

**TESTIMONY OF ELIZABETH NIELSEN, EXECUTIVE DIRECTOR
KLAMATH WATER USERS ASSOCIATION
IN SUPPORT OF H.R. 8259
“THE FEDERAL WATER PROJECTS CONSULTATION
IMPROVEMENT ACT OF 2026”**

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON WATER, WILDLIFE AND FISHERIES**

HEARING TO RECEIVE TESTIMONY ON PENDING LEGISLATION

April 29, 2026

Chair Hageman, Ranking Member Hoyle, and Members of the Subcommittee, thank you for holding this important hearing and for allowing me the honor of providing testimony before this Subcommittee.

My name is Elizabeth Nielsen. I am the Executive Director of Klamath Water Users Association (KWUA). I am pleased to provide this testimony in support of H.R. 8259, “*The Federal Water Projects Consultation Improvement Act of 2026.*”

The Endangered Species Act (ESA) is an enormously powerful law. It has had profound impacts on farm and ranch families, and rural communities. H.R. 8259 provides common-sense measures to ensure that parties directly affected by regulatory decisions can have meaningful input and dialogue with decision-makers before decisions are made. It is “good government” legislation.

As I explain below, the legislation fills a gap in the existing framework for “consultation” under section 7 of the ESA. It would also move regulated parties closer to having opportunity for input that is comparable to that provided in other federal regulatory settings. H.R. 8259 does not propose to change or weaken the ESA.

KWUA is a nonprofit corporation, formed in 1953, whose members are irrigation districts who are contractors of the United States Bureau of Reclamation’s (Reclamation) Klamath Project (Project). Our members use water from the Klamath River and Upper Klamath Lake and deliver that water to approximately 175,000 acres of high-quality agricultural land in Klamath County, Oregon, and Siskiyou and Modoc Counties in California. KWUA member districts also operate the infrastructure that delivers water to Tule Lake and Lower Klamath National Wildlife Refuges, critical to waterfowl and the Pacific Flyway.

In the testimony below, I provide background and context for the legislation, as well as KWUA's summary of the need for the bill. As an initial matter, KWUA thanks Congressman Bentz for his authorship and introduction of this legislation. It is very important to irrigation water users throughout the Western United States, as evidenced by the numerous organizations that support the bill. We also thank co-sponsors of the bill who have recognized the importance of the legislation to their constituents.

BACKGROUND: ESA SECTION 7 CONSULTATION

The ESA includes both substantive and procedural obligations for certain federal agencies. As relevant here, substantively, section 7(a)(2) requires that federal agencies ensure that their discretionary actions not jeopardize the continued existence of species listed as threatened or endangered under the ESA or destroy or adversely modify designated "critical habitat." 16 U.S.C. § 1536(a)(2). The actions subject to this obligation include both a federal agency's own actions and a federal agency's funding or authorization of actions by nonfederal parties. In addition, ESA section 9 generally prohibits "take" by federal and nonfederal parties of individual members of ESA-listed fish and wildlife species. 16 U.S.C. § 1538.

ESA section 7 "consultation" is a process between a federal action agency and the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS)¹ (collectively, "Services"). If the action agency is informed that a listed species may be adversely affected by a proposed action, it must prepare a biological assessment (BA) that describes the proposed action and anticipated effects. Upon receiving a BA, the Services prepare their biological opinion (BiOp) regarding whether the proposed action would be in compliance with the substantive obligations under section 7(a)(2). If the Services conclude that it would not, the Services are required to identify any reasonable and prudent alternatives (RPAs) that would result in the action being in compliance with section 7(a)(2). *See* 16 U.S.C. § 1536(a)(2)-(c); 50 C.F.R. § 402.14.

In addition, if the Services find that an action or RPAs would be in compliance with section 7(a)(2), their BiOp must include an incidental take statement (ITS). An ITS specifies the anticipated incidental take that will occur and also specifies reasonable and prudent measures (RPMs) required to minimize incidental take, and terms and conditions to implement the RPMs. The ITS has the effect of authorizing incidental take by the federal agency and nonfederal parties involved in the action under consultation, often conditioned by RPMs and terms and conditions. *See* 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

Upon receipt of a BiOp or BiOps for a proposed action, the federal action agency determines how to proceed in light of its substantive obligations. 50 C.F.R. § 402.15.

