



December 29, 2011

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RE: WaterWatch Klamath DEIS Comments and Attachment

Dear Ms. Elizabeth Vasquez and Mr. Gordon Leppig:

These comments are submitted in response to the Klamath Facilities Removal Draft Environmental Impact Statement/Environmental Impact Report. WaterWatch is a 501(C)(3) non-profit organization dedicating to protecting and restoring natural streamflows in Oregon rivers. We appreciate this opportunity to comment on the draft environmental impact statement (DEIS).

### **INTRODUCTION**

WaterWatch fully supports the removal of the four lower river mainstem dams on the Klamath River, and believes removal of these facilities will advance restoration of the salmonids fisheries of the Klamath Basin, and is in the public interest. The fish passage, increased habitat, and water quality benefits of facilities removal far outweigh the loss of the small amount of power generated at the dams. There are tremendous short-term job creation and economic benefits from implementing dam removal restoration work, and over the long term a restored Klamath River will continue to deliver important economic benefits to the region annually.

WaterWatch does **not**, however, support the Klamath Basin Restoration Agreement (KBRA) and does **not** support linking the KBRA to the Klamath Hydropower Settlement Agreement (KHSA) or to any other dam removal alternative. In particular, WaterWatch

opposes the KBRA because it contains provisions, subsidies, and special contracts harmful to Klamath Basin National Wildlife Refuges, and undermines Endangered Species Act (ESA) protections to listed fish by requiring regulatory assurances under the ESA to Klamath Irrigation Project irrigators at levels of water use that do not support current ESA required river flows. In addition, the KBRA does not require any minimum flows for fish or set any goals to meet current ESA required flows, either in the KBRA or the drought plan that was developed under the KBRA. WaterWatch's opposition to the KBRA and our concerns with the KHSA are more specifically expressed in the attached WaterWatch Memo of KBRA-KHSA Foundational Concerns. WaterWatch believes that the cost and adverse impacts of the KBRA negate and compromise many of the public benefits that can be achieved from dam removal without the linkage. In fact the linkage may actually delay, limit, and setback salmonid restoration and recovery in the basin. A major flaw in the DEIS is its failure to consider dam removal alternatives that are not linked to the KBRA. In addition, though the proposed action is linked to the KBRA, the DEIS's analysis of the KBRA is incomplete, inadequate, and often inaccurate. In particular, the DEIS is deficient in its failure:

- To analyze dam removal alternatives without the KBRA linkage.
- To analyze other non-KBRA restoration alternatives.
- To adequately analyze the No Action alternative.
- To analyze impacts of the KBRA on the Lost River Basin.
- To adequately analyze the KBRA impacts to Upper Klamath Lake.
- To analyze the costs of the KBRA water subsidies, power subsidies, debt cancellation, special contracts, and refuge leaseland revenue sharing, and their impact on refuge wetlands and management, on water and power use and conservation, on groundwater development, and on springs and river flows.
- To analyze impacts of commercial farming on the refuges and alternative refuge management options.
- To analyze whether current ESA flow requirements can be met at the KBRA Klamath Project water limitation/water guarantee level.
- To analyze an alternative designed to meet current ESA river flow and Upper Klamath Lake level requirements.
- To analyze the ongoing costs of a drought plan.
- To analyze whether the KBRA debt cancellation, new D-plant pumping cost sharing arrangement, and the Bureau of Reclamation's assumption of the cost of Keno Dam and Link River Dam operation are consistent with Reclamation law on cost sharing.

WaterWatch comments below will cover these and other issues in more detail.

### **INADEQUATE ALTERNATIVES ANALYSIS**

According to the DEIS, NEPA requires "Rigorous exploration and objective evaluation of all reasonable alternatives, and for alternatives which were eliminated from study, a

brief discussion of the reasons for their having been eliminated.” (Page 2-1) In addition, under 40 C.F.R. § 1502.14(a),(b),(c), the EIS must “rigorously explore and objectively evaluate all reasonable alternatives,” and “devote substantial treatment to each alternative . . . so that reviewers may evaluate their comparative merits,” including “reasonable alternatives not within the jurisdiction of the lead agency. *See also* 43 CFR 46.420(c) (defining “range of alternatives”). The White House Council on Environmental Quality (CEQ) reminds us that in establishing a reasonable range of alternatives, “the emphasis is on what is ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative.” Furthermore, the CEQ adds that “an alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. . . . Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA’s goals and policies.” *See CEQ NEPA’s Forty Most Asked Questions, 1. and 2.*

### **Inappropriate Rejection of Alternative 8.**

Based on this federal guidance and the legal requirements of NEPA and an EIS, the DEIS is legally insufficient because of its failure to analyze dam removal alternatives that are not linked to the KBRA. The DEIS’s basis for dismissal of Alternative 8 from consideration is unfounded and arbitrary:

“Alternative 8 will not be carried forward for more detailed analysis in the EIS/EIR because it does not meet most of the purpose and need/project objectives and would not reduce environmental effects of the Proposed Action. The effects of removing the four dams and related facilities will be fully analyzed under Alternative 2.” (Table 2-2, page 2-5)”

The purpose and need is stated as follows:

The Proposed Action is to remove the four lower PacifiCorp dams on the Klamath River. The need for the Proposed Action is to advance restoration of the salmonid fisheries in the Klamath Basin consistent with the KHSA and the connected KBRA. The purpose is to achieve a free flowing river condition and full volitional fish passage as well as other goals expressed in the KHSA and KBRA. (Page 1-29)

It is difficult to imagine how a reasonably likely Alternative 8 scenario resulting in four lower dam removal does not meet the proposed action of four lower dam removal above. Moreover, if the need includes required consistency with KBRA and KHSA, certainly Alternatives 4 and 5 are inconsistent with these agreements and both of there are just as reasonably likely to occur as Alternative 8. Excluding 8 for this reason is illogical and inappropriate. Also, using a restrictive definition of need should not allow agencies to escape their duties under NEPA. A much more appropriate statement of purpose and need would be:

“The Proposed Action is to remove the four lower PacifiCorp dams on the Klamath River. The need for the Proposed Action is to advance restoration of the salmonid fisheries in the Klamath Basin consistent with *the federal government’s responsibilities*

*in respect to the Endangered Species Act, the Clean Water Act, the National Wildlife System Improvement Act of 1997, the cost-sharing provisions of Reclamation Law, and its responsibilities to the Tribes. The purpose is to achieve a free flowing river condition and full volitional fish passage to advance salmonid fisheries restoration.”*

Finally, the conclusion that Alternative 8 would not reduce environmental impacts of the Proposed Action is without merit. Implementing Alternative 8 actually does “reduce environmental effects of the Proposed Action” because it would prevent the damaging environmental impacts of the KBRA from being locked in for the next 50 years. Some of the damaging environmental impacts of the KBRA that could be avoided by not implementing the KBRA include: 1) Damage to the habitat, water quality, waterfowl, fish, and wildlife by institutionalizing and subsidizing continued harmful commercial farming on Tule Lake and Lower Klamath National Wildlife Refuges; 2) Damage to these refuges by eliminating the best means of achieving water security for the refuges; 3) Keeping the purpose of the wildlife refuges subservient to the purpose of the Klamath Irrigation Project (KIP); 4) Damage to the Klamath Basin aquifer, river flows, and water quality by subsidizing unsustainable groundwater pumping; 5) Harm to the Klamath Basin’s aquatic resources by implementing a KBRA water plan that does not provide adequate flows or lake levels consistent with the best available science; 6) Damage to the fish, wildlife, and water quality of the Klamath Basin downstream of Upper Basin irrigation by subsidizing unsustainable and uneconomic water pumping through irrigation electricity subsidies; 7) Damage to aquatic resources and refuges caused by setting the KIP water limitations at a level that is too high; 8) Damage to refuges during droughts by drastically cutting water to the refuges during droughts; and 9) Damages to refuges by allowing water deliveries to refuge land for commercial farming even when water to refuge wetlands is being cutback. The DEIS is also deficient for not properly analyzing these impacts in its analysis of Alternative 2 (the Proposed Action).

To come into compliance with NEPA, WaterWatch strongly urges consideration and adoption of the “Initial Alternative” 8, described in Table 2-2, page 2-5 as “Remove four dams and related facilities but do not implement KBRA elements.”

### **Inappropriate rejection of Alternative 13 –the Federal Takeover Alternative.**

Alternative 13, the Federal Takeover alternative was rejected because:

“Alternative 13 will not move forward for more detailed analysis in the EIS/EIR because the environmental impacts would be generally the same (and have generally the same timeframe) as those under Alternative 2.”

