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

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

13 Plaintiff,

14 vs.

15 UNITED STATES BUREAU OF  
 RECLAMATION; UNITED STATES FISH  
 16 & WILDLIFE SERVICE; NATIONAL  
 MARINE FISHERIES SERVICE,  
 17

18 Defendants.

Case No.:

**COMPLAINT FOR DECLARATORY  
 AND INJUNCTIVE RELIEF**

Judge:

JURY TRIAL DEMANDED

19 Plaintiff, the Klamath Tribes, brings this Complaint, and hereby alleges as follows:

20 **INTRODUCTION**

21 1. Plaintiff Klamath Tribes (“Tribes”) bring this action for declaratory and injunctive relief  
 22 in an effort to protect two critically endangered species, the C’waam (Lost River sucker, *Deltistes*  
 23 *luxatus*) and Koptu (shortnose sucker, *Chasmistes brevirostris*) which are essential treaty-protected  
 24 resources for the Tribes. C’waam and Koptu fisheries sustained the Tribes’ people for millennia and

COMPLAINT OF PLAINTIFF THE KLAMATH TRIBES	1	CASE NO.
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1 remain central to the Tribes' ability to maintain and exercise their spiritual and cultural practices. These  
2 species are in an extremely precarious condition and at imminent risk of extinction, potentially from just  
3 a single catastrophic event.

4         2.         The C'waam and Koptu are endemic to Upper Klamath Lake ("UKL") and its environs,  
5 which also comprise significant components of the Klamath Irrigation Project ("Project"), an irrigation  
6 project operated by the United States Bureau of Reclamation ("Reclamation"). They have been listed as  
7 endangered species since 1988 and have been the subject of several biological opinions since that time.  
8 In May of 2013, after it had become clear that a 2010 biological opinion issued by the National Marine  
9 Fisheries Service ("NMFS") concerning the effects of Project operations on listed Southern  
10 Oregon/Northern California Coast ("SONCC") coho salmon was potentially in conflict with the 2008  
11 biological opinion issued by the United States Fish and Wildlife Service ("USFWS") concerning the  
12 effects of the Project on the C'waam and Koptu, USFWS and NMFS jointly issued a biological opinion  
13 ("2013 BiOp") to address the effects of the Project on all three of those species (as well as two other  
14 listed species found within the Project area). Intended to cover Project operations through May 2023,  
15 the 2013 BiOp included, among other things, criteria for Reclamation's management of UKL necessary  
16 for it to be able to operate the Project compliance with the Endangered Species Act ("ESA"), 16 U.S.C.  
17 §§ 1531, *et seq.*

18         3.         The 2013 BiOp's conclusion that the operation of the Project would not jeopardize the  
19 continued existence of the C'waam and Koptu was based on a series of assumptions—including about  
20 the hydrologic conditions that would be experienced during its 10 year term; about how Reclamation's  
21 operation of the Project would affect the elevation levels of UKL; and about the improvements the  
22 anticipated UKL elevation levels during the 2013 BiOp's term would mark in comparison to levels that  
23 had been experienced during prior periods of Project operation—that have proven in the intervening  
24 years to be deeply flawed. The 2013 BiOp identified certain minimum elevation thresholds ("BiOp

1 Thresholds”) below which Reclamation should not allow UKL to drop. Indeed, the 2013 BiOp  
 2 cautioned, if Reclamation allowed UKL to drop beneath these levels—which not intended to be  
 3 management targets, but rather floors which Reclamation should consistently strive to operate well  
 4 above—it would be operating the Project outside the 2013 BiOp’s effects analysis, likely triggering a  
 5 need for reconsultation. Yet Reclamation has done precisely that on multiple occasions, without either  
 6 Reclamation or USFWS reinitiating consultation specifically focused on the Project’s ongoing effects on  
 7 C’waam and Koptu.

8 4. In 2016, the Hoopa Valley Tribe and the Yurok Tribe both filed suit challenging the  
 9 effects of Reclamation’s operation of the Project under the 2013 BiOp on SONCC coho salmon. Case  
 10 No. 16-cv-04294-WHO (*Hoopa Valley Tribe*); Case No. 16-cv-6863-WHO (*Yurok Tribe*). In granting  
 11 summary judgment to those tribes on their claims alleging that Reclamation, USFWS and NMFS  
 12 unlawfully failed to reinitiate formal consultation, this Court recognized that the 2013 BiOp is not  
 13 entitled to a presumption of validity during the pendency of reconsultation because its assumptions  
 14 about disease levels and effects on SONCC coho salmon were not borne out in practice. For the reasons  
 15 set forth below, the 2013 BiOp is likewise infirm in relation to the C’waam and the Koptu.  
 16 Reclamation, USFWS and NMFS have recently reinitiated formal consultation concerning Project  
 17 operations. But there is no indication to date that this reconsultation process intends to take the hard  
 18 look at Project operations and UKL elevation levels necessary to ensure that the Project is compliant  
 19 with the ESA in avoiding continued jeopardy to the C’waam and Koptu and adverse modification of  
 20 their critical habitat.

21 5. This action seeks a declaration that Reclamation has violated the ESA by unlawfully  
 22 jeopardizing the C’waam and Koptu and adversely modifying their critical habitat through its operation  
 23 of the Project and by unlawfully taking individual members of the species. It further seeks an injunction  
 24 directing Reclamation, USFWS and NMFS to complete their current reconsultation utilizing the best

1 available science to include measures to adequately and appropriately protect the C’waam and Koptu  
 2 and their critical habitat. It also seeks an injunction to prevent the illegal take of C’waam and Koptu and  
 3 adverse modification of their critical habitat in order to ensure the continued existence of C’waam and  
 4 Koptu during the time it will take Reclamation, USFWS, and NMFS to complete their reinitiated  
 5 consultation and to implement sufficient measures to avoid continued jeopardy to these species from  
 6 Project operations. This injunction is an appropriate remedy for a violation of the ESA and is necessary  
 7 to correct illegal final agency action, to prevent future unlawful agency actions that may cause further  
 8 irreparable harm to the C’waam and Koptu, and to protect these critical tribal trust resources.

9         6. This action also seeks a declaration that Reclamation has violated the National  
 10 Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, *et seq.*, by failing to undertake review of its  
 11 implementation of the 2013 BiOp as required by NEPA, and an injunction requiring Reclamation to  
 12 comply with NEPA in conjunction with the implementation of the biological opinion that emerges at the  
 13 conclusion of the reinitiated consultation process.

#### 14                     **JURISDICTION, VENUE AND INTRADISTRICT ASSIGNMENT**

15         7. The District Court has jurisdiction over this matter under 5 U.S.C. §§ 701-706, 16 U.S.C.  
 16 § 1540(g), and 28 U.S.C. §§ 1331 & 2202. As required by 16 U.S.C. § 1540(g), Plaintiff has provided  
 17 Defendants with 60 days’ notice of its intent to bring suit under the Endangered Species Act. A copy of  
 18 this notice is attached hereto as **Exhibit A**. Reclamation, in coordination with USFWS and NMFS,  
 19 responded by letter dated April 10, 2018, attached hereto as **Exhibit B**, but has not remedied the  
 20 violations giving rise to this complaint.

21         8. Venue is proper in the Northern District of California under 28 U.S.C. §§ 84(a) and  
 22 1391(b) because a substantial part of the events or omissions giving rise to the Klamath Tribes’ claims  
 23 either occurred within or directly impact the district, and a substantial part of the property that is the  
 24 subject of this action—the Project—is situated within this district. The action area for USFWS’s portion

1 of the 2013 BiOp, which includes the provisions related to C’waam and Koptu, includes both southern  
2 Oregon and northern California. [2013 BiOp at § 3].

3 9. Intradistrict Assignment: This case is properly assigned to the San Francisco/Oakland  
4 Division under Civil L.R. 3-2(c) & (g) because the Klamath Tribes do not consent to the jurisdiction of a  
5 magistrate judge and this suit relates to Reclamation’s operation of the Project, which is located in  
6 substantial part in Siskiyou and Modoc counties, and whose effects are also felt in Humboldt and Del  
7 Norte counties, through which the Lower Klamath River flows before it reaches the Pacific Ocean.  
8 Moreover, this Division is already the venue for two related cases, *Hoopa Valley Tribe v. U.S. Bureau of*  
9 *Reclamation, et al.*, Case No. 3:16-cv-04294-WHO, and *Yurok Tribe, et al. v. U.S. Bureau of*  
10 *Reclamation, et al.*, Case No. 3:16-cv-06863-WHO, both of which also present challenges to the 2013  
11 BiOp and aspects of Reclamation’s operation of the Project.

#### 12 PARTIES

13 10. Plaintiff Klamath Tribes is a federally-recognized Indian tribe possessing governmental  
14 authority over its members and its Indian lands and consist of three peoples who traditionally inhabited  
15 lands that now comprise parts of Southern Oregon and Northern California: the Klamath, Modoc and  
16 Yahooskin Band of Snake Indians. The Tribes’ headquarters are in Chiloquin, Oregon, in the heart of  
17 the Upper Klamath Basin.

18 11. Since time immemorial, the Tribes and its members have used, and continue to use, the  
19 resources of the Klamath Basin in what is now both Oregon and California for subsistence, cultural  
20 ceremonial, religious, and commercial purposes. The Tribes possess federally reserved water rights to  
21 Klamath Basin water in order to, among other purposes, preserve, protect, and exercise their treaty-  
22 guaranteed rights to hunt, fish, trap, and gather. Indeed, one of the “very purposes of establishing the  
23 Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing  
24

1 lifestyle.” *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1983) (internal quotation marks  
2 omitted).

