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The Klamath Tribes

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MEDFORD DIVISION

THE KLAMATH TRIBES,  
a federally recognized Indian Tribe,

Plaintiff,

vs.

UNITED STATES BUREAU  
OF RECLAMATION

Defendant.

Case No.: 1:21-CV-00556

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

The Klamath Tribes (“Tribes”) bring this Complaint and allege the following:

**INTRODUCTION**

1. The Tribes bring this action for declaratory and injunctive relief in an effort to protect two critically endangered species, the C’waam (Lost River sucker, *Deltistes luxatus*) and Koptu (shortnose sucker, *Chasmistes brevirostris*), which are essential treaty-protected resources for the Tribes. C’waam and Koptu fisheries sustained the Tribes’ people for millennia and remain central to the Tribes’ ability to maintain and exercise their spiritual and cultural practices. These

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species are in an extremely precarious condition and at imminent risk of extinction, potentially from just a single catastrophic event. They have been listed as endangered species pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531, *et seq.*, since 1988.

2. The C’waam and Koptu are endemic to Upper Klamath Lake (“UKL”) and its environs, which also comprise significant components of the Klamath Irrigation Project (“Project”), an irrigation project operated by the United States Bureau of Reclamation (“Reclamation”) subject to biological opinions issued by the United States Fish and Wildlife Service (“USFWS”) and the National Marine Fisheries Service (“NMFS”). The 2020 USFWS Biological Opinion on the Effects of the Proposed Interim Klamath Project Operations Plan, effective April 1, 2020, through September 30, 2022, on the Lost River Sucker and the Shortnose Sucker (“2020 BiOp”)<sup>1</sup> establishes certain minimum UKL water elevation levels (referred to as “boundary conditions”) necessary to prevent the extinction of the C’waam and Koptu.

3. This action seeks a declaration that Reclamation has violated the ESA by unlawfully jeopardizing the C’waam and Koptu and adversely modifying their critical habitat through its operation of the Project and by unlawfully taking individual members of the species. It seeks an injunction preventing Reclamation from releasing water from UKL above a flow rate of 400 cfs until it achieves compliance with the minimum boundary conditions required this year by the 2020 BiOp. And it seeks an injunction directing Reclamation to remain in compliance with all applicable minimum boundary conditions set by the 2020 BiOp until such time as Reclamation, USFWS, and NMFS complete their currently ongoing reconsultation process to arrive at a new action and new biological opinions regarding Reclamation’s operation of the Project. These

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<sup>1</sup> A copy of the 2020 BiOp is attached as Ex. 1 to the Tribes’ Req. for Judicial Notice in Supp. of Compl. and Mot.s for TRO and Prelim. Inj. (“RJN”).

remedies are necessary to halt ongoing unlawful agency actions that are causing irreparable harm to the C'waam and Koptu, and to protect these critical tribal trust resources.

**JURISDICTION, VENUE AND INTRADISTRICT ASSIGNMENT**

4. The District Court has jurisdiction over this matter under 5 U.S.C. §§ 701-706, 16 U.S.C. § 1540(c), 28 U.S.C. §§ 1331 & 1362.

5. As required by 16 U.S.C. § 1540(g), the Tribes have provided Defendant with 60 days' notice of intent to bring suit under the ESA. Despite multiple additional entreaties from the Tribes, both through personal meetings and additional letters, Defendant has not remedied the violations giving rise to this Complaint.

6. Venue is proper in the District of Oregon under 28 U.S.C. § 1391(e) because the Tribes and the Defendant resides there.

7. Divisional venue is proper in the Medford Division pursuant to L.R. 3-2(a) & (b) because the Tribes and Defendant resides there and a substantial part of the events and omissions giving rise to the Tribes' claims occurred there.

**PARTIES**

8. Plaintiff Klamath Tribes are a federally recognized Indian tribe possessing governmental authority over their members and Indian lands and consist of three peoples who traditionally inhabited lands that now comprise parts of Southern Oregon and Northern California: the Klamath, the Modoc, and the Yahooskin Band of Snake Indians. The Tribes' headquarters are in Chiloquin, Oregon, in the heart of the Upper Klamath Basin.

9. Since time immemorial, the Tribes' members have used, the resources of the Klamath Basin in what is now both Oregon and California for subsistence, cultural, ceremonial, religious, and commercial purposes. The Tribes possess federally reserved water rights to Klamath

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Basin water in order to, among other purposes, preserve, protect, and exercise their treaty-guaranteed rights to hunt, fish, trap, and gather. Indeed, one of the “very purposes of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle.” *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1983) (internal quotation marks omitted). These treaty rights survived the termination of the Tribes’ former reservation. *Kimball v. Callahan*, 493 F.2d 564, 569 (9th Cir. 1974).

10. C’waam and Koptu, freshwater fish species native to lakes and rivers of the Upper Klamath Basin, have sustained the Klamath Tribes’ members since time immemorial and continue to play a central role in the Tribes’ culture and spiritual practices. They are essential to the way of life of the Tribes’ members, and the Tribes have a fundamental responsibility to protect them. Once one of the most important food-fish in the Upper Klamath Lake region, C’waam and Koptu were caught by the thousands as a mainstay of the Klamath Tribes’ diet. Recognizing the threat of imminent extinction faced by these essential cultural and treaty resources, the Tribes suspended fishing for C’waam and Koptu in 1986 and redoubled their efforts to ensure the conservation and recovery of these important species. In 1988, USFWS listed both species as endangered under the ESA. The Tribes now limit themselves to catching and releasing just two fish every year for ceremonial purposes, and a generation of tribal members has grown up knowing C’waam and Koptu only through the annual ceremonies and stories told by their elders and not through their own experience of harvesting, preparing, sharing, and consuming these vital components of their cultural existence. Defendant’s illegal operation of the Project jeopardizes the very existence of these species and consequently threatens not only the ability of the Tribes and their members to benefit from them but also the very identity of the Tribes and their people.

11. Defendant Reclamation is a federal agency within the Department of the Interior

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that constructs and operates federal water projects throughout the United States. Reclamation retains discretionary control over the operation of the Project. Defendant has a trust responsibility to protect the Tribes' treaty resources including the C'waam and Koptu.

### **THE ENDANGERED SPECIES ACT**

12. The ESA authorizes citizen suits “to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the ESA] or regulation issued under the authority thereof.” 16 U.S.C. § 1540(g)(1)(A). Federal district courts have jurisdiction “to enforce any such provision or regulation, or to order the Secretary [of the Interior or of Commerce, as applicable] to perform such act or duty, as the case may be.” 16 U.S.C. § 1540(g).

