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

14 YUROK TRIBE, PACIFIC COAST
FEDERATION OF FISHERMEN'S
15 ASSOCIATIONS, and INSTITUTE FOR
FISHERIES RESOURCES,

16 Plaintiffs,

17 v.

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

19 Defendants,

20 KLAMATH WATER USERS ASSOCIATION,

21 and

22 THE KLAMATH TRIBES,

23 Intervenor-Defendants.
24

Case No. 3:19-cv-04405-WHO

Related Cases: No. C16-cv-06863-WHO
No. C16-cv-04294-WHO

PLAINTIFFS' SUPPLEMENTAL
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

Judge William H. Orrick

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1 UNITED STATES OF AMERICA,
2
3 Cross-Claimant,

4 v.

5 KLAMATH WATER USERS ASSOCIATION,
6 and
7 OREGON WATER RESOURCES
8 DEPARTMENT,
9 Crossclaim-Defendants.

10 YUOK TRIBE; PACIFIC COAST
11 FEDERATION OF FISHERMEN’S
12 ASSOCIATIONS; and INSTITUTE FOR
13 FISHERIES RESOURCES,

14 Plaintiffs,

15 v.

16 THOMAS BYLER, DIRECTOR OF OREGON
17 WATER RESOURCES DEPARTMENT, in his
18 official capacity,

19 Crossclaim-Defendant.

20 INTRODUCTION

21 1. This supplemental complaint seeks a declaration that defendant Thomas Byler,
22 Director of Oregon Water Resources Department (“OWRD”), is violating the Supremacy Clause
23 of the United States Constitution by issuing an order and notices of violation of Oregon law that
24 interfere and conflict with the U.S. Bureau of Reclamation’s (“Reclamation”) obligations under
25 federal law. Specifically, Director Byler initiated and is overseeing an OWRD investigation into
26 whether Reclamation has established rights under Oregon law to use water from Upper Klamath
Lake (“UKL”) to provide flows into the Klamath River that are needed to meet its federal legal

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1 obligations to sustain Klamath River salmon. On April 6, 2021, Director Byler issued an order
2 (the “OWRD Order”) directing Reclamation to immediately preclude or stop the distribution, use
3 or release of “stored water” from UKL in excess of amounts that may be put to beneficial use for
4 irrigation within the meaning of the Klamath Basin water rights adjudication and Oregon law.
5 On July 2 and 28, 2021, OWRD issued notices of violation to Reclamation concluding that
6 Reclamation has released what is considered “stored water” under Oregon law to the Klamath
7 River in violation of the OWRD Order, directing Reclamation to correct the violation, and
8 indicating that Reclamation may be subject to further action or lawful remedies.

9 2. The OWRD Order and notices of violation (collectively the “Challenged Orders”)
10 interfere and conflict with Reclamation’s compliance with its federal legal obligations. The
11 federal Endangered Species Act (“ESA”) requires Reclamation to ensure that its operation of the
12 Klamath Project will avoid jeopardizing the survival and recovery of listed species or adversely
13 modifying their critical habitat and will avoid the take of listed species in excess of an authorized
14 level and extent of take. To comply with these ESA obligations, Reclamation must provide
15 flows in the Klamath River to sustain Southern Oregon/Northern California Coast Coho Salmon
16 (“SONCC Coho” or “Coho”), which are listed as threatened under the ESA, due, in large part, to
17 excessive water withdrawals for the Klamath Project to support agriculture that have severely
18 diminished Klamath River flows. Reclamation must also provide flows in the Klamath River to
19 sustain Chinook salmon that are prey for endangered Southern Resident Killer Whales that feed
20 along the west coast, including at the mouth of the Klamath River. To meet its ESA obligations,
21 Reclamation has developed and subsequently amended the Klamath Project operations plans
22 governing operations from 2019–2024, in consultation with the National Marine Fisheries
23 Service (“NMFS”), the expert fish and wildlife agency with ESA jurisdiction over salmon and
24

1 marine species, like killer whales. This Klamath Project operations plan (the “2018 Plan”)
2 requires flows in the Klamath River to sustain ecological conditions in the River that support
3 salmon and other aquatic life, including by reducing disease risks and providing habitat for
4 young salmon to rear, grow, and outmigrate to the ocean. Reclamation also provides the flows
5 required to comply with the ESA’s standards in order to operate the Project consistent with the
6 federal reserved water rights of the Yurok Tribe to support its fishery.

7 3. OWRD based the Challenged Orders solely on whether Reclamation has water
8 rights under Oregon law to release the water to the Klamath River. The Challenged Orders
9 direct Reclamation not to release what is considered “stored water” under Oregon law to the
10 Klamath River for non-irrigation purposes because Reclamation lacks a state-law water right
11 recognized under Oregon law to do so. Complying with the Challenged Orders would force
12 Reclamation to violate its obligations under federal law.

13 4. The first claim for relief seeks a declaration that the Challenged Orders are invalid
14 under the Supremacy Clause because: (1) OWRD lacks authority to impinge upon Reclamation’s
15 release of water to provide flows in the Klamath River in California to comply with its
16 obligations under the federal ESA; and (2) the Challenged Orders impede or interfere with
17 Reclamation’s release of flows to sustain salmon to comply with its obligations under the ESA,
18 which preempts OWRD’s authority.

19 5. In the alternative, if the Court fails to grant the declaratory and injunctive relief
20 requested in the first claim for relief, the second claim for relief seeks a declaration that the
21 Challenged Orders are invalid under the Supremacy Clause, U.S. Const. art. VI, cl., and the
22 Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, because: (1) OWRD lacks authority to
23 impinge upon Reclamation’s operation of the Project consistent with the Yurok Tribe’s federal
24

1 reserved water rights to support its fishery, in part, by providing flows to the Klamath River in
2 California to comply with the ESA's standards; and (2) prior to quantification of the Yurok
3 Tribe's federal reserved water rights to support its fishery, which have been held to be senior to
4 Klamath Project irrigation water rights, Reclamation has authority to operate the Project,
5 consistent with those rights, by releasing from UKL at least as much water to provide flows in
6 the Klamath River below Iron Gate Dam as is necessary to comply with the ESA's standards.

7 6. This supplemental complaint asks the Court to issue an injunction preventing
8 defendant Byler from issuing or enforcing the Challenged Orders or any similar, successor
9 orders, based solely on Oregon law, that impinge upon Reclamation's release of flows to sustain
10 salmon in the Klamath River in California and conform its operation of the Klamath Project to
11 legal obligations and authority under federal law.

12 JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

13 7. This action is brought in equity to declare unconstitutional and enjoin state actions
14 that violate supreme federal law.

15 8. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362 and authority
16 to provide declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

17 9. This Court has jurisdiction to enjoin the OWRD Director's violations of the
18 federal ESA and impingement of Reclamation's operation of the Klamath Project consistent with
19 the Yurok Tribe's senior federal reserved water rights to support its fishery, which have priority
20 under the Supremacy Clause of the Constitution. *Ex parte Young*, 209 U.S. 123, 150-51, 157,
21 159-60 (1908).

22 10. Venue is proper in this Court under 28 U.S.C. § 1391(e) because the Yurok Tribe
23 is located in the district, the commercial fishing and conservation plaintiffs reside in this district,
24

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1 and many of the events and consequences of the defendant Byler's violations of law occurred or
2 will occur in this district.

3 11. This case is properly assigned to the San Francisco/Oakland Division under Civil
4 L.R. 3-2(c) because plaintiffs are located in Humboldt, Del Norte, and San Francisco counties,
5 and a substantial part of the effects of the events or omissions which give rise to this action occur
6 in Humboldt and Del Norte counties through which the lower Klamath River flows.

7 12. This Court has personal jurisdiction over defendant Byler because OWRD has
8 had systematic and continuous contacts with California regarding Klamath Project operations
9 throughout many years and the challenged OWRD actions are intentional acts that will
10 knowingly diminish releases of water to the Klamath River and cause harm to salmon and
11 plaintiffs in California. Plaintiffs have provided notice to OWRD that any orders directing
12 Reclamation to preclude or stop the release of water to provide instream flows for salmon in
13 California will, if followed, harm salmon in California, cause injury to the Yurok Tribe and the
14 commercial fishing plaintiffs who depend on Klamath River salmon fisheries, and interfere with
15 Reclamation's compliance with its federal legal obligations to sustain Klamath River salmon.
16 Exercise of this Court's jurisdiction over the Director is reasonable and comports with fair play
17 and substantial justice because, *e.g.*, any burdens on OWRD will be minimal, other key parties
18 are already in this case, and this Court has deep familiarity with the issues through longstanding
19 related litigation. Plaintiffs and the State of California have an interest in the outcome because
20 this case concerns the impacts of water withdrawals made in Oregon on flows and fisheries in
21 California.

22 PARTIES

23 A. Tribal Plaintiff

24 13. The Yurok Tribe is a sovereign, federally recognized Indian Tribe. Since time

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1 immemorial, the Yurok Tribe has lived and fished on the Lower Klamath River in northern
2 California. An 1855 Executive Order set aside the Reservation as a permanent homeland for the
3 Yurok Tribe. The Executive Order that created the Reservation vested the Yurok Tribe’s
4 federally reserved fishing and water rights. *Parravano v. Babbitt*, 70 F.3d 539, 541 (9th Cir.
5 1995); *Baley v. United States*, 942 F.3d 1312, 1337, 1340-41 (Fed. Cir. 2019).