3 12. C’waam and Koptu, freshwater fish species native to lakes and rivers of the Upper  
4 Klamath Basin, have sustained the Klamath Tribes’ members since time immemorial and play a central  
5 role in the Tribes’ culture and spiritual practices. They are essential to the way of life of the Tribes and  
6 its members, and the Tribes have a fundamental responsibility to protect them. Once one of the most  
7 important food-fish in the Upper Klamath Lake region, C’waam and Koptu were caught by the  
8 thousands as a mainstay of the Klamath Tribes’ diet. Now endangered, the Tribes are limited to  
9 harvesting just two fish every year for ceremonial purposes. Defendants’ illegal operation of the Project  
10 jeopardizes the very existence of these species and consequently threatens not only the ability of the  
11 Tribes and its members to benefit from them but also the very identity of the Tribes and its people.

12 13. Defendant Bureau of Reclamation is a federal agency, within the Department of Interior,  
13 that constructs and operates federal water projects throughout the United States. Reclamation retains  
14 discretionary control over the operation of the Project, which lies at the core of this action.

15 14. Defendant United States Fish & Wildlife Service is a federal agency within the  
16 Department of Interior responsible for administering provisions of the Endangered Species Act with  
17 respect to non-marine species, including the C’waam and Koptu, and is the co-author (with the National  
18 Marine Fisheries Service) of the 2013 BiOp, formally titled “Biological Opinions on the Effects of  
19 Proposed Klamath Project Operations from May 31, 2013, through March 31, 2023, on Five Federally  
20 Listed Threatened and Endangered Species.”

21 15. Defendant National Marine Fisheries Service is a federal agency within the Department  
22 of Commerce responsible for administering provisions of the Endangered Species Act with respect to  
23 marine species and co-author of the 2013 BiOp. All three defendants have a trust responsibility to  
24 ensure a continued fishery for the Klamath Tribes.

**STATUTORY FRAMEWORK**

A. The Endangered Species Act

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

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

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

50 C.F.R. § 402.02; see also *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004). An agency’s obligations under Section 7 extend to any ongoing action over which the agency retains authority or discretionary control.

1           18.     ESA Section 7 also establishes an interagency consultation process to assist federal  
 2 agencies in complying with their ESA obligations to avoid jeopardy or the adverse modification of  
 3 critical habitat. Under this Section 7 process, a federal agency proposing an action that “may affect” a  
 4 listed species, such as the C’waam and the Koptu, must prepare and provide the expert agency, USFWS  
 5 in this case, a “biological assessment” of the effects of the proposed action. 16 U.S.C. § 1536(c); 50  
 6 C.F.R. § 402.12. The expert agency is then responsible for assessing the “effects of the action” together  
 7 with “cumulative effects” on listed species and critical habitat. 50 C.F.R. § 402.14(g)(3)–(4). This  
 8 determination is rendered in a biological opinion, which must also—if the determination is that the  
 9 proposed action will in fact jeopardize the species’ continued existence and/or adversely modify its  
 10 critical habitat—offer one or more reasonable and prudent alternatives (“RPA”) to the action that would  
 11 allow jeopardy or adverse modification to be avoided. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R.  
 12 § 402.14(g)-(h).

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

21           20.     If a federal action subject to consultation will result in the take of a listed species, the  
 22 associated biological opinion must include an “incidental take statement” (“ITS”) that specifies the  
 23 amount and extent of incidental take of listed species allowed as a result of the proposed action as well  
 24 as the “terms and conditions” under which such incidental take is authorized. 16 U.S.C. § 1536(b)(4);



1 50 C.F.R. § 402.14(i). The ITS acts as a crucial check on the assumptions and conclusions of a  
 2 biological opinion, as take exceeding the ITS is not protected from liability. Compliance with a valid  
 3 ITS, however, shields the actor from take liability for activities undertaken in compliance with the ITS’  
 4 terms and conditions. 16 U.S.C. § 1536(o)(2); *see* 16 U.S.C. § 1536(b)(4)(C).

5 21. After a biological opinion is issued, the action agency must request reinitiation of  
 6 consultation under certain circumstances. 50 C.F.R. § 402.16. These include if the amount or extent of  
 7 take authorized by the ITS is exceeded or if new information reveals that the effects of the action on the  
 8 listed species, critical habitat are occurring in a manner or to an extent not previously considered, or if  
 9 the federal action “is subsequently modified in a manner that causes an effect to the listed species or  
 10 critical habitat that was not considered in the biological opinion.” *Id.*

11 B. The National Environmental Policy Act

12 22. NEPA “is our basic national charter for protection of the environment.” 40 C.F.R.  
 13 § 1500.1(a). NEPA’s dual goals are to ensure that federal agencies consider significant aspects of the  
 14 environmental impacts of their proposed actions and to guarantee that those agencies inform the public  
 15 about the potential environmental effects of any proposed action and about possible alternatives to it  
 16 *before* they make decisions.

17 23. With limited exceptions not applicable here, NEPA requires that an action agency—such  
 18 as Reclamation—prepare an “environmental assessment” (“EA”) and/or an “environmental impact  
 19 statement” (“EIS”) to evaluate the environmental impacts of a proposed action. 40 C.F.R. §§ 1502.1,  
 20 1508.9, 1508.11. “An EA is meant to briefly document the reasons for the agency’s determination  
 21 whether an EIS is required.” *Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173,  
 22 1175 (9th Cir. 2016).

23 24. NEPA mandates that an EIS be prepared in advance of any “major Federal actions  
 24 significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The EIS must

1 lay out, among other things, “the environmental impact of the proposed action” and “alternatives to  
 2 the proposed action.” *Id.* As part of this process, the action agency must “study, develop, and  
 3 describe appropriate alternatives to recommended courses of action in any proposal which involves  
 4 unresolved conflicts concerning alternative uses of available resources.” *Id.* at § 4332(2)(E). When a  
 5 proposed federal action will alter the status quo, the preparation of an EIS in connection with that  
 6 decision is necessary. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 646 (9th  
 7 Cir. 2014).

8 C. The Administrative Procedures Act

9 25. The Administrative Procedures Act (“APA”), 5 U.S.C. §§ 701-706, authorizes a court to  
 10 set aside and find unlawful any final agency action or findings and conclusions that are arbitrary and  
 11 capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A).  
 12 Biological opinions issued under section 7 of the ESA are reviewed under this section of the law. *See*,  
 13 *e.g.*, *Bennett v. Spear*, 520 U.S. 154, 175 (1997). The question of whether Reclamation has complied  
 14 with NEPA in adopting the 2013 BiOp is also reviewable under this section of the APA. *See San Luis*  
 15 *& Delta-Mendota Water Auth.*, 747 F.3d at 655. The question of whether Reclamation, USFWS and  
 16 NMFS have unlawfully withheld or unreasonably delayed their reinitiation of consultation with  
 17 respect to the impacts of the Project on C’waam and Koptu and their critical habitat is reviewable  
 18 under § 706(1) of the APA.

19 **GENERAL ALLEGATIONS**

20 A. Historical Background

21 26. In 1864 the Klamath Tribes and the United States entered into the Treaty between the  
 22 United States of America and Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians,  
 23 October 14, 1864, 16 Stat. 707 (“1864 Treaty”). Under the 1864 Treaty, the Klamath Tribes enjoy  
 24 senior reserved rights to waters within the Upper Klamath Basin. The 1864 Treaty also reserved to the

1 Klamath Tribes, among other things, the exclusive right to take fish and game, including C'waam and  
2 Koptu, as well as anadromous species including Chinook salmon and steelhead, from the waters  
3 contained within the 800,000-acre reservation the Tribes retained through the 1864 Treaty. Since the  
4 construction of the mainstem Klamath River dams as part of the Klamath Hydroelectric Project, salmon  
5 have been blocked from migrating up the Klamath River above Iron Gate Dam to spawn.

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

16 28. UKL, the largest freshwater lake in Oregon and one of the largest in the west, is roughly  
17 25 miles long and up to 12.5 miles wide, with a surface area of 66,900 acres. It is fed by water from the  
18 Sprague, Williamson and Wood Rivers and their tributaries, as well as natural springs. UKL and its  
19 tributaries comprises the most important habitat for the continued existence of the C'waam and Koptu  
20 UKL is especially critical to the conservation and recovery of the C'waam and Koptu because it provides the most  
21 habitat and has the greatest variety of spawning sites.

22 29. Reclamation controls the elevation of UKL through oversight of the operation of the Link  
23 River Dam, located on the Lake's southern end. Before construction of the Link River Dam in 1921,  
24 UKL elevations varied between roughly 4,140 and 4,143 feet above sea level, with a mean annual

1 variation of approximately two feet. Since 1921, however, UKL elevations have varied annually over a  
 2 range of approximately six feet, depriving C'waam and Koptu of habitat and exposing C'waam and  
 3 Koptu to increased risk of predation and the effects of poor water quality. Since the inception of the  
 4 Project, C'waam and Koptu populations have plummeted as a direct result of Reclamation's  
 5 management of UKL at elevation levels beneath those necessary to support essential C'waam and Koptu  
 6 biological functions such as spawning, rearing, feeding, sheltering, and migration.

