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16 UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
17 SAN FRANCISCO DIVISION

18 YUROK TRIBE, PACIFIC COAST  
FEDERATION OF FISHERMEN’S  
19 ASSOCIATIONS, and INSTITUTE FOR  
FISHERIES RESOURCES,

20 Plaintiffs,

21 v.

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

23 Defendants,

24 and  
25

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

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

SUPPLEMENTAL COMPLAINT

1 KLAMATH WATER USERS ASSOCIATION,  
2 THE KLAMATH TRIBES, and KLAMATH  
IRRIGATION DISTRICT,

Intervenor-Defendants.

3 UNITED STATES OF AMERICA,

4 Cross-Claimant,

5 YUOK TRIBE, PACIFIC COAST  
6 FEDERATION OF FISHERMEN'S  
ASSOCIATIONS, and INSTITUTE FOR  
FISHERIES RESOURCES,

7 and

8 HOOPA VALLEY TRIBE,

9 Joined as Cross-Claimants,

10 v.

11 KLAMATH WATER USERS ASSOCIATION,  
and OREGON WATER RESOURCES  
12 DEPARTMENT,

13 Crossclaim-Defendants,

and

14 KLAMATH IRRIGATION DISTRICT,

15 Intervenor-Defendant.

16 KLAMATH WATER USERS ASSOCIATION,

17 Counterclaimant,

18 v.

19 UNITED STATES OF AMERICA,

20 Counterclaim-Defendant.

21 OREGON WATER RESOURCES  
22 DEPARTMENT,

23 Counterclaimant,

24 v.

25 UNITED STATES OF AMERICA,

Counterclaim-Defendant.

## INTRODUCTION

1  
2 1. This Supplemental Complaint challenges the U.S. Bureau of Reclamation's  
3 ("Reclamation's") Klamath Project January 2023 Temporary Operating Procedure ("2023  
4 TOP"), which allows flows in the Klamath River to go far below the minimum flows in the  
5 2019–2024 Klamath Project Operations Plan ("2019 Plan"), as amended by the Interim  
6 Operations Plan ("IOP"). The Klamath River minimum flows established through Endangered  
7 Species Act ("ESA") Section 7 consultation have been considered inviolate ever since the Ninth  
8 Circuit held in *Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*,  
9 426 F.3d 1082 (9th Cir. 2005) that the minimums must be provided throughout the entire time  
10 period covered by the Klamath Project Operations Plan. The 2019 Plan required that the  
11 minimum flows be met every month of the year, and the National Marine Fisheries Service  
12 ("NMFS") relied on that requirement in its 2019 Biological Opinion determining that the 2019  
13 Plan would not jeopardize the survival and recovery of threatened Southern Oregon/Northern  
14 California Coast Coho Salmon ("SONCC Coho" or "Coho") or endangered Southern Resident  
15 Killer Whales that depend on Klamath River Chinook salmon populations as their preferred prey.

16 2. Plaintiffs Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and  
17 Institute for Fisheries Resources (collectively "Yurok Tribe") originally brought this case to  
18 challenge the 2019 Biological Opinion and 2019 Plan, in part, because they reduced spring flows  
19 needed for Coho Salmon rearing habitat and for flushing out worms that host the *C. shasta*  
20 parasite that has caused excessive juvenile salmon mortalities in recent years. In 2020, the  
21 parties negotiated the IOP, which provides additional water for spring augmentation flows in  
22 most water years, although not in extreme drought years, and this Court entered a stipulated stay  
23 through September 2022. ECF No. 908. The IOP, which Reclamation recently extended  
24

1 through the 2024 water year, continues the 2019 Plan’s requirement that the minimum Klamath  
2 River flows be met every month of the year. ECF No. 1101-1 at 19–24.

3 3. Due to extreme drought conditions in the initial three years under the IOP,  
4 Reclamation has been unable to simultaneously meet its full ESA obligations to salmon in the  
5 Klamath River and to endangered fish in Upper Klamath Lake (“UKL”). Reclamation failed to  
6 provide the full surface flushing flow required in the 2019 Plan and NMFS 2019 Biological  
7 Opinion in 2020–2022. In 2021, Reclamation provided no surface flushing flow at all, but as in  
8 2020 and 2022, it still complied with the requirement to provide the minimum river flows each  
9 month of the year.

10 4. The 2023 TOP authorizes Reclamation to allow river flows to go as much as 30%  
11 below the mandatory minimums between January 20–March 31, 2023. Leading up to its  
12 adoption of the 2023 TOP, Reclamation converted what had been a guideline for UKL elevations  
13 on April 1st for endangered lake fish into a mandatory management requirement. Reclamation,  
14 however, did not shift to this inflexible UKL elevation requirement until after it had delivered  
15 more water for irrigation than provided under the allocation in the 2019 Plan, the IOP, and the  
16 2019 NMFS Biological Opinion. These additional water deliveries in 2022 lowered UKL  
17 elevations and reduced the amount of water available in 2023 to ensure UKL would be refilled  
18 and have sufficient water to meet Reclamation’s ESA obligations.

19 5. Reclamation adopted the 2023 TOP over NMFS’s objections that: (A)  
20 hydrological forecasts indicate that this year is an average to above average water year and  
21 accordingly, extraordinarily dry hydrological conditions are not preventing Reclamation from  
22 being able to meet both minimum and disease management flows for salmon and the desired  
23 UKL levels for lake fish; (B) the ESA consultation resulting in the 2019 Biological Opinion was  
24

1 predicated on the minimum flows being met every month of the year and, accordingly, NMFS  
2 neither assessed nor provided jeopardy and adverse modification determinations on Klamath  
3 Project operations that would go below the mandatory minimum flows in the fall-winter months;  
4 and (C) going below the minimum flows would cause harm to salmon by desiccating eggs and  
5 larva and reducing habitat needed for juvenile salmon rearing.

6         6. This Supplemental Complaint challenges the 2023 TOP for violating the ESA  
7 because: (1) Reclamation has not engaged in ESA Section 7(a)(2) consultation with NMFS on  
8 going below mandatory Klamath River minimum flows; and (2) implementation of the 2023  
9 TOP is likely to cause and in fact has already caused the unlawful take of threatened SONCC  
10 Coho Salmon by desiccating salmon redds, the depressions where female salmon lay their eggs,  
11 and diminishing rearing habitat for young salmon in early spring. This Supplemental Complaint  
12 also challenges the 2023 TOP for failing to provide the mandatory minimum flows required by  
13 the 2019 Plan and IOP. In addition, the Supplemental Complaint challenges Reclamation’s  
14 Finding of No Significant Impact (“FONSI”) and Supplemental Environmental Assessment  
15 (Supplemental “EA”) prepared on the 2023 TOP under the National Environmental Policy Act  
16 (“NEPA”) because they are arbitrary and capricious and contrary to the record before  
17 Reclamation. In addition to seeking declaratory relief as to these claims, the Yurok Tribe asks  
18 the Court to issue an injunction prohibiting Reclamation from delivering water for irrigation  
19 unless it can meet its full ESA obligations to SONCC Coho Salmon and Southern Resident  
20 Killer Whales as set out in the 2019 NMFS Biological Opinion, 2019 Plan, and IOP, and have  
21 sufficient water in UKL at the end of the water year to meet such obligations the following year.

JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

7. This action is brought pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g)(1)(A), and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A). On December 23, 2022, plaintiffs sent a 60-day notice to Reclamation pursuant to the ESA, 16 U.S.C. § 1540(g)(2)(A), and on January 21, 2023, plaintiffs sent a supplemental 60-day notice. Sixty days have passed, and Reclamation has not remedied the ESA Section 7 and Section 9 violations laid out in the 60-day notice. This Court has jurisdiction pursuant to 16 U.S.C. § 1540(g)(1), and 28 U.S.C. §§ 1331 and 1362.

8. Venue is proper in this Court under 28 U.S.C. § 1391(e) because the Yurok Tribe is located in this district, the commercial fishing and conservation plaintiffs reside in this district, and many of the events and consequences of the defendants’ violations of law occurred or will occur in this district.

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

PARTIES

A. Tribal Plaintiff

10. The Yurok Tribe is a sovereign, federally recognized Indian Tribe. By filing this action, the Tribe does not waive its sovereign immunity except for the claims stated herein and does not consent to any suit as to any claim, demand, offset, or cause of action of the United States, its agencies, officers, agents, or any other person or entity in this or any other court.

1 11. With more than 6,400 members, the Yurok Tribe is the largest Indian Tribe in  
2 California. Yurok people are fishing people who have lived on the Klamath River since time  
3 immemorial. The Tribe's ancestral territory includes the lower Klamath River and the coastal  
4 and mountain lands surrounding it. The Klamath River Reservation was originally created by  
5 Executive Order on November 16, 1855. The Reservation extends for one mile on each side of  
6 the Klamath River in northern California from the mouth at the Pacific Ocean approximately 45  
7 miles upriver.

