

February 9, 2018

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RE: Sixty-Day Notice of Violations of Endangered Species Act, Sections 7 and 9

Dear Commissioner Burman, Mr. Nettleton, Mr. Sheehan, Ms. Wieting, Mr. Souza, and Mr. Thom:

The reason for this letter is to notify you of the Klamath Tribes' intention to file suit against the United States Bureau of Reclamation ("Bureau"), the United States Fish & Wildlife Service ("USFWS"), and the National Marine Fisheries Service ("NMFS") (collectively, "Agencies") for violations of sections 7 and 9 of the Endangered Species Act (the "Act"). See 16 U.S.C. §§ 1536(a)(2), 1538(a)(1)(B). These violations arise from the Bureau's actions with respect to management of the Klamath Project ("Project"), including Upper Klamath Lake, as well as the deficiencies of the USFWS and NMFS 2013 Biological Opinion concerning the Bureau's operation of the Project ("Biological Opinion").

The violations described in this letter have resulted in, and will continue to result in, the unlawful take of endangered C'waam (Lost River sucker, *Deltistes luxatus*) and Koptu (shortnose sucker, *Chasmistes brevirostris*); the destruction and adverse modification of their critical habitat, particularly in Upper Klamath Lake, as well as that of the Oregon spotted frog (*Rana pretiosa*); and imminent jeopardy to the continued existence of the C'waam and Koptu. Indeed, in light of the parlous conditions of the C'waam and Koptu discussed throughout this letter, and the 2018 water year anticipated, the Klamath

Tribes believe that the 2013 Biological Opinion is inadequate to preclude the possibility of an extinction level event for the C'waam, the Koptu, or both this water year.

The Klamath Tribes remain open to collaborating with the Bureau, USFWS, and NMFS to ensure the continued existence of C'waam, Koptu, and the Oregon spotted frog. But if the Agencies are unwilling to take actions necessary to protect these species, the Klamath Tribes intend to file suit in United States District Court to remedy the violations set forth in this letter. *See* 16 U.S.C. § 1540(g)(1)(a). The Klamath Tribes file this 60-day notice now because of its overriding interest in ensuring the continued viability of these critically endangered species in the face of what is predicted to be an exceedingly poor water year. Over the next 60 days, Project water delivery quantities will be set by the Bureau. It is vitally important to the Klamath Tribes that the Project allocation be reevaluated and set with full consideration for the needs of the C'waam and Koptu, as well as the Oregon spotted frog.

BACKGROUND

The Klamath Tribes, a federally recognized Native American Nation, consists of three tribes who traditionally inhabited Southern Oregon and Northern California: the Klamath, Modoc and Yahooskin Band of Snake Indians. The Tribes' headquarters are in Chiloquin, Oregon, in the heart of the Upper Klamath River Basin.

The Tribes' 1864 Treaty with the United States preserved hunting, fishing, trapping and gathering rights for the Tribes and its members. These rights include, as part of the most senior water rights in the Klamath Basin, extensive rights in Upper Klamath Lake, which also serves as a primary source of water supply for the Project.

The C'waam and Koptu are essential tribal treaty resources for the Klamath Tribes. The C'waam and Koptu "live in the Upper Klamath Lake and rely on certain water levels" from the Klamath Project "for their habitat and survival." *See Hoopa Valley Tribe v. National Marine Fisheries Service, et al.*, 230 F. Supp. 3d 1106, 1140 (N.D. Cal. 2017). "The Klamath Project is operated by the Bureau, a federal agency that is required to comply with ESA regulations that prohibit the taking of any endangered or threatened species." *Id.* at 1112.

C'waam and Koptu fisheries sustained the Klamath Tribes' people for millennia. In addition to providing for the Tribes' subsistence, these treaty resources are central to the Tribes' ability to maintain and exercise their cultural and spiritual practices, which in turn are critical to the physical and social health of tribal families and community. Without these treaty resources, the Tribes do not have the ability to live as Klamath People in the way their Creator intended. The Klamath Tribes have a responsibility to restore and steward the C'waam and Koptu, and other tribal treaty resources, for their current members and future generations.