7 30. Nutrient loading in UKL due to timber harvesting, wetland destruction, and agricultural  
 8 activities within the Upper Klamath Basin, often directly supported by Project irrigation deliveries, have  
 9 also contributed to the near extirpation of these species.

10 31. Between 1968 and 1985 C'waam and Koptu harvests decreased from over 10,000 fish to  
 11 just 687. Recognizing the peril facing these essential cultural and treaty resources, and in an effort to  
 12 protect them from extinction, the Klamath Tribes suspended fishing for C'waam and Koptu in 1986 in  
 13 order to focus on their conservation and recovery. Since this time, the Klamath Tribes have limited their  
 14 take of C'waam and Koptu to only two fish per year for ceremonial purposes.

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

18 33. Despite their endangered status and the designation of UKL and its tributaries as critical  
 19 habitat, Reclamation continues to operate the Klamath Project in a manner inimical to the continued  
 20 existence and ultimate recovery of the C'waam and Koptu and in direct violation of the ESA.  
 21 Specifically, Reclamation has refused to manage the Klamath Project to ensure UKL elevations and  
 22 water quality sufficient to support adequate C'waam and Koptu spawning, feeding, rearing, sheltering,  
 23 and migration within and among UKL and its tributaries.

1 B. Status of C’waam and Koptu Populations

2 34. Despite a brief recovery period in the late 1980s and early 1990s, both the C’waam and  
 3 Koptu have continued on their longer-term trend towards extinction since they were listed as endangered  
 4 species.

5 35. The last major “recruitment” (that is, development of a cohort of juveniles into mature  
 6 adults capable of spawning new young) into the C’waam population occurred in 1993. Die-offs in 1995,  
 7 1996, and 1997, however, resulted in the loss of over 7,000 C’waam and Koptu, most likely due to poor  
 8 water quality in UKL. Between 2001 and 2015, the C’waam population has decreased by 55-66%. The  
 9 Koptu population has decreased by 76-78% during the same period.

10 36. The remaining populations of C’waam and Koptu are largely comprised of similar-aged  
 11 individuals. Because neither species has benefited from a major recruitment event in 20-25 years, both  
 12 C’waam and Koptu have aging populations without adequate numbers of juvenile fish to ensure the  
 13 continued existence of the species.

14 37. Individual C’waam are mostly 25-30 years old, already past their average life span of 17-  
 15 22 years, and nearing their maximum natural lifespan of 40 years. Individual Koptu are mostly 20-25  
 16 years old, well past their average lifespan of 12-14 years, and nearing their maximum lifespan of 30  
 17 years.

18 38. The Klamath Tribes and others collected over 700 dead adult C’waam and eight dead  
 19 adult Koptu in 2017 alone.

20 39. If the current adverse recruitment conditions persist, the C’waam and Koptu will likely be  
 21 extinct in less than a decade and are at continual risk that a catastrophic single-year die-off could drive  
 22 them to extinction much sooner.

23 ...

24 ...

1 C. Impacts of UKL Elevations on C’waam and Koptu

2 40. Reclamation’s decisions regarding the quantity and timing of releases from UKL have an  
 3 enormous impact on C’waam and Koptu, as certain UKL elevations during each season are required to  
 4 support essential C’waam and Koptu biological functions, to ensure sufficient high-quality habitat, and  
 5 to mitigate the occurrence of harmful water quality events.

6 41. Given the rarity of successful C’waam and Koptu spawning and recruitment and the age  
 7 of the existing populations, providing suitable spawning and rearing habitat is essential to the species’  
 8 continued survival. During the C’waam and Koptu spawning season, from late February/early March  
 9 through May each year, both species require shallow shoreline spawning sites with relatively clean,  
 10 coarse substrate to protect their eggs. C’waam and Koptu prefer such substrate in water of depths  
 11 greater than two feet for spawning and will rarely deposit eggs at depths less than one foot.

12 42. The amount of available spawning habitat, and therefore spawning activity, is primarily  
 13 influenced by UKL elevations as the Lake’s elevation determines the area of spawning substrate which  
 14 is inundated and the depth of water over such substrate. In 2010, for instance, when the elevation of  
 15 UKL was lower than 4,141.0 feet during much of spawning season, USGS monitoring showed that 14%  
 16 fewer C’waam females and 8% fewer males participated in spawning than during years when UKL was  
 17 kept above 4,142.0 feet during spawning season. The amount of time spent at the spawning areas in  
 18 2010 was at least 36% shorter for C’waam females and 20% shorter for males than in years when  
 19 elevation levels were maintained above 4,142.0 feet.

20 43. C’waam and Koptu larvae are present in UKL from late March through mid-July, with  
 21 peak abundance occurring from mid-May through mid-June. Larvae require shallow, near-shore and  
 22 marsh edge habitat with emergent vegetation not only for food, but also for protection from predators as  
 23 well as lake turbulence and currents, which can transport larvae out of UKL to perish in Project canals  
 24 and other unsuitable habitat, a process known as entrainment. Larvae are especially dependent on

1 emergent vegetation habitat located in wetland areas in and around UKL including Hanks Marsh,  
2 Shoalwater Bay, the Wood River Delta, the Upper Klamath National Wildlife Refuge, and the  
3 Williamson River Delta. The Williamson River Delta is particularly important as it is the area of highest  
4 C'waam and Koptu larvae density and serves as a thoroughfare for larvae migrating into the UKL from  
5 spawning areas in the Williamson and Sprague Rivers.

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

11 45. Dramatic changes to the Klamath River Basin's hydrology and the rise of agricultural  
12 activity within the area since the Project's inception have caused UKL to change from eutrophic to  
13 hypereutrophic, that is, from a lake with high nutrient levels to one that is excessively rich in them.  
14 Agricultural activities and timber harvesting have been the primary contributors to increased nutrient  
15 (primarily phosphorus) and sediment concentrations in UKL. Nutrient overloading in UKL has been  
16 exacerbated by the draining of over 50,000 acres of wetlands in and adjacent to UKL, which has  
17 decreased the nutrient uptake capacity of UKL while simultaneously introducing additional phosphorous  
18 from wetland decay.

19 46. As a result, water quality in UKL deteriorates during periods of maximum biological  
20 productivity each summer. Specifically, increased nutrient input into UKL has resulted in large, harmful  
21 blue-green algae blooms that develop each May through mid-July, and sometimes again in late  
22 summer/early fall. As algal biomass increases, pH levels in UKL rise, which directly stresses C'waam  
23 and Koptu. To compound this harm, the concentration of un-ionized ammonia in UKL increases  
24 exponentially as the Lake's pH level goes up. Un-ionized ammonia is directly toxic to C'waam and

1 Koptu, causing additional, cumulative stress and mortality to the species. Further, as algae respire at  
2 night they absorb dissolved oxygen (“DO”) from UKL, leading to even greater cumulative stress and  
3 mortality to C’waam and Koptu. The harmful effect of algal respiration on DO levels is especially  
4 pronounced in waters less than 3.3 feet deep. Higher UKL elevations in May through mid-July, which  
5 increase the amount of suitable habitat available for spawning and larval growth, also serve to inhibit the  
6 growth of algae blooms by depriving subsurface algae of sunlight, increasing water column stability, and  
7 diluting phosphorus.

8 47. While C’waam and Koptu spawning and recruitment are generally directly enhanced by  
9 higher as opposed to lower UKL levels through the summer months, UKL water quality can be affected  
10 both positively and negatively by higher UKL levels during that period, primarily because of the current  
11 state of poor water quality in UKL. Decreasing early summer growth of algae blooms reduces pH and  
12 phosphorus levels, which, in turn, decreases un-ionized ammonia concentrations in UKL, all of which  
13 help preserve water quality and reduce the risk of additional summer die-offs. Moreover, decreasing pH  
14 and phosphorus levels limits further algae growth. UKL elevations above 4,141.5 feet during the early  
15 summer algal bloom phase tend to decrease un-ionized ammonia concentrations, pH levels, and  
16 additional algae growth. Such elevations also reduce the amount of water less than 3.3 feet in depth,  
17 which is most affected by algal respiration. On the other hand, maintaining UKL at or slightly below  
18 4142.0 feet during the algal bloom phase tends to increase DO levels through photosynthetic oxygen  
19 production, inhibit ammonia increases in off-bottom waters, and allow for increased DO dispersal due to  
20 the actions of subsurface algae. Thus, the optimal UKL elevations for reducing the harmful effects of  
21 algae blooms require a balancing of the positive and negative effects of high and low elevations.

22 48. Another complicating consideration is the fact that blue-green algae exhaust remaining  
23 nutrients and often rapidly decline or “crash” between mid-July and the end of August. The  
24 decomposition of algae blooms by bacteria consumes DO. Thus, when large blooms crash, DO levels in



1 UKL may be depleted to less than 4.0 mg/l—levels harmful and even fatal to C’waam and Koptu.  
2 Decreasing the early summer growth of algae blooms—through the maintenance of appropriate UKL  
3 levels, for example—results in higher UKL DO levels in late-summer, as there is less algal biomass  
4 decomposition depleting DO. This directly protects the C’waam and Koptu. Higher elevations during  
5 the bloom crash period also tend to increase DO, as the impact of sediment oxygen demand is  
6 comparatively lower, while lower elevations tend to decrease DO. Higher elevations, however, also  
7 result in increased water column stability, which tends to decrease reaeration and DO levels.  
8 Comparatively lower UKL elevations also support greater photosynthetic oxygen production, increasing  
9 DO.

