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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 THE KLAMATH TRIBES, a federally
11 recognized Indian Tribe,

12 Plaintiff,

13 vs.

14 UNITED STATES BUREAU OF
RECLAMATION; UNITED STATES FISH
15 & WILDLIFE SERVICE; NATIONAL
MARINE FISHERIES SERVICE

16
17 Defendants.

Case. No. 3:18-cv-03078-WHO

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY INJUNCTION**

[Fed. R. Civ. P. 65, Civil L.R. 7-2]

Hearing Date: Wednesday, July 11, 2018

Time: 2:00 p.m.

Judge: Hon. William H. Orrick

ORAL ARGUMENT REQUESTED

18 TO THE COURT AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

19 Plaintiff, the Klamath Tribes, hereby provides notice of this Motion for Preliminary Injunction
20 and the hearing regarding the same on July 11, 2018 at 2:00 p.m.. The hearing will occur in
21 the courtroom of the Honorable William H. Orrick, room # 2, 17th Floor, San Francisco
22 Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102.

23 RELIEF REQUESTED:
24

1 Pursuant to 16 U.S.C. §§ 1536(a)(2) & 1538(a)(1) and Federal Rule of Civil Procedure 65,
2 Plaintiff, the Klamath Tribes, respectfully requests the Court grant a preliminary injunction requiring
3 Defendant United States Bureau of Reclamation to maintain Upper Klamath Lake (“UKL”) at or above
4 certain minimum elevation levels during the irrigation season of 2018 to facilitate the transition to
5 management of the UKL at elevations necessary to ensure the survival and preserve the critical habitat
6 of the Lost River sucker (*Deltistes luxatus*, referred to herein by its Tribal name “C’waam”) and
7 shortnose sucker (*Chasmistes brevirostris*, referred to herein by its Tribal name “Koptu”), as set forth in
8 **Exhibit A** (“2018 Transition Levels” and “C’waam and Koptu Conservation Levels,” respectively),
9 through the resolution of this litigation. The basis for this motion is that (1) the Klamath Tribes are
10 likely to succeed on the merits of their Section 7 and 9 Endangered Species Act (“ESA”) claims,
11 [Complaint of Plaintiff Klamath Tribes at ¶¶ 78-97, *Klamath Tribes v. United States Bureau of*
12 *Reclamation*, Case No. 3:18-cv-03078 (May 23, 2018), ECF No. 1]; (2) the Klamath Tribes will suffer
13 irreparable harm in the absence of the relief requested here, namely that the C’waam and Koptu, which
14 are vital cultural, spiritual and treaty resources, will be extirpated from UKL and potentially driven to
15 extinction; and (3) under the public policy of the United States as embodied in the ESA, the balance of
16 equities tips in favor of the Klamath Tribes and this preliminary injunction is in the public

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1 interest as it will conserve endangered species and their critical habitat. *See, e.g., Winter v. Natural Res.*
2 *Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (setting forth the standard for a preliminary injunction).

3 RESPECTFULLY SUBMITTED this 29th day of May, 2018.

4 ROSETTE, LLP

5 

6
7
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24 77 Fed. Reg. 73,740 (December 11, 2012).....4

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Issues Presented**

3 This Motion for Preliminary Injunction (“Motion”) presents the Court with three principal questions:

4 A. Are the Klamath Tribes likely to succeed on the merits of their Section 7 and 9 ESA
5 claims where Defendant United States Bureau of Reclamation has (1) jeopardized the continued
6 existence of the C’waam and Koptu and their critical habitat by failing to maintain Upper Klamath Lake
7 at or above elevations necessary to support essential biological functions of the species; (2) consistently
8 managed Upper Klamath Lake (“UKL”) to conditions contrary to and outside the analytical scope the
9 controlling Biological Opinion (“2013 BiOp) issued jointly by the United States Fish and Wildlife
10 Service (“USFWS”) and National Marine Fisheries Service (“NMFS”) and associated incidental take
11 statement; and (3) continued to rely on the 2013 BiOp and associated incidental take statement even
12 after the 2013 BiOp’s hydrological assumptions have repeatedly and substantially failed to anticipate
13 actual conditions which demonstrates significant flaws in the 2013 BiOp’s analysis of the Klamath
14 Irrigation Project’s impacts on the C’waam and Koptu?

15 B. Will the Klamath Tribes suffer irreparable harm in the absence of a preliminary
16 injunction where the C’waam and Koptu, two treaty-resource fish species central to the Tribes’ cultural
17 and spiritual practices, face imminent extirpation from the Tribes’ ancestral homeland due to the Bureau
18 of Reclamation’s persistent failure to maintain UKL at or above elevations required for essential life
19 functions and to mitigate the impacts of fatally poor water quality?

20 C. Under the circumstances described above and in light of public policy embodied by the
21 ESA, do the balance of equities and the public interest support granting the relief requested?

22 **II. Statement of Relevant Facts**

23 The C’waam (Lost River sucker, *Deltistes luxatus*) and Koptu (shortnose sucker, *Chasmistes*
24 *brevirostris*) are endemic to Upper Klamath Lake (“UKL”) in Southern Oregon and its environs, which

1 also comprise significant components of the Klamath Irrigation Project (“Project”), an irrigation project
2 operated by the United States Bureau of Reclamation (“Reclamation”). [Biological Opinions on the
3 Effect of Proposed Klamath Project Operations from May 31, 2013, through March 31, 2023, on Five
4 Federally Listed Threatened and Endangered Species (“2013 BiOp”) at §§ 4, 4.2.1, 4.2.3, 7.4.1, attached
5 hereto as **Exhibit B**]. For more than a century, the Project has accomplished its purpose of supporting
6 increased agricultural activity within the Klamath Basin, drastically altering the hydrology of the Basin,
7 and UKL in particular. [2013 BiOp at §§ 2.1, 7.2.1.; Declaration of Mark Buettner (“Buettner
8 Declaration”) at ¶¶ 11, 32, attached hereto as **Exhibit C**]. These changes have devastated the C’waam
9 and Koptu, driving them to the brink of extinction. [2013 BiOp at § 7.5 (finding that C’waam and Koptu
10 populations in UKL “are at a high risk of extinction”); Buettner Declaration at ¶ 11]. The C’waam and
11 Koptu simply can no longer endure the conditions the Project has imposed upon them, and their survival
12 depends on immediate changes to Project operations. [Buettner Declaration at ¶¶ 11–13]. Most
13 significantly, Reclamation must take immediate action to maintain UKL water elevations at levels
14 sufficient to support essential biological functions of the C’waam and Koptu pending resolution of this
15 action.

16 A. Historical Background

17 Since time immemorial, the Klamath Tribes and their members have used, and continue to use,
18 the resources of the Klamath Basin in what is now both Oregon and California for subsistence, cultural,
19 ceremonial, religious, and commercial purposes. [Buettner Declaration at ¶¶ 7–10, 14]. The C’waam
20 and Koptu, in particular, have played a central role in the Tribes’ cultural and spiritual practices, and
21 they were once the most important food-fish to the Tribes, sustaining the Tribes’ members for millennia.
22 [*Id.* at ¶¶ 8–10, 14].

23 In 1864, at Klamath Lake, Oregon, the Klamath Tribes and the United States entered into the
24 Treaty between the United States of America and Klamath and Moadoc Tribes and Yahooskin Band of

1 Snake Indians, October 14, 1864, 16 Stat. 707 (“1864 Treaty”). Under the 1864 Treaty, the Klamath
2 Tribes enjoy senior reserved rights to waters within the Upper Klamath Basin and the exclusive right to
3 take fish and game, including C’waam and Koptu, as well as anadromous species including Chinook
4 salmon and steelhead, from the waters contained within the 800,000-acre reservation established by the
5 Treaty. 1864 Treaty at Art. 1; *United States v. Adair*, 723 F.2d 1394, 1413–15 (9th Cir. 1983). As the
6 Ninth Circuit has recognized, one of the “very purposes of establishing the Klamath Reservation was to
7 secure to the Tribe a continuation of its traditional hunting and fishing lifestyle.” *Adair*, 723 F.2d at
8 1409 (internal quotation marks omitted). These treaty rights survived the termination of the Klamath
9 Tribes’ former reservation. *Kimbal v. Callahan*, 493 F.2d 564, 569 (9th Cir. 1974).

10 Pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, and under the authority of the
11 Reclamation Act of 1902, 43 U.S.C. §§ 372 et seq., Congress authorized the construction and
12 development of the Project in and around the Klamath Tribes’ ancestral homelands and waters. Over
13 the course of the following century, the Project’s infrastructure and operations have substantially
14 modified the hydrology of the Klamath River Basin, and UKL in particular, in order to store, divert, and
15 convey water for agricultural, municipal, and hydroelectric uses throughout what is now southern
16 Oregon and northern California. [2013 BiOp at §§ 2.1, 4.2.3, 7.2.1.; Buettner Declaration at ¶¶ 11, 32].
17 The Project features several major dams, including the Link River Dam at the outlet of UKL, which
18 controls UKL’s elevation. [2013 BiOp at §§ 2.1, 4.2.3; Buettner Declaration at ¶ 32].

19 B. Harmful Changes to C’waam and Koptu Habitat in Upper Klamath Lake Have Occurred
20 Since the Project’s Inception.

21 UKL is the largest freshwater lake in Oregon and one of the largest in the west, roughly 25 miles
22 long and up to 12.5 miles wide, with a surface area of up to 65,000 acres. [Buettner Declaration at ¶¶
23 30–31 & Ex. 4]. It is fed by water from the Sprague, Williamson and Wood Rivers and their tributaries,
24 as well as natural springs, and serves as a primary source of water storage for the Project. [2013 BiOp at

1 §§ 4.1.1, 7.10.1; Buettner Declaration at ¶ 33]. UKL “is critically important” to the survival of the
2 C’waam and Koptu. [2013 BiOp at § 7.10]. It “supports a large population of SNS [Koptu] and the
3 largest population of the LRS [C’waam] and is the primary rearing habitat for all life stages” of
4 C’waam and Koptu. [2013 BiOp at § 7.10; Buettner Declaration at ¶¶ 9, 15, 61]. In 2012, USFWS
5 designated UKL and its tributaries as critical habitat for the C’waam and Koptu. 77 Fed. Reg. 73,740
6 (December 11, 2012); *see generally* 16 U.S.C. § 1532(5)(A) (defining “critical habitat,” in part, as
7 geographic areas “essential to the conservation of the species” and “which may require special
8 management considerations or protection”).

