



P.O. Box 529 • Klamath, CA 95548  
Tel (707) 482-2431 • Fax (707) 482-3425

August 10, 2011

Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814



Re: Proposed Resolution Under Item 10 of the SWRCB 8/16/11 Agenda Regarding the Section 401 Water Quality Certification Application for the Klamath Hydroelectric Project

Dear Ms. Townsend:

These comments are offered by the Resighini Rancheria regarding the Resolution being considered by the State Water Resources Control Board (SWRCB) on the Klamath Hydroelectric Project (KHP) 401 Certification process. We are a federally recognized Tribe with a Reservation located at the top of the Klamath River estuary approximately three miles upstream of the Pacific Ocean. Our previous letter to the Board on May 17, 2011 (Resighini Rancheria 2011a) provided details of why we believe that you need to reinitiate the 401 Certification process. These comments are directed towards the Resolution being considered and the background information provided by your staff. We strongly disagree with staff recommendations and offer our thoughts on alternatives below along with the basis of support for our arguments. We live on the Klamath River and our lives and culture depend on its health. The SWRCB's job is to protect water quality, including the salmon on which we rely. We feel that adopting the Resolution before you is an abdication of your responsibility that poses great risk.

Quotes from the background information and Resolution related to Item 10 on your August 16, 2011 agenda below (bullets with print in italics) are followed by our comments. Where there are several statements within Item 10 related to the same point they are grouped for discussion instead of addressing them sequentially based on their occurrence in the text to avoid redundancy.

- *PacifiCorp and most interested state, tribal and local government agencies, non-governmental organizations, and other stakeholders negotiated an agreement concerning the relicensing of the facilities and other water-related issues in the Klamath River Basin.*





The Klamath Basin Restoration Agreement (KBRA) and the Klamath Hydropower Settlement Agreement (KHSA) were crafted in private in meetings that were not open to all legitimate stakeholders. The Resighini Rancheria and Quartz Valley Indian Reservation are both federally recognized Tribes that were excluded from participation in the KBRA and KHSA negotiations. Del Norte County was also excluded. **This process is of questionable legality and leads to considerable social injustice inconsistent with the State of California's environmental justice policy (Cal EPA 2004).**

California Government Code (65040.12) defines environmental justice (EJ) as “the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws and policies.” Non-party Tribes to the KHSA/KBRA lose influence over water quality and flow decisions within the Klamath River basin that effect their lives and future while the influence of large corporations and organized agricultural business interests is enhanced at our expense. **Our river is poisoned by toxic algae annually and juvenile and adult salmon are dying in alarming numbers and these conditions will be allowed by the SWRCB until at least 2020 under the Resolution you are considering.**

The conservation groups Oregon Water Watch and Oregon Wild were expelled from the Settlement talks because they insisted that changes in land management necessary to restore ecosystem function be considered. By taking the discussion of diminishment or cessation of farming within the Tule Lake National Wildlife Refuge (TLNWR) and Lower Klamath National Wildlife Refuge (LKNWR) off the table, the KBRA essentially blocks the Klamath River and Lower Lost River TMDL implementation.

- *The KHSA includes, among other things, a need for congressional legislation to halt the FERC relicensing process and to implement other aspects of the KHSA.*
- *The occurrence was changed to require enactment of federal legislation by May 17, 2011, rather than the introduction of federal legislation by June 18, 2010 (as originally adopted in Resolution 2010-0024). Federal legislation regarding the KHSA was not enacted in May 2011 and will likely not be enacted before the 90-day period passes (August 15, 2011).*
- *Per the KHSA, enactment of federal legislation is a pre-condition to the Secretarial Determination.*

