

# **ATTACHMENT 1**

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10  
11 UNITED STATES DISTRICT COURT  
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION  
14

15 YUROK TRIBE, *et al.*,

16 Plaintiffs,

17 v.

18 U.S. BUREAU OF RECLAMATION, and  
19 NATIONAL MARINE FISHERIES SERVICE,

20 Defendants.

21 KLAMATH WATER USERS ASSOCIATION,

22 Defendant-Intervenor.  
23  
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28

Case No. 3:19-cv-04405-WHO  
(Related Case No. 3:16-cv-04294-WHO)  
(Related Case No. 3:16-cv-06863-WHO)

**DEFENDANT-INTERVENOR  
KLAMATH WATER USERS  
ASSOCIATION'S MOTION FOR  
SUMMARY JUDGMENT ON  
PLAINTIFFS' FIFTH AND SIXTH  
ESA CLAIMS**

Hearing Date: TBD  
Hearing Time: TBD  
Courtroom 2, 17th Floor  
Honorable William H. Orrick

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1                   **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

2                   Defendant-Intervenor Klamath Water Users Association (KWUA) files this motion for  
 3 summary judgment on the Fifth and Sixth Endangered Species Act (ESA) Claims in Plaintiffs' First  
 4 Amended Complaint (FAC). This motion seeks final judgment on the Fifth and Sixth ESA Claims  
 5 in favor of Federal Defendants and Defendant-Intervenor KWUA. This motion is based on the  
 6 Memorandum of Points and Authorities in support of the motion for summary judgment below, the  
 7 administrative records filed with the Court, the Fourth Declaration of Brad Kirby in Support of  
 8 Klamath Water Users Association's Motion to Lift Stay (Kirby Decl.), the Declaration of Paul S.  
 9 Simmons in Support of Klamath Water Users Association's Motion for Order Lifting Stay and  
 10 Motion for Summary Judgment on the Fifth and Sixth ESA Claims (Simmons Decl.), the exhibits  
 11 attached to the Simmons Declaration, and such other matters as the Court may consider.

12                   This motion is attached as Attachment 1 and lodged concurrently with KWUA's motion to  
 13 lift the stay of this litigation that was ordered in March of 2020. If the Court lifts the stay, KWUA  
 14 will re-file the motion for summary judgment and select an available hearing date in accordance  
 15 with the Local Rules.

16                   **RELIEF REQUESTED**

17                   KWUA seeks an order from the Court granting summary judgment on the Fifth and Sixth  
 18 ESA Claims in the FAC on the basis that ESA Section 7(a)(2) does not apply to the aspects of  
 19 Klamath Project (Project) operations that involve storage, diversion, delivery, and use of water for  
 20 irrigation in the Project service area, and thus, Plaintiffs have failed to state a claim under ESA  
 21 Section 7(a)(2) as a matter of law. If the Court grants this relief, KWUA requests that the Court  
 22 order the parties to meet-and-confer, and submit a joint case management proposal to manage the  
 23 hearing and disposition of the remaining claims in the FAC.

24                   **MEMORANDUM OF POINTS AND AUTHORITIES**

25                   **I. INTRODUCTION**

26                   The Project facilities store, divert, and deliver irrigation water for approximately  
 27 200,000 acres of farmland, as well as two prized national wildlife refuges. Agriculture is the  
 28 cornerstone of the economy in the Klamath Basin, supporting farm families, farm employees,



1 agricultural support businesses, food production, and the main street. Project facilities also support  
2 abundant waterfowl and wildlife in and around the refuges. The Project is currently operated  
3 according to legal guidance that is almost three decades old. This fact became less consequential  
4 when, after the last regional disaster in 2001, stakeholders committed in earnest to and succeeded in  
5 negotiating a basin-wide settlement that required parties to move away from certain legal positions  
6 in consideration of the overall deal and stability for the Basin. That settlement no longer exists.

7 Under the current framework, the U.S. Bureau of Reclamation (Reclamation) negotiates a  
8 “proposed action” with the two consulting agencies: National Marine Fisheries Service (NMFS) and  
9 U.S. Fish and Wildlife Service (USFWS) (collectively, “Services”). The goal of the effort is to  
10 arrive at an action that will be consistent with Reclamation’s substantive obligations under  
11 Section 7(a)(2) not to jeopardize listed species or adversely affect critical habitat. The real-word  
12 result is that each proposed action has become more drastic than the last, sequentially ratcheting  
13 down Project diversions for irrigated agriculture without ever acknowledging the elephant in the  
14 room: that Reclamation does not have the legal authority or operational capability under its  
15 contracts, state, or federal law to reduce Project diversions for the purpose of providing minimum  
16 flows in the Klamath River. Contemporary jurisprudence on the scope of ESA Section 7(a)(2) and  
17 the determination of water rights in the Klamath Basin Adjudication (KBA) confirm this is the case.

18 Plaintiffs have raised Reclamation’s Section 7(a)(2) obligations in operating the Project in  
19 their Fifth and Sixth ESA Claims in the FAC. Accordingly, KWUA brings this motion to obtain  
20 judicial resolution of these consequential federal questions.

## 21 **II. STATEMENT OF ISSUES TO BE DECIDED**

22 To resolve this motion, the Court must decide whether or how ESA Section 7(a)(2) applies  
23 to two aspects of the operation of the Project:

24 1. Whether Section 7(a)(2) authorizes or requires Reclamation to curtail, or direct the  
25 curtailment of, storage, diversion, and delivery of water for irrigation in the Project in order to  
26 benefit ESA-listed species in the Klamath River; and

27 2. Whether Reclamation has an obligation to release water from Upper Klamath Lake  
28 (UKL) having the characteristic of stored water in order to benefit fish species.

1 **III. STATEMENT OF FACTS**

2 The following facts are relevant to evaluate the scope of Reclamation’s obligations and  
3 discretionary authority related to the operation of the Project. The scope of review for the ESA  
4 claims is not limited to the administrative record (AR). *See* section V.B, *infra*. KWUA cites to  
5 documentary evidence contained in the AR compiled by the agencies,<sup>1</sup> as well the Kirby  
6 Declaration, the Simmons Declaration, and its attached exhibits.

7 **A. Basic Facts of the Basin and the Project**

8 The Klamath Basin occupies 10 million acres in south-central Oregon and northern  
9 California. USBR 018815. In the uppermost watershed, rain and snowmelt-fed streams flow into  
10 UKL near Klamath Falls, Oregon. USBR 011754-55. UKL stores water during higher runoff  
11 periods, impounded by Link River Dam at its outlet. USBR 011756. During periods when natural  
12 runoff diminishes, water held behind Link River Dam can be released to flow downstream for  
13 diversion for irrigation, or otherwise used. USBR 011756-57.

14 The Project is a federal reclamation project authorized in 1905 under the Reclamation Act.  
15 USBR 008397-98. Project infrastructure provides water to irrigate approximately 200,000 acres of  
16 irrigated land. USBR 011736, 018815. The Project diverts water from UKL itself and from the  
17 Klamath River just downstream of Link River Dam. USBR 008430-31. The diverted water  
18 includes both live flow and stored water that has been collected behind Link River Dam. *Id.*

19 In western water law, water may have the legal character of “live flow” or “stored” water.  
20 The two are legally distinct, and one may have a right to use either or to use both. *See Cookinham*  
21 *v. Lewis*, 58 Or. 484, 495-96 (1911); *see also* Or. Atty. Gen. Opinion Request OP-6423, 1992 Ore.  
22 AG LEXIS 32, at \*6-9 (explaining how stored water is identified). “Live flow” means the flow rate

23 \_\_\_\_\_  
24 <sup>1</sup> Federal Defendants filed the AR with the Court in 837 separate ECF filings. The AR certified by  
25 NMFS is located at ECF No. 62 (A\_000001) (Feb. 19, 2020) through ECF No. 354 (D\_013026)  
26 (Feb. 20, 2020). The AR certified by Reclamation is located at ECF No. 355 (000001) (Feb. 20,  
27 2020) through ECF No. 524 (030205) (Feb. 21, 2020), ECF No. 527 (030206) through ECF  
28 No. 686 (060671) (Feb. 26, 2020), ECF No. 688 (060672) through ECF No. 822 (087441)  
(Feb. 28, 2020), and ECF No. 825 (087442) through ECF No. 905 (110261) (Mar. 9, 2020).  
Herein, citations to the NMFS record will be denoted with “NMFS” followed by the bates number,  
and citations to Reclamation’s record will be denoted with “USBR” followed by the bates number.