9 As a broad but comparatively shallow lake, UKL’s elevation and surface area are particularly
10 sensitive to the effects of Reclamation’s release of lake water for downstream use. The elevation of the
11 Lake also directly determines the amount, type, and depth of the habitat available in UKL and its
12 tributaries available to support essential C’waam and Koptu life functions. *See* [2013 BiOp at § 4.2.3].
13 Before construction of the Link River Dam in 1921 and resulting Project operations, natural UKL
14 elevations varied seasonally between 4,140 and 4,143 feet, with a mean annual variation of
15 approximately two feet. [Buettner Declaration at ¶ 32]. Since 1921, however, UKL elevations have
16 varied annually over a range of approximately six feet and, in recent years, have frequently fallen below
17 the historical minimum of 4,140 feet, and below the elevation levels necessary to facilitate C’waam and
18 Koptu biological functions including reproduction, rearing, sheltering, feeding, and accessing water
19 quality refuge areas. [*Id.* at ¶¶ 32, 167–168; U.S. Bureau of Reclamation, 2013 Annual Monitoring
20 Report for the May 31, 2013 Joint Biological Opinion on Klamath Project Operations Effects to
21 Federally Listed Lost River and Shortnose Suckers and Coho Salmon (2014) (“2013 Report”) at 14, Fig.
22 6, attached hereto as **Exhibit D**; U.S. Bureau of Reclamation, 2014 Annual Monitoring Report for the
23 May 31, 2013 Joint Biological Opinion on Klamath Project Operations Effects to Federally Listed Lost
24 River and Shortnose Suckers and Coho Salmon (2015) (“2014 Report”) at 14, Fig. 6, attached hereto as

1 **Exhibit E**; U.S. Bureau of Reclamation, 2015 Annual Monitoring Report for the May 31, 2013 Joint
2 Biological Opinion on Klamath Project Operations Effects to Federally Listed Lost River and Shortnose
3 Suckers and Coho Salmon (2016) (“2015 Report”) at 15, Fig. 6, attached hereto as **Exhibit F**; U.S.
4 Bureau of Reclamation, 2016 Annual Monitoring Report for the May 31, 2013 Joint Biological Opinion
5 on Klamath Project Operations Effects to Federally Listed Lost River and Shortnose Suckers and Coho
6 Salmon (2017) (“2016 Report”) at 14, Fig. 6, attached hereto as **Exhibit G**; U.S. Bureau of
7 Reclamation, 2017 Annual Monitoring Report for the May 31, 2013 Joint Biological Opinion on
8 Klamath Project Operations Effects to Federally Listed Lost River and Shortnose Suckers and Coho
9 Salmon (2018) (“2017 Report”) at 13, Fig. 6, attached hereto as **Exhibit H**].

10 In addition to modifying the hydrology of UKL, the Project and the increased agricultural
11 activity it supports have caused UKL to change from eutrophic to hypereutrophic, that is from a lake
12 with high nutrient levels to one that is excessively rich in them. This overabundance of nutrients
13 supports large, extremely harmful algae blooms. [2013 BiOp at § 7.10.1.4; Buettner Declaration at ¶¶
14 43–44]. Agricultural activities and timber harvesting in the Klamath River Basin have contributed
15 greatly to increased nutrient (primarily phosphorus) and sediment concentrations in UKL. [2013 BiOp at
16 §§ 7.10.1, 7.10.1.4; Buettner Declaration at ¶¶ 34–37]. Nutrient overloading in UKL has also been
17 exacerbated by the draining of over 50,000 acres of wetlands in the UKL watershed, which has
18 decreased the nutrient uptake capacity of the Lake while simultaneously introducing additional
19 phosphorous from wetland decay. [2013 BiOp at § 7.10.1; Buettner Declaration at ¶¶ 38–39].

20 C. Threat of Imminent Extinction Facing the C’waam and Koptu

21 A century of Project operations has decimated the C’waam and Koptu and their critical habitat,
22 leaving both species on the brink of extirpation from UKL and significantly increasing the chances of
23 extinction. [Buettner Declaration at ¶¶ 11, 14, 29]. To illustrate, between 1968 and 1985, C’waam and
24 Koptu harvests decreased from over 10,000 fish per year to just 687. [*Id.* at ¶ 24]. Studies conducted in

1 the mid-1980s confirmed that the numbers of adult C’waam and Koptu were perilously low. [*Id.*].
2 Recognizing the threat of imminent extinction faced by these essential cultural and treaty resources, the
3 Klamath Tribes suspended fishing for C’waam and Koptu in 1986 and redoubled their efforts to ensure
4 the conservation and recovery of these important species. [*Id.* at ¶ 11]. Since 1986, the Klamath Tribes
5 have limited their take of C’waam and Koptu to two fish per year for ceremonial purposes. [*Id.*].

6 Analysis of C’waam and Koptu collected after a 1986 die-off revealed that the populations of
7 both species were old and had not seen substantial “recruitment” events (that is, juveniles reaching
8 sexual maturity to become spawners in their own right) for 15 years. [*Id.* at ¶ 24]. In light of their
9 perilous condition, the USFWS listed the C’waam and Koptu as endangered species throughout their
10 entire range in 1988. 53 Fed. Reg. 27,130 (July 18, 1988); *see generally* 16 U.S.C. § 1533. Following a
11 brief recovery period during the late 1980s and early 1990s, C’waam and Koptu populations quickly
12 returned to the century-long trend towards extinction. [Buettner Declaration at ¶ 25]. The last major
13 recruitment into the C’waam population in 1993 was followed by significant die-offs in 1995, 1996, and
14 1997 due to poor water quality in UKL. [*Id.* at ¶¶ 25, 29]. These mid-1990s die-offs resulted in the loss
15 of thousands of adult C’waam and Koptu. [*Id.* at ¶ 25]. Compounding the harm of these die-offs was the
16 fact they occurred just as those fish born in the early 1990s would have been expected to begin
17 spawning. [*Id.* at ¶¶ 16, 25; *see* 2013 BiOp at § 7.4.5.2].

18 Since 2001, the C’waam population has decreased by 55-66%, and the Koptu population by 76-
19 78%. [*Id.* at ¶ 28]. It is estimated that only approximately 100,000 C’waam and 20,000 Koptu remain in
20 UKL. [*Id.* at ¶ 29]. These survivors are largely older, similar-aged fish who are nearing the end of their
21 natural life expectancy and reproductive viability. [*Id.* at ¶¶ 28–29]. Most of the adult C’waam are
22 estimated to be between 25 and 30 years old, already past their average life span of 17-22 years, and
23 nearing their maximum natural lifespan of 40 years. [*Id.* at ¶ 29]. Most of the individual Koptu are
24 estimated to be 20 to 25 years old, well past their average lifespan of 12-14 years, and nearing their

1 maximum life span of 30 years. [*Id.* at ¶¶ 28–29]. Because neither species has benefited from a major
2 recruitment event in 20 years, there are currently not enough juvenile fish to assure the continued
3 existence of the species after the death of the current generation of adults. [*Id.* at ¶ 29]. If these adverse
4 recruitment conditions persist, the C’waam and Koptu will likely be extinct in less than a decade, and
5 are at continual risk that a catastrophic single-year die-off could drive them to extinction much sooner.
6 [*Id.*]. The Klamath Tribes and others collected over 700 dead adult C’waam and eight dead adult Koptu
7 in the summer of 2017 alone. [*Id.* at ¶ 29].

8 D. Impacts of UKL Elevations on C’waam and Koptu

9 The elevation of UKL is the single most important parameter for the continued existence of the
10 C’waam and Koptu, as it directly controls the quality and quantity of habitat available to the species to
11 facilitate essential biological functions, including spawning, maturation, feeding, sheltering, and access
12 to water quality refuge areas., and impacts water quality. [*Id.* at ¶¶ 4, 167–168]. Thus, Reclamation’s
13 decisions regarding the quantity and timing of releases from UKL have an enormous impact on the
14 continued viability of the C’waam and Koptu and their condition of their critical habitat.

15 Given the rarity of successful C’waam and Koptu recruitment and the advanced age of the
16 existing populations, providing suitable spawning and nursery habitat is essential to the species’
17 continued survival. [*Id.* at ¶¶ 28–29, 65; 2013 BiOp at § 7.4.5.2]. Both species require shallow
18 shoreline spawning sites with relatively clean, coarse substrate to protect their eggs during spawning
19 season, from late February through May each year. [Buettner Declaration at ¶¶ 17, 62–65]. C’waam and
20 Koptu prefer spawning substrate at depths greater than two feet and will rarely deposit eggs at depths
21 less than one foot. [*Id.* at ¶¶ 17, 67]. Unfortunately, despite the addition of gravel and cobble substrate
22 to UKL in 1987 and 1991, suitable spawning sites remain few and small in area, even when UKL is at
23 its full pool elevation of 4,143.3 feet. [*Id.* at ¶¶ 64–65, 67]. Naturally, UKL elevation, determines the
24 area of suitable spawning substrate which is inundated and the depth of such substrate, and thus, total

1 spawning activity. [*Id.* at ¶¶ 65–67, 72]. In 2010, for instance, when the elevation of UKL was lower
2 than 4,141.0 feet during much of spawning season, 14% fewer C’waam females and 8% fewer males
3 participated in spawning than in years where the elevation was above 4142.0 feet, and the amount of
4 time spent at the spawning areas was at least 36% shorter for C’waam females and 20% shorter for
5 males than in years when elevation levels were maintained above 4,142.0 feet. [*Id.* at ¶ 66].

6 If spawning is successful, C’waam and Koptu larvae emerge from eggs from late March through
7 mid-June, with peak abundance occurring from May through June. [*Id.* at ¶¶ 18–20, 76]. Accordingly,
8 UKL should be maintained at an elevation sufficient to ensure access to spawning grounds and to
9 prevent the desiccation of eggs and emerging larvae through June 15. [*Id.* at ¶¶ 73–74]. When they
10 emerge, larvae require shallow, near-shore and marsh edge habitat with emergent vegetation not only for
11 food, but also for shelter from predators and protection from lake turbulence and currents, which
12 transport larvae out of UKL, often leading to “entrainment,” that is, the involuntary or passive transport
13 of fish by water currents into areas they otherwise would not normally travel, usually to a downstream
14 location. [Buettner Declaration at ¶¶ 19, 51, 55, 75, 78–79, 101–103; *see* 2013 BiOp at § 7.10.1.7
15 (identifying “entrainment[] and predation” as causes for “unnaturally high rates of age-0 sucker
16 mortality”), 7.10.3.4 (“Entrainment causes the largest quantified loss of LRS [C’waam] and SNS
17 [Koptu] and is estimated to involve millions of larvae and tens of thousands of juveniles.”)]. The highest
18 density of larvae occurs in the emergent wetland habitat of the Williamson River Delta which serves as a
19 major thoroughfare for C’waam and Koptu larvae. [*Id.* at ¶ 78 At depths of at least 2 feet, this and other
20 emergent vegetation near-shore and marsh edge habitat significantly reduces risk of predation from the
21 invasive fat-head minnow and has been shown to increase larvae survival rates by more than twenty
22 percent. [*Id.* at ¶¶ 51, 78–79].

