

SOMACH SIMMONS & DUNN
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SOMACH SIMMONS & DUNN, PC
A Professional Corporation
PAUL S. SIMMONS, ESQ. (SBN 127920)
BRITTANY K. JOHNSON, ESQ. (SBN 282001)
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: (916) 446-7979
Facsimile: (916) 446-8199
psimmons@somachlaw.com
bjohnson@somachlaw.com

Attorneys for Defendant-Intervenor
KLAMATH WATER USERS ASSOCIATION

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

YUOK TRIBE, *et al.*,

Plaintiffs,

v.

U.S. BUREAU OF RECLAMATION, and
NATIONAL MARINE FISHERIES SERVICE,

Defendants.

KLAMATH WATER USERS ASSOCIATION,

Defendant-Intervenor.

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

KLAMATH WATER USERS
ASSOCIATION'S OPPOSITION TO
MOTION TO LIFT STAY AND FOR
TEMPORARY RESTRAINING ORDER

Judge: Honorable William H. Orrick
Hearing Date: May 22, 2020
Hearing Time: 10:00 am (via Zoom)

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I. INTRODUCTION

Farm and ranch families are not sheltering in place. Each day, they leave the house early and come home late, their work dramatically changed by the adaptation in real time necessary to protect employees, suppliers, and all their families. Food is important, and society takes for granted that essential food producers will go out, and work.

For the producers and rural communities that rely on water delivery from the Klamath Project in 2020, the challenges and anxiety have increased exponentially. In early April, they became aware that the available irrigation water would be far less than needed: only about 140,000 acre-feet (AF); less than 40 percent of what is needed. Whether for a human or for crops, to have only 40 percent of a necessary water supply is a problem. Yet, producers worked hard to manage intensely and do the best with what there would be. They drew up creative farm plans and went to work, borrowing money, planting, revising rotational plans, mobilizing extremely limited groundwater supplies where possible, and working with their irrigation districts to provide for the best management of a system not designed to work with so little.

Then in early May, Project producers learned that the water supply would likely be cut further, and drastically, to barely more than half of what was understood and planned around in April. There is a real prospect of crops, investments, and livelihoods simply disappearing. Even still, producers' and water managers' incredible management has only intensified to do the very most with very little and continue to survive and produce. Duress and anxiety are palpable, further compounded by the inability to gather as a community in congregations, schools, and meeting rooms for ten weeks now. Unfortunately, essential producers are demonized as enemies of the environment. This case targets their water provider, the U.S. Bureau of Reclamation (Reclamation), but it is the farm families and their communities who will suffer more if their water supply diminishes further.

Plaintiffs, repeatedly and artfully, suggest that Reclamation has "cut off" augmentation flows to the Klamath River, "pushing threatened Coho further to the brink." ECF No. 909-1

at 13:9-10, 14:2, 16:10-11, 21:5-6, 21:11-12.¹ Divorced from context or fact, Plaintiffs' argument might be troubling. But they do not inform the Court that, this year, the Klamath Project Environmental Water Account (EWA), the amount of water released from the Project to the Klamath River from March to October, will be over 400,000 AF. Again, the Project Supply for irrigation will likely be less than 100,000 AF. Plaintiffs' third rendition of a motion seeking injunctive relief asks the Court to accept on faith that an increase of a few percent in EWA is essential to remedy an otherwise irreparable harm that will occur before they can file and set for hearing a new motion for preliminary injunction and obtain an adjudication of now-moot claims. In all three motions, Plaintiffs have never explained why a given number of acre-feet will remedy the harms they allege will occur; they just ask for a number.

The facts are that in 2020, the flow in the Klamath River from now until the end of September will be greater than would occur in a state of nature or if there were no operation of the Klamath Project at all. This is in large part because planned releases from Upper Klamath Lake (UKL) water storage is projected to result in over 170,000 AF *more* water flowing below Iron Gate Dam than would occur if there were no operation of the Project at all. Third Declaration of Brad Kirby ¶¶ 17-18 and Ex. C (Third Kirby Decl.).

Defendant-Intervenor Klamath Water Users Association (Intervenor) respects the legitimate interests of the Plaintiffs in having enough fish for their own harvest. But the Court must not assume that squeezing the last drops of water from the Project will make a difference for the fisheries. Regrettably, numbers of salmon returning to spawn in the river are low as they sometimes are in the cyclical pattern of fish behavior. Decl. of Mark Johnson in Supp. of Intervenor's Opp'n to Mot. for Prelim. Inj. ¶ 10 & fig. 5, ECF No. 45-3 (First Johnson Decl.). But salmon population cycles are, overwhelmingly, driven by ocean conditions. Decl. of Hans Berge in Supp. of Intervenor's Opp'n to Mot. for Prelim. Inj. ¶¶ 11, 19, ECF No. 45-1 (Berge Decl.). Empirical data show that there is no discernible correlation between variations in

¹ Unless otherwise noted, references to the docket in this case refer to ECF pagination.

1 Klamath River flows and the size of later-returning adult salmon runs. First Johnson Decl.
2 ¶¶ 11-12.

3 Further, and relevant to this case brought under the Endangered Species Act (ESA),
4 counts of genotype II spores, the genotype that affects threatened coho salmon, have not been
5 unusually elevated, are not at levels of concern, and never have been this year. Third Johnson
6 Decl. ¶¶ 4, 6. Further, coho salmon spawn and rear in tributaries to the Klamath River, and use
7 the mainstem Klamath River as a migration corridor. Berge Decl. ¶¶ 4, 8, 11, ECF No. 45-1.
8 Plaintiffs offer no evidence that any coho salmon are even present in the river, and the time of
9 peak typical outmigration has passed. *See* Decl. of Steve Cramer in Supp. of Intervenor's Opp'n
10 to Mot. for Prelim. Inj. ¶ 12, ECF No. 45-2 (Cramer Decl.) (explaining that smolt downriver
11 emigration at upper locations begins in March and peaks in April).

12 The instant motion seeks three different forms of relief. Plaintiffs first ask the Court to lift
13 the stay of the litigation, claiming that Reclamation is not acting in accordance with the Interim
14 Operations Plan (Interim Plan) developed to allow for the continued operation of the Project
15 pending the completion of the reinitiated consultation efforts. *See* ECF No. 909-1 at 6:11-16.
16 Plaintiffs have not shown that Reclamation's actions during the last few weeks depart from the
17 Interim Plan, and this relief should be denied.