8 12. The Executive Order that created the Yurok Reservation vested the Yurok Tribe  
9 with "federally reserved fishing rights." *Parravano v. Masten*, 70 F.3d 539, 541 (9th Cir. 1995).  
10 Federally reserved fishing rights are integral to the Yurok way of life for subsistence,  
11 commercial, and cultural purposes. Yurok trust species include, but are not limited to, Coho and  
12 Chinook Salmon, Steelhead Trout, lamprey, sturgeon, and eulachon. The Klamath River and its  
13 fishery are "not much less necessary to the existence of the [Yurok] than the atmosphere they  
14 breathe[.]" *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*,  
15 198 U.S. 371, 381 (1905)).

16 13. Mismanagement of the Klamath Project has severely diminished the Tribe's  
17 ability to exercise its reserved fishing rights. Tragedy struck in 2002 when Reclamation  
18 provided excessive amounts of water for irrigation, which resulted in a massive outbreak of fish  
19 disease that killed as many as 78,000 adult salmon before they could spawn, all within the Yurok  
20 Reservation. The 2002 fish kill is one of the darkest events in Yurok history. Releasing pulse  
21 flows from the Trinity River in the summer has largely prevented a recurrence of that disaster.

22 14. Tragedy struck again in 2014 and 2015 when monitoring revealed that  
23 outmigrating juvenile infection rates of *C. shasta*, a fish disease that is often fatal, reached 81%

1 and 91% respectively. The few salmon that survived to return as adults in 2016 and 2017 came  
2 back in near-record low numbers, shutting down commercial and Tribal fisheries, leading to  
3 another fisheries disaster. 2017 was the first year in history that the Yurok Tribal Council closed  
4 its subsistence fishery and Yurok people did not fish for subsistence purposes on the lower  
5 Klamath River. It was the second consecutive year that the Yurok Tribe cancelled its  
6 commercial fishery due to low salmon returns. Since 2017, the Tribe has had to cancel its  
7 commercial fishery every year due to inadequate returning salmon runs. The Tribe and its  
8 members rely on salmon as a healthy food source. Fishing for salmon provides food for Yurok  
9 families, economic opportunity, and is the fabric of the community, bringing people together to  
10 fish, connect with each other and their heritage, and anchor themselves to their fishing culture. If  
11 anything, salmon have become even more important as the community is plagued with poverty, a  
12 suicide crisis, and lack of economic opportunities. Indeed, just months after the Tribal Council  
13 voted to close the fishery for conservation purposes, it declared a suicide emergency due to a  
14 Reservation-wide epidemic of suicides by Tribal members under the age of 30. Without a  
15 salmon fishery, the Tribe's traditional way of life is disrupted, and hope is lost.

16 15. The Yurok Tribe has not had a successful commercial fishery since 2015. The  
17 Tribe's salmon allocation this year is likely to be around 1,500 salmon. This is not enough for  
18 every tribal member to even have 1/3 of a salmon, and the Yurok Tribal Council is likely to close  
19 the fishery again this year.

20 16. Tragedy struck yet again in 2021, another drought year. In 2021, Reclamation  
21 provided no surface flushing flow to reduce the incidence of salmon disease and mortalities from  
22 *C. shasta* infections, with catastrophic results. After *C. shasta* spore counts skyrocketed in April  
23 2021, infection rates remained high in April–early June. In early May, over 97% of the sampled  
24



1 fish were infected with *C. shasta*, and over 60% of those had severe infection with death being  
2 the expected outcome for those fish.

3 B. Commercial Fishing Plaintiffs

4 17. Pacific Coast Federation of Fishermen’s Associations (“PCFFA”) is the largest  
5 organization of commercial fishing families on the west coast, with member organizations from  
6 San Diego to Alaska, collectively representing the interests of thousands of men and women in  
7 the Pacific Ocean commercial salmon fishing fleet. Many of PCFFA’s members are fishermen  
8 and fisherwomen whose livelihoods depend upon harvesting and marketing salmon, including  
9 those from the Klamath River, which, until recent fisheries closures, generated hundreds of  
10 millions of dollars per year in personal income in the region. PCFFA has its main office in San  
11 Francisco, California, and a Northwest regional office in Eugene, Oregon.

12 18. Institute for Fisheries Resources (“IFR”) is a non-profit corporation that  
13 constitutes the conservation arm of PCFFA and shares PCFFA’s offices in San Francisco,  
14 California, and Eugene, Oregon. IFR, although legally and financially independent of PCFFA,  
15 was originally formed by PCFFA from within the fishing industry, and today serves as the  
16 science, resource conservation and restoration arm of PCFFA, implementing and funding a  
17 number of PCFFA projects to recover and restore many now ecologically damaged but once  
18 productive salmon-bearing watersheds throughout the U.S. west coast.

19 19. The financial and livelihood interests of PCFFA, IFR, and their members (and the  
20 fishing-dependent communities those members live in) will be severely impaired if the Klamath  
21 Project operations are managed under the Plan. The 2002 fish kill subsequently contributed to a  
22 massive 2006 commercial ocean salmon fishery shutdown, driven by Klamath losses under weak  
23 stock management. When multiple salmon stocks from different rivers intermingle together at  
24

1 sea, the weakest (i.e., least numerous) of these stocks becomes the limiting factor in opening and  
2 closing the whole ocean salmon fishery. In 2006, by far the weakest salmon stock was the  
3 Klamath fall-run Chinook returning as adults. This weak stock had to be placed in a “zero  
4 harvest” mode, which triggered the closure of all other ocean salmon fisheries, however  
5 abundant, over 700 miles of coastline in order to prevent the total collapse of Klamath Chinook.  
6 That fishery closure cost west-coast ocean salmon fishing communities at least \$200 million in  
7 lost harvest economic opportunities.

8         20. Ocean commercial salmon fishing declined again in recent years due, in part, to  
9 *C. shasta* infection outbreaks. In 2016, allocable catches of Klamath fall-Chinook in ocean  
10 fisheries were reduced significantly due to very low adult returns. In 2017 and 2018, this same  
11 ocean salmon fishery was closed due to low adult returns, due to the lowest projected abundance  
12 since forecasting began in the mid-1980s. The losses to commercial fishing families were  
13 devastating, with less than 10% of the average revenues for the preceding five years throughout  
14 these coastal communities. These losses had ripple effects on the fish processors, fishing  
15 equipment retailers, marine repair and moorage businesses, and other businesses that depend on  
16 healthy salmon fisheries. In 2021 and 2022, this ocean fishery was again closed to commercial  
17 fishing, causing huge economic losses to multiple fishing ports and their allied industries. This  
18 year, the Pacific Fishery Management Council has indicated that this ocean fishery will again be  
19 closed to commercial fishing.

20         21. Both the Yurok Tribe and the commercial fishing plaintiffs have been and are  
21 continuing to be irreparably harmed by Reclamation’s disregard of its statutory duties and by the  
22 unlawful injuries imposed on Klamath River Coho and Chinook Salmon by Klamath Project  
23 operations.

1 C. Federal Defendants

2 22. Defendant United States Bureau of Reclamation is an agency of the United States  
3 Department of the Interior that constructs and operates federal water projects throughout the  
4 United States. Reclamation has primary management authority over the Klamath Project.

5 23. Defendant National Marine Fisheries Service is an agency of the United States  
6 Department of Commerce. The Department has delegated to NMFS its responsibility for  
7 administering the ESA with regard to threatened and endangered marine species, including  
8 threatened SONCC Coho Salmon and endangered Southern Resident Killer Whales.

9 BACKGROUND

10 A. RECLAMATION MUST MANAGE THE KLAMATH PROJECT TO MEET  
11 ESA OBLIGATIONS TO THREATENED AND ENDANGERED SPECIES AS  
12 THE TOP PRIORITY.

13 24. Congress authorized construction and development of the Klamath Project in  
14 1905, pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, which provides for  
15 operation of the Project under the Reclamation Act of 1902, 43 U.S.C. §§ 372, *et seq.* Before  
16 construction of the Klamath Project, UKL was a naturally occurring lake that flowed naturally  
17 into the Klamath River. Reclamation now manages UKL as the reservoir for delivering up to  
18 40% of its annual inflow to irrigate agricultural land, which has dramatically reduced overall  
19 river flows, changed the timing of peak flows, and altered the natural flow regime. Because  
20 UKL is very shallow, the volume of water in UKL that carries over from year to year is small.  
21 Reclamation's operation of the Klamath Project determines the level, timing, and rate of water  
22 flow in the Klamath River to support salmon below Iron Gate Dam, the lowest downriver dam,  
23 which currently blocks salmon fish passage upstream.

1           25.     Reclamation’s operation of the Klamath Project is an action over which  
2 Reclamation has discretion and control and is subject to ESA Section 7. *Klamath Water Users*  
3 *Protective Ass’n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999); *Yurok Tribe v. U.S. Bureau of*  
4 *Reclamation*, No. 19-cv-04405-WHO, 2023 WL 1785278, \*1 (N.D. Cal. Feb. 6, 2023). Under  
5 Section 7, Reclamation must engage in consultation with NMFS and the United States Fish and  
6 Wildlife Service (“FWS”) to ensure its operation of the Klamath Project will not jeopardize the  
7 survival and recovery of listed species or adversely modify their critical habitat. 16 U.S.C. §  
8 1536(a)(2).