Following the construction of the Project and a century of irrigation deliveries and agricultural practices supported by the Project, reduced lake levels and excessive nutrient loading in Upper Klamath Lake have decimated the C'waam and Koptu. In an effort to protect these species from extinction, the Klamath Tribes have not fished for C'waam or Koptu since 1986 (two years ahead of their formal ESA

listing), and are restricted to taking just two fish each year for ceremonial purposes. Despite these precautionary measures, the remaining populations in Upper Klamath Lake are declining rapidly. There has not been a major recruitment event in over 20 years, and the remaining fish are nearing the end of their life expectancy. Both species are on a path to extinction within a decade if the current trend continues, even without a die-off or other significant adverse event in the coming year.

The Klamath Tribes have been actively engaged with the Bureau and USFWS to secure sufficient water levels for protection of C'waam and Koptu in the Upper Klamath Lake and its tributaries. The Klamath Tribes have identified Upper Klamath Lake levels to the Bureau and USFWS that provide adequate habitat for all life stages, reduce the risk of poor water quality events, and allow the fish to access to critical water quality refuge areas in Upper Klamath Lake. Most recently, the Klamath Tribes met with Deputy Commissioner Alan Mikkelson on February 7, 2018, and the Bureau Technical Team as recently as February 9, 2018, to discuss necessary lake levels and related emergency measures to ensure the continued survival of C'waam and Koptu during the 2018 irrigation season.

Immediate measures are needed to protect the fish this year, before Project water delivery quantities are set and delivered by the Bureau of Reclamation. While the Klamath Tribes will continue to work with all stakeholders in the Basin, protection of the endangered C'waam and Koptu must be the priority of the Bureau of Reclamation and the Klamath Project. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) (“[T]he Irrigators’ rights to water are subservient to the ESA.”).

I. The Bureau Has Violated Section 9 of the Act and Will Continue to Do So Absent an Increase in Upper Klamath Lake Elevations Above Levels Permitted by the Biological Opinion.

“[I]t is unlawful for any person subject to the jurisdiction of the United States to take any [endangered] species within the United States.” 16 U.S.C. § 1548(a)(1)(B). For purposes of the Act, “‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” a member of an endangered species. 16 U.S.C. § 1532(19). USFWS has further clarified that “harm” includes “significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

Moreover, even if an incidental take permit issued under section 10 of the Act allows a federal agency to take some members of an endangered species in connection with agency action, *see* 16 U.S.C. § 1539(a)(1)(B), an agency loses the permit’s protection when it exceeds the permitted take. *See, e.g., Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 531 (9th Cir. 2010) (“Incidental Take Statements set forth a ‘trigger’ that, when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provision.” (quoting *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1249 (9th Cir. 2001))).

The C'waam and Koptu were listed as endangered species throughout their entire range on July 18, 1988. 53 Fed. Reg. 27,130 (July 18, 1988). The Upper Klamath Lake was designated as critical habitat for each species on December 11, 2012. 77 Fed. Reg. 73,740 (December 11, 2012).

The Bureau is responsible for management and operation of the Project, including Upper Klamath Lake, for water storage, agricultural water deliveries, and operation and maintenance activities. Biological Opinion at 10. Recognizing that the elevations of Upper Klamath Lake resulting from continued operation of the Project would have adverse impacts on protected species, including the C'waam and Koptu, and their critical habitat, USFWS and NMFS issued the Biological Opinion in 2013. The Biological Opinion, among other findings, identifies critical threshold Upper Klamath Lake levels below which significant negative impacts on the C'waam and Koptu were anticipated:

“[W]hen lake levels go below 4,142.2 ft [during the spawning season from March through May] . . . the proposed action is likely to adversely affect sucker spawning because of reduced habitat availability.” Biological Opinion at 136.

