THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, and PUYALLUP TRIBE OF INDIANS, *et al.*, Intervenor-Plaintiffs vs. ELECTRON HYDRO, LLC, Defendant.	Case No. 2:20-cv-01746-JCC PUYALLUP TRIBE OF INDIANS' OPPOSITION TO MOTION TO STAY NOTE ON MOTION CALENDAR: February 11, 2022 This Document Relates To: BOTH CASES

The Puyallup Tribe of Indians (hereinafter referred to as "Tribe") joins and supports the United States' Opposition to Defendant's Motion to Stay. *See* U.S.'s Opp'n to Mot. to Stay, Feb. 07, 2022, ECF No. 54 ("U.S. Opposition Brief"). The Tribe's opposition herein is dedicated to addressing the prejudice to the Tribe's interests if Defendant's stay is granted.

LAW OFFICE
PUYALLUP TRIBE
3009 PORTLAND AVENUE
TACOMA, WA 98404
(253) 573-7877

The Tribe requests that this Court use its discretion to deny Defendant's Motion to Stay Discovery Pending Resolution of Criminal Proceedings. *See* Def's Mot. to Stay, ECF No. 46 ("Motion").

I. Background

On approximately July 29, 2020 Defendant Electron Hydro, LLC placed 2,409 square yards of artificial turf into the Puyallup River, including at least 16 cubic yard of crumb rubber, in a bypass channel during construction. Tribe's Complaint, ⁋⁋ 50-54, ECF No. 38; Affidavit of Probable Cause, 5-6, attached as Exhibit 3 to the Declaration of Svend Brandt-Erichsen, ECF No. 48-3. A significant quantity of this material, including at least 4 cubic yards of crumb rubber, were discharged into the river during work Electron was performing to replace the dam at the facility. Tribe's Compl. ⁋ 32, ⁋⁋ 56-62. The work itself was permitted, but the use of the artificial turf was not permitted and has resulted in continuing environmental harm to at least 19 miles of the Puyallup River and Commencement Bay. *Id.* at ¶¶ 63–70. Approximately seven miles of the Puyallup River runs through the Puyallup Tribe's reservation. Declaration of Fred Dillon, ¶ 7.

After the initial placement of the turf in the river and tearing away of the lower portion, stop work orders were issued to assess the problem and develop a method to remove the turf from the River. Tribe's Compl., ¶ 71. The artificial turf remained in the bypass channel, inundated by river flow until approximately October 28, 2020. *Id.* at ¶ 66. Without permit authorization from any federal regulatory agency, the defendant also constructed a rock dam, which remains in the River today. Declaration of Eric Marks, ¶ 24; Declaration of Charissa Bujak, ¶ 14, ECF No. 58. The rock dam has been changed with the changing river

LAW OFFICE
PUYALLUP TRIBE
3009 PORTLAND AVENUE
TACOMA, WA 98404
(253) 573-7877

flows, and continues to be moved and washed away as flows increase and decrease with seasonal weather events. *Id.* Tribal biologists continue to find turf mats, HDPE liner, other construction fabric, and green plastic grass fibers downstream of the facility in the river, and buried in the substrate within and near the project site, until as recently as this past Friday, February 4, 2022. Eric Marks Declaration, ¶¶ 2-23.

II. Argument

The Ninth Circuit has held that "[t]he Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings." *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995) (citations omitted). Rather, "[i]n the absence of substantial prejudice to the rights of the parties involved, simultaneous parallel civil and criminal proceedings are unobjectionable under our jurisprudence." *Id.* (brackets and citations omitted). "Nevertheless, a court may decide in its discretion to stay civil proceedings ... 'when the interests of justice seem [ ] to require such action.' " *Id.* (quoting *United States v. Kordel,* 397 U.S. 1, 12 n. 27 (1970)). The Ninth Circuit has established the following framework for the decisonmaker to consider when evaluating whether to grant a stay of a civil matter to allow parallel criminal proceedings to conclude:

> The decision whether to stay civil proceedings in the face of a parallel criminal proceeding should be made "in light of the particular circumstances and competing interests involved in the case." This means the decisionmaker should consider "the extent to which the defendant's fifth amendment rights are implicated." In addition, the decisionmaker should generally consider the following factors: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the

LAW OFFICE
PUYALLUP TRIBE
3009 PORTLAND AVENUE
TACOMA, WA 98404
(253) 573-7877

> interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Id. at 324–25 (quoting *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 899, 902 (9th Cir. 1989)). In this matter, when balancing the competing interests involved in this case, we ask the Court to recognize the substantial prejudice and harm to the Tribe's interests if a stay is granted allowing Defendant to continue to avoid mitigating for the continuing harm to the Puyallup River and the Tribe's cultural and natural resources.

A. **Plaintiff-Intervenor Puyallup Tribe of Indians' Interest**

The Puyallup Tribe is a federally recognized Indian Tribe whose reservation is located in Tacoma, Washington, other parts of Pierce County, and part of King County. Dillon Decl. ¶ 7. The Tribe owns the bed and banks of the Puyallup River within its reservation, downstream of the Electron Facility, as confirmed by the Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101-41, § 3(b)(6), 103 Stat. 83, 85. The Tribe and its members have, from time immemorial, fished the waters of the Puyallup River, the Puyallup River watershed, Commencement Bay, and other areas of Puget Sound. *See* Dillon Decl. ¶ 7. The Tribe's rights to fish in these waters are reserved and protected by the Treaty of Medicine Creek, Dec. 26, 1854, ratified Mar. 3, 1855, 10 Stat. 1132, 2 Kappler's Indian Affairs: Laws and Treaties 661- 664, https://dc.library.okstate.edu/digital/collection/kapplers/id/29633/rec/4 (last visited February 6, 2022); *United States v.* Washington, 384 F. Supp. 312, 370-371 (1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086, rehearing denied, 424 U.S. 978, aff'd sub nom. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658

LAW OFFICE
PUYALLUP TRIBE
3009 PORTLAND AVENUE
TACOMA, WA 98404
(253) 573-7877

(1979), Supplemental Findings of Fact and Conclusions of Law, 626 F. Supp. 1405, 1441-1442 (W.D. Wash. 1981). These Treaty Fishing rights and reserved water rights, which are essential to the Tribe and its members' existence and culture, have been and continue to be gravely impacted by the Electron Hydro's actions and violations of the Clean Water Act. Miller Decl. ¶¶ 3-6; Marks Decl. ¶¶ 2-24; Bujak Decl. ¶ 13-17.

The Tribe has an overriding and urgent interest in the expeditious resolution of this case and cessation of the ongoing harm caused by the Electron Hydro acts and omissions. "Generally, '[a] stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court.'" *Security and Exchange Commission v. Boucher*, No. 3:20-CV-1650-DMS (MSB), 2021 WL 5178519 Slip Copy at *3 (S.D. Cal. Signed Nov. 8, 2021) (quoting *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979)). The claims of the plaintiffs here are increasingly urgent as material remains in the river, and appears to be continuing to be released downstream from the substrate at or surrounding the project site. Marks Decl. ¶¶21-24. It has already been over 18 months since Electron Hydro LLC first discharged pollutants into the river, but it is yet to be held accountable for its blatant disregard for the water and the natural and cultural resources that are harmed by its actions.

Most alarming, and contrary to the Company and Mr. Fischer's assertions, the pollutants discharged by Electron including the turf, HDPE liner, other construction materials, and crumb rubber are still in the river, turned into the river bottom substrate, and continue to be moved and distributed downstream in a variety of forms with every change in river flow. Marks Decl. ¶¶ 2-24. The harm inflicted upon the River, its waters and habitat, and the

LAW OFFICE
PUYALLUP TRIBE
3009 PORTLAND AVENUE
TACOMA, WA 98404
(253) 573-7877

Tribe's interest in the fishery and wildlife that rely on that river for life, is ongoing. *Id. and* Miller Decl. ¶ 6. Electron has repeatedly claimed it has cleaned up the turf and other material to the both state and federal agencies, and to the media. Marks Decl., ¶ 3. Yet, the Tribe's biologists have found otherwise.

