and courts have agreed with, positions that are directly at odds with the antiquated Klamath Basin approach.

The core issue is *what* does Section 7(a)(2) require with respect to Klamath Project operations, which involves multiple actions, by multiple federal and non-federal parties, under perpetual contracts executed decades ago. The district court did not answer this question, which requires careful analysis of what actions are and are not discretionary. Instead, the district court found that because Reclamation has general rulemaking authority, it has plenary discretion to do as it pleases in the name of ESA compliance. The district court thus improperly ignored the perpetual contracts with Project beneficiaries that affect the scope of Reclamation's discretion.

Appellant Klamath Water Users Association (KWUA) asks this Court to rule on the core issues presented, examine the authorities controlling the Project and the contracts with water users, and find that, based on these authorities and obligations, Reclamation does not have discretionary authority to curtail, or direct the curtailment of, the storage, diversion, and delivery of water from the Klamath

Project for irrigation to benefit threatened or endangered species. KWUA also requests that the Court confirm the provisions of federal law that explicitly mandate that Reclamation comply with state water law.

Finally, KWUA asks that the Court recognize that certain KWUA arguments in response to the United States' arguments in the district court did not impermissibly seek to have the district court adjudicate water rights. This issue is relevant to the extent that the United States continues to assert arguments in this Court that it asserted in the district court, as discussed further below.

### **JURISDICTIONAL STATEMENT**

The district court had jurisdiction over the U.S. Crossclaim and KWUA's Counterclaim under 28 U.S.C. §§ 1331 (federal question), 1345 (United States as plaintiff), 2201(a), 2202 (Declaratory Judgment Act), and 5 U.S.C. §§ 702, 704 (Administrative Procedure Act).

Pursuant to 28 U.S.C. § 1292(a)(2), Appellant timely appealed the order granting summary judgment on the First Cause of Action in the U.S. Crossclaim and KWUA's First Counterclaim, and granting and denying injunctive relief, on April 4, 2023. 12-KWUA\_ER-2837-43. The district court entered final judgment under Federal Rule of Civil Procedure 54(b) on the First Cause of Action in the U.S. Crossclaim and KWUA's First Counterclaim. 1-KWUA\_ER-0002-6. Accordingly, this Court has jurisdiction to hear this appeal pursuant to 28 U.S.C.

§ 1291. *See Freeman v. Hittle*, 747 F.2d 1299, 1302 (9th Cir. 1984) (where a notice of appeal is filed before a Rule 54(b) certification is entered by the district court, “a 54(b) certification is sufficient to validate a premature notice of appeal” if neither party is prejudiced).

### **ISSUES PRESENTED FOR REVIEW**

1. Whether Reclamation has discretionary authority to curtail, or direct the curtailment of, the storage, diversion, and delivery of water from the Klamath Project for irrigation to benefit threatened or endangered species?
2. Whether Reclamation’s compliance with, and state enforcement of, state water law stands as an obstacle to Reclamation’s compliance with the ESA such that state water law is preempted by federal law?
3. Where the United States argued that the existence of claimed, unadjudicated federal reserved water rights is a source of discretionary authority triggering the application of Section 7(a)(2), whether the district court abused its discretion in granting Plaintiffs’ motion to strike KWUA’s arguments that were directly responsive to the United States’ arguments?

### **STATUTORY AND REGULATORY AUTHORITIES**

Relevant statutes and regulations are reproduced in the Addendum to this brief.

## STATEMENT OF THE CASE

### I. Section 7(a)(2) of the ESA

Section 7(a)(2) requires that federal agencies “insure” that actions authorized or carried out by the agency not jeopardize the continued existence of ESA-listed species or cause destruction or adverse modification of “critical habitat.”

16 U.S.C. § 1536(a)(2). This is an agency’s substantive obligation under Section 7(a)(2). *Sierra Club v. Babbitt*, 65 F.3d 1502, 1504-05 (9th Cir. 1995) (*Babbitt*). The ESA and its implementing regulations spell out a consultation process for evaluating the effects of a discretionary proposed action; the process asks what impacts the proposed discretionary action will cause. 16 U.S.C. § 1536(b)-(c); 50 C.F.R. §§ 402.01-402.03, 402.10-402.16. This consultation process is the agency’s procedural obligation to obtain the biological opinion of the consulting agency on the effects of a discretionary action. *Babbitt*, 65 F.3d at 1504. Upon receipt of the biological opinion, the action agency decides how to proceed in light of its substantive Section 7(a)(2) obligation. 50 C.F.R. § 402.15.

Crucial to the implementation of the ESA is the definition of the proposed agency action. This is because Section 7(a)(2) only applies to “actions in which there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03 (emphasis added); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-73 (2007) (*Home Builders*). Thus, a nondiscretionary action is not an

action that is subject to Section 7(a)(2)'s no-jeopardy mandate or an action on which an agency must consult.

Recent updates to the ESA regulations confirm the importance of defining the proposed action and identifying discretionary action. This task is relevant both to confirming the scope of the activity that the agency can potentially modify, and to clarifying the environmental baseline. *See, e.g.*, 50 C.F.R. § 402.02 (defining “environmental baseline” to exclude the consequences “from ongoing agency activities or existing agency facilities that are not within the agency’s discretion to modify”); Final Rule, 84 Fed. Reg. 44,976, 44,978-79 (Aug. 27, 2019) (explaining intent of revision and application of rule to water projects). In 2023, the Service proposed more revisions and confirmed that the 2019 additions related to discretion and environmental baseline codified past agency practice. Proposed Rule, 88 Fed. Reg. 40,573, 40,575-56 (June 22, 2023).

## **II. Procedural Background**

KWUA’s members are irrigation districts and other public agencies that are parties to perpetual contracts with Reclamation for storage, diversion, and delivery of water by means of Klamath Project infrastructure. KWUA appeals the district court’s: (1) denial of its motion for summary judgment on KWUA’s First Counterclaim, which sought determination that Reclamation lacks discretion to curtail Project water deliveries, or to violate state water law, in order to benefit

ESA-listed species; (2) grant of summary judgment of the United States and Plaintiffs on their First Cause of Action, which sought determination that state orders enforcing state water law were preempted by the ESA.

Plaintiffs Yurok Tribe, et al., initiated this case in 2019. 12-KWUA\_ER-2844. After staying the litigation in 2020, 9-KWUA\_ER-2066-73, the district court lifted the stay in 2021 for the limited purpose of allowing the United States to file a Crossclaim against the Oregon Water Resources Department (OWRD) and KWUA, challenging the lawfulness of OWRD Orders to Reclamation that enforced state water law. 8-KWUA\_ER-1767-72 (Bifurcation Order); 2-KWUA\_ER-0234-36 (conditioning litigation of the Crossclaim on the terms of a stipulation among various parties); 7-KWUA\_ER-1669-1683 (permitting Plaintiffs' joinder in the United States' Crossclaim); 8-KWUA\_ER-1773-77 (joinder of Hoopa Valley Tribe). Under the Bifurcation Order, the litigation of the Crossclaim proceeded in two phases. The first phase consisted of briefing the First Cause of Action on the ESA basis for the Crossclaim, which could "not seek a ruling with respect to tribal rights beyond a ruling on the applicability of the ESA to Klamath Project operations." The second phase will address the Second Cause of Action on the non-ESA, tribal water rights basis for the Crossclaim. 8-KWUA\_ER-1776-77, 1772.

KWUA asserted two Counterclaims. The First Counterclaim seeks a declaration that the ESA neither authorizes nor requires Reclamation to curtail, or direct the curtailment, or storage, diversion, and delivery of water for irrigation to benefit listed species, and that Reclamation does not have an obligation to release stored water from Upper Klamath Lake to benefit listed species. The Second Counterclaim (for Phase Two) seeks declarations related to the existence of claimed downstream tribal rights in California, the United States' obligations to determine or quantify those rights, and the use of stored water to satisfy those rights. 7-KWUA\_ER-1719-22.

On February 6, 2023, the district court granted the United States' and Plaintiffs' motions for summary judgment and denied KWUA's and OWRD's motions for summary judgment. 1-KWUA\_ER-0010-43. The district court found that Reclamation had broad authority to carry out the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (Reclamation Act), meaning that Reclamation has discretionary authority and Section 7(a)(2) applies to its actions. 1-KWUA\_ER-0035-36. Given the district court's interpretation of the ESA and the Reclamation Act, it concluded that Reclamation cannot comply both with the ESA and the OWRD Order, and thus the OWRD Order is preempted by federal law. 1-KWUA\_ER-0037-38. The district court did not reach KWUA's arguments that storage, diversion, and delivery of water in the Project is either a nondiscretionary

federal action or performed by non-federal parties to whom Section 7(a)(2) never applies. The district court also granted Plaintiffs' motion to strike portions of KWUA's briefing contrary to the Bifurcation Order, but did not opine on the United States' argument that the existence of the tribes' reserved water rights provides an additional source of discretion triggering Section 7(a)(2).

1-KWUA\_ER-0027, 32-43.

KWUA filed its notice of appeal on April 4, 2023. 12-KWUA\_ER-2837-43. Klamath Irrigation District (KID) also filed a notice of appeal, 12-KWUA\_ER-2833-36, and the appeals were consolidated. ECF No. 15.

KWUA subsequently moved the district court for entry of judgment under Federal Rule of Civil Procedure 54(b). 1-KWUA\_ER-0008. The district court granted the motion and entered final judgment on the First Cause of Action in the United States' Crossclaim, OWRD's Counterclaim, and KWUA's First Counterclaim. 1-KWUA\_ER-0002-4, 7-9.

### **III. Factual Background**

#### **A. Klamath River Basin**

In the most upstream areas of the Klamath watershed, snowmelt, precipitation runoff, and spring flow feed the Sycan, Sprague, Williamson, and Wood Rivers and other creeks that flow into Upper Klamath Lake. 7-KWUA\_ER-1684, 1437. The outflow from Upper Klamath Lake is controlled by Link River

Dam. Water that is released from Link River Dam flows down a one-mile stretch known as Link River, which then becomes the Klamath River. 7-KWUA\_ER-1684, 1437. The first several miles of the Klamath River are along the easternmost irrigated lands of the Klamath Project. 7-KWUA\_ER-1437. As it flows south and west through California, the Klamath River is fed by over 100 tributaries before it discharges to the Pacific Ocean. *Id.*

Two endangered sucker species inhabit Upper Klamath Lake and its tributaries, and threatened coho salmon inhabit the Lower Klamath River below Iron Gate Dam. 2-KWUA\_ER-63.

