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10  
 11 UNITED STATES DISTRICT COURT  
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 13 SAN FRANCISCO DIVISION

15 YUROK TRIBE, *et al.*,  
 16 Plaintiffs,  
 17 v.  
 18 U.S. BUREAU OF RECLAMATION, *et al.*,  
 19 Defendants.

Case No. 3:19-cv-04405-WHO  
 (Related Case No. 3:16-cv-04294-WHO)  
 (Related Case No. 3:16-cv-06863-WHO)

**DEFENDANT-INTERVENOR  
 KLAMATH WATER USERS  
 ASSOCIATION’S MOTION TO LIFT  
 STAY AND MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 SUPPORT**

20 KLAMATH WATER USERS ASSOCIATION,  
 21 Defendant-Intervenors.

Hearing Date: May 26, 2021  
 Hearing Time: 2:00 p.m.  
 Courtroom 2, 17th Floor  
 Judge: Honorable William H. Orrick

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1 **NOTICE OF MOTION AND MOTION TO LIFT STAY**

2 TO ALL PARTIES AND THEIR ATTORNEYS:

3 PLEASE TAKE NOTICE that on May 26, 2021, at 2:00 p.m. in Courtroom 2, 17th Floor  
4 of the San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, Defendant-Intervenor  
5 Klamath Water Users Association (KWUA) will move this Court for an order lifting the stay of  
6 this litigation established by the Court’s Order approving the stipulation to stay litigation (ECF  
7 No. 908 (Stay Order) and enabling the adjudication of KWUA’s concurrently submitted  
8 Defendant-Intervenor Klamath Water Users Association’s Motion for Summary Judgment on  
9 Plaintiffs’ Fifth and Sixth ESA Claims (MSJ). KWUA’s MSJ is attached hereto as Attachment 1.

10 In support of this motion, KWUA is submitting a proposed order, and filing the  
11 Declaration of Paul S. Simmons in Support of Klamath Water Users Association’s Motion for  
12 Order Lifting Stay and Motion for Summary Judgment on the Fifth and Sixth ESA Claims  
13 (Simmons Decl.), the Fourth Declaration of Brad Kirby in Support of Klamath Water Users  
14 Association’s Motion to Lift Stay (Kirby Decl.), the Declaration of Ben DuVal in Support of  
15 Klamath Water Users Association’s Motion for Order Lifting Stay (DuVal Decl.), and several  
16 exhibits.

17 **POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO LIFT STAY**

18 **I. INTRODUCTION**

19 On March 27, 2020, this Court entered the Stay Order. The Stay Order provides for stay of  
20 the litigation until September 30, 2022, conditioned on the Defendant U.S. Bureau of  
21 Reclamation’s (Reclamation) adherence to a “Proposed Interim Operations Plan for operation of  
22 the Klamath Project for Water Years 2020-2022” (Interim Plan). The underlying stipulation  
23 reflects Reclamation’s intent to complete a new Endangered Species Act (ESA) Section 7  
24 consultation by the same September 30, 2022 date. *See* ECF No. 907, ¶¶ 3-4; *see also* Interim  
25 Plan at 2, ECF No. 907-1. Under the Stay Order, a party may seek to reopen the case if  
26 Reclamation deviates from the Interim Plan. In addition, this Court has inherent power to vacate  
27 and lift the stay.

1 As Reclamation admits, it is not adhering to the Interim Plan. Non-adherence to the  
2 Interim Plan translates to the severe detriment of KWUA’s members and farm and ranch families  
3 served by the Klamath Project (Project). For example, a key feature of the Interim Plan, an  
4 “augmentation flow” that was furnished in May of 2020, had major impacts on Project operations  
5 that are now affecting KWUA’s members. Under the Interim Plan, the augmentation flow is to  
6 cause “a reduction to Project Supply that is limited to, and shall not exceed, 23,000 AF [and] not  
7 otherwise affect Klamath Project operations, including Klamath Project diversion rates and timing  
8 other than that caused by the above-described potential reduction in Project Supply during the  
9 spring-summer period.” *See* Interim Plan, ECF No. 907-1 at 3. But the augmentation flow is  
10 causing additional, negative effects today: it is adversely affecting the quantity and rate of water,  
11 and the time at which water will be available, in 2021, long after it happened.

12 In addition, Reclamation has deviated and is deviating from the Interim Plan based on the  
13 identification of new constraints on Project irrigation by the United States Fish and Wildlife  
14 Service (USFWS), none of which are contemplated by the Interim Plan. These constraints are  
15 affecting KWUA adversely. Because actual operations are *not* consistent with the Interim Plan,  
16 the stipulation leading to the Interim Plan has been undermined, and KWUA should be allowed to  
17 litigate the case on the merits.

18 Moreover, it has become clear that the Interim Plan simply “does not work.” It is the  
19 second extremely dry year under purported Interim Plan operations, revealing far too many round  
20 pegs for the square holes of the Interim Plan. The parties do not need a plan for wet years; wet  
21 years are easy. The parties need a plan for dry years, and it is now glaring and apparent that there  
22 is no such functional plan.

23 Making matters worse, the Interim Plan was premised on the expectation that Reclamation  
24 and federal resources agencies would complete a re-consultation process under Section 7 of the  
25 ESA by September 30, 2022. But the process is far behind schedule.

26 Further still, this motion is filed in a context that is dire for the Project’s agricultural  
27 community. The 2020 water year was the second-to-worst year of irrigation water availability in  
28 the 115-year history of the Project. The community endured hardship compounded by a pandemic

1 that affected the ability to farm or market and deliver crops. 2020 now moves to the third-to-worst  
2 year, because 2021 will be worse than 2020, and almost certainly the worst year ever.

3 Upper Klamath Lake (UKL), the Project's water storage reservoir, holds more than enough  
4 water to irrigate the entire Project this year. But 400,000 acre-feet (AF) will be sent to flow in the  
5 Klamath River in California. This is far more than would occur this summer if the Project did not  
6 exist at all: river flows are being subsidized by water that was, and can only lawfully be,  
7 impounded in UKL under a right to impound and store that water for irrigation use. This is  
8 wrong, and an extreme source of tension in the community and between Klamath Basin  
9 communities.

