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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MEDFORD DIVISION

AUDUBON SOCIETY OF PORTLAND,
OREGON WILD, and WATERWATCH OF
OREGON,

Plaintiffs,

v.

SALLY JEWELL, Secretary of United States
Department of Interior; DANIEL M. ASHE,
Director of United States Fish and Wildlife
Service; and UNITED STATES FISH AND
WILDLIFE SERVICE, an Administrative
Agency of the United States Department of the
Interior,

Defendants.

Case No.: 1:14-cv-675-CL

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT ON REMEDY
AND LEGAL MEMORANDUM
IN SUPPORT**

(National Wildlife Refuge System
Administration Act, 16 U.S.C. § 668dd)

Oral Argument Requested

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MOTION

Pursuant to Local Rule 7-1, Plaintiffs Audubon Society of Portland, Oregon Wild, and WaterWatch of Oregon (collectively, “Audubon Society”) hereby certify that the parties have made good faith efforts through both telephone conferences and written communications to resolve the dispute and have been unable to do so.

Audubon Society hereby moves for summary judgment as to relief on each of the five claims in its Complaint. Doc. 1. On August 18, 2014, this Court issued an Order declaring that Federal Defendants have violated a mandatory and nondiscretionary deadline in the Refuge Act for preparation of a Comprehensive Conservation Plan (“CCP”) by October 9, 2012 for the five National Wildlife Refuges (“NWR”) in the Klamath Basin at issue in this litigation. Doc. 14. Therefore, the only issue to be resolved in this case is the nature of the remedy to be issued by the Court. Audubon Society respectfully requests the following relief:

1. An injunction compelling Federal Defendants to complete a CCP for each of the five remaining Klamath NWR Complex refuges including, Lower Klamath, Upper Klamath, Tule Lake, Clear Lake and Bear Valley refuges within eighteen (18) months from the date of the Court’s order, or by August 1, 2016, whichever is earlier (Complaint ¶ B); and
2. That the Court retain continuing jurisdiction to enforce the terms of the injunction (Complaint ¶ C).

Audubon Society's motion for summary judgment is supported by the following legal memorandum.¹

LEGAL MEMORANDUM

I. INTRODUCTION

Plaintiffs, Audubon Society of Portland, Oregon Wild, and WaterWatch of Oregon respectfully move for summary judgment relating to the appropriate relief in this action, which involves planning and protection for prime wildlife and waterfowl habitat in the Klamath Basin National Wildlife Refuge Complex ("Klamath Complex"). The Klamath Complex consists of six refuges including the Lower Klamath, Upper Klamath, Klamath Marsh, Tule Lake, Clear Lake, and the Bear Valley National Wildlife Refuges.²

The primary purpose of each of the Klamath Complex refuges is to preserve habitat and breeding grounds for waterfowl and other wildlife. The Klamath Basin and the Klamath Complex National Wildlife Refuges provide feeding and resting grounds for over three-quarters of the waterfowl in the Pacific Flyway each year during spring and fall migrations. Over 430 wildlife species, including 263 bird species, have been observed in the basin. Former Klamath Complex Refuge Manager, Ron Cole, describes his first encounter with the wildlife of the Klamath Refuges:

"This was a *waterfowl washout* made up of thousands of ducks walking on the pavement, looking for grit. They moved in mass, slowly oozing like feathered syrup. When they lifted off the air was filled with wings and orange feet. For a moment, I lost sight of the sky. What I heard over the sound of my idling engine

¹ Audubon Society also intends to seek an award of its costs of litigation, including reasonable attorneys' fees (Complaint ¶ D).

² A separate CCP process was completed for the Klamath Marsh NWR in 2010.

was the roar of over 10,000 winged turbines lifting into space. What I had heard about the Klamath Basin was true. This indeed was a land of abundance and mystery.”

AR 5700.

Historically, the Klamath Basin contained approximately 350,000 acres of shallow lakes, wetlands and freshwater marshes that supported populations of over six million water birds. Today, less than 25 percent of the historic wetlands and marshes remain in the Basin due to large-scale conversion of wetland habitats to farmland under the Bureau of Reclamation’s Klamath Project. Commercial agricultural operations, over-allocation of water resources, agricultural pollution, and drought have resulted in further impairment of the remaining wetland habitat within the Klamath Complex. Competing uses of the Klamath Complex refuges pose a significant risk to the future health and viability of the refuges and the species that depend on their resources.

The National Wildlife Refuge System Administration Act (“Refuge Act”) was passed by Congress with the purpose to set aside lands designated as wildlife refuges for “the conservation, management, and where appropriate, restoration, of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.” 16 U.S.C. § 668dd(a)(2). In 1997, Congress passed and President Clinton signed the National Wildlife Refuge System Improvement Act, which amended the Refuge Act. *Id.* § 668dd(e)(1)(B). More specifically, the amendments required the U.S. Fish and Wildlife Service (“FWS”) to prepare and implement a Comprehensive Conservation Plan for each unit of the National Wildlife Refuge system “within 15 years after the date of enactment of the National Wildlife Refuge System Improvement Act of 1997 [enacted October 9, 1997].” *Id.* These

amendments are intended to “ensure that the biological integrity, diversity, and health of the system are protected.” 143 Cong. Rec. H3225 (daily ed. June 3, 1997) (statement of Rep. Miller).

