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**VIA OVERNIGHT MAIL AND EMAIL**

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**RE: Comments on the Draft Supplemental Environmental Impact Statement  
Shasta Lake Water Resources Investigation**

Dear Mr. Brick:

Thank you for the opportunity to provide comments on the Bureau of Reclamation's (Reclamation) Draft Supplemental Environmental Impact Statement (SEIS) for Reclamation's proposal to raise Shasta Dam (proposed Project).<sup>1</sup> If implemented, the proposed Project would modify flows in the Sacramento and McCloud Rivers; inundate pristine stretches of the McCloud River and threaten the River's wild trout fishery, both of which are protected under the California Wild and Scenic Rivers Act (Cal. Pub. Res. Code § 5093.50 *et seq.*); harm sensitive species down- and upstream from the reservoir; pollute the reservoir and nearby rivers with sediment and heavy metals; and destroy sacred sites integral to the Winnemem Wintu tribe's culture and traditions. In exchange for these devastating impacts, the proposed Project would increase the seasonal carryover storage in Shasta Reservoir by just 634,000 acre-feet and increase water deliveries even less.

We submit this comment letter to call your attention to the SEIS's numerous legal deficiencies. First, Reclamation appears to misapprehend or ignore many of the legal requirements that apply to the proposed Project, including requirements under the federal Clean Water Act, the California Endangered Species Act (CESA), and the California Wild and Scenic Rivers Act. A non-exclusive list of such errors includes the following:

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<sup>1</sup> Bureau of Reclamation, Draft Supplemental Environmental Impact Statement, Shasta Lake Water Resources Investigation (Aug. 2020).

- A. Reclamation cannot rely on Clean Water Act section 404(r) (33 U.S.C. § 1344(r)) to approve the proposed Project and must obtain Clean Water Act permits from the State Water Resources Control Board (SWRCB) before implementing the proposed Project.
- B. Reclamation must consult with Native American tribes, including the Winnemem Wintu tribe, and fully address impacts to cultural resources.
- C. Reclamation misinterprets state-law protections for the McCloud River and the River's wild trout fishery and no exception exists for Reclamation to seek any state agency assistance with its efforts to raise Shasta Dam.
- D. Reclamation must analyze whether the proposed Project will be consistent with all applicable state laws.
- E. Reclamation must consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Services (NMFS) before proceeding with the proposed Project because it will likely cause significant harm to endangered and threatened species.

Second, the SEIS fails to comply with the National Environmental Policy Act (NEPA) for the following reasons:

- A. Reclamation must address state agencies' comments submitted during earlier iterations of the proposed Project's environmental review.
- B. The SEIS fails to adequately analyze and disclose impacts to sensitive species in the region, including western yellow-billed cuckoo, several listed fish species, and Shasta snow-wreath.
- C. The SEIS fails to adequately analyze mitigation measures for wetland impacts associated with the proposed Project.

As discussed in detail below, Reclamation must correct the legal defects in the SEIS or withdraw the proposed Project.<sup>2</sup>

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<sup>2</sup> The Attorney General submits these comments on the proposed Project based on his independent power and duty to protect the environment and natural resources of the State. *See* Cal. Const., art. V, § 13; Cal. Gov. Code §§ 12511, 12600-12612; *D'Amico v. Bd. of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974).

## BACKGROUND

### **I. Raising Shasta Dam Would Result in Nominal Increases to the Water Supply and Significant Impacts to Fish and Wildlife, Water Quality, and Tribal Sacred Sites, Among Other Impacts.**

Reclamation's present effort to raise Shasta Dam began in 2006 when Reclamation released a Public Scoping Report and six years later released a Draft Feasibility Report. Reclamation initiated the NEPA process when it circulated a Draft and Final EIS that examined several proposed Project alternatives for raising Shasta Dam (6.5, 12.5, or 18.5 feet). *See* Bureau of Reclamation, Shasta Lake Water Resources Investigation, Draft Environmental Impact Statement (2013) (2013 Draft EIS); Bureau of Reclamation, Shasta Lake Water Resources Investigation, Final Environmental Impact Statement (2015) (2015 Final EIS). The Final EIS identified the preferred alternative of raising the dam 18.5 feet. 2015 Final EIS at S-32 to S-34.

The SEIS notes that raising the dam 18.5 feet would increase the seasonal carryover storage in Shasta Reservoir by only 634,000 acre-feet. SEIS at 4-2, 5-34. The dam raise also would modify flows in the Sacramento and McCloud Rivers and flood 5,000 acres of habitat. In addition, the proposed Project would cost more than \$1.3 billion and increase water available for delivery by only 51,300 acre-feet per year.<sup>3</sup>

The SEIS overestimates the potential benefits the proposed dam raise would have to anadromous fish and water supply deliveries, and underestimates the threat of significant harm the proposed Project would have to water quality, fish and wildlife, and tribal sacred sites, among other impacts.

The proposed Project would pollute the reservoir and nearby rivers with heavy metals and sediment. The proposed Project would increase mercury (from shuttered mining sites),

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<sup>3</sup> In 2016, Congress enacted the Water Infrastructure Improvements for the Nation (WIIN) Act, which requires at least a fifty-percent contribution from non-federal cost-sharing partners for the Shasta Dam raise and Reservoir expansion. WIIN Act, Pub. L. No. 114-322 (2016). The WIIN Act also requires compliance with all applicable federal and state environmental laws. Pub. L. No. 114-322, §§ 4007(b)(4), 4007(j), 4012. In March 2018, Congress approved \$20 million in WIIN Act funding for pre-construction and design engineering to raise Shasta Dam. For 2020, the Secretary of the Interior asked for \$57,000,000 for the Shasta Dam and Reservoir Enlargement Project. *See* Letter from Timothy R. Petty, Ph.D., Assistant Secretary for Water and Science, to Representative Marcy Kaptur, Chairwoman of the Subcommittee on Energy and Water Development, Committee on Appropriations (Feb. 13, 2019) *available at* [https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/200b398511/WIIN\\_FY\\_18\\_Funding\\_Congress\\_Letter\\_2-13-19.pdf](https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/200b398511/WIIN_FY_18_Funding_Congress_Letter_2-13-19.pdf). Congress struck that funding request. *See* Further Consolidated Appropriations Act, Pub. L. No. 116-94, 133 Stat. 2534, 2665-67 (2020).

copper, zinc, and other pollutants associated with sediment in the Shasta and Keswick Reservoirs and downstream in the Sacramento River. Increased mercury loading into Shasta Reservoir could increase the mercury levels in fish and invertebrates in the lake and then bio-accumulate in sensitive bird species that feed on fish. Shasta Lake is a popular camping, boating, and fishing destination, *see* 2015 Final EIS 1-3, 1-35, 18-1 through 18-3, and for several years, the California Office of Environmental Health Hazard Assessment (OEHHA) has advised women and children to reduce their consumption of fish caught from Shasta Lake because the mercury levels could harm the brain and development in fetuses, babies, and children. *See* OEHHA, Information About Eating Fish from Shasta Lake (2017) (attached as Exhibit 1); *see also* OEHHA, Health Advisory and Guidelines for Eating Fish from Shasta Lake 18-22 (2017) (attached as Exhibit 2). OEHHA recommends children and women between 18 and 45 consume only one serving or less per week of black bass, carp, catfish, or Chinook salmon caught in Shasta Reservoir. Increased mercury associated with the proposed Project could render these fish species too toxic for human consumption.

