From:	FISH1IFR@aol.com
To:	Delta Plan Comments@Deltacouncil
Subject:	CORRECTED Attachement A to PCFFA Delta Plan 2nd Draft Comments 4/15th
Date:	Saturday, April 16, 2011 4:26:00 PM
Attachments:	HVT-MemoRe50KAFHumboltWater(Aug 2010).pdf

Dear Delta Plan Staff....

Please note attached a CORRECTED Attachment A to our Supplemental Comments on the Delta Plan Draft 2, to enter into the record.

The original Attachment A has some typos and was expanded and corrected. Sending the old version was inadvertent.

This can be entered as a separate document in the Record to prevent confusion. Reference to Attachment A to our PCFFA Supplemental Comments should refer instead to this corrected Attachment as

"Corrected Attachment A to PCFFA Supplemental Comments of April 15, 2011."

==========

Glen H. Spain, Northwest Regional Director
Pacific Coast Federation of Fishermen's Associations (PCFFA)
PO Box 11170, Eugene, OR 97440-3370
Office: (541)689-2000 Fax: (541)689-2500
Web Home Page: www.pcffa.org
Email: fish1ifr@aol.com

Hoopa Valley Tribal Council

Hoopa Valley Tribe

P.O. Box 1348 ~ Hoopa, California 95546 ~ Phone (530) 625-4211 ~ Fax (530) 625-4594

Leonard E. Masten Jr.
Chairman

History of the 50,000 acre-feet proviso in Section 2 of the Act of August 12, 1955
Prepared by the Hoopa Valley Tribe for the Department of the Interior (REVISED)

August, 2010

Background

Congress authorized the Trinity River Division (TRD) of the Central Valley Project by the Act of August 12, 1955, Pub. L. 84-386, 69 Stat. 719 (1955 Act). The 1955 Act authorized the transbasin diversion of water from the Trinity River, the Klamath River's largest tributary, to the Central Valley. The TRD is the only source of Central Valley Project (CVP) water that is imported to the Central Valley. Section 2 of the 1955 Act directs that the TRD be "integrated and coordinated, from both an operational and financial standpoint" with the other units of the CVP, including any future developments.

In recognition of, and in order to protect, basin-of-origin needs, Congress added two provisos to its general integration instruction. The first proviso directs the Secretary to "adopt appropriate measures to insure the preservation and propagation of fish and wildlife, including, but not limited to" provision of instream flow releases "for maintenance of fish life and propagation thereof." The second proviso requires "That not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users. These provisos were addressed by the Solicitor in an opinion for the Assistant Secretary, Land and Water Resources pages 3-4 (December 7, 1979):

> On occasion the Congress has specifically limited the Secretary's discretion in meeting the general CVP priorities. For example, in authorizing the Trinity River Division of the CVP in 1955, Congress specifically provided that in-basin flows (in excess of a statutorily prescribed minimum) determined by the Secretary to be necessary to meet in-basin needs take precedence over needs to be served by out-of-basin diversion. See Pub. L. 84-386, §2. In that case, Congress' usual direction that the Trinity River Division be integrated into the overall CVP, set forth at the beginning of section 2, is expressly modified by and made subject to the provisos that follow giving specific direction to the Secretary regarding in-basin needs.

The first proviso is the foundational authority for the flow releases provided by the Trinity River Restoration Record of Decision (ROD) (December 2000) that was negotiated with and concurred in by the Hoopa Valley Tribe pursuant to additional congressional direction enacted in the Central Valley Project Improvement Act (CVPIA) Pub. L. 102-575 Title XXXIV (October 30, 1992). The CVPIA is unique in reclamation law for its recognition of tribal rights; it includes explicit provisions "to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe." Id. §3406(b)(23).

The second proviso is distinct from the first. It requires the Secretary to set aside 50,000 acre-feet of stored TRD water annually to be released and made available to Humboldt County and downstream users as a supply separate from the ROD flows.

Issue

Some in the Bureau of Reclamation hold the view that the "not less than 50,000 acre-feet" of TRD water is subsumed in the first proviso's fishery flow releases. This has led the Bureau to pay CVP contractors more than $1.3 million[1] for Trinity Division water to which the contractors have no legal entitlement, even as the Bureau has under-funded Trinity River restoration. The Bureau has announced that it is considering once again purchasing water in 2010 from CVP contractors rather than releasing water pursuant to the second proviso of the 1955 Act.

Analysis

The ROD flows were developed, designed and implemented entirely and exclusively for the benefit of the fishery and cannot be diverted or applied to other uses or on other schedules than as prescribed under the authority of the ROD. There are numerous technical and scientific reasons why that is the case that are beyond the scope of this memorandum. In addition, the Tribe and Humboldt County have worked collaboratively to furnish the Department with extensive analyses in the last several years that demonstrate the distinction between the two provisos.[2]

---

[1] In a July 18, 2005, response to an email inquiry from the Tribe's Special Counsel Joseph R. Membrino, Mid-Pacific Region Budget Director Craig Muelhberg stated:

> In FY 2004 we transferred $666,750 from CVP, Delta Division, Fish and Wildlife Management and Development, into CVP, Trinity River Division, Fish and Wildlife Management and Development, Water and Related Resources appropriation.
>
> In FY 2005 we transferred $150,000 from Lahontan Basin, Water and Energy Management and Development and $166,000 from Land Management and Development and also $334,000 from Klamath Project, Water and Energy Management and Development, Water and Related Resources appropriation, a total of $650,000, into the Trinity River Division, Fish and Wildlife Management and Development, Water and Related Resources appropriation.

[2] See Letter from Humboldt County to Secretary Norton (March 25, 2003); Letter from Humboldt County to Solicitor William G. Myers III (May 21, 2003); Letter from Hoopa Valley Tribe to Leslie Barbre Mid-Pacific Region, Bureau of Reclamation (February 14, 2008).

