



Memo on Top Foundational Concerns in Respect to the KBRA and KHS

Dated: March 29, 2010

Citations correspond to KBRA Public Review Draft (January 7, 2010)

A. Top Foundational Concerns With KBRA Provisions

1. Water Balance/Water Plans/Drought Plan

a) The fact that there is no guaranteed minimum flows, no guaranteed bucket of water to allocate or shape for fish, or clear trigger or path of action if the predicted flows or environmental bucket of water does not show up is a huge deficiency in the KBRA. The risk of the predicted flows not being there is all on the fish.

b) The risk of the predicted flows being enough water for fish is also on the fish. The predicted flows often do not match Hardy flows which are currently deemed the best available science. In 90% exceedence years, the predicted bucket of fish water, even if it does show up, is much less than the total bucket of fish water under Hardy and the current court ordered ESA flows. In fact the KBRA predicted bucket of water is less than the total bucket of water under Hardy in all years except the very wettest (10% exceedence). We believe the irrigation limitations are set too high, leaving too little water left over for fish to meet both the needs of the Klamath River and Upper Klamath Lake. There is one endangered and one threatened species of sucker in Upper Klamath Lake, and the risk of there being too little water in the lake is also on these fish. In addition the predicted lake levels will periodically go low enough to completely drain all 14,000 acres of wetlands in Upper Klamath National Wildlife and other wetlands around the lake. The limitations on irrigation in the KBRA are not set low enough to balance other water demands.

c) It is acknowledged that the predicted flows are not enough in drought situations, yet no drought plan has been developed (Section 19.2). That means there currently is no means of assessing whether or not an adequate drought plan will be developed before support for the KBRA and legislation will be requested. The KBRA itself may limit the ability to negotiate a plan that will effectively deal with droughts because the KBRA only explicitly allows for changes in the diversion limitations/guarantees in extreme droughts (See Section 19.2.2.B.v). Extreme droughts are defined as conditions that have only occurred twice in the last 40 years so diversion limitations/guarantees would only occur in exceptional circumstances. The predicted flows are less than what is needed for fish in many more years than extreme drought years, yet the KBRA does not even define what other conditions would be covered by a yet to be created drought plan. This is not acceptable. A drought plan should be developed to ensure specified scientifically based minimum flows for fish are met.

The drought plan also allows for waiving of the groundwater standards in an extreme drought, which could adversely affect flows. This also highlights the fact that if the irrigators choose to have significant groundwater development in their water plan to replace the water they will no longer be diverting from the Klamath River, then groundwater may well not be available in an emergency.

d) The KBRA lacks any clear measurable goals or standards for fish, and there is no clear trigger or clear path of action under the KBRA to reopen the diversion limitations if it turns out the fish are still doing badly or populations are not recovering (Section 1.3). The weak KBRA goals in respect to fisheries and the strong specific goals in respect to irrigation put fish at a disadvantage. For instance, the agreement states that one of the goals is to establish reliable water supplies for agriculture (Section 1.3.ii), and then there are also specifics elsewhere in the KBRA on what that supply is going to be, while there is no stated parallel goal to establish a reliable water supply for fish. The goal stated in the KBRA for fish is the following: “*restore and sustain natural production and provide for Full Participation in Harvest Opportunities of Fish Species throughout the Klamath Basin*” (Section 1.3.i). By not stating the level one is attempting to sustain natural production at, it could mean to just sustain natural production to avoid extinction. Likewise *to provide for Full Participation in Harvest Opportunities of Fish Species throughout the Klamath Basin* does not in anyway indicate what level of harvest opportunities one is trying to achieve. One just gets to fully participate in whatever harvest opportunity might exist. We think these are meaningless standards for fish and put parties concerned with fish at a disadvantage under the KBRA.

