

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF KLAMATH

3 In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River,
4 A Tributary of the Pacific Ocean

5
6 **In re: WATERS OF THE KLAMATH
RIVER BASIN**

Case No. WA1300001

**EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION**

7 Klamath Irrigation District,
8 Movant,

9 v.

10 United States Bureau of Reclamation,
 Respondent.

11
12 **MOTION**

13
14 Pursuant to ORCP 79A(1)(a)(b), Klamath Irrigation District (“KID”) respectfully
15 moves the court for an emergency preliminary injunction enjoining the United States
16 Bureau of Reclamation (“Reclamation”) from knowingly and willfully using stored water
17 contrary to the water rights determined in the Amended and Corrected Findings of Fact
18 and Order of Determination (“ACFFOD”) unless or until this Court stays the ACFFOD
19 pursuant to ORS 539.180. This motion is supported by the entire trial court file, the
20 declarations of Nathan Rietmann, Gene Souza, Grant Knoll, Shane Cheyne, Justin Grant,
21 Ken Schell, Andy King, Paul Crawford, and Rodney Cheyne submitted herewith, and the
22 points and authorities provided below.

23 **POINTS AND AUTHORITIES**

24 **A. INTRODUCTION**

25 Klamath Irrigation District (“KID”) is bringing this emergency motion for
26 preliminary injunction to enjoin the United States Bureau of Reclamation from brazenly
usurping this Court’s authority and causing KID irreparable harm.

1 Right now, this court is reviewing the water rights determinations in the Amended
2 and Corrected Findings of Fact and Order of Determination (“ACFFOD”) entered in the
3 Klamath Adjudication. While this review is pending, water must be distributed in
4 accordance with the ACFFOD pursuant to ORS 539.170 unless this Court grants a stay
5 pursuant to ORS 539.180. Under ORS 539.180, a stay may only be issued if the
6 requesting party posts a bond and agrees “to pay all damages that may accrue by reason
7 of the [ACFFOD] not being enforced.”

8 This court has not stayed the ACFFOD pursuant to ORS 539.180. However, the
9 United States Bureau of Reclamation (“Reclamation”) is acting as though it is above the
10 law and planning to unlawfully divert 150,000 to 275,000 acre-feet of stored water from
11 Upper Klamath Lake contrary to the ACFFOD without so much as requesting, let alone
12 obtaining, a stay from this court pursuant to ORS 539.180.

13 This flagrant violation of the ACFFOD and usurpation of this Court’s authority
14 directly injures Klamath Irrigation District (“KID”) and its constituent members, which
15 own water rights to the stored water Reclamation is planning to unlawfully divert from
16 UKL contrary to the ACFFOD.

17 Many of these injuries will be irreparable. By distributing water contrary to the
18 ACFFOD without requesting and obtaining a stay pursuant to ORS 539.180, Reclamation
19 is depriving KID and its constituent landowners of their legal right to notice, opportunity
20 for hearing, and an impartial judicial determination from this Court on whether a stay of
21 the ACFFOD should be granted. Reclamation is also depriving KID and its constituents
22 of their right to have any stay conditioned upon Reclamation posting a bond and agreeing
23 “to pay all damages that may accrue by reason of the [ACFFOD] not being enforced.”

24 What is more, many Klamath farmers are already on the brink of insolvency due
25 to water shortages Reclamation has unlawfully caused in prior years. If Reclamation is
26 not restrained, and there is another season in which stored water is unlawfully diverted
and flushed down the river contrary to the ACFFOD, it will likely cause a number of

1 farmers to go under. Legal damages from a takings case—which, if the most recent
2 Klamath takings case is any indication, would take almost 20 years to conclude—would
3 provide no relief to farmers who are forced to close their business or sell their land this
4 year or next.

5 The balance of the equities tips clearly in favor of granting an injunction. The law
6 plainly requires stored water in UKL to be distributed in accordance with the ACFFOD
7 unless this court grants a stay pursuant to ORS 539.180. Reclamation knows it must
8 follow the ACFFOD unless a stay is obtained, and a bond is posted. Federal law says so;
9 state law says so; the Solicitor’s Office of Interior says so; Reclamation’s prior
10 submissions to this court say so; and this Court has said so. Yet Reclamation still acts as
11 though abiding by the ACFFOD is merely optional for it.

12 Moreover, none of the interests Reclamation has in diverting stored water contrary
13 to the ACFFOD provide a reason for denying relief. Reclamation says it is flushing
14 stored water in UKL down the Klamath River contrary to the ACFFOD to fulfill its
15 obligations under the ESA. But the ESA does not give Reclamation any new authority to
16 violate the ACFFOD. Instead, it merely tells Reclamation to use whatever discretion it
17 *already* possesses to support endangered species.

18 Similarly, Reclamation sometimes says it is using stored water in UKL to fulfill
19 trust obligations it has to the Hoopa Valley and Yurok Tribes, both of which are located
20 in California. But Reclamation’s trust obligations to the tribes in California afford no
21 water rights to use stored water in UKL, as neither Tribe (nor Reclamation on their
22 behalf) has ever claimed a water right in UKL in the Klamath Adjudication.

23 The public interest requires Reclamation to follow the law. If Reclamation needs
24 water to meet its various environmental and trust obligations it can acquire that water
25 lawfully, not by usurping the power of this Court and unlawfully distributing stored water
26 to which KID owns the water rights under the ACFFOD. This is particularly true, where,
as here, Reclamation’s unauthorized diversion of stored water to which KID owns the

1 water rights actually constitutes a crime under Oregon law. ORS 540.720 (“No person
2 shall use without authorization water to which another person is entitled, or willfully
3 waste water to the detriment of another.”); ORS 540.990(1) (“Violation of...ORS
4 540.720...is a Class B misdemeanor”).

5 For all of these reasons, KID requests that this Court grant injunctive relief
6 enjoining Reclamation from distributing stored water in UKL except in accordance with
7 the water rights determined in the ACFFOD, unless it first obtains a stay and posts a bond
8 sufficient to cover “all damages” the stay might cause.

9 **B. LEGAL STANDARD FOR PRELIMINARY INJUNCTIONS**

10 ORCP 79 states that a preliminary injunction may be ordered “[w]hen it appears
11 that a party is entitled to relief demanded in a pleading,” and that relief “consists of
12 restraining the commission or continuance of some act, the commission or continuance of
13 which during the litigation would produce injury to the party seeking the relief.” ORCP
14 79(A)(1)(a). A preliminary injunction may also be ordered “[when it appears that the
15 party against whom a judgment is sought is doing or threatens, or is about to do, or is
16 procuring or suffering to be done, some act in violation of the rights of a party seeking
17 judgment concerning the subject matter of the action, and tending to render the judgment
18 ineffectual.” ORCP 71A(1)(b). A preliminary injunction requires five days’ notice to the
19 party against whom an injunction is sought. ORCP 79(C)(1).