Increased loading of toxic metals into Shasta Reservoir may affect the Keswick Reservoir's ability to dilute acid mine drainage from the Iron Mountain Mine Superfund site. This may result in increased loading of heavy metals into spawning habitat in the Sacramento River and further downstream into the Delta. Increased sedimentation and turbidity associated with the proposed Project would impact growth, survival, and reproductive success of aquatic organisms. Sediment exposure harms include reduced visual capacity, reduced feeding, and reduced tolerance to disease. Increased turbidity would affect fish locating and feeding on prey.

The proposed Project also would reduce flows and degrade riparian habitat quality critical to the survival of yellow-billed cuckoo and Shasta snow-wreath. Only about 23 to 25 breeding pairs of yellow-billed cuckoo occur on the Sacramento River between Red Bluff and Colusa. Proposed Project implementation would accelerate the loss of this breeding population. Shasta snow-wreath is an understory shrub endemic to the southeastern Klamath Mountains in northern California. Shasta snow-wreath is a candidate for endangered species protection under CESA. The proposed dam raise would fragment the remaining populations of Shasta snow-wreath; in all, forty-six percent of the known snow-wreath population would be lost by raising Shasta Dam. Additionally, the proposed dam raise could harm many other sensitive species in the proposed Project area, including Pacific fishers, bald eagles, western purple martin, Shasta salamander, and Shasta huckleberry.

The proposed Project also would inundate 60 acres of the McCloud River and increase reservoir levels above the McCloud River Bridge, which would convert part of the McCloud River into reservoir habitat. Inundating stretches of the McCloud River could make it ineligible for listing—and ultimately protection—under the California Wild and Scenic Rivers Act. The California Department of Fish and Wildlife (CDFW) has designated the McCloud River a Wild Trout stream, an aesthetically pleasing and environmentally productive stream managed exclusively for wild trout. The Shasta Dam raise would inundate miles of wild trout habitat in the McCloud River and destroy spawning habitat. *See* Section II.B. below for a review of

comments submitted by Russell Liebig, Greg Pasternack and G. Mathias Kondolf, and Bruce Herbold, discussing how the harm to riparian species and habitat associated with raising Shasta Dam will be much more severe than Reclamation acknowledges.

Last, the proposed Project would significantly impact tribal sacred and cultural sites, including sites important to the Winnemem Wintu tribe. The Winnemem Wintu is a non-federally recognized, native California tribe that has long opposed the proposed Project. The Winnemem Wintu's traditional territory included the east and west sides of the upper Sacramento River watershed, the McCloud River and Squaw Creek watersheds, and approximately 20 miles of the Pit River. Presently, the Winnemem Wintu tribe includes about 125 members, many of whom live in a 42-acre village. Shasta Dam and Reservoir's original construction submerged about ninety percent of the Winnemem Wintu's village, sacred, burial, and cultural gathering sites, and Reclamation's proposed Project would eliminate much of the remainder by inundating around 20 sacred Winnemem Wintu sites, including a burial ground and prayer rock. The Shasta Dam and Reservoir's original construction also eliminated the Chinook salmon runs essential to Winnemem Wintu diet and culture.

## **II. Federal and State Agencies Previously Determined Raising Shasta Dam Would Have Almost None of the Benefits Reclamation Claims.**

Reclamation has represented that raising Shasta Dam would make more cold water available to support anadromous fish downstream in the Sacramento River. However, during earlier iterations of Reclamation's NEPA process, FWS and state agencies commented that the proposed Project would result in negligible or slightly negative impacts to Chinook salmon survival. *See* Letter from FWS to Regional Director, U.S. Bureau of Reclamation, at 3 (Sept. 20, 2013) (2013 FWS Letter) (attached as Exhibit 3); *see also* Letter from CDFW to Bureau of Reclamation, Planning Division (Sept. 30, 2013) (2013 CDFW Letter) (attached as Exhibit 4). In ninety percent of years, there would be no benefit to anadromous fish survival. *See* FWS, Coordination Act Report for the Shasta Lake Water Resources Investigation (2015) (2015 FWS Report) at viii (attached as Exhibit 5). The benefits of an enlarged cold-water pool for Chinook salmon runs are limited to only six to sixteen percent of water years. *See id.* Instead of benefitting anadromous fish, the proposed Project would degrade fish habitat in the San Francisco Bay-Delta, including habitat for listed Delta smelt, California-listed longfin smelt, juvenile salmon, and California Central Valley steelhead. *See* 2013 CDFW Letter at 3, 5.

FWS concluded in 2015 that the proposed Project would not provide substantial benefits to fish and wildlife resources and would result in losses of salmonid rearing and riparian habitat. *See* 2015 FWS Report at viii, xiii. FWS also took issue with Reclamation's modeling. *See* 2013 FWS Letter at 2; 2015 FWS Report at ix. FWS stated that the modeling used in the Draft EIS did not account for population trends over time or for downstream habitat conditions. *See* 2013 FWS Letter at 2-3. Also, only a few of the 82 water years modeled showed any benefits to anadromous fish from Shasta Dam's enlargement. *See id.* at 3. Further, FWS noted that other factors beyond increasing the cold water pool, such as improved access to important rearing

habitat for juvenile salmon, restoration of downstream fish habitats, the screening of intakes to eliminate fish entrainment, and flow management, would have more substantial effects on the long-term viability of anadromous fish in the Sacramento River. *See id.* Importantly, FWS determined water management that would accompany Shasta Dam's enlargement would decrease the inundation flows that provide juvenile salmon access to important rearing habitat and benefit other fish species, such as the Sacramento splittail and Delta and longfin smelt. *See id.* at 3-4.

CDFW and the Central Valley Regional Water Quality Control Board (CVRWQCB) also submitted comments on the Draft EIS. *See* 2013 CDFW Letter; *see also* Letter from CVRWQCB to Bureau of Reclamation (Sept. 11, 2013) (2013 CVRWQCB Letter) (attached as Exhibit 6). CDFW commented that the proposed Project would result in minimal benefits for anadromous fish and cause "significant and unavoidable impacts to fish, wildlife, native plants, and natural communities." 2013 CDFW Letter at 1. The CVRWQCB commented that the proposed Project would have significant and unavoidable impacts on water quality caused primarily by increased sediment. *See* CVRWQCB Letter at 1, 3.