## **B. The Reclamation Act and Authorization of the Klamath Project**

The Reclamation Act provided for federal financing and construction of dams and canal systems for large-scale irrigation projects. By design, Reclamation was to contract with individuals and, later, with irrigation districts for the payment of construction and operation costs with the goal of transferring to the contractors legal title to the federally-constructed facilities. *See California v. United States*, 438 U.S. 645, 677 (1978) (*California*). The Reclamation Act requires the Secretary of the Interior (Secretary) to comply with state law regarding the control, appropriation, use, and distribution of water. 43 U.S.C. § 383. When Reclamation develops a reclamation project, its role is to be merely “a carrier and distributor” of water, with the beneficial interest in water rights lying in the owners of the land to

which the rights are appurtenant. *Nevada v. United States*, 463 U.S. 110, 121-25 (1983) (*Nevada*); *see also* 43 U.S.C. § 372.

The Klamath Project was authorized on May 15, 1905, under the Reclamation Act. 4-KWUA\_ER-741-46. Immediately prior to that authorization, Oregon, California, and Congress all enacted legislation to enable the Klamath Project. In early 1905, Oregon and California enacted statutes that ceded then-submerged lands owned by the states to the United States for use in pursuance of the Reclamation Act. General Laws of Oregon at 63 (Jan. 20, 1905), 12-KWUA\_ER-2832; 1905 Cal. Stat. ch. 567 at 4 (Feb. 3, 1905); *see* 6-KWUA\_ER-1270 (hereafter, “Cession Acts”).

Congress authorized raising or lowering (draining) various navigable water bodies in the area. Act of February 9, 1905, Pub. L. No. 58-66, ch. 567, 33 Stat. 714 (1905 Act). This was a necessary step given the navigability of interstate waters would be eliminated. 6-KWUA\_ER-1292. The 1905 Act authorized the Secretary to carry out “any irrigation project that may be undertaken by him under the terms and conditions of the national reclamation Act” and raise or lower the level of identified lakes and connected rivers “as may be necessary to dispose of any lands” ceded to the United States by Oregon and California “under the terms and conditions of the national reclamation act.” 1905 Act ch. 567.

### **C. Construction of the Project**

Before construction of the Project, two basalt reefs backed water into Upper Klamath Lake. At a specific lake elevation, the outflow from Upper Klamath Lake into Link River would effectively cease. 6-KWUA\_ER-1304. Based on a 1917 agreement with Reclamation, a power company developed operable storage in Upper Klamath Lake through the construction of Link River Dam. This involved excavating the natural reefs to lower them, and then constructing a dam 435 feet long and 22 feet high. 6-KWUA\_ER-1305-06. Since the dam's construction, the lake has been operated as low as 4136.0 feet. 9-KWUA\_ER-2230; 6-KWUA\_ER-1306. It is considered "full" at elevation 4143.3 feet. 6-KWUA\_ER-1305-06. By storing water between elevations 4143.3 and 4136 feet, Link River Dam creates roughly 500,000 acre-feet of "active" storage capacity, with 130,000 acre-feet of "dead" or "inactive" storage below elevation 4136.0 feet that cannot be released. 6-KWUA\_ER-1426.

### **D. Project Works and Contracts for Project Water**

After authorization of the Project in 1905, Reclamation entered into contracts providing the terms and conditions of water delivery. With one exception, all relevant contracts require the contractor to repay an allocated share of the cost of construction of Project works and ongoing operation and

maintenance. The United States agreed in the contracts to store, divert, and deliver water to the contractors.

Initially, these contracts were between Reclamation and individual landowners but, over time, Reclamation contracted with irrigation districts and water distribution entities as they were formed. *See* 6-KWUA\_ER-1301-12. Although there are nearly 200 contracts, approximately 80% of the irrigated acres in the Klamath Project that use Upper Klamath Lake and Klamath River water are served under contract with seven districts, the terms of which are described in detail in Argument, section I.D. Terms included in those districts' contracts are representative of Project contracts as a whole. 6-KWUA\_ER-1312. All of the Project contracts are in the district court's record, and many have identical terms. *See* Argument, section I.D, *infra*; 2-KWUA\_ER-53-56.

Some diversion and delivery works are still owned by the United States. However, consistent with section 6 of the Reclamation Act, 43 U.S.C. § 498, Reclamation has transferred responsibility for operation and maintenance of these facilities to irrigation districts. Other diversion and delivery works were constructed and are owned by non-federal parties. 6-KWUA\_ER-1315-16. Thus, for more than five decades, all of the works for diversion and delivery of water to individual lands have been operated by non-federal entities.

### **E. Other Significant Water Uses in the Klamath Basin**

Both upstream and downstream of the Project, there are significant other water users and uses. This includes diversions for irrigation and other uses under water rights that are junior to the Project water rights. 6-KWUA\_ER-1427-30. There are also two Reclamation projects that “export” large quantities of water out of the Klamath Basin and into the Rogue River Basin in Oregon and the Central Valley of California. 6-KWUA\_ER-1428-29, 1288-89.

### **F. Klamath Basin Adjudication (KBA)**

Consistent with this Court’s decision in *United States v. Oregon Water Resources Dep’t*, 44 F.3d 758 (9th Cir. 1994) (*U.S. v. Oregon*), the state of Oregon has been conducting a general stream adjudication for the Klamath River and its tributaries. In 2014, the “Adjudicator” issued the Amended and Corrected Findings of Fact and Order of Determination or “ACFFOD.” The ACFFOD consists of 14 pages of global findings followed by many “partial” orders determining individual water claims. 10-KWUA\_ER-2273-86. The determinations in the ACFFOD are currently subject to review based on parties’ “exceptions” in Klamath County Circuit Court. *See* Or. Rev. Stat. ch. 539. Unless stayed by the county circuit court, the ACFFOD “shall be in full force and effect from the date of its entry in the records of the [water resources] department.” *Id.*

§ 539.130(4). Accordingly, the ACFFOD is the basis for water rights regulation.

*Id.* § 539.170.

### **1. Project-Related Water Rights**

Project-related water rights determined in the ACFFOD include rights to the use for irrigation of both “live flow” and “stored” water in Upper Klamath Lake.

The two are legally distinct, and one may have a right to use either or to use both.

*See Cookinham v. Lewis*, 58 Or. 484, 495-96 (1911).

“Natural flow” means the flow rate present without any human interference—the amount naturally passing into a stream, or through a lake or reservoir. *See Gila Valley Irrigation Dist. v. United States*, 118 F.2d 507, 509 (9th Cir. 1941). “Stored” water means the water impounded behind dams during times of high flow (in winter or early spring when runoff and snowmelt occurs but water is not needed for crops) and released later in the year when there is demand.

6-KWUA\_ER-1424; *see also* Op. Or. Atty. Gen. OP-6423, 1992 Ore. AG LEXIS 32, at \*6-9 (Sept. 14, 1992). The stored water may be diverted from the reservoir itself, or may be released from the reservoir to the river for diversion from a downstream location to use for authorized purposes (including diversion for irrigation or any authorized use). 6-KWUA\_ER-1425. Project facilities divert both live flow and stored water from Upper Klamath Lake and the Klamath River below Upper Klamath Lake. *Id.*

The ACFFOD determines that Reclamation holds a right to storage of nearly 500,000 acre-feet of water in Upper Klamath Lake, which has a priority of May 19, 1905, based on an appropriation by Reclamation and development of the stored water via construction of Link River Dam. The only lawful purposes to store water are “domestic use and irrigation.” 9-KWUA\_ER-2254-55.

Project contractors, for the benefit of their patrons, hold rights to live flow and rights to the use of the stored water. *See* 9-KWUA\_ER-2247, 2252, 2256-63. The authorized place of use of the live flow rights and the stored water rights includes agricultural land in both Oregon and California. *E.g.*, 9-KWUA\_ER-2264-71. The only authorized purpose of use for live flow and stored water by contractors is domestic and irrigation use, and incidental livestock watering, on described lands. 9-KWUA\_ER-2258.

Beyond the source, point(s) of diversion, place(s) of use, purpose and time of use and priority date, the water right also includes an authorized “rate” of diversion and “duty.” Under state law, “beneficial use” is the “basis, the measure and the limit of all rights to the use of water . . . .” Or. Rev. Stat. § 540.610(1). Section 8 of the Reclamation Act restates this core principle: “[B]eneficial use shall be the basis, the measure, and the limit of the right.” 43 U.S.C. § 372. The duty determined in the ACFFOD has two components: (1) a gross seasonal quantity of diversion for irrigation systems; and (2) a total amount applied to land.

9-KWUA\_ER-2237-41. The determined beneficial use for the water applied to land is 3.5 acre-feet per acre during the ordinary irrigation season, and 2.5 acre-feet per acre for winter irrigation. 9-KWUA\_ER-2240-41.

## **2. Federal Reserved Water Rights**

“[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose” (including for “Indian reservations”), “by implication, [it] reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.” *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (*Cappaert*). These federal reserved water rights are quantified based on the minimum amount of water needed for the primary purpose of the federal reservation. *Id.* at 145; *United States v. New Mexico*, 438 U.S. 696, 704 (1978) (*New Mexico*). Federal reserved rights also have a priority date—the date of the reservation of the land from the public domain. *Cappaert*, 426 U.S. at 138. Like water rights arising under state law by appropriation, the elements of federal reserved water rights include a source, quantity, purpose, and place of use, and—when applicable—point of diversion. *See New Mexico*, 438 U.S. at 715-18; 10-KWUA\_ER-2356-57.

In the KBA, the United States claimed reserved water rights for federal land, including wildlife refuges in Oregon and California that are served by the same

infrastructure that serves agricultural lands. *See* 10-KWUA\_ER-2381-82; *see also* 10-KWUA\_ER-2352 (rights are to natural flow and not stored water).

The United States also filed many claims in its capacity as trustee for the Klamath Tribes. *See, e.g.*, 9-KWUA\_ER-2137. The United States' tribal water rights claims include claims of federal reserved rights to specific flow levels in rivers and streams for fisheries benefit. *See, e.g.*, 9-KWUA\_ER-2153-54. These claims of right claim only "natural" flow of the Klamath River between Link River Dam and the California-Oregon border, which is water that can be available without augmentation from storage releases. 10-KWUA\_ER-2436-39, 2440-43, 2444-51.

Ultimately, the ACFFOD denied all claims to flows in segments of streams and rivers outside the boundaries of the former Klamath Reservation; thus, the Klamath Tribes' claims for water rights to flows in the Klamath River in Oregon were denied. 9-KWUA\_ER-2145, 2150. The trial court has reviewed and upheld this ruling. *See In re Determination of the Relative Rights of the Waters of the Klamath River*, 2021 Ore. Cir. LEXIS 1, \*22-25 (Feb. 24, 2021).

