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11

12 UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
13 SACRAMENTO DIVISION

14 THE WILDERNESS SOCIETY, OREGON) Civ. No.
NATURAL RESOURCES COUNCIL,)
15 WATERWATCH OF OREGON,)
HEADWATERS, AMERICAN RIVERS,) COMPLAINT FOR DECLARATORY AND
16 NORTHCOAST ENVIRONMENTAL) INJUNCTIVE RELIEF
CENTER, DEFENDERS OF WILDLIFE,)
17 KLAMATH FOREST ALLIANCE,)
NATIONAL WILDLIFE FEDERATION, and)
18 KLAMATH BASIN AUDUBON SOCIETY,)
)
19 Plaintiffs,)
v.)
20)
GALE A. NORTON, Secretary of the)
21 Department of Interior; STEVEN A.)
WILLIAMS, Director, U.S. Fish and Wildlife)
22 Service; and UNITED STATES FISH AND)
WILDLIFE SERVICE,)
23)
24 Defendants.)

25 COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF
26 Civ. No.

1 INTRODUCTION

2 1. This case concerns the United States Fish and Wildlife Service’s (“FWS” or
3 “Service”) administration of Tule Lake National Wildlife Refuge and Lower Klamath National
4 Wildlife Refuge, two critically important National Wildlife Refuges in the Klamath Basin in
5 northern California and southern Oregon. By reversing the scientifically based decision to
6 prioritize the needs of wetlands over irrigated agriculture, the Service failed to protect the
7 refuges entrusted to its care.

8 2. The Tule Lake and Lower Klamath refuges contain some of the last remnants of
9 the hundreds of thousands of acres of wetlands that once existed in the Klamath Basin. These
10 wetlands lie along the Pacific Flyway, a vital migration corridor for waterfowl traveling between
11 northern breeding grounds and southern wintering sites along the west coast. Consequently,
12 millions of migratory waterfowl and other wildlife rely upon the Klamath refuges for food, rest,
13 and shelter.

14 3. Unique among the more than 500 wildlife refuges in the National Wildlife Refuge
15 System, the FWS also allows broad-scale commercial agriculture within the Tule Lake and
16 Lower Klamath refuges that provides no benefit to wildlife. In cooperation with the Bureau of
17 Reclamation (“Bureau”), the Service maintains an agricultural lease program of approximately
18 20,500 acres. The Service also administers a cooperative farming program of approximately
19 5,100 additional acres.

20 4. These programs demand a significant volume of water for irrigation (close to
21 60,000 acre-feet per year), result in the application of highly toxic pesticides, and consume
22 acreage that could otherwise be used as wetlands or for surplus water storage. By destroying
23 habitat, diverting scarce water resources, and degrading water quality, the commercial
24

1 agricultural uses of refuge lands have undermined the biological integrity, diversity, and
2 environmental health of the refuges, resulting in the decline of migratory waterfowl, bald eagles,
3 and other wildlife that utilize and rely on the refuges.

4 5. Despite these impacts, in 2002, the Service determined that the continuation of its
5 current agriculture and water management practices was consistent and compatible with the
6 primary purpose of the refuges and the mission of the National Wildlife Refuge System and
7 would have no significant impact on the refuges. In so doing, it simultaneously reversed a 1999
8 decision to allow farming within the refuges only to the extent that sufficient water was available
9 to maintain refuge wetlands.

10 6. This action challenges the Service's 2002 Compatibility / Consistency
11 determination and the Service's failure to consider adequately the significant adverse
12 environmental impacts that will occur as a result of continuing inconsistent and incompatible
13 agricultural practices within the Tule Lake and Lower Klamath refuges. The Service's actions
14 violate the National Wildlife System Administration Act, as amended by the National Wildlife
15 Refuge System Improvement Act, 16 U.S.C. § 668dd et seq., the Kuchel Act, 16 U.S.C. § 695k
16 et seq., and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.

17 7. For these reasons this action seeks a declaration that the Service's 2002
18 Compatibility / Consistency determination and finding of no significant impact are arbitrary,
19 capricious, and contrary to law in violation of the Administrative Procedure Act ("APA"), 5
20 U.S.C. § 501 et seq. Plaintiffs seek an injunction to compel the Secretary to maintain and restore
21 the refuges' biological integrity, diversity, and environmental health and terminate or modify
22 agricultural uses so as to make them consistent and compatible with the primary wildlife
23 conservation purposes for which the refuges were established and compatible with the wildlife
24

1 conservation mission of the National Wildlife Refuge System.

2 JURISDICTION AND VENUE

3 8. This action is brought pursuant to the APA, 5 U.S.C. § 706. This Court has
4 jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States).

5 9. Venue lies in this judicial district by virtue of 28 U.S.C. § 1391(e) because a
6 substantial part of the events or omissions giving rise to the claim occurred here, a substantial
7 part of the property that is the subject of this action is situated here, and some of the plaintiffs'
8 members reside here. Intra-district venue is appropriate in Sacramento as a substantial part of
9 the property that is the subject of this action is situated in Siskiyou and Modoc Counties.

10 PARTIES

11 10. The plaintiffs in this action are:

12 A. The Wilderness Society (“TWS”), a non-profit national membership organization
13 that devotes its resources to preserving wilderness and wildlife on federal public lands and
14 fostering an American land ethic. Founded in 1935, TWS is headquartered in Washington, D.C.
15 with over 200,000 members nationwide. TWS has approximately 10,000 members in its
16 Northwest Region, with many members who frequently visit and enjoy the resources of the
17 Klamath Basin. For years, TWS has been active in advocating for greater protection of the
18 wildlife, refuges, and other resources of the Klamath Basin.

