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1 SOMACH SIMMONS & DUNN  
A Professional Corporation  
2 PAUL S. SIMMONS, ESQ. (SBN 127920)  
RICHARD S. DEITCHMAN, ESQ. (SBN 287535)  
3 JARED S. MUELLER, ESQ. (SBN 257659)  
500 Capitol Mall, Suite 1000  
4 Sacramento, CA 95814  
Telephone: (916) 446-7979  
5 Facsimile: (916) 446-8199  
[psimmons@somachlaw.com](mailto:psimmons@somachlaw.com)  
6 [rdeitchman@somachlaw.com](mailto:rdeitchman@somachlaw.com)  
[jmueller@somachlaw.com](mailto:jmueller@somachlaw.com)

7 Attorneys for [Proposed] Defendant-Intervenors  
8 KLAMATH WATER USERS ASSOCIATION,  
SUNNYSIDE IRRIGATION DISTRICT, and BEN  
9 DuVAL

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

15 THE KLAMATH TRIBES, a federally  
recognized Indian Tribe,

16 Plaintiff,

17 v.

18 UNITED STATES BUREAU OF  
19 RECLAMATION; UNITED STATES FISH &  
WILDLIFE SERVICE; NATIONAL MARINE  
20 FISHERIES SERVICE,

21 Defendants.

22 KLAMATH WATER USERS ASSOCIATION,  
23 SUNNYSIDE IRRIGATION DISTRICT, and  
BEN DuVAL,

24 [Proposed] Defendant-Intervenors.  
25  
26  
27  
28

Case No. 3:18-cv-03078-WHO  
[Related Case Nos. 3:16-cv-06863-WHO  
and 3:18-cv-03078-WHO]

[PROPOSED] INTERVENORS' NOTICE  
OF MOTION AND MOTION TO DISMISS  
FOR LACK OF VENUE PLAINTIFF'S  
COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

Hearing Date: July 11, 2018  
Hearing Time: 2:00 p.m.  
Courtroom: 2, 17th Floor  
Judge William H. Orrick

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**NOTICE OF MOTION AND MOTION TO DISMISS**

TO ALL PARTIES AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that on Wednesday, July 11, 2018, at 2:00 p.m., or as soon thereafter as the matter may be heard, in Courtroom 2, 17th Floor, at the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California, Klamath Water Users Association (the Association), Sunnyside Irrigation District (Sunnyside), and Ben DuVal, who have filed an unopposed motion to Intervene in this action (collectively, “Intervenors”), will move this Court for an order dismissing this matter pursuant to 28 U.S.C. § 1406(a) and Rule 12(b)(3) of the Federal Rules of Civil Procedure or, alternatively, for transfer to the Eastern District of California, on grounds that the Northern District of California (Northern District) is not a proper venue for this action.

This motion is based upon this Notice of Motion, the Memorandum of Points and Authorities, the Declaration of Earl C. Danosky filed in support of the motion, all the pleadings and records on file herein, and on such other and further documentary or oral evidence as may be presented at the hearing of this Motion.

**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION TO DISMISS**

**I. INTRODUCTION**

The Plaintiff Klamath Tribes’ (Plaintiff) litigation against Defendants United States Bureau of Reclamation (Reclamation), United States Fish & Wildlife Service (USFWS), and National Marine Fisheries Service (collectively, Federal Defendants) concerns a lake in Oregon, two species of fish in that lake, and alleged impacts to those species caused by a federal project located entirely in Oregon and the Eastern District of California (Eastern District). There is no colorable basis for venue in the Northern District and, therefore, the action should be dismissed.

If the Court elects to transfer the action rather than dismiss, transfer to the Eastern District of California, where counsel for the Plaintiff and Intervenors have their offices, would be appropriate.

1 **II. ISSUES PRESENTED**

- 2 1. Whether the Northern District of California is a proper venue for this action?
- 3 2. Should the Court dismiss the action due to lack of venue?
- 4 3. If the Court exercises its discretion to transfer to a district in which the action
- 5 could have been brought, is the Eastern District an appropriate transferee district?