The CCPs were therefore due to be completed by October 9, 2012.

A Comprehensive Conservation Plan is a “document that describes the desired future conditions of a refuge or planning unit and provides long-range guidance and management direction to achieve the purposes of the refuge.” 50 C.F.R. § 25.12 (2014). A CCP is intended to “maintain and, where appropriate, *restore* the ecological integrity of each refuge and the Refuge System.” *Id.* (emphasis added). In developing a CCP, Federal Defendants will be required to make a determination of whether existing uses of the refuges, including agricultural uses, are compatible with the purpose of each of the five remaining Klamath Complex refuges. A compatible use is defined as a use that “will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose(s) of the national wildlife refuge.” 50 C.F.R. § 25.12.³

More than seventeen (17) years have gone by since Congress passed the NWR Systems Improvements Act, and yet the FWS still does not have in place the fundamental plans that must govern management of the Klamath Basin NWR Complex. Indeed, the Federal Defendants

³ The Secretary is also required to identify and describe several additional factors, including:

- “the purpose of each refuge comprising the planning unit,”
- “the distribution, migration patterns, and abundance of fish, wildlife and plant populations and related habitats of fish, wildlife and plants within the planning unit,”
- “significant problems that may adversely affect the populations and habitat of fish, wildlife and plants within the planning unit and the actions necessary to correct or mitigate such problems,” and
- “opportunities for compatible wildlife-dependent recreational uses.”

16 U.S.C. § 668dd(e)(2).

admit, and this Court has already declared, that the FWS has violated a mandatory statutory timeline imposed by Congress for preparation of those plans.

And while the CCPs are unfinished, hundreds and thousands of pages of analysis and draft documents have been prepared by FWS towards meeting its statutory objective. Indeed, the lead conservation planner stated in November 2013 that the draft CCP and draft Environmental Impact Statement for these five wildlife refuges were 87% complete. A substantial portion of the work has already been completed by the agency, but FWS recently, for all intents and purposes, stopped work on the project just before the draft documents were to be prepared for public review and comment. And yet now the FWS is asking for another three years – until October 2017 – to finish the job. This is plainly unreasonable.

Each additional year of delay in completing the Klamath Complex CCP/EIS marks another year where the Klamath Complex refuges are without clear planning and guidance specifically directed at protecting the purposes of each wildlife refuge. And the FWS intends to continue issuing agricultural leases while it delays completion of the CCPs. Time is of the essence for the ecological and biological integrity of the Klamath Complex refuges as increasing drought and excessive water allocation to competing agricultural uses continue to degrade and destroy wildlife and waterfowl habitat. Completion of the CCP will require future planning and management aimed at correcting or mitigating any problems that adversely affect populations and habitats of fish, wildlife and plant species within the refuges. The relief requested here – an injunction compelling timely agency action – upholds and furthers the Congressional purposes for setting a strict timeline in the Refuge Act for completion of a CCP for each National Wildlife Refuge unit.

II. STATEMENT OF FACTS

A. Klamath Basin National Wildlife Refuge Complex

The Klamath National Wildlife Refuge Complex consists of six refuges including the Upper Klamath, Lower Klamath, Tule Lake, Clear Lake, Bear Valley, and Klamath Marsh Refuges. AR 5764. Historically, the Klamath Basin contained over 350,000 acres of shallow lakes, wetlands and freshwater marshes that supported populations of over six million water birds. Wheeler Dec. ¶ 3. Today, less than 25 percent of the historic wetlands and marshes remain in the Basin. AR 5764. The Klamath Refuge Complex serves as crucial waterfowl resting and feeding grounds during seasonal migrations through the Pacific Flyway. AR 5765-68; Hunter Dec. ¶ 16

The Klamath Refuge Complex was established to conserve the Klamath Basin's remaining wetland habitat. AR 5764. However, Upper Klamath, Lower Klamath, Tule Lake, and Clear Lake Refuges exist within the U.S. Bureau of Reclamation ("Reclamation") Klamath Project and have been subject to conversion from wetland habitats to farmland. *Id.* The Kuchel Act of 1964, 16 U.S.C. § 6951, stopped wetland reclamation on the refuges and dedicated the lands to waterfowl management. AR 5764. Today, FWS and Reclamation administer a Public Lease Lands program on the Lower Klamath and Tule Lake refuges. *Id.* Refuge lands are also subject to farming under permits granted in cooperation with FWS. *Id.*

Lower Klamath National Wildlife Refuge was established in 1908 as the nation's first waterfowl refuge. *Id.*; Exec. Order No. 924 (1908). It is a 46,000-acre refuge located in northeastern California and southern Oregon. AR 5764. Lower Klamath Refuge is one of the most biologically productive refuges within the Pacific Flyway. *Id.* Approximately 80 percent

of the flyway's migrating waterfowl pass through the Klamath Basin, with 50 percent of those birds using the Lower Klamath Refuge. *Id.* The refuge provides habitat for at least 25 species of special concern listed as threatened or sensitive by California and Oregon. *Id.*

