

1 Ellen L. Wehr, CSBA #252082  
2 Grassland Water District  
200 West Willmott Avenue  
3 Los Banos, CA 93635  
Telephone (209) 826-5188  
4 E-mail: ewehr@gwdwater.org

5 Jeffrey A. Volberg, CSBA #163473  
6 California Waterfowl Association  
1346 Blue Oaks Boulevard  
7 Roseville, CA 95678  
Telephone: (916) 217-5117  
8 E-mail: jvolberg@calwaterfowl.org  
*(Petition for admission pending)*

9 Attorneys for [Proposed] Amicus Curiae  
California Waterfowl Association

10  
11 UNITED STATES DISTRICT COURT  
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION  
14

15 YUOK TRIBE, *et al.*,

16 Plaintiffs,

17 v.

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

20 Defendants.

21 KLAMATH WATER USERS ASSOCIATION,

22 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)

UNOPPOSED MOTION FOR LEAVE TO  
FILE AMICUS CURIAE BRIEF OF  
CALIFORNIA WATERFOWL  
ASSOCIATION

Judge: Honorable William H. Orrick

Hearing: February 28, 2020 at 9:30 a.m.

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

1  
2 The California Waterfowl Association hereby requests permission to file the attached  
3 amicus curiae brief to provide information to the Court regarding the likely effects of Plaintiffs'  
4 pending motion for a preliminary injunction, as well as the effects of the federal Biological  
5 Opinion and 2019-2024 Operating Plan for the Klamath Irrigation Project that are at issue in this  
6 case. The parties to this action do not object to the filing of the attached brief, subject to the same  
7 deadline and page limitation for amicus participation by the Klamath Tribes that are set forth in  
8 the Court's January 30th Order Granting Stipulation (Document 51). The attached brief is not  
9 submitted in support of any party to the pending motion.

10 The Court has broad discretion to permit third parties to participate in an action as amicus  
11 curiae. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), abrogated on other grounds by  
12 *Sandin v. Conner*, 515 U.S. 472, 472 (1995). This discretion has generally been exercised  
13 liberally by courts in favor of permitting amicus curiae briefing, if participation is useful to or  
14 desirable by the Court. *In re Roxford Foods Litigation*, 790 F. Supp. 987, 997 (E.D. Cal. 1991).  
15 The participation of *amicus curiae* is often found desirable where, as here, the legal issues in a  
16 case have potential ramifications beyond the parties directly involved, or where amicus curiae can  
17 offer a unique perspective that may assist the Court. *Sonoma Falls Developers, L.L.C. v. Nev.*  
18 *Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003); *N.G.V. Gaming, Ltd. v.*  
19 *Upstream Point Molate, L.L.C.*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005).

20 The California Waterfowl Association is a nonprofit organization whose mission is to  
21 grow California's waterfowl populations, wetlands, and hunter-conservationist communities.  
22 California Waterfowl Association and its members are actively involved in matters regarding  
23 habitat management and recreational enjoyment of the Lower Klamath and Tule Lake National  
24 Wildlife Refuges (NWR), which are served by the Klamath Project. Implementation of this  
25 Court's 2017 injunction in the related case *Yurok Tribe v. U.S. Bureau of Reclamation* (Case No.  
26 16-cv-06863-WHO, "*Yurok I*") resulted in a total loss of water deliveries to wetland habitat in the  
27 Lower Klamath NWR during the fall of 2018, whereupon the California Waterfowl Association's  
28 board of directors made the establishment of a reliable water supply for the refuge a primary

1 focus of the entire organization.

2 In this case, the Plaintiffs seek a preliminary injunction against the United States to  
3 reinstate the injunctive relief issued in *Yurok I*. The attached amicus curiae brief describes the  
4 impacts of that previous injunctive relief, primarily on the Lower Klamath NWR. The brief also  
5 describes a grave potential for further harm to wildlife as a result of the 2019 Biological Opinion  
6 and 2019-2024 Operating Plan for the Klamath Project. Accordingly, the California Waterfowl  
7 Association respectfully requests leave to file the attached amicus curiae brief.