“Although we do not know exactly at what elevation habitat for embryos and per-swim-up larvae becomes negatively affected, we assume those effects begin occurring when elevations in June go below 4,142.0 ft” Biological Opinion at 137.

For elevations at or below 4,140.0 ft from April to July, when C'waam and Koptu larvae occupy shallow, nearshore areas, particularly with emergent vegetation, “substantial larval mortality is likely because of the significant reductions in habitat that would occur.” Biological Opinion at 138–40.

“At elevations below 4,139.0 ft in August age-0 C'waam and Koptu juveniles are likely to suffer from loss of “diverse, shallow-water habitats.” Biological Opinion at 142.

The Biological Opinion recognizes that elevations below 4,138.2 ft. would limit adult and juvenile access to water quality refuge areas in August through September, leaving C'waam and Koptu exposed to the risk of a catastrophic die-off, such as occurred in 1996-97, due to very poor water quality in less desirable habitats. Biological Opinion at 143–46.

Despite the Biological Opinion's assurances that “[w]ater will **not** be managed to minimums” and “UKL elevations will also be monitored to ensure that there is not a projected or realized progressive decrease in the expected distance above the thresholds identified in this BiOp[.]” Biological Opinion at 191 (emphasis added), the Bureau has allowed Upper Klamath Lake to fall below its minimum elevation thresholds and the critical levels identified in the Biological Opinion on multiple occasions. Indeed, contrary to the Biological Opinion, the Bureau has consistently treated the elevation thresholds as management targets and, absent corrective action, appears likely to continue to do so in 2018 and beyond. The following table, compiled from the Bureau's Annual Reports on the Project, shows a consistent pattern of Upper Klamath Lake management practices which pose significant risks to the continued survival of the C'waam and Koptu:

Table 1. UKL end-of-month elevations for 2013-2017 showing months where Upper Klamath Lake elevations were at or below minimum thresholds and below critical elevations identified in the Biological Opinion.

Date	Bi-Op	2013	2014	2015	2016	2017
End of Mo.	Negative Effects					
January		40.44	40.31	41.05	41.06	40.88
February		41.27	41.50	42.32	42.04	42.38
March	4142.2	<u>41.91</u>	<u>42.17</u>	42.92	42.87	42.69
April	4142.2	42.41	42.22*	42.57^	43.07^	42.88*
May	4142.2	<u>42.01</u>	<u>41.58*</u>	42.21	42.61*	42.33*
June	4142.0	<u>41.12*</u>	<u>40.44*</u>	<u>41.35</u>	<u>41.62</u>	<u>41.67</u>
July	4140.0	<u>39.91^</u>	<u>39.26*</u>	40.39	40.28	40.36
August	4139.0	39.14	<u>38.60*</u>	39.36	<u>38.73^</u>	39.44
September	4138.2	38.80	<u>38.20</u>	38.78	<u>38.13</u>	38.80
October	4138.2	38.94	38.27	38.30	38.66	38.89
November		39.20	38.90	38.34*	39.19	39.58
December		39.61	40.41	39.71	40.00	40.19

Underlined numbers – Below levels determined to have significant negative effects on the C’waam and Koptu in 2013 Biological Opinion.

*Below 2013 Biological Opinion minimum thresholds.

^Equal 2013 Biological Opinion minimum thresholds.

By allowing these dangerously low elevations outside the scope of what was contemplated by the Biological Opinion, the Bureau has unlawfully taken C’waam and Koptu and adversely modified and destroyed critical habitat for both species.

