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Mr. Donald McCovey
Chairman, Resighini Rancheria Tribal Council
P.O. Box 529
Klamath, CA 95548

Re: Summary of California Department of Fish and Game Information Regarding Permitting of May 2010 Removal from Tule Lake of Endangered Lost River and Shortnose Suckers

Dear Chairman McCovey,

I have now had the time to review the 200 pages recently sent to the Resighini Rancheria by the California Department of Fish and Game (CDFG) in response to your California Public Records Act request of March 29. The documents indicate that CDFG did not authorize “take” of Lost River and shortnose suckers that were removed from Tule Lake in May of 2010 (Courter et al. 2010) or provide an exemption to “Fully Protected” species requirements under §5515 of the California Fish and Game Code. This means that U.S. Bureau of Reclamation (BOR) and its contractor violated both the California Endangered Species Act (CESA) and §5515. However, there is substantial evidence that CDFG knew of the illegal sucker relocation from Tule Lake to Upper Klamath Lake in Oregon and in fact one CDFG staff person was present during sucker removal activities (Fry 2010). This means that California was complicit with breaking both laws likely as a result of the political climate set up by the Klamath Basin Restoration Agreement (KBRA). Below is a brief synopsis of the correspondence between CDFG, BOR and U.S. Fish and Wildlife Service (USFWS) regarding planned sucker extinctions in the California portion of the Upper Klamath Basin. A complete reference list of documents provided is also included.

Background

On April 22, 2010 USFWS modified the Biological Opinion with BOR for Klamath Project (USFWS 2008) operation and allowed transfer of Lost River and shortnose suckers out of Tule Lake under the presumption that the lake would become too shallow for their survival in the summer of 2010. It allowed the BOR to draw down Tule Lake and Clear Lake to levels that would potentially eliminate two of three remaining populations of both species, which are listed under the federal Endangered Species Act (ESA). These sucker species were originally listed by USFWS in 1988 and two versions of a Recovery Plan (USFWS 1993, 2011) have been published. Both species are also listed under as endangered under CESA and are “Fully Protected” species under §5515.

California Code §5515: Lost River and shortnose suckers are “Fully Protected” animals under §5515, which makes them illegal to capture or transport, except in very small numbers for research purposes:

“No provision of this code or any other law shall be construed to authorize the issuance of permits or licenses to take any fully protected fish, and no permits or licenses heretofore issued shall have any force or effect for that purpose. However, the department may authorize the taking of those species for necessary scientific research, including efforts to recover fully protected, threatened, or endangered species. Prior to authorizing the take of any of those species, the department shall make an effort to notify all affected and interested parties to solicit information and comments on the proposed authorization. The notification shall be published in the California Regulatory Notice Register and be made available to each person who has notified the department, in writing, of his or her interest in fully protected species and who has provided an e-mail address, if available, or postal address to the department. Affected and interested parties shall have 30 days after notification is published in the California Regulatory Notice Register to provide any relevant information and comments on the proposed authorization.”

None of the above provisions of §5515 were met with regard to the removal of 425 Lost River and shortnose suckers from Tule Lake in May 2010 and their transport to Upper Klamath Lake as reported by Courtier et al. (2010). The only California Regulatory Notice Register (2009) provided the Resighini Rancheria by CDFG involved sucker rescue from Klamath Project canals, not large scale removal from Tule Lake.

Recovery Plans: The original Lost River and shortnose sucker Recovery Plan (USFWS 1993) recommended that Tule Lake be designated Critical Habitat and that the portion of the Lost River above it be restored as spawning habitat. The revised Recovery Plan (USFWS 2011) recognizes two separate geographic areas targeted: the Upper Klamath Lake Unit and the Lost River Basin Unit. The latter is comprised of four “management units”: 1) Clear Lake Reservoir and tributaries, 2) Tule Lake, 3) Gerber Reservoir and tributaries and 4) Lost River Proper. The Lost River itself does not currently support viable populations of either sucker species (Hodge and Buettner 2007, 2008, 2009). Gerber Reservoir has a population of shortnose suckers, but they are thought to be compromised by hybridization with Klamath smallscale suckers (*Catostomus rimiculus*) (Markle et al. 2005, Tranah and May 2006) and are consequently not suitable gene resources for use in re-establishing populations elsewhere. Thus, there are only two populations of Lost River and shortnose suckers remaining within the Lost River Basin Unit: Clear Lake and Tule Lake.

CESA: There are several statutes in CESA that suggest that a “take” permit could not be issued by CDFG for removing hundreds of listed suckers from Tule Lake in California and transporting them to Upper Klamath Lake in Oregon. For example, CESA (§2081b) requires “full mitigation” of “all impacts on the species that result from any act that would cause the proposed taking”. Eliminating one of two viable habitat patches for Lost River and shortnose suckers in the Lost River Basin Unit is a huge impact to the future potential survival of both. CESA at §2052.1 and §2081 (b) requires mitigation measures be “roughly proportional” to the impacts being caused by a project, which means that a habitat area equivalent to Tule Lake would have to be created, which is impossible.