8

9 DATED: February 7, 2020

By s/ Ellen L. Wehr  
Ellen L. Wehr  
Attorney for California Waterfowl  
Association

10

11

12

13

By s/ Jeffrey A. Volberg  
Jeffrey A. Volberg  
Attorney for California Waterfowl  
Association  
(*Petition for admission pending*)

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 Ellen L. Wehr, CSBA #252082  
2 Grassland Water District  
3 200 West Willmott Avenue  
4 Los Banos, CA 93635  
5 Telephone (209) 826-5188  
6 E-mail: ewehr@gwdwater.org

7 Jeffrey A. Volberg, CSBA #163473  
8 California Waterfowl Association  
9 1346 Blue Oaks Boulevard  
10 Roseville, CA 95678  
11 Telephone: (916) 217-5117  
12 E-mail: jvolberg@calwaterfowl.org  
13 (*Petition for admission pending*)

14 Attorneys for [Proposed] Amicus Curiae  
15 California Waterfowl Association

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

19 YUROK TRIBE, *et al.*,

20 Plaintiffs,

21 v.

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

24 Defendants.

25 KLAMATH WATER USERS ASSOCIATION,

26 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)

[PROPOSED] AMICUS CURIAE BRIEF  
OF CALIFORNIA WATERFOWL  
ASSOCIATION

Judge: Honorable William H. Orrick

Hearing: February 28, 2020 at 9:30 a.m.

27 **I. INTRODUCTION AND BACKGROUND**

28 On April 30, 2018 this Court issued an Order Denying Motion for Relief from the  
Judgment and Clarifying Injunction Orders in the related case of *Yurok Tribe v. U.S. Bureau of  
Reclamation*, Case No. 16-cv-06863-WHO (“*Yurok I*” case). In that Order, the Court noted that  
although intervenors had argued that the Klamath Project water diversions provide water for two

1 national wildlife refuges, the intervenors did not provide any information regarding the effects of  
2 the injunctions on the wildlife refuges. (Case No. 16-cv-06863-WHO, Document 129, Order  
3 dated August 30, 2019, p. 10, lines 18-24.) The Court declined to revisit the injunction it had  
4 issued in 2017. *Id.*; *Yurok Tribe v. U.S. Bureau of Recl.*, 231 F. Supp. 3d 450 (N.D. Cal. 2017).

5 The two national wildlife refuges served by the Klamath Project consist of the Lower  
6 Klamath National Wildlife Refuge (NWR) and the Tule Lake NWR. In this case, the Plaintiffs  
7 seek a preliminary injunction against the United States to reinstate the injunctive relief issued in  
8 *Yurok I*. This amicus brief describes the impacts of the 2017 injunction, primarily on the Lower  
9 Klamath NWR.

10 The Lower Klamath NWR is the oldest waterfowl refuge in the United States. It was  
11 established in 1908 by President Theodore Roosevelt. It is listed as a National Historic Landmark  
12 on the National Register of Historic Places.

13 The refuge covers the lake bed and marshlands of Lower Klamath Lake, which was  
14 drained for purposes of the Klamath Project. The 51,000-acre refuge straddles the border between  
15 the states of Oregon and California. Portions of the refuge are leased for farming and receive  
16 water from the Klamath Project, administered by the U.S. Bureau of Reclamation.

17 The rest of the refuge includes approximately 20,000 acres of managed wetlands, which  
18 are flooded seasonally to provide habitat for migratory and resident waterfowl. The refuge  
19 provides habitat on a year-round basis for approximately 1 million birds per year. In the fall and  
20 spring, the refuge provides a staging area for migratory ducks and geese migrating south on the  
21 Pacific Flyway and then north again. During the summer, many resident ducks and ducks from  
22 the Central Valley of California lay their eggs and hatch their broods on the refuge. Other ducks  
23 use the refuge to molt their feathers in the late summer and early fall.

