From:	Steven Baker
To:	Wr401program
Cc:	Dohn Henion; Steven Baker; Joan Freeman
Subject:	Comments on Draft EIR _Lower Klamath Project License Surrender FERC Project No. 14803
Date:	Tuesday, February 26, 2019 10:28:00 AM
Attachments:	2019 02 26 DEIR Comments.pdf

Attached is a letter outlining the City of Yreka's comments on the:

DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE LOWER KLAMATH PROJECT LICENSE SURRENDER FEDERAL ENERGY REGULATORY COMMISSION PROJECT NO. 14803

Please verify that you have received this email.

Thanks for your assistance.

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Office of the City Attorney
Yreka, California

DOHN R. HENION
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February 26, 2019

Ms. Michelle Siebel
State Water Resources Control Board
Division of Water Rights – Water Quality Certification Program
P.O. Box 2000
Sacramento, CA 95812-2000

Subject: State Clearinghouse No. 2016122047
City of Yreka's Comments:
Draft Environmental Impact Report for the Lower Klamath Project

Dear: Ms. Siebel:

The State Water Resources Control Board ("**SWRCB**") has circulated for public comment (State Clearinghouse No. 2016122047) a Draft Environmental Impact Report (DEIR; KRRC 2018; hereafter known as the "**DEIR**") which sets forth the fact that PacifiCorp has applied to the Federal Energy Regulatory Commission ("**FERC**") for authority to decommission and remove four PacifiCorp owned and operated Klamath Hydroelectric Project dams, the flow of which is regulated by the Bureau of Reclamation ("**BOR**"). The application requests a substitution of permitees from PacifiCorp to the Klamath River Renewal Corporation, a 501(c)(3) corporation formed to potentially oversee the project ("**KRRC**").

The dams proposed to be decommissioned are the Iron Gate Dam, the Copco[1] No. 1 Dam, the Copco No. 2 Dam, the J.C. Boyle Dam, and various appurtenant facilities, such as the removal and relocation of most of the infrastructure of the Iron Gate Fish Hatchery to a new fish hatchery located on Fall Creek immediately adjacent to the City of Yreka's diversions for its municipal water supply (collectively, the "**Lower Klamath Facilities**").

[1] This moniker is derived from the dam's predecessor owner/permittee - the California Oregon Power Company.

In significant part, the application has requested FERC to divide the Klamath River Basin Hydroelectric Project license into two separately designed projects: 1) The four lowermost dams on the Klamath River to a separate Lower Klamath Facilities project license; 2) The other PacifiCorp hydroelectric owned or operated facilities that are not proposed to be decommissioned. FERC has granted this request. The application also requests that FERC allow the transfer of the Lower Klamath Project license from PacifiCorp to KRRC. KRRC would then implement FERC approved steps to remove/decommission those facilities. Finally, the application requests that FERC stay its proceedings on PacifiCorp's (the current licensee) pending application for license renewal until FERC takes final action on the application. ("**Proposed Project**").

PacifiCorp's FERC license on the Lower Klamath Project expired in March 2006. FERC has not yet approved the Proposed Project, the transfer of the license, nor indicated what steps, if any, it will require should it approve the decommissioning of the Lower Klamath Facilities. FERC has referred the Proposed Project to an Independent Board of Consultants ("**BOC**") to fully review the Klamath Renewal Project and make its recommendations upon which FERC will base its ultimate decision to approve, disapprove or order modifications to the Proposed Project. The individuals on the BOC have expertise in dam construction and removal, engineering, aquatic and terrestrial biology, financial feasibility, construction cost estimating, insurance, and bonding for large infrastructure projects.

Significantly, although FERC has ultimate control over the nature and scope to the Proposed Project the DEIR is not being jointly submitted for comment with a NEPA environmental study. A NEPA Final Environmental Impact Study ("**FEIS**") was circulated and approved in 2012 but this study is outdated and FERC has required additional studies and information before that process can proceed.

The Proposed Project is the product of an agreement between the United States Department of the Interior (which is the overseeing agency for the Bureaus of: Indian Affairs; Land Management; Reclamation; Park Service; U.S. Fish and Wildlife and U.S. Geological Survey), United States Department of Commerce's National Marine Fisheries Service, State of California, California Natural Resources Agency (which is the umbrella agency for Department of Water Resources, Department of Fish and Wildlife, Department of Conservation), California Department of Fish and Wildlife, the State of Oregon, Oregon State of Environmental Quality, Oregon Department of Fish and Wildlife, Oregon Water Resources Department and the permittee/owner PacifiCorp (a subsidiary of Berkshire Hathaway) as well as 35 other tribal, fish and conservation related NGOs, irrigation entities and water users. This agreement is entitled the Klamath Hydroelectric Settlement Agreement, dated February 18, 2010, as amended April 6, 2016 and November 30, 2016 ("AKSA"). The AKSA has not been sanctioned by the U.S.

Congress nor ratified by state or federal law. It is an agreement whose validity has not been tested in Court and we are not aware of any pending litigation in that regard.

The federal compact to implement the 2010 agreement, was introduced and reintroduced to the House of Representatives and the U.S. Senate and variously referred to as S.1851 the "Klamath Basin Economic Restoration Act of 2011" and HR.3398, S2739 – the "Klamath Basin Water Recovery and Economic Restoration Act of 2014" and S.133 – the "Klamath Basin Water Recovery and Economic Restoration Act of 2015." None of these bills were signed into law and, accordingly, federal funds were not appropriated for its implementation. Implementation of the AKSA is now being funded with a surcharge on PacifiCorp customers ($200 million) and by California State water bond funds ($250 million). It is estimated that if this agreement is not implemented, and FERC proceeds to relicense the dams, that PacifiCorp projects that it will incur a loss estimated at 20 million dollars per year on the Klamath Hydroelectric Project, which loss, PacifiCorp will be entitled to recover from its ratepayers under PUC regulatory standards.

Summary

Yreka's sole concerns, as related in these comments, are to ensure that the Proposed Project does not, in any manner, presently or consequently in any future period, adversely affect Yreka's right to divert and consumptively use water for municipal purposes under its Water Right Permit.

The possible areas that Yreka can presently identify through the data and plans proposed thus far, related to the following areas:

1. The replacement and reconstruction of its water transmission pipeline with a water transmission pipeline that is safe and secure from external threats that could cause any interruption in municipal water service.
2. The lack of specificity of the exact improvements to be made to Yreka's water diversion facilities on Fall Creek. The lack of such concrete specificity renders it premature and impossible to adequately address those particular impacts of the Proposed Project.
3. The effects of the proposed location, construction and expansion of a defunct fish hatchery and reconstruction of rearing ponds at Fall Creek, which are proposed to divert water under a junior water permit and further proposed to rear and release endangered species which could, in the future, cause further water restrictions upon Yreka's right to take under its consumptive water permit.
4. The effect of the project on PacifiCorp's pre-1914 water right to divert water from Spring Creek (16.5 cfs) and from Fall Creek to its Fall Creek Hydroelectric Facility upon which adequate water flow to Yreka's water diversion is predicated.

5. The proposed deconstruction of the majority of the existing fish hatchery located at Iron Gate together with the lack of adequate studies and analysis of maintaining, improving and expanding hatchery activities at Iron Gate Hatchery or all other alternative locations which would thereby obviate any possible additional future adverse impacts on Yreka's right to divert or restrict the flow to such diversion, on Yreka's consumptive municipal water diversion from Fall Creek.
6. The data-deficient basis, lack of specificity and procedural compliance with applicable law in prematurely requiring Yreka to provide comments on a project that is still subject to change in the proceedings before the Federal Energy Regulatory Commission.
7. The assumption by the SWRCB of lead agency status when this status properly rests with the Klamath River Basin Compact Commission which has not been consulted, held public hearings, received public input or made any determinations regarding the Proposed Project.

Yreka's Right to Take Under its Permit and Applicable State and Klamath Water Basin Compact

Fall Creek is a tributary of the Klamath River and part of the Klamath Water Basin network. As stated in the DEIR, the City of Yreka, operates a public municipal water supply system and takes its normal water supply exclusively from Fall Creek under the allowance granted under California State Water Right Permit 15379, Application #22551, a water right that allows the diversion and consumption of up to 15 cubic feet per second ("cfs") (9.7 mgd) and allows diversion of 6,300 acre/feet annually for domestic and municipal water uses (the "Permit").[2] Yreka's water supply originates from two diversion impounds whose points of diversion are specified on the Permit. During extreme drought emergencies Yreka selectively provides other smaller municipalities with a small allocation of water in order for those municipalities to supply clean water to their inhabitants and businesses for subsistence purposes. No elaboration on the environmental impacts on humans would seem necessary if Yreka was deprived of its water supply. The effect of a project on humans is considered in the NEPA process.

The primary point where the city takes its water is known as the "A" Dam and is located directly below the tailrace of the PacifiCorp's Fall Creek Hydroelectric Facility. This powerhouse is fed by a penstock which receives water from a diversion canal from Fall Creek. The City "A" Dam is upstream of the intake of the California Department of Fish and Wildlife rearing ponds which the state ceased all operations in 2004.[3]

[2] A copy of the City's Amended Permit for Diversion and Use of Water is included as Attachment 1; see also DEIR Appendix M.

[3] Photographs taken on February 21, 2019 of the existing raceways adjacent to Yreka's points of diversion are attached as Attachment "4")

City operations occasionally require adjustment due to the operational aspects of the powerhouse. Primarily, this happens when the PacifiCorp's powerhouse trips offline, or is taken offline for maintenance. PacifiCorp will then change the gates at the Fall Creek Diversion Dam to send water down the natural channel of Fall Creek to Yreka "B" Dam instead of the penstock to the powerhouse. The "B" Dam is located in the natural channel of Fall Creek directly below the lower set of barrier falls.[4] City Staff must then manually install boards and open a valve to allow water from the "B" Dam to be gravity piped to the intake of the "A" Dam. This operational situation alters the flow over to the "A" Dam. Water from the tailrace of the powerhouse slowly reduces and depending on the situation, may cease entirely. It is important to understand that the convergence of the natural channel of Fall Creek and the tailrace section is located below the former rearing pond intake.[5]

Yreka's headworks is located at the "A" Dam. It is this location where water enters the singular intake point of a 24" pipe of Yreka's water transmission system. From the headworks, gravity conveys the water to a pump station to the West. From that point the pipe lays on the bottom of Iron Gate Reservoir thence on to Yreka's water storage tanks and purification plant. The City's water conveyance pipeline is 23 miles long.

SWRCB required in Yreka's amended water diversion permit that 15 cfs or more must flow past the Dams "A" and "B" combined for fish and wildlife purposes (See Attachment 1). When this requirement was requested in 1967 by the California Department of Fish and Wildlife the Department had not yet sought its own water appropriation of 10 cfs, which was CWRQCB permitted in 1979. The bypass measurement is taken downstream of the confluence of the tailrace section and the natural watercourse of Fall Creek. The amount and quality of water for the California Department of Fish and Wildlife ("**CDFW**") operations will hinge upon the ability of the rearing pond intake to divert water from both the "A" Dam and "B" Dam to ensure flows are present at all times. It is rare to have 15 cfs flowing past both dams at the same time. Flow past the "A" dam varies depending on how many and of what size generators are online at PacifiCorp's Fall Creek Hydroelectric Facility. In the current configuration, Yreka has two options for flow into its headworks. It is believed that CDFW owns a pipe diversion from the "B" Dam to the rearing ponds but its condition, sizing, and ability to provide required flows for hatchery and rearing pond operations are unknown to this commenting party.

[4] An overview map of the general layout of the Yreka's points of diversion to PacifiCorp's Facility is included as Attachment 2.
[5] An overview map of the general layout of the Yreka's points of diversion impounds is included as Attachment 3.

PacifiCorp diverts water from Fall Creek under Statements of Diversion and Use S015372 and S015373[6]. PacifiCorp claims a maximum non-consumptive diversion right to about 75 cfs based on a pre-1914 claim.

Yreka's diversion from Fall Creek is presently subject to a permit condition that requires the City of Yreka to bypass a minimum flow of 15.0 cfs or the natural flow of the stream whenever it is less than 15.0 cfs. The intent of the flow bypass is to benefit fish and wildlife purposes. Accordingly, without consideration for any diversion from Fall Creek or Spring Creek for the proposed 10 cfs permit allocation on its junior and subordinate priority Fall Creek Fish Hatchery, Fall Creek must have 30 cfs flowing through it for Yreka to divert its entire 15 cfs for its water supply.