13. ESA Section 7 forbids federal agency “action” that may “jeopardize the continued existence” of a listed species or destroy or adversely modify a species’ critical habitat. 16 U.S.C. § 1536(a)(2). An “action” is defined as “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02. To “jeopardize the continued existence” is “to engage in an action that 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.” *Id.*; *see also Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008) (“[T]he jeopardy regulation requires [the consulting agency] to consider both recovery and survival impacts.”). The “destruction or adverse modification of critical habitat” is defined as:

a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

50 C.F.R. § 402.02; *see also Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d

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1059 (9th Cir. 2004). An agency's obligations under Section 7 extend to any ongoing action over which the agency retains authority or discretionary control.

14. ESA Section 7 also establishes an interagency consultation process to assist federal agencies in complying with their ESA obligations to avoid jeopardy or the adverse modification of critical habitat. Under this Section 7 process, a federal agency proposing an action that "may affect" a listed species, such as the C'waam and the Koptu, must prepare and provide the expert agency, USFWS in this case, a "biological assessment" of the effects of the proposed action. 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12. The expert agency is then responsible for assessing the "effects of the action" together with "cumulative effects" on listed species and critical habitat. 50 C.F.R. § 402.14(g)(3)–(4). This determination is rendered in a biological opinion. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h).

15. Section 9 of the ESA bars the "take" of endangered species by any person, including federal agencies. 16 U.S.C. § 1538(a)(1). To "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 16 U.S.C. § 1532(19). USFWS has defined "harm" to include "an act which actually kills or injures wildlife... [including] significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. USFWS has extended this take prohibition to C'waam and Koptu by virtue of listing them as endangered species. 53 Fed. Reg. 27130 (July 18, 1988).

16. If a federal action subject to consultation will result in the take of a listed species, the associated biological opinion must include an "incidental take statement" ("ITS") that specifies the amount and extent of incidental take of listed species allowed as a result of the proposed action as well as the "terms and conditions" under which such incidental take is authorized. 16 U.S.C. §

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1536(b)(4); 50 C.F.R. § 402.14(i). The ITS acts as a crucial check on the assumptions and conclusions of a biological opinion, as take exceeding the ITS is not protected from liability. Compliance with a valid ITS, however, shields the actor from take liability for activities undertaken in compliance with the ITS' terms and conditions. 16 U.S.C. § 1536(o)(2); *see* 16 U.S.C. § 1536(b)(4)(C).

17. After a biological opinion is issued, the action agency must request reinitiation of consultation under certain circumstances. 50 C.F.R. § 402.16. These include if the amount or extent of take authorized by the ITS is exceeded or if new information reveals that the effects of the action on the listed species or its critical habitat are occurring in a manner or to an extent not previously considered, or if the federal action “is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.” *Id.* While there are circumstances under which an agency might legally continue to operate under a prior biological opinion during the pendency of a re-consultation process, the exceedance of an ITS trigger may deprive the action agency of the ability to avoid take liability under the ITS' safe harbor. *See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1249 (9th Cir. 2001).

### **GENERAL ALLEGATIONS**

#### **A. Historical Background**

18. In 1864 the Klamath Tribes and the United States entered into the Treaty between the United States of America and Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, October 14, 1864, 16 Stat. 707 (“1864 Treaty”). Under the 1864 Treaty, the Klamath Tribes enjoy senior reserved rights to waters within the Upper Klamath Basin. The 1864 Treaty also reserved to the Klamath Tribes, among other things, the exclusive right to take fish and game, including C’waam and Koptu, from the waters contained within the 800,000-acre reservation the

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Tribes retained through the 1864 Treaty.

19. Pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, and under the authority of the Reclamation Act of 1902, 43 U.S.C. §§ 372, *et seq.*, Congress authorized the construction and development of the Project. The bulk of the Project's facilities were constructed between 1906 and 1966. The Project consists of several major dams, including the Link River Dam at the outlet of UKL, and multiple canals and pumping stations. The Project's infrastructure and operations have substantially modified the hydrology of the Klamath River Basin in order to store, divert, and convey water for agricultural, municipal, and hydroelectric uses throughout what is now southern Oregon and northern California. The Project provides irrigation water annually to roughly 200,000 acres of irrigated lands, as well as water to the four federal wildlife refuges located within its service area. UKL serves as a primary source of water for the Project.

20. UKL, the largest freshwater lake in Oregon and one of the largest in the west, is roughly 25 miles long and up to 12.5 miles wide, with a surface area of 91,260 acres. It is fed by water from the Sprague, Williamson and Wood Rivers and their tributaries, as well as natural springs.<sup>2</sup> UKL and its tributaries comprise the most important habitat for the continued existence of the C'waam and Koptu. UKL is especially critical to the conservation and recovery of the C'waam and Koptu because it provides the most habitat and has the greatest variety of spawning sites. It is also home to the last genetically intact reproducing population of Koptu in existence.

21. Reclamation controls the elevation of UKL through oversight of the operation of the Link River Dam, located on the Lake's southern end. Before construction of the Link River Dam in 1921, UKL elevations varied between roughly 4,140 and 4,143 feet above sea level, with a mean annual variation of approximately two feet. Since 1921, however, after Reclamation

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<sup>2</sup> The Williamson River is by far the most significant contributor of flows to UKL.

dredged a natural reef that formed a barrier between UKL and the Link River and constructed the Link River Dam, UKL elevations have varied annually over a range of approximately seven feet, from 4,136 to 4,143 feet. These substantial drops in UKL elevation levels deprive C'waam and Koptu of habitat and expose them to increased risk of predation and the effects of poor water quality. Since the inception of the Project, C'waam and Koptu populations have plummeted as a direct result of Reclamation's management of UKL at elevation levels beneath those necessary to support essential C'waam and Koptu biological functions such as spawning, rearing, feeding, sheltering, and migration.

22. Between 1968 and 1985 C'waam and Koptu harvests decreased from over 10,000 fish per year to just 687. Recognizing the peril facing these essential cultural and treaty resources, and in an effort to protect them from extinction, the Klamath Tribes voluntarily suspended fishing for C'waam and Koptu in 1986 in order to focus on their conservation and recovery.

23. USFWS listed the C'waam and Koptu as endangered species throughout their entire range in 1988. 53 Fed. Reg. 27,130 (July 18, 1988). In 2012, USFWS designated UKL and its tributaries as critical habitat for the C'waam and Koptu. 77 Fed. Reg. 73,740 (December 11, 2012).

