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October 18, 2011

VIA E-MAIL AND US MAIL

The Honorable Jeff Merkley
United States Senate
313 Hart Senate Office Building
Washington, DC 20510

Re: Comments on proposed Klamath dam removal legislation

Dear Senator Merkley:

This letter is submitted on behalf of the County of Siskiyou with respect to the proposed legislation authorizing the Secretary of the Interior to remove the Klamath dams.

While we appreciate your staff offering us an opportunity to comment on the legislation, we do respectfully note that this legislation has been provided for quite some time to Tribes, non-governmental organizations, and others based solely on their desire to see the dams removed, three of which are located in Siskiyou County. Ironically, the proposed title of the legislation is that it is to be called the "Klamath Basin Community and Economic Recovery Act of 2011," when in reality it is an economic disaster for the County of Siskiyou. We would also respectfully note that there has been a total failure on the part of the Secretary of the Interior and the Secretary of Commerce to coordinate with the County of Siskiyou; if they had, then it is likely they would understand the mistakes being made.

Three of the four dams to be removed are located in Siskiyou County and the vast majority of the burdens of the economic and environmental harms and impacts rest squarely on this County. This conclusion is validated by the draft environmental documents that have recently been released. What is particularly disturbing about the proposed legislation and

described with particularity below is its intentional design to legislate the destruction of the economic base of a California county. Some of the examples that we have highlighted in the past have been the speculative nature of the entire endeavor as demonstrated by the federal government's own experts. One prime example of the manner in which this matter has been approached is that the impacts to property values not only speculate that at some unspecified date the Klamath is going to be a pristine river flowing by the properties in the County that are currently lakeside properties, but also that the valuation of the economic impact on these properties specifically excludes the value of the structures on the properties in an effort to minimize the effect to County revenues. We have previously corresponded with various members of Congress outlining many of our concerns and made available to your office the information and concerns we have with how this matter has been approached.

The proposed legislation is flawed in several regards. Significantly, the legislation fails to mention at all the Klamath River Basin Compact between the states of Oregon and California which was consented to by the United States Congress in 1957.[1] When the draft legislation is reviewed, in its discussion with respect to the relationship of the proposed legislation to other federal laws, there is no mention of the Klamath River Basin Compact. This Compact was specifically designed to facilitate and promote the orderly, integrated and comprehensive development, use, conservation and control of the water resources of the Klamath River Basin specifically for the purposes of domestic use and development of lands by irrigations and other means, as well as the protection of fish, wildlife and recreational resources and significantly hydroelectric power production.

Your proposed legislation is in part redundant in that there is a Compact between the states of Oregon and California that already puts in place the manner, method and priority for which the waters of the Klamath River Basin are to be used. At a minimum, the proposed legislation should acknowledge the Compact to specifically include that nothing in the proposed legislation would amend, supersede or modify the existing Compact.

What is also unexplained is the fact that the proposed legislation is contrary to the purposes agreed to by the states of Oregon and California in 1957 for the use of the Klamath River Basin waters. It appears that the entire Klamath Hydroelectric Settlement Agreement (KHSA) and the Klamath Basin Restoration Agreement (KBRA) are in part an attempt to

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[1] 71 Stat. 497.

circumvent this previously agreed to Compact between the states.[2]

Notwithstanding the concerns above, the draft legislation at page 10 exempts from the National Environmental Policy Act of 1969[3] the Secretary's signing on to the Agreements. The effect of this exemption from NEPA is to allow the Secretary to sign agreements whose primary purpose is to remove dams based on what we know from the federal parties' own scientific review is a speculative effort to restore an endangered species. What in effect this allows to be done is to have millions and possibly over a Billion Dollars funneled to the various parties and Tribes in an effort to remove dams before any meaningful environmental review is concluded. The current EIR/EIS is not a meaningful environmental review as in many cases it does not even explore the KBRA, its environmental and economic effects, and apparently is based in part on speculation that somehow in November 2012, the citizens of the State of California are going to pass a $10-$11 Billion Dollar infrastructure bond to in part fund this endeavor. For Siskiyou County, a county that is suffering through in excess of 18% unemployment, exacerbated by failed forest management policies of the United States, perhaps you can forgive the perception that the promise of such funding would lack credibility.