10 49. At the same time, water quality parameters do not exist in a vacuum. Higher lake levels  
11 that are beneficial for fish lifecycle functions can also serve to offset adverse effects of poor water  
12 quality even if those same higher levels contribute in part to poorer water quality as well. Factoring into  
13 the lake level equation during the summer months is also the fact that while adult C’waam and Koptu  
14 prefer to move to the northern end of UKL from June to September where there is more abundant food,  
15 fewer predators, and deeper water, they are often forced to migrate from this preferred habitat in July  
16 and August to escape areas of extremely poor water quality. Fish Banks, the mouth of the Williamson  
17 River, and especially Pelican Bay serve as vital water quality refuges during summer months. To enter  
18 the Pelican Bay water-quality refuge, however, C’waam and Koptu must pass through a relatively  
19 shallow portion of UKL. If UKL is not maintained at a sufficient elevation—enough to allow for a  
20 minimum depth of three feet at the entrance to Pelican Bay—C’waam and Koptu are at extreme risk from  
21 predation from pelicans as they pass into this critical water-quality refuge. Further, UKL elevations must  
22 be high enough to provide adequate amounts of sufficiently deep habitat in Pelican Bay to protect  
23 C’waam and Koptu from pelican predation and disease associated with overcrowding.

1           50.     Elevation levels continue to affect the C’waam and Koptu during the fall and winter  
 2 months, as they disperse throughout UKL. During September and October, juveniles leave near-shore  
 3 areas as UKL elevations decline, due to the combination of Project operations, seasonal hydrological  
 4 changes, and natural environmental cues, though Koptu juveniles still continue to use a diversity of  
 5 habitats, including near-shore areas impacted by declining UKL elevations. Continued access to refuge  
 6 areas from poor water quality may also be necessary during these periods for adult C’waam and Koptu.  
 7 In addition, elevations must remain sufficiently high into and through the winter to avoid dangerously  
 8 low DO concentrations as UKL freezes over, and to ensure sufficient water remains in UKL for the early  
 9 months of the following year to meet necessary spring elevation levels.

10           D.     Consultation and the 2013 BiOp

11           51.     In 2008, USFWS issued a biological opinion concerning the effects of the Project on  
 12 C’waam and Koptu that included a schedule of minimum UKL elevation levels the Project was required  
 13 to meet. In 2010, however, NMFS issued a biological opinion concerning the effects of the Project on  
 14 listed anadromous species that included an RPA that had the potential to conflict with the requirements  
 15 of the 2008 USFWS biological opinion. Consequently, the three agencies reinitiated consultation in a  
 16 process that culminated in the issuance of the 2013 BiOp in May, 2013, jointly by USFWS and NMFS.  
 17 The 2013 BiOp purports to evaluate the impacts of Project operations on five listed species, including  
 18 C’waam and Koptu, for a ten-year period ending on March 31, 2023. A copy of the 2013 BiOp is  
 19 attached hereto as **Exhibit C**. USFWS was responsible for the portions of the BiOp pertaining to  
 20 C’waam and Koptu, while NMFS took the lead on anadromous fish species.

21           52.     The 2013 BiOp acknowledged that “[g]oing into the [Endangered Species Act]  
 22 consultation, it was clear that the status and environmental baseline of the LRS [C’waam] and SNS  
 23 [Koptu] was highly degraded, so that even small adverse effects to the species were likely to reduce their  
 24 viability.” [2013 BiOp at § 10.6]. Yet it nevertheless concluded that “the continued operation of the

1 Project for a 10-year term is not likely to jeopardize the continued existence of the LRS [C’waam] and  
 2 SNS [Koptu] or result in the destruction or adverse modification of their critical habitat.” [2013 BiOp at  
 3 § 10.5].

4 53. In reaching their conclusion that Project operations would not adversely modify critical  
 5 habitat, USFWS and NMFS did “not rely on the regulatory definition of ‘destruction or adverse  
 6 modification’ of critical habitat at 50 CFR § 402.02.” [2013 BiOp at § 10.5]. Rather, they “relied upon  
 7 the statutory provisions of the ESA to complete the . . . analysis with respect to critical habitat.” [2013  
 8 BiOp at § 10.5]. USFWS and NMFS offered no explanation for this decision. Substantively, they  
 9 believed that C’waam and Koptu critical habitat would not be adversely modified because they  
 10 anticipated that the proposed action would result in “higher lake elevations in UKL in the spring and  
 11 early summer” than the Project previously had maintained, and that these levels would be “protective  
 12 and beneficial” for C’waam and Koptu spawning habitat. They based this conclusion on simulations of  
 13 UKL elevation showing that such supposedly protective elevations would be met by the Project “in all  
 14 but one of the 31 modeled years.” [2013 BiOp at § 10.7].

15 54. A similar assumption underpinned the 2013 BiOp’s no-jeopardy conclusion.  
 16 Specifically, the 2013 BiOp predicated that conclusion on the assumption that the proposed Project  
 17 operations being evaluated would include “higher seasonal UKL elevations and greater certainty that  
 18 elevation goals would be met compared to previous proposed actions.” [2013 BiOp at § 10.6]. The  
 19 2013 BiOp did not, however, set any hard and fast elevation targets for Reclamation to meet in order to  
 20 avoid jeopardy. Rather, it identified month-to-month variable “minimum elevation thresholds” (“BiOp  
 21 Thresholds”), which fluctuated based on calculated net inflows to UKL (greater inflows led to a higher  
 22 calculated threshold level) but were not derived from a specific consideration of the lifecycle needs of  
 23 the C’waam and Koptu. USFWS did warn, however, that the failure to meet the BiOp Thresholds  
 24

1 would result in the proposed action falling “outside the scope of [USFWS analyses,]” thus potentially  
 2 triggering a need for reinitiation of consultation. [2013 BiOp at § 8.1.3].

3 55. USFWS justified this approach by explaining that the BiOp Thresholds “are not intended  
 4 to serve as management targets. Instead, the Thresholds represent the *extreme* lower limits of  
 5 elevations that should be observed in UKL during the term of the proposed action and that were  
 6 considered and analyzed by this BiOp. . . . UKL elevations should rarely be at these end-of-month  
 7 thresholds; most of the time end-of-month elevations should be *well above* the thresholds.” [2013  
 8 BiOp at § 13.3.2 (T&C 1c) (emphasis added)]. Indeed, USFWS cautioned:

9 UKL elevations ***approaching*** a threshold indicate that Reclamation must identify the reasons for  
 10 the unexpected elevations and consult with the Services regarding implementation of potential  
 11 adaptive management actions to prevent violation of the threshold. However, if adaptive  
 12 management is unsuccessful at avoiding threshold violations and the [USFWS does not accept  
 13 the rationale for the violation or mitigation of the effects, the action will be declared to be outside  
 14 of the USUSFWS analysis and may trigger reinitiation of consultation.

15 [2013 BiOp § 8.1.3 (emphasis added)].

16 E. The Incidental Take Statement

17 56. Acknowledging that some take of C’waam and Koptu would occur as a result of  
 18 continued Project operations, the 2013 BiOp includes an ITS, which specified that its authorization of  
 19 incidental take only offers protection to Reclamation if the 2013 BiOp’s assumptions remain accurate  
 20 and if Reclamation complies with the ITS’s Terms and Conditions. [2013 BiOp at § 13]. Accordingly,  
 21 the ITS notes that the 2013 BiOp’s “assumptions and sideboards should be monitored throughout the  
 22 term of this BiOp to determine if they are valid; otherwise ongoing Project operations could be outside  
 23 the scope of this BiOp.” [2013 BiOp at § 13.1].

24 57. These “sideboards” include:

- a. Reliance on historical data from October 1, 1980, through September 30, 2011, to predict  
 future UKL water conditions. [2013 BiOp at § 8.1.1].

- 1           b. Use of the Klamath Basin Planning Model to generate hydrological predictions based on  
2           data beginning with the 1981 water year. [2013 BiOp at § 8.1.2].
- 3           c. The assumption that “water management decisions are linked directly to real-time  
4           hydrologic and water use conditions.” [2013 BiOp at § 8.1.2].
- 5           d. The “critical assumption” that hydrological conditions “will not change substantially over  
6           the term of th[e] BiOp” from those experienced from 1980 through 2011. [2013 BiOp at  
7           § 8.1.2].
- 8           e. The warning that if hydrological conditions “do not exhibit central tendency and  
9           variability similar to the simulated outcomes, then operations may fall outside the  
10          analytical scope of th[e] BiOp.” [2013 BiOp at § 8.1.2]. Such unaccounted for  
11          hydrological conditions, among others, include:
- 12                i. The occurrence of three “extremely dry years” in a row;
- 13                ii. “Declines in base flows during the July through September period”;
- 14                iii. “Continued shifts in the timing of spring run-off toward earlier in the year”;
- 15                iv. “Shifts in the pattern of consumptive water use within the Project, or the pattern  
16                or magnitude of water use above UKL”;
- 17                v. “Shifts in the pattern or magnitude of net accretions between Link River Dam and  
18                Iron Gate Dam”;
- 19                vi. A failure of “[f]low in the Williamson River and net inflow to UKL” to match the  
20                “magnitude, pattern, and sequence” observed in historical data; and
- 21                vii. The failure of “the pattern of [Project] water use” to match historical patterns.

22 [2013 BiOp at § 8.1.2].

