

Case Nos. **20-35508**, 20-35509, 20-35513, 20-35515

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**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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<p>AUDUBON SOCIETY OF PORTLAND, OREGON WILD, and WATERWATCH OF OREGON, <i>Plaintiffs-Appellants,</i> v. DAVID BERNHARDT, et al., <i>Defendants-Appellants,</i> TULELAKE IRRIGATION DISTRICT, et al., <i>Intervenor-Defendants-Appellees.</i></p>	<p>CENTER FOR BIOLOGICAL DIVERSITY <i>Plaintiff-Appellant,</i> v. UNITED STATES FISH AND WILDLIFE SERVICE, <i>Defendant-Appellee,</i> TULELAKE IRRIGATION DISTRICT, et al., <i>Intervenor-Defendant-Appellees.</i></p>
<p>WESTERN WATERSHEDS PROJECT, <i>Plaintiff-Appellant,</i> v. DAVID BERNHARDT, et al., <i>Defendants-Appellants,</i> TULELAKE IRRIGATION DISTRICT, et al., <i>Intervenor-Defendants-Appellees.</i></p>	<p>TULELAKE IRRIGATION DISTRICT, et al., <i>Plaintiffs-Appellants,</i> v. UNITED STATES FISH AND WILDLIFE SERVICE, et al., <i>Defendants-Appellants,</i> AUDUBON SOCIETY OF PORTLAND, et al., <i>Intervenor-Defendants-Appellees.</i></p>

On Appeal from the United States District Court for the District of Oregon Nos. 17-cv-00069-CL (lead), 1:17-cv-00098-CL, 1:17-cv-00468-CL, 1:17-cv-00531-CL

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**OPENING BRIEF OF PLAINTIFFS-APPELLANTS AUDUBON *ET AL.***

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants Portland Audubon, Oregon Wild, and WaterWatch of Oregon hereby state that none of them has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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**GLOSSARY OF TERMS**

2013 BiOp	March 2013, Biological Opinions on the Effects of Proposed Klamath Project Operations from May 31, 2013, through March 31, 2023, on Five Federally Listed Threatened and Endangered Species
Adjudication	State of Oregon Klamath Basin Water Rights Adjudication
APA	Administrative Procedure Act
Audubon	Portland Audubon, Oregon Wild, and WaterWatch of Oregon
Plan	Comprehensive Conservation Plan
CD	Compatibility Determination
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
ESA	Endangered Species Act
EPA	U.S. Environmental Protection Agency
ER	Excerpt of Record
FEIS	Final Environmental Impact Statement
FOD	Final Order of Determination
KBRA	Klamath Basin Restoration Agreement
Klamath Project or Project	U.S. Bureau of Reclamation Klamath Reclamation/Irrigation Project
LKNWR	Lower Klamath National Wildlife Refuge
NEPA	National Environmental Policy Act
NWR	National Wildlife Refuge
Reclamation	U.S. Bureau of Reclamation
Refuge Act	National Wildlife Refuge System Administration Act, as amended by National Wildlife Refuge System Improvement Act
Klamath Refuges	Klamath Basin National Wildlife Refuge Complex
ROD	Record of Decision
Secretary	Secretary of the U.S. Department of Interior
Service or USFWS	U.S. Fish and Wildlife Service
System	National Wildlife Refuge System
TLNWR	Tule Lake National Wildlife Refuge

## INTRODUCTION

This case involves the U.S. Fish & Wildlife Service’s (“Service” or “agency”) first ever Comprehensive Conservation Plan (the “Plan”) for five National Wildlife Refuges in the Klamath Basin National Wildlife Refuge Complex (“Klamath Refuges”). The Klamath Refuges are dedicated to wildlife conservation and encompass some of the nation’s most vital waterfowl habitat. Portland Audubon, Oregon Wild, and WaterWatch of Oregon’s (“Audubon”) challenge to the Plan is centered on the management and conservation of two—Lower Klamath and Tule Lake Refuges—which were established to protect what little remained of the Klamath Basin’s historic network of lakes, wetlands, and marsh habitat as breeding, nesting, and feeding grounds for millions of migrating waterfowl along the Pacific Flyway.

The Service administers Lower Klamath and Tule Lake Refuges pursuant to the Refuge Act and Kuchel Act, which establish proper waterfowl management as the Refuges’ “major purpose.” Agricultural uses are permitted, but only to the extent they do not interfere with this major purpose. Despite this clear Congressional prioritization, the Service has authorized private agricultural leasing on the Refuges to the detriment of waterfowl populations and habitat. Wetlands that provide essential waterfowl habitat and foods have suffered dramatically in recent years, through severe water shortages and water quality impacts.

Under the Refuge Act, the Service was required to develop a Plan to address these significant issues and identify solutions for achieving proper waterfowl management during the 15-year life of the Plan. However, the Plan does not propose any actions to alter the status-quo of management and improve conditions on Lower Klamath and Tule Lake Refuges, and instead, authorizes the full scale of private agricultural leasing to continue.

On account of changing climatic conditions, water rights, and other issues, Audubon acknowledges that the issues facing the Refuges are complex, but the situation is not intractable; there are important, if incremental, steps the Service can take in the near term to improve conditions. The Service's decision to approve a Plan that fails to address major issues affecting proper waterfowl management and effectively guarantees the Service will not achieve Refuge purposes during the life of the Plan is arbitrary and capricious and contrary to the Service's statutory obligations. Congress intended the Plan to be more than a paper exercise that merely explains and maintains the status quo.

Audubon respectfully requests that this Court hold unlawful and set aside the Plan and accompanying analysis under the National Environmental Policy Act ("NEPA"), and remand for preparation of a Plan that accords with the Service's duty to ensure waterfowl management and wildlife conservation and to allow private commercial agriculture only to the extent consistent therewith.

## STATEMENT OF JURISDICTION

### I. Subject Matter Jurisdiction of the District Court

The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346 because this civil action involves the United States as a defendant and arises under the laws of the United States, including the National Wildlife Refuge System Administration Act, as amended by the National Wildlife Refuge System Improvement Act, (“Refuge Act”), 16 U.S.C. §§ 668dd–ee, the Kuchel Act, 16 U.S.C. §§ 695k–r, NEPA, 42 U.S.C. §§ 4321 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 704 *et seq.*

### II. Jurisdiction of the Court of Appeals

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because this is an appeal of a final decision of the District Court of Oregon.

### III. Timeliness of Appeal

The district court entered judgment on April 6, 2020. ER78. Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B)(ii), Audubon timely filed its Notice of Appeal on June 4, 2020. ER79–80.

## STATEMENT OF THE ISSUES

1. Whether the Service complied with its obligations under the Refuge Act to issue a management plan consistent with the provisions of the Act where:

a. The Service acknowledges that the status quo of water management on Lower Klamath Refuge, carried forward under the Plan, fails to achieve proper waterfowl management, the primary purpose of the Refuge; and

b. The Service failed to propose practicable management actions that would better meet waterfowl habitat needs.

2. Whether the Service's determination that the continuation of the present pattern of agricultural leasing on Lower Klamath and Tule Lake Refuges is compatible, and not inconsistent with, proper waterfowl management was arbitrary, capricious and not in accordance with the Refuge Act and Kuchel Act, where:

a. The Service failed to explain how its chosen management strategy of eliminating wetland habitat while continuing with the full scale of agricultural leasing in times of drought accords with its statutory duties; and

b. The Service failed to address the significant degradation of water quality in Refuge wetlands caused by agricultural uses.

3. Whether the Service acted in excess of its statutory authority when it delegated to the Bureau of Reclamation administration of the agricultural lease lands where the Refuge Act mandates that the Service administer all refuge lands.

4. Whether the Service’s decision complies with the requirements of NEPA where the Service failed to consider an alternative that included fewer acres of agricultural leasing on Lower Klamath and Tule Lake Refuges.<sup>1</sup>

### **STATEMENT OF THE CASE**

The Klamath Refuges contain what little remains of a once vast network of lakes and wetlands that spanned hundreds of thousands of acres and supported the greatest concentrations of waterfowl in North America. For over a century, the lands and waters within the Klamath Refuges have been at the center of a conflict between maximizing agricultural development of land and water resources, on one hand, and preserving essential habitats for migratory birds, on the other. In 1964, Congress sought to resolve this conflict and enacted the Kuchel Act, 16 U.S.C. §§ 695k–r, which dedicated all of the lands within the Klamath Refuges to wildlife conservation and directed the Secretary of Interior (“Secretary”) to manage the lands for the major purpose of waterfowl management.<sup>2</sup> The Kuchel Act was intended as a compromise, and thus provided that the Secretary was to continue agricultural uses within the Refuge boundaries to the extent consistent with the primary waterfowl management purpose.

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<sup>1</sup> The pertinent statutory and regulatory provisions are set out in the addendum bound to this brief.

<sup>2</sup> The Kuchel Act does not apply to Bear Valley Refuge, which was not established until 1978. ER261.

However, conflict between agriculture and waterfowl management on Lower Klamath and Tule Lake Refuges continued and has intensified in recent years as drought and competing claims over limited water resources have plagued the Klamath Basin. For the past decade, waterfowl habitat on these two Refuges has suffered from water shortages and degraded water quality, and waterfowl populations have declined as a result. At the same time, commercial agriculture on the Refuges has continued at a consistent scale.

In 1997, Congress passed the National Wildlife Refuge System Improvement Act, which amended the National Wildlife Refuge System Administration Act of 1966. The Refuge Act establishes a national policy of fish and wildlife conservation on National Wildlife Refuges and sets forth the mission of the National Wildlife Refuge System (“System”): “To administer a national network of lands and waters 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).

The Refuge Act provides specific mandates to the Service, the agency charged with administration of the System. In administering the System, the Service is required to, *inter alia*, ensure that the mission of the System and the purposes of each refuge are carried out. The Refuge Act further requires the

Service to secure adequate water resources and protect water quality and determine whether agricultural uses are compatible with refuge purposes. Finally, the Refuge Act requires the Service to issue for each refuge a comprehensive conservation plan that governs uses and activities on refuge lands, consistent with the provisions of the Refuge Act. The purpose of such a plan is to guide refuge management for a 15-year period, and it must, *inter alia*, identify and describe actions necessary to correct or mitigate significant problems that may adversely affect wildlife populations.

The process to develop the Plan for the Klamath Refuges marked the first time that the Service was required to comprehensively evaluate and plan for management of waterfowl and agricultural leasing, consistent with its statutory obligations under the Refuge Act and Kuchel Act. After several years of delay, the Service finally issued a Plan in 2015. As the foundation for the Plan, the Service provided its interpretation of “proper waterfowl management”: the provision of diverse habitats and food resources necessary to support annual waterfowl populations. The Plan, however, fails to provide management direction for achieving the mission of the System and the major purpose of Lower Klamath and Tule Lake Refuges—proper waterfowl management—and otherwise fails to address any of the major problems facing the Refuges.

In addressing water shortages at Lower Klamath Refuge, the Plan includes an exhaustive discussion of the complex system of water rights, distribution, and management in the Klamath Basin, but stops short of identifying necessary corrective actions. Despite the availability of options to improve Refuge conditions during the term of the Plan, the Service effectively threw up its hands and hid behind an overstated degree of complexity. In the end, the Service concedes that the Plan will fail to support wetland habitat and waterfowl population objectives in most years.

In evaluating the agricultural leasing program, the Service determined that continuing to lease over 20,000 acres of Lower Klamath and Tule Lake Refuges for commercial crops is somehow consistent with proper waterfowl management, even when essential wetland habitat on the Refuges is severely degraded. In drought years, Refuge wetlands will fail to provide for the needs of waterfowl populations, despite available management actions to utilize agricultural lands to support needed wetland habitats and foods in line with the Service's determination to prioritize natural foods over agricultural crops. Water quality impairment caused by agricultural activities is a significant impact to Refuge wetlands, but the Service failed to propose any action to address or mitigate the impact. The Plan simply authorizes the full scale of agricultural leasing to continue, despite its interference with proper waterfowl management.

In the Plan, the Service also decided to continue to delegate administrative authority over the agricultural leasing program to the Bureau of Reclamation (“Reclamation”), an agency that once advocated for homesteading and transfer of areas of the Refuges into private ownership. Congress consolidated management authority over all refuge lands in the Service and prohibited joint administration by any other agency. The Service flouted this congressional directive and passed the buck to Reclamation, an agency with a fundamentally different purpose than the Service.