10 Further, as the parties to this case know, there are major legal issues that are in need of  
11 judicial resolution. For the last several months, the uncertain state of these legal issues has  
12 resulted in delay in the process for the reinitiated ESA consultation contemplated by the parties'  
13 stipulation and Stay Order. The issues (one of which relates to the use of "stored water" for non-  
14 irrigation purposes) require judicial resolution, which will provide a legal framework for future  
15 Project operations. Currently, *judicial resolution of all such issues is possible only in this forum.*

16 Resolution of the disputed issues is also critical for establishing an accepted legal  
17 framework for any future efforts to bring stability by settlement. For the decade between 2006  
18 and 2016, there was relative calm in the Basin. This was due to the collaborative negotiation of,  
19 and attempts to obtain congressional approval of, a settlement agreement. For KWUA, that  
20 settlement was extremely important in that it recognized that the historical pattern of simply  
21 regulating Project irrigation water use will not lead to meaningful benefit for important fish  
22 species in the Klamath River and UKL. That agreement terminated at the end of 2015 due to the  
23 lack of federal legislation necessary for its implementation. The aftermath has been characterized  
24 by a return to an atmosphere of perpetual litigation and rancor.

25 Given this dire landscape, KWUA seeks to lift the stay of this case, and asks this Court to  
26 proceed with deciding legal questions presented by Plaintiffs' First Amended Complaint. KWUA  
27 is not seeking any emergency or preliminary relief as part of this motion (although reserves the  
28 right to do so at a later time). To say "tensions are high" is an understatement. The opportunity to



1 present one’s case to a neutral arbiter of fact and law when there is a dispute among neighbors is  
2 essential to the orderly administration of daily life. Thus, KWUA asks this Court to lift the stay to  
3 do just that: proceed with hearing motions for summary judgment on Reclamation’s  
4 responsibilities under federal law including Section 7(a)(2) of the ESA with respect to the  
5 operation of the Project, and give the parties a legal determination that can be used as the  
6 beginning of a framework to work our way out of this mess.

7 **II. STATEMENT OF ISSUES TO BE DECIDED**

8 This motion requires the Court to decide whether it should lift the stay entered by the Stay  
9 Order. KWUA submits that there are several reasons, independent and compounding, for the  
10 Court to do so. The more specific issues to be decided are as follows.

11 1. Whether the stay should be lifted because Reclamation is not in compliance with  
12 the Interim Plan. KWUA submits that the answer is yes because:

13 (a) Reclamation’s 2021 operating procedures for the Project expressly deviate  
14 from the Interim Plan;

15 (b) Despite an explicit statement in the Interim Plan that an “augmentation  
16 flow” in 2020 would not have further negative effects on Project irrigation, that  
17 augmentation flow has additional and continuing negative effects by reducing the quantity  
18 of water available in 2021 and affecting the timing with which such water is available,  
19 making water unavailable when needed; and

20 (c) After development of the Interim Plan and the parties’ stipulation, USFWS  
21 established additional constraints that have been adopted by Reclamation, further causing  
22 adverse effects to KWUA and its members.

23 2. Whether the Court should exercise its inherent powers to lift the stay of litigation.  
24 KWUA submits that the answer is yes because:

25 (a) Circumstances supporting the issuance of the stay have changed since the  
26 parties stipulated to the stay in that: (i) KWUA and other Project irrigation interests have  
27 been prevented from litigating the ESA Section 7(a)(2) and other federal law questions that  
28 were pending in lawsuits at the time the stay was entered, (ii) the reinitiation of

1 consultation has stalled, (iii) any progress on resolution of the legal issues has just been  
2 “withdrawn” by the recently-installed Presidential Administration, and (iv) two years of  
3 attempted operations under the Interim Plan have shown there is no coherent plan for dry  
4 years; and

5 3. Whether proceeding with litigating the merits of the federal law and Section 7(a)(2)  
6 claims raised in the First Amended Complaint does not result in hardship and will serve the  
7 orderly course of justice by providing a forum for fundamental legal issues to be heard. KWUA  
8 submits that the answer is yes.

### 9 III. STATEMENT OF FACTS

10 The Klamath Basin and Project have experienced considerable conflict and tension over  
11 the past few decades. This conflict, and related litigation, subsided during roughly the period  
12 2006-2016, the period of the negotiation of, and attempts to obtain congressional authorization for,  
13 a settlement agreement known as the Klamath Basin Restoration Agreement (KBRA). Simmons  
14 Decl. ¶ 2. The KBRA was signed by approximately forty parties in 2010, including three Klamath  
15 Basin tribes, both the State of Oregon and the State of California, several conservation groups,  
16 Project irrigation interests, and others. Simmons Decl. ¶ 3. The KBRA addressed a variety of  
17 topics, among them the need for an adequate and reliable supply of water for irrigation in the  
18 Project and various measures to enhance fisheries. *Id.* The KBRA required congressional  
19 legislation in order for the United States to make certain commitments and to become an actual  
20 party. Simmons Decl. ¶ 5. Due to the lack of enactment of federal authorizing legislation, the  
21 KBRA expired December 31, 2015. *Id.* Since then, there has been a spate of litigation in this  
22 Court (and others) concerning the Project and compliance with ESA Section 7. *Id.* ¶ 6.

23 On February 8, 2017, the Court held, in two separate but similar lawsuits filed by the  
24 Hoopa Valley Tribe and the Yurok Tribe, that Reclamation was in procedural violation of its duty  
25 to reinstate Section 7 consultation, and imposed a permanent injunction structured to remain in  
26 effect until the reinstated consultation was completed. *Yurok Tribe v. U.S. Bureau of*  
27 *Reclamation*, 231 F. Supp. 3d 450, 474-75, 481-89 (N.D. Cal. 2017). On April 30, 2018, the  
28 Court denied a motion by KWUA and others that a portion of the 2017 injunction be stayed, and

1 for relief from the judgment imposing the 2017 injunction. *Yurok Tribe v. U.S. Bureau of*  
2 *Reclamation*, 319 F. Supp. 3d 1168, 1179 (N.D. Cal. 2018). Later in 2018, the Court denied a  
3 motion for preliminary injunction by the Klamath Tribes based on alleged noncompliance with the  
4 ESA. *Klamath Tribes v. U.S. Bureau of Reclamation*, No. 18-cv-03078-WHO, 2018 U.S. Dist.  
5 LEXIS 124741, at \*42-52 (N.D. Cal. July 25, 2018).

6 In April of 2019, Reclamation completed the reinitiated consultation with the United States  
7 Fish & Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (collectively,  
8 “Services”). First Am. Compl. (FAC) ¶¶ 61-64, ECF No. 17. As in the past consultation from  
9 2012-2013, Reclamation proposed an action for operation of the Project that it developed in  
10 conjunction with the Services that was intended to result in non-jeopardy biological opinions  
11 (BiOps), and the Services each issued non-jeopardy BiOps. NMFS AR A\_000001-359.  
12 Reclamation then adopted and implemented the 2019-2024 Operations Plan for the Klamath  
13 Project (Operations Plan), which limited water diversions and deliveries based on Section 7 of the  
14 ESA. USBR AR 019827.

