

JEAN E. WILLIAMS, Deputy Assistant Attorney General  
 U.S. Department of Justice  
 Environment & Natural Resources Division  
 SETH M. BARSKY, Chief  
 S. JAY GOVINDAN, Assistant Chief  
 ROBERT P. WILLIAMS, Sr. Trial Attorney  
 KAITLYN POIRIER, Trial Attorney  
 Wildlife & Marine Resources Section  
 Ben Franklin Station, P.O. Box 7611  
 Washington, D.C. 20044-7611  
 Tel: 202-307-6623; Fax: 202-305-0275  
 Email: robert.p.williams@usdoj.gov  
 Email: kaitlyn.poirier@usdoj.gov

*Attorneys for Federal Defendants*

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

YUOK TRIBE, PACIFIC COAST	)	Case No. 3:19-cv-04405-WHO
FEDERATION OF FISHERMEN'S	)	
ASSOCIATIONS, and INSTITUTE FOR	)	<b>*STIPULATION TO STAY</b>
	)	<b>LITIGATION</b>
FISHERIES RESOURCES,	)	
	)	* Immediate consideration requested
Plaintiffs,	)	
	)	
v.	)	
	)	
U.S. BUREAU OF RECLAMATION and	)	
NATIONAL MARINE FISHERIES	)	
SERVICE,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
KLAMATH WATER USERS	)	
ASSOCIATION,	)	
	)	
Intervenor-Defendant.	)	

1 The parties, Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and  
2 Institute for Fisheries Resources (collectively, "Plaintiffs"), National Marine Fisheries Service  
3 ("NMFS") and U.S. Bureau of Reclamation ("Bureau") (collectively, "Federal Defendants"),  
4 and Klamath Water Users' Association ("Defendant-Intervenor") have agreed to stay the above  
5 captioned case in its entirety on the terms memorialized in this Stipulated Stay Agreement  
6 ("Stipulation"). The parties respectfully request immediate consideration of this Stipulation, by  
7 no later than March 31, 2020, due to the imminent commencement of the 2020 irrigation season  
8 on April 1, 2020.

9 WHEREAS, on March 29, 2019, the Bureau completed reinitiated consultation with  
10 NMFS pursuant to Section 7(a)(2) of the Endangered Species Act ("ESA") on the effects of a  
11 five-year plan of operations for the Klamath Project (2019-2024) on ESA-listed species and  
12 their critical habitats, including the listed Southern Oregon/Northern California Coast  
13 evolutionarily significant unit of coho salmon ("SONCC coho") and the Southern Resident  
14 Killer Whale.

15 WHEREAS, in the written biological opinion ("BiOp") provided to the Bureau at the  
16 conclusion of that consultation, NMFS concluded that the proposed operations plan was not  
17 likely to jeopardize the continued existence of SONCC coho or destroy or adversely modify its  
18 critical habitat.

19 WHEREAS, on July 31, 2019, Plaintiffs initiated the above-captioned lawsuit which, as  
20 amended, challenges, in part, the "no jeopardy" and "no adverse modification" conclusions of  
21 NMFS' BiOp, the Bureau's reliance on those conclusions to comply with the ESA, and alleges  
22 that the agencies are required to reinitiate consultation, as well as challenging the Bureau's  
23 compliance with the National Environmental Policy Act ("NEPA") in three separately-  
24 enumerated claims.

25 WHEREAS, on October 18, 2019, Plaintiffs filed a motion for preliminary injunction on  
26 four of their claims relating to the ESA (ECF 27), seeking "to revert to and operate the Klamath  
27 Project under" the Bureau's operations plan from 2012, consistent with the BiOp on that  
28 operations plan from 2013, "supplemented by the flows required by the injunction issued [in

1 2017] in *Yurok Tribe v. Bureau of Reclamation* (“*Yurok I*”), No. 16-cv-6863-WHO, ECF 70”  
2 (ECF 27-1 at 2), which included a requirement to establish a reserve of 50,000 acre feet of water  
3 to be used for an emergency dilution flow(s), if triggered under the criteria set forth in the 2017  
4 injunction.

