

PCFFA ANALYSIS OF “Outline of Objections to the Klamath Basin Restoration and Hydroelectric Settlement Agreements,” dated January 20, 2010

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Basic Observations: Oregon Wild and other organizations who oppose the Klamath Settlement Agreement (together organized as the “Klamath Conservation Partnership”) have presented an “Outline” intended to be a one-page summary of what its authors see as the major flaws in the Klamath Basin Restoration Agreement (KBRA) and its companion Klamath Hydropower Settlement Agreement (KHSa). Unfortunately this “Outline of Objections” does not add much to the debate, but instead contains numerous errors of both fact and law, as well as sweeping generalizations and oversimplifications. Even when technically correct, the framing of the issue as an objection often shows fundamental misunderstandings of both how the Agreements are structured, as well as lack of knowledge of the practical and legal requirements that the KBRA and KHSa must meet under current law.

These various “objections” are analyzed below in some detail, with section references to the two Agreements as appropriate. Section references below are to the Final versions of these two Agreements formally signed on February 18, 2010. They are publicly available on www.edsheets.com by following the Klamath links. A copy of the original Oregon Wild originated “Objections” Outline is also attached to the end of this analysis, together with a Chart showing how the KBRA water reallocation regime would change upper Klamath Basin water diversions to put more water in the Klamath River.

Objection 1: “The water balance, guaranteeing diversion of 330,000 acre-feet for irrigators, has no scientific basis and will, in 40% of water years, leave too little water in the Klamath River to meet the current Coho Salmon BiOp flow requirements. There are no guaranteed flows for fish. Sec. 15.1.1.B and App. E-5.”

Analysis: Incorrect or at best misleading. First, there is a *considerable* body of science and months of intensive hydrological modeling using at least two independent approaches which support the KBRA flow regimes as highly beneficial for salmon, a small part of which is contained in science memos actually cited in the Agreement itself (Sec. 12.2.7.A). There are also model runs in KBRA Appendix E-5 which debunk the assertion that there will be shortfalls

in 40% of water years, and this assertion has been thoroughly discredited as well in science analysis work recently done by the Yurok Tribe.

The scientific basis of the KBRA flow regimes, and the scientific rationale behind all the modeling that was done to determine those flows, has been set out in great detail in a “KBRA Science White Paper” (technically titled *Compilation of Information to Inform USFWS Principals on the Potential Effects of the Proposed Klamath Basin Restoration Agreement (Draft 11) on Fish Habitat Conditions in the Klamath Basin, with Emphasis on Fall Chinook Salmon*) which is available at www.klamathriverrestoration.org/index.php/kbra-flow-science.html. Other science papers which guided the process and will provide future guidance for KBRA flow implementation are specifically referred to in KBRA itself, at Sec. 12.2.7.A.

One of the objecting organizations, the Northcoast Environmental Center (NEC), did commission an independent scientific study of the proposed KBRA flow regimes, relying on the advice of two contract scientists (Greg Kamman and Bill Trush) as well as the lead researcher in the major salmonid flow study on the Klamath, Dr. Thomas B. Hardy. It is interesting to note that two of the three scientific experts that NEC itself consulted and relied upon to assess the impacts of the KBRA, though initially skeptical, have now provided their written opinions that these KBRA target flows would, if implemented, greatly benefit lower river salmonids. Here are some examples of what these well respected scientists have most recently said about the KBRA flow targets:

“The opportunity for open discussion provided during the science meetings on April 10th and 11th were also very helpful and served to reinforce my opinion to support the Settlement Agreement. ... My detailed review of the technical information made it readily apparent that the flow regimes being considered under the Settlement Agreement are clearly an extension of the Hardy Phase II recommended flow regimes that reflect the necessary balance for agriculture, refuge deliveries, target lake elevations for the endangered Klamath Lake suckers, flood control curve, increased storage capacity of Upper Klamath Lake and factor in reasonable and achievable restoration actions both within Klamath Lake and upstream tributaries.” -- **Dr. Thomas B. Hardy (4/23/08)**

“I’ve learned that the final language contained in the Agreement addresses and negates some of my stated concerns, which were based on earlier draft versions of the Agreement. ... If asked if I would support the Settlement Agreement as currently written, I would do so.” -- **Dr. Greg Kamman, Hydrologist (4/24/08)**

Full copies of these scientist’s letters supporting the KBRA flows can be found at: <http://www.klamathriverrestoration.org/index.php/issues/fisheries.html>.

The authors of the Outline also completely ignore the fact that, instead of mandating specified flows, the KBRA guarantees specific VOLUMES of water, i.e., between 130,000 acre-feet to 230,000 acre-feet (amount varying annually by rainfall) of additional water, to be generated specifically under the KBRA to put into the lake and river system to benefit fish. This large additional volume of water to be put into the lower river will be managed under the KBRA to

maximize its benefit to the fish in terms of allocation of specific flows, on a real-time basis, with advice and oversight from the Technical Advisory Team (TAT) established under the KBRA to provide science-based technical advice (Appendix D-2).

This “environmental water” the KBRA will generate is to be provided through a combination of *permanent* Klamath Irrigation Project demand reduction *down to* the KBRA’s mandatory 330/385 K acre-feet “cap” (Sec. 15.1.1) from levels which have historically been much higher, voluntary willing seller water use retirements above the Project (Sec. 16.2.2) and various new wetlands storage restoration (Sec. 18.2).