### **III. Raising Shasta Dam Would Cause Damage Cumulative to that Caused by Adoption of the FWS and NMFS Biological Opinions.**

The harm to fish species caused by raising Shasta Dam would be cumulative to the damage already caused by the adoption of the FWS and NMFS 2019 Biological Opinions (BiOps) for the Central Valley Project. In August 2016, Reclamation requested reinitiation of consultation on an FWS 2008 BiOp and a NMFS 2009 BiOp on the Long-Term Central Valley Project and State Water Project Operations Criteria and Plan. The 2008 and 2009 BiOps found that the Central Valley Project and State Water Project operations would jeopardize the continued existence of listed species, including endangered Sacramento River winter-run Chinook salmon, threatened Delta smelt, and threatened Central Valley steelhead, and would destroy or adversely modify these species' designated critical habitat. *See* FWS, Biological Opinion on the Proposed Coordinated Operations of the Central Valley Project and State Water Project at 276, 278 (2008), *available at* [https://www.fws.gov/sfbaydelta/Documents/SWP-CVP\\_OPs\\_BO\\_12-15\\_final\\_OCR.pdf](https://www.fws.gov/sfbaydelta/Documents/SWP-CVP_OPs_BO_12-15_final_OCR.pdf); *see also* NMFS, Biological Opinion and Conference Opinion on the Proposed Long-Term Operations of the Central Valley Project and State Water Project at 30 (2009), *available at* [https://archive.fisheries.noaa.gov/wcr/publications/Central\\_Valley/Water%20Operations/Operations,%20Criteria%20and%20Plan/nmfs\\_biological\\_and\\_conference\\_opinion\\_on\\_the\\_long-term\\_operations\\_of\\_the\\_cvp\\_and\\_swp.pdf](https://archive.fisheries.noaa.gov/wcr/publications/Central_Valley/Water%20Operations/Operations,%20Criteria%20and%20Plan/nmfs_biological_and_conference_opinion_on_the_long-term_operations_of_the_cvp_and_swp.pdf). The 2008 and 2009 BiOps therefore placed restrictions on the amount of water exported via the State Water Project and the Central Valley Project Delta pumps in order to protect listed fish and their critical habitat. *See* 2008 FWS BiOp at 279-95, 360-63; 2009 NMFS BiOp at 575-726.

In 2019, FWS and NMFS issued revised BiOps. Together, the BiOps allow Reclamation to change the flow regime for the Central Valley Project in a way that threatens harm to species in the Sacramento River and San Francisco Bay Delta downstream from Shasta Dam. *See* FWS,

Biological Opinion for the Reinitiation of Consultation on the Coordinated Operations of the Central Valley Project and State Water Project at 393-401 (2019) (2019 FWS BiOp), *available at* [https://www.fws.gov/sfbaydelta/cvp-swp/documents/10182019\\_ROC\\_BO\\_final.pdf](https://www.fws.gov/sfbaydelta/cvp-swp/documents/10182019_ROC_BO_final.pdf); *see also* NMFS, Biological Opinion on the Long-Term Operation of the Central Valley Project and State Water Project at 14-19 (2019) (2019 NMFS BiOp), *available at* <https://repository.library.noaa.gov/view/noaa/22046>. The 2019 BiOps, however, do not authorize impacts to listed species associated with the proposed Shasta Dam raise. The BiOps represent that “effects of the construction of [the Shasta Dam] raise are being addressed in a separate section 7 consultation” with the wildlife agencies. 2019 FWS BiOp at 404; 2019 NMFS BiOp at 203 n.8.

## COMMENTS ON THE DRAFT SUPPLEMENTAL EIS

### **I. Reclamation Misapprehends or Ignores Legal Requirements for the Proposed Project.**

As an initial matter, Reclamation appears to misapprehend or ignore legal requirements that apply to the proposed Project. Reclamation must comply with all applicable state and federal laws before it can lawfully raise Shasta Dam.

#### **A. Reclamation Must Obtain Clean Water Act Permits from the SWRCB Before Implementing the Proposed Project.**

The SEIS suggests that the proposed Project is exempt from Clean Water Act (CWA) permit requirements, in contrast to various and consistent statements in the Final EIS acknowledging permitting requirements under CWA Sections 401 and 404. *See* SEIS at 3-1; 2015 Final EIS at 1-29, 1-31. Specifically, in the Final EIS, Reclamation determined that the proposed Project’s potential to affect Shasta Reservoir’s water quality would require Reclamation to prepare and submit a request for CWA Section 401 water quality certification to the CVRWQCB. 2015 Final EIS at 7-32. Reclamation also repeatedly acknowledged in the Final EIS that it must work closely with federal and state agencies to ensure compliance with the “CWA (e.g. Section 401 and 404)[.]” 2015 Final EIS at 7-82, 7-131, 7-175.

Now, Reclamation inexplicably and without justification contradicts its prior statements on CWA requirements. Reclamation now seeks to rely on CWA 404(r), stating in the SEIS that “[it] will comply with CWA 404(r) and will not separately obtain permits under CWA Sections 401, 402, and 404[.]” SEIS at A-1. According to the SEIS, “[b]y following CWA 404(r) Reclamation is not subject to CWA 404(r) regulations under CWA 402 if information on the effects of discharge . . . are included in an EIS.” SEIS at 3-1.

Reclamation misinterprets CWA section 404(r). Section 404(r)’s exemption is limited to the discharge of dredged or fill material that is part of a “Federal project specifically authorized by Congress.” 33 U.S.C. § 1344(r). As to all other discharges, Reclamation must comply with the CWA, including by obtaining permits from state permitting agencies.

Section 404(r) provides that “[t]he discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress” is not subject to most Clean Water Act permitting requirements

if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an [EIS] for such project . . . and such [EIS] has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such project.

33 U.S.C. § 1344(r). By its plain language, Section 404(r) does not apply to the proposed Project because it has not been “specifically authorized by Congress”—a fact Reclamation’s Deputy Director has admitted. *See Winnemem Wintu Tribe v. U.S. Dep’t of Interior*, 725 F.Supp.2d 1119, 1145 (E.D. Cal. 2010) (declaring “Reclamation is not congressionally authorized to move beyond the feasibility study phase and actually increase Shasta Reservoir storage by raising Shasta Dam”). To the contrary, Congress has appropriated only \$20 million under the WIIN Act for Reclamation to study this proposal—far short of the estimated \$1.3 billion required for full proposed Project build out. *See Del. Dep’t of Nat. Res. and Envtl. Control v. U.S. Army Corps of Eng’rs*, 685 F.3d 259, 280-82 (3d Cir. 2012) (noting “to trigger Section 404(r), there must be a federal project specifically authorized by Congress,” and “funds must be appropriated for project construction”); *see also Bd. of Miss. Levee Comm’rs v. U.S. EPA*, 785 F.Supp.2d 592, 612-13 (N.D. Miss. 2011) (noting plaintiff must invoke the appropriate Congressional authorization process, including evidence Congress received, evaluated, and approved an EIS).