15 Irrigation parties including KWUA filed lawsuits challenging Reclamation’s adoption of the  
16 Operations Plan. Simmons Decl. ¶ 14 & Ex. A. In two separate Administrative Procedure Act  
17 (APA) cases filed in the District of Oregon, these irrigation parties alleged that Reclamation’s action  
18 was in excess of its statutory authority and in violation of obligations under federal statute. *See*  
19 *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation (KID v. USBR)*, No. 1:19-cv-00451-CL,  
20 2020 U.S. Dist. LEXIS 179680, at \*15-17 (D. Or. May 15, 2020). These consolidated actions are  
21 commonly referred to as the “Medford Cases,” having been assigned to the Medford Division of the  
22 District of Oregon.

23 In the Medford Case filed by KWUA and certain irrigation districts and individuals  
24 (collectively, “KWUA”), KWUA founded its arguments on recent legal developments. These  
25 included: (1) evolution of the law regarding the application of Section 7(a)(2) to ongoing activities  
26 in water resources projects following the Supreme Court’s decision in *National Association of*  
27 *Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); and (2) the entry of an enforceable  
28 order in the Klamath Basin Adjudication (KBA), the Oregon state water rights adjudication to

1 which the United States is a party. With respect to these issues, KWUA sought adjudication to  
2 resolve:

- 3 (a) whether ESA Section 7(a)(2) authorizes or requires Reclamation to curtail water  
4 deliveries to Reclamation contractors to protect ESA-listed species, where the  
5 contracts between Reclamation and its contractors do not afford Reclamation  
6 authority or discretion to do so (Simmons Decl., Ex. A, ¶¶ 60-77);
- 7 (b) whether ESA Section 7(a)(2) authorizes or requires Reclamation to use water  
8 having the legal character of “stored” water for the benefit of ESA-listed species  
9 (Simmons Decl., Ex. A, ¶¶ 86-92); and
- 10 (c) whether federal law or downstream federal reserved water rights include the right  
11 to use water having the legal character of “stored” water to supplement Klamath  
12 River flows (Simmons Decl., Ex. A, ¶¶ 86-92).

13 In the case of KWUA’s April 2019 lawsuit against Reclamation, it was also relevant to all of these  
14 issues that the Project is authorized for purposes of the 1902 Reclamation Act, and no other  
15 purposes. Simmons Decl., Ex. A.

16 Later, in July of 2019, the Plaintiffs initiated *this* action against Reclamation and NMFS in  
17 this Court. Compl., ECF No. 1; FAC, ECF No. 17. Among other things, the Plaintiffs allege that  
18 Reclamation’s adopted action is in violation of its Section 7(a)(2) obligations. FAC ¶¶ 151-56. In  
19 October of 2019, Plaintiffs filed a motion for preliminary injunction. ECF No. 27 (First PI  
20 Motion). After Defendants and KWUA filed responses, Plaintiffs filed a reply in support of their  
21 First PI Motion in which they modified the relief requested in their First PI Motion (Modified PI  
22 Motion). *See* ECF No. 48, at 6-7. Defendants and KWUA filed responses to the Modified PI  
23 Motion. ECF Nos. 54, 54-1, 54-2, 57, 58. Thereafter, the parties entered into a stipulation for an  
24 order that would impose a stay (Stipulation for Stay). ECF No. 907.

25 Specifically, the Stipulation for Stay stated that Plaintiffs would withdraw their motion for  
26 preliminary injunction, Reclamation would proceed under an “Interim Plan” attached to the  
27 stipulation, and the instant action would be stayed until September 30, 2022, or until the  
28 completion of a reinitiated consultation, whichever was first. ECF No. 907, at 4-5. The

1 Stipulation for Stay provided that a party could “file a motion with the Court seeking to lift the  
2 stay and resume the litigation only on the grounds that the Bureau is not implementing the Interim  
3 Plan or complying with any term or condition of this Stipulation.” ECF No. 907, at 5. On  
4 March 27, 2020, consistent with the stipulation, the Court entered the Stay Order. ECF No. 908.

5 Less than two months later, the Plaintiffs in this action moved the Court to lift the stay and  
6 impose a temporary restraining order. ECF No. 909. The Court denied the motion by order dated  
7 May 29, 2020. ECF No. 924.

8 Subsequently, the “Medford Cases” were dismissed by the District of Oregon. In the  
9 Medford Cases, the Hoopa Valley Tribe and the Klamath Tribes were allowed to intervene for the  
10 limited purpose of filing motions to dismiss. *Klamath Irrigation Dist. v. U.S. Bureau of*  
11 *Reclamation*, No. 1:19-cv-00451-CL, 2019 U.S. Dist. LEXIS 192741, at \*2, 10 (D. Or. Nov. 6,  
12 2019). In their motions to dismiss, the two Tribes (neither being a party to this case) contended that  
13 they are necessary parties and, because they cannot be joined in the Medford Cases involuntarily  
14 due to their sovereign immunity, the Medford Cases must be dismissed pursuant to Federal Rule of  
15 Civil Procedure 19(a)(1). *KID v. USBR*, 2020 U.S. Dist. LEXIS 179680, at \*2-3. On May 15,  
16 2020, Magistrate Judge Clarke issued his Findings and Recommendation that the Medford Cases be  
17 dismissed on that basis. *Id.* at \*13-31. The district court adopted the Findings and  
18 Recommendation, and on September 25, 2020, the district court entered its order dismissing the  
19 Medford Cases. *Klamath Irrigation Dist. v. U. S. Bureau of Reclamation*, No. 1:19-cv-00451-CL,  
20 2020 U.S. Dist. LEXIS 177212, at \*3-4 (D. Or. Sep. 25, 2020).

21 The practical result of the Medford Cases is that any of the Klamath Basin’s tribes, or any  
22 non-tribal party with standing, can sue Reclamation for violations of the ESA or other federal law  
23 and seek remedies detrimental to KWUA and the irrigation community, but KWUA and other  
24 irrigation parties cannot sue Reclamation to protect their irrigation water unless the tribes consent  
25 to be joined in the action.<sup>1</sup>

26  
27 <sup>1</sup> In addition to the litigation described above, there have been multiple suits in state court  
28 challenging Reclamation’s operations based on water law and the Amended and Corrected

1 In the meantime, for the last few years, KWUA has urged that Reclamation re-assess its  
2 obligations under Section 7 of the ESA and other federal responsibilities. Simmons Decl. ¶ 24.  
3 Reclamation did so. In a memorandum dated October 29, 2020, the Office of the Solicitor issued  
4 a memorandum titled, “An Updated Review of Legal Issues concerning the United States Bureau  
5 of Reclamation Operation of the Klamath Project.” *Id.*, Ex. H (October 2020 Solicitor  
6 Memorandum). The October 2020 Solicitor Memorandum concludes, in relevant part:

7 [W]hen developing its proposed operations for the Klamath Project, Reclamation  
8 should . . . determine whether any portion of water in the Klamath Project is subject  
9 to nondiscretionary contract terms and include any effects attributable to the  
10 deliveries of such waters in the environmental baseline as part of any ESA  
consultation. To the extent other water users have competing or conflicting claims,  
relevant allocations shall be determined in accordance with this analysis until any  
final Klamath adjudication or any other relevant judicial order or determination.