23 By the end of July, surviving C’waam and Koptu larvae have developed into age-0 juveniles, but
24 they remain years away from recruitment into the adult breeding population. [*Id.* at ¶¶ 16, 25, 85].

1 While juvenile C’waam and Koptu are less dependent on near-shore emergent vegetation habitat than
2 larvae, they still rely on these habitats in addition to other areas with rocky substrate at depths of less
3 than four feet. [*Id.* at ¶¶ 85–86]. In the late summer and early fall, surviving age-0 juveniles tend to
4 migrate offshore, Koptu juveniles, however, require a diversity of substrates for feeding and sheltering
5 and continue to use inshore areas during this time. [*Id.* at ¶¶ 89–90].

6 In addition to determining the amount and type of available critical habitat, the elevation of UKL
7 is a significant factor influencing the UKL’s water quality. [Buettner Declaration at ¶ 111]. Harmful,
8 and even fatal, water quality conditions pose the greatest short-term threat to the C’waam and Koptu
9 from July through mid-October. [*Id.* at ¶ 104]. The most dangerous water quality conditions occur as a
10 result of summer blue-green algae blooms and crashes enabled by UKL’s high nutrient content. [*Id.* at
11 ¶¶ 106, 119–122]. Algae blooms typically begin to develop in UKL in May each year and actively grow
12 through mid-July, sometimes followed by a second bloom in August or September. [*Id.* at ¶¶ 107, 112,
13 160–161]. Inhibiting algal development in late spring/early summer is critical to avoiding serious water-
14 quality impacts, such as algal toxin (microcystin), high pH, low dissolved oxygen (“DO”) levels,
15 associated with mid-summer algae crashes. [*Id.* at ¶¶ 54, 108, 142].

16 UKL water quality can be affected both positively and negatively by higher UKL levels. [*Id.* at ¶
17 135.] Higher UKL elevations inhibit algae growth as they reduce the amount of light that reaches
18 developing algae blooms, reduce the amount of phosphorus (the nutrient most directly related to algae
19 blooms) release from the lakebed from sediment disturbance, and dilute the overall phosphorous
20 concentration in UKL. [*Id.* at ¶¶ 108, 117, 122–125, 151]. Lower elevation levels are associated with
21 higher pH and phosphorous concentrations which results in greater algal biomass, which in turn further
22 raises UKL’s pH level, directly stressing C’waam and Koptu while only enabling further algae growth.
23 [*Id.* at ¶¶ 108, 118, 128, 130, 132]. To compound these harmful impacts of low elevation levels, UKL’s
24 un-ionized ammonia concentration increases exponentially as pH rises. [*Id.* at ¶¶ 109, 132]. Un-ionized

1 ammonia is toxic to C'waam and Koptu and thus causes additional stress and mortality. [*Id.* at ¶ 132].
2 At the same time, overly high UKL elevation levels during the late June through July algae bloom phase
3 also contribute to higher ammonia concentrations by reducing photosynthetic oxygen in off-bottom
4 waters. [*Id.* at ¶ 134].

5 Further, algae respire at night, absorbing DO from UKL in the process, which sometimes results
6 in fatally low DO levels below 4 mg/liter during the bloom phase and, even if not immediately lethal,
7 causes additional stress contributing to the mortality of individual C'waam and Koptu. [*Id.* at ¶ 136].
8 The harmful effect of algal respiration on DO levels is especially pronounced in waters less than 3.3 feet
9 in depth. [*Id.* at ¶ 137]. Accordingly, maintaining UKL elevation levels high enough to optimize the
10 amount of habitat inundated to depths of at least three feet reduces the occurrence of these critically-low
11 DO areas. [*Id.*]. But, as with the management of ammonia concentrations, overly high UKL elevation
12 levels during this period can also be problematic for the availability of DO in the Lake. [*Id.* at ¶ 138].
13 At higher elevations, DO also tends to drop due to decreasing mixing of off-bottom waters and
14 reductions in overall photosynthetic oxygen production in UKL. [*Id.* at ¶¶ 138–139]. Thus, water
15 quality in UKL benefits from being maintained at an appropriate elevation to avoid the depletion of DO
16 that can occur if the Lake is maintained at either too low or too high of a level. [*Id.* at ¶ 140].

17 At the same time, water quality parameters do not exist in a vacuum. Higher lake levels that
18 support C'waam and Koptu spawning and rearing can also serve to offset adverse effects of poor water
19 quality, even if those same higher levels contribute in part to poorer water quality as well. [*Id.* at ¶ 168].
20 Factoring into the Lake level equation during the summer months is also the fact that older juvenile and
21 adult C'waam and Koptu move to the northern end of UKL, where there is more abundant food, fewer
22 predators, and higher-quality and deeper water, during the June-September period. [*Id.* at ¶¶ 23, 91 &
23 Ex. 7]. Adult C'waam and Koptu only inhabit depths between three and 25 feet, but Koptu seem to
24 prefer depths of at least six feet, while C'waam prefer depths of at least ten feet. [*Id.* at ¶¶ 21, 92–93].

1 Accordingly, during summer months, UKL must remain sufficiently deep over a large enough area to
2 accommodate these habitat needs.

3 During July and August, adult C’waam and Koptu are often forced to migrate from their
4 preferred northern-UKL habitat to escape areas of extremely poor water quality. [Buettner Declaration
5 at ¶ 95]. Fish Banks, the mouth of the Williamson River, and especially Pelican Bay all serve as vital
6 water quality refuges during summer months. [*Id.* at ¶ 95]. To enter the Pelican Bay water-quality
7 refuge, however, C’waam and Koptu must pass through a relatively shallow portion of UKL. [*Id.* at ¶¶
8 96, 100]. A minimum depth of three feet is required to protect C’waam and Koptu from predation from
9 pelicans at the entrance to and within this critical water-quality refuge. [*Id.* at ¶ 96–97]. In addition to
10 access to water-quality refuge areas, the elevation of UKL determines the amount of and depth of adult
11 C’waam and Koptu habitat within water-quality refuge areas. [*Id.* at ¶¶ 97–98]. Too little habitat causes
12 overcrowding, which increases disease among C’waam and Koptu. [*Id.* at ¶ 98].

13 Complicating matters, algae blooms that developed earlier in the year rapidly decline or “crash”
14 from mid-July through August after consuming the available nutrients. [*Id.* at ¶¶ 141, 147]. The
15 bacterial decomposition of algae blooms consumes DO, often depleting DO concentrations in UKL to
16 harmful and even fatal levels. [*Id.* at ¶¶ 142, 147]. As during the bloom phase, countervailing impacts
17 of high versus low UKL elevations inform the optimal UKL elevations to mitigate the adverse effects of
18 low DO on C’waam and Koptu during the crash period. [*Id.* at ¶ 143]. Higher UKL elevations decrease
19 relative sediment oxygen demand, tending to increase DO as compared to what would be available at
20 lower UKL elevations. [*Id.* at ¶ 143(a)]. Significantly higher elevation levels, however, also result in
21 increased water column stability, which tends to decrease reaeration and DO levels, while comparatively
22 lower UKL elevations support greater photosynthetic oxygen production, increasing DO. [*Id.* at ¶¶
23 143(a)–(b)]. Thus during this period, the elevation of UKL must achieve a balance between these
24 factors to optimize the offsetting effects of elevation on DO concentrations. [*Id.* at ¶ 148]. Adverse

1 water quality conditions often prevail in UKL through the end of September each year as well. [*Id.* at ¶
2 99]. UKL’s elevation must therefore remain sufficiently high through September to ensure that
3 adequate critical habitat remains in Pelican Bay inundated to sufficient depths. [*Id.* at ¶¶ 54, 99–100].
4 Maintaining higher elevations through September also inhibits secondary, late fall blue-green algae
5 blooms. [*Id.* at 113].

6 As UKL freezes over in the late fall/early winter, low DO levels again become a concern. Ice
7 cover, especially if the ice is covered in snow, reduces photosynthetic activity, a primary source of
8 oxygen in UKL. [*Id.* at ¶¶ 162, 164]. Ice cover for as little as 60 consecutive days during the winter can
9 result in stressful (<4.0 mg/liter) or even fatal DO levels (<2.0 mg/liter) in some areas of UKL. [*Id.* at ¶¶
10 163–165]. DO depletion rates increase as water depths decrease; thus, low winter elevations present a
11 risk of harm and mortality to C’waam and Koptu. [*Id.* at ¶¶ 164–166]. In addition, elevations must
12 remain sufficiently high into and through the winter to ensure sufficient water remains in UKL for the
13 early months of the following year to meet necessary spring elevation levels. [*Id.* at ¶ 168].

14 E. The 2013 BiOp & Incidental Take Statement

15 The 2013 BiOp acknowledged that “[g]oing into the [Endangered Species Act] consultation, it
16 was clear that the status and environmental baseline of the LRS [C’waam] and SNS [Koptu] was highly
17 degraded, so that even small adverse effects to the species were likely to reduce their viability.” [2013
18 BiOp at § 10.6]. Yet, the 2013 BiOp nevertheless—wrongly—concluded that “the continued operation of
19 the Project for a 10-year term is not likely to jeopardize the continued existence of the LRS [C’waam]
20 and SNS [Koptu] or result in the destruction or adverse modification of their critical habitat.” [2013
21 BiOp at § 10.5].

22 This no-jeopardy conclusion was largely predicated on the assumption that Project operations
23 under the 2013 BiOp would include “higher seasonal UKL elevations and greater certainty that elevation
24 goals would be met compared to previous proposed actions.” [*Id.* at § 10.6]. The 2013 BiOp did not,

1 however, set any hard and fast elevation targets for Reclamation to meet in order to avoid jeopardy to
2 C’waam and Koptu. Rather, it only identified dynamic “minimum elevation thresholds” (“BiOp
3 Thresholds”), to be calculated from time-to-time based on hydrological predictions, and explained that
4 the failure to meet the BiOp Thresholds would result in the proposed action falling “outside the scope of
5 USFWS analyses[,]” [*Id.* at § 8.1.3], thus potentially triggering a need for reinitiation of consultation.
6 The 2013 BiOp clarifies that the Thresholds

7 are not intended to serve as management targets. Instead, thresholds represent the *extreme*
8 lower limits of elevations that should be observed in UKL during the term of the
9 proposed action and that were considered and analyzed by this BiOp. . . . UKL
elevations should rarely be at these end-of-month thresholds; most of the time end-of-
month elevations should be well above [them].