1 present without any human interference—the amount naturally passing in a stream, lake, or  
 2 reservoir. NMFS C\_030370. Because most runoff and snowmelt occurs in winter or early spring,  
 3 when it is not needed for crops, dams impound water during times of abundant flow, storing it until  
 4 needed. The stored water may be diverted from the reservoir itself, or may be released from the  
 5 reservoir to use for authorized purposes downstream (including diversion for irrigation or any use  
 6 authorized by a water right). *Id.* Thus, there are water rights to divert water to storage (i.e., filling  
 7 up a reservoir) and rights to use the stored water (sometimes called secondary rights).

8 The main diversion points of stored water and live flow for the Project are A Canal (above  
 9 Link River Dam from UKL), the Lost River Diversion Channel (3 miles below Link River Dam  
 10 from the Keno Impoundment), and North and Ady Canal headworks; North and Ady Canals are  
 11 owned and operated by Klamath Drainage District (KDD). NMFS C\_030370-72. Reclamation  
 12 owns and operates Link River Dam and has transferred operational responsibility for other of the  
 13 federally owned facilities in the Project (e.g., A Canal) to irrigation districts. USBR 009104-07,  
 14 009180; NMFS C\_030370-71.

15 **B. Water Rights Determined and Quantified in the KBA**

16 In 1975, the State of Oregon commenced a general stream adjudication to determine the  
 17 relative rights of use of the Klamath River and its tributaries in accordance with state law. *United*  
 18 *States v. Oregon, Water Resources Dep't*, 44 F.3d 758, 762 (9th Cir. 1994). The Oregon Water  
 19 Resources Department's (OWRD) Adjudicator issued findings of fact and order of determination in  
 20 2013, which were submitted to the Klamath County Circuit Court in Oregon with minor corrections  
 21 in 2014 (ACFFOD). The Klamath County Circuit Court is in the process of reviewing exceptions  
 22 and holding hearings to affirm or modify the ACFFOD consistent with state law. The Adjudicator's  
 23 determinations are binding and enforceable, unless and until modified by the Klamath County  
 24 Circuit Court in its final judgment reviewing the ACFFOD. Or. Rev. Stat. §§ 539.130(4), 539.170.  
 25 Summarized below are the water rights determined in the ACFFOD relevant to this motion.

26 **1. The ACFFOD Confirms and Quantifies the Right to Store Water for the Project**

27 The ACFFOD determines that Reclamation has the right to store water in UKL.  
 28 USBR 008430, 008486. Specifically, “the United States is the owner of a right to store water in

1 Upper Klamath Lake to benefit the separate irrigation rights recognized for the Klamath  
2 Reclamation Project[.]” USBR 008453.

3 **2. The ACFFOD Confirms and Quantifies the Right to Use Stored Water from**  
4 **the Project**

5 The ACFFOD recognizes a difference between the right to store water and the right to use  
6 stored water from UKL. USBR 008455. The ACFFOD concludes that the districts and individual  
7 landowners in the Project hold the interest associated with applying water appropriated from the  
8 Klamath River (in Oregon) and UKL to beneficial use. USBR 008453. This includes the right to  
9 use both stored water (stored under Reclamation’s determined claim), and the right to use live flow  
10 (i.e., tributary inflow). USBR 008524. The authorized use for water stored in UKL is irrigation and  
11 related purposes on specifically identified places of use in the Project. *Id.*

12 **3. ACFFOD Does Not Identify or Quantify Any Yurok or Hoopa Water Rights**  
13 **for Flows in the Klamath River**

14 The Yurok and Hoopa Valley Tribes, whose reservations are located approximately  
15 200 miles downriver from the Project in California, each have federally-protected rights to fish on  
16 their reservations. *See Parravano v. Masten*, 70 F.3d 539 (9th Cir. 1995). In 1997, a Regional  
17 Solicitor of the Department of the Interior (DOI) opined that they have water rights to support their  
18 on-reservation fishery, with a priority of “at the latest in 1891.” *Baley v. United States*, 942 F.3d  
19 1312, 1323 (Fed. Cir. 2019). Neither the Yurok nor Hoopa Valley Tribes, nor the United States as  
20 their trustee, filed claims in the KBA. USBR 019007-08.

21 **C. Project Contracts**

22 Under the design of the 1902 Reclamation Act, Reclamation financed and constructed works  
23 for storage, diversion, and delivery to irrigated land in the Project. 43 U.S.C. § 372 *et seq.*;  
24 USBR 008401-02. Generally, it entered into contracts with individuals, then with irrigation districts  
25 and similar water delivery agencies, under which the contractor agreed to repay to Reclamation  
26 allocated portions of the cost of construction of a project and reimburse Reclamation for its share of  
27 the costs of operation and maintenance, in exchange for water delivery via Project works.  
28 USBR 008402. Although there are nearly 200 contracts between Reclamation and entities or

1 individuals in the Klamath area, approximately 90 percent<sup>2</sup> of the irrigated acres in the Klamath  
 2 Project that use UKL and Klamath River water are served under contracts between Reclamation and  
 3 the irrigation districts or water delivery agencies listed below:

- 4 • Klamath Irrigation District (KID), USBR 017680-821;
- 5 • Tulelake Irrigation District (TID), USBR 018341-85;
- 6 • Malin Irrigation District (MID), USBR 018028-54;
- 7 • Shasta View Irrigation District (SVID), USBR 018220-311;
- 8 • Klamath Drainage District (KDD), USBR 017580-679;
- 9 • Klamath Basin Improvement District, USBR 017524-79; and
- 10 • Van Brimmer Ditch Company, USBR 018452-71.

11 Terms included in those district's contracts are representative of Project contracts as a whole.

12 Simmons Decl. ¶¶ 11-13.

#### 13 IV. PROCEDURAL HISTORY

14 The claims in the FAC concern coho, a “threatened” species under the ESA that primarily  
 15 uses tributaries of the Klamath River for spawning and rearing and the mainstem river for migration  
 16 to and from the ocean. FAC ¶¶ 1, 24-30. Although alleging no facts to establish standing, the FAC  
 17 also concerns endangered Southern Resident Killer Whales, a small part of whose diet is Chinook  
 18 salmon from the Klamath River. *Id.* ¶¶ 1, 31-34.

19 Over recent years, Reclamation has consulted with NMFS (coho) and USFWS (suckers) on  
 20 the effects of Project operations on the listed species. NMFS D\_005089-5094. Most recently,  
 21 NMFS produced its “Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion, and  
 22 Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response for  
 23 Klamath Project Operations from April 1, 2019 through March 31, 2024” (2019 NMFS BiOp).  
 24 NMFS A\_000001-359. The 2019 NMFS BiOp found that Reclamation’s proposed action as written  
 25 in December 2018 and amended in February 2019 would not jeopardize the continued existence of  
 26 threatened coho or destroy or adversely modify designated critical habitat. NMFS A\_000268. On  
 27 April 1, 2019, Reclamation completed its “Implementation of Klamath Project Operating

28 \_\_\_\_\_  
<sup>2</sup> The ACFFOD includes the KBA Adjudicator’s determination of the total annual duty for the  
 Project claims, based on a maximum total volume of 3.5 acre-feet/per acre per season.  
 USBR 008439. The Adjudicator’s determination of the annual duty for the “Combined KID/TID”  
 and “KDD” encompasses more than 90 percent of the total annual duty for the Project, and  
 embraces the representative contracts between Reclamation and Project districts. USBR 008438.

1 Procedures, 2019-2024,” including issuance of its Finding of No Significant Impact.

2 USBR 007491-604, 007469-90.<sup>3</sup>

3 On July 31, 2019, Plaintiffs filed a complaint against NMFS and Reclamation. ECF No. 1.  
 4 After sending a 60-day notice letter, Plaintiffs filed the FAC on September 30, 2019, adding the  
 5 Fifth and Sixth ESA Claims against Reclamation. ECF No. 17. In October of 2019, Plaintiffs filed  
 6 a motion for preliminary injunction (First PI Motion). ECF No. 27. After Defendants and KWUA  
 7 filed responses, Plaintiffs filed a reply in which they modified the relief requested in their First PI  
 8 Motion (Modified PI Motion). *See* ECF No. 48 at 1-2. Defendants and KWUA filed responses to  
 9 the Modified PI Motion. ECF Nos. 54, 54-1, 54-2, 57, 58. Thereafter, the parties entered into a  
 10 stipulation for an order that would impose a stay (Stipulation for Stay). ECF No. 907.