First, the conclusion that Alternative 13 would have the same environmental impacts as Alternative 2 is without merit because Alternative 2 is linked to the KBRA, which has a broad range of adverse environmental impacts as discussed in the discussion on the rejection of Alternative 8 above. Also, there are minimal interim measures under the KHSA which allow for continued harm from dam operations until removal with no definite date to return to the FERC process even if dam removal is not accomplished by 2020. Also, the assumption that dam removal through a federal take over would be in the same general timeframe as dam removal under the KHSA is not necessarily accurate. A shorter timeframe could be required in a Federal take over, but moreover the fact that the KHSA has so many contingencies and no specific limit to annual licenses, there is a great

risk that dam operations may continue well past 2020 without any meaningful interim conditions.

**Deficient Alternative 1 (no action) analysis.**

Alternative 1 (no action) is described in the DEIS as “Klamath Hydroelectric Project would continue current operations.” (Table 2-3, page 2-7)

The DEIS also states:

For the purposes of this analysis, the No Action/No Project Alternative will continue current operations with the Four Facilities remaining in place and PacifiCorp operating under the current annual license.” (Page ES-21)

and

As the FERC relicensing process would resume following a negative determination on dam removal from the Secretary, Alternative 1 could not continue for decades as the status quo; however, over 50 years, this alternative would likely retain the majority of the existing hydroelectric power generation capacity and the reservoirs would remain in place and would continue to be used for recreational purposes.” (Page ES-42)

These assumptions for Alternative 1 cannot be considered reasonable or realistic, and lead to an inadequate analysis of the no action alternative under NEPA. The DEIS suggests under Alternative 1 that PacifiCorp may operate its Klamath River dams on annual licenses without interim prescriptions for the next 50 years, or perhaps could somehow receive a new 50-year license from FERC that does not contain the current mandatory fish passage prescriptions. This is in fact, a very improbable scenario since resources agencies have already prescribed full volitional passage and these prescriptions have survived legal challenge. Because of this fact, the collapse of the KBRA/KHSA described as the precondition justifying the exploration of Alternative 1 would result - at minimum - in extensive modifications to the structures and operations at all current dams to provide full volitional fish passage as currently prescribed by law and described in Alternative 4: “Construct fish passage facilities to provide upstream and downstream passage at four dams.” (Table 2-3, page 2-7).

It is reasonable to assume that PacifiCorp and relevant regulators – facing obvious financial, technical, or regulatory challenges in implementing these existing mandatory conditions - may choose other alternatives to achieve similar results as would be achieved under Alternative 4. Another plausible no-action alternative is reflected by Alternative 5: “Remove Copco 1 and Iron Gate Dams, construct fish passage at J.C. Boyle and Copco 2 Dams.” (Table 2-3, page 2-7) The nation’s long-term budget crisis, limited support in Congress, and high level of controversy surrounding the KBRA makes passage of KBRA legislation highly unlikely and therefore makes Alternatives 2 (the proposed action alternative) and other alternatives linked to the KBRA unlikely.

PacifiCorp’s repeated public statements indicating an unwillingness to go forward with a new license requiring full volitional passage at the four dams, as well as multiple studies showing relicensing the four lower dams under current mandatory conditions economically unfeasible, makes Alternative 4 barely plausible. Finally, unknown water quality permit conditions as well as the financial considerations of operating two remote,

marginal, and outdated dams at lower generation capacity may combine to make Alternative 5 unattractive to PacifiCorp and thus unlikely.

The no action alternative is still reasonably likely to lead to removal of some or all of the dams given the findings in the FERC relicensing EIS and the unlikely event that California will grant water quality certification. In fact, a reasonable argument can be made that dam removal might be more likely to be achieved by a return to the relicensing and water quality certification processes than via the KHSA linked to the KBRA proposed action alternative given all the contingencies in the KHSA and the cost and controversy over the KBRA. Alternatives 4, 5, 6 or 8 could more reasonably be considered for the “no action” baseline, since failure of KBRA legislation and/or a negative Secretarial Determination would likely result in one of these three scenarios, and they more accurately describe what is likely to occur if there is no action than does Alternative 1.

A no action alternative should not just consider the current status quo, but should also consider the impact of events that will occur if the proposed action is not elected. The DEIS should look at a no action alternative that recognizes legal processes that are well underway and will change the current status quo. For instance, besides failing to consider what is likely to occur under the FERC and water quality certification processes, the no action alternative analysis also fails to acknowledge that the Oregon water rights adjudication process will soon be concluded, thereby allowing for regulation of water use to meet the Klamath Tribes instream and lake level water rights and the water rights of Upper Klamath Lake, Lower Klamath Lake and Tule Lake National Wildlife Refuges creating options for restoration and fish and wildlife enhancement that the Proposed Action (alternative 2 linked to the KBRA) will either limit or foreclose. The DEIS also fails to acknowledge the requirements of the National Wildlife System Improvement Act of 1997, the fact that a Comprehensive Conservation Plan planning process is underway for Lower Klamath NWR, Tule Lake NWR and Upper Klamath Lake NWR, and that power rates are going up to market rate for Klamath Project irrigators.

#### **No non-KBRA restoration alternative considered.**

Since the KBRA is linked to dam removal as a restoration alternative, it is reasonable and necessary to consider other less harmful non-KBRA restoration alternatives, including the following:

- An alternative that provides guaranteed Klamath River flows and Klamath Lake levels for fish based on the best available science.
- An alternative that focuses on providing more water to fish and refuges by permanently reducing irrigation water demand (beyond the current KBRA prescription); full consideration and scientific evaluation should be given to basin water levels which provide a more reasonable balance between instream flows, lake levels, refuges and the needs of agriculture, ultimately providing a more sustainable water regime for healthy Klamath Basin ecosystems. Under this alternative, the EIS should consider using the KBRA water and power funding to instead implement a willing seller buyout program, developed by the Department with public input, to permanently reduce irrigation water demand in the Upper

Basin, the Lost River Basin, the Klamath Irrigation Project, and the Shasta and Scott Rivers to a level that will meet science based restoration goals.

- An alternative that will reduce irrigation season water demand, allow for winter water storage, improve water quality, and increase refuge wildlife habitat by phasing out the commercial agriculture on Lower Klamath and Tule Lake National Wildlife Refuges, and instead managing National Wildlife Refuge land for the above purposes.

### **INCOMPLETE, INADEQUATE, AND INACCURATE KBRA ANALYSIS**

It is interesting that the agencies reject looking at non-KBRA dam removal alternatives, while at the same time electing to limit their analysis of the KBRA that they have firmly linked to dam removal. The agencies are promoting the KBRA, but avoiding a transparent and thorough review of pertinent KBRA issues thereby depriving the public and Congress of important information needed to assess the true impacts and costs of the KBRA. The KBRA requires federal legislation that limits NEPA analysis of the KBRA to a piecemeal analysis when agencies take specific KBRA actions after legislation has passed, but the KBRA and the KBRA legislation itself have provisions that have environmental impacts that will thereby never get NEPA review unless it occurs in this NEPA process. As the proposed action (Alternate 2) includes implementation of the KBRA, a thorough review under NEPA is required and is needed to inform Congress and the public.

### **Failure to analyze the costs and impacts of KBRA subsidies, special contracts, debt cancellation, federal assumption of Keno and Link River Dam operational costs, and leaseland revenue sharing.**

The KBRA and legislation required by the KBRA have provisions involving what amount to subsidies, special contracts, and agreements some of which are not allowed under existing law. These provisions have an enormous price tag to the U. S. taxpayer, while at the same time having significant adverse environmental impacts. There is either no discussion or inadequate analysis of these provisions. A discussion of these KBRA provisions follows:

#### ***KBRA Water Development Subsidy for On-Project Water Plan***

Summary of subsidy:

- **\$92,500,000 to KWAPA** (an entity controlled by Klamath Project irrigators) for development and implementation of a Klamath Project water plan (Line 66, page 8, Appendix C-2, and Section 15.2, Page 66 of the KBRA).
  - The KBRA does not require any NEPA review, or other public oversight of the development of the plan, or expenditure of the funds. Plan review is limited to a 60-day review by the Bureau of Reclamation.
  - Parties to the KBRA must support funding to implement the water plan though no plan yet exists.
  - A scientifically based, permanent demand reduction program that includes conservation easements, updated conservation to irrigation systems, and water rights acquisition, etc. should be developed by the federal government with full

public participation and review under NEPA; without this process, there is great risk that any KBRA water plan funding will result in a subsidy to Project irrigators without measurable public benefits, or worse, finance unsustainable ground water development in the region.

