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May 17, 2011

Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814

Re: Resighini Rancheria Request for Reinitiation of 401 Certification Process Related to the Application for the Relicensing of the Klamath Hydroelectric Project (P-2082)

Dear Ms. Townsend:

This request is from the Resighini Rancheria, a federally recognized Tribe with a Reservation located at the top of the Klamath River estuary approximately three miles upstream of the Pacific Ocean. We rely on the river for sustenance, and have since time immemorial, and are concerned that continued operation of the Klamath Hydroelectric Project (KHP) dams threatens survival of salmon runs. We request that the State Water Resources Control Board (SWRCB) reactivate their 401 certification (33 USC § 1341, California Water Code § 13160, and 23 C.C.R. Chpt. 28) process immediately as part of Federal Energy Regulatory Commission (FERC #P-2082) KHP relicensing. Your Resolution 2010-0049 (SWRCB 2010) set a May 17, 2011 deadline for federal legislation that authorized the Klamath Basin Restoration Agreement (KBRA) and Klamath Hydropower Settlement Agreement (KHSA), but that deadline has now passed and there is no legislation or prospect thereof in the foreseeable future.

PacifiCorp Vice President Dean S. Brockbank (2011) explained why PacifiCorp has entered into the KHSA as opposed to continuing with the FERC licensing process:

“Customers are protected from the risks and liabilities that exist absent an agreement among the parties. These risks include: (1) potentially higher costs under final terms and conditions for relicensing; (2) difficulties in securing state and federal approvals for relicensing; (3) continued litigation related to endangered species act requirements and water quality issues; and (4) early shut-down and removal of the project. In the end, the terms of the KHSA allow the Company to respond to the policy preferences of the federal government favoring removal of the Project, while protecting all of PacifiCorp’s customers for the long term with respect to economic impact and risks.”





Under the KHSA, PacifiCorp limits its monetary liability and is allowed to operate the KHP under their old 1954 license on a year-to-year basis until 2020 (Brockbank 2011). Meanwhile the problems with loss of beneficial uses continue each year as nutrient pollution and algal toxins pour from the KHP into the Lower Klamath River at Iron Gate Dam. Given the lack of prospects for enabling legislation for the KHSA and KBRA, the SWRCB must recognize that PacifiCorp is stalling the relicensing process and not acting in good faith. Therefore, reinitiation of the 401 certification is in order.

FERC (2007) filed its final Environmental Impact Statement (EIS) on the KHP and has completed all steps in the licensing process necessary for a decision. Resolution 2010-0049 (SWRCB 2010) points out that FERC maintains its authority to rule on the license of the KHP because there has been no KHSA/KBRA authorizing legislation:

“Federal legislation would also be required to stay the relicensing proceeding before the Federal Energy Regulatory Commission, which forms the impetus for the State Water Board’s action under Clean Water Act section 401.”

It follows that California needs to complete the 401 certification process or risk being ruled out of compliance by FERC and the final KHP license decision made without SWRCB input.

PacifiCorp (2006) filed its formal request for 401 certification with the State of California on March 29, 2006 and the letter in reply from the SWRCB (2006) lack of measures offered to improve water quality and meet beneficial uses. Problems continue today and will through at least 2020, if the FERC process is not reactivated. The SWRCB (2006) letter recognized the problems the KHP causes for Indian Tribes of the Lower Klamath and requested more information about them from PacifiCorp:

“PacifiCorp does not provide information in the application on whether the Native American culture beneficial use is fully protected. PacifiCorp must provide information on Project impacts to uses of water that support the cultural and/or traditional rights of indigenous people such as subsistence fishing and shellfish gathering, basket weaving and jewelry material collection, navigation to traditional ceremonial locations, and ceremonial uses.”

In fact Tribes, including the Resighini Rancheria are suffering tremendously due to KHP operation. The toxic algae species Microcystis aeruginosa is now a pervasive problem in Copco and Iron Gate reservoirs (Kann and Corum 2007) and the Lower Klamath River (Kann et al. 2010) where it makes surface water contact unsafe between July and September. Removal of these two reservoirs will largely eliminate toxic algae (Dunne et al. 2011) and there is likely no other remedy. It is unacceptable to the Resighini Rancheria that the SWRCB would allow continuing pollution that prevents ceremonial and recreational uses through 2020.





Microcystin toxin has now been discovered in the livers of juvenile salmon and steelhead and in freshwater mussels in the Lower Klamath River, as well as warmwater species such as yellow perch within KHP reservoirs (Kann 2008). Kann (2008) noted that bioaccumulation in yellow perch and mussels were high enough for the SWRCB to consider issuing a public health warning. The SWRCB (2008) has also asked PacifiCorp to explore the possible effects of Microcystin toxin on Pacific salmon species in the Lower Klamath River for the potential to couple with other environmental stressors (i.e. ammonia, high pH) in compromising their immunity and contributing to disease outbreaks.

Of even greater concern are the effects of nutrient pollution emanating from the Upper Klamath Basin and KHP reservoirs that cause profuse algae blooms downstream of Iron Gate Reservoir and foster conditions that cause major fish disease epidemics (Stocking et al. 2006) resulting in the loss of hundreds of thousands of Chinook salmon (Nichols and Foott 2005). The letter from your staff (SWRCB 2006) used quotes from the FERC draft EIS to convey the magnitude of this problem and the threat it posed to fisheries on which the Lower Klamath River Indians relies:

“If disease issues are not addressed effectively within the next several years, there is a risk that the fall Chinook fishery could suffer a further, dramatic decline, and that an increased prevalence of disease pathogens may affect other salmonid species including the federally listed coho salmon ESU [Evolutionary Significant Unit].’The DEIS further states: ‘...we conclude that elimination of Iron Gate and Copco reservoirs would be likely to reduce fish stress and disease susceptibility by moderating fluctuations in DO and pH associated algal blooms, increasing DO levels... and reducing levels of ammonia in downstream areas’ (DEIS, pg 5-38).”

Nichols and Foott (2005) stated that the number of juvenile Chinook salmon mortalities from disease in 2004 and 2005 was so high that it had the potential to impact subsequent adult returns and population abundance similarly to the 70,000 adult salmon fish fill in September 2002. This magnitude of fish loss is unacceptable to the Resighini Rancheria and unsustainable.

The recently published KBRA coho salmon and steelhead Expert Panel report (Dunne et al. 2011) described changes in precipitation in the Klamath Basin and ocean conditions attendant with the Pacific decadal oscillation cycle (PDO). The switch of the PDO to dry on-land and poor ocean productivity in 1975 was followed by the 1976-77 drought and the record inter-annual drought from 1986-1992 also came during this cycle. We have been in wet climatic regime since 1995 with mostly productive ocean conditions that favor increased salmon abundance and make timing opportune for restoration (Collison et al. 2003). Collison et al. (2003) predict a PDO switch back to less productive for salmon sometime in the 2015 to 2020 period that could lead to salmon population extinctions in the northern California region, if freshwater habitat conditions have not improved. The loss of salmon stocks is irretrievable and irreversible and the SWRCB should act swiftly because waiting until 2020 for dam removal could be too late.





We request that you inform us as soon as possible regarding when the SWRCB may take up the KHP 401 certification issue and also provide us with any staff reports or background information that will be used as a basis for your decision.

Sincerely,

Rick Dowd  
Resighini Rancheria Tribal Council Chairman

**References**

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