Approximately 5,000 acres of the Lower Klamath Refuge are leased to farmers under the Public Lease Lands program. *Id.* Another 5,000-7,000 acres are farmed under permits in cooperation with FWS. *Id.* Agricultural uses within the Refuge have resulted in the loss of most of the wetland habitat. Hunter Dec. ¶ 14. Water within the Refuge is delivered through a diversion system of irrigation canals associated with the Reclamation Project. AR 5766. Due to the over-allocation of water within the system, the Refuge often faces water shortage. *Id.*; Van den Broek Dec. ¶ 8. In times of drought, as with the severe drought experienced in 2014, water resources are continually allocated to agricultural resources rather than for maintaining waterfowl and wildlife habitats within the Refuge. Wood Dec. ¶ 15; Van den Broek Dec. ¶ 11. Insufficient water supply to Lower Klamath Refuge has resulted in reduced wetland habitat for important bird migrations on the Pacific Flyway as well as increased incidence of avian botulism and disease, and increase of noxious weeds. Wheeler Dec. (Doc. 16-1) ¶ 11.

Tule Lake National Wildlife Refuge was established in 1928 as a "preserve and breeding ground for wild birds and mammals." AR 5766; Exec. Order No. 4975 (1928). It is a 39,116-acre refuge located in the Tule Lake Basin of northeastern California. AR 5766. It is made up of primarily open water and cropland with approximately 17,000 acres leased for crop farming under the Public Lease Lands program. *Id.* An additional 1,900 acres are farmed under permits. Tule Lake Refuge provides habitat for the endangered Lost River and shortnosed suckers and is a significant staging area for migrating waterfowl during spring and fall migrations. *Id.* Wetlands

in the Tule Lake Refuge frequently go dry as a result of water diversions for commercial agriculture use. Hunter Dec. ¶ 14. Habitat management of the Tule Lake wetlands to improve diversity and productivity will be addressed in the CCP. Wheeler Dec. ¶ 22.

Clear Lake National Wildlife Refuge was established in 1911 as a “preserve and breeding ground for native birds.” AR 5767; Exec. Order No. 1332 (1911). It is located in northeastern California and contains the Clear Lake Reservoir, approximately 20,000 acres of open water, surrounded by over 26,000 acres of upland bunchgrass, low sagebrush, and juniper habitat. AR 5767. Clear Lake Refuge provides nesting sites for American white pelicans, double crested cormorants, and other colonial nesting birds. *Id.* Upland areas of the refuge are habitat for pronghorn antelope, mule deer, and sage grouse. *Id.* The Clear Lake Reservoir is the primary source of water for the agricultural program of the eastern half of the Klamath Basin, with water levels regulated by Reclamation. *Id.*

Islands within the Clear Lake Refuge serve as a prime breeding ground for American white pelicans. Wood Dec. ¶ 16; Wheeler Dec. ¶ 12. However, in years of excessive water allocation and drought, the water in Clear Lake Reservoir becomes so low that those islands become connected to the mainland and made accessible to predators. Wood Dec. ¶ 16. In 2014, American white pelicans were unsuccessful in establishing nests within the Refuge due to the vulnerability to predators. *Id.*, Hunter Dec. ¶ 15. Impacts to the Clear Lake breeding grounds can carry over to the American white pelican populations on Upper Klamath and Lower Klamath Refuges. Hunter Dec. ¶ 15. Low water levels in Clear Lake also threaten the available habitat for waterfowl feeding. *Id.* Management of Clear Lake Refuge in light of available water supply is something to be addressed in the CCP. Wheeler Dec. ¶ 13. Other issues on Clear Lake

Refuge, such as intrusion of western juniper into greater sage grouse habitat, will also be addressed through the CCP process. *Id.* ¶ 15.

Upper Klamath National Wildlife Refuge was established in 1928 as a “refuge and breeding grounds for birds and wild animals.” AR 5768; Exec. Order No. 4851 (1928). It is located in southwestern Oregon and contains 15,000 acres, comprised mostly of bulrush-cattail marsh and open water, and approximately 30 acres of forested uplands. AR 5768. The refuge serves as nesting and brood rearing habitat for waterfowl and colonial nesting birds. *Id.* Bald eagles and osprey also nest nearby and use refuge waters for feeding. *Id.* Wetland and marsh habitat in the Upper Klamath Refuge are regularly drained or completely dry due to farming irrigation needs, resulting in the loss or destruction of waterfowl habitat within the Refuge. Hunter Dec. ¶ 13. The Klamath Complex CCP will address a variety of issues on the Upper Klamath Refuge, including restoration and enhancement of wetland habitat. Wheeler Dec. ¶ 23.