20 “When determining whether to issue a preliminary injunction, courts consider,
21 among other things, the likelihood that the party requesting the injunction will ultimately
22 prevail on the merits of its claim and whether, if the injunction is not issued, the party
23 will be irreparably harmed during the litigation of the claim. Courts also balance the
24 harm to the movant against harm to the opposing party and the public if the injunction is
25 issued.” *Elkhorn Baptist Church v. Brown*, 366 Or. 506, 518–19 (2020). Put another
26 way, “[t]he office of a preliminary injunction is to preserve the status quo so that, upon
the final hearing, full relief may be granted.” *Oregon Educ. Ass’n v. Oregon Taxpayers*

1 *United PAC*, 227 Or. App. 37, 45 (2009) (quoting *State ex rel. v. Mart*, 135 Or. 603, 613
2 (1931)).

3 **C. ARGUMENT**

4 **1. Water in UKL Reservoir Must be Distributed in Accordance with the**
5 **ACFFOD Issued by OWRD, Unless a Stay is Granted and a Bond is**
6 **Posted**

7 This Court is well aware of the historical background of the Klamath
8 Adjudication. In 1975, the State of Oregon commenced a general stream adjudication of
9 the waters of the Klamath Basin pursuant to ORS in Chapter 539. (Declaration of Nathan
10 Rietmann (“Rietmann Dec.”), at ¶ 2.) The purpose of a general stream adjudication is to
11 quantify and determine all state and federal reserved water rights vested prior to the
12 adoption of Oregon’s 1909 water code. ORS 539.010.

13 Oregon law specifically grants OWRD authority to adjudicate federal reserved
14 water rights, in addition to water rights arising under state law. ORS 539.010(7) (“[T]he
15 Water Resources Department may adjudicate federal reserved rights.”). The State of
16 Oregon’s power to adjudicate federal reserved water rights in the Klamath Adjudication
17 has also been specifically confirmed by the Ninth Circuit Court of Appeals. *United*
18 *States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994) (“We hold that the Klamath Basin
19 adjudication is in fact the sort of adjudication Congress meant to require the United States
20 to participate in when it passed the McCarran Amendment.”); *see also White Mountain*
21 *Apache Tribe v. Hodel*, 784 F2d 921, 924 (9th Cir. 1986) (“The state court does have the
22 authority to adjudicate tribal water rights. The Congress has said so . . . the United States
23 Supreme Court has said so . . . the Arizona Supreme Court has said so . . . and we have
24 said so. It is time that the Tribe accept the proposition as true.”). This ability to
25 adjudicate federal water rights is consistent with the U.S. Supreme Court’s recognition
26 that the purpose of Oregon’s general stream adjudication process is to obtain “a complete
ascertainment of *all existing rights*.” *Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 447–48
(1916) (emphasis added). It is also consistent with the U.S. Supreme Court’s recognition

1 that in Oregon’s water adjudication process, “[a]ll claimants are required to appear and
2 prove their claims; *no one can refuse without forfeiting his claim*, and all have the same
3 relation to the proceeding.” *Id.* (emphasis added); *see also* ORS 539.210 (“Any claimant
4 who fails to appear in the proceedings and submit proof of the claims of the claimant
5 shall be barred and estopped from subsequently asserting any rights theretofore acquired
6 upon the stream or other body of water embraced in the proceedings, and shall be held to
7 have forfeited all rights to the use of the water theretofore claimed by the claimant.”).

8 On March 6, 2013, thirty-eight (38) years after the State of Oregon initiated the
9 Klamath Adjudication, the OWRD filed its Findings of Fact and Final Order of
10 Determination in Klamath County Circuit Court. (Rietmann Dec. at ¶ 3.) Subsequently,
11 on February 28, 2014, the State of Oregon entered an Amended and Corrected Findings
12 of Fact and Final Order of Determination (“ACFFOD”) with the Klamath County Circuit
13 Court.¹ (*Id.* at ¶ 4.) Once the ACFFOD was entered, the state and federal water rights
14 comprehensively determined therein became fully enforceable, pursuant to ORS
15 537.130(4).

16 While the judicial phase of the Klamath Adjudication is pending, water in UKL
17 must be distributed in accordance with the ACFFOD. *See* ORS 539.170 (“While the
18 hearing of the order of the Water Resources Director is pending in the circuit court, and
19 until a certified copy of the judgment, order or decree of the court is transmitted to the
20 director, the division of water from the stream involved in the appeal ***shall be made in***
21 ***accordance with the order of the director.***”) (emphasis added). This requirement that
22 water be distributed in accordance with OWRD’s order pending completion of judicial
23 review has been specifically affirmed by the U.S. Supreme Court. *Pac. Live Stock Co.*,
24 241 U.S. at 447–48 (“[I]t is within the power of the [State of Oregon] to require that,

25 _____
26 ¹[https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBa
sinAdj/Pages/default.aspx](https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/default.aspx)

1 pending the final adjudication, the water shall be distributed according to the board’s
2 order [i.e. Final Order of Determination], unless a suitable bond be given to stay its
3 operation.”).

4 Any party to the Klamath Adjudication that wishes may seek a stay from this
5 Court, contingent upon judicial approval and the posting of “a bond or an irrevocable
6 letter of credit issued by an insured institution as defined in ORS 706.008, . . . in such
7 amount as the judge may prescribe, conditioned that the party will pay **all damages** that
8 may accrue by reason of the determination not being enforced.” ORS 539.180. This
9 Court has indeed heard and considered several requests for stays from several parties to
10 the Klamath Adjudication. (*See* Rietmann Dec., Exs. B–C.) Indeed, as this Court has
11 already noted, the bond must be large enough to pay all damages that may accrue from
12 the determination not being enforced, and the size of the bond does not limit the amount
13 of damages for which the movant may be liable. (*Id.* at Ex. C.) To date, Respondent
14 Reclamation has not moved to stay the ACFFOD’s determination of either its or KID’s
15 rights, and has not posted any bond to cover the damages that would be caused by such a
16 stay.

17 None of this is news to Reclamation. Reclamation is well aware of the fact that it
18 has no right to release this stored water. In fact, recent guidance issued by *Reclamation*
19 *itself* noted that, in light of the ACFFOD, Reclamation lacks the authority to divert stored
20 water for its own in-stream purposes:

21 Using stored water that is otherwise subject to the beneficial
22 use by Klamath Project beneficiaries to augment or otherwise
23 produce instream flows in the Klamath River, either in
24 Oregon or California, ***is not authorized under the ACFFOD.***
25 Reclamation therefore cannot release water previously stored
in priority and otherwise required for beneficial use by
Klamath Project beneficiaries from Upper Klamath Lake for
the specific purposes of producing instream flows in the
Klamath River either in Oregon or California.

26 (Rietmann Dec., Ex. F at 23 [emphasis added].) Reclamation itself has conceded that
what it is doing is not lawful.