This memorandum instead focuses on the legal basis for concluding that the 1955 Act, the subsequent proceedings in which the Bureau of Reclamation obtained permits for the TRD from the State Water Resources Control Board, and the contract for the 50,000 acre-feet between the Department of the Interior and Humboldt County all demonstrate that the 50,000 acre-feet is not subsumed in the ROD flows.

Legislative History

A. Proceedings in the House of Representatives

1. Hearings

The 1955 Act was passed by the 84th Congress. The House of Representatives addressed the Trinity Division authorization proposal before the Senate did. On April 13, 1955, the House Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs held a hearing in Washington, D.C. on H.R. 4663[3] to authorize the TRD (House Hearing). The hearing record includes a reprint of the bill as it stood at that time. Section 2 included a form of the proviso for the "preservation and propagation" of the fishery and mentions minimum flows. There is no other proviso in section 2.

The Administration's letter stated (House Hearing at 4) that the Department's studies

> indicate that the proposed [Trinity] diversion would utilize only a small percentage of the water now wasting into the Pacific Ocean from the Klamath River watershed. These studies also show that the relatively small amount of water that would be diverted would not affect future development of either the Trinity River Basin or the Klamath River Basin downstream since water in those areas would be more than adequate to satisfy future needs.

The first two witnesses at the hearing were the Bureau of Reclamation's Regional Director Clyde Spencer and A. N. Murray, the Bureau's Regional Planning Engineer from Sacramento, California. Mr. Spencer addressed basin-of-origin protections at page 10 of the House Hearing:

> In proposing a project which would take water from one of the coastal basins and bring it into the Central Valley Basin, we have been acutely aware of the importance of not depriving the basin of origin of water which it needs now or will ever need. Our plans contemplate making available ample water to meet the needs of the Trinity River Basin. One

[3] There was another bill in the 84th Congress, H.R. 105, that would have authorized both the Trinity Division and the San Luis Unit. The administration had been preparing a report on H.R. 105 and delivered it to the Committee with a note that it be considered the report only for the Trinity Division because the San Luis Unit review was still underway. The San Luis Unit was eventually authorized 5 years later in 1960. (Act of June 3, 1960, Public Law 86-488, 74 Stat. 156.)

> important local water need is for an adequate supply of water of favorable temperature for fish life. In planning the project, we have relied upon detailed studies by the Fish and Wildlife Service, which have been reviewed carefully by the State fish and game commission, in arriving at quantities of water which should be released to flow on down the channel of the Trinity River for preservation of fish. These releases, incidentally, will meet any consumptive requirements within the downstream basins.
>
> Planned operating criteria are such that extreme low-water flows throughout the lower Trinity and Klamath Rivers would be improved, while water would be stored in Trinity Reservoir or diverted to the Sacramento only at times when large quantities are flowing in the lower Trinity from other sources. Historically the minimum flow of the Trinity at the Lewiston gage has been as low as 23 cubic feet per second and has been below 100 cubic feet per second for many weeks at a time; planned operations would provide absolute minimums at Lewiston of 100 cubic feet per second, and during parts of each year the minimum would rise to 300 cubic feet per second. H.R. 4663 might require that about 11,000 acre-feet annually by-pass the Towerhouse and Matheson powerplants in addition to the total agreed to by the fishery experts.

Congressman Dawson of Utah then had the following exchange with Congressman Engle and the Reclamation witnesses at page 26 et seq. of the House Hearing.

> MR. DAWSON: Mr. Spencer, I understood you to say that much of the water originating in the area where it will be utilized by this project is now flowing into the Pacific Ocean?
>
> MR. SPENCER. That is correct.
>
> MR. MURRAY. The average annual runoff of the Trinity River at Lewiston, which is very close to the main storage dam, is approximately 1,100,000 acre-feet. The runoff at the mouth of the Trinity is about 4 million acre-feet; the runoff of the Klamath River where it runs into the ocean is over 10 million acre-feet. So approximately 10 percent of the total runoff of the Klamath River at its mouth originates above Lewiston on the Trinity River, and about 70 percent of that is proposed to be diverted to the Sacramento, while the remaining 30 percent of the Trinity River water would be firmed up in the low-water periods.
>
> MR. DAWSON. In other words, there is no opposition to this project from the people either in California or Washington (sic), substantial opposition, with the exception of some in the Klamath Basin area, who feel they might be deprived of water?

> MR. MURRAY. Some of the people in Humboldt County, which lies adjacent to the Pacific Ocean and adjacent to the Klamath River, do object to the project on the grounds that there has not yet been a complete survey of their ultimate water requirements. They have advanced the thought that even the taking of a small portion of the Klamath River for the project might divert water needed in Humboldt County.
>
> MR. DAWSON. Do you care to comment on whether water would be delivered in that area?
>
> MR. MURRAY. On the contrary, we believe their position could well be improved through the operation of the project. It would be a very, very small improvement, and it would come from a reduction in a very small amount of high-flood flows[4] in the whole area, and would improve again in the small amount--the low-water flows of the river.
>
> MR. DAWSON. It would result in stream control which would give them water when they needed it?
>
> MR. MURRAY. That is our opinion.

In fact, Mr. Murray misspoke here; that was not Reclamation's position at the time, but the second proviso eventually did provide for the Bureau to "release annually" and make "available" "not less than 50,000 acre-feet" of TRD water. Congressman Engle intervened at this point to help Mr. Murray away from details and back to the strategic justification for the TRD. He states at page 27 of the House Hearing:

> There are 13 million acre-feet of water going to waste in Humboldt Bay.[5] That is more water than is consumed by all of the people and all of the industries of 12 of the larger cities in this country. . . And the diversion of this dribble will not hurt them. As a matter of fact, the project operation will stabilize the flow of water so that during the summertime the steelheads do not get there backs sunburned going up the river.

However, Congressman Engle was masking a conclusion already reached by the Bureau of Reclamation that it is not feasible to develop for power and irrigation water sources that are tributary to the Trinity River below Lewiston. The testimony of Mr. Richard M. Denbo of the Humboldt County Chamber of Commerce on this matter in the House Hearing is addressed below.