9           26.     Reclamation’s Section 7 obligations must be satisfied before it can deliver water  
10 for irrigation. In *Patterson*, the Ninth Circuit held that Reclamation retained “the authority to  
11 direct Dam operations to comply with the ESA,” including by “taking control of the dam when  
12 necessary to meet the requirements of the ESA, requirements that override the water rights of the  
13 irrigators.” *Id.* This Court recently held that the ESA preempts irrigators’ Oregon-based water  
14 rights to water from the Klamath Project. *Yurok Tribe v. U.S. Bureau of Reclamation*, No. 19-cv-  
15 04405-WHO, 2023 WL 1785278, \*1 (N.D. Cal. Feb. 6, 2023).

16           27.     In 1997, NMFS listed SONCC Coho under the ESA as threatened. It found that  
17 the Coho populations “are very depressed, currently numbering approximately 10,000 naturally  
18 produced adults.” 62 Fed. Reg. 24,588 (May 6, 1997). NMFS noted that “water diversions” and  
19 “water withdrawals” for irrigation were “major activities responsible for the decline of coho  
20 salmon in Oregon and California.” *Id.* at 24,592. NMFS designated critical habitat for SONCC  
21 Coho in 1999 and included most of the Klamath River below Iron Gate Dam in the designation.  
22 64 Fed. Reg. 24,049 (May 5, 1999). In its five-year status review completed in 2016, NMFS  
23 found that Coho Salmon continue to be at high risk of extinction and noted heightened risk to  
24

1 Coho Salmon persistence since 2011 from increased water withdrawals and recent,  
2 unprecedented drought conditions. Five-Year SONCC Coho Review at 47–49 (2016).

3 28. NOAA Fisheries listed Southern Resident Killer Whales or Orcas as endangered  
4 in 2005. 70 Fed. Reg. 69,903 (Nov. 18, 2005). One of the primary threats to Orca survival is  
5 due to the loss of their salmon prey, which is primarily Chinook Salmon. 2019 BiOp at 220,  
6 223–24. The Orcas feed on Chinook Salmon, including from the Klamath River during the  
7 winter and spring.

8 29. In 1988, FWS listed populations of the shortnose and Lost River suckers as  
9 endangered (known as “C’waam” and “Koptu” by the Klamath Tribes and referred to herein as  
10 “lake fish”). 53 Fed. Reg. 27,130 (July 18, 1988). In 2012, FWS listed UKL and its tributaries  
11 as critical habitat for the lake fish. 77 Fed. Reg. 73,740 (Dec. 11, 2012).

12 II. ESA CONSULTATIONS ON KLAMATH PROJECT OPERATIONS REQUIRE  
13 COMPLIANCE WITH MANDATORY MINIMUM KLAMATH RIVER FLOWS.

14 30. Reclamation operates the Klamath Project under operating plans that determine  
15 the flow levels in the Klamath River downstream of Iron Gate Dam. When Reclamation failed  
16 to engage in Section 7 consultation on its 2000 operating plan, this Court issued an injunction  
17 requiring that Reclamation curtail water deliveries that would cause river levels to drop below  
18 specific flows needed to provide useable Coho Salmon juvenile rearing habitat until it completed  
19 formal consultation. *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*,  
20 138 F. Supp. 2d 1228, 1249–50 (N.D. Cal. 2001). The flows were based on a report prepared for  
21 the Department of Interior by Dr. Thomas Hardy to determine environmental base flows that  
22 would prevent unacceptable risks to salmon and the river’s ecological functions.

23 31. Recognizing the need to plan Klamath Project operations over a longer time  
24 horizon, Reclamation began developing ten-year operating plans. NMFS issued a biological

1 opinion concluding that the 2002–2012 Plan would likely jeopardize Coho Salmon survival and  
2 recovery and adversely modify its critical habitat. NMFS found that Reclamation’s replication  
3 of the last ten years’ minimum flows would not provide sufficient water to support Coho Salmon  
4 spawning, rearing, and juvenile migration. NMFS offered a reasonable and prudent alternative  
5 (“RPA”) that established higher long-term minimum flows based on Dr. Hardy’s report on  
6 instream flow needs, but it did not require those flows in the first and second phases of the plan,  
7 which spanned eight years.

8 32. In litigation brought by the Yurok Tribe, PCFFA, IFR, and others, the Ninth  
9 Circuit held that NMFS acted unlawfully by requiring only a portion of the flows NMFS deemed  
10 necessary in the initial two phases of the plan, leaving Coho Salmon with insufficient flows for  
11 eight of the plan’s ten years. *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of*  
12 *Reclamation*, 426 F.3d 1082, 1091–93 (9th Cir. 2005). On remand, this Court issued an  
13 injunction limiting water withdrawals if they would result in Klamath River flows falling below  
14 the minimum flows in the RPA. *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of*  
15 *Reclamation*, No. Civ.C02-2006 SBA, 2006 WL 798920, \*8 (N.D. Cal. Mar. 27, 2006).

16 33. In its 2013–2023 Klamath Project Operations Plan (“2013 Plan”), Reclamation  
17 agreed to establish the Environmental Water Account (“EWA”), an amount of water set aside to  
18 provide Klamath River flows to meet the needs of Coho Salmon between March 1 and  
19 September 30. It based the minimum spring flows on Dr. Hardy’s work. As part of a  
20 compromise to ensure more water would be in UKL and available for spring flows, the 2013  
21 Plan set minimum winter flows at levels lower than those in Dr. Hardy’s study for October 1  
22 through February. In 2013, NMFS issued a Biological Opinion determining that the 2013 Plan  
23  
24

1 would not jeopardize Coho Salmon survival and recovery or adversely modify Coho Salmon  
2 critical habitat.

3 34. The 2013 Plan and Biological Opinion addressed the emerging threat posed by *C.*  
4 *shasta* infections and mortalities in juvenile salmon by calling for, but not mandating, disease  
5 management flows. The Biological Opinion set a limit on the incidental take of salmon from *C.*  
6 *shasta* infections of 49% in an ongoing monitoring program and required reinitiation of  
7 consultation if this limit were exceeded. In 2014 and 2015, both below-average water years, *C.*  
8 *shasta* rates of 81% and 91% far exceeded the incidental take statement's 49% cap. In a lawsuit  
9 brought by the Yurok Tribe, PCFFA, and IFR seeking reinitiated consultation, this Court held  
10 that Reclamation and NMFS have a legal duty to reinitiate consultation to determine what is  
11 needed to reduce infections and avoid jeopardizing Coho Salmon survival and recovery, and the  
12 Court issued an injunction requiring disease management flows during the reinitiated  
13 consultation. *Yurok Tribe v. U.S. Bureau of Reclamation*, 231 F. Supp. 3d 450, 475 (N.D. Cal.  
14 2017).

15 35. In the reinitiated consultation, Reclamation presented a Proposed Action for  
16 2019–2024 Klamath Project operations to NMFS. The Proposed Action continued the EWA. It  
17 provided a surface flushing flow in most years to reduce the incidence of *C. shasta* infections  
18 and allocated additional water for the surface flushing flow in drier years. Reclamation  
19 subsequently added enhanced spring flows for Coho Salmon rearing habitat in most water years  
20 in response to concerns raised by NMFS about the adequacy of the spring flows, but the spring  
21 flows, even with the enhancement, were still lower than those in the 2013 Biological Opinion  
22 and Plan. 2019 BiOp at 11, 41–42. Like its predecessor, the modified Proposed Action, which  
23 became the 2019 Plan, required that the mandatory minimums be met every month of the year.

1           36.     NMFS issued the 2019 Biological Opinion determining that the 2019 Plan would  
2 not jeopardize the survival and recovery of SONCC Coho Salmon or Southern Resident Killer  
3 Whales or adversely modify SONCC Coho Salmon critical habitat. In making this  
4 determination, NMFS expressly relied on the mandatory minimum flows, the surface flushing  
5 flow, and the EWA’s replication of natural flow variability, albeit diminished in volume. 2019  
6 BiOp at 179–80, 203–04, 209–10, 215–26. Because the 2019 Plan made meeting the minimum  
7 flow requirements mandatory, the 2019 Biological Opinion never analyzed the impacts of going  
8 below the mandatory minimums and relied on the minimum flows being met in its jeopardy and  
9 adverse modification determinations. NMFS made complying with the minimums and the EWA  
10 mandatory conditions of the Incidental Take Statement. 2019 BiOp at 267–68.

11     III.     CHALLENGE TO THE 2019 PLAN AND BIOLOGICAL OPINION RESULTS IN  
12             THE INTERIM OPERATIONS PLAN.