19 B. Oregon Natural Resources Council (“ONRC”), a non-profit corporation with
20 7,500 members throughout the state of Oregon and the Pacific Northwest. ONRC and its
21 members are dedicated to protecting and conserving the region’s wildlife, lands, waters, and
22 natural resources. ONRC members use the Klamath River Basin for fishing, hiking, recreation,
23 and other pursuits.

1 C. WaterWatch of Oregon (“WaterWatch”), a non-profit conservation organization
2 incorporated under the laws of Oregon, with approximately 800 members throughout Oregon
3 and the Pacific Northwest. WaterWatch’s mission is to promote water policies and water
4 allocation decisions in Oregon that provide for the quality and quantity of water necessary to
5 support fish, wildlife, recreation, ecological values, public health, and a sound state economy.
6 WaterWatch and its members work to protect water quantity and quality in the Klamath River
7 Basin, resources that are adversely affected by the agency decisions at issue in this case.

8 D. Headwaters, a non-profit conservation organization with its principal office in
9 Ashland, Oregon. Headwaters is comprised of hundreds of individuals dedicated to the
10 conservation, protection, and restoration of forest ecosystems, clean water, and biological
11 diversity in the Klamath-Siskiyou Bioregion.

12 E. American Rivers, Inc., a national non-profit conservation organization,
13 incorporated under the laws of the District of Columbia, with its principal place of business in
14 Washington, D.C. American Rivers has several field offices throughout the country, including
15 two in California. The organization has approximately 30,000 members nationwide. American
16 Rivers stresses the importance of preserving and restoring functioning river systems, including
17 associated watershed and wetlands.

18 F. Northcoast Environmental Center (“NEC”), a non-profit educational organization
19 formed in 1971 under the laws of the state of California, with its principal place of business in
20 Arcata, California. NEC has approximately 4,500 members who strive to protect the natural
21 relationship that exists between humankind and the biosphere, including that relationship which
22 presently exists between the people and the forests and rivers and their attendant biodiversity in
23 northern California. NEC works to insure preservation of important wildlife habitat, such as the
24

1 Klamath Refuges, through educational and advocacy efforts and by monitoring the actions of
2 federal agencies, such as FWS, with trust responsibilities towards wildlife and its habitat. NEC's
3 goal is to insure the protection of viable populations of northern California's wildlife and the
4 proper management of public lands such as the Klamath Refuges for purposes of wildlife
5 conservation. NEC's members utilize the Klamath Refuges for various conservation, aesthetic,
6 and recreational purposes such as birdwatching and scientific study.

7 G. Defenders of Wildlife ("Defenders"), a non-profit corporation, with its principal
8 office in Washington, D.C. and field offices in Sacramento, California and West Linn, Oregon.
9 Defenders has over 470,000 members and supporters, including over 100,000 members and
10 supporters in California and Oregon. Defenders' primary mission is to further the protection of
11 native wildlife and plants in their natural communities, including strengthening the National
12 Wildlife Refuge System to be a model system of lands dedicated to the protection of native
13 animals and plants in their natural communities, thus providing strongholds against the tide of
14 species declines. Defenders is actively involved in species protection and restoration efforts
15 throughout the nation and, in particular, in the Oregon Biodiversity Project and California
16 Legacy Project, efforts aimed at assessing, prioritizing, and restoring the states' biodiversity and
17 ecosystems. Through education, advocacy, litigation, and other efforts, such as publication of
18 "The Citizen's Wildlife Refuge Planning Handbook," Defenders works to preserve species and
19 the habitats upon which they depend.

20 H. Klamath Forest Alliance ("KFA"), a non-profit public interest organization
21 formed in 1989 under the laws of the state of California, with its principal place of business in
22 Etna, California. KFA's mission is to protect and promote sustainable communities and
23 economies throughout northern California through the sustainable use of the forest and fishery
24

1 resources in and surrounding northern California’s Klamath River. KFA fulfills its mission
2 through education, advocacy, and enforcement of environmental laws. KFA has approximately
3 200 members, most of who live and work in or near the Klamath Basin and study and recreate on
4 the public lands of the Klamath Basin, including, specifically, the Klamath Refuges. KFA’s
5 members frequently use the Klamath Refuges for educational, scientific, and recreational
6 purposes such as birdwatching and photography.

7 I. National Wildlife Federation (“NWF”), the nation’s largest conservation
8 advocacy and education organization. Founded in 1936, NWF is a non-profit organization with
9 its headquarters in Reston, Virginia. NWF has eleven regional offices, including the
10 Northwestern Natural Resource Center in Seattle, Washington and the Western Field Office in
11 San Diego, California. NWF’s mission is to educate, inspire, and assist individuals and
12 organizations of diverse cultures to conserve wildlife and other natural resources and to protect
13 the Earth’s environment in order to achieve a peaceful, equitable, and sustainable future. As part
14 of this mission, NWF and its over 4.5 million members and supporters are dedicated to
15 protecting and restoring the National Wildlife Refuges across the country, including the Lower
16 Klamath and Tule Lake National Wildlife Refuges.

17 J. Klamath Basin Audubon Society, a non-profit organization formed in 1983 under
18 Oregon state law, with its principal place of business in Klamath Falls, Oregon. Klamath Basin
19 Audubon Society has approximately 150 members almost all of who live, work, or recreate
20 within the Klamath Basin. Klamath Audubon’s mission as an inclusive, community-based
21 organization is to promote a conservation ethic and enjoyment of the natural environment
22 through educational and interactive programs. In fulfilling its mission, Klamath Audubon seeks
23 to promote its members’ and the general public’s understanding and appreciation of the natural
24

1 environment and local environmental issues. Among other goals, Klamath Audubon seeks to
2 protect resident and migratory wildlife habitat within the Klamath Basin and to provide local
3 leadership in achieving full regard for the environmental consequences of the choices made as
4 individuals and a society. Its members regularly utilize the Klamath Refuges for recreational,
5 conservation, and educational activities including bird watching, nature walks, hunting, and
6 photography.