24. Despite a brief recovery period in the late 1980s and early 1990s, both the C'waam and Koptu have continued on their longer-term trend toward extinction. There has not been substantial "recruitment" (that is, development of a cohort of juveniles into mature adults capable of spawning new young) of new juveniles into the spawning C'waam population for 29 years, and into the Koptu population for 22. There are currently not enough younger fish to assure the continued existence of the species after the death of the current generation of adults. These surviving adults of both species are nearing their maximum life expectancy and are at ever

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increasing risk of becoming incapable of successful spawning as they senesce. Moreover, following on from the tragic fish kill that occurred in 2017, spawning runs in 2018 and 2019 at both shoreline springs in UKL and in the Williamson River were substantially lower than previous years, which strongly suggests higher average annual mortality rates for the aging C'waam and Koptu.

25. There are only three distinct C'waam spawning populations still in existence – UKL, UKL-river, and Clear Lake Reservoir. The population numbers for all three are very low and dropping, and each is at a high risk of localized catastrophic events. Koptu have more discrete sites than C'waam at which individual members of the species are located. But the Koptu have extremely low numbers in those populations, many of which also lack access to suitable spawning sites. In fact, there are currently only three known spawning Koptu populations as well, in UKL, Clear Lake, and Gerber Reservoir. But the total number of spawning Koptu populations is more accurately understood to total exactly one given the high levels of genetic introgression between Koptu and Klamath largescale suckers in Clear Lake and Gerber Reservoir. Only the UKL population of Koptu remains reasonably genetically intact.

26. All of these C'waam and Koptu populations are characterized by low abundance. Between 2001 and 2015, the number of surviving C'waam decreased by 55-66% and surviving Koptu by 76-78%. Worse, population declines have accelerated in the last several years. In 2016, there were approximately 108,000 C'waam and 19,000 Koptu adults in UKL. By 2019, in the wake of a significant fish kill event in 2017, population estimates were approximately 40,000 C'waam and 7,000 Koptu. This represents a 63% reduction for both C'waam and Koptu in that three-year period.

27. Over the past two years, the populations of both species have continued to dwindle.

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There are now only approximately 4,830 UKL spawning C'waam adults (3,240 females and 1,590 males) and approximately 25,890 river spawning C'waam adults (15,330 females and 10,560 males) left in existence. The current status of the Koptu population is even more alarming. There are only approximately 3,940 remaining adults (2,460 females and 1,480 males) in UKL. Most of the adult C'waam are estimated to be nearly 30 years old, past their average life span of 17-22 years, and nearing their maximum natural lifespan of 40 years. Most of the individual Koptu are estimated to be in their late 20s as well, perhaps more than double the Koptu's average lifespan of 12-14 years, and nearing the oldest age ever recorded for members of that species.

28. If the current adverse recruitment conditions persist, the C'waam will likely be extinct in less than a decade and the Koptu within as few as 2-3 years. And both species are at continual risk that a catastrophic single-year die-off could drive them to extinction even sooner.

B. The 2020 BiOp

29. On March 29, 2019, a protracted, multi-year ESA Section 7 reconsultation process regarding Project operations concluded when USFWS and NMFS issued separate but coordinated Section 7(a)(2) biological opinions regarding Reclamation's 2019-2024 Klamath Project Operations Plan ("Plan"). On July 31, 2019, the Yurok Tribe filed an ESA suit in the Northern District of California challenging the adequacy of the Plan and the 2019 NMFS BiOp. On November 13, 2019, in response to the discovery of errors in certain data sets provided to Reclamation and NMFS for analysis in the 2018 BA/2019 BiOp, Reclamation again formally reinitiated consultation with USFWS and NMFS. On March 27, 2020, the Northern District of California court stayed the Yurok Tribe's suit pursuant to a joint stipulation of the parties after they negotiated an Interim Operations Plan ("IOP"),<sup>3</sup> to govern Reclamation's operation of the

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<sup>3</sup> A copy of the IOP is attached as Ex. 2 to the Tribes' RJN.

Project until the end of the renewed reconsultation process, which is slated to conclude by the end of September 2022. IOP at 3.

30. Under the IOP, Reclamation planned to operate consistent with the Plan as analyzed in the 2019 BiOps issued by USFWS and NMFS, with the exception of an “augmentation” to the Environmental Water Account (“EWA”) when certain conditions were met. IOP at 2. The EWA is a volume of water to be released from UKL to support flows in the lower river for salmon needs and was set at a minimum of 400,000 acre-feet (“AF”) in the Plan. The IOP proposed augmenting the EWA by 40,000 AF in years when the Natural Resources Conservation Service April 1 inflow forecast for UKL resulted in a calculated “UKL Supply” (as that term was defined in the Plan) that met or exceeded 550,000 AF and was equal to or less than 950,000 AF. Of this 40,000 AF of new augmentation water, 23,000 AF was to come from water that otherwise would have been allocated to Project Supply, and 17,000 AF was to come from water that otherwise would have remained in UKL to support C’waam and Koptu lifecycle needs. This EWA augmentation water would be in addition to 20,000 AF of water (coming in equal proportion from water that would otherwise have gone to Project Supply and water that otherwise would have remained in UKL) that Reclamation had decided in October of 2019 to use to “enhance” the EWA in certain water years [IOP at 3].<sup>4</sup> In other words, since the issuance of the 2019 USFWS BiOp regarding Reclamation’s Plan, Reclamation committed to taking an additional 27,000 AF of water away from C’waam and Koptu needs.

31. The 2019 NMFS BiOp also called for a surface flushing flow to occur in the spring, which involved releasing a significant percentage of the regular EWA allocation from UKL to “disturb surface sediment along the river bottom and disrupt the life cycle of *Manayunkia speciosa*

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<sup>4</sup> A water year is measured from October 1 to September 30.

(a polychaete worm), which is a secondary host for the *Ceratonova shasta* parasite central to salmonid disease dynamics in the Klamath River.” 2019 NMFS BiOp at § 1.3.2.6.4. This operation was carried over into the IOP. The 2019 NMFS BiOp contains an important caveat, however, which is that this surface flushing flow cannot “result in impacts to suckers in UKL outside of those analyzed by USFWS; if Reclamation believes implementation of this volume may result in impacts to suckers outside of those analyzed by USFWS, Reclamation will coordinate with the Services.” *Id.*

32. Recognizing that the IOP’s modifications to the Plan would likely have additional impacts on C’waam and Koptu, Reclamation formally requested ESA Section 7 consultation with USFWS on the IOP on March 27, 2020. Two weeks later, on April 10, 2020, USFWS issued the 2020 BiOp, superseding its 2019 BiOp. NMFS concurred in USFWS’ opinion without amending its own 2019 BiOp.

