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**Testimony Before the Subcommittee on Water and Power
Committee on Resources
United States House of Representatives**

**Oversight Hearing
on
Environmental Regulations and Water Supply Reliability**

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Chairman Radanovich and Members of the Subcommittee:

Thank you for the opportunity to appear before you to discuss how the Endangered Species Act (ESA) can impact the water supplies and livelihoods of family farmers and ranchers. My name is Dan Keppen, and I serve as the executive director of the Family Farm Alliance. The Alliance advocates for family farmers, ranchers, irrigation districts, and allied industries in seventeen Western states. The Alliance is focused on one mission – To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers.

Today, I would like to focus my comments on the on-the-ground impacts of the ESA to farmers and farm families. While the membership of the Family Farm Alliance spans most of the West, I would like to focus on some very specific examples of how the ESA can impact the daily operation of a family farm or ranch. The observations I will make today are based on my experience working in the Klamath Basin, located in southern Oregon and northern California, where I reside.

I moved to the Klamath Basin in 2001, and served as the executive director for the Klamath Water Users Association (KWUA) until February of this year. As you may recall, 2001 was the year that the federal government announced that, for the first time in 95 years, no water would be provided for irrigators from Upper Klamath Lake. Instead, that water was reallocated to meet the alleged needs of three fish species protected by the Endangered Species Act.

During my tenure with KWUA, I represented rural farmers and ranchers in communities whose very existence relies upon the certain water supply developed 100 years ago for the purposes of irrigation. I also directly witnessed the stress and anxiety that rural families faced in 2001 and the troubling years since, the drain on their finances, and the toll on their health. These farmers – my neighbors and my friends – were impacted in almost unimaginable ways when their water supplies were curtailed in 2001. Those impacts continue to linger today, four years later.

Klamath Project Farming

Thousands of people make their living directly from farming and ranching in the Klamath Project. In turn, their activities support the communities of Malin, Merrill, Bonanza, Tulelake, Newell, and Klamath Falls.

The irrigated farm land of the Klamath Project includes about 230,000 acres. Of this, the great majority is served from diversions from Upper Klamath Lake and points immediately below on the Klamath River. Another area is served via Lost River and the two smaller reservoirs on the Lost River System – Clear Lake and Gerber Reservoirs. Farmland in the Klamath Project produces well over \$100 million annually in direct revenue, and generates roughly \$300 million in economic activity, supporting the farm families, farm workers, businesses and local communities. In addition, there are two national wildlife refuges in the Klamath Project area: Lower Klamath National Wildlife Refuge and Tulelake National Wildlife Refuge. The refuges have rights inferior to irrigation for water, but rely on the same delivery

system for water as irrigation. The refuges are heavily dependent on “return flows” from irrigated agriculture in the Klamath Project.

Klamath Project irrigation and refuges are, of course, only some of the many uses of water in the much-larger Klamath Basin. Upstream of Upper Klamath Lake, there is an estimated 200,000 acres of irrigated land and other uses that divert water. Downstream, on tributaries to the Klamath River in California, there are large areas of irrigated lands, particularly in the Shasta and Scott River Valleys, and an out-of-basin export to the Central Valley of California from the Trinity River that, in the recent past, amounted to one million acre-feet of water per year. Nevertheless, in the long history of the Klamath Project up to 2001, the water supply has ordinarily been sufficient to meet these uses, and there have been only a few years when water shortage occurred to either Klamath Project irrigation or refuges. These shortages occurred late in the irrigation season when forecasted supplies did not fully materialize.

Historic Operations

For 90 years, Klamath Project reservoirs and diversion facilities were operated to serve the authorized irrigation purpose of the Klamath Project. There were no downstream Klamath River flow requirements or minimum Upper Klamath Lake reservoir elevations binding on Klamath Project irrigation users. The focus of Project operations was to optimize irrigation diversions. Upper Klamath Lake reservoir elevations were the result of releases for power generation, judged against irrigation. Clear Lake and Gerber Reservoirs have also been operated historically to conserve water for, and provide water to, the irrigation districts on the east side of the Klamath Project.