10 [*Id.* at § 13.3.2 (T&C 1c)]. In other words, USFWS contemplated that the proposed action would keep
11 elevations sufficiently above the “minimum elevation thresholds” for such a substantial portion of the
12 time that a single drop below them could serve as an early warning indicator that the assumptions built
13 into the 2013 BiOp were not being borne out in practice and that infrequent aberrational failures to
14 remain above the thresholds would not represent a direct threat to the C’waam and Koptu.

15 USFWS admitted that, in reaching its conclusion that Project operations would not adversely
16 modify critical habitat, it did “not rely on the regulatory definition of ‘destruction or adverse
17 modification’ of critical habitat at 50 CFR 402.02.” [*Id.* at § 10.5]. Rather, it “relied upon the statutory
18 provisions of the ESA to complete the . . . analysis with respect to critical habitat,” without any
19 explanation or justification for this decision. [*Id.*]. This ultimately incorrect conclusion was predicated
20 on the assumption that C’waam and Koptu critical habitat would not be adversely modified because the
21 “higher lake elevations in UKL in the spring and early summer” would be “protective and beneficial” to
22 C’waam and Koptu spawning habitat, [*Id.* at § 9.3.1.3], based on simulations of UKL elevation showing
23 that such supposedly protective elevations would be maintained “in all but one of the 31 modeled
24 years.” [*Id.* at § 10.7].

1 In addition to the BiOp Thresholds, the 2013 BiOp also identified specific UKL elevations below
2 which the proposed action would threaten C’waam and Koptu in each phase of their life cycle (“USFWS
3 Critical Elevations”). USFWS acknowledged that its modeling (based on a period of record from 1981
4 to 2011) showed that, under the proposed action, UKL would drop below those elevations under certain
5 hydrological conditions, but USFWS nonetheless sought to justify its no-jeopardy conclusion by
6 pointing to the model’s prediction that such conditions were likely to occur infrequently during the 10
7 year-term of the proposed action. USFWS noted that during the C’waam and Koptu spring spawning
8 season, “when lake levels go below 4,142.2 ft...the proposed action is likely to adversely affect sucker
9 spawning because of reduced habitat availability.” [*Id.* at § 8.3.1.1]. But USFWS dismissed this risk by
10 assuming that there was only a 5% chance of UKL elevations falling below that elevation during
11 spawning season. [*Id.* at § 8.3.1]. In a similar vein, USFWS acknowledged that, for the late spring to
12 early summer when C’waam and Koptu eggs hatch into larvae, its modeling showed that desiccation of
13 C’waam and Koptu eggs and larvae located in shoreline spring areas was “expected to occur in about 30
14 percent of future water years.” [*Id.* at § 8.3.1.2]. USFWS assumed desiccation would occur if UKL
15 elevations drop below 4142.0 feet. [*Id.*]. But USFWS again disregarded the significance of this finding,
16 reasoning that “implementation of proposed Project operations, which are likely to cause higher
17 minimum lake elevations than in the past with more certainty that the minimum modeled lake elevations
18 will not be exceeded, [and thus] is likely to provide for the annual production of millions” of C’waam
19 and Koptu larvae. [*Id.*].

20 The 2013 BiOp recognized that, from April to July, when C’waam and Koptu larvae begin
21 swimming but before they fully develop into juveniles, they require access to suitable habitat with
22 emergent vegetation, as “[t]his type of vegetation likely provides larval suckers protection from
23 predators, possibly more diverse food resources, protection from turbulence during storm events, and
24 hydraulic roughness that could reduce the numbers of larvae transported out of the lake by currents.” [*Id.*]

1 at § 8.3.1.3 (internal citations omitted)]. The BiOp cautioned that “when lake levels go below 4,140.0 ft
2 . . . at the end of July, substantial reductions of larval habitat are likely to occur and are likely to reduce
3 larval productivity or survival.” [*Id.*]. USFWS concluded that this risk did not warrant a jeopardy
4 finding, however, because “elevations below 4,140.0 ft . . . at the end of July occurred in only one year
5 out of 31 modeled years.” [*Id.*]. With regard to August UKL elevations, USFWS observed that “at
6 elevations below 4,139.0 ft,” C’waam and Koptu juveniles are likely to suffer from loss of “diverse,
7 shallow-water habitats.” [*Id.* at § 8.3.1.4]. Yet USFWS again declined to make a jeopardy determination
8 because UKL “elevation at or below 4,139.0 ft . . . occurred in 4 of 31 modeled years . . . during
9 August.” [*Id.*].

10 The 2013 BiOp further recognized that elevation levels below 4,138.2 feet in August and
11 September would limit adult and juvenile access to water-quality refuge areas, including Pelican Bay,
12 during the bloom crash period, leaving C’waam and Koptu exposed to the risk of a catastrophic die-off
13 due to very poor water quality in less desirable habitats, such as occurred in 1996-97. [*Id.* at § 8.3.1.5].
14 USFWS similarly noted that UKL elevations below 4,138.2 feet during September through October
15 “potentially could adversely affect adult [C’waam and Koptu] by limiting their access to some preferred
16 habitats.” [*Id.* at § 8.3.1.6]. USFWS dismissed these risks, however, because only “[t]hree years out of
17 31 modeled years had an end-of-September elevation of 4,138.2 ft,” and the lowest end-of-September
18 modeled elevation was 4,137.7 feet. USFWS therefore concluded that, under all of the modeled
19 conditions, “there would be a minimum water depth of at least 4.2 ft . . . at the entrance to [Pelican
20 Bay].” [*Id.*].

21 Acknowledging that some take of C’waam and Koptu would occur as a result of continued
22 Project operations, the 2013 BiOp includes an incidental take statement (“ITS”). [*Id.* at § 13]; *see*
23 *generally* 16 U.S.C. § 1539]. In accordance with the analysis described above, the ITS specified that its
24 authorization of incidental take only offers protection to Reclamation if the BiOp’s sideboards and

1 assumptions remain accurate and if Reclamation complies with the ITS's Terms and Conditions. [2013
2 BiOp at § 13]; *see generally* 16 U.S.C. § 1539. Accordingly, the ITS notes that the 2013 BiOp's
3 "assumptions and sideboards should be monitored throughout the term of this BiOp to determine if they
4 are valid; otherwise ongoing Project operations could be outside the scope of this BiOp." [2013 BiOp at
5 § 13.1.1].

6 Such "sideboards" include the continued reasonableness of reliance on historical data from
7 October 1, 1980 through September 30, 2011 to predict future UKL water conditions and the use of the
8 Klamath Basin Planning Model to generate hydrological predictions based on this data. [*See id.* at §§
9 8.1.1, 8.1.2]. USFWS was clear that the 2013 BiOp relied on the "critical assumption" that hydrological
10 conditions "will not change substantially over the term of th[e] BiOp" from those experienced from
11 1980 through 2011. [*Id.* at § 8.1.2]. It also warned that if hydrological conditions "do not exhibit central
12 tendency and variability similar to the simulated outcomes, then operations may fall outside the
13 analytical scope of th[e] BiOp." [*Id.*]. Such unaccounted-for variability would include: the occurrence
14 of three "extremely dry years" in a row; "[d]eclines in base flows during the July through September
15 period"; and "[f]low in the Williamson River and net inflow to UKL" failing to match the "magnitude,
16 pattern, and sequence" observed in historical data. [*Id.*]. Another important sideboard clarifies that
17 USFWS assumed Project "water management decisions [would be] linked directly to real-time
18 hydrologic and water use conditions." [*Id.*].

19 The sideboards are also careful to clarify that BiOp Thresholds "**are not management targets;**"
20 instead, these "thresholds define conditions that are outside the analysis conducted by USFWS for this
21 BiOp." [*Id.* (emphasis added)]. According to the sideboards, USFWS assumed that "[e]levations in UKL
22 w[ould] be greater than the [BiOp] thresholds for all hydrologic conditions observed" in historical data,
23 "except for discrete situations caused by rare winter events." [*Id.*]. Moreover, USFWS assumed "[t]he
24 UKL elevation w[ould] be a specific distance above the threshold at the beginning of each irrigation

1 season,” and advised that “[a]s the irrigation season progresses, the distance between observed UKL
 2 elevations and the threshold should not progressively decline.” [*Id.*]. Most significantly, the sideboards
 3 contain a clear disclaimer of applicability to continued Project operations under unanticipated UKL
 4 elevations:

5 The minimum elevation threshold define UKL elevations outside the scope of USFWS
 6 analyses, and provide for an early warning that aspects of hydrological conditions or
 7 water resource management are out of balance compared with the simulated and intended
 8 results of implementing the proposed action. . . . [I]f adaptive management is
 unsuccessful at avoiding threshold violations and the USFWS does not accept the
 rationale for the violation or mitigation of the effects, the action will be declared to be
 outside of USFWS analysis and may trigger reinitiation of consultation.

9 [*Id.*]. Further underscoring the central importance of USFWS’s hydrological modeling to BiOp’s no-
 10 jeopardy finding, the “assumptions” underlying the 2013 BiOp and referenced in the ITS include that the
 11 historical data “for the hydrology of the three primary Project reservoirs [including UKL] represent the
 12 range of distribution of elevations that are reasonably likely to occur over the 10-year consultation term .
 13 . . .” [*Id.*].

14 The ITS also provides “nondiscretionary” Terms and Conditions, the violation of which exposes
 15 Reclamation to liability under Section 9 of the ESA. [*Id.* at § 13.3.2]. These Terms and Conditions
 16 reinforce the purpose of the BiOp Thresholds:

17 Threshold UKL elevations identified in . . . this BiOp are not intended to serve as
 18 management targets. . . . [W]henver operations cause UKL elevations to trend
 19 downwards towards the thresholds, special scrutiny is required . . . If a progressive
 20 decrease in elevations is identified, Reclamation shall determine the causative factors of
 21 this decrease and determine whether these factors are within the scope of the proposed
 action and the effects analyzed in this BiOp. If Reclamation determines that there are
 causative factors that may be outside the scope the proposed action and this BiOp,
 Reclamation shall immediately consult with USFWS to adaptively manage and take
 corrective actions.

22 [*Id.* at § 13.3.2 (T&C 1c)].