The Refuge Act and Kuchel Act and implementing regulations require the Service to manage Lower Klamath and Tule Lake Refuges in a manner that preserves remaining habitat while allowing agricultural uses only to the extent they are consistent with proper waterfowl management. The Plan, however, upends this statutory prioritization by elevating the present pattern of leasing above proper waterfowl management. By issuing a Plan that is inconsistent with its legal obligations, the Service has acted arbitrarily, capriciously, and contrary to law.

The Service’s analysis of the Plan’s environmental impacts pursuant to NEPA is fundamentally flawed for a similar reason: The Service refused to consider any reduction in agricultural leasing as an alternative to the status quo of management. The Service’s decision and analysis violate NEPA’s requirement to evaluate a reasonable range of alternatives and made it impossible for the public

and the agency to evaluate the comparative impacts of a reduced leasing alternative and to determine whether it might better meet the Service's substantive statutory obligations.

## STATEMENT OF FACTS

### **I. The Klamath Basin Refuge Complex was Established to Preserve the Remnants of a Once-Vast Network of Wetland Habitat in the Klamath Basin.**

The Upper Klamath River Basin serves as a major migration corridor along the Pacific Flyway where birds arrive from breeding grounds in Alaska, central and northwestern Canada, and the northern portions of the western United States as they travel to wintering grounds in California and Mexico. ER387. The Klamath Refuges are of international importance as a point of convergence for 80 percent of migrating waterfowl on the Pacific Flyway and are renowned for the great abundance and diversity of birdlife the Refuges support. ER388–89.

The Upper Klamath Basin once contained over 350,000 acres of lakes, wetlands, and freshwater marshes, which were largely drained and “reclaimed” for agricultural development and irrigation after European-American settlement of the West. ER276–79. Tule Lake, which historically fluctuated between 55,000 and 110,000 acres, today consists of two controlled open water sumps, covering just 13,000 acres. ER282–84. Lower Klamath Lake, which historically flooded with spring overflow from the Klamath River, was intentionally completely cut off from

its natural water supply. ER402. By 1920, the lake was essentially dry and remained so until alternative water supply infrastructure was developed in the 1940s to pump excess water from Tule Lake to the dried out Lower Klamath Lake. ER279.

The Klamath Basin Refuge Complex includes six refuges, including Lower Klamath and Tule Lake Refuges, and covers approximately 200,000 acres in Northern California and Southern Oregon. ER265. Today, less than 25 percent of the Basin’s historic lakes and marshes remain with the majority of remnant wetland habitat located within the Klamath Refuges. ER387. The Klamath Refuges were established to preserve the Basin’s remaining habitat for migrating waterfowl and other wildlife. ER254–62. President Roosevelt established Lower Klamath Refuge in 1908—the nation’s first waterfowl refuge—as “a preserve and breeding grounds for native birds.” ER279–80. In 1928, President Coolidge established Tule Lake Refuge amidst ongoing draining and homesteading of the historic lakebed “as a refuge and breeding ground for wild birds and animals.” ER284.

However, because Lower Klamath and Tule Lake Refuges were within the boundaries of the Klamath Reclamation Project<sup>3</sup> (“Klamath Project” or “Project”),

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<sup>3</sup> The Klamath Reclamation Project is a system of water diversion and distribution infrastructure authorized in 1905 under the Reclamation Act, 43 U.S.C. § 391 *et seq.*, which serves approximately 200,000 acres of croplands and 50,000 acres of Refuge lakes and wetlands. ER383; ER826 (map).

the lands were subject to further draining and transfer to private ownership and Reclamation proposed opening those lands for homesteading. ER279–80; *see* ER278 (maps comparing 1905 conditions to current). This proposal sparked intense debate over the fate of the two Refuges. ER280. In 1964, Congress settled the debate by passing the Kuchel Act, which stabilized federal ownership over the Refuges and dedicated all lands within them to wildlife conservation and waterfowl management purposes. 16 U.S.C. § 695k–r. Agricultural uses were allowed to continue to the extent consistent with proper waterfowl management. Nonetheless, water management issues and the competing demands of commercial agricultural operations have continued to negatively impact waterfowl habitat on the Refuges.

## **II. Wetland Habitat and Waterfowl Values on Lower Klamath and Tule Lake Refuges are Threatened by Severe Water Shortages.**

Water distribution and management is a critical issue affecting waterfowl on the Refuges. The wetland, marsh, and open water habitats within the Klamath Refuges are heavily dependent on adequate water supplies. Lower Klamath and Tule Lake Refuges are the most impacted by constraints on water availability, especially Lower Klamath, which relies entirely on water deliveries from outside the Refuge. As the Service recognized, “[s]ince 2010, the Klamath Basin refuges have struggled for water deliveries to provide key habitat for migratory waterfowl.” ER296.

In order to support a complete matrix of habitats—including permanent and seasonal wetlands, uplands, and agricultural habitats—Lower Klamath Refuge requires at least 114,000 acre-feet of water per year. ER302. Between 1962 and 2009, the Refuge received, on average, 106,000 acre-feet of water per year. ER895. In recent drought years, such as 2014, Lower Klamath Refuge has received as little as 10,000 acre-feet of water. *Id.*; ER403. According to the Service, “[t]he urgency of water issues at the refuge has been raised since the refuge is now essentially dry, a condition not observed since the 1930s.” *Id.*

The lack of adequate water and wetland habitat on Lower Klamath Refuge has resulted in declining bird populations and increased disease outbreaks. A comparison of total waterfowl use days with annual water deliveries on the Refuge for the period between 2000 and 2014 demonstrates that declining waterfowl populations correspond with decreased water deliveries. ER683; ER852–83 (waterfowl use data); ER891–95 (water delivery data). For example, in 2010 when water deliveries to the Refuge totaled approximately 20,000 acre-feet, waterfowl use days fell to the lowest point in the surveyed fifteen-year period. ER683. As wetland habitat decreases on Lower Klamath Refuge, birds crowd into the Tule Lake sumps. ER733.

Tule Lake Refuge has also experienced recent declines in water supply to support Refuge habitat, although to a lesser extent than Lower Klamath Refuge.

Nearly all of the water that enters the Tule Lake sumps is agricultural return flow during the irrigation season. ER427–28. Recently, these return flows have decreased due to reduced water supply. *Id.* The sumps have become highly eutrophic and suffer from poor water quality most of the year. ER428. As a result of the declining condition of the sumps, waterfowl abundance, productivity and diversity on Tule Lake Refuge have declined in recent decades. ER574–81. The number of bird deaths from disease on Tule Lake Refuge has sharply increased since 2010, the same period of decreased water deliveries to Lower Klamath Refuge. ER733–34. In 2014, when Lower Klamath Refuge received less than 10,000 acre-feet of water, over 13,000 birds died of botulism<sup>4</sup> on Tule Lake Refuge. ER895; ER850–51.

### **III. Commercial Agricultural Uses and Management within Lower Klamath and Tule Lake Refuges Adversely Impact Waterfowl and Wetland Habitat.**

Commercial agricultural uses on these world-renowned wildlife refuges are undermining the major purpose for the congressional withdrawals: waterfowl management. Lower Klamath and Tule Lake Refuges support the largest commercial agriculture program in the entire Refuge System. ER547.

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<sup>4</sup> Avian botulism is a paralytic disease that results when birds ingest a toxin produced by the bacterium, *Clostridium botulinum*. ER398. Human activities such as wetland flooding and draining, pesticides, and other agricultural pollutants can increase toxin production in wetlands. ER799–800.

Approximately 12 percent of Lower Klamath Refuge and 50 percent of Tule Lake Refuge is leased for commercial agricultural operations.<sup>5</sup> ER496; ER522.

Reclamation administers the agricultural leasing program on the Refuges and leases lands to private individuals and companies for a 5-year term on a competitive bid basis. ER423.

On Lower Klamath Refuge, Reclamation leases 6,254 acres in “Area K” for grazing, haying, and crop production, with approximately 5,600 acres dedicated to crop farming. ER424; ER497. Area K lease crops include barley, oats, wheat and hay. ER424. On Tule Lake Refuge, 14,800 acres are included in the agricultural leasing program. ER434. Tule Lake Refuge lessees grow grains, alfalfa, and row crops, such as potatoes, onions and horseradish. ER523. All lease land crops are harvested and crop residues are left as food for waterfowl, *id.*, but onions and horseradish, for example, “have no food value to waterfowl.” ER527–28. Certain crops, such as hay, alfalfa, and small grains, are irrigated through flood irrigation, sometimes up to four times per growing season. ER424; ER436.

Reclamation manages the timing of irrigation and drainage of Refuge lease lands according to what is optimum for agricultural operations, rather than

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<sup>5</sup> Another 10 percent of Lower Klamath Refuge and 17 percent of Tule Lake Refuge is cooperatively farmed under sharecrop agreements with the Service where farmers leave between 25 and 33 percent of crops standing for waterfowl food. ER484; ER510.

waterfowl habitat needs. For example, in February 2013, Reclamation began draining Lower Klamath Refuge wetlands in order to reduce water released from Upper Klamath Lake. ER902–05. At that same time, the Area K lease lands had not yet been drained. *Id.* The Refuge Manager at the time requested that Reclamation drain Area K prior to the wetlands, as that “would provide for proper waterfowl management.” ER904. Reclamation responded that draining the lease lands would be inconsistent with Reclamation’s standard operating practices and “would most likely cause an impact to agricultural operations[.]” ER903. Thus, Refuge wetland habitat was sacrificed during spring migration to benefit commercial agricultural interests. That summer, over 11,000 dead birds were removed from Tule Lake Refuge due to an outbreak of botulism. ER849–50.

#### **IV. Water Deliveries to Lower Klamath and Tule Lake Refuges are Governed by a Complex Regulatory System and Reclamation Uses Its Discretion to Prioritize the Needs of Agricultural Uses.**

The Service holds water rights under Oregon law for irrigation and refuge uses. ER604. In March 2013, the Oregon Water Resources Department issued its Final Order of Determination (“FOD”) in the Klamath Basin Water Rights Adjudication (“Adjudication”). ER303. Per the FOD, the Service has a 35,000 acre-feet Project irrigation water right with a 1905 priority date for 10,000 acres on Lower Klamath Refuge. *Id.*; ER604. However, the FOD restricted the allowable

use of the Service's senior irrigation water right and prohibited its use for wetland habitat. ER640–41.

While the Adjudication assigned priority of all water rights within the Basin, it did not determine the “within-Project priority”—the priority of all Klamath Project water users with a 1905 water right relative to each other. ER303. The within-Project priority governs how water is distributed to Project users in times of shortage. *Id.* Reclamation classifies within-Project priority as A, B, or C priority depending on several factors. ER810. In the event of a drought, “A priority” water users receive all of their water before other Project users receive any water. ER811.

Throughout the 1990s and 2000s, Reclamation explicitly classified the Lower Klamath Refuge agricultural lease lands as “A priority” lands. ER403. However, under severe drought conditions in 2010, Reclamation changed course and stated for the first time that little or no water would be provided to Lower Klamath Refuge. *Id.* Since then, Reclamation has downgraded Lower Klamath Refuge lease lands from “A priority” to “B priority” in its annual drought plans. ER403–04. Meanwhile, Reclamation has consistently refused to address the priority of the non-leased irrigated lands on Lower Klamath Refuge, which includes cooperatively farmed land. ER404. Ultimately, the within-Project priority is a determination made by the Secretary. ER303. The Service attributes the significant decline in water deliveries to Lower Klamath Refuge primarily to the

Secretary's failure to resolve the question of within-Project priority. ER406. In contrast, Tule Lake Refuge irrigated agricultural lands are designated "A priority" and have received full water deliveries in most years. *Id.*

In the Adjudication, the Service also received Federal Reserved water rights for Lower Klamath Refuge for up to 113,000 acre-feet with priority dates ranging from 1925 to 1949. ER303; ER604. Federal Reserved rights are not Project water rights and thus are not subject to the same limitations as the Service's 1905 irrigation right. However, even in average water years, Lower Klamath Refuge has received only half of its required water supply. ER891–95.