How the KBRA’s required Project irrigation 330/385 K acre-feet “cap” will play out under typical irrigation conditions is shown by the CHART attached, where the “cap” is the line, and past historic irrigation usage for the period of 1961-2000 is shown by the dots and circles. The primary “guarantee” the Project irrigators will get under the KBRA is the guarantee that in dry years they will *typically get much less water* from the river than before -- and the fish will therefore get that much more.

The augmented flows that are to result from the KBRA are also guaranteed to the lower river up front, *in the first years of the KBRA*, through an “Interim Water Bank” mechanism required under KBRA Sec. 20.4 that is intended to “increase, to the extent technically feasible, the amount of water in the Klamath River and Upper Klamath Lake toward the amounts which will result from permanent instream water supply enhancement actions under Sections 15, 16 and 18.” This is for all intents and purposes a “guaranteed increase” in the volume of water for lower river salmon and endangered lake fish of between 130,000 and 230,000 additional acre-feet which would kick in immediately, and not be dependent upon implementation of other sections of the KBRA.

This Interim Water Bank volume would also only be reduced incrementally, bucket for bucket, as the water storage and flow augmentation measures in other provisions of the KBRA actually kick in. If there are unforeseen delays in any of those implementations, the fish are protected from any further water shortfalls (KBRA Sec. 20.4.5.B).

Objection 2: “Under the KBRA, Parties (including federal parties) to the agreement will support regulatory assurances, thereby diminishing the administration of the Endangered Species Act, without providing minimum flow protections for fish. Sec. 3.1.2.”

Analysis: This is a complete fabrication. Nothing in the Agreement, which is a mere restoration contact, can by law overturn, change or modify the Endangered Species Act (ESA) or any other federal law. Only Congress could do that.

The ESA-based “regulatory assurances” referred to in Part V, Secs. 21 and 22 that landowners will be encouraged to apply for or participate in are all *standard* ESA habitat protection mechanisms such as Habitat Conservation Plans (HCPs), mitigated Section 10 permits and “General Conservation Plans” that any landowner can already take advantage of under the law.

Agencies must always implement these kinds of “assurances” IN ACCORDANCE WITH APPLICABLE LAW – in this case the ESA.

To make that even clearer, the KBRA states plainly at Sec. 2.2.1 in relevant part that:

“... In the implementation of this Agreement, Public Agency Parties shall comply with all applicable legal authorities, including Authorizing Legislation, National Environmental Policy Act, Endangered Species Act, Clean Water Act, and other Applicable Law.”

and also at Sec. 2.2.6 states plainly:

“Nothing in this Agreement is intended or shall be construed to be a pre-decisional commitment of funds or resources by a Public Agency Party. Nothing in this Agreement is intended or shall be construed to predetermine the outcome of any Regulatory Approval or other action by a Public Agency Party necessary under Applicable Law in order to implement this Agreement.”

In short, the KBRA leaves the ESA alive and well, and just as applicable to the protection of listed species in the basin before its execution and implementation as afterwards.

Objection 3: “The ‘goals’ of the agreement (KBRA) have no meaningful restoration objectives, and does not establish target salmon run sizes. The imbalance of the agreement is highlighted by the explicit goal of reliable water supplies for agriculture, while containing no parallel goal of water supply for fisheries. Sec. 13.”

Analysis: Also wrong. As our analysis has pointed out before, science-based restoration goals for fish are incorporated into, or required by, the KBRA Agreement in many places. For instance, the Technical Advisory Team (TAT) decisions and recommendations on water allocation and flows will be guided by certain basic biological principles and goals, including those in KBRA Sec. 20.4.3.A(ii), which read in relevant part as follows:

“... In preparing these recommendations, the TAT shall consider the guidance principles, among others, described below...”

- (1) Replicating the natural hydrologic regime under which the Fish Species evolved represents the best flow regime to conserve and recover Klamath River anadromous fish stocks and listed suckers in Upper Klamath Lake;
- (2) Flow and lake level management should strive to achieve existing habitat-based flow and lake elevation recommendations that would likely increase survival of salmonids and suckers, and potentially improve other important ecological, chemical, physical and biological processes; and

- (3) Flow and lake level management should strive to meet the lake level and flow outputs from simulations presented in Appendix E-5, recognizing such simulations do not necessarily reflect either overall water availability at any given time, or the actual water management strategy that will be employed in the future.”

See also numerous specific goals which are required elements of the later Fisheries Restoration Plan, and several provisions in the Fisheries Restoration Program (Part III – Secs. 9 through 13), which require the creation and implementation of a comprehensive Fisheries Restoration Plan to guide the 50-year fisheries restoration effort around which the KBRA centers. The purpose of the Fisheries Program is described in KBRA Sec. 9.2.1 as follows:

“Sec. 9.2.1. Purposes. The purposes of the Fisheries Program are to restore and sustain natural production of Fish Species throughout the Klamath River Basin, excluding the Trinity River. Specifically, this program:

- A. provides for reintroduction of anadromous Species throughout their historic range above Iron Gate Dam, including tributaries to Upper Klamath Lake but excluding the Lost River sub-basin, and for reestablishment and maintenance of the ecological functionality and connectivity of Fish habitat;
- B. otherwise establishes conditions that, combined with effective implementation of the Water Resources Program in Part IV, will provide for the natural sustainability and genetic diversity of Fish Species, their full utilization of restored and reconnected habitat, Full Participation in Harvest Opportunities, as well as the overall ecosystem health of the Klamath River Basin;
- C. assess status and trends, and the factors that influence those trends, of Fish Species and their habitats as identified in Sec. 9.1.1 and 9.1.2., and the effectiveness of actions under this Agreement to achieve this purpose; and
- D. provides for adaptive management and reporting as described in Sec. 5.4 and elsewhere in this Agreement.”

