



# Hoopa Valley Tribal Council

HOOPA VALLEY TRIBE

Regular Meetings on the First and Third Thursday of Each Month

P.O. Box 1348 • HOOPA, CALIFORNIA 95546 • Phone 625-4211 • Fax 625-4594



Clifford Lyle Marshall, Sr.  
Chairman

## **The Agreement in Principle and the Proposed Klamath River Basin Agreement November 21, 2008**

The 32-page Agreement in Principle and the 256-page Klamath River Basin Restoration Agreement reflect policy choices by the Bush Administration to favor certain constituencies over others. The incomplete agreements do not call for federal expenditures to remove the ancient dams or mitigate the water quality impacts that have contributed to the decimation of the West Coast fishing industry. Instead, the agreements call for an infusion of nearly \$1 billion, principally to protect and promote irrigation of low value crops in the high mountain desert of south central Oregon. A major revision of the proposed approach is required to meet the United States' trust responsibilities to the Hoopa Valley Tribe and other tribes of the Klamath River basin.

### **STATUS OF DRAFT AGREEMENTS**

On November 13, 2008, Interior Secretary Dirk Kempthorne announced an Agreement in Principle with PacifiCorp. PacifiCorp is the owner and operator of six dams on the Klamath River in Oregon and California. PacifiCorp's license from the Federal Energy Regulatory Commission expired in 2006, but the utility continues to operate the 160-megawatt project under annual licenses, which do not require fish and water improvements or any mitigation of long-standing environmental impacts. The lowest three dams (Copco I & II and Iron Gate) were built without any fish passage facilities so salmon are cut off from over 300 miles of habitat of the Klamath River Basin.

The Agreement in Principle ("AIP") defines "a path forward" from which there are many exits for the utility. Each exit (right to withdraw from the Agreement) ends the non-binding plan for removing four dams and restarts the FERC licensing process. Under the AIP, no decision whether to remove a dam can be made before March 31, 2012, at the earliest. Thus the main effect of the AIP now is to halt and delay the water quality certification analysis (required by the Clean Water Act) which was underway in California and Oregon, and to suspend the FERC relicensing process.

The AIP envisions negotiation toward a Final Agreement in late 2009. The affected Indian tribes are not parties to the AIP but may be permitted to observe the new negotiations. Enactment of federal legislation is a condition of the "path forward;" it must ratify a separate agreement, the Klamath Basin Restoration Agreement ("Basin Agreement"), authorize the United States to conduct studies, and direct the United States to make a determination, by March 31, 2012, of whether the benefits of dam removal justify the potential costs, risks,

liabilities, etc. § 3, p. 6. The states of Oregon and California may exercise a right of withdrawal within sixty days if they disagree with the United States' 2012 determination. In the interim, the licensing process and water quality evaluations are stalled and the Project continues generating power without necessary conditions to protect fish health, habitat, or water quality.

The AIP also requires Oregon and California each to secure by legislation a total state contribution toward dam removal of \$200 million from power customer rate increases. In addition, the State of California must obtain voter approval of a general obligation bond for an additional \$250 million for dam removal. Failure of any of these pieces of legislation will end the Agreement. The full text of the AIP is available at <http://www.schlosserlawfiles.com/~hoopa/AIPConformedFinal11-13-08.pdf>

The federal legislation required by the AIP will direct the United States to designate a dam removal entity, which must be a non-federal entity qualified to remove the dams, defend any litigation, pay all damages, and provide complete protection from liability for PacifiCorp. § 4, p. 7, § VIII, p. 15. Having a non-federal entity perform these functions, if a qualified entity can be found, will lead to higher insurance and defense costs than if the federal government took the responsibility.