e) The KBRA does establish a process to develop and implement a water use reduction plan for the off-Project irrigators in the Upper Basin (Section 16.2.2), but does not for the Klamath Irrigation Project, and it has no plan for water demand reduction in the Shasta and Scott Rivers. We have tremendous concerns over the \$92.5 million funding allocation (line 66, page 8, Appendix C-2, and Section 15.2) to fund the development and implementation of a Project water plan that is to be developed and implemented by the irrigators, subject only to 60 day review and approval by the Bureau of Reclamation. Instead of being developed solely by the Project irrigators with no public oversight, the water plan should be developed by a federal agency with appropriate NEPA analysis and public oversight. The plan should actually have a goal of permanently reducing irrigation water demand to solve the basin’s overallocation problem rather than allowing for shifting the demand to the Lost River, the Pit River, or back to the Klamath through groundwater development. A certain percentage of the funds should be spent on permanent water demand reduction, similar to the off-Project water use reduction plan in the Upper Basin. In addition, pre-agreement to provide millions of dollars for implementation of a Project water plan, before being able to assess specifically how taxpayer dollars will be spent is not a responsible commitment of federal funds.

A water use reduction plan for the Shasta and Scott similar to the off-Project Upper Klamath Basin plan is essential for basin restoration and no specific provision for such a plan in the KBRA is a serious restoration deficiency.

2. ESA/CESA

a) We acknowledge that the ESA is not specifically being waived, but we do believe the KBRA undermines the administration of the ESA because it requires support for regulatory assurances consistent with the diversion limitations/guarantees to irrigators without providing minimum flow protections for fish. See section 3.1.2, section 21.3, and section 21.3.1.B. The parties who sign the agreement most likely cannot initially challenge a biop that is consistent with the diversion limitations/guarantees and in fact would most likely be required to support one that does that. We believe the parties to the agreement will be supporting and may be required to support a biop that violates the ESA, leaving it to others to take appropriate legal action if in fact a biop should come out that does not provide protected flows or a protected bucket of water for fish based on the best available science. We know that the diversion limitations are set too high in dry years, and we know the ESA should require minimum flow protections. The KBRA puts tremendous pressure on NMFS and USFWS to come up with bi-ops that allows water diversions at the level set forth in Appendix E, and gives them cover to do so as non-federal KBRA parties are required to support those agencies in doing just that. (See Section 21.3.1.A and 21.3.1.B.ii.a.). A water deal should have been negotiated that will meet ESA requirements, instead of a deal that puts pressure on agencies and others to support a deal that does not.

The KBRA also invites NMFS and USFWS to rely on actions planned (but not funded) in the KBRA as a reason to conclude fish will need less water than the current biological opinion requires, and also invites them to deliver incidental take coverage based on the diversion limitations/guarantees (See Section 22.2.2 through 22.2.5). In fact this coverage is contemplated to even last beyond the 50 year term of the agreement (See the last sentence of 22.2.1).

b) The KBRA supports development of California legislation that will allow take of southern bald eagles, golden eagles, Lost River suckers, greater sandhill cranes, American peregrine falcons, and shortnose and Lost River suckers in the Lost River and Tule Lake Basins in California under California's Endangered Species Act (CESA) (Section 24.2). This could lead to setting aside existing CESA protections and highlights the concern that the KBRA will actually make matters worse in the Lost River and Tule Lake Basins.

3. Refuges

a) Section 15.4.3.A. on page 100 of the KBRA requires all non-federal parties to support continued commercial farming on 22,000 acres of Tule Lake and Lower Klamath National Wildlife Refuges. The purpose of this provision is to promote the continuation of commercial farming of these important refuge lands and to lock this in for the 50 year term of the agreement. Agreeing to support commercial farming on these refuges undermines and unduly influences the Comprehensive Conservation Plan (CCP) planning process that will shortly be initiated for these refuges as required under the National Wildlife System Improvement Act of 1997. Commercial farming should be prohibited, as it is incompatible with refuge purposes and the purposes of the National Wildlife System Improvement Act of 1997. The support for commercial farming in the KBRA invites USFWS to determine commercial farming is compatible and consistent with

refuge purposes and gives them cover if they do so. This harmful practice on two of the nation's most important national wildlife refuges should be phased out not locked in.