33. The 2020 BiOp explained that the accuracy of its analysis depends on the maintenance of specific boundary conditions and the validity of certain assumptions, and that when such conditions are exceeded or assumptions prove invalid, the 2020 BiOp’s analysis would not adequately address the IOP’s effects on the species and reinitiation of consultation would therefore be required. These conditions and assumptions include that hydrologic conditions “will not change substantially over the term of th[e] BiOp” from those experienced “in the [period of record (“POR”)]<sup>5</sup>, which provided the basis ... of the effects analysis....” [2020 BiOp at § 7.1.2]. Among these unaccounted-for hydrological conditions would be the occurrence of “[h]igher frequencies of dry conditions than observed in the period of record that lead to lower lake levels generally[,]”

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<sup>5</sup> The period of record means historical hydrologic conditions as they occurred between 1981 and 2019, which provided the basis for Reclamation’s development of the action that underpinned the IOP. 2020 BiOp at § 4.

and Williamson River flows and net inflow to UKL that deviate in magnitude, pattern, or sequence from those observed in the POR. *Id.*

34. To ground truth its assumptions, the 2020 BiOp identified several real-world conditions, the occurrence of which would mean “the effects of the proposed action [have gone] beyond the scope of what has been analyzed” in the 2020 BiOp. *Id.* at § 7.1.3. These include:

- Two consecutive years in which UKL surface elevations fall below 4142 ft (1,262.48 m) in April or May; or any year in which UKL surface elevations fall below 4142 ft (1,262.48 m) in April or May when EWA augmentation is provided[;]
- UKL surface elevations below observed elevations in 2010 in April or May[;]<sup>6</sup>
- UKL surface elevations will not fall below 4,138.00 ft at any time; [Id.]
- UKL surface elevations will not drop below 4,138.25 ft (1,261.34 m) at any time in more than one water year; [Id.]
- UKL surface elevations will not be less than 4,140.0 ft (1,261.9 m) by July 15, below 4,140.5 ft (1,262.0 m) by July 15 in more than one year, or more below 4,140.8 ft (1,261.1 m) by July 15 in more than two years.; [Id.]

35. USFWS concluded in the 2020 BiOp that, in the absence of these sorts of events, Reclamation’s management of the Project pursuant to the IOP would not jeopardize the C’waam and Koptu<sup>7</sup> but found that Reclamation’s operation of the Project pursuant to the IOP would lead

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<sup>6</sup> Reclamation’s management of the Project brought UKL into the spring/summer half of the 2010 water year at an extremely low level, and between the start of April and the end of May, UKL never exceeded an elevation of 4,141.31 and dropped as low as 4,140.47. Recognizing the deleterious effects these had on C’waam and Koptu spawning, USFWS adopted the daily elevations observed in April and May of that year as an independent boundary condition to provide a secondary floor beneath the requirement of 4,142.0 feet.

<sup>7</sup> To “jeopardize” a species is to “to engage in an action that 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.”

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to incidental take of both C'waam and Koptu and would have adverse effects on their critical habitat. Consequently, the 2020 BiOp contains an ITS sheltering Reclamation's operation of the Project pursuant to the IOP from take liability so long as the 2020 BiOp's assumptions remained accurate, and Reclamation remained in compliance with the terms and conditions of the ITS. Accordingly, the ITS noted that the 2020 BiOp's "assumptions and sideboards should be monitored throughout the term of this BiOp to determine if they are valid; otherwise ongoing Project operations could be outside the scope of this BiOp." [2020 BiOp at § 11.1].

36. The ITS' Terms and Conditions also require that "[i]f a progressive decrease in elevations that is projected to fall outside the conditions outlined above is identified, Reclamation shall determine the causative factors of this decrease and determine whether these factors are within the scope of the proposed action and the effects analyzed in this BiOp. Reclamation shall immediately consult with the Service concerning the causes to adaptively manage and take corrective actions." [2020 BiOp at § 11.3.2].

37. Term and Condition 1c of the 2020 BiOp's ITS ("Take Corrective Action to Ensure UKL Elevations Are Managed within the Scope of the Proposed Action") is the ITS provision most directly relevant to this suit. In it, USFWS mandated that Reclamation ensure that its management of UKL elevations must avoid breaching the various boundary conditions identified in § 7.1.3 of the 2020 BiOp. It also required Reclamation to "immediately consult with [USFWS] concerning the causes [of any projected breach of these conditions] to adaptively manage and take corrective actions." 2020 BiOp T&C 1c.

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50 C.F.R. § 402.02. The Tribes dispute the accuracy of the 2020 BiOp's no-jeopardy finding, and nothing herein should be construed to waive any claim the Tribes might have in regard to that conclusion or related to the compliance (or lack thereof) of the 2020 BiOp with the mandates of the ESA. Those are simply not claims the Tribes are bringing in the instant action.

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38. The minimum elevation requirements built into this condition of the ITS are not arbitrarily chosen. Rather each is tied to the adverse effects on C'waam and Koptu survival and life cycle functions and the availability of their critical habitat that stem from excessively low UKL elevations.<sup>8</sup> April and May elevations of at least 4,142.0 feet are vital because the amount of available spawning habitat, and therefore spawning activity, is primarily influenced by UKL elevations since they determine the area of spawning substrate which is inundated and the depth of water over such substrate. If the spawning grounds are dry or barely damp, spawning opportunities are reduced, which is something neither species can afford given their low numbers and geriatric status. In 2010, for instance, when the elevation of UKL was lower than 4,141.0 feet during much of spawning season, USGS monitoring showed that the amount of time spent at the spawning areas was at least 36% shorter for C'waam females and 20% shorter for males than in years when elevation levels were maintained above 4,142.0 feet. And many fish simply skipped spawning that year altogether, with USGS data showing that 14% fewer C'waam females and 8% fewer males participated in spawning in 2010 than during years when UKL was kept above 4,142.0 feet during spawning season. *See* 2020 BiOp at § 7.3.1.1. Given the advanced age and low abundance of the remaining adults of both species, the loss of any opportunity to spawn is

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<sup>8</sup> The Tribes have a water right in UKL determined in the Klamath Basin Adjudication (KBA) that is senior to the water rights of the Project. When the Tribes' UKL water right becomes enforceable against the Project at the conclusion of the circuit court's review of the administrative adjudicator's Amended and Corrected Findings of Fact and Order of Determination, the Tribes will be able to maintain significantly higher water levels in UKL under that right. (For example, enforcement of the Tribes' right would require UKL to be maintained at an elevation no lower than 4,143.0 feet from April 1 to June 15, no lower than 4,141.5 feet on July 15, and no lower than 4,139.5 feet at any point during the March-September period.) This right is quantified based on the amount of water necessary to provide a healthy and productive habitat for C'waam and Koptu and other resources protected by the Tribes' treaty-based rights to hunt, fish, trap, and gather. The elevations set forth as the boundary conditions in the 2020 BiOp ITS are the minimum levels USFWS believed were necessary to avoid jeopardy.