And while many *specific* Fisheries Program goals will be set later, when the Fisheries Restoration Plan will be more fully developed, several specific goals to be set out in that Plan are clearly set forth in the KBRA as well as soundly based on salmon biology. See for instance KBRA Sec. 9.2.6, which states as follows:

“Sec. 9.2.6. Fisheries Program Goals. The Fisheries Program shall include goals to evaluate the Fisheries Program’s progress and evaluate effectiveness of implementation.

“Consistent with the purposes stated in Section 9.2.1, the goals of the Fisheries Program are to (i) restore and maintain ecological functionality and connectivity of historic Fish habitats; (ii) re-establish and maintain naturally sustainable and viable populations of Fish to the full capacity of restored habitat; and (iii) provide for Full Participation in Harvest Opportunities for Fish Species.

“The Fisheries Program will establish metrics to evaluate program progress.

“The Fish Managers shall use best available science to establish the specific metrics for such goals for each phase of the Fisheries Program. These metrics shall consider and integrate the four parameters for evaluation population viability status, including: abundance, population growth rate, genetic diversity, and population spatial structure.”

In Section 1.7, the terms of art “Fish Species, Fish, Fisheries, or Species” (when referencing Fish) are also defined broadly to mean the historic complement of species (including races) of fish that naturally occupied the Klamath River Basin.

One of the strengths of the KBRA is that it is not a final work product intended to cover all future restoration contingencies. It is much more a framework for achieving these goals through adaptive management problem solving, flexibly evolving over a broader and much longer-term (i.e., 50 years). It would therefore not be appropriate to micro-detail those Plans (particularly the Fisheries Restoration Plan) in the KBRA itself, thus foreclosing future options and planning flexibility. Instead, those later Plans will be developed by the Parties to the Agreement and adapted as needed to meet then-current conditions and based on then-current scientific information -- but each Plan with certain *elements* that are required in the KBRA.

For instance, Section 10.1.2 contains several required elements of the Fisheries Restoration Plan, including (but not limited to) “restoration and permanent protection of riparian vegetation, restoration of stream channel functions, remediation of Fish passage problems, and prevention of entrainment into diversions.” There are also numerous other elements to be included in the Fisheries Restoration Plan codified in other KBRA sections.

Additionally, the State of Oregon Department of Fish and Wildlife has already begun the creation of a KBRA-required “Anadromous Fish Reintroduction Plan” in preparation for the return of anadromous fish to the Upper Klamath Basin above the dams. That preliminary Oregon Plan can be readily found on the Internet.¹

Specific numerical goals are likely to be important elements of *each* of these later-developed Plans. The KBRA is more a partnership framework and guideline for developing and then implementing those plans over the next 50 years – *not* a finished work product.

And finally, specific numerical water goals for additional storage projects are an integral part of the KBRA “environmental water” Section 18.2, and part of each of the modeling runs included in the KBRA at Appendix E-5

Objection 4: “The KBRA attempts to lock in commercial agriculture on Tule Lake and Lower Klamath National Wildlife refuges by requiring non-federal party support of this harmful practice for 50 years. If commercial agriculture were phased out, these National Wildlife Refuges could provide increased wildlife habitat and an adequate and reliable source of water for the refuges. Sec. 1.6 and 15.4.3.A.”

¹ A Plan for the Reintroduction of Anadromous Fish in the Upper Klamath Basin (March 2008), at: www.dfw.state.or.us/agency/commission/minutes/08/05_may/C_2_Draft%20Plan%20for%20the%20Reintroduction%20of%20Anadromous%20Fish%20in%20the%20Upper%20Klamath%20Basin.pdf .

Analysis: This often-repeated claim, while a good media “sound-bite,” does not hold up under scrutiny. In addition, the many benefits of the KBRA to the wildlife refuges are ignored.

The Klamath Basin is unique in America for allowing large-scale row crop farming on approximately 23,000 acres of two of its national wildlife refuges (Tule Lake and Lower Klamath National Wildlife Refuges). However, agricultural leases have been allowed on these national wildlife refuges *since the passage in 1964 of the Kuchel Act (PL 88-567) (16 U.S.C. § 695m)*. Attributing this lease lands program to the KBRA is *more than 45 years too late*. The already pre-existing Congressional legal authority for this lease lands program will simply not be affected by the KBRA in any way.

This simple fact may be disappointing to some groups which tried and failed to make the lease land program a KBRA issue, but the remedy for those advocating an end to national wildlife refuge lease land farming is in Congress, not in the KBRA. Only *Congress* can change that federal law, not the mere restoration contract that is the KBRA.

The Outline references the one direct reference to the lease lands program in the KBRA, Section 15.4.3.A, as “*requiring non-federal party support of this harmful practice for 50 years.*” This is an error based on a fundamentally flawed misreading (or partial misquote) of this section, which actually reads in full as follows:

“Section 15.4.3.A. Refuge Lease Lands. With respect to the Wildlife Refuge lands leased for agriculture under section 4 of the Kuchel Act, Public Law 88-567 (Refuge lease lands), the Non-Federal Parties (i) recognize the unique history and circumstances of the Wildlife Refuges’ lease lands and their wildlife and agricultural values; (ii) *recognize that in the conduct of the leasing of the Refuge lease lands, the Secretary, through collaborative efforts with growers and water delivery agencies, has made or may make use of practices, such as walking wetlands, lease incentives, and other programs, that enhance waterfowl management while optimizing agricultural use and maximizing lease revenues;* and (iii) seek to further the beneficial partnerships that have developed between the growers and the Wildlife Refuges. Recognizing Applicable Law, the Non-Federal Parties support continued lease land farming on TLNWR and LKNWR managed as described above in (ii).”