Of primary significance to Yreka's ability to take its full appropriation is PacifiCorp's right to divert up to 16.5 cfs from Spring Creek to Fall Creek for the use of its power generation facilities which is also the product of a State of Oregon pre-code water right. After this 16.5 cfs is diverted from Spring Creek, it flows through PacifiCorp's Fall Creek Hydroelectric facility (the "Facility") and flows into Fall Creek thereby increasing Fall Creek's flow by 16.5 cfs, which then continues to flow on to the point of Yreka's water diversion. While PacifiCorp appears to have secured a right to divert up to 16.5 cfs under Oregon law, during FERC's earlier consideration of relicensing of the Facility, it was considered but not yet implemented, that PacifiCorp's Spring Creek diversion be greatly restricted. FERC's 2012 Final Environmental Impact Study determined to impose two conditions on PacifiCorp's federal power permit – no diversions from Spring Creek to Fall Creek from June 1 through September 15 and a reduction from 16.5 cfs to 4 cfs the remainder of the year.[7] Accordingly, to great extent, the necessary volume of Yreka's water source is dependent on water that is diverted from Spring Creek to the Facility. When the flow of Fall Creek is at its lowest the demand by municipal water users is at its highest. Any implementation of a reduction to Spring Creek's diversion to the Facility, under present permitting conditions, would prevent Yreka from the benefit of its full 15 cfs allocation for domestic and municipal water uses.

Table 2.7-16 of the DEIR purports to demonstrate "historical Fall Creek flow," which table, merely shows the flows during a short two-year period spanning 10/01/2003 through 9/01/2005. As discussed below, this data inaccurately describes the actual long-term flows especially as it would regard multiple-year low-flow periods, in which the 2012 FEIS proposed action by FERC to discontinue all flow diversion from Spring Creek to the Facility during the critical low-flow periods (and Yreka's high-use periods) and reduce Spring Creek's diversion to the Facility the rest of the year from 16.5 cfs to 4 cfs – Yreka would not have sufficient water for

[6] See DEIR Appendix M.
[7] Final EIS for Relicensing Klamath Hydroelectric Project No. 2082, November 16, 2007, pp. 5-42 -- 5-44.

domestic/municipal use five months the first dry year, six months the second year and five months the third year. This is the case even if all consideration of the proposed diversion of up to 10 cfs for the newly erected Fall Creek Hatchery were disregarded.

With 30 cfs as a baseline for Yreka to fully take under its present permit, together with the year around flow to the PacifiCorp Facility from Spring Creek (16.5 cfs) to Fall Creek, flow records at the USGS operated Gage 11512000 near the confluence of Fall Creek and the Klamath River exist for the period April 1933 to September 1959. As shown in Table 1, the mean monthly flow for the period in August was 33 cfs.

Table 1
Monthly Mean Flow at USGS Gage 11512000
1933-1959

Month	Calculated Flow (cfs)
January	46
February	51
March	49
April	45
May	38
June	35
July	34
August	33
September	34
October	35
November	37
December	43

In 2018 the maximum flows decreased from the historical average high of 51 cfs down to 41 cfs. Although the low flow was greater that year, increasing in that one year from a mean average in august from 33 cfs to 38 cfs, one can objectively determine that, without the Spring Creek diversion, or if the CDWF junior water right of 10 cfs depleted water flow at Yreka's point of diversion, there would be insufficient water for Yreka to divert enough flow under its permitted allocation even at Yreka's present population. See Table 2 below:

Table 2
Fall Creek - Annual Water Level Log Sheet Year: 2018

FALL CREEK MEASUREMENT PROCEDURE: Reads will be taken monthly on or near the 1st of each month.

1st of month	Fall Creek Gaging Station Level (ft – no pumps running)	Calculated Flow (cfs)
January	1.10	41.0
February	1.09	40.5
March	1.08	40.0
April	1.08	40.0
May	1.07	39.0
June	1.04	37.6
July	1.06	38.6
August	1.06	38.6
September	1.06	38.6
October	1.06	38.6
November	1.08	40.0
December	1.08	40.0

Table 3
Illustrates the Maximum Rate of Water Diverted and used from Fall Creek by Yreka in the Year 2017

Month	Maximum Rate of Diversion (cfs)
January	10.9
February	10.8
March	10.7
April	11
May	11
June	11
July	11.7
August	13.7
September	11
October	11
November	5.8
December	13.8

Table 4 demonstrates the monthly divertible flow for a multiple dry year period. PacifiCorp's present bypass flow requirement of 5.0 cfs is considered, and the City of Yreka's 15.0 cfs bypass flow requirement is included. Table 4 shows total divertible flows dipping to a low of 9.0 cfs in the first dry year, 8.0 cfs in the second dry year, and 9.0 cfs in the third dry year. Yreka would not have enough water for its municipal use five months the first dry year, six months the second year and five months the third year. As we will go into in more detail later in these comments, SWQCB's consideration of this DEIR is premature when it is unknown all the conditions that FERC will approve/impose, should the Proposed Project be allowed to proceed in any manner.

Table 4
Monthly Divertible Flow for a Multiple Dry Year Period

USGS Gage 1151200	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
1939 (cfs)	30	32	35	30	29	28	28	28	29	28	29	33	358
w/o Spring Creek	26	28	31	26	25	24	24	24	25	24	25	29	n/a
Spring Creek "Add Back"	30	32	35	30	29	24	24	24	25	28	29	33	n/a
Flow @ Dam A (cfs)	25	27	30	25	24	19	19	19	20	23	24	28	n/a
City- divertible Flow @ Dam A (cfs)	10	12	1	10	9	4	4	4	5	8	9	13	n/a
City- divertible Flow @ Dam B (cfs)	5	5	5	5	5	5	5	5	5	5	5	5	n/a
City-total Diversion ("A" + "B")	18	17	20	15	14	**9**	**9**	**9**	**10**	**13**	**14**	18	n/a

USGS Gage 1151200	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
1940 (cfs)	34	44	44	37	29	27	28	27	29	30	30	33	392
w/o Spring Creek	30	40	40	33	25	23	24	23	25	26	26	29	n/a
Spring Creek "Add Back"	34	44	44	37	29	23	24	23	25	30	30	33	n/a
Flow @ Dam A (cfs)	25	27	30	25	24	19	19	19	20	23	24	28	n/a
City- divertible Flow @ Dam A (cfs)	10	12	1	10	9	4	4	4	5	8	9	13	n/a
City- divertible Flow @ Dam B (cfs)	5	5	5	5	5	5	5	5	5	5	5	5	n/a
City-total Diversion ("A" + "B")	18	17	20	15	14	**9**	**9**	**9**	**10**	**13**	**14**	18	n/a

USGS Gage 1151200	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
1941 (cfs)	33	37	30	32	30	29	28	28	29	29	29	31	376
w/o Spring Creek	29	33	26	28	26	25	24	24	25	25	27	36	n/a
Spring Creek "Add Back"	33	37	30	32	30	25	24	24	25	29	31	40	n/a
Flow @ Dam A (cfs)	28	32	25	27	25	20	19	19	20	29	31	40	n/a
City- divertible Flow @ Dam A (cfs)	10	12	1	10	9	5	4	4	5	9	11	20	n/a
City- divertible Flow @ Dam B (cfs)	5	5	5	5	5	5	5	5	5	5	5	5	n/a

City-total Diversion ("A" + "B")	18	22	15	17	15	**10**	**9**	**9**	**10**	**14**	16	25	n/a

All of this data is publicly available on SWQCB's website.

Table 5 demonstrates the recent multiple year drought effect in the years 2015 and 2016

Table 5

Year 2015

1st of the Month	Fall Creek Gaging Station Level	Calculated Flow
January	1.48	40.4
February	1.44	39.0
March	1.32	33.6
April	1.28	32.0
May	1.26	31.2
June	1.24	30.5
July	1.16	27.4
August	1.26	31.2
September	1.29	32.4
October	1.30	32.8
November	1.30	32.8
December	1.30	32.8

2016

1st of the Month	Fall Creek Gaging Station Level	Calculated Flow
January	1.33	34
February	1.48	40.4
March	1.50	41.2
April	1.24	30.5
May	1.20	28.6
June	1.20	28.6
July	1.17	27.8
August	1.17	27.8
September	1.17	27.8
October	1.17	27.
November	1.24	30.5
December	1.20	28.6

If the FERC determines, as it did in its 2012 FEIS, to curtail the diversion from Spring Creek to the Facility from June 1st through September 15th together with a 4 cfs diversion limit the remainder of the year – with the present 15cfs bypass in effect – Yreka would rarely be able to divert the 15 cfs it requires for domestic/municipal uses. As further discussed in these comments, the circulation of this DEIR is premature, in part because it is not clear what proposed action the presently designated federal lead agency, FERC, will propose as its Preferred Alternative. If FERC continues to pursue restrictions to the Spring Creek diversion to the Facility, **Yreka recommends that the effects of the Proposed Project be mitigated by action through SWQCB to amend Yreka's permit to entirely eliminate the 15 cfs bypass** (15 cfs – 16.5 cfs = -1.5 cfs). It is precisely these types of unknowns that the requirement that a joint DEIR/DEIS be submitted for circulation.

Water Laws Granting Domestic Water Use as the State's Highest Priority

According to California, Oregon and the United States Code, municipal water use has the highest priority of any other use, including those uses related to fish and wildlife considerations.

First, California Water code §106 provides:

> "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water ..."

Water Code §106.3 provides, in part:

> "(a) It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.
>
> (b) All relevant state agencies, including the department, **the state board**, and the State Department of Public Health, **shall consider this state policy when** revising, **adopting**, or establishing **policies, regulations**, and grant criteria **when those policies, regulations, and criteria are pertinent to the uses of water described in this section**. [Emphasis added]
>
> (e) The implementation of this section shall not infringe on the rights or responsibilities of any public water system."

Thus, it is clear under California water law that municipal water use has the priority of any other use and that the SWQCB is statutorily bound to afford Yreka with its "highest use" priority.

However, there is even a more specific statutory scheme affirming this principal which is specifically applicable to the use of water from the Klamath River Basin. Those principals are set out in Federal, California and Oregon laws collectively known as the Klamath River Basin Compact, Public Law 85-222, ratified by Congress and signed into law by the President on August 30, 1957, colloquially dubbed "The Law of the River" (the "**Compact**"). The law creates a federally designated commission to implement its provisions called the "Klamath River Compact Commission" (the "**Commission**.") Each of the ancillary state laws also refer to, and are members of, the Commission.

Oregon has adopted the KORS 542.610 which provides:

> "The Legislative Assembly of the State of Oregon hereby ratifies the Klamath River Basin Compact set forth in ORS 542.620 (Klamath River Basin Compact), and the provisions of such compact hereby are declared to be the law of this state upon such compact becoming effective as provided in subsection (2) of this section.

> (2) The compact shall become effective when it has been ratified by the legislatures of the States of California and Oregon, and has been consented to by the Congress of the United States as provided in Article XIII of the compact. [1957 c.142 §1]"

The compact was ratified by the State of Oregon by Chapter 142, Oregon Laws 1957 (signed by Governor on April 17, 1957).

The State of California has adopted the Compact at Water Code §5900, *et seq*. The Compact was ratified by the State of California by Chapter 113, California Statutes 1957 (signed by Governor on April 17, 1957, and effective on September 11, 1957). The provisions of said Klamath River Basin Compact reiterated in California Water Code 5901 are:

> **Article I. Purposes**
>
> The major purposes of this compact are, **with respect to the water resources of the Klamath River Basin:**
>
> **A. To facilitate and promote the orderly, integrated and comprehensive development, use, conservation and control thereof for various purposes, including, among others: the use of water for domestic purposes**; **the development of lands**[8] by irrigation and other means; the protection and enhancement of fish, wildlife and recreational resources; the use of water for industrial purposes and hydroelectric power production; and the use and control of water for navigation and flood prevention.
>
> B. **To further intergovernmental co-operation and comity with respect to these resources and programs for their use and development and to remove causes of present and future controversies by providing (1) for equitable distribution and use of water among the two states and the Federal Government, (2) for preferential rights to the use of water after the effective date of this compact for the anticipated ultimate requirements for domestic** and irrigation **purposes in** the Upper Klamath River Basin in Oregon **and California, and (3) for prescribed relationships between beneficial uses of water as a practicable means of accomplishing such distribution and use.**
>
> **Article II. Definition of Terms**
>
> As used in this compact:
>
> **A. "Klamath River Basin" shall mean the drainage area of the Klamath River and all its tributaries within the States of California** and Oregon and all closed basins included in the Upper Klamath River Basin.
>
> B. …
>
> **C. "Commission" shall mean the Klamath River Compact Commission as created by Article IX of this compact.**

[8] Obviously, the decommissioning of dams is exactly the sort of change in the physical environment that constitutes a "project" under 14 Cal Code Regs §15502(d).

D. "Klamath Project" of the Bureau of Reclamation of the Department of the Interior of the United States shall mean that area as delineated by appropriate legend on the official map incorporated by reference under subdivision B of this article.

E. "Person" shall mean any individual **or any other entity, public** or private, including either state, but excluding the United States.

F. …

G. "Water" or "waters" shall mean waters appearing on the surface of the ground in streams, lakes or otherwise, regardless of whether such waters at any time were or will become ground water, but shall not include water extracted from underground sources until after such water is used and becomes surface return flow or waste water.

H. "Domestic use" shall mean the use of water for human sustenance, sanitation and comfort; for municipal purposes; for livestock watering; for irrigation of family gardens; and for other like purposes.