18 Plaintiffs then ask the Court to "reinstate" Plaintiffs' already-modified motion for
19 preliminary injunction, which Plaintiffs intend to "modify" further in both the amount of water
20 requested and the basis for providing that water. *See* ECF No. 909-1 at 6:19-8:12. Plaintiffs'
21 prior motions were based on claims challenging the adequacy of the 2019 biological opinion
22 (2019 BiOp) issued by the National Marine Fisheries Service (NMFS) and Reclamation's
23 reliance on the 2019 BiOp to satisfy its ESA Section 7 obligations. *See* section II.A-C, *infra*.
24 Those agency actions have been modified by the Interim Plan and NMFS's concurrence letter
25 evaluating the Interim Plan. Plaintiffs make no attempt to explain how the Court can "reinstate" a
26 motion that has been wholly reformed twice and that is unsupported by the operative complaint
27 and 60-day notice letter. If Plaintiffs truly seek a preliminary injunction on the grounds asserted
28

1 in the instant motion, they must notice a new motion and explain how the Court can possibly
2 grant the requested relief based on the current record.

3 Last, Plaintiffs ask the Court to enter a temporary restraining order (TRO) requiring
4 Reclamation to release flows from Iron Gate Dam as required under the 2019 BiOp, but without
5 the Interim Plan, plus an additional 390 cubic feet per second (cfs). These flows would continue
6 until the additional flow volume above the 2019 BiOp requirement reaches 23,000 AF, less the
7 (unspecified) amount of water already provided under the Interim Plan, or until the Court decides
8 a motion for preliminary injunction to obtain the same 23,000 AF. Additionally, Plaintiffs seek
9 7,000 AF for the boat dance, a non-ESA purpose not previously mentioned in any briefing thus
10 far. *See* ECF No. 909-1 at 8:13-9:5. This operational direction is nonsensical. Reclamation and
11 irrigation districts cannot be expected to operate a reclamation project and all its moving parts
12 based on Plaintiffs' ever-changing instructions.

13 Beyond the impractical nature of the proposed order, Plaintiffs fail to explain how this
14 flow regime will prevent the irreparable harm that will allegedly result from the ESA violations
15 that Plaintiffs have pled. Plaintiffs also fail to confront the other factors required to obtain
16 injunctive relief, namely that the balance of equities tip in Plaintiffs' favor and that the injunction
17 is in the public interest. Here, Plaintiffs' request to release an arbitrary amount of water for
18 whatever number of coho may be in the river that are not exposed to harmful spore
19 concentrations, must be weighed against the equity of further reductions in Project allocations
20 after significant investment has occurred and against the impact of falling UKL elevations.

21 Plaintiffs' motion for the proposed TRO and all other relief should be denied, the
22 litigation should remain stayed (or preferably dismissed), and Reclamation should continue to
23 work with stakeholders to manage the limited supply of water that is left, without court
24 intervention.

25 **II. HISTORY OF THE TRIBE'S REQUESTS FOR INJUNCTIVE RELIEF**

26 **A. First Amended Complaint**

27 On September 30, 2019, Plaintiffs filed their First Amended Complaint for Declaratory
28 and Injunctive Relief (Complaint). ECF No. 17. The First, Second, and Third Claims allege that,

for various reasons, NMFS’s no-jeopardy and no-adverse modification conclusions in the 2019 BiOp violate the Administrative Procedure Act (APA). Compl. ¶¶ 96-108, 112-126. The Fourth Claim for Relief alleges that the incidental take statement in the 2019 BiOp is invalid. *Id.* ¶¶ 127-137. The Fifth Claim alleges that Reclamation and NMFS failed to reinstate consultation because the first year of operations under the 2019 BiOp revealed effects on the species and critical habitat not previously considered. *Id.* ¶¶ 138-150. The Sixth Claim alleges that Reclamation is in violation of ESA Section 7(a)(2) by relying on the 2019 BiOp. *Id.* ¶¶ 151-156. The Complaint then includes another three separate claims for relief, alleging that the environmental assessment (EA) and finding of no significant impact (FONSI) issued by Reclamation analyzing the effects of operations under the 2019 BiOp and other alternatives do not comply with the National Environmental Policy Act (NEPA) and are thus invalid under the APA. *Id.* ¶¶ 157-182.

A 60-day notice letter, dated July 30, 2019 (Notice Letter), is attached as an exhibit to the Complaint. ECF No. 17-1. The Notice Letter asserts that Reclamation is violating the ESA by failing to reinstate formal consultation on Project operations based on conditions observed in 2019, and that Reclamation is failing to satisfy its obligations under Section 7 of the ESA by relying on the 2019 BiOp. ECF No. 17-1 at 2-11.

B. October 18, 2019 Motion for Preliminary Injunction

On October 18, 2019, Plaintiffs moved for preliminary injunctive relief (First PI Motion). ECF Nos. 27, 27-1 to 27-8. The First PI Motion seeks preliminary injunctive relief based on the First, Second, Third, and Sixth Claims for Relief in the Complaint. ECF No. 27 at 13 n.4, 14, 19, 21. The First PI Motion requested that the Court require that Reclamation “operate the Klamath Project under the flow regime embodied in the predecessor 2013 biological opinion, plus the surface flushing and emergency dilution flows required in *Yurok I.*” *Id.* at 7. It was not clear what exactly Plaintiffs were requesting with respect to flushing flows based on contradictory statements, but Intervenor assumed that Plaintiffs desired surface flushing flows each year and deep flushing flows opportunistically. Plaintiffs also requested a reserve to provide dilution flows if certain triggers are met, consistent with the prior injunction which required a reserve of

1 50,000 AF. *Id.* at 4-5. The proposed order submitted by the Plaintiffs also stated that, “the
2 mitigation measures shall not interfere with conditions necessary to protect sucker fish as
3 determined by NMFS in either the 2013 or 2019 biological opinions.” ECF No. 27-1 at 5.

4 Intervenor opposed the First PI Motion and filed supporting declarations explaining why a
5 return to the 2013 biological opinion was problematic, why irreparable harm was not likely to
6 occur to coho, and how uncertainty in Project allocations and reductions to Project Supply would
7 cause harm to irrigators and rural communities. *See* ECF No. 45; Berge Decl., ECF No. 45-1
8 (fisheries expert); Cramer Decl., ECF No. 45-2 (fisheries expert); First Johnson Decl., ECF
9 No. 45-3 (deputy director for Intervenor); Decl. of Brad Kirby in Supp. of Intervenor’s Opp’n to
10 Mot. for Prelim. Inj., ECF No. 45-4 (First Kirby Decl.) (Project operations expert); Decl. of Luke
11 Robison in Supp. of Intervenor’s Opp’n to Mot. for Prelim. Inj., ECF No. 45-5 (grower). Federal
12 Defendants also opposed and filed supporting declarations from agency officials. ECF Nos. 46,
13 46-1 to 46-3.

