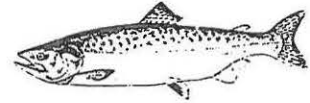




Hoopa Valley Tribal Council
Natural Resources Division
Fisheries Department
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January 29, 2015

David Murillo, Director
USBR Mid-Pacific Region
2800 Cottage Way
Sacramento, CA

Dear David:

I am pleased to submit final comments in regards to the "***Draft Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River***", released for review on December 31, 2014. These comments reflect a thorough review by our staff and consultants. Given the gravity of this issue – continuing threats of fish kills in our river - we stand ready to collaborate fully in development of effective solutions.

Please feel free to contact our Director of Fisheries, Michael Orcutt for further information as needed.

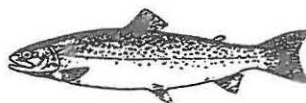
Sincerely,

Danielle Vigil-Masten, Chair

Hoopa Valley Tribal Council



PACIFIC LAMPREY



STEELHEAD



GREEN STURGEON

Comments of the Hoopa Valley Tribe

Draft Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River, December 31, 2014

General Comments

- Alternatives considered in the Draft Plan fall short of the appropriate action required of a federal trustee for the restoration and maintenance of fishery resources of the Klamath/Trinity River system. The Draft Plan is tactical rather than strategic; and reactive rather than preventive. Statutory priorities for use of Trinity River Division water in basin are subordinated to exports. Junior priorities for irrigation use of Klamath River water on the Klamath Irrigation Project are given preference to senior fishery rights in the Klamath River.
- The design of the Long Term Plan perpetuates a fundamental flaw in the Bureau of Reclamation's management of the Klamath and Trinity Rivers identified and analyzed in *Hydrology, Ecology, and Fishes of the Klamath River Basin*, Committee on Hydrology, Ecology, and Fishes of the Klamath River Basin, National Research Council (December 2007).
- The National Research Council stated at page 8:

The Committee found that science in the basin was being done by bits and pieces, sometimes addressing important questions, but not linked to other important questions and their studies. The Natural Flow Study and the Instream Flow Phase II were major science and engineering investigations, but the linkage of one to the other was only partially achieved. Other studies in the basin, such as the U.S. Geological Survey's hydrologic studies in the Sprague River Basin, or the extensive research in the Trinity River Basin (which is part of the Klamath River Basin), seem not to have had any influence on each other or on the flow studies examined in this report. The committee found that the most important characteristics of research for complex river-basin management were missing from the Klamath River: the need for a "big picture" perspective based on a conceptual model encompassing the entire basin and its many components. As a result, the integration of individual studies into a coherent whole has not taken place, and it is unlikely to take place under the present scientific and political arrangements.

With respect to the policy and science of the Draft Plan, the NRC in 2007 was regrettably prescient. Reclamation's "scientific and political arrangements" have to change if the fishery is to be restored and preserved.

- The stated purpose of the Draft Plan is to provide "fundamental elements of a long-term plan" to avoid fish kills such as took place in 2002. However, the Draft Plan fails to address the causes of adult fish kills – principally, water management decisions by Bureau of Reclamation officials and Federal Energy Regulatory Commission (FERC) licensees that produce flows lower than required to meet instream needs, an unnatural thermal regime and unhealthy water quality resulting; these factors combine to create chronic conditions affecting salmonid population productivity and leading to disease outbreaks. The Long-Term Plan should be a strategic response to these underlying causes for adult fish kills and disease issues in Klamath Basin to avoid a continuation of the pattern of recent years – ad hoc reactions to symptoms of disease outbreaks, rather than prevention.
- Conditions of flow, water temperature and water quality in the lower Klamath during the late summer period have been altered dramatically from historic patterns. Timing of entry to the lower Klamath by summer/fall-run Chinook and other native fishes associates with natural seasonal flow and temperature regimes; historically, the River cooled during the months of September and October, affording migrants progressively cooler water as they ascended to spawning grounds in the Klamath mainstem and its major tributaries. This pattern is unique to the Klamath River; elsewhere throughout the range of Chinook salmon, adults entering freshwater move steadily upstream to spawning grounds following a brief pause for acclimatization to freshwater. Now, adult salmon entering lower Klamath during hot periods to suspend their upstream migration, and to congregate for extended periods in limited thermal refugia located below Weitchpec. Forced to pause their upstream migration, Klamath River fish are compromised by the effects of warm water plus pollutants including virulent cyanotoxins that put them at high risk of infection by endemic epizootic organisms.
- Low fertility rates in Coho and Chinook salmon seen at both Trinity River and Irongate Hatcheries in 2014 are perhaps related to exposure to high temperatures in lower Klamath, as postulated recently by California Fish and Wildlife's Region 1 Hatchery Manager, Linda Radford.