11 October 2020 Solicitor Memorandum at 9.

12 In January 2021, Reclamation completed the re-assessment called for by the October 2020  
13 Solicitor Memorandum. *See* U.S. Bureau of Reclamation, Reassessment of U.S. Bureau of  
14 Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the  
15 Endangered Species Act (January 2021) (Reassessment), attached as Exhibit I to the Simmons  
16 Declaration. The Reassessment was very similar in format to a reassessment completed by the  
17 U.S. Army Corps of Engineers in 2014 for the reservoir operations on the Middle Rio Grande  
18 Basin of New Mexico, which was upheld by the Tenth Circuit Court of Appeals in *WildEarth*  
19 *Guardians v. United States Army Corps of Engineers*, 94 F.3d 635 (10th Cir. 2020).

20 Ultimately, the Reassessment determined there were at least eleven operational actions in  
21 connection with the Project that are properly considered subject to Section 7(a)(2) consultation.  
22 Reassessment at 39. However, the Reassessment also determined that there were four operational  
23 actions that were not subject to Section 7(a)(2) consultation: (1) establishing minimum release  
24 rates from UKL, (2) coordinating project diversions from UKL, (3) establishing minimum river

25 \_\_\_\_\_  
26 Findings of Fact and Order of Determination (ACFFOD) in the KBA, another lawsuit filed by the  
27 Yurok Tribe regarding operations to support its Boat Dance ceremony, a litigation by Klamath  
28 Tribes for alleged violations of ESA Section 7 and section 9 in the 2021 water year (temporary  
restraining order hearing set for April 26, 2021, and a recent motion for preliminary injunction in  
the KBA pending in Klamath County Circuit Court that has been removed to the District Court for  
the District of Oregon. Simmons Decl. ¶¶ 8-9, 16-23.

1 flows in the Klamath River, and (4) establishing minimum water levels in the Tule Lake  
2 Sump 1A. *Id.* at 39-40.

3 The Reassessment was to provide the legal framework for the reinitiated consultation  
4 planned for completion by September 30, 2022.

5 However, by memorandum dated April 8, 2021, Secretary Haaland withdrew the  
6 Reassessment and other related documents that had been issued to support the reinitiated  
7 consultation. *Simmons Decl., Ex. M.*

8 The Interim Plan was developed, in part, so as to maintain the UKL elevation at not lower  
9 than 4138 feet, which USFWS has determined as the elevation to protect endangered sucker  
10 populations in UKL. *Id.* In 2020, revised hydrologic forecasting in May showed that the UKL  
11 elevation could drop below the minimum UKL elevation of 4138 feet. *Id.* ¶ 34. At that point,  
12 Reclamation informally advised that the irrigation Project Supply would be reduced to  
13 approximately 80,000 AF for irrigators for the summer, rather than the planned 147,000 AF  
14 calculated from the Interim Plan. *Id.* However, later, as a result of an improvement in the  
15 hydrologic outlook, the 2020 Project Supply increased back up to 140,000 AF. *Id.* ¶ 35. An  
16 80,000 AF Project Supply would have resulted in devastation throughout the community. *Id.* ¶ 34.  
17 The ultimate 2020 allocation to the Project, however, was still less than 40 percent of the irrigation  
18 need for the 2020 season. *Id.* ¶ 35.

19 Under the terms of the Stipulation for Stay and Interim Plan, the Interim Plan was expected  
20 to control Project operations for the 2021 water year. *Kirby Decl.* ¶ 31. The 2021 water year is  
21 significantly drier than 2020. *Kirby Decl.* ¶¶ 40, 52. There has been minimal winter precipitation.  
22 The resulting inflows from the tributaries of UKL have been extremely low, to the point of setting  
23 many daily record lows, and the cumulative UKL net inflow for the water year beginning  
24 October 1, 2020, to date is the lowest on record out of the last 41 years. *Id.* ¶ 39.

25 On April 14, 2021, Reclamation released the “2021 Annual Operations Plan” (2021 Plan).  
26 *Kirby Decl.* ¶ 41, Ex. E. The 2021 Plan states that Reclamation will not comply with the terms of  
27 the Interim Plan: “Critically dry and extraordinary hydrologic conditions in the Klamath River  
28 Basin will prevent full simultaneous satisfaction of requirements for ESA-listed species in Upper

1 Klamath Lake (UKL) and the Klamath River, as specified in the 2018 Modified Operations  
2 Plan/Interim Operations Plan (IOP) and the BiOps, even without water deliveries to the Klamath  
3 Project (Project).” *See id.*, Ex. D at 1.

4 The 2021 Plan provides an “initial minimum” Project Supply of 33,000 AF. Kirby Decl.  
5 ¶ 43. The 2021 Plan states that Project Supply from UKL will become available to charge  
6 Klamath Project canals and allow for limited irrigation no earlier than May 15 and remaining  
7 Project deliveries will begin no earlier than June 1. *Id.* ¶ 43. Additionally, in a deviation from the  
8 Interim Plan, the 2021 Plan uses 4138.3 feet as the floor for UKL level. *Id.* ¶ 45.

#### 9 IV. LEGAL BACKGROUND

##### 10 A. ESA Section 7

11 The legislation underlying this action is Section 7 of the ESA. Section 7(a)(2) of the ESA  
12 requires action agencies to ensure that any discretionary action or project they authorize, fund, and  
13 carry out “is not likely to jeopardize the continued existence of any endangered or threatened  
14 species or result in the destruction or adverse modification” of critical habitat designated for such  
15 species. 16 U.S.C. § 1536(a)(2). To assist in compliance with this obligation, federal action  
16 agencies must consult with federal fish and wildlife agencies – either or both of the Services – on  
17 the potential impacts of a proposed action on endangered and threatened species and their critical  
18 habitat. *Id.* § 1536(a)(2), (3). This consultation process may result in the issuance of a BiOp that  
19 analyzes the effects of the proposed action and includes the consulting agency’s conclusion as to  
20 whether the proposed action likely will or will not jeopardize the continued existence of the listed  
21 species or destroy or adversely modify its critical habitat. *Id.* § 1536(b)(3); 50 C.F.R.  
22 § 402.14(h)(2), (3). If so, the consulting agency must include in its BiOp reasonable and prudent  
23 alternatives (RPAs) that, if followed by the action agency, would avoid jeopardizing the listed  
24 species or destroying or adversely modifying critical habitat. 16 U.S.C. § 1536(b)(3)(A);  
25 50 C.F.R. § 402.14(h)(3).