14 **C. January 22, 2020 “Modified” Motion for Preliminary Injunction**

15 On January 22, 2020, Plaintiffs filed a reply brief in which they “modif[ied]” the relief
16 requested in their First PI Motion (Modified PI Motion). *See* ECF No. 48 at 7:1-10. With this
17 modification, Plaintiffs asked the Court to order Reclamation to continue to operate based on the
18 2019 Plan and add 50,000 AF of water to the EWA for the purpose of increasing spring-habitat
19 forming flows. *Id.* at 7:11-25. Plaintiffs specifically included the qualification that the “modified
20 relief requested would not require particular dilution flows” and that “there [was] no need for the
21 parties’ technical experts to work out the parameters of such flows.” *Id.* at 7:22-24. Instead, the
22 “additional water in the EWA would be used during the spring months to provide accessible
23 rearing habitat and/or for an emergency dilution flow based on the recommendations of the
24 technical experts and subject to the 2019 Plan’s sucker requirements.” *Id.* at 7:17-20. Plaintiffs
25 also “dropp[ed]” certain arguments that had contended that they were likely to succeed on the
26 merits. *Id.* at 15 n.6.

27 Intervenor again opposed the Modified PI Motion. *See generally* ECF Nos. 54, 54-1,
28 54-2. Intervenor explained that:

- 1 • Plaintiffs offered no reasoning why the arbitrary amount of 50,000 AF would be sufficient
- 2 to remedy any alleged harm, ECF No. 54 at 5, 7 ;
- 3 • Plaintiffs failed to address why their First PI Motion or the Modified PI Motion are not
- 4 moot, *id.* at 5-6;
- 5 • Under the 2019 Plan, in the majority of years, the operation of the Project increases, not
- 6 decreases, the quantity of Klamath River flows in June versus flows that would otherwise
- 7 occur absent storage provided by the Project, *id.* at 8;
- 8 • The great majority of salmon migrate out of the river by early May, *id.*; and
- 9 • Plaintiffs admit that their requested flows are not for an ESA-listed species, despite
- 10 seeking injunctive relief based on claims pled under the ESA, not tribal trust obligations,
- 11 *id.* at 10-11.

12 Federal Defendants also opposed the Modified PI Motion. ECF No. 57.

13 **D. Stipulation to Stay the Litigation**

14 On March 27, 2020, the parties filed the Stipulation to Stay Litigation (Stipulation). ECF
15 No. 907. The key provisions of the stipulation are:

- 16 • Plaintiffs withdraw the First PI Motion and Modified PI Motion, Stipulation ¶ 1;
- 17 • The litigation is stayed so long as Reclamation operates the Klamath Project in accordance
- 18 with the Interim Plan, *id.* ¶ 3;
- 19 • If Reclamation does not operate the Project in accordance with the Interim Plan, then a
- 20 party may file a motion seeking to lift the stay and resume the litigation, *id.* ¶¶ 4, 6; and
- 21 • “No party may seek specific performance of any term or condition of this Stipulation or
- 22 the Interim Plan.” *Id.* ¶ 6.

23 The Interim Plan is attached to the Stipulation. ECF No. 907-2. More details on the Interim Plan
24 are provided below.

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III. NEW ESA OPERATING REGIME

A. Reclamation Reinitiated Consultation Upon Discovery of an Error Perpetuated by Plaintiffs' Declarant

In prior briefing, Intervenor and Federal Defendants explained the error in the habitat modeling used for the 2019 BiOp as a result of the incorrect files sent by Plaintiffs' declarant, Dr. Thomas Hardy, to agency staff. *See* ECF No. 45 at 13-15; ECF No. 46 at 13-15. Ultimately, Reclamation determined it was necessary to reinitiate consultation with NMFS. ECF No. 45 at 14:24-25 (citing November 13, 2019 reinitiation letter). On February 7, 2020, Reclamation submitted a Final Biological Assessment on the Effects of the Proposed Action to Operate the Klamath Project from April 1, 2020 through March 31, 2024 on Federally Listed Threatened and Endangered Species (2020 BA). ECF No. 907-2 at 2-3. Reclamation requested that the formal consultations be completed by March 31, 2020. *Id.* at 3.

B. Reclamation Adopted the Interim Plan Last Month

Subsequent to the transmission of the 2020 BA, "Reclamation and the Services agree[d] that it is in the public interest that additional time be provided to complete the consultations on Project operations." ECF No. 907-2 at 3. Reclamation intends to develop a new operations plan in lieu of the 2020 BA, informed by a collaborative process with stakeholders and agency technical staff, to submit to NMFS and the U.S. Fish and Wildlife Service (FWS) (collectively, "Services"). *Id.* Reclamation proposed to operate the Project based on the Interim Plan until the earlier of September 30, 2022, or the completion of the reinitiated consultation on the modified operations plan developed based on the collaborative process. *Id.*

The Interim Plan incorporates the 2019 Plan, with the following deviation. Reclamation proposed to provide an additional 40,000 AF of water to the EWA in years when UKL supply is at or above 550,000 AF or below 950,000 AF. ECF No. 907-2 at 3. This additional block of water is called "EWA augmentation" flow or volume. *Id.* The EWA augmentation volume is in addition to the enhanced May/June flows in the 2019 Plan. *Id.* The 40,000 AF is comprised of 23,000 AF from Project Supply and 17,000 AF from storage volume in UKL. *Id.* Whether the

1 EWA augmentation volume is available in a given year is based on the April 1 forecast and UKL
2 supply. The following conditions further qualify the use of the EWA augmentation volume:

- 3 • “When the EWA augmentation is triggered, it would result in a reduction to Project
4 Supply that is limited to, and shall not exceed, 23,000 AF.” *Id.*
- 5 • “Reclamation would maintain a flexible approach to utilizing the proposed 40,000 AF of
6 EWA augmentation and enhanced May/June flows. With the exception that the EWA
7 augmentation water and enhanced May/June flows would be utilized within the March
8 through June timeframe, Reclamation would allow for flexibility in the timing and
9 distribution of augmentation volumes.” *Id.* at 4.
- 10 • “Release of the 40,000 AF of EWA Augmentation will be according to a schedule set by
11 Reclamation, NMFS, and FWS with input from the FASTA team.” *Id.* at 9.
- 12 • The Interim Plan seeks to protect UKL levels through the end of May at 4142.0 feet for
13 sucker spawning habitat. *Id.* at 5. To achieve this result, Reclamation proposed to
14 coordinate with PacifiCorp on potential springtime water borrowing operations. *Id.* at 4.
- 15 • “In the event PacifiCorp is unable to provide the water, and/or if modeling shows that
16 implementation of the 40,000 AF of EWA augmentation releases is likely to result in
17 UKL elevations below 4,142.0 feet in April or May, despite good faith efforts to rearrange
18 the 40,000 AF of EWA releases within reasonable bounds, Reclamation will coordinate
19 with the Services and PacifiCorp to best meet the needs of ESA-listed species as well as
20 coordinate and obtain input from Yurok and other affected Klamath River Basin Tribes
21 through government-to-government consultation on how to manage water.” *Id.* at 4.
- 22 • “With respect to the above coordination and ensuing management of 40,000 AF of EWA
23 augmentation releases and consequences for Upper Klamath Lake elevations, there can be
24 no effect on Project irrigation supplies/water availability (e.g., no change in quantity, rate,
25 timing) other than that caused by the above-described potential reduction in Project
26 Supply during the spring-summer period.” *Id.* at 4-5.