23

24

1 f. The BiOp Thresholds “are not management targets.” [2013 BiOp at § 8.1.3]. Rather,  
2 these “thresholds define conditions that are outside the analysis conducted by [ ]USFWS  
3 for this BiOp.” [2013 BiOp at § 8.1.3].

4 g. “Elevations in UKL will be greater than the thresholds for all hydrologic conditions  
5 observed” in historical data, “except for discrete situations caused by rare winter events.”  
6 [2013 BiOp at § 8.1.3].

7 h. UKL “elevation will be a specific distance above the threshold at the beginning of each  
8 irrigation season . . . . As the irrigation season progresses, the distance between observed  
9 UKL elevations and the threshold should not progressively decline.” [2013 BiOp at §  
10 8.1.3].

11 i. “The minimum elevation thresholds define UKL elevations outside the scope of  
12 [ ]USFWS analyses, and provide for an early warning that aspects of hydrological  
13 conditions or water resource management are out of balance compared with the simulated  
14 and intended results of implementing the proposed action. . . . if adaptive management is  
15 unsuccessful at avoiding threshold violations and the [ ]USFWS does not accept the  
16 rationale for the violation or mitigation of the effects, the action will be declared to be  
17 outside of [ ]USFWS analysis and may trigger reinitiation of consultation.” [2013 BiOp  
18 at § 8.1.3].

19 58. The BiOp’s “assumptions” include, among others:

20 a. “Reclamation will ensure that hydrological data used to manage Project reservoirs are  
21 accurate.” [2013 BiOp at § 8.2].

22 b. The historical data “for the hydrology of the three primary Project reservoirs [including  
23 UKL] represent the range of distribution of elevations that are reasonably likely to occur  
24 over the 10-year consultation term . . . .” [2013 BiOp at § 8.2].

- 1 c. “Revised bottom elevations at the entrance to Pelican Bay are accurate.” [2013 BiOp at §
- 2 8.2].
- 3 d. “Any deviation from the formulaic approach intended to improve conditions for ESA-
- 4 listed species cannot create adverse effects greater than was analyzed in th[e] BiOp . . . .”
- 5 [2013 BiOp at § 8.2].

6 59. The 2013 BiOp also provides “nondiscretionary” Terms and Conditions the violation of  
 7 which would expose Reclamation to liability under Section 9 of the Endangered Species Act. [2013  
 8 BiOp at § 13.3.2]. These Terms and Conditions include, among others:

- 9 a. “Threshold UKL elevations identified in . . . this BiOp are *not intended to serve as*
- 10 *management targets*. . . . [W]henever operations cause UKL elevations to trend
- 11 downwards towards the thresholds, special scrutiny is required . . . . If a progressive
- 12 decrease in elevations is identified, Reclamation shall determine the causative factors of
- 13 this decrease and determine whether these factors are within the scope of the proposed
- 14 action and the effects analyzed in this BiOp. If Reclamation determines that there are
- 15 causative factors that may be outside the scope the proposed action and this BiOp,
- 16 Reclamation shall immediately consult with [USFWS to adaptively manage and take
- 17 corrective actions.” [2013 BiOp at § 13.3.2 (T&C 1c) (emphasis added)].
- 18 b. “Reclamation shall undertake appropriate hydrologic monitoring in Project reservoirs and
- 19 canals because accurate monitoring of water levels in Project reservoirs and flows
- 20 through Project facilities is fundamental to [USFWS’s] understanding of the effects of the
- 21 proposed action and amount of take of LRS [C’waam] and SNS [Koptu].” [2013 BiOp at
- 22 § 13.4.1(3)].

23 F. Reclamation’s Operation of the Project Under the 2013 BiOp

24

1           60.     Since USFWS and NMFS issued the 2013 BiOp, and directly contrary to the BiOp’s  
2 terms, Reclamation has consistently operated the Project such that the BiOp Thresholds have been  
3 treated as management targets rather than absolute minimums to be routinely operated well above, to be  
4 approached only in rare instances, and not ever to be breached “except for discrete situations caused by  
5 rare winter events.” [2013 BiOp at § 8.1.3.] These operational decisions put Reclamation outside the  
6 2013 BiOp’s scope and jeopardize the C’waam and Koptu. They also directly belie USFWS’s  
7 assumption that the 2013 BiOp will ensure “higher seasonal UKL elevations.” [2013 BiOp at § 10.6].  
8 Indeed, despite the 2013 BiOp’s assumptions that “[w]ater will not be managed to minimums” and that  
9 “elevations will also be monitored to ensure that there is not a projected or realized progressive decrease  
10 in the expected distance above the thresholds identified in this BiOp[.]” [2013 BiOp at § 10.6. at § 10],  
11 Reclamation has repeatedly allowed UKL to fall to or below the BiOp Thresholds. In fact, to date the  
12 C’waam and Koptu have yet to enjoy even one full year of spawning and maturation under the  
13 conditions that the 2013 BiOp envisioned as being necessary to support its no-jeopardy conclusion.

14           61.     Although recruitment into the C’waam and Koptu populations is essential for the species’  
15 continued existence, Reclamation has repeatedly disregarded the BiOp Thresholds during spring and  
16 early summer spawning and larval development periods, and has consistently kept UKL at or below  
17 elevations that USFWS identified in the 2013 BiOp as causing adverse effects to the species.

18           62.     In the 2013 BiOp, USFWS noted, for example, that during the C’waam and Koptu spring  
19 spawning season, “when lake levels go below 4,142.2 ft...the proposed action is likely to adversely  
20 affect sucker spawning because of reduced habitat availability.” [2013 BiOp at § 8.3.1.1]. But USFWS  
21 dismissed this risk by assuming that there was only a 5% chance of UKL elevations falling below that  
22 elevation during spawning season. [2013 BiOp at § 8.3.1.1] Yet even as the 2103 BiOp was being  
23 finalized, Reclamation permitted UKL elevations in March and May of 2013 to drop to 4,141.91 feet  
24 and 4,142.01 feet, respectively.



1           63.     In March of 2014, Reclamation again allowed UKL to drop below the adverse effect  
2 level of 4,142.2 feet when the Lake fell to 4,142.17 feet, and in April of that year, UKL’s elevation of  
3 4,142.22 was beneath the BiOp Threshold. The May 2014 elevation of 4,141.58 feet was beneath both  
4 of those metrics.

5           64.     In April of 2015 Reclamation met but did not exceed the BiOp Threshold of 4,142.57  
6 feet, and in April of 2017, Reclamation allowed UKL to fall beneath the BiOp Threshold again, to  
7 4,142.88 feet. Reclamation also breached the BiOp Thresholds in May of 2016 and May of 2017 by  
8 allowing UKL to drop to 4,142.61 feet and 4,142.33 feet respectively. As of May 23, 2018, UKL was  
9 below the BiOp Threshold for May 2018 as well, and Reclamation appears likely to miss—or, at most,  
10 barely exceed—the BiOp Threshold again this month.

11           65.     In the late spring to early summer, when C’waam and Koptu eggs hatch into larvae,  
12 USFWS acknowledged that its modeling showed that desiccation of C’waam and Koptu eggs and larvae  
13 located in shoreline spring areas was “expected to occur in about 30 percent of future water years,”  
14 based on its assumption that these adverse effects would occur if UKL elevations drop below 4,142.0  
15 feet. [2013 BiOp at § 8.3.1.2]. But USFWS again discounted the significance of this finding, reasoning  
16 that “implementation of proposed Project operations, which are likely to cause higher minimum lake  
17 elevations than in the past with more certainty that the minimum modeled lake elevations will not be  
18 exceeded, is likely to provide for the annual production of millions” of C’waam and Koptu larvae.  
19 [2013 BiOp at § 8.3.1.2]. But in June of each year 2013-2017, Reclamation has allowed UKL to drop  
20 below 4,142.0 feet: to 4,141.12 feet in 2013 (also below the BiOp Threshold); to 4,140.44 in 2014  
21 (again below the BiOp Threshold as well); to 4,141.35 feet in 2015; to 4,141.62 feet in 2016; and to  
22 4,141.67 feet in 2017.

23           66.     USFWS further concluded that “Project operations in most years are likely to adequately  
24 provide for inundation of emergent vegetation that is very important as larval sucker habitat during the

1 April-July period.” [2013 BiOp at § 8.3.1.3.] From April to July, when C’waam and Koptu larvae  
 2 begin swimming but before they develop into juveniles, they require access to suitable habitat with  
 3 emergent vegetation, as “[t]his type of vegetation likely provides larval suckers protection from  
 4 predators, possibly more diverse food resources, protection from turbulence during storm events, and  
 5 hydraulic roughness that could reduce the numbers of larvae transported out of the lake by currents.”  
 6 [2013 BiOp at § 8.3.1.3 (internal citations omitted)]. But USFWS cautioned that “when lake levels go  
 7 below 4,140.0 ft . . . at the end of July, substantial reductions of larval habitat are likely to occur and are  
 8 likely to reduce larval productivity or survival.” [2013 BiOp at § 8.3.1.3] USFWS concluded that this  
 9 risk did not warrant a jeopardy finding, however, because “elevations below 4,140.0 ft . . . at the end of  
 10 July occurred in only one year out of 31 modeled years.” [2013 BiOp at § 8.3.1.3].

11 67. In July of 2013, however, Reclamation permitted the UKL elevation to drop to 4,139.91  
 12 feet, below the BiOp Threshold and the adverse effect level. That pattern recurred in July of 2014, when  
 13 Reclamation allowed UKL to drop to 4,139.26 feet.