Another Subcommittee member joined the discussion at page 27.

---

[4] H.R. 4663 as then being considered and as enacted is not authorized to provide for flood control.

[5] Chairman Engle also misspeaks here. The Klamath River does not drain into Humboldt Bay; it enters the Pacific Ocean at Klamath, California, approximately 60 miles to the north in Del Norte County.

CONG. YOUNG OF NEVADA: Did you say there was no objection to the project from the Klamath area?

MR. MURRAY. No; I said there had been objection registered by people of Humboldt County who lie adjacent to the Klamath River.

MR. YOUNG. Referring to the Klamath area shown on that map, that is in Humboldt County, is it?

MR. MURRAY. No, sir. You mean the entire Klamath area?

MR. DAWSON. Yes, sir.

MR. MURRAY. There have been no objections raised from the State of Oregon at all. In fact, they do not consider themselves affected in any way by the project, which lies entirely in the State of California.

MR. SPENCER. May I make an observation on that?

MR. YOUNG. Yes.

MR. SPENCER. We did have at the April [1954] hearing a complaint from some of the Indians from reservations in the Klamath Basin, and I think one or two of those were from the State of Oregon.[6]

---

[6] The following is an excerpt from Trinity River Development: Hearing Before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, House of Representatives, 83rd Cong., 2d Sess. pages 71-72 (April 16, 1954, Redding, California).

[Humboldt County resident LEE BROWN] In 1950 Mr. Marshall Jones, regional manager of the Bureau at Chico who is here, suggested that we ask for a study, and that is the study that they are telling the people here present that the Federal Government is wasting Federal funds doing in our area. That study was not to study the Trinity River diversion. That was to make a resource survey, a water survey of the area and certainly in terms of utilization in our area, and the end product of this survey to be a project in our area in which we can utilize our own water resources.

* * * *

CHAIRMAN HARRISON. Is Mr. Robert Lake in the room representing the Hoopa Indians? Who represents the Hoopa Indians?

A REPRESENTATIVE. Gentlemen, I am representing the general council of the Hoopa Indians. We would like a complete survey of this water-diversion project before it is started. Like these other gentlemen before me, we have large resources down there. We would like to have that survey made. I believe they said there has been surveys, but I have never seen any yet. I believe we should have that first.

CHAIRMAN HARRISON. That is the position of your tribe, is that right?

REPRESENTATIVE. Yes; we are right at the mouth of the Trinity River. We are pressed for time, and I would like to see the rest of the people get a chance to talk.

CHAIRMAN HARRISON. The Yurok Indians are represented by Princess Lowana Brantner.

> MR. YOUNG. Did you discuss the provisions in here for the protection of fish and wildlife, or is that part of your testimony?
>
> MR. MURRAY. Briefly it is discussed at page 8.
>
> MR. YOUNG. I can read that.

At pages 104-106 of the House Hearing, Cong. Scudder of the First District joins the discussion.

> MR. SCUDDER. . . . About 15 years ago the Corps of Engineers was authorized to make a survey of the water needs of this area. The survey was about 60 percent completed when by Presidential directive during World War II moneys were not made available for such investigations and the lack of funds thereafter caused the engineers to stop their survey.
>
> About 3 years ago, the Board of Supervisors of Humboldt County asked the Bureau of Reclamation to make a survey of water and water needs of the north coast area of California. This survey has been in progress for

---

PRINCESS LOWANA BRANTNER. My name is Princess Lowana Brantner. I represent the Yurok Tribe, lower Klamath strip. With me is Edgar McLoughlin, of Witchipec, who represents the upper Klamath strip.

I have come a long way for the opportunity to talk to you for only a limited time. There is a lot we, the Yurok Indians, don't understand about the Trinity River diversion.

I would like to state about four important reasons why the Yurok Indians don't believe that any water should be taken out of the Trinity River.

The first is: When Oregon takes the water out of the Klamath River to irrigate the Chiloquin Indian Reservation, Tule Lake, and Butte Valley, we wonder how much water would be left in the Klamath River.

Second, Indiam (sic) timber, logging companies, and the Forest Service have a vast stand of timber that is being logged off. The Indians work for these logging companies, making their livelihood. Those logs have to be rafted down the river to Klamath. There are no roads, and if there is not enough water, the logging companies have to close down. There are days during the summer months when there is not sufficient water.

Third, we would like a complete study of our mineral and other resources on the Lower Klamath Basin. Gold has been found on the upper Klamath River and on the Trinity River, and if other mineral is found, we would need the water in both rivers to develop our resources.

Fourth, if the water is taken out of the two rivers there would not be enough water left to allow the salmon and steelhead to spawn. The Copco Dam has ruined the spawning grounds for thousands of salmon. During the summer months, along the banks of the Klamath River you can see dead trout by the hundreds-the water being low and warm.

I want to express my sincere appreciation for appearing before your honorable group in behalf of my people who have lived and been a part of northern California since the white man arrived on the American Continent.

> about 3 years at a very substantial cost to the taxpayers of our country. It is estimated that the report will be completed in about 2 years. Until this report is completed, the potential need of water for expanding industry will not be known.
>
> Therefore the people of Humboldt and Del Norte Counties are concerned as to whether sufficient water will be available to take care of the expanding economy, particularly as it affects the manufacture of wood products.
>
> You are aware that the former Secretary of the Interior, Mr. Oscar Chapman, authorized this project by a letter of engineering feasibility some 2 months after his administration had been defeated at the polls, and was a deathbed authorization.
>
> When the Interior Department appropriation bill for fiscal 1955 was under consideration, I appeared before the committee and I desire at this point to insert in the record the statement I made at that time.