Additionally, Endangered Species Act ("ESA") listings for Klamath Basin fish species have resulted in increased pressure on water resources. ER301–03. In March 2013, the Service and the National Marine Fisheries Service issued Biological Opinions evaluating the Klamath Project's effects on ESA listed species ("2013 BiOp"). ER308.<sup>6</sup> The 2013 BiOp influences the timing and amount of water deliveries to the Klamath Project, including Lower Klamath and Tule Lake Refuges. *Id.*

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<sup>6</sup> 2013 BiOp. <https://repository.library.noaa.gov/view/noaa/21261>. (Last Accessed on October 11, 2020)

**V. Despite Years of Development and Public Input, the Long-Awaited Plan Simply Maintains the Status Quo and Fails to Identify any Concrete Strategy to Address the Greatest Problems Facing Lower Klamath and Tule Lake Refuges.**

**A. The Service issued the Plan after years of delay.**

The Service began the formal scoping process for the first-ever Klamath Refuge Complex Comprehensive Conservation Plan in spring 2010 with four public meetings where the Service sought input on the issues to be addressed in the Plan. ER230–31. Given the water supply issues and conflicts between agriculture and waterfowl habitat, many commenters requested that the Service “assess the commercial farming program . . . the number of leased acres, types of agricultural practices, water requirements, and the influence of these factors on the Service’s ability to effectively manage waterfowl and carry out refuge purposes[.]” ER907.

The Service missed its statutory deadline of October 9, 2012 to complete the Plan. 16 U.S.C. § 668dd(e)(1)(B). In 2015, Audubon successfully challenged the Service’s inaction and secured an order requiring the agency to produce the long-overdue Plan. *Audubon Soc’y of Portland v. Jewell*, 104 F. Supp. 3d 1099 (D. Or. 2015).

**B. The Plan maintains the status quo of management strategies that have failed to achieve Refuge purposes in recent years.**

The Service released the draft Plan combined with a draft Environmental Impact Statement (“EIS”) in May 2016. ER231. The draft Plan’s alternatives for

Lower Klamath and Tule Lake Refuges did not include any meaningful changes in management for water quantity or quality on the Refuges, and failed to address the significant ongoing impacts that are impairing the Service's ability to achieve proper waterfowl management. The Service refused to even consider a management alternative that included fewer acres of commercial agricultural leasing. Audubon, as well as many other commenters, requested that the Service expand its analysis to consider a reduction in lease land agriculture and that the Plan/EIS focus on increasing and stabilizing the refuges' water supply. ER630; ER633; ER687–715.

The Service issued the final Plan/EIS in December 2016 with no changes made to address the irreconcilable conflict between proper waterfowl management and the present pattern of leasing. Audubon submitted additional comments on the final Plan/EIS to reiterate its request that the Service evaluate additional water management strategies and thoroughly review the compatibility of the agricultural leasing program. ER244–48. The Service signed the Record of Decision (“ROD”) on January 13, 2017, without further analysis or changes. ER205–32.

**C. The District Court upheld the do-nothing Plan in which the Service flouts Congressional mandates to prioritize waterfowl management.**

Audubon timely filed suit to challenge the Plan/EIS on January 17, 2017. ER149–204. Audubon's case was consolidated with three later-filed suits brought

by two environmental organizations and a group of agricultural/irrigation organizations. ER967. The agricultural parties also intervened in each of the other three cases. *See* ER964–66. Audubon intervened in the agricultural plaintiffs’ case. ER968. The parties filed cross-motions for summary judgment and a hearing was held before a magistrate judge on January 8, 2019. ER980–97. On November 18, 2019, the magistrate issued a report and recommendation, which recommended denying Audubon’s claims and granting summary judgment to the Service. ER24.

The magistrate found that the Service’s decision to maintain the status quo of water management on Lower Klamath Refuge complied with the Service’s duty to manage the Refuges to achieve refuge purposes. ER33. The magistrate noted that “[t]he Service acknowledges that it may not be able to provide enough water necessary to achieve refuge purposes in years of drought, as there are limitations on the Service’s ability to acquire water rights or physically obtain water.” ER32. Thus, the magistrate concluded that the Service’s vague objective to “seek to secure and efficiently distribute water of sufficient quantity and quality to achieve habitat and population objectives” satisfied the mandates of the Refuge Act. ER33.

With respect to agricultural leasing on Lower Klamath and Tule Lake Refuges, the magistrate found that “under the plain language of the [Kuchel] Act, if an agricultural use is not consistent with proper waterfowl management, then the Act in fact requires that the Service impose restrictions that ensure proper

waterfowl management.” ER21. The magistrate concluded that Service adequately explained its decision to prioritize agricultural crops over wetland habitat, ER37, but did not address how this decision aligns with the agency’s determination that proper waterfowl management requires prioritizing natural wetland foods over agricultural crops. *See* ER565. The magistrate did not address Audubon’s arguments regarding water quality impacts in the context of the compatibility of the present pattern of agricultural leasing with refuge purposes.

The magistrate also concluded that the Service’s delegation of authority over the agricultural lease lands to Reclamation does not violate the Refuge Act because “the Service retains ultimate control over all activities on the Refuges[.]” ER35.

Finally, with respect to the Service’s failure to consider a reduced leasing alternative under NEPA, the magistrate concluded that the Service did consider “both the elimination of lease land farming and the curtailment of agriculture.” ER31. The magistrate found that the Service had adequately explained its decision to exclude both of those actions from detailed consideration in the alternatives analysis. ER31–32.

Audubon filed objections to the magistrate’s resolution of these four principal issues that strike at the core of the Service’s Plan and management of the Refuges. ER1000. On April 6, 2020, the district court issued an opinion and order

adopting the magistrate's findings and recommendation in full. ER76–77.

Audubon filed its notice of appeal on June 6, 2020. ER79–83.

### **SUMMARY OF ARGUMENT**

The Refuge Act and Kuchel Act set forth congressional directives for the management of the Klamath Refuges. In sum, the Service is charged with managing the Refuges in a manner that preserves remaining habitat and prioritizes waterfowl management and wildlife conservation above all else. A comprehensive conservation plan provides the blueprint for refuge management and must be consistent with the requirement of the Refuge Act to carry out the mission of the System and refuge purposes.

The Plan fails to satisfy its fundamental objective—to guide the Service's long-range management of the Refuges towards achieving these statutory directives. Instead, under the Plan, the Service will continue the status quo of management, which for over a decade has failed to support necessary Refuge habitats, prioritized commercial agriculture over wetlands, and led to declining waterfowl populations on lands that were set aside to provide necessary habitat for millions of birds migrating along the Pacific Flyway.

In adopting the Plan, the Service acted arbitrarily, capriciously, and contrary to the mandates of the Refuge Act and Kuchel Act for three fundamental reasons.

First, the Service issued a Plan that is inconsistent with the agency's obligations under the Refuge Act. "Proper waterfowl management" is the primary purpose of Lower Klamath and Tule Lake Refuges, as established by Congress in the Kuchel Act. In order to carry out proper waterfowl management, the Service identified waterfowl population objectives for the Refuges, the habitat matrix required to support those populations, and—in the case of Lower Klamath Refuge—the amount of water necessary to ensure those habitats are available throughout the annual cycle. The agency acknowledged that its historic water management and existing water rights have proven inadequate to support necessary Refuge habitats in recent years. Yet, the Service adopted a Plan that merely continues the status quo while ignoring practicable water management actions that could improve conditions on the Refuge and provide tangible benefits for waterfowl habitat.

Second, the Service failed to provide a rational explanation for its decision that continuing the present pattern of agricultural leasing on Lower Klamath and Tule Lake Refuges is compatible and consistent with proper waterfowl management. The Refuge Act prohibits the Service from authorizing any use of a refuge unless it is compatible with the major refuge purposes. Under the present pattern of leasing, the Service prioritizes commercial crops over seasonal wetlands and the natural waterfowl foods they provide. The Service failed to explain how

this management strategy accords with the agency's statutory obligation to achieve proper waterfowl management. Additionally, the Service acknowledged that agricultural uses under the present pattern of leasing degrade water quality in Refuge wetlands. But the Service failed to impose any measures to protect Refuge habitat and wildlife from agricultural pollution and instead, kicked the can down the road and deferred to a long-overdue and uncertain multi-agency process to address water quality impacts.

Third, the Service exceeded its authority under the Refuge Act when it shirked its management obligations and delegated authority over the agricultural leasing program to the Bureau of Reclamation. Reclamation serves a fundamentally different purpose than the Service; Congress did not provide the Service the authority to institute joint management over refuge lands.

The Service also failed to comply with its obligations under NEPA. In the EIS, the Service failed to consider any alternative that reduced the scale of commercial agricultural leasing on Lower Klamath and Tule Lake Refuges, despite the statutory command under the Refuge Act and Kuchel Act that leasing may continue only to the extent that it is consistent with proper waterfowl management. Under NEPA, an agency must develop and study in detail all reasonable alternatives to the proposed action to allow the public and decisionmakers to compare the effects of alternative proposals and the related environmental harms.

Here, however, each alternative included the same acreage of agricultural leasing, and thus, the Service had no basis by which to evaluate whether other leasing acreages would better comport with the agency's statutory duties. The Service's refusal to evaluate a reduced leasing alternative violated NEPA.

## LEGAL BACKGROUND

### I. Refuge Act

The Refuge Act consolidated the management of all national refuge units into the National Wildlife Refuge System and delegated authority over those lands to the Secretary through the Service. 16 U.S.C. § 668dd(a)(1). Each refuge “shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established.” *Id.* § 668dd(a)(3)(A).

The Refuge Act requires the Service to prepare a plan for managing each refuge—a comprehensive conservation plan—consistent with the provisions of the statute. *Id.* § 668dd(e)(1)(A)(iii). The plan must, among other things, identify and describe “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.” *Id.* § 668dd(e)(2)(E). The plan is intended to “provide long-range guidance and management direction to achieve the purposes of the refuge[.]” 50 C.F.R. § 25.12(a). Once completed, the Service “shall manage the refuge or planning unit in a manner consistent with the plan[.]” 16

U.S.C. § 668dd(e)(1)(E). A plan must be reviewed and revised, as necessary, every 15 years. *Id.* § 668dd(e)(1)(A)(iv). According to Service policy, the plan, “when fully implemented, should achieve refuge purposes[.]” ER963 (602 FW 3, 3.4(C)(1)(d)).

The Refuge Act also governs the Service’s management of refuge uses, such as commercial agriculture, and provides that the Service “shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use[.]” 16 U.S.C. § 668dd(d)(3)(A)(i). A compatible use is one that “will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.” *Id.* § 668ee(1).

## **II. Kuchel Act**

Congress passed the Kuchel Act in 1964 to resolve a controversy over the management and ownership of lands within Lower Klamath, Clear Lake, Tule Lake, and Upper Klamath Refuges, which were subject to pressure from private interests for homesteading and agricultural development. The purpose of the Kuchel Act was to retain the Refuge lands in federal ownership in order to “preserve intact the necessary existing habitat for migratory waterfowl in this vital area of the Pacific flyway, and to prevent depredations of migratory waterfowl on agricultural crops in the Pacific Coast States.” 16 U.S.C. § 695k.

Congress declared that “all lands” within the boundaries of the four Refuges were to be “dedicated to wildlife conservation” and administered “for the major purpose of waterfowl management, but with full consideration to optimum agricultural use that is consistent therewith[.]” *Id.* § 695l. The Act also provides that the Secretary “shall, consistent with proper waterfowl management, continue the present pattern of leasing” on certain units of Lower Klamath and Tule Lake Refuges. *Id.* § 695n.

### **III. National Environmental Policy Act**

NEPA is our nation’s charter for protecting the environment. *N. Idaho Cmty. Action Network v. U.S. DOT*, 545 F.3d 1147, 1153 (9th Cir. 2008). NEPA and its implementing regulations set forth “action-forcing” procedures designed to ensure that an agency takes a “hard-look” at detailed information concerning significant environmental impacts, while guaranteeing that the relevant information will be made available to the public so that it may play a role in both the decisionmaking process and the implementation of the decision. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989).

In particular, NEPA requires federal agencies to prepare a detailed Environmental Impact Statement for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). An EIS must “study, develop, and describe appropriate alternatives to recommended courses of

action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” *Id.* § 4332(2)(E). An agency must analyze a reasonable range of alternatives to the proposed action. 42 U.S.C. § 4332(2)(E); 40 C.F.R. §§ 1501.2(c), 1502.14(a).<sup>7</sup>

## ARGUMENT

### I. Standard of Review

The issues presented in this appeal were resolved below in an order granting summary judgment to Federal Defendants and Defendant-Intervenors. ER76–77. This Court reviews a grant of summary judgment *de novo*. *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 960 (9th Cir. 2005). Audubon’s claims challenging the Service’s decision under the Refuge Act, Kuchel Act, and NEPA, which provide no separate cause of action to enforce their provisions, are reviewed pursuant to the APA. *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1238 (9th Cir. 2005).

