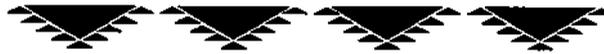


Karuk Community Health Clinic
64236 Second Avenue
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Phone: (530) 493-5257
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Karuk Tribe



Karuk Dental Clinic
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June 14, 2016

The Honorable Sally Jewell
Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

David Murillo, Regional Director
Mid-Pacific Regional Office
U.S. Bureau of Reclamation
2800 Cottage Way, Mail Code MP-100
Sacramento, CA 95825-1898

Estevan López, Commissioner
U.S. Bureau of Reclamation
1849 C Street, N.W., Mail Code 91-00000
Washington, D.C. 20240

The Honorable Penny Pritzker
Secretary of Commerce
United States Department of Commerce
1401 Constitution Ave., N.W.
Washington, D.C. 20230

Eileen Sobeck, Assistant Administrator
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

VIA CERTIFIED MAIL

RETURN RECEIPT REQUEST

Re: Notice of Violation and Intent to File Suit under the Endangered Species Act

Ayukii Secretary Jewell, Secretary Pritzker, Commissioner López, Regional Director Murillo, and Assistant Administrator Sobeck:

I am writing to give notice that the Karuk Tribe intends to file a civil action against the National Marine Fisheries Service ("NMFS") and the Bureau of Reclamation ("BOR") for violations of the Endangered Species Act ("ESA").

This notice concerns violations of the ESA by BOR and NMFS for operations of water diversions and downstream releases associated with the Klamath Project which jeopardize survival of ESA listed Southern Oregon Northern California Coast coho ("SONCC coho") as well as violations stemming from the failure to reinitiate formal consultation of the Klamath Project Operations Biological Opinion

Notice of Intent
June 14, 2016

("BiOp") as required by ESA section 7. Continued operation of the KIP without a revised Biological Opinion constitutes unauthorized take of a listed species under the ESA.

This letter constitutes the required notice of the violations described below. As such, you are hereby placed on formal notice by the Karuk Tribe that, after the expiration of sixty (60) days from the date of this Notice of Violation and Intent To File Suit, the Karuk Tribe intends to file suit in federal court under ESA section 11(g), 16 U.S.C. § 1540(g) against NMFS and BOR for violations of the ESA.

I. IDENTITY OF PERSONS GIVING NOTICE

The Karuk Tribe hereby gives notice of the names, address, and telephone number of the person giving notice of intent to file suit, which is the Karuk Tribe.

The Karuk Tribe is a federally recognized Indian Tribe with a population of approximately 3,700 members. Its headquarters is located in Happy Camp, along the Klamath River and in the vicinity of the Salmon and Scott Rivers. The Karuk Tribe has lived in northern California since time immemorial and its ancestors are considered among the earliest inhabitants of aboriginal California.

The stated mission of the Karuk Tribe is to promote the general welfare of all Karuk people; establish equality and justice for the Tribe; restore and preserve Tribal traditions, customs, language, and ancestral rights; and secure for themselves and their descendants the power to exercise the inherent rights of self-governance. Among the many goals of the Tribe is the protection and restoration of native fish and wildlife species that the Tribe has depended upon for traditional cultural, religious, and subsistence uses.

The Karuk Tribe may be contacted at the following address:

Russell Attebery, Chairman
Karuk Tribe
P.O. Box 1016
Happy Camp, CA 96039

Phone: 530-493-1600

Email: rattebery@karuk.us

II. BACKGROUND

A. Setting and Location of the Klamath Irrigation Project Facilities

The Klamath Irrigation Project ("KIP") is a water management project developed by BOR to deliver irrigation water to over 220,000 acres of former lakes, marshes and rangelands spanning the California-Oregon border. KIP lands are in Klamath County, Oregon and Siskiyou County, California. Construction of the project began in 1907. KIP diversions are used to grow alfalfa, barley, hay, wheat, potatoes, horse radish, and other crops. This year, the KIP plans to divert 388,000 acre feet of water from the Klamath River and Upper Klamath Lake for agricultural purposes.