- An effective long-range plan of action to restore river health of the system, and prevent fish kills over the long term should include the following actions:
 - Removal of Klamath mainstem dams.
 - Provision of year-round flows in Klamath mainstem supportive of native fish communities (implementation of recommendations in, Hardy, T.B., R.C. Addley, and E. Saraeva. 2006. *Evaluation of Instream Flow Needs in the Lower Klamath River: Phase II, Final Report*. Institute for Natural Systems Engineering, Utah State University, Logan, UT.
 - Augmentation of flows as necessary to protect fish in dry years.
 - Establish and implement water quality standards for agricultural return flow to meet fish needs
 - Make annual CVP and Klamath Project water allocations to irrigators, based on surplus above instream flow needs and Trinity basin priorities sufficiently in advance of deadlines for planting crops
 - Coordinated operation of Klamath Project and Trinity River Division to fulfill priorities and reduce impacts on diversions.
 - Complete FERC proceedings on mainstem dam hydropower licenses.
- The Draft Plan limits use of federally controlled water supplies for fishery protection to Trinity Reservoir releases. The Trinity River confluence is at Weitchpec. However, the Klamath River above Weitchpec suffers from inadequate flows, unnatural thermal regime, poor water quality and increasing incidence of fish disease that contribute substantially to the risk of repeated fish kills in the lower Klamath.
- Lowered fertilization rates at Iron Gate and Trinity River hatcheries have been reported in 2014. If these lowered fertilization rates, are not shown to result from sedimentation episodes at the hatcheries, there is reason to suspect they are due to sub-lethal stress from *Ich* infections, not from warm water temperature exposure. This would highlight the need to manage water temperatures to address sub-lethal effects.
- The Draft Plan's flow release regimen would have permanent adverse impacts on tribal harvest. Experience since 2003 demonstrates that the gillnet fishery is for all intents and purposes shut down as fishers are faced with an overabundance of debris carried by these unnatural flows when Lewiston releases are high. Clean nets are critical to effectiveness in entangling salmon nets cannot be maintained free of "moss" through overnight fishing periods. Instead, nets fill quickly with debris and are rendered useless. Cleaning of fouled nets requires increased effort each

day. Together these impacts increase work and lower catch per unit of effort, rendering fishing infeasible and damaging perhaps permanently the ability of the tribe's right to produce a moderate standard of living from its federally reserved fishing right. The Long Term Plan must be designed to prevent harm to the fishery rather than be an invasive emergency response entailing collateral damage to the trust resource. By way of analogy, the Long Term Plan should eliminate the known causes of disaster rather than focusing on emergency responses that are themselves destructive of the fishery.

- To be effective, the Draft Plan must identify how to design and implement an adaptive management program for the Klamath-Trinity Basin.

Specific Comments

Title

Suggest changing to read "Long-term Plan for Protecting Adult Salmon in Klamath River Basin", as "late summer" misstates the temporal scope of the plan that is needed, and fish kills in areas above the lower Klamath should also be in view – as evidenced by experience in 2014.