CESA also does not allow CDFG or other California agencies to use a statement of override to permit unavoidable and/or unmitigated impacts to listed species, which is allowed under the California Environmental Quality Act (CEQA). Jeopardy statutes within CESA (§2081c) prohibit issuance of any incidental take permit if "issuance of the permit would jeopardize the continued existence of the species." As noted above, elimination of one of two populations of Lost River and shortnose suckers in the Lost River Basin Unit is clearly a diminishment of their ability to survive into the future.

CDFG is also required by CESA §2081(c) to insure that projects will not put species at risk of extinction based on "best scientific and other information that is reasonably available" regarding "(1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities." The prior USFWS (1993) Recovery Plan and the National Research Council (2004) Klamath endangered fish recovery report both indicate that Tule Lake is an essential refugia for both sucker species. These "best science" documents also recommended re-establishment of spawning habitat in the lower Lost River so that the Tule Lake populations could be fully restored. This is the opposite of the actions permitted by USFWS (2010) and carried out by the BOR and its contractor (Courter et al. 2010). Furthermore, if CDFG were considering cumulative effects of drawing down Tule Lake as proposed by the BOR and authorized by USFWS, increased concentration of pollutants in Keno Reservoir and its effects on suckers there would be a major consideration.

The draw down of Tule Lake appears to be in response to the Klamath Basin Restoration Agreement (KBRA), which also calls for the continued use of Lease Lands within the Lower Klamath National Wildlife Refuge for 50 years. This will block Lost River and shortnose sucker restoration in Lower Klamath Lake as recommended by NRC (2004). Consequently, this is another cumulative effects concern that would have to be considered, if CDFG were trying to justify a CESA "take" permit for the Tule Lake draw down and sucker removal. Additionally, the modification of Tule Lake to where it no longer supported suckers should have likely triggered CEQA analysis to fully comply with California law.

Permits Issued for Lost River and Shortnose Sucker Capture

CDFG, Oregon Department of Fish and Wildlife (ODFW), and the National Marine Fisheries Service (NMFS) have all issued permits for capture of Lost River and shortnose suckers from Klamath Project canals, but none of these permits were issued specifically to authorize the removal of suckers from Tule Lake to Upper Klamath Lake.

CDFG permits generally take the form of Memorandums of Understanding (MOUs) entered into with the BOR (CDFG and BOR 2010) and U.S. Geologic Survey (CDFG and USGS 2011). Suckers trapped within the canal system that services the Klamath Project are often juveniles and their capture and relocation is generally thought of as saving individual fish that would otherwise perish and helping the population incrementally, if these fish survive in the locations to which they are transplanted. The MOUs are between CDFG and individual fish biologists; Darren Taylor of the BOR Klamath Falls office and Mark Johnson of USGS. Again, none of these permits cover removal of adult suckers from Tule Lake and their transport to Oregon and in fact they say that salvaged fish should be transported to Tule Lake (CDFG and BOR 2010).

ODFW (2010, 2011) also issues permits to specific staff of the BOR Klamath Falls office. Reports on fish salvage operations were part of the CPRA information acquired by the Resighini Rancheria. Most suckers captured in Klamath Project canals within Oregon are transported to Upper Klamath Lake. NMFS (2011) permits for sucker salvage are issued at the request of ODFW and are federal coverage for the same activities Oregon is permitting and neither authorizes Tule Lake sucker removal.

U.S. Fish and Wildlife Service Memo Regarding California Permitting Issues

In an email of December 3, 2010, U.S. Fish and Wildlife Service Klamath Falls Project Leader Laurie Sada characterized the “need to develop a comprehensive approach to dealing with CDFG permitting/regulatory challenges associated with relocating listed suckers from California to Oregon.” The information she provides for justification of moving Lost River and shortnose suckers from Tule Lake is contradictory and indicates a policy shift with regard to protection of the species.

On the one hand she claims that all the suckers in Tule Lake are essentially from Upper Klamath Lake and have recruited through the A Canal and the Klamath Project; therefore, removing and transporting them is just placing fish back in their native habitat. “Conservation and recovery of listed suckers includes the need to relocate suckers that have moved from Upper Klamath Lake through the Klamath Irrigation Project into California back into Upper Klamath Lake.” In fact, Abney (as cited by USFWS 1993) noted that there was a substantial hydrologic connection between the Klamath River and Tule Lake during extreme flood events: “The Klamath River periodically flooding down the Lost River Slough is the main source of water which caused Tule Lake’s historic high levels.” This means that Lost River and shortnose suckers have historically augmented populations of Tule Lake and the lower Lost River. Consequently, the assertion that fish transported from Upper Klamath Lake via Klamath Project canals need to be captured and returned to the lake is not justifiable nor does it mimic historic conditions.

Ms. Sada (2010) acknowledges the importance of Tule Lake as sucker habitat: “the recovery plan for both species identifies Tule Lake as a refugial site that should be maintained to limit extinction risk until the populations in Upper Klamath Lake and Clear Lake are recovered.” She also states that “Historically, the Service's biological opinion also required BOR to salvage fish from the canals before draining them at the end of the irrigation system and move them to sump 1A at Tule Lake.” Sada (2010) notes that “Although Tule Lake was historic habitat for suckers, habitat alteration resulting from Project construction prevents suckers living here from reaching spawning habitat and reproducing.” This statement ignores USFWS’ responsibility for ESA enforcement.