PacifiCorp will operate the dams under its annual license until decommissioning of each individual dam, which would begin, at the earliest, in 2020. Operations will be subject to interim conditions contained in the Final Agreement to be negotiated. Also, PacifiCorp, the National Marine Fisheries Service and U.S. Fish and Wildlife Service have approved an Interim Conservation Plan (a subset of the minimal interim measures in the AIP) which will be added to PacifiCorp's annual license; however, that plan fails to meaningfully address the significant threats to fish health and water quality that plague the river

## **THE PROPOSED BASIN AGREEMENT**

The draft Basin Agreement, intended to be signed concurrently with a Final Agreement with PacifiCorp for dam removal, covers a variety of topics including fisheries programs; water allocation in Oregon; measures to limit the effects of the Endangered Species Act ("ESA regulatory assurances"); power subsidies for federal and private irrigation interests; measures to minimize adverse effects on counties; and tribal program funding. The proposed Basin Agreement has significant implications for tribal trust resources. This memorandum will not describe each section in detail. The full text of Basin Agreement draft #11 and a more complete summary are available at <http://www.edsheets.com/Klamathdocs.html> or <http://www.waterwatch.org> (search: Klamath).

## **FISHERIES PROVISIONS**

Section 8 of the Basin Agreement incorporates the anticipated dam removal agreement with PacifiCorp and provides for continued operation of Link River Dam and Keno Dam by Reclamation. Sections 9-11 of the Basin Agreement provide for plans to restore fish habitat and to reintroduce anadromous species to habitat opened by dam removal.

Section 12.2.7 calls for scientific reviews, beginning in 2020 and 2030, to determine the success of restoration efforts in achieving fish habitat envisioned by the Settlement Group Tech

Team Assignment X Flow Report (Jan. 6, 2007) and other hydrologic modeling. Here and elsewhere, the Basin Agreement draft #11 does not establish target salmon run sizes or harvest goals. By comparison, the 1984 Trinity Basin Act, 98 Stat. 2721, and its 1996 amendment, 104 Stat. 143, requires restoration of fish and wildlife populations to levels approximating those that existed immediately before Reclamation's dam construction began and to reestablish tribal, ocean, and sport harvests of those populations.

Section 19, "environmental water," is the operational heart of the agreement with respect to fisheries during the next decades. Section 19.4.4 calls for federal appropriations to provide \$10 million per year to lease, purchase or otherwise reduce surface water diversions from the Klamath River on the basis of recommendations of a Technical Team. The Team will be guided by the lake level and flow outputs derived from a hydrologic model, WRIMS Run 32/Refuge, which is detailed in Appendix E-5, but the \$10 million per year is subject to appropriations, and also the agreement does not obligate the Bureau of Reclamation to implement the Technical Team recommendations. The \$10 million annual expenditure would occur although water rights to divert in the upper basin are junior to the tribal rights lower in the basin in California.

Also, even if the WRIMS Run 32 flows are achieved, they will fail to meet ESA-required flows in 40% of years. Many fisheries scientists believe they will be insufficient to restore anadromous fish. The federal and state fish agencies have declined to show any biological rationale behind the Basin Agreement water program. In sum, the fisheries provisions are weak and provide little to no certainty that fish runs will be adequately protected, let alone restored.

## **WATER PROVISIONS**

The water resources program of the Basin Agreement is the heart of the document. The focus of these sections is upon allocating water rights claimed in Oregon by the Klamath Irrigation Project, the Klamath Tribes of Oregon, two federal wildlife refuges, and individual irrigators. These wildlife refuges are partially leased to commercial farming by the U.S. Fish and Wildlife Service and the continuation of this controversial practice is provided for by Section 15.4.3.

The Basin Agreement confers many benefits on Klamath Project irrigators including \$41 million in power subsidies; \$92.5 million to implement their own water plan that they develop without public oversight; preferential Columbia River hydro-system power rates; debt forgiveness on disputed Klamath Project capital costs owed to the United States; special contracts on project operation, maintenance and pumping costs that need legislative exemptions from the cost sharing provision of the Reclamation Reform Act of 1982; support for continuing commercial leaseland farming on national wildlife refuges for 50 years; 80% of the revenue paid for farming refuge lands goes back to their benefit by payments of 10% of the revenue to Tulelake Irrigation District, 10% of the revenue to Klamath Drainage District, and approximately 60% to the Bureau of Reclamation to reduce capital costs of the Klamath Project that would otherwise be recoverable from the Project irrigators; U.S. Fish & Wildlife Service picking up a greater percentage of the pumping costs for operating the D plant that drains Tule Lake for farming; Reclamation assuming all costs for operating Link River Dam and Keno Dam for

Project diversion, a substantial portion of which costs should be paid by Project irrigators under current cost-sharing laws; and finally regulatory assurance benefits (noted below).