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potentially immediately threatening to the viability of the species as there is no guarantee that the fish will survive and be capable of spawning the following year. *See* 2020 BiOp at § 6.3.3.1 (“The effects of senescence on the survival and reproduction of these two species are unknown at present, but the populations in UKL are clearly aging (Hewitt et al. 2018 pp. 15, 18, 21). The low recent survival rates could be an early signal that senescence is leading to increased mortality rates and accelerated population declines.”).

39. Maintaining baseline UKL elevations through the spring and summer has other important biological benefits. C’waam and Koptu larvae are present in UKL from late March through mid-July, with peak abundance occurring from mid-May through mid-June. Larvae require shallow, near-shore and marsh edge habitat with emergent vegetation not only for food, but also for protection from predators as well as lake turbulence and currents, which can transport larvae out of UKL to perish in Project canals and other unsuitable habitat, a process known as entrainment. Larvae are especially dependent on emergent vegetation habitat located in wetland areas in and around UKL including Hanks Marsh, Shoalwater Bay, the Wood River Delta, the Upper Klamath National Wildlife Refuge, and the Williamson River Delta. The Williamson River Delta is particularly important as it is the area of highest C’waam and Koptu larvae density and serves as a thoroughfare for larvae migrating into the UKL from spawning areas in the Williamson and Sprague Rivers.

40. During July, surviving C’waam and Koptu larvae transform into juveniles. While juvenile C’waam and Koptu are less dependent on near-shore emergent vegetation habitat than larvae, they still rely on this habitat in addition to other near-shore areas, particularly those with rocky substrate. Maintaining UKL at sufficient elevations to ensure access to all of these critical areas during the period from March to mid-July is therefore essential to the continued existence of

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the C'waam and Koptu.

41. Moreover, while adult C'waam and Koptu prefer to move to the northern end of UKL from June to September where there is more abundant food, fewer predators, and deeper water, they are often forced to migrate from this preferred habitat in July and August to escape areas of extremely poor water quality. Dramatic changes to the Klamath River Basin's hydrology and the rise of agricultural activity within the area since the Project's inception have caused UKL to change from eutrophic to hypereutrophic, that is, from a lake with high nutrient levels to one that is excessively rich in them. Agricultural activities and timber harvesting have been the primary contributors to increased nutrient (primarily phosphorus) and sediment concentrations in UKL. Nutrient overloading in UKL has been exacerbated by the draining of over 50,000 acres of wetlands in and adjacent to UKL, which has decreased the nutrient uptake capacity of UKL while simultaneously introducing additional phosphorous from wetland decay.

42. Poor water quality conditions that are stressful or lethal to fish, including high pH, high un-ionized ammonia, and low dissolved oxygen ("DO"), occur every summer in UKL as a result of large cyanobacteria blooms and crashes. Specifically, increased nutrient input into UKL has resulted in large, harmful blue-green algae blooms that develop each May through mid-July, and sometimes again in late summer/early fall. As algal biomass increases, pH levels in UKL rise, which directly stresses C'waam and Koptu. To compound this harm, the concentration of un-ionized ammonia in UKL increases exponentially as the Lake's pH level goes up. Un-ionized ammonia is directly toxic to C'waam and Koptu, causing additional, cumulative stress and mortality to the species. Further, as algae respire at night, DO can drop to low levels leading to even greater cumulative stress and mortality to C'waam and Koptu. The harmful effect of algal respiration on DO levels is especially pronounced in waters less than 3.3 feet deep.

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43. “[W]ater quality poses the greatest threat to fish [in UKL] from July to mid-October, but especially late July and August.” 2020 BiOp at § 7.3.1.6. C’waam and Koptu must have good access to water quality refuge habitat in Pelican Bay and other tributary inflow areas like the mouth of the Williamson and Wood rivers if poor water quality conditions occur, and UKL elevations must be sufficient to protect them from predation from pelicans and other birds while they shelter there. *See id.* at § 6.2.5 (“Adult suckers require adequate water quality, or at least refugia from poor water quality conditions, within their growth habitat”); § 7.3.1.5 (“Navigating through shallow water to enter Pelican Bay could also expose suckers to increased avian predation”).

44. Fish Banks, the mouth of the Williamson River, and especially Pelican Bay serve as vital water quality refuges during summer months. To enter the Pelican Bay water-quality refuge, however, C’waam and Koptu must pass through a relatively shallow portion of UKL. If UKL is not maintained at a sufficient elevation—one that allows for a minimum depth of three feet at the entrance to Pelican Bay—C’waam and Koptu are at extreme risk from predation from pelicans as they pass into this critical water-quality refuge. Further, UKL elevations must be high enough to provide adequate amounts of sufficiently deep habitat in Pelican Bay to protect C’waam and Koptu from pelican predation and disease associated with overcrowding. The inability to access critical water quality refuges puts the fish at much greater risk for mass mortality events. 2020 BiOp at §6.2.5 (“Although adult suckers are hardier than juveniles and larvae, they are still susceptible to poor water quality, which can be associated with die-offs (see Section 6.5.4). Thus, adult suckers require adequate water quality, or at least refugia from poor water quality conditions, within their growth habitat.”).

45. For these reasons, the 2020 BiOp established a July 15 boundary condition of

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4,140.0 feet. But recognizing the cumulative toll years of poor water quality could take, it added a condition that July 15 elevations could not be allowed to drop below 4,140.5 feet for more than one year during the BiOp's term.

C. Reclamation's Water Management Under the IOP

46. In 2020, the UKL Supply based on the NRCS April 1 forecast was calculated at 557,000 AF, 7,000 AF above the level triggering EWA augmentation and the concomitant requirement for Reclamation to maintain UKL above an elevation of 4142.0 during April and May. Unfortunately, 2020 proved to be an exceptionally poor water year, and the NRCS April 1 forecast quickly turned out to be significantly overinflated. Indeed, the 2020 water year proved to be the third driest year in terms of UKL inflows in the previous 40 years, a circumstance the 2020 BiOp had heavily discounted the possibility of occurring. Nonetheless, Reclamation released both a surface flushing flow and EWA augmentation water from UKL in April 2020.