The primary water diversions feeding the KIP are Upper Klamath Lake and the Klamath River although significant volumes of water are also diverted from Clear Lake, Lost River, and Tule Lake. Since the designation of SONCC coho as endangered-threatened in 1997, the KIP operational plan has been subject to a BiOp authored by the National Marine Fisheries Service or a jointly issued BiOp from NMFA and the US Fish and Wildlife Service which has the responsibility to ensure that KIP operations do not jeopardize survival of ESA listed Short-nose and Lost River suckers.

Upper Klamath Lake represents the primary water storage feature in the Klamath Basin outside of the Trinity sub-basin. Because the major points of diversion are located at or just below Upper Klamath Lake, BOR controls the majority of the volume of water flow in the Klamath River for most of its length for most of the year. Thus, KIP operations have a direct effect on ESA listed SONCC coho populations in the Klamath Basin.

B. Precarious Status of SONCC Coho

NMFS listed SONCC coho as a protected threatened species under the ESA on May 6, 1997. NMFS has designated critical habitat for the SONCC coho to include all accessible reaches of rivers (including estuarine areas and tributaries) between Cape Blanco, Oregon, and Punta Gorda, California. 64 Fed. Reg. 24,049 (May 5, 1999); 50 C.F.R. § 226.210(b). The Klamath River below Iron Gate Dam are among the waters within this critical habitat designation. On July 10, 2000, NMFS promulgated regulations under ESA section 4(d) establishing protective requirements for the species--including an extension to SONCC coho of the prohibition on unauthorized taking of the species established by ESA section 9. 65 Fed. Reg. 42,422 (July 10, 2000). The current version of these regulations is codified at 50 C.F.R. section 223.203.

NMFS and the California Department of Fish and Game have concluded that SONCC coho are not presently viable, meaning they do not meet NMFS's multiple criteria for a species to survive and recover. Instead, these agencies have concluded that the species is currently at a moderate to high risk of extinction. These agencies have pointed out that this is due to a precipitous decline in population abundance from historical levels, the entire loss of the species from several of the streams it formerly inhabited and the concentration of the remaining populations into fewer streams, poor reproductive success, poor genetic diversity among remaining populations, and the existence of catastrophic threats that could rapidly eliminate populations. The cause of the species' decline is the widespread loss and degradation of its habitat, particularly the species' freshwater habitat in rivers and streams. See 62 Fed. Reg. 24588 (1997); NMFS website at: http://swr.nmfs.noaa.gov/recovery/Coho_SONCCC.htm#_Toc103497318. NMFS reaffirmed this ESA listing on June 28, 2005. *Id.*

III. VIOLATIONS OF THE FEDERAL ENDANGERED SPECIES ACT

Agencies must consult with NMFS pursuant to Section 7 of the ESA for any discretionary agency action that 'may affect' a listed species or its designated critical habitat. See *Karuk Tribe of California v. United States Forest Service*, 681 F. 3d 1006, 1027 (9th Cir. 2012). The Ninth Circuit found that "may affect is a 'relatively low threshold' for triggering consultation." *Id.*

An agency must reinitiate consultation under ESA section 7 when the "...the amount or extent of taking specified is exceeded, new information reveals effects that may affect listed species or critical habitat in a manner not considered..." See *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F. 3d 1220 (9th Cir. 2008)(citing 50 C.F.R. § 402.16).

The current KIP plan and the conditions of the NMFS BiOp are supposed to address the impacts of KIP operations to coho populations. KIP operations affect the total volume of flow in the Klamath River, affect water quality of the Klamath River, and impair the natural hydrograph and thereby the geomorphological features of the Klamath River within designated SONCC coho habitat.