There is a discernable shift in policy with regard to Tule Lake later in the memo (Sada 2010) with its draining treated as inevitable:

“Two events occurred in 2010 that made it clear that we need the flexibility to relocate these fish to Upper Klamath Lake: 1) the 2010 drought crisis made it impossible for BOR to maintain required water elevations in Tule Sump 1A so the fish had to be salvaged and relocated to support their survival; and 2) the Klamath Basin National Wildlife Refuge developed a proposal to restore wetlands at Tule Sump 1 A for

waterfowl that would require draining the sump. Although there is a self-sustaining population of suckers at Clear Lake in California it is unclear if fish here are genetically matched. In addition, this lake is remote and accessed by dirt roads making transport of fish here unlikely or impossible.”

It was certainly “possible” for the U.S. BOR to comply with the USFWS (2008) B.O. by restricting water supply to irrigators and restricting groundwater pumping in the Lost River aquifer above Tule Lake by entities such as the Tule Lake Irrigation District. Instead USFWS (2010) issued a modified B.O. that allowed the activity. The same modified B.O. also allows Clear Lake to be drawn down below levels previously required; therefore, the possibility of mortality of suckers transported there is likely a consideration that Ms. Sada (2010) avoids in the background information she provides. Since Clear Lake is at the headwaters of the Lost River, suckers from there have contributed to the Tule Lake since time immemorial.

The memo (Sada 2010) complains about the lack of cooperation from California on moving suckers from Tule Lake to Upper Klamath Lake:

“The California permitting process and staff availability make it extremely challenging to effectively comply with biological requirements, respond to emergency situations, and carry out recovery plan actions. We also need to limit the need to sacrifice these endangered fish on an individual permit basis to comply with fish health requirements.”

The fish health requirements noted here are those of ODFW for fish relocated from the Lost River Basin Unit back to Upper Klamath Lake. Sada (2010) notes that 50 endangered suckers were sacrificed May 2010, which alone exceeds allowable take of Lost River and shortnose suckers under §5515. Information provided by Ms. Sada indicates that, while CDFG did not supply any “take” permits or waivers of §5515, they were in correspondence related to planned sucker removal and sent staff to witness the illegal capture and transport of 425 Lost River and shortnose suckers from Tule Lake to Upper Klamath Lake: “We avoided this process in 2010 by having a CDFG employee on-site for part of the BOR salvage effort.”

U.S. Bureau of Reclamation Memo Regarding California Permitting Issues

On June 21, 2010 Ms. Susan M. Fry, Area Manager of the Bureau of Reclamation Klamath Basin Area Office wrote a memo to CDFG staff James Whelan thanking him for helping facilitate relocation of ESA and CESA listed Lost River and shortnose suckers:

“My staff and I wish to express our appreciation for your inputs during the development of the relocation plan for Tule Lake suckers. In addition, we recognize your efforts to assist the Bureau of Reclamation in obtaining the proper authority to allow the relocation effort to proceed. With your assistance, the majority of the fish were relocated in May of 2010, prior to degraded water quality or the low lake elevations anticipated this summer.”

The letter also includes a similar subtle indication of policy shift as the Sada (2010) memo with regard to Tule Lake and its future under the KBRA: “The fish were relocated to the more permanent waters of Upper Klamath Lake.” Tule Lake is a perennial water body that has

historically supported suckers and would unless the U.S. BOR allowed it to be illegally dried up with the complicity of the USFWS and CDFG.

Conclusion

The U.S. BOR and its contractors broke California law, both CESA and §5515, when 425 endangered Lost River and shortnose suckers were removed from Tule Lake and transported to Upper Klamath Lake in Oregon. The CDFG was complicit in this illegal action in that it was notified, failed to issue permits, but sent staff to witness illegal actions. CDFG appears to be carrying out KBRA sections 24.2 and 24.3 that call for blanket take permits for CESA listed species in Upper Klamath in California, which were to follow an affirmative Secretarial Decision. Memos relinquished to the Resighini Rancheria from USFWS (Sada 2010) and U.S. BOR (Fry 2010) show collusion to justify activities that are contrary to the survival of ESA listed sucker species and in fact constitute a planned extinction of the fish within the Lost River Basin Unit. Basic principals of conservation biology and previous science on conservation of these sucker species (USFWS 1993, NRC 2004) suggest that Tule Lake is critical to their survival and recovery. The loss of one of two remaining populations within the Lost River Basin Unit causes Jeopardy and violates the federal ESA. Modifying Tule Lake to where it does not support suckers is also a violation of the Clean Water Act and should also be subject to CEQA review. Removal of suckers from Tule Lake is not conservation-related as purported by Sada (2010). Instead it shows a troubling change in policy, complicity of both State and federal agencies in violating the law and the corrosive influence of the KBRA, an agreement which California has signed.

Sincerely,



Patrick Higgins

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