6 14. The Yurok Reservation extends for one mile on each side of the Klamath River in
7 northern California from the mouth at the Pacific Ocean approximately 45 miles upriver.

8 15. The Tribe’s fishing rights are integral to the Yurok way of life. The Klamath
9 River and its fishery are “not much less necessary to the existence of the [Yurok] than the
10 atmosphere they breathe[.]” *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United*
11 *States v. Winans*, 198 U.S. 371, 381 (1905)).

12 16. The Yurok Tribe has federal reserved water rights that include, but are not limited
13 to, sufficient water to support its fishery, which is the only aspect of the Tribe’s water rights
14 implicated by this case. The Yurok Tribe’s federal reserved water rights have been held to be
15 senior to and have priority over Reclamation’s and any irrigators’ rights to use water from the
16 Klamath Project for irrigation. *Baley*, 942 F.3d at 1323, 1335, 1341; *Klamath Water Users*
17 *Protective Ass’n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999).

18 17. The Tribe and its members rely on salmon as a healthy food source. Fishing for
19 salmon provides food and economic opportunities for Yurok families, many of whom have
20 annual incomes far below the poverty line. Fishing is also the fabric of the community, bringing
21 people together to connect with each other and their heritage, and to anchor themselves to their
22 fishing culture.

1 18. Reclamation's operation of the Klamath Project has diminished Klamath River
2 flows and harmed the Yurok Tribe's fishery. Tragedy struck in 2002 when Project water
3 diversions led to a massive outbreak of fish disease that killed as many as 78,000 returning adult
4 salmon before they could spawn. The dead salmon washed up on the Yurok Reservation. The
5 2002 adult fish kill is one of the darkest events in Yurok history. It contributed to the shut down
6 or curtailment of most of the Tribal fishery from 2005 through 2006.

7 19. Tragedy struck again in 2014 and 2015 when monitoring revealed 81% and 91%
8 infection rates in sampled outmigrating juvenile salmon of *C. shasta*, a fish disease in juvenile
9 salmon that is often fatal. The few salmon that survived to return as adults in 2016 and 2017
10 came back in near-record low numbers, again shutting down the commercial Tribal fishery,
11 leading to another fishery disaster. In 2017, the Yurok Tribal Council also closed its fall
12 subsistence fishery. 2017 likely was the first time in history that Yurok Tribal members did not
13 fish on the Klamath River. From 2017 to the present, *C. shasta* has continued to plague the
14 River and the Tribal commercial fishery has been closed.

15 20. Reclamation's implementation of biological opinions and Klamath Project
16 operations plans that have been developed to comply with the ESA reduces the harm to the
17 Yurok Tribe's fishery from water withdrawals from the Klamath Project and supports, in part,
18 the Tribe's federal reserved water rights for its fishery, which have not yet been adjudicated or
19 quantified, but which vested upon establishment of the Reservation.

20 21. The Tribe waives its sovereign immunity for the limited purpose of resolving the
21 issues presented in this supplemental complaint; specifically, whether the Challenged Orders and
22 similar, successor orders are beyond OWRD's authority and are preempted by federal law under
23 the Supremacy Clause. The Tribe reserves all other rights of sovereign immunity and does not
24

1 consent to adjudicate: (1) any aspect of its water rights, including quantification, priority dates,
2 purposes of the reservation, sources of water, and scope of the rights; (2) the relative priority of
3 the federal reserved water rights of any Klamath Basin Tribes with respect to each other; and/or
4 (3) a breach of trust claim against the United States. It does not consent to any suit, crossclaim,
5 or counterclaim against it by any party or any other person or entity that intervenes in this case or
6 seeks to present a claim in this or any other court.

7 B. Commercial Fishing Plaintiffs

8 22. Pacific Coast Federation of Fishermen’s Associations (“PCFFA”) is the largest
9 organization of commercial fishing families on the west coast, with 17 member organizations
10 from San Diego to Washington State collectively representing the interests of thousands of men
11 and women in the Pacific Ocean commercial salmon fishing fleet. Many of PCFFA’s individual
12 members are fishermen and fisherwomen whose livelihoods depend upon harvesting and
13 marketing salmon, including those from the Klamath River. Until recent fisheries closures, the
14 Klamath fishery generated hundreds of millions of dollars per year in personal income in the
15 region. PCFFA is incorporated in California and has its main office in San Francisco, California.

16 23. Institute for Fisheries Resources (“IFR”) is a non-profit corporation incorporated
17 in California that constitutes the conservation arm of PCFFA and shares PCFFA’s offices. IFR,
18 although legally and financially independent of PCFFA, was originally formed by PCFFA, and
19 today serves as the science, resource conservation, and fisheries habitat restoration arm of
20 PCFFA, implementing and funding PCFFA projects to recover and restore many now
21 ecologically damaged, but once productive, salmon-bearing watersheds throughout the U.S. west
22 coast, including the Klamath.

23 24. The financial and livelihood interests of PCFFA, IFR, and their members (and the
24 fishing-dependent communities where those members live) will be severely impaired if the

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1 Klamath Project operations are managed in accordance with the Challenged Orders. The
2 devastating fish kill in 2002 subsequently contributed to a massive 2006 commercial ocean
3 salmon fishery shutdown, driven by Klamath losses under weak stock management. When
4 multiple salmon stocks from different rivers mingle together at sea, the weakest (*i.e.*, least
5 numerous) of these stocks becomes the limiting factor in opening and closing the whole ocean
6 salmon fishery. In 2005 through 2007, for instance, with the lowest abundance levels in 2006,
7 by far the weakest salmon stock in the ocean was the Klamath fall-run Chinook returning as
8 adults. This weak stock year-class was so damaged by the 2002 fish kill that its progeny had to
9 be placed into a “zero harvest” mode in 2006, which then triggered the closure of all other ocean
10 salmon fisheries, however abundant, over 700 miles of coastline in order to prevent the total
11 collapse of Klamath fall-run Chinook. The near total fishery closure of 2006, and related
12 restrictions of these same fisheries in 2005 and 2007, cost west-coast ocean salmon fishing
13 communities at least \$200 million in economic impacts.

14 25. After struggling to recover from the unprecedented 2006 fish kill, ocean
15 commercial salmon fishing controlled by weak Klamath stocks declined again in recent years
16 due, in part, to *C. shasta* infection outbreaks among vulnerable juvenile fish. In 2016, allocable
17 catches of Klamath fall Chinook in ocean fisheries were again reduced significantly due to very
18 low adult spawner returns. In 2017, this ocean salmon fishery was closed once again due to
19 similar low adult returns, and in-river fishing for Klamath Chinook Salmon was prohibited, due
20 to the lowest projected salmon abundances since forecasting began in the mid-1980s. The
21 economic losses to coastal commercial fishing families were devastating, with less than 10% of
22 the average revenues for the preceding five years. These losses had ripple effects on the fish
23 processors, fishing equipment retailers, marine repair and moorage businesses, and other
24

1 businesses that depend on healthy salmon fisheries. The commercial Chinook salmon fishery in
2 the California Klamath Management Zone was closed again for the same reasons in 2020, and
3 once again this year. Adequate water flows coming into the California portions of the Klamath
4 River from UKL are essential for the protection of both fall-run Chinook fisheries, as well as for
5 ESA-listed Coho to survive in the lower Klamath River.

6 26. Both the Yurok Tribe and the commercial fishing plaintiffs will suffer irreparable
7 harm from the Challenged Orders and any similar, successor orders issued by OWRD that
8 preclude or delay flows needed to sustain salmon in the Klamath River and comply with the
9 federal ESA. The Yurok Tribe and the commercial fishing plaintiffs have been and will continue
10 to be harmed when flows in the Klamath River fall short of what is required by the federal ESA
11 and Reclamation's operations plans, which are also consistent with the Yurok Tribe's federal
12 reserved water rights to support its fishery.

13 C. State Defendant

14 27. Defendant Thomas Byler is the Director of the OWRD. He is responsible for
15 directing OWRD and administering Oregon laws concerning water resources of the State of
16 Oregon. Or. Rev. Stat. § 536.037(1)(c). He exercises general control over OWRD's
17 watermasters. ORS 540.030. He issued the Challenged Orders and is continuing to issue
18 monthly determinations on whether Reclamation is releasing water to the Klamath River without
19 a water right recognized under Oregon law. He is sued in his official capacity.

20 BACKGROUND

21 I. THE KLAMATH PROJECT LED TO THE DECLINE OF KLAMATH RIVER
22 FISHERIES

23 28. The Klamath River was once the third most productive salmon-producing river in
24 the continental United States. It originates in an arid high desert region in Oregon and flows into

1 California and through the Yurok Reservation into the Pacific Ocean.

2 A. The Klamath Project

3 29. Congress authorized construction and development of the Klamath Project in
4 1905, pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, which authorized the
5 Secretary of the Interior to operate the irrigation project under the terms and conditions of the
6 Reclamation Act of 1902, 43 U.S.C. §§ 372, *et seq.*

7 30. The Klamath Project is located in Southern Oregon and Northern California.
8 Various facilities, including dams, diversions, canals, and pumping stations, were built in the
9 Upper Klamath Basin in Oregon and California between 1906 and 1966 as part of the Klamath
10 Project, and a federal hydroelectric project, partially within the Project footprint, extends
11 downstream to Iron Gate Dam in California. Iron Gate Dam blocks all fish passage upstream.