Draft #11 guarantees water to irrigation and refuge users but does not guarantee water for Upper Klamath Lake or instream flow of the Klamath River downstream of the irrigation project. Water diversions under the Basin Agreement would authorize diversion from Upper Klamath Lake and river of 330,000 af during the summer plus 50,000 af for refuges. *See* Section 15.1.1.B and Appendix E-1. The authorized diversion volume under the proposed agreement would be greater than the recent allowable Project diversions during years when water withdrawals were restricted to protect threatened Coho salmon. The diversion limitations proposed under the agreement would not become effective until approximately 2017, so they would not contribute to the needs of fish in the near term. Section 15.3.1 provides that Project irrigation parties' diversion limitations will become enforceable approximately 10 years in the future, if the State of Oregon approves, following implementation of a \$100 million demand reduction plan, the funding for which is also subject to appropriations, and occurrence of certain other events. It is unlikely the proposed diversion program can be operated consistent with ESA obligations.

The Basin Agreement would not protect water rights for the Hoopa Valley and Yurok Tribes whose reservations date from 1855 and 1864. Instead, the Basin Agreement would establish guaranteed amounts of water for the junior water users in the Upper Basin. The federal representatives and irrigation interests have strongly opposed setting minimum instream flows for the benefit of the downstream California fisheries. The basis for requiring such instream flows was set out in the Thomas Hardy, et al. Phase II Report, (which was endorsed by the recent National Research Council Klamath Report). If the Hardy flows were adopted, a lower volume (i.e., less than 300,000 af), would be available for irrigation diversions. The Hardy study could be the basis for a scientific process which the Secretary could use to allocate water to irrigators based on annual hydrological conditions, but that option was omitted from the Basin Agreement.

Section 15.2 may limit the groundwater pumping that is anticipated as a supplement to surface water diversions for irrigation uses. *See also* Power Subsidies, below. Section 15.2.4 defines adverse impacts to groundwater as 6% reduction or more from certain named water bodies and calls for technical analyses by U.S. Geological Survey. Kamman Hydrology & Engineering Inc., which prepared one of the two technical analyses of the Basin Agreement, criticized section 15.2.4 as too limited in its geographic applicability. Both Kamman and Dr. William Trush questioned the hydrological modeling used in the Basin Agreement because it ignored effects of water withdrawals from hydrologically connected groundwater sources.

Sections 16-18 provide for retirement of 30,000 af of water rights in the drainages above Upper Klamath Lake through open market purchases; funding for new storage opportunities; and preparation of plans for responding to droughts. However, those sections do not reduce the irrigation withdrawals discussed above.

## **TRIBAL CLAIM WAIVERS**

Section 15.3 demands assurances that tribal water rights will not be asserted to prevent the diversions of surface water and groundwater authorized by the Basin Agreement. That section also releases the United States of any breach of trust based claims by tribes which might

assert that federal agencies in the past (or by negotiating this agreement) have interfered with reserved tribal fishing and water rights. Section 15.3.3 quantifies water rights of the Klamath Tribes of Oregon that are at issue in the Klamath Basin adjudication being conducted by Oregon Water Resources Department. The “interim assurances” of Sections 15.3.3 and 15.3.9 will be replaced by permanent assurances given by the United States and the Klamath Tribes of Oregon upon the occurrence of certain events, including an undefined commitment toward dam removal, events that should occur by 2012.