14 68. With regard to August UKL elevations, USFWS observed that “at elevations below  
 15 4,139.0 ft,” C’waam and Koptu juveniles are likely to suffer from loss of “diverse, shallow-water  
 16 habitats.” [2013 BiOp at § 8.3.1.4]. USFWS again declined to make a jeopardy determination, because  
 17 an UKL “elevation at or below 4,139.0 ft . . . occurred in 4 of 31 modeled years . . . during August.”  
 18 [2013 BiOp at § 8.3.1.4].

19 69. In August of 2014 and 2016, however, Reclamation permitted UKL to decrease to  
 20 beneath both the BiOp Threshold and the adverse effect levels, to 4,138.6 feet in 2014 and 4,138.73 feet  
 21 in 2016. Thus, for most of the summer of 2014 and again in 2016, Reclamation deprived larval and  
 22 juvenile C’waam and Koptu of critical habitat and prevented adults from accessing and enjoying  
 23 sufficient habitat within essential water-quality refuge areas, including Pelican Bay, during the bloom  
 24

1 crash period, leaving C'waam and Koptu exposed to the risk of a catastrophic die-off due to very poor  
2 water quality in other parts of UKL, such as occurred in 1996-97. [See 2013 BiOp at § 8.3.1.5].

3 70. Reclamation has also forced C'waam and Koptu adults and juveniles to endure UKL's  
4 poor late summer water conditions without the benefit of adequate depths and adequate access to water  
5 quality refuge areas in late summer. In the 2013 BiOp, USFWS acknowledged that "low lake levels (i.e.  
6 those below 4,138.2 ft . . .) in September could adversely affect adult suckers by limiting their access to  
7 some preferred habitats." [2013 BiOp at §8.3.1.5.] In September 2014, the elevation of UKL was  
8 4,138.20 feet, right at the adverse effect level. In September of 2016, Reclamation allowed UKL to drop  
9 below that level, to 4,138.13 feet.

10 71. In November 2015, Reclamation also allowed the elevation of UKL to fall beneath the  
11 BiOp Threshold, reaching a level of 4,138.34 feet, exposing C'waam and Koptu to low DO levels  
12 throughout the winter of 2015-2016.

13 72. The information in the preceding 10 paragraphs is also reflected in the following table:

Ending Month	2013 BiOp Adverse Effects Levels	2013	2014	2015	2016	2017
January		4,140.44	4,140.31	4,141.05	4,141.06	4,140.88
February		4,141.27	4,141.50	4,142.32	4,142.04	4,142.38
March	<u>4,142.2</u>	<u>4,141.91</u>	<u>4,142.17</u>	4,142.92	4,142.87	4,142.69
April	4,142.2	4,142.41	<b>4,142.22</b>	4,142.57	<u>4,143.07</u>	<b>4,142.88</b>
May	4,142.2	<u>4,142.01</u>	<b>4,141.58</b>	4,142.21	<b>4,142.61</b>	<b>4,142.33</b>
June	4,142.0	<b><u>4,141.12</u></b>	<b><u>4,140.44</u></b>	<u>4,141.35</u>	<b><u>4,141.62</u></b>	<u>4,141.67</u>
July	4,140.0	<u>4,139.91</u>	<b><u>4,139.26</u></b>	4,140.39	4,140.28	4,140.36
August	4,139.0	4,139.14	<b><u>4,138.60</u></b>	4,139.36	<u>4,138.73</u>	4,139.44
September	4,138.2	4,138.80	<u>4,138.20</u>	4,138.78	<u>4,138.13</u>	4,138.80
October	4,138.2	4,138.94	4,138.27	4,138.30	4,138.66	4,138.89

Ending Month	2013 BiOp Adverse Effects Levels	2013	2014	2015	2016	2017
November		4,139.20	4,138.90	<b>4,138.34</b>	4,139.19	4,139.58
December		4,139.61	4,140.41	4,139.71	4,140.00	4,140.19

**Bold** indicates elevations below the applicable BiOp Threshold; Underlined indicates elevations precisely at the applicable BiOp Threshold; and *Italicized* indicates elevations below the adverse effects levels identified in the 2013 BiOp.

73. Reclamation's ongoing failure to comply with the terms of the 2013 BiOp and its ITS jeopardize the continued existence of the C'waam and Koptu.

G. Necessary C'waam and Koptu Conservation Levels

74. In order to preserve the C'waam and Koptu, the Klamath Tribes have invested significant resources in developing a robust Aquatics Program within its Natural Resources Department. The Aquatics Program has utilized the best available science to identify an annual UKL elevation regime ("C'waam and Koptu Conservation Levels") the maintenance of which as part of Project operations would allow the Project to more successfully avoid jeopardizing the C'waam and Koptu.

75. Paragraphs 40-50 above identify the key lifecycle and water quality considerations that connect particular UKL elevations to the needs of the C'waam and Koptu. When these considerations are analyzed in light of the best available science, the following conclusions are reached:

- a. The best available science demonstrates that a minimum UKL elevation of 4,143.0 feet at the end of March is required to ensure that nearly all potential spawning substrate is inundated to a depth of at least one foot and to provide spawning adults access to spawning grounds. Furthermore, this elevation must be maintained through June 15 to prevent the desiccation of larvae and eggs deposited at shallower depths. At this

1 elevation, 44% of spawning habitat in the Ouxy Springs spawning area and 68% of the  
 2 Sucker Springs spawning area are inundated to the more protective depth of at least two  
 3 feet.

4 b. The existence of suitable larvae habitat at depths of at least two feet reduces the risk of  
 5 predation from the invasive fathead minnow and has been shown to increase larvae  
 6 survival rates by more than 20%, while the minimum depth for larvae habitat is one foot.  
 7 The best available science shows that UKL elevations must therefore remain at or above  
 8 4,143.0 feet through June 15 to maximize the available emergent vegetation habitat and  
 9 to ensure that eggs deposited during spawning season are able to develop into viable  
 10 larvae. This minimum elevation also ensures that at least 40% of critical larvae emergent  
 11 vegetation habitat in the Williamson River Delta is inundated to at least two feet.

12 c. The best available science shows that UKL elevations must remain at or above 4142.0  
 13 feet through June 30 to ensure emergent vegetation habitat remains to facilitate larval  
 14 feeding and sheltering as they continue to mature. This elevation would result in 2,240  
 15 acres of suitable habitat in the Williamson River Delta and inundation of 68% of  
 16 available marsh edge habitat to the preferred depth of two feet. The one-foot elevation  
 17 drop between June 15 and June 30 serves to reduce the reproduction of predatory  
 18 invasive fathead minnows that spawn in shoreline areas and prey on larval C’waam and  
 19 Koptu. The water quality considerations identified in paragraph 46 above further support  
 20 these C’waam and Koptu Conservation Levels for the spring period.

21 d. The best available science shows that elevation levels of 4,142.0 feet on June 30,  
 22 dropping to 4,141.5 feet on July 15 are the most effective way to combat the harmful  
 23 effects of algae blooms. It also demonstrates that a minimum UKL elevation of 4,141.0  
 24 feet through July 31 ensures that at least 38% of suitable marsh edge habitat and 1,660

1 acres of Williamson River Delta habitat remain available until larvae have transformed  
2 into juveniles. This minimum elevation is also necessary to ensure adequate amounts of  
3 habitat at depths of at least six feet for adult C’waam and Koptu in the northern portions  
4 of UKL. (Adult C’waam and Koptu typically inhabit depths of six to 25 feet.) The  
5 gradually declining water elevations during this time period also reduce fathead minnow  
6 spawning habitat, which in turn lowers the population who prey on larval C’waam and  
7 Koptu the following year, while still maintaining adequate amounts of near-shore habitat  
8 for juvenile C’waam and Koptu feeding and shelter.

- 9 e. As set forth in paragraph 49 above adult C’waam and Koptu must often leave their  
10 preferred August habitat in the north end of UKL to seek areas of better water quality.  
11 The best available science shows that UKL minimum elevations of 4,140.5 feet on  
12 August 15, 4,140.0 feet on August 31, and 4,139.5 feet on September 15 are required to  
13 allow adult C’waam and Koptu to enter and remain in the critical water quality refuge of  
14 Pelican Bay during these summer months. These levels are further informed by the  
15 effects of UKL water quality on the species’ continued viability, as they also serve to  
16 reduce the occurrence of harmful water quality events. That is, when all of these  
17 considerations set forth paragraphs 40–50 above about the benefits and costs of higher  
18 and lower elevations during the July and August bloom crash are taken into account, the  
19 best available science indicates that the optimal UKL elevations for maintaining DO  
20 levels during the seasonal algae crash period are neither relatively high nor relatively  
21 low—which also corresponds to 4,140.5 feet on August 15, 4140.0 feet on August 31,  
22 and 4,139.5 feet September 15 through October 15. These elevation levels also help  
23 protect C’waam and Koptu from the effects of a second bloom phase that can also occur  
24 between September and mid-October. Although cooler water temperatures tend to

1 improve water quality during this time of year, these late blooms may still reduce DO to  
 2 stress-inducing levels below 4.0 mg/l and increase UKL pH values. Maintaining the  
 3 4,139.5 feet elevation through mid-October ameliorates these effects. These levels also  
 4 allow adult C’waam and Koptu to continue to access water-quality refuge areas while  
 5 maintaining some diversity of near-shore habitat to support the biological functions of  
 6 Koptu juveniles.

