March 26, 2012

Honorable Ken Salazar
Secretary of the Interior
1849 C Street, NW
Washington, DC 20420

Re: Concern Regarding Lack of Endangered Species Act Enforcement

Dear Secretary Salazar,

I write on behalf of the Resighini Rancheria, a federally recognized Tribe located at the top of the Klamath River estuary approximately three miles above its convergence with the Pacific Ocean. We have been participating in review of the Klamath Facilities Removal Environmental Impact Statement/Environmental Impact Report (EIS/EIR) under our Memorandum of Understanding with the Department of the Interior (DOI) and Bureau of Reclamation (BOR) Mid-Pacific Region (Resighini Rancheria 2011a, 2011b, 2011c, 2011d, 2011e).

In the course of analyzing the government’s proposed action to remove dams under the Klamath Hydropower Settlement Agreement (KHSA) and to implement the Klamath Basin Restoration Agreement (KBRA), we have come upon some alarming information regarding lack of protection for the Lost River and shortnose suckers, two endangered species of fish native to the Upper Klamath Basin (USFWS 1988). In April, 2010 the U.S. Fish and Wildlife Service (USFWS) amended its existing Biological Opinion (BO)(USFWS 2008) for Klamath Project operation to allow Tule Lake to be drawn down so low that it would no longer support the populations of both species that have inhabited it since time immemorial. The BOR was also allowed to trap and remove from Tule Lake a substantial portion of these populations, which are considered very important to recovery efforts. Both species of suckers are also listed under the California Endangered Species Act (CESA) and Tule Lake is in California; therefore, the removal of these endangered fish was likely a violation of CESA. In addition, the new proposed Critical Habitat for Lost River and shortnose suckers (DOI 2011) leaves out Tule Lake and Lower Klamath Lake, which is contradictory to previous Recovery Plan recommendations (USFWS 1993) and scientific studies (NRC 2004).

The USFWS amended its BO in April, 2010, just three months after the signing of the KBRA. This, along with the modifications of Critical Habitat which conform with the provisions of the KRBA, creates the appearance that USFWS is compromising ESA enforcement in the Upper
Klamath Basin in California. Please inform us as to how DOI otherwise justifies the failures documented herein to enforce ESA.

**Status of Lost River and Shortnose Suckers as Context for USFWS Action**

The map of the Upper Klamath Basin, below, shows that the Lost River and shortnose suckers are extinct in much of their former range and that there are only three populations at present: Upper Klamath Lake, Tule Lake and Clear Lake. Gerber Reservoir contains hybridized shortnose suckers that are not considered important for conservation. The National Research Council (NRC 2004) and the USFWS (1993) recommended that the lower Lost River be restored so that suckers of both species in Tule Lake would be able to naturally reproduce. A USFWS (Snyder-Conn et al. 1999) study characterized Tule Lake as a refuge for Lost River and shortnose suckers and noted good conditions and low disease rates there.

In April 2010, the USFWS revised its BO to allow Tule Lake to drop to levels that would not support sucker fish and to allow the BOR to remove both sucker populations from the lake. Neither of these actions is justifiable in terms of conservation of these species. In May of 2010, 413 fish of both species were trapped and transported to Upper Klamath Lake (Courter et al. 2010), which most likely significantly depleted the populations: “Utilizing even the most liberal estimate, it appears that we captured and relocated a significant portion of the Tule Lake sucker population during our two-week effort.” This suggests that populations within Tule Lake have been reduced to extremely low levels and that their risk of extirpation by stochastic events is increased.

The decision by USFWS (2010) to transport these fish to Upper Klamath Lake instead of Clear Lake is at odds with conservation of these endangered species. USFWS recently stated that Upper Klamath Lake sucker populations are declining at a rate of 10 to 20 percent a year. The KBRA Expert Panel on Native Fish (Buchanan et al. 2011) stated that: “Unless a recruitment event occurs soon, these populations could become extinct in the near future given their current annual mortality rates.”

A more reasonable plan would be to move the Lost River and shortnose suckers from Tule Lake to Clear Lake, where the region’s only healthy sucker populations survive. It appears that Clear Lake was not chosen because the modified B.O. (USFWS 2010) also allowed Clear Lake to be drawn down to levels that posed the risk of winter kill of the last healthy populations. Therefore, USFWS actions could have eliminated two of three of the last endangered sucker populations, which constitutes Jeopardy under ESA. As noted above, the USFWS modified its BO less than 90 days after the signing of the KBRA, which creates the appearance that the two actions are connected and that ESA is being compromised as a result. If we are in error with regard to this assumption, please provide us explanatory information.

The lack of public notice or review for the 2010 BO modification is also quite troubling and appears to disregard federal environmental justice policies. We request notification should any similar future action be considered.
Status of Lost River and shortnose sucker populations in the Upper Klamath Basin with annotations indicating populations at risk of extirpation as a result of USFWS modified BO.

Resighini Rancheria Letter to Secretary Salazar re: ESA Enforcement and the KBRA
March 26, 2012
Critical Habitat
The Resighini Rancheria submitted comments on the designation of proposed Critical Habitat (DOI 2011), which are attached as Appendix A. Your new proposed Critical Habitat contains only 23% of the area formerly recommended (USFWS 1993) and fails to designate Tule Lake, Lower Klamath Lake, or any areas within Siskiyou County, California. This falls far short of sufficiency with regard to ESA requirements (Higgins 2012) and does not appear biologically or scientifically justifiable. In order to function as a hedge against extinction, NRC (2004) recommended: “Reestablishment of spawning and recruitment capability for endangered suckers in Tule Lake and Lower Klamath Lake, even if the attempts require alterations in water management.” The proposed Critical Habitat appears to reflect KBRA stipulations that emphasize agriculture on National Wildlife Refuge Lease Lands over restoration and conservation. If USFWS and DOI have other explanations, please provide them.

