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February 22, 2002

***Certified Mail: Return Receipt Requested***

Gale A. Norton  
Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240

John W. Keys, Commissioner  
Bureau of Reclamation  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240

David Sabo, Area Manager  
Bureau of Reclamation  
U.S. Department of the Interior  
Klamath Basin Area Office  
660 Washburn Way  
Klamath Falls, OR 97603

Steven A. Williams, Director  
Fish and Wildlife Service  
U.S. Department of Interior  
1849 C Street, N.W.  
Washington, DC 20240

Donald L. Evans  
Secretary of Commerce  
U.S. Department of Commerce  
Herbert C. Hoover Bldg., Room 5610  
15<sup>th</sup> St. and Constitution Ave., N.W.  
Washington, DC 20230

William T. Hogarth  
Acting Director  
National Marine Fisheries Service  
Silver Spring Metro Center 3  
1315 East-West Highway  
Silver Spring, MD 20910

Rod McInnis  
Acting Regional Administrator  
National Marine Fisheries Service  
Southwest Region  
501 W. Ocean Blvd., Suite 4200  
Long Beach, CA 90802-4213

Re: Supplemental Notice of Violation of the Endangered Species Act:  
Proposed Klamath Reclamation Project Operations for 2002 Will Jeopardize  
Threatened Coho Salmon and Endangered Lost River and Short-nosed Suckers,  
Adversely Modify the Designated Critical Habitat of the Coho, and Take These  
Species in Violation of Sections 7 and 9 of the Act.

Dear Sir or Madam:

On January 23, 2002, we sent to you a notice that the Bureau of Reclamation (“BOR” or “Bureau”) would be in violation of the Endangered Species Act (“ESA”) if it did not complete consultation on its operation of the Klamath Project for 2002 before the existing

biological opinions for 2001 Project operations expire. A copy of that letter is attached to this letter as Exhibit A and is incorporated herein by this reference, but is not otherwise modified or amended in any way except as specifically set forth below with respect to the addition of certain parties to that letter.

This letter identifies two separate and additional violations of the ESA that will occur if the BOR, with our without completed consultations and the requisite biological opinions, proceeds with Klamath Project operations in 2002 as outlined in its draft Biological Assessment of January 24, 2002 (the "2002 Draft BA"). This letter also specifically supplements our earlier letter by adding the Defenders of Wildlife to it.

This letter is sent on behalf of the Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Oregon Natural Resources Council (Fund), Klamath Forest Alliance, Northcoast Environmental Center, WaterWatch Oregon, and the Defenders of Wildlife (hereinafter referred to collectively as "PCFFA").

Each of these organizations asks that you take immediate action to remedy the additional imminent violations of the ESA by the Bureau described below as well as the violations described in the prior letter. We sincerely hope that the necessary steps to fully comply with the law will be taken in a timely manner. Nonetheless, in the event that the agencies follow their current course as well as past practice and either do not act, or act in violation of the law, this letter and the prior letter constitute the notice required by Section 11(g) of the ESA, 16 U.S.C. § 1540(g), prior to commencement of legal action.

### **Background**

The background of this controversy is set forth in our prior letter at pages 2-3. On January 24, 2002, the BOR released a draft Biological Assessment setting forth its plans for operating the Klamath Project in 2002 and beyond (the "2002 Draft BA").

### **Additional ESA Violations**

We are sending this letter at this time because it appears from the 2002 Draft BA that the actions the Bureau is proposing for Klamath Project operations in 2002 will jeopardize ESA-listed coho salmon and Lost River and short-nosed suckers, adversely modify the designated critical habitat of the coho, and take each of these species in violation of ESA sections 7, 9, and 4(d) 16 U.S.C. §§ 1536, 1538, and 1533(d), for at least the following reasons.

#### **A. Violations of ESA Section 7.**

The BOR will violate ESA § 7 if it proceeds with operation of the Klamath Project as outlined in the 2002 Draft BA, or with any similar operations, because such actions will

jeopardize threatened coho salmon and destroy their designated critical habitat in the Klamath River and will jeopardize endangered Lost River and short-nosed suckers affected by Klamath Project operations.

