

MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP
1681 Bird Street
P.O. Box 1679
Oroville, CA 95965
(530) 533-2885

1 JACKSON A. MINASIAN (SBN 311031)
ANDREW J. McCLURE (SBN 266824)
2 DUSTIN C. COOPER (SBN 245774)
MINASIAN, MEITH, SOARES,
3 SEXTON & COOPER, LLP
1681 Bird Street, P.O. Box 1679
4 Oroville, California 95965
Telephone: (530) 533-2885
5 Fax: (530) 533-0197

6 Attorneys for Respondents/Defendants

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF PLACER

10 WATER AUDIT CALIFORNIA,)
11 Petitioner and Plaintiff,)
12)
13 v.)
14 NEVADA IRRIGATION DISTRICT, and)
DOES 1 to 100,)
15 Respondent and Defendant.)
16)

Case No.: SCV0044119
STIPULATION FOR DISMISSAL OF
PENDING LITIGATION

17
18
19 Plaintiff and Petitioner WATER AUDIT CALIFORNIA, and Defendant and Respondent
20 NEVADA IRRIGATION DISTRICT, stipulate as follows:

21 This stipulation is entered into on January 29, 2020 at Grass Valley,
22 California, by and between Nevada Irrigation District, a California Irrigation District (“NID” or
23 “District”) of 1036 W. Main Street, Grass Valley, CA, and Water Audit California, a California
24 Public Benefit Corporation, of Grass Valley, California (“Water Audit”).
25

26 **RECITALS**

27 This stipulation is entered into with reference to the following facts:
28

1 **A.** The Hemphill Diversion Structure (“Hemphill”) is a structure located in Auburn
2 Ravine near the community of Lincoln. It allows for the diversion of water from Auburn Ravine
3 into the Hemphill Canal, thence to customers of NID located in Placer County.

4 **B.** NID’s mission statement, adopted in April of 2016, states that “The District will
5 provide a dependable, quality water supply; continue to be good stewards of watersheds, while
6 conserving the available resources in our care.”

7 **C.** In 2012 the District installed a fish passage structure at its Highway 65/Lincoln
8 Gauging Station located on Auburn Ravine. The purpose of the project was to improve fish
9 passage at the gauging station. The total cost for the project was approximately \$1,015,717,
10 funded in part by grants. The District’s contribution was approximately \$599,822. Prior to the
11 project, the Lincoln gauging station impeded fish passage in Auburn Ravine.

12 **D.** In 2017, the District formed a group of regulatory agencies and local stakeholders
13 including California Department of Fish and Wildlife (“DFW”), National Marine Fisheries
14 Service (“NMFS”), the Department of Water Resources (“DWR”), and the Friends of Auburn
15 Ravine to evaluate the feasibility and permitting requirements to implement strategies to improve
16 fish passage and eliminate fish entrainment at Hemphill. The group, known as the Technical
17 Advisory Committee, or “TAC”, is a forum for regulators and interested parties.

18 **E.** On August 17, 2015, District engaged an engineering firm, Kleinschmidt Group,
19 to investigate options and alternatives for modifying or removing Hemphill. The final report
20 released in April 2016 (“Kleinschmidt Study”) proposed seven alternatives, two of which the
21 District concluded qualified for further study: (1) removal of Hemphill and installation of a
22 Rainey Well Pump, and (2) removal of Hemphill and installation of a Riverbank Filtration Sump
23 Pump System.

24 **F.** In June 2017, a separate consultant retained by the District, Holdrege & Kull,
25 prepared a Hemphill Project Sediment Characterization Report. Removing diversion structures,
26 such as Hemphill, can have unintended negative consequences to the fishery through the release
27 of sediment. The Sediment Characterization Report analyzed the quality and profiles of
28 sediment associated with Hemphill for the purpose of informing future permitting and sediment

1 removal activities associated with any future project, including the quantity and character of
2 sediment that could be discharged if Hemphill is removed.

3 **G.** On February 14, 2018, the District’s Board of Directors approved a \$228,000
4 contract with Helix Environmental Planning for California Environmental Quality Act
5 (“CEQA”) compliance consulting services analyzing the proposed project and alternatives,
6 including the removal of Hemphill and construction of alternative water delivery facilities for
7 customers served by the Hemphill Canal.

8 **H.** On March 6, 2019, the District accepted a Holdredge & Kull proposal for further
9 engineering work on the Hemphill project including work to determine the size and position of
10 the infiltration beds pursuant to comments made by NMFS and DFW to the preliminary design
11 work for the infiltration bed.