1 Reclamation is also fully aware of the enforceability of the ACFFOD and the
2 requirements for a stay and a bond. In fact, Reclamation has specifically *opposed* prior
3 attempts by water rights holders seeking a stay. (*Id.* at Ex. M.) In doing so, Reclamation
4 noted that the rights found in the ACFFOD “are ‘in full force and effect’ at this time.”
5 (*Id.* at 3.) Reclamation has argued that the bond amount cannot be nominal or “miserly,”
6 noting that “[t]he intent of the statute [ORS 539.180] is clear from its plain language and
7 context: a stay bond needs to be set in an amount to ensure the payment of the damages
8 resulting from the stay.” (*Id.* at 9.) Further, Reclamation has noted in briefs to this Court
9 that, because the ACFFOD is in full force and effect, “[t]he status quo is that the Project
10 water rights [found in the ACFFOD] are now enforceable. Oregon’s adjudication statutes
11 could not be more clear on this point.” (*Id.* at 45.)

12 Because Oregon statute and prior orders of this Court expressly state—and
13 Reclamation concedes—that the ACFFOD is fully enforceable unless and until a stay is
14 issued and a bond is posted, KID clearly has the legal right to an injunction preventing
15 Reclamation from violating the ACFFOD. This is particularly true where, as discussed
16 below, Reclamation has recently violated the ACFFOD during last year’s irrigation
17 season and has again made clear that it will do so this year as well.

18 **2. Reclamation is Not Abiding by the Water Rights Determined in the**
19 **ACFFOD, and Intends to Continue Violating Those Rights**

20 *a. Reclamation has No Right Under the ACFFOD to Use Stored Water*
21 *for Its Own Instream Purposes*

22 In 2019 and 2020, Reclamation violated the terms of the ACFFOD by releasing
23 so-called “flushing flows”—i.e., water discharged for non-consumptive, instream uses
24 meant to benefit coho salmon in California—of stored water in UKL. (Souza Dec. at
25 ¶ 7.) These flushing flows were necessarily made from stored water in UKL, as the
26 discharge through the Link River Dam *vastly* exceeded the inflow into UKL at the time.

1 (*Id.* at ¶ 7.) These releases violated the ACFFOD, and were made without seeking a stay
2 or posting the necessary bond.²

3 The ACFFOD determined that “[t]he United States is the owner of a right to store
4 water in Upper Klamath Lake to benefit the separate irrigation rights for the Klamath
5 Reclamation Project.” This storage right authorizes Reclamation to store up to 486,828
6 acre-feet per year in UKL reservoir between the elevations of 4,143’ and 4,136’ “for
7 agricultural irrigation, stockwater and domestic uses.” (Rietmann Dec. at Ex. A at
8 KBA_ACFFOD_07060.) The storage right does not give Reclamation the right to use
9 the water that it stores for purposes of enhancing instream flows in the Klamath River.
10 *Cookinham v. Lewis*, 58 Or. 484, 492 (1911) (holding that a primary storage right “does
11 not include the right to divert and use stored water, which must be the subject of the
12 secondary permit”); *see also* Rietmann Dec., Ex. A at KBA_ACFFOD_07083–84
13 (explaining the principle that “the right to store water is distinct from the right to use
14 stored water”).

15 Accordingly, while the right store water in UKL reservoir is owned by
16 Reclamation, the secondary right to beneficially use the stored water is owned by KID
17 and other water right holders within the Klamath Project. (Rietmann Dec. at Ex. A at
18 KBA_ACFFOD_07083–84.) The ACFFOD provides that “[b]eneficial users within the
19 Klamath Project hold a 1905 water right to beneficially use the water that the United
20 States stores in Upper Klamath Lake reservoir for “irrigation, domestic and incidental
21 stock watering uses.” (Rietmann Dec., Ex. A, at KBA_ACFFOD_007058, 007061,
22 007075–82.) The ACFFOD also recognizes that KID, and other irrigation districts within
23 the Klamath Project, “represent the beneficial users’ interests with respect to the

24 ² Reclamation also has not acquired these rights through any other lawful means, such as
25 purchasing, leasing, or being granted limited licenses to use these rights. Although the
26 water rights recognized for KID and the farmers it serves are for irrigation use, any water
rights that KID and its farmers hold which are not needed for irrigation may be leased
instream pursuant to Sections 1 and 2, Chapter 445, Oregon Laws 2015 (codified as a
note in the Oregon Revised Statutes immediately following ORS 539.170).

1 beneficial use component of the water rights recognized in [the ACFFOD].” (*Id.* at
2 KBA_ACFFOD_007045, 007082.)

3 KID’s secondary water rights to *stored water* in UKL reservoir cannot be “called”
4 or curtailed by any water rights—even senior water rights—in *the Klamath River*. “Once
5 water from a natural source has been legally stored, use of the stored water is subject only
6 to the terms of the secondary permit that grants the right to use of stored water.” Op.
7 Att’y Gen. OP-6308 (1989); *see also* ORS 540.210(3) (“The distribution and division of
8 water shall be made according to the relative and respective rights of the various users
9 *from the ditch or Reservoir.*”) (emphasis added); OAR 690-250-0150(4) (“Use of legally
10 stored water is governed by the water rights, if any, which call on that source of water.”);
11 *Tudor v. Jaca*, 178 Or. 126, 147–148 (1945) (impounded water may only be used to
12 satisfy the secondary right). Because of this, “legally stored water *is not subject to call by*
13 *senior rights to natural flow, even if the stored water originated in that stream.*” Op.
14 Att’y Gen. OP-6308 (1989) (emphasis added).

15 Although the ACFFOD does not grant Reclamation the right to use stored water in
16 UKL reservoir, and KID’s secondary water rights in UKL reservoir cannot be curtailed
17 based on any senior water right in the Klamath River, Reclamation is nevertheless
18 distributing vast quantities of stored water out of UKL reservoir through the Link River
19 Dam to provide enhanced instream flows in the Klamath River in California. In 2020,
20 starting on April 17, 2020, Reclamation released 32,889 acre-feet of stored water from
21 UKL reservoir for this purpose. (Souza Dec. at ¶ 7.) Reclamation then continued to
22 release an additional 90,414 acre-feet of stored water throughout the irrigation season for
23 its own instream purposes, totaling 123,303 acre-feet, *without* a call for that water from a
24 water rights holder. (*Id.* at ¶ 8.) This water would have been sufficient to irrigate another
25 45,668 acres of farmland. (*Id.*)

26 Reclamation is planning the same type of impermissible stored water releases for
2021. Documents distributed by Reclamation in February 2021 show that, regardless of

1 the actual level of inflows into UKL, a large release is planned for mid-April. (Souza
2 Dec., Ex. C at 16.) This type of a release, which vastly exceeds the amount of inflow into
3 UKL at that time, is not natural or live flow. (Souza Dec. at ¶ 14.) Instead, it is—
4 obviously and necessarily—the release of previously stored water. Moreover, this large
5 spike in releases is not in response to an expected sudden and temporary call for water
6 from a water rights holder, but rather for Reclamation’s own in-stream purposes to
7 provide additional water for juvenile salmon. (Souza Dec. at ¶ 15.) Similarly,
8 Reclamation has indicated that it intends to continue discharging stored water throughout
9 the irrigation season for its own in-stream purposes, without a call from any holder of a
10 right to use stored water. (Souza Dec. at ¶ 16.) It is clear Reclamation intends to violate
11 the ACFFOD during the 2021 irrigation season as well.