Section 15.3.6 provides similar assurances that tribal trust water rights will not be asserted by the Yurok Tribe and the United States and that the Yurok Tribe will release the United States of any claims of damage, interference with or other injury to fish, wildlife, land or other resources of the Klamath River Basin above the Oregon-California border. Section 15.3.7 would require similar assurances and releases from the Hoopa Valley Tribe and 15.3.8 from the Karuk Tribe of California. Unlike the Klamath Tribes of Oregon, whose water rights are at issue in the Klamath Basin adjudication, the three California tribes would not receive any quantified tribal water rights under draft #11, although the Klamath River flows across the Hoopa Valley Reservation and flows through the 45-mile length of the Yurok Reservation. Both the Hoopa Valley and the Yurok tribes hold federally reserved rights to take fish sufficient to support a moderate livelihood, together with the instream flows necessary to support those fish runs.<sup>1</sup> That fishing right has further been defined by Congress in the Central Valley project Improvement Act and the 1984 and 1996 Trinity River restoration acts referred to above. The Hoopa Valley Tribe has advised the Basin Agreement participants that Section 15.3.7 is unacceptable, but the section remains in the Basin Agreement at pages 73-75.

#### **LIMITATION OF ENDANGERED SPECIES ACT RESTRICTIONS ON AGRICULTURE**

Sections 20-24 address Habitat Conservation Plans to protect landowners from reintroduced species in areas that have been inaccessible due to the PacifiCorp dams. Section 20.3 requires much more -- stakeholders must support the out-of-stream diversion amounts authorized by the Basin Agreement against ESA limitations and not seek restrictions on such diversions through citizen suits under the Endangered Species Act prior to completing preliminary steps. Stakeholders seeking to avoid jeopardy to fish must certify the status of the water rights retirement programs, seek available alternatives for restricting diverters outside the Irrigation Project, and go through dispute resolution procedures before filing suit. None of the foregoing would be prerequisites to citizens’ suits under the ESA in the absence of the Basin Agreement.

#### **POWER SUBSIDIES**

Sections 25-28 state a purpose to maintain power costs for irrigation pumping at approximately \$0.03 per kilowatt hour, delivered, in 2007 dollars. This rate is below that charged to other irrigation pumping in Oregon and California and has been rejected by both state PUCs. Interim and long term subsidy funding is provided, plus legislation authorizing use of power for federal agency purposes as federal project use power/reserve power is anticipated in Section 27. The Bonneville Power Administration has not approved the Basin Agreement.

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<sup>1</sup> *Klamath Water Users Ass’n v. Patterson*, 204 F.3d 1206 (9<sup>th</sup> Cir. 2000); *Parravano v. Babbitt*, 70 F.3d 539 (9<sup>th</sup> Cir. 1995).

## **COUNTY AND TRIBAL PROGRAMS**

Sections 29-32 call for measures to insulate Klamath County, Siskiyou County and Humboldt County from adverse effects of dam removal. Sections 33-36 direct funding for tribal participation in fisheries and other programs and \$21 million for acquisition of the Mazama Forest Project by the Klamath Tribes of Oregon.

## **GOVERNANCE**

Decision making under the Basin Agreement is left to the relevant state and federal agencies as advised by two groups, the Klamath Basin Coordinating Council and the Technical Advisory Team, which are intended to become chartered under the Federal Advisory Committee Act. *See* Section 5 and Appendix C. The November National Research Council Report on the Klamath criticized balkanized decision making in the Klamath Basin, noting the lack of consideration of all the river's tributaries and the absence of studies that are basin wide. The Basin Agreement does not address these shortcomings.

### **Further Information:**

Clifford Lyle Marshall, Chairman	(530) 625-4211, ext. 161
Mike Orcutt	(530) 625-4267, ext. 13
Thomas P. Schlosser	(206) 386-5200

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Clifford Lyle Marshall, Sr.  
Chairman

August 27, 2008

L. Michael Bogert  
Counselor to Secretary Dirk Kempthorne  
U.S. Department of the Interior  
1841 C St., N.W., Rm. 6132  
Washington, D.C. 20240

Re: Accommodation of Hoopa Tribal Concerns Regarding Klamath Basin Agreement

Dear Mr. Bogert:

Thank you for the opportunity to meet last month in Portland, Oregon. We appreciate your efforts to protect tribal interests in the Klamath River Basin and your willingness to hear our views concerning how that should be done. As you know, we find major shortcomings in the Klamath Basin Agreement ("KBA") with respect to the possibility of recovery of Klamath River Basin anadromous fish. We also find that the draft Agreement in Principle requires substantial revision.