Under the APA, the Court must set aside the agency’s decision if it is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

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<sup>7</sup> An amended version of the NEPA implemented regulations took effect on September 14, 2020. 85 Fed. Reg. 43304. Citations are to the 1978 version of the regulations, which were in effect at the time the Service issued the ROD and thus govern this Court’s review of the decision. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (“[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result.”).

with law.” 5 U.S.C. § 706(2). The agency must “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Mtr. Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted). Agency action is arbitrary and capricious where the agency:

[R]elied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Id.* While the APA standard of review is “narrow” and “deferential,” the Court’s inquiry must be “searching and careful.” *Sierra Club v. Bosworth*, 510 F.3d 1016, 1022 (9th Cir. 2007) (internal quotation omitted).

## **II. The Plan is Inconsistent with the Requirement of the Refuge Act to Administer the Refuges to Carry Out Proper Waterfowl Management.**

The Plan fails to satisfy the Service’s fundamental duty to manage Lower Klamath Refuge in a manner that will achieve the mission of the System and the major refuge purpose: proper waterfowl management. 16 U.S.C. § 668dd(a)(4)(D); 16 U.S.C. §§ 6951, n. The Plan details significant problems with severe water shortages on the Refuge and the inability of the current management regime to support waterfowl habitat and population objectives. Instead of considering and proposing corrective actions for water shortages on Lower Klamath Refuge, however, the Service merely described the complexity of water management in the

Klamath Basin and adopted a Plan that maintains the status quo. The Service’s decision is arbitrary and capricious and inconsistent with the mandates of the Refuge Act. *See Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife, BLM*, 273 F.3d 1229, 1236 (9th Cir. 2001) (reviewing courts must not “rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute”) (citing *NLRB v. Brown*, 380 U.S. 278, 291–92 (1965)).

**A. The relevant mission and purposes center on wildlife conservation and waterfowl management.**

The Refuge System mission is focused on the conservation, management, and restoration of fish, wildlife, and plants, and their habitats for the benefit of all Americans. 16 U.S.C. § 668dd(a)(2). Lower Klamath Refuge was first established “as a preserve and breeding ground for native birds.” ER279. In articulating its interpretation of the Kuchel Act, the Service identified “proper waterfowl management” as the primary purpose of the Refuge, which it defined as,

Providing habitats sufficient to support waterfowl population objectives throughout the annual cycle while promoting the highest possible natural biological diversity of refuge habitats. A sufficient quantity and diversity of foraging resources should be provided that will meet the energy requirements and nutritional demands of all waterfowl species. Where feasible, natural foods should be given priority over agricultural crops.

ER565; *see also* 16 U.S.C. §§ 6951, n.

In order to implement the proper waterfowl management on Lower Klamath Refuge, the Service identified as its Goal 1: “Provide wetland and agricultural habitats that meet food and cover requirements sufficient to support migratory waterfowl and non-game waterbird population objectives throughout the annual cycle while promoting the highest possible natural biological diversity of refuge habitats.” ER293; *see also infra* page 42–44.

In order to implement this Goal, the Service established waterfowl population and habitat objectives. ER454–58. Specifically, the Service identified population objectives for migrating, breeding, and molting waterfowl on the Refuge. *Id.* In terms of the habitats needed to support population objectives, the Service identified as necessary at least 16,114 acres of seasonal wetlands and 9,294 acres of permanent wetlands, as well as a mix of agricultural, upland, and other habitat types. ER463–70. The Service calculated the amount of water needed to support its habitat objectives: “in order to provide a complete matrix of permanent wetlands, seasonal wetlands, uplands, and agricultural habitats, Lower Klamath Refuge requires a minimum of 95,000 acre-feet of water on a yearly basis, not including Area K, which requires an additional 19,000 acre-feet per year.” ER302.

In summary, the Service determined that in order to carry out proper waterfowl management, Lower Klamath Refuge requires a minimum of 114,000

acre-feet of water deliveries each year to support waterfowl population and habitat objectives.

**B. The Service acknowledged that current water management—carried forward under the Plan—is inadequate to achieve proper waterfowl management on Lower Klamath Refuge.**

One of the primary challenges that framed the Service’s development of the Plan is that “[s]ince 2010, the Klamath Basin refuges have struggled for water deliveries to provide key habitat for migratory waterfowl.” ER296. In crafting the refuge management alternatives, the Service calculated a range of simulated water delivery volumes and corresponding habitat acreages for Lower Klamath Refuge based on two water delivery scenarios. ER314–15.

The first scenario represents current water deliveries and management under the 2013 BiOp. ER314. The Plan states, “[i]n all but the wettest years under the 2013 BiOp, **water deliveries would fall well short of habitat needs.**” ER315–16 (emphasis added). In a median (0.5 percentile)<sup>8</sup> year, Lower Klamath Refuge would receive less than half of the minimum 95,000 acre-feet of water required for a complete habitat matrix outside the Area K lease lands. ER884. Even in an 80th

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<sup>8</sup> A 0.5 percentile water year represents a year when half of years are drier and half are wetter. In comparison, a 0.2 percentile water year represents a relatively dry year, when 20% of years are drier and 80% are wetter. A 0.8 percentile year represents a relatively wet year, when 80% of years are drier and 20% of years are wetter. ER315. The Service’s modeling is based on water years 1981 through 2011, *Id.*, which does not include the three consecutive drought years in 2013, 2014, and 2015. ER403.

percentile year, Lower Klamath Refuge water deliveries would fall short by at least 20,000 acre-feet. *Id.*

The second water delivery scenario represents a hypothetical management approach that is not implemented in the Plan. ER645. It is based on a management regime under the Klamath Basin Restoration Agreement (“KBRA”)—a negotiated agreement between Klamath Basin stakeholders and Native American Tribes. ER315. While the KBRA would have provided greater and more consistent water deliveries to Lower Klamath Refuge than under the 2013 BiOp, *id.*; ER303–04; *see* ER884, it failed to pass Congress, expiring on January 1, 2016. ER315. Thus, the Service noted, “[n]one of the alternatives rely upon implementation of the KBRA.” ER645.

The Service’s selected management alternative for Lower Klamath Refuge (Alternative C) includes a water management approach that is, for all practical purposes, unchanged from the no-action alternative (Alternative A). ER336. All but one of the proposed management strategies relating to water quantity are already included in the Service’s current management of the Refuge. ER343–44. Specifically, under the selected management alternative, the Service will maintain its water rights for Lower Klamath Refuge as they were declared in the FOD for the Adjudication and water will be delivered according to the 2013 BiOp water

delivery scenario. ER320. The Service will also continue to pursue changes to its water rights through exceptions to the Adjudication FOD. *Id.*

The only new water management strategy under the selected alternative for Lower Klamath Refuge provides, “[i]f KBRA or some comparable agreement is not implemented, pursue changes in the type, place of use, and period of use for the Lower Klamath and Tule Lake water rights to ensure sufficient water is available for refuge wetlands.” ER343–44; ER459–60. This management “strategy” is effectively a commitment by the Service to do nothing. Aside from a conclusory statement in the Plan that negotiations to revive the failed KBRA are ongoing, there is no evidence in the record to support a finding that the KBRA will be implemented during the term of the Plan. ER315. And yet, the Plan does not indicate *how long* the Service will await the revival of the KBRA before it will ultimately resign to taking action to improve conditions on the Refuge—if at all—or what specific actions it will take. Moreover, the Service’s fallback strategy of pursuing changes to its water rights is contingent on a process which the Service itself believes cannot reasonably be assumed to be completed during the 15-year life of the Plan. ER240.

In other words, under the Plan, the Service will continue the status quo of water management, which has failed to ensure that Lower Klamath Refuge supports wetland habitat necessary for proper waterfowl management. Under the

selected management alternative, in a median (0.5 percentile) water year the Refuge will support 9,700 acres of seasonal wetlands—only 60 percent of the Service’s habitat management objective. ER335; ER463. Permanent wetlands will cover over 700 acres—less than 8 percent of the objective. ER335; ER464. Meanwhile, 15,000 acres of Lower Klamath Refuge wetland units will be dry. ER335. Thus, the Service will not be able to “provid[e] sufficient habitats to support waterfowl population objectives” in order to ensure proper waterfowl management is carried out on Lower Klamath Refuge. ER565 (definition of “proper waterfowl management”); *see* ER884 (projected water deliveries); ER335 (habitat acres for selected alternative).

As water supplies on Lower Klamath Refuge decrease, waterfowl use of the Refuge declines. ER683. At the same time, waterfowl deaths due to disease outbreaks on Tule Lake Refuge tend to increase. ER734. Tule Lake Refuge provides fewer options for waterfowl in terms of diversity of habitats, ER591–92, likely resulting in birds crowding in the open-water sumps. Low, stagnant water levels in wetlands and crowding of birds can lead to deadly disease outbreaks. ER653. The Service admits that disease outbreaks “pose a tremendous challenge” to waterfowl management. ER653.

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**C. The Service failed to identify and describe practicable management actions that are available now to achieve tangible benefits for Refuge habitat.**

The Refuge Act provides specific directives to guide the Service’s management of water resources towards achieving refuge purposes. Specifically, Congress mandated that the Secretary, through the Service, “assist in the maintenance of adequate water quantity and quality to fulfill the mission of the System and the purposes of each refuge,” and “acquire, under State law, water rights that are needed for refuge purposes[.]” 16 U.S.C. § 668dd(a)(4)(F) & (G).

While water management on the Refuge is influenced by the complex regulatory system that governs water rights and distribution in the Klamath Basin, the Service and the Secretary are not powerless actors in improving conditions on the Refuge. Yet, the Plan is devoid of any management action that will assist in maintaining adequate water resources or securing needed water rights for the Refuge during the 15-year life of the Plan, despite the fact that the Service acknowledged several practicable solutions throughout the planning process.

The Plan explains that historic water deliveries to Lower Klamath Refuge “have drastically declined in recent years, mainly due to the unresolved question of within-Project priority for Lower Klamath Refuge.” ER309; *see also* ER643 (“the immediate challenge for irrigated lands on Lower Klamath NWR is not a lack of senior water rights but rather a ‘within-project’ water delivery priority that has not

been determined by the Secretary of Interior.”). Because the within-Project priority for the Refuge has not been determined, “the Refuge has been assumed to be last in priority.” *Id.* The Plan states, “[t]he Service and Reclamation continue to work towards a common understanding of the within project priority for irrigated lands on Lower Klamath Refuge[.]” ER303. However, the Service’s selected management alternative for Lower Klamath Refuge does not include any strategy aimed at resolving this issue. ER343–44. Nor does the Plan provide any guidance for how the Service would manage the Refuge differently if the within-Project priority were resolved during the Plan’s 15-year term.

Additionally, in response to Audubon’s comments on the draft Plan/EIS, the Service acknowledged several actions as potentially viable management strategies to improve water management at Lower Klamath Refuge. For example, the Service stated, “there may be some water rights available” in the Lost River Basin, which is not subject to the Adjudication, and that “[i]t may be possible to move the water” to the Refuge. ER642. The Service also acknowledged that “[t]here may be appropriative water rights available for transfer to Lower Klamath NWR in the Upper Klamath Basin. This option is currently being investigated by the Service.” *Id.* However, none of these actions were included for consideration in the Plan as potential strategies for improving water management at Lower Klamath Refuge.

ER343–44. Instead, the Service summarily discounted these actions by citing the potential complexities in carrying them out. ER642.

**D. The Service failed to explain how the Plan is consistent with the relevant provisions of the Refuge Act and Kuchel Act.**

The Service concluded that the Plan “will provide Refuge Complex managers with a 15-year strategy for achieving [refuge] purposes and contributing toward the mission of the [System], consistent with sound principles of fish and wildlife conservation and legal mandates.” ER265. However, the Service acknowledges that under current management, water deliveries to Lower Klamath Refuge fall far short of what is necessary to support habitat objectives for achieving proper waterfowl management. And despite available practicable solutions for addressing water quantity issues, the Plan does not include any management action to alter the status-quo. On this record, the Service has failed to explain how it satisfied its duty to issue a plan that is consistent with the provisions of the Refuge Act. 16 U.S.C. § 668dd(e)(1)(A)(iii); *see also NRDC, Inc. v. Pritzker*, 828 F.3d 1125, 1135 (9th Cir. 2016) (“Merely reciting the statutory language is not enough to satisfy [a] statute’s explicit requirement. An agency acts contrary to the law when it gives mere lip service or verbal commendation of a standard but then fails to abide by the standard in its reasoning and decision.”).