11 On April 19, 2021, KWUA filed a motion to lift the stay based on Reclamation’s  
 12 noncompliance with terms of the Stipulation for Stay, and lodged the instant motion for summary  
 13 judgment on the Fifth and Sixth ESA Claims in the FAC.

## 14 V. LEGAL STANDARD

### 15 A. The Fifth and Sixth ESA Claims in the FAC Allege Violations of the Substantive Duty 16 Under Section 7(a)(2) to Avoid Jeopardy to Species

17 The allegations in the FAC involve four core issues: (1) whether NMFS complied with ESA  
 18 Section 7 when it adopted the 2019 NMFS BiOp (First, Second, Third, Fourth ESA Claims);  
 19 (2) whether Reclamation violated Section 7 by failing to reinitiate consultation based on conditions  
 20 observed during April/May 2019 (Fifth ESA Claim); (3) whether Reclamation is in violation of  
 21 Section 7(a)(2) by operating the Project according to the Operations Plan (Sixth ESA Claim); and  
 22 (4) whether Reclamation violated NEPA when it issued its environmental assessment and finding of  
 23 no significant impact for the Operations Plan (First, Second, and Third NEPA Claims).

24 Summary judgment is proper if the movant shows “there is no genuine dispute as to any  
 25 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). This

26 \_\_\_\_\_  
 27 <sup>3</sup> The Proposed Action for 2019-2024 Project operations analyzed in the 2019 NMFS BiOp and  
 28 documents for compliance with the National Environmental Policy Act (NEPA) are referred to as  
 the “Operations Plan.”

1 motion seeks summary judgment in favor of Federal Defendants and Defendant-Intervenors on the  
 2 Fifth and Sixth ESA Claims for Relief because the material facts are undisputed, and the claims fail  
 3 as a matter of law.

4 **B. The Scope of Review for the Fifth and Sixth ESA Claims Is Not Limited to the AR**

5 Plaintiffs bring the Fifth and Sixth ESA Claims under the ESA citizen suit provision. FAC  
 6 ¶¶ 9, 149 (citing 16 U.S.C. § 1540(g)(1)). “A suit to compel agencies to comply with the  
 7 substantive provisions of the ESA arise[s] under the ESA citizen suit provision . . .” *Nat. Res. Def.*  
 8 *Council v. Zinke*, No. 1:05-cv-01207 LJO-EPG, 2017 U.S. Dist. LEXIS 138172, at \*21 (E.D. Cal.  
 9 Aug. 28, 2017) (internal quotes and citations omitted). “For claims that arise directly under the  
 10 ESA, the [Administrative Procedure Act’s] record review provision does not apply and ‘evidence  
 11 outside the administrative record [may be considered] for the limited purposes of reviewing  
 12 Plaintiffs’ ESA claim.’ ” *Id.* at \*21-22 (citation omitted); *see also Yurok Tribe v. U.S. Bureau of*  
 13 *Reclamation (Yurok I)*, 231 F. Supp. 3d 468-69 (N.D. Cal. 2017).

14 **VI. ARGUMENT**

15 **A. The Fifth and Sixth ESA Claims Are Premised on the Incorrect Assumption that**  
 16 **Section 7(a)(2) Requires Reclamation to Assure Minimum Flows Below Iron Gate**

17 **1. The Fifth and Sixth ESA Claims Allege Violations of ESA Section 7(a)(2) Based**  
 18 **on the Failure to Provide Sufficient Minimum Flows**

19 Whether phrased as disease mitigation flows, spring flows, May and June flows, minimum  
 20 flows, protective flows, surface flushing flows, deep flushing flows, emergency dilution flows, or  
 21 flows to meet a conservation standard, Plaintiffs’ allegations in the FAC are plainly directed at the  
 22 flows below Iron Gate Dam, and in turn, releases from UKL to maintain instream flows in the  
 23 Klamath River for the benefit of threatened coho. *See* FAC ¶¶ 2, 16, 49, 55, 57, 60, 62, 71. The  
 24 Fifth and Sixth ESA Claims allege that Reclamation is violating its substantive obligations under  
 25 the ESA because these flows are not high enough to avoid jeopardy to the threatened species or  
 26 adversely modifying its critical habitat, or that the flows observed in April and May 2019 are  
 27 already outside the bounds of the effects analysis in the 2019 NMFS BiOp triggering the obligation  
 28 to reinitiate consultation.

1 By alleging that Reclamation is not in compliance with its ESA Section 7(a)(2) obligations,  
2 the Fifth and Sixth ESA Claims presume that Section 7(a)(2) can and does require Reclamation to  
3 provide specific levels of flow on the Klamath River.

4 **2. Section 7(a)(2) Only Applies to Discretionary Federal Actions**

5 Notwithstanding Plaintiffs' complaint, ESA Section 7(a)(2) does not apply to every federal  
6 agency activity. The substantive obligation and related procedural obligation to consult with the  
7 Services only applies to "actions in which there is *discretionary* Federal involvement or control."  
8 50 C.F.R. § 402.03; *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife (Home*  
9 *Builders)*, 551 U.S. 644, 661-73 (2007) (emphasis added). The same language qualifies the  
10 obligation to reinstate consultation found in 50 C.F.R. § 402.16. Under the Ninth Circuit's  
11 interpretation of this standard, "Section 7(a)(2)'s consultation requirement is triggered so long as a  
12 federal agency retains 'some discretion' to take action for the benefit of a protected species." *Nat.*  
13 *Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014); *see also Sierra Club v. Babbitt*  
14 *(Babbitt)*, 65 F.3d 1502, 1509 (9th Cir. 1995) (holding that Section 7(a)(2) does not apply when the  
15 agency "lacks the discretion to influence the private action" and "does not possess the ability to  
16 implement measures that inure to the benefit of the protected species").

17 Reclamation does not have the authority to curtail—or direct the curtailment of—irrigation  
18 water deliveries in order to provide more water for ESA-listed fish species, and thus Section 7(a)(2)  
19 does not apply to activities related to diversion and delivery of water to Project beneficiaries.  
20 Similarly, neither ESA Section 7(a)(2) nor any other federal law requires Reclamation to release  
21 stored water from UKL to provide instream flows to benefit fish. Thus, Plaintiffs have failed to  
22 state a claim under ESA Section 7 as a matter of law, and summary judgment should be granted in  
23 favor of Federal Defendants and Defendant-Intervenor.

24 **3. Prior Cases Involving Project Operations Have Not Examined the Question**  
25 **Whether ESA Section 7(a)(2) Applies to the Specific Agency Action**

26 There are several cases concerning the Project, the ESA, and the uses of water in the  
27 Klamath Basin. In hindsight, it is not difficult to understand why and when these cases started to  
28 proliferate. Coho salmon were listed as threatened species under the ESA in 1997. 62 Fed.



1 Reg. 24,588 (May 6, 1997). During this time period, ESA jurisprudence and litigation was guided  
 2 by the Supreme Court’s powerful statements in the landmark decision *Tennessee Valley Authority v.*  
 3 *Hill (TVA v. Hill)*, 437 U.S. 153 (1978), in which the Court affirmed the issuance of an injunction to  
 4 stop construction of the nearly complete Tellico Dam. Subsequent decisions in the lower courts  
 5 repeated the Court’s missive that the no-jeopardy language in Section 7 “admits of no exception.”  
 6 *See, e.g., Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994) (quoting *TVA v. Hill*,  
 7 437 U.S. at 173). KWUA’s motion does not speak to that issue; rather, it addresses whether and  
 8 how Section 7 applies at all.

9 After the listing and prior to the filing of claims in the KBA, when questions regarding the  
 10 Project, the ESA, and reserved fishing rights started to multiply, the Office of the Solicitor produced  
 11 legal advice for its client agencies that was consistent with this type of “no-exception” thinking.  
 12 Specifically, two legal memoranda, issued by a regional solicitor in 1995 and two regional solicitors  
 13 in 1997, provided legal guidance that shaped an operations plan issued in 1997. USBR 099030-40,  
 14 101066-76, 098674-80. That 1997 operations plan identified minimum UKL elevations and  
 15 minimum Klamath River flows below Iron Gate Dam that Reclamation would maintain as a priority  
 16 over irrigation. Ever since, the Klamath Basin has drowned in litigation over these issues,  
 17 beginning with a 2001 decision that, based on a procedural violation of Section 7, enjoined  
 18 irrigation deliveries and ordered minimum flows for the Klamath River, and with no end in sight.  
 19 *See, e.g., Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d  
 20 1228 (N.D. Cal. 2001); *Klamath Water Users Protective Ass’n v. Patterson (Patterson II)*, 204 F.3d  
 21 1206 (9th Cir. 1999); *Yurok I*, 231 F. Supp. 3d 450; Simmons Decl. ¶¶ 7-9, 14-23.

