PATTI A. GOLDMAN (WSBA # 24426) (*pro hac vice*)
KRISTEN L. BOYLES (CSBA # 158450)
PAULO PALUGOD (WSBA # 55822) (*pro hac vice*)
Earthjustice
810 Third Avenue, Suite 610
Seattle, WA 98104
Ph: (206) 343-7340
pgoldman@earthjustice.org
kboyles@earthjustice.org
ppalugod@earthjustice.org

ANNA K. STIMMEL (CSBA # 322916)
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
Ph: (415) 217-2000
astimmel@earthjustice.org

Attorneys for Plaintiffs/Cross-Claimants Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, and Yurok Tribe

AMY CORDALIS (CSBA # 321257)
4856 29th St. N.
Arlington, VA 22207
Ph: (541) 915-3033
acordalis@ridgestoriffles.org

Attorney for Plaintiff/Cross-Claimant Yurok Tribe

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

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

Plaintiffs,

v.

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

Defendants,

and

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

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

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

HEARING DATE: April 26, 2023
TIME: 2:00 pm
LOCATION: Videoconference
JUDGE: Hon. William H. Orrick

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

Intervenor-Defendants.

UNITED STATES OF AMERICA,

Cross-Claimant,

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

and

HOOPA VALLEY TRIBE,

Joined as Cross-Claimants,

v.

KLAMATH WATER USERS ASSOCIATION, and OREGON WATER RESOURCES DEPARTMENT,

Crossclaim-Defendants,

and

KLAMATH IRRIGATION DISTRICT,

Intervenor-Defendant.

KLAMATH WATER USERS ASSOCIATION,

Counterclaimant,

v.

UNITED STATES OF AMERICA,

Counterclaim-Defendant.

OREGON WATER RESOURCES DEPARTMENT,

Counterclaimant,

v.

UNITED STATES OF AMERICA,

Counterclaim-Defendant.

TABLE OF CONTENTS

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

TABLE OF AUTHORITIES

Page(s)

Cases

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

Statutes

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

Other Authorities

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

TABLE OF ACRONYMS

BiOp	Biological Opinion
cfs	cubic feet per second
ESA	Endangered Species Act
EWA	Environmental Water Account
FWS	Fish and Wildlife Service
IOP	Interim Operations Plan
NMFS	National Marine Fisheries Service
PCFFA	Pacific Coast Federation of Fishermen's Associations
SEA	Supplemental Environmental Assessment
SONCC	Southern Oregon/Northern California Coast
TOP	Temporary Operating Procedure
UKL	Upper Klamath Lake

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

Pursuant to Fed. R. Civ. P. 65, Plaintiffs Yurok Tribe, Pacific Coast Federation of Fishermen's Associations ("PCFFA"), and Institute for Fisheries Resources (hereinafter "Yurok Tribe") hereby request a preliminary injunction to prohibit Defendant U.S. Bureau of Reclamation ("Reclamation") from delivering water for irrigation unless Reclamation can ensure that it will be able to comply fully with its Endangered Species Act ("ESA") obligations to threatened Southern Oregon/Northern California Coast ("SONCC") Coho Salmon and endangered Southern Resident Killer Whales ("Killer Whales") that depend on Klamath River Chinook Salmon as prey. In January 2023, Reclamation adopted the 2023 Temporary Operating Procedure ("TOP") allowing Klamath River flows to go below the minimum flows mandated in the 2019-2024 Klamath Project Operations Plan ("2019 Plan") and the 2019 Biological Opinion ("BiOp") issued by the National Marine Fisheries Service ("NMFS") on that Plan's impacts on SONCC Coho Salmon and Killer Whales. Reclamation adopted the 2023 TOP to refill Upper Klamath Lake ("UKL") after it provided substantial amounts of water for irrigation in the fall-winter, reducing UKL elevations. On February 14, 2023, Reclamation began reducing Klamath River flows 11% below the minimums and, on February 25, 2023, it increased the reduction to 16% below the minimums, despite knowing the reductions would cause serious harm to and actually kill salmon. The motion is noted for hearing at 2:00 p.m. on April 26, 2023.

Two operational decisions backed Reclamation into a precarious corner that led it to adopt the 2023 TOP. First, Reclamation provided more water in the summer for irrigation than provided under its 2019 Plan, and it subsequently provided additional water for irrigation in the fall-winter, even as it was proposing to allow the river to go below the minimum flows. Second, Reclamation converted what had been an aspirational guideline for UKL elevations to provide habitat for endangered fish into a mandatory management requirement. By making its April 1

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

UKL elevation guideline a binding requirement after over-allocating water for irrigation, Reclamation pitted one set of ESA-listed species against another. To be certain to meet its new UKL requirement, Reclamation contravened the mandatory minimum river flows.

Reducing Klamath River flows below the minimums is reasonably certain to cause the unlawful take of threatened Coho Salmon by dewatering and killing salmon eggs before they can hatch and by harming juvenile salmon by diminishing the amount and quality of their rearing habitat. Going below the minimum flows also violates ESA § 7 because Reclamation has never consulted with NMFS on the effects of violating the mandatory minimum flows. Reclamation's 2019 Plan required that the minimums be met year-round and NMFS's 2019 no-jeopardy determination explicitly relied on the year-round minimums. Going below the minimums will irreparably harm Coho Salmon and, in turn, irreparably harm the Yurok Tribe whose livelihood, culture, and entire way of life revolve around Klamath River salmon, and will have devastating effects on commercial fishing families who continue to face salmon fishery closures.

To prevent a recurrence of these ESA violations and the irreparable harm to Coho Salmon, the Tribe, and commercial fishing families, this motion asks the Court to order Reclamation not to provide water for irrigation unless:

(1) Reclamation can meet its full ESA obligations to SONCC Coho Salmon and Chinook Salmon that are prey for Killer Whales, as set out in the 2019 Plan and BiOp and the Interim Operations Plan ("IOP"), which include:

   a. providing at least the 2019 Plan and BiOp's minimum flows every month of the year;

   b. allocating water to and distributing water from the Environmental Water Account and providing enhanced flows in accordance with the 2019 Plan and BiOp, and allocating and providing augmentation flows in accordance with the IOP; and

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

c. providing a full surface flushing flow in compliance with the provisions of the 2019 Plan and BiOp; and

(2) UKL shall have an elevation of at least 4139.2 feet on September 30 to ensure the refilling of UKL over the fall-winter, without compromising Reclamation's to comply with the 2019 Plan and BiOp and the IOP as set out in (1) above.