7 f. The best available science shows that, to avoid stressful or lethal levels of DO, UKL’s  
 8 elevation must be brought to at least 4,141.0 feet by the end of December, and that UKL  
 9 elevations should rise as quickly as possible from January 1 to 4,143.0 feet by March 31  
 10 to decrease the chance of critically low DO levels under ice and to provide adequate in-  
 11 lake spawning habitat during the upcoming spring season.

12 76. The C’waam and Koptu Conservation Levels are summarized as follows:

RATIONALE	DATE	C’WAAM AND KOPTU CONSERVATION LEVEL
Spawning habitat; ensure adequate beginning elevation at beginning of irrigation season	March 31	4,143.0 feet*
Spawning habitat; larvae habitat	April 30	4,143.0 feet
Spawning habitat; larvae habitat	May 15	4,1430.0 feet
Spawning habitat; larvae habitat; lake-wide water quality	May 31	4,143.0 feet
Larvae habitat; lake-wide water quality	June 15	4143.0 feet
Larvae habitat; reduce predatory fathead minnow habitat; lake-wide water quality	June 30	4,142.0 feet
Lake-wide water quality; reduce predatory fathead minnow habitat	July 15	4,141.5 feet

<b>RATIONALE</b>	<b>DATE</b>	<b>C’WAAM AND KOPTU CONSERVATION LEVEL</b>
Lake-wide water quality; adult access to water-quality refuge; juvenile habitat; adult habitat	July 31	4,141.0 feet
Lake-wide water quality; adult access to water-quality refuge	August 15	4,140.5 feet
Lake-wide water quality; adult access to water-quality refuge; juvenile habitat; adult habitat	August 31	4,140.0 feet
Lake-wide water quality; adult access to water-quality refuge; juvenile habitat; adult habitat	September 15	4,139.5 feet
Lake-wide water quality; adult access to water-quality refuge	September 30	4,139.5 feet
Lake-wide water quality; adult access to water-quality refuge	October 15	4,139.5 feet
Lake-wide water quality; ability to reach 4,143.0 feet by March 31	October 31	4,140.0 feet
Lake-wide water quality; ability to reach 4,143.0 feet by March 31	November 30	4,140.5 feet
Lake-wide water quality; ability to reach 4,143.0 feet by March 31	December 31	4,141.0 feet

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

77. The Klamath Tribes have shared this information with Reclamation, but to date it has not incorporated it into its operation of the Project. Indeed, since 2013, Reclamation has allowed UKL elevations to stay below the C’waam and Koptu Conservation Levels during the majority of this time ...



1 period and, therefore, deprived the species of the necessary habitat and water quality benefits that inform  
 2 those Levels. Specifically,

- 3 a. In May 2014, Reclamation allowed UKL to reach an elevation of 4,141.6 feet, below the  
 4 C’waam and Koptu Conservation Level of 4,143.0 feet.
- 5 b. In June, July, August, September, October, November, and December of each year from  
 6 2013 through 2017, Reclamation maintained UKL elevations below the applicable  
 7 C’waam and Koptu Conservation Levels.
- 8 c. In March, April, and May 2018, Reclamation allowed UKL to drop below the C’waam  
 9 and Koptu Conservation Level of 4,143.0 feet, depriving them of the opportunity for  
 10 meaningful recruitment.

11 **COUNT I:**  
 12 **ENDANGERED SPECIES ACT SECTION 9 - UNLAWFUL TAKE**  
 13 **(Defendant Reclamation)**

14 78. The Klamath Tribes incorporate by reference all preceding paragraphs as if fully alleged  
 15 herein.

16 79. “[I]t is unlawful for any person subject to the jurisdiction of the United States to take any  
 17 [endangered] species within the United States.” 16 U.S.C. § 1538(a)(1)(B). For purposes of the  
 18 Endangered Species Act, “‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture,  
 19 or collect” a member of an endangered species. 16 U.S.C. § 1532(19). USFWS has further clarified that  
 20 “‘harm’ includes “significant habitat modification or degradation where it actually kills or injures fish or  
 21 wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing,  
 22 migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

23 80. The take prohibition applies to “any person,” including “any officer, employee, agent,  
 24 department, or instrumentality of the Federal Government . . . .” 16 U.S.C. § 1532(13). The citizen suit  
 provision of the ESA empowers any individual to bring suit to enforce the ESA and its implementing

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1 regulations against any person, including federal agencies. 16 U.S.C. § 1540(g)(1). Reclamation is  
2 perform a person subject to both the ESA's take prohibition and its citizen suit provision.

3 81. By consistently managing the Project at or below the BiOp Thresholds, and thereby  
4 treating those Thresholds as management targets in direct contravention of the 2013 BiOp, Reclamation  
5 has unlawfully taken and continues to unlawfully take C'waam and Koptu, both through direct negative  
6 impacts on individual fish as well as through significant modification and degradation of critical habitat  
7 far beyond the terms of the 2013 BiOp.

8 82. Since 2013, Reclamation's failure to maintain UKL elevations consistently well above  
9 the BiOp Thresholds as contemplated by the 2013 BiOp has resulted in excessive take of C'waam and  
10 Koptu. The loss of larvae and juveniles through entrainment has exceeded the ITS, as Reclamation has  
11 released waters that should have been retained in UKL as required to exceed the Thresholds. Also,  
12 several hundred thousand eggs and larvae have been harmed from desiccation and predation due to  
13 inadequate inundation of shoreline spawning habitat caused by Reclamation's repeated breach of the  
14 BiOp Thresholds during critical spawning times. Seasonal habitat reductions related to water diversions  
15 resulting in UKL elevations lower than those analyzed and mandated by the 2013 BiOp have also  
16 resulted in harm and harassment to hundreds of thousands of larvae, tens of thousands of juveniles, and  
17 thousands of adults each year as they are forced to move into areas where conditions (e.g., food  
18 availability, water quality, or predation) are less favorable.

19 83. Furthermore, Reclamation has violated Term & Condition 1(c) of the ITS by managing  
20 UKL elevations to and frequently below the BiOp Thresholds, thus leaving the safe harbor of the ITS's  
21 permitted take.

22 84. Reclamation's illegal take of C'waam and Koptu has harmed and is harming the Klamath  
23 Tribes and the Klamath Tribes have no adequate remedy at law.

24

1 85. Accordingly, pursuant to 16 U.S.C. § 1540(g)(1)(A), the Klamath Tribes are entitled to  
2 an injunction against further unlawful take of C’waam and Koptu and specifically requiring Reclamation  
3 to maintain UKL elevations at or above C’waam and Koptu Conservation Levels until a new biological  
4 opinion covering Project operations is issued that specifically addresses the impacts of the Project on  
5 C’waam and Koptu and their critical habitat.

6 **COUNT II:**  
7 **ENDANGERED SPECIES ACT SECTION 7 - VIOLATION OF DUTIES TO AVOID**  
8 **JEOPARDY TO THE CONTINUED EXISTENCE OF THE C’WAAM AND KOPTU AND**  
9 **ADVERSE MODIFICATION TO THEIR CRITICAL HABITAT**  
10 **(Defendant Reclamation)**

11 86. The Klamath Tribes incorporate by reference all preceding paragraphs as if fully alleged  
12 herein.

13 87. In accordance with 16 U.S.C. § 1536(a)(2):

14 Each Federal agency shall, in consultation with and with the assistance of the  
15 Secretary, insure that any action authorized, funded, or carried out by such agency  
16 . . . is not likely to jeopardize the continued existence of any endangered species  
17 or threatened species or result in the destruction or adverse modification of habitat  
18 of such species which is determined by the Secretary, after consultation as  
19 appropriate with affected States, to be critical . . . .

20 88. An agency action “jeopardizes” a protected species if it “reasonably would be expected,  
21 directly or indirectly, to reduce appreciably the species' likelihood of both the survival and recovery of a  
22 listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50  
23 C.F.R. § 402.02.

24 89. “Destruction or adverse modification” means “a direct or indirect alteration that  
appreciably diminishes the value of critical habitat for the conservation of a listed species,” such as  
alterations which “alter the physical or biological features essential to the conservation of a species . . .  
.” 50 C.F.R. § 402.02.

90. A federal agency breaches its duty to ensure its actions do not jeopardize or adversely  
modify critical habitat of listed species when it relies on a faulty biological opinion.

1 91. Despite USFWS’s warning that management to and breaches of the BiOp Thresholds  
2 would exceed the scope of the impacts contemplated by the 2013 BiOp, Reclamation has continued to  
3 rely on the 2013 BiOp after allowing UKL to fall below the BiOp Thresholds during 10 different months  
4 since the BiOp issued in 2013, and to barely meet the Thresholds during seven other months since that  
5 time.

6 92. Further, the occurrence of dry conditions in three consecutive years and four of the past  
7 six year (2013, 2014, 2015, 2018) falls outside the 2013 BiOp’s explicit modeling assumptions. For  
8 example, the modeling upon which the 2013 BiOp relied showed a five-percent probability of elevations  
9 below the BiOp Thresholds occurring during spawning season. Yet this has taken place in two of five  
10 years since 2013 (2013 and 2014). In total, UKL elevations have fallen to or below the BiOp  
11 Thresholds during 17 of the 61 months from May 2013 through May 2018, more than a quarter of the  
12 total period.