1 In a letter dated April 13, 2020, NMFS² concurred with Reclamation's conclusions that
 2 "implementation of the proposed Interim Plan is expected to result in reduced effects from those
 3 previously analyzed in NMFS' 2019 BiOp, and therefore is expected to be consistent with
 4 NMFS' determinations that Project operations are not likely to jeopardize the continued existence
 5 of SONCC coho salmon or destroy or adversely modify its designated critical habitat." ECF
 6 No. 909-6 at 3.

7 Reclamation also issued new environmental documents for purposes of NEPA
 8 compliance. *See* ECF No. 909-7 (April 2020 Finding of No Significant Impact; Implementation
 9 of Klamath Project Operating Procedure 2020-2023).

10 **IV. CURRENT HYDROLOGIC CONDITIONS AND PROJECT OPERATIONS**

11 Consistent with operations plans of the past several years, the Project Supply (water
 12 available from UKL and Klamath River for irrigation) under the Interim Plan is calculated after the
 13 April 1 forecast of UKL inflow (estimated inflow through the end of September) becomes
 14 available. Third Kirby Decl. ¶¶ 3, 5. This year, the "locked in" Project Supply was approximately
 15 140,000 AF. *Id.* ¶ 5; *see also* ECF No. 909-8 at 7 (2020 operations plan). This figure is 23,000 AF
 16 less than the Project Supply would have been under the 2019 BiOp because the Interim Plan's
 17 conditions for triggering the 23,000 AF reduction were present. Third Kirby Decl. ¶ 5; ECF
 18 No. 907-2 at 9 ("Project Supply calculations . . . are reduced by 23,000 acre-feet when the EWA
 19 augmentation scheme is triggered."). The calculated EWA intended for flow to the Klamath River
 20 was 407,000 AF, which was increased by 40,000 AF due to the augmentation trigger (April 1 UKL
 21 supply) having been met.³ Third Kirby Decl. ¶ 5.

22 A Project Supply of 140,000 AF falls far short of the irrigation need, which would be
 23 expected to be over 350,000 AF this year. Third Kirby Decl. ¶ 8. Producers and irrigation

24 ² On April 10, 2020, FWS issued a new biological opinion analyzing the effects of the Interim
 25 Plan on protected suckers. ECF No. 909-13. FWS concluded the operation of the Project
 26 pursuant to the Interim Plan is not likely to result in the destruction or adverse modification of
 critical habitat for the Lost River sucker and shortnose sucker. *Id.*

27 ³ Under the operations occurring under the 2013 biological opinion that preceded the 2019 BiOp,
 28 the Project Supply would have been 271,000 AF and the EWA would have been at least
 320,000 AF and possibly as high as 336,000 AF. Third Kirby Decl. ¶ 7.

districts have never had to cope with such a situation.⁴ But after being informed in early April, they went about their work. *Id.* For example, some producers elected not to irrigate some lower-value crops in order to arrange for water for higher value crops such as potatoes or onions. Some growers have wells but also had a right to relatively more surface water than others, but worked with their neighbors to help make too little water go as far as it could and do the best for the region. District managers developed plans for integrated management that have never been tried. Producers borrowed based on modified farm plans. They invested in soil preparation, seed, and planting. They contracted for inputs. Employees, both seasonal and permanent, went to work. *Id.* And there was a sense that, although some family farm operations would surely be lost, for the most part, the agricultural community could navigate through to the next year. *Id.*

Then, in early May, an updated forecast reflected an unprecedented decrease in projected inflow. It seemed that snowpack in the mountains has disappeared rather than running off into streams and UKL. Third Kirby Decl. ¶ 9. Under the 2019 BiOp as modified in the Interim Plan, the calculated April Project Supply is “locked in” and cannot be decreased. *Id.* Under the Interim Plan, the reduction to Project Supply is strictly limited to 23,000 AF and this reduction is reflected in the April 1 allocation. *See* ECF No. 907-2 at 3 (“When the EWA Augmentation is triggered, it would result in a reduction of Project Supply that is limited to, and shall not exceed, 23,000 AF.”).

These provisions assuring the Project Supply will be reliably known in early April are critical to farm and Project operations planning and early-season actions to implement the plans. This year, reasonable estimates became available by late March, and the “locked in” Project Supply of 140,000 AF was known on April 7. Third Kirby Decl. ¶ 5 (April 7 announcement). Nevertheless, irrigation district managers were informed in May that the Project Supply would have to drop precipitously. *Id.* ¶ 11. On May 8, it appeared the reduction could be nearly 50 percent, to only 80,000 AF. *Id.* Anxiety and fear set in. *Id.*, Ex. A (local newspaper article).

⁴ This is the second-lowest value and shortage in the 115-year history of the Klamath Project. Third Kirby Decl. ¶ 8. In 2001, the announced water supply from the Klamath system was zero, which did not require the same intense management effort. *Id.* The severe impact of the 2001 experience lingers today, and yet 2020 has proven worse because of the reliance in 2020 on an anticipated supply that has disappeared.

1 Currently, the exact amount that will be available is not even known, but managers are operating
2 with the assumption that the amounts Reclamation identified on May 8 will be applicable. *Id.* ¶ 12.

3 Producers and districts have no choice but to confront the terrible new reality. They are
4 doing what they can, and even more intensively managing what little they have. Third Kirby
5 Decl. ¶ 12.

6 V. LEGAL STANDARD

7 The standard governing the issuance of a TRO is “substantially identical” to the standard
8 governing the issuance of a preliminary injunction. *Stuhlbarg Int’l Sales Co. v. John D. Brush &*
9 *Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).

10 A preliminary injunction is “an extraordinary remedy that may only be awarded upon a
11 clear showing that the plaintiff is entitled to such relief.” *Winter v. NRDC, Inc.*, 555 U.S. 7, 22
12 (2008). Plaintiffs must demonstrate that: (1) they are likely to succeed on the merits; (2) they are
13 likely to suffer irreparable harm absent an injunction; (3) the balance of equities tips in their favor;
14 and (4) an injunction is in the public interest. *Id.* at 20. The Ninth Circuit has held that *Winter*’s
15 analysis of injunctive relief extends to the ESA, but that the ESA strips courts of “at least some of
16 their equitable discretion” in determining the third and fourth prongs of the traditional four-part
17 test. *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1089-91 (9th Cir. 2015).