The Ninth Circuit held more than two decades ago that Reclamation's ESA obligations take precedence over and over-ride irrigators' rights to water. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999). The requested relief will hold Reclamation to this legal prioritization and ensure sufficient water is available to meet its ESA obligations.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Yurok Tribe is likely to succeed on its claim that reducing Klamath River flows below the minimums violates the ESA § 9 prohibition on take of listed species because it is reasonably certain to desiccate salmon redds and diminish rearing habitat for young salmon in early spring;

2. Whether the Yurok Tribe is likely to succeed in its claim that Reclamation violated ESA § 7(a)(2) because it never consulted with NMFS on the impacts of going below the mandatory Klamath River minimum flows and NMFS's no-jeopardy determination relied on the minimums being met; and

3. Whether salmon, the Yurok Tribe, and the commercial fishing groups are likely to suffer irreparable harm in the absence of injunctive relief.

BACKGROUND

I. RECLAMATION'S OPERATION OF THE KLAMATH PROJECT IS SUBJECT TO ESA SECTION 7.

The Klamath River was once the third most productive salmon-producing river in the continental United States, and UKL was a naturally occurring lake that flowed naturally into the Klamath River. Reclamation now manages UKL as the reservoir for delivering up to 40% of its annual inflow to irrigate agricultural land, which has dramatically reduced overall river flows,

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

changed the timing of peak flows, and altered the natural flow regime. 2019 BiOp at 93-95, 121.[1] Because UKL is very shallow, the volume of water in UKL that carries over from year to year is small. Reclamation's operation of the Klamath Project controls the level, timing, and rate of water flow in the Klamath River to support salmon below Iron Gate Dam, which currently blocks upstream salmon fish passage.

II. ESA GUARD RAILS FOR THE KLAMATH PROJECT.

Reclamation must engage in ESA § 7 consultation with NMFS to ensure its operation of the Klamath Project will not jeopardize the survival of SONCC Coho Salmon or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2); *see Patterson*, 204 F.3d at 1213 (Reclamation's operation of Klamath Project is subject to ESA § 7). Section 7 consultations and ESA litigation have established three guard rails for the Klamath Project: (1) minimum river flows; (2) natural flow variability, including higher spring flows to provide juvenile salmon rearing habitat; and (3) disease management flows to reduce the incidence of disease.

A. Minimum Flows

Reclamation operates the Klamath Project under plans that provide for water releases for flows in the Klamath River. When Reclamation failed to engage in § 7 consultation on its 2000 operating plan, this Court issued an injunction directing Reclamation to curtail water deliveries that would cause river levels to drop below specific flows needed to provide salmon habitat until it completed formal consultation. *PCFFA v. Reclamation,* 138 F. Supp. 2d 1228, 1249-50 (N.D.

[1] The Yurok Tribe has filed a motion to take judicial notice of government documents that are in the stipulated documents for the Supremacy Clause summary judgment motions (cited as "STIPDX" or "STIP"), attached to the judicial notice motion ("JN"), and/or submitted with the Decl. of Patti Goldman (Jan. 31, 2023) (ECF 1101-1). The 2019 BiOp is at STIP#70.

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

Cal. 2001). The flows were drawn from a report by Dr. Thomas Hardy for the Department of Interior identifying minimum flows to prevent unacceptable risks to salmon.

In 2002, NMFS issued a BiOp concluding that Reclamation's 2002-2012 operations plan would likely jeopardize Coho Salmon survival and recovery and adversely modify Coho critical habitat largely due to insufficient spring flows for juvenile salmon rearing. NMFS offered a reasonable and prudent alternative with higher minimum flows based on Dr. Hardy's report but required those flows only in the last two years of the ten-year plan. *See* 16 U.S.C. § 1536(b)(3)(A) (jeopardy BiOps must develop reasonable and prudential alternatives that do not violate § 7). The first year under the plan starkly brought home the devastation from going below minimum flows. Reclamation delivered water for irrigation and allowed flows to drop to 800 cubic feet per second ("cfs"), which in 2002 caused the spread of a deadly fish disease and the largest fish kill on American soil with as many as 78,000 returning adult salmon perishing before they could spawn. 5th Decl. of Michael Belchik ¶¶ 11-13, 15 (March 22, 2023).

In *PCFFA v. Reclamation*, 426 F.3d 1082, 1091-93 (9th Cir. 2005), the Ninth Circuit held that NMFS acted unlawfully by requiring only a portion of the flows in the first eight year of the plan that NMFS deemed necessary. Ever since, NMFS's BiOps and Reclamation's operation plans have made the minimum flows mandatory. 5th Belchik Decl. ¶¶ 17-19, 22.

B. Flows Above the Minimums Are Needed to Support Salmon Rearing and to Reduce Disease.

While minimum flows are necessary to sustain the river's basic ecological functions, it is also essential to replicate the natural flow regime because salmon evolved in response to variability in the flows throughout the year and from year to year. 2019 BiOp at 61, 92-93, 129.

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

Salmon adapted to spring pulse flows, which make floodplains, side channels, and edge habitat accessible. Salmon populations also rebuild in wetter years. 5th Belchik Decl. ¶¶ 9, 18.

Coho Salmon spend half of their three-year life cycle in fresh water. Spring flows inundate and make accessible side channels and low-velocity edge habitat where young salmon can find food and cover to hide from predators. In low flows, suitable rearing habitat is inaccessible and young salmon utilize sub-par reaches where they lack plant cover and must compete for limited food in overcrowded conditions. 2019 BiOp at 95, 130-31, 159-60, 175.