In sum, the Plan fails to alter the status quo of water management, ensuring that “proper waterfowl management” will not be achieved during the 15-year life

of the Plan. The Plan is therefore flatly inconsistent with the duty to “ensure that the mission of the System [and] purposes of each refuge are carried out[.]” *Id.*

§ 668dd(a)(4)(D); *see also* 50 C.F.R. § 25.12. And the Plan is inconsistent with the duty to identify and describe actions necessary to correct or mitigate the significant problem of water shortages facing Lower Klamath Refuge, 16 U.S.C.

§ 668dd(e)(2)(E), including assisting in the maintenance of water quantity and acquiring water rights necessary to fulfill refuge purposes. *Id.* § 668dd(a)(4)(F) & (G). By issuing a Plan that is inconsistent with the governing provisions of the Refuge Act, the Service has acted arbitrarily and capriciously, or otherwise not in accordance with law. *See Nat. Res. Def. Council v. United States DOI*, 113 F.3d 1121 (9th Cir. 1997) (agency action failed to survive judicial review under 5 U.S.C. § 706(2)(A) where agency failed to consider the relevant factors and articulate a rational connection between the facts found and the choice made).

### **III. The Service’s Determination that Continuing the Present Pattern of Agricultural Leasing is Compatible with Proper Waterfowl Management is Arbitrary and Capricious.**

The Service also acted arbitrarily and capriciously when it authorized agricultural uses pursuant to the present pattern of leasing to continue in a manner that will impair Refuge habitats and interfere with proper waterfowl management. The Service failed to explain how favoring commercial crops over necessary

wetland habitat and allowing unmitigated agricultural pollution in Refuge wetlands is compatible and consistent with proper waterfowl management.

Prior to authorizing any use on the Refuges as part of the Plan, the Service was required to evaluate existing and proposed uses of each Refuge to determine whether those uses are “compatible.” 16 U.S.C. § 668dd(d)(3)(A)(i). A “compatible use” is a “wildlife dependent recreational use or any other use of a refuge that, in the sound professional judgement of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.” *Id.* § 668ee(1). With respect to agricultural uses, the Service interprets the Refuge Act’s “compatibility” requirement to be synonymous with the Kuchel Act’s mandate that agricultural uses be “consistent” with waterfowl management. 16 U.S.C. §§ 695l, n; ER592–93.

The Service issued Compatibility Determinations (“CDs”) for lease land agriculture on Lower Klamath and Tule Lake Refuges, authorizing the continuation of agricultural uses with certain stipulations. ER495; ER521. For both Refuges, the Service’s selected management alternative continues the agricultural leasing program on the same number of acres and lots as under the status-quo management (the “no action” alternative). ER317; ER355. Thus, the Service concluded that the “present patten of leasing” on Lower Klamath and Tule Lake

Refuge is “consistent with proper waterfowl management.” 16 U.S.C. § 695n; ER508; ER534–35.

The Service’s CDs authorize the continuation of agricultural uses in a manner that conflicts with the agency’s own definition of “proper waterfowl management.” Specifically, the Service’s decision (1) authorizes management of agricultural uses in a manner that prioritizes agricultural crops over natural foods and wetland habitat, impeding proper waterfowl management, and (2) allows agricultural uses to significantly impact refuge water quality without mitigation.

- A. The Service’s decision to continue the present pattern of agricultural leasing prioritizes agricultural crops over natural wetland foods and diverse habitats, in direct conflict with proper waterfowl management.**
  - 1. The Service has failed to provide for “proper waterfowl management” in recent years.**

According to the Service, “proper waterfowl management” requires providing diverse refuge habitats throughout the annual cycle, prioritizing natural foods over agricultural crops, and providing foraging resources to meet nutritional demands of all waterfowl species. ER565. “Natural” foods include those found in wetlands. ER559–60. The Service determined that “[f]or the ‘present pattern of leasing’ to be consistent with proper waterfowl management, . . . the overall program must provide sufficient food resources and support population objectives for waterfowl (dabbling ducks and geese) during the spring and fall migration.”

ER566. In other words, “the leased agricultural lands on the refuges should not be managed in isolation.” ER591. The leased lands “must be used and/or modified as needed to provide the food and habitat needs in concert with other refuge habitats.” *Id.* “In order to provide sufficient foods to support waterfowl population objectives . . . a specific acreage of each habitat type will be required.” ER458.

However, the Service has struggled in recent years to provide the necessary matrix of habitats on Lower Klamath and Tule Lake Refuges. ER296. The open water sumps on Tule Lake Refuge “do not provide the diversity and complexity of wetland habitats provided on Lower Klamath NWR, thus waterfowl currently have less option for utilizing diverse habitats on Tule Lake NWR.” ER591–92. And, as discussed above, Lower Klamath Refuge will continue to suffer from lack of adequate water to support necessary wetland habitat under the Plan. *See supra* pages 33–36. The Service acknowledged that during drought years, “there may be agricultural habitat and not seasonal wetlands” at Lower Klamath Refuge. ER649.

The Service notes that “crops and associated farm lands do not provide for the needs of other waterfowl guilds such as diving ducks and other dabbling duck species[.]” ER502; ER528. Thus, the Service concluded, “[b]ecause agricultural foods contain insufficient protein and/or a full complement of required amino acids and support a relatively limited assemblage of waterfowl species, experts believe that agricultural crops should be limited to the minimum necessary to satisfy food

production objectives that cannot be provided from more ‘natural’ foods.” ER559 (internal citations omitted).

Nevertheless, certain crops grown on the Tule Lake Refuge lease lands, such as horseradish and onions, “have no food value for waterfowl[.]” ER527–28. The Service has allowed these crops to be planted on an increasing number of acres, ER523, even as Lower Klamath Refuge wetland habitats have suffered to the point of being essentially dry. ER403. Even for those lease land crops that do provide waterfowl food value, the full crop is harvested leaving only residues as food for waterfowl. ER523. At the same time, the number of acres of unharvested gain on Tule Lake Refuge cooperatively farmed lands—where growers leave between 25 and 33 percent of crops standing for waterfowl—have progressively declined during the period of severe water shortages from 2010 to 2014. ER511.

**2. The Service failed to rationally explain how the present pattern of leasing is consistent and compatible with proper waterfowl management.**

The record in this case is clear: While the Service has maintained the present pattern of leasing, wetland habitats and food resources have failed to support waterfowl population objectives, the cornerstone of “proper waterfowl management.” Despite these facts, the Service determined that continuing the present pattern of commercial agricultural leasing on the Refuges is consistent with proper waterfowl management.

The Service contends that it is hamstrung by the limitations imposed on its senior irrigation water right in the Adjudication, restricting its use for wetland purposes. ER351, ER376; ER640–41. Due to this restriction, “agriculture on the refuge is generally assured of receiving water in most years, whereas wetland areas are not.” ER351, ER376. The Service further argues that “water limitations and drought increase the importance of agricultural lands to waterfowl.” ER651–52. Thus, according to the Service, because lease land agriculture ensures water delivery to Lower Klamath and Tule Lake Refuges, ER351, ER376, and agricultural crops provide foods for *some* waterfowl, the present pattern of leasing is consistent with proper waterfowl management. ER508; ER534–3.

Notwithstanding the limitations on the Service’s senior water rights, the Service itself acknowledges one way in which it can explicitly prioritize wetland habitats and foods over agricultural crops. In response to declining wetland productivity and diversity on Lower Klamath and Tule Lake Refuges, the Service developed the “walking wetlands” program, whereby agricultural fields are rotationally flooded for a period of 1 to 4 years to create restored wetland habitat. ER395–96. These permanently flooded fields “will grow sago pondweed and other submergents and provide good habitat for diving ducks, a habitat that is limited on Lower Klamath NWR.” ER643. The Service “believes the practices of pre-irrigation and flood/fallowing are legally permissible under the constraints of the

existing irrigation water rights imposed by the State of Oregon, both on the lease lands and on the co-op farmed lands” ER642. Thus, in years when the Service’s senior irrigation water rights are available for lease land crops, they are also available to provide much-needed wetland habitat and foods.

The Service’s selected management alternative for Tule Lake Refuge provides that the agency will “[s]trive to increase acreage and interspersion of walking wetlands within lease lands so that all fields are within 1 mile of a wetland (minimum of approximately 1,380 acres).” ER214; *see also* ER530–31 (TLNWR Lease Land CD). However, the agency admits that in low water years, walking wetlands may be cut from Tule Lake Refuge management—as has been done in recent years—while agricultural leasing will continue. ER652. For example, in drought years 2013 and 2014, Tule Lake Refuge supported zero acres of walking wetlands while nearly all 14,800 acres of the lease lands were actively farmed. ER789 (acres of walking wetlands); ER523 (acres planted on TLNWR). In those years, the lease lands produced over 1,500 acres of alfalfa—the most water intensive crop grown on the Refuge—and over 1,500 acres of row crops (onion and horseradish), which provide no food value to waterfowl. *Id.*; ER786 (table of water use by crop).

On Lower Klamath Refuge, the Service does not intend to implement any walking wetlands and will instead work to incentivize farmers to implement the

program on off-refuge croplands. ER318. The Service did not provide any explanation for why it will not use walking wetlands on the Refuge. *Id.*; ER650. Similar to Tule Lake Refuge, nearly all 5,600 acres of the Lower Klamath agricultural lease lands have been planted with crops in recent years, even while Refuge wetlands have gone dry. ER497. Thus, in low water years, wetland habitat has been reduced or eliminated, while the lease lands continue to receive water to support commercial crops.

To justify this prioritization, the Service elevates the importance of agricultural crops. While agricultural foods may become increasingly important during times of drought, they are not *more* important than wetland foods. As one Service employee noted during development of the Plan: “It would seem like there is a point, with limited water availability, where it is not ‘consistent with proper waterfowl [management]’ to continue to farm and have dry wetlands.” ER890. Moreover, leasing is not the only means—much less the optimum means—of providing agricultural foods for waterfowl. *See* ER317, ER356 (25%–35% of cooperatively farmed crops left standing for waterfowl). By authorizing the full scale of leasing to continue, even in times of drought, the Service is prioritizing commercial agricultural crops over natural foods and wetland habitats, despite the agency’s own insistence that, “where feasible, natural foods should be given priority over agricultural crops.” ER565.

The Service failed to reconcile these discrepancies in its consistency determination. There are viable alternatives for providing wetland habitat and food resources that better comport with proper waterfowl management than simply relying on harvest residue from agricultural crops. In light of the Service’s statutory obligation to prioritize waterfowl management over commercial agricultural uses, the Service’s determination that continuing the present pattern of leasing is compatible and consistent with proper waterfowl management is arbitrary and capricious. *See Native Ecosystems Council*, 418 F.3d at 960 (“To not have acted in an arbitrary and capricious manner, the agency must present a rational connection between the facts found and the conclusions made.”) (citation omitted).

**B. The Service failed to provide a rational explanation as to how allowing the full scale of agricultural uses—responsible for significant impairment of refuge water quality—is consistent and compatible with proper waterfowl management.**

**1. Agricultural uses on Lower Klamath and Tule Lake Refuges degrade water quality in wetland habitats and adversely impact waterfowl.**

The Service admits that agricultural uses are causing a “significant impact” on water quality in Lower Klamath and Tule Lake Refuges: “partly because of agricultural runoff and other activities related to refuge management, water quality at the refuge does not meet state standards, a significant impact that would

continue[.]”<sup>9</sup> ER448; *see also* ER443. The CDs for lease land agriculture acknowledge, “farming will contribute to poor water quality at certain times of the year with runoff that may contain elevated concentrations of nutrients.” ER500; ER526.