The Draft Plan should clearly define "lower Klamath River" as this phrase is understood differently by various groups. A map would be very useful in this regard, and to better illustrate relative location of features referred to in the text.

Section 1.1

Please describe runs of Chinook as entering Klamath River during most months of the year, including summer period.

While noting impacts of Trinity River Division on Chinook salmon habitat and migration patterns in the Trinity River, the Draft fails to describe similar and very substantial impacts of the Klamath Irrigation Project and downstream hydroelectric dams on the mainstem Klamath. The effects of Klamath Irrigation Project on timing, magnitude and quality of water released to the mainstem Klamath must be described and mitigated in the Long Term Plan. In addition, the effects of PacifiCorp dams on mainstem Klamath water temperatures, water quality and fish disease must be described and mitigated. Such effects include blockage of upstream habitat including a number of biologically significant groundwater springs accessible, under pre-dam conditions, to anadromous salmonids.

Emerging fish diseases are also a concern for juvenile salmonids in the River, causing significant mortality each year, with greater losses in drier years.

Section 1.2

“Despite the continued efforts to restore and protect the various salmon and steelhead runs in the Klamath River Basin through flow releases and other habitat improvement measures, an unforeseen and unprecedented die-off occurred during a two-week period beginning in late September of 2002”

Please revise to state that fish health concerns, and the threat of adult kills, were foreseen in 2002; numerous warnings were issued to Reclamation by tribal and state fisheries agencies.

Section 1.3

“Immediately following the 2002 die-off, the Department of the Interior pledged that measures would be developed and implemented to help protect future runs from an epizootic disease outbreak. In support of this commitment, the Department has undertaken flow augmentation in years when it has been determined to be necessary,”

This statement is incomplete and inaccurate. Interior has spent more than a decade reacting tactically, not acting strategically.

“The Department has undertaken flow augmentation in years when it has been determined to be necessary, because flow augmentation has been and remains the most viable management action to help protect the returning adult salmon population in late summer ”

Releases from Lewiston Dam represent only one viable action. See section above at “General Comments”.

Data from 2014 show Chinook in spring and summer runs were infected with Ich, which likely increased risk to the fall run. As discussed below, the Draft Plan must address adult fish health whenever (and wherever) necessary, not limited to summer period (or lower Klamath).

“This document is intended to provide the fundamental elements of a long-term plan that acknowledges this possible future need and discusses the statutory authority and policy implications associated with providing water releases from Trinity Reservoir for lower Klamath River fish protection purposes.”

This is incorrect. To be successful the Long-Term Plan must be a strategic and comprehensive with the objective of reestablishing the attributes of a healthy river for the Klamath River and its tributaries. An effective plan cannot be simply a program for tactical responses to periodic outbreaks of debilitating fishery conditions.

“An abbreviated history of the key considerations Reclamation has identified while evaluating flow augmentation measures”

With all four bullet points the Draft Plan jumps immediately and exclusively to flow augmentation. We need to restore the health of the Klamath River to have a sustainable healthy fishery.

Section 2.1

“As discussed further in Section 3, technical experts from Reclamation, other Federal agencies, the Hoopa Valley Tribe, the Yurok Tribe, the State of California, and other entities have convened on many occasions since the 2002 die-off to analyze the various contributing factors and measures for prevention. The U.S. Fish and Wildlife Service report and subsequent studies concluded that the timing of the adult salmon return (mid-August through September) that coincides with the seasonal low flows in the lower Klamath River would be a key factor in preventing subsequent die-off events. Given the disease propagation mechanics discussed in other sections, increasing flow rates in the lower Klamath River during the return period was identified as the only potentially effective means to minimize the potential for an epizootic disease outbreak, thus the terms “preventative measure”, “protective measure”, and “flow augmentation” will be used interchangeably throughout this document. Similarly, flow increases presently are believed to be the only effective means of mitigating the effects of an outbreak once it becomes clear that a significant number of fish have been infected.”