In its 2013-2023 Klamath Project operations plan, the first plan after the 2005 *PCFFA* decision, Reclamation established the Environmental Water Account ("EWA"), setting aside an amount of water based on each year's hydrological conditions to provide Klamath River flows to meet salmon needs between March 1 and September 30. NMFS issued a BiOp determining that the 2013 Plan would not cause jeopardy or adverse modification of critical habitat, based on the EWA's replication of natural flows and the year-round minimum flows. STIP #96. The 2013 Plan used the Hardy minimum flows for the spring months, but to make more water available to refill UKL and for spring flows, it set minimum winter flows below the Hardy minimums.

The 2013 BiOp addressed the emerging threat posed by *C. shasta* infections mortalities in juvenile salmon. When *C. shasta* rates far exceeded the limit in the 2013 BiOp's Incidental Take Statement, this Court held that Reclamation had to reinitiate consultation and issued an injunction requiring disease management flows during the reinitiated consultation. *Yurok Tribe v. Reclamation*, 231 F. Supp. 3d 450, 475 (N.D. Cal. 2017) ("*Yurok Tribe I*").

C. The 2019 Biological Opinion, This Litigation, and the IOP.

In the reinitiated consultation, Reclamation proposed continuing the EWA, providing a surface flushing flow to reduce the incidence of *C. shasta* infections, and requiring minimum

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

flows every month of the year. 2019 BiOp at 25-26. Reclamation subsequently added enhanced spring flows for Coho Salmon rearing habitat in response to concerns raised by NMFS, but the spring flows were still lower than those in the 2013 Plan. 2019 BiOp at 11, 41-42. NMFS's 2019 BiOp made a no-jeopardy/no adverse modification determination, expressly and extensively relying on the mandatory minimum flows, the surface flushing flow, and the EWA's replication of natural flow variability, albeit diminished in volume. 2019 BiOp at 179-80, 203-04, 209-10, 215-16. NMFS made complying with the minimums and the EWA mandatory conditions of the Incidental Take Statement. 2019 BiOp at 267-68, 280-81.

The Yurok Tribe filed this lawsuit challenging the 2019 BiOp and Plan, in large part, because the spring flows were insufficient to support juvenile salmon rearing and to reduce the incidence of *C. shasta* disease. Reclamation and NMFS reinitiated consultation because they had used erroneous data that underestimated the adverse effects of the flows on salmon habitat. 5th Belchik Decl. ¶¶ 25-26. The parties negotiated the Interim Operations Plan ("IOP"), which incorporates the 2019 Plan, including its mandatory minimum flows, plus an additional 40,000 acre-feet in spring augmentation flows in all but the driest and wettest years. The IOP remains in effect through the 2024 water year when removal of four Klamath River dams and the reinitiated consultation are slated to be completed. ECF 1101-1 at 29, 23.

III. TEMPORARY OPERATING PROCEDURES IN 2021 AND 2022

Extreme droughts in 2021 and 2022 precluded Reclamation's full compliance with the 2019 NMFS BiOp for salmon and the 2020 Fish and Wildlife Service ("FWS") BiOp for two endangered fish populations that depend in part on UKL for critical habitat. STIP# 64. In both years, Reclamation invoked parallel "meet and confer" provisions in the respective NMFS and FWS BiOps that require it to notify the Services if it cannot comply with the BiOp requirements

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

due to extraordinary hydrological conditions. NMFS BiOp Term & Condition 1A; FWS BiOp Term & Condition 1c. The Services concurred in Reclamation's determination that extraordinary hydrological conditions made it impossible for Reclamation to simultaneously meet its ESA obligations for salmon and the lake fish. STIP# 5, 9, 34, 39.

Reclamation then adopted TOPs for the 2021 and 2022 water years to govern operations from April 1-September 30. STIP # 11, 38. For the lake fish, the focus was on various UKL elevation guidelines. For salmon, the TOPs set preconditions for a surface flushing flow that allowed for a partial flow in 2022, but no surface flushing flow in 2021. The results in 2021 were disastrous, with the worst juvenile salmon fish kill in history, which will adversely affect adult salmon returns and fisheries in future years. 5th Belchik Decl. ¶¶ 30-34. Under the 2022 TOP, Reclamation provided a flushing flow of shorter duration and magnitude than called for in the NMFS BiOp and fell short of the UKL elevation guidelines. Nonetheless, Reclamation provided water deliveries for irrigation, and, in the summer of 2022, Reclamation provided 57,000 acre-feet of additional water for irrigation, above and beyond the allocation provided under the 2019 Plan and the 2019 BiOp. 5th Belchik Decl. ¶ 36 & Ex. C.

The 2021 and 2022 TOPs required that the minimum flows be met. The 2022 TOP made this explicit, stating "Reclamation intends to maintain minimum flows in the Klamath River below Iron Gate Dam, as prescribed in the NMFS BiOp." 2022 TOP at 1 n.2 (STIP at 126). In the meet and confer process, NMFS concluded that the 2021 and 2022 TOPs would not cause adverse effects to Coho Salmon and Killer Whales beyond those analyzed in the 2019 BiOp because Reclamation would still provide the minimum flows. STIP at 114.

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

IV. 2023 TEMPORARY OPERATING PROCEDURE

A. Development of the 2023 TOP.

The circumstances leading to the 2023 TOP differed markedly in four respects. First, in 2021 and 2022, NMFS and FWS agreed that extraordinary hydrological conditions precluded full ESA compliance based on the spring forecasts set out in the 2019 Plan and the NMFS and FWS BiOps for predicting water availability and establishing the river and agricultural allocations for the April 1-September 30 water year. In contrast, in 2022-2023, NMFS consistently disagreed with Reclamation's assertions that hydrological conditions were extraordinary and would preclude compliance with Reclamation's ESA obligations. In December, NMFS urged Reclamation to curtail water deliveries for irrigation and address unauthorized agricultural diversions that interfere with refilling UKL to have sufficient water for spring ESA needs. NMFS Comments (Dec. 12, 2022) (ECF 1101-1 at 55-58). In January, NMFS described the hydrological conditions as "average to above average" and continued to question why Reclamation had not curtailed irrigation deliveries or prevented an irrigation district from diverting unauthorized water that could have supported river flows. NMFS Comments (Jan. 11, 2023) (ECF 1101-1 at 61-63); NMFS Comments (Jan. 25, 2023) (ECF 1101 at 65-66).

