Statement of Tricia Hill, Farmer
On Behalf of Klamath Water Users Association
Before the
Natural Resources Committee
Subcommittee on Water, Oceans and Wildlife
U.S. House of Representatives
on
Klamath River Basin Conditions and Opportunities

March 8, 2022

Chairman Huffman, Ranking Member Bentz, and Members of the Subcommittee, thank you for this important hearing and for allowing me the honor of testifying before this subcommittee.

My name is Tricia Hill. I am a farmer, and work in partnership with my parents, my uncle, my brother, and my sister.

I am appearing on behalf of Klamath Water Users Association (KWUA), where I am a board member and the immediate past President of the Board of Directors. KWUA is a nonprofit corporation, formed in 1953, whose members are irrigation districts who are contractors of the United States Bureau of Reclamation's Klamath Project. Our members use water from the Klamath River and Upper Klamath Lake, serving approximately 175,000 acres in southern Oregon and northern California.

Our Area

Irrigation in this area began in the 19th century. The Bureau of Reclamation's Klamath Project was authorized in 1905, and by the 1940s was serving approximately the same number of acres that it does today.

The irrigated lands of the Klamath Project support family farms and ranches that produce cereal grains, potatoes, alfalfa and grass hay, beef and dairy, onions, and several specialty crops including horseradish, mints (for both oil and tea), strawberry rootstock, and other crops. Producers here grow crops that are coveted because of their quality, and we are very proud of what we do.

In addition to providing water to for irrigated agriculture, Klamath Project facilities are also the sole means for delivery of water to two long-standing and highly valued federal wildlife refuges, Lower Klamath and Tule Lake National Wildlife Refuges (NWR), managed by the U.S. Fish and Wildlife Service. Waterfowl and other wildlife that grace both private and public lands are an integral part of my everyday life. The greatest concentration of bald eagles in the lower 48 states today is a few miles straight east of the office in which I am sitting. And I am blessed to see both bald and golden eagles every day, either driving to work or in the evenings, hunting the agricultural lands around my home.

As you consider issues of the basin, I ask that you please stop thinking of the Klamath Project as an irrigation project that grew out of drying up rivers.

Two hundred years ago, two thousand years ago, and two million years ago, much of the area we now farm was under water. It was lakebed and marsh. The idea behind the Klamath Project was to hold the water that was normally on the lands in other places and apply it for irrigation during the spring and summer. Even though those who designed the Project did not have the statistics, their planning was remarkable. Evaporation and evapotranspiration from the open water and marsh was a greater amount of water than what our crops consume today.

Our People

We live in close communities and pride ourselves on our diversity.

Many people in the farming community are descendants of the earliest European settlers, whose vision and energy remains a source of amazement. There is a proud history of homesteading in the Tule Lake Basin where veterans of World War I and World War II were awarded homesteads in thanks for their service and embraced the work of feeding the nation and building the community from the ground up.

We have descendants of migrants from China whose family has been producing potatoes for a century. We have post-war settlers from Germany, whose first exposure to the Klamath Basin was in a prisoner of war camp yet they wanted to come back to the area after the war. Hispanic families are prominent members of our communities as well, and we embrace their heritage.

My family is Czech, descendants of people who left Eastern Europe looking for a better life. We came from a country whose people were denied basic freedoms during the political chaos of 16th Century Europe. My people immigrated to escape rule of the Habsburg Empire who suppressed our culture and religion. War and famine were common. Our men were drafted by the Habsburgs for up to ten years. When they returned to our rural homelands, there was not enough work or land to attract a bride and raise a family.

Lured by advertisements by the United States government and private individuals that promised a better life, we came to America. We settled in enclaves of other Czechs, such as Omaha, Nebraska. There, a group of folks formed the "Czech Colonization Club," sending out three scouts to find farmland to settle a Czech community. Eventually, we accepted the promise of a not yet-existing town and farmland still under the waters of Tule Lake.