22 However, more recent ESA jurisprudence and basic principles of water law require the re-  
 23 examination of the fundamental but unanalyzed premise of these decisions—that Reclamation is  
 24 subject to the substantive obligations of ESA Section 7(a)(2) for all aspects of Project operations.  
 25 For example, the following passage in *Patterson II* is routinely quoted casually: “Because  
 26 Reclamation retains authority to manage the Dam, and because it remains the owner in fee simple of  
 27 the Dam, it has responsibilities under the ESA as a federal agency. These responsibilities include  
 28 taking control of the Dam when necessary to meet the requirements of the ESA . . . .” *Patterson II*,

1 204 F.3d at 1213. There are no legal citations in this paragraph, nor is there an identification of  
 2 which ESA provision(s) the court is invoking to support this sweeping proclamation. And  
 3 ownership in fee simple or “authority to manage” are not dispositive facts when analyzing whether  
 4 there is sufficient discretionary authority to trigger the Section 7(a)(2) obligation. The underlying  
 5 claims in the *Patterson* litigation did not even involve the ESA. *See Klamath Water Users Ass’n v.*  
 6 *Patterson*, 15 F. Supp. 2d 990, 992-93, 996-97 (D. Or. 1998). Yet the *dictum* endures.

7 More recently, when water users tried to obtain judicial review of the correct interpretation  
 8 and application of the ESA under contemporary understanding, they were prevented from litigating  
 9 the merits due to the assertion of necessary party status and sovereign immunity by two tribes in the  
 10 Klamath Basin. *See Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, No. 1:19-cv-00451-  
 11 CL, 2020 U.S. Dist. LEXIS 179680, at \*15-17 (D. Or. May 15, 2020); KWUA’s Mot. to Lift Stay at  
 12 6-7; Simmons Decl. ¶¶ 14-15. The crisis in the Klamath Basin is due, at least in part, to the  
 13 divergence between the current ESA consultation framework for the Project, and the very clear  
 14 conclusion based on contemporary case law that ESA Section 7 does not apply to many aspects of  
 15 Project operations. It is time for these issues to be properly addressed by a federal district court.

16 **B. It Is Now Settled Law that the ESA Is Not an Independent Source of Statutory**  
 17 **Authority for Federal Agencies to Take Actions to Benefit Species**

18 **1. The *Home Builders* Decision Unequivocally Overturned an Interpretation of**  
 19 **the ESA that Would Grant Agencies Authority to Protect Species**

20 Jurisprudence regarding the scope of Section 7(a)(2) and the meaning of “discretionary  
 21 Federal involvement or control” came into sharp focus in *Defenders of Wildlife v. U.S. Env’tl. Prot.*  
 22 *Agency (Defenders)*, 420 F.3d 946 (9th Cir. 2005). The case involved the transfer of National  
 23 Pollutant Discharge Elimination System permitting authority under the Clean Water Act (CWA)  
 24 from the U.S. Environmental Protection Agency (USEPA) to the State of Arizona. Under the  
 25 CWA, if nine statutory criteria are met, USEPA must approve the transfer of permitting authority to  
 26 the state. *Id.* at 950. In *Defenders*, environmental plaintiffs challenged the transfer of the  
 27 permitting program to the State of Arizona based on alleged non-compliance with ESA Section 7.

28 The Ninth Circuit 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

1 habitat when it decides whether to transfer water pollution permitting authority to state  
2 governments?” 420 F.3d at 950. It answered that question in the affirmative. The Ninth Circuit  
3 held that Section 7 confers authority on federal agencies to protect listed species that “goes beyond  
4 that conferred by agencies’ own governing statutes.” *Id.* at 964. “We conclude that the obligation  
5 of each agency to ‘insure’ that its covered actions are not likely to jeopardize listed species is an  
6 obligation in addition to those created by the agencies’ own governing statute.” *Id.* at 967. With  
7 respect to 50 C.F.R. § 402.03, the court held that discretionary actions must be “congruent with the  
8 statutory reference to actions ‘authorized, funded, or carried out’ by the agency.” *Id.* at 968.

9 The Supreme Court reversed the Ninth Circuit’s *Defenders* decision. Before that reversal,  
10 however, other Ninth Circuit judges expressed their concern with the panel’s decision in a unique  
11 order. Specifically, the author of the panel opinion defended the opinion against six judges  
12 dissenting from the denial of petition for rehearing en banc. *See Defs. of Wildlife v. U.S. Envtl.*  
13 *Prot. Agency*, 450 F.3d 394 (9th Cir. 2006). The dissent remarked that the panel had nullified the  
14 ESA regulation requiring discretionary action and erroneously “transformed the ESA into an over-  
15 riding mandate that trumps an agency’s obligations under its own governing statute.” *Id.* at 398.

16 By reversing *Defenders* in *Home Builders*, the Supreme Court set the record straight on the  
17 reach of Section 7(a)(2). The Court acknowledged the panel’s “substantive construction of the  
18 statutes at issue” and its holding that “the ESA granted the EPA both the power and the duty to  
19 determine whether its transfer decision would jeopardize threatened or endangered species.” *Home*  
20 *Builders*, 551 U.S. at 656. The Supreme Court explained that the Ninth Circuit’s reading of  
21 Section 7(a)(2) “would effectively repeal § 402(b)’s statutory mandate by engrafting a tenth  
22 criterion onto the CWA.” *Id.* at 663. The Supreme Court extended this reasoning to all other  
23 statutes: “Reading the provision broadly would thus partially override every federal statute  
24 mandating agency action by subjecting such action to the further conditions that it pose no jeopardy  
25 to endangered species” in contravention of the presumption against implied repeals. *Id.* at 664.

26 The Court then turned to the agencies’ attempt to resolve the “tension” through its  
27 regulations implementing Section 7(a)(2). Under 50 C.F.R. § 402.03, the “ESA’s requirements  
28 would come into play only when an action results from the exercise of agency discretion.” *Home*

1 *Builders*, 551 U.S. at 665. The Court found the regulation harmonizes statutes “by applying  
 2 § 7(a)(2) to guide agencies’ existing discretionary authority, but not reading it to override express  
 3 statutory mandates.” *Id.* at 666. The Court found this interpretation to be reasonable, entitled to  
 4 deference, and consistent with other Supreme Court precedent. *Id.* at 666-67.

5 Thus, the Supreme Court rejected a reading of Section 7(a)(2) which would grant federal  
 6 agencies affirmative authority under the ESA to take actions to benefit species that go beyond  
 7 already existing authority. Instead, the Court’s ruling limits the application of Section 7(a)(2) to  
 8 actions that an agency takes under its governing statutes that involve its discretion.

9 **2. The Ninth Circuit Also has a Body of Case Law Analyzing Whether**  
 10 **Section 7(a)(2) Applies to the Performance of Executed Contracts**

11 *Home Builders* also implicitly affirms statements in Ninth Circuit decisions prior to  
 12 *Defenders* and the decisions of other courts of appeal noted by the Court in conflict with *Defenders*.  
 13 Compare *Home Builders*, 551 U.S. at 656-57 (citing *Platte River Whooping Crane Critical Habitat*  
 14 *Maint. Tr. v. Fed. Energy Regulatory Comm’n (Platte River)*, 962 F.2d 27, 33-34 (D.C. Cir. 1992)  
 15 (holding that Section 7 “does not *expand* the power conferred on an agency by its enabling act”),  
 16 with *Babbitt*, 65 F.3d at 1510 (agreeing with construction of Section 7 announced in *Platte River*).  
 17 In *Babbitt*, the Ninth Circuit evaluated the question: “To what extent does section 7 apply where the  
 18 [agency] granted right-of-way by contract to a private entity *before* passage of the ESA *and* the  
 19 agency’s continuing ability to influence the private conduct is limited to three factors unrelated to  
 20 the conservation of the threatened spotted owl.” *Id.* at 1508. The court answered that 50 C.F.R.  
 21 § 402.03 “suppl[ies] the answer.” *Id.* at 1509. There, the agency considered its obligations under  
 22 “the right-of-way agreement, the regulations, and the statute, and determined there was no  
 23 discretionary federal action to which section 7(a)(2) could apply.” *Id.* This was because the agency  
 24 could take no further action to benefit the spotted owl under a right-of-way agreement that was  
 25 granted prior to the enactment of the ESA. *Id.*