Poor water quality increases waterfowl and other birds’ susceptibility to avian cholera and botulism, diseases which have killed thousands of birds on the Refuges in recent years. ER398; ER779; ER832-33. Waterbodies within Lower Klamath and Tule Lake Refuges are listed under Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), as impaired for high pH, nutrients, and low dissolved oxygen as a result of internal nutrient cycling, agricultural activities, and water diversion. ER385–86. The Environmental Protection Agency determined that agricultural runoff from Refuge lands contributes the overwhelming majority of nutrient pollution that is impairing surface waters on the Refuges. ER807–08 (Table 4-1).

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<sup>9</sup> The Service defines “significant impact” as something that “would result in substantial consequences to a local area or regional population, wildlife or plant community, recreation opportunity, visitor experience, or cultural resource. Of particular concern would be effects to resources that are fundamental to the refuge such as waterfowl at Upper Klamath, Clear Lake, Tule Lake, and Lower Klamath Refuges[.]” ER439. With respect to water quality, “[a]n adverse impact is considered significant if an action would violate water quality standards or substantially alter water quality.” ER440.

**2. The Plan and CDs allow agricultural uses to continue to impair Refuge water quality in a manner inconsistent and incompatible with waterfowl management.**

Despite acknowledging the significant water quality impacts from agricultural uses, the Service determined that the present pattern of leasing on the Refuges will be compatible—without any binding stipulations or management strategies to address ongoing water quality impacts. ER504, ER530; *see also* ER508, ER535 (lease land agriculture “will be consistent with the mission of the System” and “will contribute to meeting the Refuge purposes”). Indeed, the Service’s selected management alternatives for Lower Klamath and Tule Lake Refuges do not include any action that changes the status quo to address the ongoing “significant impact” of water quality impairment. ER343–46; ER371.

Instead, the Plan and CDs defer to the long-overdue development and implementation of a nutrient management plan and best management practices through a multi-agency process. ER449; ER409; 430. In the CD for lease land agriculture on Tule Lake Refuge, the Service includes the nutrient management plan as one of the “stipulations necessary to ensure compatibility/consistency.” ER530–33. However, the “stipulation” merely provides that “[a] nutrient management plan **will be developed** in concert with the State of California’s Agricultural Discharge Program (currently in progress) that will provide best

management practices regarding fertilizer use on the Refuge.”<sup>10</sup> ER533 (emphasis added).

The referenced multi-agency process and resulting nutrient management plan were set to begin around March 2010 and to be completed within six months. ER533. As of 2013, the agencies had not yet finalized the agreement for moving forward with implementing water quality improvements. ER803–04. The Plan provides no indication of when the process will be completed and the nutrient management plan implemented. Thus, the Plan states, “specific timelines and specific water quality improvements have not been formally defined at this stage, including the prescriptions for the Service to undertake on the refuge, but are part of a longer-term strategy to improve water quality.” ER449. In other words, the Plan and CDs authorize agricultural uses to continue regardless of whether the nutrient management plan is ever completed, despite identifying it as “necessary to ensure compatibility/consistency” for lease land agriculture. ER530–33.

The record in this case plainly demonstrates that agricultural uses under the present pattern of leasing have ongoing significant impacts to Refuge habitats. The Service’s determination that continuation of the status quo on Lower Klamath and Tule Lake Refuges is compatible and consistent with Refuge purposes runs counter

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<sup>10</sup> The CD for lease land agriculture on Lower Klamath Refuge does not even include this purely aspirational stipulation to address water quality impacts. ER505–08.

to the evidence before the agency and is arbitrary and capricious. *See State Farm*, 463 U.S. at 43 (agency action is arbitrary and capricious where the agency “offered an explanation for its decision that runs counter to the evidence before the agency”).

**IV. The Service’s Decision to Delegate Administrative Authority Over the Agricultural Leasing Program to Reclamation Exceeds its Statutory Authority Under the Refuge Act.**

The Plan also is inconsistent with the Refuge Act because it continues the unlawful system of joint management over the agricultural lease lands on Lower Klamath and Tule Lake Refuges between the Service and Reclamation. The Refuge Act provides that all lands within the System “shall be administered by the Secretary through the [Service].” 16 U.S.C. § 668dd(a)(1). Despite this clear mandate, the Service delegated authority to Reclamation to administer the agricultural leasing program on Lower Klamath and Tule Lake Refuges.

Congress amended the National Wildlife Refuge System Administration Act in 1976, to consolidate all management authority over the Refuge System and assign the sole responsibility of administering the System to the Secretary “through the United States Fish and Wildlife Service.” Pub. L. No. 94-223, 90 Stat. 199 (1976) (codified at 16 U.S.C. § 668dd(a)(1)). The intention of this provision of the Act was to “eliminat[e] the possibility of the Secretary delegating his authority to . . . any other Interior agency.” *Trustees for Alaska v. Watt*, 524 F. Supp. 1303,

1309 (D. Alaska 1981), *aff'd per curiam*, 690 F.2d 1279 (9th Cir. 1982), (quoting Refuge System Legislative History, reprinted in 1976 U.S.C.C.A.N. at 289). This was because “dual administration” of Refuge System lands among the Service and other federal agencies proved “unworkable.” S. Rep. No. 94-593, *reprinted in* 1976 U.S.C.C.A.N. at 288-95.

The prohibition on dual administration serves important purposes. Under the Refuge Act, the Service is charged with managing all lands within the System for the conservation of fish and wildlife for the benefit of present and future generations. 16 U.S.C. § 668dd(a)(1), (2). Other agencies are not bound by such a focused directive. Reclamation, for example, has an altogether different mission, which, in many cases, is in conflict with the Service’s conservation mission. *See* <https://www.usbr.gov/main/about/mission.html> (Accessed 10/11/2020) (Mission is “to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public.”). Indeed, in the controversy leading up to enactment of the Kuchel Act, Reclamation was the lead advocate for transferring Refuge lands to private ownership. ER549.

Despite the clear statutory command, the Plan authorizes Reclamation’s continued administration of the lease lands. The Service acknowledged in the Plan, “[a]lthough the lease lands are under administrative jurisdiction of the Refuge Complex, Reclamation administers the agricultural leasing program via a

Cooperative Agreement, including pesticide use, for the Refuge Complex[.]” ER395. Pursuant to a 1977 Cooperative Agreement, Reclamation is responsible for preparing, reviewing and approving lease contracts, as well as ensuring compliance and enforcement of lease agreements, including stipulations necessary to ensure compatibility with refuge purposes. ER605–27. Under the Plan, “[t]he Service would continue to delegate management of the lease lands program to Reclamation[.]” ER355; *see* ER317 (Lower Klamath lease lands “would continue to be leased by Reclamation”).

Because the Refuge Act mandates the Service’s administration of all Refuge lands, the Service exceeded its statutory authority by delegating administration of the Lower Klamath and Tule Lake Refuge lease lands to Reclamation. The Plan is therefore inconsistent with the Refuge Act and is arbitrary, capricious, an abuse of discretion and is in excess of the Secretary and the Service’s statutory authority under the Refuge Act. 5 U.S.C. § 706(2); *Trustees for Alaska*, 524 F. Supp. at 1310, *aff’d per curiam*, 690 F.2d 1279, (Secretary’s assignment of lead responsibility for refuge management functions to USGS, “was clear error of judgment and beyond his statutory authority.”).

**V. The Service’s Failure to Consider a Reduced Leasing Alternative is Arbitrary, Capricious and Contrary to NEPA.**

The scale and management of the agricultural leasing program on Lower Klamath and Tule Lake Refuges has been the subject of intense debate for decades.

ER547. The Plan/EIS process marked the first time the Service has been required to take a holistic view of Refuge management and to evaluate alternatives to the status quo for the lease land program. Despite numerous calls from the public, as well as from within the agency, the Service refused to evaluate a management alternative that reduced the scale of the agricultural leasing program on Lower Klamath and Tule Lake Refuges.

**A. Evaluating alternatives that all include the same acreage of agricultural leasing does not satisfy the agency’s obligation to consider all reasonable alternatives.**

NEPA requires agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives” when preparing an EIS. 40 C.F.R. § 1502.14(a); *see* 42 U.S.C. § 4332(2)(E). An EIS must “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

Here, each of the EIS alternatives include the exact same acreage of agricultural leasing on Lower Klamath and Tule Lake Refuges. For Lower Klamath Refuge, the section of the EIS entitled “Features Common to All Alternatives” provides that “Area K would continue to be leased by Reclamation to private farmers on a competitive bid basis . . . Area K consists of 43 individual lots ranging from 102 to 160 acres for a total of 5,605 irrigated acres.” ER317. Likewise, for Tule Lake Refuge, the EIS provides that “the Service would continue

the lease lands program on 14,800 acres on 168 lots,” under each of the alternatives. ER355.

This Court has held on multiple occasions that an agency violates NEPA where the range of alternatives is unreasonably narrow. *See, e.g., W. Watersheds Proj. v. Abbey*, 719 F.3d 1035, 1053 (9th Cir. 2013) (no meaningful difference between alternatives in terms of how much resource use they allow); *Ctr. for Biological Diversity v. Nat’l Hwy. Traffic Safety Admin.* (“*CBD v. NHTSA*”), 538 F.3d 1172, 1218 (9th Cir. 2008) (rejecting consideration of only a “very narrow range of alternatives”); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (per curiam) (agency “failed to consider an adequate range of alternatives”).

For example, in *Abbey*, this Court held that an Environmental Assessment (“EA”) for a grazing permit violated NEPA by “not considering a reasonable range of alternatives that included a no- or reduced-grazing option.” 719 F.3d at 1054.<sup>11</sup> The EA considered four alternatives in detail: a no-action alternative, which would implement the same management practices as the previous permit; and three action alternatives that proposed different management practices including range

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<sup>11</sup> Notably, “an agency’s obligation to consider alternatives under an EA is a lesser one than under an EIS.” *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 915 (9th Cir. 2012). Accordingly, *Abbey*’s teachings as to the adequacy of an alternatives analysis apply with even more force to an EIS.

improvements such as installing or removing fencing. *Id.* at 1050. Importantly, however, all of the alternatives involved issuing a new grazing permit at the same level as the previous permit. *Id.* The Court was “troubled” by the agency’s decision not to consider a reduced or no-grazing alternative:

Each of the four alternatives considered in detail, including the no-action alternative, would have reauthorized grazing at the exact same level—3,120 animal unit months. . . . There is no meaningful difference between the four alternatives considered in detail as to how much grazing they allow.

*Id.* at 1051.

The same core problem is present here. Each of the alternatives considered by the Service in the EIS, including the no-action alternative, involve the exact same amount of private lease land agriculture on the public national wildlife refuges. By failing to consider any alternative to the status quo of the full scale of agricultural leasing, the Service violated NEPA’s fundamental requirement to evaluate reasonable alternatives.

**B. The Service’s failure to evaluate the comparative impacts of a reduced leasing alternative thwarted the fundamental purposes of NEPA.**

NEPA “is a democratic decisionmaking tool, designed to ‘foster excellent action’ by ‘help[ing] public officials make decisions that are based on [an] understanding of environmental consequences.’” *Or. Natural Desert Assoc. v. U.S. BLM*, (“*ONDA v. BLM*”), 625 F.3d 1092, 1121 n. 24 (9th Cir. 2010). The

alternatives analysis is “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. It is intended to “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14.

The Service’s failure to consider a reduced leasing alternative frustrated these purposes and eliminated the possibility of comparing the effects of a reduced leasing alternative to the status quo. The public was deprived of the opportunity to evaluate whether and how the Service might better discharge its refuge management obligations under an alternative that included fewer acres of lease land agriculture. *See, e.g.* ER630–32 (public comments asking for a range of alternatives regarding lease land agriculture in the FEIS).

And the lack of any reduced leasing alternatives also prevented the Service from making a fully informed decision. The Service’s decision assumed the status quo of leasing would continue and did not give the agency the opportunity to evaluate whether a reduced leasing alternative would allow the Service to better manage the Refuges towards achieving proper waterfowl management. An alternatives analysis that evaluated the comparative environmental impacts of various acreages of lease land agriculture might have resulted in a different decision. *See ONDA v. BLM*, 625 F.3d at 1094 (“Having addressed the problems

we have identified, the BLM may decide to make different choices. NEPA is not a paper exercise, and new analyses may point in new directions.”).