5 WHEREAS, on November 13, 2019, the Bureau requested reinitiation of formal ESA  
6 Section 7 consultation with NMFS – and also with the U.S. Fish & Wildlife Service (“FWS”) –  
7 based on new information that revealed effects of Klamath Project operations on ESA-listed  
8 species and critical habitat in a manner or to an extent not previously considered.

9 WHEREAS, in written letters dated November 14, 2019 and December 9, 2019, NMFS  
10 and FWS, respectively, accepted the Bureau’s request to reinitiate consultation.

11 WHEREAS, on December 11, 2019, Federal Defendants and Defendant-Intervenor filed  
12 oppositions to Plaintiffs’ motion for preliminary injunction.

13 WHEREAS, on January 22, 2020, Plaintiffs filed a reply in support of their motion for a  
14 preliminary injunction, wherein they requested a modified preliminary injunction to alter the  
15 2019-2024 Operations Plan, as amended and analyzed in the 2019 BiOps, by adding 50,000 acre  
16 feet of water to the Environmental Water Account (“EWA”) for water year 2020 and until this  
17 case is resolved on the merits.

18 WHEREAS, on January 29, 2020, Federal Defendants filed a motion to exclude or, in  
19 the alternative, limit consideration of extra-record materials proffered by Plaintiffs in support of  
20 their motion for preliminary injunction (ECF 50).

21 WHEREAS, on February 4, 2020, Plaintiffs filed an opposition to Federal Defendants’  
22 motion to exclude their extra-record materials.

23 WHEREAS, on February 7, 2020, Federal Defendants filed a combined objection to  
24 reply evidence and sur-reply to Plaintiffs’ modified injunction request, and Defendant-  
25 Intervenor filed a sur-reply to Plaintiffs’ modified injunction request.

26 WHEREAS, on February 14, 2020, Plaintiffs filed a response to Federal Defendants’  
27 and Defendant-Intervenor’s sur-replies.  
28

1 WHEREAS, on February 7, 2020, as part of the ongoing reinitiated consultation on the  
2 2019-2024 operations plan, the Bureau provided NMFS with a biological assessment (“2020  
3 BA”) of a proposed operations plan for 2020-2024 Project operations.

4 WHEREAS, the Bureau had requested that NMFS and FWS complete the respective  
5 consultations on the Bureau’s proposed 2020-2024 operations plan by March 31, 2020 but the  
6 parties now agree that it is in the public interest that the agencies have until September 30, 2022.

7 WHEREAS, if this Stipulation is approved and the litigation is stayed accordingly, the  
8 Bureau will develop and submit to the Services a modified or new proposed operations plan in  
9 lieu of the one set forth in the 2020 BA, informed by a collaborative process similar to the  
10 consultation process that was conducted in regards to the 2012 operations plan and Biological  
11 Assessment.

12 WHEREAS, in letters to NMFS and to FWS dated March 27, 2020, the Bureau has  
13 proposed to operate the Klamath Project during the currently-ongoing ESA Section 7  
14 consultations with NMFS and FWS in accordance with a two-and-a-half year interim operations  
15 plan (“Interim Plan”).

16 WHEREAS, the parties have negotiated in good faith and have reached the agreement  
17 set out below to stay this litigation pending completion of reinitiated consultation and  
18 implementation of the Interim Plan, while otherwise preserving all arguments on the merits of  
19 this litigation and motions and issues directly or indirectly implicated by the litigation and  
20 motion.

21 WHEREAS, the letters embodying the Bureau’s proposed Interim Plan are attached to  
22 this Stipulation for the sole purpose of confirming the identity of the letters, and shall not be  
23 incorporated as requirements in any order of the Court.

