

November 12, 2021

U.S. Fish and Wildlife Service
Klamath Basin Refuge Complex
FW8PlanComments@fws.gov

Re: Barnes Agency Restoration - Comment Letter

To Whom It May Concern:

Klamath Water Users Association (KWUA) offers these comments on the DRAFT Environmental Assessment of Wetland Restoration on Upper Klamath National Wildlife Refuge Barnes Unit, Agency Lake Units, and Adjacent Lands (Draft EA).

KWUA is a nonprofit corporation based in Klamath Falls, Oregon, which was incorporated in 1953. Our members are irrigation districts and similar water distribution entities who are parties to contracts with the U.S. Bureau of Reclamation (Reclamation) related to water stored, diverted, and delivered through facilities of the Klamath Project. Together, KWUA's members hold water rights for, and provide irrigation water service to, thousands of persons and approximately 175,000 acres of irrigated farmland in Klamath County, Oregon and Siskiyou County, California. They also operate the facilities that are the sole source of surface water diversion and delivery to Lower Klamath and Tule Lake National Wildlife Refuges.

KWUA has been a consistent supporter of environmental restoration and enhancement projects in the Upper Klamath Basin. We respect our neighbors and partners in the basin who believe there would be ecological benefits from the proposed project. However, KWUA objects to the project as proposed, and the Draft EA is legally deficient and may not be the basis for a finding of no significant impact. The Draft EA fails to evaluate or acknowledge adverse impacts on the availability of water for uses down-stream of the proposed project. These uses include irrigation in the Klamath Project, irrigation and wildlife habitats in Tule Lake and Lower Klamath NWRs, and stream flows in the Klamath River.

Impacts to Other Uses and Users of Water and the Environment

To the extent that the proposed project could cause or exacerbate a condition of water shortage for irrigation in the Klamath Project or Tule Lake or Lower Klamath NWRs, there could be a myriad of adverse and significant environmental impacts. These include loss of topsoil from prime farmland, wind erosion and associated air quality impacts, loss of recharge of groundwater for shallow domestic wells, resulting in wells going dry (no water for drinking, cooking, sanitation), infestations of noxious weeds and pests, increased reliance on groundwater basins, socioeconomic and mental health impacts,

injury to wildlife on both private land and public land, loss of aquatic habitats in water delivery system, and others. One need only observe the consequences of this year's water curtailments, where all of these types of impacts have occurred.

Our concerns about potential water supply impacts are not new. KWUA received a briefing regarding the proposed project in late 2020. In a memorandum to U.S. Fish and Wildlife Service (USFWS) and Reclamation representatives dated November 16, 2020, KWUA stated:

We recognize that the project would mean that there is more water in storage. This does not translate directly into improved water availability or reliability. There is an obvious concern with the loss of water due to the "first fill."

In addition, there would be an increase in evapotranspiration due to an increased surface area. As we understand, the increase would be at least 30,000 acre-feet. Recent and current Klamath Project operations "allocate" virtually every drop of water. With increased evapotranspiration, there would be less water to allocate

We request that Larry Dunsmoor and Dan Easton be tasked with analyzing the effects this project would have on the water balance in the Klamath Basin and the availability of water for other uses. We also request that we be able to participate in developing assumptions for analysis or modeling, as well as alternative operations scenarios to be evaluated.

On September 7, 2021 KWUA met with USFWS representatives and others, and received a briefing and executive summary regarding Appendix B of the Draft EA¹, which includes certain hydrologic analysis based on the assumptions used in that Appendix. Appendix B, does not, however, address impacts of the "first fill" or the longer-term impacts "on the water balance in the Klamath Basin and the availability of water for other uses."