Further, even if Section 404(r) applies, it does not waive all CWA permit requirements. Rather, Section 404(r) waives CWA permit requirements only for water quality impacts caused by “[t]he discharge of dredged or fill material,” not by the many other potential discharges associated with the proposed Project. 33 U.S.C § 1344(r).<sup>4</sup>

The SEIS also does not provide a full analysis of the section 404(b)(1) guidelines, as section 404(r) requires. *See* 33 U.S.C. § 1344(r). The section 404(b)(1) guidelines, codified at 40 C.F.R. pt. 230, set out detailed requirements for the discharge of dredged or fill material

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<sup>4</sup> The Section 404(r) exemption is very narrow, and not applicable here. “The narrow nature of this exemption is underscored by the fact that it applies only to discharges integral to construction of designated federal projects. [Citation Omitted.] . . . ‘The conferees did not intend to exempt other discharges which may be associated generally with constructing Federal projects, but which are ancillary to the specific activities submitted to and approved by Congress’ [Citation Omitted.]” *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 51 n. 9 (D.C. Cir. 1987). Reclamation’s reading of Section 404(r) would have the narrow exemption swallow the rule.

pursuant to section 404. *See* 40 C.F.R. § 230.10(a). Among other things, the guidelines require agencies to evaluate whether a discharge will “[c]ause[] or contribute[] ... to violations of any applicable State water quality standards”; “[j]eopardize[] the continued existence” of any threatened or endangered species”; cause significant adverse effects to “human health or welfare,” including but not limited to effects on “municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites”; cause significant adverse effects to “aquatic ecosystem diversity, productivity, and stability”; or cause significant adverse effects to “recreational, aesthetic, and economic values.” 40 C.F.R. § 230.10(b), (c). Neither the SEIS nor the 2015 Final EIS provides this detailed analysis.

Even if Reclamation could rely on section 404(r)—which it cannot—Reclamation must still comply with California state regulations governing the discharge of dredged and fill material. Under CWA section 404(t), California state agencies have authority to “control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of” the state, “including any activity of any Federal agency.” 33 U.S.C. § 1344(t). Federal agencies must therefore “comply with such State . . . requirements both substantive and procedural . . . to the same extent that any person is subject to such requirements.” *Id.*; *see also Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 934-35 (9th Cir. 1988).

Reclamation must discuss such state regulations and demonstrate how the proposed Project will comply with them. *See* 40 C.F.R. § 1506.2. Applicable regulations include the new dredge and fill regulations the SWRCB adopted in 2019, which set out detailed procedures for the discharge of dredged or fill material to state waters. *See* SWRCB, State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (Apr. 2, 2019) (attached as Exhibit 7).

Reclamation is not, as the SEIS suggests, exempt from all “permits under CWA Sections 401, 402, and 404.” SEIS at A-1. To address this flaw, the SEIS should evaluate the CWA permits it will need to obtain for all proposed discharges, whether or not Congress “specifically authorize[s]” the proposed dam raise. Those include permits related to the discharge of dredged or fill material; discharges and groundwater dewatering caused by new construction accompanying the dam raise; discharges from maintenance of supply wells and pipelines; discharges from well development; and other point-source discharges. SEIS at 3-1 through 3-6.

B. Reclamation Must Consult with Tribes and Fully Analyze Impacts to Winnemem Wintu and Other Tribal Sacred Sites.

As discussed, raising Shasta Dam will cause significant and permanent harm to tribal sacred and cultural sites, including sites that are important to the Winnemem Wintu tribe. Reclamation must consult with tribes and comply with the National Historic Preservation Act (NHPA) regarding impacts to tribal sacred sites before proceeding with any work to raise Shasta Dam.

The NHPA requires federal agencies, before approving a proposed federal “undertaking,” to “take into account the effect of the undertaking on any historic property,” 54 U.S.C. § 306108, including by consulting with tribes, *see* 54 U.S.C. § 306102(b)(4).

The 2015 Final EIS acknowledges that “a considerable number of Traditional Cultural Properties and other areas of special concern” are likely “present in the study area.” 2015 Final EIS at 14-19. The Winnemem Wintu in particular have repeatedly raised concerns about impacts to their sacred sites, many of which will be inundated if Reclamation raises the level of Shasta Reservoir. 2015 Final EIS at 14-24, 24-4.

Construction of the original Shasta Dam flooded nearly 27 miles of the McCloud River, including a significant portion of the Tribe’s ancestral homeland. Reclamation’s proposal to raise the dam would compound that historical harm. For example, the proposed Project would inundate Balas Son or Puberty Rock, which is the site of an important coming-of-age ritual for young women in the Winnemem Wintu tribe. Letter from the Winnemem Wintu Tribe to Tribal Council Representatives Regarding Resolution Opposing the Proposed Raise of Shasta Dam at 2 (Sept. 12, 2020) (attached as Exhibit 8). The dam raise would also submerge important “gathering areas, village sites,” and burial sites, “as well as habitat essential to [the Tribe’s] salmon restoration efforts.” *Id.* By the Tribe’s estimate, “nearly all of the tribe’s remaining sites would be put permanently underwater with the reservoir’s expansion.” Craig Miller, Shasta Dam Project Sets up Another Trump-California Showdown, *KQED* (Jan. 28, 2019) (attached as Exhibit 9); *see also* 2015 Final EIS at 14-24 (“The Winnemem Wintu have estimated that 120 ancestral villages still accessible above the current high waterline of Shasta Lake would be adversely impacted” by the proposed dam raise.).

Raising Shasta Dam also would threaten other tribal sites, including villages and burial grounds identified by the Pit River Madesi Band. 2015 Final EIS at 24-5. Reclamation must consult with all tribes that the dam raise may affect and provide a full accounting of impacts to tribal cultural and sacred sites before it moves forward with the proposed Project.

The 2015 Final EIS represents that Reclamation would mitigate these impacts but provides no information about what those mitigation measures might entail. 2015 Final EIS at 14-33 through 14-36. Reclamation further concedes that “it is unlikely that adequate mitigation is available to reduce the impact” to sacred and cultural sites “to a less-than-significant level.” 2015 Final EIS at 14-24 through 14-25.