26 The court also rejected the environmental plaintiffs’ arguments that the ESA “implicitly  
 27 abrogates preexisting agreements such as the one at issue here.” *Babbitt*, 65 F.3d at 1510. While  
 28 acknowledging that Congress has the power to legislatively alter contractual arrangements to which

1 the federal government is a party, the Ninth Circuit found this was not the case with Section 7(a)(2)  
2 where “Congress specifically limited the application of section 7(a)(2) to cases where the federal  
3 agency retained some measure of control over the private activity.” *Id.*

4 The Ninth Circuit has applied the reasoning from *Babbitt* in other cases. The most relevant  
5 of these precedents to the facts of the Project is *Envil. Prot. Info. Center v. Simpson Timber Co.*  
6 (*EPIC*), 255 F.3d 1073 (9th Cir. 2001). In *EPIC*, plaintiffs brought suit against the USFWS for its  
7 refusal to reinitiate consultation regarding the effects of an incidental take permit for the northern  
8 spotted owl on two other, newly listed species. The court concluded that *Babbitt* provided the  
9 appropriate test—the plaintiff “must allege facts to show that the [Service] retained sufficient  
10 discretionary involvement or control over [the] permit ‘to implement measures that inure to the  
11 benefit of the’ [species].” *Id.* at 1080. The court found that the agency did not have a duty to  
12 reinitiate because the Service did not retain the discretion in the permit to impose an amendment  
13 that would benefit the new species. *Id.* at 1081-82.

14 The court in *EPIC* also distinguished another case involving the renewal of water contracts:  
15 *Nat. Res. Def. Council v. Houston (Houston)*, 146 F.3d 1118 (9th Cir. 1998). The court  
16 acknowledged the holding in *Houston* that negotiating and executing contracts constitutes “agency  
17 action” because Reclamation retained the discretion to set contract terms and decrease the available  
18 water quantities. The court clarified that it “did not suggest in *Houston* that once the renewed  
19 contracts were executed, the agency had continuing discretion to amend them at any time to address  
20 the needs of endangered or threatened species.” *EPIC*, 255 F.3d at 1082.

21 After *EPIC*, the Ninth Circuit applied the holdings of *Babbitt*, *EPIC*, and *Home Builders* in  
22 situations involving ongoing water projects and contracts or contract renewals. See *Grand Canyon*  
23 *Tr. v. U.S. Bureau of Reclamation*, 690 F.3d 1008, 1018-21 (9th Cir. 2012); *Cal. Sportfishing Prot.*  
24 *All. v. Fed. Energy Reg. Comm’n*, 472 F.3d 593, 596-99 (9th Cir. 2006); *W. Watersheds Project v.*  
25 *Matejko*, 468 F.3d 1099, 1106-11 (9th Cir. 2006).

26 *EPIC* was the central precedent applied in the recent decision in *Nat. Res. Def. Council v.*  
27 *Norton (NRDC v. Norton)*, 236 F. Supp. 3d 1198 (E.D. Cal. 2017). That case involved a challenge  
28 to Reclamation’s ESA compliance when renewing long-term contracts with senior water users in

1 the Sacramento Valley. Plaintiffs argued that Reclamation had failed to reinitiate the consultation  
 2 that was completed when the contracts were renewed in 2004-05 based on events during the 2014-  
 3 15 drought. *Id.* at 1210. Federal Defendants moved to dismiss the failure-to-reinitiate claim,  
 4 arguing that Section 7 did not apply because Reclamation did not retain sufficient discretionary  
 5 control or involvement over implementing the terms of the executed contracts. *Id.* at 1212. In  
 6 deciding the Federal Defendants’ motion to dismiss, the court carefully explained the legal standard  
 7 in *EPIC*, which it found controlled the disposition of the claim: “[I]n order to trigger the  
 8 requirement for re-consultation under *EPIC* and 50 C.F.R. § 402.16 in the context of an executed  
 9 and otherwise valid contract, the action agency must have retained sufficient discretion in that  
 10 contract to permit material revisions to it that might benefit the listed species in question.” *Id.*  
 11 at 1216-17. After reviewing more than a dozen contract terms that plaintiffs claimed were sources  
 12 of discretion, the court concluded that plaintiffs had identified no contract provision or other source  
 13 of authority that would have permitted Reclamation to modify contract terms or otherwise exercise  
 14 discretion to increase protections for listed species, and dismissed the claim. *Id.* at 1219-30.

15 In sum, these cases demonstrate that (a) the ESA is not a source of authority for agencies to  
 16 take actions to benefit species and the agency must have authority under some other statute to  
 17 support its action, and (b) in the context of executed, valid contracts, the agency is not required to  
 18 consult on its continued performance of that contract if the contract does not allow it to materially  
 19 revise the contract to add terms that could benefit the species. Both points are relevant to the reach  
 20 of Section 7(a)(2) and scope of consultations for Project operations, as discussed below.

21 **C. The Fifth and Sixth ESA Claims in the FAC Fail to State a Claim Under ESA**  
 22 **Section 7(a)(2) as a Matter of Law**

23 Plaintiffs in this and other cases have assumed the existence of ESA Section 7(a)(2)  
 24 discretion because in the recent history of consultations for the Project, Reclamation had worked  
 25 with the Services to negotiate a proposed action that would produce a no-jeopardy conclusion.  
 26 Simmons Decl. ¶ 33 &, Ex. I at 4-12.<sup>4</sup> In other words, agencies have not evaluated the scope of the

27 <sup>4</sup> Ex. I to the Simmons Declaration is the “Reassessment of U.S. Bureau of Reclamation Klamath  
 28 Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act”  
 (Jan. 2021) (Reassessment). The Reassessment summarizes the history of consultations related to

1 proper application of Section 7(a)(2) in light of contemporary authorities. Since 2007, the  
 2 consultations also reflected the compromise framework of the Klamath Basin Restoration  
 3 Agreement (KBRA), a basin-wide settlement in which all parties made legal concessions for  
 4 consideration of the overall deal. Simmons Decl. ¶¶ 2-5 & Ex. I at 8. Once the KBRA expired in  
 5 2015, the inertia of the framework for past ESA consultations continued, but the necessary changes  
 6 to the authorizing statute for the Project and other legislative changes upon which the KBRA was  
 7 premised never occurred. *Id.* Thus, rather than analyzing the fundamental questions of authority,  
 8 especially after the issuance of *Home Builders* in 2007 and the ACFFOD in 2014, Reclamation  
 9 continued to use the status quo framework when it developed the Operations Plan in 2018. The  
 10 status quo is a disaster. *See generally* KWUA Mot. to Lift Stay; Kirby Decl. Judicial resolution of  
 11 Reclamation’s Section 7(a)(2) obligations is necessary to bring stability back to the Klamath Basin.

12 To analyze properly whether Reclamation is required to consult under Section 7(a)(2), the  
 13 first question is to identify the agency action. *Nat. Res. Def. Council v. Bernhardt*, No. 1:05-cv-  
 14 01207 LJO-EPG, 2019 U.S. Dist. LEXIS 30649, at \*63-64 (E.D. Cal. Feb. 26, 2019) (listing  
 15 multiple cases describing the role of the action agency in proposing the action versus the role of the  
 16 consulting agency to “give its opinion on the impact of a project as proposed”). Here, the  
 17 evaluation of agency action requires analysis of discrete parts of the operation of the Project by  
 18 Reclamation and by non-federal actors.

19 Once water flows into UKL, there are several things that can happen—it can be stored  
 20 behind Link River Dam in UKL for use at a later time, it can be diverted from (or shortly  
 21 downstream of) UKL by water users for beneficial use, or it can be released by Link River Dam to  
 22 flow into the Klamath River. Kirby Decl. ¶¶ 17, 24. In general, making more water available for  
 23 any of these uses can decrease the amount of water available for others. Kirby Decl. ¶ 24.  
 24 Plaintiffs claim that Reclamation violates Section 7(a)(2) by failing to make more water available to  
 25 flow into the Klamath River for fish species. To do so, Reclamation would have to make less water  
 26 \_\_\_\_\_  
 27 the Project from 1988 to 2020. Simmons Decl., Ex. I at 4-12. On April 8, 2021, Secretary of the  
 28 Interior Haaland, by secretarial letter, withdrew the Reassessment and other related documents.  
 Simmons Decl., Exs. L & M. Independent of the cited reasons for withdrawal, the recounting of  
 the history of ESA consultations for the Project is accurate. Simmons Decl. ¶ 33.