Demand for Change in Purposes of Operation

Starting in the 1990’s, political and regulatory demands have affected activities at the Klamath Project. For example, in 1988, the short nose sucker and the Lost River sucker, two species that live in Upper Klamath Lake, were designated as endangered under the ESA. Biological opinions issued by the U.S. Fish and Wildlife Service in 1992 and 1994 concerning operation of the Klamath Project identified Reasonable and Prudent Alternatives (RPAs) to avoid jeopardy to suckers. When the suckers were listed, there had been no mention whatsoever of reservoir elevations as a factor affecting sucker populations. Nonetheless, these biological opinions included minimum reservoir elevations to protect the suckers. These operating elevations were adopted by the Bureau of Reclamation (Reclamation). The reservoir elevations pertaining to Upper Klamath Lake generally allowed the Project to operate for its intended purposes. During the mid-1990’s, a court found the reservoir elevations pertaining to sucker populations in Clear Lake and Gerber Reservoirs to be arbitrary and capricious, and they were invalidated in a succession of decisions.

In late 1994, demands were made by various parties that Reclamation reprioritize and reallocate water. In particular, demands were made that Reclamation take steps to increase both Klamath River flows (as measured at Iron Gate in California) and Upper Klamath Lake reservoir elevations above and beyond the adopted ESA lake levels. The demand was that new flow requirements and lake elevations be set with Klamath Project irrigation and refuges eligible for only the amount of water left over.

Changes to Klamath Project Operations

In 1997, Reclamation made a fundamental change in the operation of the Klamath Irrigation Project. Prior to that time, Project reservoirs and other facilities were operated to ensure irrigation deliveries; the authorized purpose of the Project. In 1997, priorities were reversed, such that the Project was operated to increase flows in the Klamath River (for NOAA Fisheries-driven coho salmon purposes) and to maintain high lake levels in the Upper Klamath Lake reservoir (for the sucker fish), with only the water left over being available for irrigation and wildlife refuges that the Project had previously served for nearly a century.

In more blunt terms, the Project was operated in a manner to promote the potential for water shortages.

2001 Operations Plan

On April 6, 2001, Reclamation announced another one-year change in the historic operation of the Project. That change ultimately had dire repercussions for our community. On that day, USFWS and NOAA Fisheries each issued new biological opinions (for suckers and newly-listed coho salmon, respectively) for Klamath Project operations. To achieve the Klamath River flows at Iron Gate in California and the Upper Klamath Lake elevations specified as “reasonable and prudent alternatives” in these opinions would result in no water whatever for 170,000 acres in 2001. The same date, Reclamation issued a plan adopting these standards, literally triggering disaster.

Impacts to the Community

The types of economic, human, and environmental suffering caused by the 2001 Plan were catastrophic and well-documented. Hundreds of farm and ranch families without income experienced hardship trying to support themselves. Their ability to pay bills and service debt was impaired. Similar types of impacts occurred for farm employees, and for the owners and employees of the agriculture related businesses. The demand for social services increased. Some people simply moved out.

City parks, schoolyards, and cemeteries went without water. Farm fields became fields of weeds and dust. Tremendous wind-borne soil erosion occurred, impairing land productivity and causing air pollution.

Irrigated farmland provides food and habitat for the abundant waterfowl, deer, antelope, and other species. This value was also lost. Tragically, two of the nation’s premier national wildlife refuges were left without water for wetlands and waterfowl habitat.

The 2001 Klamath Basin water crisis received national media attention, and many of the members of this Committee are likely familiar with some of these stories. One study that received considerable attention in the media was developed by Oregon State University economists, and unfortunately, that report – which was roundly condemned by the local farming and business community – seriously downplays the real impacts of the water shutoff to real farmers. Today, I would like to offer up observations from some of my neighbors and associates in the Klamath Basin that may provide you with a new sense of how the ESA, if improperly implemented, can devastate lives.

Real Impacts to Real People

Dick Carleton is a 61-year old, third generation farmer from Merrill, Oregon. Mr. Carleton likes to remind visitors to the Klamath Basin that, when irrigation water was restored to the Klamath Project irrigators in 2002, things did not return to normal. For Dick Carleton and many other family farmers in the Klamath Project, life since then has been a roller coaster ride, both emotionally and financially.

I also draw in this testimony from the observations of Greg Williams, the Klamath Falls, Oregon Branch Manager for Northwest Farm Credit Services. Mr. Williams has first-hand knowledge and experience –from the lender’s point of view – of impacts resulting from the 2001 Klamath Project water curtailment.

The impacts described below rely heavily on input provided by these two individuals, who have direct, on-the-ground experience with real-world impacts that tie back directly to agency implementation of the ESA. Their observations will likely be replicated in other parts of the West should implementation of the ESA or other federal regulations reallocate water supplies originally intended for agriculture.