26 Issuance of a BiOp concludes formal consultation. 50 C.F.R. § 402.02. After receipt of a  
27 BiOp, the action agency determines how to proceed in light of its substantive obligations under the  
28



1 ESA. *Id.* § 402.15(a). An action agency must reinitiate consultation under certain circumstances.  
2 *Id.* §§ 402.14(i)(4), 402.16(a), (b).

3 The obligation to consult under Section 7(a)(2), or reinitiate consultation, only applies to  
4 agency actions in which there is discretionary federal involvement or control. 50 C.F.R.  
5 §§ 402.03, 402.16.

6 **B. Standard for Lifting Stay**

7 Under the Stipulation for Stay, any party to the litigation may file a motion to lift the stay  
8 and resume the litigation only on the grounds that Reclamation is not implementing the Interim  
9 Plan or complying with the terms and conditions of the Stipulation for Stay. ECF No. 907, at 5.

10 Beyond the Stipulation for Stay, a district court has broad discretion to stay proceedings as  
11 an incident to its power to control its docket. *United States v. Fallbrook Pub. Util. Dist.*,  
12 No. 51-cv-1247-GPC(RBB), 2017 U.S. Dist. LEXIS 53782, at \*12 (S.D. Cal. Apr. 6, 2017)  
13 (*Fallbrook*) (citing *Landis v. N. Am. Co.*, 299 U.S. 248 (1936)). “In determining whether to grant  
14 a motion to stay, ‘the competing interests which will be affected by the granting or refusal to grant  
15 a stay must be weighed.’ ” *Id.* at \*12 (quoting *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110  
16 (9th Cir. 2005)). The interests to be considered by the court include:

17 (1) the possible damage which may result from the granting of the stay, (2) the  
18 hardship or inequity which a party may suffer in being required to go forward, and  
19 (3) the orderly course of justice measured in terms of the simplifying or  
complicating of issues, proof, and questions of law which could be expected to  
result from a stay.”

20 *Id.* at \*12-13.

21 The corollary of the power to stay proceedings is the ability to lift the stay. *Fallbrook*,  
22 No. 51-cv-1247-GPC(RBB), 2017 U.S. Dist. LEXIS 53782, at \*13 (citations and quotes omitted);  
23 *see also Akeena Solar Inc. v. Zep Solar Inc.*, No. C 09-05040 JSW, 2011 U.S. Dist. LEXIS 72847,  
24 at \*4 (N.D. Cal. July 7, 2011) (quoting *Canady v. Erbe Elektromedizin GmbH*, 271 F. Supp. 2d  
25 64, 74 (D.D.C. 2002)). “A court may lift the stay when ‘circumstances have changed such that the  
26 court’s reasons for imposing the stay no longer exist or are inappropriate.’ ” *Fallbrook*, 2017 U.S.  
27 Dist. LEXIS 53782, at \*13 (quoting *Canady*, 271 F. Supp. 2d at 75); *see also Agua Caliente Band*  
28 *of Cahuilla Indians v. Coachella Valley Water Dist.*, No. EDCV 12-0883 JGB (SPx), 2017 U.S.

1 Dist. LEXIS 223356, at \*14-15 (C.D. Cal. June 5, 2017) (explaining that circumstances have  
 2 changed since the court imposed the stay that justify lifting the stay, and proceeding with litigating  
 3 “Phase II” and quantifying the tribe’s water rights while parties pursued an appeal of a Ninth  
 4 Circuit ruling).

## 5 V. ARGUMENT

6 KWUA requests that the Court lift its stay of the litigation, proceed with adjudication of  
 7 KWUA’s MSJ, and otherwise proceed with litigating the merits of the claims in the First  
 8 Amended Complaint in an orderly and efficient manner.<sup>2</sup> Reclamation is not implementing the  
 9 Interim Plan, and even if it were, the stay should be lifted under the Court’s inherent authority to  
 10 do so.

### 11 A. Reclamation Is Not Implementing the Interim Plan

#### 12 1. Reclamation’s 2021 Plan Expressly Deviates from the Interim Plan

13 The 2021 Plan, and transmitting correspondence, state that Reclamation will not comply  
 14 with the terms of the Interim Plan: “Critically dry and extraordinary hydrologic conditions in the  
 15 Klamath River Basin will prevent full simultaneous satisfaction of requirements for ESA-listed  
 16 species in Upper Klamath Lake (UKL) and the Klamath River, as specified in the 2018 Modified  
 17 Operations Plan/Interim Operations Plan (IOP) and the BiOps, even without water deliveries to  
 18 the Klamath Project (Project).” *See* Kirby Decl., Ex. D at 1. Thus, Reclamation is presently not in  
 19 compliance with the Interim Plan, and will not comply with the Interim Plan for the remainder of  
 20 2021.

#### 21 2. The Interim Plan Made Commitments Not to Adversely Affect Project Supply 22 Beyond the Terms Identified in the Interim Plan, But Those Commitments Have Not Been Honored

23 In the Interim Plan, Reclamation states that when certain hydrologic conditions are met  
 24 Reclamation will provide Environmental Water Account (EWA) “augmentation” flows of  
 25 40,000 AF. Interim Plan at 2, ECF No. 907-1. “The 40,000 AF of EWA augmentation would be  
 26 comprised of 23,000 AF from Project Supply and 17,000 AF from storage volume from UKL.”  
 27

28 <sup>2</sup> KWUA is not seeking preliminary relief or any set-aside or other action with respect to the  
 Interim Plan at this time.

1 *Id.* Further, if the EWA augmentation is triggered, “it would result in a reduction to Project  
2 Supply that is limited to and shall not exceed 23,000 AF. **The EWA augmentation would not**  
3 **otherwise affect Project operations, including Project diversion rates and timing other than**  
4 **that caused by the above-described potential reduction in Project Supply during the spring-**  
5 **summer period.”** *Id.* (emphasis added).

6 Despite the express assurances in the Interim Plan, Project operations have been  
7 “otherwise” adversely affected in 2020 by the EWA augmentation flow and will be adversely  
8 affected under Reclamation’s 2021 Plan. Kirby Decl. ¶ 53. The effects include: a change in the  
9 timing of up to two months or more for when irrigation diversions will begin in 2021; a lack of  
10 adequate carryover water storage from 2020 to 2021, in part based on 2020’s inappropriately  
11 triggered augmentation flow; and, a modification to the minimum lake level for UKL for 2021,  
12 which contrasts with the science-based minimum lake level minimum provided by USFWS. *Id.*  
13 ¶¶ 43, 45.