47. The IOP contained an important sideboard for the provision of EWA augmentation water, namely that if EWA augmentation is to be provided in any water year, "UKL elevation will not drop below 4142.0 feet during the months of April and May in that water year" [IOP at 6]. More specifically, the IOP provided that if "implementation of the 40,000 AF of EWA augmentation releases is likely to result in UKL elevations below 4,142.0 feet in April or May, despite good faith efforts to rearrange the 40,000 AF of EWA releases within reasonable bounds, Reclamation will coordinate with the Services and PacifiCorp to best meet the needs of ESA-listed species as well as coordinate and obtain input from Yurok and other affected Klamath River Basin Tribes through government-to-government consultation on how to manage water" [IOP at 4]. The importance of the maintaining UKL at an elevation at or above 4,142.0 feet in April and May was made explicit in the 2020 BiOp, which specifically included

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the non-discretionary command that UKL not be allowed to fall below 4,142.0 feet in April or May in any year during which EWA augmentation water is provided.

48. UKL reached an elevation above 4142.0 feet during the first week of April 2020, but Reclamation nonetheless failed to maintain UKL above an elevation of 4,142.0 feet thereafter. Instead, Reclamation made three distinct decisions that caused it to violate this boundary condition of the 2020 BiOp. First, it authorized the commencement of agricultural deliveries in early April despite UKL hovering just barely above 4,142.0. Second, and more consequentially, it forced 43,000 AF out of UKL in mid-April to provide for a surface flushing flow below Iron Gate Dam. It made this decision without consulting with USFWS, or the Klamath Tribes, despite the requirement of the 2019 NMFS BiOp that a surface flushing flow not occur without consultation with the Services if doing so would – as it did in 2020 – “result in impacts to the [C’waam and Koptu] outside those analyzed by USFWS[.]” 2019 NMFS BiOp at § 1.3.2.6.4. Third, despite UKL already having dropped well below 4,142.0 feet, Reclamation began releasing EWA augmentation water in late April and continued doing so until the end of the first week of May. The net effect of these decisions was to create the entirely unprecedented situation where UKL elevations actually *decreased* markedly from mid-April into May, dropping by more than 0.7 feet – from 4142.10 to 4141.38 feet – directly in the middle of C’waam spawning season, chasing many fish away from their spawning ground and leading to the desiccation of thousands of eggs.

49. Although UKL elevations have infrequently experienced slight decreases during spawning season during the POR, most often due to the release of surface flushing flows, they have never decreased so sharply so quickly and from such a low base as Reclamation caused

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them to do in 2020. The 2020 BiOp in fact specifically dismissed the possibility of a decrease this sudden and of this magnitude.

50. Allowing UKL to drop below 4,142.0 feet during the April/May period in 2020 had two additional consequences for Reclamation's operations under the IOP in 2021. First, as set forth in the 2020 BiOp, UKL "elevations below 4,142 ft (1,262.5 m) between the end of March and the end of May in consecutive years or in more than 2 years during the implementation of the proposed action would fall outside the scope of this BiOp, as described in Section 7.2, and therefore this incidental take statement." 2020 BiOp at §11.2.2.6. Thus, the moment Reclamation allowed UKL to fall below 4,142.0 feet in mid-April 2020, it was on notice that it had a fundamental obligation to preserve that elevation in April and May 2021 in order to continue to benefit from the protections from take liability offered by the ITS and to avoid further adverse modifications to C'waam and Koptu critical habitat. Second, by violating the clear mandate of 2020 BiOp T&C 1c by releasing EWA augmentation water while failing to maintain UKL at or above 4,142.0 feet, Reclamation triggered the invalidation of the ITS' safe harbor provision. ("Conditions outside these bounds may result in greater adverse effects than analyzed in this BiOp and exceedance of the take anticipated in the *Incidental Take Statement*." 2020 BiOp T&C 1c.)

51. Yet despite the clear mandates of the 2020 BiOp, the legal jeopardy it faced due to the violation of T&C 1c in April and May 2020, and the precarious condition of the C'waam and Koptu, Reclamation's water management decisions throughout the remainder of water year 2020 and continuing into water year 2021 have created a situation where it has again violated T&C 1c by failing to maintain UKL at or above an elevation of 4,142.0 feet during April. (Reclamation's management of UKL in 2020 also pushed the Lake below 4,140.5 feet ahead of

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July 15 last summer, which means that 4,140.5 feet is now the July 15 floor for 2021, and Reclamation’s own hydrologic projections illustrate that it is in grave danger of violating that boundary condition as well.) Prior to the conclusion of the 2020 water year, Reclamation increased its deliveries from UKL to Project irrigators by an additional 8,000 AF and delivered 4,000 AF from UKL to the Lower Klamath National Wildlife Refuge. It then delivered roughly 9,500 AF from UKL to the Klamath Drainage District during the Fall/Winter period at the start of water year 2021, putting additional pressure on winter inflows to refill UKL ahead of the spring spawning season. But those inflows did not arrive as anticipated.

52. Instead, since the beginning of the 2021 water year on October 1, 2020, through the April 8, 2021, daily mean flows of the Williamson River, UKL’s primary tributary, have set 58 record lows, including 10 of the 28 days in February, and 30 of 31 days in March, and three of the first eight days of April. That means that on each of these days, inflows from the Williamson River into UKL were the lowest ever in the 102 years records have been kept. Since January 1, 2021, Wood River inflows to UKL have set 71 similar daily record lows, including on 24 of the 28 days of February, 28 of the 31 days of March, and four of the first eight days of April. And Sprague River inflows to UKL also set record daily lows on 16 of the 31 days in March and four of the first eight days of April.

53. These flow conditions, particularly coming on the heels of the extraordinarily poor water year that was 2020, traduce a key assumption of the 2020 BiOp, that the hydrology reflected in the 40-year period of record USFWS utilized to estimate the likely effects of Reclamation operation under the IOP on UKL elevations “represent the range and distribution of elevations that are reasonably likely to occur over the 3-year consultation term (April 1, 2020 – September 30, 2022).” 2020 BiOp at § 7.2; *see also id.* at §§ 11.2, 11.2.2.6. They also set the

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C’waam and Koptu up for failure during the 2021 spring spawning season, an outcome the species can ill afford.