The KBRA in Section 8.11.1A (Potential Termination Events) states “This Settlement shall be terminable if..... Authorizing Legislation is not Timely enacted.” When the SWRCB first held the 401 process in abeyance, it set a deadline of June 18, 2010 (Resolution 2010-0024) for legislation then revised the deadline to May 17, 2011 (Resolution No. 2010–0049). On the face of the evidence, timely authorizing of federal legislation has not been enacted and there is no prospect thereof. The Chair of the Power and Water Committee, Congressman McClintock (R), has said that he will block funding for KHSA and KBRA implementation (Siskiyou Daily News 3/3/11). No legislation has been introduced in the House and there is no identifiable bill in any advanced stage of development. Furthermore, Congressman Wally Herger (R) who represents Siskiyou County is also opposed to the KHSA (Redding Searchlight 2/26/11), which makes any





authorizing legislation and federal funding unlikely. Freshman Senator Merkley of Oregon is currently considering sponsorship of a bill in the Senate, but there are no declared co-sponsors.

The KBRA also envisioned the State of California providing \$250 million through a 2010 bond measure to help cover decommissioning costs. The bond measure was withdrawn because of a likely lack of voter support. There are no known plans to make up this short fall in funding and no State legislation under consideration. Therefore, the lack of California's willingness or ability to come up with these funds doom the program even though this is not a stated cause for termination. **Since there is no prospect of funding of the KHSA and KBRA at both the State and federal levels, the Resolution before you today simply stalls needed action to abate water pollution and instead you should re-start the 401 Certification process.**

- *On June 21, 2011, PacifiCorp requested that the State Water Board further modify Resolution No. 2010-0024 to remove the condition that federal legislation be enacted by a date certain. Removal of the requirement for enactment of federal legislation means the next milestone that would lift the abeyance is April 30, 2012. This is the deadline for a Secretarial Determination.*

Given the rancor in the U.S. Congress as evidenced by the recent budget impasse, there is a significant chance that there will be no legislation even if the Secretary of Interior does make an affirmative determination in favor of dam removal. Federal agencies are not parties to the KBRA or KHSA and can only become full cooperators with authorization from Congress. Thus, the Secretary's Decision may be rendered moot because government agencies will not be able to participate in implementation. **Consequently, it makes little sense for the SWRCB to leave out the requirement for federal legislation in the Resolution being considered under Item 10.**

- *The Hoopa Valley Tribe and some environmental groups, who are not parties to the KHSA, recently submitted letters to the State Water Board.*

We are displeased that SWRCB staff did not make note of the comments of the Resighini Rancheria (2011) sent to the Board on May 17, 2011. This makes us wonder about the diligence and thoroughness of staff in researching background material in preparation of the draft Resolution before you. It also makes us wonder whether there are pre-determined, fixed outcomes in lieu of real deliberations today.

- *If implementation of the KHSA is delayed, the State Water Board may consider whether additional mitigation measures identified during the FERC relicensing process should be required. These would likely address concerns related to the KHP's impacts on water quality, apart from the interim measures included in the KHSA.*



- 
- *PacifiCorp has begun to implement and provide funding for interim measures called for in the KHSA that focus on water quality and habitat improvement.*

As we pointed out in our May 17, 2011 letter (Resighini Rancheria 2011), SWRCB (2006, 2008) correspondence with PacifiCorp make it clear that water quality problems created by KHP reservoirs cannot be mitigated or abated short of dam removal.

1. Thermal problems that make water temperatures too warm for fall Chinook salmon spawning and too cold for juvenile rearing cannot be solved because water quality at depth is too poor in Iron Gate Reservoir to allow for withdrawal of water of varying temperatures from below the surface.
2. Toxic algae and nitrogen fixing algae blooms cannot be abated without reservoir removal and SWRCB staff is recommending against actions such as trying to kill algae with chemicals.
3. Depressed dissolved oxygen (D.O.) below Iron Gate Dam creates adverse conditions for salmonids downstream, which is another irremediable problem and also one that SWRCB staff feels cannot be resolved by mechanical oxygenation of Iron Gate Reservoir.