Portions of the draft legislation at page 12 also cause concern in that apparently there is going to be a Klamath Drought Fund established, over which those parties signing the KBRA, with the sanction of the Secretary of the Interior, are going to be given full control. These funds are for the management of drought issues in the County of Siskiyou; yet, they exclude Siskiyou County and the Siskiyou County Flood Control and Water Conservation District, both of which have jurisdiction, from the process. The County has often been told that if it would participate, then it would have say. But, why would a county such as Siskiyou allow its affairs to be governed by another county in the state, a county from another state, the State of Oregon, and non-governmental organizations whose members have never been elected by the people of the County, to direct how such matters are going to be governed in the County?

While much is made of the commitment to the Yurok, Karuk, and Klamath Tribes, including the purchase of the Mazama Forest for one of the Tribes, in none of the legislation, environmental documents, or elsewhere are the concerns of the Shasta Tribe specifically

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[2]Although it has never been clear, it appears that sometime after the fact, without any meaningful participation by the Compact's governing body, there was action to rubber-stamp some of the activities in the KBRA and KHSA.

[3]42 USC §4321 et seq.

acknowledged. Certainly they are entitled to due consideration if the intent is to allow the Klamath Tribe to utilize fisheries that may have historically belonged to them.

In the proposed legislation at page 23, the Secretary is given authority to fund fisheries programs with a priority to "qualified Party Tribes" in awarding grants, contracts, and other agreements. The County of Siskiyou has long supported fisheries restoration programs but is excluded. When one reviews the KBRA, this authority is revealed as simply a method to funnel funding to the Tribes, apparently for economic purposes, while making none of the funding available to the County of Siskiyou, which has endeavored to restore fisheries for many years and is the recipient of the majority of the burdens of this proposed endeavor.

Page 24 of the proposed draft legislation raises the question of whether or not it is excluding the ability for anyone to file suit with respect to the actions of the KBRA and KHSA, some of which take place over the next 15-20 years. This type of an unprecedented exclusion of the ability to challenge as-yet scientifically and environmentally unreviewed proposed actions is of concern.

We have the following specific observations:

- Section 3(7), page 3 - The term "facilities removal" should be amended to include a detailed mitigation plan addressing direct and indirect environmental, economic, energy, and social impacts of facilities removal. The Council on Environmental Quality ("CEQ") recently issued a guidance on mitigation under the National Environmental Policy Act ("NEPA") that strongly suggests no federal action can go forward unless all of the mitigation agreed to in an environmental impact statement ("EIS") is fully funded. CEQ's guidance points with approval to the NEPA guidelines of the Department of the Army, from whom Clean Water Act permits will need to be secured before dam removal can occur, as the model that all agencies should follow. The Army's guidelines specifically require that agreed to mitigation be fully funded. The analogy here is clear. First, there should be a detailed mitigation plan that is incorporated into the record of decision for any EIS and that plan must be fully funded before the project can proceed. Second, there should be a clearly defined monitoring program, also as provided for in the new CEQ Guidance, that is coupled with legally enforceable rights in order to ensure the mitigation plan is fully implemented.

- Section 3(7)(D), page 8 - "All associated permitting" should be clarified to state that such required permitting includes all permits and authorizations required under applicable state and local laws. Please note that under the proposed legislation compliance with state and local laws is not required.

- Section 3(12), page 5 - The City of Yreka is a water user. The City should be consulted to determine if it is "Project Water User."

- Section 101(a), page 9 - The "except" clause should be amended to include "other applicable law." Otherwise, compliance is required only with the Title which appears to waive other applicable law not referenced in the Title. Compliance with all laws would seem to be an appropriate standard. Note, for example, section 108(b)(2) appears to adopt this principle but subsection (c) creates a negative implication that only some laws apply i.e. those specifically listed in subsection (c). The principle that all laws apply should be stated clearly at the beginning of this title in section 101 and the negative implications in subsequent sections should be removed.

- Section 101(d), page 10 creates a negative implication that the enumerated laws are the only ones with which compliance is required. Compliance with all federal, state, and local laws should be required.

- Section 103, page 11 - The rights of the County of Siskiyou and cities in the County, including the City of Yreka, to receive funds should also be unimpaired.

- Section 105(a), page 13 - First, the term "Klamath Reclamation Project" does not appear to be defined anywhere in the legislation. Second, the words used in this section as to the purposes of the project include "domestic," "municipal," and "industrial." What is a domestic purpose? The same question obtains for the other terms. In that regard, does the term "power" include the provision of alternative power for those who will lose access to affordable and clean hydropower?

- Section 105(d), page 14 - Funding allocable to the County of Siskiyou should be included.

- Section 201(a), page 26 - The same comments regarding section 101(a) apply with equal force here. The standard should be that there is compliance with all applicable law.