The 2002 Draft BA falls far short of meeting the Bureau's legal obligations and lacks any adequate basis in science for its provisions for record low lake levels and near record low summer flows in the Klamath River. The 2002 Draft BA proposes to operate the Klamath Project "consistent with the historic operation of the Project from 1961 to 1997," 2002 Draft BA at 10, essentially without regard to any impacts these proposed operations may have on coho, their critical habitat, and the two endangered suckers. The 2002 Draft BA appears to have been crafted without incorporating or taking into account much of the scientific information compiled in the 2001 biological opinions of the United States Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"), the many additional studies performed by the fisheries experts of the Tribes of the Klamath Basin and the Bureau of Indian Affairs, or the findings of several important reviews conducted since the issuance of the 2001 biological opinions, in particular the Hardy Phase II Flow Study. Similarly, although the 2002 Draft BA purports to summarize the legal authorities relevant to the proposed action, the assessment ignores cases from the past three years that directly address BOR's obligation to operate the Klamath Project in compliance with the ESA. The result is a proposed action that, if implemented in its current or similar form, will jeopardize the continued existence of ESA listed species, an outcome flatly prohibited by section 7 of the ESA.

**Failure to Acknowledge Legal Duties.** The Bureau's own attorneys and others in the Department of Interior have long recognized that BOR must comply with the ESA in operating the Klamath Project. See Memoranda from David Nawi, Regional Solicitor, of January 9, 1997, and July 25, 1995. The courts have also clearly stated that the Bureau's ESA obligations take legal priority, if necessary, over operating the Klamath Project for irrigation. *Kandra v. United States*, 145 F. Supp.2d 1192, 1207 (D. Or. 2001); see also *Klamath Water Users Association v. Patterson*, 204 F.3d 1206, 1213 (9<sup>th</sup> Cir. 2000).

Reclamation, like all federal agencies, is required to ensure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2). This language "affirmatively command[s] all federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species... This language admits of no exception." *TVA v. Hill*, 437 U.S. 153, 173 (1973) (citations omitted). The Supreme Court has stated, "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.... In addition, the legislative history undergirding section 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation

reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” *Id.* at 183-84.

While the 2002 Draft BA in places appears to acknowledge BOR’s section 7 obligations at some vague and general level, the proposed action is designed as if ESA obligations do not apply to Klamath Project operations, and the description of the legal authorities relevant to the proposed action does not even mention the numerous cases defining the Bureau’s obligation at the Klamath Project. Although the 2002 Draft BA does not explicitly state that project operations may not be altered to comply with the ESA, this appears to be the theory underlying the proposed action. This theory is directly contradicted by every decision issued by every federal court at any level addressing Klamath Project operations and the ESA. The 2002 Draft BA does not cite a single one of these cases. The theory is also contradicted by generally applicable Ninth Circuit case law addressing ESA compliance on federal water projects, which the 2002 Draft BA also fails to cite. The theory is not even supported by the cases that are cited in the BA, some of which do not deal with endangered species compliance at all and others of which do not address agency obligations under section 7(a)(2) as they relate to federal water contracts. Finally, the Bureau’s apparent theory is directly contradicted by applicable opinions of Interior’s Office of the Solicitor, which explicitly provide that ESA compliance and tribal trust obligations supersede Reclamation’s contractual obligation to provide Klamath Project water for irrigation. Any Klamath Project operations in 2002 that fail to acknowledge and comply with the Bureau’s legal responsibilities under the ESA and consequently fail to avoid jeopardy to listed species and adverse modification of critical habitat will violate ESA section 7(a)(2).

**Failure To Set Lake Levels Adequate To Ensure Survival:** The 2002 Draft BA would allow the level of Upper Klamath Lake (“UKL”) to drop to elevation 4137.0 in some years and does not appear to preclude lake levels this low even in 2002. In only two years (1926 and 1994) has a lake level this low ever been allowed, and there is considerable evidence that the very low lake levels allowed in 1994 contributed substantially to species loss and eutrophication during that year. There is simply no scientific justification for allowing lake levels that jeopardize listed species and, in fact, the Bureau acknowledges that at levels below 4137.5 essentially zero edge spawning habitat would remain for suckers, with spawning habitat falling below 15% at levels around 4139.2 feet. 2002 Draft BA, Table 5.2 at 52). Spawning recruitment is a key limiting factor in the recovery of these species. Any Project operations that fail to provide lake levels adequate to meet the needs of listed species at each life stage violate section 7 of the ESA.

**Failure To Ensure Adequate In-River Flows:** BOR’s annual Klamath Project operation plans since 1995 have set flow levels for the Klamath River below Iron Gate Dam (“IGD”) to protect salmon and other fish in the river. Irrigators have opposed downstream flow releases, arguing that the ESA does not require the Klamath Project to release “stored” water to “augment” downstream flows. The federal government has never before accepted this argument, and the court squarely rejected it in *Kandra v. United States*, 145 F. Supp.2d at 1207.