12 *b. No Stay has been Sought and No Bond has been Posted*

13 As set out above, Reclamation is well aware the ACFFOD is in effect and controls
14 the distribution of water in UKL, unless and until a stay is issued and whatever bond this
15 Court orders is posted. Reclamation participated in prior requests for a stay by filing
16 briefs and submitting arguments to this Court (*see* Rietmann Dec., Ex. M), and was
17 served with this Court’s opinions and orders noting the necessity of a stay and a bond.
18 (*Id.*, Exs. B and C.)

19 Nevertheless, Reclamation has decided to grant itself a stay of the ACFFOD, and
20 continue acting as though it has no effect. Reclamation has not sought nor received an
21 order granting a stay of any part of the ACFFOD, nor has it posted a bond that would
22 cover “all damages” arising from such a stay. Because no stay has been issued and no
23 bond has been posted, as expressly required by both statutory law and orders of this
24 court, KID’s case is meritorious and an injunction against further deprivations should
25 issue.

26 ///

1 c. *A preliminary injunction is necessary to maintain the status quo, and*
2 *entitlement to an injunction is clearly set forth in Oregon statutes*

3 As Reclamation has previously realized, Oregon statutes create a unique situation
4 insofar as they specifically require water to be distributed in accordance with the
5 ACFFOD during the pendency of the proceeding—absent a stay and corresponding
6 bond—irrespective of the ultimate outcome of the litigation. To quote Reclamation’s
7 prior briefs, “[t]he status quo is that the Project water rights [found in the ACFFOD] are
8 now enforceable. Oregon’s adjudication statutes could not be more clear on this point.”
9 (Rietmann Dec., Ex. M, at 45.) In that sense, therefore, the likelihood of prevailing on
10 the underlying claims is wholly immaterial to whether KID is entitled to injunctive relief
11 now. While review of the ACFFOD is pending, KID is entitled to have water distributed
12 in accordance with the water rights determined in the ACFFOD unless this court grants a
13 stay pursuant to ORS 539.180, irrespective of whether the ultimate decree modifies or
14 changes the ACFFOD.

15 This makes perfect sense in light of such a complex water adjudication. OWRD
16 took almost four decades to reach the decision in the ACFFOD. This litigation has
17 already been pending for approximately seven years. Even a conservative estimate of the
18 litigation suggests it will take another eight or ten years to complete. Therefore, how
19 water is distributed in the interim—a period which may itself span two decades—is of
20 great importance to the water rights holders. The ultimate judgment or decree in this case
21 will *never* govern how water was to be distributed here, today, in 2021. Thus, the
22 relevant question is whether KID is likely to prevail on its claim in this motion that
23 Reclamation may not knowingly distribute stored water contrary to the water rights
24 determinations in the ACFFOD unless Reclamation obtains a stay from this court
25 pursuant to ORS 539.180. The law on this “could not be more clear on this point,” as
26 Reclamation has pointed out. (Rietmann Dec., Ex. M at 45.)

26 ///

1 Specifically, ORS 539.130(4) states:

2 The determination of the department [i.e. ACFFOD] shall be in full force
3 and effect from the date of its entry in the records of the department, unless
4 and until its operation shall be stayed by a stay bond as provided by ORS
539.180

5 ORS 539.170 states:

6 While the hearing of the order of the Water Resources Director is pending
7 in the circuit court, and until a certified copy of the judgment, order or
8 decree of the court is transmitted to the director, the division of water from
the stream involved in the appeal shall be made in accordance with the
order of the director [i.e. ACFFOD].”

9 ORS 539.180 states in relevant part:

10 At any time after the determination of the Water Resources Director has
11 been entered of record, the operation thereof may be stayed in whole or in
12 part by any party by filing a bond or an irrevocable letter of credit issued by
13 an insured institution as defined in ORS 706.008 in the circuit court
wherein the determination is pending, in such amount as the judge may
prescribe, conditioned that the party will pay all damages that may accrue
by reason of the determination not being enforced.

14 It is beyond dispute that KID has an existing statutory right to have the ACFFOD
15 enforced as it is now during the pendency of the judicial phase of the Klamath
16 Adjudication. Reclamation has conceded as much.

17 *d. Regardless of how the Court determines the exceptions Reclamation*
18 *has filed, Reclamation's current use would still not be allowed*

19 What is more, this particular dispute will ultimately be found in KID's favor,
20 regardless of how this Court rules on the exceptions before it. Even after this case is fully
21 resolved, Reclamation would *still* not be permitted to do what it is presently doing under
22 Oregon law. Reclamation has not asserted any claim that it has a right to use the water it
23 stores in UKL for instream purposes in the Klamath River. While Reclamation has
24 claimed that the Project's use rights should be held in its name, and not directly by the
25 irrigators, it has not filed any exception to KID's water rights asserting stored water in
26 UKL may be used for instream purposes, rather than irrigation. Given that

1 Reclamation *has never* claimed the right to use stored water in UKL for instream
2 purposes during the 46-years the adjudication has been pending, KID will prevail on its
3 claim, to the extent that it asserts that the right to use stored water is specifically the right
4 to use stored water *for irrigation*. There simply is no dispute in this proceeding in regard
5 to whether Reclamation stores water in UKL for irrigation use within the Klamath Project
6 or for purposes of providing instream flows in the Klamath River. It is the former, and
7 Reclamation has never suggested differently.

8 **3. KID and Its Members Suffer Significant, and Irreparable, Injury as a**
9 **Result of Reclamation’s Refusal to Abide by the Terms of the**
10 **ACFFOD**

11 Both KID and its members suffer serious, extensive, and often irreparable injury to
12 their rights when Reclamation simply ignores the ACFFOD and releases stored water
13 without a corresponding water right, thereby flouting the law and this Court’s jurisdiction
14 to decided whether the ACFFOD shall be enforced or stayed while its review is pending.
15 The unauthorized release of stored water obviously detrimentally impacts KID and all of
16 its members, as less water is therefore available to be used in irrigation.