54. But agriculture deliveries and disastrously poor hydrology do not tell the entire story. The final, and ultimately most significant, contributor to the crisis facing the C’waam and Koptu this spring, is the huge volume of water Reclamation has released to date and continues to release from UKL to support flows in the Klamath River below Iron Gate Dam. From the start of calendar year 2021 through April 8, 2021, Reclamation has released approximately 120,000 AF of water from UKL to support minimum flows below Iron Gate Dam for benefit of lifecycle needs of the Interior Klamath Diversity Strata (“IKDS”)<sup>9</sup> populations of the threatened Southern Oregon/Northern California Coast (“SONCC”) coho salmon Evolutionarily Significant Unit,<sup>10</sup> as well as Chinook salmon, who are not themselves listed under the ESA but who are an important protein source for the endangered Southern Resident Killer Whale.

55. The 2019 NMFS BiOp establishes a schedule of targeted minimum flows below Iron Gate Dam, which rely heavily on releases from UKL to be satisfied. During the spring/summer operating period, these UKL release are accounted against the EWA, whose volume is established by an equation based on UKL inflows but which cannot be set below 400,000 AF. On current hydrologic trends, a 2021 EWA volume of 400,000 AF will exceed the total volume of water Reclamation will allocate to UKL during the 2021 spring/summer season to meet C’waam and Koptu lifecycle needs. This scenario, where Reclamation’s prior management decisions and the unforgiving nature of a year’s hydrology combine to create a

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<sup>9</sup> This term includes the several populations of the SONCC coho salmon ESU that use the Klamath River and its tributaries, including the Shasta, Scott, Salmon, Upper Klamath, Middle Klamath populations.

<sup>10</sup> “Evolutionarily Significant Unit” is a NMFS designation for a distinct population segment (as that term is used in the ESA, 16 U.S.C. § 1532(16)) of a salmon species.

situation where the core biological needs of the species (as identified for C'waam and Koptu in the 2020 BiOp, and the SONCC coho and Chinook in the 2019 NMFS BiOps) are in direct conflict is totally outside the scope of any scenario evaluated by either Service in connection with Reclamation's operation under the IOP.

56. This conflict came to a head on April 1, 2021. That date is significant for both the 2020 BiOp and the 2019 NMFS BiOp, since April 1 triggers Reclamation's obligation to maintain UKL at or above 4,142.0, as well as its obligation to increase the minimum flows below Iron Gate Dam called for by NMFS in its BiOp from 1000 cubic feet per second (cfs) to 1,325 cfs, which can only be accomplished by a concomitant increase in releases from UKL.

57. On April 1, UKL sat at an elevation of approximately 4,140.84, nearly 14 inches (and 105,000 AF) below where the 2020 BiOp required it to be. Yet Reclamation mechanistically *increased the releases of water from the UKL that day*, more than doubling their flow rate overnight from approximately 550 cfs on March 31 to over 1,300 cfs on April 1. Although release rates have fluctuated since then, they continue to run at an average rate well above 1,000 cfs, depriving UKL of a minimum of 2,000 AF per day,<sup>11</sup> and UKL's elevation has flatlined or slightly decreased at precisely the time of year it should be increasing to maximize available spawning habitat. At this point, there is very little prospect of UKL rising anywhere close to 4,142.0 feet at any point in April or May, and Reclamation is currently on track to fail to comply with this year's July 15 boundary condition as well.<sup>12</sup>

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<sup>11</sup> A continuous flow rate of 1 cfs amounts to roughly 2 AF per day.

<sup>12</sup> On April 11, 2021, UKL sat at an elevation of 4,140.75 feet. The corresponding 2010 daily minimum for that date is 4,140.64 feet. By April 15, the corresponding 2010 elevation will be 4,140.76 feet. By April 30, that elevation rises to 4,141.0 feet, and it peaks on May 28 at 4,141.31 feet before declining slightly to 4,131.28 feet at month's end.

58. Reclamation has arbitrarily chosen to comply with the terms of the NMFS BiOp over the USFWS BiOp rather than consulting promptly with both Services – as it showed in 2020 it had the capacity to, when it got from promulgation of the IOP to the issuance of the 2020 BiOp in exactly two weeks – to adaptively manage this year’s drastically limited water supply. It is simply privileging the needs of the coho and Chinook over the C’waam and Koptu despite the C’waam and Koptu being listed as endangered – and currently on the verge of extinction – and the coho being listed only as threatened and the Chinook not being listed under the ESA at all. Not only is this decision arbitrary, capricious, and outside the scope of the 2020 BiOp’s ITS, it even contravenes the requirements of the 2019 NMFS BiOp.

59. The 2019 NMFS BiOp contemplates deviations from the formulaic approach to meeting Iron Gate Dam minimum flow and augmentation targets, which must be evaluated based on a “balancing [of] the costs and benefits to deviations from the formulaic approach on both listed suckers and coho salmon.” NMFS 2019 BiOp at § 2.2.4.1.1; *see also id.* at § 1.3.2.8. It is true that the NMFS BiOp does not specifically contemplate deviations *below* the IGD minimum flows because of conflicts with C’waam and Koptu needs, the way it does with surface flushing flows, which are not to be conducted per the terms of the 2019 NMFS BiOp if they “result in impacts to suckers in UKL outside of those analyzed by USFWS”; 2019 NMFS BiOp at 1.3.2.6.4; or the enhanced May/June flows that Reclamation added to the Plan in 2019 (“Reclamation will not provide alternative distributions to the default rules [for the release of the enhanced flows] that result in impacts to suckers outside of those analyzed in USFWS’ 2019 Opinion”) (2019 NMFS BiOp at 1.3.2.6). But this is most likely because NMFS, like USFWS, failed to take seriously the possibility of consecutive dry years of the extremity that the Basin is experiencing in 2020 and 2021.

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**COUNT 1:**  
**ENDANGERED SPECIES ACT SECTION 9 – UNLAWFUL TAKE**

60. The Tribes re-allege each and every allegation set forth in this complaint.

61. Section 9 of the ESA prohibits Reclamation from taking a listed species unless the taking is within the safe harbor provision of an ITS. 16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1536(a)(2).

62. The take prohibition applies to “any person.” 16 U.S.C. § 1538(a)(1). The ESA defines “any person” to include any officer, employee, agent, department, or instrumentality of the Federal Government.” 16 U.S.C. § 1532(13). The ESA citizen suit provision authorizes suits to enforce the ESA and its implementing regulations against any person, including federal agencies. 16 U.S.C. § 1540(g)(1).

63. Reclamation is a person subject to the ESA take prohibition and to ESA citizen suits.

64. “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

65. USFWS has defined “harm” by regulation to mean:

an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

66. USFWS has defined “harass” by regulation to mean:

an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.

50 C.F.R. § 17.3.

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67. The 2020 BiOp's ITS specified the conditions with which Reclamation needed to comply in order to escape liability for take associated with its management of the Project under the IOP.