The United States did not file claims on behalf of any California tribes in the KBA; nor did the California-based tribes themselves file claims.

## **G. ESA Legal Guidance for the Klamath Project**

In recent decades, Klamath Project operations have been loosely guided by memoranda from 1995, supplemented in 1997 (in response to objections from the Oregon Department of Justice) from Regional Solicitors of the Department of the Interior. 10-KWUA\_ER-2474-83, 2470, 2453. The memoranda pre-dated the ACFFOD and broadly reflected the state of ESA jurisprudence in the mid-1990s. The 1997 memorandum opined on Reclamation's obligations and responsibilities to Project water users, wildlife refuges, tribes, and species protected under the ESA in "the absence of completed adjudication." 10-KWUA\_ER-2456. Neither memorandum analyzes whether any of Reclamation's actions to operate the Project are discretionary under ESA Section 7(a)(2). *See generally* 10-KWUA\_ER-2474-83, 2452-62. Nor do they recognize that Section 7(a)(2) only applies to discretionary agency actions.

Given a history of dysfunction in Project consultations, outdated legal guidance, and nonstop litigation, since 2017, KWUA urged that Reclamation reassess its obligations under Section 7 of the ESA and other federal laws based on contemporary case law and regulations. Reclamation ultimately did so in a memorandum dated October 29, 2020, from the Office of the Solicitor. 8-KWUA\_ER-1953-63. The October 2020 Solicitor memorandum concludes, in relevant part:

[W]hen developing its proposed operations for the Klamath Project, Reclamation should . . . determine whether any portion of water in the Klamath Project is subject to nondiscretionary contract terms and include any effects attributable to the deliveries of such waters in the environmental baseline as part of any ESA consultation.

8-KWUA\_ER-1963.

In January 2021, Reclamation completed the reassessment called for by the October 2020 Solicitor memorandum. 8-KWUA\_ER-1894-935. The “Reassessment” was accompanied by two additional legal memoranda by the Solicitor of the Department of the Interior. 8-KWUA\_ER-1936-42, 1943-52. The Reassessment was very similar in format to a reassessment completed by the U.S. Army Corps of Engineers in 2014 for the reservoir operations on the Middle Rio Grande Basin of New Mexico, which was upheld by the Tenth Circuit in *WildEarth Guardians v. U.S. Army Corps of Eng’rs.*, 947 F.3d 635, 642 (10th Cir. 2020) (*WildEarth Guardians*). 8-KWUA\_ER-1896.

The Solicitor’s memoranda and Reassessment generally found that storage, diversion, and delivery of water for irrigation in the Klamath Project are not subject to the requirements of Section 7(a)(2) because such actions are nondiscretionary. They further found that Reclamation lacks discretion to use water stored in Upper Klamath Lake for purposes other than irrigation. The Reassessment also determined there were at least 11 operational activities in connection with the Project that are properly considered discretionary and subject

to Section 7(a)(2). 8-KWUA\_ER-1932-34. Overall, however, the Reassessment supported that the existing paradigm is wrong and must change.

The Reassessment was intended to provide the legal framework for an ESA consultation to be completed by September 30, 2022. 8-KWUA\_ER-1896.

However, in a two-page memorandum dated April 8, 2021, Secretary Haaland withdrew the Reassessment and its supporting documents. 8-KWUA\_ER-1882-83.

#### **H. Current ESA-Based Operations and the Challenged OWRD Order**

Since April 2020, the Project nominally has been operated under an Interim Operations Plan (IOP), which itself is based on modifications of an operations plan in a 2018 biological assessment and other modifications in 2019 and 2020.

9-KWUA\_ER-2061-65, 2075-2136. It has been impossible to meet the terms of the IOP, and the result has been disastrous for agricultural communities and national wildlife refuges sustained by water diverted through Project facilities.

7-KWUA\_ER-1438-45.

The IOP requires Reclamation to provide minimum instream flows for threatened coho salmon in the Klamath River and minimum elevations in Upper Klamath Lake for two endangered sucker species. 7-KWUA\_ER-1437-42. Then, there is “Project Supply” for irrigation that is subject to shortage if hydrological conditions do not yield enough water for minimum river flows and lake levels.

The National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS), respectively, have issued biological opinions for operations based on the IOP. 9-KWUA\_ER-2061-65.

The United States admits that the current ESA compliance approach for the Project requires the release of “stored water” from Upper Klamath Lake into the Klamath River, notwithstanding irrigation demands for the use of that stored water. 8-KWUA\_ER-1759; 7-KWUA\_ER-1602.

On April 6, 2021, OWRD, the state agency that administers the adjudicated water rights in the Klamath Basin pursuant to the ACFFOD, issued an order to Reclamation “to immediately preclude or stop the distribution, use or release of stored water from the UKL, in excess of amounts that may be put to beneficial use under KA 1000 downstream of the Link River Dam.” 8-KWUA\_ER-1893. On July 2, 2021, OWRD issued a notice of violation in which OWRD concluded that legally stored water was passing through Link River Dam in violation of the April 6, 2021 Order and that OWRD considered the action to be a “major violation.” 8-KWUA\_ER-1807. On July 28, 2021, OWRD issued another notice of violation. 8-KWUA\_ER-1797-98.

The United States filed a Crossclaim against OWRD and KWUA on October 1, 2021, challenging the OWRD Orders.<sup>1</sup> 8-KWUA\_ER-1725-66. KWUA filed its Counterclaim against the United States on April 7, 2022. 7-KWUA\_ER-1657-68.

### **SUMMARY OF THE ARGUMENT**

Reclamation's authority and obligations to operate the Klamath Project are based on the Reclamation Act, the 1905 Act, and its contractual commitments to Project water users. Nowhere in these authorities and obligations is there discretion to curtail the storage, diversion, and delivery of water for irrigation to benefit listed species. Thus, Reclamation's obligations under Section 7(a)(2) do not apply to this aspect of Project operations, and Reclamation's compliance with, and the state's enforcement of, state water law is not preempted by the ESA.

The district court erred by interpreting the Reclamation Act to provide broad discretionary authority for Reclamation to act for the benefit of listed species. Its interpretation ignores the express language and history of the Reclamation Act, ESA regulations, and applicable precedent evaluating the existence of

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<sup>1</sup> The OWRD Order was a product of state court litigation in which KID obtained orders requiring OWRD to enforce state law. *Klamath Irrigation Dist. v. Or. Water Res. Dep't*, 527 P.3d 999 (Or. 2023); *Klamath Irrigation Dist. v. Or. Water Res. Dep't*, 518 P.3d 970 (Or. Ct. App. 2022). The trial court's decision was reversed for reasons unrelated to the merits and the OWRD Order was withdrawn. 1-KWUA\_ER-0005.

discretionary authority for purposes of Section 7(a)(2). Further, the district court ignored the terms of perpetual contracts under which Reclamation made nondiscretionary commitments to provide water, and ignored that non-federal actors carry out much of the diversion and delivery. Ninth Circuit precedent requires that these legal obligations and circumstances be considered as part of the Section 7(a)(2) analysis.

In addition, because federal law requires Reclamation to comply with state water law, and the ESA creates no independent authority to act to benefit species, the district court erred in ruling that the ESA preempted the OWRD Orders.

The district court also abused its discretion in granting Plaintiffs' motion to strike KWUA's arguments that were directly responsive to the United States' argument that the existence of a claimed but unadjudicated downstream right is a basis of Section 7(a)(2) discretion. This Court should reverse the ruling striking KWUA's arguments. This Court may decide the issue whether the existence of a claimed but unadjudicated downstream right is a basis of Section 7(a)(2) discretion, or remand to the district court to decide the question in the first instance as part of Phase Two under the Bifurcation Order.

### **STANDARD OF REVIEW**

The district court's grant of summary judgment is reviewed de novo. *Glacier Fish Co. LLC v. Pritzker*, 832 F.3d 1113, 1120 (9th Cir. 2016). A district

court’s construction of a federal statute is a question of law and is reviewed de novo. *Arizona v. Tohono O’odham Nation*, 818 F.3d 549, 555 (9th Cir. 2016). The district court’s grant of a motion to strike is reviewed for abuse of discretion. *Ready Transp., Inc. v. AAR Mfg.*, 627 F.3d 402, 404 (9th Cir. 2010) (*Ready Transp.*).

## ARGUMENT

### **I. Reclamation Does Not Have Discretion to Curtail, or Direct the Curtailment of, the Storage, Diversion, and Delivery of Water for Irrigation to Benefit Threatened or Endangered Species**

The storage, diversion, and delivery of water from Upper Klamath Lake and the Klamath River for irrigation are nondiscretionary. Accordingly, Section 7(a)(2) does not require, let alone authorize, Reclamation to alter those actions to the detriment of irrigation water users. The district court incorrectly found that Reclamation has broad authority under the Reclamation Act to send water downstream to benefit listed species in the name of “complying with the ESA.”

General, conclusory statements that Reclamation “must comply with the ESA in operating the Klamath Project” do not answer the relevant question, which is: what exactly does the ESA require? To answer this question requires evaluation of which federal actions are discretionary and subject to the substantive obligation

under Section 7(a)(2), versus which actions are nondiscretionary actions or non-federal actions to which Section 7(a)(2) does not apply.

**A. ESA Section 7(a)(2) Does Not Apply to Nondiscretionary Agency Actions, or to Non-Federal Actions Over Which Federal Agencies Do Not Have Discretionary Authority**

The Section 7(a)(2) obligation to avoid jeopardy to listed species applies only to federal discretionary actions. *See* Statement of the Case, section I, *supra*. Thus, to properly evaluate the scope of an agency’s obligation under Section 7(a)(2), this Court must perform the following analysis: (1) identify the agency action, (2) identify the legal authority under which the agency takes the action, (3) under that authority, consider whether there is “some discretion” to take action for the benefit of a protected species, and (4) if there is some discretion to take action for the benefit of a protected species, define the scope of that discretion. *See NRDC v. Jewell*, 749 F.3d 776, 779 (9th Cir. 2014) (*NRDC v. Jewell*) (“Section 7(a)(2) consultation is required so long as the federal agency has ‘some discretion’ to take action for the benefit of a protected species”); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 639 (9th Cir. 2014) (“[t]he real question after *Home Builders* is what counts as a non-discretionary action, to which § 7(a)(2) does not apply”).