14 a. **Reclamation’s Actions Have Resulted in the Delay of the Irrigation**  
15 **Season, Negating the Commitment Not to Affect Diversion Rates and**  
16 **Timing**

17 Certainty in the Project Supply and starting the irrigation season by the beginning of April  
18 is a necessity for agricultural and irrigation operations. Under Reclamation’s 2021 Plan, Project  
19 districts have been told not to divert any Project Supply until at least May 15 for “limited”  
20 irrigation, and until at least June 1 or later otherwise. Kirby Decl. ¶ 46. This “late start” is  
21 severely damaging and causing irreversible damage to district and farm operations, and crops. *Id.*  
22 The 2021 Plan’s calendar is a severe, new constraint that is not a component of the Interim Plan.  
23 *See id.*

24 With respect to agricultural operations, farmers make planting decisions and crop choices  
25 based on projected water deliveries from UKL that are announced in April. DuVal Decl. ¶ 8. To  
26 successfully produce any plant or any value from a potato or alfalfa crop requires adequate  
27 irrigation throughout the short Klamath Basin growing season. *Id.* ¶ 10. For example, alfalfa goes  
28 dormant without water, and some varieties in the Project can be lost completely in the event  
irrigation water is not timely applied. *Id.* ¶ 11. Potatoes are normally planted in April and May,

1 and harvested in October, and thus potato farmers need adequate water through the end of  
2 September. *Id.* ¶ 12. After making planting decisions, farmers then must invest in field  
3 preparation, seed purchases, soil improvements, equipment, and employment of workers. *Id.* ¶ 9.  
4 Farmers also have to pay irrigation district assessments, obtain financing, enter into contracts for  
5 the delivery of crops when harvested in the fall, install irrigation equipment, and secure fertilizer.  
6 *Id.* ¶ 14. Uncertainty in water supply and water shortages affects farmers' ability to fulfill existing  
7 contracts, earn new multi-year contracts, obtain or repay financing or make payments for  
8 machinery, insurance premiums, laborers, or otherwise support their families. *Id.* ¶ 19. Thus, the  
9 quantity of water is important, but also the timing and certainty of the allocated water is crucial as  
10 farmers make expensive decisions to properly plan for the upcoming year's crops. *Id.*

11 For irrigation operations, districts in the Project typically begin in early- to mid-March.  
12 Kirby Decl. ¶ 22. This begins by charging the open ditch/canal irrigation systems as dry canals  
13 must first be wetted before water can be delivered and efficiently travel through the system. *Id.*  
14 ¶ 23. The 2021 Plan deviates from the Interim Plan's assurance that it would not otherwise impact  
15 "timing" of Project deliveries. Because Reclamation's 2021 Plan is not in compliance with the  
16 Interim Plan, and severely impacts the timing of Project deliveries beyond the scope of the Interim  
17 Plan, the Court should lift the stay.

18 **b. Operations Under the Interim Plan in 2020 Has Reduced the Project**  
19 **Supply for 2021**

20 Project operations in 2020 have impacted the Project's allocation as set forth in the  
21 2021 Plan, in a manner that deviates from the Interim Plan. In 2020, the Project Supply allocation  
22 announced in April was a total of 140,000 AF. Kirby Decl. ¶ 28. Due to errors in the forecasting  
23 and the reality of the 2020 hydrology, that allocation was revised to approximately 80,000 AF for  
24 the summer, after farmers had planted potatoes and onions and made the corollary investments  
25 based on the commitment to 140,000 AF allocation. *Id.* ¶ 34. Ultimately, by June, actual inflows  
26 had caught up to initial forecasts, and the Project Supply allocation returned to approximately  
27 140,000 to 147,000 AF. *Id.* ¶ 35.

28

1 The 2020 Project Supply was the second worst year of irrigation water delivery ever.  
2 Kirby Decl. ¶ 34. Operations at Tulelake Irrigation District (TID) were at such a low diversion  
3 rate that diversions and deliveries had to be managed so that water was always moving in the ditch  
4 system, so no additional supplies were used as carriage water. *Id.* ¶ 36. TID also managed to  
5 divert approximately 9,000 AF to Tule Lake National Wildlife Refuge, in lieu of delivery to  
6 farmers with a higher legal priority, to assist with the botulism outbreaks that were occurring on  
7 the Refuge. *Id.* ¶ 37. This was the first time water was pulled and delivered to the Refuge before  
8 irrigation deliveries. *Id.* By the end of the 2020 irrigation season, the UKL elevation was at  
9 4138.21 feet, Project Supply was 140,000 AF, and EWA released to the Klamath River was  
10 415,000 AF. *Id.* ¶ 38. In addition, the EWA augmentation volume for spring flushing flows was  
11 reduced to only 15,000 AF rather than the 40,000 AF (23,000 AF + 17,000 AF) that was  
12 projected. *Id.* ¶ 34. Notwithstanding that the total EWA augmentation was less than 40,000 AF,  
13 the Project Supply was reduced by its full 23,000 AF, and this remained true through the irrigation  
14 season (in other words, despite the express language in the Interim Plan, UKL did not provide  
15 augmentation flows and, in fact, functionally, less water was released from UKL for the river even  
16 if there had been no augmentation flow). *Id.* UKL did not make any of its 17,000 AF contribution  
17 set forth in the Interim Plan, but the Project allocation made its full 23,000 AF contribution. *Id.*  
18 This caused significant confusion for all water users. *Id.* Overall, if there had not been an over-  
19 forecast, then the 40,000 AF of augmentation flow would not have been triggered. But, by the  
20 time the over-forecast was corrected in May, 15,000 AF of water had already flowed down the  
21 river. *Id.* The loss of 15,000 AF due to the over-forecast contributed to a lack of sufficient  
22 carryover storage, which has reduced the Project allocation for 2021, as set forth in the 2021 Plan.  
23 This is a constraint on Project operations that goes beyond the EWA augmentation assurances set  
24 forth in the Interim Plan.