Second, in the fall of 2022, Reclamation began treating what the 2019 BiOp considered a UKL "guideline" as a mandatory requirement. 2019 BiOp at 24 (UKL elevations "are not a target to which UKL should be managed, but rather a guideline"). Under the 2019 BiOp, any reductions in Klamath River flows made for the purpose of meeting UKL guidelines "may not result in flows at IGD less than the proposed minimum IGD target flows," and may not reduce EWA releases for disease mitigation or habitat flows "at any time." *Id*. at 24; 2020 FWS BiOp at 22, 28-29 (same). After Reclamation proposed and later indicated that it would adopt the 2023

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

TOP, FWS issued a new BiOp on the impacts of Klamath Project operations on the lake fish, which is predicated on a fundamentally different approach to UKL levels. JN317. Instead of treating the UKL levels as guidelines, the 2023 FWS BiOp treats them as mandatory. The terms and conditions in its Incidental Take Statement provide that "Reclamation shall meet" the 4142-foot UKL level for April 1 through May 31, and other UKL levels set for July 15 and year-round. 2023 BiOp at 218 (JN317). Having acceded to this change in Klamath Project operations during the consultation, Reclamation made refilling UKL to achieve a 4142-foot depth by April 1 its top priority. Accordingly, the stated objective of the 2023 TOP is to achieve a UKL elevation of 4142 feet on March 31 with a surface flushing flow possible only if an additional 0.4 feet has accumulated in UKL. 2023 TOP (ECF 1101-1 at 46).

Third, Reclamation changed the nature of the UKL elevations after it had delivered more water for irrigation than provided under the 2019 Plan and BiOp. After making an agricultural allocation of 30,000 acre-feet in the spring of 2022 in keeping with the formula in the Plan and BiOp, Reclamation provided an additional 57,000 acre-feet agricultural allocation in the summer, thereby significantly drawing down UKL. To make matters worse, Reclamation continued to make fall-winter irrigation deliveries, even as it was proposing to go below the minimum river flows. It was only after Reclamation made the full fall-winter deliveries that it adopted the 2023 TOP. Instead of cutting off irrigation deliveries to have sufficient water to meet its ESA obligations, Reclamation gave away the water and then felt it had no option but to sacrifice the minimum river flows to achieve its newly hardened 4142-foot UKL target.

Fourth, while NMFS determined that the 2021 and 2022 TOPs would have no effects beyond those analyzed in the 2019 BiOp, NMFS took the opposite position on the 2023 TOP. It submitted comments telling Reclamation that the 2019 NMFS BiOp never analyzed the impacts

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

of going below the minimums, but instead predicated its no-jeopardy finding on the minimum flows being met every month of the year. ECF 1101-1 at 46. NMFS also warned Reclamation that going below the minimums would cause take of listed Coho Salmon by dewatering redds and reducing habitat needed for juvenile salmon rearing. ECF 1101-1 at 47, 61; JN57-60.

B. Implementation of the 2023 TOP

On January 26, 2023, Reclamation released what it characterized as the final 2023 TOP, which allows Reclamation to reduce Klamath River flows by up to 30% below the BiOp minimums. ECF 1101-1 at 44.[2] To monitor the impacts of the flow reductions, FWS and the Yurok and Karuk Tribes conducted surveys of salmon redds. The initial redd survey conducted in late January encountered poor visibility, but nonetheless identified a total of 55 redds, with approximately 30 at risk of dewatering with the anticipated flow reductions. Redd Survey Update (Feb. 1, 2023) (JN1). Coho spawning began in early December and the redds are visible for only approximately two weeks from construction, so the survey identifications represent only a small portion of all redds constructed this season. 5th Belchik Decl. ¶ 44, 57, 59; JN1, 57.

On February 13, 2023, Reclamation, NMFS, and FWS agreed to operating coordination for winter-spring flows under which Reclamation would reduce flows 11% below the minimums beginning February 14, 2023, and by an additional 5% if monitoring indicated no more than three redds had been dewatered. JN9. On February 14, 2023, Reclamation began reducing flows

[2] Reclamation had released a draft 2023 TOP on January 13, 2023, and on January 20, 2023, Reclamation announced that it would begin reducing flows 20% below the minimums as early as January 25, 2023, and that it would reduce flows by as much as 30% below the minimums in February and March. JN47; 5th Belchik Decl. ¶¶ 40-41. On January 25, 2023, Reclamation let Klamath Basin Tribes know that it would not start going below the minimums on that day, but it would continue assessing hydrological conditions to determine whether and when to do so. 5th Belchik Decl. ¶ 42. The final 2023 TOP is nearly identical to the January 13th draft and is dated January 20, 2023. JN47; ECF 1101-1 at 44.

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

11% below the minimums. Monitoring conducted on February 16-17, when visibility was again poor, found no dewatered redds, but four redds were in less than one inch of water and likely would be dewatered with future flow reductions. FWS Mem. (Feb. 21, 2023 (JN10). Nonetheless, on February 25, 2023, Reclamation reduced flows by an additional 5% below the minimums. No further redd surveys have been conducted due to storms. 5th Belchik Decl. ¶ 49.

STANDARD OF REVIEW

To obtain a preliminary injunction, a party must demonstrate: (1) a likelihood of success on the merits; (2) it is likely to suffer irreparable harm in the absence of injunctive relief; (3) the balance of equities favors an injunction; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). The Ninth Circuit has held that "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1135 (9th Cir. 2011). The ESA alters this standard such that courts "presume … that the balance of interests weighs in favor of protecting endangered species, and that the public interest would not be disserved by an injunction." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018).

ARGUMENT

This motion seeks to prevent deliveries of water for irrigation unless Reclamation can comply fully with the NMFS 2019 BiOp. A preliminary injunction is appropriate because the Yurok Tribe is likely to succeed on the merits of its ESA claims and suffer irreparable harm and the public interest and balance of harms favors the requested relief.