7 11. Plaintiffs and their members have been and continue to be actively involved in
8 efforts to protect and restore the Klamath Refuges. Plaintiffs have pursued numerous avenues to
9 maintain the wildlife purposes for which the Klamath Refuges were established. Plaintiffs and
10 their members have written articles discussing the ecological importance and significance of the
11 Klamath Refuges, commented on various federal agency actions that affect the refuges, and
12 when necessary, pursued litigation.

13 12. Many of plaintiffs' members live and/or work in communities in California and
14 Oregon near the Klamath Refuges. They use, on a continuing and ongoing basis, the Klamath
15 Refuges for recreational, scientific, aesthetic, educational, conservation, and commercial
16 purposes. These uses include, but are not limited to, hiking, photography, nature study, wildlife
17 observation, and general aesthetic enjoyment. Plaintiffs' members intend to continue such uses
18 on an ongoing basis in the future. Plaintiffs and their members derive recreational, aesthetic,
19 scientific, educational, conservation, and economic benefit and enjoyment from the existence of
20 the Klamath Refuges and the wildlife that utilize the refuges. In particular, plaintiffs' members
21 who enjoy bird watching rely on the health of the Klamath Refuges to sustain migratory bird
22 populations along the Pacific Flyway.

23 13. Plaintiffs and their members believe that the Service's emphasis on commercial
24

1 agriculture on the Klamath Refuges has resulted in the deaths and decline of waterfowl, bald
2 eagles, and other wildlife utilizing the Klamath Refuges and in the degradation of the overall
3 biological integrity, diversity, and environmental health of the refuges.

4 14. Plaintiffs and their members have been, are being, and will continue to be harmed
5 and injured by the Service's actions in permitting and allowing agricultural uses and water
6 management practices on the Klamath Refuges that are inconsistent and incompatible with the
7 primary wildlife conservation purposes for which the refuges were established and the wildlife
8 conservation mission of the National Wildlife Refuge System and by the Service's refusal to
9 modify or eliminate such inconsistent and incompatible agricultural uses and practices on the
10 refuges.

11 15. The above-described recreational, scientific, aesthetic, educational, conservation,
12 economic and other interests of plaintiffs and their respective members have been, are being, and
13 unless the relief prayed for herein is granted, will continue to be adversely affected and
14 irreparably injured by the Service's actions in permitting and allowing commercial agricultural
15 uses and water management practices on the Klamath Refuges that are inconsistent and
16 incompatible with the primary wildlife conservation purposes for which the Klamath Refuges
17 were established and the wildlife conservation mission of the National Wildlife Refuge System
18 and by the Service's refusal to modify or eliminate such agricultural uses and practices on the
19 refuges.

20 16. The injuries described above are actual, concrete injuries suffered by plaintiffs.
21 These injuries are caused by the actions and omissions of the FWS described above would be
22 redressed by the relief sought herein.

23 17. The defendants in this action are:

1 A. Gale A. Norton, Secretary of the Department of Interior. Norton is sued in her
2 official capacity. In that capacity she is ultimately responsible for the management of the
3 National Wildlife Refuge System, in general, and the Klamath Refuges, in particular.

4 B. Steven A. Williams, Director, U.S. Fish and Wildlife Service. Williams is sued in
5 his official capacity. In that capacity he is responsible for the management of the National
6 Wildlife Refuge System, in general, and the Klamath Refuges, in particular.

7 C. United States Fish and Wildlife Service, an agency of the United States
8 Department of Interior responsible for the administration of the National Wildlife Refuge
9 System.

10 BACKGROUND

11 The Klamath Basin and its Wildlife Refuges

12 18. Historically, the Klamath River Basin in southern Oregon and northern California
13 contained approximately 350,000 acres of wetlands, consisting of shallow lakes, fresh water
14 marshes, wet meadows, and seasonally flooded basins. These extensive wetlands annually
15 attracted tens of millions of migratory waterfowl in the spring and fall to rest and feed during
16 their migration along the Pacific Flyway. They also supported abundant populations of other
17 water birds, fish, and wildlife.

18 19. Only a small fraction of these historic wetlands remains today. Nonetheless, the
19 area continues to be one of the most important stopovers for migratory waterfowl in the western
20 United States. The Klamath Basin annually receives the largest concentration of migratory
21 waterfowl in North America, as nearly 80% of the Pacific Flyway waterfowl population funnels
22 through the Basin. During migration in the spring and fall, the area provides feeding and resting
23 grounds for millions of ducks, geese, and other waterfowl. The Klamath Basin also supports the
24

1 largest wintering population of threatened bald eagles in the lower 48 states, as well as a variety
2 of other animals, birds, and fish.

3 20. Early settlers were also attracted to this region. Beginning around 1882, water
4 was diverted for irrigation purposes, and Klamath Basin wetlands were “reclaimed” – that is,
5 drained and converted to agricultural lands. Following enactment of the Reclamation Act of
6 1902, 32 Stat. 388 (1902), and an authorization act of 1905, 33 Stat. 714 (1905), the United
7 States Reclamation Service (now the United States Bureau of Reclamation) initiated the Klamath
8 Reclamation Project (“Klamath Project”).