25 **c. Conditions Imposed by USFWS Not Considered by the Interim Plan**  
26 **Are Now Controlling Operations**

27 The 2021 Plan includes conditions imposed by USFWS and adopted by Reclamation that  
28 were not considered by the Interim Plan. The 2021 Plan uses 4138.3 feet in elevation as the floor

1 for UKL levels, even though the BiOp for the Interim Plan sets the minimum at 4138.0 feet.  
2 Kirby Decl. ¶ 45. The new requirement, announced on April 14, 2021, to now keep 4138.3 feet  
3 (above the Interim Plan’s minimum) in UKL equals an increase of 20,515 AF that has to remain in  
4 UKL. *Id.* In 2021, there has been minimal winter precipitation. *Id.* ¶ 45. The resulting inflows  
5 from the tributaries of UKL have been extremely low to the point of setting many daily record  
6 lows, and the cumulative UKL net inflow for the water year beginning October 1, 2020, to date is  
7 the lowest on record out of the last 41 years. *Id.* Because there has been very little runoff from  
8 the dry winter, limited carryover storage in UKL from 2020, and greater releases from UKL  
9 required to meet Iron Gate minimum flows due to lower accretions between Link River Dam and  
10 Iron Gate Dam than previous years, the UKL elevation is at a very low level in this early point of  
11 the irrigation season. *Id.*

12 KWUA agreed to enter the Stipulation for Stay for various reasons, including assurances in  
13 the Interim Plan that Klamath Project Supply would not be affected more than the 23,000 AF  
14 identified in the Interim Plan. Kirby Decl. ¶ 47. In reality, this has not happened. KWUA and its  
15 members, as a result of 2020 operations under the Interim Plan and based on the 2021 Plan have  
16 been impacted beyond the scope of the Interim Plan: the timing for irrigation is set back up to two  
17 months from normal and the necessary certainty of the April allocation has been eroded, available  
18 Project Supply has been severely limited by 2020 EWA augmentation that was improperly  
19 triggered (and the Project has faced the full burden of the mistake), and the 2021 Plan includes  
20 minimum lake levels that are beyond the scope of the applicable BiOp. Reclamation is not  
21 complying with the Interim Plan and the Court should lift the stay.

22 **B. The Stay Should be Lifted in Any Event**

23 **1. Circumstances Have Changed, and a Stay Is No Longer Justified**

24 **a. Key Federal Law Questions Are No Longer Being Heard Due to**  
25 **Dismissal of the Medford Cases**

26 As explained above, in April of 2019, KWUA and other irrigation parties filed lawsuits in  
27 the District of Oregon. The Medford Cases challenged the 2019 Operations Plan, alleging that  
28 Reclamation had exceeded its authority under ESA Section 7 in developing and issuing the 2019

1 Operations Plan, and that the release of stored Project water for instream Klamath River flows is  
2 not required by state or federal law. Simmons Decl., Ex. A, ¶¶ 75, 92.

3 In July of 2019, the Yurok Tribe and its co-plaintiffs filed its complaint initiating this  
4 litigation in this district, challenging the adequacy of NMFS's 2019 BiOp and Reclamation's  
5 compliance with the National Environmental Policy Act (NEPA) in adopting the 2019 Operations  
6 Plan. *See generally* ECF No. 1. Plaintiffs filed an amended complaint on September 30, 2019,  
7 after sending its citizen suit notice letter, adding claims against Reclamation, challenging  
8 Reclamation's compliance under ESA Section 7(a)(2) in operating under the 2019 Operations  
9 Plan, and alleging that Reclamation failed to reinstate consultation as required by ESA  
10 regulations. FAC ¶¶ 9, 138-56, ECF No. 17. On October 18, 2019, Plaintiffs filed their motion  
11 for preliminary injunction. ECF No. 27.

12 In the Medford Cases, in August of 2019, the Hoopa Valley Tribe and the Klamath Tribes,  
13 the other two tribes who claim federal reserved water rights in the Klamath Basin, filed their  
14 motions to intervene for the limited purpose of filing a motion to dismiss. The court granted  
15 intervention on November 6, 2019. In September 2020, the court dismissed the case for failure to  
16 join indispensable parties – the two tribes considered to be necessary parties but who would not  
17 waive sovereign immunity to join the suit. *KID v. USBR*, 2020 U.S. Dist. LEXIS 179680, at \*2-3.

18 KWUA's intervention in this case and agreement to the Stipulation for Stay was informed  
19 by the knowledge and understanding that legal questions concerning contemporary understandings  
20 of federal law including the application of ESA Section 7(a)(2) to the Project would be  
21 concurrently considered and decided in the Medford Cases. Kirby Decl. ¶ 49. KWUA frequently  
22 brought that issue to the Court's and the parties' attention, and preserved all arguments raised in  
23 the Medford Cases as this case proceeded through multiple rounds of briefing leading up to the  
24 Stipulation for Stay. *See, e.g.*, ECF No. 45, at 7:13-23; Stipulation for Stay ¶ 7, ECF No. 907.

25 There are serious questions – by all stakeholders – regarding the lawfulness of operations  
26 challenged in this case and the Medford Cases. However, KWUA and the irrigation parties are  
27 currently the stakeholders who do not have the ability to affirmatively litigate all those questions.

28

1 For this reason, the circumstances surrounding the stay have changed and justify lifting the stay so  
2 these legal issues can be heard in a federal district court.

3 **b. The Reinitiated Consultation Is Stalled**

4 Well before this Court entered its order approving the Stipulation for Stay, Reclamation  
5 had reinitiated the Section 7(a)(2) consultation on Project operations due to errors discovered in  
6 the modeling as a result of erroneous files provided by a consultant. AR D\_012921–22  
7 (Reclamation’s November 13, 2019 letter); AR D\_012923–24 (NMFS’s November 14, 2019  
8 confirmation letter); ECF No. 45, at 8-10 (explaining the circumstances surrounding  
9 Reclamation’s request to reinitiate consultation in fall of 2019). With that knowledge, part of the  
10 focus of the Stipulation for Stay and the Interim Plan was salvaging the relationships in the Basin  
11 following the disintegration of the KBRA and the litigation that followed. *See, e.g.*, Stipulation  
12 for Stay at 4, ECF No. 907 (committing to a collaborative process for the reinitiated consultation  
13 similar to the 2012 process); Interim Plan at 2, ECF No. 907-1 (describing the “Hydro Team” that  
14 the Yurok Tribe planned to convene throughout the reinitiation process).

15 As described in the statement of facts, after the Stay Order, Reclamation undertook the  
16 process for reinitiating consultation. A key element of that work was the evaluation of controlling  
17 legal authority and development of the Reassessment, which concluded earlier this year. The re-  
18 assessment established a legal framework for ESA consultation. However, on April 8, 2021, the  
19 re-assessment and supporting Solicitor’s memoranda were withdrawn. With the effective loss of  
20 12 months in the consultation process, the reinitiated consultation presumably will, once again,  
21 start over. Kirby Decl. ¶ 54. With the vacatur of the Reassessment, the timetable for that re-  
22 renewed process is uncertain. *Id.* The Stipulation for Stay was premised upon a timely process to  
23 reach a collaborative outcome in the new consultation. *Id.* There is now no progress on this  
24 consultation, and the fundamental legal issues are no closer to being resolved – by the agencies or  
25 by a court. Thus, the circumstances supporting the issuance of the stay have changed, and this  
26 Court is needed to provide those legal determinations so that the next consultation can move  
27 forward.