I. …

J. …

Article III. Distribution and Use of Water

A. There are hereby recognized vested rights to the use of waters originating in the Upper Klamath River Basin validly established and subsisting as of the effective date of this compact under the laws of the state in which the use or diversion is made, **including rights to the use of waters for domestic** and irrigation **uses within the Klamath Project**. **There are also hereby recognized rights to the use of all waters reasonably required for domestic** and irrigation **uses which may hereafter be made within the Klamath Project.**

B. Subject to the rights described in subdivision A of this article and excepting the uses of water set forth in subdivision E of Article XI, rights to the use of unappropriated waters originating within the Upper Klamath River Basin for any beneficial use in the Upper Klamath River Basin, by direct diversion or by storage for later use, may be acquired by any person after the effective date of this compact by appropriation under the laws of the state where the use is to be made, as modified by the following provisions of this subdivision B and subdivision C of this article, and may not be acquired in any other way:

1. In granting permits to appropriate waters under this subdivision B, as among conflicting applications to appropriate when there is insufficient water to satisfy all such applications, each state shall give preference to applications for a higher use over applications for a lower use in accordance with the following order of uses:

(a) Domestic use,

(b) …

(c) Recreational use, including use for fish and wildlife,

> (d) …
> **(e) Generation of hydroelectric power**,
> **(f) These uses are referred to in this compact as uses (a)**, (b), (**c**), (d), (e) and (f), respectively. **Except as to the superiority of rights to the use of water for use (a) or (b) over the rights to the use of water for use (c),** (d), (e) or (f), as governed by subdivision C of this article, upon a permit being granted and a right becoming vested and perfected by use, priority in right to the use of water shall be governed by priority in time within the entire Upper Klamath River Basin **regardless of state boundaries**. The date of priority of any right to the use of water appropriated for the purposes above enumerated shall be the date of the filing of the application therefor, but such priority shall be dependent on commencement and completion of construction of the necessary works and application of the water to beneficial use with due diligence and within the times specified under the laws of the state where the use is to be made. Each state shall promptly provide the commission and the appropriate official of the other state with complete information as to such applications and as to all actions taken thereon."

Why does the Compact matter? The interstate compacts clause of the United States Constitution, Article I, §10, cl. 3, which states in pertinent part: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power." Since a Compact has already been entered regarding the exact prioritization of the use of Klamath River Basin waters in Oregon, California and throughout the federal reservations (i.e., the U.S. Forests, the Wildlife Refuges, the Tribal Nations, the Bureau of Reclamation, etc.) it is required that to encroach on the jurisdiction of the Compact requires the consent of the Commission.

Prior to the entry of the AKSA there were many attempts to gain the "consent of Congress." Each of those attempts failed. Nowhere in the provisions of the Compact is there any time-limitation that causes the compact to expire. It is not clear whether the Congress even has the authority under the Constitution to reserve to itself in compact legislation the ability to "alter, amend, or repeal" the terms of a compact. Litwak, *Compact Law* 33, 241, notes:

> After Congress gives its consent to a compact, two questions arise relating to the relationship between the compact and the federal government. First, does that consent limit the ability of the federal government to enact subsequent law that might affect the implementation of the compact? . . . Second, does consent alter the responsibilities of the federal government under existing federal law that relates to the subject matter of the compact?

Consent matters not only because it satisfies the constitutional requirement but also because it makes clear the fact that, in addition to whatever specific interests the two states might have in a given situation, there is a national interest in the matter that is critical. The states are not free to assert that only their particular concerns count, either at the time of the agreement or later when disputes may arise over its terms. As the Supreme Court made clear in *Dyer v. Sims*: "A compact

is more than a supple device for dealing with interests confined within a region. That it is also a means of safeguarding the national interest is well illustrated in the Compact now under review." *West Virginia ex rel. Dyer v. Sims* 341 U.S. 22, 27 (1951). In *Hess v. Port Authority Trans-Hudson Corp*., Justice Ginsburg echoed the *Dyer* language., 341 U.S. 22, 27 (1951).

Litwak explains at length, and with excerpts from a variety of key cases, this national interest and the constitutional consent requirement that protects it. This doctrine allows Congress to ensure that agreements among states do not injure either other states or the nation as a whole, and is key to understanding why states cannot act unilaterally with respect to existing compacts. He stresses that: "*Dyer v. Sims* is the Supreme Court's clearest statement on holding states to their obligations under a compact, even if a state believes its constitution restricts the state's ability to fulfill the compact."[9]

The *Dyer* Court held that it would not be states that would decide, but the federal courts.

> "But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the "federal common law" governing interstate controversies (*Hinderlider v. La Plata Co*., 304 U.S. 92, 110), is the function and duty of the Supreme Court of the Nation. Of course, every deference will be shown to what the highest court of a State deems to be the law and policy of its State, particularly when recondite or unique features of local law are urged. Deference is one thing; submission to a State's own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite another."

The Commission's exercise of powers is conditioned on the ability of "any interested party [to] have the opportunity to present his views on the proposed action" before Commission action, after "reasonable" advance notice of the action. (71 Stat. at 505.) Decision-making by the compact entity is thus nothing like the negotiation of a settlement agreement without such

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[9] Litwak, *Compact Law*, at 61-62. He then cited and explained such examples as *Washington Metropolitan Area Transit Authority v. One Parcel of Land*, 706 F.2d 1312 (4th Cir. 1983); *Stephans v. Tahoe Reg'l Planning Agency*, 697 F. Supp. 1149, 1152 (D. Nev. 1988); *Alcorn v. Wolfe*, 827 F. Supp. 47 (D.D.C. 1993); and *Parkridge 6, LLC v. U.S. Dep't of Transp*., No. 1:09CV1312(LMB/IDD) (E.D. Va. Apr. 6, 2010).

opportunity for public comment. The Supreme Court has confirmed that the requirement of decision-making by a compact entity involves a different sort of "political accountability;"

> "An interstate compact, by its very nature, shifts a part of an authority to another state or states, or to the agency the several states jointly create to run the compact. Such an agency under the control of special interests or gubernatorially appointed representatives is two or more steps removed from popular control, or even of control by a local government."

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 42 (1994) (quoting M. Ridgeway, *Interstate Compacts: A Question of Federalism* 300 (1971)).

Moreover, compact issues under agreements to which the Congress has consented are matters of federal, not state law, known generally as the "Law of the Union" doctrine.[10] This critically important doctrine is one that many state officials do not appear to understand, but the Supreme Court has made the point clearly in *Cuyler v. Adams* 449 U.S. 433 (1981). "Because congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States, we have held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question."[11] The Court added "[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause."[12]

In addition to the obvious points, Litwak stresses that because compact law is federal law, the usual considerations of federal preemption are not present and the compact law "supersedes the party states' statutes and constitutions."[13] That being understood, the Compact Commission itself is not always an agency of the United States but, can be, depending on the language of the compact itself, a regional planning agency.[14]

Statutes are exercises of the legislative power to prescribe or prohibit public or private conduct, establish policy, or mandate processes by which public agencies operate and are part of the body of positive law. Compacts are agreements that represent a meeting of the minds among different parties and are interpreted today against a longstanding common law tradition.

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[10] See Litwak, *Compact Law*, at 95.

[11] *Cuyler v. Adams* 449 U.S. 433 (1981). at 438. In support of that holding, the Court cites *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278 (1959); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951); *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 427 (1940).

[12] Id. at 440.

[13] Litwak, *Compact Law,* 103.

[14] *Stephans v. Tahoe Reg'l Planning Agency*, 697 F. Supp. 1149, 1152 (D. Nev. 1988); *Rhode Island Fishermen's Alliance v. Rhode Island Dep't of Envtl. Mgmt*., 585 F.3d 42 (1st Cir. 2009), and *Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency*, 24 F. Supp. 1062 (E.D. Cal. 1998); *City of South Lake Tahoe v. Tahoe Reg'l Planning Agency*, 664 F. Supp. 1375 (E.D. Cal. 1987), *Klickitat County v. State*, 71 Wn. App. 760 (1993); and *Columbia River Gorge Comm'n v. Hood River County*, 210 Or. App. 689 (2007).

An interstate compact is clearly an agreement among states, but it is also statutory, both in terms of the legislation adopted by the participating states to sanction the agreement but also because of the critically important fact that Congress adopts legislation consenting to the agreement. The congressional action is not only an exercise of its authority under the interstate compact clause of the Constitution, but also transforms issues that arise under the compact into federal questions under the Law of the Union doctrine.

If the focus is on statutory interpretation and if the issues are matters of federal law, compact agencies may be entitled to deference by courts in their interpretation of the legislation they implement and administer under the Supreme Court's Chevron doctrine.[15] Indeed, the Oregon Supreme Court recognized that Chevron deference is due to the Gorge Commission.[16] Litwak even notes that a number of compacts empower the compact agency "to provide guidance on compact responsibilities and interpretation of compact provisions."[17]

The California and Oregon state statutes and the United States Code make it clear that the Compact's application not only applies to the Upper Klamath Basin, which is defined as the portion of the Klamath Project within Oregon commencing at the Stateline, but also to the entire Klamath River Basin in California; which, without question and specifically, includes the Klamath River's tributaries such as Fall Creek. California Water Code § 5901, Article II(H) defines "domestic use" among other uses as "municipal use." Thus, the California Water Code specifically provides that the use of water for "domestic purposes," that being, the use of water for "municipal purposes" has the first priority in the allocation of Klamath Basin water usage. Significantly, public policy specifically declares water for municipal use to be of a higher priority than water use for fish and wildlife purposes. That does not mean that Yreka is opposed to the use of conservation hatcheries, just that any operational conflicts which negatively impacts

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[15] "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determined Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. . .. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency." *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 842-844 (1984).

[16] *Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 346 Or. 366, 384 (2009). The Court wrote, "[W]e conclude that . . . Congress delegated authority to the commission that, under the federal methodology that we are bound to apply, implies a congressional expectation that the commission will 'speak with the force of law' when it addresses ambiguities and gaps in the statutory scheme. The commission's interpretations of the Act therefore are entitled to the level of deference that the Chevron doctrine prescribes." *Id.*

[17] Litwak, *Compact Law*, at 205.

Yreka's present or future right to take water must be resolved in favor of the protection of Yreka's municipal usage.

As set out in the Compact itself, the purpose of the Compact is to further intergovernmental co-operation and comity with respect to these resources and programs for their use and development and to remove causes of present and future controversies by providing (1) for equitable distribution and use of water among the two states and the Federal Government, (2) for preferential rights to the use of water after the effective date of this compact for the anticipated ultimate requirements for domestic and irrigation purposes in the Upper Klamath River Basin in Oregon and California, and (3) for prescribed relationships between beneficial uses of water as a practicable means of accomplishing such distribution and use.

This provision encompasses this exact circumstance – one in where it is being determined how the SWQCB shall determine, in the context of the Proposed Project, whether Yreka's municipal use of water is of a higher priority than that of any other use, regardless of when the right was appropriated. It goes without saying that any portion of the Proposed Project that could impact or adversely affect Yreka's right to utilize its fully permitted allocation must be adequately studied and modified so that Yreka's municipal water use is not adversely impacted. Thus, when considering whether the relocation of a fish hatchery that propagates ESA designated threatened species would detrimentally affect the city's right to take in the future, it is clear that any wildlife consideration must give way to the priority granted to municipal water usage.

Accordingly, SWQCB is constrained to construe the laws and environmental regulations of the State of California in a manner that is consistent with the provisions and existence of the Compact. No joint or individual action by Oregon, California or any of the parties to the Proposed Project, can take lawful action other than to prioritize Yreka's water use as the highest priority use in the Klamath River Basin.

It is equally clear that the Commission is the proper lead agency to the Proposed Project as the regional planning agency. The circulation of this DEIR by an agency without authorization, public hearings before the Commission and delegation under the Compact is premature as the Commission is the appropriate regional planning agency to circulate it. Any other course of conduct would constitute a violation of both the "Law of the River" and the "Law of the Union." The correct application of these doctrines make crystal clear that the DEIR must be circulated for comment as a joint state and federal DEIR/DEIS.