9 21. The Klamath Project was one of the earliest Federal reclamation projects. After
10 Oregon and California both ceded title in historic Lower Klamath Lake and Tule Lake to the
11 United States in 1905, work began to drain the lakes and to reclaim and convert the lake beds to
12 agricultural lands, to store waters of the Klamath River and Lost River, to divert water for
13 irrigation, and to control flooding of the reclaimed lands.

14 22. The Klamath Project today controls the flow and distribution of water within the
15 Klamath Basin, including the Klamath Refuges. As a result, at least 80% of the historic Klamath
16 Basin wetlands – some 260,000 acres – have been converted to farmland.

17 23. Most of these remnant wetlands are today included in five Klamath Basin
18 National Wildlife Refuges: Upper Klamath National Wildlife Refuge, Lower Klamath National
19 Wildlife Refuge, Tule Lake National Wildlife Refuge, Klamath Marsh National Wildlife Refuge,
20 and Clear Lake National Wildlife Refuge. The Tule Lake National Wildlife Refuge (“Tule Lake
21 NWR”) and Lower Klamath National Wildlife Refuge (“Lower Klamath NWR”) are the subject
22 of this challenge.

1 Tule Lake National Wildlife Refuge

2 24. Tule Lake NWR was first established on October 4, 1928 as the Tule Lake Bird
3 Refuge by Executive Order 4975 (President Calvin Coolidge). The Executive Order “reserved
4 and set apart . . . [the area] as a refuge and breeding ground for birds.” Executive Order 4975 at
5 1. The Tule Lake Bird Refuge was enlarged to 11,000 acres and renamed the Tule Lake Wildlife
6 Refuge on November 3, 1932 by Executive Order 5945 (President Herbert Hoover). Executive
7 Order 5945 reiterated the Refuge’s primary purpose “as a refuge and breeding ground for wild
8 birds and animals.” Executive Order 5945 at 1, 2. On April 10, 1936 the refuge was enlarged
9 once again, to its present size of about 39,000 acres, by Executive Order 7341 (President
10 Franklin D. Roosevelt).

11 25. Tule Lake NWR today encompasses about 39,100 acres of mostly open water and
12 croplands. What remains of historic Tule Lake itself consists of 13,000 acres divided into two
13 “sumps” – 1(A) and 1(B) – that receive almost all their water from return flow irrigation. See
14 Map of Tule Lake NWR, attached as Exhibit 1. Very little productive, permanent marshland
15 remains.

16 26. Nearly half of Tule Lake NWR – approximately 17,000 acres – is devoted to
17 commercial farming. About 15,500 acres are leased to farmers under the Bureau’s leasing
18 program, subject to approval by the Service. Of these 15,500 acres, about 11,500 acres are
19 farmed for small grains such as barley and oats with the remaining 4,000 acres farmed for row
20 crops such as onions, potatoes, and until recently, sugar beets. These row crops provide virtually
21 no food value for waterfowl.

22 27. Approximately another 1,500 acres are used by FWS permittees for grain
23 production. Under the FWS program, the farmer pays nothing for the privilege of farming on the
24

1 refuge but can grow only grain crops and must leave 25-33% of the crop for waterfowl.

2 28. During irrigation season, when supplies in the Basin are otherwise scarce, Tule
3 Lake lease lands consume over 35,000 acre-feet of water.

4 Lower Klamath National Wildlife Refuge

5 29. Lower Klamath NWR was the nation's first waterfowl refuge. It was established
6 on August 8, 1908 by President Theodore Roosevelt through Executive Order No. 924, which
7 "reserved and set aside" the land within what was then called the Klamath Lake Reservation, "as
8 a preserve and breeding ground for native birds." Several subsequent Executive Orders modified
9 the boundaries of Lower Klamath NWR. See Executive Order 2200 (May 14, 1915) (President
10 Woodrow Wilson); Executive Order 3187 (December 2, 1919) (President Woodrow Wilson);
11 Executive Order 3422 (March 28, 1921) (President Warren Harding).

12 30. Lower Klamath NWR is often the most heavily used waterfowl refuge on the
13 Pacific Flyway, and possibly in North America, with over 140 million waterfowl use days in
14 1997. It supports one of the densest breeding populations of waterfowl in the entire National
15 Wildlife Refuge System. Lower Klamath NWR also supports the greatest number of bald eagles
16 in the Klamath Basin, listed as threatened under the Endangered Species Act. 16 U.S.C. § 1531
17 et seq.

18 31. Historically, Lower Klamath Lake and its associated wetlands covered about
19 80,000 acres. Nine years after the refuge was first established, its main source of water – a
20 channel of the Klamath River – was blocked by railroad construction, and by 1921, Lower
21 Klamath Lake was completely dry. In 1941, a tunnel was constructed allowing water to flow
22 from Tule Lake to the former Lower Klamath Lake. About 25% of the original Lower Klamath
23 wetlands, some 20,000 acres, have since been restored to wetland habitat. Today, Lower
24

1 Klamath NWR contains a total of approximately 53,600 acres of mixed shallow freshwater
2 marshes, open water, and grassy uplands.

3 32. Approximately 10,000 acres of Lower Klamath NWR lands are devoted to
4 commercial agriculture. See Map of Lower Klamath NWR, attached as Exhibit 2. About 6,200
5 acres are leased to farmers for commercial agriculture under the program administered by the
6 Bureau but subject to the ultimate approval of FWS. These leaselands are devoted to the
7 growing of grains such as barley and oats. Another 3,500 – 4,500 acres are farmed by Service
8 permittees.

9 33. Agricultural and water management decisions for Tule Lake NWR directly impact
10 the ecology of both Tule Lake NWR and Lower Klamath NWR.