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

I. THE YUROK TRIBE IS LIKELY TO SUCCEED ON THE MERITS OF ITS ESA TAKE CLAIM.

A. The ESA Prohibits Reclamation from Causing Take of Listed Salmon.

ESA § 9 prohibits the "take" of endangered or threatened species unless the take is specifically authorized by the relevant federal fish and wildlife agency, NMFS for salmonids. 16 U.S.C. §§ 1538(a)(1)(B), 1539. By regulation, NMFS has extended the take prohibition to threatened species, including SONCC Coho Salmon. 50 C.F.R. § 223.203; *see* 16 U.S.C. § 1533(d) (authorizing regulatory extensions of the take prohibition to threatened species). The take prohibition applies to "any person," 16 U.S.C. § 1538(a)(1), which includes federal agencies. 16 U.S.C. § 1532(13) (defining "any person" to include "any officer, employee, agent, department, or instrumentality of the Federal Government"). The ESA citizen suit provision authorizes suits to enforce the ESA and its implementing regulations against any person, including federal agencies. *Id.* § 1540(g)(1).[3]

The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). By regulation, 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 direct, as well as indirect harm, and need not be purposeful.

[3] Before bringing an ESA citizen suit, parties must provide a 60-day notice of the violation. 16 U.S.C. § 1540(g)(2)(A)(i). The Yurok Tribe provided such notice on December 23, 2022, and again on January 21, 2023. 5th Belchik Decl. Ex. D; ECF 1101-1 at 1.

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

To prove take, the Yurok Tribe must show that Reclamation's actions are "reasonably certain to injure" listed species, "reasonably certain to cause harm," or "a reasonably certain threat of imminent harm." *See Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995); *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783 (9th Cir. 1995). Reclamation's reduction of flows is reasonably certain to cause harm to threatened SONCC Coho Salmon in at least two ways: (1) by dewatering redds; and (2) by diminishing habitat needed for juvenile salmon rearing.

B. Reclamation's Reduction of Klamath River Flows Below the Minimums Is Reasonably Certain to Dewater Redds.

Reducing the flows below the minimums is reasonably certain to harm salmon redds, depressions where female Coho Salmon deposit 1,400-3,000 eggs. Coho Salmon prefer to spawn in tributaries, but flows in the Klamath River were so low in 2022 that a large percentage of the returning adult Coho Salmon were unable to access the tributaries and spawned in the Klamath River mainstem. 5th Belchik Decl. ¶ 53; NMFS Technical Analysis (JN57-58).

As Reclamation explained in its Supplemental Environmental Assessment ("SEA") on the 2023 TOP, "[r]edd dewatering occurs when river flows decrease after a redd is constructed to a level that exposes the redd to the air, cutting off water-borne oxygen supply, ultimately leading to egg mortality." ECF 1101-1 at 117. The Supplemental EA estimated that 3-9% of the Coho redds in the Klamath River would be adversely impacted if flows were reduced by 10-20% below the minimums. *Id.* at 117-18.

FWS reported that the redd survey it conducted with the Yurok and Karuk Tribes after adoption of the 2023 TOP found approximately 30 redds at risk of dewatering. JN1. NMFS's

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

technical analysis explained that the survey represents only a fraction of the redds that could be harmed because of the survey's short duration, poor visibility, and the fact that redds can be observed for only two weeks after they are constructed. JN57. Coho spawning began in early December and continued through February. *Id.*; 5th Belchik Decl. ¶ 53.

FWS reported that the second redd survey conducted after the 11% reduction found four redds in less than one inch of water, and that the 11% flow reduction lowered water depths by six inches. JN78. FWS concluded that the redds in less than one inch of water would likely be dewatered with the additional flow reductions. JN8 ("[t]hese shallow depths suggest dewatering is likely with an additional drop in stage").

The additional 5% flow reduction began on February 25, 2023, and water depths dropped by 1.2 inches. This almost certainly dewatered the four redds in less than one inch of water. 5th Belchik Decl. ¶¶ 50, 59. Since the surveys captured only a fraction of the Coho redds in the mainstem, the number of redds disturbed or dewatered is likely far greater. For each dewatered redd, between 1,400-3,000 Coho hatchlings would be lost. JN57-58. Reclamation's flow reductions severely degraded the river habitat and killed Coho Salmon eggs, thereby causing take in violation of the ESA.

C. Reclamation's Reduction of River Flows is Reasonably Certain to Diminish Juvenile Coho Rearing Habitat.

Reducing flows below the minimums is reasonably certain to degrade and diminish the amount and quality of habitat needed for successful juvenile Coho Salmon rearing. In March, Coho Salmon are hatching from redds in the mainstem and tens of thousands of salmon fry are moving from the tributaries into edge habitat in the Klamath River. The mainstem Klamath River is limited in its channel complexity and floodplain connection. Slow velocity habitat in the side

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

channels and alcoves is critical for salmon fry after they hatch out of redds and for fry that enter the mainstem from tributaries. 5th Belchik Decl. ¶ 60; NMFS Technical Analysis (JN59-60).

Flows provide rearing habitat for salmon fry by inundating and making accessible side channels and edge-habitat. The amount of suitable rearing habitat is a limiting factor for SONCC Coho Salmon. 5th Belchik Decl. ¶ 61. The 2019 BiOp evaluated the extent to which the 2019 Plan would decrease the amount of available juvenile habitat below NMFS's conservation standard, which calls for 80% of maximum available habitat. 2019 BiOp at 63, 146-51, 159-60, 175, 202-03. Because the 2019 BiOp used erroneous data in this assessment, the losses of juvenile habitat due to the 2019 Klamath Projects operations plan are far greater. 5th Belchik Decl. ¶¶ 25-27; 2nd Decl. of Michael Belchik (Jan. 22, 202 (ECF No. 48-1).

Reclamation's reductions in flow below the minimums reduce juvenile rearing habitat. 5th Belchik Decl. ¶¶ 62-63. The Supplemental EA indicates that juvenile rearing habitat will be reduced by 5-11% in March with flow reductions 10-20% below the minimums. ECF 1101-1 at 118-19. The Supplemental EA further estimates that 10-20% flow reductions could impact 2.5%-8.25% of individual salmon in the early life history stage. ECF 1101-1 at 119-20.