12 31. Agricultural development around UKL in the Upper Klamath Basin, which
13 included draining portions of lakes and converting thousands of acres from wetlands to
14 agriculture, significantly reduced the amount of water available for flows in the Klamath River.
15 The Project provides irrigation water to approximately 200,000 acres of agricultural land in the
16 Upper Klamath Basin each year, as well as to four national wildlife refuges within its
17 boundaries.

18 32. Before construction of the Klamath Project, UKL was a naturally occurring lake
19 that flowed naturally into the Klamath River. A rock reef with steep rapids called Klamath Falls
20 formed the natural barrier at the foot of the lake. Each winter the lake would rise naturally as it
21 accumulated water, and that water would be released throughout the following spring and
22 summer. Construction of the Klamath Project entailed chiseling down the rock reef and creating
23 Link River Dam at the foot of the lake in 1917 to allow Reclamation to control and access the

1 water in the lake. It also allowed Reclamation to draw the lake down below levels that would
2 have occurred naturally.

3 33. The Project did not substantially increase UKL's maximum capacity. It merely
4 created the ability to lower lake levels below natural levels and changed the timing of flows from
5 UKL to the Klamath River.

6 B. The Klamath Project Led to the Decline of Klamath River Fisheries

7 34. Before the Klamath Project, the Klamath River supported robust salmon
8 populations and thriving fisheries. Several species of anadromous fish still inhabit the Klamath
9 River and its tributaries, including spring and fall-run Chinook and Coho salmon.

10 1. *The Imperiled Status of Klamath River Salmon*

11 35. Coho have on average a three-year life cycle, spending half their lives in fresh
12 water and half in salt water. After the eggs hatch in the winter, the Coho fry spend up to 18
13 months in freshwater. They typically out-migrate to the sea between mid-February and mid-
14 June. The Klamath Project has altered the natural hydrograph and dramatically reduced the
15 spring flows that supported juvenile Coho salmon rearing and the outmigration of the year-old
16 salmon to the Pacific Ocean. At about three years old, adult Coho return in September through
17 December to the same stream where they were born to spawn and die.

18 36. In 1997, NMFS listed SONCC Coho salmon as threatened under the ESA. 62
19 Fed. Reg. 24,588 (May 6, 1997). In 1940, SONCC Salmon, a population that includes Klamath
20 River Coho, were estimated to range between 150,000 and 400,000 naturally spawning fish
21 annually. By the 1970s, this Coho population had become very depressed with naturally
22 producing adults declining to approximately 10,000. The California portion of the population
23 had by then declined to six percent or less of its abundance during the 1940s. NMFS identified
24

1 agricultural development and water withdrawals for irrigation as major activities responsible for
2 the decline of SONCC Coho salmon. *Id.* at 24,592-93.

3 37. NMFS designated critical habitat for SONCC Coho salmon in 1999 and included
4 most of the Klamath River below Iron Gate Dam in northern California in the designation. 64
5 Fed. Reg. 24,049 (May 5, 1999). NMFS found that irrigation water withdrawals and dam
6 operations were “[a]ctivities that may require special management considerations” for juvenile
7 Coho. *Id.* at 24,059.

8 38. In its five-year status review completed in 2016, NMFS found that SONCC Coho
9 continue to be at high risk of extinction and noted heightened risk to Coho salmon persistence
10 since 2011 from increased water withdrawals and unprecedented drought conditions in four of
11 the prior five years that likely resulted in reduced juvenile survival and stressful rearing
12 conditions in nearly all parts of their range. Five-Year SONCC Coho Review at 47-49 (2016).

13 39. The Chinook salmon in the Klamath River basin have also declined, also due, in
14 part, to agricultural development, water withdrawals, and reduced flows in the Klamath River.

15 2. *Adverse Impacts of the Klamath Project on Klamath River Salmon*
16 *Populations*

17 40. Reclamation’s operation of the Klamath Project determines the amount, timing,
18 and rate of water flow in the Klamath River available to support salmon in California below Iron
19 Gate Dam.

20 41. Reclamation’s operation of the Klamath Project has diminished Klamath River
21 flows needed to sustain healthy salmon populations. Water withdrawals for irrigation to the
22 Klamath Project in 2002 contributed to historic low flows and the spread of a deadly fish disease
23 that caused the largest fish kill on American soil, killing as many as 78,000 returning adult
24 salmon before they could spawn.

1 42. When the Project has been operated in a manner that precludes spring flushing
2 flows, a high percentage of outmigrating juvenile salmon have been infected by *C. shasta* and
3 died. In 2014 and 2015, *C. shasta* infection rates in sampled fish reached 81% and 91%
4 respectively. In 2020, *C. shasta* infection rates in all sampled fish averaged 61%.

5 43. In 2021, the Klamath Basin has been plagued by an extreme drought. *C. shasta*
6 spore counts skyrocketed in April 2021, infection rates were high in April-early June, and in
7 many weeks, more than $\frac{3}{4}$ of the sampled fish were infected with *C. shasta*. Even though *C.*
8 *shasta* infection rates exceeded the threshold warranting a surface flushing flow under the 2018
9 operations plan to reduce spore counts and infection rates, Reclamation did not provide a
10 flushing flow. High fish mortalities were found in sampling, with over 90% mortalities in
11 critical weeks in May.

12 44. Since June 2020, Reclamation has been releasing no more than the minimum
13 flows required by the ESA for the Klamath River. These low flows have contributed to
14 devastating levels of fish disease and mortalities in juvenile salmon and have adversely affected
15 habitat for juvenile rearing and outmigration of juvenile Klamath River salmon to the ocean.

16 II. RECLAMATION'S LEGAL OBLIGATION TO PROVIDE KLAMATH RIVER 17 FLOWS TO SUSTAIN SALMON IN COMPLIANCE WITH THE FEDERAL ESA

18 A. The Endangered Species Act's Requirements

19 45. Congress enacted the ESA "to halt and reverse the trend toward species
20 extinction, whatever the cost" and to afford endangered species the highest of priorities,
21 including by giving them "priority over the 'primary missions' of federal agencies." *Tenn.*
22 *Valley Auth. v. Hill*, 437 U.S. 153, 174, 184-85 (1978). It imposes obligations on federal
23 agencies to take affirmative steps to ensure their actions will avoid jeopardizing the survival and
24 recovery of threatened and endangered species or adversely modifying their critical habitat. It

1 also prohibits anyone, including federal and state agencies, from harming or injuring individual
2 members of an endangered or threatened species.

3 *1. The Federal Duty to Avoid Jeopardy to the Survival and Recovery of*
4 *Listed Species and Adverse Modification of Critical Habitat.*

5 46. Section 7 of the ESA requires federal agencies to ensure that their actions are not
6 likely to jeopardize the survival and recovery of a listed species or adversely modify its critical
7 habitat. 16 U.S.C. § 1536(a)(2). “Action” is defined broadly to encompass “all activities or
8 programs of any kind authorized, funded, or carried out, in whole or in part, by Federal
9 agencies.” 50 C.F.R. § 402.02. By regulation, Section 7 applies to all actions in which there is
10 discretionary federal involvement or control. *Id.* § 402.03.

11 47. Section 7 establishes an interagency consultation process to assist federal agencies
12 in complying with their duty to avoid jeopardy to listed species or destruction or adverse
13 modification of critical habitat. Under this process, a federal agency proposing an action that
14 “may affect” a listed species, including SONCC Coho salmon, must prepare and provide to the
15 appropriate expert agency a description of the proposed action, its effects, and the relevant
16 scientific evidence. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

17 48. For actions that may adversely affect a listed species or critical habitat, Section 7
18 requires a formal consultation with the expert fish and wildlife agency. 50 C.F.R. § 402.14.
19 NMFS is the expert fish and wildlife agency with responsibility for administering the ESA with
20 regard to threatened and endangered marine species, including salmon. *See* 16 U.S.C. §
21 1532(15); 50 C.F.R. § 17.2. At the conclusion of a formal consultation, the expert fish and
22 wildlife agency issues a biological opinion assessing the effects of the action on the species and
23 its critical habitat, determining whether the action is likely to jeopardize the continued existence
24 of the species or adversely modify its critical habitat and, if so, offering a reasonable and prudent

1 alternative that will avoid jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A); 50
2 C.F.R. § 402.14(g)-(h).

3 49. While the action agency has an independent, substantive duty to comply with
4 Section 7, it may generally rely on a no-jeopardy biological opinion in discharging its Section 7
5 obligations as long as the biological opinion is not legally flawed and the agency addresses
6 information that would undercut the opinion’s conclusions. *Wild Fish Conservancy v. Salazar*,
7 628 F.3d 513, 532 (9th Cir. 2010); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*,
8 898 F.2d 1410, 1415-16 (1990).