13           37.     The Yurok Tribe filed this lawsuit challenging the 2019 Biological Opinion and  
14 2019 Plan, in large part, because the spring flows were insufficient to provide rearing habitat for  
15 juvenile salmon and reduce the incidence of *C. shasta* disease. When the Yurok Tribe presented  
16 evidence that the agencies had used erroneous data to evaluate the effects of the flows on salmon  
17 habitat needs, the agencies reinitiated consultation. The parties entered into negotiations, which  
18 culminated in the Interim Operations Plan (“IOP”). The IOP incorporates the 2019 Plan, plus  
19 additional augmentation flows to benefit juvenile Coho and Chinook Salmon in the spring  
20 months in most water years, although not in the driest and wettest years. The IOP continues the  
21 2019 Plan’s requirement that the minimum flows be met every month of the year. Based on the  
22 IOP, this Court approved a stipulated stay of the litigation until September 30, 2022. *See*  
23 Stipulation to Stay Litigation (Mar. 27, 2020) (ECF Nos. 907 & 908) and Attached Interim  
24 Operations Plan (ECF Nos. 907-1 & 907-2). Reclamation has since committed to continue



1 implementing the IOP through the 2024 water year when it expects to complete the reinitiated  
2 consultation. ECF No. 1101-1 at 19–24.

3 IV. 2021 AND 2022 TEMPORARY OPERATING PROCEDURES

4 38. 2021 and 2022 were extreme drought years. In both years, Reclamation invoked  
5 parallel “meet and confer” provisions in the respective NMFS and FWS Biological Opinions that  
6 require it to notify the Services if it cannot comply with the Biological Opinion requirements due  
7 to extraordinary hydrological conditions. Term and Condition 1A of NMFS BiOp and Term and  
8 Condition 1c of FWS BiOp. In both years, the Services concurred in Reclamation’s  
9 determination that extraordinary hydrological conditions made it impossible for Reclamation to  
10 simultaneously meet its ESA obligations for salmon and the lake fish. The Services also  
11 determined that the Temporary Operating Procedures adopted for those water years would not  
12 result in impacts to listed species beyond those analyzed in the respective Biological Opinions.  
13 For lake fish, the focus has been on various UKL levels that are boundary conditions in the FWS  
14 Biological Opinion.

15 39. For salmon, the temporary plans set preconditions for a surface flushing flow that  
16 allowed for a partial flow in 2022, but no surface flushing flow in 2021. Under the 2021  
17 Temporary Operating Procedures (“2021 TOP”), Reclamation provided no surface flushing flow  
18 to reduce the incidence of *C. shasta* infections and mortalities. The results were disastrous.  
19 Juvenile salmon suffered the worst fish kill in history, devastating the outmigrating year-class,  
20 which will adversely affect future adult salmon returns and fisheries in future years. Under the  
21 2022 TOP, Reclamation provided a flushing flow of shorter duration and magnitude than called  
22 for in the NMFS Biological Opinion and fell short of the UKL boundary conditions. In both  
23 years, Reclamation provided water deliveries for irrigation. In 2022, Reclamation provided  
24

1 additional water for irrigation in the summer, above and beyond the allocation provided in the  
2 2019 Plan, the IOP, and the 2019 Biological Opinion. In both years, Reclamation also provided  
3 fall-winter water deliveries for irrigation and a national wildlife refuge.

4 40. In the 2021 and 2022 TOPs, Reclamation still maintained the minimum flow  
5 requirements. The 2022 TOP made this explicit, stating “Reclamation intends to maintain  
6 minimum flows in the Klamath River below Iron Gate Dam, as prescribed in the NMFS BiOp.”  
7 2022 TOP at 1 n.2. In the meet and confer process, NMFS concluded that the 2021 and 2022  
8 TOPs would not cause adverse effects on SONCC Coho Salmon and Southern Resident Killer  
9 Whales beyond what NMFS considered in the 2019 Biological Opinion. NMFS relied on the  
10 retention of the minimum flows in reaching this conclusion.

11 V. 2023 TEMPORARY OPERATING PROCEDURE

12 41. Despite claiming not enough water was available to meet its obligations under  
13 both the NMFS and FWS Biological Opinions in 2022, Reclamation allocated more than 30,000  
14 acre-feet for irrigation in the spring of 2022, using the formula in the 2019 Plan and 2019  
15 Biological Opinion.<sup>1</sup> No water was allocated for augmentation flows under the terms of the IOP  
16 in 2022.

17 42. In the summer of 2022, Reclamation provided a second allocation of 57,000 acre-  
18 feet more water for irrigation above and beyond the agricultural allocation. This extra allocation  
19 of water for irrigation was a deviation from the 2019 Plan, the IOP, and the 2019 Biological  
20 Opinion. Reclamation failed to curtail unauthorized diversions by the Klamath Drainage  
21 District. Reclamation also made fall-winter deliveries for irrigation in 2022. These water  
22

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23 <sup>1</sup> An acre-foot is the amount of water that would cover an acre of land one foot deep.  
24

1 deliveries had the effect of lowering UKL levels and creating what Reclamation considered a  
2 water deficit heading into the winter and 2023 water year.

3 43. Despite having just provided this extra allocation for irrigation, Reclamation  
4 began claiming in the fall of 2022 that it would be unable to discharge its full ESA duties to  
5 listed salmon and lake fish in the spring of 2023 due to what Reclamation called “extraordinary  
6 hydrological conditions.” Reclamation began considering going below the minimum river flows  
7 in order to refill UKL and achieve a UKL elevation of 4142 feet by April 1st.

8 44. Under the 2019 NMFS Biological Opinion (at 24), UKL elevations established for  
9 endangered lake fish are “are not a target to which UKL should be managed, but rather a  
10 guideline.” The 2019 NMFS Biological Opinion further provides that any reductions in Klamath  
11 River flows made for the purpose of meeting UKL guidelines “may not result in flows at [Iron  
12 Gate Dam] less than the proposed minimum [Iron Gate Dam] target flows,” 2019 BiOp at 24,  
13 and may not reduce EWA releases for disease mitigation or habitat flows “at any time,” *id.* at 24.  
14 In addition, agricultural allocation can be reduced to ensure minimum flows are met. *Id.* at 32.  
15 After Reclamation proposed and indicated it would adopt the 2023 TOP, FWS issued a new  
16 Biological Opinion for the lake fish predicated on a fundamentally different approach to UKL  
17 levels. Under the 2023 FWS Biological Opinion, UKL elevations must be met before water is  
18 allocated for the EWA and agriculture, and the terms and conditions of the incidental take  
19 statement provide that “Reclamation shall meet” the 4142-foot UKL level for April 1 through  
20 May 31, and other UKL levels set for July 15 and year-round. 2023 Biological Opinion at 16–  
21 17, 218 (January 13, 2023). Having acceded to this change in Klamath Project operations during  
22 the consultation process leading to the January 13, 2023, FWS Biological Opinion, Reclamation  
23  
24

1 made refilling UKL to achieve a 4142-foot depth by April 1 its top priority in proposing and  
2 ultimately adopting the 2023 TOP.

3 45. On December 9, 2022, Reclamation released what it called a “strawman” winter  
4 flow proposal that would allow river flows to go 40% below the 2019 Biological Opinion  
5 minimums through March 31, 2023, marking the first time Reclamation would adopt such a  
6 water management strategy since the Ninth Circuit’s 2005 *Pacific Coast Federation of*  
7 *Fishermen’s Associations* decision.

8 46. The Upper Klamath Basin subsequently experienced several storms producing  
9 large amounts of rain and snow and the hydrologic indicators improved. By early January 2023,  
10 Klamath Basin snowpack was 124% of average, precipitation was at 98% of average, and  
11 inflows from tributaries into UKL had risen substantially to median levels. NMFS characterized  
12 the hydrological conditions in January 2023 as average to above average. Nonetheless,  
13 Reclamation released an amended strawman proposal on January 6, 2023, continuing to propose  
14 reducing the minimums by up to 40%.

15 47. On January 13, 2023, Reclamation released the 2023 TOP, labeled “draft.” The  
16 2023 TOP authorizes reductions up to 30% in minimum flows. On January 13, 2023,  
17 Reclamation announced that it would be implementing the 2023 TOP. It indicated that it would  
18 not start going below the minimums as of January 13, 2023, but that it would revisit doing so  
19 over the course of the following week.

20 48. On January 20, 2023, Reclamation announced that it planned to reduce Klamath  
21 River flows to 20% below the minimums beginning on or about January 25, 2023, and up to 30%  
22 below the minimums in February and March 2023. Also on January 20, 2023, Reclamation  
23 issued a Finding of no Significant Impacts (“FONSI”) and Supplemental Environmental

1 Assessment (“SEA”), that tiered to previous EAs on Reclamation’s operation plans. The EA  
2 acknowledged negative impacts to salmon spawning and to early juvenile salmon rearing habitat  
3 in March. On January 25, 2023, Reclamation indicated that it would not start going below the  
4 minimum flows on January 25, 2023, as previously announced, but would still consider doing so  
5 in accordance with the 2023 TOP through March 31, 2023.

6 49. On January 26, 2023, Reclamation released what it called its final 2023 TOP.  
7 The 2023 TOP’s objective is to achieve a UKL elevation of 4142 feet on March 31 with a  
8 surface flushing flow possible only if an additional 0.4 feet has accumulated in UKL. It  
9 authorizes a reduction in Klamath River flows up to 30% of the minimum flows in the 2019  
10 Plan. Acknowledging that going below the minimum flows is likely to desiccate salmon eggs,  
11 the 2023 TOP calls for a monitoring plan that includes emergency surveys of salmon redds, the  
12 depressions where female salmon lay their eggs, to assess the impact of the flow reductions.