Bear Valley National Wildlife Refuge was established in 1978 to protect a major night roost site for wintering bald eagles in Southern Oregon. AR 5768. The refuge is 4,200 acres and consists primarily of old growth ponderosa pine, incense cedar, and white Douglas fir. *Id.* Bear Valley Refuge has served as a roost for as many as 300 bald eagles in a single night. *Id.* Management issues for Bear Valley that will be addressed in the CCP include coniferous forest and riparian habitat management, particularly for bald eagles; and increased opportunities for wildlife observation, photography, interpretation, and environmental education. Wheeler Dec. ¶

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B. FWS has already completed substantial work over a period of six years towards completion of the CCP

The FWS initiated work on the Klamath Complex CCP long ago with plenty of runway to complete the planning process well in advance of its statutory deadline. FWS began its preplanning work on the Klamath Complex CCP/EIS in 2008 by securing a contractor to prepare sections of the CCP and EIS. Wheeler Dec. ¶ 53; AR 7148-7278. On April 29, 2010 the FWS announced its intent to prepare a CCP and EIS for the Upper Klamath, Lower Klamath, Tule Lake, Bear Valley, and Clear Lake National Wildlife Refuges. 75 Fed. Reg. 22620 (April 29, 2010); Exhibit 3. FWS held a scoping process, whereby it held public meetings and solicited comments from the public. AR 5633. The scoping process closed on June 28, 2010. *Id.* FWS thereafter released a Scoping Summary Report in December 2010. Wheeler Dec. ¶ 54; Exhibit 5.

The next step in the CCP process for FWS is to complete an administrative draft CCP and draft EIS under the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4321 *et seq.* Wheeler Dec. ¶ 37. Despite the fact that FWS initiated its planning process in 2008, FWS has yet to release either a draft CCP or environmental document for the five National Wildlife Refuge units subject to this action despite its October 9, 2012 deadline. *See* 16 U.S.C. § 668dd(e)(1)(B).

More specifically, FWS has completed the following work on the Klamath Complex CCP/EIS:

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Date	Task Completed	Record Citation
Sept. 2008	FWS secures contract with North State Resources (“NSR”) to assist in planning and drafting of CCP/EIS	AR 7152-7181
March 2009	FWS develops a public outreach plan for the CCP process	AR 6742-6764
April 2009	NSR sends FWS draft Affected Environment chapter of CCP for review	AR 6741; 6609-6737
Jan. 2010	FWS hires Conservation Planner, Michelle Barry, to serve as lead on Klamath Complex CCP/EIS process	AR 6189
April 2010	FWS announces intent to prepare a CCP/EIS for the Klamath Complex Refuges	AR 5729-30 (Ex. 3)
May 2010	FWS holds four scoping meetings in southern Oregon and northern California	AR 5783
Nov. 2010	FWS completes a Klamath Complex CCP Scoping Summary Report	AR 5461-5473 (Ex. 5)
Jan. 2011	FWS extends contract with NSR to May 2012 due to government-caused scheduling delays	AR 5267-70
May 2011	NSR sends FWS draft of Cultural Resources chapter of CCP for review	AR 4767; 4768-4832
Dec. 2011	FWS completes draft Vision Statements for each Refuge to be included in CCP	AR 4614-4621, 4622
May 2012	FWS completes draft Alternatives matrix for each of the five Klamath Complex Refuges	AR 4448, 4449-4474
May 2012	FWS completes draft of interpretation of Kuchel Act to be incorporated into CCP	AR 4228-4305; Wheeler Dec. ¶ 30
May 2012	FWS again extends contract with NSR to May 2013	AR 4193-4196
March 2013	FWS drafts Introduction chapter and Table of Contents for CCP/EIS	AR 2918-31; 2932-2940
April 2013	FWS contractor prepares preliminary Economic Analysis for CCP	AR 2886-2907
April 2013	NSR sends FWS drafts of Environmental Consequences and Refuge Environment Chapters of CCP along with Economics Report	AR 2652; 2654-2846
May 2013	FWS completes a draft Compatibility Determination for farming uses on Lower Klamath and Tule Lake National Wildlife Refuges	AR 1979; 1980-2003
July 2013	FWS completes a draft of Alternatives chapter of CCP	AR 1751-1770
Aug. 2013	FWS completes a draft of Comprehensive Conservation Planning Process chapter of CCP/EIS	AR 1637-1651
Nov. 2013	FWS submits administrative draft of CCP to Regional FWS Office for review	Wheeler Dec. ¶ 55
Aug. 2014	FWS secures contractor to complete Compatibility Determinations	Wheeler Dec. ¶ 41

While it has been over six years since FWS initiated its planning for the remaining Klamath Complex Refuges' CCP process, the record shows that FWS, at all times, estimated the entire CCP process for the Klamath Basin NWR Complex to take approximately three years to complete. AR 3414, 4605, 4632, 5475, 5652, 6263, 6739, 7099, 7125, 7288, 7612, 7628; Exhibit 1.⁴ And yet, even though it has completed six years of work and has hundreds of pages of draft documents prepared, FWS now asserts it needs an additional three years, until October 2017, to complete the CCP and EIS for the Klamath Complex Refuges. Wheeler Dec. ¶ 35. Indeed, as mentioned above, in November 2013, the lead FWS Conservation Planner for the Klamath Complex CCP, Michelle Barry, estimated that the administrative draft of the CCP was about 87% complete. Exhibit 7. Since that time, FWS has had over a year to continue working on the CCP draft, but asserts that it needs until May 2015 – two and a half years after the statutory deadline - before even beginning its internal review of an administrative draft. Wheeler Dec., Exhibit D. The agency has plainly lost its way and has turned a deaf ear to a clear and unambiguous mandate from Congress.