**Therefore, there is no action the SWRCB can take other than to force dam removal that will resolve KHP reservoir related water quality problems.**

- *Additionally, a condition is added allowing the Executive Director or Chief Deputy Director to lift the abeyance if the Executive Director or Chief Deputy Director determines the environmental documentation being prepared to support the Secretarial Determination is not adequate for the State Water Board to use for issuance of water quality certification, should that become necessary.*

This statement is somewhat incoherent. As noted above, without federal authorizing legislation the Secretary's Decision will be moot. The SWRCB 401 Certification responsibility is under the Federal Energy Regulatory Commission (FERC) process and can only be exercised in that context. The authority over the 401 Certification process is too important to be delegated to staff and deliberations on this question should continue to be deliberated by the Board itself. **FERC (2007) has issued its final Environmental Impact Statement (EIS) and is prepared to move forward in its relicensing decision and the SWRCB needs to re-start that the 401 Certification as part of that process.**

As noted previously (Resighini Rancheria 2011), FERC maintains its authority to rule on the license of the KHP because there has been no KHSA/KBRA authorizing legislation:



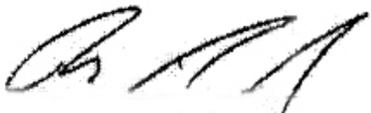
“Federal legislation would also be required to stay the relicensing proceeding before the Federal Energy Regulatory Commission, which forms the impetus for the State Water Board’s action under Clean Water Act section 401” (SWRCB Resolution 2010-0024).

**It follows that California needs to complete the 401 Certification process or risk being ruled out of compliance by FERC and the final KHP license decision made without SWRCB input.**

We hope that you will not follow your staff’s recommendations with regard to the KHP 401 Certification and will instead re-start the process as required by law. If you do pass the Resolution recommended in Item 10 today, we ask that you maintain a date certain for authorizing legislation for reasons stated above.

After you make this decision, you will all go home to the suburbs, a rural home or a nice urban neighborhood and you will be far removed from the effects of your decision. We will return to our home of the last 10,000 years on the Klamath River where we will face the consequences of your action first hand. Delaying dam removal means we will be exposed to toxic algae annually and will suffer deprivation in the form of reduced salmon harvest until at least 2020. The adult fish kill of up to 70,000 adult salmon in September 2002 was without precedent. Annual juvenile fish death in the hundreds of thousands brought on by water pollution is an equal impact on depressing salmon populations. These are signs that the Klamath River is dying. We fear that 2020 may be too late for the salmon. **Please act now.**

Sincerely,



Rick Dowd  
Resighini Rancheria Tribal Council Chairman





**References**

California Environmental Protection Agency (Cal EPA). 2004. Intra-Agency Environmental Justice Strategy. State of California, California Environmental Protection Agency. August 2004. <http://www.calepa.ca.gov/EnvJustice/Documents/2004/Strategy/Final.pdf>

Federal Energy Regulatory Commission (FERC). 2007. Final Environmental Impact statement for the Klamath Hydroelectric Project, Docket No. P-2082-027. 11/18/07. U.S. DOE, FERC, Washington D.C.

PacifiCorp Energy. 2006. Request to the State Water Resources Control Board (SWRCB) to Certify the California Portions of the Klamath Hydroelectric Project Pursuant to Section 401 of the Federal Clean Water Act. Letter of March 29, 2006. PacifiCorp, Portland, OR.

Redding Searchlight. 2011. Lawmakers push to keep four hydro dams running, cite need for electricity. 2/26/2011. By Dillon Darling. Redding, CA. <http://www.redding.com/news/2011/feb/26/push-onto-keep-4-dams-running/>

Siskiyou Daily News. 2011. Congressman McClintock speaks on Klamath, delta issues to House. March 3, 2011. Siskiyou Daily News, Yreka, CA.

State Water Resources Control Board. 2006. Response to PacifiCorp’s Request for Consideration of 401 Certification for the Klamath Hydroelectric Project (P-2082). SWRCB, Sacramento, CA.