Due to the Bureau's failure to maintain adequate Upper Klamath Lake elevations, the Bureau has also likely exceeded the Project's incidental take permit. The Biological Opinion's incidental statement allows a maximum of 164 adult C'waam and Koptu to be "harmed" in the Upper Klamath Lake each year. Biological Opinion at 380. A 2017 study by the Klamath Tribes, however, found at least 499 adult C'waam and Koptu had died that year. Absent a change in Bureau practices and priorities, the Klamath Tribes anticipate another significant, and potentially irremediable, die-off of C'waam and Koptu in 2018. Specifically, the Bureau must correct its practice of managing Upper Klamath Lake elevations to minimum targets and instead ensure the maintenance of appropriately higher elevations to avoid continued unlawful take of C'waam and Koptu.

II. The Bureau Has Violated Section 7 of the Act by Taking Action Likely to Jeopardize the Continued Existence of the C'waam and Koptu and Result in Destruction or Adverse Modification of Critical Habitat.

"[A]fter consulting with the Secretary the federal agency involved must determine whether it has taken all necessary action to ensure that its actions will not jeopardize the continued existence of an endangered species or destroy or modify habitat critical to the existence of the species." *Nat'l Wildlife Federation v. Coleman*, 529 F.2d 359, 371 (5th Cir. 1976); *accord Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978).

An agency action "jeopardizes" a protected species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. "Destruction or adverse modification" means "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species," such as alterations that "alter the physical or biological features essential to the conservation of a species . . ." *Id.*

As noted above, the Bureau has consistently managed Upper Klamath Lake to (or even below) the minimum thresholds identified in the Biological Opinion. Even more significantly, management of the Upper Klamath Lake even at or slightly above those threshold elevations jeopardizes the C'waam and Koptu and adversely modifies their critical habitat. Technical analysis carried out on behalf of the Klamath Tribes since the finalization of the Biological Opinion demonstrates that the levels set in the Biological Opinion are inadequate.

Some, but not all, of the impacts of the too-low elevations allowed under the Biological Opinion include:

- Insufficient inundation of C'waam shoreline spawning habitat
- Insufficient shallow shoreline emergent wetland habitat for C'waam and Koptu larvae
- Insufficient diverse shallow shoreline habitats for C'waam and Koptu juveniles

Failure to increase these elevations to appropriate levels would continue to pose insurmountable obstacles to C'waam and Koptu during all phases of life and during every season.

III. The Bureau Has Violated Section 7 of the Act by Continuing to Rely on a Clearly Inadequate Biological Opinion Issued by USFWS and NMFS.

A federal agency breaches its duty to ensure its actions do not jeopardize or adversely modify critical habitat of listed species when it “[a]rbitrarily and capriciously rel[ies] on a faulty Biological Opinion.” *See Save Our Cabinets v. United States Fish & Wildlife Serv.*, 255 F. Supp. 3d 1035, 1043 (D. Mont. 2017) (citing 16 U.S.C. § 1536(a)(2)). In the face of recent weather patterns, destructive algae blooms, and the dire status of C’waam and Koptu, the Bureau’s continued reliance on the Biological Opinion is arbitrary and capricious.

Recent dry conditions and excessive water deliveries have caused the Bureau’s management of the Project to exceed the scope of the impacts contemplated by the Biological Opinion. *See* Biological Opinion at 117. During the last 5 years Upper Klamath Lake elevations have been below levels at which significant negative effects are anticipated for all sucker life history stages at a frequency that falls outside the predicted range of the Biological Opinion’s modeling assumptions. For example, elevations expected to cause negative effects occurred 40% of the time (2 out of 5 years) for lake-spawning adults, larvae (40%), age-0 juveniles (40%), age 1+ juveniles (40%), and adult suckers (40%) compared to an expected likelihood of occurrence of 5%, 3%, 13%, 10%, and 10%, respectively. Biological Opinion at 115, 140, 142.

The failure of the Biological Opinion to anticipate and evaluate the effects of these conditions directly impairs its no-jeopardy conclusions with respect to the C’waam and Koptu. *See* Biological Opinion at 196. For example, the modeling upon which the Biological Opinion relied showed a five-percent probability of elevations below the threshold occurring during spawning season. Biological Opinion at 136. Yet this is exactly what took place in the spring of 2017 and, based on the Bureau’s past management practices, is likely to occur again. This means the C’waam and Koptu will have to spawn under conditions significantly worse than those contemplated by the Biological Opinion two years in a row, while the aging adult C’waam and Koptu populations continue to lose reproductive viability.