The DEIS does discuss the On-Project Water Plan, but wrongfully concludes on page 3.3-143 that the plan will improve water quantity and quality and therefore is beneficial to salmonids. The DEIS also wrongfully concludes on pages 3.7-19 and 3.7-20 that: “In the long-term implementation of the On-Project Plan (KBRA Section 15.2) and the Water Diversion Plan (KBRA Section 15.2.4) would be expected to benefit groundwater resources by protecting them from overuse (through provisions prohibiting adverse impacts to groundwater, where none currently exist).

These conclusions are based on the fact that “the On-Project Plan would include a groundwater monitoring plan that limits pumping so that flows from springs in the watershed upstream of Copco 1 Dam would not be reduced by more than 6 percent, protecting these important habitats that provide stable habitat conditions and often support rare or unique species”, and because “it would also provide a plan to implement the water diversion limitations described above.”. The problem with these conclusions is twofold. First, a water plan does not yet exist that can be evaluated and the plan does not have any sideboards that require any actual reduction in overall irrigation demand. This means that it is possible that a substantial amount of the \$92.5 million could go to increased water groundwater development in the basin to make-up for the water they will not be directly diverting from the Klamath River. Second, though there is a required monitoring plan that offers some protection to springs, the DEIS fails to highlight or note that it is the \$92.5 million subsidy in the KBRA that makes large scale groundwater development possible in the first instance. The monitoring may limit the harm from this subsidy but the subsidy will still be harmful. The DEIS recognizes the importance of springs to water quality and quantity in the Klamath River but doesn't recognize or analyze the adverse water quality and quantity impacts that even a 6% reduction in clean cold water spring flow would have in the Klamath River, which reduction is made possible by the subsidy. What would be the predicted impact on KBRA Klamath River flows if spring flows were reduced by 6%? Also, the impacts from groundwater development might not be readily ascertainable and the reduction to spring flow could be a number of years out creating a risk that a portion of the \$92.5 million dollars may be invested in a manner that is not sustainable and the investment would be lost. It is highly likely that the On-Project water plan subsidy will actually further reduce river flows, diminish water quality, and be harmful to salmonids.

It should also be noted that the DEIS claims the monitoring plan in the KBRA protects groundwater where no protections exist. In fact there are provisions in Oregon water rights law and Oregon's Scenic Waterways Act that in many cases will actually give greater protection to the Klamath River and its groundwater resources than the KBRA provisions. Also, the KBRA groundwater protections don't apply to the Lost River and Tule Lake Basins, where most of the groundwater impacts are likely to occur because California law doesn't offer the same protections as Oregon.

The DEIS is deficient because the agencies have conveniently and inappropriately decided not to assess impacts to the Lost River and Tule Lake Basin or the Pitt River

basin that might be affected by groundwater development subsidized by the KBRA. The reality is that groundwater development on the Oregon side of the Klamath Project will be somewhat limited by Oregon law as discussed above, but there are few restrictions on groundwater development on the California side. What can be expected is a large increase in groundwater development just over the border in California. This could have a major impact on springs and refugia for ESA and CESA listed suckers in the Lost River and Tule Lake Basin and other aquatic and terrestrial wildlife, as well as on the water supply for Oregon communities (the impacts on Oregon community water supply have been well documented during past intensive groundwater use during droughts), and by causing interference with existing wells. As some groundwater in this region eventually flows to the Pitt River, impacts could be seen there as well. Also, the Lost River basin is connected to the Klamath River Basin via the D-Plant pumping station and the Klamath Straits Drain. Groundwater development in the Lost River Basin could also decrease Lost River basin return flows to the Klamath River further decreasing Klamath River flows.

It is interesting to note that impacts are expected in the Lost River Basin from the Water Plan because the KBRA, as noted in the DEIS, requires California Department of Fish and Game to submit California legislation that will allow take of southern bald eagles, golden eagles, 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 of the KBRA). 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. The lack of an analysis of impacts to the Lost River and Tule Lake Basins is a major legal deficiency in the DEIS.

In the past, temporary groundwater use has been a major tool for dealing with droughts in the basin. Extensive new groundwater development could undermine and limit the tools available for a drought plan. The DEIS should evaluate the impacts that potential use of this subsidy for large scale groundwater development could have on responding to future droughts.

### ***KBRA Power and Pumping Cost Subsidies***

Summary of subsidies:

- Over \$50,000,000 in power subsidies (See KBRA Sections 14 and 17, and lines 72 - 75 on Appendix C-2). These subsidies will be distributed to Klamath Project irrigators in Oregon and California, as well as certain Klamath County, off-project irrigators to reduce their power costs. \$7,690,000 of this sum will be direct payments to reduce power bills (Section 17.5), while \$42,498,000 (Section 17.7) will fund unspecified projects to generate renewable energy and increase energy efficiency to indirectly reduce power costs of Klamath Project and certain Klamath County irrigators.
  - Klamath Project irrigators and Klamath County off-project irrigators long enjoyed power rates considerably below market rates for other agricultural users under special contracts with PacifiCorp. Those contracts were terminated as discriminatory by the Oregon Public Utility Commission and the California Public

Utility Commission in 2007. To prevent rate shock, the Oregon legislature passed legislation that ramps power rates up to market value for affected Klamath County Oregon over seven years; California Public Utility Commission gave California Klamath Project irrigators a four year ramping period.

- The KBRA modifies existing contracts; increases the payment obligation by the USFWS and decreases the amount paid by Tule Lake Irrigation District for D plant pumping (KBRA, Section 15.4.2A).
  - This requirement likely violates current Reclamation law on cost sharing, therefore Section 15.4.6 circumvents the law by requiring 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).
  - D plant pumping costs will increase by 6.5% for the USFWS and decrease by 6.5% for TID under the KBRA. The KBRA budget provides for \$170,000 per year to cover this cost (line 69, Appendix C-2).
- In addition the KBRA Section 17.6 provides that Klamath Project irrigators receive an allocation of power from the Bonneville Power Administration that will also provide them a lower preferential power rates from the Columbia River Hydropower System.

The DEIS does not discuss or analyze the taxpayer cost or adverse impacts of these subsidies. The following adverse impacts of these subsidies should be addressed:

1. These power subsidies allow Project irrigators to either directly or indirectly enjoy lower power costs and below market power rates. These lower power costs to be funded by the U.S. taxpayer subsidize draining Tule Lake National Wildlife (TLNWR) wetlands for commercial agriculture rather than allow management of these lands for the refuges intended fish and wildlife purposes. The construction of the tunnel through Sheepy Ridge and the D pumping plant in 1942, coupled with years of below market power rates, have allowed Project irrigators to pump water off, drain, and keep drained 15,500 acres of Tule Lake NWR so that the lands can be commercially farmed. Commercial farming of TLNWR land is very harmful as will be discussed below. Refuge personal testified at the California rate hearing that once Tule Lake farmers were required to pay market power rates, they would no longer be able to economically drain these important wetlands. The KBRA provides taxpayer funded subsidies that allow continued harm to an incredible public resource.
2. Subsidizing power costs also encourages wasteful water and power use and discourages water and power conservation.
3. There is no public policy purpose for these subsidies. Rather, these subsidies just advance narrow private interests and provide some farmers and ranchers with an unfair competitive advantage over other nearby farmers and ranchers that won't receive these subsidies.
4. The DEIS should also discuss whether any of these subsidies and special cost sharing arrangements violate the Reclamation Reform Act of 1982 (Public Law 97-293)

### ***Debt Forgiveness Subsidy***

Summary of subsidy:

- Currently there exists a dispute between the federal government and Klamath Project irrigators on the amount of Klamath Project capital costs currently owed by Klamath Project irrigators to the United States, and how much of the leaseland revenue in the Reclamation Fund should be applied to the aforementioned capital costs. Rather than protecting the taxpayer, the KBRA provides that the debt owed, though yet to be determined, will be forgiven (KBRA, Section 15.4.4 A).

The DEIS should determine the amount of debt that will actually be forgiven so the public and Congress can understand the true cost to the taxpayer of this provision.

### ***Leaseland Revenue Subsidy***

Summary of subsidy:

- Approximately 60% of the net revenue from leasing refuge land for commercial farming are directed to the Bureau of Reclamation and applied to the benefit of Project irrigators.
  - These revenues will cover costs of maintaining and operating Keno and Link River Dams (a cost that should be born by Project irrigators), and any remaining funds will either be applied to reduce future capital costs of the Project, or subsidize power costs to both on and off Project irrigators (Section 15.4.4 B and Appendix A, Section H).
- In addition, 20% of leaseland revenues are directed to USFWS, 10% to Tulelake Irrigation District (TID), and 10% to Klamath Drainage District (KDD).
  - TID and KDD represent the two irrigation districts, whose customers commercially farm the refuges.
  - These revenue allocations create agency dependence on leaseland agriculture for both the Bureau of Reclamation and USFWS. Harmful commercial agriculture on federal refuge land should be phased out, not used to subsidize Project operations or irrigators.
  - Federal legislation is necessary to implement this reallocation of leaseland revenues, as the provision is inconsistent with existing law.

