



March 26, 2010 Memo- Klamath Legislation Concerns, Comments and Recommendations

With the signing of the Klamath Basin Restoration Agreement (KBRA) and the Klamath Basin Hydroelectric Settlement Agreement (KHSa), there is a push for federal legislation to approve and implement the agreements. WaterWatch believes that if Congress approves the KBRA and/or directs the federal agencies to become contractually bound to the agreement for its 50-year term, it will set back important conservation interests in the Klamath Basin for years to come. WaterWatch also believes legislation related to the KHSa should be de-linked and separated from the controversial and costly provisions of the KBRA, and believes there are significant issues in the KHSa that need to be addressed in legislation related to it.

Below is a summary of some of WaterWatch's chief concerns with federal legislation related to these agreements along with suggestions for appropriate legislation.

KBRA Legislative Concerns, Comments and Recommendations:

1. Congress should neither approve, ratify, or confirm the KBRA, nor direct federal agencies to sign the KBRA and be contractually bound to it for the next 50 years.

Approving, ratifying or confirming the KBRA would elevate the KBRA to an Act of Congress and make it federal law. This is not necessary and is bad public policy. Similarly, directing federal agencies to sign and become parties to the KBRA would also be bad public policy. The KBRA and attachments are well over 300 pages and were negotiated behind closed doors in a non-transparent process from which the public was excluded. Many of its provisions have not been closely scrutinized and: are harmful to the environment; could undermine important environmental laws; are not good public policy; have unwarranted and costly subsidies; fail to address key basin problems; and are unnecessarily expensive to the U.S. taxpayer. In addition, directing federal agencies to sign and become contractually bound to a 50 year agreement will greatly limit the flexibility the federal government needs to serve the broader public interest, to respond to current and future basin issues, and to implement existing and future laws. It also unnecessarily exposes the federal government to litigation and liability for breach of contract claims.

Even if the KBRA moves forward, the appropriate role for Congress would be to simply authorize federal agencies to implement specific elements of the agreement consistent with existing federal law, and provide funding for appropriate programs with legitimate public benefits. Such authorization avoids the critically bad public policy problems that come with Congress directing agencies to sign the KBRA and having Congress approve the KBRA in its entirety.

2. The KBRA provides for the appropriation of nearly a hundred million dollars to the On-Project irrigators to develop a private water plan without public oversight. Congress should not appropriate funds for a private water plan, but rather fund an agency driven water and drought plan that is developed in an open and transparent process.

A water plan needs to be developed in the Klamath Basin that brings irrigation water use back into balance with what is sustainable. However, such a plan should not be developed and implemented by the On-Project irrigators using nearly one-hundred million dollars of taxpayer money without any public oversight as provided in the KBRA. Similarly, the drought plan promised in the KBRA should not be developed by a small group, in a process that is not open or transparent to the public.

A quick look at recent history shows why it is so important to design the water and drought plans properly. The drought this year has again brought a water crisis to the basin, highlighting the need to bring water use into balance with what is sustainable. It is unfortunate that little has been done since the crisis of 2001 and the fish kill of 2002. If the Klamath legislation proposed by the Oregon and California Senators in the 2002 Farm Bill had passed we would have been in a much better position to deal with the crisis. It is doubtful that having the KBRA in place would have avoided the crisis as it does not prioritize reducing the overall water demand of the Klamath Project, nor establish a transparent process to develop a meaningful water and drought plan. \$50 million did go to Klamath irrigators in the 2002 Farm Bill, but was misspent and did nothing to balance the water equation. We can't afford to again spend public money on programs that do not help bring the demand for water back into balance with supply in the Klamath Basin.

Legislation should instead authorize and fund a basin-wide water and drought plan, consistent with the following:

- Provide \$150 million over 10 years for Reclamation, USFWS, and NMFS to develop and implement a basin-wide water and drought plan subject to NEPA review;
- The plan should include the tributaries above Upper Klamath Lake, the Klamath Irrigation Project, and the Shasta and Scott Rivers in California;
- At least 75% of the funding should be dedicated to a willing seller buyout program in the basin to permanently reduce irrigation water demand to a level that will bring it back into balance with what is sustainable for healthy ecosystems. This would be done by purchasing water and/or irrigated land from willing sellers and permanent dry-year non-irrigation easements.
- The plan should limit new ground water development and limit the use of ground water for supplementing supplies or substituting for surface water only as part of a drought response under the drought plan and not for use on a perpetual basis;
- The plan should give priority consideration to reducing irrigation season water demand on lands already owned by the federal government by phasing out commercial farming on Lower Klamath and Tule Lake National Wildlife

Refuges. It is the right thing to do for these important refuges and is an important piece of solving the water crisis and improving water quality.

It should be noted that the KBRA would not have prevented the water crisis this year or brought about a result that would meet ESA flows for salmon either under the old or new bi-op.