The Preservation of Yreka's Right to Take as Agreed by the Parties to the Amended Klamath Settlement Agreement

As noted in the preface to these comments the Proposed Project is the genesis of the AKSA. The SWRCB, if it proceeds to the stage of a FEIR, must make its determinations regarding the Proposed Project by construing the AKSA as providing Yreka's municipal water use with the highest priority use over lesser priorities set out in the Compact. Fortunately, the AKSA contains multiple provisions intended to protect Yreka's municipal water supply. The provision relating to the protection of Yreka's municipal water permit and its water conveyance infrastructure as follows:

> AKSA ¶ 7.2.3 "Assessment and Mitigation of Potential Impacts to the City of Yreka The Parties understand that actions related to this Settlement may affect the City of Yreka. In recognition of this potential, the Parties agree to the following provisions, which shall remain in effect so long as this Settlement remains in effect.
>
> A. **The Parties collectively and each Party individually shall agree not to oppose the City of Yreka's continued use of California State Water Right Permit 15379, which provides for the diversion of up to 15 cfs for municipal uses by the City of Yreka**.
>
> B. As part of implementation of this Settlement, **an engineering assessment to study the potential risks to the City of Yreka's water supply facilities as a result of implementation of Facilities Removal shall be funded and conducted by the Secretary**. Actions identified in the engineering assessment necessary to assure continued use of the existing, or equivalent replacement, water supply facilities by the City of Yreka shall be funded from the California Bond Measure and implemented. Actions that may be required as a result of the engineering assessment and in consultation with the City of Yreka include, but are not limited to:
>
> > (1) **Relocation, replacement, and/or burial of the existing 24-inch diameter water line and transmission facilities** from the City of Yreka's Fall Creek diversion;
> >
> > (2) Assessment, mitigation, and/or funding to address potential damage to the City of Yreka's facilities located along the Klamath River, including mitigation of potential impacts that may occur as a result of a dam breach. Such assessment, mitigation, and/or funding shall include consideration of the cathodic protection field located near the north bank of the Iron Gate crossing and the facilities that house the City's diversion and pump station; and
> >
> > (3) **Assessment, mitigation, and/or funding to address any impacts resulting from implementation of the Settlement, on the ability of the City to divert water consistent with its Water Right Permit 15379**.
>
> C. As part of implementation of this Settlement, an assessment of the potential need for fish screens on the City of Yreka's Fall Creek diversion facilities was completed in the Detailed Plan and it identified the need for fish screens on Dam A and Dam B. As a result

> of implementation of this Settlement, in order to meet regulatory requirements and screening criteria, **construction of the required fish screens, including, but not limited to, necessary costs to preserve City facilities with additional species protection, shall be funded** through the California Bond Measure pursuant to Section 4.2.3, or through other appropriate sources." [Emphasis added]

Since the State of California, SWQCB and the Department of Fish and Wildlife are all parties to this agreement, the parties have agreed that all their actions will support the continued and unimpaired use of Yreka's 15 cfs water diversion. This would include all determinations made on the Proposed Project and on the DEIR.

ASKA Interim Measure 17 states in relevant part:

> "Additionally, if anadromous fish have passage to the Fall Creek following removal of the California dams, flows will be provided in the Fall Creek bypass reach to provide for the appropriate habitat needs of the anadromous fish species of any kind that are **naturally and volitionally** present in the Fall Creek bypass reach. Flows will be based on species specific habitat needs identified by the IMIC. The operation will also avoid and minimize take of any listed species present."

Accordingly, if anadromous fish take passage into Fall Creek, processes must be put into place to ensure that Yreka receives its full allocation of water as well as any additional water needed for the anadromous fish. This should not be interpreted to imply that anadromous fish should be encouraged to take passage into Fall Creek through the imprinting of being raised in a hatchery located there. In fact, use of the words "naturally and volitionally" should be correctly interpreted as those anadromous fish that are the product of the natural production of fish occupying the Klamath River Basin rather than those caused to immigrate to Fall Creek after their rearing as hatchery Yearlings. There is no reason to single out Fall Creek from any of the other Klamath tributaries except for the purpose of the protection of Yreka's water diversion. Another provision of the Fish and Game Code that could apply is section 5937, which requires the owner of any dam to "allow sufficient water at all times to pass through …to keep in good condition any fish …below the dam…." This section is notable because third-parties like environmental groups can bring lawsuits against public entities that own dams to enforce this duty, which appears to be frequently occurring.

The DEIR Fails to Select a Preferred Alternative of Three Types of Replacement to Yreka's Water Transmission Pipeline and the Improvements That Will be Made to Yreka's Water Diversion Facilities Thereby Rendering Yreka's Ability to Comment Impossible

Yreka's water transmission pipeline lays along the bottom of Iron Gate Reservoir. When the reservoir is drawn down, it will be subject to high velocity waters and scouring that will be harmful to it. The DEIR states that a replacement pipe crossing is needed before dam removal and reservoir drawdown to ensure an uninterrupted water supply to the City of Yreka. The DEIR

generally opines that, as a result of any chosen alternative, excepting the no removal alternative, that Yreka's water transmission pipeline, must be reconstructed in one of three methods:

> 1. A new buried pipeline by micro-tunneling in the immediate vicinity of the existing waterline crossing.
>
> 2. A new aerial pipeline on a dedicated utility pipe crossing in the immediate vicinity of the existing waterline crossing.
>
> 3. A new buried pipeline and an aerial pipeline crossing on the existing timber traffic bridge along Daggett Road located approximately 2,000 feet upstream of the existing waterline crossing.

How this pipeline is replaced is of vital importance to Yreka. No selection is made even though the DEIR states that this is one of the first projects that must be completed before the water in Iron Gate Reservoir is drawn down.

A DEIR must consider all phases of project planning, implementation, and operation. 14 Cal Code Regs §15063(a)(1). It is referred to as Potential Impact 3.8-4. The DEIR states merely that it will determine the preferred alternative in consultation with the City of Yreka. Consultation is not the equivalent of consent and deprives Yreka of any ability to comment. It concludes that any of the selections made will result in the same quantity and quality of water conveyed to the city. However, because the exact plans for pipeline re-routing are incomplete, it is not possible to determine the reasonableness of the assumed timeframe for pipeline disconnection. An interruption in service is not limited to the time it takes to reconnect a water line. If the pipeline is constructed in a manner that permits service interruption in the *future* it is also an environmental consideration that must be considered. *Environmental Protection Inf. Ctr. v Department of Forestry & Fire Protection* (2008) 44 C4th 459, at 503. The level of specificity required in the DEIR regarding this part of the Proposed Project is therefore inadequate.

In regard to the replacement of the water diversion fish screens, the DEIR states: "While the fish screens have recently been updated, their compliance to NMFS, USFWS, and CDFW screen criteria for anadromous fish still needs to be confirmed. These fish screens would require updates, if found to be non-compliant." To mitigate the impact the DEIR states: "Any work the KRRC undertakes to ensure that the City of Yreka water supply intakes' screens comply with fish screen criteria shall be completed within the water delivery outage period specified above." This lack of specifics in the DEIR impermissibly disables Yreka to comment.

The DEIR circulated is required to avoid vagueness, incompleteness, or untested mitigation measures. Mitigation measures must not be remote and speculative. *Federation of Hillside & Canyon Assn's v City of Los Angeles* (2000) 83 CA4th 1252, 1260. Here the mitigation measures are inadequate because they are so undefined that it is impossible to gauge their effectiveness. *Preserve Wild Santee v City of Santee* (2012) 210 CA4th 260*San Franciscans for Reasonable*

Growth v City & County of San Francisco (1984) 151 CA3d 61, 79); *Kings County Farm Bureau v City of Hanford* (1990) 221 CA3d 692, 727.

Yreka's present water pipeline is buried or covered with many feet of water. It is of critical importance that the reconstruction of the pipeline be done in a manner that ensures that water service will remain as uninterrupted as it was before the Proposed Project. Yreka is concerned about possible terrorist attacks on exposed portions of the pipeline (if simply suspended over the riverbed or placed in open view under a bridge structure) and simple vandalism with rural citizens sporting .50-caliber rifles. Thus, Yreka recommends the imposition of a **mitigation measure which requires the selection of a new buried pipeline by tunneling in the immediate vicinity of the existing waterline crossing or that the DEIR be recirculated with the proper amount of specificity required to enable Yreka to comment.**

The same situation applies to the Fish Screens that the DEIR indicates need to be replaced but does not provide any specificity as to what improvements or modifications will be undertaken.

The lack of concrete specificity of the exact improvements to be made to Yreka's water pipeline and water diversion facilities on Fall Creek renders it premature and impossible to adequately address those particular impacts of the Proposed Project.

The Decommissioning of the Iron Gate Hatchery and the Construction of the Fall Creek Hatchery

The ASKA contains the following provisions regarding the fish hatcheries.

7.6.6 PacifiCorp Hatchery Facilities:

A. Hatchery Funding

"PacifiCorp will fund 100 percent of hatchery operations and maintenance necessary to fulfill annual mitigation objectives developed by the California Department of Fish and Wildlife in consultation with the National Marine Fisheries Service. This includes funding the Iron Gate Hatchery facility as well as funding of other hatcheries necessary to meet ongoing mitigation objectives following Facilities Removal…"

B. Hatchery Production Continuity

"PacifiCorp will fund a study to evaluate hatchery production options that do not rely on the current Iron Gate Hatchery water supply. The study will assess groundwater and surface water supply options and water reuse technologies that could support hatchery production in the absence of Iron Gate Dam. **The study may include examination of local well records and increasing production potential at existing** or new **facilities in the Klamath Basin as well as development of a test well or groundwater supply well**. Based on the study results and with the approval of the California Department of Fish and Wildlife and the National Marine Fisheries Service, PacifiCorp will provide one-time

> funding to construct and implement the measures identified as necessary to continue to meet current mitigation production objectives for a period of eight years following the Decommissioning of Iron Gate Dam….Production facilities capable of meeting current hatchery mitigation goals must be in place and operational upon removal of Iron Gate Dam. PacifiCorp shall not be responsible for funding hatchery programs, if any, necessary to reintroduce anadromous fish in the Klamath basin."

The DEIR Proposes to Construct a new Fall Creek Hatchery adjacent to Yreka's Municipal Water Supply Improvements located at Fall Creek. The DEIR proposes to reopen Fall Creek Hatchery with upgraded facilities (e.g., install circular tanks, UV treatment system, renovate existing raceways, upgrade plumbing, provides for settling ponds, etc.) for raising **coho salmon** (an ESA designated "threatened" species[18]) and Chinook salmon yearlings within the existing facility footprint and an area adjacent to the upper raceways (Figure 2.7-15 in the DEIR). Additional space requirements needed for most operations (e.g., vehicle parking, pertinent buildings, tagging trailer, etc.) can be accommodated on existing developed or disturbed areas around the hatchery and powerhouse, but the settling pond would need to be located outside of this area. The settling pond would be constructed on one of two potential nearby sites located on Parcel B lands downstream of the Fall Creek Hatchery, with a minimally buried or at-grade conveyance pipeline transporting flows from the hatchery to the settling pond.

The AKSA does not obligate PacifiCorp to fund the study of the construction of a hatchery at Fall Creek adjacent to Yreka's water diversion facilities in particular. One study opines that once Iron Gate Dam is removed the river will have cooler water, which cooler water could supply IGH. It does not consider any filtering methods to improve IGH water quality. The DEIR does not reference any studies undertaken to generate further cooling of the water that IGH uses. It would appear that geothermal cooling could be studied. If geothermal cooling were not sufficient for optimal fish propagation, it could be supplemented with water cooler. PacifiCorp has access to the cheapest source of power than anyone else.

How was FCH selected when it is known that there are other better sources of cool water in the area which would sustain a fish hatchery. Under the "dams out" alternative, adult salmon access will be provided to cool water tributaries (i.e., Shovel Creek, 2.1 mi; and upper/middle Spencer Creek, 7.1 mi) above the dams, springs currently inundated by reservoirs, and groundwater areas above the Keno Reservoir (the Wood River, the Williamson River, and springs on the west side of Upper Klamath Lake). In addition, a large spring complex discharging directly to the mainstem Klamath River downstream from JC Boyle Dam provides ~225 cubic feet per second of cool water year-round (USDI Bureau of Land Management 2003), creating a large thermal

[18] 62 FR 24588; May 6, 1997; 70 FR 37160; June 28, 2005; NMFS 2016.

refuge area currently unavailable to salmon, particularly during summer and fall months.[19] Accordingly, **Yreka requests further studies be conducted before the selection of a site adjacent to Yreka municipal water source and the construction of FCH is implemented.**

The Fall Creek Hatchery was originally built in 1919 and operated until 1948. The facility thereafter consisted of rearing ponds used from 1979 to 2003 to raise 180,000 chinook salmon which were released at the Iron Gate Hatchery.[20] Chinooks are not an ESA listed species. There are six raceways that remain, unused since 2003. Photographs taken on February 21, 2019 of the current state of what remains of the "hatchery" are attached as Attachment 4. The hatchery itself is completely demolished. Since the DCFW 10 cfs junior and subordinate water appropriation was acquired in 1979[21], it could not have been used for hatchery purposes, only for the rearing ponds from 1979 through 2003. This CDFW permits the diversion of 5,463 acre-feet per year while Yreka's permit allows 6,300 acre-feet per year. If CDFW were to fully use its permitted allocation Yreka would not be able to take under its permit as agreed by the parties to the ASKA.

To operate the Fall Creek Hatchery, up to 10 cfs of water would be diverted from the PacifiCorp Fall Creek powerhouse return canal downstream of the City of Yreka's diversion facility at Fall Creek Dam A. Hatchery water would be diverted from Fall Creek Dam B to Dam A during periods when the powerhouse return canal is not flowing. While the Definite Plan specifies diverted water would be returned to Fall Creek at the fish ladder located in the lower tank area or the settling pond location (Appendix B: Definite Plan −Section 7.8.3), an October 2018 update specifies the upper rearing tank would discharge diverted water directly to Fall Creek, the lower rearing tank would discharge to the fish ladder adjacent to the tank, and the settling pond would discharge to Fall Creek further down, but upstream of the USGS 11512000 gage on Fall Creek (S. Leonard, AECOM as KRRC Technical Representative, pers. comm., October 2018). Fall Creek diverted water would be gravity fed and plumbed to each rearing location and all circular tanks.