III. ARGUMENT

There is no genuine issue of material fact for trial in this case. FWS does not dispute that it has not yet completed a Comprehensive Conservation Plan for the five remaining Klamath Complex refuges. Answer (Doc. 9) ¶ 28. On August 18, 2014, this Court issued an order on liability declaring that FWS has violated a mandatory and nondiscretionary deadline in the Refuge Act for completion of a CCP for each of the five remaining Klamath Complex refuges by October 9, 2012. Doc. 14. This failure constitutes agency action unlawfully withheld under

⁴ Various copies of the FWS's CCP planning schedule found throughout the Administrative Record have been compiled into Plaintiffs' Exhibit 1.

Section 706(1) of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1). *Id.* Therefore, Audubon Society is entitled to judgment as a matter of law, and the only issue left for the Court to consider is the nature of the relief to be granted.

Audubon Society seeks a Court-ordered deadline for completion of the Klamath Complex CCP/EIS because ongoing commercial agricultural operations on refuge lands, excessive water diversions, agricultural pollution, and drought have resulted in further damage to the remaining wetland habitat within the Klamath Complex. In the absence of this relief, Plaintiffs’ long-standing interests in the conservation, management, and restoration of the Klamath Complex refuges will be prejudiced, and the refuges will continue to be managed and agricultural leases issued without long-term planning and guidance towards achieving their ultimate purpose of waterfowl and wildlife habitat. This Court should grant Audubon Society’s motion, and order FWS to complete a Comprehensive Conservation Plan for the five remaining Klamath Complex refuges within 18 months of the Court’s order, or by August 1, 2016, whichever is earlier.

A. Standard of Review

Under FED. R. CIV. P. 56(a), the court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” The moving party bears the initial responsibility of “informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). From there, the burden of production shifts to the defendant to show at least one issue of material fact appropriate for trial.

When a motion is properly made and supported, the opposing party may not rely merely on allegations or denials in its own pleadings, but must support the assertion by citing to materials in the record or showing that the materials cited do not establish the absence of a genuine dispute. FED. R. CIV. P. 56(c). Otherwise the court may, *inter alia*, consider the fact undisputed or grant summary judgment if the motion and supporting materials show that the movant is entitled to it. FED. R. CIV. P. 56(e). When the evidence is “so one-sided that one party must prevail as a matter of law,” summary judgment is appropriate. *Anderson v. Liberty Lobby*, 477 U.S. 242, 251–52 (1986).

The Refuge Act does not contain its own standard of review. Where a substantive statute lacks its own standard of review, the Ninth Circuit imports the standard of review from § 706 of the APA. *Wilson v. Comm’r*, 705 F.3d 980, 997 (9th Cir. 2013); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000) (“[Section] 706 of the APA functions as a default judicial review standard.”). In suits alleging failure to comply with a firm deadline, the proper standard is whether agency action was “unlawfully withheld.” 5 U.S.C. § 706(1); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002) (declining to apply the ‘unreasonably delayed’ factors where a firm statutory deadline was imposed). The distinction between the “unlawfully withheld” and “unreasonably delayed” standards turns on whether Congress imposed a date certain deadline on agency action. *Id.*; *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1998) (citing *Sierra Club v. Thomas*, 828 F.2d 783, 794–95 & nn. 77–80 (D.C. Cir. 1987)). In the case of completing Comprehensive Conservation Plans, Congress imposed a date certain deadline. This Court has already declared that Federal

Defendants' failure to comply with the statutory deadline for completing a CCP constitutes agency action unlawfully withheld under § 706(1) of the APA. Doc. 14.

Where Congress has provided a date certain by which to act, a reviewing court "shall compel agency action unlawfully withheld." 5 U.S.C. § 706(1); *see Forest Guardians*, 174 F.3d at 1190–1191 (where an agency withholds timely action under a specific statutory deadline, "a reviewing court must compel the action unlawfully withheld."). To hold otherwise would be "an affront to our tradition of legislative supremacy and constitutionally separated powers." *Forest Guardians*, 174 F.3d at 1190. Additionally, where, as here, an injunction is the only means of compliance, the Court should order FWS to comply with the terms of the statute. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982).

In determining the appropriate timeline for agency action, the Ninth Circuit has instructed district courts to follow a standard of reasonableness. *Env'tl. Def. Ctr. v. Babbitt*, 73 F.3d 867, 872 (9th Cir. 1995); *see also Ctr. for Biological Diversity v. Norton*, 304 F.Supp.2d 1174, 1184 (D. Ariz. 2003). Consistent with Congressional intent in imposing strict statutory deadlines, courts reviewing deadline cases in the Endangered Species Act ("ESA") context have refused to consider the agency's other priorities and have fashioned relief based on how quickly the work can be accomplished. *Forest Guardians*, 174 F.3d 1178 (10th Cir. 1999); *Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, Civil No. 02-9450KI, 2002 WL 31109573 (D. Or. Sept. 5, 2002). This case is no different from the ESA context where Congress has imposed a strict timeline for completion of Comprehensive Conservation Plans which further the purpose of the Refuge Act to conserve, manage and restore fish, wildlife, and plant resources for the benefit of present and future generations. 16 U.S.C. § 668dd(a)(2).