6 **III. STATEMENT OF FACTS**

7 On May 24, 2018, Plaintiff filed the Complaint for Declaratory and Injunctive Relief.

8 Dkt. No. 1 (Complaint). The same day, Plaintiff filed an administrative motion seeking leave to

9 file an oversize brief in support of a motion for preliminary injunction, to which Plaintiff attached

10 the planned motion and accompanying declarations and exhibits. Dkt. No. 5-1. Following the

11 Court's granting of the administrative motion, Plaintiff filed the motion for preliminary

12 injunction, including the 38-page memorandum of points and authorities and the 64-page

13 declaration on technical issues, along with approximately 1,485 pages of exhibits. Dkt. Nos. 13

14 through 13-11.

15 The Complaint focuses exclusively on two species of sucker, the Lost River sucker and

16 the shortnose sucker (referred to by Plaintiff as C'waam and Koptu), the abundance of those

17 species in Upper Klamath Lake (UKL), and the effects on the species of the Klamath Project,

18 which is under the supervision of Defendant Reclamation. *See, e.g.*, Dkt. No. 1, ¶¶ 2, 3, 5; Dkt.

19 No. 13.

20 Intervenors filed an unopposed motion to intervene, and file this Motion to ensure that the

21 threshold issue of venue will be resolved prior to any further proceedings.

22 **IV. ARGUMENT**

23 The proper venue for civil actions is provided in 28 U.S.C. § 1391 as follows:

- 24 (b) **Venue in General.**—A civil action may be brought in—
- 25 (1) a judicial district in which any defendant resides, if all defendants
- 26 are residents of the State in which the district is located;
- 27 (2) a judicial district in which a substantial part of the events or
- 28 omissions giving rise to the claim occurred, or a substantial part of property
- that is the subject of the action is situated; or
- (3) if there is no district in which an action may otherwise be brought
- as provided in this section, any judicial district in which any defendant is
- subject to the court's personal jurisdiction with respect to such action.

(e) **Actions Where Defendant Is Officer or Employee of the United States.—****(1) In general.—**

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedures and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

“Most courts hold that when venue is challenged under [28 U.S.C.] section 1406(a), the plaintiff bears the burden of establishing that venue is in the proper forum.” *R. Griggs Group Ltd. v. Consolidated Shoe, Inc.*, 1999 U.S. Dist. LEXIS 5426, \*10-11 (N.D. Cal. Apr. 8, 1999), citing *Airola v. King*, 505 F.Supp. 30, 31 (D. Az. 1980). Paragraph 8 of Plaintiff’s Complaint alleges as follows:

Venue is proper in the Northern District of California under 28 U.S.C. §§ 84(a) and 1391(b) because a substantial part of the events or omissions giving rise to the Klamath Tribes’ claims either occurred within or directly impact the district, and a substantial part of the property that is the subject of this action – the Project – is situated within this district. The action area for USFWS’s portion of the 2013 BiOp, which includes the provisions related to C’waam and Koptu, includes both southern Oregon and northern California. [2013 BiOp at § 3].

While Plaintiff incorrectly alleges venue under subsection (b) of section 1391, instead of subsection (e) which applies to federal agencies, Plaintiff nevertheless cannot establish venue in the Northern District under the requirements of either subsection: (A) the Federal Defendants do not reside in the Northern District;<sup>1</sup> (B) the subject sucker species inhabit UKL, located entirely within Oregon,<sup>2</sup> and all Klamath Project “events or omissions” allegedly affecting the subject

<sup>1</sup> Nor does Plaintiff allege that any of the Defendants reside in the Northern District. Dkt. No. 1, ¶¶ 13-15.

<sup>2</sup> UKL is “the largest freshwater lake in Oregon . . . .” Dkt. No. 1, ¶ 28.