It is proposed that the hatchery diversion would not significantly alter Fall Creek flows measured at the USGS 11512000 gage or compliance with minimum Fall Creek flow requirements since the diversion flows for Fall Creek Hatchery would be diverted and returned (less evaporative losses) to Fall Creek upstream of the USGS 1151200 gage under the Proposed Project. This action would return most hatchery flows to Spring Creek before the point where the CDFW imposed Yreka's Fall Creek bypass is measured.

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[19] Goodman, D., Harvey M., Hughes R., Kimmerer, K., Ruggerone, G., (2011) Klamath River Expert Panel Final Report Scientific Assessment of Two Dam Removal Alternatives on Chinook Salmon, Appendix A, page 5.
[20] See: wildlife.ca.gov/Fishing/Hatcheries/Iron-Gate/History.

[21] Application ID #A025896, 5,465 acre/feet per year for fish propagation purposes. (DEIR Appendix "M".

However, the effect, if any, that Mitigation Measure 17[22] has at this point, is relevant because it is not clear where the flows will come from to satisfy the concept that "flows will be provided in the Fall Creek bypass reach to provide for the appropriate habitat needs of the" fish. Is this phrase meant to apply to Yreka's municipal diversion or PacifiCorp's 75 cfs Fall Creek and 16.5 cfs Spring Creek right to take? There is no explanation of how these flows can be created and not affect Yreka's diversion.

Further, unless Yreka's permit is amended, the permit's Condition F provides:

> "This permit does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, the permittee shall obtain authorization for an incidental take prior to construction or operation of the project. Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit."

The KRRC Definite Plan set out that the intention is to raise 75,000 Coho Yearlings and 115,000 Chinook Yearlings at the proposed Fall Creek Hatchery ("FCH").[23] These Coho Yearlings are now being raised at Iron Gate Hatchery ("IGH"). The DEIR ¶2.3.4, *et seq*. summarizes that the IGH, now raises steelhead, coho salmon, and Chinook salmon. The hatchery includes a warehouse, a hatchery building, four fish-rearing ponds, a fish ladder, a visitor center, and four employee residences. It has a fish trapping and holding facility including a fish ladder, holding tanks, and a processing facility at the downstream base of Iron Gate Dam. It is supplied by water from the present reservoir.

The objectives of the AKSA as detailed in the Definite Plan present imminent risks for the City of Yreka's Fall Creek water right. Specifically, the broad objective of the AKSA Fisheries Program is intended to reintroduce anadromous fish species which could migrate into Fall Creek. Reintroduction of fish species could lead to the increased prevalence of threatened or endangered species in and around the City of Yreka's points of diversion. Also, various habitat restoration requirements could have an impact on the nature of the flow in Fall Creek. CDFW's proposal to construct a new hatchery facility at the site of its defunct fish hatchery is adjacent to Yreka's points of diversion will likely cause the hatchery raised fish to return to Fall Creek due to these species homing mechanisms. The objective of the AKSA is for the reintroduction of anadromous species throughout their historic range above Iron Gate Dam and provides that the focus of

[22] "Additionally, if anadromous fish have passage to the Fall Creek following removal of the California dams, flows will be provided in the Fall Creek bypass reach to provide for the appropriate habitat needs of the anadromous fish species of any kind that are naturally and volitionally present in the Fall Creek bypass reach. Flows will be based on species specific habitat needs identified by the IMIC. The operation will also avoid and minimize take of any listed species present."
[23] Definite Plan (June 2018) Table 7.8-1.

habitat restoration and monitoring is to be the Upper Klamath River Basin. Retaining coho prorogation at the IGH is directly in line to the Upper Klamath Basin and must remain the place of propagation of coho hatchery production. Instead the majority of this hatchery is proposed for demolition and eliminates coho production.[24]

The data clearly demonstrates that Yreka would only receive its fully permitted water allocation *one month out of the three-year period during low flow years* if CDFW's junior, lower priority appropriation was permitted for the use of a Fall Creek hatchery/rearing ponds and if CDFW did *not* be return its hatchery flows above the gage as is presently proposed or if more water is used by the hatchery than is proposed CDFW. **If CDFW is allowed to construct a hatchery at Fall Creek, the return of its flows above the gage must be a made condition of that allowance.**

Further, as noted in the DEIR, it is "unclear" how the Fall Creek Hatchery would be "decommissioned" or "repurposed" at the expiration of the eight-year PacifiCorp financial commitment. What is known to this commentator is that at least one Indian Tribe desires to take over the operation of the hatchery. Should the State transfer its operation to a sovereign nation the next step, five years later, is for that tribe to request the Bureau of Indian Affairs to transfer the property into trust for the benefit of the Tribe. At that point neither the State, nor Yreka, would have any degree of control over the diversion to the hatchery and one would have to assume that, rather than the projected monthly Fall Creek Hatchery diversions set out in the DEIR, that the full allocation of 10 cfs would be used year around. On the basis of "federal reservation" arguments, some additional extraction might occur.

Accordingly, the threat to Yreka's continued extraction of 15 cfs is clear and imminent unless a **mitigation measure is placed into effect that the Fall Creek Hatchery be decommissioned at the end of PacifiCorp's financial commitment. The State of California should be required to set aside sufficient revenues to adequately finance this obligation.**

If the Proposed Fall Creek Hatchery is allowed to be constructed, given this consideration, Yreka requests that the effects of the Proposed Project be mitigated by action through SWRCB to amend Yreka's permit to reduce the present 15 cfs bypass to 5 cfs (15 cfs – 10 cfs = 5 cfs). As previously mentioned, when Fish and Wildlife requested this bypass flow it did not then have its own 10 CFS appropriation intended for its rearing ponds/raceways. If the Fall Creek Hatchery is permitted to be constructed, the rationale for the bypass is then mooted since proactive propagation measures would be in effect through the operation of the Fall Creek Hatchery and there would be no additional environmental need for the bypass.

[24] California Department of Fish and Wildlife's website at: wildlife.ca.gov/Fishing/Hatcheries/Iron-Gate

The Definite Plan and DEIR propose hatchery propagation of threatened Coho salmon at the proposed FCH to the stage of yearling maturation. By hatchery raising cohoes to the yearling stage it is certain that they will be imprinted to return to Fall Creek as their "home" rather than where they are actually planted in the various tributaries, the Klamath River itself or within the Upper Klamath River Basin – which is the actual objective of the Proposed Project. This imprinting occurs at different times caused by differing hormonal conditions in natural salmon, but in hatchery raised salmon, the homing mechanism is almost certainly imprinted between the fry and smolt stages.[25] Thus, not only is Yreka's water diversion suddenly directly in conflict with protections for ESA species but the objectives of the Proposed Plan themselves are not accomplished. As a consequence, Fall Creek is likely to be designed as "critical habitat" for the cohoes in a creek that does not itself provide good habitat for spawning, in which previous studies have shown varying returns between 0 to 10%. What data does the latest Biological Opinion have to say about this effect? "Little is known about juvenile coho salmon movement into, out of, and within the mainstem of the Klamath River. The analysis for this BA assumes similar movement patterns as nearby drainages, where data is available."[26]

The ESA, enacted in 1973, tasked all federal agencies with the protection of endangered species, declaring: "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." Early litigation clarified that species protection occupied a position of utmost priority, superseding other policy and economic considerations.

Two federal agencies—the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS)—are primarily responsible for implementing the ESA, under authority delegated by the U.S. Department of the Interior and the U.S. Department of Commerce, respectively.

To oversimplify how ESA operates, endangered or threatened species are first recognized and listed through a science-based administrative process, and the implementing agencies also identify their critical habitat.[27] Federal agency actions that might adversely affect a listed species can proceed only after consultation with either the FWS or NMFS (depending on the species involved), which then advise the federal agency through a Biological Opinion (BiOp) whether the proposed action would jeopardize the continued existence of the species or damage or destroy its critical habitat, and what "prudent and reasonable alternatives" might be available.

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[25] Dittman, A.H. and Quinn, T. P. (1996) Homing in Pacific Salmon: Mechanisms and Ecological Basis, *Journal of Experimental Biology* 199, 83–91.
[26] Bureau of Reclamation, Final Biological Assessment the Effects of the Proposed Action to Operate the Klamath Project from April 1, 2019 through March 31, 2029 on Federally-Listed Threatened and Endangered Species, Section 3.6.3.
[27] 16 U.S.C. § 1532(15). 75 Id. § 1533.

Coho salmon once existed throughout the Basin but are now extinct above Iron Gate Dam, the lowermost Klamath mainstem dam that blocks fish passage. This salmon species was listed as threatened in 1997 and is NMFS's responsibility to manage and recover.

Meanwhile the BOR BiOp contains a request for formal consultation under section 7(a)(2) of the ESA with NMFS relating to coho salmon and their designated critical habitat. Until this occurs, it is premature to circulate this DEIR because it is impossible for Yreka to comment upon the Proposed Project with that issue unresolved.

Because of the inherent conflict between Yreka's right to take water for municipal purposes and the potential effect of the propagation of threatened species negatively affecting that right to take its full 15 cfs, as the parties agreed in the AKSA, **Yreka requests that a mitigation measure be imposed that, should the FCH be constructed, no ESA endangered or threatened species be propagated at FCH.**

It has been found that it is possible to prevent imprinting by treating water with activated carbon and ion-exchange resin, insoluble in petroleum-ether, dialyzable, non-volatile, and heat-stable and then imprinted with ß-phenylethyl alcohol (PEA) or morpholine for at least 14 days during smoltification and lured into unfamiliar streams scented with these odors during homing migration a few years later. Alternatively, in a natural stream environment, however, after preventing imprinting in the hatchery environment, smolts should be imprinted immediately by different odors when they encounter a branch stream that flows into a main stream during downstream migration as in the sequential imprinting hypothesis.[28] **If construction of the FCH is approved, and further if CDFW is not prohibited from raising ESA threatened species at FCH, this mitigation measure must be imposed** to mitigate the probability that the cohoes will be imprinted to return to Fall Creek as a result of their rearing at the FCH.

To further prevent Fall Creek from becoming a magnet for salmonid spawning, **Yreka seeks a mitigation condition that all fish propagated at FHC be planted at other tributaries and areas where they will be likely to return and that they not be released at Fall Creek itself.**

This means planting the yearlings where the habitat is favorable to coho spawning propelling spawning upward into the Upper Klamath Basin. However, Oregon and California do not agree on whether hatchery fish should be propagated to accomplish the objectives of the Proposed Project. Oregon endorses a policy of native fishery production while CDFW originally proposed

[28] Ueda, H. (2014) Homing Ability and Migration Success in Pacific Salmon: Mechanistic Insights from Biotelemetry, Endocrinology, and Neurophysiology, *Mar Ecol Prog Ser* Vol. 496: 219–232.

a "wait and see" approach before engaging in hatchery operations[29]. All parties agree that hatchery fish compete with native fish, could create increased risk of disease, and could negatively affect natural fish production. In this regard the latest BiOp states:

> "Uncertainty exists concerning the interrelationship of hatchery produced fish with the naturally produced coho salmon when both are present in the natural environment (i.e., after the hatchery fish are released into the Klamath River). This includes the role of hatchery produced salmon in the spread and proliferation of fish disease. The effects of hatchery operations are included as a Baseline condition."[30]

Yet, CDFW is proposing to directly and immediately proceed with the demolition of IGH and construction of FCH. While it is understandable that CDFW desires to proceed while the project funding is occurring, PacifiCorp's commitment for funding would remain in place in the event that "waiting and seeing" proves out to require hatchery produced fish following dam decommissioning.

While Yreka is neutral on whether or not the Proposed Project dams are decommissioned, it is interesting that it has been determined that the parasites that are largely creating the mortality of the salmon can be obviated by simply flushing the parasites off the rocks on the bottom of the river. While it is proposed that this flushing will naturally occur through flooding once the dams are decommissioned, there are no studies presented in the Definite Plan nor any proposed alternative in the DEIR, that suggests that the BOR cannot simply perform this task though the rapid release of water with the dams intact. This is one of the functions of the BOR – to regulate the flow of water while balancing water usage with species recovery alternatives.

There is no study, proposal requiring or discussion that hatchery raised fish be genetically diversified to assure they do not pose a risk to wild populations. **This mitigation is requested.**

The characterization in the DEIR that there would be "upgraded plumbing" with the construction of a new Fall Creek Hatchery is a gross minimization of the water facilities that would be constructed. Attachment 5 demonstrates the last water layout design plan provided to Yreka by KRRC's engineers. Attachment 6 is the latest Fall Creek Hatchery layout provided to Yreka. The DEIR

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[29] Klamath Basin Restoration Agreement (2010) §11.4.1.

[30] Bureau of Reclamation, Final Biological Assessment the Effects of the Proposed Action to Operate the Klamath Project from April 1, 2019 through March 31, 2029 on Federally-Listed Threatened and Endangered Species, Section 3.6.3.

Should Yreka's water diversion impounds be altered in any manner, coordination between all parties would be absolutely necessary to maintain operations. In fact, the same coordination from all who are diverting water from Fall Creek (including any newly constructed fish hatchery) is necessary when Yreka performs periodic maintenance on its diversion impounds and fish screens.