After starting out with technical points on reclamation law and the process for authorization of new project units, Cong. Scudder's written statement to the Appropriations Committee as inserted in the House Hearing continues on page 106:

> [T]he project proposed to divert water from the north coast watershed, which is in my congressional district, to the Sacramento Valley and eventually, possibly, to the San Joaquin valley of California. There may very well be some excess waters in this watershed which might be diverted to other areas which are in need of additional supplemental water. However, this north coast area is growing rapidly. There is increased activity in lumbering and other forest products. Before this Congress commits itself to allowing waters to be exported from the area I would like to be certain that we can be assured that all possible future needs of this area are first taken care of. Some of my people would probably like to appear before the appropriate congressional committee in hearings on this project and testify as to the anticipated future need of that area. This opportunity should be afforded them before any commitments are made directly or indirectly for allowing the Trinity project to be regarded as authorized.

At page 169 of the House Hearing is testimony by the Humboldt County Chamber of Commerce representative Richard F. Denbo. He refers to a resolution of the Board of Supervisors dated June 5, 1952 and then states:

> MR. DENBO. . . . Until such time as there has been a determination of not only the need for Trinity River water, but until the needs of the people of the north coast area now and in the foreseeable future have been

> determined, Humboldt County will continue its opposition to the development of the Trinity River project.
>
> [Page 170] MR. DENBO. . . . In 1952 the Board of Supervisors of Humboldt County invited the Bureau of Reclamation to make a study of the present and future water needs for Humboldt County. We were assured at that time by those interests who wished to divert the Trinity River that no steps would be taken for this diversion until the final report of the Bureau was made which would definitely establish the present and future water needs of Humboldt County.
>
> The Bureau has a staff of five men, plus office personnel, that have been surveying the water resources of Humboldt County for 3 years. However, it will be 2 years, in 1957, according to the Bureau office located in Eureka, until the final report is finished. It is our contention that Congress should not appropriate any funds for Trinity River diversion until this report is complete. It would seem that the needs of our area are unknown or the Bureau of Reclamation would not maintain an office in Humboldt County.
>
> * * *.*
> H.R. 4663 gives no consideration to the present or future needs of the county of Humboldt or the north coast area of California.

At page 171, Mr. Denbo makes a crucial observation about The Bureau of Reclamation's and Cong. Engle's references to surplus water.

> MR. DENBO. . . . We readily admit that there are several million acre-feet of water that flow into the Pacific each year from the streams of Humboldt and Del Norte Counties; however many of these streams are 40 to 50 miles in length and according to the Bureau of Reclamation it is not economically feasible to trap this water for irrigation or power.

This is crucial because the 50,000 acre-feet proviso authorizes to be made available for scheduled release water that has been stored and developed in TRD facilities that Congress found was economically feasible on the basis of an unusually high benefit-cost ratio. See below at 14. In contrast, according to the Bureau, water could not be developed for Humboldt County and downstream users by means of separate, smaller facilities on a downstream Trinity tributary. At page 173 of the House Hearing, Mr. Engle reacts to Mr. Denbo's statement.

> MR. ENGLE.. . . I wish unanimous consent to file in the record a short commentary and reply to the statement of Mr. Denbo, for the purpose of showing that the water diverted is less than 7 percent of the average amount wasting to the ocean annually from the Klamath River and that the water diverted is without question surplus to the future needs in the

> Klamath Basin. If all the water that flows out of Humboldt County were dammed up, the water would be 305 feet deep and the Trinity diversion would only reduce the flood waters of that reservoir 6 feet.

Cong. Engle then submits a prepared statement that recapitulates the testimony of Mr. Spencer, Mr. Murray and others. Nowhere, however, does he rebut the essential point made by Mr. Denbo, that the Bureau of Reclamation had concluded that it is not feasible to develop the smaller, downstream tributaries.

Twelve days after the House Hearing, on April 25, 1955, the Humboldt County Board of Supervisors adopted Resolution No. 827 in which the Board stated that

> Humboldt County and the north coast have much water that flows into the ocean. However, due to the topography and geography of this area, many of the streams are less that 50 miles in length and do not lend themselves to the trapping of water for transportation, irrigation or power development.
>
> The survey by the Bureau of Reclamation is not complete and we are informed it will take another two years, or 1957, before they can give us an answer to the question of present and future water needs of the County of Humboldt and the north coast area of California.
>
> * * * *
>
> NOW THEREFORE BE IT UNANIMOUSLY RESOLVED, that should this Congress in its wisdom divert the Trinity River, the Board of Supervisors of the County of Humboldt will interpose no opposition to the diversion, provided the County of Humboldt is guaranteed:
>
> 1. That the author of H.R. 4663 and members of the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, House of Representatives of the United States, amend H.R. 4663 so that any time within the life of the proposed diversion project as contained in H.R. 4663 Humboldt County may divert up to 100,000 acre feet of water yearly for its use in irrigation, commercial, residential and industrial purposes.
>
> 2. That the maintenance of the flow of the Trinity River below the diversion point be maintained at not less that 200 cubic feet per second during the lifetime of the project or any other type of diversion.[7]

The resolution concluded with a directive that it be delivered to, among others, the California congressional delegation, the House and Senate Committees with jurisdiction over H.R. 4663,

---

[7] In the resolution there were two initialed, hand-written interlineations. The first substituted 100,000 acre-feet for 50,000 acre-feet, the second inserted "residential."

President Eisenhower, and the Governor of California. The resolution makes clear, consistent with Cong. Scudder's position, that two distinct supplies of water were required in order for the TRD authorization to be acceptable.

2. House Committee Report

Less than a month after the resolution was adopted, H.R. 4663 was reported out of the Committee on Interior and Insular Affairs. House Rept. No. 602, 84th Cong. 1st Sess. (May 19, 1955). The report at page 4 made specific reference to the fishery resources of the Trinity and stated that the TRD has been

> planned with a view to maintaining and improving fishery conditions. The legislation requires that the project be operated so as to insure the preservation and propagation of fish and wildlife and sets out minimum flows to be maintained below the Trinity diversion point and below the Clear Creek diversion point.

Also, at page 4 of the House Report, Chairman Engle makes one more statement about additional water beyond fishery flow requirements. In it he ignores the protestations of Humboldt County Board of Supervisors, the Hoopa Valley and Yurok Tribes of the Klamath/Trinity Basin, the Chamber of Commerce, and Congressman Scudder who had insisted that studies be completed before the project was authorized.