The Klamath Basin water crisis has generally adversely impacted the financial position of the farmers of the basin. This is due to loss of income, loss of opportunity to grow crops in 2001(a year of high potato prices), capital expenditures for wells and other adjustments to irrigation systems, producers being forced to farm further from home, cash contributions to fight the water battle, and fewer buyers of commodities (i.e. some potato sheds shutting down after 2001).

Income Tax Impacts - Dick Carleton and others like him in the Basin are still feeling the effects of the 2001 curtailment. The first long-term impact became apparent in 2002 and related to income tax consequences that were felt because the established income-expense cash flow for his farming operation was interrupted. The Carletons realized most of their income from the 2000 crop in the 2001 tax year. Since they received no water in 2001, they did not plant crops as normal that year, and hence, did not realize normal expenditures for fertilizer, seed, fuel, labor, etc. to offset that income. The net result was that Dick Carleton and his family were left with a \$120,000 tax bill, collectively, between state and federal taxes, with no income from 2001 crops to pay it. This hefty tax bill compares to a normal collective income tax bill of between \$20,000 and \$30,000.

Inability to Establish Credit - Another financial impact to the Carletons has been the loss of credit and inability to establish an operating line of credit. The Carleton’s credit rating with their bank dropped in 2001, and they were told that their bank would not refinance them in 2002. The Carletons felt their only option was to file a Chapter 11 bankruptcy. Primarily because of that action, and due to the uncertainty of future water deliveries, banks have been unwilling to establish a line of credit for the Carletons. In one case, they were told by a loan officer from outside the area that that particular bank would not approve loans in the Klamath Basin. Locally they were told that it would be useless for them to even submit a loan application. Since income from the crops grown by Dick Carleton and his family is realized

throughout the year, it has been impossible for them to pay bills in a timely manner. Fortunately, the local businesses where they have large bills - such as seed, fertilizer, and fuel suppliers - have been patient and have carried those bills until such time as the Carletons can acquire the capitol to pay them. This allows the Careltons to stay current on bills for necessities like health insurance, labor, family living, electricity, and heating.

Developing Alternative Water Supplies - In January of 2003, the status of water deliveries for the upcoming crop year was uncertain, at best. The Carletons felt that if they were to keep on farming and have a viable operation, they had to have assurance of a dependable water supply. With that in mind, they chose to drill a well, even though they were short of money. Fortunately, the well driller recognized and empathized with their dire situation and agreed to let the Carletons delay payment of over \$100,000 to drill the well. While the Carletons were obviously pleased to have an assured water supply from this source, the money that was spent could have been used to help pay for things like fertilizer and fuel. That expenditure carried over into the next year, and took away funds that could have been invested in the 2003 crop.

In addition to the Carletons, there were others in 2001 who submitted loan requests of \$100,000 –\$250,000 to drill and develop wells. Some of these wells were dry or had inadequate water, which amounted, in essence, a waste of resources. In other cases, well installation increased owners' debt/asset ratio, drained cash reserves, and did not appreciably increase the value of the land. However, it may have given those landowners a safety net for the future. Should there be another total cutoff of water, the Basin's irrigated land, without wells, could fall dramatically to dry land values. This would destroy the balance sheets of Basin farmers, as well as diminish their ability to generate income.

On-Farm Impacts – The Carletons felt continuing on-farm impacts from a year without water:

- Alfalfa crops that went without water in 2001 suffered a loss of stand. Now, those fields must be rotated sooner than normal, which incurs expenses sooner than normal.
- Expenses associated with weed control are now greater for the Carletons and many Basin farmers, especially on those fields that went fallow in 2001.
- Because farm machinery was used sparingly, if at all, in 2001, and also because only absolutely necessary repairs were made that year, farm machinery needed extra repairs the following year.
- In some cases, crops that were planted in the fall of 2000 did not survive the harsh conditions of 2001. Those crops had to be re-seeded, which meant that farm ground had to be re-worked.

Impacts on Ability of Farmers to Generate Income. Capacity is defined as the ability to generate income to pay annual operating expenses, service debt payments, and provide a reasonable level of living for the family. The Klamath Project water cutoff in 2001 changed the ability of many farmers to repay these costs due to: 1) Inability to grow a normal crop; and 2) Increasing expenses.