12 **J.** The NID Board of Directors is committed to complete its CEQA analysis of the
13 proposed project and alternatives. When the NID Board of Directors makes a determination and
14 adopts a Hemphill project, the Board is committed to diligently apply for and seek necessary
15 regulatory and funding approvals to promptly implement the approved project.

16 **K.** Water Audit is an advocate for the public trust and seeks the remediation of fish
17 passage and fish entrapment issues at Hemphill.

18 **L.** A dispute has arisen between the parties concerning NID’s efforts related to
19 Hemphill. On December 3, 2019, Water Audit filed a Verified Petition for Writ of Mandate and
20 Complaint for Declaratory Judgment in the Superior Court for Placer County, Case No.
21 SCV0044119 (“Pending Litigation”).

22 **M.** With this stipulation, the parties wish to memorialize NID’s commitment to
23 continue to pursue the removal and/or retrofit Hemphill, and to dismiss the Pending Litigation
24 during the pendency of NID’s active and good faith pursuit of its ongoing environmental review
25 and regulatory process in advance of potential project implementation as set forth below.

26 **N.** The parties desire to settle and compromise their dispute upon the terms and
27 conditions set forth below.
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

TERMS OF SETTLEMENT

In consideration of the compromise of their respective claims and contentions, and the mutual promises, representations, and warranties contained in this Agreement, the parties agree as follows:

1. NID’s proposed or preferred Hemphill removal/retrofit project to be analyzed as part of its compliance with CEQA shall be a project that does not cause fish entrainment or fish passage issues; provided, however, that NID retains its discretion to consider any and all alternatives to the proposed project and may, in its discretion, adopt any alternative in the Board of Directors’ discretion.

2. NID will use its best efforts to issue a CEQA Draft Environmental Impact Review (DEIR) for the Hemphill Project by April 1, 2021. NID will use its best efforts by Fall of 2021 to (a) certify the Hemphill EIR under CEQA, adopt a project, and issue a notice of determination; (b) apply for and diligently pursue all necessary regulatory approvals to implement the adopted project; (c) secure other necessary approvals, including financing, to implement the adopted project. NID will use best efforts to award a construction contract to implement the project within 10 months of adoption. However, the Parties acknowledge that NID does not unilaterally control the timeline for obtaining the approvals necessary to complete the adopted project, and that events out of its control, including potential litigation, may delay the foregoing actions beyond Fall 2021.

3. In pursuit of regulatory authorizations and approvals, including, but without limitation NID’s compliance with CEQA, NID will consult with all Responsible Agencies and Trustee Agencies in conformance with applicable law, including National Marine Fisheries Service and Department of Fish and Wildlife.

4. NID is unable, at this time, to definitively commit to a particular project for the removal of Hemphill because it cannot “predetermine” the outcome of its CEQA analysis, in violation of the principles articulated by the California Supreme Court in *Save Tara v. City of W. Hollywood* (2008) 45 Cal.4th 116.

1 56. If NID accepts and returns to counsel for ~~Within five days of full execution of this~~
2 stipulation, Water Audit a fully endorsed copy of this Settlement Agreement before 5 p.m.
3 January 29, 2020, Water Audit shall dismiss the Pending Litigation without prejudice by a date
4 not later than January 31 2020, when the Parties current Stipulation for Extension of Time to File
5 Initial Responsive Pleading is set to expire.

Formatted: Underline, Font color: Custom Color(RGB(68,114,196))

Formatted: Underline, Font color: Custom Color(RGB(68,114,196))

6 **67.** This Agreement is entered into for the purposes of compromising disputed claims
7 and avoiding the expense, inconvenience, and uncertainty of litigation. Nothing contained in this
8 stipulation, nor any consideration given pursuant to it, shall constitute or be deemed an
9 admission of any breach, liability, or damages of any party.

10 ~~8. The parties shall each bear its own attorney's fees and other expenses~~
11 ~~incurred as a result of the dispute to which this stipulation relates, including expenses for the~~
12 ~~negotiation and preparation of this stipulation. This paragraph is limited to the Pending Litigation~~
13 ~~and events leading to it and shall not preclude or otherwise prejudice either Party's entitlement to~~
14 ~~pursue or obtain attorney fees in subsequent litigation concerning these matters.~~

Formatted: Highlight

15 79. This stipulation contains the entire understanding between the parties concerning
16 the settlement of this dispute. Any and all prior negotiations that are not contained in this
17 stipulation are superseded and of no force or effect. Each party represents and warrants that no
18 promise or inducement to enter into this settlement has been made to him or her that is not set
19 forth in this stipulation, and that the signatory has the authority to enter into the Settlement.