Moreover, the Biological Opinion recognizes that “the lack of recruitment into the adult breeding population of both species since the late 1990s is magnifying the significance of [the] adverse effects” of declining water levels, though it mistakenly assumed that “such events are likely to be infrequent.” Biological Opinion at 142. Yet as illustrated on Table 1 above, during each of the past five years water levels have fallen beneath the levels identified in the Biological Opinion as elevations below which the C’waam, Koptu, and their critical habitats are anticipated to suffer significant harm.

The Biological Opinion also failed to recognize, let alone meaningfully address, the connection between lower elevations and the occurrence of algae blooms, nutrient input, and other water quality factors in Upper Klamath Lake. *See* Biological Opinion at 181. This omission is despite available data demonstrating such a connection, and the obvious importance of water quality as a critical parameter of the continued survival and recovery of the C’waam and Koptu.

The Biological Opinion likewise fails to address the Project’s impact on the now-threatened Oregon spotted frog, *see* 79 Fed. Reg. 51,657 (September 29, 2014), and its critical habitat in and along

Upper Klamath Lake tributaries and surrounding seasonal wetlands within the Biological Opinion's action area. *See* 81 Fed. Reg. 29,335 (May 11, 2016); Biological Opinion at 7.

Ultimately, the clearest indicator of the Biological Opinion's inadequacy is the current status of C'waam and Koptu. Due to catastrophic die-offs in the mid-1990s, both species have suffered from a dramatic decrease population numbers, magnifying the importance of Upper Klamath Lake habitat to the species' survival. C'waam have not benefited from a major recruitment event since 1993, Koptu since 1998. The Klamath Tribes collected 490 dead adult C'waam and nine dead adult Koptu last year alone. In the face of these facts, continued reliance on the Biological Opinion would permit dangerously low Upper Klamath Lake elevations, imposing additional strain on these already dwindling populations.

IV. The Agencies Have Violated Section 7 of the Act by Engaging in Inadequate Reconsultation.

A federal agency acting pursuant to a biological opinion "must reinitiate consultation if the specified level of take is exceeded or if new information or a modification to the action indicates previously unexamined effects." *Save Our Cabinets v. United States Fish & Wildlife Serv.*, 255 F. Supp. 3d 1035, 1044 (D. Mont. 2017); *See* 50 C.F.R. § 402.16.

Despite the Klamath Tribes participation in the consultation on the Biological Opinion reinitiated by the Agencies in light of the litigation brought by the Yurok and Hoopa tribes, the Agencies have failed to address the Klamath Tribes' recommendations on managing lake levels in Upper Klamath Lake to avoid further mortality to the endangered species and further damage to their critical habitat. The current scope of that reconsultation is therefore inadequate, as it fails to appropriately consider the imperiled state of the C'waam and Koptu, and has completely ignored the effects of the operation of the Project on the Oregon spotted frog and its critical habitat.

CONCLUSION

This letter provides notice of, and the bases for, the Klamath Tribes' intent to file a lawsuit to protect these Endangered species. Over the next 60 days, the Klamath Tribes will continue to invite the Agencies' cooperation in resolving the violations identified in this letter and finding effective remedies to ensure the continued survival of C'waam and Koptu, as well as the Oregon spotted frog, and the protection of their critical habitat. But in the absence of a swift and acceptable resolution of these issues, upon the expiration of the Act's 60-day notice period, the Klamath Tribes intend to file a citizens' suit for declaratory and injunctive relief against the Agencies to remedy the violations described in this letter and any and all similar violations.

Sincerely,
ROSETTE, LLP



Douglas C. MacCourt

Sixty-Day Notice of Violations of Endangered Species Act

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