1 available for Project diversions for agriculture.<sup>5</sup> Put differently, the premise of Plaintiffs' claims is  
 2 that to be in compliance with Section 7(a)(2), Reclamation must curtail Project deliveries for  
 3 agriculture to release more water downstream for fish species.

4 That premise is incorrect. As explained below, under the many contracts executed by the  
 5 United States with Project water users, Reclamation does not have discretion to curtail Project  
 6 deliveries for this purpose, or to otherwise modify the timing, quantity, diversion rate, or location of  
 7 the diversions of live flow or stored water from UKL for beneficial use within the Project.

8 The analysis below begins by explaining Reclamation's lack of discretion under its contracts  
 9 with Project waters to take actions for the benefit of species. Then, KWUA explains why  
 10 Reclamation similarly lacks discretion under state and federal law to reduce, or direct the reduction  
 11 of, Project diversions in order to make water available for instream flows in the Klamath River.<sup>6</sup>  
 12 Traditionally, Reclamation has taken the position that it must reduce Project diversions for  
 13 agriculture to comply with its ESA obligations. However, the ESA is not a source of authority.  
 14 Instead, Reclamation must have independent and discretionary authority to take an action. It is  
 15 clear, applying current case law and the ACFFOD, that Reclamation does not have that discretion  
 16 and is not obligated to consult under Section 7(a)(2).

17 **1. Under the Executed Contracts with Project Beneficiaries, Reclamation Does**  
 18 **Not Have Discretion to Take Action to Benefit Species**

19 The diversion and use of water by Project beneficiaries are controlled by two sources of law.  
 20 First, as a matter of water rights law, there must be a right to store, divert, and use water for a  
 21 specific purpose. Second, contracts between Reclamation and each Project contractor define the  
 22

23 \_\_\_\_\_  
 24 <sup>5</sup> Plaintiffs have generally disclaimed that they are seeking reduced lake levels, which would  
 25 purportedly affect endangered sucker species. *See, e.g.*, ECF No. 48 at 1-2. Thus, the only knob to  
 turn in order to provide Klamath River flows is to reduce Project diversions for agriculture.

26 <sup>6</sup> KWUA does not dispute that as a matter of water law, water from UKL in excess of Project  
 27 demands could be released for downstream flows. However, there are many water rights junior to  
 the Project, such as reserved rights that USFWS holds for national wildlife refuges and other  
 28 federal diversions in the basin. Whether Reclamation could curtail those water rights to provide  
 instream flows in the Klamath River is not necessary for resolution of this motion.



1 terms upon which Reclamation makes water available to the contractor, or upon which the  
2 contractor itself diverts water for delivery, as well as monetary payments the contractors make.

3 The ACFFOD defines the rights to divert and use stored water and live flow from UKL and  
4 locations immediately downstream. These are limited by the authorized purpose (i.e., irrigation),  
5 place of use, timing, and rate of diversion. *See* section III.B, *supra*. Therefore, the water rights for  
6 the Project, by themselves, limit Reclamation's discretion to determine the volume, rate, location,  
7 and timing of diversions by the contractors of live flow and stored water from UKL for beneficial  
8 use within in the Project. The ACFFOD is clear on this point.

9 Next, Reclamation has executed over 150 perpetual contracts with district entities and  
10 individual landowners to provide water from the Project. NMFS C\_030332-33. Under *Home*  
11 *Builders*, the ESA is not itself a source of *authority* to protect species. Under *EPIC*, Reclamation  
12 must have retained discretion under the contract terms to implement measures to benefit listed  
13 species. And under *NRDC v. Norton*, the type of discretion that Reclamation must have retained in  
14 the contract is the discretion to permit material revisions to it that might benefit the listed species in  
15 question. *See* section IV.B, *supra*. Contracts with seven irrigation entities result in service to  
16 approximately 90 percent of the irrigated acreage in the Project and are representative of the types  
17 of terms found in all the contracts. Simmons Decl. ¶¶ 12-13. The terms are discussed below.

18 Each contract was entered into before the enactment of Section 7. The term of each contract  
19 is perpetual. *See* USBR 017680-821, 018341-85, 018028-54, 018220-311, )17580-679, 017524-79,  
20 018452-71. They do not have a modification clause or any other clause under which Reclamation  
21 could unilaterally change the terms to implement measures to benefit species. *See id.* Thus, under  
22 the *NRDC v. Norton* court's articulation of the *EPIC* standard, Reclamation did not retain discretion  
23 to permit revisions to the contracts to include measures that benefit species, and Section 7(a)(2)  
24 does not apply to Reclamation's performance of the contracts. That is the end of the analysis.

25 If the Court desires to go a step further and consider the broader question of whether  
26 Reclamation retained discretion to implement contract terms in a manner that could benefit fish  
27 species, there are five types of terms relevant to this question: liability waivers, beneficial use, the  
28 amount of water for diversion, the timing of diversion, and reapportionment. Six of the seven

1 contracts contain a liability waiver, a representative example of which states that “on account of  
2 draft, inaccuracy of distribution or other cause, there occur at times a shortage in the quantity of  
3 water provided for herein,” and limits the United States’ liability in such circumstances. *See*  
4 USBR 017759, 018373, 018033, 018300, 017616-17. These are force majeure clauses, and the  
5 court in *NRDC v. Norton* found that these types of provisions do not confer discretion on  
6 Reclamation to reduce the contract supply for the benefit of species. *See* 236 F. Supp. 3d at 1219-  
7 20. The provisions protect the United States from liability if drought conditions make it impossible  
8 or impracticable to perform; they do not provide a method to change the amount of water the United  
9 States is obligated to deliver.

10 Other provisions in the contract define the quantity, timing, and location of the use of water.  
11 In some cases, the contract has a fixed amount of water that may be diverted. *See* USBR 018031  
12 (2 acre-feet per irrigable acre during the season); 018298 (not in excess of 0.6 acre-feet per acre in  
13 one month). Under these contract terms, Reclamation lacks discretion to change the quantity or  
14 timing of delivery. *See also* USBR 018226, 017609 (the United States agrees to deliver water from  
15 April 15 to September 30 each year). Under some contracts, the quantity of the contract supply is  
16 “beneficial use.” *See* USBR 018376-77 (TID entitled to “receive from the Klamath Project all  
17 water needed by the District for beneficial irrigation uses within the District”). “Beneficial use” is a  
18 concept under state law. *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir.  
19 1983). And for water from UKL, it is defined by the ACFFOD. *See* section III.B.2 & n.2, *supra*.  
20 Reclamation does not have authority to change this definition; rather, it is the water user that must  
21 comply with the beneficial use requirement under state law. *See NRDC v. Norton*, 236 F. Supp. 3d  
22 at 1224-26 (rejecting the plaintiffs’ argument that a contract reference to “beneficial use” as a limit  
23 on quantity is a source of discretion under Section 7(a)(2).); *see also* 43 U.S.C. §§ 372, 383.

24 The last category of contract term that is relevant to the question of discretion is the  
25 apportionment clause. Some contracts have terms that define those contractors’ priority to water  
26 relative to other contracts and water users in the Project. *See* USBR 018377 (TID Contract),  
27 018031 (MID Contract). These are not open-ended clauses that allow the United States to  
28 reallocate water between the Project and instream uses of water to benefit listed species; they relate

1 to the allocation of water between fellow contract holders in specific circumstances. They are also  
2 not a source of discretion for Reclamation under Section 7(a)(2).

3 In several of these contracts, Reclamation has also transferred to irrigation districts like TID,  
4 KID, and KDD the operations of major Project infrastructure and the obligation to deliver water to  
5 landowners and other contractors. *See* USBR 018352-55 (TID), 017737-40 (KID). In other cases,  
6 districts own their own diversion works and distribution systems, like North and Ady Canals which  
7 are owned and operated by KDD. KDD constructed these canal systems, financed them, paid the  
8 costs, and now operates the systems for the benefit of its landowners according to state law.  
9 USBR 017610, 017614, 017621, 017647-69. Reclamation does not have discretionary authority to  
10 direct the operations of any of these diversion works.