The district court did not perform this analysis. *See* 1-KWUA\_ER-0032-39. Instead, the district court found that *Klamath Water Users Protective Ass’n v.*

*Patterson*, 204 F.3d 1206 (9th Cir. 1999), amended on denial of rehearing, 203 F.3d 1175 (9th Cir. 2000) (*Patterson*), a 24-year-old decision from the Ninth Circuit, “remains the controlling law on whether the ESA applies to the Klamath Project.” 1-KWUA\_ER-0032-33. The *Patterson* decision did not perform this necessary analysis either.

This Court defined the issue in the *Patterson* case as follows: “This appeal involves a basic contract issue: whether the [Project water users] are third-party beneficiaries to a 1956 contract (the ‘Contract’) between [Reclamation and a power company] that governs the management of [Link River Dam] in the Klamath Basin (the ‘Project’).”<sup>2</sup> *Patterson*, 204 F.3d at 1209. It summarized its holding as follows: “Under the plain language of the 1956 contract between [PacifiCorp] and

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<sup>2</sup> The United States, the plaintiffs, and PacifiCorp, the counterclaimant, all agreed in the district court that the case concerned contract interpretation and did not involve ESA issues. In the United States’ opposition to the motion for summary judgment on the amended counterclaim, it argued “What this case is now about is a dispute over the interpretation of a contract.” 4-KWUA\_ER-0805; *see also* 4-KWUA\_ER-0806 (“The only rights at issue before the Court are those contractual rights which Copco and the United States intended to create in their agreement over forty years ago.”). As the United States put it, “While [KWUA] plainly take[s] issues with Federal Defendants’ view of their legal obligations in the Klamath Project, the content of those obligations does not turn on the interpretation of the 1956 Contract.” 4-KWUA\_ER-0805. The amended counterclaim states that, “[t]here presently exists a dispute between PacifiCorp and plaintiffs regarding plaintiffs’ rights, if any, under the 1956 Contract,” and specific declaratory relief concerns the 1956 contract. 7-KWUA\_ER-1564. Federal Defendants and PacifiCorp moved for summary judgment on the amended counterclaim, and this was the procedural posture for the district court’s decision reviewed by the Ninth Circuit.

Reclamation, the Irrigators do not possess third-party beneficiary water rights.” *Id.* at 1214.

Yet, as part of the decision, the Court also stated:

Because Reclamation retains authority to manage the Dam, and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators. Accordingly, we hold that the district court did not err in concluding that *Reclamation has the authority to direct Dam operations to comply with the ESA.*

204 F.3d at 1209 (emphasis added). This singular passage—including as dicta in a case interpreting a now-expired contract—has been cited and repeated by courts in subsequent cases as the definitive holding on all ESA issues in the Project. *See, e.g., Baley v. United States*, 942 F.3d 1312, 1323 (Fed. Cir. 2019); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1201 (D. Or. 2001). The district court repeated the same pattern.

Nonspecific statements in *Patterson* or by the district court that Reclamation “must comply with the ESA” are not informative. KWUA does not dispute that Reclamation, as a federal agency, is subject to the ESA. But a generic statement that Reclamation is subject to the ESA does not take into account the multiple actions, by multiple federal and non-federal parties, that comprise “Project operations.” These details matter when analyzing ESA compliance, because when nondiscretionary actions are involved, the federal agency “lacks the power to

‘insure’ that such action will not jeopardize endangered species.” *See Home Builders*, 551 U.S. at 667.

As stated above, the relevant question is: what are the obligations of Reclamation as an action agency under Section 7(a)(2), given the scope of its authority to take action to benefit listed species? The statute, ESA regulations, and contemporary case law require a detailed consideration that no court has provided.

**B. Reclamation Does Not Have Independent Authority Under the ESA to Take Actions to Benefit Listed Species**

The ESA itself does not give Reclamation authority to act for the benefit of listed species. *See Babbitt*, 65 F.3d at 1510. This principle is anchored in *Home Builders*, 551 U.S. 644, where the Supreme Court reversed the Ninth Circuit’s decision in *Defenders of Wildlife v. United States EPA*, 420 F.3d 946 (9th Cir. 2005) (*Defenders*).

The case involved the transfer of permitting authority under the Clean Water Act (CWA) from the U.S. Environmental Protection Agency (USEPA) to the state of Arizona. Under the CWA, if nine statutory criteria are met, USEPA must approve the transfer of permitting authority to the state. *Defenders*, 420 F.3d at 950. In *Defenders*, environmental plaintiffs challenged the transfer of the permitting program to Arizona based on alleged non-compliance with ESA Section 7.

This Court framed the issue in *Defenders* as follows: “Does the [ESA] authorize – indeed, require – the EPA to consider the impact on endangered and threatened species and their habitat when it decides whether to transfer water pollution permitting authority to state governments?” 420 F.3d at 950. It answered that question in the affirmative, and held that Section 7 confers authority on federal agencies to protect listed species that “goes beyond that conferred by agencies’ own governing statutes.” *Id.* at 964. “We conclude that the obligation of each agency to ‘insure’ that its covered actions are not likely to jeopardize listed species is an obligation in addition to those created by the agencies’ own governing statute.” *Id.* at 967.

The Supreme Court rejected this interpretation of the ESA. The Supreme Court explained that the reading of Section 7(a)(2) in *Defenders* “would effectively repeal § 402(b)’s statutory mandate by engrafting a tenth criterion onto the CWA.” *Home Builders*, 551 U.S at 663. The Supreme Court extended this reasoning to all other statutes: “Reading the provision broadly would thus partially override every federal statute mandating agency action by subjecting such action to the further conditions that it pose no jeopardy to endangered species” in contravention of the presumption against implied repeals. *Id.* at 664, 669.

The Supreme Court then turned to the agencies’ attempt to resolve the “tension” through its regulations. Under 50 C.F.R. § 402.03, the “ESA’s

requirements would come into play only when an action results from the exercise of agency discretion.” *Home Builders*, 551 U.S. at 665. The Court found the regulation harmonizes statutes “by applying § 7(a)(2) to guide agencies’ existing discretionary authority, but not reading it to override express statutory mandates.” *Id.* at 666. “The regulation’s focus on ‘discretionary’ actions accords with the commonsense conclusion that, when an agency is *required* to do something by statute, it simply lacks the power to ‘insure’ that such action will not jeopardize endangered species.” *Id.* at 667.

Based on admitted legal principles expounded in *Home Builders*, for Section 7(a)(2) to apply, there must be a basis of legal authority—other than the ESA—that allows Reclamation to take action to benefit listed species.

**C. Reclamation Does Not Have Authority Under the Reclamation Act to Take Actions to Benefit Listed Species**

**1. The Klamath Project Is a Single Purpose Project Authorized for Irrigation**

The Klamath Project is authorized exclusively under the Reclamation Act and the 1905 Act.<sup>3</sup> Section 6 of the Reclamation Act provides that the Secretary is “authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and

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<sup>3</sup> In the district court, the United States and the Yurok Tribe did not dispute that the Project is authorized under the 1902 Act and the 1905 Act of Congress. 3-KWUA\_ER-0498; 4-KWUA\_ER-0654.

development of waters, including artesian wells.” 43 U.S.C. § 411. The 1905 Act authorized the Secretary to raise or lower the level of lakes in the Project area “in carrying out any irrigation project that may be undertaken by him under the terms and conditions of the [Reclamation Act].” Nothing in the Reclamation Act or the 1905 Act goes beyond this specific single purpose of irrigation.

Since the earliest days of the Reclamation Act, Congress frequently has revised different project authorizations to add authorized purposes for fish and wildlife and address the reimbursability<sup>4</sup> of allocable costs.<sup>5</sup> For example, the Central Valley Project Improvement Act of 1992 (CVPIA) amended the 1937 reauthorization statute for the Central Valley Project (CVP) by adding fish, wildlife, and habitat restoration as purposes with coequal priority with municipal, agriculture, and agricultural water supply purposes. *See San Luis & Delta-*

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<sup>4</sup> Under section 4 of the Reclamation Act, construction costs for a federal reclamation project are intended to be repaid to the Reclamation Fund by the beneficiaries of the project. *See* 43 U.S.C. §§ 419, 461. Reclamation’s record of cost allocation for the Project shows costs allocated to flood control and irrigation only, and refers to the Klamath Project as a “single purpose Reclamation project.” 4-KWUA\_ER-0750-78, 0748, 0780-97; 6-KWUA\_ER-1317.

<sup>5</sup> *See* Act of June 27, 1960, Pub L. No. 86-529, § 2, 74 Stat. 225 (Norman reclamation project, Oklahoma); Act of March 2, 1945, Pub. L. No. 79-79, 59 Stat. 10 ch. 19 at 22 (Umatilla Dam, Oregon); Act of June 12, 1948, Pub L. No. 70-629, 62 Stat. 382 ch. 453 (Kennewick Division, Yakima Project, Washington); Act of August 29, 1948, Pub. L. No. 81-273, 63 Stat. 677 ch. 519 (Weber Basin Project, Utah); Act of September 9, 1958, Pub. L. No. 86-248, 73 Stat. 478 (Bully Creek Extension, Vale Project, Oregon).

*Mendota Water Auth. v. United States*, 672 F.3d 676, 683-85 (9th Cir. 2012) (describing the CVPIA and the dedication of 800,000 acre-feet annually of CVP water (i.e., stored water) to implement fish, wildlife, and habitat restoration purposes and to help meet obligations imposed under the ESA); *see also United States v. Cal. State Water Res. Control Bd.*, 694 F.2d 1171, 1172 n.1 (9th Cir. 1982) (describing amendments to the original authorization for the New Melones Project adding “the preservation and propagation of fish and wildlife” as a purpose and authorizing the allocation of costs to that purpose).

Where Congress does not directly address the issue in legislation for a given project, the Fish and Wildlife Coordination Act specifies how Reclamation handles fish and wildlife issues related to federal reclamation projects. *See* 16 U.S.C. §§ 661-666c. However, by its terms, the Fish and Wildlife Coordination Act does not apply to projects, like the Klamath Project, that were authorized and constructed before the date of its enactment in 1934. *Id.* § 662(g).

**2. The Rulemaking and the Reclamation Fund Provisions of the Reclamation Act Do Not Confer Discretion to Curtail Irrigation for the Benefit of Listed Species**

The district court found Section 7(a)(2) discretion based on its conclusion that the Reclamation Act gives the Secretary broad authority to “perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act into full force and effect.”

