

# Water Review

*A Perspective on Western Water Issues Prepared by the Family Farm Alliance and Its Members*

## CALIFORNIA, OREGON

### Another Klamath River Fish Protected by the ESA?

*Federal Agency to Determine if Spring-Run Chinook Salmon Should be Listed*



#### Overview

The National Marine Fisheries Service (NMFS) on April 12, 2011 announced a 90-day finding for a petition filed by four environmental groups to list the Chinook salmon in the Upper Klamath and Trinity Rivers Basin (CALIFORNIA and OREGON) as threatened or endangered and designate critical habitat under the Endangered Species Act (ESA). NMFS found that the petition presents “substantial scientific information indicating the petitioned actions may be warranted”. The agency will now conduct a status review of the Chinook salmon in the Upper Klamath and Trinity Rivers Basin to determine if the petitioned actions are warranted. Local water users fear that another ESA-listed fish will bring with it new pressures to send agricultural water downstream for the purported benefit of the fish.

NMFS is now soliciting information pertaining

to this species and its habitat from all interested parties. The Klamath Water Users Association (KWUA) is preparing a rebuttal to NMFS with supporting information and best available scientific and commercial data. This issue is the topic of the April 2011 Family Farm “Water Review”.

#### About KWUA

The current Klamath Water Users Association (KWUA) has its origins in the Klamath Water Users Protective Association, bylaws adopted June 22, 1953, organized to address water right and electrical power issues for Klamath Basin irrigators. The Protective Association reformed itself March 16, 1993 with amended bylaws, and incorporated in 1994 as the modern Klamath Water Users Association.

The KWUA represents private rural and suburban irrigation districts and ditch companies within the Klamath Project, along with private irrigation interests outside the Project in both Oregon and California in the Upper Klamath Basin. The KWUA is governed by an eleven-person board of directors elected from supporting irrigation districts, private irrigation interests, and the business community. The KWUA now represents over 5,000 water users on 1,400 family farms.

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## **Klamath River Spring-Run (Cont'd from P. 1)**

### **Petition Background**

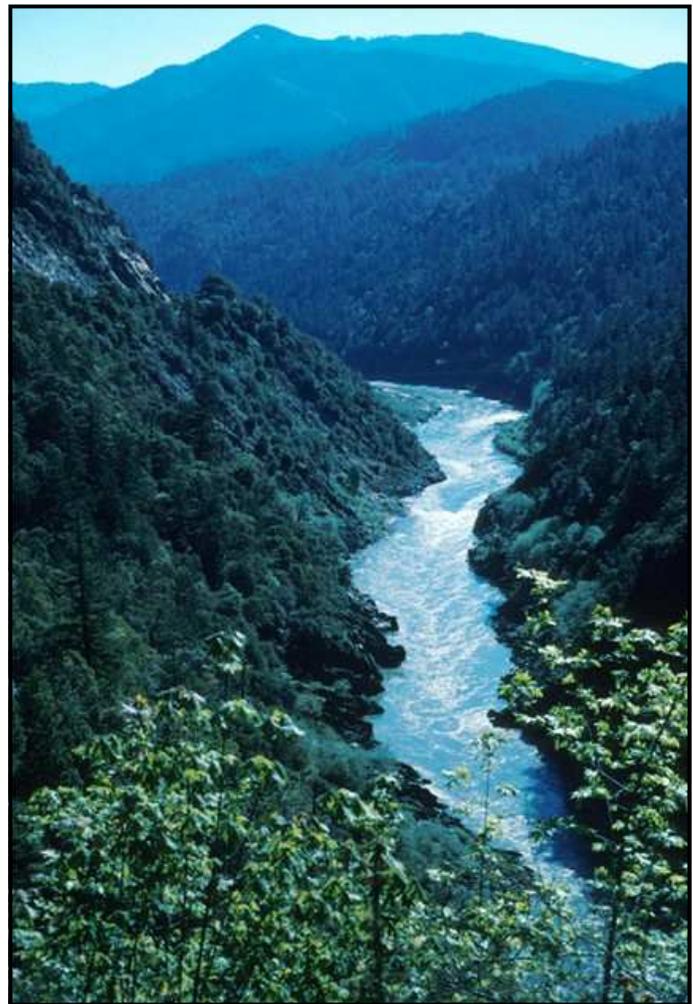
On January 28, 2011, the U.S. Secretary of Commerce received a petition from the Center for Biological Diversity (CBD), Oregon Wild, Environmental Protection Information Center (EPIC), and The Larch Company (hereafter, the Petitioners), requesting that NMFS list Chinook salmon in the Upper Klamath Basin under the Endangered Species Act (ESA). NMFS describes all Klamath River Basin populations of Chinook salmon from the Trinity River and Klamath River upstream from the confluence of the Trinity River as the Upper Klamath and Trinity Rivers Evolutionary Significant Unit (ESU), which includes both spring-run and fall-run fish.