This introduction describes what occurs in nature as the problem. This simplistic restatement misunderstands how a restored, healthy river accommodates migrating salmon in such conditions. The salmon did just fine with low water for millennia because the natural stream regimen provided mitigation for stressful conditions and the host-pathogen relationship was in balance.

It should be noted that the scientific record establishes that under some conditions, releases from Lewiston can ameliorate water temperatures in lower Klamath, as well as flow rates.

It should be noted that there are hypotheses regarding risk of epizootic disease outbreaks and their relationship to Klamath hydropower projects; removal of mainstem Klamath dams is likely to reduce fish residence time in lower Klamath, reduce myxosporidian disease loads, and reduce toxic blue green algae – all of which would improve fish health and reduce risk of an *Ich* outbreak.

The addition of data from 2002 could help to put data from subsequent years in context.

“The majority of that combined volume was acquired through an exchange with the Metropolitan Water District of Southern California.”

This exchange was unlawful and wasteful of taxpayer funds because of the 1955 act's two provisos in section 2 of the 1955 TRD act (Pub. L. 84-386) both authorize and require use of that water without cost to the federal taxpayer and without payment to CVGP contractors, the MWD or anyone else.

Section 2.2

“...Reclamation made preventative releases from Trinity Reservoir in the late summers of both years totaling 38,000 and 36,313 acre-feet (a-f), respectively, to improve fish habitat conditions in the lower Klamath River.”

One result of these releases was a shift in understanding of the importance of flows – from moving fish upstream to impeding infection rates by interfering with the free-swimming *Ich* lifestage.

Section 2.4.2

“In response, Reclamation collaborated with tribes, regulatory agencies, and other basin partners to develop and refine monitoring and flow augmentation criteria”

Reclamation refused to take any action to modify Klamath Reclamation Project operations. Such action was recommended for consideration by Hoopa Valley Tribe, and rejected by Reclamation as infeasible in the face of irrigation demands of junior water users.

“as a *preventative measure*, they recommended that flows in the lower Klamath River be augmented to 3,200 cubic feet per second (cfs) beginning August 15, 2012, and continuing through September 21, 2012, or until river water temperatures were reduced to below 23 degrees C”

The flow rate of 3,200cfs was equivalent to median flow for this period. The augmentation of flow to the 3,200cfs rate was a tactical, not strategic response. See section above at “General Comments”.

Footnote 7

“The Trinity Management Council is prescribed by the ROD to serve as the primary governing body for implementation of the Trinity River Restoration Program”

This is incorrect; Trinity Management Council is not a governing body; it makes recommendations to the Interior Secretary.

Section 2.4.3

“In addition to collaborating with partners in formulating the action, Reclamation consulted with water user and power customer representatives prior to releasing the EA and again prior to executing the FONSI”

The Draft Plan fails to disclose that Reclamation promised to pay contractors for the water released, which is unauthorized and wasteful of taxpayer funds.

“Ultimately, 39,000 a-f was released for preventative purposes and no emergency releases were required. There was no substantial disease outbreak noted...”

Neither were there detectable levels of *Ich*.

Footnote 8

This highlights both the value of clean, cold water available behind Trinity Dam and the need to manage for clean water below Klamath Irrigation Project.

Section 2.5

This section contains no reference to litigation brought against Interior by water contractors in the San Joaquin Valley to vitiate the priority for in-basin use of TRD water over diversions to the Central Valley.

Section 2.5.3

“Citing sub-normal Klamath River Basin hydrology, the FONSI stated that augmentation would be provided exclusively from Trinity Reservoir.”

Reclamation failed consistently to plan for Klamath Irrigation Project releases and other management of Klamath Irrigation Project for benefit of Lower Klamath. This took place in the face of recommendations from Hoopa Valley Tribe for timely consideration of allocations to Klamath Irrigation Project.