1-KWUA\_ER-0036 (citing Reclamation Act § 10, 43 U.S.C. § 373). From this language, the district court concluded that Congress granted Reclamation a broad mandate and did not direct Reclamation to perform specific nondiscretionary actions, as was the case in *Home Builders*. *Id.*

The district court’s analysis is wrong. First, relying on the generic rulemaking provision in section 10 of the Reclamation Act to find authority to take action to benefit species that does not otherwise exist in the Reclamation Act would rewrite the law. Section 10, by its express terms, refers to rules and regulations to carry out the Reclamation Act, not the ESA. The section does not create a new source of authority for the Secretary, or expand the Secretary’s authority:

No further extension of [her] powers is granted by the tenth section, by which [she] is authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying the provisions of the act into full force and effect. This does not warrant [her] to import into the act authority to obtain any other means to construct irrigation works than those stated . . . . That would be to amend the law . . . .

27 Op. Atty Gen. 360, 370-71 (May 26, 1909).

Federal statutes frequently have provisions granting the agency officials charged with administering the statute “necessary” authority to carry out the statute and to enact “rules and regulations.” Indeed, the CWA has a similar provision granting the USEPA Administrator authority “to prescribe such regulations as are

necessary to carry out the functions under this Act.” 33 U.S.C. § 1361(a).

However, the existence of such a provision in the CWA did not prevent the Supreme Court from concluding that, upon satisfaction of stated criteria, USEPA had a nondiscretionary obligation to transfer permitting authority under a different provision of the same statute, 33 U.S.C. § 1342(b). *Home Builders*, 551 U.S. at 661-62. Interpreting these “necessary” authority provisions to provide a federal agency some additional authority to implement the ESA that it does not otherwise have would result in the implicit repeal of countless federal statutes, a result the Court explicitly avoided in *Home Builders*. *See id.* at 664. Likewise, “[t]he grant of authority to promulgate ‘necessary’ regulations cannot expand the scope of the provision the agency is tasked with ‘carry[ing] out.’ [Citation.]” *Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Serv.*, 968 F.3d 454 (9th Cir. 2020).

Similarly, the district court found broad authority for Reclamation to act under section 6 of the Reclamation Act, citing language authorizing the Secretary to “use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act.” 1-KWUA\_ER-0036. However, the “reclamation fund” is created in section 1 of the Reclamation Act, which provides for a “special fund in the Treasury to be known as the ‘reclamation fund,’ to be used in the examination and survey for and the construction and maintenance of *irrigation works* for the storage, diversion, and

development of waters for the *reclamation of arid and semiarid lands*” in the identified states and territories. 43 U.S.C. § 391 (emphasis added). The district court does not explain why statutory authority for a Treasury fund for the specific purpose of examination, survey, operation, and maintenance of *irrigation works* for the *reclamation* of lands provides authority to use water developed for irrigation purposes to provide instream flows for listed species.

Other cases analyzing whether discretionary authority exists to trigger application of ESA Section 7(a)(2) demonstrate the error in the district court’s analysis. It is not enough to locate the most general provision in a statute and find there is not a specific nondiscretionary mandate that is inconsistent with the ESA. Instead, courts consider the specific statutory provision or specific legal obligation at issue in analyzing whether an obligation is nondiscretionary. *See Home Builders*, 551 U.S. at 661-62 (analyzing whether 33 U.S.C. § 1342(b) creates a nondiscretionary mandate to transfer permitting authority); *San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation Dist.*, 49 F.4th 1242, 1246-47 (9th Cir. 2022) (analyzing whether Reclamation has discretionary authority under Pub. L. No. 83-774, the statute authorizing the construction of Twitchell Dam, based on its authorized purposes for irrigation, water conservation, flood control, and “other purposes” outlined in a 1953 Secretary’s Report); *WildEarth Guardians*, 947 F.3d at 639-42 (analyzing whether discretion exists

when operating dams in the Middle Rio Grande Project under the Flood Control Acts of 1948 and 1960, which authorized specific dams for the limited purposes of flood control, sediment control, or storage of specific blocks of water).

In this case, the district court should have considered the specific authorization of the Klamath Project under the Reclamation Act, the 1905 Act, and the Cession Acts. Under these authorities, Reclamation is authorized to construct works to lower lake levels and reclaim land for irrigation, and to operate the Project to store, divert, and deliver water for irrigation. The statutes do not confer discretionary authority to curtail irrigation for the benefit of listed species.

**D. Under Perpetual Contracts with Project Beneficiaries, Reclamation Does Not Have Discretion to Curtail, or Direct the Curtailment, of Storage, Diversion, and Delivery of Water to Benefit Listed Species**

Contracts between Reclamation and individuals and districts provide mutual promises regarding the storage, diversion, and delivery of water, payment of costs of construction, operation, and maintenance of facilities, and so on. *See* 6-KWUA\_ER-1307-12. Given that Reclamation does not have discretionary authority under either the Reclamation Act or the 1905 Act triggering its Section 7(a)(2) obligation, a relevant inquiry is whether these contracts afford discretion to curtail the irrigation water supply in order to protect listed species.

Review of the contracts reveals that they create nondiscretionary obligations for the United States to store, divert, and deliver water for irrigation, and provide

that non-federal parties will divert and deliver water for irrigation, with no reservation in the contract for the United States to direct that the contractor not do so as a means to protect ESA-listed species. Thus, even if the Reclamation Act and 1905 Act do not *preclude* operations benefiting ESA-listed species, Reclamation has, in the exercise of its authority under the Reclamation Act, entered contracts creating specific, nondiscretionary obligations.

Below, KWUA describes specific contract terms based on diversion and delivery system.

- 1. Storage, Diversion, and Delivery of Water for Irrigation Use Is Either a Nondiscretionary Federal Action or the Action of a Non-Federal Actor**

- a. Lands Served Through Main Division Works**

The A Canal diverts water directly from Upper Klamath Lake and serves the “Main Division” of the Project. The A Canal branches into the B and C Canals, which then feed other canals (*e.g.*, E, F, G, and D Canals) and smaller distributaries, and ultimately the turnout structures for individual farms.

6-KWUA\_ER-1313. The Main Division includes all the lands that can be served by gravity through the A Canal and its distributaries. *Id.* In a 1954 contract, the United States transferred responsibility for operation and maintenance of the Main Division to KID. 11-KWUA\_ER-2639-77.

The Pumping Division refers to lands that are irrigated by pumping water from the A Canal and its distributaries. 6-KWUA\_ER-1309. The Pumping Division encompasses lands served by irrigation districts, as well as individuals whose lands are not part of any district and that operate their own pumping equipment. *Id.*

**(1) Van Brimmer Ditch Company**

In anticipation of interfering with a non-federal diversion that had existed for two decades, in 1909 the United States entered into a contract with the Van Brimmer Ditch Company (VBDC). 6-KWUA\_ER-1286. That contract committed the United States to furnish VBDC with an alternative supply of water for irrigation of approximately 5,000 acres served by VBDC whenever Reclamation drained Lower Klamath Lake, VBDC's original water supply. *Id.*; 12-KWUA\_ER-2826-31.

Article 2 of the 1909 contract, as amended in 1943, provides: “[T]he United States and its assigns, will deliver to the Company during each and every irrigation season . . . a quantity of water, not to exceed fifty second-feet, in which the Company claims the right to the exclusive use of, to irrigate . . . .”

11-KWUA\_ER-2756-57 (emphasis added). Article 5 of the 1909 contract, as amended, further provides that, “[t]he United States will deliver the said water to

the Company at the points marked on the map attached to this contract and made a part hereof, and identified as Exhibit ‘B.’” *Id.* (emphasis added).

## **(2) Lands Originally Under Water Right Applications**

Lands in the Project’s Main Division that were covered under water right applications between Reclamation and individual landowners became the land within KID. 6-KWUA\_ER-1308. The Secretary executed “water right applications” with private landowners and prospective entrymen, which obligated them to repay their portion of the construction, operation, and maintenance charges, along with other conditions, in exchange for the perpetual right to receive water from the Project in a quantity measured by beneficial use for irrigation. *See, e.g.,* 6-KWUA\_ER-1309-10.

## **(3) Pumping Division**

For the five districts in the Pumping Division, Reclamation agreed to furnish water to these lands under the terms of the Act of February 21, 1911, Pub. L. No. 61-406, 36 Stat. 925, commonly known as the Warren Act. 6-KWUA\_ER-1309. These contracts provide a given district with a perpetual right to receive a supply of water from the Project at a designated location, in exchange for repayment of a fixed construction charge and advance payment of a proportionate share of the estimated annual operation and maintenance costs. The

1922 contract with Malin Irrigation District (MID) is illustrative. Article 7 states, in relevant part, that:

The United States *will* impound, store, or otherwise provide water for the irrigation of District lands, and deliver same to the District through the Adams or D Canal of the Klamath Project, at a turnout located on the north side of said canal . . . .

10-KWUA\_ER-2487 (emphasis added). The MID contract provides no basis for the United States to curtail storage, diversion, and delivery of water to MID lands. Rather, article 20 of MID's contract states that the United States only "reserves the right to refuse to deliver water to the District, in the event of default for a period of more than one year in any payment due the United States under this contract."

10-KWUA\_ER-2493-94.

In the mid-1930s, MID amended its contract with Reclamation to increase the maximum amount of water to be delivered not to exceed 2.5 acre-feet per acre of irrigable land. 11-KWUA\_ER-2782.

The 1922 contract with MID, as modified by the 1936 amendment, is in relevant part the same as the four other irrigation districts that pump water from the Main Division works. 2-KWUA\_ER-0054-55. Taken in their entirety, these contracts impose nondiscretionary obligations for the United States to "impound, store, and otherwise deliver" water from the Project to the districts in the Pumping Division at a specified location. *See* 11-KWUA\_ER-2781; 2-KWUA\_ER-0054-55 (identifying the remaining pumping division contracts with districts).

#### (4) Individual Landowners

Between 1924 and 1944, Reclamation entered 94 separate contracts with individual landowners, agreeing the landowners would construct and operate, for irrigation on their land, private pumps that take water from the Main Division works. In exchange, the individual landowners agreed to pay certain construction, operation, and maintenance charges. *See* 2-KWUA\_ER-0054-55. These 94 contracts are all based on the same contract template and therefore share the same terms, with one exception. *Id.*

In 1936, Reclamation and the individual landowners amended their contracts to provide for receiving up to 2.5 acre-feet per irrigable acre under the standard charges, with the option to take water in excess of that amount, subject to paying for it “at the rate established in the Public Notices of Annual Water Charges issued or to be issued hereafter for the Klamath Project.” 2-KWUA\_ER-0054-55; *see, e.g.*, 11-KWUA\_ER-2770-75. The contracts provide that delivery of water in excess of 2.5 acre-feet per acre “will be furnished” to the contractor, subject only to the contractor paying for it. *Id.*

Article 5 of these 1936 contract amendments with individual landowners provides that the United States “shall furnish each year to the Contractor during the usual irrigation season water from the [a designated canal or lateral] and deliver same to the Contractor at or near [a designated location] for the irrigation of the

land of the Contractor described as follows: [as so described] . . . .” *See* 2-KWUA\_ER-0054-55; *see, e.g.*, 11-KWUA\_ER-2775-77.