68. By failing to maintain UKL at an elevation at or above 4,142.0 in April and May of 2020 when it provided EWA augmentation water, Reclamation has violated the conditions of its ITS.

69. By failing to maintain UKL at or above 4,142.0 in April of 2021, a second consecutive year when UKL has been below that elevation during the critical spring spawning season, Reclamation has committed a successive and continuing violation of its ITS.

70. Because these actions constitute a repeated and ongoing failure to comply with T&C 1c of the ITS issued to Reclamation in the 2020 BiOp, and because Reclamation has not promptly consulted with USFWS to address the causes of this noncompliance and taken prompt corrective action, Reclamation is no longer entitled to benefit from the safe harbor provisions of its ITS.

71. Nevertheless, Reclamation has taken and continues to take C'waam and Koptu, including but not necessarily limited to harming and harassing them, by persisting in its operations under the IOP, including by releasing large volumes of water from UKL to the detriment of necessary elevations for the C'waam and Koptu.

72. Reclamation's current operations violate and will continue to violate Section 9 of the ESA.

73. Reclamation's illegal take of C'waam and Koptu has harmed and is harming the Klamath Tribes, including by further diminishing their ability to exercise their treaty rights and

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spiritual and cultural practices centered on the C'waam and Koptu, and the Klamath Tribes have no adequate remedy at law.

74. Accordingly, pursuant to 16 U.S.C. § 1540(g)(1)(A), the Klamath Tribes are entitled to an injunction against further unlawful take of C'waam and Koptu and specifically requiring Reclamation to reduce UKL releases and maintain UKL elevations at or above the applicable minimum boundary conditions of the 2020 BiOp until Reclamation completes consultation and USFWS issues a new biological opinion covering Project operations.

**COUNT II:**  
**ENDANGERED SPECIES ACT SECTION 7 - VIOLATION OF DUTIES TO AVOID**  
**JEOPARDY TO THE CONTINUED EXISTENCE OF THE C'WAAM AND KOPTU**  
**AND ADVERSE MODIFICATION TO THEIR CRITICAL HABITAT**

75. The Klamath Tribes incorporate by reference all preceding paragraphs as if fully alleged herein.

76. The ESA requires that Reclamation “insure” that its operation of the Klamath Project “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . .” 16 U.S.C. § 1536(a)(2).

77. Despite USFWS’s warning that Reclamation’s failure to manage UKL in compliance with the minimum boundary conditions established by the 2020 BiOp would cause impacts exceeding the scope of those contemplated by the 2020 BiOp, Reclamation has continued to rely on the 2020 BiOp after failing to manage UKL in compliance with those minimum boundary conditions. Reclamation is currently out of compliance with those conditions and appears likely to remain so through at least July 15, 2021.

78. This means C'waam and Koptu have been forced to spawn, feed, and shelter

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under conditions significantly worse than those contemplated by the 2020 BiOp, while the aging adult C'waam and Koptu populations continue to lose reproductive viability.

79. Hydrologic conditions in 2020 and 2021 have revealed that key assumptions of the 2020 BiOp were inaccurate and the entire BiOp needs to be revisited. *See* 2020 BiOp at § 7.2.

80. Reclamation's failure to maintain UKL elevations at or above the 2020 BiOp's minimum boundary conditions and its failure to immediately consult with USFWS to adaptively manage and take corrective actions when the assumptions underlying the 2020 BiOp proved to be inaccurate have jeopardized and continue to jeopardize the continued existence of the C'waam and Koptu, including by reducing the reproduction and numbers of these species and by threatening reduced safe access to important water quality refugia.

81. Reclamation's failure to maintain UKL elevations at or above the 2020 BiOp's minimum boundary conditions and its failure to immediately consult with USFWS to adaptively manage and take corrective actions when the assumptions underlying the 2020 BiOp proved to be inaccurate have adversely modified the C'waam and Koptu's critical habitat and continue to do so, including by diminishing the amount of habitat available for vital spawning and rearing activities and threatening reduced safe access to important water quality refugia.

82. Reclamation's continued operation of the Project in a manner that fails to insure against jeopardy to the C'waam and Koptu and/or the unlawful modification of their critical habitat has harmed and is harming the Klamath Tribes, including by further diminishing their ability to exercise their treaty rights and spiritual and cultural practices centered on the C'waam and Koptu, and the Klamath Tribes have no adequate remedy at law.

83. Accordingly, pursuant to 16 U.S.C. § 1540(g)(1)(A), the Klamath Tribes are

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entitled to an injunction against further agency action jeopardizing the continued existence of C'waam and Koptu and destroying and adversely modifying their critical habitat, and specifically requiring Reclamation to reduce UKL releases and maintain UKL elevations at or above the applicable 2020 BiOp boundary conditions until Reclamation completes consultation and USFWS issues a new biological opinion covering Project operations.

**PRAYER FOR RELIEF**

WHEREFORE, the Klamath Tribes pray as follows:

A. The Court adjudge and declare that Reclamation has violated the ESA by unlawfully taking C'waam and Koptu, destroying and adversely modifying their critical habitat, and jeopardizing their continued existence through Project operations;

B. The Court enjoin, pursuant to 16 U.S.C. § 1540(g)(1)(A) and 5 U.S.C. § 706, Reclamation from further unlawful take of C'waam and Koptu and specifically require Reclamation to maintain UKL elevations at or above the minimum boundary conditions set forth in the 2020 BiOp until reconsultation results in the issuance of a new biological opinion;

C. The Court enjoin Reclamation from releasing water from UKL at a flow rate of more than 400 cfs until UKL exceeds an elevation of 4,141.3 feet, to manage those releases so as to maintain UKL at or above an elevation of 4,141.3 feet through the end of May 2021, and to remain in compliance thereafter with each and every applicable minimum boundary conditions set by the 2020 BiOp until such time as Reclamation, USFWS, and NMFS complete their currently-ongoing reconsultation process and new BiOps and ITSs are issued;

D. The Court award the Klamath Tribes their attorneys' fees and costs pursuant to 16 U.S.C. § 1540(g)(4);

E. The Court award the Klamath Tribes their attorneys' fees and costs pursuant to 28

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U.S.C. § 2412; and

F. The Court grant such other and further relief as it may deem appropriate, or as justice requires.

Dated: April 13, 2021.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 13, 2021, a true and correct copy of the above document was electronically filed with the Clerk of Court using CM/ECF. Copies of the document will be served upon interested counsel via the Notices of Electronic Filing that are generated by CM/ECF.

/s/ Jay D. Weiner  
Jay D. Weiner (OSBA No. 182247)  
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