Section 2.5.4

Emergency Flow Augmentation

“Observed mortality of greater than 50 dead adult salmonids in a 20 kilometer reach in 24 hours combined with a confirmed presence of *Ich* by the U.S. Fish and Wildlife Service Fish Health Center...”

We recall this criterion as applicable to any 20 kilometer reach, regardless of location within Klamath system, so long as within influence of emergency flow augmentations.

“There was no substantial disease outbreak...”

Neither were there detectable levels of *Ich*.

Section 2.6

Section requires updates with 2014 run size and disease information, when available.

Section 2.6.1

“In March of 2014, PFMC announced its in-river run size projection for Klamath River fall Chinook of 92,800 adults”

Note the error in these predictions, and the warning of a larger than predicted run-size (voiced by Dr. Joshua Strange). Note also the eventual run size estimate, in outcome section.

“Conversely, Reclamation received letters from Central Valley Project (CVP) water and power users questioning the biological basis for releasing additional water and expressing concern about the impact to water supplies and power generation”

Here again the Draft Plan must acknowledge the litigation by San Joaquin Valley contractors.

Section 2.6.3

“During the first half of August, hydrologic conditions and observed fish health both continued to worsen”

Add footnote regarding subsequent analysis showing infection rates of spring/summer Chinook, and increasing concerns about poor conditions and low flows in spring and summer leading to increased background levels of *Ich* and risk of outbreaks during fall run.

“By the end of August, the Klamath Fish Health Assessment Team reported...a significant fish die-off was imminent”

Several others, including the Tribe, joined in these warnings.

Footnote 12

A citation is available – Strange 2010, in Transactions of the American Fisheries Society

Section 2.6.4

“On August 22, 2014, Reclamation announced it would increase releases from Trinity Reservoir to achieve a flow rate of approximately 2,500 cfs in the lower Klamath River. The ramp-up began the following day, August 23, and the increased release rate continued through September 14, 2014.”

Should also describe release of water from Iron Gate for Yurok Boatdance concurrent with equivalent decrease in Lewiston Dam release (see records for Iron Gate and Lewiston USGS gages), and exceptionally poor quality of water in that release (foul odor and color as reported in monitoring at downstream stations). In addition, describe releases from storage in PacifiCorp hydroelectric dams on mainstem Klamath that were negotiated on basis of “repayment” to PacifiCorp of water volume discharged.

“Though there were documented reports of diseased fish present at several locations...”

The term “diseased” is inappropriate. Say instead “high percentages of fish severely infected with *Ich*”

Need to add to this section substantial detail regarding outcome in terms of run size and outbreak monitoring, when available.

Section 3.1.1

“Throughout the process, however, there have been no viable non-flow alternatives for fish protection identified”

A number of viable long-range, strategic alternatives were identified by parties including the Hoopa Valley Tribe. See section above at “General Comments”.

Section 3.1.2

“The transmission of the free-swimming *Ich* life stage that propagates among fish can be physically hindered by increased flow rates and velocities.”

High flows can also flush *Ich* parasites out to sea where they would perish in salt water.

Please mention also the effect of high flows on turnover rates within pools.

“Increased flows from the Trinity River Basin often reduce lower Klamath River temperatures in the late summer which can reduce stress and offer migration opportunity in migrating adult fish.”

Such flows can also dilute toxic blue green algae and myxosporidian parasites, and slow development rate of *Ich* and other pathogens.

“Additional flows can increase the wetted cross-sectional area within the river bed, decreasing fish densities. “

Please note concurrent increase in volume of pools and runs holding salmon.

“Fish are sometimes cued by the flow changes and reduced water temperatures to continue their migration upstream to suitable areas of both river systems.”

As a general statement this is not accurate, as shown by data collected over multiple years through use of telemetry in lower Klamath. Rather, the data support a conclusion that those fish confined to thermal refugia only will resume upstream migration with arrival of increased flow and dropping temperatures.