BAs and BiOps are typically complex, formidable documents covering regulatory and technical subjects, and often extend to hundreds of pages. A BiOp or action agency decision can be challenged in court, although courts uphold agency determinations on technical and scientific

¹ Broadly, USFWS has jurisdiction over terrestrial and freshwater species, and NMFS has jurisdiction over marine and anadromous species.

matters unless the determinations are arbitrary and capricious. 5 U.S.C. § 706; *see San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 610 (9th Cir. 2014) (*Delta Smelt Consolidated Litigation*).

H.R. 8259 ADDRESSES THE UNIQUE INTERESTS OF FEDERAL WATER PROJECT CONTRACTORS

H.R. 8259 affords procedural opportunities in ESA section 7 consultation to “covered entities.” The term “covered entities” includes municipal and irrigation agencies that have contracts for water supplies made available through federal water projects in the western states. This would include, for example, irrigation districts and similar water distribution entities that hold contracts with Reclamation related to storage, diversion, and delivery of water to individual farmers and ranchers for irrigation.

These contractors, the vast majority of whom are public agencies, have strong and unique interests in ESA consultation and its outcomes. Although not all Reclamation projects are identical, contractors typically have been required to pay allocated costs of the construction of federal projects and additionally must pay for recurring annual costs of operation and maintenance. These costs are owed whether the contractors and their patrons receive water or not. In many instances, districts operate federally constructed and owned infrastructure as well as their own infrastructure related to local delivery and drainage.

Landowners, the districts’ patrons, own the beneficial interest in the right of use of water delivered through federal water project infrastructure. In many cases, federal contractors hold both the legal and beneficial interest in the water rights that support the farms and ranches in the district.

ESA section 7, and consultation under section 7, can adversely affect available water supplies, the operation of infrastructure, and overall costs. In turn, these conditions can damage contractors, farmers and ranchers, food production, regional economies, local governments, and the local environment.

In short, section 7 consultation impacts the core function of federal water project contractors and their patrons and often affects their activities and well-being directly. The contractors have vital and unique interests in section 7 consultation. They also possess information and expertise that is critical to the consultation process itself.

H.R. 8259 FILLS A GAP BY ASSURING CONTRACTORS CAN BE ENGAGED IN SECTION 7 CONSULTATIONS

Despite federal water project contractors’ unique interests, they currently have no assured or prescribed role in ESA section 7 consultations. The nature and extent of any opportunity for engagement with the involved federal agencies is at the discretion of the federal agencies, and has been unpredictable and inconsistent, both geographically and over time. This lack of a defined role is unfair, and contrasts sharply with the role of regulated parties in other contexts.

One such context is the section 7 consultation itself. Nonfederal parties who are “applicant(s)” have defined opportunities for input and engagement. *See* 16 U.S.C. § 1536(a)(3); 50 C.F.R. §§ 402.11(a) (“the prospective applicant should be involved throughout the consultation process”), 402.14(g)(5),(8) (Services’ responsibility to discuss BiOp elements with action agency and applicants); *Consultation Handbook*, U.S. Fish & Wildlife Service and National Marine Fisheries Service (March 1998), at 2-13 (Applicants’ role in the consultation process).

Further, in some circumstances, a nonfederal party whose license or permit application is subject to section 7 consultation, may be designated to *prepare the BA*. 16 U.S.C. § 1536(c)(2). Of course, the “designated nonfederal representative” (50 C.F.R. § 402.08) for consultation must coordinate with and act under the supervision of the federal action agency. Nonetheless, this authority underscores the very high degree of participation and engagement available to certain nonfederal parties who are dependent on the outcome of a section 7 consultation.²

But federal agencies’ longstanding interpretation is that parties with existing water contracts³ do not meet the specific regulatory definition of “applicants.” We believe that this is one example of the ESA not being written with ongoing federal water projects in mind. Regardless, the important point is that federal water project contractors have at least as much at stake in section 7 consultations as do parties who are deemed to be “applicants,” but is no established, defined role for federal water project contractors. H.R. 8259 does not speak to the question of whether a given party is an “applicant” and does not create new authority regarding designated nonfederal representatives, but it does respect the interests of parties who have core interests at stake in section 7 consultations.

It is noteworthy also that there are irrigation entities who do not have a federal nexus and thus are not subject to section 7 consultations but are subject to the ESA section 9 prohibition on take. These entities may be required to pursue an ITP pursuant to section 10(a)(1)(B) of the ESA (16 U.S.C. § 1539(a)(1)(B)). That process involves dialogue and issue resolution between the nonfederal party and the Services directly.⁴ There is no functional difference between the interests of the nonfederal party in those circumstances and the interests of federal water project contractors in a section 7 consultation.