Appendix B of the Draft EA appears to assert that it did not evaluate impacts on water availability for downstream irrigation, refuges, or river flows because it does not control Link River Dam or because it cannot predict how Upper Klamath Lake will be managed in the future. Draft EA at App B; Executive Summary at fn 1. We do not understand how or why that point is considered relevant to the first fill. Moreover, USFWS has a tremendous amount of say in the operation of Link River Dam, through its authorship of ESA biological opinions and otherwise. The NEPA implementing regulations provide that when incomplete but available information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable, the agency is required to include the

¹ Summary of analysis of potential storage capacity of Upper Klamath Lake with reconnection with Barnes-Agency historic wetlands. Prepared by U.S. Fish and Wildlife Service: Rachel Esralew1 and Adam Johnson (Executive Summary)

information. (40 C.F.R. § 1502.21(b) (2020).)² Moreover, given NEPA’s inherently speculative nature, agencies are required to engage in reasonable forecasting whilst conducting NEPA review. (*N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078-79 (9th Cir. 2011).) Reasonably foreseeable future actions must be considered, lest an agency “shirk [its] responsibilities under NEPA by labeling any and all future environmental effects as crystal ball inquiry.” (*Id.* at 1079, citing *Selkirk Conservation All. v. Forsgen*, 336 F.3d 944, 962 (9th Cir. 2003).)

USFWS cannot assert that no information was available to provide a reasoned analysis of the impacts of water availability. This type of evaluation occurs regularly in the Klamath Basin and elsewhere. Notably, Appendix B itself assumes that operations of Link River Dam and A Canal are the same as historic conditions for the years evaluated.³ Using those same assumptions, one could have evaluated water availability for other uses, and alternative operations. We also note that in its biological assessment for water acquisition for water acquisitions⁴, USFWS effectively assumed, as a no action alternative, the status quo for water diversions through Project facilities. In so doing, USFWS has acknowledged the availability of relevant information.

By email dated September 14, 2021 to USFWS and Reclamation representatives, KWUA requested that Reclamation task its hydrologic modeling consultants with a proper evaluation of the impacts of the proposed project on the availability of water for other uses. We have received that analysis. As reflected in the attached draft summary completed by Reclamation’s consultant, using the same assumptions as the Draft EA’s Appendix B with regard to storage quantities and evaporation, and applying the operations of Reclamation’s current, “Interim Operations Plan,⁵” there would be reductions in water availability for irrigation (and by extension NWRs) and Klamath River flows as a result of the proposed project. That summary reflects a greater average reduction in river flows than in Project diversions, but KWUA does not assume that the National Marine Fisheries Service would support that distribution of shortage. In addition to overall water quantity effects discussed in the attached paper, one can anticipate effects on the timing with which irrigation diversions could begin, particularly if, as in the recent past, there are Upper Klamath Lake operational minima during spring

² Section 1502.21 is applicable to environmental assessments, in addition to environmental impact statements. (40 C.F.R. § 1501.5(g)(1) (2020)).

³ Based on the text, in its analysis, USFWS:

- Takes historical UKL levels;
- Calculates the volume in the lake using the existing bathymetry;
- Determines the lake level and change in surface area using the new bathymetry;
- Calculates evaporative loss from the increased surface area dividing it into wetlands and open water and using a seasonal evaporation rate;
- Does not adjust UKL net inflow; and
- Does not adjust Link releases or A Canal diversions.

⁴ U.S. Fish and Wildlife Service, 2021. Final Environmental Assessment on Water Supply Enhancement for Lower Klamath National Wildlife Refuge. Sacramento, CA.

⁵ KWUA believes that recent Klamath Project operations, including the Interim Plan, are legally and technically defective. Those arguments are not essential here, but are not waived.

and summer. KWUA member Klamath Irrigation District is providing a more detailed discussion of water supply consequences, and we incorporate that analysis by reference.

The critical point is that one can reasonably evaluate the potential changes in water availability resulting from the proposed project, or a range of foreseeable changes, and USFWS has chosen not to do so. One of the goals of NEPA is to inform the public that an agency has considered environmental impacts when making a decision. 40 C.F.R. § 1500.1(a) (2020); *Balt Gas & Elec. Co. v. Nat. Res. Def. Council* 462 U.S. 87, 97 (1983). By failing to consider available information in evaluating impacts to water availability, the Draft EA fails as an environmental disclosure document, and is legally deficient.