The Carletons were not able to make payments on long term loans in 2002 or 2003. While the lending institutions recognized the rather unique, unprecedented nature of this development,

they did not foreclose. However, the interest on these notes continued to accrue. So, instead of shrinking, the amount of the loan actually increased, leaving the Carletons with a greater debt load. To adjust, they were forced to dip into family savings to cover living expenses and in some instances, those savings were depleted. Cumulatively, all of these new expenses – directly tied to the 2001 curtailment of water - required money that could otherwise have been invested in the current year's crop.

Impacts to Collateral Value: Collateral is an important credit factor and includes assets to repay and secure the loan. This may include a lien on crops, cattle, equipment, and real estate. A water shutoff would cause the value of collateral to fall to the point that customers may not be able to repay the loans from normal income or the sale of collateral. If real estate becomes dry land, the income capacity of the land will be limited to pasture or dry land grain, which typically is not profitable. (For example, if potatoes are grown, the gross income may typically be \$2,700/acre. As a dry land farm, the income may only be \$100/acre.) In other words, if land value drops by 80%, many of the land owners will not be able to either sell out or generate sufficient income to ever repay their loans.

Uncertainty - The water cutoff has left Klamath Project irrigators in a position of not knowing when the next "surprise" cutoff or reduction in water deliveries will occur. This has impacted the capacity or repayment ability of farmers, as they have taken a more conservative approach to crop rotation. Many farmers now plant fewer acres of row crops (potatoes and onions) due to the risk of having the water cutoff. In addition, tenant farmers now prefer land with secondary water sources (i.e. wells). This adversely impacts the landlords who do not have an alternative source of water.

Dick Carleton believes that probably the most difficult thing he and his neighbors have to face is the uncertainty of the future. With current operations plans in place, Klamath Project irrigators still don't know if they will have water, or, if so, how much. This uncertainty makes planning for the future, at best, very difficult.

The Klamath Project Regulatory Regime is Peer-Reviewed

In the wake of the 2001 regulatory disaster, the Klamath Project agricultural community and its political leaders strongly advocated for an independent peer review of the 2001 fishery agency biological opinions, the underlying science, and the related overall scientific process. In early 2002, an interim report from the National Research Council (NRC) Committee on Endangered and Threatened Fishes in the Klamath Basin was released. This represented a critical step towards ensuring proper assessment and maintenance of healthy fish populations.

The panel successfully completed an objective, unbiased initial review of the information used by the U.S. Fish and Wildlife Service (USFWS) and NOAA Fisheries to formulate the agencies' two 2001 Biological Opinions (BOs). The interim NRC report concluded that there was insufficient scientific evidence used by USFWS and NOAA Fisheries in 2001 to support changing the recent historical water operations of the Klamath Project. Specifically, the NRC interim report concluded that higher or lower than recent historical lake levels or Klamath River flows were not scientifically justified based on the available information used by the

USFWS and NOAA Fisheries.

Despite varying interpretations of the data used by the USFWS and NOAA Fisheries in the BOs, it is especially noteworthy that the NRC panel achieved consensus on the Interim Report's conclusions for not just one, but both BOs. The report's conclusions were adequately supported by the available evidence and analyses used by USFWS and NOAA Fisheries. It was particularly evident that the NRC Committee report was fair and impartial, essential attributes that were sorely lacking in Klamath Basin issues to date.

The U.S. Bureau of Reclamation's final 10-year Biological Assessment for Klamath Project 2002-2012 operations properly incorporated the findings of the 2002 interim National Research Council's (NRC) interim report, and generally captured the essence of the "watershed-wide" philosophy endorsed in the NRC report.

Unfortunately, the "new" fishery agency biological opinions (BOs) do not. Despite the so-called ecosystem approach to species recovery advocated by the USFWS and NOAA Fisheries, their actions in the Klamath basin over the past decade amply demonstrates that the exact opposite took place. Instead, they focused on: 1) a single-species approach; and 2) Klamath Project operations.

The USFWS opinion continues to perpetuate the questionable assumption that lake level management is the principle mechanism affecting sucker survival in Upper Klamath Lake (UKL). The NOAA Fisheries jeopardy decision similarly continues to place high emphasis on downstream flows. The stored water developed for Klamath Project farmers continues to be reallocated to meet the artificial demands set by agency biologists.