20 810. Each party covenants and agrees to execute such further documents and perform
21 such further acts as may be reasonable, lawful and necessary to effectuate the purposes of this
22 stipulation. A digital representation of a signature shall be as effective as an original.

23 911. This stipulation shall become effective on its execution by or on behalf of all
24 parties. It may be executed in two or more counterparts, each of which shall be deemed to be an
25 **original, and all counterparts shall together constitute the stipulation.**

26 **102.** This stipulation may not be orally superseded, modified, or amended. No waiver,
27 modification, or amendment shall be valid unless signed by all parties.

Formatted: Normal, Left, Right: 0", Line spacing: single, Tab stops: Not at 0.79"

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

11. If within thirty (30) days after the Settlement the Parties are unable to agree regarding the attorneys' fees and costs payable, Water Audit shall be entitled to bring a motion in Superior Court for the payment of attorneys' fees in the Action, including fees for the bringing of the fee motion, and a prayer for such fee enhancements as the court shall find appropriate for Water Audit acting contingently in the public interest.

12. The Parties agree that a "force majeure event" means an event beyond the reasonable control of NID that prevents NID from fulfilling an obligation required by the Settlement, despite the exercise of due diligence by NID. Such events may include natural disasters, as well as all unavoidable legal impediments or prohibitions. In the case of a force majeure event, NID shall be relieved of those specific obligations precluded by the force majeure event, as well as those obligations the performance of which is precluded or rendered useless by the inability to perform, or delay in performing, the precluded obligations, and only for the duration of such force majeure event, as provided herein. The term "due diligence" includes, to the extent reasonably possible, steps by NID to prevent or to minimize the force majeure event's interference with NID's performance of any affected obligations under the Settlement.

13. In the event of a force majeure event, within five days of the onset of the event, NID shall orally notify Water Audit of the occurrence, nature, and expected duration of such event to the extent known by NID. Within ten days of the force majeure event, NID shall send a written notice of the event to Water Audit that includes the aforementioned information as well as a description, to the extent then known by NID, of the steps taken or proposed to be taken by NID or other parties to prevent or minimize the force majeure event's interference with NID's performance of any affected obligations

Formatted: Indent: Left: 0.08", No bullets or numbering

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

under the Settlement.

14. All agreements with third parties to implement material terms of the Settlement shall be consistent with the Settlement. The Parties will develop procedures to provide notice to each other of such agreements.

15. In the event of any action by third parties to challenge the terms of the Settlement, the Parties agree to cooperate in a vigorous defense of such action, as necessary.

16. The Settlement is binding upon the Parties and shall inure to the benefit of the Parties. The Settlement is not intended to and shall not be interpreted in a manner so as to confer rights on persons or entities who are not the Parties hereto.

17. Each Party acknowledges that it has been represented by counsel throughout all of the negotiations that preceded execution of the Settlement, and that it has executed the Settlement in consideration of the advice of such legal counsel.

18. For purposes of the Settlement, each Party shall designate a contact person for all notices and consultations required by the Settlement, which may be changed by Notice. The initial contacts so designated are:

For Water Audit:

William McKinnon
General Counsel for
Water Audit California
952 School Street, #316
Napa, CA 94559

AND BY EMAIL TO: Mail@WilliamMcKinnon.com and General@WaterAuditCA.org

For NID:

<<INSERT>>

Formatted: Indent: Left: 0.08", First line: 0.5", No bullets or numbering

Formatted: Indent: Left: 0.08", No bullets or numbering

MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP
1681 Bird Street
P.O. Box 1679
Oroville, CA 95965
(530) 533-2885

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

19. The text of this Settlement is the joint product of the Parties and shall not be construed as having been prepared by any one Party.

Formatted: Indent: Left: 0.08", First line: 0.5", No bullets or numbering

Dated: _____, 2020. NEVADA IRRIGATION DISTRICT
By _____
REMLEH SCHERZINGER, General Manager

Dated: _____, 2020. WATER AUDIT CALIFORNIA ADVOCATES FOR THE PUBLIC TRUST
By _____

APPROVED AS TO FORM:
MINASIAN, MEITH, SOARES,
SEXTON & COOPER, LLP:
By _____
ANDREW J. McCLURE

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

Attorneys for Defendants

ADVOCATES FOR THE PUBLIC TRUST

By: _____

WILLIAM MCKINNON
Attorney for Plaintiffs

DRAFT