11 34. Because a large percentage of the water available to Lower Klamath NWR flows
12 directly from Tule Lake NWR, refuge wetlands compete directly with the farm program for this
13 source of water. Consequently, the degree to which water is available to Lower Klamath NWR,
14 and the quality of that water, is greatly dependent on decisions involving Tule Lake NWR.

15 35. Lower Klamath NWR requires a total of about 90,000 acre-feet of water per year
16 from the Klamath Project to fulfill its statutorily mandated purposes of wildlife conservation.
17 Much of that water, about 40,000 acre feet, is needed for the critically important “fall flood-up”
18 of seasonal marshes and the maintenance of permanent marshes in September through December
19 when Lower Klamath NWR hosts over one million migratory waterfowl. The most important
20 months are September and October when about 15,000 acre-feet each month are needed.

21 Agricultural Practices and Water Use on the Refuges

22 36. Current agricultural practices on Lower Klamath NWR and Tule Lake NWR
23 consume large amounts of scarce water – close to 60,000 acre-feet annually – otherwise needed
24

1 for refuge wildlife purposes such as the fall flood-up for Lower Klamath NWR.

2 37. In 2001, the Service estimated the impact to the refuges' wetlands based on the
3 1999 Klamath Operations Plan. In a "dry" year designation, the Service calculated that over
4 16,000 acres, or approximately 75%, of permanent and seasonal wetlands would be left dry on
5 Lower Klamath NWR for peak fall migration. In a "below average" year, as many as 13,500
6 acres of wetlands could go dry, amounting to 62% of the refuge's total. On Tule Lake NWR, the
7 Service estimated that 309 acres, or 70% of the total wetland acreage, would dry out in a "dry"
8 year. In a below average year, 192 acres would suffer, amounting to 59% of the refuge's
9 wetlands.

10 38. A "dry" or "below average" designation will occur roughly one out of every two
11 years. In fact, in five different years between 1992 and 2001, the Lower Klamath Refuge has
12 had its water supplies shut off or reduced, and in late August 2002, Lower Klamath NWR had
13 water deliveries suspended at the time the refuge needed to begin flooding refuge lands. The
14 FWS has indicated that in general the insufficient supply of water "threatens the ecological
15 integrity of the Refuge[.]"

16 39. The drying of wetlands reduces the amount of suitable habitat for migrating birds.
17 Wetlands provide a balanced diet for waterfowl with higher protein content than waste grain
18 from crops. Wetlands produce various moist seeds as well as browse, tubers, rootlets, and
19 aquatic invertebrates. Desiccated wetlands also lead to overcrowding in the limited available
20 habitat, substantially raising the risk of diseases such as avian botulism and cholera.

21 40. The impacts from farming are not limited simply to water use. Farming on both
22 refuges utilizes former marshlands valuable to waterfowl and other wildlife and precludes those
23 lands from being restored to productive marshlands or being used to store surplus water collected
24

1 when other Basin needs are reduced. Furthermore, agriculture demands the intensive use of
2 pesticides harmful to refuge fish and wildlife that result in a decline of the refuges' biological
3 health. In recent years, close to 50 different pesticides have been in use within the refuges.

4 41. The row crops grown on Tule Lake NWR are especially harmful to refuge
5 wildlife, requiring large volumes of water and an especially heavy application of pesticides, yet
6 providing virtually no food value for waterfowl.

7 42. Overall, the alterations to Tule Lake NWR have significantly affected its original
8 conditions and few elements of biological diversity remain. Waterfowl and other wildlife
9 populations have declined steadily in the last several decades, and the refuge currently supports a
10 fraction of its past use. The reduction in waterfowl populations has reduced the ability of the
11 refuge to support threatened bald eagles, and their populations have declined drastically.
12 Similarly, numbers of redhead and gadwall breeding pairs, shorebirds, and other wildlife,
13 including amphibians and reptiles, have also declined. At the same time, the Service has found
14 that the biological potential of Tule Lake NWR, if managed to enhance wetland productivity, is
15 "enormous."

16 43. Although water quality is poor at Lower Klamath NWR, many thousands of the
17 birds that formerly utilized Tule Lake NWR now flock to Lower Klamath NWR instead. The
18 additional birds in the reduced habitat create over-crowded conditions that can exacerbate
19 naturally occurring outbreaks of bacterial diseases. The outbreaks in some years have killed a
20 large percentage of refuge birds.

21 44. In 1999, agricultural production on the lease lands generated approximately \$1.43
22 million for the federal treasury. None of the money, however, funds activities in the refuges.

1 Statutory Background

2 45. Created by Presidential Executive Orders, the Lower Klamath and Tule Lake
3 refuges were subsequently given a statutory basis by the 1964 Kuchel Act. 16 U.S.C. § 695k et
4 seq.

5 46. The Kuchel Act confirmed that the primary purpose of the refuges of the Klamath
6 Basin, including Klamath Lake NWR and Tule Lake NWR, is wildlife conservation. Section 2
7 of the Kuchel Act closed all lands owned by the United States within the four refuges to any
8 further homesteading and declared that all such lands are “hereby dedicated to wildlife
9 conservation.” 16 U.S.C. § 695l. The Kuchel Act permits agricultural uses within Klamath
10 Refuges, but only to the extent that the uses are “consistent” with the “major purpose of
11 waterfowl management[.]” Id.

12 47. In 1966, Congress passed the National Wildlife Refuge System Administration
13 Act, creating a nationwide “system” of refuges. The Act again mandated that secondary uses –
14 such as commercial agriculture – were to be allowed within the refuges only upon a
15 determination that such uses were “compatible with the major purposes for which such areas
16 were established.” The Administration Act was amended in 1976 to provide that the Service has
17 primary administrative control over all lands within the National Wildlife Refuge System.