Phasing out commercial farming would not only provide additional wildlife habitat, it would reduce irrigation season water demand, allow for natural storage of winter water, and help improve water quality. It should also be noted that not only does the KBRA require non-federal parties to support commercial farming, but it subtly attempts to create a new management standard by requiring support for leaseland farming managed to "enhance waterfowl management while optimizing agricultural use and maximizing lease revenues" (Section 15.4.3.A.ii). This appears to give agricultural uses and maximizing lease land revenues equal weight to waterfowl management in managing refuge lands, and suggests that as long as you are doing something to enhance waterfowl management from the current situation, commercial farming somehow becomes consistent with waterfowl management. This conflicts with both the National Wildlife System Improvement Act of 1997 and the Kuchel Act, which make it clear that wildlife conservation and waterfowl management are the primary purposes of the refuges, and that any commercial farming activity must be consistent and compatible with these primary purposes. In fact, the large scale commercial farming that occurs on these refuges is not compatible with refuge purposes, and the KBRA makes it more difficult to challenge this incompatible use, especially if Congress should ratify and approve the KBRA and direct the federal agencies to sign it.

b) 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 (Section 15.1.2.F). (In this regard it should be noted that a prior biological opinion indicated a minimum of 32,000 acre-feet is necessary just to support the waterfowl food base of the approximately 1,000 bald eagles that overwinter in the basin.) These drier year and drought year cutbacks to water delivered to Lower Klamath NWR wetlands are required under the KBRA without first requiring cutbacks in water delivered to irrigators commercially farming National Wildlife Refuge land. This is most likely in violation of the Kuchel Act and National Wildlife System Improvement Act of 1997. There was a move at the end of the Clinton administration to enforce these laws by first requiring reductions in commercial farming on the refuges to avoid cutting back water deliveries to refuge wetlands. Ironically, Section 15.1.2.G.iv, of the KBRA does allow the On-Project Water plan to limit deliveries to these refuge leaselands to meet water needs on private farms, but not to meet refuge needs. There should be no cutbacks to LKNWR water deliveries in droughts or at other times without first cutting back irrigation water deliveries to refuge land that is being commercially farmed.

c) Though the KBRA gives Lower Klamath NWR a water allocation, it is not the full amount needed in many years, and the Settlement Agreement has language that could be interpreted to limit the ability of Lower Klamath NWR to do better in drier years, or expand its wetlands in wetter years. Section 15.1.2.E.iii(5) provides that the allocation to Lower Klamath NWR shall be reduced by any delivery of surface water through Reclamation facilities from other delivery points. This would limit the ability of the refuges to increase their water supplies by developing other water sources by purchase, lease, or storage if delivered through Reclamation facilities. It should be noted that under

the KBRA, the Project irrigators guaranteed water from the Klamath River is not reduced if they find or develop alternate sources of water, but the refuges are not allowed to do better by developing or purchasing alternate sources, even though under the National Wildlife Systems Improvement Act the Secretary of Interior is required to secure needed refuge water supplies. In addition, Sections 18.3.2 and 15.1.2.E.ii of the agreement also reduce, if not eliminate, the possibility of storing water on the refuges for increasing refuge water supply. Section 18.3.2 predetermines how all new storage should be allocated regardless of where it is developed, and refuges are not identified as a priority to receive any newly stored water, and Section 15.1.2 reduces irrigation season deliveries to Lower Klamath NWR by any amount stored on the refuge in excess of the 35,000 acre-feet wintertime allocation. Also, Section 15.1.2.E.iii sets forth other situations that would also reduce the allocation of water to Lower Klamath NWR, including reducing the irrigation season allocation by one-acre foot for each acre placed in walking wetlands, whether the walking wetlands are on refuge or private lands, and regardless of how much water is actually delivered to the walking wetlands.

It should also be noted that the KBRA requires a number of difficult to achieve conditions to be met before the water allocation to Lower Klamath NWR goes into effect.

d) The KBRA also promotes federal agency reliance on commercial farming on the refuges and builds a greater constituency for it by changing existing law. Section 15.4.4 B and Appendix A, Section H of the KBRA provide that approximately 60% of the net revenue from leasing refuge land for commercial farming will go to a Reclamation fund and applied to the benefit of Project irrigators, either by covering costs of maintaining and operating Keno and Link River Dams (a cost that should be born by Project irrigators), by reducing future capital costs of the Project or by subsidizing power costs to both on and off Project irrigators. By diverting these funds for these purposes, the KBRA will increase and broaden the political support for continuing commercial farming on these two national wildlife refuges at a time many have begun to question the practice. In addition 20% of the revenues would go to USFWS (the other 20% is to go 10% to Tulelake Irrigation District and 10% to Klamath Drainage District, the two irrigation districts, whose customers commercially farm the refuges). This provision will create an agency dependence on farming the refuges with both the Bureau of Reclamation and USFWS, which would make it harder to make the changes that are needed on these refuge lands. Parties to the KBRA are required to support federal legislation to implement this KBRA provision as it is inconsistent with existing law.