Water Rights

A water right is necessary for the collection of water to storage. The Draft EA does not address whether or how there are water rights that would allow impoundment of increased quantities of water behind Link River Dam.

ESA Consultation

Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), requires that federal agencies ensure that their actions not jeopardize the continued existence of ESA-listed species or destroy or adversely modify habitat that has been designated as “critical” habitat. In aid of compliance with these substantive obligations, section 7 also imposes binding procedural requirements. Based on federal agency documents, we presume listed species and habitats potentially affected by the proposed project include endangered Lost River sucker (LRS; *Deltistes luxatus*), endangered shortnose sucker (SNS; *Chasmistes brevirostris*), threatened Southern Oregon/Northern California Coast (SONCC) coho salmon (*Oncorhynchus kisutch*) Evolutionarily Significant Unit (ESU), threatened Southern Distinct Population Segment (DPS) of the North American green sturgeon (*Acipenser medirostris*), endangered Southern Resident killer whale (SRKW; *Orcinus orca*) DPS, and threatened DPS of Pacific eulachon (*Thaleichthys pacificus*).

With any proposed project, a federal agency is obliged to determine whether the action is likely to affect a listed species or critical habitat. We are not aware, and the Draft EA does not reflect, whether such a determination has been made. If an action is likely to have an adverse effect, the action agency must request formal consultation.

NEPA’s implementing regulations state:

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws and Executive orders applicable to the proposed action, including the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (54 U.S.C. 300101 *et seq.*), and the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other authorizations that must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other authorization is necessary, the draft environmental impact statement shall so indicate.

40 C.F.R. § 1502.4. The policies underlying these requirements are equally applicable in the preparation of an EA.

USFWS appears to have chosen not to adhere to 40 C.F.R. 1502.4(a). Unless cured, and ESA issues are addressed, there will be piecemeal and inefficient environmental evaluations, and impacts may be concealed. Similarly, we find no text in the Draft EA reflecting compliance with 40 C.F.R. § 1502.4(b).

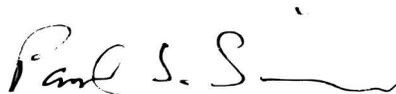
Recommendations

It is possible the project would provide certain environmental benefits. But it is proposed in a context where the Klamath Project and Upper Klamath Lake are controlled by an ESA consultation ethic where every molecule is treated as a prize to be gained and controlled, common sense is discarded, and limiting factors for fish populations (such as lack of sucker recruitment) are subordinated to the quest for more and more water. Respectfully, in the Draft EA, USFWS has not subjected the project to the scrutiny or granular attention that is given to all other activities in the basin that affect water quantity.

KWUA believes the proposed project could be considered as part of comprehensive discussion directed toward stability and improved health for all Klamath Basin communities and resources. But as a stand-alone proposition, it would cause damage and undisclosed damage that we cannot support.

Thank you for consideration of these comments.

Sincerely,

A handwritten signature in black ink that reads "Paul S. Simmons". The signature is written in a cursive style with a long horizontal flourish at the end.

Paul S. Simmons
Executive Director and Counsel

Potential Klamath Project Operational Effects of Agency-Barnes Restoration
Under the Interim Operations Plan

Agency-Barnes Restoration will increase the operable Upper Klamath Lake storage capacity by 73,000 acre-feet. This can enable the Klamath Project to store winter flood flows that would otherwise have to be released. However, the Agency-Barnes Restoration will also increase Upper Klamath Lake surface area and evaporative losses.