“As provided in Section 2.2, this Agreement does not alter the authorities or obligations of the Secretary, FWS, or Reclamation to administer Applicable Law.” (emphasis added above for the most relevant parts)

In essence, all this innocuous sub-section (iii) actually says is that the non-federal Parties recognize that the various mitigation measures USFWS uses on these lease lands to help waterfowl *actually are being used*. Additionally, the final sentence at the end makes it even clearer that nothing in the KBRA (and no statements in that sub-section) will alter wildlife protection requirements (or any other provision) of the Kuchel Act *or any other Applicable Law*.

The phrases “optimizing agricultural use” and “maximizing lease revenues” above, by the way, are virtually direct quotes from the Kuchel Act itself (16. USC 695k et seq., Pub L. 88-567, Sec. 1), the law that created the Klamath lease land program and by which it is still governed. Kuchel Act Sec. 695l already states in part:

“Such lands shall be administered by the Secretary of the Interior for the major purpose of waterfowl management, but with full consideration to optimum agricultural use that is consistent therewith.”

And Kuchel Act Sec. 695n already states in relevant part:

“Leases for these lands shall be at a price or prices designed to obtain the maximum lease revenues.”

In summary, at most the oblique KBRA references at Sec. 15.4.3.A appears to do nothing more than restate the Kuchel Act itself. Parties to the KBRA are not, in our opinion, expressing by this provision any views whatsoever as to whether the lease lands program should even exist, nor opposing in any way some hypothetical future effort in Congress to repeal or amend the Kuchel Act. Nor is there anything in this statement nor any other KBRA provision that constrains any group’s rights to make whatever arguments they like in the upcoming Comprehensive Conservation Planning (CCP) process that may determine future refuge management. And of course, the whole provision does not even apply to Federal Parties.

By and large, issues about the future of refuge lease lands management and the fate of the Kuchel Act in Congress are simply issues *which are irrelevant* to the KBRA.

Benefits for the National Wildlife Refuges

KBRA critics also discount certain specific benefits the KBRA brings to these national wildlife refuges listed below. These are not trivial benefits, but are typically ignored by many of the KBRA’s critics who focus far more on what is *not* in the Agreement, rather than on what actually is. The KBRA does support the following significant benefits to the basin’s national wildlife refuges:

1. In KBRA Sec. 15.1.2.E, *a guaranteed minimum summer water supply* for the Lower Klamath National Wildlife Refuge of between 48,000 and 60,000 acre-feet (scaled depending on the water year type). At present this National Wildlife Refuge has *no guarantee whatsoever of a water supply*, which means they can be (and have been) completely dried up during previous low rainfall years. This new refuge water supply can be scaled down to *no less* than 24,000, but only in the most extreme drought water shortages under Sec. 15.1.2.F.i. Having a guaranteed water supply is far better for the National Wildlife Refuge and its wildlife than the current situation of having none. The KBRA provides for making the water supply to the refuges of equal rank to the water supply for the federal irrigation system. At present the refuges have the most junior water right, which means in dry years they can and do get little or nothing.

2. The KBRA would provide for federal implementing legislation (See Appendix A-1, provision G) which would for the first time *specifically* add “fish and wildlife and National Wildlife Refuges” as legally authorized purposes of the Klamath Reclamation Project. This change will also legally and *permanently* institutionalize the requirement for the Bureau of Reclamation to provide reliable water supplies to the nearby National Wildlife Refuge.
3. Under Sec. 15.4.4.B.iii of the KBRA, US Fish and Wildlife Klamath Refuge managers would for the first time have a dedicated funding stream (20% of future lease land revenues) to better provide for fish and wildlife needs on the wildlife refuges themselves, including enforcement and implementation of new mitigation measures required for the lease land program in accordance with the Kuchel Act. Refuge managers believe this will make much better management of the refuges for wildlife possible. At present, the U.S. Fish and Wildlife Service gets none of these lease land revenues, and refuge managers must instead tap the U.S. Treasury for all of their refuge management funds, competing (sometimes unsuccessfully) against every other use of federal taxpayer dollars in a time of massive federal budget deficits.
4. An additional benefit to waterfowl generally from the KBRA will also be the reclaiming and addition of several hundreds of new wetlands acres to the existing upper basin wetlands land base, to be used for additional water storage as well as waterfowl (KBRA Sec. 18.2). This would provide more wetlands areas for birds to live and breed.

There are also a number of additional KBRA benefits to the wildlife refuges not listed above. These significant benefits to the national wildlife refuges from the KBRA are why the US Fish and Wildlife Service Refuge Managers *fully support* the KBRA (see for instance *Briefing Paper: How the Klamath Basin Restoration Agreement (KBRA) Affects the Klamath Basin National Wildlife Refuges (KBNWR)*, by USFWS (Ron Cole – Project Leader) 20 January 2010).