18 Therefore, under the precedent in *Winter*, the burden remains on Plaintiffs to establish all
19 four factors to obtain a preliminary injunction based on an ESA violation. *See, e.g., Pac. Coast*
20 *Fed’n of Fishermen’s Ass’ns v. Ross*, No. 1:20-cv-00431-DAD-SAB, 2020 U.S. Dist. LEXIS
21 62051, at *7-8 (E.D. Cal. Apr. 7, 2020) (reciting legal standard in decision denying environ-mental
22 plaintiffs’ TRO motion based on the issuance of an allegedly invalid biological opinion); *Klamath*
23 *Tribes v. U.S. Bureau of Reclamation*, No. 18-cv-03078-WHO, 2018 U.S. Dist. LEXIS 124741,
24 at *25-26, 47-51 (N.D. Cal. July 25, 2018) (this Court weighing the balance of equities and public
25 interest factors and recognizing plaintiff’s proposed remedy is not in the species’ best interest);
26 *Ctr. for Biological Diversity v. United States Bureau of Reclamation*, No. 6:15-cv-02358-JR,
27 2016 U.S. Dist. LEXIS 59648, at *14 (D. Or. Apr. 6, 2016) (denying preliminary injunction and
28

1 finding that “plaintiffs fail to show that the balance of hardships tips in their favor and serves the
2 public interest”).

3 Even if Plaintiffs meet the showing for preliminary injunctive relief, they would not be
4 entitled to any form of injunctive relief they request. “[R]eason dictates that plaintiffs make a
5 showing that the particular injunction they request is necessary to prevent irreparable harm caused
6 by the defendants’ violation of the ESA.” *S. Yuba River Citizens League v. Nat’l Marine*
7 *Fisheries Serv.*, 804 F. Supp. 2d 1045, 1054 (E.D. Cal. 2011). This is because “injunctive relief
8 must be *tailored to remedy the specific harm alleged*.” *Id.* (citation and quotation omitted)
9 (emphasis added). A showing of irreparable harm “is required in order to justify the specific
10 measures that plaintiffs’ request.” *Id.* Thus, the alleged ESA violation, the irreparable harm
11 caused by the violation, and the relief to remedy the specific irreparable harm caused by the
12 violation are all interrelated.

13 And this interrelated showing must relate to the applicable time period: the interim period
14 that the relief is to be provided, or in this case, before the Court determines a motion for
15 preliminary injunction. *See S. Yuba River Citizens League v. Nat’l Marine Fisheries Serv.*,
16 No. 2:13-cv-00059-MCE-EFB, 2013 U.S. Dist. LEXIS 114477, at *22-23 (E.D. Cal. Aug. 12,
17 2013) (“The relevant inquiry for preliminary injunction purposes is whether the requested relief is
18 necessary to avoid irreparable harm during the interim period that the relief is to be provided.”).

19 VI. ARGUMENT

20 A. The Stay of This Litigation Should Not Be Lifted Because Plaintiffs Have Not 21 Demonstrated that the Trigger for Lifting the Stay Has Occurred

22 Plaintiffs have run to the Court, declaring that communications from Reclamation during
23 unprecedented Project operations challenges amount to a conclusion that Reclamation “has
24 abdicated its responsibility to implement the Interim Plan.” *See* ECF No. 909-1 at 13:27.
25 However, the simple statement from Plaintiffs that Reclamation “dramatically reduced the
26 40,000 acre-feet required to be set aside for augment flows under the Interim Plan . . . cutting off
27 augmented spring flow” is not cause to conclude that the stay should be lifted. *See id.* at 14:1-8.
28 Plaintiffs here omit any of the operational details of the Interim Plan, omit that Reclamation has

made no determination modifying its 2020 Annual Operations Plan, omit mention of at least 7,000 AF of EWA augmentation flows that have been provided thus far, and omit any explanation of the role that UKL levels play in May/June operations. Plaintiffs also do not confront that their request to enforce the Interim Plan directly contravenes the terms of the Stipulation. *Compare* ECF No. 909-1 at 7:16-18 (“The Tribe asks the Court to order the Bureau to provide 23,000 of the 40,000 acre-fee of the Interim Plan’s augmented flows this year . . .”), *with* Stipulation ¶ 6 (“No party may seek specific performance of any term or condition of this Stipulation.”).

As detailed above, the Interim Plan provides significant detail on when and how EWA augmentation flows will be provided, and Reclamation has followed these provisions to date. Under the Interim Plan, whether the EWA augmentation volume is available depends on whether UKL supply is above 550,000 AF based on the April 1 forecast. ECF No. 907-2 at 8. The 2020 Annual Operations Plan shows that based on the April 1 forecast, UKL supply was 577,000 AF, just barely above the augmentation trigger. ECF No. 909-8 at 7. Plaintiffs do not dispute that in the Operations Plan that was adopted for 2020, 40,000 AF was added to the EWA based on the April 1 forecast. ECF No. 909-1 at 12:5-9.

Under the Interim Plan, when EWA augmentation is triggered, Project Supply is reduced by 23,000 AF. ECF No. 907-2 at 8-9. The 2020 Annual Operations Plan shows that the initial Project Supply calculation of 147,000 AF was reduced by 23,000 AF. ECF No. 909-8 at 7 (“577 - 407 - 23 = 147”); *see also* Third Kirby Decl. ¶¶ 4-5.⁵

Under the Interim Plan, Reclamation maintains a flexible approach to using the EWA augmentation flows within the March to June timeframe according to a schedule set by Reclamation, NMFS, and FWS with input from the technical team (the “FASTA” team). ECF No. 907-2 at 4, 9. As Plaintiffs admit, Reclamation, working with the FASTA team, provided a flushing flow with the EWA augmentation volume in April. ECF No. 909-1 at 12:11-19; *see also* Third Kirby Decl. ¶ 19. Using the EWA augmentation volume, Reclamation also operated to

⁵ The 147,000 AF figure does not reflect a further adjustment that reduces actual Project Supply to 140,000 AF. Third Kirby Decl. ¶ 5.

1 release more flow from Iron Gate Dam than would have been provided under the 2019 Plan and
2 2019 BiOp. Third Kirby Decl. ¶¶ 6, 16-17.