The DEIS should analyze the impacts of these subsidies. This is especially important because this subsidy needs federal legislation to implement and Congress and the public should be fully informed of its ramifications. This provision of the KBRA and the legislation that is required by the KBRA sets a terrible precedent for national wildlife refuge management as it institutionalizes using Lower Klamath and Tule Lake National Wildlife Refuges for commercial purposes to generate revenue rather than promoting refuge management for fish and wildlife purposes. Interior should not be using national wildlife refuges to subsidize operations of a federal reclamation project even if a small share of the revenues goes back to USFWS.

By diverting refuge commercial leasing revenues for the purposes specified in the KBRA, 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. This revenue sharing arrangement will also create an agency dependence on farming the refuges with both the Bureau of Reclamation and USFWS, and could undermine the Comprehensive Conservation Plan (CCP) process currently underway for these refuges. As part of the CCP process required under the National Wildlife Refuge Systems Improvement Act of 1997 the compatibility of commercial farming on these refuges should be analyzed and should be found to be incompatible and inconsistent with refuge purposes. These cost sharing subsidies and other KBRA provisions promote continued commercial farming on these refuges. The DEIS should discuss fully the impacts of commercial farming on these refuges and the impact of the KBRA on commercial farming. The impacts of commercial farming on the refuges will be discussed more fully in the section on refuges below.

### ***Link River and Keno Dam Operations Subsidy***

Summary of Subsidy:

- The Bureau of Reclamation will be assuming all costs for operating Link River Dam and Keno Dam for Project diversion (Section 15.4.5 A).
  - PacifiCorp is not seeking a new license to generate power at Link River and Keno Dam. These dams also serve as diversion structures for the Klamath Irrigation Project.
  - At present, the cost of operating these facilities are currently paid by PacifiCorp; however, once they are used for irrigation purposes only, the federal government should not be fully responsible for this cost. Project irrigators should be required to pay their share as required under current cost-sharing laws.

The DEIS should discuss these costs and the degree to which Reclamation assumption of these costs is in conformity with current Reclamation cost sharing laws and regulations. In addition, following transfer of the facilities to Reclamation, the KBRA requires operation to maintain water levels for irrigation in accordance with historic practices. This greatly reduces the management flexibility that may be needed to address water quality concerns in the reach of the Klamath River between Link River Dam and Keno Dam. The DEIS should discuss the impacts from continued historic operations.

The DEIS should analyze how all these subsidies taken together are supporting agricultural activity in the Klamath Basin that might otherwise not be economically viable and that will continue to be a burden to the U.S. taxpayer. At the same time these subsidies make it more difficult to address the basin's water over-allocation problems and the problems with commercial farming on LKNWR and TLNWR, by reducing incentives to conserve water and power, by reducing support for a willing seller water and/or irrigated land buyout program in the basin, and by making it financially easier to drain refuge wetlands for commercial farming.

### **Failure to adequately or accurately address KBRA impacts to National Wildlife Refuges**

The DEIS concludes that the KBRA would generally be beneficial for the terrestrial resources on the Upper Klamath, Lower Klamath, and Tule Lake National Wildlife Refuges. (See pages 3.5-67 to 3.5-6.9 and page 4-105). The DEIS does not provide sufficient evidence to support this conclusion, and overlooks and fails to analyze many of

the provisions in the KBRA that have adverse impacts to the refuges. The conclusion that the KBRA is generally beneficial to the refuges is based predominately on the assumptions in a USFWS 2010 report, that the KBRA will lead to increased water deliveries to LKNWR and TLNWR and therefore there will be more wetlands available for wildlife, and the assumption that the refuges cannot do better under a no action or other non-KBRA alternative.

A more thorough analysis of the KBRA will show that the KBRA will not provide either sufficient water to Upper Klamath NWR, or a better water situation for the refuges. In respect to Lower Klamath and Tule Lake National Wildlife Refuges, they still will not have sufficient water during many years and it is doubtful that the KBRA will provide a more secure water situation for Lower Klamath and Tule Lake National Wildlife Refuges than non-KBRA alternatives. In fact, the KBRA will make things much worse in general for the Refuges, because of the impact of KBRA subsidies as previously discussed in pages 7 to 12 above; because it forecloses and limits opportunities to provide a better and more secure water future for the refuges; and because it predetermines refuge management for the next 50 years in a way that is harmful to the refuges. This is demonstrated by the following analysis of KBRA impacts on the refuges:

***Locking in harmful commercial farming on LKNWR and TLNWR***

First, the DEIS does not adequately or accurately describe the current commercial farming activities on Lower Klamath National Wildlife Refuge (LKNWR) or Tule Lake National Wildlife Refuge (TLNWR) or the impact of these operations.

In respect to LKNWR, the DEIS states on pages 3.5-19 and 3.5-19 that: “In addition to wetland habitats, Lower Klamath NWR also contains approximately 9,000 acres of agricultural lands including grain fields that are extremely attractive to fall migrant and wintering waterfowl and large numbers of wintering raptors, with bald eagles being the most conspicuous.” The DEIS is not clear whether these 9,000 acres includes refuge acreage leased for commercial farming or are acres farmed cooperatively for wildlife management purposes rather than commercial purposes. The DEIS does not indicate how many acres of LKNWR are leased for commercial farming of which there are approximately 7,000 acres leased for commercial farming purposes.

In respect to TLNWR, the DEIS states on page 3.5-20 that there are 17,000 acres of croplands and that: “In addition, Tule Lake NWR agricultural programs require growers to leave a proportion of small grain crops (typically 25-33 percent) standing for wildlife consumption. The high energy content of agricultural crops provides an important energy source for migrating waterfowl as they travel northward and southward in the Pacific Flyway (USFWS 2010).” Again, the DEIS does not give any breakdown between cropland that is land leased for commercial farming and land that is farmed cooperatively, and wrongfully gives the impression that the farming on TLNWR is beneficial to wildlife. It is only the cooperative agricultural programs that require a percentage of grain be left for wildlife and there are now very little, if any, of the croplands on TLNWR that are part of the cooperative farming program. Most refuge croplands are actually leased for commercial farming and do not require a portion of the crop be left for wildlife and in fact many of the crops on these lands have little or no food value for wildlife.

Second, the DEIS should have described some of the harmful impacts of leasing land for commercial farming on LKNWR and TLNWR. This is important to understand many of the adverse impacts of the KBRA. Eleven of the most harmful impacts and lost restoration opportunities caused by leasing refuge land for commercial farming are:

1. Commercial farming on refuge land uses scarce water resources at the expense of refuge wetlands, and the fish and wildlife of Upper Klamath Lake and the Klamath River. Commercial farms on refuge land receive water even when adjacent refuge wetlands are forced to go dry.
2. Commercial farming uses critical refuge lands that should be used for wetland and wildlife management. Eighty percent of the basin's wetlands have been drained for commercial agriculture. Keeping historic wetlands on our refuges drained to lease for commercial farming is incompatible with the purposes of our National Wildlife Refuges and a violation of public trust.
3. Commercial farming uses refuge land that could be used to store water naturally for refuge purposes. The refuges need an independent secure source of water. Up to 100,000 acre-feet of water could potentially be stored naturally on refuge land currently leased for commercial agriculture.
4. Phasing out commercial farming on the refuges is the logical place to begin reducing the irrigation season water demand of the Klamath Project (a necessary step to solve the basin's water crisis). Eliminating lease-land farming on the refuges could save up to 50,000 acre-feet (16 billion gallons) of water during the irrigation season thereby reducing Klamath Reclamation Project irrigation water use by approximately 10%. This reduction could be achieved on land already owned by the federal government and would reduce the need to purchase private lands in order to reduce demand.
5. Phasing out commercial farming on the refuges would save taxpayer dollars. The federal government has in the past paid out more money per acre to Klamath Project farmers not to irrigate each year as part of a water bank than it receives from leasing refuge land to farmers to irrigate. The government could save money in meeting water bank requirements by simply not renewing leases for refuge lands for irrigated agriculture when the current leases expire.
6. Leasing out refuge lands for commercial farming unfairly competes with Klamath Reclamation Project landowners who lease their private lands for commercial farming.
7. Row crops such as onions and potatoes that are grown on refuge lands leased for commercial farming provide little or no benefit to wildlife. Even waste grain from left over grain harvests on refuge land provide only about one-tenth to one-half the food per acre as wetlands and are used by only a small number of species.
8. Heavy use of pesticides known to be harmful to wildlife are used on refuge lands leased for commercial agriculture including known carcinogens, neurotoxins, and endocrine disruptors. Some of these pesticides are so toxic EPA rules prohibit human entry into the treated fields for 24 to 72 hours after treatment.
9. Commercial farming activities (e.g. tilling, planting, mowing, cultivation, irrigation, harvesting, and pesticide/fertilizer applications) destroy nests and kill wildlife.