23 ...
 24 ...

1 F. This Court's Prior Order Invalidating Portions of the 2013 BiOp & Reconsultation

2 In February 2017, this Court issued an order invalidating portions of the 2013 BiOp pertaining to
3 the Project's impacts on Southern Oregon/Northern California Coast ("SONCC") Coho salmon in
4 connection with two related cases. *Hoopa Valley Tribes v. Nat'l Marine Fisheries Serv.*, 230 F. Supp.
5 3d 1106, 1146 (N.D. Cal. 2017) [Order Re Motions for Summary Judgment, Motions to Strike, and
6 Motion to Dismiss at 53, *Yurok Tribe v. United States Bureau of Reclamation*, No. 3:16-06863-WHO
7 (Feb. 8, 2017), ECF No. 62; *Hoopa Valley Tribe v. United States Bureau of Reclamation*, No. 3:16-cv-
8 04294-WHO (Feb. 8, 2017), ECF No. 102 ("Order")]. Finding that Reclamation had failed to reinstate
9 consultation when the Project exceeded its permitted incidental take of SONCC Coho salmon, this court
10 ordered Reclamation to maintain flushing and dilution flows to combat *Certanova shasta* infection
11 among the salmon pending re-consultation under the ESA and the issuance of a new biological opinion.
12 *Hoopa Valley Tribes*, 230 F. Supp. 3d at 1127–46.

13 In response to the 60-day notice of the Klamath Tribes' intention to bring suit under the ESA,
14 Reclamation acknowledged it had reinstated consultation with USFWS and NMFS regarding the
15 Project's impacts on listed species but declined to make any commitment to operate UKL at adequate
16 elevations to ensure the continued survival of the C'waam and Koptu or even to take a serious look at
17 the impacts of UKL elevations on C'waam and Koptu. [April 10, 2018 Correspondence from Jeffrey
18 Nettleton, Area Manager for the Klamath Basin Office of the Bureau of Reclamation, attached hereto as
19 **Exhibit I**. This lack of assurance that the recovery needs of the C'waam and Koptu will be met is
20 especially disturbing in light of how Project operations under the 2013 BiOp have unfolded.

21 G. Project Operations under the 2013 BiOp

22 Project operations since 2013 have shown that the 2013 BiOp's central assumptions concerning
23 the relationship between Reclamation's proposed action and UKL elevation levels were significantly
24 flawed. The Project is therefore operating outside the 2013 BiOp's analytical scope. Reclamation has

1 consistently treated the BiOp Thresholds as routine management targets rather than absolute minimums
2 designed only to be rarely exceeded, thereby creating conditions beyond the BiOp’s scope and under
3 which the C’waam and Koptu simply cannot continue to survive. *See [Id.]*. This directly invalidates
4 USFWS’s assumption that Project operations during the BiOp’s term would ensure “higher seasonal
5 [UKL] elevations....” [*Id.* at § 10.6]. Indeed, despite the 2013 BiOp’s assumptions that “[w]ater
6 w[ould] not be managed to minimums” and that “elevations w[ould] also be monitored to ensure that
7 there is not a projected or realized progressive decrease in the expected distance above the thresholds
8 identified in this BiOp[,]” [*Id.* at § 10], Reclamation has repeatedly allowed UKL to meet or fall below
9 the BiOp Thresholds. [2013 Report at 14, Fig. 6; 2014 Report at 14, Fig. 6; 2015 Report at 15, Fig. 6;
10 2016 Report at 14, Fig. 6; 2017 Report at 13, Fig. 6]. In fact, to date, the C’waam and Koptu have yet to
11 enjoy even one full year of spawning and maturation under the conditions that the 2013 BiOp assumed
12 would routinely occur in order to support its no-jeopardy conclusion.

13 Although recruitment into the C’waam and Koptu populations is acutely necessary for the
14 species’ continued existence, Reclamation has routinely failed to observe the BiOp Thresholds. It has
15 also often allowed UKL to fall below the USFWS Critical Elevations during the spring and early
16 summer spawning and larval development periods. Indeed, even as the BiOp was being finalized,
17 Reclamation permitted UKL elevations in March and May of 2013 to drop to 4,141.91 feet and 4,142.01
18 feet, respectively. [2013 Report at 14, Fig. 6]. Both of these levels are below the USFWS Critical
19 Elevation of 4,142.2 feet for spring spawning activity. [2013 BiOp at § 8.3.1.1].

20 In June 2013, Reclamation permitted the UKL elevation to drop to 4,141.12 feet, below both the
21 BiOp Threshold for the end of that month and FWS Critical Elevation of 4,142.0 feet. [2013 Report at
22 14 & Fig. 6]. Again, in March 2014, Reclamation allowed the elevation to fall below the FWS Critical
23 Elevation of 4,142.2. [2014 Report at 14, Fig. 6; 2013 BiOp at § 8.3.1.1]. In April of that year, the
24 elevation of UKL failed to reach the BiOp Threshold. [2014 Report at 14 & Fig. 6]. From May through

1 August 2014, during the vital C'waam and Koptu larvae maturation period, UKL elevations remained
2 below both the BiOp Thresholds and the applicable FWS Critical Elevations of 4,142.2 feet, 4,142.0
3 feet, 4,140.0 feet, and 4,1390.0 feet. [*Id.*; 2013 BiOp at §§ 8.3.1.1–8.3.1.4]. In June 2015, Reclamation
4 allowed the elevation of UKL to fall below the FWS Critical Elevation of 4,142.0 feet. [2015 Report at
5 15, Fig. 6; 2013 BiOp at § 8.3.1.2]. In May 2016, the elevation of UKL again fell below the BiOp
6 Threshold, and in June of the same year, Reclamation allowed the elevation to drop to 4,141.62 feet,
7 breaching the FWS Critical Elevation. [2016 Report at 15 & Fig. 6; 2013 BiOp at § 8.3.1.2]. In April
8 and May of 2017, Reclamation again failed to meet the BiOp Thresholds. [2017 Report at 13 & Fig. 6].
9 Compounding the harm caused by 2017's difficult spring, Reclamation also breached the FWS Critical
10 Elevation in June by allowing the elevation of UKL to drop to 4,141.67 feet. [*Id.*; 2013 BiOp at §§
11 8.3.1.2]

12 During summer months, Reclamation has deprived C'waam and Koptu juveniles and adults of
13 necessary habitat features each year since the implementation of the 2013 BiOp. In July 2013,
14 Reclamation permitted the UKL elevation to drop below the FWS Critical Elevation of 4,140.0 feet.
15 [2013 Report at 14, Fig. 6; 2013 BiOp at § 8.3.1.3]. In July and August 2014, UKL elevations were
16 4,139.26 and 4,138.60 feet, respectively, below both the BiOp Thresholds and the FWS Critical
17 Elevations of 4,140.0 feet and 4,139.0. [2014 Report at 14 & Fig. 6; 2013 BiOp at §§ 8.3.1.3–8.3.1.4].
18 In June 2015, the UKL elevation of 4,141.35 feet was below the applicable FWS Critical Elevation.
19 [2015 Report at 15, Fig. 6; 2013 BiOp at §§ 8.3.1.2]. In June, August, and September 2016,
20 Reclamation allowed UKL elevations of 4,141.62, 4,138.73, and 4,138.13 feet, respectively, each below
21 FWS Critical Elevations. [2016 Report at 14, Fig. 6; 2013 BiOp at §§ 8.3.1.2, 8.3.1.4, 8.3.1.6] Thus for
22 most of the summer of 2016, Reclamation deprived C'waam and Koptu of critical habitat and failed to
23 mitigate the dangerous impacts associated with blue-green algae blooms.

1 Reclamation has also forced C’waam and Koptu adults and juveniles to endure UKL’s poor late
2 summer water conditions without the benefit of adequate depths, adequate access to water quality refuge
3 areas in late summer, and mitigation of harmful water quality effects. Specifically, in September 2014,
4 the elevation of UKL was 4,138.20 feet, right at the applicable USFWS Critical Elevation. [2014 Report
5 at 14, Fig. 6; 2013 BiOp at § 8.3.1.5]. In September 2016, Reclamation allowed the elevation of UKL to
6 drop below the USFWS Critical Elevation. [2016 Report at 14, Fig. 6; 2013 BiOp at § 8.3.1.5].
7 Furthermore, in November and December 2015, Reclamation allowed the elevation of UKL to fall
8 beneath the BiOp Threshold, potentially exposing C’waam and Koptu to low DO levels throughout the
9 winter of 2015-2016. [2015 Report at 15 & Fig. 6].

10 In 2018, Reclamation has continued this trend, managing UKL to absolute minimums—on May
11 14 of this year, UKL’s elevation was just .06 feet above the May 15 BiOp Threshold. [May 14, 2018
12 Water Report at 1 (showing UKL elevation of 4,142.36 feet), attached hereto as **Exhibit J**; Buettner
13 Declaration at Ex. 6]. Reclamation is presently on track to miss—or, at best, barely exceed—the May
14 31 BiOp Threshold of 4,142.09 feet as well. [May 21, 2018 Water Report at 1 (showing UKL Elevation
15 of 4,142.08), attached hereto as **Exhibit K**]. This means C’waam and Koptu larvae and juvenile
16 survival rates will likely be lowered, and an important opportunity to limit summer blue-green algae
17 blooms is slipping away. [*Id.* at ¶ 173]. Given Reclamation’s consistent practice of managing UKL
18 elevations *to* rather than above the BiOp Thresholds, as instructed by the 2013 BiOp, this likely means
19 that without the relief requested herein, the C’waam and Koptu will most likely be forced to endure yet
20 another summer deprived of the critical habitat and water quality benefits necessary for their continued
21 survival as species.

22 The Klamath Tribes’ immediate goal is merely to facilitate the survival of C’waam and Koptu
23 through late summer and early fall water-quality declines. [Buettner Declaration at ¶ 172]. While the
24 C’waam and Koptu Conservation Levels discussed below provide the best year-round chances for the

1 continued survival and ultimate recovery of C’waam and Koptu, the Klamath Tribes recognize the
 2 improbability of this year’s hydrological conditions allowing the elevation to brought up to
 3 Conservation Levels before the end of July, 2018. [*Id.* at ¶¶ 171–172 & Table 1]. Accordingly, the
 4 Klamath Tribes request the Court to order Reclamation to operate UKL to intermediary “2018
 5 Transition Levels” to facilitate C’waam and Koptu survival until the C’waam and Koptu Conservation
 6 Levels can be maintained beginning on July 31. The 2018 Transition Levels are as follows:

Date	BiOp Threshold (feet above sea level)	2018 Transition Levels (feet above sea level)	C’waam and Koptu Conservation Levels (feet above sea level)
June 30	4,140.90	4,140.90	4,142.0
July 15	4,140.33	4,141.00	4,141.5
July 31	4,139.77	4,141.00	4,141.0

12 [*Id.* at Table 1 (p. 41) & Ex. 6].