24 This refuge is one of the most biologically productive refuges within the Pacific Flyway.  
25 Approximately 80 percent of the flyway's migrating waterfowl pass through the Klamath Basin  
26 on both spring and fall migrations, with 50 percent using the refuge. Peak waterfowl populations  
27 can reach 1.8 million birds, which represent 15 to 45 percent of the total birds wintering in  
28 California. The refuge produces between 30,000 and 60,000 waterfowl annually. The refuge is

1 also a fall staging area for 20 to 30 percent of the Central Valley population of sandhill cranes, a  
2 fully protected species under California law.

3 From 20,000 to 100,000 shorebirds also use refuge wetlands during the spring migration.  
4 Wintering wildlife populations include 500 bald eagles and 30,000 tundra swans. Spring and  
5 summer nesting wildlife include many colonial water birds, such as white-faced ibis, heron, egret,  
6 cormorant, grebe, white pelican, and gulls.

7 The Lower Klamath NWR is operated by the United States Fish & Wildlife Service under  
8 the National Wildlife Refuge Administration Act of 1966 (Public Law 89-669), as amended by  
9 the National Wildlife Refuge System Improvement Act of 1997 (Public Law 105-57). The Kuchel  
10 Act (Public Law 88-567, 16 U.S.C. 695k-r), enacted in 1964, dedicated the land within the Lower  
11 Klamath and Tule Lake NWRs to wildlife conservation and waterfowl management.

12 The Kuchel Act was enacted in reaction to demands to open the refuge lands to homestead  
13 settlement. The Kuchel Act did allow leasing of federal lands on the refuge for agriculture, which  
14 continues to this day. Refuge lands make up nearly 20 percent of the agricultural land in the  
15 Klamath Project. These lands have been instrumental in developing the organic market by using  
16 flood fallow programs to promote organic certifications. The refuges have worked collaboratively  
17 with local producers and the Bureau of Reclamation to manage portions of both Tule Lake and  
18 Lower Klamath NWR's.

19 The Tule Lake NWR was established in 1928. The Tule Lake NWR is sited in a low area  
20 in the Klamath Basin that receives a large volume of agricultural return water in late summer and  
21 fall every year. The former lakebed is divided into sumps that collect the return water. In order to  
22 prevent flooding of the leased farmlands, the Tule Lake Irrigation District (TID) pumps water  
23 from the sumps through a tunnel to the Lower Klamath NWR. This pumped water once  
24 constituted approximately three quarters of the annual water supply for the Lower Klamath NWR.

25 For 50 years, TID operated its pumps under a contract for power that limited the price of  
26 electricity to \$0.06 per kilowatt hour. When the contract expired in 2006, the price of electricity  
27 reverted to the current market price, which was many times the previous contract price. This  
28 made it uneconomical for TID to continue pumping as much water through the tunnel. The water

1 supply from TID to the Lower Klamath NWR decreased drastically, from 70,000 to 100,000 acre  
2 -feet per year to 10,000 acre-feet per year presently.

3 Since the listing of fish species in the Klamath River and the Upper Klamath Lake under  
4 the Endangered Species Act, the Lower Klamath NWR's other water supply – water in the  
5 Klamath Project – has also become much less reliable, if available at all. Following several years  
6 of drought, the Court's 2017 decision in *Yurok I* reduced water supplies available from the  
7 Klamath Project and resulted in the Lower Klamath NWR going almost completely dry during  
8 the fall of 2018, during the peak migration season. The subsequent adoption of a biological  
9 opinion in April 2019 further limited the amount of water from the Klamath Project that could be  
10 delivered to the refuge during the term of the biological opinion.

11 The purpose of this amicus brief is to describe the impacts of these actions on the Lower  
12 Klamath NWR.

## 13 **II. INTEREST OF AMICUS CURIAE CALIFORNIA WATERFOWL ASSOCIATION**

14 The California Waterfowl Association (California Waterfowl) is a 501(c)(3) nonprofit  
15 corporation whose mission is to grow California's waterfowl populations, wetlands, and hunter-  
16 conservationist communities. California Waterfowl's members include many who hunt and have  
17 hunted at the Lower Klamath and Tule Lake NWRs for decades. California Waterfowl initiates  
18 and participates in wetland habitat restoration and maintenance on the refuges practically every  
19 year.