24 **THE PARTIES STIPULATE AS FOLLOWS:**

25 1. Plaintiffs hereby withdraw their motion for preliminary injunction, as modified  
26 (ECF 27 & 48).

27 2. Federal Defendants hereby withdraw their motion to exclude, or in the  
28 alternative, limit consideration of Plaintiffs’ extra-record materials (ECF 50).

1           3.       The above-captioned litigation, and all associated deadlines and obligations are  
2 hereby stayed until September 30, 2022, provided that the Bureau operates the Klamath Project  
3 in accordance with the Interim Plan.

4           4.       A party may file a motion in accordance with paragraph 6 seeking to lift the stay,  
5 subject to the meet and confer requirements of paragraph 9, if the Bureau deviates from or  
6 modifies the Interim Plan prior to September 30, 2022.

7           5.       The parties will coordinate in good faith to consider whether an amended Interim  
8 Plan is appropriate for 2021 and/or 2022. The stay of litigation will remain in effect in  
9 accordance with the other provisions of this Stipulation unless unanimous agreement on an  
10 amended Interim Plan is reached.

11          6.       A party to this litigation may file a motion with the Court seeking to lift the stay  
12 and resume the litigation only on the grounds that the Bureau is not implementing the Interim  
13 Plan or complying with any term or condition of this Stipulation. No party may seek specific  
14 performance of any term or condition of this Stipulation or the Interim Plan. This prohibition  
15 against seeking specific performance has no effect on the enforceability of any pre-existing or  
16 independent legal rights and obligations to engage in government-to-government consultation  
17 with affected Tribes or to protect Tribal fishing and water rights.

18          7.       The parties have entered into this Stipulation so as to avoid further litigation of  
19 the Plaintiffs' pending lawsuit, afford more time for completion of the Bureau's ESA  
20 consultations, and create opportunity for a more collaborative process for resolving conflicts  
21 concerning water in the Klamath Basin. Nothing in this Stipulation shall be construed to  
22 constitute an admission of any issue of fact, law or liability by any of the parties hereto, nor as a  
23 concession by any such party that the Interim Plan either does or does not meet, or either is or is  
24 not necessary to meet, the needs of ESA-listed species or critical habitat, Tribal trust resources,  
25 or any legal requirements. Except as expressly provided in this Stipulation, none of the Parties  
26 waives or relinquishes any legal rights, claims or defenses it may have. Subject to paragraphs  
27 2-4 and 6, the non-federal parties: fully reserve any rights to bring any claims, known or  
28 unknown, past, present, or future, regarding the Bureau's operation of the Klamath Project and

1 Federal Defendants' compliance with their obligations under the ESA, NEPA, and other  
2 applicable laws; and expressly reserve any rights to challenge or defend any aspect of Federal  
3 Defendants' future operations plans after the stay is lifted and Federal Defendants' compliance  
4 with the ESA, NEPA, the government's trust responsibility, and other applicable laws. Federal  
5 Defendants fully reserve all defenses to any such claims.

6 8. Federal Defendants will provide Plaintiffs and Defendant-Intervenors with status  
7 reports on the progress of the reinitiated consultations every six months after this Stipulation  
8 becomes effective.

9 9. If any disputes arise concerning the Interim Plan or the terms of this Stipulation,  
10 the parties agree to meet and confer in good faith to resolve the dispute before seeking to lift the  
11 stay of this litigation.

12 10. The terms of this Stipulation shall become effective immediately upon its  
13 approval by the Court.