1 sucker species occur in Klamath County, Oregon, or Modoc and Siskiyou Counties, California;<sup>3</sup>  
 2 and (C) Plaintiff resides in the District of Oregon.<sup>4</sup>

3 Plaintiff has not alleged – and cannot establish – residence of either itself or the Federal  
 4 Defendants in the Northern District, rendering subsections (e)(1)(A) and (e)(1)(C) of section 1391  
 5 inapplicable. Instead, Plaintiff has resorted to a vague allegation that “a substantial part of the  
 6 events or omissions giving rise to the Klamath Tribes’ claims either occurred within *or directly*  
 7 *impact* the [Northern] district, and a substantial part of the . . . [Klamath] Project . . . is situated  
 8 within this district.” Dkt. No. 1, ¶ 8 (emphasis added). These allegations are untrue or irrelevant,  
 9 or both.

10 First, neither subsections (b)(2) nor (e)(1)(B) of section 1391 consider whether a  
 11 substantial part of the events or omissions “directly impact the district.”<sup>5</sup> Rather, the relevant  
 12 inquiry is whether the “events or omissions giving rise to the claim occurred” in the district, or  
 13 whether “a substantial part of property that is the subject of the action is situated” in the district.  
 14 28 U.S.C. §§ 1391(b)(2), 1391(e)(1)(B).

15 Second, “[o]nly the events that *directly* give rise to a claim are relevant.” *Lawler v.*  
 16 *Tarallo*, No. C13-03284 MEJ, 2013 U.S. Dist. LEXIS 152412, \*8 (N.D. Cal Oct. 23, 2013),  
 17 citing *Jenkins Brick Co. v. Bremer*, 321 F.3d 366, 1371 (3rd Cir. 2003) (emphasis added). “And  
 18 of the places where the events have taken place, only those locations hosting a substantial part of  
 19 the events are to be considered.” *Id.* “Since the events or omissions giving rise to the plaintiff’s  
 20 claim must be substantial, ‘events or omissions that might only have some tangential connection  
 21 with the dispute in litigation are not enough.’ ” *Id.* at \*8-9, citing *Cottman Transmission Sys.,*  
 22 *Inc. v. Martino*, 36 F.3d 291, 294 (3rd Cir. 1994). “Further, in determining whether events or  
 23 omissions are substantial to support venue under § 1391(a)(2), the court should generally focus on

24 \_\_\_\_\_  
 25 <sup>3</sup> While Klamath County is within the District of Oregon, Modoc and Siskiyou Counties are within the Eastern  
 26 District. Declaration of Earl C. Danosky in Support of Intervenor’s Motion to Dismiss (Danosky Decl.) ¶ 3;  
 27 28 U.S.C. § 84(b).

28 <sup>4</sup> “The Tribes’ headquarters are in Chiloquin, Oregon, in the heart of the Upper Klamath Basin.” Dkt. No. 1, ¶ 10.

<sup>5</sup> Both subsections have identical language requiring the action to be brought in the district where “a substantial part  
 of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the  
 action is situated.” 28 U.S.C. §§ 1391(b)(2), 1391(e)(1)(B).

1 activities of the defendant and not the activities of plaintiff.” *Id.* at \*9, citing *Kelly v. Qualitest*  
 2 *Pharm., Inc.*, No. CIV-F-06-116 AWI LJO, 2006 U.S. Dist. LEXIS 65814, \*8 (E.D. Cal. Aug. 31,  
 3 2006).

4 The subject sucker species are located exclusively within Klamath County, Oregon, and  
 5 the “events or omissions” affecting them are located either there or in Modoc or Siskiyou  
 6 Counties, California. Danosky Decl. ¶ 3. While Plaintiff cites “northern California” as part of  
 7 the “action area” for the 2013 BiOp, the “Northern District” does not encompass all of “northern  
 8 California.”<sup>6</sup> In fact, the only Klamath Project facilities outside of Oregon are located within  
 9 either Modoc or Siskiyou Counties, California, neither of which are within the Northern District.<sup>7</sup>

10 In short, Oregon-resident Plaintiff has brought an action on behalf of Oregon-resident  
 11 sucker fish inhabiting Oregon-situated UKL as a result of Federal Defendants’ actions occurring  
 12 only in either the District of Oregon or the Eastern District. Thus, venue does not lie in the  
 13 Northern District, but rather only in the District of Oregon or the Eastern District. As such, the  
 14 district court “shall dismiss, or if it be in the interest of justice, transfer the case to any district or  
 15 division in which it could have been brought.” 28 U.S.C. § 1406(a); *Pac. Coast Dist., M.E.B.A. v.*  
 16 *Alaska*, 682 F.2d 797, 799 (9th Cir. 1982).