17 The most serious effects are felt by KID’s members. Numerous irrigators within
18 KID will not survive another year of severe water restrictions. (Crawford Dec. at ¶ 22;
19 King Dec. at ¶ 11 [“If Reclamation again flushes the stored water down the river this
20 year, and I receive no, or only a very small amount of water, I will almost certainly have
21 to file for bankruptcy.”]; Knoll Dec. at ¶ 12 [“If the Bureau flushes our water down the
22 river this year, and I am unable to irrigate this year, I will likely have to consider filing
23 for bankruptcy, or selling parts of the farm and equipment to make it through the year.”];
24 Grant Dec. at ¶ 18 [“If there is no or very little water this year, my business will not be
25 able to survive this year.”].) Indeed, some have already begun liquidating significant
26 portions of their business to stay afloat. (Schell Dec. at ¶¶ 7–11 [noting he is liquidating
his cow herd because of the difficulties finding feed for them when pasture fields cannot
be irrigated].) Even those who may be able to survive this year will be on the brink of

1 bankruptcy. (*See* S. Cheyne Dec. at ¶¶ 17–18 [noting that if Reclamation creates another
2 water shortage this year, it will “fully deplete my available cash reserves for the farm,”
3 and if there is another water shortage next year, “I would certainly need to file for
4 bankruptcy”]; Knoll Dec. at ¶ 12 [“If I am able to get some water, I might be able to
5 squeak by through this year, but I certainly could not make it through two more years like
6 that.”]; Grant Dec. at ¶ 18; Schell Dec. at ¶ 16 [noting he may be able to make it through
7 a few more years, but only because he is “liquidating half of my business . . . If
8 Reclamation actually prevents us from irrigating t all, it won’t even be that long”].)

9 Farming, as a business, requires significant up-front expenses and obligations to
10 prepare for and produce the crop, with virtually no income for months or years until the
11 returns from the crop’s productions are realized. (Crawford Dec. at ¶ 17 [“The biggest
12 expenses I have during the year are for mortgages, leases, fertilizer, and pesticides. Most
13 of these are fixed costs, in that they must be incurred before I know what my yields will
14 be that year or even what fields will be able to be irrigated.”]; Knoll Dec. at ¶ 8 [“The
15 vast majority of these expenses—approximately 75 percent of them—must be paid up-
16 front before irrigation even begins.”]; Grant Dec. at ¶ 14 [noting most costs “must be
17 incurred before the irrigation season even begins”].) Klamath farmers undertook
18 significant costs in the form of land rental obligations, mortgage payments, operating
19 loans, equipment loans, water assessments, infrastructure, and expenditures for seed,
20 fertilizer, pesticides, fuel, and other necessary items long before Reclamation indicated it
21 intended to release stored water in 2021 for its own purposes and not for irrigation. (*See*
22 Crawford Dec. at ¶ 17; King Dec. at ¶ 8 [“[M]ost of the expenses I have associated with
23 farming a particular area are already incurred by the time I learn that Reclamation plans
24 to flush our stored water down the river.”].) Many Klamath farmers do not operate with a
25 large profit margin, which leaves them particularly vulnerable when Reclamation violates
26 the law by flushing stored water down the river without a right to do so. (Crawford Dec.

at ¶¶ 16, 18 [noting that, of the \$480,000 in gross revenue generated in a year,

1 approximately \$450,000 must go to pay expenses]; King Dec. at ¶ 7; Knoll Dec. at ¶ 9
2 [noting he must get at least a 75 percent yield to break even]; Grant Dec. at ¶ 13 [profit
3 margin of 20-25%.])

4 When Reclamation makes unilateral decisions to seize these water rights it does
5 not own by releasing stored water for the benefit of individuals or obligations that have
6 no right to use that water, it cripples these farmers. (Crawford Dec. at ¶ 22 [noting
7 business “likely could not survive” another water shortage, and “I would need to
8 consider bankruptcy, or beginning to liquidate some of the equipment and property I own
9 to cover my expenses”]; King Dec. at ¶ 7 [with significant water shortage, “I will not be
10 able to break even”]; Schell Dec. at ¶ 15 [noting losses in successive years due to
11 Reclamation-caused water shortages].) Farmers are left with no way to pay off the
12 expenses and debts they undertook to prepare the land for farming. (See Crawford Dec.
13 at ¶ 22.) Many farmers are forced to work additional jobs to subsidize their farms, which
14 are already a full-time job. (See Crawford Dec. at ¶ 20; S. Cheyne Dec. at ¶ 14 [noting he
15 has worked full-time as a project manager since 2010]; Schell Dec. at ¶¶ 14–15.) Nor
16 are these impacts limited to the year in which Reclamation actually takes the water:
17 many of the crops in the Klamath Basin are actually on multi-year rotations, and water
18 shortages in any particular year have multi-year effects. (See S. Cheyne Dec. at ¶ 8
19 [noting his farm rotates an alfalfa field every four to seven years; “The younger stands
20 may be able to survive a season of water shortage, but will last significantly fewer
21 seasons, because of the water stress.”]; Crawford Dec. at ¶ 13 [“Because I will be unable
22 to irrigate 240 acres of my land this year due to Reclamation-induced water shortages,
23 those crops will die. I will need to replant them next year. That means that, for alfalfa
24 crops that I planted this year, I will have twice the expenses initially.”]; Knoll Dec. at ¶
25 11 [noting some of his crops are “more sensitive to water shortages” and that if he is
26 “unable to water the rye grass I planted last year, it won’t survive the year”].)

1 Additionally, when water shortages cause crop shortages, the businesses that
2 Klamath farmers supply turn elsewhere to get the crops they need. (*See* Crawford Dec. at
3 ¶ 19 [“Not only is having water necessary to keep the multi-year crops alive, but it’s
4 critical for me to have product to supply my customers. A significant amount of business
5 goes to only a few customers. If I’m unable to supply my customers with the hay and
6 alfalfa I farm, they need to go elsewhere to purchase it.”].) Often, these customers are
7 difficult or impossible to get back. (Crawford Dec. at ¶ 19 [“Because they need a
8 consistent supply of [my crops], they are unlikely to switch back to me if I cannot
9 consistently provide it. If I lose these customers, they cannot readily be replaced, since
10 these business relationship are cultivated over a number of years.”].) This is compounded
11 by the fact that, just last year, Reclamation undertook a similar seizure of water rights,
12 releasing massive amounts of stored water for its own instream purposes. (Souza Dec. at
13 ¶¶ 6–8, 11.) When water shortages are perpetuated over successive growing seasons, the
14 increased likelihood of bankruptcy or foreclosure increases dramatically. (Crawford Dec.
15 at ¶ 11 [noting that, because of Reclamation-induced water shortages, “I was barely able
16 to scrape by last year”].) Farmers are at serious risk of permanent and irreparable
17 injury—such as bankruptcy and the loss of farms and land—if Reclamation is not
18 enjoined from violating the ACFFOD.