18 48. In 1997, Congress again amended the Administration Act with the passage of the
19 National Wildlife Refuge System Improvement Act. Under the Improvement Act, the Secretary
20 “shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a
21 refuge, unless the Secretary has determined that the use is a compatible use[.]” 16 U.S.C. §
22 668dd(d)(3)(A)(i). The legislation defines a “compatible use” as use that “will not materially
23 interfere with or detract from the fulfillment of the mission of the System or the purposes of the
24

1 refuge.” 16 U.S.C. § 668ee(1).

2 49. The mission of the Refuge System is “to administer a national network of lands
3 and waters for the conservation, management, and where appropriate, restoration of the fish,
4 wildlife, and plant resources and their habitats within the United States for the benefit of present
5 and future generations of Americans.” 16 U.S.C. § 668dd(2). “Conservation” and
6 “management” are defined to mean “to sustain and, where appropriate, restore and enhance,
7 healthy populations of fish, wildlife, and plants” 16 U.S.C. § 668ee(4).

8 50. The Service has determined that “consistent” as used in the Kuchel Act has the
9 same meaning as “compatible” under the Administration Act and Improvement Act. The Service
10 reads the statutes as being consistent rather than in conflict.

11 51. According to regulations developed pursuant to the Improvement Act, the Service
12 “may only authorize public or private economic use of the natural resources of any national
13 wildlife refuge . . . where [the Service] determine[s] that the use contributes to the achievement
14 of the national wildlife refuge purposes or the National Wildlife Refuge System mission.” 50
15 C.F.R. § 29.1. The Service may “authorize economic use by appropriate permit only when [the
16 Service has] determined the use on a national wildlife refuge to be compatible.” *Id.* “Economic
17 use” is defined to include “cultivating areas.” *Id.*

18 52. When a use is found to be incompatible, the Service will “expeditiously terminate
19 or modify the use to make it compatible.” 50 C.F.R. § 26.41(d).

20 53. The National Wildlife Refuge System Improvement Act, 16 U.S.C. § 668dd et
21 seq., also mandates that the Service shall

- 22 A) provide for the conservation of fish, wildlife, and plants, and their habitats
23 within the System;

- 1 B) ensure that the biological integrity, diversity, and environmental health of
2 the System are maintained for the benefit of present and future generations
3 of Americans; ...
- 4 F) assist in the maintenance of adequate water quantity and water quality to
5 fulfill the mission of the System and the purposes of each refuge; ...
- 6 H) recognize compatible wildlife-dependent recreational uses as the priority
7 general public uses of the System through which the American public can
8 develop an appreciation for fish and wildlife; ...
- 9 J) ensure that priority general public uses of the System receive enhanced
10 consideration over other general public uses in planning and management
11 within the System.

12 16 U.S.C. § 688dd(a)(4)(A)-(N).

13 Consistency / Compatibility Determinations

14 54. Under the terms of a 1993 court settlement, the Service agreed to make
15 consistency / compatibility findings for activities allowed within the National Wildlife Refuge
16 System. In September 1994, the Service produced two-page Compatibility Determinations for
17 farming on the Lower Klamath and Tule Lake Refuges.

18 55. The Tule Lake NWR leaselands compatibility determination contained several
19 “[s]tipulations necessary to ensure compatibility.” One was that “[c]rops not directly beneficial
20 to waterfowl management will be restricted or eliminated (onions, sugar beets).” Another was
21 that “[a]ll pesticide use will follow DOI policy and review process.”

22 56. The Service’s compatibility determination for farming of Lower Klamath NWR
23 leaselands was similar to that for Tule Lake NWR. It included as a “[s]tipulation necessary to
24

1 ensure compatibility” that “[p]esticides and the methods of application follow Department of
2 Interior Policy”

3 57. Neither Compatibility Determination analyzed the effects from diverting water
4 from refuge wetlands to irrigated agriculture.

5 58. From 1995 to 1998, the Service issued annual one-sentence “recertifications” of
6 the agricultural use on Lower Klamath and Tule Lake based on the 1994 Compatibility
7 Determinations.

8 59. The 1998 determinations were challenged in Klamath Forest Alliance v. Babbitt,
9 Civ. No. 97-2274 GEB GGH (E.D. Cal.). The Court denied plaintiffs’ motion for summary
10 judgment, observing that plaintiffs did “not point to any evidence in the record indicating
11 changed conditions on the Refuges between 1994 and 1998 that might require new
12 documentation rather than recertification of the 1994 documented determinations.” Water use
13 and diversion of water from the refuges for irrigation was not addressed in that challenge.

14 60. In February 1999, the Service released a new “Compatibility / Consistency
15 Determination” (“1999 CD”) that recognized the detrimental effects of diverting water to irrigate
16 crops within the refuges.

17 61. The 1999 CD found that the potential impacts to the biological resources of the
18 refuges were “significant.” FWS concluded that agriculture on the refuges was compatible and
19 consistent with their primary purposes and the mission of the Refuge System overall “only if
20 sufficient water is available to maintain the wetlands first, followed secondarily by water use on
21 agricultural habitats.”

22 62. On March 15, 1999, the Service distributed to the public a “Draft Discussion
23 Paper” that further evaluated the issue of water shortages to refuge wetlands and summarized the
24

1 preliminary options for implementation of the 1999 CD. The Draft Discussion Paper noted that
2 it was “paramount” that refuge wetlands receive “as full a supply of water as possible” for
3 several reasons: 1) to meet refuge purposes for wildlife conservation; 2) to replace wildlife
4 values lost to the Basin and Pacific Flyway with the 80% reduction in the Basin’s historic
5 wetland habitats; and 3) to offset further loss of wetland habitat in the Basin that occurs during
6 dry and below average water years.