10. Managing the commercial farming activities on the refuges uses up time of refuge personnel and funds that should be used to manage the refuges for wildlife purposes.

11. Commercial farming on the refuges impairs water quality, while returning the lands to wetlands, especially in the area of the Klamath Straits Drain, could improve water quality.

Third, the DEIS does not evaluate how the KBRA institutionalizes and attempts to lock in commercial farming on these refuges, and how it could undermine the current CCP process for these refuges. 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. This KBRA provision, as well as the KBRA subsidy provisions discussed in pages 7 to 12 above, promote and create an agency reliance on commercial farming of these important refuge lands, essentially institutionalizing this harmful practice for 50 years (Section 1.6 on page 5 of the KBRA provides that the term of the agreement and contractual obligations to support commercial farming on the refuges is 50 years). These KBRA provisions and legislative approval of the KBRA will put intense pressure on Interior to continue harmful commercial farming on the refuges and will undermine a fair evaluation of the compatibility of commercial farming on these refuges during the CCP process. Because commercial farming is so harmful to these critically important national wildlife refuges, and because alternative refuge management offers significant opportunities for refuge and basin restoration, these KBRA impacts and on the refuges and refuge management alternatives need to be thoroughly analyzed.

Both the National Wildlife System Improvement Act of 1997 and the Kuchel Act, 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 can no longer be considered compatible with refuge purposes, especially in light of current water shortages and the reduction of wetlands in the basin and throughout the Pacific flyway. The DEIS should discuss the requirements of the National Wildlife System Improvement Act of 1997 and the Kuchel Act, and how they could and should limit commercial farming through the CCP process or otherwise. This should be discussed as part of the no action baseline in the DEIS and is not.

***The Realization of the KBRA Water Allocation to Lower Klamath NWR is Doubtful***

The whole crux of the DEIS's conclusion that the KBRA is beneficial to the basin's national wildlife refuges is the assumption that the KBRA refuge water allocation will improve the refuges' water situation. First, under the KBRA, Tule Lake NWR would get the same water allocation it currently gets under existing contracts and biological opinions for the listed suckers that inhabit the refuge, and the KBRA just reflects this. Second, the KBRA's water allocation for Upper Klamath Lake NWR is not likely and is somewhat illusory, while the KBRA forecloses the best means of achieving a better and more secure water future for this refuge. In this regard, the DEIS fails to analyze the actual likelihood that the KBRA water allocation to LKNWR will ever become effective, or if it does become effective whether other KBRA provisions diminish the potential benefits of such an allocation.

The KBRA's Lower Klamath Lake NWR water allocation does not become effective unless and until a number of difficult-to-satisfy conditions are first met. These conditions include: 1) Regulatory assurances under the ESA that would guarantee water deliveries to Klamath Project irrigators at a level that current ESA regulation would not allow (In other words, this condition can only be met if the ESA is undermined – another factor the impacts of which the DEIS fails to analyze); 2) Final judgments in state courts confirming or validating the water allocation (if individual irrigators should object, this may not be achievable); 3) The deadline for implementing the On-Project Water Plan has passed (this could be as late as March 1, 2022 – Section 15.3.8A, Page 97 of the KBRA); 4) Timely publication of a notice by the Secretary of Interior indicating a number of other conditions have been met, including very substantial funding, and completion of dam removal or volitional fish passage; and 5) The acceptance by the Adjudicator or court that might then be handling the Oregon water rights adjudication (Oregon has made it clear it is not obligated to accept the allocation.). See Sections 15.3.1 A, 15.3.4 A, 15.3.8A and 22.12 of the KBRA.

The DEIS needs to discuss these conditions and analyze whether the refuges would be better off with a different alternative to address its water needs, rather one that might never occur or not occur for many years, while harmful KBRA provisions go into affect immediately on passage of federal legislation approving the KBRA. In addition, even if the KBRA allocation becomes effective, the water allocated will be taken away by other KBRA provisions as discussed below, while some of the best tools to improve its water situation will be essentially eliminated as possibilities for the next 50 years as discussed below.

### ***The KBRA Places a Heavy Burden on Lower Klamath NWR Wetlands in Times of Water Shortage***

Lower Klamath NWR's water shortages are typically most acute in the drier years and the KBRA doesn't change this. In fact the KBRA locks in a drought year response that reduces the refuge's already low KBRA dry year allocation of 48,000 acre-feet down to 24,000 acre-feet and then possibly lower to zero (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 over winter 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 Refuge 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 the refuges. Ironically, Section 15.1.2G (iv) of the KBRA does allow the On-Project Water plan to limit deliveries to these refuge leaslands to meet water needs on private farms, but not to meet refuge needs. The DEIS should discuss whether these KBRA provisions are in conformance with the National Wildlife Refuge System Improvement Act of 1997.

These dry year cutbacks are not discussed or analyzed in the DEIS, though the KBRA requires these cutbacks as a first response to droughts. The DEIS should analyze how often and to what extent the refuge allocation would be reduced under the KBRA to meet

current EIS required river flows and lake levels. The fact is, that the on-project water limitation/guarantee to on-Project farmers is still so high that in order to meet current on-Project water allocation and ESA flow requirements in drought years, water deliveries to LKNWR will still be severely cut and will be cut to zero in some drought situations. Neither the KBRA nor the drought plan that has been developed explain how the irrigation target, refuge target, and current ESA Klamath River flow requirements in drought years can be met. The DEIS needs to discuss the impacts to the KBRA LKNWR water allocation in drought years, and the need to meet current ESA flow requirements.

### ***Other KBRA Reductions in Lower Klamath NWR Water Allocation***

In addition, Section 15.1.2 E (iii) of the KBRA 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; refilling Tule Lake sumps after intentional drawdowns; and conveyance losses at Anderson-Rose Dam and through the North canal. The impact of these reductions, especially those related to the walking wetlands program, should be carefully evaluated. The KBRA penalizes Lower Klamath NWR for any walking wetlands, by reducing the water allocation to Lower Klamath NWR wetlands by one-acre foot per acre of walking wetlands (KBRA, Section 15.1.2 E (iii) e.). Water will be withheld from Lower Klamath NWR at a rate of one-acre foot per acre of walking wetlands, regardless of how much water is applied to the walking wetlands, and regardless of whether it is more or less than would have been applied if the land was farmed. Lower Klamath NWR is even being penalized where private walking wetlands are created under the program to increase the value of farming on private lands. Though the private wetlands will provide some benefit to waterfowl, public wetlands on a national wildlife refuge would suffer, in order to temporarily create wetlands on private lands for the private landowners' benefit, all at taxpayer expense. This is poor public policy and should be discussed in the DEIS. Though the KBRA does not provide for any specific amount of walking wetlands, expansion of that program under the KBRA could have dramatic impacts on LKNWR. In addition, because walking wetlands are temporary and will be returned to farming in the future there are many wildlife species that will not benefit from rotating wetlands. For many species keeping the wetlands, whether seasonally or permanently, in the same place, are essential for their success.

### ***The KBRA limits Lower Klamath NWR from improving its water situation and eliminates the best tools to secure water for Lower Klamath NWR***

Lower Klamath NWR's water needs based on current refuge management goals are equal to 60,000 acre-feet during the irrigation season and 35,000 acre-feet in the winter. Because the refuge's water rights for refuge wetlands have a priority date of 1908 and the Klamath Reclamation Project has a 1905 priority date for irrigation, Lower Klamath NWR wetlands have suffered recently, especially in the drier years. Under the KBRA, the irrigation season allocation is 60,000 acre- feet in the wetter years and then is progressively diminished to 48,000 acre-feet as water year types get drier, with a dramatic additional reduction in drought years. Even in the unlikely event the water allocation in the KBRA for Lower Klamath NWR materializes, it is not the full amount needed in many years, and the KBRA would limit LKNWR to this less than ideal

allocation for the next 50 years ( In this regard the USFWS is required to also limit its reserved water right for the refuge to this allocated amount).