3. Congress should not exempt the KBRA from NEPA.

Under the KHSA, before dam removal can occur there will first be a NEPA process and a process to determine whether dam removal is in the public interest before implementation of dam removal. However, under the KBRA, Congress is being asked to approve the KBRA and direct federal agencies to sign and be contractually committed to the KBRA without any NEPA review or a process to determine whether the KBRA is in the public interest. The KBRA should undergo a NEPA review, not be exempted from it.

4. Congress should request a review of the subsidies and special contracts by the GAO.

The KBRA is laden with special contracts and subsidies to the irrigators (predominantly to the On-Project irrigators). Some of these subsidies involve shifting irrigation pumping costs onto the American taxpayer; some involve direct payment to the irrigators for plans that will be developed in private; one involves relieving any debt owed by the On-Project irrigators to the federal government for the Klamath Reclamation Project; one would require the federal government to pay for future Operation & Maintenance costs at Keno and Link Dams in violation of current Reclamation law; and yet another would provide \$42 million in direct power subsidies and for as yet unidentified power development for the benefit of a small group of irrigators. These subsidies also have adverse environmental impacts, because they make it economically possible to continue draining refuge wetlands for commercial farming and encourage wasteful water and power use.

Congress should not even be considering approving the KBRA until it has a thorough analysis in hand regarding the fiscal implications of these many subsidies and special contracts for the American taxpayer and the environment. Congress should also consider requesting the GAO to review existing contracts and cost sharing arrangements in the Klamath Project to insure they are consistent with current law.

5. Congress should expand the purposes of the Klamath Irrigation Project, but not in a manner that unnecessarily limits water use for fish, wildlife and refuges, or that could be interpreted as ESA sufficiency language.

Specifically expanding the purposes of the Klamath Irrigation Project to include fish, and wildlife and national wildlife refuge purposes is appropriate. However, these purposes should not be limited by the KBRA language that states: “The fish and wildlife and national wildlife refuge purposes of the Klamath Reclamation Project shall not adversely affect the irrigation purposes of the Klamath Reclamation Project, ...”. This language

has uncertain implications and could be interpreted as ESA sufficiency language because managing the Project for fish and wildlife purposes to comply with ESA can certainly be deemed to “adversely affect the irrigation purpose of the Klamath Project”.

Instead of stating fish and wildlife and National Wildlife Refuge purpose shall not adversely affect the irrigation purposes of the Project, a clearer way to address the apparent concern would be to state: “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.” Notably, the KBRA attempts to expand the purposes of the Klamath Irrigation Project to other purposes (e.g. municipal, industrial and power), but there is no limiting language applied to those purposes and likewise there should not be limiting language applied to the fish wildlife and refuge purposes either.

6. Congress should not approve of funding the irrigators’ future operations and maintenance costs for Keno and Link River Dams through commercial farming on the Tule Lake and Lower Klamath National Wildlife Refuges.

The KBRA would transfer Keno and Link River Dams to the Bureau of Reclamation to be managed for irrigation purposes as part of the Klamath Project, but exempt the irrigators from paying any of the operation and maintenance costs required under Reclamation law. Instead, the KBRA attempts to finance these costs and future capital costs of the Project by applying 60% of the net revenue from commercial farming on the Tule Lake and Lower Klamath National Wildlife Refuges to Keno and Link River Dam costs.

Commercial farming on the national wildlife refuges should not be used to finance Reclamation’s operation of the Klamath Irrigation Project. This type of revenue sharing arrangement inappropriately gives Reclamation and Interior a strong financial incentive to continue a harmful commercial farming program on two of the nation’s most important national wildlife refuges. WaterWatch also believes that this receipts arrangement which also grants 20% of the net revenues to USFWS, risks USFWS developing financial reliance on commercially farming the refuges, thereby creating an agency disincentive to do what is right and legally compelled for the refuges.

7. Congress must ensure that any legislation does not condone or further the KBRA provisions that would set back restoration and protection of Tule Lake and Lower Klamath National Wildlife Refuges.

In respect to Lower Klamath National Wildlife Refuge (LKNWR) and Tule Lake National Wildlife Refuge (TLNWR), it is long overdue for Congress to take steps to restore these national treasures. Congressional approval of the KBRA would be a big step back for these vitally important refuges. For instance the KBRA attempts to lock in commercial agriculture on the refuges; eliminates the best tool for securing refuge water supplies, and hinders the refuges from improving their water supply; severely limits water deliveries to refuges during droughts, even while water deliveries for irrigating

refuge lands for commercial farming are not cutback; creates agency economic incentives to maintain commercial farming on the refuges; and has provisions that unfairly reduce LKNWR water deliveries.