7 63. Actual implementation of the 1999 CD was put on hold due in part to litigation
8 brought by the Tule Lake Irrigation District. The District filed suit in reaction to language added
9 to 1999 leases that authorized the cessation of irrigation in accordance with the 1999 CD.

10 64. In January 2001, FWS issued a draft Environmental Assessment (“EA”) pursuant
11 to NEPA that explored alternatives to implementing the agricultural program on Tule Lake NWR
12 under the water stipulations of the 1999 CD. FWS found that a “full complement of seasonal
13 and permanent wetlands on Tule Lake and Lower Klamath NWRs is required to meet Refuge
14 and Refuge System purposes.”

15 65. The Service found that a “no action” alternative carried with it a nearly 50%
16 probability of drying 65 to 70% of Lower Klamath NWR permanent wetlands. The drying of
17 permanent wetlands would kill large numbers of forage fish, submerged aquatic plants, and
18 invertebrates, all of which are key food items for or habitat components for breeding waterbirds.
19 A corresponding loss of seasonal wetlands would also lead to waterfowl overcrowding. The
20 Service anticipated that this reduction in seasonal wetlands coupled with the lack of permanent
21 marshes could have “severe” consequences for the ecological integrity of the Lower Klamath
22 NWR.

23 66. In addition to a “no action” alternative, the EA developed two alternatives that
24

1 incorporated the thrust of the 1999 determination by prioritizing water for the wetlands over
2 agriculture within the Tule Lake Refuge. The preferred alternative prioritized wetlands but
3 “locked in” a decision to allow irrigation regardless of whether a water shortfall later becomes
4 apparent.

5 67. Of nearly 80 comments received in response to the EA, only 5 supported the “no
6 action” alternative. Seventy-five comments supported the alternative that would have both
7 prioritized wetlands needs and allowed the Service to curtail permitted irrigation in response to
8 later water shortages.

9 68. On June 4, 2002, however, the Service reversed course, choosing instead the “no
10 action” alternative as part of a Finding of No Significant Impact (“FONSI”). The Service
11 simultaneously revoked its 1999 CD, putting its 1994 Compatibility Determination back into
12 force for 2002.

13 69. In justifying its determinations, the Service asserted: 1) contrary to prior analyses
14 completed in 1999 and 2001, water “savings” from reduced irrigation would not benefit
15 wetlands; 2) weed infestations could occur on former leaselands; and 3) working relationships
16 with Tule Lake Irrigation District would be compromised.

17 70. In late summer 2002, it was announced that there was no water available for
18 Lower Klamath NWR’s fall flood up. Although farmers within the Tule Lake and Lower
19 Klamath refuges continued to irrigate their crops, the Service’s manager for the Klamath refuges
20 was forced to resort to pleading for water donations from private sources.

1 CLAIMS FOR RELIEF

2 FIRST CLAIM FOR RELIEF

3 Violation of the Kuchel Act

4 71. The 1964 Kuchel Act confirmed that the primary purpose of the Klamath Basin
5 refuges, including Lower Klamath NWR and Tule Lake NWR, is wildlife conservation. Section
6 2 of the Kuchel Act closed all lands owned by the United States within the four refuges to any
7 further homesteading and declared that all such lands are “hereby dedicated to wildlife
8 conservation.” 16 U.S.C. § 695*l*.

9 72. Section 2 of the Kuchel Act further provides that “[s]uch lands shall be
10 administered by the Secretary of the Interior for the major purpose of waterfowl management,”
11 allowing agricultural use only to the extent that it is “consistent therewith.” *Id.*

12 73. Current commercial agricultural uses of and water management practices on
13 Lower Klamath NWR and Tule Lake NWR are not consistent with the major purpose for which
14 the refuges were established.

15 74. The Service’s 2002 decision that agriculture as currently practiced within the
16 refuges is consistent with the major purpose for which the refuges were established is arbitrary,
17 capricious, violates the Kuchel Act, and is reviewable under the APA, 5 U.S.C. §§ 701-706.

18 SECOND CLAIM FOR RELIEF

19 Violation of the National Wildlife Refuge System Improvement Act

20 75. Under the National Wildlife Refuge System Improvement Act, the Secretary
21 “shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a
22 refuge, unless the Secretary has determined that the use is a compatible use[.]” 16 U.S.C. §
23 668dd(d)(3)(A)(i).

1 H) recognize compatible wildlife-dependent recreational uses as the priority
2 general public uses of the System through which the American public can
3 develop an appreciation for fish and wildlife; ...

4 J) ensure that priority general public uses of the System receive enhanced
5 consideration over other general public uses in planning and management
6 within the System.

7 16 U.S.C. § 688dd(a)(4)(A)-(N).

8 80. Current commercial agricultural uses of and water management practices on Tule
9 Lake NWR and Lower Klamath NWR do not provide for the conservation of fish, wildlife and
10 plants and their habitats on Lower Klamath NWR and Tule Lake NWR; do not ensure that the
11 biological integrity, diversity, and environmental health of those refuges are maintained for the
12 benefit of present and future generations of Americans; do not assist in the maintenance of
13 adequate water quantity and quality; and do not give priority to compatible wildlife-dependent
14 recreational uses such as wildlife observation and photography and environmental education and
15 interpretation over other general public uses such as commercial agriculture.

16 81. The Service's 2002 decision to continue current agricultural practices and water
17 management practices within the refuges is arbitrary, capricious, violates the National Wildlife
18 Refuge System Improvement Act and its implementing regulations, and is reviewable under the
19 APA, 5 U.S.C. §§ 701-706.