13 50. Reclamation solicited public comments on its strawman proposals, but it allowed  
14 only 3–5 days (including weekend days) for comments after release of the proposals. NMFS  
15 submitted comments on both the original and amended strawman proposals. NMFS’s December  
16 12, 2022, comments disagreed with Reclamation’s assertion that “extraordinary hydrological  
17 conditions” existed in the Klamath Basin because winter hydrological forecasts are unreliable for  
18 management decisions and Reclamation could take other corrective actions, like curtailing  
19 deliveries for irrigation and addressing then-ongoing unauthorized agricultural diversions.  
20 NMFS also pointed out that current UKL levels had been reduced because Reclamation  
21 delivered approximately 57,000 more acre-feet to agriculture in 2022. In its January 11, 2023,  
22 comments, NMFS explained that hydrological conditions were average to above average.  
23 NMFS’s January 11, 2023, comments also questioned why Reclamation had not curtailed

1 irrigation deliveries or prevented an irrigation district from diverting water that could have been  
2 used to support river flows in order to keep more water in UKL.

3 51. NMFS's comments further explained that the ESA consultation resulting in the  
4 2019 Biological Opinion was predicated on the minimum flows being met every month of the  
5 year. As a result, NMFS neither assessed nor provided jeopardy and adverse modification  
6 determinations on Klamath Project operations that would go below the mandatory minimum  
7 flows in any of the fall-winter months. NMFS explained that it "understood these proposed  
8 flows, including winter flows, to be the minimums required to avoid jeopardy to listed coho  
9 salmon."

10 52. NMFS described adverse effects to Coho and Chinook Salmon from going below  
11 the minimum flows, including reducing adult spawning habitat, desiccating eggs and larva, and  
12 reducing habitat needed for juvenile salmon rearing. If the reduced flows continued into early  
13 spring, it would reduce the amount of available juvenile rearing habitat and increase the  
14 incidence of *C. shasta* infections.

15 53. On January 25, 2023, NMFS sent a letter to Reclamation indicating that current  
16 hydrological data reflects average to above-average conditions for the 2023 water year and  
17 reiterating that meeting the needs of listed salmon and lake fish must take priority over  
18 agricultural deliveries.

19 54. The Yurok Tribe submitted detailed comments on December 12, 2022 and  
20 January 11, 2023 on Reclamation's strawman proposals, describing the immediate harm to  
21 salmon that going below the minimums would cause. The Tribe's comments also explained that  
22 current hydrological indicators, particularly after the winter precipitation, did not reflect  
23 extraordinary drought conditions warranting invocation of the meet and confer process. Instead,  
24

1 any shortfalls in UKL levels are due to Reclamation's previous deliveries of water for irrigation  
2 above and beyond the allocation allowed under the 2019 Plan, the IOP, and 2019 Biological  
3 Opinion and Reclamation's failure to curtail deliveries of water for non-ESA purposes in the fall-  
4 winter.

5 55. To monitor the impacts of the flow reductions, FWS and the Yurok and Karuk  
6 Tribes conducted surveys of salmon redds. The initial redd survey conducted January 24–26,  
7 2023 encountered poor visibility, but nonetheless identified a total of 55 redds, with  
8 approximately 30 at risk of dewatering with the anticipated flow reductions. Coho spawning  
9 began in early December and the redds are visible for only approximately two weeks following  
10 construction, so the survey identifications represent only a small portion of all redds constructed  
11 this season.

12 56. On February 13, 2023, Reclamation, NMFS, and FWS agreed to operating  
13 coordination for winter-spring flows under which Reclamation would reduce flows 11% below  
14 the minimums beginning February 14, 2023, and by an additional 5% if monitoring indicated no  
15 more than three redds had been dewatered.

16 57. On February 14, 2023, Reclamation began reducing 11% flows below the  
17 minimums. Preliminary results of monitoring conducted on February 16–17, when visibility was  
18 again poor, found no dewatered redds, but did find four redds in less than one inch of water and  
19 likely would be dewatered with future flow reductions. The 11% flow reduction had lowered  
20 river depths by six inches. The additional 5% reduction in flows would lower river depths by  
21 more than one inch and would therefore dewater the four redds in less than one inch of water.

22 58. Nonetheless, on February 25, 2023, Reclamation reduced flows by an additional  
23 5% below the minimums for a total of a 16% reduction.





1 16 U.S.C. § 1536(a)(2).

2 62. “Action” is defined broadly to encompass “all activities or programs of any kind  
3 authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02.

4 63. Reclamation’s operation of the Klamath Project is an action over which  
5 Reclamation has discretion and control and is subject to ESA Section 7. *Patterson*, 204 F.3d at  
6 1213. In keeping with this obligation, Reclamation has consulted on the impacts of its long-term  
7 Klamath Project operations plans, including the 2019 Plan and the IOP, on listed species  
8 including threatened Coho Salmon and endangered Southern Resident Killer Whales.

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

15 65. For actions that may adversely affect a listed species or critical habitat, a formal  
16 consultation with the expert fish and wildlife agency is required. 50 C.F.R. § 402.14. At the  
17 conclusion of a formal consultation, the expert fish and wildlife agency issues a biological  
18 opinion assessing the effects of the action on the species and its critical habitat, determining  
19 whether the action is likely to jeopardize the continued existence of the species or adversely  
20 modify its critical habitat and, if so, offering a reasonable and prudent alternative that will avoid  
21 jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)–(h).

22 66. After completion of consultation, reinitiation of consultation is required if the  
23 amount or extent of allowable taking is exceeded, new information reveals effects on listed  
24

1 species or their critical habitat in a manner or to an extent not previously considered, or the  
2 action is subsequently modified in a manner that causes effects to listed species or their critical  
3 habitat that have not been considered in the biological opinion. 50 C.F.R. § 402.16 & (a)–(b).

4 67. In the reinitiated consultation ordered by this Court, Reclamation developed a  
5 Proposed Action for Klamath Project operations for 2019–2024. The focus of the consultation  
6 was the adequacy of spring flows to reduce the incidence of *C. shasta* infections and to provide  
7 sufficient rearing habitat for juvenile salmon. The Proposed Action provided a surface flushing  
8 flow in most years to reduce the incidence of *C. shasta* infections and allocated additional water  
9 for the surface flushing flow in drier years. After NMFS identified the need for higher spring  
10 habitat flows, Reclamation agreed to provide 20,000 more acre-feet for enhanced spring flows  
11 for Coho Salmon rearing habitat in most water years. 2019 BiOp at 11, 41–42. The Proposed  
12 Action required that the mandatory minimums be met every month of the year. 2019 BiOp  
13 Table 5 at 25-26.

14 68. To complete the reinitiated consultation, NMFS issued a biological opinion,  
15 determining that the 2019 Plan is not likely to jeopardize the continued existence of Coho  
16 Salmon or Southern Resident Killer Whales. The 2019 Biological Opinion also found that the  
17 2019 Plan would not be likely to adversely modify designated critical habitat for Coho Salmon,  
18 despite providing less rearing habitat than the previous operations plan. NMFS's adverse  
19 modification analysis modeled the amount of suitable rearing habitat that will result from  
20 implementation of the Plan based on the flows required under various water conditions. NMFS  
21 compared those flows to its longstanding conservation standard that it had applied in previous  
22 biological opinions for nearly 20 years. That standard calls for at least 80% of the maximum  
23 habitat to be available to salmon. 2019 BiOp at 61–63, 144–50, 155, 159–60, 174–76, 202–04,

1 208–11, 244–49. The Biological Opinion found violations of the conservation standard in many  
2 months in various reaches depending on hydrological conditions. Because the 2019 Plan  
3 required that the minimum flows would be met every month of the year, the 2019 Biological  
4 Opinion was predicated on Reclamation providing the minimum flows as set out in the Plan.  
5 The predicted number and severity of violations of the 80% concentration standard would be  
6 greater if the minimum flows were not provided as required.

7 69. NMFS never analyzed the effects of going below the minimum flow  
8 requirements. Because the 2019 Plan made meeting the minimum flow requirements mandatory,  
9 the 2019 Biological Opinion never analyzed the impacts of going below the mandatory  
10 minimums. NMFS relied on the minimum flows being met in its jeopardy and adverse  
11 modification determinations. 2019 BiOp at 203–04, 209–11, 213, 215. NMFS explained in its  
12 December 12, 2022 comments on the strawman proposal that “the new action is inconsistent  
13 with what was proposed and analyzed in existing consultations” because it would result in  
14 “winter flows lower than the minimum flows analyzed in” the 2019 Biological Opinion and that  
15 “NMFS understood these proposed flows, including winter flows, to be the minimums required  
16 to avoid jeopardy to listed coho salmon.” NMFS Comments at 2–3.