State Water Resources Control Board. 2008. Response to PacifiCorp’s Letter Regarding State Water Resources Control Board on the 2008 Water Quality Study Plan and Information Request for the Klamath Hydroelectric Project (P-2082). To Cory Scott of PacifiCorp from Jennifer Watts SWRCB Environmental Scientist. SWRCB, Sacramento, CA. 5 p.





P.O. Box 529 • Klamath, CA 95548  
Tel (707) 482-2431 • Fax (707) 482-3425

May 17, 2011

Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814

Re: Resighini Rancheria Request for Reinitiation of 401 Certification Process Related to the Application for the Relicensing of the Klamath Hydroelectric Project (P-2082)

Dear Ms. Townsend:

This request is from the Resighini Rancheria, a federally recognized Tribe with a Reservation located at the top of the Klamath River estuary approximately three miles upstream of the Pacific Ocean. We rely on the river for sustenance, and have since time immemorial, and are concerned that continued operation of the Klamath Hydroelectric Project (KHP) dams threatens survival of salmon runs. We request that the State Water Resources Control Board (SWRCB) reactivate their 401 certification (33 USC § 1341, California Water Code § 13160, and 23 C.C.R. Chpt. 28) process immediately as part of Federal Energy Regulatory Commission (FERC #P-2082) KHP relicensing. Your Resolution 2010-0049 (SWRCB 2010) set a May 17, 2011 deadline for federal legislation that authorized the Klamath Basin Restoration Agreement (KBRA) and Klamath Hydropower Settlement Agreement (KHSA), but that deadline has now passed and there is no legislation or prospect thereof in the foreseeable future.

PacifiCorp Vice President Dean S. Brockbank (2011) explained why PacifiCorp has entered into the KHSA as opposed to continuing with the FERC licensing process:

“Customers are protected from the risks and liabilities that exist absent an agreement among the parties. These risks include: (1) potentially higher costs under final terms and conditions for relicensing; (2) difficulties in securing state and federal approvals for relicensing; (3) continued litigation related to endangered species act requirements and water quality issues; and (4) early shut-down and removal of the project. In the end, the terms of the KHSA allow the Company to respond to the policy preferences of the federal government favoring removal of the Project, while protecting all of PacifiCorp’s customers for the long term with respect to economic impact and risks.”





Under the KHSA, PacifiCorp limits its monetary liability and is allowed to operate the KHP under their old 1954 license on a year-to-year basis until 2020 (Brockbank 2011). Meanwhile the problems with loss of beneficial uses continue each year as nutrient pollution and algal toxins pour from the KHP into the Lower Klamath River at Iron Gate Dam. Given the lack of prospects for enabling legislation for the KHSA and KBRA, the SWRCB must recognize that PacifiCorp is stalling the relicensing process and not acting in good faith. Therefore, reinitiation of the 401 certification is in order.

FERC (2007) filed its final Environmental Impact Statement (EIS) on the KHP and has completed all steps in the licensing process necessary for a decision. Resolution 2010-0049 (SWRCB 2010) points out that FERC maintains its authority to rule on the license of the KHP because there has been no KHSA/KBRA authorizing legislation:

“Federal legislation would also be required to stay the relicensing proceeding before the Federal Energy Regulatory Commission, which forms the impetus for the State Water Board’s action under Clean Water Act section 401.”

It follows that California needs to complete the 401 certification process or risk being ruled out of compliance by FERC and the final KHP license decision made without SWRCB input.

PacifiCorp (2006) filed its formal request for 401 certification with the State of California on March 29, 2006 and the letter in reply from the SWRCB (2006) lack of measures offered to improve water quality and meet beneficial uses. Problems continue today and will through at least 2020, if the FERC process is not reactivated. The SWRCB (2006) letter recognized the problems the KHP causes for Indian Tribes of the Lower Klamath and requested more information about them from PacifiCorp:

“PacifiCorp does not provide information in the application on whether the Native American culture beneficial use is fully protected. PacifiCorp must provide information on Project impacts to uses of water that support the cultural and/or traditional rights of indigenous people such as subsistence fishing and shellfish gathering, basket weaving and jewelry material collection, navigation to traditional ceremonial locations, and ceremonial uses.”