11 Other than Link River Dam, Reclamation does not operate—and in some cases does not  
12 own—the diversion and distribution works, and lacks discretion under the contracts to direct the  
13 operation of these works for the benefit of listed species. The Project is atypical in this regard,  
14 demonstrating one more reason why the current Operations Plan does not work.

15 **2. There Is No Water Right for Release of Water Stored by the Project for the**  
16 **Purpose of Providing Instream Flows in the Klamath River**

17 Without discretion under the contracts, it is necessary to consider whether some other source  
18 of law allows Reclamation to curtail Project diversions for the benefit of listed species. For  
19 purposes of state law, that question is answered by the ACFFOD.

20 The Project was authorized under the 1905 Act for reclamation purposes. USBR 008397-98;  
21 NMFS C\_030330-31. And consistent with this purpose, the ACFFOD provides that the United  
22 States has the right to store water in UKL “to benefit the separate irrigation rights recognized for the  
23 Klamath Reclamation Project[.]” USBR 008453. The ACFFOD also provides that the authorized  
24 use for water stored in UKL and live flow is irrigation and related purposes on specified places of  
25 use in the Project by districts and landowners that hold this right. USBR 008453, 008524; *see also*  
26 NMFS C\_030331-32. There is no water right recognized under Oregon state law to use stored  
27 water or live flow in UKL for instream flows in the Klamath River.

28 Thus, Reclamation, as a water right holder in the State of Oregon, is subject to and bound by

1 the ACFFOD when releasing stored water from UKL. *See* 43 U.S.C. § 383; *California v. United*  
2 *States*, 438 U.S. 645, 675-78 (1978) (holding Reclamation must operate projects under state law  
3 relating to the control, appropriation, use, or distribution of water to the extent there is no  
4 conflicting congressional directive). Under the terms of the ACFFOD, Reclamation does not have  
5 authority under state law to release stored water or live flow in UKL for the purpose of instream  
6 flows in the Klamath River. *See* Simmons Decl., Ex. B (OWRD order to Reclamation).

7 Other federal agencies have recently addressed the question of application of Section 7(a)(2)  
8 to single-use projects. In *WildEarth Guardians v. U.S. Army Corps of Eng'rs (WildEarth I)*,  
9 314 F. Supp. 3d 1178 (D.N.M. 2018), *aff'd* 947 F.3d 635 (10th Cir. 2020) (*WildEarth II*), the court  
10 evaluated the Army Corps' compliance with Section 7(a)(2) in operating four dams in the Middle  
11 Rio Grande Project. Each dam is authorized for limited purposes of flood control, sediment control,  
12 or storing specific pools of water. *WildEarth I*, 314 F. Supp. 3d at 1184-86. Pursuant to a 2013  
13 agency-wide memorandum from its general counsel, the Corps had reassessed its operational  
14 actions and legal obligations, identifying 13 actions that the Corps undertakes when operating the  
15 four dams, and then analyzed whether the Corps had discretion over any of the 13 actions. *Id.*  
16 at 1186-91. In this evaluation of discretion, the Corps looked to case law, governing statutes, and  
17 its own operational expertise. The Corps concluded that it did “not need to consult on 11 of 13  
18 identified actions because those actions are either non-discretionary, not Corps actions, or not  
19 applicable given certain facts . . . .” *Id.* at 1191. The district court, citing *Home Builders*, upheld  
20 this approach and agreed with the Corps' position that the flood control acts “entirely stifle [the  
21 Corps'] ability to deviate in its operations” as the Corps “is directed to only consider flood and  
22 sediment control; [and] Congress explicitly provided a way to deal with environmental issues in the  
23 statutes . . . .” *Id.* at 1195. The Tenth Circuit affirmed. *WildEarth II*, 947 F.3d at 641-42.

24 The Project is similarly authorized for a single use—reclamation purposes, i.e., irrigation.  
25 Reclamation's water rights for the Project are thus constrained, and there is no authorized use of  
26 Project water for environmental purposes like instream flows. As was the case for the Corps in  
27 *WildEarth*, these authorities “stifle” Reclamation's ability to release Project water for instream  
28 flows in the Klamath River.

1           **3. The Downstream Reserved Rights Held by the Yurok and Hoopa Valley Tribes**  
 2           **Are Not Quantified and Do Not Extend to Stored Water**

3           After analyzing Reclamation’s authority under state law, the analysis turns to whether  
 4 federal law (other than the ESA) requires Reclamation to reduce diversions by Project beneficiaries  
 5 or release water from UKL for minimum flows in the Klamath River for coho needs. Here, the  
 6 federal obligation for consideration is the existence of federal reserved rights held by two  
 7 downstream tribes for their fisheries. “Congress does not defer to state water law with respect to  
 8 reserved rights.” *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist. (Agua*  
 9 *Caliente)*, 849 F.3d 1262, 1269 (9th Cir. 2017). Rather, Congress retained authority “to reserve  
 10 unappropriated water . . . for use on appurtenant lands withdrawn from the public domain for  
 11 specific federal purposes.” *Id.* (internal quotes and citation omitted); *see also id.* at 1268  
 12 (explaining the *Winters* doctrine as “reserv[ing] water to the extent it is necessary to accomplish the  
 13 purpose of the reservation, and it only reserves water if it is appurtenant to the withdrawn land”).

14           It is undisputed that the Yurok and Hoopa Valley Tribes hold federal reserved rights to fish  
 15 on their reservations. For purposes of this motion, KWUA assumes that there are implied federal  
 16 reserved water rights for the fishing purpose, and that this right has an earlier priority date than the  
 17 water rights for the Project. It is undisputed that the United States did not bring a water right claim  
 18 for these reserved rights in the KBA, and that these reserved rights have not otherwise been  
 19 adjudicated as to location, quantity, or other characteristics. *See* section III.B.3, *supra*.

20           Water law and federal trust responsibilities do not authorize or require Reclamation to  
 21 quantify these rights or impose a shortage on one class of water users in order to meet the rights as  
 22 subjectively quantified by Reclamation. In practice, this exercise would require Reclamation, as a  
 23 water right holder under Oregon state law, to quantify or adjudicate the reserved downstream right  
 24 in California, determine the location and the amount of water necessary to fulfill the downstream  
 25 right compared to the available supply and Project demand, ignore the occurrence of other diver-  
 26 sions by non-federal parties, and then curtail the Project beneficiaries’ diversions for irrigation—  
 27 every single year. Reclamation, as a fellow water user, does not have this authority under either its  
 28 governing statutes in the Reclamation acts or its independent trust obligation to tribes. *See*

1 *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (explaining that an  
2 agency must exercise trust responsibility within the context of its authorizing statute).

3 The most analogous case to the present set of facts is the *Navajo Nation* litigation. The  
4 Navajo Nation holds reserved rights to the mainstream Colorado River; the Nation's reservation in  
5 the Upper and Lower Colorado River Basins is the largest in the United States. *Navajo Nation v.*  
6 *U.S. Dep't of Interior (Navajo Nation I)*, 34 F. Supp. 3d 1019, 1021-22 (D. Ariz. 2014), *aff'd in part*  
7 *and rev'd in part*, 876 F.3d 1144, 1152 (9th Cir. 2017) (*Navajo Nation II*). The Supreme Court has  
8 exclusive jurisdiction over the allocation of the mainstream Colorado River, and the reserved rights  
9 of the Navajo Nation were never quantified as part of the *Arizona v. California* proceedings.  
10 *Navajo Nation II*, 876 F.3d at 1156, 1161-62. In 2003, the Nation filed suit against the United  
11 States, alleging NEPA violations based on injury to its reserved rights resulting from basin-wide  
12 operations plans for the Colorado River and breach of the trust obligation. *Id.* at 1157-60.