The Petitioners recommend three alternatives for listing Chinook salmon: (1) List spring-run only as a separate ESU; (2) list spring-run as a distinct population segment (DPS) within the Upper Klamath and Trinity Rivers ESU; or (3) list the currently defined Upper Klamath and Trinity Rivers ESU, which includes both spring-run and fall-run. The petitioners also request designation of critical habitat for the Chinook salmon populations that are found to warrant listing.

### **ESA Statutory Provisions and Policy Considerations**

The ESA requires that NMFS make a finding as to whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating the petitioned action may be warranted. The ESA defines “substantial information” as the amount of information that would lead a reasonable person to believe the measure proposed in the petition may be warranted. To make that determination, NMFS must take into account several factors, including information submitted with, and referenced in, the

petition and all other information readily available in agency files. If NMFS find that a petition presents substantial information indicating that the requested action may be warranted, the NOAA Assistant Administrator for Fisheries conducts a status review of the species and makes a finding as to whether or not the petitioned action is warranted within 12 months of receipt of the petition.



*Klamath River.*  
Source: U.S. Fish and Wildlife Service

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## **Klamath River Spring-Run (Cont'd from P. 2)**

### **Upper Klamath and Trinity Rivers Chinook Salmon ESU**

In 1998, NMFS completed a status review of west coast Chinook salmon populations that defined the Chinook salmon ESU as including all spring-run and fall-run populations from the Trinity River and the Klamath River upstream from the confluence of the Trinity River.

Based on the health of the fall-run populations within the ESU, NMFS concluded at that time the ESU was not at significant risk of extinction nor likely to become endangered in the foreseeable future, and therefore, did not warrant listing under the ESA.

The Petitioners essentially request NMFS to revisit its previous conclusion based on more recent information and the current status of this ESU.

### **Analysis of Petition**

The Petition contains information and arguments in support of listing Chinook salmon under the three alternatives recommended by the Petitioners. The Petitioners also include information on spring-run and fall-run Chinook salmon, including life history and physiology, diet, associated fish species, habitat requirements, historic and current distribution, and population status and trends. The Petitioners present several arguments made to support three proposed recommended alternatives. Those arguments are primarily based on claims that new genetic evidence suggests the spring-run Chinook salmon populations in the Upper Klamath and Trinity Rivers ESU are distinct and qualify as being separate from the fall-run populations. Petitioners also argue that spring-run and fall-run Chinook salmon populations in the Upper Klamath and Trinity Rivers Basin have seen a significant decline and low numbers that are increasingly dominated by hatchery fall-run Chinook salmon. According to the petitioners, a history of dams, mining, water diver-

sions, habitat degradation, disease, and fisheries have played a key role in the decline of the populations.



***KWUA Executive Director Greg Addington.***

“Right now, many experts close to this issue believe that the true so-called “spring-run Chinook” in the lower basin are long gone,” said Greg Addington, executive director of the Klamath Water Users Association (KWUA). “The earlier NMFS analysis showed no significant genetic differences that they could hang any legal distinctions on. However, that decision was based on genetic data that was perhaps less complete than what we have available today.”

### **Petition Finding and Resulting Species Status Review**

Based on the information contained in the petition, NMFS found that the petition presents substantial scientific and commercial information indicating that the petitioned actions concerning listing spring-run Chinook salmon in the Upper Klamath and Trinity Rivers Basin as a separate ESU or listing the entire Upper Klamath and Trinity Rivers Chinook salmon ESU may be warranted.

Accordingly, the agency is now initiating a status review of the species. By January 28, 2012, NMFS

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## Klamath River Spring-Run (Cont'd from P. 3)

will make a finding as to whether the petitioned actions are warranted. If any of the petitioned actions are warranted, NMFS will publish a proposed rule and solicit public comments before preparing a final rule.