In fact Tribes, including the Resighini Rancheria are suffering tremendously due to KHP operation. The toxic algae species Microcystis aeruginosa is now a pervasive problem in Copco and Iron Gate reservoirs (Kann and Corum 2007) and the Lower Klamath River (Kann et al. 2010) where it makes surface water contact unsafe between July and September. Removal of these two reservoirs will largely eliminate toxic algae (Dunne et al. 2011) and there is likely no other remedy. It is unacceptable to the Resighini Rancheria that the SWRCB would allow continuing pollution that prevents ceremonial and recreational uses through 2020.





Microcystin toxin has now been discovered in the livers of juvenile salmon and steelhead and in freshwater mussels in the Lower Klamath River, as well as warmwater species such as yellow perch within KHP reservoirs (Kann 2008). Kann (2008) noted that bioaccumulation in yellow perch and mussels were high enough for the SWRCB to consider issuing a public health warning. The SWRCB (2008) has also asked PacifiCorp to explore the possible effects of Microcystin toxin on Pacific salmon species in the Lower Klamath River for the potential to couple with other environmental stressors (i.e. ammonia, high pH) in compromising their immunity and contributing to disease outbreaks.

Of even greater concern are the effects of nutrient pollution emanating from the Upper Klamath Basin and KHP reservoirs that cause profuse algae blooms downstream of Iron Gate Reservoir and foster conditions that cause major fish disease epidemics (Stocking et al. 2006) resulting in the loss of hundreds of thousands of Chinook salmon (Nichols and Foott 2005). The letter from your staff (SWRCB 2006) used quotes from the FERC draft EIS to convey the magnitude of this problem and the threat it posed to fisheries on which the Lower Klamath River Indians relies:

“If disease issues are not addressed effectively within the next several years, there is a risk that the fall Chinook fishery could suffer a further, dramatic decline, and that an increased prevalence of disease pathogens may affect other salmonid species including the federally listed coho salmon ESU [Evolutionary Significant Unit].’The DEIS further states: ‘...we conclude that elimination of Iron Gate and Copco reservoirs would be likely to reduce fish stress and disease susceptibility by moderating fluctuations in DO and pH associated algal blooms, increasing DO levels... and reducing levels of ammonia in downstream areas’ (DEIS, pg 5-38).”

Nichols and Foott (2005) stated that the number of juvenile Chinook salmon mortalities from disease in 2004 and 2005 was so high that it had the potential to impact subsequent adult returns and population abundance similarly to the 70,000 adult salmon fish fill in September 2002. This magnitude of fish loss is unacceptable to the Resighini Rancheria and unsustainable.

The recently published KBRA coho salmon and steelhead Expert Panel report (Dunne et al. 2011) described changes in precipitation in the Klamath Basin and ocean conditions attendant with the Pacific decadal oscillation cycle (PDO). The switch of the PDO to dry on-land and poor ocean productivity in 1975 was followed by the 1976-77 drought and the record inter-annual drought from 1986-1992 also came during this cycle. We have been in wet climatic regime since 1995 with mostly productive ocean conditions that favor increased salmon abundance and make timing opportune for restoration (Collison et al. 2003). Collison et al. (2003) predict a PDO switch back to less productive for salmon sometime in the 2015 to 2020 period that could lead to salmon population extinctions in the northern California region, if freshwater habitat conditions have not improved. The loss of salmon stocks is irretrievable and irreversible and the SWRCB should act swiftly because waiting until 2020 for dam removal could be too late.





We request that you inform us as soon as possible regarding when the SWRCB may take up the KHP 401 certification issue and also provide us with any staff reports or background information that will be used as a basis for your decision.