Some refuge advocates are disappointed that the KBRA, a mere contract, cannot repeal the 1964 Kuchel Act by which Congress allows commercial lease land farming on parts of these refuges. And while there must also be authorizing legislation submitted to Congress to implement the KBRA, that authorizing legislation will impact the Kuchel Act in only one way – to clarify certain long-standing disputes on how lease land revenues are divided up, among more or less the same parties as have been receiving portions of these revenues since 1964 (Sec. 15.4.4).

On the other hand, neither will KBRA legislation overturn, nor in any other way change or diminish, the Kuchel Act's, or any other laws', important wildlife protections for these national wildlife refuges (Appendix A, Item L). In other words, the KBRA is going to have *no impact whatsoever on these important laws*. Indeed, by its very nature the KBRA must abide by these laws and be implemented within their legal framework.

Objection 5: “*The KBRA locks in a drought year response that reduces Lower Klamath National Wildlife Refuge’s already low dry year allocation of 48,000 acre-feet to 24,000 acre-feet and possibly lower. (A prior biological opinion indicated a minimum of 32,000 acre-feet are necessary to support the waterfowl food base of nearly 1,000 bald eagles that overwinter in the basin). Sec. 15.1.2.F.i.b.*”

Analysis: Deliberately misleading. KBRA critics and Outline authors conveniently do not inform the reader that, under current conditions, the national refuges in question have NO meaningful right to ANY water that can be enforced, since the refuges are the most junior water right holder in the system. Thus in some past drought years these refuges were *entirely dewatered*, killing tens of thousands of waterfowl. Without the refuge protections provided for in the KBRA, entirely dewatering that refuge is almost certain to happen again.

What the KBRA would do is – for *the first time ever* – provide a minimum water guarantee for the Lower Klamath National Wildlife Refuge of 60,000 acre-feet (in wet years) scaled down to no less than 48,000 acre-feet in most future dry years.

Under the drought emergency provisions of the KBRA, this new refuge water supply could be scaled down to *no less* than 24,000, but only in the most extreme drought water shortages under Sec. 15.1.2.F.i. Having a guaranteed water supply is far better for the Lower Klamath National Wildlife Refuge and its wildlife than the current situation of having none. This is one reason the KBRA has been endorsed and is supported by the California Audubon Society.

The Biological Opinion referred to has long been superseded, the bald eagle is no longer ESA listed, and no 32,000 acre-feet refuge minimum water requirement appears in any of the recent or current Biological Opinions.

Objection 6: “*The KBRA requires Indian Tribes to waive claims of violation of trust water and fishing rights regardless of the success of restoration efforts. The agreement attempts to subordinate the federally recognized rights of the Hoopa Valley Tribe without their consent. Sec. 15.3.9.*”

Analysis: Partially true (but misstated) as well as partially false. The KBRA opponents writing this have completely misunderstood these provisions. Three major Klamath Basin Tribes (the Yurok and Karuk Tribes in California, and the Klamath Tribes of Oregon) have *negotiated for and agreed* to waive or subordinate certain senior water rights and claims – and consented to the waiver provisions of Sec. 15.3.9 that opponents complain of – *preconditioned upon and in return for* securing and locking in certain important KBRA restoration benefits. These Tribal waivers are the legal consideration for the many KBRA restoration benefits to the Tribes.

These restoration benefits, which must be certified by the Secretary of Interior to have occurred (Sec. 15.3.4.A), include: (1) implemented Klamath Irrigation Project and off-Project water use retirement programs; (2) full funding of the KBRA Fisheries Program; (3) the implementation of the additional water storage commitments (Sec. 18.2) to put more water in the river; (4) the

Project irrigation withdrawal “cap” has become permanent, and most important; (5) that final dam removal of all four PacifiCorp power dams and free-flowing river has been achieved. In addition, each of these three Tribes has certain other pre-conditions that must also be met before they will perfect and make permanent those Tribal claim waivers (Klamath Tribes = Sec. 15.3.5.C ; Yurok Tribe = Sec. 15.3.6.B.iii; Karuk Tribe = Sec. 15.3.7.B.iii).

Unless these KBRA benefits are delivered, there is no permanent Tribal waiver of any of these rights. These KBRA restoration deliverables are the precondition for these waivers and the benefit of the Tribes’ bargains.

The status of the Hoopa Valley Tribe will depend upon whether or not they ultimately decide to join the KBRA as full Parties. If they do so, their waiver provision will be very similar to that of the Yurok Tribe. If they do not, the resulting conflicts among and between the Tribes may have to be reconciled by the Federal Trustee, which under U.S. Indian law has the power to do so unilaterally if it must, although that is not its preference.

Objection 7: “\$970 million in federal appropriations are called for in the KBRA. None of these funds will be used for dam removal. \$92.5 million are provided for irrigators to develop their own Water Plan and nearly \$50 million are allotted for power or pumping related subsidies. App. C-2, Secs. 17.5-7, 15.2, 14.3.1.”

Analysis: While technically correct, these facts are not presented in context, and so are designed to mislead. First, the \$970 million figure is to be spread over 10 years (2012 to 2022), thus amounting to less than \$100 million/year. Second, nearly half of that amount is already coming to the Klamath basin in the form of multiple other federal programs, and would simply be reprogrammed to be spent in ways that coordinate with and support the overall KBRA restoration efforts. Only approximately \$50 million/year would be new money, most of that spent within the first half of the 10-year KBRA planning budget.