13 H. C’waam and Koptu Conservation Levels

14 This section identifies minimum seasonal UKL elevation levels which, according to the best
 15 available science, best facilitate survival and recovery of C’waam and Koptu. [Buettner Declaration at
 16 ¶¶ 168–171]. The C’waam and Koptu Conservation Levels are summarized in the following chart.

RATIONALE	DATE	C’WAAM AND KOPTU CONSERVATION LEVEL
Spawning habitat; ensure adequate beginning elevation at beginning of irrigation season	March 31	4,143.0 feet*
Spawning habitat; larvae habitat	April 30	4,143.0 feet
Spawning habitat; larvae habitat	May 15	4,1430.0 feet

RATIONALE	DATE	C'WAAM AND KOPTU CONSERVATION LEVEL
Spawning habitat; larvae habitat; lake-wide water quality	May 31	4,143.0 feet
Larvae habitat; lake-wide water quality	June 15	4143.0 feet
Larvae habitat; reduce predatory fathead minnow habitat; lake-wide water quality	June 30	4,142.0 feet
Lake-wide water quality; reduce predatory fathead minnow habitat	July 15	4,141.5 feet
Lake-wide water quality; adult access to water-quality refuge; juvenile habitat; adult habitat	July 31	4,141.0 feet
Lake-wide water quality; adult access to water-quality refuge; juvenile habitat; adult habitat	August 15	4,140.5 feet
Lake-wide water quality; adult access to water-quality refuge; juvenile habitat; adult habitat	August 31	4,140.0 feet
Lake-wide water quality; adult access to water-quality refuge; juvenile habitat; adult habitat	September 15	4,139.5 feet
Lake-wide water quality; adult access to water-quality refuge	September 30	4,139.5 feet
Lake-wide water quality; adult access to water-quality refuge	October 15	4,139.5 feet
Lake-wide water quality; ability to reach 4,143.0 feet by March 31	October 31	4,140.0 feet

RATIONALE	DATE	C'WAAM AND KOPTU CONSERVATION LEVEL
Lake-wide water quality; ability to reach 4,143.0 feet by March 31	November 30	4140.5 feet
Lake-wide water quality; ability to reach 4,143.0 feet by March 31	December 31	4141.0 feet

*This elevation may be impacted by flood control considerations during wet years.

UKL must reach an elevation of at least 4,143.0 feet by the end of March to ensure that nearly all of the limited, suitable spawning substrate is inundated to a depth of at least one foot, the minimum depth at which C'waam and Koptu will typically deposit eggs. [*Id.* at ¶¶ 67–72 & Ex. 9]. Furthermore, at this elevation, 44% of spawning habitat in the important Ouxy Springs spawning area and 68% of the Sucker Springs spawning area are inundated to the preferred and safer depth of at least two feet. [*Id.* at ¶ 68]. This elevation must be maintained at or above 4,143.0 feet through June 15 to ensure adult access to shoreline spawning grounds and to prevent the desiccation of eggs and emerging larvae. [*Id.* at ¶¶ 73–75 & Ex. 9].

From June 16 through the end of the month, UKL's elevation needs to remain at or above 4,142.0 feet to ensure the availability of sufficient nursery habitat remains for emerging C'waam and Koptu larvae and juveniles—2,240 acres of emergent vegetation habitat in the critical Williamson River Delta, with 68% of potential suitable marsh edge habitat inundated to the preferred depth of two feet, and that 97% of it is at or above the minimum viable depth of one-foot to maximize larval survival rates. [*Id.* at ¶¶ 77–82 & Ex. 9]. Dropping the UKL elevation this from the 4,143.0 level between June 15 and June 30 adequately maintains these habitat benefits while also limiting reproduction of predatory fathead minnow. [*Id.* at ¶¶ 79–80 & Ex. 9]. Moreover, lowering the elevation to 4,142.0 feet by June 30, then dropping down to 4,141.5 feet by July 15 achieves the optimum balance between the countervailing

1 impacts of high versus low elevation as required to mitigate water quality impacts associated with the
2 algae bloom phase. [*Id.* at ¶¶ 135, 140 & Ex. 9].

3 UKL elevations must remain at or above 4,141.5 feet through July 15 and at least 4,141.0 feet
4 through the end of July to ensure adequate larval habitat remains as larvae begin their transformation
5 into juveniles, while simultaneously continuing to mitigate harmful water quality events. [*Id.* at ¶¶ 83–
6 84 & Ex. 9]. An UKL elevation of 4,141.0 feet through the end of July ensures that 68% of potentially
7 available marsh edge habitat and 63% of potentially available emergent wetland habitat in the
8 Williamson River Delta (1,660 acres) is inundated to at least one foot, as required for larvae and age-0
9 juvenile feeding and shelter. [Buettner Declaration at ¶¶ 83, 86–88]. Because a lack of meaningful
10 recruitment poses a direct threat to the continued existence of the C’waam and Koptu, maximizing larval
11 survival rates by observing these elevations is paramount. [*Id.* at ¶ 84]. A minimum elevation of 4,141.0
12 feet through July 31 also provides adequate amounts of preferred habitat at depths of at least six feet for
13 adult C’waam and Koptu to feed and shelter in their preferred summer habitat in the northern portions of
14 UKL (13,270 acres). [*Id.* at ¶ 94 & Ex. 9].

15 An elevation of at least 4,140.0 feet is necessary through the end of August to ensure adequate
16 amounts of emergent wetland (33% of the potentially available total) and marsh edge habitat remain
17 (37% of the potentially available total) to allow emerging C’waam and Koptu to continue to feed and
18 shelter under more protective conditions. [*Id.* at ¶¶ 88 & Ex. 9]. This Conservation Level is also
19 required to provide safe access to and adequate habitat within the Pelican Bay water-quality refuge, and
20 prevent overcrowding. [*Id.* at ¶¶ 96–98, & Ex. 9]. At an UKL elevation of 4,140.0 feet, 43% of Pelican
21 Bay is inundated to depths of at least three feet, the minimum viable depth for adult C’waam and Koptu
22 habitat. [*Id.* at ¶ 98].

23 The C’waam and Koptu Conservation levels are also informed by the countervailing effects of
24 UKL elevation during the late summer algae crash phase. The optimal UKL elevations for maintaining

1 viable DO concentrations during the seasonal algae crash period are 4,140.5 feet on August 15 and
2 4,139.5 feet through October 15. [*Id.* at ¶ 159]. In addition, UKL’s elevation must remain above 4,139.5
3 feet through September to ensure that a minimally adequate amount (188 acres) of critical habitat in
4 Pelican Bay remains inundated to depths greater than three feet through the end of late-summer poor
5 water-quality conditions. [*Id.* at ¶ 99]. An elevation of at least 4,139.5 feet through October 15 also
6 ensures at least some viable critical habitat remains for juveniles to continue to feed and shelter through
7 late summer. [*Id.* at ¶ 90 & Ex. 9].

8 These late summer/early fall elevations also help protect C’waam and Koptu from the effects of
9 a second algal bloom phase that often occurs between September and mid-October. [*Id.* at ¶¶ 159–160].
10 Although cooler water temperatures tend to improve water quality during this time of year, these late
11 blooms may still reduce DO to stress-inducing levels below 4.0 mg/liter and increase UKL pH and un-
12 ionized ammonia concentration. [*Id.* at ¶¶ 158–161]. Maintaining the elevation level of 4,139.5 feet
13 through mid-October ameliorates these adverse habitat conditions. [*Id.*]. The elevation must rise again
14 to 4,141.0 by the end of December, and continue to increase above that level over the winter months, to
15 reduce the risk of critically low DO during a prolonged ice-over and increase the likelihood UKL will
16 reach 4,143.0 feet for the next spring’s spawning season.. [*Id.* at ¶¶ 164–166, 168 & Ex. 9].

17 UKL of management in accordance with the C’waam and Koptu Conservation Levels would also
18 reduce entrainment of C’waam and Koptu, especially larvae and age-0 juveniles. [*Id.* at ¶¶ 102–104].
19 The take of C’waam and Koptu from entrainment is roughly proportional to the amount and frequency
20 of water releases through Link River Dam, which lower UKL’s elevation. [*Id.* at ¶ 103]. Limiting these
21 releases as required to meet the Conservation Levels, therefore, would save approximately 273,000
22 C’waam and Koptu larvae and 5,000 scarce C’waam and Koptu juveniles each year over even the BiOp
23 Thresholds. [*Id.* at ¶¶ 103–104].

24 ...

1 **III. Discussion**

2 The Klamath Tribes respectfully submit they are entitled to the preliminary injunction requested
 3 herein because (1) they are likely to succeed on the merits of their Section 7 and 9 ESA claims; (2) they
 4 will suffer irreparable harm in the absence of the relief requested here, namely the extirpation of the
 5 species from UKL and likely extinction of the C’waam and Koptu—protected treaty resources; and (3)
 6 the balance of equities tips in favor of the Klamath Tribes, and granting this preliminary injunction is in
 7 the public interest as it will further the policy of the United States to conserve endangered species and
 8 their critical habitat. *See, e.g., Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (setting
 9 forth the standard for a preliminary injunction); *see generally* Fed. R. Civ. P. 65(a). Moreover, this
 10 Court may issue a preliminary injunction even if “serious questions going to the merits” of the Klamath
 11 Tribes’ claims exist because “the balance of hardships tips sharply” in their favor. *See Alliance for the*
 12 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Clear Channel Outdoor, Inc. v.*
 13 *City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)).

14 A. The Klamath Tribes Are Likely to Succeed on The Merits of Their Section 7 and 9
 15 Endangered Species Act Claims.

16 The ESA recognizes a cause of action “to enjoin any person, including the United States and any
 17 other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of
 18 th[e ESA] or regulation issued under the authority thereof.” 16 U.S.C. § 1540(g)(1)(A). As relevant to
 19 this Motion, the Klamath Tribes have filed a suit seeking injunctive relief against Reclamation under
 20 Sections 7 and 9 of the ESA, 16 U.S.C. §§ 1536 & 1538. [Complaint of Plaintiff Klamath Tribes at ¶¶ 5,
 21 85, 97, *Klamath Tribes v. United States Bureau of Reclamation*, No. 3:18-cv-03078 (May 23, 2018),
 ECF No. 1]. The Klamath Tribes are likely to succeed on the merits of both claims.