> With respect to the transmountain diversion of water from the Trinity River Basin to the Central Valley, the committee notes that such diversion is approved by the State of California. The committee notes also that both the State and the Bureau of Reclamation conclude that there is available for importation from the Trinity River, water that is surplus to the present and future water requirements of the Trinity and Klamath River basins, and that surplus water, in the amount proposed in the Trinity division plan, can be diverted without detrimental effect to the fishery resources. The committee believes it unnecessary to await the final results of studies presently underway to determine precisely the future water requirements in the Klamath River Basin before going ahead with this relatively small diversion compared to the average amount wasting to the Pacific Ocean from the basin each year.

3. House Rules Committee

Once H.R. 4663 was reported, it was sent to the Rules Committee to prepare the terms under which it would be considered by the full House of Representatives. The rule for H.R. 4663, (H. Res. 263) "gives ample time for debate on the subject and would allow amendments to be offered from the floor." 101 Cong. Rec. 7962 (June 9, 1955). The discussion of the rule continues at page 7962 of the Congressional Record. There Congressman Ellsworth reports that an amendment to H.R. 4663 would add the 50,000 acre-feet proviso insisted on by Congressman Scudder on behalf of his Trinity/Klamath Basin constituents.

> MR. ELLSWORTH. [W]hen this bill was brought before the Rules Committee there was also a question regarding the protection of another area of California. . . [I]t . . . is my understanding informally that another amendment will be offered by the committee which will probably satisfy the opposition to the bill by another Representative from California. As I understand it, this amendment will be offered to assure to Humboldt County, Calif., an additional 50,000 acre-feet of water from the rivers concerned, which should properly take care of the neighboring area.

4. Proceedings on the House Floor

Less than two weeks later on July 21, 1955, H.R. 4663 was brought to the floor and the following colloquy occurred which memorializes Cong. Engle's acquiescence to Cong. Scudder (101 Cong. Rec. 8888 (June 21, 1955)).

> MR. SCUDDER. Mr. Chairman, I offer an amendment.
>
> The Clerk read as follows:
>
> Amendment offered by Mr. Scudder: Page 4, line 4, strike out the period and insert in lieu thereof a colon and the following: "*Provided further*, That not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users."
>
> MR. ENGLE. Mr. Chairman, will the gentleman yield?
>
> MR. SCUDDER. I yield to the gentleman from California.
>
> MR. ENGLE. I am delighted to agree to and accept the amendment offered by the gentleman which will provide the assurance of water for people downstream from this reservoir in the gentleman's area.
>
> MR. SCUDDER. I thank the gentleman and appreciate his statement.
>
> The CHAIRMAN. The question is on the amendment offered by the gentleman from California [Mr. Scudder].
>
> The amendment was agreed to.

The efforts of Cong. Scudder and the other advocates for the Trinity Basin in the House of Representatives to secure an allocation of 50,000 acre-feet in addition to water for fishery flow releases had succeeded.

Proceedings in the Senate

The Senate Hearing[8] was held on July 14, 1955, approximately one month after the House had passed H.R. 4663 with amendments, most importantly the second proviso in section 2 regarding the 50,000 acre feet.

California's Senators at this time were William F. Knowland and Thomas H. Kuchel. Under normal circumstances as Senator Kuchel stated at the Senate Hearing, he would have asked the Committee to turn its attention to S. 178, the Senate companion bill to H.R. 4663. In the Senate Hearing at page 1, Chairman Anderson noted that both S. 178 and H.R. 4663 were scheduled for consideration.

> SENATOR KUCHEL. The House bill, Mr. Chairman does have a number of amendments in it to which I will allude, and I am sure my colleague, Congressman Engle, will also allude to them. I would ask the Chair to consider, in these hearings, the provisions of the House bill alone.
>
> SENATOR ANDERSON. The House bill alone?
>
> SENATOR KUCHEL. Yes, sir.
>
> SENATOR ANDERSON. Thank you. We have to know which way we are going. So we will put in H.R. 4663 and the reports from the Department and the Bureau of the Budget at this point.

The Senate Hearing then sets forth H.R. 4663 as passed by the House with the second proviso in section 2 regarding the 50,000 acre-feet included in it. By this time the San Luis Unit had dropped out of the House bill and it stayed out of play in the Senate. Senator Kuchel makes clear at pages 10 and 11 of the Senate Hearing that the California delegation is eager to enact the bill as soon as possible. Then at page 11 of the Senate Hearing he states:

> SENATOR KUCHEL. Two other provisions [in addition to the public-private partnership for power development] of the House bill which are different from S. 178 should be mentioned. I believe both should be retained but I think one of them might be revised and broadened.
>
> At the instance of Congressman Scudder, whose district embraces the downstream area concerned, the House adopted an amendment which is the last proviso of section 3 (sic), the clause which guarantees not less that 50,000 acre-feet annually to Humboldt County and users below Trinity Dam. This guaranty added to the bill by Congressman Scudder will remove any basis for apprehension that the Trinity project might adversely

---

[8] Trinity River Division--Central Valley Project, California: Hearing before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs on H.R. 4663, 84th Cong. 1st Sess. (July 14, 1955) (Senate Hearing).

> affect a section of our State where lumbering is an important part of the economy. I concur with the amendment.[9]

Senator Kuchel makes it clear at pages 10-11 of the Senate Hearing, that even with the 50,000 acre-feet being provided for the Trinity River basin in addition to the fishery flow releases the proposed Trinity diversion would be an extremely valuable undertaking. There is no indication in the hearing record that either the Bureau of Reclamation or any other interest appearing before the Senate believed that the 50,000 acre-feet proviso added by the House to H.R. 4663 would have an adverse impact on the benefit-cost ratio of the project.