Dam Removal Is Not Federally Funded: It should not shock anyone that federal money will *not* have to be spent for fund dam removal. One of the strengths of the Klamath Hydroelectric Settlement Agreement (KHSA) is that dam removal *will not require additional federal funds*. Dam removal will instead be funded by PacifiCorp (which provides the first \$200 million), and if necessary the rest (up to \$250 million in additional funds) is to be drawn from the State of California – *the state which benefits most from dam removal*. The current plan is to do this through a provision in the California Water Bond that will be voted on in November, 2010. If this Bond Act fails to pass in 2010, other options for such funding will be pursued so that the appropriate California funding will be available by the dam removal target date of 2020.

The \$92.5 million cited to fund implementation of the “On-Project Water Plan” required pursuant to Sec. 15.2 is simply to fund, *again over the next 10 years*, the many structural and water management changes that the Project *must make in order to learn to permanently live with less water in dry years under the Project diversion “cap.”* Plan elements are specified in KBRA Sec. 15.2.3, and include planning and implementing both short-term and long-term measures

including: “conservation easements, forbearance agreements, conjunctive use programs, efficiency measures, land acquisitions, water acquisitions, groundwater development, groundwater substation, other voluntary transactions, water storage, and any other applicable measures.” The On-Project Plan will require Bureau of Reclamation approval and NEPA analysis as well, and funding would likely also be through the Bureau.

While there is some money in the Budget (about \$7.6 million) that *might* be characterized by some as a temporary “subsidy” to irrigators dealing with rising power costs in the Interim Power Sustainability Program under Sec. 17.5, the majority of the funding complained of is to go instead to develop *new renewable energy generation capacity in the upper basin*, plus an aggressive power conservation program (Sec. 17.7). It is also not that unusual for the federal government to provide grants for such purpose, with the Klamath Water and Power Authority (KWAPA) already formed to serve essentially as a “rural electrification district” entity for that purpose. Depending on the source, some or much of that funding may also be in the form of long term repayable development loans.

If Project and off-Project irrigators who will co-own and manage that facility can, they will sell some of that power during the winter to help offset their own power costs when they use power during irrigation season – like any other co-generation or small power producing business.

In fact, what the KBRA opposition terms as “subsidies” is merely the legal consideration for the concessions (including permanently giving up as much as 130,000 acre-feet of current legally held water rights) that the Project and non-Project irrigators are surrendering.

Objection 8: “Neither the KBRA nor the KHSRA requires removal of any dam. The KHSRA creates a process to determine whether or not dam removal is in the public interest. A finding that dam removal is not in the public interest will halt potential dam removal. A finding in favor of dam removal would require duplicative NEPA and CEQA studies, delaying dam removal for 10 or more years. KHSRA Secs. 3.3.1 and 7.3.1.”

Analysis: Again, technically correct but intended to mislead by lack of context. The Agreement opponents who are the authors of this objection also show their lack of understanding of how these types of public works projects work. What they are criticizing is merely a typical process for undertaking projects of this magnitude. Federal policy in such matters can be summed up as – “look before you leap.”

The federal government does not have the authority to take on a potential dam removal project of this magnitude, said to be the largest in history, on a whim. *No public entity should.*

The KHSRA thus provides for a full NEPA (and related California CEQA) analysis of potential environmental impacts (as well as potential mitigation measures to take), the development of a Detailed Plan for how the physical engineering of the actual removal should proceed, and only then -- *once all the facts and engineering studies are complete* -- a final Secretarial Decision by March 31, 2012 on whether taking *over the dams for removal* would be beneficial to lower river

salmon fisheries, in the public interest, and financially achievable within the “state cost cap of \$450 million” being provided for that purpose. *This is the prudent as well as typical way to proceed in a potential project of this magnitude.*

The NEPA and CEQA process are also already going on in parallel right now, but in close coordination to avoid duplication of effort. Such coordination is actually required by the KHSA (KHSA Sec.3.2.3). The very similar California CEQA analysis can easily tier off the NEPA process, saving much effort and time.

And far from delaying the process “for 10 years or more” as they claim, the NEPA process is scheduled to be completed well before the Secretarial Determination to be made by March 31, 2012, and the CEQA analysis shortly afterwards to support the concurrence findings by the States 60 days later.

Later required permits can simply tier off these NEPA and CEQA documents, thus saving considerable time and money, and avoiding future permitting delays.

Objection 9: “The KHSA requires signatory parties to also sign the KBRA, linking the documents. KHSA Sec. 2.2.”

Analysis: Correct! Opponents of one Agreement or the other object to this, but these two parallel Agreements are *inherently* interlinked, and both dam removal under the KHSA as well as the water reallocation reforms required under the KBRA are necessary for salmon recovery in the lower basin. Neither is sufficient in itself. One cannot be opposed to one Agreement without in effect opposing the other. This is a strength of the Klamath Settlement, not a weakness.

Objection 10: “The KHSA prohibits the Secretary from electing to remove the Klamath dams until, among other things, a dam removal entity (DRE) is secured and the State and Congress pass legislation to fund removal. KHSA Sec. 3.3.4.”

Analysis: Again correct! But again, this should not be surprising. The dams are NOT OWNED by the federal government, they are privately owned by PacifiCorp. They cannot just be removed by the Secretary unilaterally without Congressional authorization. They also cannot be removed unless PacifiCorp agrees to do so and transfer title to the DRE, as they have in the KHSA.