9 2. *The Prohibition on Take of Listed Species and Incidental Take Statements.*

10 50. Section 9 of the ESA prohibits the “take” of endangered species by any person,
11 which includes federal and state agencies. 16 U.S.C. § 1538(a)(1). “Take” means to “harass,
12 harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” 16 U.S.C. § 1532(19). NMFS
13 has defined “harm” to include “significant habitat modification or degradation which actually
14 kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including,
15 breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

16 51. The ESA makes the take prohibition applicable to species listed as endangered,
17 like Southern Resident Killer Whales which depend on salmon prey for their food and prefer
18 Chinook salmon, including from the Klamath River. NMFS has extended the take prohibition to
19 salmon listed as threatened, including SONCC Coho salmon. 50 C.F.R. § 223.203(a); 65 Fed.
20 Reg. 42,422 (2000).

21 52. If a federal action is not likely to cause jeopardy or adverse modification of
22 critical habitat but is likely to cause an incidental take of individual members of a listed species,
23 the biological opinion must include an “incidental take statement” that specifies the amount and
24 extent of incidental take of listed species that may occur without causing jeopardy or adverse

1 modification of critical habitat. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The incidental
2 take statement provides a safe harbor, insulating from take liability activities undertaken in
3 compliance with the incidental take statement's terms and conditions. 16 U.S.C. § 1536(o)(2);
4 *see* 16 U.S.C. § 1536(b)(4)(C).

5 3. *Reclamation's ESA Consultations for Klamath Project Operations*

6 53. Reclamation owns Link River Dam and operates the Klamath Project, making
7 Klamath Project operations an action carried out by a federal agency, which is subject to Section
8 7. Reclamation has discretionary involvement and control over the operation of the Klamath
9 Project that can inure to the benefit of listed species in or affected by the Klamath River. The
10 Ninth Circuit has held that Reclamation's operation of the Klamath Project is an action subject to
11 ESA Section 7. *Patterson*, 204 F.3d at 1213. And this Court has held that Reclamation's
12 operation of the Klamath Project is an action subject to Section 7 that is likely to adversely affect
13 listed salmon and therefore must undergo formal Section 7 consultation. *PCFFA v. Bureau of*
14 *Reclamation*, 138 F. Supp. 2d 1228, 1230-31, 1244-47 (N.D. Cal. 2001).

15 54. Early ESA litigation over Reclamation's operation of the Klamath Project focused
16 on the necessity of providing flows in the Klamath River to provide juvenile salmon rearing
17 habitat. In *PCFFA*, 138 F. Supp. 2d at 1249-50, this Court issued an injunction requiring
18 Reclamation to curtail water deliveries that would cause river levels to drop below specific flows
19 needed to provide useable rearing habitat for juvenile Coho until it completed formal
20 consultation. In *PCFFA v. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005), the Ninth
21 Circuit held that a biological opinion's reasonable and prudent alternative failed to provide
22 sufficient flows for salmon because it provided only a portion of the minimum flows deemed
23 biologically necessary to avoid jeopardy. The subsequent biological opinions issued in 2013 and
24 2019 required that minimum flows be met in each month of the irrigation season, and NMFS

1 findings of no-jeopardy and incidental take statements relied on the minimum flows being met.

2 55. The 2013 and 2019 biological opinions also called for disease management flows
3 to reduce *C. shasta* infections and mortalities in outmigrating juvenile salmon, which had
4 become the primary threat to juvenile SONCC Coho salmon survival in the Klamath Basin. The
5 necessary flows failed to materialize in 2014 and 2015, which were both below-average water
6 years. *C. shasta* juvenile salmon infection rates in sampled fish skyrocketed to 81% and 91%.
7 In a related case, this Court held that Reclamation had a legal duty to reinitiate consultation
8 because *C. shasta* infection rates exceeded the biological opinion's incidental take statement
9 limit of 49%, which was equivalent to the highest incidence of reported *C. shasta* infections
10 when the biological opinion was issued. This Court issued an injunction requiring disease
11 management flows to reduce the incidence of *C. shasta* upon finding that: "Plaintiffs have
12 demonstrated that flushing flows and emergency dilution flows would reduce *C. shasta* rates
13 among Coho salmon. There is no meaningful dispute among the parties on this point." *Yurok*
14 *Tribe v. U.S. Bureau of Reclamation*, 231 F. Supp. 3d 450, 479, 483-84, 489 (N.D. Cal. 2017).

15 56. In 2018, Reclamation submitted the proposed 2018 Klamath Project operations
16 plan to NMFS for Section 7 consultation. On March 29, 2019, NMFS issued a biological
17 opinion, concluding that the 2018 Plan would not jeopardize SONCC Coho salmon survival and
18 recovery or adversely modify Coho salmon critical habitat. NMFS based its no-jeopardy
19 conclusion on the required minimum flows and the fact that the 2018 Plan would provide a
20 surface flushing flow in the winter-spring months to flush out the worms that host the *C. shasta*
21 parasites. NMFS based its no-adverse-modification conclusion on the 2018 Plan's mandatory
22 minimum flows to provide and make accessible habitat for juvenile salmon rearing and provide
23 for other salmon habitat needs.

1 57. Relying on the 2019 biological opinion, Reclamation adopted the 2018 Plan,
2 which requires minimum flows from March-September and provides for a surface flushing flow
3 in the winter-spring months to flush out the worms that host the *C. shasta* parasites. The 2018
4 Plan and 2019 biological opinion determined that the flows were also necessary to support
5 Klamath River Chinook salmon, which are prey for endangered Southern Resident Killer Whales
6 that feed at the mouth of the Klamath River.

7 58. The Yurok Tribe, PCFFA, and IFR filed this lawsuit (“*Yurok II*”) challenging the
8 2019 biological opinion and Reclamation’s failure to comply with Section 7 of the ESA, alleging
9 that the flows were insufficient to meet the needs of juvenile salmon. This Court approved a
10 stipulated stay of the litigation until September 30, 2022, which the parties entered into
11 contingent on Reclamation operating the Klamath Project under an Interim Operations Plan that
12 incorporates the 2018 Plan, plus additional augmentation flows to benefit juvenile Coho and
13 Chinook salmon in the spring months under certain conditions. *See* Stipulation to Stay Litigation
14 (March 27, 2020) and Attached Interim Operations Plan, in *Yurok Tribe v. U.S. Bureau of*
15 *Reclamation*, No. 19-4405-WHO (ECF No. 908). On September 30, 2021, this Court lifted the
16 stay, in part, to allow the federal defendants to file a crossclaim and plaintiffs to file this
17 supplemental complaint; the stay remains in effect for all other purposes. ECF No. 961.

18 B. The Klamath River Basin Compact

19 59. The States of Oregon and California entered into the Klamath River Basin
20 Compact (the “Compact”), which became effective upon its ratification by the U.S. Congress in
21 1957. Klamath River Basin Compact, Pub. L. No. 85-522, 71 Stat. 497 (1957). The Compact’s
22 purposes include facilitating and promoting the orderly, integrated, and comprehensive
23 development, use, conservation, and control of water in the Klamath River Basin for various
24

1 purposes, including “the protection and enhancement of fish, wildlife, and recreational
2 resources.” *Id.*, Article I(A).

3 60. The Compact provides that it shall not be deemed to “impair or affect any rights,
4 powers, or jurisdiction in the United States, its agencies or those acting by or under its authority,
5 in, over and to the waters of the Klamath River Basin.” *Id.*, Article XI. The Compact also
6 provides that it shall not be deemed “to impair or affect the capacity of the United States, its
7 agencies or those acting by or under its authority in any matter whatsoever, except as provided
8 by the federal legislation” enacted to implement the Compact. *Id.* The Compact further provides
9 that “[n]othing in this compact shall be deemed . . . [t]o deprive any individual Indian, tribe, band
10 or community of Indians of any rights, privileges, or immunities afforded under federal treaty,
11 agreement, or statute” or “to affect the obligations of the United States of America to the Indians,
12 tribes, bands or communities of Indians, and their reservations.” *Id.*, Article X.

13 III. THE STATE COURT LITIGATION AND ENSUING CHALLENGED ORDERS

14 61. The Challenged Orders grew out of state court litigation by Klamath Irrigation
15 District (“KID”) seeking to compel OWRD to enforce water rights recognized under Oregon law
16 and stop Reclamation’s releases of water to sustain Klamath River salmon as required by federal
17 law.

18 A. The 2018 KID State Court Litigation and OWRD Investigation

19 62. In April 2018, KID asked OWRD to take exclusive charge of UKL to reduce
20 discharges from Link River Dam because of a dispute between it and Reclamation over
21 entitlement to the water from UKL. KID alleged that water from UKL must be distributed in
22 accordance with OWRD’s administrative determination in the Klamath Basin Adjudication
23 (“KBA”), which is embodied in the Amended and Corrected Findings of Fact and Order of
24 Determination (“ACFFOD”). The ACFFOD is currently under judicial review in Klamath

1 County Circuit Court, which has exclusive jurisdiction to review it. *In the Waters of the Klamath*
2 *River Basin*, WA 1300001.