4. Power subsidy and special contracts

a) The KBRA provides over \$50 million in power subsidies and preferential power rates from the Columbia River Hydropower System that will continue to subsidize draining refuge land for farming (See KBRA Sections 14 and 17, and lines 72 -75 on Appendix C-2). Federal legislation will also be necessary to implement these provisions, and the KBRA requires parties to support such legislation. There is no public policy purpose for this subsidy. It provides an unfair competitive advantage over other nearby farmers and ranchers who just happen not to own lands in the Klamath Project or Klamath County, and encourages not only wasteful power use, but also wasteful water use as the power is used to pump water. Subsidized power in the Klamath Basin has

contributed to the basin's water crisis and has also made it economical to drain wetlands on Lower Klamath and Tule Lake National Wildlife Refuges for harmful commercial farming on refuge land (At the California PUC hearing refuge personnel testified that the once the cost of power reached the market rate, draining refuge land on Tule Lake NWR for commercial farming would no longer be economical.) If such a subsidy is granted it should only be on the condition that commercial farming on the refuges be phased out.

b) The KBRA, in Section 15.4.2.A, modifies existing contracts to change the cost allocation of the D plant pumping by increasing the amount the USFWS has to pay and decreasing the amount the Tule Lake Irrigation District has to pay (this is shown to cost USFWS \$170,000 per year, line 69, Appendix C-2). Since this would most likely violate current Reclamation law on cost sharing, Section 15.4.6 of the KBRA attempts to circumvent the law by having the Secretary of Interior agree that the cost sharing agreements in the KBRA are not a "contract" as defined in the Reclamation Reform Act of 1982 (Public Law 97-293). This contract modification allows Project irrigators to use D plant pumping to drain and keep drained 15,500 acres of Tule Lake NWR so that the lands can be commercially farmed. In addition, under Section 15.4.4.A of the KBRA, existing Project irrigator debt to the United States for unpaid capital costs of the Project facilities is cancelled without even first determining the amount. This would be a very bad precedent without any public policy justification.

5. Implementing legislation

a) No KBRA legislation should have language approving, ratifying or confirming the KBRA or directing federal agencies to become parties to the agreement, though this is contemplated under the KBRA (See Appendix A, section A). It is only necessary to authorize federal agencies to implement the agreement and that implementation should specifically indicate that implementation must be consistent with and in compliance with all existing laws, rules, and regulations, including but not limited to the National Environmental Policy Act, the Endangered Species Act, the Clean water Act, the National Wildlife Refuge System Improvement Act of 1997, and the Reclamation Reform Act of 1982. It is not good policy to have federal agencies contractually committed to an agreement for 50 years. It would impede the ability of agencies to respond to changes and implement existing and future laws.

b) Appendix A, Section G of the KBRA requires support for expanding the purposes of the Klamath Reclamation Project to include fish and wildlife and other additional uses. Expanding the purposes is good, but by adding the following to the legislation it unnecessarily limits the benefits to fish, wildlife and refuges, and raises ESA concerns:

"The fish and wildlife and National Wildlife Refuge purposes of the Klamath Reclamation Project shall not adversely affect the irrigation purpose of the Project, *provided that*, the provisions regarding water allocations and delivery to the National Wildlife Refuges agreed upon in Section 15.1.2, including any additional water made available under Section 15.1.2.E.ii and 18.3.2.B.V, of the

Klamath River Basin Restoration Agreement are hereby deemed not to constitute an adverse effect upon the Klamath Reclamation Project's irrigation purpose."