The reduction in rearing habitat will impair juvenile Coho rearing, feeding, sheltering, and migration. 5th Belchik Decl. ¶¶ 60-65. As NMFS explained in its technical assessment, the flow reductions will reduce essential edge habitat and create habitat bottlenecks for salmon fry during the critical rearing period of February-June and result in premature downstream movement that "increases risk of predation, reduces feeding success, reduces fitness, and ultimately results in a lower survivorship of the cohort." JN59. Moreover, "[d]uring the spring, coho salmon fry compete with other species for available habitat." *Id.*; *see also* ECF 1101-1 at 120 (SEA). at 23 (low flows lead salmon to crowd into available habitat, compete for limited

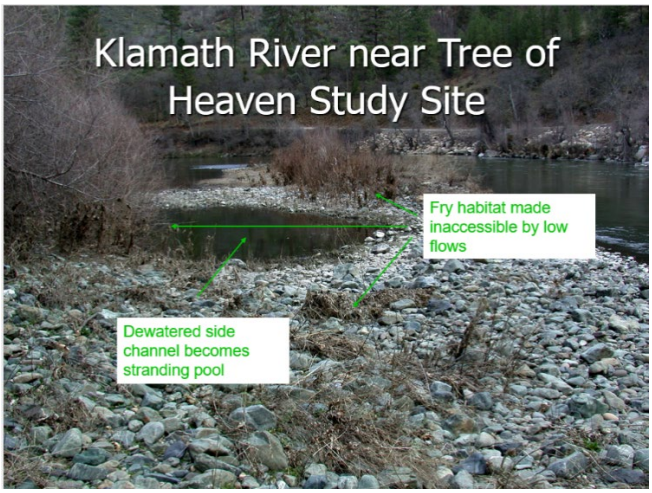
Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

food and shelter, and become susceptible to predators as they search for better and less crowded habitat).

NMFS further explained (JN59-60) that:

> We know from past experience that as habitat availability becomes limited we can expect habitat-induced mortality to increase with decreasing flows and habitat reductions. Klamath River releases as low as 800 cfs occurred in the February through April period of 2005 and provide an illustration of potential effects that may occur from Reclamation's proposed flow reduction. Despite abundant coho and Chinook salmon fry emigration from Bogus Creek into the Klamath River below IGD, fry survival in 2005 was measured as extremely low. Scarce, low quality rearing habitat resulting from low flows (i.e., 800 cfs) was identified as a primary cause of the poor fry production.

The low flows in 2005 dewatered edge habitat as shown in the picture taken at the time.



5th Belchik Decl. ¶ 65. Salmon fry relegated to inferior habitat lacking cover succumbed to predators. *Id*. Two years later when these salmon fry would have been returning as adults, the entire west coast salmon fishery was shut down due to weak Klamath stocks. *Id*. ¶ 67.

The heart-rending losses in 2005 due to below-minimum flows are evidence of the harm likely to occur under the 2023 TOP. *See Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc*., 23 F.3d 1508, 1512 (9th Cir. 1994) (past takings are "instructive, especially if there is evidence that future similar takings are likely"). The evidence is overwhelming that Reclamation's reduction in

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

flows below the minimums is reasonably certain to harm SONCC Coho Salmon by diminishing the amount and quality of available rearing habitat in violation of the ESA take prohibition.[4]

II. RECLAMATION AND NMFS FAILED TO COMPLETE SECTION 7 CONSULTATION ON REDUCING FLOWS BELOW MANDATORY MINIMUMS.

Reclamation has not completed § 7 consultation with NMFS on going below the minimum flows, which have been treated by Reclamation and NMFS as inviolate ever since the Ninth Circuit held in 2005 that the minimum flows had to be met throughout the life of Klamath Project operations plans. The 2019 BiOp never analyzed a proposed action that would lead to violations of the minimum flows because the 2019 Plan makes compliance with the minimums flows mandatory. 2019 BiOp, Table 5 at 26. NMFS deemed the minimum flows necessary to avoid jeopardy to listed Coho Salmon. 2019 BiOp at 179-80, 203-04, 209-10, 215-26; *see* ECF 1101-1 at 56 ("NMFS understood these proposed flows, including winter flows, to be the *minimums* required to avoid jeopardy to listed coho salmon") (emphasis in original).

In recent months, Reclamation fundamentally changed a different component of its Klamath Project operations. Previously, Reclamation treated UKL elevations as guidelines, not mandatory management requirements. Now, however, Reclamation is treating the UKL

[4] The 2019 BiOp's Incidental Take Statement uses meeting the minimum flows for March-September as a surrogate for the extent and amount of take of SONCC Coho Salmon allowed. 2019 BiOp at 267-69, 280-81. Because Reclamation is not providing the minimum flows in March, the amount of allowable take has been exceeded and the safe harbor provided by the Incidental Take Statement is unavailable. *See* 16 U.S.C. §§ 1536(b)(4)(C) & 1536(o)(2) (authorizing take in compliance with incidental take statement). In addition, an incidental take statement must be predicated on a no-jeopardy/no adverse-modification determination, but NMFS has not rendered a no-jeopardy determination on going below the minimum flows, and therefore there is no predicate for an incidental take statement that would allow Reclamation to reduce flows below the minimums.

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

elevations as mandatory requirements that must be met at any cost, including going below the minimum river flows in clear violation of the 2019 BiOp.

In addition, under the 2019 Plan, Reclamation sets the irrigation allocation in the spring based on hydrological forecasts with modifications envisioned only until June 1. The IOP continued this approach. In 2022, however, Reclamation made an additional 57,000 acre-feet available for irrigation in the summer beyond that provided under the 2019 BiOp and 2019 Plan. This additional allocation for agricultural irrigation reduced the amount of water in UKL available to meet the needs of the listed fish in both the river and the lake and set in motion the conditions leading Reclamation to go below the minimums. Just as the 2019 BiOp never analyzed the effects of going below the mandatory minimums, so too it did not assess the effects of providing more water to agriculture than allocated in the spring under the operations plans. Providing water for irrigation before meeting ESA obligations also violates the law of the river, which priorities ESA compliance over water for irrigation. *Patterson*, 204 F.3d at 1213.