13 The Ninth Circuit affirmed the dismissal of the NEPA claims based on standing and lack of  
14 concrete injury to the unquantified rights. *Navajo Nation II*, 876 F.3d at 1161-64. It then reversed  
15 the district court's ruling on the trust claim pled under the Administrative Procedure Act after  
16 clarifying its case law on the legal standard and remanded to the district court. *Id.* at 1167-72, 1174.  
17 On remand, the district court again dismissed the claim, holding that "the enforceable trust duties  
18 the Nation asserts are not inferable from the mere existence of implied water rights. The undisputed  
19 existence of the Nation's implied, as-yet-unquantified rights to some as-yet determined appurtenant  
20 water does not create those duties." *Navajo Nation v. U.S. Dep't of Interior (Navajo Nation III)*,  
21 No. CV-03-00507-PCT-GMS, 2019 U.S. Dist. LEXIS 143801, at \*15-16 (D. Ariz. Aug. 23, 2019).  
22 Nowhere in the litigation did the government suggest it could quantify the senior reserved rights in  
23 the operations plan and short the other, numerous entitlement holders on the Colorado River.  
24 Instead, the United States pointed to the necessity to acquire water supplies through water rights  
25 settlements and general stream adjudications. *See Navajo I*, 34 F. Supp. 3d at 1024.

26 It is an arduous undertaking to quantify a reserved right. *See generally Agua Caliente Band*  
27 *of Cahuilla Indians v. Coachella Valley Water Dist.*, No. EDCV 13-00883 JGB (SPx), 2019 U.S.  
28 Dist. LEXIS 115346 (C.D. Cal. Apr. 19, 2019); *see also* Simmons Decl., Ex. N (order determining

1 exceptions to the ACFFOD for the reserved right of the upstream Klamath Tribes). A reserved right  
 2 likely would not include rights to off-reservation waters or flows immediately below Iron Gate,  
 3 which is far upstream of the California tribes' reservations. *See Agua Caliente*, 849 F.3d at 1268  
 4 (explaining appurtenance requirement); *United States v. State (In re CSRBA Case No. 49576*  
 5 *Subcase No. 91-7755)*, 448 P.3d 322, 355-59, 363-66 (Idaho 2019); Simmons Decl., Ex. N at 12-13.  
 6 The reserved right would also not include the right to stored water in the Project, the distribution  
 7 and rights to which are controlled by the ACFFOD. *See* section III.B, *supra*. Indeed, the ACFFOD  
 8 explicitly finds that there is no right to UKL's stored water to satisfy a federal reserved right's  
 9 wildlife purposes in either Oregon or California. USBR 008428.

10 Federal reserved rights are not self-executing. To enforce their priority against junior water  
 11 users, they must be quantified—through settlement or adjudication. Neither has occurred for the  
 12 downstream rights for the Yurok and Hoopa Valley Tribes. In contrast, the ACFFOD quantifies, in  
 13 great detail, the right to store water in UKL, the right to divert the stored water by irrigation districts  
 14 and other entities, and other federal reserved rights in the upper watershed, including the reserved  
 15 fishing rights of the Klamath Tribes and other federal diversions. Continued allusion to the  
 16 requirement of federal law as a basis for curtailing Project deliveries to agriculture to protect an  
 17 unquantified downstream right is without support.

18 **4. The Federal Government's Trust Obligation Is Satisfied by Compliance with**  
 19 **Generally Applicable Statutes**

20 To the extent the federal government's trust obligation to tribes is cited as a source of  
 21 federal law to curtail Project deliveries in order to satisfy unquantified downstream rights, this  
 22 Court has previously held that Reclamation does not violate its trust obligation to the downstream  
 23 tribes if it does not release supplemental water for the fishery, and that the government's general  
 24 trust responsibilities . . . are discharged by compliance with generally applicable regulations and  
 25 statutes. *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, No. C 02-02006  
 26 SBA, 2005 U.S. Dist. LEXIS 36035, at \*40-41 (N.D. Cal. Mar. 7, 2005); *see also Gros Ventre*  
 27 *Tribe v. United States*, 469 F.3d 801, 811-14 (9th Cir. 2006); *Navajo Nation III*, 2019 U.S. Dist.  
 28 LEXIS 143801, at \*7-23.

1 **D. The Court Should Grant KWUA’s Motion and Direct the Parties to Submit a Joint**  
 2 **Case Management Proposal**

3 The Fifth and Sixth ESA Claims fail as a matter of law because ESA Section 7(a)(2) does  
 4 not apply to the aspects of Project operations implicated in the FAC—Project diversions for  
 5 agriculture and the release of stored water for instream minimum flows. If the Court grants this  
 6 motion, then the remaining claims are likely moot. That is, the Court should not use its judicial  
 7 resources to determine the adequacy of the consultation when the agencies have already reinitiated  
 8 consultation and the scope of that consultation will be fundamentally different based on the Court’s  
 9 ruling. *See Deutsche Bank Nat’l Trust Co. v. F.D.I.C.*, 744 F.3d 1124, 1135 (9th Cir. 2014) (courts  
 10 are empowered to dismiss claims under the doctrine of prudential mootness where “circumstances  
 11 have changed since the beginning of litigation that forestall any occasion for meaningful relief”)  
 12 (citations and internal quotes omitted); *Wallis v. IndyMac Fed. Bank*, 717 F. Supp. 2d 1195, 1198-  
 13 1200 (W.D. Wash. 2010) (discussing the prudential mootness doctrine). In this event, KWUA  
 14 requests that the Court order the parties to confer and submit a joint case management proposal on  
 15 how the litigation of the remaining claims should proceed.

16 **VII. CONCLUSION**

17 For all the reasons stated above, KWUA respectfully requests that the Court grant summary  
 18 judgment in favor of Federal Defendants and Defendant-Intervenor KWUA on the Fifth and Sixth  
 19 ESA Claims, and then order the parties to confer and propose a manner in which to address the  
 20 proper disposition of the remaining claims in the FAC consistent with the Court’s ruling.

21 SOMACH SIMMONS & DUNN, PC

22  
 23 DATED: April 19, 2021

By s/ Brittany K. Johnson

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10  
 11 UNITED STATES DISTRICT COURT  
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 13 SAN FRANCISCO DIVISION

14  
 15 YUROK TRIBE, *et al.*,

16 Plaintiffs,

17 v.

18 U.S. BUREAU OF RECLAMATION, and  
 19 NATIONAL MARINE FISHERIES SERVICE,

20 Defendants.

21 KLAMATH WATER USERS ASSOCIATION,

22 Defendant-Intervenor.

Case No. 3:19-cv-04405-WHO  
 (Related Case No. 3:16-cv-04294-WHO)  
 (Related Case No. 3:16-cv-06863-WHO)

[PROPOSED] ORDER GRANTING  
 KWUA’S MOTION FOR SUMMARY  
 JUDGMENT ON FIFTH AND SIXTH  
 ESA CLAIMS

Hearing Date: TBD  
 Hearing Time: TBD  
 Courtroom 2, 17th Floor  
 Honorable William H. Orrick

23  
 24 This matter is before the Court on Defendant-Intervenor Klamath Water Users  
 25 Association’s (KWUA) Motion for Summary Judgment on the Fifth and Sixth Endangered  
 26 Species Act (ESA) Claims. After reviewing the briefs, declarations, administrative record  
 27 materials, and hearing oral argument, and for the reasons in the Court’s opinion, the Court  
 28

1 hereby grants the motion for summary judgment on the Fifth and Sixth ESA Claims in favor of  
2 Defendants and Defendant-Intervenor. The Court finds and determines as follows:

3 1. Section 7(a)(2) neither authorizes nor requires the U.S. Bureau of Reclamation  
4 (Reclamation) to curtail, or direct the curtailment of, storage, diversion, and delivery of water for  
5 irrigation in the Klamath Reclamation Project (Project) to benefit ESA-listed species that inhabit  
6 or depend on the Klamath River;

7 2. Reclamation does not otherwise have an obligation to release water from Upper  
8 Klamath Lake have the characteristic of stored water in order to benefit fish species;

9 3. Because Section 7(a)(2) does not require the curtailment of Project deliveries for  
10 agriculture to make water available for ESA-listed species in the Klamath River, Plaintiffs have  
11 failed to state a claim under Section 7(a)(2) against Reclamation as a matter of law; and

12 4. There is no dispute of material facts relevant to the Fifth and Sixth ESA Claims,  
13 and the Fifth and Sixth ESA Claims fail as a matter of law.

14 Accordingly, it is hereby ORDERED that KWUA's motion for summary judgment on the  
15 Fifth and Sixth ESA Claims is GRANTED.

16 Further, IT IS HEREBY ORDERED that the parties shall confer and propose a joint case  
17 management statement within 30 days of entry of this order, with recommendations on how the  
18 Court should proceed to hear and resolve the remaining claims in the First Amended Complaint.

19 IT IS SO ORDERED.

20  
21 DATED:

\_\_\_\_\_  
22 William H. Orrick  
23 United States District Court Judge  
24  
25  
26  
27  
28