Reclamation asserts in the 2015 Final EIS that it is not yet required to comply with NHPA requirements because to date Reclamation has only completed “nondestructive project planning” activities. 2015 Final EIS at 14-16. Nevertheless, given the potentially severe impacts to tribal sacred sites, Reclamation must begin the NHPA consultation process as soon as possible to ensure that such impacts are given due weight. The Attorney General submits that the irreversible harm to tribal sacred and cultural sites should be a substantial, if not a dispositive, consideration as Reclamation decides whether to move forward with this proposal.

C. Reclamation May Not Seek any State Agency Assistance with its Efforts to Raise Shasta Dam.

No support exists for Reclamation's assertion that "the [California] legislature specifically excepted enlargement of Shasta Dam from the prohibition on [state agencies] assisting or cooperating" with Reclamation. SEIS at 5-4. California has long sought to preserve certain rivers in their natural free-flowing state for extraordinary scenic, recreational, fishery, or wildlife values. *See e.g. Cal. Trout, Inc. v. State Water Res. Control Bd.*, 90 Cal. App. 3d 816, 821 n.3 (1979) (noting California's "clear statutory schemes" for protecting fish and wildlife, which include the California Wild and Scenic Rivers Act, the California Environmental Quality Act, and the California Fish and Game Code); *see also* Cal. Water Code § 83002(b)(6)(A)(iii) (mandating any feasibility study must evaluate projects consistent with requirements to protect, and not harm, the McCloud River). Consistent with those efforts, the California Wild and Scenic Rivers Act specifically prohibits construction of new dams, diversions, and reservoirs on 47 miles of the McCloud River and specifically bars any state agency or department from participating in the "planning or construction of any dam, reservoir, diversion, or other water impoundment facility that could have an adverse effect on the free-flowing condition of the McCloud River, or on its wild trout fishery." Cal. Pub. Res. Code § 5093.542(c). The Wild and Scenic Rivers Act makes plain the fundamental protections for the McCloud River, and raising Shasta Dam would violate these long-standing protections.

To justify its claim that the proposal to raise Shasta Dam is exempt from the California Wild and Scenic Rivers Act requirements, Reclamation cites a narrow exception that allows the California Department of Water Resources (DWR) to "participat[e] . . . in studies involving the technical and economic feasibility of enlargement of Shasta Dam." Cal. Pub. Res. Code § 5093.542(c). But the exception simply does not apply here. First, DWR is not participating in Reclamation's efforts to raise the dam. Second, the exception applies only to certain types of studies. To read the exception as applying to Reclamation's efforts to enlarge the dam would swallow and nullify the whole prohibition and undermine the purpose of the provision. As such, the SEIS should incorporate the analysis from the Final EIS, which analyzed the California Wild and Scenic Rivers Act's requirements as applied to the McCloud River.

Protection of the McCloud River is so fundamental that the Attorney General's Office recently brought a civil action against Westlands Water District (Westlands) when that agency tried to side-step the California Wild and Scenic Rivers Act and remove obstacles to raising Shasta Dam. Specifically, Westlands approved \$1,020,000 to study raising Shasta Dam and published an Initial Study / Notice of Preparation of an Environmental Impact Report for the Shasta Dam Raise Project. CDFW and the SWRCB commented on the Initial Study that the Project would impact the lower McCloud River, alter the River's free-flowing condition, and adversely impact the River's trout fishery, in contravention of the California Wild and Scenic Rivers Act. The Attorney General promptly sued and moved for a preliminary injunction to stop Westlands from continuing further environmental review, and the court enjoined Westlands from "taking any action that constitutes planning for or the construction of the Shasta Dam Raise

Project[.]” Order Granting Preliminary Injunction, *People v. Westlands Water Dist.*, Case No. 192487 (filed July 29, 2019) (attached as Exhibit 10). Shortly thereafter, Westlands withdrew the Initial Study and terminated the environmental review process. In November 2019, the Attorney General’s Office settled with Westlands and Westlands agreed not to conduct environmental review, fund or assist any federal, state, or local agency planning or construction, or acquire real property to facilitate raising Shasta Dam. This result affirms that the narrow exception in the California Wild and Scenic Rivers Act does not apply to raising Shasta Dam or to any state agency other than DWR.

D. Reclamation Must Analyze all Applicable State Laws.

Reclamation must analyze whether the proposed Project would comply with applicable state laws. The SEIS incorrectly asserts Reclamation is exempt from any obligation to analyze state law requirements under the California Wild and Scenic Rivers Act, and instead Reclamation can “re-focus the analysis on the federal requirements.” See SEIS at 5-3. These assertions substantially depart from statements in the Final EIS recognizing Reclamation’s obligation to analyze and comply with state and local laws, and they are not supported by established law. See, e.g., 2015 Final EIS at S-1, S-6.

At the outset, Reclamation is required under NEPA to “discuss any inconsistency of a proposed action with any approved State, Tribal, or local plan or law (whether or not federally sanctioned). Where an inconsistency exists, the [EIS] should describe the extent to which the agency would reconcile its proposed action with the plan or law.” 40 C.F.R. § 1506.2(d). Such state laws include but are not limited to the laws discussed in this letter: for example, the California Wild and Scenic Rivers Act, CESA, and the 2019 SWRCB dredge and fill regulations.

In addition, Reclamation must comply with any state-law requirements that are incorporated through section 8 of the Reclamation Act. The Reclamation Act of 1902 requires “cooperative federalism” such that Reclamation must comply with California state laws “relating to the control, appropriation, use, or distribution of water used in irrigation.” 43 U.S.C. § 383; see also *California v. United States*, 438 U.S. 645, 653, 665-679 (1978) (finding a long history of deference to state water law, and one that requires Reclamation to comply with state law in the “control, appropriation, use, or distribution of water”); *United States v. State Water Res. Control Bd.*, 694 F.2d 1171, 1174 (9th Cir. 1982) (holding Congress could have but did not eliminate the role of state law in governing a dam inundation project). Laws “relating to the control, appropriation, use, or distribution of water” include laws that limit impoundment and distribution of water to protect environmental values. See *Nat. Res. Def. Council v. Patterson*, 791 F. Supp. 1425, 1435 (E.D. Cal. 1992) (resolving any doubts that compliance includes the impoundment and distribution of water), *aff’d and remanded sub nom. Nat. Res. Def. Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998).

The WIIN Act further affirms this deference to state law by providing that the Act “shall not be interpreted or implemented in a manner that ... preempts or modifies any obligation of the

United States to act in conformance with applicable state law, including applicable State water law[.]” Pub. L. No. 114-322, § 4012(a).

Reclamation must therefore analyze whether the proposed Project will comply with relevant state-law requirements, including any state-law requirements incorporated through Reclamation Act section 8.