Hoopa Valley Tribal support for the Klamath Basin Agreement must be conditioned upon the following:

1. Active administration support for H.R. 2733 and enactment of that legislation in substantially the form introduced. That bill will help assure funding to the long-delayed Trinity River Restoration Program;
2. Active administration support and enactment into law of an amendment to Title IV of Pub. L. 93-638 that provides tribes the option to contract to carry out federal statutory restoration programs for federally reserved rights, as set forth in the majority staff draft mark up version of H.R. 3994 on June 25, 2008;
3. Development of an enforceable harvest allocation method that will assure that the Hoopa Valley Tribe has the opportunity to take 50% of the allowable Indian harvest of Trinity origin salmon. We have written to the Bureau of Indian Affairs Regional Director requesting a legal opinion concerning BIA's ability to adopt such an allocation system, but we are still awaiting the promised opinion. However, it is likely that such allocation will require new

L. Michael Bogert  
August 27, 2008  
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legislative authority so appropriate provisions to accomplish the allocation will be required. Please see the attached explanation and proposed legislation.

4. Legislation that assures in-stream water minimum flows in the Klamath River (beyond those required under the applicable Endangered Species Act biological opinion), sufficient to support existing fish runs during the interim period until final dam removal.

5. An agreed upon method to provide up to 50,000 af of water annually from Trinity Reservoir to be made available to Humboldt County and downstream water users pursuant to Section 2 of the Act of August 12, 1955, 69 Stat. 719.

We hope this letter makes clear to you our focus on successful restoration of Trinity origin fish runs which must pass through the degraded Lower Klamath River for approximately 45 miles on their migration path. The Department's efforts to improve conditions for Klamath River Basin fisheries have not been matched yet at the Washington, D.C. level by comparable efforts by the Department to assure full funding for the Trinity River Restoration Program, required by Congress in 1992 in the Central Valley Project Improvement Act, nor by Department support for contracting authority to enable the tribes to carry out the needed work. We stand ready to assist your efforts to assist on Trinity River fisheries restoration objectives.

Sincerely,



Clifford Lyle Marshall, Chairman  
Hoopa Valley Tribal Council

## **The Klamath Basin Agreement and Protection of Trinity River Stocks**

The Hoopa Valley Tribe seeks legislation directing the Secretaries of Interior and Commerce, in consultation with the Tribe, to: (a) restore fish populations in the Trinity River and (b) develop and enforce an inter-tribal harvest allocation between the Hoopa Valley and Yurok Tribes that will provide one-half of the Indian allocation of Trinity River-origin fish to the Hoopa Valley Tribe. The need for legislation arises from the proposed Klamath River Basin Restoration Agreement (“Basin Agreement”), which will likely impair ongoing efforts to recover Klamath and Trinity River fish populations. The Hoopa Valley Tribe has federal reserved vested property rights to take fish necessary to support a moderate livelihood. Legislation is necessary, due to the potential impacts of the proposed Basin Agreement, to ensure adequate fish return to the Trinity River for harvest by the Hoopa people.

### **I. The Klamath River Basin Restoration Agreement**

On January 15, 2008, Klamath River Basin stakeholders released a 256-page partial agreement, the Klamath River Basin Restoration Agreement (“Basin Agreement”). The proposed Basin Agreement covers a variety of topics including fisheries programs; water allocation in Oregon among irrigators, Upper Klamath Lake, and national wildlife refuges; measures to limit the effects of the Endangered Species Act; power subsidies for federal and private irrigation interests; measures to minimize adverse impacts on Humboldt, Siskiyou, and Klamath counties; and tribal fisheries program funding.

The water diversions permitted to the Klamath Irrigation Project, together with other water allocations proposed in the Basin Agreement, will leave insufficient flows in the Klamath River. The Hoopa Valley Tribe’s expert fisheries scientists (as well as others) believe those water diversions will adversely affect Klamath River origin fish runs, and Trinity River origin runs, and halt or impede the recovery of anadromous fish. (The Trinity River is the largest tributary to the Klamath.)