B. Plaintiffs have standing

Plaintiffs Audubon Society of Portland, Oregon Wild, and WaterWatch of Oregon each have alleged and established facts to show Article III standing and are properly before this Court as organizations representing aggrieved individuals. *Cf. Sierra Club v. Norton*, 405 U.S. 727, 739 (1972). Individual members have suffered an injury in fact, which is traceable to FWS's failure to complete a Comprehensive Conservation Plan for the five remaining Klamath Complex refuges, and that injury will be redressed by requiring FWS to complete the CCP. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Audubon Society of Portland, Oregon Wild, and WaterWatch have standing because: (1) they each represent members who otherwise would have had standing to sue on their own behalf; (2) the interests at stake are germane to the organizations' purposes; and (3) neither the claims asserted nor the relief requested must require the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 181 (2000); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Biodiversity Legal Found.*, 309 F.3d at 1171.

Individuals from the plaintiff organizations would have independent standing to bring this action. Members of the Audubon Society of Portland, Oregon Wild, and WaterWatch have used and enjoyed each of the five Klamath Complex refuges at issue, and express a desire to continue doing so in the future. Van den Broek Dec. ¶¶ 5-10; Wood Dec. ¶¶ 6-8, 10-12; Hunter Dec. ¶¶ 7-10, 12, 18. Wood has been visiting the Klamath Complex refuges for over 30 years to view, observe and photograph plants, waterfowl, raptors and other wildlife, and intends to continue doing so at in the future. Wood Dec. ¶¶ 6, 10-13. Hunter has visited Lower Klamath, Upper Klamath, and Tule Lake Refuges innumerable times since the 1970's to recreate and

birdwatch, and frequently views bald eagles as they fly out of Bear Valley Refuge. Hunter Dec. ¶¶ 7, 8, 10. Hunter has also participated in a FWS banding project for American white pelicans within the Clear Lake Refuge. *Id.* ¶ 9. Van den Broek has been visiting the Klamath Refuges to birdwatch and recreate since 1987. Van den Broek Dec. ¶¶ 5, 6. “[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.” *Laidlaw*, 528 U.S. at 183 (citations omitted).

Van den Broek, Wood, and Hunter are members of Audubon Society of Portland, Oregon Wild, and WaterWatch, who engage with the Klamath Complex Refuges and the waterfowl and wildlife within as part of their occupational and volunteer activities. Van den Broek Dec. ¶ 6; Wood Dec. ¶¶ 7,8; Hunter Dec. ¶¶ 10-12. Wood and Hunter believe that the waterfowl and wildlife purposes of the Klamath Complex Refuges are not given the priority and consideration in management decisions that they would receive under a CCP. Wood Dec. ¶¶ 15–17; Hunter Dec. ¶¶ 16–18. Plaintiffs are concerned that their future ability to gain occupational, aesthetic, scientific, moral, spiritual, and recreational values from visiting and observing the Klamath Complex Refuges will be substantially reduced or eliminated, without intervention from this Court. *Laidlaw*, 528 U.S. at 183.

Because Audubon Society complains of a procedural failing, standing requirements as to immediacy and redressability are relaxed. *Mass. v. U.S. EPA*, 549 U.S. 497, 527–18 (2007); *Lujan*, 504 U.S. at 572 n.7. A litigant who alleges a deprivation of a procedural protection “never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive

result.” *Mass. v. U.S. EPA*, 549 U.S. at 518 (quoting *Sugar Cane Growers Cooperative of Fla. v. Veneman*, 289 F.3d 89, 94–95 (D.C. Cir. 2002)). Increasingly severe drought in the Basin since 2012 has meant that refuge lands go dry while water deliveries to lease land farming continue. Lack of water in the refuges results in loss of habitat requiring birds to crowd into what little habitat remains, increasing the potential for disease outbreak and botulism. A CCP will require FWS to identify “significant problems” affecting fish, wildlife, and plant habitat within the Refuges and any “actions necessary to correct or mitigate such problems.” 16 U.S.C. § 668dd(e)(2). Because FWS will not be required to address those problems until a CCP is in place, Plaintiffs’ injuries can only be redressed through a favorable ruling of this Court. Without a CCP for the remaining Klamath Complex refuges, ongoing injuries to Plaintiffs’ concrete interests in the ecological integrity of the refuges cannot be redressed.

The interests at stake in this lawsuit do not require individuals to participate in the suit. *Hunt*, 432 U.S. at 343; *Biodiversity Legal Found.*, 309 F.3d at 1172. The interests at stake are also germane to Audubon Society of Portland’s, Oregon Wild’s, and WaterWatch’s missions. *See Van den Broek Dec.* ¶ 3 (“Audubon’s mission is to promote the understanding, enjoyment, and protection of native birds, other wildlife and their habitats.”); *Wood Dec.* ¶ 4 (“Oregon Wild’s mission is to work to protect and restore Oregon’s wildlands, wildlife and waters as an enduring legacy for all Oregonians.”); *Hunter Dec.* ¶ 4 (WaterWatch’s Klamath Basin program is focused on “restoring the Klamath Basin to a more natural state by balancing water demands and ensuring there is sufficient water allocated for fish, wildlife, and wetlands...”).

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C. The Court should compel FWS to complete a CCP for the Klamath Complex National Wildlife Refuges within eighteen (18) months of its order or by August 1, 2016, whichever is earlier.