> MR. KUCHEL. . . . The project has been described as gold plated from the viewpoint of financial feasibility. The primary benefit-cost ratio is 1.86 to 1 and the indirect ratio 3.31 to 1. It would cost approximately $220 million, according to the latest available Bureau of Reclamation estimates, and all but $262,000 of this is reimbursable. The power features, which represent approximately three-fourths of the total cost, would be repaid in 26 years, and the cost for electricity is estimated at only 4.6 mills.

He is supported later on page 17 of the Senate Hearing by Congressman Engle who testifies that he wants to add one point about the positive benefit-cost ratio: "that is that the Trinity River project can be authorized, constructed, and paid for and still leave in the Central Valley project $170 million in profit; that is, profit for the Federal Government." He makes no assertion that Cong. Scudder's amendment would undermine that value.

In a July 14, 1955, letter to the Senate Committee, reprinted in the Senate Hearing at page 18, Cong. Scudder states:

> When this bill was first proposed, the residents of Humboldt and Del Norte Counties objected to the diversion of this river, as there are water needs in those two counties for a certain amount of the water that flows in the river. There was included in the bill a proviso that would maintain a low of water in the Trinity River during the months of July through November, sufficient to maintain fish life.
>
> The residents of the counties requested a provision be placed in the bill that would guarantee to them sufficient water to provide for their expanding economy.
>
> You will note the proviso on page 4, line 4, "That not less that 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt Count and downstream water users."
> This apparently will satisfy the downstream users, and their objection to the project as originally proposed, has thereby been removed.

---

[9] The second amendment is not relevant to the 50,0000 acre-feet. It had to do with federal aid to Trinity County for impacts, including lost tax revenues, associated with the TRD.

To our knowledge, Congressman Engle made no statement in response to Cong. Scudder's statement, nor did he make any other mention of the 50,000 acre-feet when he appeared at the Senate Hearing.

2. Senate Committee Report

Less than two weeks following the July 14, 1955, Senate Hearing, the Committee on Interior and Insular Affairs filed its report on H.R. 4663. Senate Report No. 1154 84th Cong., 1st Sess. (July 27, 1955). The Senate Report did not address the 50,000 acre-feet proviso.

H.R. 4663, with the 50,000 acre-feet proviso was passed by the Senate and then signed into law on August 12, 1955, approximately two weeks after the Senate Report was filed.

Summary of Legislative History Analysis

The legislative history of H.R. 4663 fully informs the meaning and intent of the enacted legislation. The 1955 Act requires that the Trinity Division provide annual releases of not less than 50,000 acre-feet to be made available to Humboldt County and downstream water users in addition to regulated releases for the benefit of the downstream fishery. See also pages 3-4 of the Barbre letter cited in footnote 2 for discussion of the legal effect of provisos.

California Water Rights Board Hearing for TRD Permits December 29, 1958

On December 29, 1958, the California Water Rights Board held a hearing on the Bureau of Reclamation's request for permits to construct and operate the TRD.[10] Chief among the issues at the hearing was whether the water for fishery flow releases and the 50,000 acre-feet were separate supplies requiring separate conditions under the requested permits. A. N. Murray, the Bureau's Regional Planning Engineer for the State of California was a principal witness at the hearing. Notwithstanding the foregoing record in the legislative history, the Bureau of Reclamation strongly argued for the Water Rights Board to treat the 50,000 acre-feet as subsumed in fishery flow releases. Following are extensive excerpts from the hearing that demonstrate the lengths the Bureau went to evade or nullify the effect of the second proviso in section 2 of the 1955 Act. The Bureau of Reclamation's written statement to the Water Rights Board is excerpted at the beginning of the hearing record regarding the proposed condition for the 50,0000 acre-feet.

> [Pages 10-11] Assistant Regional Director A. N. Murray, who was in responsible (sic) charge of our planning work on the Trinity Project will appear at the hearing with regard to the objections to this proposed condition. It appears that this proposed condition would require that ultimately 50,000 acre-feet annually must be released down the natural channel below Trinity and Lewiston Dams, in addition to the quantities required to assure fish maintenance. This is not a correct interpretation of

[10] In the Matter of Applications 5627, 5628, 15374, 15375, 15376, 16767, 16768 and 17374, United States of America, Bureau of Reclamation, Applicant, California Department of Fish and Game, Protestant, Trinity River, Trinity County, Before the Water Rights Board, State of California, Sacramento, California, (December 29, 1958).

the Bureau of Reclamation's plan. In the letter to the former California State Water board (now California State Water Commission) and the Department of Water Resources from former Regional Director Spencer of the Bureau of Reclamation dated June 6, 1957, which was presented at a hearing before the State Water Board on the assignment of Applications 5627 and 5628, the plan for releasing water from Trinity and Lewiston Reservoirs was described as follows:

> Firm Releases of not less than 150 c.f.s. will be made into the Trinity River channel below Lewiston Dam. Such releases will require about 120,500 acre-feet annually. This quantity is adequate to satisfy the requirements for fish culture and the quantity set forth in Section 2 of P.L. 386 that not less than 50,000 acre-feet be released annually from Trinity River and made available to Humboldt County and downstream water users.

* * * *

[Pages 18-19] CHAIRMAN HOLSINGER: Any body else desire to be heard on this subject?

MR. ROWE [WATER RIGHTS BOARD MEMBER]: I think Fish and Game may have a statement to make. As I understand, though, is there a stipulation between Fish and Game and the Bureau?

* * * *

MR. VANDEGRIFT [DEPUTY ATTORNEY GENERAL, CALIF. DEPT. FISH AND GAME]: Mr. Chairman and Mr. Rowe, we have been negotiating with the Bureau for some time to work out an integrated agreement with them.

* * * *

The Department of Fish and Game, of course, wanted the assurance that any diversions downstream to satisfy the interests of people in Humboldt County, for example, will not cut into the minimum flows necessary for fish life and whatever particular language is worked out to express that view will be satisfactory with us.