Nonetheless, the Bureau's proposed water regime for downriver flows, as summarized in Table 1 below, provides flows even in a wet year (such as 2002 is likely to be) lower than those required in a critically dry year of record drought (such as 2001). In short, the proposed flows below Iron Gate Dam (IGD) in the 2002 Draft BA would plunge the lower river into a permanent state of drought. Additionally, Table 1 compares the downriver flows of the 2002 Draft BA to the Hardy Phase II flow recommendations necessary for coho survival and recovery. As is immediately apparent from this Table, the 2002 Draft BA proposes flows for 2002, even though it is projected to be an above average water year, that would be substantially less than the Hardy Phase II recommended flows for June 1 through the end of September in such a year. These proposed IGD flows also appear, at least for part of the water year, to be less than the minimum FERC required flows for the operations of the PacifiCorps' Klamath Power Project under FERC License No. 2082. In sum, the proposed downriver flows in the 2002 Draft BA below IGD appear to be less than the minimums required by FERC, less than the minimum necessary to prevent extinction of coho in the river system as a whole, and far less than the flows recommended by the best available science, i.e., the Hardy Phase II Flow Study.

**TABLE 1: THE 2002 COHO FLOW REGIMES FOR KLAMATH PROJECT OPERATIONS IN THE BUREAU OF RECLAMATION'S 2002 DRAFT BIOLOGICAL ASSESSMENT**

**TABLE 1: Comparison of Phase II Hardy Study Flows to Draft 2002 Bureau of Reclamation Proposed Flows at Iron Gate Dam (IGD) (in cfs)**

Time Step	Phase II Flows <sup>1</sup> 50% Level	BuRec Proposed <sup>2</sup> (Above Av.)	BuRec Proposed (Below Av.)	BuRec Proposed ( Dry Yr)	BuRec Proposed (Critically Dry Yr)	2001 Biop Min. Flows <sup>3</sup>
Oct	1470	2635	1600	1084	811	
Nov	1710	2500	2238	1393	1136	
Dec	2030	2655	2986	2188	1393	
Jan	2400	3145	3036	2318	1393	
Feb	2720	4061	2389	1970	1197	
Mar 1-15	3400	4885	2769	2368	1000	
Mar 16-31	3400	5074	2777	2376	1000	
Apr 1-15	3300	4326	2063	1725	1000	1700
Apr 16-30	3300	4399	2400	1535	1000	1700
May 1-15	3100	3251	2007	1175	898	1700
May 16-31	3100	3194	1892	1100	898	1700
June 1-15	2300	1723	1236	908	492	2100
June 16-30	2300	1232	943	888	492	1700
July 1-15	1530	874	757	481	514	1000
July 16-31	1530	874	757	481	514	1000
Aug	1250	903	840	614	438	1000
Sep	1350	1014	1000	892	651	1000

Source: Bureau of Reclamation Draft 2002 Biological Assessment, pages 45 and pages 66-67.

<sup>1</sup> Phase II or 'Hardy Study' flows are those minimal flows recommended for coho salmon recovery by the scientific team doing the current multi-agency flow study of the Klamath Basin system, which represents the best available science to date on in-stream flow salmonid requirements. We used the 50% Exceedance Level for these numbers as the mid-range for an average water year for purposes of comparison. The Bureau claims that these studies do not apply to them and therefore have not factored these flow levels into their Biological Assessment.

<sup>2</sup> These are flow averages. Flow minimums, under the Bureau's current plan outlined in the Biological Assessment, can be considerably less, down to as little as 400 cfs for a 'dry' or 'critically dry' year. In fact, language elsewhere in the BA, including the repudiation of any obligation to provide water for fish and wildlife needs at all, imply that these 'minimum' may also not be binding if the Bureau interprets its obligations to provide water for Project contractors as prior in right.

<sup>3</sup> Considered by NMFS in the 2001 Biological Opinion as the minimum flows necessary to prevent extinction during the midst of the record drought of 2001.

**Failure To Use The Best Available Science:** The 2001 Klamath Project Biological Opinion for coho salmon contained considerable scientific support and justification for maintaining specific water levels in the Klamath River below Iron Gate Dam. The scientific basis for maintaining downriver flows as specified in the 2001 BiOp was deemed adequate by one recent peer review team, *see* University of California Peer Review of 2001 Klamath Biological Opinions, but deemed inconclusive by the recent preliminary report by a National Research Council team, *see* Interim Report from the Committee on Endangered and Threatened Fishes in the Klamath River Basin, “Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin” (February 2002)(the “NRC Report”).