In order to effectuate the purpose of the Refuge Act to conserve, manage, and restore refuge fish, wildlife, and plant resources and their habitats for the benefit of present and future generations, Audubon Society respectfully asks the Court to order FWS to complete a Comprehensive Conservation Plan for the five remaining Klamath Complex refuges by a date certain. In this case, injunctive relief is the only remedy that is consistent with the mandate of Congress.

This Court has already declared and ordered that Federal Defendants' failure to comply with the Refuge Act's 15-year statutory deadline for completing a CCP for each National Wildlife Refuge unit constitutes agency action unlawfully withheld under § 706(1) of the APA. Doc. 14. Thus, injunctive relief compelling FWS to act by a date certain is the proper remedy. *See* 5 U.S.C. § 706(1); *Forest Guardians*, 174 F.3d at 1190–91. In setting a timetable for injunctive relief, this Court should base that decision on how quickly the agency can complete that work without regard to the agency priorities. *Forest Guardians*, 174 F.3d 1178.

Audubon Society's request for an eighteen-month timeframe is more than reasonable, considering the substantial delay to date, the FWS's own projections of the needed timeframe throughout the administrative record, the substantial work already completed, and the importance of implementing a comprehensive planning and management scheme in the Klamath Complex Refuges. As discussed in detail above, the various competing uses that take place on the Klamath Complex Refuges, along with increasing drought conditions in the Klamath Basin, have created conditions that frustrate refuge purposes. Completion of the CCP will require future

planning and management aimed at correcting or mitigating any problems that adversely affect populations and habitats of fish, wildlife and plant species within the refuges.

FWS has had over seventeen (17) years to prepare and complete a CCP for the Klamath Complex Refuges. *See* 16 U.S.C. § 668dd(e)(1)(B). FWS began preplanning work for the Klamath Complex CCP/EIS in 2008. Wheeler Dec. ¶ 53. Preplanning included procurement of a contractor to prepare sections of the EIS and CCP, as well as developing a work plan and planning schedule. *Id.* As early as 2006, FWS estimated that completion of the Klamath Complex CCP would take a total of three years, from the initiation of pre-planning to publishing of a final CCP. Exhibit 1, p.1. Memoranda distributed to Refuge staff from the FWS Director and Region 8 Regional Director provide that more complex CCPs should take no more than three years to complete. Exhibit 2. Even after initiating the CCP planning process, FWS consistently estimated that completion of the Klamath Complex CCP would take approximately three years. *See* Exhibit 1.

As noted above, FWS has already completed substantial work on the CCP and draft EIS, and the lead FWS Conservation Planner, Michelle Barry, estimated in November of 2013 that this work was 87% complete. Exhibit 7. Since that time, however, it appears that FWS has, for the most part, stopped work on the project despite its statutory mandate. The timeline proposed by Audubon Society would allow FWS approximately six months to finish the draft CCP and EIS – work that has already been moving forward for more than six years – and then one year to take public comment and to prepare a final CCP and EIS.

This proposed schedule is fully consistent with the statements made by FWS throughout the planning process to date. In May 2014, lead Conservation Planner projected that an

administrative draft CCP could be complete by September 2014 – or in four months – if FWS staff “makes this a priority and we had the support we needed.” Exhibit 8. That was, of course, approximately seven months prior to the filing of this opening brief. The record, including the supplement to the administrative record filed on November 21, 2014, includes lengthy drafts of the CCP/EIS chapters, studies, and appendices, demonstrating that extensive work that has been completed to date. *See* Exhibits 9-21. Finally, in numerous places in the record, FWS estimates for the time needed to move from an administrative draft to a final CCP/EIS and ROD range from thirteen (13) to nineteen (19) months. *See* Exhibit 1, pp. 5, 8-10, 13. It is more than reasonable to order the FWS to take the work that has been completed to date, to finish the draft CCP and EIS and to take public comment and produce final documents by August 1, 2016 – nearly four years after its statutory deadline.

FWS, however, claims it needs until October 2017 – another three years – to complete and finalize the CCP. Wheeler Dec., Ex. D (Doc. 16-2, p. 60). It now estimates that it needs twenty-seven (27) months – more than two years - after completion of an administrative draft to finalize and publish the CCP/EIS. *Id.*

As justification for its proposed three-year timeline, FWS describes the work that remains to be completed and estimates for the amount of time each task will take to complete. Wheeler Dec. ¶¶ 37–51. While FWS has provided general estimates of the number of months or weeks that will be required to complete each step of the CCP process, it has not explained why those estimates are reasonable or necessary.

FWS seems to rely on the significant past delays experienced to date in the CCP planning process as justification for its proposed timeline going forward. The Wheeler Declaration

provides numerous excuses for why FWS is behind in the planning process including completion of the Klamath Marsh CCP, staff vacancies dating back to 2011, uncertainty due to the Klamath Basin Restoration Agreement (KBRA) and water rights, endangered species management, and funding reductions since 2010. Wheeler Dec. ¶¶ 53–62. However, these factors relate almost exclusively to FWS’s preparation of the substance of the CCP/EIS, rather than to the reviewing, commenting and revision processes that make up the bulk of the remaining work. *See Id.* Moreover, FWS already stipulated and this Court already declared that the agency failed to meet a nondiscretionary statutory deadline, and thus its arguments as to the earlier reasons for delay are largely irrelevant in this case.