13 93. This means C’waam and Koptu have been forced to spawn, feed, and shelter under  
14 conditions significantly worse than those contemplated by the 2013 BiOp, while the aging adult C’waam  
15 and Koptu populations continue to lose reproductive viability. Moreover, the USFWS recognized that  
16 “the lack of recruitment into the adult breeding population of both species since the late 1990s is  
17 magnifying the significance of [the] adverse effects” of declining UKL elevations, though it mistakenly  
18 assumed that “such events are likely to be infrequent.” [2013 BiOp at § 8.3.1.4].

19 94. Reclamation’s consistent failure to maintain UKL elevations above the BiOp Thresholds  
20 and its failure to immediately consult with USFWS to adaptively manage and take corrective actions  
21 when the assumptions underlying the 2013 BiOp proved to be inaccurate have jeopardized and continue  
22 to jeopardize the continued existence of the C’waam and Koptu.

23 95. Reclamation’s consistent failure to maintain UKL elevations at or above the BiOp  
24 Thresholds and its failure to immediately consult with USFWS to adaptively manage and take corrective

1 actions when the assumptions underlying the 2013 BiOp proved to be inaccurate have caused and  
 2 continue to cause the destruction and adverse modification of C’waam and Koptu critical habitat.

3 96. Reclamation’s continued operation of the Project in a manner that fails to ensure against  
 4 jeopardy to the C’waam and Koptu or the illegal modification of their critical habitat has harmed and is  
 5 harming the Klamath Tribes and the Klamath Tribes have no adequate remedy at law.

6 97. Accordingly, pursuant to 16 U.S.C. § 1540(g)(1)(A), the Klamath Tribes are entitled to  
 7 an injunction against further agency action jeopardizing the continued existence of C’waam and Koptu  
 8 and destroying and adversely modifying their critical habitat, and specifically requiring Reclamation to  
 9 maintain UKL elevations in accordance with the C’waam and Koptu Conservation Levels until a new  
 10 biological opinion covering Project operations is issued that specifically addresses the impacts of the  
 11 Project on C’waam and Koptu and their critical habitat.

12 **COUNT III:**  
 13 **ENDANGERED SPECIES ACT SECTION 7 – FAILURE TO REINITIATE ADEQUATE**  
 14 **CONSULTATION**  
 15 **(Defendants Reclamation, USFWS, and NMFS)**

16 98. The Klamath Tribes incorporate by reference all preceding paragraphs as if fully alleged  
 17 herein.

18 99. Reclamation, USFWS, and NMFS each have a non-discretionary duty under 50 C.F.R.  
 19 § 402.16 to reinstate formal consultation if (i) “the amount or extent of taking specified in the incidental  
 20 take statement is exceeded,” (ii) “new information reveals effects of the action that may affect listed  
 21 species or critical habitat in a manner or to an extent not previously considered,” or (iii) “the identified  
 22 action is subsequently modified in a manner that causes an effect to the listed species or critical habitat  
 23 that was not considered in the biological opinion.”

24 100. Because Reclamation has not adhered to the 2013 BiOp’s sideboards, because the  
 assumptions upon which the 2013 BiOp was predicated have proven to be flawed, and because  
 Reclamation has exceeded the amount of take authorized by the 2013 BiOp’s Incidental Take Statement,

1 Reclamation, USFWS, and NMFS must reinitiate consultation with regard to the impact of the Project  
2 on C'waam and Koptu and their critical habitat.

3 101. In addition, because new information regarding the hydrological realities of Project  
4 operations has come to light since the issuance of the 2013 BiOp, Reclamation, USFWS, and NMFS  
5 must reinitiate consultation to consider the effect of these developments on C'waam and Koptu and their  
6 critical habitat.

7 102. Because Reclamation has operated the Klamath Project at elevations below those  
8 contemplated by the 2013 BiOp, Reclamation, USFWS, and NMFS must reinitiate consultation to  
9 consider the effect of these unlawful actions on C'waam and Koptu and their critical habitat.

10 103. While, as of January 5, 2017, Reclamation, USFWS, and NMFS have formally reinitiated  
11 consultation on the effects of the Project, Reclamation's April 10, 2018 letter, drafted in coordination  
12 with USFWS and NMFS in response to the Klamath Tribes' ESA 60-day notice, provides no assurances  
13 that this reconsultation will adequately address the harmful impacts of the Project on C'waam and Koptu  
14 and their critical habitat. In particular, Reclamation has failed to provide any assurance the consultation  
15 will re-examine the BiOp Thresholds or USFWS Critical Levels in order to ensure the continued  
16 survival of C'waam and Koptu and the maintenance of their critical habit. The letter fails to  
17 acknowledge the obvious need for higher UKL levels or the imminent jeopardy the C'waam and Koptu  
18 presently face.

19 104. This failure to reinitiate appropriate consultation with respect to the impacts of the  
20 Project on C'waam and Koptu and their critical habitat has harmed and is harming the Klamath Tribes  
21 and the Klamath Tribes have no adequate remedy at law.

22 105. Accordingly, pursuant to 16 U.S.C. § 1540(g)(1)(A), the Klamath Tribes are entitled to  
23 an injunction requiring Reclamation to reinitiate ESA consultation with respect to the impacts of the  
24 Project on C'waam and Koptu and their critical habitat.

106. Reclamation's, USFWS' and NMFS' actions and omissions in failing to reinitiate  
consultation with respect to the impacts of the Project on C'waam and Koptu and their critical habitat

1 are arbitrary, capricious, and an abuse of discretion, and otherwise not in accordance with the law and  
2 are reviewable under the APA, 5 U.S.C. § 706.

3  
4 **COUNT IV:**  
**NEPA – FAILURE TO COMPLY WITH NEPA**  
**(Defendant Reclamation)**

5 107. The Klamath Tribes incorporate by reference all preceding paragraphs as if fully alleged  
6 herein.

7 108. NEPA and its implementing regulations require a federal agency to conduct an analysis  
8 of the potential impacts of any “major Federal actions significantly affecting the quality of the human  
9 environment.” 42 U.S.C. § 4332(C); 40 C.F.R. pt. 1501.

10 109. As the 2013 BiOp notes, *e.g.*, at §§ 8.3, fig. 8.13, 8.3.1.2 & 10.6, the proposed Project  
11 operations evaluated therein are a departure from, and not a mere continuation of, the Project’s prior  
12 operational plan. It therefore constitutes a major federal action significantly affecting the quality of the  
13 human environment subject to NEPA.

14 110. Reclamation, however, failed to prepare an EIS regarding its implementation of the 2013  
15 BiOp, unlawfully refusing to give the environmental impacts of Project operations the hard look NEPA  
16 requires and depriving the public of a meaningful opportunity to comment on the impacts of the Project.  
17 *See* 42 U.S.C. § 4332.

18 111. By the actions and inactions alleged above, Reclamation is currently violating, and unless  
19 enjoined will continue to violate, NEPA and its implementing regulations.

20 112. Reclamation’s actions and inactions are arbitrary, capricious, an abuse of discretion, and  
21 otherwise not in accordance with the requirements of NEPA and its implementing regulations. These  
22 actions and inactions are reviewable under the Administrative Procedures Act. *See* 5 U.S.C. §§ 701–  
23 706.

1 113. Accordingly, pursuant to 5 U.S.C. § 706, the Klamath Tribes are entitled to a declaration  
2 that Reclamation has failed to comply with NEPA by failing to prepare an EIS regarding its decision to  
3 commence Project operations under the 2013 BiOp.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, the Klamath Tribes pray as follows:

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

9 B. The Court enjoin, pursuant to 16 U.S.C. § 1540(g)(1)(A), Reclamation from further  
10 unlawful take of C’waam and Koptu and specifically require Reclamation to maintain UKL elevations at  
11 or, where appropriate, above C’waam and Koptu Conservation Levels until reconsultation results in the  
12 issuance of a new biological opinion;

13 C. The Court enjoin, pursuant to 16 U.S.C. § 1540(g)(1)(A), Reclamation from further  
14 jeopardizing the continued existence of C’waam and Koptu and further destruction and adverse  
15 modification of their critical habitat and specifically require Reclamation to maintain UKL elevations at  
16 or, where appropriate, above C’waam and Koptu Conservation Levels, until reconsultation results in the  
17 issuance of a new biological opinion;

18 D. The Court order, pursuant to 16 U.S.C. § 1540(g)(1)(A), Reclamation, USFWS, and  
19 NMFS to reinitiate Endangered Species Act consultation with respect to the impacts of the Project on  
20 C’waam and Koptu and their critical habitat;

21 E. The Court adjudge and declare, pursuant to 5 U.S.C. § 706, that Reclamation has violated  
22 NEPA by failing to prepare an EIS that addresses the environmental impacts of, and reasonable  
23 alternatives to, the decision to implement the 2013 BiOp in Project operations;



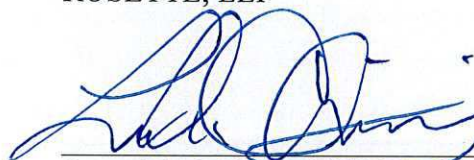
1 F. The Court award the Klamath Tribes their attorneys' fees and costs pursuant to 16 U.S.C.  
2 § 1540(g)(4);

3 G. The Court award the Klamath Tribes their attorneys' fees and costs pursuant to 28 U.S.C.  
4 § 2412; and

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

7 RESPECTFULLY SUBMITTED this 23rd day of May, 2018.

8 ROSETTE, LLP

9 

10  
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