**(5) Klamath Basin Improvement District**

The 1962 contract with the Klamath Basin Improvement District (KBID) is Reclamation’s last major contracting action for water from the Project.

11-KWUA\_ER-2545-94. Article 2 provides that the United States “will deliver or cause to be delivered to the District each year surplus water in such quantities as can be beneficially used for irrigation of lands included within the District but not to exceed an average of three and six-tenths (3.6) acre-feet per irrigable acre . . . .”

11-KWUA\_ER-2551. Article 2 goes on to provide that KBID and KID shall separately arrange for the specific points of delivery for water furnished under the contract, “with the approval of the Contracting Officer, or, in the absence of such agreement, at such points as may be designated by the Contracting Officer.”

11-KWUA\_ER-2552. Here, Reclamation appears to retain authority to approve precisely where KBID’s water is delivered; however, the second part of this article provides that Reclamation otherwise bears no responsibility for such deliveries. *Id.*

The only other basis for non-delivery to KBID is provided for under article 21 for non-payment of amounts due to the United States under the contract.

11-KWUA\_ER-2579. Reclamation’s discretion therefore related to withholding

deliveries of Project water to KBID is limited to circumstances where KBID fails to pay, continuously, the various charges due the United States under its contract.

**(6) Non-Federal Assumption of Responsibility for Diversion and Delivery to All of the Above Contractors**

Section 6 of the Reclamation Act provides a process by which responsibility for operating federally-constructed works is transferred to those who are required to repay construction costs and who benefit from the operation of the irrigation works. 43 U.S.C. § 498. Under this authority, KID entered into a contract in 1954 with the United States to operate and maintain the Main Division irrigation works. 11-KWUA\_ER-2639-77. The “transferred works” include the A Canal diversion works and A Canal system and the canals and laterals branching from the A Canal. 11-KWUA\_ER-2644.

While the 1954 contract provides that title to the transferred works remained with the United States, article 25 shifts all responsibility and liability for these works to KID. 11-KWUA\_ER-2666. The 1954 contract identifies discrete circumstances under which the United States may elect to resume and otherwise strip KID of management and control of the transferred works. Article 7(d) lays out a temporary arrangement along these lines in the “event of major disaster to, or failure of, the transferred works.” 11-KWUA\_ER-2647. Article 21 provides three other conditions under which the United States may, “at the option of the

Secretary,” resume operation and maintenance of the transferred works: (1) default on payment for a period of one year; (2) failure to perform necessary repairs for a period of one year; or (3) “any other violation by the District of the terms of this contract.” 11-KWUA\_ER-2660-63. Reclamation’s discretion to alter the current arrangement and resume direct operation of the transferred works is limited by the contract to these three conditions.

Articles 13, 14, 15, 19, 20, and 23 of the 1954 contract provide the operative terms for diversion and delivery of water to other districts and individual landowners. With respect to the lands within KID, article 13(a) provides that KID “*shall* take the water supply for the lands within the limits of the District . . . to be served by or through the transferred works, at the headworks of the main canal and other delivery locations . . . and *shall* distribute the same to the water users entitled thereto.” 11-KWUA\_ER-2650 (emphasis added); *see also* 11-KWUA\_ER-2651. The United States reserves the right to disallow water deliveries to landowners within KID under limited circumstances specified in article 20 for default of payment for more than twelve months. 11-KWUA\_ER-2660.

With respect to the lands outside of KID covered by already existing contracts between the United States and other parties, article 13(b) of the 1954 contract provides:

The District hereby assumes and agrees to carry out, during the term of this contract, to the satisfaction of the Secretary, all the obligations

imposed upon the United States by the contracts listed on Exhibit ‘A’ . . . for the carriage and delivery of water, in force as of the effective date of this agreement, insofar as said contracts relate to the delivery and carriage of irrigation and drainage water through the transferred works.

11-KWUA\_ER-2650. Among the contracts listed on Exhibit A are VBDC’s 1943 amendatory contract and all contracts in the Pumping Division. 11-KWUA\_ER-2673.

Article 13(e) expands on KID’s obligation to the contractors listed in Exhibit A to the 1954 contract:

For lands outside the District boundaries, and served through the transferred works, water shall be delivered in the quantities, at the times and at the points of diversion from the transferred works as required from time to time by contractors that have executed contracts with the United States in such manner as to meet obligations which the United States has assumed under said contracts.

11-KWUA\_ER-2651-52.

Taking these provisions collectively, the contract unambiguously provides that KID is charged with carrying out the “delivery and carriage” obligations under all perpetual contracts with the United States to receive water from the Main Division works.

**b. Tule Lake Division**

Tulelake Irrigation District (TID) includes approximately 42,000 acres of homesteaded lands, along with 17,300 acres of federal lands within Tule Lake National Wildlife Refuge that are leased to farmers for agricultural production.

6-KWUA\_ER-1284, 1308-09. Between 1922 and 1948, homesteaders signed water right applications similar to those discussed above, which provided for “a permanent water right for the irrigation of and to be appurtenant to all of the irrigable area now or hereafter developed under the [Klamath Project] within the tract [described in the application].” 6-KWUA\_ER-1385.

In 1956, Reclamation contracted with TID to transfer responsibility for operation and maintenance of the federal facilities serving the Tule Lake Division. *See* 11-KWUA\_ER-2595-638; 6-KWUA\_ER-1309. The contract identifies numerous facilities (*e.g.*, “[t]he entire J Canal and lateral system, including the Lower Lost River Diversion works and the related drainage system and drainage pumps”), the “care, operation and maintenance” of which the United States “will transfer,” and a process by which Reclamation can transfer additional works. 11-KWUA\_ER-2606-08. TID agreed that it “will, from and after the date of any transfer, assume the care, operation, and maintenance of the lands and irrigation works[.]” 11-KWUA\_ER-2608.

TID’s right to water on behalf of landowners within TID with water rights applications with the United States is encapsulated in article 33 of the 1956 contract:

The District shall have the right in perpetuity, subject to the terms and conditions of this contract and consistently with the laws of the State of California, to receive from the Klamath Project all water needed by the District for beneficial irrigation uses within the District. Said

water *shall be delivered* from the works under the control of the United States or its designees or agents at such times and in such amounts as the District may demand, *subject only to* the limit of the capacity of the facilities available therefore and the amount of water required for beneficial use within the District . . . .

11-KWUA\_ER-2630-31 (emphasis added).

With respect to the lands within TID that are owned by the United States, article 33(d) of the 1956 contract provides: “[t]he District shall deliver or furnish water from the works operated and maintained by the District to any lands owned or under the control of the United States within the District . . . .” 11-KWUA\_ER-2631-32. In exchange, the contract requires the United States to pay the actual costs of these services. *Id.*

Reclamation’s discretion over delivery of Project water to TID in the 1956 contract is limited to two specific circumstances. First, in article 20, Reclamation reserved “the right to refuse to deliver water to the District” in the event TID is in arrears to the United States by a year or more for any payment due under the contract. 11-KWUA\_ER-2621. The second circumstance has to do with the intra-Project division of water in times of shortage. In the event of a shortage in the Project’s supply, under article 33(c), Reclamation may elect to allocate the available Project water between TID and “others” having “equal” rights.

11-KWUA\_ER-2631. The “others” is defined by the preceding clause, namely

“others executing similar contracts under the Reclamation Act of June 17, 1902, as amended.” *Id.*

The 1956 contract expressly limits Reclamation’s discretion to take back TID’s management and control of the transferred works. An immediate but temporary mechanism is provided in article 10, in the event of a “major disaster to, or failure of” the transferred works. 11-KWUA\_ER-2611. Otherwise, Reclamation’s ability to take control of the transferred works is governed by article 21. Reclamation may elect to resume operation and maintenance of the transferred works, “or any part thereof,” in the event of (1) a default by the district to make payments due to the United States for a period of one year, (2) failure by the district to make necessary repairs for a period of one year, or (3) “any other violation by the District of the terms of this contract.” 11-KWUA\_ER-2621.

The 1956 TID Contract was approved by an act of Congress. Act of August 1, 1956, Pub L. No. 84-877, 70 Stat. 799.

**c. Lands in the Lower Klamath Lake Division**

In 1921, the Klamath Drainage District (KDD) contracted with the United States in order to secure water for lands of the district. 11-KWUA\_ER-2802. The operative article of the contract provided that “[t]he United States shall deliver to the District during the irrigation season each year . . . a sufficient quantity of water for the irrigation of the irrigable lands of the District, not exceeding

27,500 acres . . . .” *Id.* “Beneficial use shall be the basis and limit of all rights acquired by the District hereunder.” 11-KWUA\_ER-2803.

KDD’s contract was amended in 1943. Article 21 of the 1943 contract addresses the conditions for “Refusal to Deliver Water in Case of Default.” 11-KWUA\_ER-2735. This article lays out three conditions under which Reclamation “shall” not deliver water “to or for” KDD: (1) the district being in arrears at any time for the advance payment for operation and maintenance charges due to the United States; (2) the district being more than 12 months in arrears for any construction charges due to the United States; or (3) the district being more than 12 months in arrears for any other amount due to the United States under the contract. *Id.*

The KDD contract was approved by an act of Congress. Act of June 17, 1944, Pub. L. No. 78-342, 58 Stat. 279.

#### **d. Other Diversions from the Klamath River**

The last group of contracts to receive water from Upper Klamath Lake and the Klamath River are a set of 32 contracts with districts and individual landowners to pump and divert Klamath water through private facilities. *See, e.g.,* 2-KWUA\_ER-0056-57. These contracts all follow an identical form, and therefore differ only with respect to the identity of the contractor, the location and amount of land to be served, and the corresponding price to be paid.

With respect to the water supply to be furnished, article 4 of these contracts provides that:

The United States shall deliver in Klamath River at the outlet of Upper Klamath Lake, for pumping and distribution to and upon the lands herein described only, a sufficient quantity of water during the irrigation season of each year hereafter, not exceeding such quantity as may be used beneficially upon said lands . . . .