E. Reclamation Must Consult with Federal Wildlife Agencies Before Authorizing the Proposed Project.

The SEIS identifies impacts to Winter-run Chinook salmon, Central Valley steelhead, and western yellow-billed cuckoo that necessitate consultation with FWS and NMFS before Reclamation can move forward with the proposed Project. *See* SEIS at 4-6. The Final EIS acknowledged the consultation requirement, but to date Reclamation has not completed the required consultation. *See* 2015 Final EIS at 1-29, 1-30, 27-5.

The federal Endangered Species Act (ESA) requires federal agencies to consult with FWS and NMFS before taking action that “may affect” listed species or their critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The Ninth Circuit has explained:

Section 7 . . . requires federal agencies to ensure that none of their activities . . . will jeopardize the continued existence of listed species or adversely modify a species’ critical habitat. [Citation omitted.] Section 7 imposes on all agencies a duty to consult with . . . [FWS] . . . before engaging in any discretionary action that may affect a listed species or critical habitat. [Citation omitted.] The purpose of consultation is to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species or adversely modify its critical habitat . . . [.]

An agency has a duty to consult under Section 7 of the ESA for any discretionary action that “may affect” a listed species or designated critical habitat. [Citation omitted.] . . . Once an agency has determined that its action “may affect” a listed species or critical habitat, the agency must consult, either formally or informally, with the appropriate expert wildlife agency . . . [.]

We have previously explained that “may effect” is a “relatively low” threshold for triggering consultation. [Citation omitted.] “Any possible effect, whether beneficial, benign, or adverse or of an undetermined character,” triggers the requirement. [Citation omitted.]

*Karuk Tribe of Cal. v. U.S. Forest Service*, 681 F.3d 1006, 1019-20, 1027 (9th Cir. 2012). The negative and even the beneficial impacts to listed species discussed above require consultation. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011) (noting that “[a]ny

possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement”) (quotation omitted).

Consultation could help avoid impacts to listed species associated with the proposed Project. For instance, FWS commented on the 2013 Draft EIS that Reclamation should discuss an alternative that increases water supply reliability and anadromous fish survival without enlarging Shasta Dam. 2013 FWS Letter at 1. Since Reclamation’s express purpose and need for the proposed Project is to “improve operational flexibility of the Delta watershed system,” it should consult with FWS on the recommendation that an alternative could accomplish this purpose without raising the dam.

As the Attorney General has argued elsewhere, Reclamation should have consulted regarding the potential impacts of the Shasta Dam raise *before* it adopted the 2019 Biological Opinions regarding operation of the Central Valley Project. The “ESA requires the biological opinion to analyze the effect of the *entire* agency action,” not just an arbitrary segment of it. *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988) (interpreting the term “agency action” broadly); *see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 522 (9th Cir. 2010) (“The artificial division of a continuing operation into short terms can undermine the consulting agency’s ability to determine accurately the species’ likelihood of survival and recovery.”).

At the time Reclamation was consulting on the impacts of Central Valley Project operations more generally, it had already completed a Final EIS for its proposal to raise Shasta Dam. Although, as noted, Congress has not appropriated funds to complete the dam raise, and there are many legal hurdles Reclamation must clear before it can proceed with the proposed Project, Reclamation’s intention to raise Shasta Dam, and even the specifics of its proposed operation of the enlarged reservoir, have been clear for years. *See, e.g.*, 2015 Final EIS at S-22 through S-23 (describing Reclamation’s proposal to increase water deliveries from enlarged reservoir). The 2019 BiOps’ claim that the wildlife agencies could not adequately assess impacts of the proposed Project is therefore unsupported. *See* 2019 NMFS BiOp at 203 n.8; *cf. Wild Fish Conservancy*, 628 F.3d at 525 (rejecting a similar claim).

Reclamation violated the ESA when it failed to include the Shasta Dam raise in its earlier consultation with the wildlife agencies. Reclamation must correct that error immediately. At a minimum, Reclamation must complete a section 7 consultation before proceeding any further with the proposed Project.

## **II. The Draft SEIS Does Not Comply with NEPA.**

Reclamation must revise the SEIS so that it complies with all NEPA requirements. As a threshold matter, Reclamation should apply the 1978 NEPA regulations rather than the recently revised regulations as it finalizes the supplemental EIS. Part way through the public comment period on the SEIS, the Council on Environmental Quality’s (CEQ) Final Rule revising the NEPA regulations became effective. *See* Final Rule, Update to the Regulations Implementing

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the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020). The Final Rule makes significant changes to forty years of established NEPA regulations. The Attorney General of California and a coalition of 23 other attorneys general (collectively, State Attorneys General) recently filed suit challenging this Final Rule. *See California v. Council on Env'tl. Quality*, Case No. 3:20-cv-06057 (N.D. Cal., complaint filed Aug. 28, 2020) (attached as Exhibit 12).

The new NEPA regulations provide Reclamation with discretion to “apply the regulations in this subchapter to ongoing activities and environmental documents begun before September 14, 2020,” the effective date of the revised regulations. 40 C.F.R. § 1506.13. We urge you to comply with the 1978 regulations, if only to avoid creating confusion among commenters and other members of the public about the legal standards that apply to this NEPA process.

In addition, Reclamation should not apply the revised NEPA regulations because the Final Rule updating the NEPA regulations is unlawful in that it violates NEPA, the Administrative Procedure Act, and other laws. The State Attorneys General challenged the Final Rule because: (i) the Final Rule is contrary to NEPA’s text and purpose; (ii) CEQ failed to provide a rational explanation for the Final Rule’s numerous changes in policy and interpretation; (iii) CEQ exceeded its statutory authority with certain revisions in the Final Rule; (iv) CEQ violated notice-and-comment requirements; and (v) CEQ failed to analyze the Final Rule’s significant environmental impacts or consider reasonable alternatives to the Final Rule, as NEPA requires. *See Complaint, California v. Council on Env'tl. Quality*, No. 3:20-cv-06057, at ¶ 9 (N.D. Cal. filed Aug. 28, 2020). For these reasons, we expect the Final Rule will be vacated as arbitrary, capricious, and contrary to law.

In any event, whichever regulations Reclamation applies, the SEIS does not comply with NEPA. Reclamation has neither taken the required “hard look” at the consequences of its proposed action, nor ensured all the relevant information is available to the public prior to implementing its decision.

Congress enacted NEPA in 1969 “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. § 4331(a). NEPA has two fundamental purposes: (1) to guarantee that agencies take a “hard look” at the consequences of their actions before the actions occur by ensuring that “the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts;” and (2) to ensure that “the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989).