3 Further, under the Interim Plan, the EWA augmentation volume is intended to be used in
4 the March to June time period. ECF No. 907-2 at 4, 9. Although it is unknown how operations
5 will develop based on changing forecasts, it is difficult to understand Plaintiffs' assertion that
6 Reclamation is not complying with the Interim Plan when the Interim Plan does not prescribe a
7 flow regime.⁶

8 Under the Interim Plan, UKL elevations below 4,142.0 feet in April or May are considered
9 undesirable for suckers. ECF No. 907-2 at 4. As explained above, the updated forecast in the
10 first week of May showed a drastic reduction in UKL inflow, a situation unseen by Project
11 operators and managers in recent history. Third Kirby Decl. ¶¶ 9-10. Elevations were above
12 4142.0 feet from the end of March to April 19, but are now below 4142.0 feet, and augmentation
13 flows will reduce lake elevations further. *Id.*

14 Other than sprinting to court with Plaintiffs' characterizations of recent communications
15 from Reclamation, and a flow schedule showing ramp-down rates, Plaintiffs do not explain why
16 the condition necessary for lifting the stay has been met. *See* ECF No. 909-1 at 11:12-14:7; ECF
17 No. 909-9 (May 11, 2020 email from Vice Chairman of Yurok Tribe); ECF No. 909-10 (May 11,
18 2020 email from Reclamation Deputy Director inviting further discussions); ECF No. 909-11
19 (May 12, 2020 from counsel for Yurok Tribe threatening litigation); ECF No. 909-2 ¶ 15
20 (screenshot of Iron Gate Dam releases from May 6 through May 13).

21 With respect to the Boat Dance, the ceremony occurs in August. ECF No. 909-8 at 7.
22 And the 2020 Annual Operations Plan includes the 7,000 AF sought for the ceremony. *Id.* ("The
23 407 TAF includes 7 TAF for the Yurok Tribal Boat Dance Ceremony in August."). Intervenor is
24 not privy to the discussions that precipitated this TRO filing. However, discussions on how to
25 manage the current crisis continue and change, even as these papers are filed with the Court. *See*
26 Third Kirby Decl. ¶ 12. Given the timing of the boat dance ceremony three months away,

27 _____
28 ⁶ Plaintiffs' Modified PI Motion also did not prescribe a flow schedule and only requested a
volume of water to be used in May and June. *See* ECF No. 48 at 7:1-10.

1 Plaintiffs have not shown in this motion that, at this time, Reclamation has deviated from the
 2 Interim Plan, nor is the issue relevant to the proposed TRO. The Court should deny Plaintiffs’
 3 motion to lift the stay.

4 **B. Plaintiffs’ Requested Relief Exceeds the Scope of the Current Case**

5 **1. Plaintiffs’ Current TRO Motion Exceeds the Scope of Allegations in the**
 6 **Complaint and Attached 60-Day Notice Letter**

7 Although Plaintiffs obfuscate the basis for the TRO, Plaintiffs’ TRO motion essentially
 8 seeks to enforce the Interim Plan.⁷ ECF No. 909-1 at 8:13-14 (requesting a TRO “directing the
 9 Bureau to *resume* augmentation flows”) (emphasis added); *id.* at 9:1-6 (asking for 390 cfs until
 10 additional flows have reached a total water volume of 23,000 AF, including the additional flow
 11 volume released between May 1 and May 14, the same terms as the Interim Plan). Yet, the
 12 operative complaint does not mention the Interim Plan, nor does the Notice Letter. *See generally*
 13 ECF Nos. 17, 17-1. Plaintiffs have no allegations in their pleading supporting the relief they now
 14 seek from the Court. This is problematic as the Court’s jurisdiction over Reclamation (as opposed
 15 to NMFS) is arguably based on the ESA citizen suit provision. *See* Compl. ¶¶ 9, 149-156. And
 16 a “failure to strictly comply with the notice requirement acts as an absolute bar to bringing suit
 17 under the ESA.” *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515,
 18 520 (9th Cir. 1998). Plaintiffs must explain how the Court can proceed and enforce the Interim
 19 Plan when the operative pleading and Notice Letter do not include any allegations related to the
 20 Interim Plan.

21 **2. The Twice-Modified Request for Relief Requires that Plaintiffs File a New**
 22 **Motion for Preliminary Injunction**

23 In addition to lifting the stay, Plaintiffs ask the Court to “reinstate” its motion for
 24 preliminary injunction even though Plaintiffs are now seeking different relief. *E.g.*, ECF
 25 No. 909-1 at 6:19. Whereas the Modified PI Motion sought 50,000 AF to remedy alleged
 26 irreparable harm to Chinook salmon, Plaintiffs “reinstated” motion seeks 23,000 AF of the

27 _____
 28 ⁷ As previously noted, the parties agreed in the Stipulation that they could not seek specific
 performance of the Interim Plan. Stipulation ¶ 6.

1 40,000 AF of the Interim Plan's augmented flows, and 7,000 AF of water for the Yurok Tribe's
 2 boat dance. *Id.* at 6:19-8:12. Plaintiffs' practice of continually moving the goalpost ignores the
 3 burden that Plaintiffs have to show that "the particular injunction they request is necessary to
 4 prevent irreparable harm caused by the defendants' violation of the ESA." *S. Yuba River*,
 5 804 F. Supp. 2d at 1054. The "injunctive relief must be tailored to remedy the specific harm
 6 alleged." *Id.*

7 At this point, it is unclear what the ESA violation is, what the alleged irreparable harm to
 8 the species is, how water for the Boat Dance will remedy the alleged harm to the species, or how
 9 much water is left to meet a 23,000 AF augmentation volume or would, if a TRO were issued, be
 10 left by the time there is a hearing on the requested preliminary injunction. Plaintiffs must file a
 11 new motion, in accordance with Local Rules, and explain how they are entitled to the requested
 12 relief based on the current record.

13 **C. The Project and the Communities It Supports Are in Dire Straits, and Plaintiffs'**
 14 **Unscientific Approach Will Make a Catastrophic Year Worse**

15 In evaluating a motion for preliminary injunctive relief in a different case involving the
 16 Klamath Project, this Court recognized the need to balance the equities and ensure that "the
 17 remedy requested is likely to be effective" given the "complex interests that would be affected by
 18 preliminary relief." *Klamath Tribes*, 2018 U.S. Dist. LEXIS 124741, at *25-26, 47-51
 19 (considering the water users' concerns given that the requested injunction would prompt a mid-
 20 season shutoff and would financially ruin farm families). Here, Intervenor will detail the
 21 unprecedented challenge that the Project faces.