- Section 202(a), page 27 - The only two standards the Secretary applies in making the dam removal determination are whether such an action will advance the restoration of salmonid resources and is in the public interest. In addition to these standards, the Secretary should determine that dam removal and the plan for implementing such removal is consistent with all applicable laws (federal, state, and local), and that mitigation as discussed above with respect to section 3(7) is provided for (i.e. there is a detailed mitigation plan complete with full funding and a monitoring and enforcement program).

- Section 202(f), page 30 - This section seems inconsistent with other judicial review sections. However, before reaching those issues the threshold question is to what does this section apply. Specifically, is the requirement that cases be brought in the Court of Appeals applicable only to environmental laws (line 14, page 30)? The next question is whether the term "environmental laws" includes only federal laws or also includes state and local laws. Is the effect of this section to require that a suit for compliance with state or county environmental laws must be brought in federal circuit court or Court of Appeal?

- Section 203(a)(1) page 32 - Concurrence with a Secretarial determination should also include affected counties given that County laws may be different and counties are independent sovereign authorities.

- Section 203(a)(4)(A)(11), page 34 - Should be clarified to require that all permits etc. mean all permits etc. that are required under all applicable laws (federal, state, and local).

- Section 203(a)(4)(B), page 34 - This section is internally inconsistent and requires significant revision. It begins by appearing to require compliance with all state and local laws, an appropriate principle as noted above, but lines 17-21 provide that such compliance is required only if it does not conflict with federal law and the Secretary's determination. Since this legislation, upon passage, is federal law, it appears as if anything that would be inconsistent with achieving the purposes of this legislation as set forth in the yet to be drafted findings and purposes, or with the Secretary's determination, is waived.

- Section 203(b), page 36 - This section provides that original jurisdiction for cases involving state and local laws arise in federal district court. It is unclear how this section is consistent with section 202(f).

- Section 203(c), page 37 - This section bars certain persons from bringing suits. A person is defined in 1 U.S.C. 1 to include governmental entities. Is the intention to bar any suit? The County of Siskiyou already has a court judgment specifically preserving the right of the County to file suit with respect to the KBRA and KHSA. The same question applies to section 108(b) on page 24. Essentially this legislation bars any legal challenge to as yet unidentified and unreviewed environmental projects and would result in complete circumvention of NEPA and CEQA.

- Section 205(a), page 37 - This section provides PacifiCorp with a blanket exemption from all liability associated with any harm resulting from dam removal. The protection applies to any federal, state, local, or other law. Two issues arise. First, if PacifiCorp is not liable who is liable given the exemptions elsewhere? Second, how is the specific mention of local and other law in this section consistent with the conspicuous absence of specifically mentioning local and other law in other sections of the draft bill.

- Section 207(c), page 42 - The mention of only certain laws creates a negative implication that other laws not mentioned are pre-empted as well. This is essentially open-ended preemption.

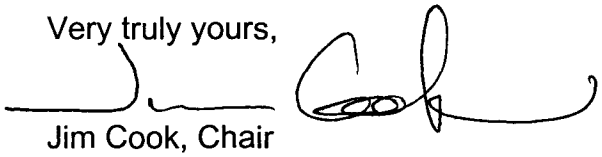
The time periods for shortened judicial review of the Secretary's actions and exemption from compliance with various federal laws, including NEPA, essentially precludes any member of the public or anyone opposed to these actions from having a meaningful opportunity for review. In fact, depriving the District Courts of the United States of the ability to have initial review elevates the Secretary of the Interior so far above the law governing other federal actions that he is almost governing by fiat. There are a variety of other matters including relieving essentially anyone involved of any liability for their actions, making no provision for the identification of a Dam Removal Entity that has sufficient ability and resources to undertake the proposed effort, as well as other issues.

In closing, we would like to point out that, throughout the negotiations, it was often mentioned that there would be no preemption of state and local laws. Page 34 of the proposed legislation does just this. Essentially, the federal government or the Dam Removal Entity will comply with state and local laws regarding permits and other authorizations as long as it does not interfere with the Secretary's schedule for removal of the dams. Because the draft Agreements failed to take into account the impacts on local roads, disposal facilities, and other such infrastructure meaningfully, this legislation effectively shields whomever is going to remove the dams from any responsibility for their

actions.

We respectfully urge you to withdraw this flawed legislation.

Very truly yours,



Jim Cook, Chair
Siskiyou County Board of Supervisors

cc: Senator Barbara Boxer
Senator Dianne Feinstein
Congressman Wally Herger
Congressman Tom McClintock
Congressman Jeff Denham
Governor Jerry Brown