To achieve these purposes, NEPA requires the preparation of a detailed environmental impact statement for any “major Federal actions significantly affecting the quality of the human

environment.” 42 U.S.C. § 4332(2)(C). In preparing environmental impact statements, federal agencies must consider all of the environmental impacts of their proposed actions. *Diné Citizens Against Ruining Our Env’t v. Bernhardt*, 923 F.3d 831, 851 (10th Cir. 2019).

Reclamation’s failure to discuss and adequately respond to many Federal and state agency concerns raised during the earlier EIS iterations also contravenes NEPA. Prior to publishing any detailed environmental impact statement, the lead Federal agency official “shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.” 42 U.S.C. § 4332(2)(C). Following circulation of a draft environmental impact statement, the lead agency “shall discuss any responsible opposing view that was not adequately discussed in the draft statement and shall indicate the agency’s response to the issues raised.” 40 C.F.R. § 1502.9(c). “This disclosure requirement obligates the agency to make available to the public high quality information, including accurate scientific analysis, expert agency comments and public scrutiny, before decisions are made and actions are taken.” *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003).

A. Reclamation Must Adequately Address State Agencies’ Comments on the 2013 Draft EIS.

California state agencies, including CDFW and CVRWQCB, submitted comments during earlier stages of Reclamation’s NEPA review for the proposed Project. *See* 2013 CVRWQCB Letter and 2013 CDFW Letter (cited above). These comments (attached as exhibits to this letter) raised concerns about Reclamation’s failure to adequately consider and disclose potential impacts to water quality, wildlife, and other values associated with raising Shasta Dam. California state agencies also raised concerns related to the scientific evidence supporting the proposed Project—namely, that it would result in minimal benefits for anadromous fish and cause significant and unavoidable impacts to fish, wildlife, native plants, natural communities, and water quality. To date, Reclamation has not provided any meaningful response to the state agencies’ comments.

NEPA requires Reclamation to assess, consider, and respond to comments. *See California v. Block*, 690 F.2d 753, 770 (noting “NEPA’s public comment procedures are at the heart of the NEPA review process”). “The main policy reason for soliciting public comment is to use public input in assessing a decision’s environmental impact.” *Id.* at 771. The requirement to address comments subsumes a mandate to disclose, analyze, and respond to opposing viewpoints. 40 C.F.R. § 1502.9(b); *see also Seattle Audubon Soc’y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) (finding that the Forest Service was required to address in the final environmental impact statement scientific criticisms opposing evidence upon which the final statement’s management strategy rested); *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 981 (N.D. Cal. 2002) (concluding that a reasoned discussion of major scientific objections must be disclosed in the final impact statement).

After Reclamation published a Draft EIS in 2013, CDFW submitted the following comments based on “staff’s scientific expertise on California’s fish and wildlife and associated habitats including anadromous fish species in the Sacramento River watershed”:

The DEIS demonstrates that all proposed action alternatives would result in significant and unavoidable impacts to fish, wildlife, native plants, and natural communities. All action alternatives propose very costly enlargements to the cold water pool of Shasta Lake and have highly suspect benefits to anadromous fish survival while providing limited contributions to additional water supply. These benefits, as currently described in the DEIS, would be of minimal value and would not significantly contribute to recovery of anadromous species.

*See* 2013 CDFW Letter at 1.

CVRWQCB commented that “[t]he project will have a number of significant and unavoidable direct and indirect impacts on water quality and the environment that cannot be mitigated to the point where these impacts could be considered less than significant.” *See* 2013 CVRWQCB Comment Letter at 3. Those impacts are from “[increased] sediment that will be generated by the raised water level”; “increase[d] turbidity [that] will also reduce the ability of predatory birds . . . to visually spot and capture fish”; and “increased sediment loads to reservoirs” that can “introduce inorganic matter.” *See* 2013 CVRWQCB Letter at 1-3.

The Final EIS did not adequately address these comments. With respect to many of the points raised by state agencies, Reclamation simply dismissed the agencies’ concerns without any attempt to explain why Reclamation believed those concerns were not supported. *See, e.g.*, 2015 Final EIS at 33.8-21 (Reclamation’s response to CVRWQCB’s comment that raising Shasta Dam would increase load of metal pollutants in Shasta Reservoir).

Reclamation could have remedied this failure in the Draft SEIS, but it did not. The SEIS continues to maintain that the proposed Project (including the 6.5, 12.5, and 18.5 foot alternatives) would contribute to increased survival of anadromous fish, even though CDFW provided unrefuted scientific evidence to the contrary. *See e.g.* SEIS at 5-27, 5-31. In addition, other than proposing the use of best management practices in connection with the future development of a storm water pollution prevention plan, the SEIS does not address CVRWQCB’s concerns related to increased sediment and turbidity. *See e.g.* SEIS at 3-1 through 3-2. The SEIS provides no adequate explanation why Reclamation ignored the input of California’s expert wildlife and environmental agencies.

The comments from state agencies are critical to understanding potential significant water quality impacts and impacts to fish and wildlife species. Responses to these comments are a necessary and legally required step in the NEPA process, and may require significant revisions to Reclamation’s review of impacts. If such revisions are necessary, Reclamation should recirculate the SEIS for further public comment.

B. Reclamation Failed to Adequately Analyze Harm to Sensitive Species During the Entire NEPA Process.

The SEIS further fails to meaningfully address impacts to sensitive species, including species listed under the ESA:

1. Western yellow-billed cuckoo

Western yellow-billed cuckoo are listed as threatened under the federal ESA, and FWS has proposed to designate critical habitat for this species in the Sacramento River below Shasta Dam. The SEIS asserts that impacts to yellow-billed cuckoo and their habitat will not be “significantly different” from the impacts Reclamation described in its 2015 Final EIS. *See* SEIS at 4-8.

However, Reclamation’s attempt to rely on the 2015 Final EIS’s analysis of impacts to western yellow-billed cuckoo is unavailing, because the Final EIS failed to fully grapple with those impacts. The 2015 Final EIS concedes that raising Shasta Dam could result in “loss of nesting habitat” for some species, including western yellow-billed cuckoo, and could “eventually lead to a reduction in local populations” of cuckoo. 2015 Final EIS at 13-151 to 13-152. But this understates the extent of potential harm to the birds. As FWS explained in a 2015 report to Reclamation, raising Shasta Dam, when combined with other anticipated impacts, could extirpate western yellow-billed cuckoo from the area. 2015 FWS Report at xiii. Reclamation must update the 2015 Final EIS’s analysis of cuckoo impacts to include a full and fair assessment of impacts to western yellow-billed cuckoo.