22 When comparing operations plans, it is the Project Supply available for irrigation that is
 23 continually reduced, not water for instream Klamath River flows. Under the 2013 biological
 24 opinions, the minimum Project Supply for 2020 would have been 271,000 AF, and the final EWA
 25 would have been at least 320,000 AF, and potentially up to 336,000 AF. Third Kirby Decl. ¶ 7.
 26 Under the 2019 BiOp operations, the Project Supply allocation would have been 160,000 AF, and
 27 the EWA would have been 407,000 AF. *Id.* ¶¶ 5-6. Under the Interim Plan currently controlling
 28

1 Project operations, the Project Supply allocation based on the April 1 forecast was 140,000 AF,
2 and the EWA was 447,000 AF. *Id.*

3 After receiving the April 1 forecast information, but receiving no other official
4 announcement or formally adopted a plan for 2020, on April 7, 2020, Intervenor issued a public
5 notice of the anticipated 140,000 AF Project Supply. Third Kirby Decl. ¶ 5. At that point,
6 producers and districts engaged in intense farm planning, and irrigation districts and managers
7 worked to develop plans for integrated management that have never been tried in an effort to
8 avoid a growing season with catastrophic losses. *Id.* ¶ 8.

9 In early May, district managers received the UKL inflow forecast based on May 1
10 conditions in the watershed. Third Kirby Decl. ¶ 9. The forecasted values were severely lower
11 than could have been anticipated after the April forecast, and never before seen based on typical
12 snowpack and snowmelt conditions. *Id.* Based on the requirement to maintain UKL levels to
13 protect sucker species, it was quickly anticipated that Project Supply would be reduced drastically.
14 *Id.* ¶¶ 10-11. The exact amount of Project Supply that actually will be available is not known with
15 certainty, but district managers are operating with the assumption that the amounts Reclamation
16 identified on May 8 will be applicable. *Id.* ¶ 12. That amount was 80,000 AF. *Id.* ¶ 13.

17 The situation is already dire enough for producers and the people they employ. Third
18 Kirby Decl. ¶¶ 13-14. If the Court grants Plaintiffs' proposed TRO, the increased flows will
19 presumably only further reduce Project Supply. *See id.* ¶¶ 14, 21. This water would not be
20 available for release down the Klamath River if not for the storage provided by the Project above
21 Link River Dam. *Id.* ¶ 18 & Ex. C. The augmentation of Klamath River flows between May 1
22 and September 30 attributable to Project operations is projected to be approximately 173,000 AF.
23 *Id.* ¶ 18. Also, the artificially generated flushing flow last month caused the rate of flow at Iron
24 Gate to be greater than it would have been at any time in the preceding fall / winter in the absence
25 of any Project operation. *Id.* ¶ 19. The flushing flow was accomplished by the release of more
26 than 30,000 AF of previously-stored water. *Id.* These releases from storage are provided even
27 though the storage was developed for irrigation purposes. *Id.* ¶ 18.

The balance of equities does not tip in Plaintiffs' favor. The Project is already devoting much more water from storage to Klamath River flows than the total amount of water irrigators will receive in the Project Supply allocation. The Court must weigh further reductions to the Project Supply allocation against the likelihood that the proposed TRO will be effective. As explained below, Plaintiffs have not demonstrated irreparable harm in the first instance, let alone demonstrated that the proposed TRO will be effective in remedying the alleged harm. On the other hand, if the Court grants Plaintiffs' requested relief, harm to Project irrigators is certain to occur.

D. Plaintiffs Have Not Shown that They Are Entitled to Injunctive Relief During the Interim Period Before a Hearing on a Motion for Preliminary Injunction

1. Plaintiffs Have Not Confronted Why Their Claim Challenging the Merits of the 2019 NMFS BiOp Is Not Moot

As cited above, to obtain injunctive relief in the form of the TRO, Plaintiffs must show that they are likely to succeed on the merits of their underlying ESA claims. *See* section V, *supra*. The underlying ESA claims are that NMFS's issuance of the 2019 BiOp and Reclamation's reliance on the 2019 BiOp do not comply with Section 7 of the ESA. ECF No. 909-1 at 14:24-20:19. Yet, Reclamation is no longer operating solely under the 2019 Plan and in reliance on the 2019 BiOp to meet its Section 7 obligations. *See* section III, *supra*. Plaintiffs admit as much. ECF No. 909-1 at 15:6-7 (the "Interim Plan supplemented the 2019 Plan by adding the 40,000 acre-feet in augmented spring flows in certain water years"). NMFS has given its opinion that the addition of 40,000 AF to the EWA under the Interim Plan rules is expected to result in a marked increase in suitable habitat for coho fry, which is the very issue that Plaintiffs argue renders the 2019 BiOp inadequate. *Compare* ECF No. 909-6 at 2 (Apr. 13, 2020 NMFS concurrence letter), *with* ECF No. 909-1 at 16:15-20:11 (arguing that operations under the 2019 BiOp do not provide sufficient habitat for juvenile salmon). Further, the Interim Plan is intended to govern operations while the agencies complete the reinitiated formal consultation on Project operations.

Plaintiffs ask this Court to issue a ruling on the adequacy of a Section 7 consultation that has already been modified on an interim basis and will be replaced on a permanent basis as the

1 agencies work through the technical team-advisory process that the Plaintiffs requested. The
 2 underlying merits claims are moot. *See Forest Guardians v. Johanns*, 450 F.3d 455, 461-63
 3 (9th Cir. 2006). The Court should not accept Plaintiffs' invitation to issue an advisory ruling on
 4 the merits of the 2019 BiOp.

5 To the extent the Court considers Plaintiffs' arguments on the merits of the 2019 BiOp,
 6 Plaintiffs have not added anything new. Intervenor has previously explained why Plaintiffs'
 7 merits arguments fail and incorporate that briefing in opposition to Plaintiffs' TRO motion. *See*
 8 ECF No. 45 at 15-24. Plaintiffs' TRO motion should be denied because Plaintiffs are not likely
 9 to succeed on the merits of the claims challenging the 2019 BiOp (if they choose to pursue them).

10 **2. Plaintiffs Do Not Address at All How the Requested Relief Will Remedy the** 11 **Alleged Irreparable Harm**

12 Plaintiffs ask for Reclamation to provide flows under the 2019 BiOp plus an additional
 13 390 cfs, until augmentation flows reach a total volume of 23,000 AF. ECF No. 909-1 at 8:14-9:5.
 14 To date, Project operation expert Brad Kirby estimates that over 7,000 AF and less than
 15 10,000 AF of "augmentation" water has been released. Third Kirby Decl. ¶ 20. Plaintiffs provide
 16 absolutely no information to explain why an additional 390 cfs for some number of days until
 17 Reclamation spends an arbitrary volume of approximately 13,000-16,000 AF of EWA water will
 18 remedy any harm, let alone, irreparable harm to coho. This represents a failure to meet Plaintiffs'
 19 burden to show the requested injunction is tailored to remedy the specific harm alleged. *See*
 20 *S. Yuba River*, 804 F. Supp. 2d at 1054.