But, we feel that if paragraph 15(b) were stricken in toto, it would leave this unclear as to whether or not the downstream diverters could cut into these releases which would be made to maintain the fish life, and if such were the intent of the Bureau, we would have to object strenuously to that. As we understand it, however, the Bureau anticipates there will be additional water which will accumulate in the Trinity River sufficient to supply the people of Humboldt County.

MR. ROWE: You mean below the point of diversion, originating in the Trinity below the point of diversion?

MR. VANDEGRIFT: Yes, so the flows for fish life as expressed in our protest and in our proposed memorandum of agreement which has not yet been filed with the Board shows flows would be assured to maintain the flows for the fish life throughout the entire stretch of the Trinity River. And that, of course, is our objective in this matter.

* * * *

MR. VANDEGRIFT: As far as I know from the study that Fish and Game has made and I am speaking as a lawyer, simply expressing my impressions, Fish and Game feels these flows are necessary in order to maintain the fishery and if you cut into these flows, you are going to damage the public resource. (P. 21).

[Page 23] MR. MURRAY: The release schedules which are stated in second feet in 15(a) add up on an annual basis to 120,500 acre feet. As Mr. Spencer [Mid-Pacific Regional Director] indicated in the letter he wrote to the State Water Board some time ago, we have regarded that as being as ample quantity of water, well in excess of the 50,000 acre feet that is specified in Section 2 of the authorizing legislation for downstream uses.

Condition 15(b), however, as stated, would under ultimate conditions make that 50,000 acre feet additive to the quantities that are specified in second feet for fish releases and it is to that addition we object.

CHAIRMAN HOLSINGER: You object to 15(b) in its entirety?

MR. MURRAY: I would say yes. It would appear that it is unnecessary for the protection of the Humboldt County people inasmuch as there is through the release schedule for fish certain to be 120,500 acre feet annually released below Lewiston, and of course, there are very large quantities of water that enter the Trinity River between there and the point where the Trinity River enters Humboldt County.

* * * *

[Pages 24-25]. MR. GIANELLI [PRINCIPAL HYDRAULIC ENGINEER FOR THE DEPARTMENT OF WATER RESOURCES]: Well, Mr. Rowe, I think it might be helpful -- maybe Mr. Murray has touched on it -- to go back and touch on the Federal position at the time the 50,000 acre feet was requested. Perhaps that might give some clue as to whether or not this matter of fish

release was included in their minds at that time or not. Now in the assignment there has been a general reservation, however, limited to the counties of origin. I presume this would cover in part what we are talking about, but it might not perhaps cover this matter in Humboldt County. It would probably cover it in Trinity. I think the Federal authorization might give some clue as to what was considered here with respect to this 50,000 acre feet.

* * * *

[Pages 26-27]. MR. MURRAY: Mr. Chairman, may I offer a comment here? Far be it from me to interpret the legislative background of this, but I was involved in the Trinity hearings in both the House and the Senate, and I think that I can say this quite safely, having studied the record on it, that there is practically no history with respect to this 50,000. The Trinity Bill was reported by the House Committee on Interior and Insular Affairs and was reported to the floor of the House without this particular proviso in it. An amendment in the language of the proviso of Section 2 of the Bill was offered by Congressman Scudder on the floor and was accepted by the sponsors of the Bill. There is practically no comment in there as to its source or reason or why or what was anticipated beyond the comment of Congressman Scudder that if such an amendment were accepted it would remove the qualms of the people that he represented.

CHAIRMAN HOLSINGER: Well, it is in the Legislation. You admit that?

MR. MURRAY: In the 50,000, yes, sir.

CHAIRMAN HOLSINGER: And yet you are recommending it not be followed here by the Board?

MR. MURRAY: Not at all, sir, we are simply taking the position that the 50,000 referred to in acre feet is included within the total quantity of the water provided for in the fish releases.

* * * *

[PAGES 28-30] CHAIRMAN HOLSINGER: What is the position of Humboldt County on this?

MR. MONTGOMERY: Mr. Chairman, I am Thomas Montgomery, County Counsel of Humboldt County, and we have reviewed the report that has been submitted to the State Water Rights Board and we have no disagreement or objection insofar as paragraph 15(b) of the conditions is concerned. We compared the language as used there with the language that is in the Federal law setting up the project in question and there is a

little bit of difference in terminology in the two places, but we feel that the two things mean the same, actually. And as far as the preservation of the 50,000 acre feet is concerned, I believe that the language of the legislation passed by Congress really answers the matter. I should like to read this brief provision that is in Section 2 of the Act.

It states as follows: "Provided further that not less than 50,000 acre feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users."

Now, it seems to me that, well, in the first place, the word "released" is used in connection with the 50,000 acre feet. It says actually that water shall be released annually from the Trinity Reservoir and then the further reference is that it is to be made available to Humboldt County and downstream water users. So I would submit that it seems very clear that this legislation means a release of 50,000 acre feet from the reservoir and has no reference to what water might come into the river from downstream tributaries and that it is referring to actual use of the water or consumptive use, rather than the Fish and Game requirements which are something else, and I think that the Fish and Game requirements are something that came into this proceeding separately from the 50,000 acre feet requirement.

Now, as to the history of this legislation, I am afraid I can't either shed too much light on it. This matter came up just about the time I went to Humboldt County, but I am quite sure that the idea behind it was to provide for this consumptive use should there ever be any such use take place or any need for it and the idea was to insure Humboldt County certain water.

So now, we have no objection to the provision in Section 15(b) of the conditions which states that this 50,000 acre feet or a portion thereof may be included as a part of the required releases for fish life as specified in (a) above until such time as future development below Trinity Dam requires the full 50,000 acre feet annually.

We have no objection to that, but we do very definitely feel that the Federal legislation doesn't contemplate what is being asked for by the Bureau of Reclamation today and that is clear that it refers to the 50,000 acre feet release and that it isn't something connected with the Fish and Game requirement.