In short, the ESA and its implementing regulations and policies recognize the unique interests of parties who are subject to the direct its consequences of ESA regulation, and H.R. 8259 is consistent with that principle. Equally important, engagement between the regulated party and

² In the Klamath Basin, the Klamath River Renewal Corporation, a nonprofit corporation formed for the purposes of removing dams on the Klamath River, was designated as the nonfederal representative for section 7 consultation on the necessary approvals to allow dam removal. *Lower Klamath Project Biological Assessment*, Klamath River Renewal Corporation (March 2021).

³ In the Klamath Project, contracts with Reclamation are perpetual in term, and some were entered over a century ago.

⁴ The Services have developed a *Habitat Conservation Planning and Incidental Take Permit Processing Handbook*. www.fws.gov/sites/default/files/documents/habitat-conservation-planning-handbook-entire_0.pdf (last visited Apr. 20, 2026).

agency staff in these situations often leads to resolving issues through mutual education and constructive dialogue, reducing unnecessary conflict and tension. That sort of process involving collaboration between regulator and regulated can and should characterize section 7 consultation for federal water projects.

THERE IS FURTHER PRECEDENT

H.R. 8259 is not the first legislation of its type. In section 4004 of the Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, [130 Stat. 1628](#) (2016) (WIIN Act), Congress provided similar opportunities for input in section 7 consultations to contractors of the Central Valley Project (CVP) and California State Water Project (SWP). H.R. 8259 builds on lessons learned from those provisions and also omits other provisions that are relevant only to consultations on the coordinated operations of the CVP and SWP. Section 4004 of the WIIN Act is part of the much-broader Subtitle J of Title II of that Act, and, consistent with negotiations of all of the provisions of that subtitle, will expire at the end of this year. However, we are aware of nothing in the WIIN Act experience that suggests that H.R. 8259 would not be an appropriate replacement.

In addition, Indian tribes that have interests in the resources that are the subjects of section 7 consultation have means to engage with the involved federal agencies. Such engagement follows generally from the United States' government-to-government relationship with tribes. See *Memorandum on Government-to-Government Relations with Native American Tribal Governments*, 59 Fed. Reg. 22951 (May 4, 1994). In addition, a long-standing order directs federal agencies to consult and coordinate with relevant tribes with respect to matters under the ESA. *SECRETARIAL ORDER 3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997).⁵

Federal water project contractors' interests are not identical to those of tribes, but we support recognition that both water contractors and tribes have unique interests that merit respect.

SPECIFIC COMMENTS

In general, H.R. 8259 would ensure that federal water project contractors have the opportunity to be heard by, and have bidirectional communication with, the action agency and the Services with respect to each of the core elements of an ESA section 7 consultation as described above. We emphasize the importance of true engagement, and the bill's definition of "engage" as being "to conduct direct written and in-person communications recognizing the unique interest of the contractor and promoting maximum candor and cooperation."

⁵ "Principal 1" of this Order states: "Whenever the agencies, bureaus, and offices of the Departments are aware that their actions planned under the [ESA] may impact tribal trust resources, the exercise of tribal rights, or Indian lands, they shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable."
www.doi.gov/sites/doi.gov/files/elips/documents/3206_-_american_indian_tribal_rights_federal-tribal_trust_responsibilities_and_the_endangered_species_act.pdf (last visited Apr. 20, 2026).

Finally, I wish to bring to the subcommittee's attention a drafting issue related to section 2(a)(2). Overall, this provision states that "if the head of an action agency suggests or considers an agency action that would not result in full delivery of water for contractors of a Federal water project," contractors will have the opportunity to be informed and engaged with regard to various aspects of that potential action. We have become aware of a concern that this language may imply that federal action agencies have the discretion to impose such an action or even that the provision may *confer* such discretion. I do not believe that would be the correct interpretation. At minimum, it would be determined on a case-by-case basis whether such discretion exists.

However, we support further clarification in this regard. This could be achieved simply by revising section 2(a)(2)(A) to read as follows: "(A) Whether such action, or any component of such action, would be within the scope of the legal authority of the action agency;".

Again, thank you for the opportunity to provide testimony in support of the enactment of H.R. 8259 in the United States House of Representatives. KWUA stands ready to work with the Subcommittee and our partners to advance this legislation expeditiously. I would be happy to answer any questions the Subcommittee has on this important bill.