Further, the KBRA 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 (e) 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 could limit the ability of the refuges to increase their water supplies by developing other water sources by purchase, lease, or storage. 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 if Reclamation facilities are used to deliver the water. In addition, Sections 18.3.2 B 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 B 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. Section 15.1.2 E (ii) 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.

The DEIS does not discuss these ramifications of the KBRA on LKNWR, and it does not account in its no action alternative for developments that will occur even without the KBRA that will improve the current refuge water situation. The administrative determinations in the Oregon Klamath Basin water adjudication are about to be completed and the State of Oregon will soon be able to regulate junior water users to meet refuge reserved water rights, which does not occur now. Increased power rates will make commercial farming on Tule Lake NWR less economical, and should incentivize water conservation and generate support for a federally funded irrigation water and/or land purchase program with willing sellers.

In addition, under the National Wildlife Refuge Systems Improvement Act of 1997, the Secretary of Interior is required to secure needed refuge water supplies. Once the Oregon adjudication is complete the US Fish and Wildlife Service (USFWS), could and should, under the NWSIA, require the 1905 priority dated water rights associated with the refuge lands farmed for commercial agriculture be delivered to refuge wetlands rather than for irrigating 22,000 acres of refuge land for commercial farming. In fact, by locking in leaseland farming and by fixing the water allocation between on-Project irrigation and the refuges for the next 50 years, the KBRA would eliminate the best way to give water security to the refuges, which would be to phase out commercial farming on the refuges and use those lands to store winter water, and use the water rights associated with those lands for refuge purposes. The DEIS should discuss how the KBRA limits Interior's ability to comply with the National Wildlife Refuge Systems Improvement Act of 1997.

#### ***Upper Klamath National Wildlife Refuge Will Still Periodically Go Dry.***

In addition to adverse impacts caused by the KBRA to Lower Klamath Lake and Tule Lake National Wildlife refuges, the KBRA will also negatively impact Upper Klamath National Wildlife Refuge. Water for Upper Klamath National Wildlife Refuges is dependent on the lake levels in Upper Klamath Lake. When lake levels drop below an

elevation of 4,140 feet, refuge wetlands begin to go dry and when lake levels reach 4,139 feet, all 14,000 acres of marshes in Upper Klamath NWR will be dry. Because of the water guarantees to Project irrigators in the KBRA, Upper Klamath NWR wetlands will be greatly diminished in late summer and fall in most years and completely dry at those times in dry years, due to irrigation diversions from Upper Klamath Lake to Project irrigators. This is supported by the DEIS by the following statement:

**Based on modeled water elevations for future years, water elevations in Upper Klamath Lake would be low enough to leave refuge wetlands dry during the fall migration period (September-October) in 82 percent of years with implementation of the KBRA as compared to 68 percent of years under the No Action/No Project Alternative (USFWS 2010). Thus implementation of the KBRA would actually be an adverse impact compared to the No Action/No Project Alternative, if no other measures are taken. p. 3.5-69**

The DEIS should analyze alternatives that improve the situation in Upper Klamath Lake and the Upper Klamath Lake NWR. Not only is the refuge adversely affected but so are water quality and other aquatic resources. The DEIS does not discuss the water quality impact from dewatering refuge and other wetlands around Upper Klamath Lake. When dewatered and exposed to the sun the peat soils are broken down and when rewetted phosphorous and other nutrients that were locked in the soils are released. The DEIS should carefully analyze the extent this contributes to water quality problems in the basin.

#### **Failure to adequately or accurately address KBRA impacts to Aquatic Resources and Water Management**

A major failing of the KBRA is that it is not an agreement designed to ensure that fish receive a minimum amount of water to meet their biological needs or even to receive what ESA flow and lake level requirements currently require. The KBRA sets no specific minimums or water allocation goals for fish. It is an agreement designed to ensure a specific amount of water for On-Project irrigators first, with fish left to make do with whatever is left over. In fact, the predicted river flows under the KBRA do not meet current ESA flow requirements, and show that under the KBRA flow levels could fall below levels that precipitated the 2002 fish kill. The DEIS fails to discuss or analyze whether current EIS flow requirements can be met under the KBRA, and what the impact is of failing to meet these requirements. Instead, the DEIS minimizes and avoids a meaningful discussion of the potential impacts of the KBRA on flows by twice asserting that:

”Minimum flows may change in the future. Hydrologic modeling assumed that the Drought Plan would include a minimum flow of 800 cfs (DOI 2011). The final Drought Plan or future ESA actions could change the minimum flows; however, these assumptions reflect the best available information at the time of the modeling. (Footnote, pp. 2-19 & 3.8-19)”

Though hydrologic modeling may have made the assumption that a minimum flow of 800cfs would be provided in the Drought Plan, the Drought Plan has been released and no such minimums are included. In fact, the KBRA makes it clear that even the predicted

flows are not guaranteed and that there are no water guarantees or minimum stream flow levels or lake levels for fish (including three fish species listed under the Endangered Species Act) in the KBRA. This is not discussed in the DEIS.

In analyzing the impact of the KBRA on fish and other aquatic resources, the DEIS mainly focused on the KBRA Water Diversion Limitations and the On-Project Water Plan. The DEIS concluded that based on anticipated improvements in water quantity and water quality, from implementation of Water Diversion Limitations and On-Project Water Plan the KBRA would be beneficial for fall-run Chinook salmon, spring-run Chinook salmon, steelhead, Pacific lamprey, redband trout, and shortnose and Lost River suckers, and for coho salmon, except those in the Trinity River population units, where they would be no change from existing conditions. (Pages 3.3-142 and 3.3-142) The anticipated water quantity and water quality improvements from the KBRA asserted in the DEIS were based on the conclusion that the KBRA limits on specific water diversions within Reclamation's Klamath Project would protect flows in the mainstem, and that groundwater monitoring plan and restriction on pumping to no more than 6 percent of flows in the Klamath River upstream of Copco 1 Dam would protect flows and improve water quantity. These conclusions are not supportable for the following reasons:

1. Current ESA regulation and fulfillment of the federal government's tribal trust responsibilities offer more protection to flows and lake levels than the KBRA, which attempts to undermine these protections by requiring signatory Tribes to waive enforcement of their water rights up to the On-Project irrigators water limitations/guarantees, by foregoing federal government enforcement of non-signatory Tribes water rights or tribal trust responsibilities up to the On-Project irrigators water limitations/guarantees, and by requiring all KBRA parties to support ESA regulatory assurances at the guaranteed level of diversion for On-Project irrigators. The KBRA does not attempt to meet ESA water requirements for fish in Upper Klamath Lake or the Klamath River or the federal government's tribal trust responsibilities, but instead tries to remove obstacles to providing water security to On-Project irrigators at the expense of fish and wildlife. The DEIS needs to highlight current flow protections and responsibilities and how the KBRA impacts them, including the impact on streamflow and lake levels of filing a stipulation in the Oregon Water Rights adjudication that will limit enforcement of tribal water rights .
2. A careful analysis will show that the water limitations/guarantees for On-Project irrigators is set too high and will not balance the basin's water budget without undermining flows and lake levels needed by fish. The KBRA water guarantees for the Klamath Project Irrigators in wet years would deliver more water to the irrigators than they typically used historically in wet years, and in dry years would deliver more water to the irrigators than allowed under current Endangered Species Act protections for coho salmon, and tribal trust protections that the federal government should be enforcing. The DEIS should examine the impact of the limitations on providing for and meeting ESA flow requirements and tribal trust responsibilities.

3. The DEIS does recognize on page 3.3-142 that: “Reduced surface water deliveries associated with the diversion limitations could result in the increased use of groundwater for irrigation supply.” But the DEIS discounts the possible impacts of increased groundwater development because of the 6% restriction in spring flow reduction to Klamath River springs, without assessing what the impact would be to flow and water quality if in fact all monitored springs were actually reduced by 6%. As discussed previously on page 7 to 12 the KBRA actually facilitates groundwater use, any increase of which has negative impacts that should be assessed. Also, as discussed previously, the potential impacts of groundwater development in the Lost and Tule Lake basins are enormous and are not discussed. The DEIS fails to analyze these potential impacts entirely.

4. Because the KBRA water plan has not yet been developed, all conclusions that this plan is beneficial are premature and without basis. However, the fact that there are no sideboards on the plan and the fact that parties to the KBRA are required to support the On-Project water plan as developed by Project irrigators without oversight, means the KBRA should analyze the potential impacts of a plan that does not actually reduce On-Project water demand in dry years, but that takes the same amount of water, but from different sources, including groundwater, either shifting the impacts to another basin or making it more difficult to determine the impacts to the Klamath River and Upper Klamath Lake. Even with the restrictions on springs in the Klamath Basin, this could have severe detrimental effects to the Lost River Basin springs and aquatic resources, existing groundwater users, and even on Klamath River flows. The DEIS must examine these potential impacts. The yet to be developed water plan could also result in a poor investment that does not advance water balance in the basin and ends up being an irretrievable and irreversible commitment of resources.