6-KWUA\_ER-1410; *see also* 2-KWUA\_ER-0056-57. Nowhere in these contracts does the United States reserve the discretion to even temporarily withhold deliveries to the contractor; not even, for example, due to non-payment.

**2. There Are No Contract-Based Sources of Section 7(a)(2) Discretion to Curtail Irrigation in Order to Benefit ESA-Listed Species**

The contracts discussed above establish nondiscretionary commitments of the United States with respect to the storage, diversion, and delivery of water for irrigation. Were the contracts to be entered or renewed today, Section 7(a)(2) would likely be implicated. *See, e.g., NRDC v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998); *NRDC v. Jewell*, 749 F.3d 776.

Here, however, the contracts were all signed well before enactment of the ESA, and all are perpetual contracts. In such circumstances, the issue is whether the federal agency has, under the already existing arrangement, “retained sufficient discretionary involvement or control” to allow it “to implement measures that inure

to the benefit of the [ESA-listed species].” *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1080 (9th Cir. 2001) (*EPIC*) (internal quotes omitted).

In *NRDC v. Norton*, 236 F. Supp. 3d 1198 (E.D. Cal. 2017), the District Court for the Eastern District of California agreed within the United States that it should follow *EPIC* and *Babbitt* and, with that framework, rejected arguments that various terms of existing contracts create Section 7(a)(2) discretion. *Id.* at 1219-30. This decision is currently on appeal. *NRDC v. Haaland*, Case No. 21-15163 (9th Cir. filed Jan. 28, 2021). In Federal Appellees’ Answering Brief in that case, the United States cites the rule from *EPIC* and explains that, under the already-existing contracts in issue, Reclamation lacks discretion to modify the contracts in order to benefit ESA-listed salmon species. *See* 2-KWUA\_ER-0298-306. The same conclusion applies here.

In addition, the contracts discussed above provide that non-federal entities will operate facilities for the diversion and delivery of water. In some cases, the facilities are owned by the United States, but the United States long ago transferred all responsibility for operation and maintenance to a non-federal party. In other cases, the diversion and delivery works are not even owned by the United States. In such circumstances, the applicable test is set forth in *Babbitt*. That test is whether the federal agency has the discretion to influence the non-federal action

and possesses the ability to implement measures that inure to the benefit of the protected species. *Babbitt*, 65 F.3d at 1509.

Applying the relevant tests from *EPIC* and *Babbitt*, a review of the contract terms cited above shows that the United States lacks discretion to modify the perpetual contracts to add provisions that benefit listed species or to influence the non-federal action to implement measures that inure to the benefit of listed species. The United States obtained the water rights to store and divert water for the Project, and then in over 100 contracts, committed to deliver water to the homesteaders, ditch companies, and later irrigation districts who farmed the reclaimed land. This contractual system was in place before the enactment of the ESA, and the contract terms simply do not afford Reclamation the discretion necessary to trigger its substantive obligation under Section 7(a)(2) based on contemporary case law.

Despite extensive briefing of the contract terms, which were directly relevant under the Section 7(a)(2) legal landscape, the district court did not consider even one contract term in its order. *See* 1-KWUA\_ER-0010-43. The contracts are necessary to the Section 7(a)(2) analysis, and this Court should engage in a thorough review of the relevant terms and conclude that the United States has no discretion to modify the contract terms for the benefit of listed species.

## **II. The ESA Does Not Preempt Administrative Enforcement of State Water Law Because Section 7(a)(2) Does Not Create Discretion to Benefit Listed Species, and Federal Law Requires Reclamation to Comply with State Water Law**

Based on its erroneous interpretation of Reclamation’s authority under the Reclamation Act, the district court found that the OWRD Order—as OWRD’s administrative enforcement of state water law under the ACFFOD—stands as an obstacle to the accomplishment and execution of the ESA. This is because the OWRD’s determinations and enforcement of the ACFFOD preclude Reclamation from releasing stored water in conflict with Reclamation’s determination that the release of stored water is necessary to “comply with the ESA.” 1-KWUA\_ER-0036-37 (citing *Arizona v. United States*, 567 U.S. 387, 399-400 (2012)).

Again, this approach bypasses the evaluation of *what the ESA requires*. As explained above, the ESA is not a source of Section 7(a)(2)-triggering discretion, and such discretion must be found in other sources. The Reclamation Act is not such a source. Indeed, section 8 of the Reclamation Act requires Reclamation to comply with state water law. 43 U.S.C. § 383; *see also California v. U.S.*, 438 U.S. at 675-78. This is a nondiscretionary obligation.

OWRD’s implementation of the ACFFOD in the OWRD Order is not in conflict with federal law; instead, federal law requires compliance with state water law and state administration of water law. *See* 43 U.S.C. §§ 383, 666(a). For these

reasons, the district court's conclusions regarding preemption should also be reversed.

### **III. The District Court Abused Its Discretion by Striking KWUA's Arguments that Were Responsive to the United States' Position that Asserted, Unadjudicated Tribal Rights Are a Source of Section 7(a)(2) Discretion**

#### **A. KWUA's Arguments Were Proper**

The district court granted Plaintiffs' motion to strike certain KWUA arguments based on its conclusion that KWUA sought an adjudication of claimed tribal water rights for flows in the Klamath River. This conclusion lacks any basis in the record.

In its motion for summary judgment, the United States asserted that Reclamation must operate the Project consistent with claimed but unadjudicated tribal reserved rights, and that the asserted existence of those rights is a source of discretionary authority that triggers Reclamation's obligations under Section 7(a)(2). 8-KWUA\_ER-1746, 1755; 7-KWUA\_ER-1642. No tribal party presented those arguments.

KWUA responded to the United States' arguments, explaining why downstream, unadjudicated water rights claims are not a source of Section 7(a)(2) triggering discretion. 7-KWUA\_ER-1547-56; *see also* 3-KWUA\_ER-0360-68.

The United States did not object, but the Plaintiffs filed a motion to strike KWUA's arguments and supporting evidence, thus seeking to police the arguments

that KWUA may make in response to the United States. But KWUA’s arguments fell easily within the Bifurcation Order, which barred the parties only from seeking “a ruling with respect to tribal rights *beyond a ruling on the applicability of the ESA to Klamath Project operations.*” 8-KWUA\_ER-1772, 1776 (emphasis added). Because the United States asserted that unadjudicated tribal rights are germane to the application of the ESA, KWUA’s response was proper.

Unsurprisingly, Plaintiffs failed to identify any supporting legal authority for their motion to strike KWUA arguments. 3-KWUA\_ER-0458-81, 0454-57, 0425-53, 0400-07; 4-KWUA\_ER-0619-22; 2-KWUA\_ER-0228-0233.

Nevertheless, the district court struck nearly all of KWUA’s arguments. 1-KWUA\_ER-0027. It concluded that KWUA “effectively asks me to adjudicate or quantify the Tribes’ water rights,” *id.*, which would be inconsistent with the Bifurcation Order incorporating the stipulated provisions that the lifting of the prior stay “shall not allow or result in adjudication or quantification of the Tribes’ water rights,” 8-KWUA\_ER-1776. Having reached its erroneous conclusion on the scope of discretionary authority under the Reclamation Act, the district court did not rule on the substance of the tribal rights arguments as it relates to the application of Section 7(a)(2) as a basis for its grant of summary judgment. 1-KWUA\_ER-0032-43.

The court's ruling on the motion to strike was in error. To be sure, "district courts have inherent power to control their docket," and their exercise of that power "is reviewed for an abuse of discretion." *Ready Transp.*, 627 F.3d at 404 (internal quotes omitted). But here the lack of any basis in the record for the court's ruling shows an abuse of discretion.

KWUA could not have been clearer in disclaiming any request to obtain adjudication of any water right; its arguments are based solely on legal facts that relate to the lack of discretion to curtail Project deliveries based on claimed, unadjudicated water rights. *See* 7-KWUA\_ER-1548.

An adjudication is a formal legal proceeding that determines the existence and elements of a water right. *See generally U.S. v. Oregon*, 44 F.3d at 763-65 (describing history of water rights adjudication). For a "instream" water right (a right to a flow of water), the elements of a right include its purpose, its location, the quantity of water to which a right exists, and the priority date of the water right. *See, e.g.*, 3-KWUA\_ER-0436 (ACFFOD determination and quantification of the existence and elements of a tribal water right in the Sycan River in Oregon). KWUA requested judicial resolution of none of these matters with respect to downstream tribal water rights claims in the Klamath River. Rather, KWUA explained that the United States' arguments are wrong based on rudimentary

principles of water law, Reclamation's legal authority, and the administration of water rights. 7-KWUA\_ER-1547-56; *see also* 3-KWUA\_ER-0360-68.

Broadly, these arguments fall into three categories. First, any downstream, unadjudicated water rights are, by definition, unadjudicated and unknown. If downstream water rights claims were actually to be adjudicated, there would be significantly contested issues of fact and law, related to the location(s), source of water, rate of flow, priority date relative to the Project, and other issues.

7-KWUA\_ER-1548-51. KWUA did not ask the district court to resolve any of those contested issues. Rather, KWUA's arguments go to the fact that any downstream water right is currently unknown and speculative.

Second, KWUA explained, Reclamation lacks authority to determine what any party's water rights are. 7-KWUA\_ER-1553-60. Adjudication of rights occur in litigation settings, with due process and a neutral finder of fact, not in a closed process in federal agency offices. Reclamation has no authority to determine the existence or nature of unadjudicated water rights. The United States itself has successfully contended in litigation concerning the Klamath River that it has no obligation to provide a given quantity of water for unadjudicated water rights claims. *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, No. C 02-02006 SBA, 2005 U.S. Dist. LEXIS 36035, at \*40-41 (N.D. Cal. Mar. 7, 2005); 5-KWUA\_ER-0980, 0941. And the Supreme Court's recent decision in

*Arizona v. Navajo Nation*, \_\_\_ U.S. \_\_\_, 143 S. Ct. 1804 (2023), directly addresses the Reclamation’s obligations to manage reclamation projects given the existence of claimed, unadjudicated tribal reserved rights. “The Federal Government owes judicially enforceable duties to a tribe ‘only to the extent it expressly accepts those responsibilities.’ [Citation.] Whether the Government expressly accepted such obligations ‘must train on specific rights-creating or duty-imposing’ language in a treaty, statute, or regulation. [Citation.]” *See id.* at 1813.