At the same time, the Secretary of Interior is mandated to restore Trinity River fish runs to pre-dam populations. *See* Trinity River Basin Fish and Wildlife Management Act of 1984, Public Law 98-541 (98 Stat. 271), as amended by Trinity River Basin Fish and Wildlife Management Reauthorization Act of 1996, Public Law 104-143 (110 Stat. 1338); *see also* Central Valley Project Improvement Act, Public Law 102-575, title XXXIV. The Basin Agreement will make this already challenging mandate even more difficult. Legislation is necessary to reaffirm the commitment to restore Trinity stocks and to ensure that adequate stocks return to the Trinity for harvest by the Hoopa people.

### **II. Basis for Legislation**

The Basin Agreement will make recovery of mainstem Klamath origin salmonid stocks impossible. As Klamath fish populations diminish there will be increased harvest pressures on fish that enter the Klamath River, but are ultimately destined for the Trinity River. As a consequence, the upriver Hoopa Valley Tribe and its people will be severely hurt and Hoopa will not enjoy the intended benefits of congressionally-mandated Trinity River fish restoration.

The Basin Agreement will limit recovery of Trinity-origin salmonid stocks as well. Trinity fish are obliged to reside in the lower 45 miles of the Klamath River mainstem during

migrations to the ocean as juveniles and again as adults returning to spawn. Based on our analysis of hydrologic simulations used by all Settlement parties to evaluate the Basin Agreement, subsistence conditions as identified in Thomas Hardy, et al., Phase II Report cannot be met. Instead, habitats critical to Trinity fish repeatedly will provide intolerable water quality and insufficient physical habitat. Direct injury to significant numbers of outmigrating juveniles and returning adults can be predicted.

Given the impacts that the Basin Agreement will have on Klamath River and Trinity River origin runs, the Hoopa Valley Tribe believes that legislation is necessary to: (a) reaffirm the government's commitment to restore Trinity River fish populations; (b) ensure that sufficient fish populations return to the Trinity River for harvest by the Hoopa Valley Tribe in accordance with the Tribe's federal reserved rights. Specifically, Congress must ensure that no less than 50% of the tribal allocation of harvestable Trinity River fish is allowed to escape to the Trinity River and establish numeric, quantitative goals for the spawning and harvestable portions of restored populations originating from Trinity River.

### **III. Proposed Legislation**

The Hoopa Valley Tribe proposes adoption of the following legislation for the protection of Trinity River fish stocks and the protection of the Hoopa Valley Tribe and its members:

#### **SECTION \_\_\_\_ . Protection of Trinity River Fishery Restoration Goals and Hoopa Valley Tribe Fishing Rights.**

##### **(a) Trinity River Fishery Restoration Program**

This Act reaffirms and preserves the fishery restoration goals for the Trinity River and the concurring role of the Hoopa Valley Tribe, as prescribed in the Record of Decision of December 19, 2000 approved by the Secretary of Interior and the Hoopa Valley Tribe. The Secretary of Interior shall implement, in consultation with the Secretary of Commerce and the Hoopa Valley Tribe, a Trinity River Fishery Restoration Program that shall include and be subject to the following principles:

- (i) Restoration of Trinity River fish populations to pre-Trinity Dam construction levels by 2035;
- (ii) Fishery restoration shall be measured not only by returning anadromous fish spawners but also by the ability of dependent tribal and non-tribal fishers to participate fully in the benefits of restoration through meaningful harvest opportunities;
- (iii) An appropriate balance between stocks of natural and hatchery origins shall be maintained to minimize negative interactions upon naturally produced fish by hatchery mitigation releases;
- (iv) A co-management working relationship between federal agencies and the Hoopa Valley Tribe for activities associated with the Tribe's share of the fishery shall be maintained; and

- (v) Portions of federal activities that are associated with the United States' trust obligations to the Hoopa Valley Tribe are Indian Programs for purposes of the Indian Self-Determination Act.