2. Riparian species

The SEIS further fails to rationally address impacts to fish and other riparian species. Rivers downstream from the proposed Project provide important spawning and rearing habitat for sensitive anadromous fish species, including Chinook salmon and Central Valley steelhead. *See* SEIS at 4-6. The SEIS asserts that the proposed Project generally would be beneficial to anadromous fish, “with an increase in cold-water storage and better temperature management.” SEIS at 4-7. This assertion ignores earlier assessments by CDFW and FWS—the experts on impacts to these species—that Reclamation has overstated the benefits of increased cold-water storage, and that any benefits from the proposal are outweighed significantly by anticipated harms to anadromous fish from detrimental changes to rearing habitat. 2015 FWS Report at viii, xiii; *see also* 2013 CDFW Letter at 4-6. According to FWS, “[o]nly one alternative (CP4) provides *any* substantial benefit to anadromous fish survival[.] . . . In about 90 percent of the years, there would be no benefit to anadromous fish survival.” 2015 FWS Report at viii. The SEIS ignores these expert assessments.

Further, as discussed in the expert comment letters submitted by Russell Liebig, Greg Pasternack and G. Mathias Kondolf, and Bruce Herbold, harm to riparian species and habitat

associated with raising Shasta Dam will be much more severe than Reclamation acknowledges.<sup>5</sup> See Letter from Russ Liebig, Stillwater Sciences, to David Brick, Bureau of Reclamation (Oct. 5, 2020) (Liebig Letter); Letter from Greg Pasternack & G. Mathias Kondolf to David Brick, Bureau of Reclamation (Oct. 4, 2020) (Pasternack & Kondolf Letter); Letter from Bruce Herbold to David Brick, Bureau of Reclamation (Oct. 5, 2020) (Herbold Letter). As the letters state:

- Increasing the level of Shasta Reservoir could largely eliminate habitat for special status species in the lower reaches of the McCloud River, including habitat for hardhead and foothill yellow-legged frog, Liebig Letter at 4;
- Periodic flooding of the lower McCloud River could reduce the productivity of trout food sources in the River and thus harm the local trout population, Liebig Letter at 6;
- Altering habitat in the lower McCloud River could change the composition of fish species and “may increase the distribution of non-native warm water species to the detriment of native cold-water species,” Liebig Letter at 7;
- The SEIS’s prediction that raising the dam will merely shift habitat in the lower McCloud River further upstream is incorrect and ignores the unique geomorphology of the lower River, Pasternack & Kondolf Letter at 4;
- Habitat in the transition reach of the McCloud River—that is, the portion of the River that is periodically flooded as the level of Shasta Reservoir fluctuates—is unique and “of disproportionate importance to the Lower McCloud River,” Pasternack & Kondolf Letter at 4;
- Riffle habitat in the transition reaches of the lower McCloud River “has the potential to support more salmonid spawning over more of the year” than other segments of the River, Pasternack & Kondolf Letter at 5;
- The SEIS fails to analyze how the timing of inundation of the lower McCloud River relative to the timing of different stages of the salmonid life cycle may exacerbate impacts to salmonid species, Pasternack & Kondolf Letter at 6;
- The SEIS ignores impacts to habitat in the existing transition reach, which would be inundated to a greater extent if Reclamation raises Shasta Dam, Pasternack & Kondolf Letter at 6;

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<sup>5</sup> The expert comment letters are hereby incorporated by reference, as if set forth here in full.

- The SEIS provides no meaningful analysis of mitigation measures that could reduce impacts to fisheries, Pasternack & Kondolf Letter at 7.

FWS agrees that raising Shasta dam could have severe impacts on fish in the proposed Project area. As FWS concluded in its 2015 report:

[t]he enlargement of Shasta Dam . . . will reduce rearing capacity for juvenile salmonids by further altering the natural successional process for riparian forest habitat, and by reducing juvenile salmonid access to the high quality rearing habitat found in floodplains and bypasses because of reduced high water flow events.

2015 FWS Report at xiii; *see also* 2013 CDFW Letter at 4-6. Reclamation must disclose and address all of these issues in the final SEIS.

The SEIS further ignores potential impacts to Delta smelt and other fish species in the San Francisco Bay Delta. Raising Shasta Dam would allow Reclamation to increase exports from the Delta, thus potentially worsening the Delta's hydrology. *See* 2019 FWS BiOp at 404-05; 2015 FWS Report at 125; Herbold Letter at 11. For example, "[i]ncreasing Delta exports during Delta smelt spawning in February could increase entrainment of this federally-listed species especially during critically dry years[.]" 2015 FWS Report at 126. The SEIS, however, makes no attempt to predict how such changes could affect the status of Delta smelt or other species in the Delta. The SEIS also fails to address how impacts from raising Shasta Dam will compound impacts from other water projects in the Central Valley, such as Reclamation's proposals to raise the level of San Luis Reservoir and to alter operation of the Yolo Flood Bypass. Herbold Letter at 11-12. Reclamation must address such impacts, so that members of the public can fully understand all of the proposed Project's potential downstream effects.

### 3. Shasta snow-wreath

California proposed earlier this year to list the Shasta snow-wreath under CESA. *See* California Regulatory Notice Register, No. 18-7, at 692 (May 1, 2020). Reclamation ignores this proposed listing, despite the fact that raising Shasta Dam could "partly or substantially" inundate "46 percent of all known occurrences of the plant species." 2015 FWS Report at xii. This impact is particularly concerning, as an additional 46 percent of Shasta snow-wreath populations are already threatened by projects not associated with the proposed dam raise, such as mining, fire, invasive species, and "other human-related activities"; just one of the 24 known snow-wreath populations is "not currently threatened by the [proposed dam raise] or non-project related activities." 2015 FWS Report at 93. Thus, "[f]urther evaluation of the Shasta snow-wreath is needed to determine if the species can be conserved / protected from impacts" associated with raising Shasta dam, 2015 FWS Report at xii, especially in light of California's proposed CESA listing.

C. The Draft SEIS Lacks Meaningful Measures to Mitigate Wetland Impacts.

Reclamation must provide more information about mitigation measures for impacts to wetlands from the proposed Project. The SEIS indicates that Reclamation will develop a “Wetland Mitigation Plan” with a minimum replacement ratio of three to one at a later time, but it does not provide any details about the contents of that plan or location (on site or off site) of the replacement wetlands. See SEIS at 2-10. Further discussion of mitigation measures is essential to understanding the project’s potential wetland impacts. *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (EIS must discuss “mitigation measures, with “sufficient detail to ensure that environmental consequences have been fairly evaluated.”) (quotation omitted).

**CONCLUSION**

In sum, Reclamation misapprehends and ignores the fundamental environmental protections that apply to its effort to raise Shasta Dam. The draft supplemental EIS further fails to comply with NEPA’s basic environmental disclosure requirements. Reclamation must correct these errors before it takes any further step towards implementing the proposed Project.

Sincerely,



J. MANI



Deputy Attorneys General

For XAVIER BECERRA  
Attorney General

AK:JRP:db

Enclosure: Disk with exhibits to comment letter