17 **II. RECLAMATION HAS FAILED TO COMPLETE SECTION 7 CONSULTATION ON**  
18 **OPERATING THE KLAMATH PROJECT TO ALLOW KLAMATH RIVER FLOWS**  
19 **TO GO BELOW THE MANDATORY MINIMUMS.**

20 70. Reclamation has not completed Section 7 consultation with NMFS on going  
21 below the minimum flows, which have been treated by Reclamation and NMFS as inviolate ever  
22 since the Ninth Circuit held in 2005 that the minimum flows had to be met throughout the life of  
23 Klamath Project operations plans. Reclamation is, therefore, in violation of its duty to consult  
24

1 with NMFS before it takes actions that are likely to adversely affect SONCC Coho Salmon and  
2 Southern Resident Killer Whales by depleting their Chinook Salmon prey base.

3 71. The 2019 Biological Opinion analyzed the effects of the flow regime set out in the  
4 2019 Plan. Under the 2019 Plan, Reclamation sets the irrigation allocation in the spring based on  
5 hydrological forecasts with modifications envisioned only until June 1. The IOP continued this  
6 approach. In 2022, however, Reclamation gave agriculture approximately 57,000 acre-feet more  
7 water in the summer than provided under the allocation made in the spring in accordance with  
8 the 2019 Biological Opinion, the 2019 Plan, and the IOP.

9 72. This additional allocation for agricultural irrigation set into motion the conditions  
10 Reclamation now asserts necessitate going below the minimum river flows. The additional  
11 allocation reduced the amount of water in UKL that is available to meet the needs of the listed  
12 fish in both the lake and the river. Just as the 2019 Biological Opinion never analyzed the effects  
13 of going below the mandatory minimums, so too it did not assess the effects of providing more  
14 water to agriculture than allocated in keeping with the parameters set out in the operations plans.  
15 Providing water for irrigation before meeting ESA obligations also violates the law of the river,  
16 which prioritizes ESA compliance over delivery of water for irrigation. *Patterson*, 204 F.3d at  
17 1213.

18 73. Because providing an additional agricultural allocation in the summer and going  
19 below the minimums deviate so substantially from what NMFS analyzed in the 2019 Biological  
20 Opinion, Reclamation has violated Section 7 by not completing formal consultation on these  
21 actions before implementing them. By proceeding with a fundamentally altered action without  
22 completing consultation, Reclamation is violating its Section 7 obligations and, in the alternative,  
23 Reclamation and NMFS are violating their obligation under 50 C.F.R. § 402.16 to complete  
24

1 reinitiated consultation on the modification of the Klamath Project operations plan, which causes  
2 effects on listed species and their critical habitat not considered in the 2019 Biological Opinion.  
3 Reclamation and NMFS need to consult on going below the minimum flows before doing so  
4 either in a new ESA consultation or as part of its reinitiated consultation on its Klamath Project  
5 operations plans pursuant to 50 C.F.R. § 402.16.

6 74. After initiation of consultation, ESA Section 7(d) prohibits federal agencies from  
7 making any irreversible or irretrievable commitment of resources which has the effect of  
8 foreclosing the formulation or implementation of reasonable and prudent alternatives that would  
9 avoid jeopardizing the continued existence of listed species or resulting in the destruction or  
10 adverse modification of critical habitat. Congress enacted § 7(d) to prevent Federal agencies  
11 from steamrolling activities that secure completion of the projects regardless of the outcome of  
12 the Section 7 consultation. Section 7(d) prevents agencies taking preliminary actions like  
13 entering into contracts, signing leases, or constructing associated facilities that create  
14 unstoppable momentum toward completing the project no matter the outcome of Section 7  
15 consultation. Section 7(d) does not allow an agency to implement an agency action before  
16 completing Section 7(a)(2) consultation. Reclamation cannot invoke Section 7(d) to authorize  
17 going below the mandatory minimum Klamath River flows before it completes consultation on  
18 the effects of going below the minimums on SONCC Coho Salmon, their critical habitat, and  
19 Southern Resident Killer Whales.

20 III. THE MEET AND CONFER PROCESS CANNOT AUTHORIZE GOING BELOW THE  
21 MINIMUMS BECAUSE ITS PRECONDITIONS HAVE NOT BEEN MET AND THE  
22 2019 BIOLOGICAL OPINION DOES NOT ASSESS THE IMPACTS OF GOING  
23 BELOW THE MINIMUMS.

24 75. The 2019 Biological Opinion allows Klamath Project operations to depart to some  
25 extent from some of its conditions through an adaptive management process, which Reclamation

1 calls the “meet and confer” process. In adopting the 2021 and 2022 TOPs, Reclamation invoked  
2 this process, with the concurrence of the Services. NMFS and FWS then determined whether the  
3 2021 and 2022 TOPs fell within the range of impacts analyzed in their Biological Opinions on  
4 the 2019 Plan and IOP. NMFS signed off on the 2021 and 2022 TOPs, which reduced or  
5 eliminated the surface flushing flow, but continued to provide the mandatory minimum river  
6 flows. NMFS explicitly conditioned its sign off on the 2022 TOP on the mandatory minimum  
7 flows being met.

8 76. In developing the 2023 TOP, Reclamation tried to invoke the meet and confer  
9 process authorized under the Terms and Conditions of the Incidental Take Statements in both the  
10 NMFS and FWS Biological Opinions. NMFS BiOp Term and Condition 1A; FWS BiOp Term  
11 and Condition 1c. The NMFS and FWS Biological Opinions require Reclamation to manage the  
12 distribution of water to meet specified conditions in each of the Biological Opinions: river flows  
13 for salmon and UKL levels for lake fish. If Reclamation determines that any of those conditions  
14 are unlikely to be met, it must immediately notify and meet and confer with the Services to  
15 determine the causative factors and appropriate corrective measures. The NMFS Biological  
16 Opinion provides that if the river flows have not yet fallen outside the required conditions “and  
17 NMFS determines that the causative factors are not due to extraordinary hydrological conditions,  
18 Reclamation, in consultation with the Services, shall determine and take in-season corrective  
19 actions including adjustments to avoid falling outside the thresholds listed above.” NMFS  
20 Incidental Take Statement, Term and Condition 1A.

21 77. Reclamation asserted that extraordinary hydrological conditions in the Klamath  
22 Basin would prevent Reclamation from meeting the Biological Opinion conditions on March 31,  
23 2023, specifically an UKL elevation of 4142 feet for the lake fish with a surface flushing flow  
24

1 possible only if UKL has an additional 0.4 feet. Based on these asserted extraordinary  
2 hydrological conditions, Reclamation tried to initiate the meet and confer process set out in the  
3 NMFS and FWS Biological Opinions.

4 78. NMFS did not concur in Reclamation's assertion that hydrological conditions  
5 were extraordinary or the causative factor of the winter UKL levels. NMFS December 12, 2022,  
6 comments explained that winter hydrological forecasts are unreliable for management decisions,  
7 which is why the 2019 Plan and 2019 Biological Opinion rely on spring forecasts for allocation  
8 determinations. NMFS's January 11, 2023, comments described current hydrological conditions  
9 as average to above-average with snowpack at 124% of average, precipitation at 98% of average,  
10 and net inflows into UKL at 119% of median for this time of year.

11 79. NMFS identified other causative factors for the winter UKL levels, including  
12 Reclamation's delivery of approximately 57,000 more acre-feet to agriculture in 2022 above and  
13 beyond what should have been delivered under the 2019 Plan, the IOP, and Biological Opinion,  
14 and its failure to curtail fall-winter deliveries even as Reclamation was proposing to go below the  
15 mandatory minimum flows. NMFS also identified corrective actions Reclamation could take to  
16 avoid falling outside the Biological Opinion's conditions, including curtailing deliveries for  
17 irrigation and addressing unauthorized agricultural diversions.

18 80. Although Reclamation tried to invoke the meet and confer process, the factual  
19 prerequisites for that process were not met. In addition, because the 2019 Biological Opinion  
20 assumed the minimum flows would be met and never analyzed the impacts of going below them,  
21 NMFS had no basis on which it could sign off on Reclamation's plan to go below the minimums  
22 this winter.

SECOND CLAIM

VIOLATION OF ESA SECTION 9 BY CAUSING TAKE OF SALMON

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

I. THE ESA PROHIBITS RECLAMATION FROM ENGAGING IN ACTIONS THAT TAKE LISTED SONCC COHO SALMON.

82. Section 9 of the ESA prohibits any person from “taking” an endangered species. 16 U.S.C. § 1538(a)(1)(B). Under Section 4(d), 16 U.S.C. § 1533(d), NMFS has the authority to issue regulations extending the take prohibition to threatened species. NMFS has extended the take prohibition to threatened species, including SONCC Coho Salmon. 50 C.F.R. § 223.203. Under Section 9(a)(1)(G), it is unlawful to take threatened salmon in violation of this regulation.

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

84. “Take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” 16 U.S.C. § 1532(19). NMFS has defined “harm” to include “significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 (1995), the Supreme Court upheld the validity of the harm regulation and made it clear “take” includes indirect, as well as direct harm, and need not be purposeful.



1 II. ALLOWING RIVER FLOWS TO GO BELOW THE MINIMUMS HAS CAUSED  
2 AND IS REASONABLY CERTAIN TO CONTINUE TO CAUSE TAKE OF  
3 THREATENED SONCC COHO SALMON.