5. The KBRA also 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 tremendous disadvantage. For instance, the agreement states that one of the goals is to establish reliable water supplies for agriculture (Section 1.3.ii), and there are also specifics elsewhere in the KBRA on the amounts of this supply. However, 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). This is an illusory standard. By failing to provide any measurable level of restoration or sustained natural production, this illusory standard may mean nothing more than sustaining 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. These are meaningless standards for fish.

6. The DEIS fails to address the fact that there are no guaranteed minimum flows, no guaranteed bucket of water to allocate or shape for fish, and no clear trigger or path of action if the predicted flows or environmental bucket of water does not materialize. This

is a huge deficiency in the DEIS. The risk of shortfalls in predicted flows is all on the fish, as is the risk of the predicted flows being enough water for 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 Biological Opinion. 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). 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. With climate change the risks the KBRA places on fish are even greater. The DEIS should evaluate these risks but does not.

7. The KBRA predicted flows are clearly insufficient in drought situations, yet only a vague Drought Plan with no defined flow minimums is required by the KBRA (Section 19.2). Though a drought plan has now been developed, it contains no minimum flows or lake level goals or requirements and the plan elements remain as vague as the KBRA requirements. Moreover, 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 any changes to diversion limitations/guarantees would only occur in exceptional circumstances. The KBRA's 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. The drought plan also allows for a waiver 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. The DEIS also fails to analyze the huge potential on-going costs of a drought plan given the water diversion limitations have been set so high.

8. The KBRA predicted flows are shaped to create unnaturally low flows in the late fall and winter. This could be particularly harmful to ESA listed coho salmon adults returning to spawn in November and December. The DEIS should discuss the impacts of such an altered hydrograph. The tradeoff is to try and maintain higher spring flows for out-migrating juveniles, but this trade-off is made necessary because the KBRA diversion limitations are set too high.

9. As acknowledged in the DEIS, much of the KBRA restoration work, including Upper Klamath Lake restoration will occur with or without the KBRA and the KBRA does not really add to the baseline here.

10. The DEIS should also examine and discuss the modeling assumptions used to generate the KBRA predicted flows. In particular, the DEIS should examine the following assumptions and the risk implications they have for fish:

a. Off-Project Water Use Retirement Program Assumptions.

The model assumes 30,000 acre-feet of new water being contributed from the Off-Project area (in this case Off-Project refers to irrigated lands above Upper Klamath Lake that are not part of the Klamath Reclamation Project). The KBRA, however indicates that this

amount will be reduced by the difference between any reductions that have already occurred since 2001 less any new water surface water rights after 2001. This amount may be small, but it has not yet been quantified so that we do not know the extent to which the 30,000 acre-feet amount may be reduced.

As of yet specific lands have not been identified, specific willing sellers have not been identified, and funding for a land and/or water retirement program is not in place. In addition, because of return flow issues, there are assumptions that go into how many acre-feet of additional inflow is actually achieved with the purchase of each acre-foot of water. Further, protective mechanisms to protect the retired or purchased water instream are not yet in place.

Though the benefits from this Upper Basin water retirement are assumed in setting Klamath Irrigation Project delivery limits, Project irrigators are granted assurances against future curtailment of water use as long as they are at or under their limits even if these increased inflow assumptions are not met. Even if the assumptions are eventually met there will be an interim period of as yet unidentified length in which they are not. The DEIS is deficient in failing to analyze these issues.

#### b. Increased Upper Klamath Lake Storage Assumptions.

The DEIS and KBRA assume a net 107,700 acre-feet of additional storage in Upper Klamath Lake, before accounting for evapotranspiration. This additional storage is assumed to come through reconnection of drained and diked former wetlands to Upper Klamath Lake. The specific projects include: Williamson River Delta (owned by TNC – TNC has removed the dikes on two-thirds of its property, the remaining land is to be flooded by 2009), dike removal to join Agency Lake Ranch (owned by BOR), Barnes Ranch (recently acquired); and Wood River Ranch (owned by BLM) to Upper Klamath Lake.

This assumption of additional storage needs to be carefully analyzed and scrutinized. For example, Agency Lake Ranch is already contributing additional water by being operated as a pump storage facility (it is unclear to us how this is treated in the model). If the water contribution that Agency Lake Ranch is currently making is reflected in the model and counted in the amount of water left over for fish it needs to be subtracted from the 63,700 acre feet of additional water that is being added back in for this project so that it is not double counted. If the dikes to Agency Lake Ranch are opened, it can no longer be operated for pump storage, and the pump storage contribution will be gone. This is particularly important because we now know that even with the Barnes Ranch addition (which is adjacent to Agency Lake Ranch), the combined acre-feet of active storage created by opening the dikes to these two ranches will actually be less than the acre-feet currently contributed by Agency Lake pump storage operations alone. (The pump storage operation on Agency Lake Ranch probably cannot be continued much longer because of water quality problems with its discharge into Upper Klamath Lake and the lack of screening on Sevenmile Creek.) It should be noted that the KBRA provides On-Project irrigators with assurances whether additional lake storage is achieved or not, and the KBRA allows On-Project irrigators to increase their irrigation delivery cap if additional storage beyond these projects is brought online or at the time dams are removed. The DEIS must closely examine these assumptions and KBRA impacts.

c. Klamath Straits Return Flow Assumptions.

In the KBRA model that predicts flows, the return flows from the Klamath Project are part of the flows observed at Iron Gate Dam as the return flows enter the Klamath River through the Klamath Straits Drain above the dam. The KBRA water plan may reduce these return flows, thereby diminishing some of the hoped for benefits of the diversion limitation. Again the risk is on the fish because no minimum flows or environmental bucket has been guaranteed.

d. Water Use Time Steps and Real Time Water Use Assumptions.

The KBRA assumes irrigation water use based on a certain rate of water use during different time steps throughout the irrigation season. The risk of the seasonal rate of actual irrigation water use deviating from the modeling inputs is again on the fish. To insure that the predicted flows for fish are actually available at the times the water is needed there must also be an agreement limiting the rate of water use in different water year types to a level that will allow the predicted flows to be met. In other words if the irrigators are allowed a total duty of 385,000 acre-feet during the irrigation season of a wet year, the model assumes the duty is spread over the irrigation season in a particular manner, but does not account for a possible shifting in the timing of use that could have a very large negative impact on flows during any such times. The KBRA fails to place limits on how much water is used in different timesteps, and these impacts should be discussed in the DEIS.

e. Eastside Demand Assumptions.

The KBRA predicted flows are based on an assumption of no change in wintertime diversions from Upper Klamath Lake or in irrigation season diversions from the Eastside Delivery Area of the Project (Clear Lake, Gerber Reservoir and the Lost River) that would affect the amount of storage in Upper Klamath Lake or in Klamath River flows.

Wintertime diversions can limit the ability to utilize the full storage capacity of Upper Klamath Lake in drier years, and could have as direct an impact on water available during the irrigation season as if it had occurred during the irrigation season.

In respect to the Eastside Delivery Area, if irrigation demand should increase in that area during different water year types, or if Eastside water is used to supplement decreased diversion from the Upper Klamath Lake Delivery Area then it could impact river flows because the Eastside is connected to the Klamath River via the tunnel through Sheepy Ridge and the Lost River Diversion Channel, and the Eastside currently contributes to Klamath River flows. Without the KBRA restricting Eastside diversions or groundwater development on the Eastside at specified levels in different water year types to assure a continued contribution from the Eastside to Klamath River flows, the model's flow predictions could end up being an overestimate, and the DEIS should note this.

f. Assumption that New Groundwater Development will not Affect Streamflows.

The states of Oregon and California are still issuing new ground water permits in the basin, and the KBRA funds an On-Project plan that allows for new groundwater development for irrigation. The USGS study shows that groundwater and surface water are connected in most places in the basin. Even with the restrictions in the KBRA, there is a risk that any future groundwater development will affect Upper Klamath Lake levels

and Klamath River flows. The model does not take this into account and the risk is again all placed on the fish. The Kamman Hydrology & Engineering's study of the draft Basin agreement makes this same point. The DEIS fails to analyze these issues.

g. Assumption that Predicted Flow and Lake Levels will be Met and that the Predicted Levels are Sufficient.