California Endangered Species Act Concerns
Although we recognize the separate authority of the State of California with regard to endangered Lost River and shortnose sucker species under CESA, both USFWS and the California Department of Fish and Game (CDFG) have jurisdiction over the Tule Lake populations because of the redundant listing at the State and Federal level. The EIS/EIR for your KHP dam removal process eliminated Tule Lake and Lower Klamath Lake areas from consideration and did not analyze Lost River and shortnose sucker issues within California. An affirmative Decision would also implement the KBRA, which has a troublesome pertaining statute (24.2.2):

“Within sixty days of concurrence by the Governor of California with an affirmative Determination by the Secretary under Section 3.3 of the Hydroelectric Settlement, CDFG will provide the draft legislation to the Parties regarding a limited authorization to take incidentally Lost River suckers, shortnose sucker, golden eagles, southern bald eagles, greater sandhill cranes, or American peregrine falcon contingent upon the fulfillment of certain conditions, if such authorization is necessary for implementation of the Agreement.”

This shows intense pressure on the CDFG to grant “take” permits for listed sucker species when, in fact, the species is no longer being protected by USFWS and likely to go extinct, if the modified BO and seriously flawed proposed Critical Habitat are implemented. The Resighini Rancheria requests that you provide all correspondence between the USFWS and CDFG related to the removal of endangered suckers from Tule Lake so that we can be assured that both agencies are working in concert to restore these important indicator species.

BOR Implementation of Measures Conforming to Terms and Conditions USFWS BO
The USFWS actions compromising protection of Lost River and shortnose suckers and their habitat raises questions as to whether they are enforcing terms and conditions of the USFWS 2008 BO. Please provide us with electronic copies of the BOR’s annual reports to the USFWS detailing their progress and any memos pertaining to both successes and failures of these efforts.
Flows Crisis for National Wildlife Refuges
The Resighini Rancheria is aware that the 2012 water year had been shaping up until recently to be an extreme drought, which threatened to create a water supply crisis for both Tule Lake and Lower Klamath National Wildlife Refuges (NWR). We share the concerns the two dozen environmental groups that are writing to you at this time and will not provide the details they do in this regard. However, as a Harmony-based culture we are distressed that the DOI, BOR and USWFS may not supply water to the Lower Klamath NWR when 40% of the birds in the Pacific Flyway depend on it. Although the bald eagle is no longer federally listed, it is a sacred bird to our culture and the decrease in over-wintering birds from nearly 1,000 in the early 1990s to approximately 250 today troubles us. We also have similar concerns for CESA listed wildlife species dependent on the NWR’s as listed in KBRA 24.2.2: golden eagles, southern bald eagles, greater sandhill cranes, and American peregrine falcons. Any real Klamath Basin water pollution abatement will require expanding Tule Lake and Lower Klamath Lake and surrounding marshes as water storage and water filtration systems, similar to the Everglades restoration program (SERES 2011).

Conclusion
Members of the Resighini Rancheria are not wealthy and they rely on the Klamath River for sustenance as they have since time immemorial. While we have never relied on suckers as a food source, they have always been important to us because they are indicators of the health of the Klamath River as a whole. We feel that if the suckers cannot live, the Lower Klamath River cannot be healed and salmon and we, as a people, will perish with them.

From the outset of our engagement with the government over the Klamath dam removal and KBRA implementation, we have requested that actions associated with KBRA be fully disclosed and analyzed. The government refused to conduct such analysis because, it claimed, the actions of the KBRA are unknown. It appears to us that at least some of the provisions of the KBRA are being implemented. This is of questionable legality given the lack of authorizing legislation or proper scientific review and validation.

In conclusion, we would like an explanation from your offices with regard to USFWS actions described above that undermine ESA protection of endangered Lost River and shortnose suckers.

1) Why was USFWS willing to compromise its 2008 BO and allow Tule Lake and Clear Lake to drop below protective levels?
2) Why did USFWS allow the removal of the important Tule Lake populations of endangered suckers?
3) How does USFWS (DOI 2011) justify eliminating both Tule Lake and Lower Klamath Lake from proposed Critical Habitat given their previously recognized importance for recovery?

If these actions were not part of KBRA implementation, please supply us with written justification and additional information requested in other sections above.
Since both Lost River and shortnose suckers are considered beneficial uses under the Clean Water Act for *Lower Klamath River and Lost River Total Maximum Daily Load* (NCRWQCB 2010), their elimination in Tule Lake would represent a severe set back for prospects of successful TMDL implementation. Also, effluent from the Klamath Project associated with KBRA implementation is likely to cause the reach of the Klamath River within Keno Reservoir to remain anoxic for weeks each year as described by the Chinook Expert Panel (Goodman et al. 2011), which will likely confound Upper Basin salmon recovery. We will address these issues separately with the U.S. Environmental Protection Agency and California water quality authorities.

We would be happy to answer any questions you might have and look forward to working with you on a dam removal solution that allows ecological restoration of the Klamath River so that all its species and communities can thrive.

Sincerely,

Donald McCovey
Chairman, Resighini Rancheria Tribal Council

CC: John Bezdek, DOI
Elizabeth Vasquez, BOR
Dennis Lynch, USGS
Christine Karas, BOR
Congressman Mike Thompson
Senator Barbara Boxer
Senator Diane Feinstein
Senator Jeff Merkley
Senator Ron Widen
Congressman Earl Blumenauer
Congressman George Miller
Congresswoman Barbara Lee
References


http://www.waterboards.ca.gov/northcoast/water_issues/programs/tmdls/klamath_river/

www.klamather.org/Documents/Resighini_Drought_Plan_Comments_04_07_11_SENT.pdf