Section 3.1.3

“Potential concerns have included:”

The list following this text is incomplete. A number of additional concerns, including potential for drawing fall-run fish into spawning grounds amidst spring-run fish – increasing risk of interbreeding - is one example. Again, sole reliance upon Trinity River for flow augmentation affects access to the trust fishery practiced by Hoopa Valley Tribal members, primarily during the fall Chinook migration.

Section 3.2.1

“It was suggested at the workshop that hatcheries may be over producing, such that the habitat capacity within the lower Klamath River has been exceeded. A brief discussion of harvest and production management included statements by tribal representatives that their fishing rights are not currently being fulfilled and cannot be further compromised.”

Intrinsic habitat capacity, as such, is not likely to be a contributing factor. Historical run size is known to have been much greater than recent numbers. This has been well documented in the literature (e.g. Hamilton, J.B., G.L. Curtis, S.M. Snedaker and D.K. White, *Distribution of Anadromous Fishes in the Upper Klamath River Watershed Prior to Hydropower Dams – A Synthesis of the Historical Evidence*, American Fisheries Society Volume 30, Number 4 . Addressing altered ecosystem effects upon migrating fish populations should remain the focus of this plan.

Section 3.3

“In October of 2013, the Hoopa Valley Tribe submitted a recommended fish protection approach, included as Appendix A. The approach would emphasize determining fishery needs and the available water supply, then allocating water first to the fishery and secondarily to water users”

Beyond this mention of the Tribe's submission, the substance of our approach must be discussed in the Draft Plan as elements of a viable, tactical reaction to problems over the short term.

Section 4.1

“As discussed in other sections of this document, Reclamation and Klamath River partners have spent considerable time developing and refining scientifically-based criteria for considering flow augmentation, culminating in the TRRP Fall Flow Subgroup recommendations developed in 2012 and the 2013 Joint Memorandum (again, the latter having been based on 2013 conditions)”

These were, as a group, no more than tactical responses to episodic events. The Plan should be designed to prevent these over the long term.

“Reclamation will consider whether flow augmentation is necessary when the fall Chinook in-river run size is projected to be 170,000 or greater and flows in the lower Klamath River are forecast to be 2500 cfs or lower.”

The recommendation was for augmentation when run size projected at 170,000 or greater or flows at KNK gage projected to fall below 2,500cfs, not both.

Initiate preventative flow augmentation in the lower Klamath River to a minimum of 2,500 - 2,800 cfs when the cumulative harvest of Chinook salmon in the Yurok Tribal fishery in the Estuary area meets or exceeds a total of 7,000 fish.”

Progression of run analysis based on cumulative fall Chinook harvest in estuary by Yurok Tribe was used as a proxy to get at the fish density side. This criterion is well described in NOAA/FWS memorandum to Brian Person of 12 August 2013. It likely was the most objective and readily retrievable suite of information available to inform onset of peak fall Chinook run and fish density in lower Klamath for 2013, a year of forecast high abundance when Yurok Tribe implemented a commercial fishery in estuary. It is likely this criterion would not be useful in moderate or low abundance years. Authors allowed that an ideal metric would be based upon true fish density and density of Ich theronts in the lower Klamath above estuary where 2002 kill occurred (which were not available).

“As discussed in greater detail in later sections, Reclamation has determined that it shall administer as a distinct quantity its statutory obligation to release water to Humboldt County as provided for in Section 2 of the 1955 Act.”

No, the Solicitor determined that the quantity is separate. Reclamation doesn't "administer" that water any more than it administers contractors' water supplies. Reclamation needs to revise this to reflect that the Tribe is a third party beneficiary of this water and as such can make a call on that water. Reclamation must coordinate with the Tribe as well as Humboldt County.

“Preventative Flow Augmentation – Current Criteria”

Data collected in 2014 suggest that 2,500cfs provides too little to protect against severe drought and run size uncertainty. A range of 2,800 to 3,200cfs is more appropriate, in addition to consideration of summer pulse flows (July/August) to reduce background levels of *Ich* parasite.