By giving irrigators assurances of water deliveries at the contemplated levels, the risk of uncertainty falls squarely on the fish. As indicated above if some of the assumptions are incorrect the burden falls on the fish, plus the burden of the time lag to implement many of the natural storage and restoration projects falls on the fish. With climate change one can also expect a change in the hydrograph, the risk of such changes again falling on the fish. It is also uncertain that even if the predicted lake levels and river flows are achieved, these levels will be enough water to sustain and recover Klamath Lake and Klamath River fisheries, and in fact the predicted flows are often less than what the current science tells us is necessary. The DEIS fails to analyze these risks or the burdens of placing these risks on fish in the basin.

**ADDITIONAL COMMENTS**

**Impacts to Upper Klamath Lake**

The DEIS should discuss the historical importance of Upper Klamath Lake as a rearing area for salmon, and the impact of the KBRA's predicted low lake levels on salmon restoration in the Upper Basin.

**Flow needs for Water Quality**

The only way to meet TMDL's for the Keno reach of the Klamath River will probably be to require flow levels during the summer that are greater than the predicted flows from the KBRA, yet the parties to the KBRA support the Project irrigators getting regulatory assurances that protect them from any future water reductions. Also, there may need to be changes in Keno Dam operations to improve fish passage and water quality in the Keno reach, yet the KBRA requires, and the parties signing the agreement are required to seek legislation that requires Keno Dam to be operated by Reclamation to maintain water levels for irrigation diversion consistent with historic practices.

**Social Justice**

The KBRA requirement that the federal government not enforce tribal rights even of non-signatory Tribes is a substantial diminution in rights to affected Tribes and this diminution of rights should be discussed in the DEIS.

**Irreversible and Irretrievable Commitment of Resources**

The KBRA if approved by legislation and signed by federal parties will bind the federal government to a 50 year agreement greatly limiting the federal government's flexibility to respond to future needs and the potential impacts of the long duration of the KBRA should be discussed in the DEIS.

**Compliance with Laws**

The DEIS fails to discuss whether the KBRA provisions are in conformity with the Reclamation Reform Act of 1982 and the National Wildlife Refuge System Improvement

Act of 1987. In addition, the DEIS fails to discuss how the KBRA can meet current ESA flow requirements.

## **Errata**

### 1. The DEIS states:

“In spring of 2001, the federal government announced there would be no deliveries of water from Upper Klamath Lake or Klamath River to Reclamation’s Klamath Project due to Federal Endangered Species Act (ESA) concerns - the first time project water deliveries were not made at a Reclamation project (very limited deliveries occurred later in the summer).” ES-1

This statement though true does not accurately paint the full picture of water deliveries to Project irrigators in 2001. While some irrigators suffered during the drought, many were able to irrigate normally. In fact, the On-Project irrigators experienced only a 32% overall reduction in normal deliveries, while the water year was 46% less than normal.

According to reports in *The Oregonian* at the time, roughly 200 Project farms saw no reduction whatsoever in water deliveries. ((Michael Milstein, “Clearing up water issues on Klamath Basin,” *The Oregonian*, August 29, 2001)

The On-Project irrigators total normal water intake is approximately 450,000 acre feet (af) of water per year. Before the decision to reduce deliveries, the USBR’s Klamath Basin Pilot Irrigation Demand Reduction Program had paid 162 irrigators \$2.7 million to idle roughly 17,000 acres of irrigated land within the Project. This reduced demand by roughly 35,000 af, or 7% of total demand. Given this reduction, 415,000 af would have been “normal” in 2001. The Project received at total of 283,000 af of water from in 2001, or 68% of normal. Here are the numbers:

26%: On April 6<sup>th</sup>, Vice President Dick Cheney ordered 70,000 af released from Clear Lake Reservoir. In fact, the USBR spilled 107,000 af from Clear Lake at this time to compensate for losses to evaporation and rampant unregulated diversions along the Lost River delivery system (Jim Bryant, USBR). The USBR had no authority to release this additional 37,000 af.

18%: On July 24, Secretary of the Interior Gail Norton directed a 75,000 af release from Upper Klamath Lake. USBR officials actually released 76,000 af.

24%: Emergency wells authorized and funded after the federal decision produced up to 100,000 acre-feet of water for the Project. (Oregon Department of Water Resources)

### 2. The DEIS states:

“In 2008 and 2010, the United States Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration (NOAA) Fisheries Service, respectively, issued biological opinions on Reclamation’s Klamath Project operations to better protect listed species. Project operations are governed in part by both opinions.” ES-7 through ES-10.

This statement skips over the 2001 Biological Opinion and the court ordered flows from the 2002 Biological Opinion protecting the Klamath’s same listed species – the 2001 Biological Opinion and the court ordered flows under the 2002 Biological Opinion

should be mentioned and explained. They provided better protection to river flows and lake levels than the 2008 and 2010 biological opinions.

3. The DEIS states:

“A Negative Determination would be a potential termination event for the KHSA and facilities removal would likely not proceed. The FERC relicensing process would resume.” ES-18

In fact, a continued FERC process would most likely result in full or partial removal of the four lower dams because it is economically in PacifiCorp’s interest to remove all or some of the dams.

4. The DEIS states:

“The key negotiated outcomes of the KBRA include mutually-beneficial agreements for the Klamath, Karuk, and Yurok Tribes not to exercise water right claims that would conflict with water deliveries to Reclamation’s Klamath Project water users and for project water users to accept reduced water deliveries.” ES-19

The water limitations to Reclamation’s Klamath Project water users are not actually a reduction in water deliveries from the limits imposed by the ESA and the governments tribal trust responsibilities. It is actually an increase in water deliveries from that allowed under current regulation. It should also be noted that the KBRA also diminishes rights to non-signatory tribes in basin.

5. The DEIS states:

“Circumstances for threatened and endangered species in the Klamath Basin are not improving.” ES-41

Actually, fish in the Basin have done better than they would have without ESA protection. This was very evident in 2002, when the federal government undermined the ESA by ignoring the best available science, and instead delivered too much water to Project irrigators, resulting in low flows and the worst fish kill of record. Litigation restored ESA required flows and now the KBRA is the next attempt to get around ESA regulation that reduces irrigation water deliveries to assure minimum flows and lake levels to benefit ESA listed fish. Also, a lot of restoration has been accomplished and will continue even without the KBRA.

6. The DEIS states:

“Improves base flows for salmonids, particularly in drought years, through KBRA Water Resources Program” ES-45

This statement is simply false. The KBRA provides no base flows for salmonids, and the predicted flows are often less than the ESA and Hardy tell us fish need.

7. The DEIS states:

“These conflicts have cost the United States an average of \$100 million per year over the past ten years (Sheets 2011).” 1-13

This statement really needs further explanation and a breakdown of the costs. In addition, as the water limitations are set too high and ESA flows are not met by these

limitations, conflicts can still be expected and large expenditures will still be required during droughts to try and balance unsustainable water demands created by the KBRA.

8. The DEIS states:

“In the past few decades, however, Klamath Project irrigators and refuge managers have not always had their requests for water met during drought years because of the need to conserve water for fish in the Klamath River downstream of Iron Gate Dam and in Upper Klamath Lake.” 1-15

Irrigators always received their water first until the 2001 BiOp for coho created the bookend with the sucker BiOp. The KBRA now attempts to return to pre-2001 conditions. The refuges still remain subservient to irrigators even under the KBRA.

9. The DEIS states:

“The KHSA was an outcome of the FERC's Alternative Dispute Resolution Procedures as outlined in the Energy Policy Act of 20057 (18 C.F.R. 385.601, et seq.) wherein the parties elected to set aside differences to reach resolution on a settlement that is in furtherance of the interests of all of the parties.” 1-18

It should be noted that during much of the negotiation PacifiCorp was not even at the table, and FERC's Alternative Dispute Resolution Procedures as outlined in the Energy Policy Act of 20057 were co-opted to deliver a sweetheart deal (the KBRA) to Klamath Project irrigators, who had strong political ties to the Bush administration. Parties, other than PacifiCorp were required to agree to Klamath Project irrigator demands as a condition of staying in the negotiations. WaterWatch and Oregon Wild were inappropriately and involuntarily excluded from the process for not agreeing to support continued commercial farming on Lower Klamath and Tule Lake NWR's for the next 50 years.

WaterWatch will be closely evaluating the response to these comments. We appreciate the opportunity to comment.

Sincerely,



John DeVoe,  
Executive Director



## **Memo on Top Foundational Concerns in Respect to the KBRA and KHSA**

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. In addition, if the power fund is not fully funded, the KBRA allows Project

irrigators to allocate water plan funding to the power fund subsidy as a priority. (See Section 15.2.2A and Section 14.3.1)

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.