Beginning in the fall of 2020, Tribal biologist Eric Marks began an effort to search and retrieve turf, crumb rubber, HDPE liner, and the degraded components of the turf, which are predominantly green plastic strands of what was once the grass fibers of the artificial turf. *Id.* at ¶¶ 2-4. Mr. Marks has collected and photographed the materials, cataloguing the dates and locations of where each item has been found. *Id.* at ¶ 4. To date, Mr. Marks has over 1900 photos and videos of the material he has found. *Id.* In Mr. Marks' Declaration, filed herewith, he has presented a description and photos of only a fraction of the material he has collected and catalogued. *Id.* at ¶¶2-24.

Of particular concern, however, is that even in the last 6 weeks Mr. Marks and his team have found significant pieces of turf and HDPE liner. *Id.* at ¶ 20-21. In January of 2022, Mr. Marks and his team continued to find and recover turf fibers, intact turf mats, geotechnical fabric, and HDPE liner. *Id.* at. ¶ 20. Recovered items included an 8 square foot intact turf mat found approximately a half mile downstream of the Electron powerhouse, an approximately 140 square foot piece of geotechnical fabric found approximately 1.3 miles down from the project site, and 36 pieces of HDPE liner. *Id.* In the former bypass channel, the Mr. Marks found a piece of HDPE liner mixed into the substrate. *Id.* Mr. Marks had searched this area before, and this material appeared to have been deposited or revealed in the substrate due to scour from flows since his last visit to that river segment. *Id.*

LAW OFFICE
PUYALLUP TRIBE
3009 PORTLAND AVENUE
TACOMA, WA 98404
(253) 573-7877

Remarkably, just this past Friday, on February 4, 2022, Mr. Marks and his team found large pieces of turf that appear to be emerging after having been turned into the substrate of the river bottom. *Id.* at ¶ 21. These pieces are still somewhat buried, but coming free as high flows continue to scour out the materials placed in the channel by Defendant. *Id.* Most of these pieces were found just feet downstream of the dam or in the substrate just upstream of the remaining wooden spillway near the entrance to the fish ladder where Defendant replaced significant substrate material into and over the former bypass channel where the turf and liner were originally placed in the river. *Id.*

The continued presence of turf, HDPE liner, plastic strands, and crumb rubber will result in further degradation of the materials into the water column, adding chemicals and making the solid waste less recoverable. *Id.* at ¶ 24. This pollution is harmful to fish and wildlife, and impacts the Tribe's treaty fishery. *Id.*; Bujak Decl. at ¶¶13-14.

Any further delay in forcing the Defendant to take responsibility for what it did and mitigate the harm it has, and continues to, cause by its actions will prejudice the Tribe, and its members' way of life as fishing people. Miller Decl. at ¶¶ 2-6; Dillon Decl. at ¶¶ 5-8. Washington State's criminal case has just begun and there is currently no trial date set. The remedies sought by the Washington Attorney General's office are jail time and fines. *See* Decl. of Svend A. Brandt-Erichsen – Ex. 2, ECF No. 48–2. The remedies in the criminal matter will do nothing to address, minimize, or mitigate the harm caused by the Defendant to the waters of the Puyallup River. However, in these consolidated matters under the Clean Water Act, the court has may exercise its discretion that, while limited, may reward relief such as cleanup or mitigation "so long as the district court's equitable measures are reasonably