19 The water shortages caused by Reclamation releasing stored water for its own
20 instream purposes also cause emotional harm to the farmers in the Klamath Project. (*See*
21 S. Cheyne Dec. at ¶ 20 [noting these shortages are “extremely stressful” because he does
22 not “know whether I will be able to make ends meet when they happen”; noting also prior
23 water restrictions almost “bankrupted” him, and it “took me more than a decade to
24 recover from that”]; Schell Dec. at ¶¶ 11, 13 [noting difficulty of deciding to liquidate
25 cow herd he has maintained for 50 years].) Reclamation’s continued flouting of
26 established water rights has caused multi-generational farming families to sincerely doubt
the continued viability of farming in the Klamath Basin. (*See* S. Cheyne Dec. at ¶¶ 3, 21

1 [family has been farming here since the early 1900s; “Several of my children have
2 expressed interest in running the business, but with the consistent water shortages, I do
3 not feel like I can recommend this business to them in the Klamath Basin as a career
4 decision. I’ve told them that if they want to farm, they should look for land elsewhere.”];
5 Knoll Dec. at ¶ 13 [“Farming is a tradition in my family. . . . All three of my oldest
6 children are interest in agriculture nd love farming. I would like to be able to pass the
7 farm onto them someday.”].) As one farmer put it, while “[c]ontinuing this heritage is
8 important to me . . . I’ve told [my children] that if they want to farm, they should look for
9 land elsewhere.” (See S. Cheyne Dec. at ¶¶ 3, 21; see also Knoll Dec. at ¶ 14 [“I don’t
10 know whether, as a parent, I should encourage [my kids] to stay in the Klamath area . . . I
11 can’t encourage my kids to go into a business that has been so difficult and volatile for
12 me.”].)

13 Aside from the tangible physical losses that follow Reclamation’s flouting of the
14 ACFFOD, KID and its members are deprived of valuable and important legal rights as
15 well. The ACFFOD is fully enforceable unless and until a stay is issued by this Court.
16 See ORS 539.170. Critically, Reclamation’s seizure of water rights under the ACFFOD
17 prevents KID from the right to have the issue of whether a stay is warranted determined
18 by this Court. As Reclamation itself has previously argued, whether to issue a stay is
19 always a matter of discretion for this Court. (Rietmann Dec., Ex. M, at 16–18.) Forcing
20 Reclamation to move for a stay, should it need one, provides KID with due process, and
21 the ability to contest or dispute particular arguments Reclamation might make for or
22 against implementation of the ACFFOD. By simply taking KID’s water rights,
23 Reclamation becomes the decision-maker, and usurps this Court’s proper authority.

24 Additionally, even if a stay is warranted, this Court has already held that no stay
25 may be granted except upon the posting of a bond and an agreement to pay “all damages”
26 that may be caused by the stay. (Rietmann Dec., Exs. B and C.) This language is quite
broad, and intended to cover any harm that might fall on KID and its members as the

1 result of a stay in this litigation. That includes not only the value of the water itself, but
2 the significant amount of consequential damages that will accrue if Reclamation
3 continues to release stored water for unauthorized purposes. (*See id.* [noting that the
4 obligation to “pay all damages that may accrue by reason of the determination not being
5 enforced” is “in addition to the bond,” and the bond “does not limit or cap that
6 obligation,” subjecting those who would seek a stay “to a significant liability”].) This
7 requirement—both the posting of the bond and the agreement to pay damages—provide
8 significant considerations to KID and its members’ adjudicated rights. It ensures all
9 parties are clear where damages will lie in the event they occur. And the provision of a
10 bond ensures that certain amounts of money will be reserved to cover the farmers’ losses.

11 Lastly, whether or not the ACFFOD is presently enforceable impacts other legal
12 rights and obligations which impact KID and Reclamation. While discussed in more
13 detail below, if the ACFFOD is presently enforceable, Reclamation has only very narrow
14 discretion in releasing previously stored water, because it may not do so differently than
15 the ACFFOD dictates and cannot use stored water for in-stream ESA purposes. Just a
16 few months ago, Reclamation and the Office of the Solicitor reached that very
17 conclusion, noting “[t]o the extent Reclamation releases water previously appropriated
18 and stored in priority from Upper Klamath Lake for a beneficial use, including in the
19 State of California, the use must be consistent with the ACFFOD or applicable federal
20 law.” (*See* Rietmann Dec., Exs. D, E, and F.) Because of this, Reclamation “cannot
21 release water previously stored in priority and otherwise required for beneficial use by
22 Klamath Project beneficiaries from Upper Klamath Lake for the specific purposes of
23 producing instream flows in the Klamath River.” (*Id.* at 23.) Determinations of
24 discretion by Reclamation impact how Reclamation operates the Klamath Project,
25 including whether it purchases or leases KID’s water rights for in-stream purposes (as
26 opposed to merely seizing them).

1 Reclamation’s failure to abide by the terms of the ACFFOD has and is causing
2 numerous severe and irreparable injuries, including the imminent loss or bankruptcy of a
3 number of family farms; the loss of KID’s legal right to have stays determined by this
4 court; and the loss of a bond to cover “all damages” associated with the stay.
5 Additionally, whether the ACFFOD is presently enforceable impacts how Reclamation
6 discharges its other legal responsibilities in operating the Klamath Project.

7 **4. The Endangered Species Act Does Not Authorize the Use of Stored**
8 **Water in UKL Without a Water Right**

9 Reclamation may contend the Endangered Species Act empowers it to use stored
10 water in UKL reservoir for instream purposes without a water right. This contention is
11 wholly without merit.

12 It is well-established that the ESA imposes obligations on federal agencies, but
13 does not expand the authority of agencies to act beyond the power the agency otherwise
14 possesses. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995) (“[The ESA]
15 directs agencies to ‘utilize their authorities’ to carry out the ESA’s objectives; it does not
16 expand the powers conferred on an agency by its enabling act.”) (quoting *Platte River*
17 *Whooping Crane v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992)). The D.C. Circuit
18 described as “far-fetched” the argument that the general consultation requirements of the
19 ESA expand agencies’ authority to act beyond their enabling acts. *See Platte River*
20 *Whooping Crane*, 962 F.2d at 34. This principle has not only been upheld by the Ninth
21 and D.C. Circuits, but also the Fifth Circuit. *See Am. Forest & Paper Ass’n v. U.S. EPA*,
22 137 F.3d 291, 299 (5th Cir. 1998) (“We agree that the ESA serves not as a font of new
23 authority, but as something far more modest: a directive to agencies to channel their
24 *existing* authority in a particular direction.”)

25 The Supreme Court recently weighed in on an analogous issue in *National*
26 *Association of Home Builders v. Defenders of Wildlife* (“*Home Builders*”), 551 U.S. 644
(2007). At issue in *Home Builders* was a conflict between the ESA’s consultation

1 requirement under 16 U.S.C. § 1536(a)(2) and a requirement under the Clean Water Act
2 that the EPA turn over authority to issue discharge permits to a state if the state met nine
3 specified criteria. *Home Builders*, 551 U.S. at 651–52. The Ninth Circuit held the ESA
4 required the agency to consider whether turning over this authority to the states would
5 create jeopardy for an endangered species, even though the requirement to turn over
6 authority was mandatory if the nine criteria were met. *Id.* at 655–57. The Supreme
7 Court, noting the Circuit split on the issue created by this holding and the D.C. Circuit’s
8 holding in *Platte River Whooping Crane*, reversed. *Id.* at 657. In doing so, it noted that
9 the ESA’s general consulting obligation under 16 U.S.C. § 1536(a)(2) does not effect an
10 implied repeal of previously-enacted statutes. *Id.* at 662–66. As such, it imposes no
11 consultation obligation on agency actions that are mandatory, and can only apply where
12 the actions of the agency are discretionary. *Id.* at 666–67.