The combined – and apparently, unanticipated – impacts placed on the Upper Basin community from the application of the two new opinions are unacceptable. On June 25th, 2003, local irrigators were told by Reclamation officials that UKL diversions to the Project would be shut down for a minimum of 5 days – in the middle of the growing season. By day's end, reason prevailed: the agencies backed off their initial request and instead, Reclamation notified farmers to continue their efforts to reduce diversions from the lake. This was driven by one apparent agency mission: to avoid dropping UKL one inch below a lake level elevation established by the USFWS.

In addition to the continued uncertainty irrigators face, the opinions are generating new, unanticipated impacts to the community. In the past 40 to 50 years, while the cropping pattern in the Klamath Project has varied from year to year, the overall planted acreage has remained consistent. On the other hand, the 2002-2012 biological opinion created by NOAA Fisheries for coho salmon established the river flow schedule and an "environmental water bank" – which ratchets up to 100,000 acre-feet this year, regardless of actual hydrologic conditions – that is the primary source of new demand for water in the Klamath River watershed.

The result: stored water that has flowed to farms, ranches and the refuges for nearly 100 years is now sent downstream at such high levels, that groundwater pumped from the Lost River basin is being used to supplement the resulting "coho salmon demand" in the Klamath River.

It is not the farmers who have imposed new water demands that, in essence, have made groundwater the default supplemental supply to the Klamath Project. It is the opinions of agency fishery biologists who have fundamentally altered how this century-old water project operates, and who have apparently failed to anticipate the resulting impacts to the community.

While Reclamation in 2002 sharply disagreed with the findings of both fishery agency biological opinions, it is not yet clear how consultation will be reinitiated to create a new operations plan.

Recommendation: Inject Peer-Review into Critical ESA Decisions

The NRC committee's reports effectively found no scientific basis for the 2001 cut-off to the Klamath Project. Proponents of the agency decisions (opponents of the Klamath Project) correctly point out that the NRC committee did not say the decisions were "wrong" or "arbitrary." And, they say, "Science is uncertain, we all know that: hence, no big deal."

For anyone who endured the consequences of the 2001 decisions, the efforts to minimize the significance of the NRC committee's findings are absurd. In 2001, a desperate community was looked in the eye and told, "sorry, we know it may hurt, but 'the science' is compelling and requires you to go without water." This was wrong, literally, and as a matter of policy. For whatever reason, the agencies had become too close to, and too much a part of, the side-taking that had come to dominate issues surrounding the Klamath Project. For this reason alone, outside review was needed.

The Family Farm Alliance strongly affirm the goals of the ESA. However, this 30-year old law could stand some targeted reforms, including common-sense changes to make it work better, minimize confusion, and discourage litigation. We support legislation that would require the establishment of standards for scientific and commercial data that are used to make decisions under the ESA. We believe that relatively greater weight should be given to data that have been field-tested or peer-reviewed. The former requirement would help clarify when such things as "personal observations" or mere folklore are considered by the agencies to be reliable enough to make decisions with potentially profound effects. We support peer review of ESA listing decisions and ESA section 7 consultations by a disinterested panel, and we believe legislation can be crafted to create procedures for that process.

There is nothing inherent in peer review that either favors or disfavors economic interests. If the administration of the ESA has reached such a point that oversight is perceived as critical, the act is not working.

The Klamath peer review underscores the point. That peer review process not only forced a reconsideration of otherwise-unchecked disastrous decisions, it pointed to a better approach for species recovery. It also hints at something that is often overlooked in the ESA debate, especially by interests outside of rural areas. If protecting a species is important to society as a whole, then all of society - not just select family farms - should bear that burden.

Thank you for this opportunity to present testimony to you.

SOURCES OF INFORMATION

1. A Lender's Point of View, Greg Williams, Klamath Branch Manager – Northwest Farm Credit Services AgLifeNW Magazine January 2004 issue.
2. Economic update by Dick Carleton, Merrill rancher 1/27/04, AgLifeNW Magazine, April issue, Klamath Basin Update.
3. Kandra v. United States - this case challenged the zero allocation decision of 2001. A hearing on preliminary injunction was briefed and heard on an expedited basis. The preliminary injunction challenges were based, in addition to hardship to Project interests, on NEPA, the ESA, and Reclamation law and contracts. The preliminary injunction was denied. The case, which was directed at water deliveries in 2001, was eventually dismissed without prejudice, and there was no final judgment.
4. Hearing underscores need for common sense, by Dan Keppen, KWUA Executive Director, Capital Press, Vol. 77, No. 36, Sept. 3, 2004.