Nevertheless, the NRC Report does not endorse the Bureau’s proposed operations for 2002 as set forth in the 2002 Draft BA. Indeed, the NRC Report also considered the Bureau’s own 2001 Biological Assessment and proposed water plan (which is similar to and in several ways more generous with water levels in UKL and the river than the 2002 Draft BA), and pointedly noted the following:

reduction in main-stem flows, as might occur if the USBR proposal were implemented, cannot be justified. Reduction of flows in the main stem would lead to habitat conditions that are not documented, and thus present an unknown risk to the population.

NRC Report at 3. The NRC Report also states:

The committee concludes that the USBR proposals also are unjustified, however, because they would leave open the possibility that water levels in Upper Klamath Lake and minimum flows in the Klamath River main stem could be lower than those occurring over the past 10 years for specific kinds of climatic conditions.

Id. at 3-4. The NRC Report continues:

while the observational record contradicts important underlying assumptions of the [2001] RPA, it does not provide an endorsement for the lake levels proposed in the USBR biological assessment, which if implemented could take interannual mean lake levels well below those of recent historical observation.

Id. at 16.

Given the NRC Report’s condemnation of last year’s Bureau proposals to reduce both lake levels and in-river flows, and the fact that in many years the 2002 Draft BA would provide even lower lake levels and river flows than those proposed by the BOR in 2001 (and for a period of ten years instead of just one), the Bureau has failed to offer any scientific justification for its proposed actions.

B. Violation of ESA §§ 4(d) and 9

In addition to the above violations of ESA § 7, the actions the BOR proposes in the 2002 Draft BA, if implemented as proposed or in any similar fashion, would take listed species in violation of ESA section 9. This section prohibits all activities that cause a “take” of an endangered species. 16 U.S.C. 1538(a)(1)(B); (C); 50 C.F.R. §17.11(h). Congress intended the term “take” to be defined in the “broadest possible manner to include every conceivable way” in which a person could harm or kill fish or wildlife. See S. Rep. No. 307, 93rd Cong., 1st Sess. 1, reprinted in 1973 U.S. Code Cong. & Admin. News 2989, 2995. “Take” is defined by the ESA to encompass killing, injuring, harming, or harassing a listed species. 16 U.S.C. § 1532(19). NMFS and FWS have further defined “harm” within this statutory definition as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 222.102. The U.S. Supreme Court has upheld the validity of this definition. See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 701 (1995) (upholding similar definition used by Fish and Wildlife Service).

“Take” is also defined to include harassment of listed species. Fish and Wildlife Service regulations define “harass” as

an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

50 C.F.R. § 17.3. NMFS has not promulgated regulations defining “harass.” A congressional report explicitly states that the word “harass” encompasses unintentional acts. Moreover, the report clarifies that the inclusion of the word “harass” in the take definition allows the agencies “to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it more difficult for them to hatch and raise their young.” H.R. Rep. No. 412, 93d Cong., 1st Sess. at 11 (1973).


The statutory take prohibition in ESA § 9 applies only to endangered, not to threatened, species. However, under Section 4(d), the take prohibition may be extended to threatened species by regulation. For threatened coho salmon, NMFS has adopted a regulation making the take prohibition applicable. 65 Fed. Reg. 42,422 (July 10, 2000). Accordingly, if the BOR proceeds with the actions described in the 2002 Draft BA, or any similar actions, it will be in violation of ESA §§ 4(d) and 9 by proceeding with actions that may result in a take of listed coho salmon and Lost River and short-nosed suckers.

**Conclusion**

If BOR commences Klamath Project operations for 2002 on April 1, 2002, without completing consultation with NMFS and FWS on the effects of these operations on ESA-listed species affected by the Project, as we have previously informed you, BOR will be in violation of Sections 7(a)(2) and 7(d) of the ESA. In addition, if BOR commences 2002 Klamath Project operations pursuant to the 2002 Draft BA, or any similar proposed action, with or without completing consultation, its actions will jeopardize listed species as described above in violation of ESA section 7 and will also take these species in violation of ESA sections 9 and 4(d).

Unless these violations are avoided within 60 days hereof, we will be left with no alternative but to once again take appropriate legal action to protect the listed species. There is still ample time to remedy these imminent violations of the law. The requirements of the ESA, however, leave us no alternative but to send this letter. It would be in the best interest of all of the parties concerned about the health of the environment, the economy, and the management of water resources in the Klamath basin for the Bureau to comply fully with the ESA and other applicable laws in its 2002 Project operations.

If you believe any of the foregoing is in error, have any questions, or would like to discuss this matter, please do not hesitate to call me at (206) 343-7340.

Sincerely,  
  
Todd D. True