13 The Supreme Court’s holding in *Home Builders* establishes an important principle
14 that supports the holdings of *Sierra Club*, *Platte River Whooping Crane*, and *American*
15 *Forest & Paper Association* by analogy. Where an agency lacks discretion, there is no
16 requirement to consult under Section 7 of the ESA. *See Cottonwood Env’tl. Law Ctr. v.*
17 *U.S. Forest Serv.*, 789 F.3d 1075, 1086–87 (9th Cir. 2015) (“[I]f an agency has no
18 discretion to take any action that might benefit the threatened species, Section 7
19 consultation would be ‘a meaningless exercise.’”) (quoting *Env’tl. Prot. Info. Ctr. v.*
20 *Simpson Timber Co.*, 255 F.3d 1073, 1085 (9th Cir. 2001)); *see also Home Builders*, 551
21 U.S. at 669 (noting the ESA’s “no-jeopardy duty covers only discretionary agency
22 actions and does not attach to actions . . . that an agency is required by statute to
23 undertake once certain specified triggering events have occurred”). This is because the
24 ESA does not grant the agency any additional powers to act it did not already possess.
25 *Am. Forest & Paper Ass’n*, 137 F.3d at 299; *Sierra Club*, 65 F.3d at 1510; *Platte River*
26 *Whooping Crane*, 962 F.2d at 34. Instead, the ESA requires the agency to discharge the
discretionary powers it was given in other statutes in accordance with the ESA. 16

1 U.S.C. § 1536(a)(2). Similarly, an agency’s non-discretionary obligations or duties under
2 other statutes are not modified, discharged, or excused by the consultation and no-
3 jeopardy requirements of the ESA.

4 The ESA does not modify, remove, or discharge the other obligations Reclamation
5 has under the Reclamation Act, which require it to act in accordance with state water law
6 in the purchase, condemnation, “control, appropriation, use, or distribution of water.”
7 *See California v. United States*, 438 U.S. 645, 674–75 (1978) (“The legislative history of
8 the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to
9 the substance, as well as the form, of state water law.”). More particularly, the
10 Reclamation Act states:

11 Nothing in this Act shall be construed as affecting or intended
12 to affect or to in any way interfere with the laws of any State or
13 Territory relating to the control, appropriation, use, or
14 distribution of water used in irrigation, or any vested right
15 acquired thereunder, and the Secretary of the Interior, in
16 carrying out the provisions of this Act, shall proceed in
conformity with such laws, and nothing herein shall in any way
affect any right of any State or of the Federal Government or of
any landowner, appropriator, or user of water in, to, or from
any interstate stream or the waters thereof.

17 43 U.S.C. § 383. Thus, while Reclamation is specifically given the authority to condemn
18 property rights—such as the right in Oregon to use water, *see* ORS 307.010(1)(b)(D)—
19 where necessary, *see* 43 U.S.C. § 421 (Reclamation may “acquire any rights or property”
20 deemed necessary “by purchase or condemnation under judicial process”), it does not
21 have the right to do so without complying with the Reclamation Act, which requires
22 adherence to state law. As set forth in *Sierra Club, Platte River Whooping Crane*, and
23 *American Forest & Paper Association*, and supported by the Supreme Court’s decision in
24 *Home Builders*, the ESA does not expand the authority of an agency to take actions it is
25 not otherwise empowered to take. Thus, the ESA does not entitle Reclamation to use
26 stored water in UKL reservoir without a water right; rather it creates an obligation that

Reclamation use its discretionary powers to avoid jeopardy to endangered species. It is

1 the Reclamation Act that empowers Reclamation to acquire Oregon water rights through
2 purchase or condemnation. *See* 43 U.S.C. § 421. However, such rights must be acquired
3 in accordance with state law. *See* 43 U.S.C. § 383; *California v. United States*, 438 U.S.
4 at 674–75.

5 Reclamation’s own interpretation of its discretion supports this conclusion. As
6 mentioned above, recent guidance from the Office of the Solicitor and Reclamation’s
7 own reassessment of its discretion has concluded that it lacks discretion to release stored
8 water from UKL other than for the beneficial use of KID and other irrigators. (*See*
9 Rietmann Dec., Ex. F at 23; Rietmann Dec., Ex. E at 5–6 [concluding that Reclamation
10 lacks discretion to modify or independently determine the amount of water necessary for
11 beneficial use].

12 Additionally, if Reclamation truly requires water for some purpose other than what
13 is set forth in the ACFFOD, Reclamation may compensate KID or others to lease their
14 water rights instream. Alternatively, Reclamation may purchase KID’s water rights and
15 lease them instream itself in accordance with law. In the past, Reclamation has obtained
16 limited licenses authorizing it to use stored water in UKL for instream purposes in
17 accordance with law with the tacit agreement of KID and other Project irrigators. (Souza
18 Dec. at Exs. A and B.) But now, Reclamation is simply usurping this Court’s authority
19 and granting itself a de facto stay of the ACFFOD in open defiance of the law. In short,
20 the ESA provides no basis for Reclamation to violate the ACFFOD.

21 **5. The Equities Clearly Favor a Preliminary Injunction Here**

22 As discussed at length above, Reclamation clearly knows that releasing stored
23 water from UKL for its own in-stream purposes is unlawful under state and Federal
24 statutory law, prior orders of this Court, and its own internal legal guidance. Oregon
25 statutes unequivocally state that a water rights determination by OWRD in a general
26 stream adjudication is fully enforceable during judicial review of that decision. *See* ORS
539.130(4) (“The determination of the department shall be in full force and effect from

1 the date of its entry in the records of the department, unless and until its operation shall
2 be stayed by a stay bond as provided by ORS 539.180.”); ORS 539.170 (“While the
3 hearing of the order of the Water Resources Director is pending in the circuit court, and
4 until a certified copy of the judgment, order or decree of the court is transmitted to the
5 director, the division of water from the stream involved in the appeal shall be made in
6 accordance with the order of the director.”); ORS 539.180 (noting enforcement may be
7 stayed by posting of a bond “conditioned that the party will pay all damages that may
8 accrue by reason of the determination not being enforced”). This Court has recognized
9 the same thing, noting that any party that wants a stay of the ACFFOD pending these
10 judicial proceedings must seek such a stay and must be prepared to both post a bond and
11 agree to pay “all damages” that may result from the failure to abide by the terms of the
12 ACFFOD. (Rietmann Dec., Ex. B.) Even Reclamation itself has recognized that it lacks
13 discretion to release stored water for purposes other than beneficial use, as determined
14 under the ACFFOD, or to re-evaluate for itself what constitutes beneficial use. (*See*
15 Rietmann Dec., Ex. F at 23 [Reclamation Reassessment]; Rietmann Dec., Ex. E at 5–6
16 [concluding that Reclamation lacks discretion to modify or independently determine the
17 amount of water necessary for beneficial use].) And Reclamation is very aware of how it
18 may discharge its obligations *lawfully*, because it has leased KID’s water rights in the
19 past, when necessary. (Souza Dec., Exs. A and B.)