20 FOURTH CLAIM FOR RELIEF

21 Violation of National Environmental Policy Act

22 82. The National Environmental Policy Act, 42 U.S.C. § 4321 et seq., and the
23 Council on Environmental Quality's ("CEQ") implementing regulations, 40 C.F.R. § 1500-1517,
24

1 require that an agency prepare an Environmental Impact Statement (“EIS”) for every major
2 federal action significantly affecting the environment. 42 U.S.C. § 4332(C). If there is
3 uncertainty over whether an EIS should be prepared, CEQ regulations mandate preparation of an
4 Environmental Assessment (“EA”) to determine if an EIS is necessary. An EA must provide
5 sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no
6 significant impact. 40 C.F.R. § 1508.9. An EIS must adequately describe the affected
7 environment and disclose the environmental consequences of the proposed action. See id. §
8 1502. NEPA’s implementing regulations further dictate that until an agency has complied with
9 NEPA and issued a record of decision, no action concerning the proposal can be taken that will
10 have an adverse environmental impact or limit the choice of reasonable alternatives. 40 C.F.R. §
11 1506.1(a).

12 83. The FWS is a federal agency subject to NEPA, and the 2002 decision to allow
13 current agricultural practices on the Lower Klamath and Tule Lake NWRs is a major federal
14 action significantly affecting the human environment.

15 84. In 2002, the Service concluded that the continuation of its agricultural and water
16 management practices on Lower Klamath and Tule Lake NWRs would have no significant
17 impact the environment. The Service’s conclusion is unsupported by either an EA or an EIS, as
18 mandated by NEPA and its implementing regulations.

19 85. The Service has declared that it will operate pursuant to the two 1994
20 Compatibility Determinations. The Service previously found that 1994 Compatibility
21 Determinations were entitled to a categorical exclusion under NEPA, and they have therefore
22 never undergone an environmental analysis.

23 86. FWS failed to consider the significant impact of allowing current agricultural
24

1 practices within the Lower Klamath and Tule Lake NWRs in violation of NEPA and its
2 implementing regulations. The agricultural programs demand a significant volume of water for
3 irrigation, result in the application of highly toxic pesticides, and consume acreage that could
4 otherwise be used as wetlands or for the storage of excess water.

5 87. The Service's 2002 decision is arbitrary, capricious, violates NEPA and its
6 implementing regulations, and is reviewable under the APA, 5 U.S.C. §§ 701-706.

7 PRAYER FOR RELIEF

8 WHEREFORE, plaintiffs respectfully request that the Court:

9 A. Adjudge and declare that the Service's 2002 decision to continue current
10 commercial agricultural and water management practices on Lower Klamath NWR and Tule
11 Lake NWR violates the Kuchel Act, the National Wildlife Refuge System Administration Act,
12 the National Wildlife Refuge System Improvement Act, and the Administrative Procedure Act,
13 including by: 1) being inconsistent and incompatible with the mission of the National Wildlife
14 Refuge System and with the primary wildlife conservation purposes for which Lower Klamath
15 NWR and Tule Lake NWR were established, and with proper waterfowl management; 2) failing
16 to ensure that the biological integrity, diversity and environmental health of Lower Klamath
17 NWR and Tule Lake NWR are maintained for the benefit of present and future generations of
18 Americans; 3) failing to maintain adequate water quantity and water quality to fulfill the mission
19 of the National Wildlife Refuge System and the purposes of Lower Klamath NWR and Tule
20 Lake NWR; 4) conflicting with wildlife-dependent recreational uses including wildlife
21 observation and photography, hunting, fishing, and environmental education which are supposed
22 to be the priority uses where compatible with the wildlife conservation purposes of the refuges.

23 B. Order the FWS to comply with its duty to modify or eliminate existing
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1 commercial agricultural and water management practices on Lower Klamath NWR and Tule
2 Lake NWR to the extent necessary to: 1) make the agricultural use of and water management on
3 those refuges consistent and compatible with the mission of the National Wildlife Refuge System
4 and the primary wildlife conservation purposes for which Lower Klamath NWR and Tule Lake
5 NWR were established, and with proper waterfowl management; 2) ensure that the biological
6 integrity, diversity, and environmental health of Lower Klamath NWR and Tule Lake NWR are
7 maintained for the benefit of present and future generations of Americans; 3) maintain adequate
8 water quantity and water quality to fulfill the mission of the National Wildlife Refuge System
9 and the purposes of Lower Klamath NWR and Tule Lake NWR; and 4) ensure that compatible
10 wildlife-dependent recreational uses including wildlife observation and photography, hunting,
11 fishing, and environmental education receive priority over agriculture.

12 C. Establish a reasonable timetable for defendants to carry out the above duties and
13 to comply with the order of this Court and retain jurisdiction over this matter until such time as
14 defendants have done so.

15 D. Adjudge and declare that FWS has failed to comply with the National
16 Environmental Policy Act prior to adopting the 2002 decision to continue current commercial
17 agricultural and water management practices on Lower Klamath NWR and Tule Lake NWR.

18 E. Order FWS to comply with the requirements of NEPA, including by preparing a
19 legally valid environmental assessment, and if necessary, an environmental impact statement.

20 F. Grant such restraining orders and/or preliminary and permanent injunctive relief
21 as plaintiffs may from time to time request to ensure that the Lower Klamath and Tule Lake
22 National Wildlife Refuges do not suffer irreparable harm pending resolution of the merits of this
23 action.

1 G. Award plaintiffs their reasonable fees, expenses, costs, and disbursements,
2 including attorneys' fees associated with this litigation under the Equal Access to Justice Act 28
3 U.S.C. § 2412.

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

6 DATED this 28th day of October, 2002.

7 Respectfully submitted,

8 /s/ Kristen L. Boyles

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