22 i. The Klamath Tribes are likely to prevail on their Section 7 jeopardy claim
 23 because Reclamation has jeopardized the continued existence of the C’waam and
Koptu and destroyed and adversely modified their critical habitat.

24 16 U.S.C. § 1536(a)(2) provides that:

1 Each Federal agency shall, in consultation with and with the assistance of the Secretary,
2 insure that any action authorized, funded, or carried out by such agency . . . 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.

3 *See also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978) (“One would be hard pressed to find a
4 statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. . . .
5 This language admits of no exception.”). An agency action “jeopardizes” a protected species if it
6 “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the
7 survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or
8 distribution of that species.” 50 C.F.R. § 402.02. “Destruction or adverse modification” means “a direct
9 or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a
10 listed species,” such as alterations which “alter the physical or biological features essential to the
11 conservation of a species” *Id.* Moreover, even “after consulting with the Secretary[,] the federal
12 agency involved must determine whether it has taken all necessary action to insure that its actions will
13 not jeopardize the continued existence of an endangered species or destroy or modify habitat critical to
14 the existence of the species.” *Nat’l Wildlife Fed’n v. Coleman*, 529 F.2d 359, 371 (5th Cir. 1976);
15 *accord Tennessee Valley Auth. v. Hill*, 437 U.S. at 173.

16 Reclamation’s ongoing management of UKL to elevations below those analyzed in the 2013
17 BiOp jeopardizes the continued existence of the species and adversely modifies their critical habitat.
18 Reclamation’s practice of managing UKL to and even below the BiOp Thresholds reduces the amount
19 and quality of suitable spawning and larval nursery habitat. *C.f. Sw. Ctr. for Biological Diversity v.*
20 *Bartel*, 470 F. Supp. 2d 1118, 1146-48 (S.D. Cal. 2006) (finding a no-jeopardy conclusion unreasonable
21 where the incidental take statement authorized “12% of habitat loss” without explanation). This
22 management practice inhibits much needed recruitment into the breeding populations of C’waam and
23 Koptu—thus, “appreciably diminish[ing] the value of the critical habitat for the conservation of [the]
24 species.” *See* 50 C.F.R. § 402.02. Allowing this (mis)management to persist would “reduce appreciably

1 the likelihood of both the survival and recovery of [C'waam and Koptu] in the wild by reducing the
2 reproduction, numbers, or distribution of that species,” as the importance of each spawning season is
3 magnified as fewer and fewer reproductively viable adults remain extant. *See* 50 C.F.R. § 402.02.

4 Reclamation’s actions also adversely modify the C’waam’s and Koptu’s critical habitat by
5 reducing the amount of useable water-quality refuge habitat during critical periods. Areas of sufficiently
6 deep, relatively high-quality water are essential for facilitating the survival of older juvenile and adult
7 C’waam and Koptu during UKL’s summer water-quality crashes. In fact, Reclamation’s current
8 management of UKL elevation levels exacerbates this problem by directly facilitating the growth of
9 blue-green algae blooms and the annual depletion of dissolved oxygen in UKL that results when the
10 blooms crash. By consistently maintaining elevations which are too low in the spring and which do not
11 properly balance the impacts of elevation during the algae crash period, Reclamation has and will likely
12 continue to contribute to reduced dissolved oxygen and increased pH and un-ionized ammonia in UKL,
13 making it less habitable for C’waam and Koptu. If Reclamation is permitted to continue to ignore the
14 effect its water management decisions have on UKL water-quality, C’waam and Koptu will continue to
15 swim, feed, and shelter in water that is harmful and even fatal to them. Indeed, this late summer/early
16 fall could well see a devastating second bloom phase if Reclamation does not maintain levels
17 sufficiently high to inhibit algae growth through September and October.

18 The most obvious sign that Reclamation has breached its obligation to insure its actions are not
19 likely to jeopardize the continued existence of the C’waam and Koptu is the imperiled state of the fish
20 themselves. Their populations are aging and rapidly declining, with larvae and juveniles unable to
21 survive to sexual maturity. Summer water-quality die-offs resulting in the loss of thousands of C’waam
22 and Koptu have become regular occurrences. Absent swift remedial action, both species are at acute
23 risk of extinction in less than a decade. *See Nat’l Marine Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*,
24 422 F.3d 782, 799 (9th Cir. 2005) (upholding preliminary injunction against continued Section 7

1 violation based on finding that protected species were “in serious decline and not evidencing signs of
2 recovery”).

3 ii. The Klamath Tribes are likely to prevail on their Section 7 re-consultation claim
4 because Project conditions have exceeded the scope of the 2013 BiOp.

5 Reinitiation of formal consultation is required and shall be requested by the Federal
6 agency or by the Service, where discretionary Federal involvement or control over
7 the action has been retained or is authorized by law and:

8 (a) If the amount or extent of taking specified in the incidental take statement is
9 exceeded;

10 (b) If new information reveals effects of the action that may affect listed
11 species or critical habitat in a manner or to an extent not previously considered;

12 (c) If the identified action is subsequently modified in a manner that causes an effect to
13 the listed species or critical habitat that was not considered in the biological opinion

14 50 C.F.R. § 402.16. “The duty to reinitiate consultation lies both with the action agency and the
15 consulting agency.” *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir.
16 2008); *see* 50 C.F.R. § 402.16. “Reinitiation of consultation requires either the FWS or the NMFS to
17 issue a new Biological Opinion before the agency action may continue.” *Envtl. Prot. Info. Ctr. v.*
18 *Simpson Timber Co.*, 255 F.3d 1073, 1076 (9th Cir. 2001); *accord Mt. Graham Red Squirrel v.*
19 *Madigan*, 954 F.2d 1441, 1451 (9th Cir. 1992).

20 Here, Reclamation must re-initiate consultation with USFWS and NMFS because: 1) it has
21 exceeded the amount and extent of take contemplated by the 2013 BiOp and authorized by the ITS; 2)
22 new information regarding the continued validity of the assumptions underpinning the 2013 BiOp and of
23 the effects of Project operations on C’waam and Koptu has emerged since the issuance of the 2013
24 BiOp; and 3) Reclamation has been operating the Project in a manner outside the 2013 BiOp’s analysis.
UKL elevations have consistently been lower than the 2013 BiOp contemplated, effectively rendering it
inapplicable to Project operations and of little value as a means to understand the Project’s impacts on
C’waam and Koptu. In addition to its systematic breaches of the BiOp Thresholds, Reclamation has
consistently managed the Project below the USFWS Critical Elevations, subjecting C’waam and Koptu

1 to the “adverse[],” “negative[],” “substantial,” and “significant” effects of low UKL elevations. [See
2 2013 BiOp at §§ 8.3.1.1–8.3.1.5]. As a result, the amount of Reclamation’s take has not been analyzed
3 by the 2013 BiOp or permitted by the ITS. See *Nat’l Marine Wildlife Fed’n v. Nat’l Marine Fisheries*
4 *Serv.*, 886 F.3d 803, 819 (9th Cir. 2018) (“Section 7(a)(2) permits incidental take *only* where [the
5 consulting agency] has determined in a valid BiOp that the activity and level of incidental take complies
6 with the ESA.” (Internal citation omitted)). Moreover, new information has shown that the 2013 BiOp’s
7 hydrological assumptions were not reliable, resulting in unanalyzed effects on C’waam and Koptu. See
8 *Hoopa Valley Tribe v. Nat’l Marine Fisheries Serv.*, 230 F. Supp. 3d at 1130 (finding consecutive
9 drought years “caused variations in [Project] operations and hydrologic conditions that were not
10 anticipated at the time the Proposed Action was analyzed in the [2013] BiOp”). Conditions have been
11 dryer, and dryer for longer, than predicted by the BiOp’s modeling techniques, with the three
12 consecutive dry years from 2013-2015 alone falling outside the 2013 BiOp’s scope. Nor has
13 Reclamation’s repeated breaches of the BiOp Thresholds been consistent with the 2013 BiOp’s
14 assumptions. [See 2013 BiOp at § 8.1.2]. This combination of unanticipated hydrological conditions and
15 Reclamation’s non-compliance with the 2013 BiOp’s directive to refrain from managing the Project to
16 minimums have resulted in Project operations well outside the scope of prior consultation. While the
17 agencies have begun reconsultation on the effects of the Project, this reconsultation was not timely
18 initiated, and does not alter the continued jeopardy faced by the C’waam and Koptu during the pendency
19 of the reconsultation process. Accordingly, until reconsultation fully addressing the impacts of the
20 Project on C’waam and Koptu and their critical habitat is complete, this Court should enjoin further
21 harmful Project operations. See, e.g., *Nat’l Marine Wildlife Fed’n*, 886 F.3d at 817–24 (upholding
22 preliminary injunction modifying operation of Federal Columbia River Power System to conserve
23 salmonids pending completion of Section 7 reconsultation); *Hoopa Valley Tribes v. Nat’l Marine*
24 *Fisheries Serv.*, 230 F. Supp. 3d 1106, 1146 (N.D. Cal. 2017); *Pac. Coast Fed’n of Fishermen’s Ass’ns*

1 v. *U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1250 (N.D. Cal. 2001) (enjoining Klamath Project
2 irrigation deliveries pending completion of Section 7 process).

3
4 iii. The Klamath Tribes are likely to prevail on their Section 9 claim as Reclamation
has engaged in unauthorized take of C’waam and Koptu.

5 Except as provided in sections 1535(g)(2) [state cooperation] and 1539 [incidental take
6 statements] of this title, with respect to any endangered species of fish or wildlife listed
pursuant to section 1533 of this title it is unlawful for any person subject to the
7 jurisdiction of the United States to—

8

(B) take any such species within the United States or the territorial sea of the United
States[.]

9 16 U.S.C. § 1538(a)(1)(B). “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill,
10 trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* at § 1532(19). By regulation,
11 USFWS has clarified that:

12 *Harm* in the definition of “take” in the [Endangered Species] Act means an act which
13 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
14 behavioral patterns, including breeding, feeding or sheltering.

15 50 C.F.R. § 17.3; accord *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067 (9th Cir. 1996), as amended
16 on denial of reh'g (June 26, 1996) (“[A] habitat modification which significantly impairs the breeding
17 and sheltering of a protected species amounts to ‘harm’ under the ESA.”).