20 Nevertheless, Reclamation persists in acting unlawfully. It did so last year when it
21 released large amounts of stored water for in-stream purposes in both a spring “flushing
22 flow” and then throughout the irrigation season, without obtaining a stay or leasing these
23 rights from KID or other irrigators. And it has already announced it will do so again this
24 year, planning another flushing flow for mid-April, and then continual releases of stored
25 water from UKL, not based on the call of an irrigator or water rights holder, but instead
26 to satisfy its own purposes. Reclamation has no right to act unlawfully, and both equity
and the public interest require Reclamation—like everyone else—to abide by the law.

1 Reclamation’s unlawful acts cause significant and irreparable injury to KID and its
2 constituent members. If Reclamation is permitted to continue depriving KID’s irrigators
3 of their rights to use stored water, numerous family farms face an imminent danger of
4 closing. These losses are irreparable: even if a farm could succeed in a takings case and
5 be awarded damages in a takings case some 10 or 20 years from now, the business will be
6 closed and the land sold. These injuries cannot be remedied through a later damages
7 claim, but must be enjoined by the Court now.

8 The ESA provides no basis for finding the equities tip in favor of permitting
9 Reclamation’s unlawful actions. The ESA did not expand the authority of agencies such
10 as Reclamation to do acts they were otherwise not permitted to do. Instead, it merely
11 directed that agencies such as Reclamation are to discharge whatever authority they have
12 in accordance with the ESA. The ESA does not provide a basis for Reclamation to
13 *expand* its authority under the Reclamation Act or state law, and does not permit it to
14 unilaterally seize water in violation of the ACFFOD. Further, Reclamation is fully aware
15 of how to comply with both the ESA and the ACFFOD, because it has *specifically*
16 received a limited license to use Klamath Project irrigators’ water rights in the past to
17 supplement instream flows. (Souza Dec., Exs. A and B.) There simply is no basis to
18 conclude that the ESA supports Reclamation’s actions here.

19 Given the clearly impermissible nature of Reclamation’s actions, the injury to KID
20 and its members, and Reclamation’s awareness of how to conduct these activities
21 lawfully, the balance of equities tips heavily in KID’s favor. Reclamation should be
22 forced to comply with the ACFFOD—a proceeding it is well aware of and has actively
23 participated in—just like every other water rights’ holder in the Klamath Basin.

24 ///

25 ///

26 ///

1 **6. An Injunction from this Court is Necessary to Enforce the Terms of the**
2 **ACFFOD**

3 Ultimately, this Court must act to stop the unlawful acts described above. KID
4 tried bringing suit to enforce these rights in federal court in 2019, only to be told that that
5 suit was not a suit for the “administration” of water rights in a general stream
6 adjudication and be procedurally barred by the intervention of the downstream Tribes.
7 *See Klamath Irr. Dist. v. Bureau of Reclamation*, No. 1:19-cv-00451-CL, 2020 WL
8 5751560, at *8 (D. Or. Sept. 25, 2020).

9 KID then requested that OWRD intervene to stop Reclamation from unlawfully
10 releasing stored water last year, in 2020. (*See Rietmann Dec., Ex. G.*) OWRD refused to
11 take action, and KID was forced to file an administrative suit to compel it to discharge its
12 duty. (*Id.*, Ex. H.) The Marion County Circuit Court ultimately found in KID’s favor,
13 and directed OWRD, via the watermaster for the Klamath Basin, “to immediately stop
14 the distribution, use and/or release of Stored Water from UKL without determining that
15 the distribution, use and/or release is for a permitted purpose by users with existing water
16 rights of record or determined claims to use the Stored Water in the UKL.” (*Id.*, Ex. I,
17 p.2.) OWRD *still* refused to act, and sought a stay pending appeal and a motion to
18 reconsider the order, both of which were curtly denied. (*Id.*, Ex. J [Order Denying Stay
19 Pending Appeal]; Ex. K [Order Denying Motion for Reconsideration].) In denying the
20 motion for reconsideration, the Court noted that OWRD had “continued to allow the
21 Bureau of Reclamation to take Stored Water without determining the Bureau’s right to do
22 so.” (*Id.*, Ex. K at 1.) To date, OWRD has refused to take *any* actual affirmative action
23 to prevent Reclamation from unlawfully diverting stored water, and a hearing for OWRD
24 to show cause in re: contempt is currently set for May 26, 2021 in front of the Marion
25 County Circuit Court. (*Id.*, Ex. L.)

26 KID is loathe to add more complexity to such a complex case or more work for
 this Court, given the significant tasks it already has. Unfortunately, at this point, KID has
 no other options. This Court *must* act to prevent Reclamation from unlawfully diverting

1 water. OWRD has wholly abdicated its duty to intervene and enforce the ACFFOD, and
2 it therefore must fall to the courts to do so.

3 **D. CONCLUSION**

4 Despite federal law, Oregon law, OWRD orders, this Court's orders, and its own
5 internal guidance all being to the contrary, Reclamation nevertheless persists in violating
6 the water rights KID and its members hold under the ACFFOD in the Klamath
7 Adjudication. There simply is no lawful basis for Reclamation to release stored water
8 from UKL to satisfy its own in-stream purposes, without having obtained a stay from this
9 Court and posted a bond or purchased or leased these rights from irrigators.
10 Nevertheless, Reclamation violated the ACFFOD in the 2020 irrigation season and has
11 now announced it intends to violate the ACFFOD again in the 2021 irrigation season.
12 This unlawful activity must be enjoined. It causes tremendous and irreparable harm to
13 KID and the farmer's impacted by the water shortage. KID requests that this Court grant
14 this motion for preliminary injunction, and order Reclamation not to release stored water
15 from UKL for purposes other than those set forth in the ACFFOD.

16 DATED this 29th day of March 2021.

17

18

Respectfully submitted,

19

20 Dated: March 29, 2021

RIETMANN LAW P.C.

21

22

s/ Nathan R. Rietmann
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3 **CERTIFICATE OF SERVICE**

4 On March 30, 2021, I caused to be served a true and correct copy of NOTICE OF
5 APPEARANCE OF COUNSEL FOR KLAMATH IRRIGATION DISTRICT to be
6 served using the Oregon Judicial Department Odyssey File and Serve system for service
7 to the electronic service contacts registered in this case at the email addresses as recorded
8 on the date of service in the eFiling system, and by first class mail on those listed on the
9 current service list at the postal addresses provided by the Klamath County Circuit Court.

10 DATED: March 29, 2021

RIETMANN LAW P.C.

11 s/Nathan R. Rietmann

12

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