21 On the other hand, information before the Court shows that coho do not typically spawn
 22 or rear in the mainstem Klamath River where the additional water would flow. Berge Decl. ¶¶ 4,
 23 8, 11, ECF No. 45-1. Rather, coho salmon use the Klamath River as a migration corridor. *Id.*
 24 And in that regard, typical salmon outmigration peaks before early May. Cramer Decl ¶ 12, ECF
 25 No. 45-2; Third Johnson Decl. ¶ 7; First Johnson Decl., fig. 3, ECF No. 45-2. In 2019, most if
 26 not all juvenile Chinook salmon had migrated out by calendar week 19, or early May. First
 27 Johnson Decl., fig. 4, ECF No. 45-2. Although the 2020 outmigration estimates are not yet
 28 available, Third Johnson Decl. ¶ 7, Plaintiffs have not introduced any evidence to suggest that

1 migration behavior would be atypical this year. Thus, if Plaintiffs obtain the requested TRO,
2 Reclamation could very well reallocate water from Project growers that urgently and undeniably
3 need the water to keep planted crops alive, to create habitat for fish that are very likely not in the
4 river and have moved on to unmanaged ocean habitat.

5 **3. Once Again, Plaintiffs' Citation to Disease Monitoring Is Misleading and Not**
6 **Relevant to the Issue Before the Court**

7 Citing the May 8, 2020 hydrologic update, Plaintiffs state that following the surface
8 flushing flow in April, "*C. Shasta* infection and disease rates have since skyrocketed." ECF
9 No. 909-1 at 13:3-4. Intervenor has previously explained how Plaintiffs' frequent reference to
10 *C. shasta* infection rates blurs the distinction between coho salmon and Chinook salmon. *See*
11 ECF No. 45 at 27:23-29:1; Cramer Decl. ¶¶ 20, 24, 25, ECF No. 45-2. Genotype I of *C. shasta*
12 infects Chinook salmon, not coho salmon. *Id.*; *see also* Third Johnson Decl. ¶ 4. Only
13 genotype II can infect coho salmon. Third Johnson Decl. ¶ 4. As in other recent years, when
14 elevated spore concentration have occurred, genotype I has been predominately the cause. *Id.*

15 During the week of May 11, 2020, genotype II, the genotype that affects the listed coho,
16 dropped to less than one spore per liter at most sampling locations to a high of one spore per liter
17 at the remaining locations. Third Johnson Decl. ¶ 5 & Ex. D. The highest genotype II detection
18 this season was two spores per liter, which is less than half of the five spores per liter
19 concentration that has been determined to cause harm to coho. *Id.* ¶ 5.

20 Monitoring shows that the infection rates for juvenile Chinook salmon dropped
21 dramatically over the week of May 11. Third Johnson Decl. ¶ 3 & Ex. A. The spore reduction
22 coincides with Reclamation ramping down flows at Iron Gate Dam somewhat last week. *Id.*
23 Moreover, while the overall infection rate held steady the past two weeks, the clinical infection
24 rate has dropped from 90 percent to 43 percent for Chinook sampled at Kinsman. *Id.* ¶ 5 & Ex. B.
25 The clinical infection rate provides insight into the severity of the infection. In 2019, there were
26 instances where the infection rate was 87 percent. However, the clinical infection rate was only
27 20 percent for the sampled Chinook at Kinsman. *Id.* ¶ 5 & Ex. C.
28

Thus, the most recent monitoring data shows that genotype II concentrations are not causing harm to coho salmon, and even if infection rates of juvenile Chinook salmon were considered, the clinical infection rates dropped. Risk of disease based on current monitoring results is not a basis for finding that current operations are likely to result in irreparable harm, particularly when considering that the bulk of fish have already outmigrated.

E. Plaintiffs Have Not Addressed the Requirements of Federal Rule of Civil Procedure 65

Plaintiffs' TRO motion does not address the bond requirements of Federal Rule of Civil Procedure (FRCP) 65. Pursuant to FRCP 65(c), Intervenor requests that if the Court issues a preliminary injunction, it condition the issuance of the injunction on Plaintiffs posting a bond. The damage from the proposed preliminary injunction would be enormous. It cannot be quantified with precision, particularly given the stage of the current irrigation season in which the proposed injunction would issue. Project irrigation districts are required by contract to submit annual crop reports to Reclamation. *See* Third Kirby Decl. ¶ 14. In 2016, the total annual gross crop value for lands in the Project was \$168,552,187.00. *Id.* This figure does not include the multiplying economic benefits as dollars move through the economy. *Id.* The motion proposes an additional 14,000 AF be taken from the Project. A perfect projection of damages is not simple. However, a conservative estimate of losses is \$20 million. *Id.*⁸ Although not sufficient to make Project water users whole, an amount on this order would at least provide a degree of assistance for many Project farmers to resume operation in post-injunction years. Intervenor recognizes that in this type of case a bond is rare.⁹ However, Plaintiffs filed this motion at a time that will inflict the worst possible damage on the agricultural community. If Plaintiffs prevail on the merits, the bond will have been of no consequence to Plaintiffs.

⁸ The estimate is based on an estimate of acreage planted in row crops that could be irrigated to harvest with 14,000 AF and the University of California Cooperative Extension's 2015 estimate of the per-acre cost of producing fresh market potatoes. Third Kirby Decl. ¶ 14.

⁹ To the extent that the Court grants the requested relief for release of water for the Boat Dance, Intervenor submits that any nominal bond exception for public interest environmental lawsuits should not apply.

1 Finally, Plaintiffs' motion does not comply with Local Rule 65-1(c), which provides:

2 No temporary restraining order will be issued except with an order to show cause
3 fixing the time for hearing a motion for a preliminary injunction, which shall be
4 scheduled pursuant to Fed. R. Civ. P. 65(b). Proposed orders submitted under this
5 Rule must provide a place for the Judge to fix the time within which the restraining
order and all supporting pleadings and papers must be served upon the adverse
party of any opposing papers.

6 Given the legal flaws identified in the "reinstated" motion for preliminary injunction, and the
7 need for Plaintiffs to file a new motion for preliminary injunction alleging ripe claims, Plaintiffs
8 did not comply with the Local Rule and properly schedule a hearing on such a motion for
9 preliminary injunction. For this reason, Plaintiffs' TRO motion is procedurally defective and
10 should be denied.

11 VII. CONCLUSION

12 For all the reasons stated above, Intervenor respectfully requests that the Court deny all
13 relief sought by the Plaintiffs, and continue the stay of this litigation.

14
15 SOMACH SIMMONS & DUNN, PC

16 DATED: May 18, 2020

By s/ Paul S. Simmons

Paul S. Simmons
Attorneys for Defendant-Intervenor
Klamath Water Users Association

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing will be e-filed on May 18, 2020, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

/s Paul S. Simmons
Paul S. Simmons

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A Professional Corporation