The Consequences of the Proposed Spring Creek Flow Restriction Condition Taken Together with Yreka's Water Permit Bypass Condition Will Restrict Yreka From Taking its Permitted Allocation

In the conditions proposed for renewal of the hydroelectric licenses, it has been proposed that PacifiCorp's 16.5 diversion from Spring Creek to its Fall Creek Hydroelectric facility be discontinued during the low-flow months of the summer. These are also Yreka's highest demand months. If this condition were implemented, together with the consequences of the CDFW 15 cfs bypass, Yreka would be deprived of its municipal water source during its most critical period. Accordingly, Yreka requests that a **mitigation measure be imposed that SWQCB recommend to FERC that it not impose the proposed restriction of the diversion of Spring Creek water to the Facility.**

The Klamath River Basin Compact Commission is an Essential party and is Properly the Lead Agency for the Purposes of this Circulating the DEIR and making Determinations Upon it.

Section 1.1 of the Draft Environmental Impact Report (DEIR; KRRC 2018; hereafter known as DEIR) states that the Klamath River Renewal Corporation (KRRC) has applied to the Federal Energy Regulatory Commission (FERC) to decommission and remove the four Lower Klamath Project dams (Proposed Project). Section 1.1 further states that FERC is the federal lead agency that licenses the construction, operation, and decommissioning of most hydroelectric dams in the United States.

However, in the DEIR we are now required to comment upon, the SWRCB has assumed the lead agency role and prepared the Lower Klamath Project License Surrender Project DEIR without following the legislative intent of CEQA, CEQA Guidelines, and CEQ NEPA regulations and, equally significant, the state and federal laws relating to the Klamath River Compact. This is a logical non sequitur under the law since the project is intended to be carried out by the KRRC, a non-public 501(c)(3) organization. If 14 Cal Code Regs §15051(a) applies at all, it does not apply to SWQCB but to the Compact Commission. Pursuant to the Law of the River and the Law of the Union, the Commission is specifically designated as the regional planning agency with the greatest responsibility for supervising or approving the project as a whole pursuant to 14 Cal Code Regs §15051(b).

Article IX (Administration) of the Compact creates the Klamath River Compact Commission. (See 69 Stat. 613, 71 Stat. 497 [1957]; Cal. Water Code §§ 5900-5901 and ORS 542.610 to 542.630) Under Article IX subparagraph 1 creates the commission to administer the compact (the "Commission"). The Commission consists of three: a ex officio representative designated by the State of Oregon Water Resources; an ex officio representative designated by the SWRCB and a nonvoting Chair of the Commission designated by the President of the United States. Action is effective only if it is unanimously affirmed by both voting members. The Commission is required to appoint an executive director. Subparagraph 8 requires the Commission to be subject to open meeting laws.

The Commission is obligated to hold public hearings and to submit to the Governor of each state a budget of its estimated expenditures for such period as required by the laws of that state for presentation to the legislature thereof. Each state pledges itself to appropriate and pay over to the commission one-half of the amount required to finance the commission's estimated expenditures as set forth in each of its budgets. The Commission is required to transmit to the legislature and Governor of each state and to the President of the United States an annual report covering the finances and activities of the Commission and embodying such plans, recommendations and findings as may have been adopted by the Commission and to be annually audited by a Certified Public Accountant.

The Commission has monetary restrictions. It is prohibited from pledging the credit of any government except by and with the authority of the legislative body thereof given pursuant to and in keeping with the constitution of such government and is also prohibited from incurring any obligations prior to the availability of funds adequate to meet them. The Commission is empowered to: 1) borrow, accept or contract for the services of personnel from any government or agency thereof, from any intergovernmental agency, or from any other entity; 2) Accept for any of its purposes and functions under this compact any and all donations, gifts, grants of money, equipment, supplies, materials and services from any government or agency thereof or intergovernmental agency or from any other entity; 3) Acquire, hold and dispose of real and personal property as may be necessary in the performance of its functions; and 4) Make such studies, surveys and investigations as are necessary in carrying out the provisions of this compact. Obviously, the studies relevant to the Proposed Project and the preparation of the related environmental DEIR fall within these categories.

The DEIR and the DEIS Should be Required to be jointly Submitted

The National Environmental Policy Act (NEPA) (42 USC §§4321-4370h), was adopted to mandate public agencies to consider the environmental impacts of their actions, to document

those impacts, and to disclose that documentation to the public. See *No Oil, Inc. v City of Los Angeles* (1974) 13 C3d 68, 86 n21, 118 CR 34; *Friends of Mammoth v Board of Supervisors* (1972) 8 C3d 247, 261, 104 CR 761; Selmi, The Judicial Development of the California Environmental Quality Act, 18 UC Davis L Rev 197 (1984).

If a project requires approvals from a California public agency but will also be carried out, financed, or approved in part by a federal agency, preparation of a joint EIR/EIS may be required (see 14 Cal Code Regs §§15220-15228), and the joint document must usually meet the requirements of both CEQA and NEPA. This is particularly applicable where projects that have a significant impact on matters within federal jurisdiction, such as some projects that require a permit to fill wetlands or that may affect waters that are subject to United States jurisdiction under §404 of the Federal Water Pollution Control Act (Federal Clean Water Act) (33 USC §1344).

This project expressly concerns the flow of navigable water between Oregon and California and through federal (US Forest Service) and Tribal reservations Klamath Tribe, Karuk Tribe, Hoopa Tribe and Yurok Tribe). Each of these tribes are federally recognized. Not only is an express federal approval an integral part of the implementation of this plan, the deconstruction of four hydroelectric dams, under FERC required considerations, significantly affects the quality of the human environment which separately requires NEPA environmental assessment. 42 USC §4332(2)(C), 40 CFR §§1501.4(b), 1508.9.

The National Environmental Policy Act (NEPA), is intended to ensure that Federal agencies actively participate as cooperating agencies in other agency's NEPA processes. The CEQA regulations addressing cooperating agencies status (40 C.F.R. §§ 1501.6 & 1508.5) implement the NEPA mandate that Federal agencies responsible for preparing NEPA analyses and documentation do so "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise. (42 U.S.C. §§ 4331(a), 4332(2)).

The Intergovernmental Cooperation Act contains specific coordinated planning requirements for local, state and federal agencies. Presidential Executive Order 12372 requires federal agencies to coordinate actions and projects with local governments so that local impacts arising from federal projects may be identified.

The National Environmental Policy Act (NEPA) applies to projects that are carried out, financed, or approved in whole or in part by federal agencies; therefore, FERC must prepare an environmental impact statement prior to acting with respect to the Proposed Project.

Yreka respectfully requests SWQCB to take the action above stated.

Respectfully Submitted,

Dohn Henion
City Attorney, City of Yreka

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

AMENDED PERMIT FOR DIVERSION AND USE OF WATER

APPLICATION 22551 PERMIT 15379

Permittee: City of Yreka
701 Fourth Street
Yreka, CA 96097

Therefore, an amended permit on **Application 22551** filed on **August 12, 1966** has been approved by the State Water Board SUBJECT TO PRIOR RIGHTS and to the limitations and conditions of this amended permit.

Permittee is hereby authorized to divert and use water as follows:

1. Source of water

Source:	Tributary to:
(1) Unnamed Stream	**Fall Creek thence Klamath River**
(2) Fall Creek	**Klamath River**

within the County of **Siskiyou**.

2. Location of points of diversion

By California Coordinate System of 1983 in Zone 1	40-acre subdivision of public land survey or projection thereof	Section (Projected)*	Township	Range	Base and Meridian
(1) North 2,606,815 feet and East 6,463,303 feet	**SW ¼ of NW ¼**	**30**	**48N**	**4W**	**MD**
(2) North 2,606,933 feet and East 6,462,972 feet	**SE ¼ of NE ¼**	**25**	**48N**	**5W**	**MD**

Location of point of rediversion

By California Coordinate System of 1983 in Zone 1	40-acre subdivision of public land survey or projection thereof	Section (Projected)*	Township	Range	Base and Meridian
(1) North 2,606,815 feet and East 6,463,303 feet	**SW ¼ of NW ¼**	**30**	**48N**	**4W**	**MD**

3. Purpose of use	4. Place of use					
	40-acre subdivision of public land survey or projection thereof	Section (Projected)*	Township	Range	Base and Meridian	Acres
Municipal, Domestic and Industrial	**Within the City of Yreka service area boundary which is a gross 5,490 acres within Sections 7 and 19, T45N, R6W, MDB&M; Sections 12, 13, 14, 15, 21, 22, 23, 24, 26, 27, 28, 33, 34, and 35, T45N, R7W, MDB&M; and Sections 3 and 4, T44N, R7W, MDB&M; as shown on map dated March 2012.**					

The place of use is shown on map filed with the State Water Board.

5. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed **15 cubic feet per second** to be diverted from **January 1 to December 31** of each year. The maximum amount diverted under this permit shall not exceed **6,300 acre-feet per year**.

(0000005A)

6. Construction work and complete application of the water to the authorized use shall be prosecuted with reasonable diligence and completed by **December 31, 2022**.

(0000009)

7. This permit shall not be construed as conferring upon the Permittee right of access to the points of diversion.

(0000022)

8. Permittee shall comply with the following provisions which are derived from the agreement between permittee and the Department of Fish and Game executed on January 9, 1967 and filed with the State Water Board:

    1. Permittee shall, during the diversion period, bypass a minimum flow of 15.0 cubic feet per second or the natural flow of the stream whenever it is less than 15.0 cubic feet per second to maintain fish life. Such a flow shall be measured by a gage presently maintained by the Pacific Power and Light Company which is located downstream from the proposed point of diversion.

    2. For the protection, propagation and preservation of fish life, permittee shall not divert water in any manner that will interfere with or diminish the flow release schedule to be made below Iron Gate Dam on the Klamath River, as provided for in License 9457 (Application 17527).

    3. A velocity barrier to prevent upstream migration by fish will be constructed in conjunction with the diversion dam proposed by the permittee immediately below the Fall Creek powerhouse in conformance with functional plans to be provided by the Department of Fish and Game. For the preservation of wildlife, particularly black-tailed deer, the permittee shall construct facilities, approved by the Department of Fish and Game, at the diversion intake to prevent wildlife loss.

    Inclusion in this permit of certain provisions of the referenced agreement shall not be construed as disapproval of other provisions of the agreement or as affecting the enforceability, as between the parties, of such other provisions insofar as they are not inconsistent with the terms of this permit.

(0000024)

9. Permittee shall consult with the Division of Water Rights and, within one year from the date of this permit, shall submit to the State Water Board its Urban Water Management Plan as prepared and adopted in conformance with section 10610, et seq. of the California Water Code, supplemented by any additional information that may be required by the Board.

All cost-effective measures identified in the Urban Water Management Plan and any supplements thereto shall be implemented in accordance with the schedule for implementation found therein.

(0000029A)

10. If it is determined after permit issuance that the as-built conditions of the project are not correctly represented by the map(s) prepared to accompany the application, permittee shall, at his expense have the subject map(s) updated or replaced with equivalent as-built map(s). Said revision(s) or new map(s) shall be prepared by a civil engineer or land surveyor registered or licensed in the State of California and shall meet the requirements prescribed in section 715 and sections 717 through 723 of the California Code of Regulations, Title 23. Said revision(s) or map(s) shall be furnished upon request of the Deputy Director for Water Rights.

(0000030)

11. No water shall be diverted under this permit unless the flow in Fall Creek is at or above 15.0 cubic feet per second, as measured at the Gauging Station on Fall Creek.

(0140060)

12. Permittee shall install a device, satisfactory to the State Water Board, which is capable of measuring the bypass flows required by the conditions of this permit. Said measuring device shall be properly maintained.

(0060062B)

13. No water shall be diverted under this permit unless, within six months of the date of this permit, Permittee is monitoring the bypass flow required by this permit in accordance with a compliance plan, satisfactory to the Deputy Director for Water Rights. Permittee shall submit a report on bypass flow compliance activities in accordance with the schedule contained in the compliance plan.

(0000070)

14. No water shall be directly diverted under this permit unless Permittee is monitoring and reporting said diversion of water. This monitoring shall be conducted using devices and methods satisfactory to the Deputy Director for Water Rights. The devices shall be capable of monitoring of the rate and quantity of water diverted and shall be properly maintained.

Right holder shall provide the Division of Water Rights with evidence that the devices have been installed with the first annual report submitted after device installation. Right holder shall provide the Division of Water Rights with evidence that substantiates that the devices are functioning properly every five years after device installation as an enclosure to the current annual report or whenever requested by the Division of Water Rights.

Right holder shall maintain a record of all diversions under this right that includes the date, time, rate of diversion, and the amount of water diverted. The records shall be submitted with the annual report or whenever requested by the Division of Water Rights.

(000000R)

THIS PERMIT IS ALSO SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

A. The amount authorized for appropriation may be reduced in the license if investigation warrants.

(0000006)

B. Progress reports shall be submitted promptly by permittee when requested by the State Water Board until a license is issued.

