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**Via Electronic Mail**

January 28, 2016

State Water Resources Control Board  
Division of Water Rights  
Water Quality Certification Program  
Attention: Mr. Parker Thaler  
P.O. Box 2000  
Sacramento, CA 95812-2000

E-mail: [parker.thaler@waterboards.ca.gov](mailto:parker.thaler@waterboards.ca.gov)

Re: Klamath Hydroelectric Project EIR – Scoping Comments of Hoopa Valley Tribe

Dear Mr. Thaler:

On behalf of the Hoopa Valley Tribe, we submit the following comments regarding the scope and content of the Board's EIR relating to the application for Section 401 certification of the Klamath Hydroelectric Project. These comments are filed in response to the November 30, 2015 Notice of Preparation and of Scoping Meetings for an Environmental Impact Report for 401 Water Quality Certification of the Klamath Hydroelectric Project ("Scoping Notice").

On February 23, 2009, the Hoopa Valley Tribe submitted Scoping Comments in response to the Board's similar September 30, 2008 Notice of Preparation regarding this Project. These are incorporated by this reference. However, in *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, D.C. Cir. No. 14-1271, the Tribe explained that the Board has since waived its right to require a Section 401 certification for the Klamath Hydroelectric Project relicensing application because of the abeyances in processing since 2008. If the Court agrees, the preparation of an EIR now on PacifiCorp's relicensing will become unnecessary. Nevertheless, because a Section 401 application for certification of a closely related Klamath Hydroelectric decommissioning proposal is likely, these Scoping Comments will be relevant regardless of the outcome of this litigation.

1. The Hoopa Valley Tribe Agrees That a Separate EIR is Necessary under CEQA Because the FERC EIS is Inadequate and Violates NEPA.

The State Water Board's Scoping Notice mentions that "the FERC EIS does not fully comply with the requirements of CEQA." The Hoopa Valley Tribe submitted comments on both the Draft and Final EIS prepared in the FERC proceedings. Some of the Tribe's objections to the Final EIS that are directly relevant to the State Water Board proceeding are as follows:

- (a) the facts relied upon in the Final EIS are inconsistent with the factual findings and scientific evidence submitted at the August 2006 EPA Act Trial-Type hearing;
- (b) the Final EIS failed to consider viable alternatives such as full project decommissioning and dam removal;
- (c) the Final EIS improperly dismissed dam removal alternatives despite evidence that removal of dams is likely the only way for the project to satisfy applicable water quality standards; and
- (d) the Preferred Alternative in the Final EIS improperly fails to include the mandatory conditions prescribed by the Departments of Interior and Commerce.

2. The Tribe Supports the Alternatives Identified in the State Water Board Scoping Notice, but Believes the Board Should also Evaluate a Four-Dam Removal Alternative.

The Tribe generally supports the range of alternatives developed by the State Water Board. The Tribe agrees that it would be improper for the State Water Board to evaluate any alternative that fails to include either of: (a) the Federal Agencies' mandatory Section 4(e) and Section 18 conditions or (b) the decommissioning and removal of one or more project dams. Thus, the Tribe agrees that the State Water Board should evaluate: (a) the FERC Staff Alternative with Mandatory Conditions; (b) the Removal of Iron Gate and Copco No. 1; and (c) the Removal of Iron Gate, Copco No. 1, and Copco No. 2.

In addition to the alternatives identified in the State Water Board's notice, the Tribe also believes that the State Water Board should fully evaluate a four-dam removal alternative, which would include the removal of J.C. Boyle Dam. Although the J.C. Boyle Dam is located in Oregon, the State Water Board must consider what impacts the existence and operation of that facility, and discharges therefrom, have on the overall project's ability to comply with water quality standards in California. It is possible that the State Water Board will determine, after review of the scientific evidence, that the project cannot satisfy water quality standards in California absent decommissioning and removal of J.C. Boyle Dam in Oregon. At this stage, the State Water Board should fully evaluate the impacts to water quality that arise at all project dams, including J.C. Boyle. Likewise, if removal of that facility is necessary to comply with California's standards, the EIR should evaluate that possible outcome. The Board should also evaluate removal of J.C. Boyle Dam as part of the Board's "CEQA No-Project Alternative."