And while *federal* funding for removal is not required (see above), state funding of California’s share of the “State cost cap” as well as certain other statutory changes as set forth in the KHSA will nonetheless also be required for ultimate removal. Again, what Agreement opponents are in effect objecting to is to proceeding in a prudent, step-by-step and orderly manner through the required process that any such project would require.

Objection 11: “The KHSA lists eight events that will terminate the dam removal planning process and restart FERC relicensing/dam removal proceedings. These include the States right to veto dam removal if they do not concur in both the Secretarial Determination and the choice of a DRE, or legislation or any regulatory approval conditions that are ‘materially inconsistent’ with the KHSA. KHSA Secs. 8.11.1, 8.11.1.C.”

Analysis: Correct again -- but so what? The check-points in the KHSA that could trigger termination are actually very few relative to the magnitude of this undertaking (see KHSA Sec.8.11.1), but all are reasonable ones, many of them required by law.

The State of California, for instance, cannot lawfully commit State bond or taxpayer funds to such a major deconstruction project unless it first does its own independent CEQA analysis, and retains the power to make an informed decision based on that CEQA analysis (characterized by KHSA opponents here as a “veto” power) on whether to proceed or not. Again, that Agreement opponents raise this as an objection at all demonstrates a lack of knowledge of both CEQA and how such major projects are typically conducted, and of the various legal requirements they must meet.

Objection 12: “The KHSA minimizes PacifiCorp’s required operational changes until at least 2021, strips FERC of jurisdiction while the agreement remains in place, and also protects the utility from compliance with any other meaningful measures to improve water quality. KHSA Sec. 6.1.1 and 6.3.4.A.”

Analysis: Patently untrue. A detailed and extensive list of various “interim protective measures” to protect both fish and water quality that PacifiCorp has committed to both perform and pay for under this Agreement is part of the KHSA, at Appendices B and C. PacifiCorp has in fact committed several million dollars each year to fund these interim protective measures. Additional water quality protection measures may also be imposed later on to meet as yet not adopted TMDL requirements, under KHSA Sec. 6.3.

By comparison, FERC has utterly refused to impose any “interim measures” as part of its annual FERC license extensions, which under the regular FERC process could be extended annually for many years. Hence the river would be much better off during the “interim period” of about 10 years under the KHSA, until the dam removal target date in 2020, than it would be under the regular FERC process.

Finally, although the FERC relicensing process will be suspended while a dam removal process is pending, FERC only loses legal jurisdiction over the dams once they are transferred to the DRE, most likely the federal government (KHSA Appendix E, KHSA Provisions P and Q). But FERC would have no legal jurisdiction over *federally* owned dams in any event. However, if the KHSA Agreement ultimately fails then the whole process reverts back to the regular FERC relicensing track.

Objection 13: “The KHSA halts State water quality certification proceedings, the only remaining step before FERC would force dam removal. KHSA Sec. 6.5.”

Analysis: Correct – but completely irrelevant. Opponents failed to note that the current state 401 Certification Applications being considered are for full four-dam RELICENSING, not dam removal. Why would any of the opponents want a dam *relicensing* proposal to move forward, as certification would then only result in four-dam relicensing, not removal?

Also, it is extremely unlikely that FERC would ever, on its own initiative, “force dam removal” as opponents obviously hope. *In fact, in all its history FERC has never once required dam removal, against the wishes of the relicensing Applicant company, without a negotiated Settlement Agreement in hand to do so.*

In the FERC Final EIS, the FERC staff recommendation was also full relicensing. Thus a negotiated Settlement such as the KHSA is the only way to assure that dam removal in the Klamath actually happens.

Objection 14: “The KHSA demands up to \$27 million in extra payments to PacifiCorp if dam removal begins before 2021. KHSA Sec. 7.3.3.”

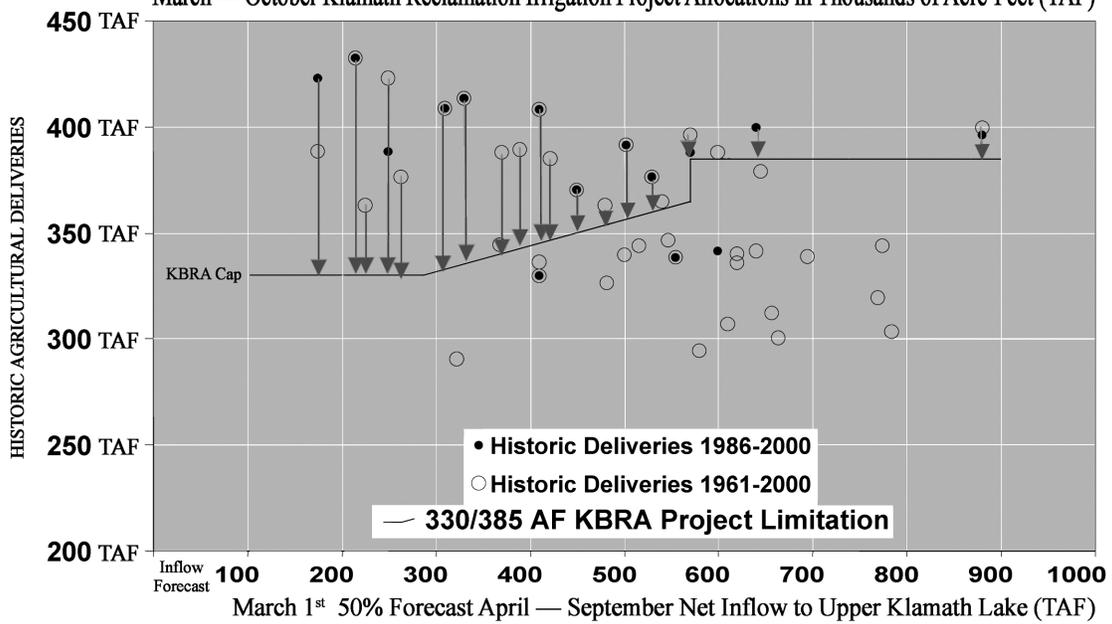
Analysis: This is simply an error. The target date to complete dam removal under the KHSA is December 31, 2020.