This language is inconsistent with the concept that nothing is intended to modify the ESA. Managing the Project for fish and wildlife purposes to comply with the ESA can certainly be deemed to "adversely affect the irrigation purpose of the Klamath Project". In addition it could be interpreted to limit the refuges from improving on its water allocation except in very limited specified ways under the KBRA. The language is also not necessary and it is ambiguous and vague. There are any number of scenarios in which one can imagine someone raising the argument that the fish and wildlife and National Wildlife Refuge purposes are adversely affecting irrigation purposes. Presuming the intent was to make sure this did not affect the priority of water use we suggest the following provision in any legislation in lieu of the above:

"The fish and wildlife purposes and national wildlife refuge purposes of the Klamath Reclamation Project shall not change the priority of use of Project water, which priorities shall remain subject to applicable state and federal laws."

B. Top Foundational Concerns With KHSA Provisions

1. Linkage with the KBRA

The KBRA has many controversial provisions and seeks \$985 million in appropriations. It is not necessary for PacifiCorp's support for the KHSA. We believe linking the KBRA with the KHSA is very likely to derail needed KHSA legislation and/or implementation of the KHSA. Passage of legislation to implement the KBRA should not be a precondition to filing the Secretarial determination or to dam removal. In addition the KHSA is just a process that might lead to dam removal, but may not. If linked to the KBRA, many of the environmentally harmful provisions of the KBRA will already be in effect before we know whether dams will be removed or not.

2. Secretarial Determination

The KHSA and Appendix E legislation leaves the determination of whether dam removal is in the public interest to the discretion of the Secretary of Interior. This determination process is not necessary. It just delays the federal government's decision on whether or not it will commit to dam removal and creates another forum for PacifiCorp or any group that opposes dam removal to have an opportunity to block it. If the Secretarial determination comes back negative, then it will give PC lots of leverage in the FERC process and with the PUC's to keep the dams and recover the costs of any mandatory conditions. Instead Congress should determine in the legislation that the dam removals are in the public interest and authorize the Secretary to remove the dams and commence the necessary planning and environmental review processes to achieve dam removal, rather than delegate the public interest determination to the Secretary.

3. Preconditions and Exits/DRE

Though the KHSA could lead to dam removal, it has so many off ramps and preconditions that it makes dam removal less certain than it has to be. More of these

preconditions should be satisfied upfront, especially since the KHSA is linked to the harmful provisions of the KBRA. It would be terrible to be stuck with the harmful provisions of the KBRA and have no dam removal take place.

4. California Bond.

The KHSA has no provision that provides the needed California bond will not be packaged with environmentally harmful projects. Unfortunately, this is what has occurred in the current California bond. California bond funding is a condition of dam removal, putting KHSA supporters in a position of having to support more harmful provisions to get California bond funding needed for dam removal.

5. Interim Measures and Application of Existing Laws

The interim measures in the KHSA are inadequate, allowing PacifiCorp (PC) to continue to operate for at least the next decade in a manner that will continue to harm salmon. The agreement should require PC to immediately implement the non-structural operational requirements that are part of the mandatory conditions for a new license rather than essentially granting PC what amounts to a new 10 year or longer license with minimal conditions. In addition, PC should remain liable and its operations should remain subject to the CWA and the ESA in the interim (the KHSA contemplates giving PC ESA coverage during the interim). The feasibility of operating Copco I and Irongate at reduced pool levels to minimize temperature increases and toxic algae in the reservoirs during the interim should be explored.

6. State Water Quality Certification

State water quality certification processes should proceed during the interim so that these processes won't further delay the relicensing process if dam removal does not move forward.

7. FERC Annual Licenses and Suspension of Relicensing Process

The KHSA does not state any clear limitation on the number of annual FERC licenses that can be granted to PacifiCorp, or state clearly when the FERC relicensing process would start up again, if dam removal has not commenced by 2020. The KHSA is deficient for not stating a definite limit on the number of annual licenses and a specific date after which relicensing should again commence if dam removal has not yet commenced.

8. Delayed Commencement of Dam Removal

Even if there is a positive Secretarial Determination under the KHSA, no dams are to be removed under the KHSA before 2020 and maybe not for some time thereafter. The Klamath salmon are suffering now from these dams and waiting until 2020 or later to take action with no substantive change in operations during the interim puts salmon at risk.