20 California Waterfowl has advocated in Sacramento and Washington, D.C. for a reliable  
21 water supply for the Lower Klamath NWR since the water supply became problematic in 2001.  
22 California Waterfowl is currently participating on a monthly basis in various coalitions seeking to  
23 develop a comprehensive agreement to resolve the various conflicts and controversies over water  
24 in the Klamath River and the Klamath Basin.

25 Since the total loss of water at the refuge in the fall of 2018, California Waterfowl's board  
26 of directors has made the establishment of a reliable water supply for the Lower Klamath NWR a  
27 primary focus of the entire organization.

28

### III. IMPACT OF THE 2017 INJUNCTION ON THE LOWER KLAMATH NWR

When the Court issued its Order Denying Motion for Relief from Injunction and Clarifying Injunction Orders in Case No. 16-cv-04294-WHO on April 30, 2018, the Court noted that 2018 was a substantially drier year than 2017 (Order p. 2, lines 4-5.) The dry conditions in 2018 resulted in the Klamath Project having no surplus water in 2018. As a result, the Bureau of Reclamation did not deliver a sufficient supply of water to the Lower Klamath NWR.

By the summer of 2018, Lower Klamath NWR was essentially dry. Starting in September and going through the through the end of November, Lower Klamath NWR received 18,873 acre-feet of water (approximately 6,000 acre-feet from the Klamath Project and 12,873 from TID) and only 6,291 acres were flooded during that time. The delayed timing of water delivery onto a dry refuge, and limited habitat available for fall migrating waterfowl at Lower Klamath NWR, resulted in a peak population of 160,000 birds, the lowest in recorded history. The 2018 population was 5 percent of the historic peak populations (approximately 3 million) and 20 percent of the long-term average peak population (approximately 800,000).

### IV. IMPACT OF 2019 BIOLOGICAL OPINION

In April 2019, the Bureau of Reclamation adopted a Proposed Action for Operation of the Klamath Project based on the Biological Opinions prepared by the National Marine Fishery Service (NMFS) and the United States Fish & Wildlife Service, as required by section 7(a)(2) of the Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. 1531 et seq.). The agencies preparing the Biological Opinions and the Bureau of Reclamation did not consider the water supply needs of the Lower Klamath NWR in issuing the Biological Opinions or adopting the Proposed Action.

Under the 2019 Biological Opinions, Lower Klamath NWR is not entitled to receive guaranteed or modeled water from March through December annually. This delivery schedule ignores key components of the refuge's established purposes and the annual life cycle requirements of migratory birds. Specifically, the lack of summer deliveries does not provide resources to support nesting and brood-rearing wetland habitat. Additionally, more than 90 percent of the Pacific Flyway fall migrating population have moved through the Klamath Basin



1 by December 1. With modeled deliveries not beginning until December, Lower Klamath NWR  
2 will not have adequate water under the Biological Opinions for both the breeding season and the  
3 fall migration.

4 Fortunately, in the summer of 2019, the irrigation districts that receive water from the  
5 Klamath Project were able to allocate approximately 35,000 acre-feet to the Lower Klamath  
6 NWR, although the Bureau of Reclamation would have been prohibited from allocating the water  
7 under its own authority by the Biological Opinions. This allocation was made available due to  
8 late planting conditions and reduced demand for irrigation water caused by favorable weather  
9 conditions. The allocation made it possible to flood most of the refuge in time for the fall  
10 migration. The conditions that made this allocation possible in 2019 are unlikely to occur again in  
11 the coming years.