LAW OFFICE
PUYALLUP TRIBE
3009 PORTLAND AVENUE
TACOMA, WA 98404
(253) 573-7877

calculated to remedy an established wrong…." *Sierra Club v. BNSF Railway Company*, C13-0967-JCC, 2014 WL 12029092, at *8 (W.D. WA March 12, 2014) (quoting *Nat. Res. Def. Council v. Southwest Marine, Inc.*, 236 F.3d 985, 1000 (9th Cir. 2000) (internal citations omitted). Defendants are asking the Court to stay discovery in this case until the criminal case is resolved, thereby postponing the only remedies that will vindicate the Tribe's interests. The Tribe's interests are the cessation and remediation of the damage caused to the natural resources, and those interests will be prejudiced if it has to wait for the State of Washington to prosecute criminal charges.

B. Burden on the Defendant:

As discussed in the U. S.'s Opposition Brief and joined by the Tribe, the Defendant Mr. Fischer has failed to make a "clear case of inequity or hardship" required to justify the "extraordinary remedy" of a stay of the civil proceedings. *See Landis*, 299 U.S. at 255; *Keating,* 45 F.3d at 324; *and Whitsitt v. Allen & Assoc., LLC,* 2014 WL 11997865, at *2 (Coughenour, J. ("[a] stay of [a] civil case to permit conclusion of a related criminal prosecution has been characterized as 'an extraordinary remedy."). U. S.'s Opposition Brief 6-11, ECF No. 54.

Similarly, and as discussed in the U. S.'s Opposition Brief, Electron Hydro's assertion to any right to assert Mr. Fischer's 5th Amendment Rights are similarly misplaced. *Id.* at 7.

//

//

//

//

LAW OFFICE
PUYALLUP TRIBE
3009 PORTLAND AVENUE
TACOMA, WA 98404
(253) 573-7877

C. Court's Interests

As discussed in the U. S.'s Opposition Brief, and joined by the Tribe, the Court's interest in the efficient administration of justice would be best served by denying Defendants' Motion for a Stay. *Id.* at 11.

D. Interest of Non-Parties and the Public

As discussed in the U. S.'s Opposition Brief, and joined by the Tribe, there is a substantial interest of both non-parties and the public in seeing this case move forward to mitigate the continuing harm caused by the Electron Hydro. *Id.* at 12. More specifically, individual Tribal members, particularly those that rely on fish or other wildlife to provide both their subsistence food and their livelihood, are uniquely impacted by Electron Hydro's actions. *See generally,* Miller Decl. and Dillon Decl. Furthermore, members of the general public in Washington hold an interest in addressing the ongoing harm releasing chemicals and solid waste into the Puyallup River, which eventually drains into Commencement Bay and greater Puget Sound. The waters impacted by Electron Hydro are relied upon by a robust recreational fishery, wildlife, including Southern Resident Killer whales, and recreational water users across the western Washington.

III. Conclusion

For the foregoing reasons the Puyallup Tribe respectfully requests the Court deny Defendant's Motion to Stay Discovery Pending Resolution of Criminal Proceedings. Proceeding expeditiously with this case is paramount to addressing the ongoing harm to the Puyallup River and the Puyallup Tribe.

LAW OFFICE
PUYALLUP TRIBE
3009 PORTLAND AVENUE
TACOMA, WA 98404
(253) 573-7877

DATED this 7th Day of February, 2022.

PUYALLUP TRIBE OF INDIANS
By: s/*Lisa A.H. Anderson*
s/*Alec S. Wrolson*
s/*Samuel J. Stiltner*
Lisa A.H. Anderson, WSBA #27877
Alec S. Wrolson, WSBA #54076
Samuel J. Stiltner, WSBA #7765

Law Office of the Puyallup Tribe of Indians
3009 E. Portland Ave.
Tacoma, WA 98404
Telephone: (253) 573-7877
Email:
Lisa.Anderson@Puyalluptribe-nsn.gov
Alec.Wrolson@Puyalluptribe-nsn.gov
Sam.Stiltner@Puyalluptribe-nsn.gov