3 63. In the KBA, the United States asserted water rights in UKL for Reclamation to
4 store and use water. The United States also asserted water rights on behalf of the Klamath
5 Tribes, located in Klamath County, Oregon, for certain lake levels in UKL and streamflows in
6 several basin tributaries and in the Klamath River below UKL to protect the Klamath Tribes'
7 federal reserved rights in Oregon, including federal reserved water rights for Tribal fisheries.

8 64. The Yurok Tribe did not assert claims in the KBA, and the United States did not
9 assert claims on its behalf. It has been held that declining to participate and assert claims in the
10 KBA had no effect on the existence or nature of the Yurok Tribe's federal reserved water rights
11 in California; indeed, OWRD lacked authority to extinguish or abrogate these federal reserved
12 water rights. *Baley*, 942 F.3d at 1341; *Baley v. United States*, 134 Fed. Cl. 619, 679 (Ct. Cl.
13 2017).

14 65. In 2018, KID filed a petition in a different Circuit Court in Marion County
15 seeking to compel OWRD to take exclusive charge of UKL for the purpose of distributing the
16 water in accordance with the ACFFOD. *KID v. OWRD*, No. 18CV18112 (Marion Cnty. Cir. Ct.
17 2018). KID invoked ORS 540.210, which provides that, whenever water users disagree as to the
18 distribution of water from a reservoir, the watermaster must take exclusive charge of a reservoir
19 for the purpose of distributing the water in accordance with the relevant rights of the various
20 users.

21 66. In April 2018, the Yurok Tribe and the commercial fishing plaintiffs sent a letter
22 to OWRD explaining that OWRD's authority is circumscribed by Reclamation's federal legal
23 obligations: (1) to comply with the federal ESA, which requires that Reclamation provide flows
24

1 in the Klamath River to sustain salmon; and (2) to protect the Yurok Tribe's federal reserved
2 water rights to support its fishery, which have been held to be senior to water rights for irrigation
3 from the Klamath Project. The letter explained that these federal legal obligations take
4 precedence under the Supremacy Clause and asked that OWRD ensure that its determinations
5 and orders would avoid infringing on these superseding federal rights and obligations.

6 67. The Marion County Circuit Court issued an order directing the OWRD
7 Watermaster to take charge of UKL for the purpose of distributing that water. General J. (Aug.
8 15, 2018). OWRD initiated an investigation in August 2018. OWRD ended its investigation at
9 the end of the 2018 irrigation season when the dispute between KID and Reclamation ceased and
10 the 2018 lawsuit was dismissed.

11 B. 2020 KID State Court Lawsuit To Compel OWRD To Take Charge of UKL

12 68. In March 2020, KID again asked the OWRD Watermaster to take charge of UKL
13 because of a dispute between KID and Reclamation over the release of water for Klamath River
14 flows. The OWRD Watermaster took charge of UKL and initiated an investigation to determine
15 relative rights to the water from UKL before KID filed its petition for a writ of mandamus.

16 69. In April 2020, KID filed a state court mandamus action seeking an order directing
17 the OWRD Watermaster to take change of UKL for the purpose of distributing the water in
18 accordance with the relative priority to water established under Oregon law.

19 70. In April 2020, the Yurok Tribe and the commercial fishing plaintiffs submitted
20 another letter to OWRD reiterating the need to accommodate and avoid interfering with
21 Reclamation's federal legal obligations to comply with the ESA and to protect the Yurok Tribe's
22 senior federal reserved water rights to support its fishery, which take precedence over conflicting
23 state law under the Supremacy Clause. In seeking dismissal of KID's mandamus action, OWRD
24 referenced the letter from the Yurok Tribe and commercial fishing groups and Reclamation's

1 federal legal obligations. However, the Marion County Circuit Court subsequently allowed the
2 writ.

3 71. OWRD thereafter issued an interim order to Reclamation concerning release of
4 “stored water” without state law rights, which recognized that Reclamation might be releasing
5 water for a purpose other than to satisfy state law and directed Reclamation to identify the legal
6 authority for any such releases. The order went on to state:

7 Nothing in this order relieves any person, state, or federal agency from any and all
8 obligations to comply with federal law and related federal agency regulations or federal
court orders as may be relevant to release of water from UKL.

9 OWRD Interim Order to Reclamation Concerning Release of Stored Water, ¶ 3 (April 23, 2020).

10 In response to this order and a subsequent request for information, Reclamation identified the
11 federal ESA, reserved Tribal water rights, and trust obligations to Tribes as sources of legal
12 authority for such releases. Initial and First Suppl. Resps. to Order (April 23 & 28, 2020); Initial
13 Resp. to Req. for Info. (May 5, 2020).

14 C. 2020 KID State Court Lawsuit Leading To The Challenged Orders

15 72. In May 2020, KID filed a new lawsuit presenting two claims: (1) an unreasonable
16 delay claim alleging the OWRD Watermaster had delayed or refused to take charge of UKL and
17 distribute water from UKL in accordance with the ACFFOD; and (2) a claim seeking an
18 injunction directing the OWRD Watermaster to stop Reclamation from diverting water from
19 UKL for Klamath River flows to sustain salmon. *KID v. OWRD*, No. 20CV17922 (Marion Cnty.
20 Cir. Ct. Or. 2020). KID sought summary judgment on the injunction claim set out in Count 2.

21 73. The Yurok Tribe and commercial fishing plaintiffs sought leave to file an *amicus*
22 brief in support of OWRD and lodged an *amicus* brief that described the extensive precedent
23 requiring Reclamation to comply with the ESA and protect the Yurok Tribe’s senior federal
24 reserved water rights to support its fishery. KID opposed the motion for leave to file the *amicus*

1 brief, and the Marion County Circuit Court denied leave because the Oregon Rules of Civil
2 Procedure did not expressly provide for *amicus* briefs.

3 74. OWRD opposed KID's motion for summary judgment and filed a cross-motion
4 on numerous grounds, including that KID failed to join indispensable parties. It explained that
5 Reclamation is an indispensable party because the requested relief would impede its ability to
6 meet its federal legal obligations that require it to provide flows to the Klamath River to support
7 salmon, and the Yurok Tribe is an indispensable party because the requested relief would impede
8 its ability to protect its federal reserved water rights to support its fishery. Because Reclamation
9 and the Tribes could not be joined due to sovereign immunity, OWRD argued that KID's claims
10 had to be dismissed. The Marion County Circuit Court never addressed this argument.

11 75. On July 30, 2020, the Marion County Circuit Court issued an opinion letter
12 indicating it would grant KID summary judgment on its injunction claim. On October 2, 2020,
13 the Marion County Circuit Court issued an amended opinion, holding that OWRD must prohibit
14 Reclamation from using "stored water" for flows in the Klamath River unless OWRD determines
15 that Reclamation has an established right, permit, or license under Oregon law to do so. The
16 court stated that OWRD must carry into effect the ACFFOD, which determines the respective
17 and relative priority for dividing and distributing water from UKL. On October 13, 2020, the
18 court ordered the OWRD Watermaster "to immediately stop the distribution, use or release of
19 Stored Water from the UKL, without first determining that the distribution, use and/or release is
20 for a permitted purpose by users with existing water rights of record or determined claims to use
21 the Stored Water in the UKL." The order specified that "existing water rights of record" has the
22 meaning provided in ORS 539.170, and "determined claims" has the meaning provided in a
23 statute that refers to the ACFFOD and is reproduced as a note to ORS 539.170. The court did
24

1 not enter a limited judgment because of the pendency of Count 1 – KID’s unreasonable delay
2 claim, and OWRD was unable to appeal the order at that time.

3 76. In September 2020, PCFFA, IFR, and WaterWatch of Oregon moved to intervene
4 to protect their longstanding interests in adequate Klamath River flows to support healthy salmon
5 populations, but the Marion County Circuit Court denied the motion. That decision is on appeal.
6 CA A175510. In October 2020, the Yurok Tribe moved to intervene for the limited purpose of
7 moving to dismiss for failure to join indispensable parties who cannot be joined due to sovereign
8 immunity, but the Marion County Circuit Judge denied the motion. OWRD moved for summary
9 judgment on KID’s first claim for relief. The Marion County Circuit Court granted OWRD
10 summary judgment and entered a general judgment. In June 2021, OWRD appealed. CA
11 A176270.

12 77. On March 29, 2021, KID filed an emergency motion for preliminary injunction
13 against Reclamation in the KBA proceeding pending in Klamath County Circuit Court. KID’s
14 motion sought an order enjoining Reclamation from releasing “stored water” to provide flows in
15 the Klamath River to sustain salmon and prohibiting Reclamation from releasing “stored water”
16 from UKL for purposes other than those set forth in the ACFFOD. Reclamation has removed
17 that motion to federal court, and KID has filed a motion to remand the case to the Klamath
18 County Circuit Court, which remains pending. No. 1:21-cv-00504-AA (D. Or.).

19 D. The Challenged Orders

20 78. On January 22, 2021, OWRD issued its first determination on the status of
21 Reclamation’s releases from UKL. Based solely on Oregon law, OWRD found that the water
22 passing through Link River Dam at that time was not “legally stored water,” but natural flow,
23 and OWRD would therefore not order Reclamation to stop releasing this water. The
24 determination stated that OWRD would make monthly determinations and would issue an order

1 to stop releases if it determined Reclamation was releasing “stored water” through Link River
2 Dam. OWRD made a similar determination at the end of February 2021.