Sincerely,

Rick Dowd  
Resighini Rancheria Tribal Council Chairman

**References**

Brockbank, D.S. 2011. Testimony regarding benefits of the Klamath Hydropower Settlement Agreement for PacifiCorp rate payers versus the Federal Energy Regulatory Commission relicensing process. Dean S. Brockbank, Vice President and General Counsel of PacifiCorp Energy, Portland, OR. 25 p.  
[http://www.psc.state.ut.us/utilities/electric/10docs/10035124/70688Direct Testimony of Dean Brockbank.doc](http://www.psc.state.ut.us/utilities/electric/10docs/10035124/70688Direct%20Testimony%20of%20Dean%20Brockbank.doc)

Collison, A., W. Emmingson,, F. Everest, W. Hanneberg, R. Martston, D. Tarboton, R. Twiss. 2003. Phase II Report: Independent Scientific Review Panel on Sediment Impairment and Effects on Beneficial Uses of the Elk River and Stitz, Bear, Jordan and Freshwater Creeks. Performed under contract to the North Coast Regional Water Quality Control Board, Santa Rosa, CA. 95 p.

Dunne, T., G. Ruggerone, D. Goodman, K. Rose, W. Kimmerer and J. Ebersole. 2011. Klamath River Expert Panel Final Report: Scientific Assessment of Two Dam Removal Alternatives on Coho Salmon and Steelhead. Published April 25, 2011. Funded by U.S. Fish and Wildlife Service but produced with assistance from Atkins Company, San Diego, CA. 380 p.

Federal Energy Regulatory Commission (FERC). 2007. Final Environmental Impact statement for the Klamath Hydroelectric Project, Docket No. P-2082-027. 11/18/07. U.S. DOE, FERC, Washington D.C.

Kann, J. 2008. Microcystin Bioaccumulation in Klamath River Fish and Freshwater Mussel Tissue: Preliminary 2007 Results. Aquatic Ecosystem Sciences LLC, Ashland, OR. 48 p.





Kann, J. and S. Corum. 2007. Summary of 2006 Toxic *Microcystis aeruginosa* Trends in Copco and Iron Gate Reservoirs on the Klamath River, CA. Prepared For: Karuk Tribe Department of Natural Resources, P.O. Box 282 Orleans, CA, 95556, by Kann, J; Corum, Susan; June, 2007. 23 pp.

Kann, J., L. Bowater and S. Corum. 2010. Middle Klamath River Toxic Cyanobacteria Trends, 2009. Aquatic Ecosystem Sciences LLC. and Karuk Tribe Department of Natural Resources. 25 pp.

Nichols, K. and J.S. Foott. 2005. Health Monitoring of Juvenile Klamath River Chinook Salmon, FY 2004 Investigational Report. USFWS California-Nevada Fish Health Center, Red Bluff, CA.

PacifiCorp Energy. 2006. Request to the State Water Resources Control Board (SWRCB) to Certify the California Portions of the Klamath Hydroelectric Project Pursuant to Section 401 of the Federal Clean Water Act. Letter of March 29, 2006. PacifiCorp, Portland, OR.

State Water Resources Control Board. 2006. Response to PacifiCorp's Request for Consideration of 401 Certification for the Klamath Hydroelectric Project (P-2082). SWRCB, Sacramento, CA.

State Water Resources Control Board. 2008. Response to PacifiCorp's Letter Regarding State Water Resources Control Board on the 2008 Water Quality Study Plan and Information Request for the Klamath Hydroelectric Project (P-2082). To Cory Scott of PacifiCorp from Jennifer Watts SWRCB Environmental Scientist. SWRCB, Sacramento, CA. 5 p.

Stocking, R. W., R. A. Holt, J. S. Foott and J. L. Bartholomew. 2006. Spatial and temporal occurrence of the salmonid parasite *Ceratomyxa shasta* (Myxozoa) in the Oregon-California Klamath River Basin. *Journal of Aquatic Animal Health*. 18: 194-202.