**C. A reduced leasing alternative would have better comported with the Service’s statutory obligations.**

The agency action at issue here, the development of a 15-year plan for management of the Refuges, is dictated by the Refuge and Kuchel Acts. “Where an action is taken pursuant to a specific statute . . . the statutory objectives underlying the agency’s action work significantly to define [the agency’s] analytic obligations.” *ONDA v. BLM*, 625 F.3d at 1109. As discussed above, the Service must prepare a Plan to achieve refuge purposes and must evaluate whether the present pattern of agricultural leasing is consistent with proper waterfowl management—the major purpose of Lower Klamath and Tule Lake Refuges. 16 U.S.C. §§ 668dd(a)(4)(D), (e)(1)(A)(iii); 16 U.S.C. §§ 6951, n.

During the administrative process, Audubon alerted the Service to the need to consider reduced-leasing alternatives as an option for achieving the mission of the System and major refuge purpose of proper waterfowl management. *See, e.g.*, ER707–08; ER712–14. The Service interpreted the Kuchel Act as providing discretion to the agency to alter the present pattern of agricultural leasing if it is determined to be inconsistent with proper waterfowl management. ER566. Nevertheless, the Service failed to study in detail an alternative that may better

meet its mandate to prioritize wildlife conservation and waterfowl management on Refuge lands by reducing the current level of private lease land agriculture.

Such was the case in *Abbey*, where the agency was acting pursuant to a Presidential proclamation designating the area at issue as a National Monument. 719 F.3d at 1039. The proclamation’s purpose was to protect various “objects” of biological, geological, or historical significance, including upland and riparian habitat. *Id.* at 1039–40. The Court concluded that the EA was “deficient in its consideration of alternatives insofar as it did not consider in detail any alternative that would have reduced grazing levels on the Allotment in light of the Monument’s protected objects.” *Id.* at 1053.

Here, the Service failed to give “full consideration” to what level of agricultural leasing is consistent with the waterfowl management and wildlife conservation purposes of the Refuges. 16 U.S.C. § 695l. Consideration of a reduced leasing alternative would have aligned with the Service’s statutory obligations. *See ONDA v. BLM*, 625 F.3d at 1123–24 (failure to consider any alternative that proposed closing more than a fraction of the planning area to ORV use, consistent with the agency’s statutory obligations).

**D. A reduced leasing alternative was viable and unexamined.**

The Service concluded that the “present pattern of leasing” is consistent with proper waterfowl management. ER508; ER534–35. As discussed in detail above,

Audubon strenuously disagrees with that assessment as a substantive matter; under NEPA, the Service’s ultimate determination rests on shaky procedural foundations where it did not consider any alternatives to the present pattern of leasing. *Cf. Abbey*, 719 F.3d at 1051 (“[W]e do question how an agency can make an informed decision on a project’s environmental impacts when each alternative considered would authorize the same underlying action[.]”).

The Service arbitrarily rejected reduced-leasing alternatives. In particular, the agency referenced two actions which were eliminated from detailed consideration—elimination of lease land agriculture or “curtailment” of agriculture. ER351; ER376. In this context, “elimination” of lease land agriculture is a strawman; the Service never determined that an alternative with a **reduction** in leasing would not meet the purpose and need of the Plan. *See SE Alaska Conserv. Council v. FHA*, 649 F.3d 1050, 1057, 1059 (9th Cir. 2011) (agency failed to explain why viable alternative was not given detailed consideration).

With respect to curtailment of agriculture, the Service dismissed any reduction in leasing based on the faulty premise that “any water savings from a reduced irrigation program on the refuge would simply make more water available for higher priority Project water users rather than to refuge wetlands.” ER376. “Irrigation,” however, is not synonymous with “leasing.” Irrigation occurs on lands dedicated to cooperative agriculture, and can be used to create walking wetlands.

ER303. In other words, leasing is not a prerequisite to water delivery, other management scenarios can facilitate water delivery. Accordingly, there was no basis to dismiss reduced-leasing alternatives from detailed consideration.

Nor did Service determine that reduced-leasing alternatives were not “viable.” *See Illio ‘ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1097 (9th Cir. 2006) (a “viable” alternative is one that accords with the project’s purpose and need). There can be no dispute on this record that reduced-leasing alternatives would satisfy the Plan’s purpose and need—to develop a 15-year strategy consistent with refuge purposes, refuge goals and objectives, and applicable laws.

ER207. Viable alternatives must be given “full and meaningful consideration,” *CBD v. NHTSA*, 538 F.3d at 1217, and the existence of “viable but unexamined alternatives renders the [EIS] inadequate.” *Muckleshoot Indian Tribe*, 177 F.3d at 814.

The “touchstone” for this Court’s review is whether the Service’s “selection and discussion of alternatives fosters informed decisionmaking and informed public participation.” *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 872 (9th Cir. 2004). Here, the Service could not make an informed decision about the environmental consequences of the present pattern of leasing without studying in detail any alternative involving a lesser amount of leasing. By failing to

study in detail any alternatives to the present pattern of leasing, the Service failed to comply with NEPA's alternatives requirement.

### **CONCLUSION**

Audubon respectfully requests that this Court reverse the judgment of the district court, and hold unlawful and set aside the Service's Plan, FEIS, and ROD and remand to the District Court for further proceedings.

Respectfully submitted this 14th day of October, 2020.

s/ Maura C. Fahey

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1, Plaintiffs-Appellants Audubon *et al.* hereby certify that this brief contains 13,999 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f), and therefore complies with the word limit of Circuit Rule 32-1. The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Maura C. Fahey

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*Of Attorneys for Plaintiffs-Appellants Audubon et al.*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 14, 2020, a copy of the foregoing OPENING BRIEF OF PLAINTIFFS-APPELLANTS AUDUBON *ET AL.* was served electronically on the Federal Defendants-Appellees and Intervenor-Defendants-Appellees via CM/ECF.

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### **STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28-2.6, Plaintiffs-Appellants certify that the only related cases are those that have already been consolidated with this one: Nos. 20-33509, 20-33513, 20-33515.

**ADDENDUM**

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## STATUTES

### ADMINISTRATIVE PROCEDURE ACT

#### 5 U.S.C. § 706 – Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

## REFUGE ACT

### (NATIONAL WILDLIFE REFUGE SYSTEM ADMINISTRATION ACT, as amended by, NATIONAL WILDLIFE REFUGE SYSTEM IMPROVEMENT ACT)

#### 16 U.S.C. § 668dd – National Wildlife Refuge System

#### **(a) Designation; administration; continuance of resources-management-programs for refuge lands in Alaska; disposal of acquired lands; proceeds.**

(1) For the purpose of consolidating the authorities relating to the various categories of areas that are administered by the Secretary for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife refuges, game ranges, wildlife management areas, or waterfowl production areas are hereby designated as the “National Wildlife Refuge System” (referred to herein as the “System”), which shall be subject to the provisions of this section, and shall be administered by the Secretary through the United States Fish and Wildlife Service. With respect to refuge lands in the State of Alaska, those programs relating to the management of resources for which any other agency of the Federal Government exercises administrative responsibility through cooperative agreements shall remain in effect, subject to the direct supervision of the United States Fish and Wildlife Service, as long as such agency agrees to exercise such responsibility.

(2) The mission of the System is to administer a national network of lands and waters 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.

(3) With respect to the System, it is the policy of the United States that—

(A) each refuge shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established;

\* \* \*

(4) In administering the System, the Secretary shall—

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

(B) ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans;

\* \* \*

(D) ensure that the mission of the System described in paragraph (2) and the purposes of each refuge are carried out, except that if a conflict exists between the purposes of a refuge and the mission of the System, the conflict shall be resolved in a manner that first protects the purposes of the refuge, and, to the extent practicable, that also achieves the mission of the System;

\* \* \*

(F) assist in the maintenance of adequate water quantity and water quality to fulfill the mission of the System and the purposes of each refuge;

(G) acquire, under State law, water rights that are needed for refuge purposes;

\* \* \*

\* \* \*

**(d) Use of areas; administration of migratory bird sanctuaries as game taking areas; rights of way, easements, and reservations; payment of fair market value.**

(1) The Secretary is authorized, under such regulations as he may prescribe, to—

(A) permit the use of any area within the System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access whenever he determines that such uses are compatible with the major purposes for which such areas were established: *Provided*, That not to exceed 40 per centum at any one time of any area that has been, or hereafter may be acquired, reserved, or set apart as an inviolate sanctuary for

migratory birds, under any law, proclamation, Executive order, or public land order may be administered by the Secretary as an area within which the taking of migratory game birds may be permitted under such regulations as he may prescribe unless the Secretary finds that the taking of any species of migratory game birds in more than 40 percent of such area would be beneficial to the species; and

(B) permit the use of, or grant easements in, over, across, upon, through, or under any areas within the System for purposes such as but not necessarily limited to, powerlines, telephone lines, canals, ditches, pipelines, and roads, including the construction, operation, and maintenance thereof, whenever he determines that such uses are compatible with the purposes for which these areas are established.

\* \* \*

(3)

(A)

(i) Except as provided in clause (iv), the Secretary shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use and that the use is not inconsistent with public safety. The Secretary may make the determinations referred to in this paragraph for a refuge concurrently with development of a conservation plan under subsection (e).

\* \* \*

(iv) Compatibility determinations in existence on the date of enactment of the National Wildlife Refuge System Improvement Act of 1997 [enacted October 9, 1997] shall remain in effect until and unless modified.

\* \* \*

**(e) Refuge conservation planning program for non-Alaskan refuge lands.**

(1)

(A) Except with respect to refuge lands in Alaska (which shall be governed by the refuge planning provisions of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 *et seq.*)), the Secretary shall—

(i) propose a comprehensive conservation plan for each refuge or related complex of refuges (referred to in this subsection as a “planning unit”) in the System;

(ii) public a notice of opportunity for public comment in the Federal Register on each proposed conservation plan;

(iii) issue a final conservation plan for each planning unit consistent with the provisions of this Act and, to the extent practicable, consistent with fish and wildlife conservation plans of the State in which the refuge is located; and

(iv) not less frequently than 15 years after the date of issuance of a conservation plan under clause (iii) and every 15 years thereafter, revise the conservation plan as may be necessary.

(B) The Secretary shall prepare a comprehensive conservation plan under this subsection for each refuge within 15 years after the date of enactment of the National Wildlife Refuge System Improvement Act of 1997 [enacted October 9, 1997].

(C) The Secretary shall manage each refuge or planning unit under plans in effect on the date of enactment of the National Wildlife Refuge System Improvement Act of 1997 [enacted October 9, 1997], to the extent such plans are consistent with this Act, until such plans are revised or superseded by new comprehensive conservation plans issued under this subsection.

(D) Uses or activities consistent with this Act may occur on any refuge or planning unit before existing plans are revised or new comprehensive conservation plans are issued under this subsection.

(E) Upon completion of a comprehensive conservation plan under this subsection for a refuge or planning unit, the Secretary shall manage the refuge or planning unit in a manner consistent with the plan and shall revise

the plan at any time if the Secretary determines that conditions that affect the refuge or planning unit have changed significantly.

(2) In developing each comprehensive conservation plan under this subsection for a planning unit, the Secretary, acting through the Director, shall identify and describe—

(A) the purposes of each refuge comprising the planning unit;

(B) the distribution, migration patterns, and abundance of fish, wildlife, and plant populations and related habitats within the planning unit;

(C) the archeological and cultural values of the planning unit;

(D) such areas within the planning unit that are suitable for use as administrative sites or visitor facilities;

(E) significant problems that may adversely affect the populations and habitats of fish, wildlife, and plants within the planning unit and the actions necessary to correct or mitigate such problems; and

(F) opportunities for wildlife-dependent recreational uses.

\* \* \*

#### **16 U.S.C. § 668ee – Definitions.**

For purposes of this Act:

(1) The term “compatible use” means a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.

\* \* \*

(3) The term “sound professional judgment” means a finding, determination, or decision that is consistent with principles of sound fish and wildlife management

and administration, available science and resources, and adherence to the requirements of this Act and other applicable laws.

\* \* \*

(10) The terms “purposes of the refuge” and “purposes of each refuge” mean the purposes specified in or derived from the law, proclamation, executive order, agreement, public land order, donation document, or administrative memorandum establishing, authorizing, or expanding a refuge, refuge unit, or refuge subunit.

\* \* \*

## KUCHEL ACT

**16 U.S.C. § 695k** – Congressional declaration of policy for preservation of habitat for migratory waterfowl and prevention of depredations on agricultural crops.