3 79. Beginning in March, OWRD’s determinations focused on two claims in the
4 ACFFOD, called KA 294 and KA 1000, which provisionally authorize Reclamation to “store”
5 up to a certain volume of water in UKL and to divert both natural flow and “stored water” from
6 UKL for the beneficial use of Project water users. OWRD continued to base its determinations
7 solely on Oregon law. It found that water passing through Link River Dam as of March 30,
8 2021, was natural flow as opposed to “stored water.” It made similar findings in its April, May,
9 June, and August 2021 determinations.

10 80. On April 6, 2021, Director Byler issued the OWRD order directing Reclamation
11 “to immediately preclude or stop the distribution, use or release of stored water from the UKL, in
12 excess of amounts that may be put to beneficial use under KA 1000 downstream of the Link
13 River Dam.” *Order Regarding Release of Water Stored Under Determined Claim KA 294* (April
14 6, 2021). The OWRD Order’s factual determinations are based solely on Oregon law. The
15 OWRD Order states that OWRD believes that Reclamation will, at some near future date, release
16 “stored water” to comply with its ESA and federal tribal trust obligations. After ordering
17 Reclamation to immediately preclude or stop releases of “stored water” from UKL for Klamath
18 River flows, the order states:

19 Nothing in this order alters, relieves or releases any person, state, or federal agency from
20 any and all rights, duties or obligations arising from other sources of law including
21 without limitation other state laws or rules, federal laws and related federal agency
22 regulations, federal or state court orders, or contracts.

23 81. The OWRD Order references a March 12, 2021, letter from Reclamation directing
24 Klamath Project water users to delay diversions of water from UKL and the Klamath River
25 because drought conditions have made water currently unavailable for irrigation purposes.

1 Reclamation explained that drought conditions likely make it impossible to operate the Klamath
2 Project in accordance with the 2019 biological opinion that requires Klamath River flows for
3 salmon and a 2020 Fish and Wildlife Service biological opinion that requires certain UKL levels
4 for endangered fish in UKL. Reclamation subsequently issued a temporary operations plan for
5 2021, which allocated only a small amount of water for irrigation due to the drought and the
6 needs of listed species, and this amount was subsequently reduced due to illegal water diversions
7 by one of KWUA’s members, the Klamath Drainage District.

8 82. On June 4, 2021, Reclamation sought reconsideration of the April 2021 order,
9 arguing that the order exceeds OWRD’s jurisdiction and is preempted under the Supremacy
10 Clause by Reclamation’s obligations to comply with the federal ESA and downstream Tribes’
11 federal reserved water rights to support their fisheries.

12 83. On July 2, 2021, OWRD issued a notice of violation to Reclamation upon finding
13 that Reclamation was in violation of the OWRD Order. OWRD determined that the water
14 passing Link River Dam is, in part, “stored water” in excess of the needs of beneficial use under
15 KA 1000 and determined that Reclamation willfully released “stored water” in violation of the
16 OWRD Order. OWRD ordered Reclamation to correct the violation within one day and
17 indicated it may pursue other agency action or lawful remedies if the violation is not corrected.
18 The notice of violation remains in effect for three years. On July 28, 2021, OWRD issued
19 another notice of violation upon concluding that Reclamation released “stored water” on June 29,
20 2021, and July 2, 2021.

21 84. On July 3, 2021, Reclamation provided an initial response to the July 2, 2021
22 notice of violation, reiterating that the July 2, 2021 notice of violation, like the OWRD Order,
23 exceeds OWRD’s jurisdiction and is preempted by the Supremacy Clause.

1 state regulation must be affirmative, clear, and unambiguous and cannot be implied.

2 89. No federal statute provides affirmative, clear, and unambiguous authority for
3 OWRD to issue the Challenged Orders and therefore, the Challenged Orders are preempted by
4 federal law.

5 90. Congress has the power to regulate federal property, including water. U.S. Const.
6 art. IV, cl 2. Congress authorized the Secretary of the Interior to operate the Klamath Project
7 under the Reclamation Act and other applicable federal laws. Act of February 9, 1905, ch. 567,
8 33 Stat. 714.

9 91. Reclamation operates the Klamath Project not only for irrigation, but also for
10 hydropower and for protection of fish and wildlife. *E.g., Baley v. United States*, 134 Ct. Cl. 619
11 (2017), *aff'd*, 942 F.3d 1312 (Fed. Cir. 2019) (*quoting Klamath Irrigation Dist. v. United States*,
12 635 F.3d 505, 508 (Fed. Cir. 2011)); *PCFFA*, 138 F. Supp. 2d at 1230-31 (reciting various
13 purposes of Reclamation’s operation of the Klamath Project, including fish and wildlife);
14 *Kandra v. United States*, 145 F. Supp. 2d 1192, 1207 (D. Or. 2001) (rejecting as without merit
15 the argument that the Klamath Project’s purpose is irrigation and operating the Project to benefit
16 fish to the detriment of irrigation is inconsistent with that purpose).

17 92. Section 10 of the Reclamation Act authorizes the Secretary, acting through
18 Reclamation, “to perform any and all acts and to make such rules and regulations as may be
19 necessary and proper for the purpose of carrying out the provisions of this Act into full force and
20 effect.” 43 U.S.C. § 373. This authority includes Reclamation’s development of operations plan
21 for operating the Klamath Project consistent with the Reclamation Act and other applicable
22 federal law.

1 93. Section 8 is a limited exception to the prohibition on state regulation of federal
2 reclamation projects that makes some state water laws applicable to those aspects of federal
3 reclamation projects that fall clearly and unambiguously within its terms. Section 8 provides:

4 Nothing in this Act shall be construed as affecting or intended to affect or to in any way
5 interfere with the laws of any State or Territory relating to the control, appropriation, use,
6 or distribution of water used in irrigation, or any vested right acquired thereunder, and the
7 Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in
8 conformity with such laws, and nothing herein shall in any way affect any right of any
9 State or of the Federal Government or of any landowner, appropriator, or user of water in,
10 to, or from any interstate stream or the waters thereof.

11 43 U.S.C. § 383.

12 94. Reclamation acted in accordance with Section 8 in 1905, when it appropriated
13 water then available in various Upper Klamath Basin waterbodies for the Klamath Project under
14 Oregon water law. The exercise of those water rights, however, is subject to the mandates of
15 federal law under Section 8's express limitations on the applicability of state water law to
16 reclamation projects, like the Klamath Project.

17 95. By its plain terms, Section 8 makes state water law applicable only with respect to
18 water appropriated for, distributed for, or used in irrigation. It does not require Reclamation to
19 act in conformity with state water law when distributing water for other purposes or in carrying
20 out the requirements of other federal laws, like the ESA. The Supreme Court has held that
21 Section 8's direction to act in conformity with state water law does not apply when it would be
22 "inconsistent with other congressional directives to the Secretary." *California v. United States*,
23 438 U.S. 645, 668 n.21 (1978). The ESA is such a congressional directive.

24 96. Further, Section 8 expressly provides that "nothing herein shall in any way affect
25 any right" including of any state or the federal government in any interstate stream or waters,
26 like the Klamath River system that originates in Oregon and flows for hundreds of miles in

1 California downstream through the Yurok Reservation before reaching the Pacific Ocean.
2 Therefore, Section 8 cannot be applied to affect in any way the rights of California or federal
3 rights, including the Yurok Tribe’s federal reserved water rights, that require flows in the
4 Klamath River in California to sustain salmon.

5 97. Nothing in the Reclamation Act or any other federal statute provides an
6 affirmative, clear, and unambiguous authorization for OWRD to apply Oregon water law to
7 preclude Reclamation’s release of water from the Klamath Project to provide flows in the
8 Klamath River required to comply with the ESA. Under the Supremacy Clause, OWRD lacks
9 authority to issue the Challenged Orders or any similar, successor orders impinging upon
10 Reclamation’s ability to release flows to the Klamath River to comply with the ESA.

11 B. The Challenged Orders are Preempted by Federal Law, Specifically the
12 Endangered Species Act.

13 98. The Challenged Orders are also preempted by the federal ESA, rendering them
14 invalid under the Supremacy Clause. Under the Supremacy Clause, federal statutes, regulations,
15 orders and plans issued pursuant to federal legislation, and the policies and objectives contained
16 within federal legislation, preempt state laws, policies, and objectives that are in conflict with or
17 that stand as an obstacle to accomplishment and execution of the federal purposes and objectives.

18 99. Congress enacted the ESA to halt and reverse the trend toward extinction
19 whatever the cost. *Tenn. Valley Auth. v. Hill*, 437 U.S. at 174, 184-85. Section 7 of the ESA
20 requires federal agencies to ensure, in consultation with the expert fish and wildlife agency, that
21 their actions are not likely to jeopardize the survival and recovery of a listed species or adversely
22 modify its critical habitat. 16 U.S.C. § 1536(a)(2). “Action” is defined broadly to encompass
23 “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by
24 Federal agencies.” 50 C.F.R. § 402.02.