Preventive actions require substantial further development in the Draft Plan, in order to avoid placing unreasonable risk on the Tribe’s fishery and in order to conserve water supplies. Effective preventive criteria, if implemented, could avoid future release of emergency flows.

Section 4.2

“The average volume released for augmentation in 2003, 2004, 2012, 2013, and 2014 was 38,963 a-f. We anticipate a similar quantity will be sufficient in the majority of years where augmentation is required.”

The year 2013 should be excluded from this calculation, as releases in that year were curtailed consequent to litigation brought by San Joaquin Valley contractors (see Section 6.2.2). The effect of including 2013 is to underestimate approximate water volume anticipated as “sufficient in the majority of years”.

Section 4.3.1

Section is vague as to when annual decisions and actions will be taken. Most are to be done sometime during a 90-day period in "March-May." Milestones should be much more specific. The March 1 forecast is used at UKL and KID volumes are set based on an April 1 forecast with possible revisions per May 1 and June 1 forecasts.

Sec. 4.3.1.C emphasizes compensation to CVP users. The plan provides for some compensation to water and power users and mentions past compensation. However, only water lost to water users beyond the Proviso 2 volume of 50 TAF will be compensated (see page 24, sec. 6.5.2). Additional water will be acquired by Reclamation under sec. 14 of the 1939 Act.

Section 6.2.4

Section says that because Trinity Reservoir has not refilled in the relevant years, the accumulated total augmentation volume of 120.5 TAF has cut directly into CVP water deliveries. This is inaccurate for two reasons: 1) In 2014, unmet needs north of the Delta make it unlikely that even if water had been available it could have been available for Westlands and others south of the Delta users; and

2) complexity of operations in any single year as well as across multiple years is such that consequences of decisions made throughout CVP cannot be tracked to any single choice, such as to release storage from behind Trinity Dam.

Section 6.3.1

Because this is an obligation directed by Section 2 of the 1955 Act, no compensation will be owed to other water or power users for releasing a requested volume to Humboldt County. Impacts caused by the release of augmentation flows will be addressed as described in other sections."

Any beneficiary of proviso 2 including Hoopa Valley Tribe can call on the water. It is not an exclusive interest of Humboldt County.

Footnote 18

"18 An August 10, 2012 letter from Barbara Evoy, Deputy Director of the Division of Water Rights, State Water Resources Control Board, explains that Reclamation may bypass and/or release water for non-consumptive cultural resource needs and to improve instream conditions for the benefit of aquatic resources without obtaining a change of place of use approval. "However, such bypass and/or release is not a beneficial use under Reclamation's permits absent approval of the amended place of use, and a decision not to divert water or failure to put water to beneficial use for a period of five years may result in reversion of the water to the public and result in partial or total revocation of the water right under Water Code § 1241." The State Board continued by advising Reclamation to file a petition to change the place of use if this is a concern. For these reasons, Reclamation has determined that it should file a petition under Water Code §§ 1701 and 1707 to add the Trinity River below Lewiston Dam and the lower Klamath River below the junction with the Trinity to the place of use for the TRD's permits"

This analysis is entirely incorrect. The 1959 TRD State permit (No. 11968) conditions 8 and 9 require fishery flow releases. Reclamation is not changing place of use by putting TRD water to use as the 1955 act and TRD permit direct.. The State Board misunderstands the law here. See additional comments under Section 6.3.2.

Section 6.3.2

The Bureau of Reclamation is incorrect in concluding that it should file a petition under Water Code §§ 1701 and 1707 to add the Trinity River below Lewiston Dam and the lower Klamath River below the junction with the Trinity to the place of use for the TRD's permits. Doing so undermines the existing Law of the Trinity River. Those areas are already recognized places of use for the TRD water releases pursuant to: (1) the two provisos in section 2 of Pub. L. 84-386; (2) the TRD State Water Board permits,

including Permit 11968; and (3) the 1959 Contract between Humboldt County and the United States for the benefit of Humboldt County and downstream water users. The only limitation on the use of TRD water under the 1959 contract between the United States and Humboldt County for the benefit of the County and downstream water users is that it be beneficial. See Section 8 of the 1959 Contract.