(b) Hoopa Valley Tribe Fishing Rights

Without regard to the tribal harvest that occurs in the part of the Klamath River that is located on the Hoopa Valley Indian Reservation, upstream of the Yurok Reservation:

- (i) Indian tribal harvests of anadromous fish species shall be managed to provide the Hoopa Valley Tribe one-half of the Indian harvest allocation of Trinity River origin fish; and
- (ii) Harvest sharing between the Hoopa and Yurok Tribes for all anadromous fish, lamprey, sturgeon and other non-salmonid species shall be shared based on numeric, quantitative criteria developed by the Secretary of the Interior and Hoopa and Yurok Tribes giving proper consideration to the Hoopa Valley Tribe having not waived tribal trust water and fishing rights in the Klamath River Basin Restoration Agreement.

(c) Monitoring

The Secretaries of Interior and Commerce, in consultation with the Hoopa Valley Tribe, shall monitor management activities, including Yurok and Hoopa Valley tribal harvest and stock of origin, to verify that the requirements of this Section are fulfilled.

(d) Funding for the Hoopa Valley Tribe

Nothing in the Klamath River Basin Restoration Agreement shall be construed to prevent the Hoopa Valley Tribe from receiving funding for managing its federally protected water and fishing rights. The Secretaries of Interior and Commerce shall identify and allocate available funds to the Hoopa Valley Tribe comparable to funds other signatory parties receive pursuant to the Klamath River Basin Restoration Agreement.

Inquiries regarding the proposed legislation should be directed to: Clifford Lyle Marshall, Chairman, Hoopa Valley Tribe (530) 625-4211, ext. 161.



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Clifford Lyle Marshall, Sr.  
Chairman

June 5, 2008

Dale R. Morris, Regional Director  
Bureau of Indian Affairs  
2800 Cottage Way  
Sacramento, CA 95825

Re: Meeting Regarding Effect of Yurok Claim Waivers on Hoopa Fishing Rights

Dear Mr. Morris:

On April 30, 2008, we met with you concerning the imminent change in the United States' trust relationships with respect to Klamath River fish runs. That change arises from the Yurok and Karuk tribal claim waivers in the Klamath River Basin Restoration Agreement ("KRBRA"). The Hoopa Valley Tribe is principally concerned about the effect of the assurances by and between the Yurok Tribe and the United States.

The water diversions permitted to the Klamath Irrigation Project under the KRBRA, together with the water enhancements envisioned by the KRBRA, will leave insufficient flows in the River. Our fisheries scientists (as well as those of the Pacific Coast Federation of Fishermen's Associations and the Northcoast Environmental Center) believe those water diversions will adversely affect Klamath River origin runs, and Trinity River origin runs, and halt or impede the recovery of anadromous fish. However, the Interior Department is still mandated by the CVPIA to restore Trinity River runs to pre-dam populations. This cannot happen if Trinity stocks are over harvested by the Yurok Tribe.

We discussed with you the need to manage Trinity River - origin salmonid stocks separately from the management of mainstem Klamath River - origin salmonids stocks to insure 50% escapement of harvestable Trinity fish to the Trinity River. In this way, could BIA protect the Hoopa tribal harvest of Trinity stock (and promote the ongoing restoration effort there) even if, as seems likely, recovery of the mainstem Klamath origin salmonid stocks is made impossible by the low water flows to which the Yurok and Karuk tribes have agreed.

You promised to respond to this proposal by May 19 and we look forward to hearing from you.

Sincerely,

*s/ Clifford Lyle Marshall*

Clifford Lyle Marshall, Chairman  
Hoopa Valley Tribal Council



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Clifford Lyle Marshall, Sr.  
Chairman

March 25, 2008

Dale R. Morris, Regional Director  
Bureau of Indian Affairs  
2800 Cottage Way  
Sacramento, CA 95825

Re: Meeting Regarding Effect of Tribal Claim Waivers on Hoopa Fishing Rights

Dear Mr. Morris:

The Hoopa Valley Tribe requests a meeting with you concerning the imminent change in the United States' trust relationships with respect to Klamath River fish runs. That change arises from the Yurok and Karuk tribal claim waivers in the Klamath River Basin Restoration Agreement ("KRBRA"). As you may know, the joint Yurok and Hoopa meeting with BIA that we requested earlier has been difficult to arrange; as a result we want to meet separately with you as soon as possible.