It is hereby declared to be the policy of the Congress to stabilize the ownership of the land in the Klamath Federal reclamation project, Oregon and California, as well as the administration and management of the Klamath Federal reclamation project and the Tule Lake National Wildlife Refuge, Lower Klamath National Wildlife Refuge, Upper Klamath National Wildlife Refuge, and Clear Lake National Wildlife Refuge, to preserve intact the necessary existing habitat for migratory waterfowl in this vital area of the Pacific flyway, and to prevent depredations of migratory waterfowl on agricultural crops in the Pacific Coast States.

**16 U.S.C. § 659I** – Dedication of lands within boundaries of refuges to wildlife conservation; administration of lands for waterfowl management and optimum agricultural use; homestead entry prohibition; inclusion of other public lands; property of the United States

Notwithstanding any other provisions of law, all lands owned by the United States lying within the Executive order boundaries of the Tule Lake National Wildlife Refuge, the Lower Klamath National Wildlife Refuge, the Upper Klamath National Wildlife Refuge, and the Clear Lake Wildlife Refuge are hereby dedicated to wildlife conservation. Such lands shall be administered by the Secretary of the Interior for the major purpose of waterfowl management, but with full consideration to optimum agricultural use that is consistent therewith. Such lands shall not be opened to homestead entry. The following public lands shall also be included within the boundaries of the area dedicated to wildlife conservation, shall be administered by the Secretary of the Interior for the major purpose of waterfowl management, but with full consideration to optimum agricultural use that is consistent therewith, and shall not be opened to homestead entry: Hanks Marsh, and first form withdrawal lands (approximately one thousand four hundred and forty acres) in Klamath County, Oregon, lying adjacent to Upper Klamath National Wildlife Refuge; White Lake in Klamath County, Oregon, and Siskiyou County, California; and thirteen tracts of land in Siskiyou County, California, lettered as tracts “A,” “B,” “C,” “D,” “E,” “F,” “G,” “H,” “I,” “J,” “K,” “L,” and “N” totaling approximately three thousand two hundred and ninety-two acres, and tract “P” in Modoc County, California, containing about ten acres, all as shown on

plate 4 of the report entitled “Plan for Wildlife Use of Federal Lands in the Upper Klamath Basin, Oregon-California,” dated April 1956, prepared by the United States Fish and Wildlife Service. All the above lands shall remain permanently the property of the United States.

\* \* \*

**16 U.S.C. § 695n** – Leases of Lower Klamath and Tule Lake National Wildlife Refuge reserved lands’ management of other reserved public lands for waterfowl purposes

The Secretary shall, consistent with proper waterfowl management, continue the present pattern of leasing the reserved lands of the Klamath Straits unit, the Southwest Sump, the League of Nations unit, the Henzel lease, and the Frog Pond unit, all within the Executive order boundaries of the Lower Klamath and Tule Lake National Wildlife Refuges and shown in plate 4 of the report entitled “Plan for Wildlife Use of Federal Lands in the Upper Klamath Basin, Oregon-California,” dated April 1956. Leases for these lands shall be at a price or prices designed to obtain the maximum lease revenues. The leases shall provide for the growing of grain, forage, and soil-building crops, except that not more than 25 per centum of the total leased lands may be planted to row crops. All other reserved public lands included in section 2 of this Act [16 USCS § 695l] shall continue to be managed by the Secretary for waterfowl purposes, including the growing of agricultural crops by direct planting and sharecrop agreements with local cooperators where necessary.

\* \* \*

## NATIONAL ENVIRONMENTAL POLICY ACT

**42 U.S.C. § 4332** – Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible:

(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and

(2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

\* \* \*

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

\* \* \*

## REGULATIONS

### REFUGE ACT IMPLEMENTING REGULATIONS

#### 50 C.F.R. § 25.11 – Purpose of regulations.

(a) The regulations in this subchapter govern general administration of national wildlife refuges, public notice of changes in U.S. Fish and Wildlife Service policy regarding refuges, issuance of permits required on refuges, and other administrative aspects involving the management of various units of the National Wildlife Refuge System. These regulations apply to areas of land and water held by the United States in fee title and to property interests in such land and water in less than fee, including but not limited to easements. For areas held in less than fee, these regulations apply only to the extent that the property interest held by the United States may be affected.

(b) All national wildlife refuges are maintained for the primary purpose of developing a national program of wildlife and ecological conservation and rehabilitation. These refuges are established for the restoration, preservation, development and management of wildlife and wildlands habitat; for the protection and preservation of endangered or threatened species and their habitat; and for the management of wildlife and wildlands to obtain the maximum benefits from these resources.

#### 50 C.F.R. § 25.12 – What do these terms mean?

(a) As used in the rules and regulations in this subchapter:

\* \* \*

Compatibility determination means a written determination signed and dated by the Refuge Manager and Regional Chief, signifying that a proposed or existing use of a national wildlife refuge is a compatible use or is not a compatible use. The Director makes this delegation through the Regional Director.

Compatible use means a proposed or existing wildlife-dependent recreational use or any other use of a national wildlife refuge that, based on sound professional judgment, 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.

Comprehensive conservation plan means 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; helps fulfill the mission of the Refuge System; maintains and, where appropriate, restores the ecological integrity of each refuge and the Refuge System; helps achieve the goals of the National Wilderness Preservation System; and meets other mandates.

Conservation, and Management mean to sustain and, where appropriate, restore and enhance, healthy populations of fish, wildlife, and plants utilizing, in accordance with applicable Federal and State laws, methods and procedures associated with modern scientific resource programs. Such methods and procedures include, consistent with the provisions of the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd-668ee), protection, research, census, law enforcement, habitat management, propagation, live trapping and transplantation, and regulated taking.

\* \* \*

Director means the Director, U.S. Fish and Wildlife Service or the authorized representative of such official.

\* \* \*

National wildlife refuge, and Refuge mean a designated area of land, water, or an interest in land or water located within the National Wildlife Refuge System but does not include coordination areas.

National Wildlife Refuge System, and System mean all lands, waters, and interests therein administered by the U.S. Fish and Wildlife Service as wildlife refuges, wildlife ranges, wildlife management areas, waterfowl production areas, coordination areas, and other areas for the protection and conservation of fish and wildlife including those that are threatened with extinction as determined in writing by the Director or so directed by Presidential or Secretarial order. The determination by the Director may not be delegated.

National Wildlife Refuge System mission, and System mission mean to administer a national network of lands and waters 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.

\* \* \*

Purpose(s) of the refuge means the purposes specified in or derived from the law, proclamation, executive order, agreement, public land order, donation document, or administrative memorandum establishing, authorizing, or expanding a national wildlife refuge, national wildlife refuge unit, or national wildlife refuge subunit. For refuges that encompass Congressionally designated wilderness, the purposes of the Wilderness Act are additional purposes of the wilderness portion of the refuge.

Refuge management activity means an activity conducted by the Service or a Service-authorized agent to fulfill one or more purposes of the national wildlife refuge, or the National Wildlife Refuge System mission. Service-authorized agents include contractors, cooperating agencies, cooperating associations, refuge support groups, and volunteers.

Refuge management economic activity means a refuge management activity on a national wildlife refuge which results in generation of a commodity which is or can be sold for income or revenue or traded for goods or services. Examples include: Farming, grazing, haying, timber harvesting, and trapping.

\* \* \*

Refuge use, and Use of a refuge mean a recreational use (including refuge actions associated with a recreational use or other general public use), refuge management economic activity, or other use of a national wildlife refuge by the public or other non-National Wildlife Refuge System entity.

\* \* \*

Sound professional judgment means a finding, determination, or decision that is consistent with principles of sound fish and wildlife management and

administration, available science and resources, and adherence to the requirements of the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd-668ee), and other applicable laws. Included in this finding, determination, or decision is a refuge manager's field experience and knowledge of the particular refuge's resources.

\* \* \*

**50 C.F.R. § 26.41** – What is the process for determining if a use of a national wildlife refuge is a compatible use?

The Refuge Manager will not initiate or permit a new use of a national wildlife refuge or expand, renew, or extend an existing use of a national wildlife refuge, unless the Refuge Manager has determined that the use is a compatible use. This section provides guidelines for making compatibility determinations, and procedures for documenting compatibility determinations and for periodic review of compatibility determinations. We will usually complete compatibility determinations as part of the comprehensive conservation plan or step-down management plan process for individual uses, specific use programs, or groups of related uses described in the plan. We will make all compatibility determinations in writing.

(a) What information do we include in a compatibility determination? All compatibility determinations will include the following information:

- (1) The proposed or existing use;
- (2) The name of the national wildlife refuge;
- (3) The authorities used to establish the national wildlife refuge;
- (4) The purpose(s) of the national wildlife refuge;
- (5) The National Wildlife Refuge System mission;
- (6) The nature and extent of the use including the following:
  - (i) What is the use? Is the use a priority public use?;

- (ii) Where would the use be conducted?;
- (iii) When would the use be conducted?;
- (iv) How would the use be conducted?; and
- (v) Why is the use being proposed?.

(7) An analysis of costs for administering and managing each use;

(8) The anticipated impacts of the use on the national wildlife refuge's purposes and the National Wildlife Refuge System mission;

(9) The amount of opportunity for public review and comment provided;

(10) Whether the use is compatible or not compatible (does it or will it materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose(s) of the national wildlife refuge);

(11) Stipulations necessary to ensure compatibility;

(12) A logical explanation describing how the proposed use would, or would 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;

(13) The Refuge Manager's signature and date signed; and

(14) The Regional Chief's concurrence signature and date signed.

(15) The mandatory 10 — or 15-year re-evaluation date.

(b) Making a use compatible through replacement of lost habitat values or other compensatory mitigation. We will not allow compensatory mitigation to make a proposed refuge use compatible, except by replacement of lost habitat values as provided in paragraph (c) of this section. If we cannot make the proposed use compatible with stipulations we cannot allow the use.

(c) Existing right-of-ways. We will not make a compatibility determination and will deny any request for maintenance of an existing right-of-way which will affect a unit of the National Wildlife Refuge System, unless: the design adopts appropriate measures to avoid resource impacts and includes provisions to ensure no net loss of habitat quantity and quality; restored or replacement areas identified in the design are afforded permanent protection as part of the national wildlife refuge or wetland management district affected by the maintenance; and all restoration work is completed by the applicant prior to any title transfer or recording of the easement, if applicable. Maintenance of an existing right-of-way includes minor expansion or minor realignment to meet safety standards.

(d) Termination of uses that are not compatible. When we determine an existing use is not compatible, we will expeditiously terminate or modify the use to make it compatible. Except with written authorization by the Director, this process of termination or modification will not exceed 6 months from the date that the compatibility determination is signed.

**50 C.F.R. § 29.1** – May we allow economic uses on national wildlife refuges?

We may only authorize public or private economic use of the natural resources of any national wildlife refuge, in accordance with 16 U.S.C. 715s, where we determine that the use contributes to the achievement of the national wildlife refuge purposes or the National Wildlife Refuge System mission. We may authorize economic use by appropriate permit only when we have determined the use on a national wildlife refuge to be compatible. Persons exercising economic privileges on national wildlife refuges will be subject to the applicable provisions of this subchapter and of other applicable laws and regulations governing national wildlife refuges. Permits for economic use will contain such terms and conditions that we determine to be necessary for the proper administration of the resources. Economic use in this section includes but is not limited to grazing livestock, harvesting hay and stock feed, removing timber, firewood or other natural products of the soil, removing shell, sand or gravel, cultivating areas, or engaging in operations that facilitate approved programs on national wildlife refuges.

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**50 C.F.R. § 29.2** – Cooperative land management.

Cooperative agreements with persons for crop cultivation, haying, grazing, or the harvest of vegetative products, including plantlife, growing with or without cultivation on wildlife refuge areas may be executed on a share-in-kind basis when such agreements are in aid of or benefit to the wildlife management of the area.

## **NEPA IMPLEMENTING REGULATIONS (1978 VERSION)**

### **Part 1500 – Purpose and Policy**

#### **40 C.F.R. § 1500.1 – Purpose**

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains “action-forcing” provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

### **Part 1501 – NEPA and Agency Planning**

#### **40 C.F.R. § 1501.2 – Apply NEPA early in the process.**

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

\* \* \*

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

\* \* \*

## **Part 1502 – Environmental Impact Statement**

### **40 C.F.R. § 1502.1 – Purpose.**

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

### **40 C.F.R. § 1502.14 – Alternatives including the proposed action.**

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.
- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.