In addition, fishery protection is an authorized use of TRD water and California law defines use of water to maintain a fishery in a wild and scenic river as beneficial. California Public Resources Code Division 5, Chapter 1.4, Parks and Monuments §5093.50. Section 5093.545 of the California Code designates the Trinity River below TRD facilities and the Klamath River below Iron Gate Dam as wild and scenic. Thus, the entire course through which TRD releases under the 1959 Contract would flow is designated as a wild and scenic river under California law.

Section 6.4.1

“In addition to considering the purchase of replacement power under the authority of the 1939 Act, discussed in a later section, Reclamation has considered options to compensate power users for the impacts caused by the augmentation releases made in 2012, 2013, and 2014.”

No compensation or adjustment is authorized for the power contractors.

Section 6.5.1

“Reclamation will consider whether to compensate for any releases above 50,000 a-f based on the conditions at the time any such additional release becomes necessary. Reclamation will also consider whether to compensate CVP water users for effects related to releases of project water supplies made in 2012, 2013, and 2014, as they occurred prior to the revised determination regarding the Humboldt County contract”

No compensation should be provided to the CVP contractors, under any use of proviso 1 or proviso 2 water.

Section 6.5.2

“Acquiring Additional Water – Section 14 of 1939 Act”

The analysis is legally incorrect for a number of reasons. Paying for water contradicts the mandates and priorities of the 1955 act. If anything, BOR should pay the proviso 2 beneficiaries for the use by the Secretary of the 50,000 acre-feet to meet her obligations for fishery protection. Moreover, Section 14 of the 1939 Reclamation Act (43 U.S.C. section 389) is inapplicable for the following reasons.

The first paragraph of that section provides authority for the Secretary to purchase, condemn and relocate public infrastructure such as roads and power lines for the convenience of reclamation project construction operation and maintenance.

The second paragraph states: "The Secretary is further authorized, for the purpose of orderly and economical construction or operation and maintenance of any project, to enter into such contracts for exchange or replacement of water, water rights, or electric energy, or for the adjustment of water rights, as in his judgment are necessary and in the interests of the United States and the project." Here are several reasons why this authority is not applicable here.

First, it does not authorize water purchases; at best it authorizes bartering of water in circumstances that do not exist in this context.

Second, it is not "orderly or economical" from the federal perspective to pay federal money to a CVP contractor whose CVP water use the two provisos in section 2 of the Act of August 12, 1955 (Pub. L. 84-386)--the TRD authorizing act--makes explicitly subordinate to Trinity basin uses in-basin uses. See section 2 of 1955 Act, the 1979 Solicitor Krulitz opinion, and the December 23, 2014 Solicitor's opinion (M-37030) on this topic.

Third, it is not necessary or in the interest of the United States for the Secretary to construe the 1939 Act to authorize the Secretary to disregard the specific mandates in the 1955 Act's section 2 provisos. Statutory construction principles provide no support for having a specific later enacted statute undercut or qualified by a general earlier enacted statute.

Fourth, the costs to the United States will be enormous. The contractors asserted in a conference call on August 22, 2014 with the Department of the Interior that the value to them of the TRD water identified for the 2014 supplemental flows (25,000 acre-feet) is worth \$50 million to them. Whatever value that water has inures to the beneficiaries of proviso 2 of the 1955 Act as construed in Opinion M-37030, not CVBP contractors.

Fifth, using the CVP contractors' calculus, the 50,000 acre feet entitlement under the 1955 Act's 2d proviso is worth \$100 million *annually*. That value, which was secured North Coast communities in 1955 cannot be reallocated to the Central Valley contractors whose interest in the CVP is specifically defined and subordinate to Trinity basin interests.