The KRBRA in Section 15.3 sets out proposed waivers of tribal claims in the form of "assurances" that certain tribal rights will not be asserted. The enclosed memorandum from our attorney explains the overlapping claim waivers found in the KRBRA and attaches the waiver language. The waivers become effective upon the date of signature of the KRBRA. The initial subsections of § 15.3 (KRBRA draft 11, pages 65-71) relate to claims involving the Klamath Tribes of Oregon and other parties to the Oregon water adjudication. Section 15.3.6 provides for assurances by and between the Yurok Tribe and the United States. Proposed § 15.3.7 (pages 73-75 of draft 11) seeks similar assurances by and between the Hoopa Valley Tribe and the United States. Finally, § 15.3.8 relates to assurances by and between the Karuk Tribe and the United States. The Hoopa Valley Tribe does not agree to § 15.3.7 and will not enter into a claim waiver so that section will be deleted.

The Hoopa Valley Tribe is principally concerned about the effect of the assurances by and between the Yurok Tribe and the United States. Both those parties have indicated in the Klamath Settlement Group discussions their willingness to include such provisions in a final settlement agreement. They are ready to sign the assurances and waivers.

Section 15.3.6.A provides that the United States in its trustee capacity and the Yurok Tribe will not assert Yurok tribal or trust water rights in a manner that will interfere with the out-of-stream diversions of water by the Klamath Project provided elsewhere in the agreement.

Dale Morris, Regional Director

March 25, 2008

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In other words, they give up the right to additional Klamath water for fish. Section 15.3.6.B provides that the Yurok Tribe provides a complete waiver and release of claims against the United States for all losses and damages to fish, wildlife, land and other resources in the past, and up to and including the effect of the KRBRA itself. What is the scope of these releases of tribal rights, and how will the Bureau of Indian Affairs, as trustee for the Hoopa Valley Tribe, prevent the Yurok Tribe's surrender of rights to water needed for fisheries from having an adverse effect on fishing rights of the Hoopa Valley Tribe whose fish runs must pass through 45 miles of river affected by Yurok Tribe's release of claims?

By way of example, the water diversions permitted to the Klamath Irrigation Project under the KRBRA, together with the water enhancements envisioned by the KRBRA, are modeled in the WRIMS Run 32 Refuge model. WRIMS shows the actions will produce flows at the present site of Iron Gate Dam less than 1,000 cfs in 40% of the years 1960 through 2000. Our fisheries scientists (as well as those of the Pacific Coast Federation of Fishermen's Associations and the Northcoast Environmental Center) believe those water diversions will adversely affect Klamath River origin runs, and Trinity River origin runs, and halt or impede the recovery of Klamath River origin anadromous fish. The Klamath-origin rights are virtually destroyed and will not be restored. However, the Interior Department is still mandated by the CVPIA to restore Trinity River runs to pre-dam populations. This cannot happen if Trinity stocks are over harvested by the Yurok Tribe.

How will the Bureau assure that the decline in Klamath harvestable numbers will affect only the Yurok tribal fishery and will not adversely affect the Hoopa Valley Tribe's fishery resources for which the United States retains trust protection duties? One specific approach we wish to discuss is the possibility of managing Trinity River - origin salmonid stocks separately from the management of mainstem Klamath River - origin salmonids stocks. Harvest should be managed to insure 50% escapement of Trinity stocks to the Trinity River. In this way, could BIA protect the Hoopa tribal harvest of Trinity stock (and promote the ongoing restoration effort there) even if, as seems likely, recovery of the mainstem Klamath origin salmonid stocks is made impossible by the low water flows to which the Yurok and Karuk tribes have agreed?

We look forward to an analysis of these problems. Thank you for your consideration.

Sincerely,

*s/ Clifford Lyle Marshall*

Clifford Lyle Marshall, Chairman  
Hoopa Valley Tribal Council

cc: Maria Tripp, Chairperson  
Yurok Tribal Council