1 100. Because Reclamation owns the Klamath Project and has the statutory authority to
2 operate the Project, Reclamation’s operation of the Klamath Project is an action within the
3 meaning of Section 7. It is the law of this Circuit that Reclamation’s operation of the Klamath
4 Project, including releases of water from UKL to provide flows for salmon in the Klamath River,
5 is subject to Section 7. *Patterson*, 204 F.3d at 1213; *see also Kandra*, 145 F. Supp. 2d at 1207
6 (rejecting “novel” argument that “no provision of the ESA compels Reclamation to take action to
7 release previously stored water to augment the flow of the Klamath River” and the contention
8 that irrigation deliveries take precedence over the ESA).

9 101. By regulation, Section 7 applies to all actions in which there is *some* discretionary
10 federal involvement or control. 50 C.F.R. § 402.03. This regulation makes Section 7
11 inapplicable only where another statute requires that the agency take specific, nondiscretionary
12 action that strips the agency of any discretion to act in a manner beneficial to the listed species
13 and thereby precludes its compliance with Section 7. *See Nat’l Ass’n of Home Builders v.*
14 *Defenders of Wildlife*, 551 U.S. 644, 669 (2007); *Natural Res. Def. Council v. Jewell*, 749 F.3d
15 776, 779-80, 784-85 (9th Cir. 2014) (en banc).

16 102. No federal statute strips Reclamation of discretion to operate the Klamath Project
17 in a manner beneficial to salmon in the Klamath River. The Ninth Circuit has held that
18 Reclamation has some measure of control over operation of Link River Dam, requiring it to
19 comply with Section 7 of the ESA. *Patterson*, 204 F.3d at 1213. Indeed, the Reclamation Act
20 contains a broad mandate to perform any and all acts necessary and proper for the operation of
21 the Klamath Project to meet its various purposes. 43 U.S.C. § 373.

22 103. Section 8’s direction to Reclamation to act in conformity with state water law is
23 limited to water appropriated, distributed, or used for irrigation as part of the Klamath Project. It
24

1 is inapplicable to the distribution or use of water for purposes other than irrigation, like its
2 actions taken to comply with other federal statutes, like the ESA.

3 104. Reclamation appropriated all waters of the Klamath Basin in Oregon that were
4 available for appropriation in 1905 for the Klamath Project. The Yurok Tribe's federal reserved
5 water rights to support its fishery have been held to be senior to the Klamath Project. *Baley*, 942
6 F.3d at 1336-40. Water for the Yurok Tribe's federal reserved water rights to support its fishery
7 was therefore unavailable for appropriation in 1905, *id.*, and is outside Section 8's direction to
8 Reclamation to act in conformity with state water law.

9 105. Section 8 also expressly provides that it does not in any way affect any right of
10 any state or the federal government in interstate waters, like the Klamath River system. Section
11 8 therefore does not remove Reclamation's discretion and authority to operate the Klamath
12 Project to provide flows to the Klamath River consistent with rights to water in California,
13 including the Yurok Tribe's federal reserved water rights to support its fishery.

14 106. No federal statute eliminates Reclamation's discretion to operate the Klamath
15 Project in a manner that inures to the benefit of salmon in the Klamath River that are listed under
16 the ESA or that are prey for a listed species.

17 107. Nor do Reclamation's contracts with irrigation districts and water users remove
18 its discretion to operate the Klamath Project to comply with the ESA. It is well-settled that
19 federal contracts can be modified by subsequent legislation unless Congress's power to exercise
20 such sovereign authority has been surrendered in unmistakable terms. *O'Neill v. United States*,
21 50 F.3d 677, 686 (9th Cir. 1995); *see also Patterson*, 204 F.3d at 1213 (ESA alters and applies to
22 Reclamation contract with PacifiCorp regarding operation of Link River Dam). The Klamath
23 Project contracts do not surrender Congress's sovereign power in unmistakable terms. The vast
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1 majority of these contracts do not require delivery of a specific quantity of water, and they do
2 require compliance with all Interior regulations, now in force or hereafter promulgated. In
3 addition, most of the contracts: (1) expressly allow Reclamation to apportion water among
4 Project contractors in times of shortage, confirming its discretion to do so; and (2) absolve
5 Reclamation of liability for shortages resulting from drought and other causes. It is the law of
6 this Circuit that a contractual liability limitation applicable to shortages resulting from other
7 causes “broadly and unambiguously contemplates the effects of subsequent Congressional
8 mandates,” like the ESA, making water deliveries under federal contracts with such a clause
9 subject to the ESA. *O’Neill*, 50 F.3d at 682-84, 686.

10 108. Section 7 requires that Reclamation ensure, in consultation with NMFS, that its
11 operation of the Klamath Project will not jeopardize the survival and recovery of threatened
12 SONCC Coho salmon, adversely modify SONCC Coho salmon critical habitat, or jeopardize the
13 survival and recovery of endangered Southern Resident Killer Whales by diminishing their
14 Chinook salmon prey.

15 109. Reclamation has engaged in Section 7 consultations with NMFS to develop
16 Klamath Project operations plans to avoid: (1) jeopardizing Coho salmon survival and recovery;
17 (2) adversely modifying Coho salmon critical habitat in the Klamath River; and (3) diminishing
18 Chinook salmon populations and causing jeopardy to endangered Southern Resident Killer
19 Whales, which prey on Chinook salmon at the mouth of the Klamath River. Through Section 7
20 consultation, Reclamation developed the 2018 Klamath Project operations plan. The 2019
21 biological opinion and 2018 operations plan require that Reclamation provide various Klamath
22 River flows to sustain salmon in order to comply with the ESA, including minimum flows to
23 provide accessible rearing habitat for young salmon and surface flushing flows and other disease
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1 management flows to prevent or reduce *C. shasta* disease outbreaks and mortalities in juvenile
2 salmon.

3 110. Under Section 9 of the ESA, Reclamation and others acting pursuant to its
4 operations plans are prohibited from taking individual SONCC Coho salmon, unless their actions
5 are in compliance with an operative biological opinion and its incidental take statement. Along
6 with the 2019 biological opinion, NMFS issued an incidental take statement that exempts
7 Reclamation and water users from Section 9 take liability if they act in accordance with the
8 statement's terms and conditions that require Reclamation to meet the designated minimum
9 flows, the allocation of water for Klamath River flows, and disease management flows.

10 111. Reclamation is operating the Klamath Project in accordance with the 2019
11 biological opinion and incidental take statement flows to comply with its obligations under the
12 ESA and avoid irreparable harm to listed Coho salmon and Chinook salmon that are prey for
13 endangered Southern Resident Killer Whales.

14 112. The Challenged Orders would, if followed, prohibit Reclamation from making
15 water from UKL available to provide the Klamath River flows that are required to comply with
16 the federal ESA. The Challenged Orders conflict with the ESA and the 2019 biological opinion
17 and 2018 Klamath Project operations plan. The Challenged Orders impede fulfillment of the
18 ESA's objectives and policies. Accordingly, the Challenged Orders and any similar, successor
19 orders exceed OWRD's authority, are preempted by the federal ESA, and violate the Supremacy
20 Clause of the U.S. Const. art. VI, cl. 2.

1 SECOND ALTERNATIVE CLAIM FOR RELIEF

2 THE CHALLENGED ORDERS EXCEED OWRD'S AUTHORITY AND ARE PREEMPTED
3 UNDER THE SUPREMACY AND INDIAN COMMERCE CLAUSES BECAUSE THEY
4 IMPINGE UPON RECLAMATION'S AUTHORITY TO OPERATE THE KLAMATH
PROJECT CONSISTENT WITH THE YUOK TRIBE'S FEDERAL RESERVED WATER
RIGHTS TO SUPPORT ITS FISHERY.

5 113. Plaintiffs plead this second claim for relief as an alternative to the first claim for
6 relief if the Court fails to grant the relief requested based on the first claim for relief. Plaintiffs
7 include this alternative claim for relief because the Challenged Orders recognize that
8 Reclamation operates the Klamath Project consistent with the Yurok Tribe's federal reserved
9 water rights to support its fishery, yet the Challenged Orders would, if followed, prevent
10 Reclamation from doing so. There is a risk that some parties may present arguments that go to
11 the quantification, scope, or other aspects of the Tribe's federal reserved water rights, which can
12 only be fairly decided in an adjudication based on a full evidentiary record and are outside the
13 Tribe's waiver of sovereign immunity in this case. To avoid prejudging the outcome of a future
14 adjudication of the Tribe's federal reserved water right, plaintiffs plead this claim for relief in the
15 alternative and respectfully ask the Court to refrain from deciding it unless it becomes necessary
16 to do so to resolve this case.

17 114. Plaintiffs reallege each and every allegation set forth in this complaint.

18 115. The Supremacy Clause provides: "This Constitution, and the Laws of the United
19 States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the
20 Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State
21 to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under the Supremacy Clause, the
22 states have no power to retard, impede, burden, or in any manner control the federal
23 government's execution of the powers vested in it by the Constitution and federal laws.