(0000010)

C. Permittee shall allow representatives of the State Water Board and other parties, as may be authorized from time to time by the State Water Board, reasonable access to project works to determine compliance with the terms of this permit.

(0000011)

D. Pursuant to California Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the State Water Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the State Water Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the State Water Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the State Water Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Section 2; is consistent with the public interest; and is necessary to preserve or restore the uses protected by the public trust.

(0000012)

E. The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the State Water Board if, after notice to the permittee and an opportunity for hearing, the State Water Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the State Water Board finds that (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

(0000013)

F. This permit does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, the permittee shall obtain authorization for an incidental take prior to construction or operation of the project. Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit.

(0000014)

G. Permittee shall maintain records of the amount of water diverted and used to enable the State Water Board to determine the amount of water that has been applied to beneficial use pursuant to Water Code section 1605.

(0000015)

H. No work shall commence and no water shall be diverted, stored or used under this permit until a copy of a stream or lake alteration agreement between the Department of Fish and Game and the permittee is filed with the Division of Water Rights. Compliance with the terms and conditions of the agreement is the responsibility of the permittee. If a stream or lake agreement is not necessary for this permitted project, the permittee shall provide the Division of Water Rights a copy of a waiver signed by the Department of Fish and Game.

(0000063)

This permit is issued and permittee takes it subject to the following provisions of the Water Code:

Section 1390. A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code), but no longer.

Section 1391. Every permit shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed.

Section 1392. Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any permittee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

STATE WATER RESOURCES CONTROL BOARD

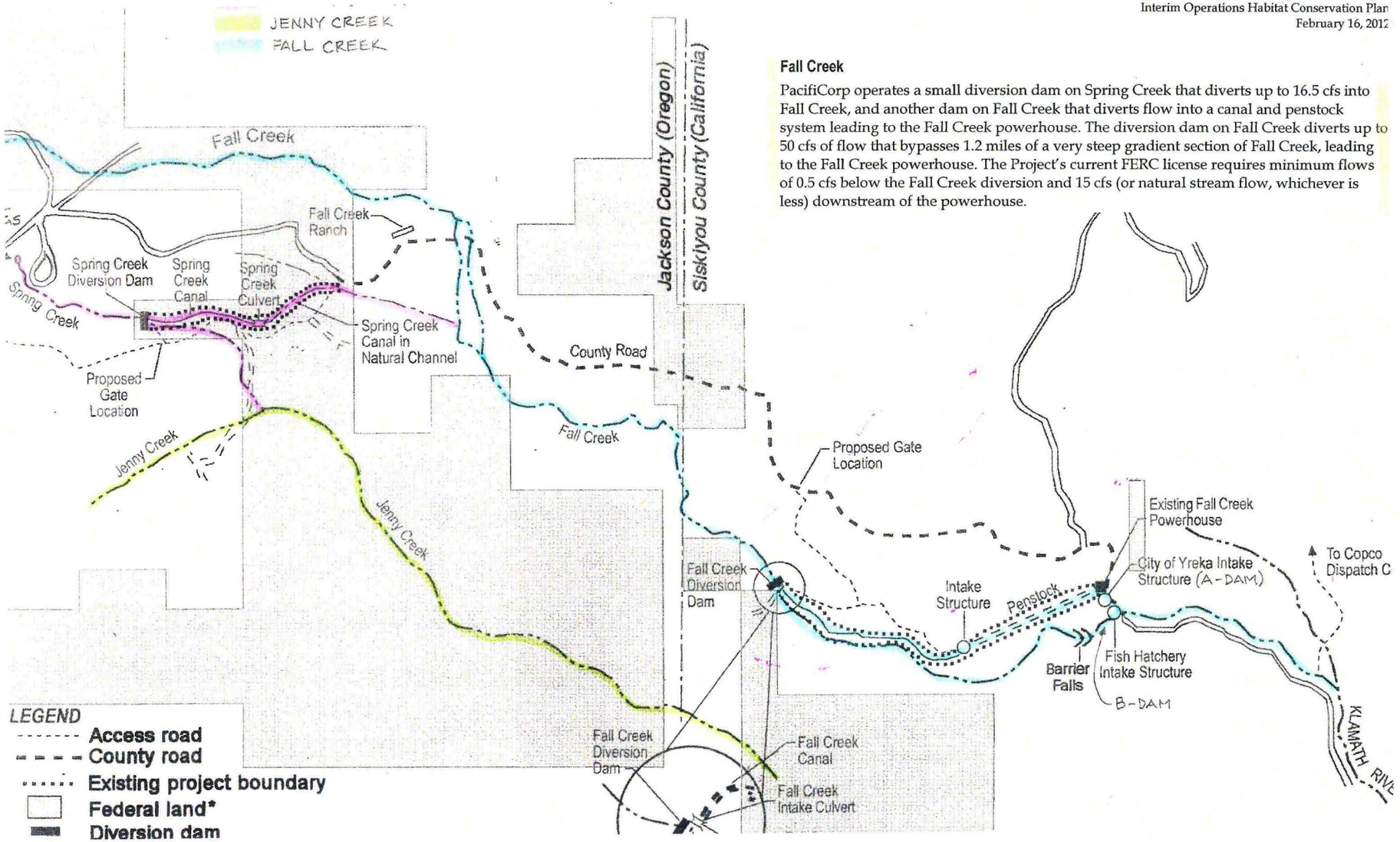
ORIGINAL SIGNED BY:

Barbara Evoy, Deputy Director
Division of Water Rights

Dated: SEPT 12 2012

Fall Creek

PacifiCorp operates a small diversion dam on Spring Creek that diverts up to 16.5 cfs into Fall Creek, and another dam on Fall Creek that diverts flow into a canal and penstock system leading to the Fall Creek powerhouse. The diversion dam on Fall Creek diverts up to 50 cfs of flow that bypasses 1.2 miles of a very steep gradient section of Fall Creek, leading to the Fall Creek powerhouse. The Project's current FERC license requires minimum flows of 0.5 cfs below the Fall Creek diversion and 15 cfs (or natural stream flow, whichever is less) downstream of the powerhouse.



Attachment 2


Dam B /
Yreka Intake
Powerhouse
Tailrace Canal
Fall Creek
Dam A
Upper Rearing Ponds
Hatchery Diversion
Structure
Copco Road
Fall Creek Bridge
Lower Rearing Ponds

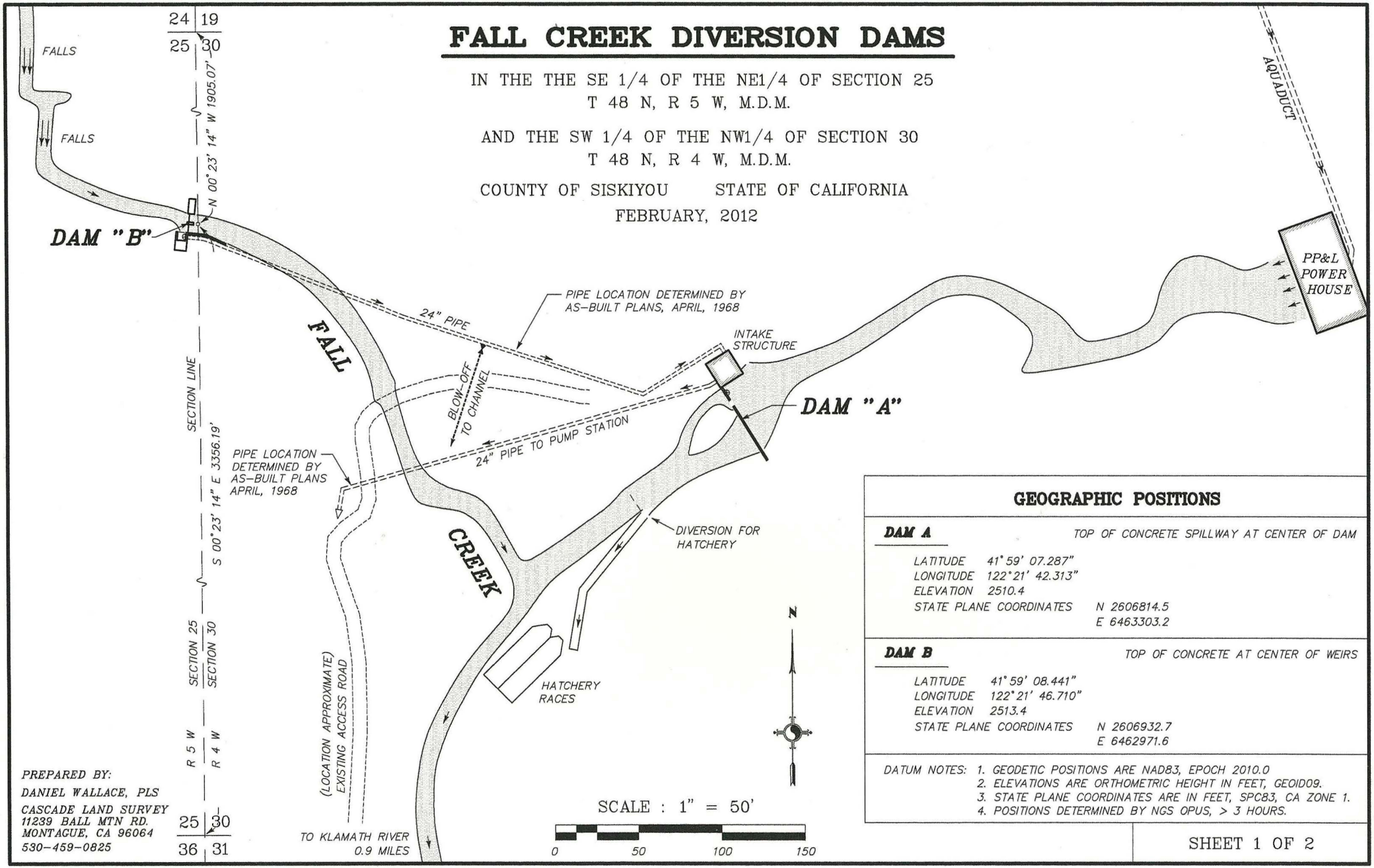
FALL CREEK DIVERSION DAMS

IN THE THE SE 1/4 OF THE NE1/4 OF SECTION 25
T 48 N, R 5 W, M.D.M.

AND THE SW 1/4 OF THE NW1/4 OF SECTION 30
T 48 N, R 4 W, M.D.M.

COUNTY OF SISKIYOU STATE OF CALIFORNIA

FEBRUARY, 2012



PREPARED BY:
DANIEL WALLACE, PLS
CASCADE LAND SURVEY
11239 BALL MTN RD.
MONTAGUE, CA 96064
530-459-0825

GEOGRAPHIC POSITIONS

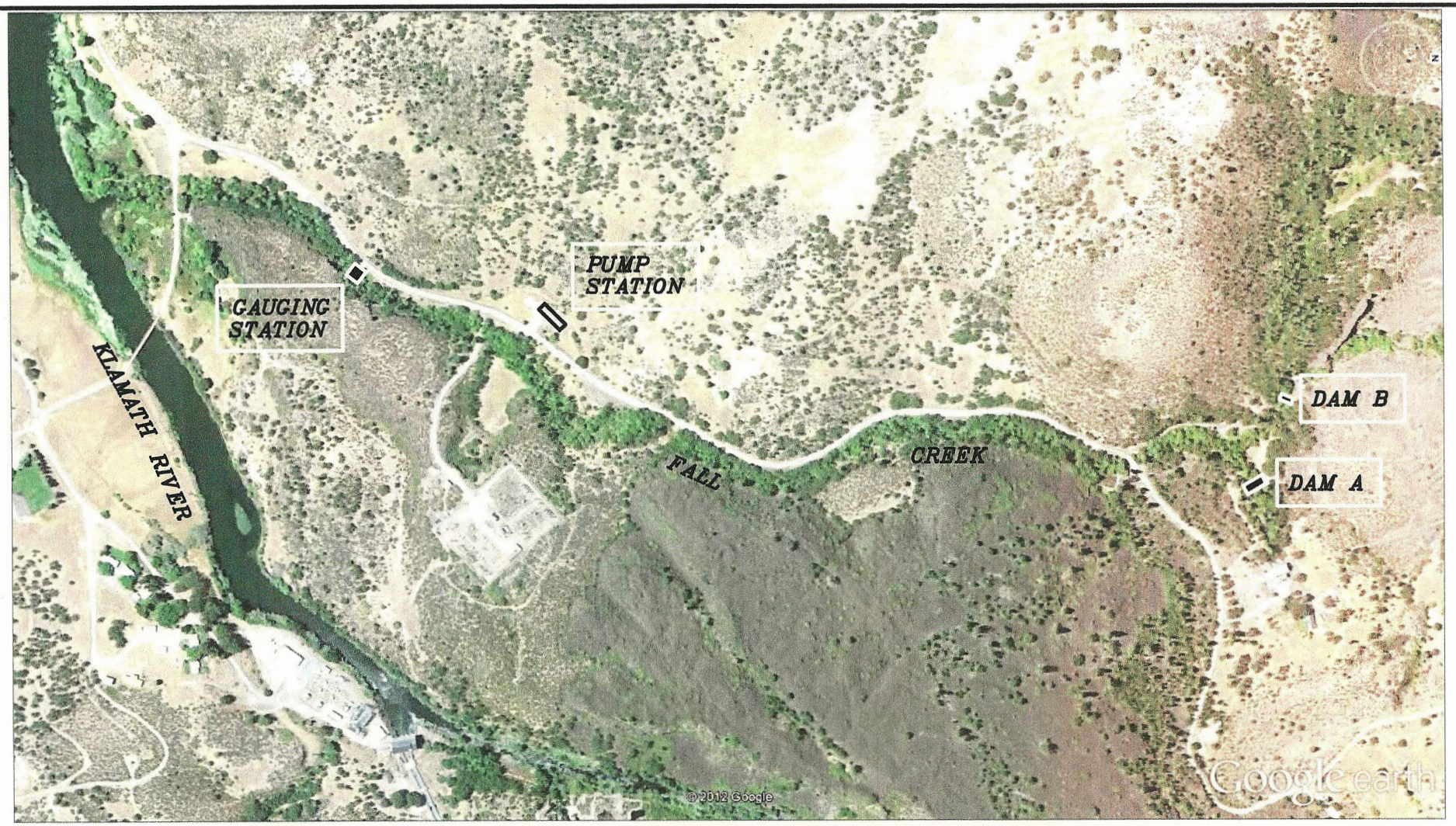
DAM A — *TOP OF CONCRETE SPILLWAY AT CENTER OF DAM*