NMFS has also requested information on areas that may qualify as critical habitat for Chinook salmon in the Upper Klamath and Trinity Rivers Basin. The ESA defines critical habitat as specific areas: (1) Within the geographical area occupied by the species at the time of listing, on which are found those physical or biological features that are essential to the conservation of the listed species and that may require special management considerations or protection; and (2) Outside the geographical area occupied by the species at the time of listing that are essential for the conservation of a listed species.

To ensure the status review is based on the best available scientific and commercial data, NMFS is now soliciting information on Chinook salmon in the Upper Klamath and Trinity Rivers Basin. The agency is requesting information from the public and any other interested parties concerning the current and/or historical status of Chinook salmon in the Upper Klamath and Trinity Rivers Basin.

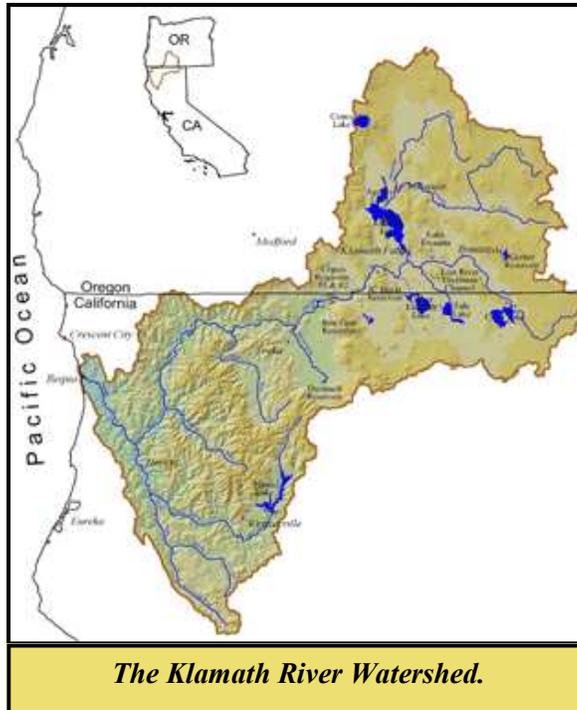
Addington and KWUA – the association that represents Klamath Project irrigators – are in the process of hiring a professional fisheries scientist to collect and develop the best information to submit for the record.

“Submissions merely stating support for or op-

position to the action under consideration without providing supporting information will not be considered in making a determination based on the best available scientific and commercial data,” said Addington. “Addressing this proposed listing with sound science is one of our highest priorities right now.”

### **Potential Impacts and Concerns to Klamath River Communities**

Single-species management driven by ESA-based litigation has already taken a toll on rural communities in the West. A recent editorial in the Redding (CALIFORNIA) *Record Searchlight* predicts that a “threatened or endangered listing (for spring-run Chinook) would further crimp logging, restrict water diversions for farm irrigation, and feed an endless series of lawsuits like those the Klamath Basin and Sacramento River already see over coho salmon, Sacramento Chinook, suckers, steelhead, delta smelt and green sturgeon.”



**The Klamath River Watershed.**

Communities that rely on Klamath and Trinity River waters face potential impacts from another fish listed on the ESA. Already, river management is heavily influenced by federal fishery agency biological opinions intended to protect two species of sucker fish and coho salmon. Interests up and down the river are already speculating as to what the impacts of another ESA-listed fish will be.

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## **Klamath River Spring-Run (Cont'd from P. 4)**

For farmers and ranchers who receive their water from the Bureau of Reclamation's Klamath Irrigation Project – which currently bears the regulatory burden associated with existing ESA-listed fish – the primary fear is that another ESA listing will eventually lead to further agency-directed actions that take stored water away from farmers and send it down river for the purported benefit of fish.

Already, Upper Klamath Lake – the primary reservoir that serves the Klamath Project – is partially managed by federal fishery agencies in a way that sends very high releases downstream to “protect” coho salmon in winter and early spring months. This management scheme, in part, did not allow Upper Klamath Lake to fill in 2010, shorting Klamath Project irrigators over 50% of their water supplies. Optimists believe that current Klamath River flow regimes will already protect spring-run Chinook, which come in from the ocean during the spring, at the time of high flows. However, many others worry that another listed fish will only lead to a more rigid management scheme, one that further locks in artificially high spring flows, and increasing the possibility of even more shortages during summer irrigation months.