CHAIRMAN HOLSINGER: The point of difficulty where to my mind at least of interpreting the fish releases as being part and parcel of the water referred to in 15(b) is this, that if you assume that those waters to be released for fish purposes is necessary to accomplish that objective, if you

> are to allow that to be invaded for other uses, consumptive use, well, naturally you wouldn't be able to maintain the flows for fish purposes.
>
> * * * *
>
> [Page 42] MR. ROWE: Well, the staff has made a specific request that 15(b) be include. I just suggest that Fish and Game and the Bureau sit down and see if 15(a) isn't all-inclusive without being specific as to the rate of release. If you are going to release for agriculture, you will have to release in the summer time for use in the county and work with the Department on the side inflows and I am satisfied the water is there. Now, in connection with that there must have been some basis for the 50,000 acre feet. I don't think it is something just pulled out of thin air.
>
> * * * *
>
> [Pages 97-98]. MR. MONTGOMERY: Mr. Chairman, we just without laboring the point at all on behalf of Humboldt County want to reiterate our position on condition 15(b), that we approve of that condition as it now is in the report and feel that is the proper interpretation of the Federal Act.
>
> MR. ROWE: Well, everybody agrees with that. It comes to whether it shall be included in 15(a) or 15(b) separate and apart. As it reads, it is separate and apart. There are two different release clauses.
>
> CHAIRMAN HOLSINGER: Your interpretation is that they are separate?
>
> MR. MONTGOMERY: Well, gentlemen, that the 50,000 acre foot provision is separate from the provision necessitating releases for fish protection.

Ultimately, the Water Rights Board agreed with the objections of Humboldt County and the State Department of Fish and Game to the Bureau's interpretation of the 50,000 acre-feet proviso and rejected the position of the Bureau of Reclamation. Among the conditions established in the TRD Permits when they were issued in 1959 by the Water Rights Board is Condition 8 that applied to the first proviso and Condition 9 that applied to the second proviso of the 1955 Act.

> Condition 8. "Permittee shall at all times bypass or release over, around or through Lewiston Dam the following quantities of water down the natural channel of Trinity River for the protection, preservation and enhancement of fish and wildlife from said dam to the mouth of said stream;

October 1 through October 31	200 cfs
November 1 through November 30	250 cfs
December 1 through December 31	200 cfs

January 1 through September 30	150 cfs

> Any water released through said Lewiston Dam for use in the fish hatchery now under construction adjacent thereto shall be considered as partial fulfillment of the above schedule."
>
> Condition 9. "Permittee shall release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users."

Contract between the United States and Humboldt County

Approximately six months after the Water Rights Board Hearing, the Bureau of Reclamation entered into a contract with Humboldt County on June 19, 1959 to implement the 1955 Act's second proviso regarding the 50,000 acre-feet. By letter written that same day, after the contract with Humboldt County was signed, the Bureau of Reclamation's Mid-Pacific Regional Director wrote to the California State Water Rights Board. The letter states in its entirety:

> Supplementing our letter to you of June 1, 1959, I am enclosing a copy of a contract which was executed June 19, 1959, between the United States and Humboldt County, relating to Applications 5627, 5628, 15375, 16767, 16768 and 17374 of the United States to appropriate water from the Trinity River. This contract has been executed on the basis of our firm position that the 50,000 acre-feet made available thereby is not additive to the 120,500 acre-feet annually to be released from Lewiston Dam as provided in an agreement between the United States and the State Department of Fish and Game dated March 27, 1959, copies of which have been furnished to you.

The 1959 Contract does not say that however. The Regional Director's 1959 letter, which merely states the Bureau's "position", does not supersede the 1955 Act, the permit conditions or the 1959 contract.

In summary, Humboldt County did not sign the 1959 Contract with the understanding that the 50,000 acre-feet called for in the second proviso of the 1955 Act "was not additive to [the release of water for fish and wildlife pursuant to the first proviso of the 1955 Act] . . . as long as reservoir releases, accretions, and tributary inflows are sufficient to supply the 50,000 acre-feet required for downstream use(s)." The plain meaning of the 1955 Act establishes two separate and distinct provisos for water releases. The 1959 Contract addresses only the second proviso and creates no implication that the Secretary's clearly described obligation in that contract to

release TRD water is somehow vitiated by the mere existence of the first proviso relating to fishery flow releases.[11]

In view of this history, the Tribe requests the Secretary to direct the Bureau of Reclamation to:

1. Direct Central Valley Operations office to memorialize in its operating plans and otherwise so that 50,000 acre-feet of water developed and stored in the Trinity River Division is managed for release on a schedule that makes it available for any beneficial uses in the Trinity/Klamath basin, including non-consumptive instream flows for fishery purposes.

2. Direct the Central Valley Operations office to segregate the 50,000 acre-feet and manage it in a manner that does not interfere with or diminish flow releases identified in the Trinity River Restoration Record of Decision (December 2000) (ROD).

3. Pursuant to section 3404(c)(2) of the CVPIA include in every new, interim or renewed CVP water service or repayment contract provisions by which the contractors expressly agree to the separate and independent management of the ROD flow releases and the 50,000 acre-feet.

78953.1:423250:00600

[11] Incidentally, there is no requirement in the 1955 Act, the 1959 Contract, or otherwise in State or Federal law that release of water be for *consumptive* use. Section 8 of the 1959 Contract states that the release is to be for *beneficial* use.
California law defines use of water to maintain a fishery in a wild and scenic river as beneficial. California Public Resources Code Division 5, Chapter 1.4, Parks and Monuments §5093.50. Section 5093.545 of the California Code designates the Trinity River below TRD facilities and the Klamath River below Iron Gate Dam as wild and scenic. Thus the entire course through which TRD releases under the 1959 Contract would flow is designated as a wild and scenic river under California law. The Bureau of Reclamation has entered into discussion with the Tribe about making releases in 2010 from the TRD, in addition to those in the ROD flow schedule, to protect anadromous fish in the lower Klamath River, particularly in the vital reach of the Klamath River between the Trinity confluence and the Pacific Ocean. Water is available for that purpose at no cost to the Federal government under the authority of the 50,000 acre-feet proviso of the 1955 Act, the State permit conditions and the 1959 contract.