1                   c.       **It Is Clear after Two Water Years Under the Interim Plan that There**  
2                                   **Is No Coherent Plan for Dry Years**

3                   The Interim Plan does not work. It did not work in 2020, as detailed in the Kirby Decl.  
4 ¶¶ 30-39. The significant drought and expected low inflows at current projections, the required  
5 annual release minimum of 400,000 AF for EWA flows, and the requirement in the 2021  
6 Operating Procedures to keep UKL elevation at 4138.3 feet have all affected and will continue to  
7 affect the Project Supply in ways that are inconsistent with the Interim Plan. *Id.* ¶ 45. In its first  
8 two years, the Interim Plan did and will not work, and there is no reason to let it try again in 2022.

9                   2.       **No Damage or Hardship Will Result from Lifting the Stay, and Proceeding**  
10                                   **with Litigation of the Merits Will Actually Serve the Orderly Course of Justice**

11                   As stated above, KWUA is not by this motion seeking any preliminary relief in terms of  
12 2021 Project operations. However, based on events of the last year, KWUA and other parties need  
13 a determination on the proper scope of Reclamation's authority and obligations under ESA  
14 Section 7(a)(2), and authority and obligations with respect to stored water in the Project. The first  
15 attempt to do this in the Reassessment has been rescinded. Both the timeline for the reinitiated  
16 consultation and the stay, and gravity of the situation on the ground, require that this issue now be  
17 decided by a federal court.

18                   While this litigation has been stayed, KWUA and other irrigation parties have lost the  
19 ability to obtain a determination of these legal issues in the Medford Cases due to the assertion, by  
20 tribes other than the Plaintiff Yurok Tribe, of both necessary party status and sovereign immunity.  
21 Other litigation has proliferated in Oregon state court. Yet, the federal law and current ESA  
22 Section 7(a)(2) questions loom undecided.

23                   Plaintiffs here have directly raised, at the very least, Reclamation's Section 7(a)(2)  
24 obligation in operating the Project in the First Amended Complaint. FAC ¶¶ 9, 138-56, ECF  
25 No. 17. Plaintiffs sent a 60-day notice letter to establish jurisdiction for these claims. *Id.* ¶ 9.  
26 These actions indicate Plaintiffs' willingness to consent to the Court's jurisdiction and be bound by  
27 the judgment of the Court after its decision on the merits. Plaintiffs therefore will not be harmed  
28 by proceeding with the litigation, they initiated according to the terms of the First Amended

1 Complaint that they filed. Plaintiffs also previously moved to lift the stay last year, approximately  
2 two months after the stay was entered, and concurrently filed a motion for temporary restraining  
3 order. ECF No. 909. At that time, Plaintiffs claimed that irreparable harm would occur if the  
4 Court did not lift the stay. ECF No. 909-1, at 15-22. Conditions are worse this year, and the need  
5 to litigate the issues pled in the First Amended Complaint has only increased.

6 Federal Defendants would also benefit from a legal determination of the scope of their  
7 authorities and obligations in coordinating operations of the Project and conducting consultations  
8 for Project operations. The recent actions by the Secretary in withdrawing the Reassessment show  
9 that the agencies are no closer to resolving these questions administratively and internally than  
10 they were when the Stipulation for Stay was entered.

11 Likewise, KWUA will not be harmed by proceeding with the litigation, and strongly  
12 desires to bring about resolution of these issues. The costs and uncertainties of litigation are  
13 outweighed by the benefit of having judicial resolution of critical issues. Water shortage adversely  
14 affects the agricultural businesses and economy in the region. DuVal Decl. ¶¶ 5, 20. The human  
15 impacts from water shortage are more severe. *Id.* ¶ 21-22. Fear and anxiety are rippling  
16 throughout the community as the reality of the 2021 Project Supply is settling in. *Id.* ¶¶ 23-24.

17 The ability to bring a dispute to a court for judicial review is an essential foundation of our  
18 government and trust in government. KWUA and other irrigation parties have attempted to seek  
19 judicial review of core legal issues in the Medford Cases, but the courthouse door is closed to  
20 irrigation parties who wish to challenge Reclamation's decisions. Proceeding with the litigation of  
21 the merits of the First Amended Complaint will at least provide access to the court for affected  
22 communities. In that most fundamental way, the feeling of being heard, lifting the stay, will serve  
23 the "orderly course of justice." *See Fallbrook*, 2017 U.S. Dist. LEXIS 53782, at \*12-13.

#### 24 **C. Case Management**

25 Submitted concurrently with this motion to lift stay is KWUA's motion for summary  
26 judgment on the Fifth and Sixth ESA Claims for Relief in the First Amended Complaint. KWUA  
27 contends that Reclamation does not have the discretionary authority to curtail storage, diversion, or  
28 use of water for irrigation in the Project, or the obligation or authority to release stored water for

1 minimum flows in the Klamath River for the benefit of fish species. If KWUA is correct, then the  
 2 Court need not decide Plaintiff's claims challenging the adequacy of the Section 7(a)(2) consultation  
 3 with NMFS, or at the least, the matter should be remanded to the agencies. This would be the most  
 4 efficient way to proceed. This Court has inherent authority to set forth "the sequence in which  
 5 issues will be briefed and decided" before it. *Brown v. Virga*, 2011 U.S. Dist. LEXIS 156279, at \*  
 6 15 (C.D. Cal. 2011); *White v. Pollard*, 2019 U.S. Dist. LEXIS 228089, at \*4-5 (C.D. Cal. 2019)  
 7 ("The sequence in which issues should be briefed is a highly discretionary one. The Court has the  
 8 inherent authority to regulate the course of proceedings before it."); *see also Lambrix v. Singletary*,  
 9 520 U.S. 518, 525 (1997). KWUA's motion for summary judgment presents threshold issues that, if  
 10 resolved in favor of KWUA, would make it unnecessary for the Court to take up Plaintiffs' Other  
 11 Claims. In KWUA's motion for summary judgement, KWUA respectfully asks that, in the interest  
 12 of judicial economy, this Court address the issues raised in this Motion as to Plaintiffs' Fifth and  
 13 Sixth Claims for Relief before taking up any other motions or argument concerning Plaintiffs' Other  
 14 Claims.

15 KWUA is also amenable to cooperative discussion with other parties to propose further case  
 16 management proposals premised and contingent on a lifting of the stay. KWUA is committed to  
 17 seeking the most efficient and orderly manner in which the Court may proceed to a merits decision  
 18 on the federal questions that all parties realize to be critical.

## 19 VI. CONCLUSION

20 For the foregoing reasons, KWUA respectfully submits that this Court should lift the stay  
 21 entered in this action on March 27, 2020, ECF No. 908, and adjudicate KWUA's motion for  
 22 summary judgment.

23 SOMACH SIMMONS & DUNN, PC

24 DATED: April 19, 2021

By s/ Paul S. Simmons

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