The Tribe is unclear about the intended purpose of one alternative suggested for evaluation in the State Water Board's notice – "implementation of the Settlement Agreements measures to the extent the Settlement Agreements effect California's environmental resources." The referenced Settlement Agreements, the KBRA, the KHSA, and the UKBCA have collapsed. The KBRA expired on December 31, 2015. The other two Agreements were dependent upon the KBRA and upon failed legislation that could have ratified the now-expired KBRA. Thus, the KHSA and the UKBCA have become obsolete, although they have not yet been formally terminated.

Amendment of the KHSA is currently under discussion. In a series of letters, the Tribe has previously informed the Board of its concerns with the Agreement in Principle, which is substantially similar to the KHSA, and of the KHSA itself. Given the numerous off-ramps and withdrawal rights that could result in termination of the KHSA, the Tribe does not believe that the KHSA is likely adequately to protect Klamath water quality. Under no circumstances should the Board allow the KHSA process to further delay work on the EIR for the Section 401 certification. In addition, the Tribe is unaware of any proposed settlement alternative that does not include dam removal as an option. Thus, a "negotiated settlement" alternative is potentially redundant with other dam removal alternatives already proposed for consideration.

3. Removal of One or More Project Dams and Reservoirs is the Only Mitigation Measure That Will Allow Compliance with Applicable Water Quality Standards.

The best available evidence suggests that it is impossible to operate the Klamath Hydroelectric Project in compliance with applicable water quality requirements. The FERC EIS suggests that water quality objectives cannot be met absent dam removal. The Final EIS states: (1) "the project [without dam removal] would continue to adversely affect water quality conditions downstream of Iron Gate Dam, which has the potential to adversely affect [ESA-listed] juvenile Coho salmon" (FEIS, at 3-426); (2) "the project, as proposed, would continue to affect temperatures in the Klamath River;" (3) "even with implementation of best management practices that may be developed as part of a project-wide water quality management plan, it is likely that algal blooms would continue to occur in project reservoirs;" and (4) "some degree of project related nutrient enrichment would occur in the Klamath River downstream of Iron Gate Dam." FEIS, at 3-173, 3-174. Despite these findings, FERC did not choose dam removal as a preferred alternative, or as a means to restore Klamath water quality, because it would lower the economic value of the Project to the licensee.

In 2009, the Hoopa Valley Tribe also submitted with its Scoping Comments an independent analysis of water quality impacts as part of its Recommended Section 10(a) Terms and Conditions on March 29, 2006 (attaching excerpt of 10(a) conditions related to water quality). The Hoopa 10(a) conditions also confirm that many water quality impacts resulting from the project can be mitigated only through removal of the dams and draining project reservoirs.

Regarding impacts on water temperature, page 68 of the Hoopa 10(a) report states: “PacifiCorp’s own analyses make it clear that the KHP’s effects on water temperature are immitigable; therefore, the only way to substantially reduce the impacts is to remove all KHP dams and drain the reservoirs.” The report also noted that dam removal was the only way to mitigate the project’s impact on pH levels. “Dam removal would eliminate both the KHP’s direct and indirect effects on pH. We are not aware of any way to mitigate the KHP’s impact to pH.” Hoopa 10(a) Report, at p. 86. Page 92 of the Hoopa 10(a) report also discussed the relationship between the project and the distribution and abundance of *Microcystis aeruginosa* (MSAE) in the Klamath River. “Iron Gate and Copco Reservoirs provide ideal habitat for MSAE. Dam removal would eliminate these reservoirs, dramatically reducing available habitat for MSAE. Without the KHP reservoirs, MSAE might persist in the Klamath River, but it would likely be at much lower levels . . . .”

The Hoopa 10(a) document also evaluated potential mitigation measures related to nutrient levels, dissolved oxygen, and other water quality related impacts, and documented areas where further research and information is necessary regarding potential benefits of non-removal mitigation measures. Overall, based on the information available at that time, the report indicates that removal of the dams and associated reservoirs is the only feasible way to mitigate project effects on water quality.

4. The Tribe Supports the Board’s Consideration of Interim Operation Measures.

The Tribe also urges the Board’s evaluation of additional interim measures that would provide some level of necessary water quality protection pending completion of long-term project modifications. The analysis of such measures should not be limited to dams in California, but should also include potential interim operation measures at J.C. Boyle. The Tribe does not believe the interim measures identified in PacifiCorp’s proposed Interim Conservation Plan are adequate to protect water quality in the period pending re-licensing.