18 In failing to heed the 2013 BiOp’s warnings regarding consistently maintaining UKL at low
19 elevations, Reclamation has unlawfully taken C’waam and Koptu and is likely to continue to do so
20 absent the relief requested. Reclamation’s management of UKL elevations below USFWS Critical
21 Elevations during spring and early summer spawning season has resulted in consistent, harmful
22 reduction in the amount of C’waam and Koptu spawning substrate and nursery habitat. *C.f. Marbled*
23 *Murrelet v. Babbitt*, 83 F.3d at 1063 n.4 (enjoining timber harvesting plan that would have resulted in
24 removal of 40-60% of nesting-habitat trees as Section 9 taking); *Forest Conservation Council v.*

1 *Rosboro Lumber Co.*, 50 F.3d 781, 787–88 (9th Cir. 1995) (holding that, if factually demonstrated,
2 impairment of owl pair’s “essential behavioral patterns, including breeding, feeding, and sheltering”
3 would amount to “take”); *see generally*, *Babbit v. Sweet Home Chap. of Cmty. for a Great Or.*, 515
4 U.S. 687, 697–708 (1995). By allowing consistently low UKL elevations during the late summer and
5 early fall, Reclamation has limited access to and the amount of habitat in water-quality refuge areas,
6 impairing their sheltering and migration to extents un contemplated by the 2013 BiOp.

7 In addition, Reclamation has failed to manage UKL to mitigate harmful and fatal summer water-
8 quality events attributable to blue-green algae blooms. This not only directly harms C’waam and Koptu
9 through increased exposure to low DO concentrations and toxins such an un-ionized ammonia, but also
10 significantly degrades their UKL critical habitat. *See Palila v. Haw. Dep’t of Land and Natural Res.*,
11 852 F.2d 1106 (9th Cir. 1988) (upholding district court finding of take where state allowed sheep to
12 degrade endangered bird species’ woodland habitat). Reclamation’s decisions to release waters to
13 downstream users cause further direct harm to individual C’waam and Koptu through entrainment.
14 Limiting these releases as required to maintain the elevations contemplated by the 2013 BiOp would
15 spare hundreds of thousands C’waam and Koptu larvae and thousands of juveniles each year.

16 Reclamation cannot claim the protection of ITS because Project operations since 2013 have
17 exceeded both the analytical scope of 2013 BiOp and the permitted take. *See, e.g., Wild Fish*
18 *Conservancy v. Salazar*, 628 F.3d 513, 531 (9th Cir. 2010) (“Incidental Take Statements set forth a
19 ‘trigger’ that, when reached, results in an unacceptable level of incidental take, invalidating the safe
20 harbor provision.” (quoting *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229,
21 1249 (9th Cir. 2001)); *see generally* 16 U.S.C. § 1539(a)(1)(B). As discussed above, Reclamation has
22 consistently managed the Project at or below BiOp Thresholds, directly contrary to the 2013 BiOp’s
23 clear directives prohibiting this, resulting in a greater amount and extent of take than contemplated by
24 the 2013 BiOp and ITS.

1 Furthermore, Reclamation has violated the ITS's Terms and Conditions by consistently treating
2 the BiOp Thresholds as "management targets," and failing to "immediately" determine whether Project
3 operations remained within the BiOp's scope in the face of the unanticipated dry conditions. [2013
4 BiOp at § 13.3.2 (T&C 1c)]. Through this failure to adhere to the ITS's Terms and Conditions,
5 Reclamation has cast aside the protections of the ITS. *See Bennett v. Spear*, 520 U.S. 154, 170 (1997)
6 ("Thus, the Biological Opinion's Incidental Take Statement constitutes a permit authorizing the action
7 agency to 'take' the endangered or threatened species so long as it respects the Service's 'terms and
8 conditions.' The action agency is technically free to disregard the Biological Opinion and proceed with
9 its proposed action, but it does so at its own peril . . .").

10 B. The Klamath Tribes Will Suffer Irreparable Harm in The Absence of The Requested
11 Relief.

12 To establish irreparable harm, the Klamath Tribes need not demonstrate that an extinction-level
13 event will ensue absent the relief requested. *See, e.g., Nat'l Marine Wildlife Fed'n* 886 F.3d at 818 ("The
14 district court did not err when it found irreparable harm without finding an extinction-level threat to the
15 listed species in the remaining two years of the remand period."); *Alliance for Wild Rockies v. Marten*,
16 253 F. Supp. 3d 1108, 1111 (D. Mont. 2017) ("Plaintiffs' desire to visit the area [affected by proposed
17 land management activities] in an undisturbed state is all that is required to sufficiently allege harm [for
18 purposes of a preliminary injunction] under ESA."). Rather, the required showing of harm must be
19 informed by the purposes of the statute at issue. *Nat'l Marine Wildlife Fed'n*, 886 F.3d at 803. Because
20 "[t]he ESA accomplishes its purpose" of conserving endangered species "in incremental steps, which
21 include protecting the remaining members of a species," "[h]arm to those members is irreparable." *Id.*
22 "Once a member of an endangered species has been injured, the task of preserving that species becomes
23 all the more difficult." *FCC v. Rosboro Lumber*, 50 F.3d 781, 785 (9th Cir. 1995).

24 Given Reclamation's consistent practice of managing UKL elevations to minimums and the
already low 2018 elevations, more C'waam and Koptu will suffer and perish from worse water-quality,

1 less and worse quality habitat, increased predation, and increased entrainment absent an injunction
2 requiring Reclamation to quickly transition to and thereafter observe the C’waam and Koptu
3 Conservation Levels. The BiOp Threshold for this July 2018 is only 4,139.77 feet. At this elevation,
4 the C’waam and Koptu would be forced to endure yet another summer deprived of adequate amounts of
5 high-quality habitat and exposed to increased risk of disease and entrainment. This cannot be
6 permitted—as the 2013 BiOp cautioned, at elevations below 4,140.0 feet during the month of July
7 C’waam and Koptu larvae “could be more vulnerable to entrainment at the outlet of the lake, predation,
8 and starvation.” [2013 BiOp at § 8.3.1.3]. Furthermore, an injunction requiring Reclamation to begin
9 transitioning to the C’waam and Koptu Conservation Levels this summer will ensure that UKL will be
10 on track to hit the critical spring spawning season Level of 4,413.0 feet next March, facilitating the
11 continued survival and eventual recovery of the species through increased spawning activity. *See Nat’l*
12 *Marine Wildlife Fed’n*, 422 F.3d at 799 (upholding preliminary injunction against continued Section 7
13 violations based on finding that protected species were “in serious decline and not evidencing signs of
14 recovery”).

15 These harmful impacts to the C’waam and Koptu, critically endangered treaty- and ESA-
16 protected resources, would amount to irreparable harm to the Klamath Tribes should the Court decline to
17 grant the relief requested. The Tribes have a millennia-long relationship to the C’waam and Koptu.
18 These species have sustained the members of the Klamath Tribes, and the Tribes’ right to continue to
19 engage in their ancestral fishing practices is recognized in the 1864 Treaty. Moreover, the C’waan and
20 Koptu continue to play a significant role in the Tribes’ cultural, spiritual, and ceremonial practices. Any
21 worsening of the already imperiled state of the C’waam and Koptu would only further hinder the Tribes
22 in the exercise of their treaty and reserved sovereign rights and in the enjoyment of their cultural and
23 spiritual practices.

24 ...

1 C. The Balance of Equities Tips in Favor of The Klamath Tribes and The Requested
2 Injunction Is in The Public Interest.

3 When the federal government is a party to preliminary injunction request, the balance of equities
4 and public interest factors “merge.” *Drakes Bay Oyster Co. v. Jewell*, 1092 (9th Cir. 2014) (citing *Nken*
5 *v. Holder*, 556 U.S. 418, 435 (2009)). Moreover, in the context of ESA litigation, both of these factors
6 are presumed to weigh in favor of the moving party. *Nat’l Marine Wildlife Fed’n.*, 886 F.3d at 817
7 (“When considering an injunction under the ESA, we presume . . . that the balance of interest weighs in
8 favor of protecting endangered species, and that the public interest would not be disserved by an
9 injunction.”); *see also Alliance for Wild Rockies v. Marten*, 253 F. Supp. 3d at 1112 (“[I]n the context
10 of alleged procedural violations of the ESA, the public interest and the balance of hardships weighs
11 heavily in favor of a preliminary injunction due [to] the emphasis placed by Congress on the protection
12 of endangered and threatened species.”). As the Supreme Court has explained, “Congress has spoken in
13 the plainest of words, making it abundantly clear that the balance has been struck in favor of affording
14 endangered species the highest of priorities” *Tennessee Valley Auth.*, 437 U.S. at 193–95 (granting
15 injunction prohibiting federal action that would jeopardize the continued existence of endangered
16 species); *see also Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999).
17 Accordingly, “the ESA strips courts of at least some of their equitable discretion in determining whether
18 injunctive relief is warranted,” *Cottonwood Env’tl Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088
19 (9th Cir. 2015), insofar as it “removes” the balance of hardships and public interest factors from the
20 Court’s “equitable discretion.” *Nat’l Marine Wildlife Fed’n*, 886 F.3d at 817; *accord Cottonwood*, 789
21 F.3d at 1090.

22 Thus, because the Klamath Tribes seek a preliminary injunction to conserve endangered species
23 and their critical habitat in furtherance of purposes of the ESA, Congress has already decided the
24 balance of equities and the public interest weigh in their favor. *See Nat’l Wildlife Fed. v. Burlington N.*
R.R., Inc., 23 F.3d 1508, 1510–11 (9th Cir. 1994) (“The ‘language, history, and structure,’ of the ESA

1 demonstrates Congress’ determination that the balance of hardships and the public interest tips heavily
2 in favor of protected species.”) (quoting *Tennessee Valley Auth.*, 437 U.S. at 174)); *see generally* 16
3 U.S.C. § 1531.

4 **IV. Conclusion**

5 Reclamation’s operation of the Project have failed to comply with the terms of the 2013 BiOp,
6 which itself has proven to be based on flawed assumptions. The C’waam and Koptu remain on a path to
7 near-term extinction. The Klamath Tribes will suffer irreparable harm through the unnecessary loss of
8 C’waam and Koptu to poor water quality and habitat conditions if Reclamation is permitted to continue
9 with the status quo. Due to the precarious status of the C’waam and Koptu, the Klamath Tribes
10 respectfully request this Court issue a preliminary injunction requiring Reclamation to maintain UKL
11 elevations consistent with the 2018 Transition Levels through July 31, 2018 and the C’waam and Koptu

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1 Conservation Levels thereafter under the present action is resolved. [See Exhibit A].

2 Respectfully submitted this 29th day of May, 2018.

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