Third, even assuming a downstream water right that is senior to the Project, Reclamation lacks any authority to enforce such a right. In fact, water rights are administered on a priority basis, where the most junior water user is regulated to provide water for a senior, then the next most junior, until the senior right is satisfied. *See, e.g., Montana v. Wyoming*, 563 U.S. 368, 375-76 (2011); 7-KWUA\_ER-1553-55. There are many water rights that are junior to the Project, 6-KWUA\_ER-1427-31, and they are not subject to regulation in favor of unadjudicated water rights. The United States itself has argued successfully in the KBA that “selective enforcement” of water rights is “contrary to Western water law generally and Oregon water law specifically.” 4-KWUA\_ER-0857-59.

In sum, KWUA did not ask the district court, and does not ask this Court, to adjudicate any water right or any element of a water right. KWUA merely argues that Reclamation's arguments regarding ESA discretion are not viable.<sup>6</sup>

Finally, given that the district court did not rule on whether Section 7(a)(2) discretion exists based on the existence of claimed, unadjudicated tribal rights, granting of the motion to strike was unnecessary.

**B. This Court Can Resolve the Merits of This Issue or Remand the Matter for Development in the District Court**

Appellate courts may address an issue on appeal even if the district court did not reach the issue “so long as it was ‘raised sufficiently for the trial court to rule on it.’” *Munden v. Stewart Title Guar. Co.*, 8 F.4th 1040, 1049 (9th Cir. 2021) (quoting *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1191 n.5 (9th Cir. 2016)). Here, the issues were fully briefed, and the Court can decide the issues if it chooses. *See* 7-KWUA\_ER-1642:19-24;3-KWUA\_ER-0561-66; 7-KWUA\_ER-1547-56; *see also* 3-KWUA\_ER-0360-68.

Alternatively, KWUA asks that the Court find the district court abused its discretion by granting the motion to strike, and instruct the district court to reach

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<sup>6</sup> KWUA recognizes that this Court has referred to obligations to operate the Project consistent with senior tribal water rights. *See Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 941 (9th Cir. 2022). That is true for all water right holders under the prior appropriation doctrine. In any event, the relevance of tribal water rights specifically is an issue preserved for Phase Two of this litigation under the Bifurcation Order.

the substantive issue on remand in Phase Two of the litigation as contemplated in the Bifurcation Order, consistent with the Court's rulings on the first and second issues presented.

### CONCLUSION

For all these reasons, this Court should reverse the district court's entry of judgment in favor of the United States, et al., on the First Cause of Action in the United States' Crossclaim, KWUA's Counterclaim, and OWRD's Counterclaim. This Court should reverse the district court's ruling striking KWUA's arguments and remand to the district court. The remand order should direct the district court to enter judgment in favor of KWUA and against the United States, et al., on the First Cause of Action in the Crossclaim and KWUA's Counterclaim, or alternatively, to decide issues regarding the applicability of Section 7(a)(2) based on the existence of unadjudicated downstream reserved tribal rights claims and proceed with Phase Two consistent with this Court's rulings.

Date: October 16, 2023

SOMACH SIMMONS & DUNN, PC

*s/ Brittany K. Johnson*  
Brittany K. Johnson  
*Attorneys for Crossclaim-Defendant/  
Counter-Claimant/Appellant  
Klamath Water Users Association*

**Certificate of Compliance for Briefs**

**9th Cir. Case Number(s) 23-15499 and 23-15521**

I am the attorney or self-represented party.

**This brief contains 13,699 words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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**Signature:** *s/ Brittany K. Johnson*

**Date:** 10/16/2023

**ADDENDUM TO  
APPELLANT'S OPENING BRIEF**

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**TAB A**  
**FEDERAL STATUTES**

**43 U.S.C. § 371**

**Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388**

**Sec. 1. [Reclamation fund established from public land receipts except 5 percent for educational and other purposes.]**

All moneys received from the sale and disposal of public lands in Arizona, California; Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this act.

(32 Stat, 388; 43 U.S.C. § 391)

**Sec. 2. [Authority to study, locate and construct irrigation works.]**

The Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells.

(32 Stat. 388; Act of August 7, 1946, 60 Stat. 866; 43 U.S.C. § 411)

**Sec. 3. [Withdrawal of lands for irrigation works – Withdrawal of lands susceptible of irrigation – Homestead entries – Determination whether project is practicable – Restoration and entry – Commutation.]**

The Secretary of the Interior shall, before giving the public notice provided for in section 4 of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys

for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*; That the commutation provisions of the homestead laws shall not apply to entries made under this act.

(32 Stat. 388; 43 U.S.C. §§ 416, 432, 434)

**Sec. 4. [Contracts for construction – Public notice of irrigable lands, limit of area, charges per acre, and method of payment.]**

Upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments; not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work.

(32 Stat. 389; Act of May 10, 1906, 34 Stat. 225; 43 U.S.C. §§ 419, 461)

**Sec. 5. [Reclamation requirements for entrymen – No water for more than 160 acres of private lands in one ownership – Residence of landowner – Receipts to reclamation fund.]**

The entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section 4. No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. All moneys received from the above sources shall be paid into the reclamation fund.

(32 Stat. 389; § 1, Act of December 16, 1930, 46 Stat. 1029; § 8, Act of September 6, 1966, 80 Stat. 639; 43 U.S.C. §§ 392, 431, 439)

**Sec. 6. [Reclamation fund to be used for operation and maintenance – Management of works to pass to landowners – title.]**

The Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

(32 Stat. 389; 43 U.S.C. §§ 491, 498)

**Sec. 7. [Authority to acquire property – Attorney General to institute condemnation proceedings.]**

Where in carrying out the provisions of this act it becomes necessary to acquire any rights of property, the Secretary of the Interior is hereby authorized to

acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application of the Department of Justice.

(32 Stat. 389; 43 U.S.C. § 421)

**Sec. 8. [Irrigation laws of States and Territories not affected – Interstate streams – Water rights.]**

Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the Waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

(32 Stat. 390; 43 U.S.C. §§ 372, 383)

**Sec. 9. [Allocation of funds to States and Territories of origin.] – Repealed**

**Sec. 10. [Necessary and proper acts and regulations.]**

The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.

(32 Stat, 390; 43 U.S.C. § 373)

**33 Stat. 714**

**1905 Klamath Project Act Authorization, Pub. L. No. 58-66 ch. 567,  
33 Stat. 714**

**Chap. 567.** An Act Authorizing the changing of the levels of certain lakes and the disposal of certain lands under the terms of the national reclamation Act.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior is hereby authorized in carrying out any irrigation project that may be undertaken by him under the terms and conditions of the national reclamation Act and which may involve the changing of the levels of Lower or Little Klamath Lake, Tule or Rhett Lake, and Goose Lake, or any river or other body of water connected therewith, in the States of Oregon and California, to raise or lower the level of said lakes as may be necessary and to dispose of any lands which may come into the possession of the United States as a result thereof by cession of any State or otherwise under the terms and conditions of the national reclamation Act.

Approved, February 9, 1905.

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**16 U.S.C. § 1536(a)**

**§ 1536. Interagency cooperation**

(a) Federal agency actions and consultations.

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act [16 USCS § 1533].

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after

consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 [16 USCS § 1533] or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

**TAB B**  
**STATE STATUTES**

## CESSION ACTS

### CALIFORNIA

**CHAPTER VI. An act authorizing the United States government to lower the water levels of any or all of the following lakes: Lower or Little Klamath lake, Tule or Rhett lake, Goose lake and Clear lake, situated in Siskiyou and Modoc counties, and to use any part or all of the beds of said lakes for the storage of water in connection with the irrigation and reclamation operations conducted by the Reclamation Service of the United States; also ceding to the United States all the right, title, interest or claim of the State of California to any lands uncovered by the lowering of the water levels of any or all of said lakes not already disposed of by the state.**

(Approved February 3, 1905.)

*The People of the State of California, represented in senate and assembly, do enact as follows:*

**Section 1.** That for the purpose of aiding in the operations of irrigation and reclamation conducted by the Reclamation Service of the United States, established by the act of congress approved June 17, 1902 (32 Stat., 388), known as the reclamation act, the United States is hereby authorized to lower the water levels of any or all of the following lakes: Lower or Little Klamath lake, Tule or Rhett lake, Goose lake, and Clear lake, situated in Siskiyou and Modoc counties, as shown by the map of the United States Geological Survey, and to use any part or all of the beds of said lakes for the storage of water in connection with such operations.

**Section 2.** And there is hereby ceded to the United States all the right, title, interest, or claim of this state to any lands uncovered by the lowering of the water levels, or by the drainage of any or all of said lakes not already disposed of by the State; and the lands hereby ceded may be disposed of by the United States free of any claim on the part of this state, in any manner that may be deemed advisable by the authorized agencies of the United States, in pursuance of the provisions of said reclamation act: *provided*, that this act shall not be in effect as to the lakes named which lie partly in the State of Oregon until a similar cession as been made by that state.

OREGON

CHAPTER 5

**An Act: To authorize the utilization of Upper Klamath Lake, Lower or Little Klamath Lake, and Tule or Rhett Lake, situate in Klamath County, Oregon, and Goose Lake, situate in Lake County, Oregon, in connection with the irrigation and reclamation operations of the Reclamation Service of the United States all the right, title, interest and claim of the State of Oregon to any and all lands recovered by the lower of the water levels, or by the drainage of any or all of said lakes.**

*Be it enacted by the Legislative Assembly of the State of Oregon; Be it enacted by the People of the State of Oregon:*

**Section 1.** That for the purpose of aiding in the operations of irrigation and reclamation, conducted by the Reclamation Service of the United States, established by the act of Congress, approved June 17, 1902 (32 Stat. 388), known as the Reclamation Act, the United States is hereby authorized to lower the water level of Upper Klamath Lake, situate in Klamath County, Oregon, and to lower the water level of, or to drain any and all of the following lakes: Lower or Little Klamath Lake, and the Tule or Rhett Lake, situate in Klamath County, Oregon, and Goose Lake, situate in Lake County, Oregon; and to use any part or all of the beds of said lakes for the storage of water in connection with such operations.

**Section 2.** That there be and hereby is ceded to the United States all the right, title, interest, or claim of this State to any land uncovered by the lowering of the water levels, or by the drainage of any or all of said lakes not already disposed of by the State; and the lands hereby ceded may be disposed of by the United States, free and clear of any claim on the part of this State in any manner that may be deemed advisable by its authorized agencies, in pursuance of the provisions of said Reclamation Act.

Approved January 20, 1905.

Filed in the Office of the Secretary of State January 20, 1905.

**TAB C**  
**FEDERAL REGULATIONS**

**40 CFR § 402.02**

**§ 402.02 Definitions.**

\* \* \* \* \*

Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.

\* \* \* \* \*

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**40 CFR § 402.03**

**§ 402.02 Applicability.**

Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.