12 Refuge lands are tied to local agricultural production by the 1964 Kuchel Act. The Act  
13 states the one of the primary purposes of the refuge lands is for proper waterfowl management  
14 with consideration for optimal agricultural production. The refuges have worked collaboratively  
15 with local producers and the Bureau of Reclamation to manage portions of both Tule Lake and  
16 Lower Klamath NWRs. However, both the previously issued injunction and the 2019 Biological  
17 Opinion places the refuge in jeopardy of violating the 1964 Kuchel Act with respect to proper  
18 waterfowl management and agricultural production.

19 Modeled deliveries under the 2019 Biological Opinion allow for 11,000 acre-feet or 65  
20 cubic feet per second (cfs) of water to be delivered to Lower Klamath NWR from the Klamath  
21 Project between December 1 and February 28 annually. The modeled water equates to only 3,666  
22 acres of floodable land (wetland and/or agricultural) that can receive Klamath Project water; these  
23 flooded acres represents less than 10% of the floodable ground on Lower Klamath NWR.

24 Under the 2019 Biological Opinion, combined estimated deliveries (Klamath Project/TID)  
25 range between 16,000 and 23,000 acre-feet (5,332-9,332 acres or 14-24% of floodable land).  
26 This combined delivery accounts for 16-20 percent of the historic average refuge water delivery.

27 Deliveries that do not coincide with habitat management needs provide limited benefits to  
28 wetland-dependent migratory birds. The Biological Opinions will exacerbate the loss of wetland

1 habitat, compromise the ability to manage for waterfowl, and remove the ability to reliably  
2 provide lands for agricultural production each year, in turn compromising the refuge's ability to  
3 meet its statutory purposes and comply with the Kuchel Act.

4 The experience with insufficient water supply in 2018 is indicative of the refuge's future.  
5 Flyway-wide wetland loss is the biggest challenge migratory waterbirds face. In less than 100  
6 years, the Klamath Basin has experienced a 95 percent loss of permanent wetlands and 75 percent  
7 of the riparian and wet meadow wetlands have disappeared. When the refuges were established,  
8 80 percent of the water birds (waterfowl and shorebirds) in the Pacific Flyway used the Klamath  
9 Basin as their primary staging area during the fall and spring migrations. The Basin was an  
10 important breeding area for numerous species of colonial waterbirds and over-water nesting  
11 waterfowl. In the 1950's an estimated 40,000 redhead ducks were produced on refuge lands, but  
12 in recent years that number has fallen to less than 100 birds produced annually. The dramatic  
13 decline of redheads has pushed California to consider listing redheads as a state species of  
14 concern.

15 Under the modeled deliveries in the 2019 Biological Opinions, 71 species of waterbirds  
16 can no longer find adequate wetland resources to meet the energetic or habitat requirements to be  
17 successful during their annual life cycle. Countless other wetland dependent wildlife species,  
18 including protected species, face similar challenges. Additionally, when water deliveries are  
19 insufficient to meet permanent and seasonal wetland demands, large areas of wetlands are left dry  
20 and susceptible to invasion by highly invasive plants such as perennial pepperweed. The refuge  
21 expects to see an increase in invasive plants/weed growth, since there will be less water to flood  
22 wetland units and kill the weeds. The modeled water deliveries in the 2019 Biological Opinions  
23 effectively remove the largest and most diverse remaining wetland landscape from the Klamath  
24 Basin.

## 25 **V. CONCLUSION**

26 Amicus curiae California Waterfowl Association respectfully draws the Court's attention  
27 to the impacts that its past decisions and the Biological Opinions have had on the Lower Klamath  
28 NWR and the public trust resources it serves. At a minimum, the water supply needs of the refuge

1 should be recognized and considered in further decisions concerning water in the Klamath River  
2 and Klamath Basin.

3  
4 DATED: February 7, 2020

By s/ Ellen L. Wehr  
Ellen L. Wehr  
Attorney for California Waterfowl  
Association

6

7

By s/ Jeffrey A. Volberg  
Jeffrey A. Volberg  
Attorney for California Waterfowl  
Association  
(*Petition for admission pending*)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing will be e-filed on February 7, 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 Ellen L. Wehr  
Ellen L. Wehr