1 116. In addition, it is well-settled that the Supremacy Clause shields a federal
2 installation from direct state regulation unless Congress has provided “clear and unambiguous”
3 authority for the state regulation. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988). Such
4 authority for state regulation must be affirmative, clear, and unambiguous and cannot be implied.

5 117. The Indian Commerce Clause, U.S. Const. art. I, § 8, cl.3, provides Congress
6 plenary power to legislate in the field of Indian affairs. Pursuant to this power, Congress has
7 given the President and the Department of the Interior authority to manage Indian affairs, 25
8 U.S.C. §§ 2, 9, which includes the authority to manage and conserve Tribal resources, including
9 fisheries. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443
10 U.S. 658, 691 (1979) (“*Fishing Vessel*”); *United States v. Eberhardt*, 789 F.2d 1354, 1360-61
11 (9th Cir. 1986). Federal actions undertaken under the Indian Commerce Clause override and
12 preempt conflicting state laws. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142
13 (1980); *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1152 (9th Cir. 2020).

14 118. No federal statute provides affirmative, clear, and unambiguous authority for
15 OWRD to issue the Challenged Orders or similar, successor orders that impinge upon
16 Reclamation’s authority to provide flows consistent with the Yurok Tribe’s federal reserved
17 water rights to support its fishery, which have been held to be senior to state water rights for the
18 Klamath Project.

19 119. The Yurok Tribe is a fishing Tribe that has lived and fished in the Klamath River
20 in what is now California since time immemorial. The 1855 Executive Order that created the
21 Yurok Reservation vested the Yurok Tribe’s federally reserved fishing and water rights.
22 *Parravano v. Babbitt*, 70 F.3d 539, 541; *Baley*, 942 F.3d at 1337, 1340-41. A formal Solicitor of
23 the Interior opinion has described on the Department of the Interior’s obligations to affirmatively
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1 protect the Tribe’s fishing rights. *See, e.g.*, M-36979, Memorandum from Solicitor to Secretary,
2 *Fishing Rights of the Yurok and Hoopa Valley Tribes* (Oct. 4, 1993).

3 120. The Yurok Tribe’s fishing rights are integral to protecting the Yurok way of life.
4 The Klamath River and its fishery are “not much less necessary to the existence of the [Yurok]
5 than the atmosphere they breathe[.]” *Blake v. Arnett*, 663 F.2d 906, 909 (quoting *Winans*, 198
6 U.S. 371, 381). Yurok people fish for Coho and Chinook salmon and other fish species to
7 provide for subsistence, ceremonial, and commercial purposes. *Mattz v. Arnett*, 412 U.S. 481,
8 465-86 (1973); *Eberhardt*, 789 F.2d at 1359.

9 121. The Yurok Tribe has federal reserved water rights that include sufficient water to
10 support its fishery, which is the only part of the water rights at issue in this case. The Yurok
11 Tribe’s federal reserved water rights to support its fishery have been held to be senior to any
12 water rights recognized under Oregon law for the Klamath Project. *Baley*, 942 F.3d at 1336-40.

13 122. The Yurok Tribe’s fishery supported by its federal reserved water rights is located
14 in California. It has long been established that an adjudication of water rights in one state cannot
15 cause prejudice to water users in a downstream state or confer rights in excess of that state’s
16 equitable share in an interstate stream. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,
17 304 U.S. 92, 102-03 (1938). As the Supreme Court explained in *United States v. District Court*
18 *in and for Eagle County, Colorado*, 401 U.S. 520, 523 (1971): “No suit by any State could
19 possibly encompass all of the water rights in the entire Colorado River which runs through or
20 touches many States. The ‘river system’ must be read as embracing one within the particular
21 State’s jurisdiction” in water rights adjudications. *See also M’Culloch v. Maryland*, 17 U.S. 316,
22 429-30 (1819) (a state’s authority is limited to its people and territory).

1 123. The Yurok Tribe did not waive its rights by not asserting them in the State of
2 Oregon’s Klamath Basin Adjudication and OWRD lacks authority to extinguish or abrogate the
3 Tribe’s federal reserved water rights. *Baley*, 942 F.3d at 1341.

4 124. The Yurok Tribe’s federal reserved water rights to support its fishery are federal
5 rights that preempt state laws that conflict with or interfere with such rights under the Supremacy
6 Clause. *Baley*, 942 F.3d at 1336-40; *see Winans*, 198 U.S. at 378, 381-82 (state cannot impinge
7 on Treaty fishing rights); *accord Fishing Vessel*, 443 U.S. at 680-81(same); *Colville*
8 *Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981) (state cannot authorize
9 actions that interfere with federal reserved rights to instream flows).

10 125. Federal courts have held on numerous occasions that Reclamation must operate
11 the Klamath Project consistent with Tribal federal reserved water rights to support fisheries in
12 the Klamath Basin. *See Patterson*, 204 F.3d at 1214 (“Because Reclamation maintains control of
13 the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes’
14 rights, rights that take precedence over any alleged rights of the Irrigators. Accordingly, we hold
15 that the district court did not err in concluding that Reclamation has the authority to direct
16 operation of the Dam to comply with Tribal water requirements.”); *see also Kandra*, 145 F.
17 Supp. 2d at 1204, 1207 (Reclamation has trust obligation to operate Klamath Project consistent
18 with Klamath Basin Tribes’ senior federal reserved water rights).

19 126. Most recently, the Federal Circuit Court of Appeals rejected the Klamath
20 irrigators’ Fifth Amendment takings claim due to ESA compliance in 2001 because the water
21 needed to comply with the ESA also supported senior federal reserved water rights held by the
22 Yurok Tribe and other Tribes, explaining that “[a]t the bare minimum, the Tribes’ rights entitle
23 them to the government's compliance with the ESA in order to avoid placing the existence of
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1 their important tribal resources in jeopardy. We therefore reject appellants' argument that the
2 Court of Federal Claims erred when it held that the Tribes had rights to an amount of water that
3 was at least equal to what was needed to satisfy the Bureau of Reclamation's ESA obligations.”
4 *Baley*, 942 F.3d at 1337. The Federal Circuit further held that the Yurok Tribe's senior federal
5 reserved water rights to support its fishery do not need to be adjudicated or quantified for
6 Reclamation to have authority to operate the Klamath Project consistent with those rights. *Id.* at
7 1339-40.

8 127. Reclamation has attempted to act consistent with the Yurok Tribe's federally
9 reserved water rights to support its fishery through its compliance with the ESA. Reclamation
10 has, in consultation with NMFS, developed Klamath Project operations plans to avoid
11 jeopardizing Coho salmon survival and recovery, adversely modifying Coho salmon critical
12 habitat in the Klamath River, and jeopardizing endangered Southern Resident Killer Whales by
13 diminishing their salmon prey. Reclamation is currently operating the Klamath Project under the
14 2018 Klamath Project operations plan, as modified by its Interim Operations Plan, which require
15 various Klamath River flows to sustain salmon, including minimum flows to provide functioning
16 salmon habitat and disease management pulse flows.

17 128. By limiting Reclamation's ability to provide flows to comply with the ESA's
18 standards, the Challenged Orders impinge upon Reclamation's ability to act consistent with the
19 Yurok Tribe's federally reserved water rights to support its fishery. The Challenged Orders and
20 similar, successor orders are preempted by federal law and violate the Supremacy Clause of the
21 U.S. Constitution, art. VI, cl. 2 and the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

22 PRAYER FOR RELIEF

23 WHEREFORE, plaintiffs respectfully request that this Court:

24 A. Declare that the Challenged Orders and similar, successor orders are invalid under

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1 the Supremacy Clause because:

2 (1) OWRD lacks authority to impinge upon Reclamation's release of water to
3 provide flows in the Klamath River in California to comply with its obligations under the
4 federal ESA; and

5 (2) the Challenged Orders impede or interfere with Reclamation's release of flows
6 to sustain salmon to comply with its obligations under the federal ESA, which preempts
7 OWRD's authority.

8 B. In the alternative, if the Court fails to grant the above requested declaratory relief,
9 declare that:

10 (1) the Challenged Orders and similar, successor orders are invalid under the
11 Supremacy Clause because OWRD lacks authority to impinge upon Reclamation's
12 operation of the Project consistent with the Yurok Tribe's federal reserved water rights to
13 support its fishery, in part by providing flows to the Klamath River in California to
14 comply with the ESA's standards; and

15 (2) the Challenged Orders are preempted under the Supremacy Clause and the
16 Indian Commerce Clause because, prior to quantification of the Yurok Tribe's federal
17 reserved water rights to support its fishery, which have been held to be senior to Klamath
18 Project irrigation water rights, Reclamation has authority to operate the Project,
19 consistent with those rights, by releasing from UKL at least as much water to the
20 Klamath River as is necessary to comply with the ESA's standards.

21 C. Enjoin Director Byler from issuing or enforcing the Challenged Orders or similar,
22 successor orders that, based solely on Oregon law, impinge upon Reclamation's release of flows
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1 to sustain salmon in the Klamath River and conform its operation of the Klamath Project to its
2 federal legal obligations.

3 D. Grant such further and additional relief as the Court may deem just and proper.
4

5 DATED this 12th day of October, 2021.

6 Respectfully submitted,

7 s/ Patti A. Goldman

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