Farmers aren't the only ones worried about another ESA-listed fish. Although they do not intermingle significantly in the oceans, spring-run and fall-run Chinook do intermingle in the river, and are indistinguishable to the naked eye. The Hoopa Valley Tribe harvests a considerable number of spring-run Chinook in the Trinity River, and an ESA listing could wreak havoc with their fishery. A similar scenario could arise on the Lower Klamath River estuary with the gill net fisheries of the Yurok Tribe, where the spring-run Chinook and fall-run Chinook intermingle. Within days of the NMFS announcement that it would conduct a status review of the Klamath River spring-run Chinook salmon, the Yurok Tribal Council announced that it would close the spring fishery for three days per week.

Commercial fishermen on the Pacific coast are already regulated under the ESA, and Klamath River fall-run Chinook are an important part of their business success. Again, there is concern that a new ESA-protected fish would intermingle with fall-run Chinook, resulting in new federal restrictions that could very well put the ocean commercial fishery that relies on Klamath River Chinook salmon out of business.

### **Petitioners' Motives Questioned**

There has been plenty of media coverage in California and Oregon on the petition submitted by the four environmental groups to NMFS. What has not been well-covered to date is the known track record and motives of the groups who submitted the petition – particularly the Center for Biological Diversity.

What is known, however, is that this latest attempt to add yet another single “distinct species” to the ESA is nothing new for CBD. Unfortunately, CBD's petition on the Klamath is just another in a long series of actions that suggests money – and not a desire to protect fish – is the real reason behind their latest action.

Two years ago, Budd-Falen Law Offices of Cheyenne, Wyoming set out to determine the amount of litigation filed by environmental organizations and the amount of attorneys' fees these groups have received from the federal government for these cases. Between 2000 and 2009, eight environmental groups – led by the Center for Biological Diversity- filed at least 1,596 federal court cases against the federal government.

“Every one of the groups is a tax exempt, non-profit organization that receives attorney fees from the federal government. ....for suing the federal government,” said Karen Budd-Falen, who oversaw the legal research from Wyoming. “These same environmental groups are receiving billions of tax dollars in attorney fees for settling or ‘winning’

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## Klamath River Spring-Run (Cont'd from P. 5)

cases against the federal government.”

Based on the limited information that was available, Budd-Falen found that over \$4.7 billion in total payments were paid in taxpayer dollars from 2003 through July 2007 for attorney fees and costs in cases against the federal government. CBD alone has filed 149 cases in the four Federal District Courts in California, all of which have been decided in a nine year period ending in 2009. Of those cases, the federal government stipulated to payment of attorneys fees in 74 cases. Of the 59 cases where fees were disclosed, the CBD was awarded over \$3.6 million in attorney's fees and costs.

According to data collected by the Congressional Research Service, CBD also seems to have spearheaded the effort to use the ESA to enforce its global warming beliefs. The CBD has a list of 350 species it believes should be listed and critical habitat designated under the ESA to protect them from greenhouse gases and global warming. Just between five states and the District of Columbia, the CBD has amassed over \$6.7 million in attorneys fees, all paid by taxpayers.

The vast majority of these cases were suits over the failure of the federal government to “timely” respond to CBD's ESA listing petitions.

“The real rub is that these types of litigious environmental groups are not asking the federal court to decide whether a species is scientifically threatened or endangered or whether greenhouse gases adversely impact the species,” said Ms. Budd-Falen. “The majority litigation is only over the timing of the federal government's decisions or the process used to make the decisions.”

Funds awarded to the “prevailing” litigants are taken from the “losing” federal agencies' budget. There is no oversight in spending this money, which could otherwise be funding on- the-ground programs to protect public lands, national forests, wildlife, other land uses.

“Nonprofit, tax exempt groups are making billions of dollars, while ranchers and other citizens are being forced to expend millions of their own

money to intervene or participate in these lawsuits to protect their way of life when they have no chance of the same attorney fee recovery if they prevail,” said Ms. Budd-Falen.

“The real motivation here may be one of raking in clams instead of protecting fish,” said Dan Keppen, executive director of the Family Farm Alliance, who has lived in the Klamath Basin since 2001.

### Additional Information

Information related to this petition finding must be received by June 13, 2011. You may submit comments, identified by [RIN 0648-XA272](#), by any of the following methods:

- **Electronic Submissions:** Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **Mail or hand-delivery:** Assistant Regional Administrator, Protected Resources Division, Attn: Rosalie del Rosario, National Marine Fisheries Service, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213.

For more information on local efforts to influence the NMFS status review, contact:

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