LATITUDE	*41° 59' 07.287"*
LONGITUDE	*122° 21' 42.313"*
ELEVATION	*2510.4*
STATE PLANE COORDINATES	*N 2606814.5*
	E 6463303.2

DAM B — *TOP OF CONCRETE AT CENTER OF WEIRS*

LATITUDE	*41° 59' 08.441"*
LONGITUDE	*122° 21' 46.710"*
ELEVATION	*2513.4*
STATE PLANE COORDINATES	*N 2606932.7*
	E 6462971.6

DATUM NOTES:
1. *GEODETIC POSITIONS ARE NAD83, EPOCH 2010.0*
2. *ELEVATIONS ARE ORTHOMETRIC HEIGHT IN FEET, GEOID09.*
3. *STATE PLANE COORDINATES ARE IN FEET, SPC83, CA ZONE 1.*
4. *POSITIONS DETERMINED BY NGS OPUS, > 3 HOURS.*



FALL CREEK DIVERSION DAMS

SHOWING DIVERSIONS, PUMP HOUSE & GAUGING STATION

0 400 800 1200

SCALE : 1" = 400'

GEOGRAPHIC POSITIONS

GAUGING STATION
LAT: 41° 58' 31.24"
LONG: 122° 21' 54.87"
ELEVATION: 2368 (GROUND)
STATE PLANE COORDINATES:
N 2603169
E 6462339

PUMP HOUSE
LAT: 41° 58' 39.00"
LONG: 122° 21' 52.29"
ELEV: 2398 (SHOP FLOOR)
STATE PLANE COORDINATES:
N 2603954
E 6462538

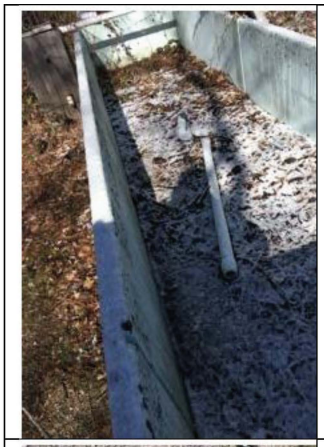
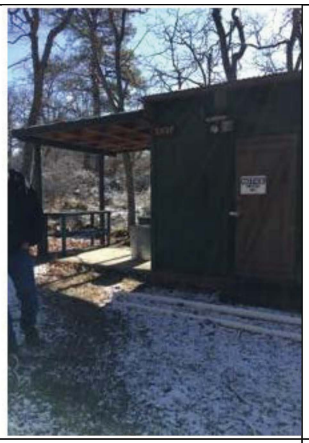
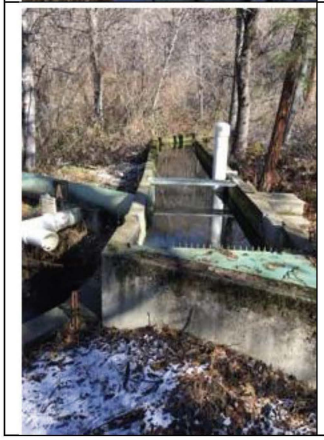
N

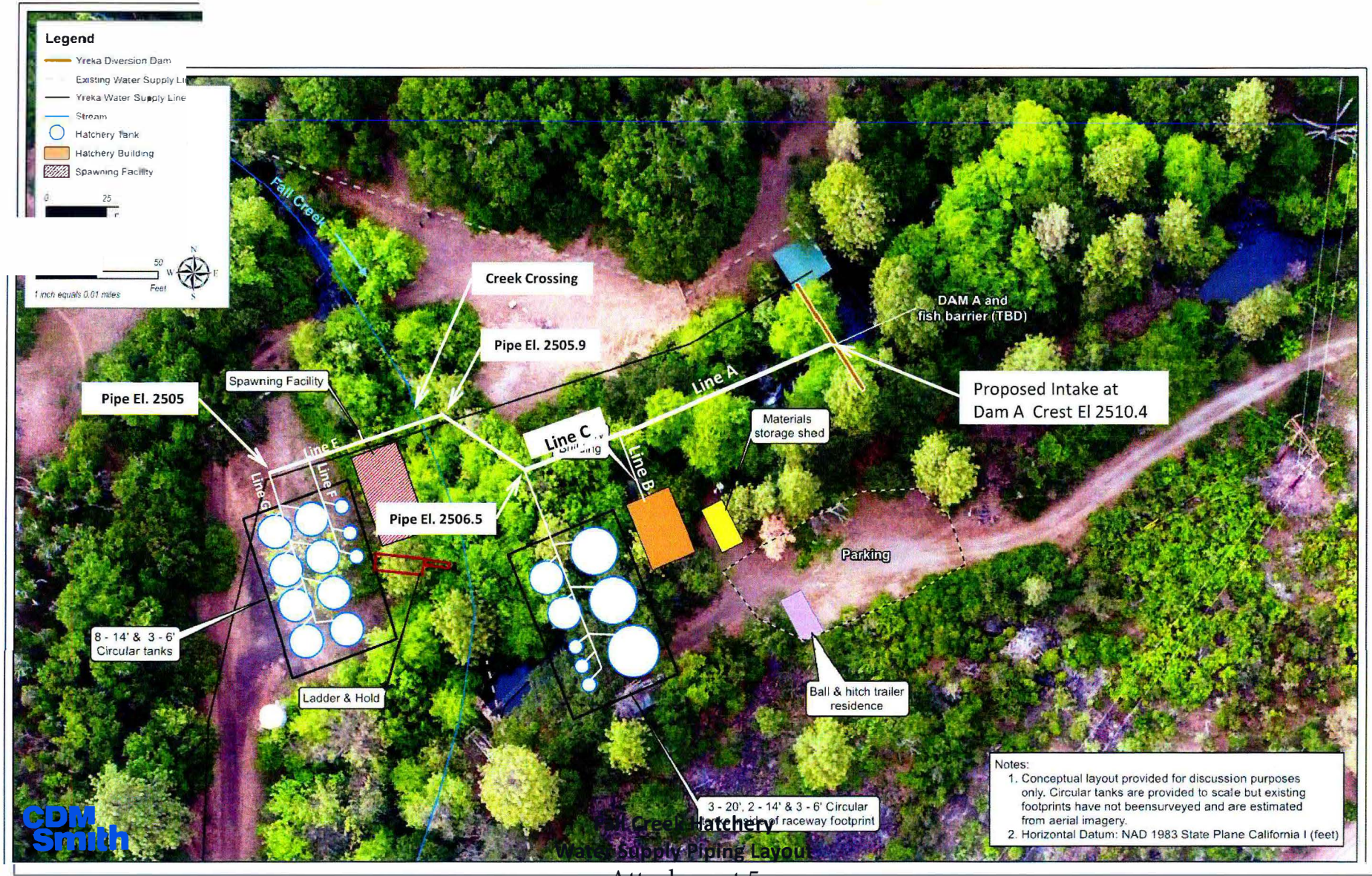
SHEET 2 OF 2

Attachment 3

Attachment 3
Present state of Fall
Creek Fishery Improvements

Attachment 4



Attachment 5

Line A	Line B	Line C	Line D	Line E	Spawning Facility	Line F	Line G
105 ft	25 ft	40 ft	60 ft	155 ft	10 ft	42ft	72 ft
4.8% slope	2% slope	1.3% slope	1.7% slope	1% slope	5% slope	1.2% slope	0.7% slope
8.15 cfs	0.18 cfs	7.97 cfs	3 cfs	4.97 cfs	0.67 cfs	0.14 cfs	4.1 cfs
Pipe Dia: 16"	Pipe Dia: 4"	Pipe Dia: 16"	Pipe Dia: 12"	Pipe Dia: 14"	Pipe Dia: 6"	Pipe Dia: 4"	Pipe Dia: 14"

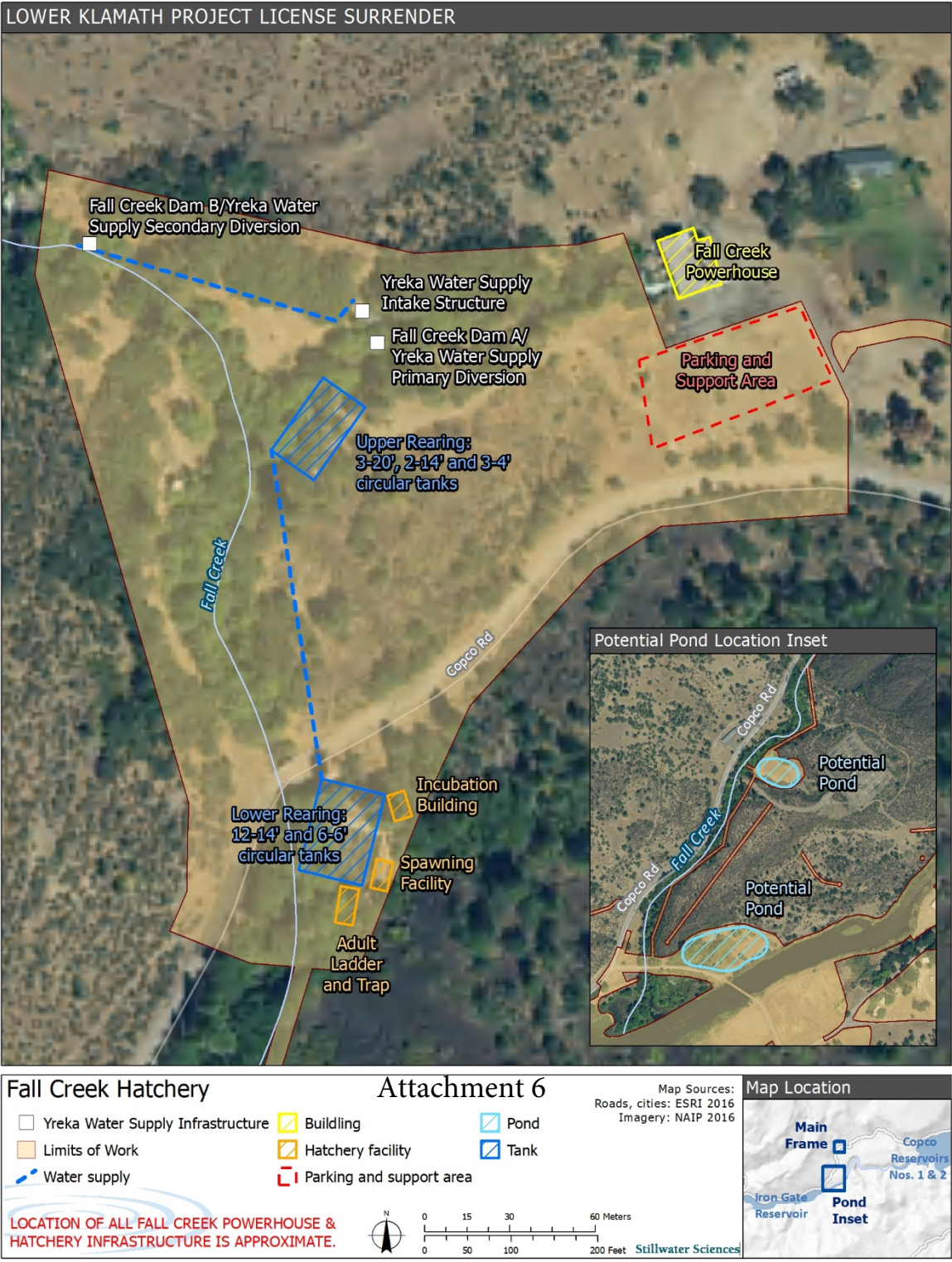


Figure 2.7-15. Fall Creek Hatchery Existing Features and Proposed Modifications.