This objection, however, merely demonstrates a basic lack of understanding about how this dam removal project has been structured and how it will be paid for. If dam removal is to be paid for through a 2% PacifiCorp Klamath ratepayer surcharge, as authorized by Oregon SB 76, and PacifiCorp is required to pony up \$200 million through collections of that surcharge, *it is not mathematically possible to accumulate that \$200 million prior to the latter part of the year 2020 under the assumptions made.* Trying to force PacifiCorp to take the dams down earlier simply means a cash shortfall in the dam removal fund of many tens of millions of dollars – money that would have to be made up from some other source. The rate surcharge calculation sheet at KHSA Appendix H details this dilemma, based on reasonable interest, accumulation and payout assumptions as outlined in that table.

Please feel free to contact me if you have any additional questions about my analysis above.

CHART ATTACHED

March — October Klamath Reclamation Irrigation Project Allocations in Thousands of Acre-Feet (TAF)



**Outline of Objections to the
Klamath Basin Restoration and Hydroelectric Settlement Agreements**
January 20, 2010

Major defects in the current drafts of the Klamath Basin Reclamation Agreement (KBRA) and Klamath Hydroelectric Settlement Agreement (KHSA) include:

1. The water balance, guaranteeing diversion of 330,000 acre-feet for irrigators, has no scientific basis and will, in 40% of water years, leave too little water in the Klamath River to meet the current Coho Salmon BiOp flow requirements. There are no guaranteed flows for fish. Sec. 15.1.1.B and App. E-5.
2. Under the KBRA, Parties (including federal parties) to the agreement will support regulatory assurances, thereby undermining the administration of the Endangered Species Act, without providing minimum flow protections for fish. Sec. 3.1.2.
3. The "goals" of the agreement (KBRA) have no meaningful restoration objectives, and does not establish target salmon run sizes. The imbalance of the agreement is highlighted by the explicit goal of reliable water supplies for agriculture, while containing no parallel goal of water supply for fisheries. Sec. 1.3.
4. The KBRA attempts to lock in commercial agriculture on Tule Lake and Lower Klamath National Wildlife refuges by requiring non-federal party support of this harmful practice for 50 years. If commercial agriculture were phased out, these National Wildlife Refuges could provide increased wildlife habitat and an adequate and reliable source of water for the refuges. Sec. 1.6 and 15.4.3.A.
5. The KBRA locks in a drought year response that reduces Lower Klamath National Wildlife Refuge's already low dry year allocation of 48,000 acre-feet to 24,000 acre-feet and possibly lower. (A prior biological opinion indicated a minimum of 32,000 acre-feet are necessary to support the waterfowl food base of nearly 1,000 bald eagles that overwinter in the basin.) Sec. 15.1.2.F.i.b.
6. The KBRA requires Indian Tribes to waive claims of violation of trust water and fishing rights regardless of the success of restoration. The agreement attempts to subordinate the federally recognized rights of the Hoopa Valley Tribe without their consent. Sec. 15.3.9.
7. \$970 million federal appropriations are called for in the KBRA. None of these funds will be used for dam removal. \$92.5 million are provided for irrigators to develop their own Water Plan and nearly \$50 million are allotted for power or pumping related subsidies. App. C-2, Sec. 17.5-7, 15.2, 14.3.1.
8. Neither the KBRA nor the KHSA requires removal of any dam. The KHSA creates a process to determine whether or not dam removal is in the public interest. A finding that dam removal is not in the public interest will halt potential dam removal. A finding in favor of dam removal would require duplicative NEPA and CEQA studies, delaying dam removal for 10 or more years. KHSA Sec. 3.3.1 and 7.3.1.
9. The KHSA requires signatory parties to also sign the KBRA, linking the documents. KHSA Sec. 2.2.
10. The KHSA prohibits the Secretary from electing to remove the Klamath dams until, among other things, a dam removal entity (DRE) is secured and the States and Congress pass legislation to fund removal. KHSA Sec. 3.3.4.
11. The KHSA lists eight events that will terminate the dam removal planning process and restart FERC relicensing/dam removal proceedings. These include the States right to veto dam removal if they do not concur in both the Secretarial Determination and the choice of a DRE, or legislation or any regulatory approval conditions that are "materially inconsistent" with the KHSA. KHSA Sec. 8.11.1, 8.11.1.C.
12. The KHSA minimizes PacifiCorp's required operational changes until at least 2021, strips FERC of jurisdiction while the agreement remains in place, and also protects the utility from compliance with any other meaningful measures to improve water quality. KHSA Sec. 6.1.1 and 6.3.4.A.
13. The KHSA halts State water quality certification proceedings, the only remaining step before FERC would force dam removal. KHSA Sec. 6.5.
14. The KHSA demands up to \$27 million in extra payments to PacifiCorp if dam removal begins before 2021. KHSA Sec. 7.3.3.