Because providing an additional agricultural allocation in the summer and going below the minimums deviate so fundamentally from what NMFS analyzed in the 2019 BiOp, Reclamation has violated § 7 by not completing formal consultation on these actions before implementing them. In the alternative, Reclamation and NMFS are violating their duty under 50 C.F.R. § 402.16 to complete reinitiated consultation on these substantial modifications of the 2019 Klamath Project operations plan, which cause effects on listed species and their critical habitat not considered in the 2019 BiOp. Because Reclamation has done neither, it is in violation

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

of its duty to complete consultation before it takes actions likely to adversely affect SONCC Coho Salmon and Killer Whales by depleting their Chinook Salmon prey base.[5]

III. THE REQUESTED INJUNCTION

By the time the Court hears argument on this motion, the 2023 TOP will no longer be in effect. However, it set a precedent for violating the ESA and the mandatory minimums that previously was unimaginable. Going below the minimums became the inevitable result of Reclamation's conversion of the UKL elevation guidelines into mandatory management directives without limiting irrigation deliveries to ensure it could still comply with the 2019 NMFS BiOp. Reclamation claimed that it had to reduce river flows below the minimums to ensure UKL would refill and reach the new hard target of 4142 feet by April 1. Reclamation also claimed it could not provide a surface flushing flow to reduce *C. shasta* infections in juvenile salmon, as required under the 2019 BiOp, unless an additional 0.4 feet has accumulated in UKL.

To avoid a recurrence of these ESA violations, the Yurok Tribe seeks a preliminary injunction to prohibit Reclamation from providing deliveries of water from UKL for irrigation unless Reclamation can meet its full ESA obligations set out in the 2019 BiOp and Plan and the IOP, including: (1) providing at least the minimum flows every month of the year; (2) allocating water to and distributing water from the EWA and providing enhanced flows in accordance with the 2019 BiOp and Plan, and providing augmentation flows in accordance with the IOP; and (3) providing a full surface flushing flow in accordance with the 2019 BiOp and Plan.

---

[5] In 2019, the agencies reinitiated consultation because the 2019 BiOp's habitat analysis was based on erroneous data. Going below the minimums requires reinitiated consultation on a wholly separate component of the operations plan. In the interim, Reclamation cannot lawfully implement an operations plan that has never undergone consultation and § 7(d) cannot authorize such an action. *See Yurok Tribe I*, 231 F. Supp.3d at 479-80 (it is a "a poor argument" to claim the project can go ahead under § 7(d) before completing consultation).

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

In addition, the Tribe asks the Court to prohibit Reclamation from making irrigation deliveries unless UKL will have an elevation of at least 4139.2 feet on September 30 to ensue UKL refilling without compromising its compliance with the 2019 NMFS BiOp, Plan, and IOP. In 2002, after Reclamation released 57,000 acre-feet of water for irrigation in the summer and made additional fall-winter deliveries for irrigation, Reclamation became concerned about whether UKL would refill and meet its UKL April 1 target, which depends on fall-winter precipitation, snowpack, and inflows into UKL. For the fourth year in a row, inflows into UKL from tributaries were among the lowest on record since the Dust Bowl in the 1920s. The low UKL inflows appear to be due to climate change and increased groundwater withdrawals in recent year. Even when storm events brought substantial rain and snow to the Upper Klamath Basin, Reclamation saw going below the minimums as the only management option to refill UKL in light of the low inflows from the tributaries and UKL levels at the time.

To avoid a recurrence of this situation, Reclamation needs to manage irrigation deliveries more conservatively to prevent UKL from going below elevations that create this type of crisis. Accordingly, the Tribe asks the Court to prohibit Reclamation from making irrigation deliveries unless the UKL elevation will be at least 4139.2 feet on September 30. This year-end UKL elevation is necessary to achieve UKL April 1 elevations for the lake fish and have an additional 0.4 feet of water available for a full surface flushing flow in accordance with the 2019 NMFS BiOp. 5th Belchik Decl. ¶ 72 (lower UKL elevation proved insufficient in 2022).

This requested injunctive relief is carefully crafted to avoid favoring one listed species over another. Instead, it would hold Reclamation to the priorities established by Congress in the ESA and recognized by the Ninth Circuit under which the ESA takes precedence over the distribution of water for irrigation. *See Patterson*, 204 F.3d at 1213; *Yurok Tribe I*, 231 F. Supp. 3d at 484-86; *Yurok Tribe*

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

v. Reclamation, No. 19-cv-04405-WHO, 2023 WL 1785278 (N.D. Cal. Feb. 6, 2023). By doing so, it would prevent a recurrence of the untenable—but avoidable—predicament that pitted the river and its salmon against UKL and its fish this year.

IV. COHO SALMON, THE YUROK TRIBE, AND COMMERCIAL FISHING FAMILIES ARE LIKELY TO SUFFER IRREPARABLE HARM UNLESS A PRELIMINARY INJUNCTION IS ISSUED.

Irreparable harm is determined by reference to the purposes of the statute being enforced. *Nat'l Wildlife Fed'n,* 886 F.3d at 818. The ESA's central purpose is the recovery of listed species. *See* 16 U.S.C. § 1531(b) (conservation purpose); 16 U.S.C. § 1532(3) ("conservation" is "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point" of recovery). The "plain intent" of Congress in enacting the ESA was "to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). In light of the ESA's conservation purpose, the Ninth Circuit has indicated, "establishing irreparable injury should not be an onerous task for plaintiffs" in ESA cases. *Cottonwood Env't Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015). Moreover, the Supreme Court has recognized that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

Focusing on the ESA's take prohibition, the Ninth Circuit has explained that the ESA "accomplishes its purpose in incremental steps, which include protecting the remaining members of a species." *Nat'l Wildlife Fed'n,* 886 F.3d at 818. Because the ESA prohibits the unauthorized take of individual members of a listed species, proof of an "extinction-level threat" to a species is not required. *Id.* at 819. Harm to individual members of a species from ESA-prohibited take is irreparable because "[o]nce a member of an endangered species has been injured, the task of

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

preserving that species becomes all the more difficult." *Forest Conservation Council*, 50 F.3d at 785; *see Nat'l Wildlife Fed'n*, 23 F.3d at 1512 n.8 ("a threat of extinction to the species" is not required "before an injunction may issue under the ESA" because that "would be contrary to the spirit of the statute").