5. The Board Must Evaluate Whether the Project Can Satisfy the Hoopa Valley Tribe’s Water Quality Standards.

In 1990, the Hoopa Valley Tribe received approval from the United States Environmental Protection Agency to be treated as a state for purposes of developing and implementing water quality standards under the Clean Water Act. The U.S. EPA approved amendments to the Tribe’s Water Quality Control Plan (WQCP) on February 14, 2008. *See Exhibit E* to the Tribe’s 2009 Scoping Comments. The Tribe’s WQCP applies to the Klamath River, which flows through the Hoopa Valley Reservation.

In this certification proceeding, the State Water Board must ensure that the project will not cause or contribute to violations of the Hoopa Valley Tribe’s water quality standards. Since the project is not located within the boundaries of the Hoopa Valley Reservation, the Hoopa Valley Tribe has a role analogous to a “downstream state” in this proceeding. Under the Clean Water Act, upstream states must ensure that their permitting or certification decision will not

result in violations of water quality standards in affected downstream states. *See Arkansas v. Oklahoma*, 503 U.S. 91 (1992). This is true even if the standards imposed by the downstream state or, in this case, EPA-approved Indian tribe are more restrictive than the upstream state. *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996). To the extent that a state certifying agency proposes to certify a project under Section 401 that would cause or contribute to violations of a downstream state (or Tribe's) water quality standards, the Clean Water Act provides a mechanism to resolve such disputes. 33 U.S.C. § 1341(a)(2); 33 U.S.C. § 1377(e); 40 C.F.R. §§ 121.11-121.16; 40 C.F.R. § 131.7; *see also Wisconsin v. EPA*, 266 F.3d 741, 748-49 (7th Cir. 2001).

The Clean Water Act requires the State Water Board to ensure that its certification is consistent with the Tribe's EPA-approved 2008 Water Quality Control Plan. The EIR must include analysis of the Tribe's water quality standards, project effects on the Tribe's water quality, and whether the project can operate in compliance with the Tribe's standards.

6. The Board Must Carefully Evaluate How Project-Related Water Quality Impacts Affect the Health and Viability of the Klamath Fishery.

Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Hoopa Valley Tribe. The fishery was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The salmon fishery of the Klamath and Trinity Rivers holds significant commercial, economic, and cultural value to the Tribe.

The Klamath Hydroelectric Project has significant adverse impacts on the Tribe's federally reserved fishing rights and on the health of the Klamath River, which flows through the Tribe's Reservation lands. In addition to blocking more than 300 miles of once fully occupied habitat, the project has caused or contributed to water quality conditions that imperil existing fish populations. The project has contributed to a 90% reduction in historic fish runs. Specific water-quality related impacts to the fishery include, but are not limited to, the following:

- (a) The dam reservoirs, particularly the Iron Gate Reservoir, slow down water and allow sunlight to heat it up to near fatal temperatures for downstream salmon. Elevated water temperatures not only encourage algae blooms but also encourage warm water parasites like *Ceratomyxa Shasta* and *Parvicapsula minibicornis*, which are fatal to many juvenile salmon.
- (b) Waters warmed by the reservoirs also cause stress to both adult and juvenile salmon, making them more susceptible to predators and fish pathogens downriver from the dams.
- (c) The dams trap and hold back natural gravel-rich sediments, impoverishing salmon spawning gravel beds for at least 50 miles downriver of Iron Gate Dam.

This limits the ability of salmon to spawn in the river and pushes them out of some of their best remaining habitat.

The Board's analysis must carefully focus on how project-related water quality impacts imperil the fishery relied upon by the Hoopa Valley Tribe and its members since time immemorial.

7. Additional Issues and Questions for the Board's Consideration.

In addition to the items addressed above, the Board should also address the following questions:

- (a) How will the Board incorporate studies and standards developed in the California and Oregon TMDL process for the Klamath system?
- (b) How will the Board distinguish natural baseline conditions from anthropogenic/agriculture-related conditions that originate in the Upper Klamath Basin?
- (c) How will the Board incorporate the work of the Blue-Green Algae Working Group and dam removal studies conducted by the California Coastal Conservancy into the analysis?

8. Conclusion.

The Tribe looks forward to working closely with the State Water Board in determining whether the Klamath Hydroelectric Project can be certified to comply with the water quality standards of both the State and the Tribe, and what conditions are appropriate. The Tribe urges the Board to proceed ahead with its analysis of water quality impacts in the 401 process. Please contact the undersigned if you have any questions about these comments. Thank you for your consideration.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE



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