4 85. On February 14, 2023, Reclamation began reducing flows to 11% below the  
5 minimums in the 2019 Plan, IOP, and 2019 NMFS Biological Opinion. On February 25, 2023,  
6 Reclamation began reducing the flows by an additional 5%, for a total reduction of 16% below  
7 the minimums in the 2019 Plan, IOP, and 2019 NMFS Biological Opinion.

8 86. Allowing Klamath River flows to go below the minimums has already caused and  
9 is reasonably certain to continue causing harm to Klamath River Salmon. The lower flows have  
10 led to the desiccation of salmon redds, which will reduce hatching success by suffocating eggs  
11 and larva. As Reclamation explained in its Supplemental EA on the 2023 TOP, “[r]edd  
12 dewatering occurs when river flows decrease after a redd is constructed to a level that exposes  
13 the redd to the air, cutting off water-borne oxygen supply, ultimately leading to egg mortality.”  
14 SEA at 20.

15 87. The redd survey conducted by FWS and the Yurok and Karuk Tribes after  
16 adoption of the 2023 TOP found approximately 30 redds at risk of dewatering. The survey  
17 represents only a fraction of the redds that could be harmed because of the survey’s short  
18 duration, poor visibility, and the fact that redds can be observed for only two weeks after they are  
19 constructed. Coho spawning began in early December and continued through February. A  
20 relatively large number of Coho Salmon spawned in the Klamath River mainstem in 2022 due to  
21 the extremely low river flows in the tributaries.

22 88. The second redd survey conducted after the 11% reduction found four redds in  
23 less than one inch of water. The 11% flow reduction lowered water depths by six inches. An  
24 additional 5% flow reduction would lower river depths by more than one inch. The four redds in

1 less than one inch of water were almost certainly dewatered with the additional 5% flow  
2 reduction that began on February 25, 2023. Since the surveys captured only a fraction of the  
3 Coho redds in the mainstem, the number of redds disturbed or dewatered is likely far greater.  
4 Each redd has between 1,400–3,000 eggs. Therefore, for each dewatered redd, between 1,400–  
5 3,000 Coho hatchlings would be lost. The flow reductions severely degraded the river habitat  
6 and killed Coho Salmon eggs, thereby causing take in violation of the ESA.

7 89. Going below the minimums is also reasonably certain to cause take by degrading  
8 and diminishing the amount of habitat available for successful juvenile Coho Salmon rearing. In  
9 March, Coho Salmon are hatching from redds in the mainstem and tens of thousands of salmon  
10 fry are moving move from the tributaries into edge-habitat in the Klamath River. Slow velocity  
11 habitat in the side channels and alcoves is critical for salmon fry after they hatch out of redds and  
12 for fry that enter the mainstem from tributaries.

13 90. Flows provide rearing habitat for salmon fry by inundating and making accessible  
14 side channels and edge-habitat. The mainstem Klamath River is limited in its channel  
15 complexity and floodplain connection. The amount of suitable rearing habitat is a limiting factor  
16 for SONCC Coho Salmon. The 2019 BiOp evaluated the extent to which the 2019 Plan would  
17 decrease the amount of available juvenile habitat below NMFS’s conservation standard, which  
18 calls for 80% of maximum available habitat. 2019 BiOp at 63, 146–51, 159–60, 175, 202–03.  
19 Because the 2019 BiOp used erroneous data in this assessment, the loss of juvenile habitat due to  
20 the 2019 Klamath Projects operations plan are far greater.

21 91. Reclamation’s reductions in flow below the minimums further reduce the amount  
22 of habitat available for juvenile salmon rearing. The Supplemental EA indicates that juvenile  
23 rearing habitat will be reduced by 5–11% in March with flow reductions 10–20% below the  
24

1 minimums. SEA at 21–22. The Supplemental EA further estimates that 10–20% flow  
2 reductions could impact 2.5%–8.25% of individual salmon in the early life history stage. SEA at  
3 22–23.

4 92. With less available rearing habitat, juvenile salmon will be crowded into the  
5 available habitat, compete for limited food and shelter, and be more susceptible to predators as  
6 they search for better and less crowded habitat. SEA at 23. Such impairments of essential life  
7 functions are reasonably certain to cause injury and possibly death of substantial numbers of  
8 SONCC Coho Salmon in violation of the ESA take prohibition.

9 III. THE TAKE CAUSED BY ALLOWING KLAMATH RIVER FLOWS TO GO BELOW  
10 THE MINIMUMS IS UNLAWFUL.

11 93. The take from Klamath River flows to go below the minimums is unlawful under  
12 ESA Section 9 unless it is authorized by and in compliance with the terms and conditions in the  
13 Incidental Take Statement in the 2019 Biological Opinion. 16 U.S.C. § 1536(o)(2); *see* 16  
14 U.S.C. § 1536(b)(4)(C).

15 94. If a Section 7 consultation results in a no-jeopardy biological opinion, the  
16 biological opinion must include an “incidental take statement” that specifies the amount and  
17 extent of incidental take of the listed species that may occur without causing jeopardy or adverse  
18 modification, includes “terms and conditions,” and provides for monitoring of take. 16 U.S.C. §  
19 1536(b)(4); 50 C.F.R. § 402.14(i)(1)–(3). The incidental take statement only insulates from take  
20 liability those activities conducted in compliance with its terms and conditions. 16 U.S.C. §  
21 1536(o)(2); *see* 16 U.S.C. § 1536(b)(4)(C).

22 95. The 2019 Plan and 2019 NMFS Biological Opinion make compliance with the  
23 minimum flows mandatory. The 2019 Biological Opinion never analyzed a proposed action that  
24 would lead to violations of the minimum flows. NMFS deemed the minimum flows necessary to

1 avoid jeopardy to listed Coho Salmon. An incidental take statement must be predicated on a no-  
2 jeopardy/no adverse-modification determination in an ESA consultation. Because NMFS has not  
3 analyzed or rendered a no-jeopardy determination on going below the mandatory minimum  
4 flows, there is no predicate for an incidental take statement that would allow Reclamation to  
5 reduce flows below the minimums.

6 96. Not only do the 2019 Plan and Biological Opinion require compliance with the  
7 minimum flows, the Biological Opinion’s Incidental Take Statement uses meeting the minimum  
8 flows for March–September as a surrogate for the allowable extent or amount of take of SONCC  
9 Coho Salmon. 2019 BiOp at 267–69. Term and Condition 1A of the incidental take statement  
10 requires that Reclamation shall manage EWA water distribution and Klamath River flows to  
11 meet these minimum flows. 2019 BiOp at 280–81. If the minimum flows are not provided in  
12 any month between March–September, the amount of allowable take is exceeded and the safe  
13 harbor provided by the Incidental Take Statement is lost.

14 97. The take of SONCC Coho Salmon that has occurred and is reasonably certain to  
15 continue occurring as a result of Reclamation’s reduction in Klamath River flows below the  
16 minimums is not covered by the 2019 Biological Opinion or its Incidental Take Statement. It is,  
17 therefore, unlawful.

### 18 THIRD CLAIM

#### 19 VIOLATION OF THE RECLAMATION ACT BY GOING BELOW THE PLANS’ MINIMUM 20 FLOW REQUIREMENTS

21 98. Plaintiffs re-allege each and every allegation set forth in this complaint.

22 99. In 1902, Congress enacted the Reclamation Act. Pub. L. No. 57-161, § 2, 32 Stat.  
23 388 (June 17, 1902) (codified at 43 U.S.C. §§ 371 *et seq.*). Three years later, it authorized the  
24 Secretary of Interior, in carrying out a reclamation project in the Klamath Basin under the terms

1 and conditions of the Reclamation Act, to change lake levels and dispose of reclaimed lands.  
2 Act of Feb. 9, 1905, ch. 567, 33 Stat. 714. In May 1905, the Secretary of Interior authorized  
3 construction and funding of the Klamath Project under the 1902 Act.

4 100. Section 10 of the Reclamation Act authorizes the Secretary, acting through  
5 Reclamation, “to perform any and all acts and to make such rules and regulations as may be  
6 necessary and proper for the purpose of carrying out the provisions of this Act into full force and  
7 effect.” 43 U.S.C. § 373.

8 101. Under Section 10, Reclamation develops long-term plans for operating the  
9 Klamath Project to fulfill its various purposes consistent with the Reclamation Act and other  
10 applicable federal law. Each year, Reclamation issues annual operating plans that make  
11 allocations based on forecasts of available water supply and hydrological conditions in  
12 accordance with its long-term operations plans. In adopting the 2019 Plan and the IOP,  
13 Reclamation exercised the broad authority Congress gave it in the Reclamation Act “to perform  
14 any and all acts” necessary to manage federal water projects.

15 102. The 2019 Plan requires compliance with the mandatory minimum flows during  
16 every month of the year. 2019 Biological Opinion at 25–26. Under the 2019 Biological  
17 Opinion, any reductions in Klamath River flows made for the purpose of meeting UKL  
18 guidelines “may not result in flows at [Iron Gate Dam] less than the proposed minimum [Iron  
19 Gate Dam] target flows,” and may not reduce EWA releases for disease mitigation or habitat  
20 flows “at any time.” *Id.* at 24. And the allocation made in the spring for agricultural irrigation  
21 can be reduced to ensure minimum flows are met. *Id.* at 32.