Further, the record shows that from November 2013, when a draft CCP was submitted to the FWS Regional Office, to the time this action was filed in April 2014, essentially zero progress was made on completing the CCP/EIS. *See* AR 7151, 975, 877. It is clear from the record that FWS simply did not afford the CCP the level of priority that was intended by Congress. While NSR contractor, Ginger Bolen, worked on completing draft chapters of the CCP, FWS staff continuously failed to provide feedback on those drafts for months at a time, such that the contractor could not move forward. *See* AR 6741, 6335-36, 6190. The CCP project was pushed aside either to free-up resources for other, non-mandatory agency actions or perhaps because of the unwelcome political ramifications completion of the CCP might bring. *See* AR 4948, 1179. It was only upon the filing of this lawsuit that FWS reinitiated its planning process and decided it was “now a priority for us to make headway” on the CCP. AR 616; *see also* AR 863, 877.

FWS does not provide any explanation of why its past problems in administration of its workload, contributing to the delay thus far, justify further delay going forward. And again, the record demonstrates that the substance of the CCP/EIS is near complete – 87% complete when the agency apparently shut down work on the project over a year ago. Exhibit 7.

Based on FWS's own estimates in the record of the time needed to complete the CCP, an eighteen-month deadline is more than reasonable. Indeed, Audubon Society has no interest in imposing an unreasonable deadline that could compromise the integrity of the management plan. But here, the timeline proposed by the Plaintiffs is fully consistent with all of the statements made by the agency until just recently when the project was shut down and litigation commenced. Injunctive relief should be framed according to how quickly the work can be accomplished if given the priority and attention required by Congress. *See Forest Guardians*, 174 F.3d 1178. The timeframe proposed by Audubon Society, which would result in completion of the Klamath Complex CCP nearly four years after the statutory deadline, and nearly eight years after FWS began its planning process, is more than reasonable and would uphold the mandate from Congress that FWS complete the planning process in a timely manner that is meaningful to the management of the refuge system. FWS has not provided adequate justification why it needs twenty years to prepare a management plan for the Klamath Refuge network.

Audubon Society also requests that the Court retain continuing jurisdiction over this action to ensure the imposed deadline is met, as prior courts have in similar cases. *See, e.g., Hells Canyon Pres. Council v. Richmond*, 841 F. Supp 1039 (D. Or. 1993); *Ctr. for Biological*

Diversity v. Abraham, 218 F.Supp.2d 1143 (N.D. Cal. 2002); *Xerces Society for Invertebrate Conservation v. Jewell*, No. 3:13-cv-01103-MO (D. Or. July 31, 2014).

V. CONCLUSION

For the reasons stated above, Plaintiffs Audubon Society of Portland, Oregon Wild, and WaterWatch of Oregon respectfully request that the Court grant their motion for summary judgment on remedy and order Federal Defendants to complete the Comprehensive Conservation Plan for the remaining five Klamath Basin National Wildlife Refuges within eighteen (18) months of this Court's order, or by August 1, 2016, whichever is earlier.

DATED this 5th day of December, 2014.

Respectfully submitted,

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Table of Exhibits

Exhibit	Document Title	Administrative Record Page Cites
1	Various schedules for completion of CCP	007628, 7612, 7288, 7125, 7099, 6739-40, 6263, 5652, 5475, 4632-33, 4605, 3414
2	July 08, 2008 Memo from Regional Director re Meeting CCP Deadline	007282-83
3	April 29, 2010 Federal Register Notice of Intent to prepare CCP and EIS for Klamath Complex Refuges	005729-5730
4	Draft talking points for CCP scoping meetings- 4/29/10	005727
5	FINAL CCP Scoping Summary Report for Klamath Basin NWR- 11/23/2010	005461-73
6	11/29/2010 Request for Extension of Contract	005342
7	11/18–11/19/2013- Notes on CCP progress	001187, 1189
8	5/27/2014- Klamath CCP preliminary timeline	000823
9	Draft CCP Table of Contents	008618-19
10	Draft CCP Chapter 1 – Introduction	000455-483
11	Draft CCP Chapter 2 – Planning Process	000440-454
12	Draft CCP Chapter 3 – Alternatives	000419-439
13	Draft CCP Chapter 3 – Alternatives Matrix	001359-1386
14	Draft CCP Chapter 4 – Affected Environment	000283-418
15	Draft CCP Chapter 5 – Environmental Consequences	000210-282
16	Effects of KBRA on Lower Klamath, Tule Lake and Upper Klamath National Wildlife Refuges	000069-143
17	The Kuchel Act and Management of Tule Lake and Lower Klamath National Wildlife Refuges	000673-704
18	KBNWRC Cultural Resources Assessment	000145-209
19	Economic Analysis of KBNWRC Comprehensive Conservation Plan Alternatives	002021-2041
20	A Bioenergetic Approach to Conservation Planning for Waterfowl at Lower Klamath and Tule Lake National Wildlife Refuges	006779-6901
21	Draft Compatibility Determination for Agricultural Program on Tule Lake and Lower Klamath National Wildlife Refuges	001795-1819