An injunction is also an appropriate remedy for a substantial procedural violation of the ESA § 7. *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056-57 (9th Cir. 1994). Reclamation's violation of § 7 is a substantial procedural violation. If Reclamation and NMFS "fail to complete the necessary consultation process, they cannot ensure that they are in compliance with the substantive provisions of the ESA and run a significant risk of causing substantial substantive harm." *Yurok Tribe I*, 231 F. Supp.3d at 478, citing *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).

Going below the minimums has already caused grievous harm by dewatering salmon redds and diminishing the amount and quality of rearing habitat for salmon fry. Under Ninth Circuit precedent, such harm to members of a listed species is irreparable. *Nat'l Wildlife Fed'n,* 886 F.3d at 819. SONCC Coho Salmon are in a precarious state and such take could further diminish the salmon's resilience, abundance, and viability. *See Yurok Tribe I*, 231 F. Supp.3d at 483-84 (finding irreparable harm warranting injunction because SONCC Coho Salmon are in a precarious state). Because Reclamation departed so fundamentally from the 2019 BiOp by going below the minimums that Reclamation had promised and NMFS had assumed were inviolate, the population effects of the 2023 TOP are largely unknown. Reclamation is thereby running the risk of causing jeopardy to SONCC Coho Salmon or adversely modifying Coho critical habitat.

This harm to SONCC Coho Salmon irreparably harms the Yurok Tribe and commercial fishing plaintiffs. *Nat'l Wildlife Fed'n*, 886 F.3d at 822 (plaintiffs establish "irreparable harm to

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

their own interests stemming from the irreparable harm to the listed species"). In *Yurok Tribe I*, this Court found that the same plaintiffs "presented sufficient evidence to show that they will face irreparable harm absent an injunction" to prevent ESA violations because SONCC Coho Salmon are in a perilous state and, without protective measures, the already weakened population could be further weakened. 231 F. Supp. 3d at 483-84.

Here too, salmon mortalities will cause egregious harm to the Yurok Tribe, whose federally reserved fishing rights are integral to the Yurok way of life. As the Ninth Circuit has recognized, the Tribal fishery "is not much less necessary to the existence of the [Yurok] than the atmosphere they breathe[ ]." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). As this Court recognized in *Yurok I*, the Tribe is "inextricably linked to salmon" for its subsistence, cultural and spiritual identity, and economic well-being. 231 F. Supp. 3d at 481. Due to low salmon returns, the Tribe has had to close its commercial and even its subsistence fisheries in recent years. Such closures have made it hard for Tribal members to clothe and feed their families and have put pressure on the Tribe to provide additional basic services Tribal members cannot afford. Decl. of Chairman James ¶¶ 8-17 (Oct. 10, 2019) (ECF 27-6). For the Yurok Tribe, the loss of salmon is a spiritual and cultural loss, as well as an economic and subsistence one. As Chairman James explains (¶ 15):

> This fishery collapse has crushed the spirit of our people whose very existence is tied to the salmon runs. We cannot simply pack up and move to another place. This Yurok Country is our only home. Without the River and our connection to it, we would no longer be the people the creator intended us to be. We would no longer be Yuroks.

Harm to SONCC Coho Salmon also irreparably harms commercial fishing communities that rely on salmon for their livelihoods. As this Court previously found, the harm salmon are facing would harm the fishing association plaintiffs. *Yurok I,* 231 F. Supp. 3d at 481 ("The

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

fishing associations have shown that they are harmed when salmon abundance drops because the potential salmon harvests decrease."); *see* Decl. of Glen Spain (Oct. 2, 2019) (ECF 27-8).

V. THE PUBLIC INTEREST AND BALANCE OF HARMS WEIGH IN FAVOR OF GRANTING THE PRELIMINARY INJUNCTION.

In ESA cases, the court "presume[s] that remedies at law are inadequate, that the balance of interests weighs in favor of protecting endangered species, and that the public interest would not be disserved by an injunction," *Nat'l Wildlife Fed'n*., 886 F.3d at 817. The ESA strips courts of some equitable discretion because it "established an unparalleled public interest in the 'incalculable' value of preserving endangered species," which renders remedies available at law, such as monetary damages inadequate. *Cottonwood Env't Law Ctr.*, 789 F.3d at 1091 (quoting *TVA v. Hill*, *id.* at 185, 187-88). Because the requested injunction would prohibit water deliveries for irrigation that are likely to impede Reclamation's ability to meet its obligations to listed species in the river and UKL, it promotes the ESA's goals of preserving endangered species and lessens the inter-species conflicts that have plagued the basin in recent years.

CONCLUSION

The Yurok Tribe asks the Court to issue the requested preliminary injunction.[6]

Dated: March 22, 2023

Respectfully submitted,

/s/ Patti A. Goldman
PATTI A. GOLDMAN (WSBA # 24426) (*pro hac vice*)

[6] While a bond is generally required under Fed. R. Civ. P. 65(c) "in an amount the court considers proper," the "court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review" or where plaintiffs are likely to succeed on the merits or obtain an injunction in the public interest. *California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985); *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975).

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104-1711
(206) 343-7340

KRISTEN L. BOYLES (CSBA # 158450)
PAULO PALUGOD (WSBA # 55822) (*pro hac vice*)
Earthjustice
810 Third Avenue, Suite 610
Seattle, WA 98104
Ph: (206) 343-7340
pgoldman@earthjustice.org
kboyles@earthjustice.org
ppalugod@earthjustice.org

/s/ Anna K. Stimmel
ANNA K. STIMMEL (CSBA # 322916)
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
Ph: (415) 217-2000
astimmel@earthjustice.org

Attorneys for Plaintiffs/Cross-Claimants Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, and Yurok Tribe

/s/ Amy Cordalis
AMY CORDALIS (CSBA # 321257)
4856 29th St. N.
Arlington, VA 22207
Ph: (541) 915-3033
acordalis@ridgestoriffles.org

Attorney for Plaintiff/Cross-Claimant Yurok Tribe