1 103. The IOP amended the 2019 Plan to require augmentation flows in the spring  
2 under certain hydrological conditions, but made no changes to the mandatory minimum flow  
3 requirements in the 2019 Plan.

4 104. By operating the Klamath Project to go below the 2019 Plan’s minimum flow  
5 requirements, as set out in the 2023 TOP, Reclamation is violating the 2019 Plan and IOP and  
6 this violation of the 2019 Plan and IOP is arbitrary, capricious, and not in accordance with the  
7 Reclamation Act, in violation of the APA, 5 U.S.C. § 706(2)(A). Under the APA, courts may  
8 review final agency actions and hold unlawful and set aside final agency action, findings, and  
9 conclusions that are arbitrary and capricious, an abuse of discretion, or otherwise not in  
10 accordance with law. 5 U.S.C. § 706(2)(A). The APA provides for judicial review of the  
11 Reclamation’s violations of the 2019 Plan, IOP, and Reclamation Act.

12 FOURTH CLAIM

13 VIOLATION OF NEPA BY ADOPTING ARBITRARY AND CAPRICIOUS EA AND FONSI

14 105. Plaintiffs re-allege each and every allegation set forth in this complaint.

15 106. NEPA is our “basic national charter for protection of the environment.” 40  
16 C.F.R. § 1500.1(a). Under NEPA, federal agencies must take a hard look at the environmental  
17 impacts of their proposed major federal actions before deciding to proceed with the proposed  
18 action. 42 U.S.C. §§ 4321, *et seq.*

19 107. To that end, NEPA requires federal agencies to evaluate and disclose the  
20 significant adverse environmental impacts of their proposed actions and alternatives. 42 U.S.C.  
21 § 4332(C). If an agency action is likely to have adverse environmental effects that are  
22 “significant,” they need to be analyzed in an environmental impact statement (“EIS”). 40 C.F.R.  
23 § 1501.4. If it is unclear whether the impacts are significant, the agency may prepare an

1 Environmental Assessment (“EA”) to assist in making that determination. *Id.* Based on the EA,  
2 the agency can determine whether the action may have significant adverse environmental effects.  
3 If the agency determines that the agency action is not likely to have significant environmental  
4 impacts in what is called a FONSI, then it need not prepare an EIS.

5 108. Reclamation is a federal agency subject to NEPA. The 2023 TOP is a major  
6 federal action under NEPA. Because construction of the Klamath Project preceded enactment of  
7 NEPA, Reclamation does not need to comply with NEPA for routine maintenance of the project,  
8 but it has a legal obligation to comply with NEPA when operations change substantially. Since  
9 the ESA listing of the lake fish and Coho Salmon and as a result of court decisions holding that  
10 Reclamation has fallen short of its ESA obligations, Reclamation has made substantial changes  
11 to Klamath Project operations. Reclamation develops operations plans to try to provide for the  
12 needs of Klamath River Salmon and listed lake fish in UKL, while still delivering large volumes  
13 of water for agriculture. The operations plans have far-reaching impacts on the lake, the river,  
14 threatened and endangered fish species, and the Tribal communities and commercial fishing  
15 families that depend on them. Reclamation has a legal obligation to comply with NEPA when it  
16 adopts an operations plan for the Klamath Project.

17 109. Reclamation prepared a Supplemental EA on the 2023 TOP. Its no-action  
18 alternative consists of Project operations under the 2019 Plan as amended by the IOP. Its  
19 preferred alternative would operate the Klamath Project in accordance with the 2023 TOP.  
20 Reclamation released its Supplemental EA and issued a FONSI on January 20, 2023.

21 110. Under the APA, courts may review final agency actions and hold unlawful and set  
22 aside final agency action, findings, and conclusions that are arbitrary and capricious, an abuse of  
23

1 discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). The APA provides  
2 for judicial review of the Reclamation's Supplemental EA and FONSI.

3 111. The Supplemental EA and FONSI contend that extraordinary hydrological  
4 conditions are impeding its ability to meet its ESA obligations to both Klamath River Salmon  
5 and the lake fish. This contention is arbitrary, capricious, and contrary to the record. NMFS  
6 disagrees with this contention. NMFS's comments conclude that January 2023 hydrological  
7 conditions are average to above-average for this time of year and that any shortfalls in UKL are  
8 the result of Reclamation's deliveries of excess water for non-ESA purposes in the summer and  
9 fall and could be ameliorated through corrective actions that would avoid going below minimum  
10 river flows. The Department of Interior's NEPA regulations require Reclamation, as an agency  
11 within the Department of Interior, to consider comments timely received, even if not solicited.  
12 43 C.F.R. § 46.305. The Supplemental EA and FONSI never disclose or address NMFS  
13 conclusions with respect to the hydrological forecasts or irrigation deliveries Reclamation made  
14 or allowed.

15 112. The Supplemental EA and FONSI state that there is no reason to believe there  
16 will be jeopardy to SONCC Coho Salmon or adverse modification of its critical habitat as a  
17 result of the 2023 TOP. NMFS is the expert fish and wildlife agency, charged with assessing  
18 through ESA Section 7 consultations, whether and the extent to which proposed Klamath Project  
19 operations will cause jeopardy or adverse modification. The 2019 Biological Opinion neither  
20 analyzed nor rendered a jeopardy or adverse-modification determination on going below the  
21 minimum river flows. Reclamation lacks the necessary expert analysis to support its conclusory  
22 statement that the 2023 TOP is unlikely to cause jeopardy or adverse modification.



1 113. The FONSI asserts the 2023 TOP “will not violate federal . . . law or requirements  
2 imposed for the protection of the environment.” FONSI at 10. This assertion is arbitrary,  
3 capricious, and contrary to law. Because Reclamation has not completed Section 7 consultation  
4 on going below the mandatory minimum flows, the 2023 TOP violates Section 7 of the ESA.  
5 Because implementation of the 2023 TOP is reasonably certain to cause unlawful take of listed  
6 SONCC Coho Salmon, the 2023 TOP also violates Section 9 of the ESA. The FONSI’s  
7 assertion that the 2023 TOP will not violate any federal environmental laws is arbitrary,  
8 capricious, and contrary to the record.

9 PRAYER FOR RELIEF

10 WHEREFORE, plaintiffs respectfully request that this Court:

11 A. Declare that Reclamation is in violation of Section 7 of the ESA because it has  
12 adopted and is implementing the 2023 TOP without completing formal consultation and/or  
13 because Reclamation and NMFS have not completed reinitiated formal consultation on  
14 operations of the Klamath Project that allow Klamath River flows to go below the mandatory  
15 minimum flows in the 2019 Biological Opinion and the 2019 Plan;

16 B. Declare that Reclamation’s reduction of Klamath River flows below the minimum  
17 flows in the 2019 Biological Opinion and 2019 Plan is reasonably certain to cause the take of  
18 threatened SONCC Coho Salmon in violation of Section 9 of the ESA;

19 C. Declare that the 2023 TOP is arbitrary and capricious and violates Reclamation’s  
20 2019 Plan as amended by the IOP, in violation of the Reclamation Act of 1905 and the APA, 5  
21 U.S.C. § 706(2)(A);

22 D. Issue an injunction prohibiting Reclamation from delivering water for irrigation  
23 unless Reclamation can meet its full ESA obligations to SONCC Coho Salmon and Southern  
24

1 Resident Killer Whales, including providing at least the Biological Opinion’s minimum flows  
2 every month of the year, allocating water to and distributing water from the Environmental  
3 Water Account in accordance with the 2019 Biological Opinion, providing enhanced flows in  
4 accordance with the 2019 Biological Opinion, providing augmentation flows in accordance with  
5 the IOP, and providing a full surface flushing flow complying with the provisions of the 2019  
6 Biological Opinion;

7 E. Further prohibit Reclamation from delivering water for irrigation unless it UKL  
8 will have an elevation of 4139.2 feet on September 30<sup>th</sup>, while complying with 2019 NMFS  
9 Biological Opinion and IOP, to ensure that UKL will refill over the fall-winter to levels needed  
10 for Reclamation to meet its full ESA obligations to SONCC Coho Salmon and Southern Resident  
11 Killer Whales;

12 F. Declare that Reclamation’s Supplemental EA and FONSI are arbitrary,  
13 capricious, and contrary to NEPA in violation of the APA, 5 U.S.C. § 706(2)(A);

14 G. Award plaintiffs their reasonable fees, expenses, costs, and disbursements,  
15 including attorneys’ fees associated with this litigation under the ESA, 16 U.S.C. § 1540(g)(4),  
16 and the Equal Access to Justice Act 28 U.S.C. § 2412; and

17 H. Grant plaintiffs such further and additional relief as the Court may deem just and  
18 proper.

19 DATED this 22nd day of March, 2023.

20 Respectfully submitted,

21 /s/ Patti A. Goldman

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