A consequence of the impaired natural flow caused by operation of the KIP, is an elevated rate of infection of SONCC coho by the disease causing parasite *Ceratonova shasta* (*C. shasta*, previously referred to as *Ceratomyxa shasta*). Research suggests that disease occurs as a function of the following parameters: low velocity stable flows (which lead to higher density of the intermediate host for the disease parasite, called polychaetes), high numbers of spawning salmon, and water temperatures. Operation of the KIP plays a critical role in each of these parameters. The disease infects juvenile fish and can lead directly to mortality or decreased survival rates.

This is why, in its own BiOp regarding KIP operations, NMFS attempted to mandate a flow pattern regime that would increase flow variability and provide flow adequate for coho survival migration as adults and emigration as juveniles. Because of the issue regarding SONCC coho infection by *C. nova*, NMFS' Incidental Take Statement established an infection threshold of 49% of sampled juvenile Chinook. Because coho are in such decline, not enough individuals can be captured to directly determine coho infection rates and thus Chinook serve as a surrogate to determine rate of coho infection.

According to NMFS' own BiOp, *"If the percent of C. Shasta infections for Chinook salmon juveniles in the mainstem Klamath River between Shasta River and Trinity River during May to July exceed these levels (i.e., 54 percent infection via histology or 49 percent infection via QPCR), reinitiation of formal consultation will be necessary."* See page 391, <http://www.fws.gov/klamathfallsfwo/news/2013%20BO/2013-Final-Klamath-Project-BO.pdf>.

Observed infection rates of Chinook salmon between Shasta River confluence and Trinity River confluence in 2014 and 2015 were 81% and 91% respectively – dramatically exceeding the threshold established in the biological opinion (True, Kimberly, A. Voss, and S. Foott, 2016, Myxosporean Parasite Prevalence of Infection in Klamath River Basin Juvenile Chinook Salmon, April-July 2015.)

BOR sent NMFS a letter dated July 17, 2015 inquiring as to how NMFS would address the high infection rates. NMFS responded with a letter dated March 29, 2016 stating, *"In response to your letter, we determined that Chinook salmon Ceratanova shasta (C shasta) infection rates used in the Incidental Take Statement (ITS) of the 2013 BiOp as a surrogate for the extent of incidental take of listed Southern Oregon Northern California Coast Evolutionarily Significant Unit coho salmon from increased disease risk, were exceeded in 2014 and 2015. We conclude that the effects analysis and conclusions in the 2013 BiOp remain valid. However, based on new information described below, we intend to revise the ITS prior to the 2017 operational water year, commencing April, 1,2017."*

We emphasize that the BiOp called for re-initiation of consultation if the the infection rates were exceeded, not a simple revision of the take statement.

Despite the very clear commitment in the BiOp to reinitiate consultation as a consequence of exceeding the specified infection rates, NMFS appears to justify its decision to not do so by stating in this same letter, *"Although the extent of dry hydrologic and associated environmental conditions in the Klamath River in 2014 and 2015 are rare, the analysis in the 2013 BiOp fully considered the expectation that disease infection rates would generally be higher in dry years, and NMFS expected that environmental conditions during consecutive dry years would be particularly poor and associated disease risks would be higher. Therefore, the effects analysis and conclusions of the 2013 BiOp remain valid."*

We contend that this contorted argument results in the clear violation of its own Biological Opinion as well as Section 7 of the ESA and 50 C.F.R. § 402.16 (a).

We urge NMFS and the BOR to instead reinitiate consultation, consider recent data indicating the need for high water events in the winter and spring in order to scour the river channel, and provide increased flows to prevent the high rates of infection observed in recent years.

The Karuk Tribe is interested in discussing effective remedies for the violations noted in this letter. If you wish to pursue such discussions in the absence of further litigation, we suggest that you initiate those discussions within the next 20 days so that they may be completed before the end of the 60-day notice period.

Yootva,

A handwritten signature in black ink, appearing to read "Russell A. Attebery". The signature is written in a cursive style with a large, stylized initial 'R'.

Russell "Buster" Attebery
Chairman