Agency-Barnes Restoration was added to the Klamath Basin Planning Model to analyze the operational effects under the Interim Operations Plan (IOP). Over the period of record (1981-2020), evaporative losses increase by an average of 38,000 acre-feet per year (see Table 1 on p. 2). This loss ultimately effects river flow, Ag deliveries, and refuge deliveries. When operating under the IOP, the negative effects of increased evaporation will mostly decrease Klamath River flows. The results are summarized in Table 2.

| Table 2 | |
|--|------------------|
| Avg. Annual Reduction in UKL Supply to... | |
| Klamath River Flow | 34,000 acre-feet |
| Ag Delivery | 3,000 acre-feet |
| Refuge Delivery | 1,000 acre-feet |

Under the IOP, the Agency-Barnes Restoration will lower UKL surface elevations. Minimum lake level at the end of the irrigation season will be 0.1 feet lower on average, and the elevation at the end of May will be 0.2 feet lower on average. The FWS has specified a UKL surface elevation of 4142 feet and above as needed for sucker spawning habitat during spawning season (April-May). With the Agency-Barnes Restoration, this elevation is achieved and held in 71% of simulated years. Without restoration, the elevation threshold is achieved and held in 80% of years.

The negative effects to Klamath River flows and UKL surface elevations will likely be unacceptable to the NMFS and the FWS. This opinion is based on past agency assessments of impact to salmon and suckers due to similar changes in flow and UKL elevation. It is likely that the agencies will request higher UKL carryover targets, at the expense of Ag deliveries, to maintain existing Klamath River flows and UKL surface elevations. It is important to remember that if all the stakeholders are willing to work together, operational rules can be developed to distribute any negative water supply effects of the Agency-Barnes Restoration in a way that is less likely to have negative effects on salmon and sucker populations while limiting negative effects to irrigators.

**Table 1
Agency-Barnes Evapotranspiration**

| WY | Open Water (TAF) | Wetland (TAF) | Total (TAF) |
|------|---------------------|------------------|----------------|
| 1981 | 14 | 21 | 35 |
| 1982 | 26 | 15 | 42 |
| 1983 | 30 | 13 | 43 |
| 1984 | 29 | 14 | 43 |
| 1985 | 24 | 16 | 41 |
| 1986 | 23 | 17 | 40 |
| 1987 | 20 | 19 | 39 |
| 1988 | 18 | 20 | 38 |
| 1989 | 19 | 19 | 38 |
| 1990 | 18 | 20 | 38 |
| 1991 | 13 | 22 | 35 |
| 1992 | 6 | 26 | 32 |
| 1993 | 22 | 18 | 40 |
| 1994 | 12 | 22 | 34 |
| 1995 | 24 | 17 | 41 |
| 1996 | 24 | 17 | 41 |
| 1997 | 24 | 17 | 41 |
| 1998 | 28 | 15 | 42 |
| 1999 | 28 | 14 | 43 |
| 2000 | 25 | 16 | 41 |
| 2001 | 15 | 21 | 36 |
| 2002 | 14 | 21 | 35 |
| 2003 | 15 | 21 | 36 |
| 2004 | 16 | 20 | 36 |
| 2005 | 17 | 20 | 37 |
| 2006 | 24 | 17 | 41 |
| 2007 | 19 | 19 | 38 |
| 2008 | 24 | 17 | 41 |
| 2009 | 20 | 19 | 39 |
| 2010 | 15 | 21 | 36 |
| 2011 | 24 | 17 | 41 |
| 2012 | 18 | 20 | 37 |
| 2013 | 14 | 21 | 36 |
| 2014 | 13 | 23 | 35 |
| 2015 | 12 | 22 | 34 |
| 2016 | 14 | 21 | 35 |
| 2017 | 21 | 18 | 39 |
| 2018 | 18 | 20 | 38 |
| 2019 | 20 | 19 | 39 |
| 2020 | 10 | 24 | 34 |
| AVG | 19 | 19 | 38 |
| MIN | 6 | 13 | 32 |
| MAX | 30 | 26 | 43 |