The most significant step Congress could take would be to prohibit any new leases for commercial farming on refuge lands (cooperative farming as a refuge management tool would still be allowed).

Short of this Congress should turn the program over to USFWS (rather than have it remain with Reclamation), direct USFWS to complete the Comprehensive Conservation Plan (CCP) for these refuges by 2012, and in the CCP process determine the compatibility of commercial farming on the refuges with refuge purposes and the purposes of the National Wildlife Refuge System Improvement Act of 1997, and if determined to be incompatible to phase out the practice.

8. Congress should not approve an agreement that directs Bureau of Indian Affairs (BIA) or direct BIA to waive and/or not enforce the water, fishing, or other rights of any non-consenting Klamath Basin Tribe.

The KBRA provides and seeks legislation that would direct BIA to waive and/or not enforce the rights of Klamath Basin Tribes, including non-party and non-consenting Tribes. This is unjust and highly inappropriate.

9. Congress should not authorize nearly a billion dollars to implement the KBRA, but should instead fund specific restoration actions or programs that will actually restore the basin with a greatly reduced impact on the federal budget.

The KBRA seeks federal appropriations of almost a billion dollars. These appropriations are a heavy burden on the U.S. taxpayer and should be carefully scrutinized. For instance the KBRA contains approximately \$42 million in power subsidies that would allow the continuation of draining wildlife refuge wetlands for commercial farming; encourage over use of water and power; and give Klamath Project and some Klamath County irrigators an unwarranted competitive advantage over neighboring irrigators outside Klamath County and the Project. There are only about 1,200 farms in the project and many of those are small hobby farms. Why is the U.S. taxpayer being asked to fund unidentified power development for their financial benefit?

Congress should instead fund specific restoration actions or programs that are most likely to solve the basin's water, fish and refuge problems such as:

- \$150 million over 10 years for an agency led water and drought plan as discussed in paragraph 2 above,
- \$150 million to USFWS and the Tribes for needed Klamath Basin fisheries restoration work over 10 years
- \$20 million to USFWS over 5 years to develop and implement a plan to phase out commercial farming on the refuges and to secure refuge water supplies.

- \$22 million for economic development funding to Klamath Basin Tribes, including the \$21 million for the Klamath Tribes Mazama Project.

KHSA Legislative Concerns and Comments:

1. The KHSA and KHSA legislation should not be linked to the KBRA or KBRA legislation.

WaterWatch strongly supports dam removal, but does not believe it is appropriate to burden dam removal with the controversial and costly provisions of the KBRA. The issues in the two agreements are entirely separate. The dams do not provide irrigation water or affect the power costs of irrigation. The KHSA legislation should be moved forward separately from the KBRA.

2. KHSA legislation needs to specify a specific date after which the annual licenses will no longer be granted and the FERC process will resume if dams have not been removed.

A major flaw in the KHSA and proposed legislation is staying the FERC process and continuing to issue annual licenses to PacifiCorp until the KHSA is terminated. The problem is the KHSA does not have a clearly defined termination date. It should be clearly stated in any legislation that if an Affirmative Secretarial Determination is not made by the end of 2012, or if a Affirmative Secretarial Determination is made, but dam removal for any of the facilities has not commenced by the end of 2023 then the FERC process shall be reinitiated and annual licenses will no longer be automatically issued as to any facility in which removal has not commenced.

3. There should not be a Secretarial Determination process, but if there is, there should not be conditions precedent that prevent the determination from being filed.

The newly created Secretarial Determination process in the KHSA, to determine whether dam removal is in the public interest, is not a necessary process, and just opens up dam removal to more political manipulation. Congress could declare it is in the public interest and just direct Interior to proceed with NEPA review and preparation of a detailed dam removal plan.

In any event if there is to be a Secretarial Determination, the enactment of KBRA legislation should not be a condition precedent to making an Affirmative Determination as required under Section 3.3.4A of the KHSA (Again it is inappropriate and not necessary to burden dam removal with the controversial and costly provisions of the KBRA). In fact none of the conditions stated in Section 3.3.4 should delay filing of an Affirmative Secretarial Determination that dam removal is in the public interest.

4. Congress should provide for a federal financial contribution for dam removal if it necessary to implement and complete facilities removal.

Though it is hoped federal funding will not be required for dam removal, the federal government should make a commitment to assist with the funding if necessary.

5. Congress should either require a shorter timeframe in which to commence dam removal, or require implementation of the non-structural conditions that were proposed as mandatory conditions on a new license and other conditions as necessary to comply with law during the interim.

A shorter time period should be considered before dam removal commences, such as 2015. If no dams will be removed before 2020, then PacifiCorp should be required to implement the non-structural mandatory conditions that would be required in a new license as soon as practicable. In addition, any annual licenses should be subject to conditions necessary to comply with the ESA, Clean Water Act and fish protection measures.