14 IT IS SO STIPULATED

15 Dated: March 27, 2020

16 Respectfully submitted,

17 JEAN E. WILLIAMS and PRERAK SHAH,  
18 Deputy Assistant Attorneys General  
19 SETH M. BARSKY, Chief  
20 S. JAY GOVINDAN, Assistant Chief  
21 U.S. Department of Justice  
22 Environment and Natural Resources Division

23 /s/ Robert P. Williams  
24 ROBERT P. WILLIAMS, Sr. Trial Attorney  
25 KAITLYN POIRIER, Trial Attorney  
26 Wildlife and Marine Resources Section  
27 Ben Franklin Station, P.O. Box 7611  
28 Washington, D.C. 20044-7611  
(202) 307-6623 (tel)  
(202) 305-0275 (fax)  
robert.p.williams@usdoj.gov  
kaitlyn.poirier@usdoj.gov

/s/ Thomas K. Snodgrass

THOMAS K. SNODGRASS, Sr. Attorney  
Natural Resources Section  
999 18th Street, South Terrace, Suite 370  
Denver, CO 80202  
Telephone: 303-844-7233  
Thomas.snodgrass@usdoj.gov

***Attorneys for Federal Defendants***

/s/ Patti A. Goldman (with permission on 3/26/2020)

PATTI A. GOLDMAN (WSBA # 24426) [*Pro Hac Vice*]  
KRISTEN L. BOYLES (CSBA # 158450)  
ASHLEY BENNETT (WSBA # 53748) [*Pro Hac Vice*]  
Earthjustice  
810 Third Avenue, Suite 610  
Seattle, WA 98104  
Ph: (206) 343-7340 | Fax: (206) 343-1526  
kboyles@earthjustice.org  
pgoldman@earthjustice.org  
abennett@earthjustice.org

***Attorneys for Plaintiffs Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, and Yurok Tribe***

/s/ Amy Cordalis (with permission on 3/26/2020)

AMY CORDALIS (CSBA # 321257)  
Yurok Tribe  
190 Klamath Blvd.  
P.O. BOX 1027  
Klamath, CA 95548  
Ph: (707) 482-1350 | Fax: (707) 482-1377  
acordalis@yuroktribe.nsn.us

DANIEL CORDALIS (CSBA #321722)  
Cordalis Law, P.C.  
2910 Springer Drive  
McKinleyville, CA 95519  
Ph: (303) 717-4618  
dcordalislaw@gmail.com

***Attorneys for Plaintiff Yurok Tribe***

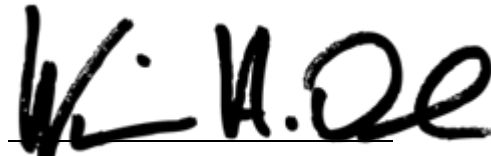
/s/ Paul S. Simmons (with permission on 3/24/2020)

SOMACH SIMMONS & DUNN, PC, A Professional Corporation  
PAUL S. SIMMONS, ESQ. (SBN 127920)  
JARED S. MUELLER, ESQ. (SBN 257659)  
500 Capitol Mall, Suite 1000  
Sacramento, CA 95814  
Telephone: (916) 446-7979  
Facsimile: (916) 446-8199  
psimmons@somachlaw.com  
jmueller@somachlaw.com

***Attorneys for Defendant-Intervenor  
Klamath Water Users Association***

**THE STIPULATION IS APPROVED, AND IT IS HEREBY ORDERED THAT  
THE LITIGATION IS STAYED**

Dated: March 27, 2020



William H. Orrick,  
United States District Court Judge

**ATTORNEY ATTESTATION OF CONCURRENCE**

I hereby attest that I have obtained concurrence in the filing for the signature of all counsel indicated by a “conformed” signature (“/s/”) within this e-filed document, in accordance with Civil L.R. 5-1(i).

Dated: March 27, 2020

/s/ Robert P. Williams

ROBERT P. WILLIAMS, Sr. Trial Attorney  
U.S. Department of Justice  
Environment and Natural Resources Division  
Wildlife and Marine Resources Section  
Ben Franklin Station, P.O. Box 7611  
Washington, D.C. 20044-7611  
(202) 305-0206 (tel) | (202) 305-0275 (fax)  
robert.p.williams@usdoj.gov