17 Intervenors urge dismissal, as there can be no prejudice from requiring Plaintiff to incur  
 18 the time and trouble of filing a properly pled complaint in the proper forum. *McFarland v.*  
 19 *Memorex Corp.*, 493 F.Supp. 657, 660 (N.D. Cal Feb. 12, 1980) (“Plaintiff has the responsibility  
 20 to file a legally sufficient complaint both substantively and with respect to jurisdiction and  
 21 venue.”); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1523 (9th Cir.

22  
 23  
 24 <sup>6</sup> The USFWS is the agency with jurisdiction and statutory responsibility with respect to protection of suckers. The  
 25 page of the 2013 Biological Opinion referenced in Plaintiff’s venue allegations states: “The action area for USFWS’s  
 26 portion of the 2013 BiOp, which includes the provisions related to C’waam and Koptu, includes both southern  
 27 Oregon and northern California.” [2013 BiOp at § 3.] That statement is true, but the “action area” is described as  
 28 follows: “For purposes of USFWS’s BiOp, the action area includes UKL in south central Oregon, Gerber Reservoir  
 and Clear Lake in the Lost River drainage of southern Oregon and northern California downstream to [Iron Gate  
 Dam].” Dkt. No. 13-2, ECF p. 25. The Klamath River from the Oregon-California border to Iron Gate Dam is in  
 Siskiyou County. Danosky Decl. ¶¶ 3-4.

<sup>7</sup> Modoc and Siskiyou Counties are located within the Eastern District. 28 U.S.C. § 84(b).

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1 1983) (affirming district court’s refusal to transfer to jurisdiction that plaintiff purposely sought to  
2 avoid).

3 If, however, this Court elects to transfer the matter, the Eastern District is an appropriate  
4 transferee district. Under Plaintiff’s allegations, a proper venue is where a substantial part of the  
5 events or omissions giving rise to the Klamath Tribes’ claims occurred, and where a substantial  
6 part of the Klamath Project is situated, including the portion of the Klamath Project that is in  
7 California. Dkt. No. 1, ¶ 8. An action may be transferred only to a district in which “it could  
8 have been brought.” 28 U.S.C. § 1406(a). “Where an action ‘could have been brought’ is  
9 interpreted to mean that the proposed transferee court must have subject matter jurisdiction,  
10 proper venue, and personal jurisdiction.” *Billing v. CSA – Credit Solutions of America*,  
11 No. 16-cv-0108 (NLS), 2010 U.S. Dist. LEXIS 63314, \*10-11 (S.D. Cal. Jun. 21, 2010), citing  
12 *Shapiro v. Bonanza Hotel Co.*, 185 F.2d 777, 780 (9th Cir. 1950). The Eastern District satisfies  
13 these conditions. Furthermore, Plaintiff’s counsel is located in Folsom, California, within a half-  
14 hour drive of the Eastern District courthouse in Sacramento. Intervenor’s counsel is in  
15 Sacramento, four blocks from the Eastern District courthouse. Defendants will be represented by  
16 the Department of Justice in Washington, D.C., for whom Sacramento is readily accessible.

17 **V. CONCLUSION**

18 Intervenor respectfully request that the Court grant the motion.

19 SOMACH SIMMONS & DUNN, PC

20 DATED: June 6, 2018

21 By s/ Paul S. Simmons  
22 Paul S. Simmons, Attorneys for  
23 [Proposed] Defendant-Intervenor Klamath  
24 Water Users Association, Sunnyside Irrigation  
25 District, and Ben DuVal