We were different than many immigrants at that time—we came as family groups, not just men. Sixty-six Czech families arrived in the Klamath Basin in September of 1909, just in time to assemble simple, quickly built cabins. The first winter was brutal. The shores of Tule Lake came nearly to the doorsteps of our new homes; the wind blowing dust, then snow, through the cracks between the boards of the floors of our newly built homes. Most of us stayed, including my Ottoman and Halousek ancestors, and others followed, including my Rajnus great-great grandparents, Vaclav and Elizabeth in 1913. My personal history is made up of remarkable women and I am proud that my daughters are following in their footsteps.

Of course, overall, we in the basin are mindful that we are "latecomers" to the area compared to the Native Americans who have their own rich history and we celebrate as neighbors. It has been the farming community's good fortune to gain awareness of our neighbors through our shared experiences living together in the basin.

The Current State of the Klamath Basin

For nearly 100 years, the Klamath Project received full water deliveries – all that was needed or at least very close to that – every single year. However, in the last 20 years, that has changed as a direct result of actions taken under the federal Endangered Species Act (ESA).

In 2021, for example, the federal government allowed Klamath Project deliveries to be cut to zero, for the first time in more than a century that it has existed. By comparison, in past years of drought similar to the drought of 2021, we received close to 400,000 acre-feet of irrigated water from the Klamath system. That water was provided to not only farms and communities, but also wildlife and refuges throughout the basin.

In 2021, all the water in our system was allocated to maintain elevations in Upper Klamath Lake for ESA-listed suckers and unnaturally high river flows in the Klamath River for ESA-listed salmonids. No water was allocated to farmers or our local waterfowl. A direct impact I saw firsthand: the pair of sandhill cranes in my valley disappeared. The frogs and water snakes that populated my yard near the irrigation canal were nowhere to be seen.

There are of course significant and widespread economic impacts, and they are too extensive and complex to enumerate here. But we would be happy to discuss them separately.

That said, we are very grateful for the efforts of federal and state agencies and members of Congress in supporting and advocating for financial assistance that has helped soften the blow for producers and employees. That type of funding, which unfortunately will be needed again this year, represents a temporary "tourniquet on a wound" that needs much more fundamental attention.

In the basin today, it seems that water issues serve as more of a competition among stakeholders rather than being recognized for what they are – problems affecting all in the basin in one way or another that can best be addressed through partnership and cooperation.

Winning has become the goal instead of actual success for our species and our communities. As a member of the agricultural community, I will tell you we feel targeted and devalued. We are struggling to explain to our children why raising food has become a thing to be ashamed of, why the downsizing of the Klamath Project is a trophy to be won.

What our irrigation communities need is hope. Today we have none. Although we sincerely appreciate the attention and funds that have been directed to the basin, this is not who we are. We are farmers. We grow things – crops, plants, children, and communities. Although we appreciate it – cash is not enough. We need water.

Although we understand that they are hurting too, our neighbors that have advocated for dam removal on the Klamath River have both water and hope in abundance. The federal and state

commitments to the dam removal process and the huge amount of funds available for restoration work is impressive. All of this signals to the tribal communities and environmental groups that their voices are heard. It provides hope for those communities for a better future.

In the agricultural community, dust storms from lands in the basin – previously always either covered by water or by crops – create major air quality issues daily. We worry constantly for our elderly and people with respiratory disease. In addition, last year, hundreds of domestic wells went dry.

In a time when COVID-19 was a constant focus of our nightly news, people could not flush their toilets. People carried buckets of water to their neighbors and families, or trucked water to each other. To this day, these people remain without water; they were, and are, shell-shocked. This is the human toll of no water.

And it is not just people. We are experiencing an environmental disaster inside the Klamath Project. Last year, Lower Klamath National Wildlife Refuge went dry. This year, Tule Lake National Wildlife Refuge will join Lower Klamath National Wildlife Refuge in going dry for the first time in its history.

How bad is it for wildlife? Last year, turtles wandered the streets in Merrill, Oregon, looking for water because there was no water in the canals. And our nights are silent because the croaking of frogs that once called our irrigation drains home are gone.

In short, the ESA is failing fish and wildlife it is intended to protect, and people are suffering as well. There are no winners. Only losers.

I cannot convey how heartbreaking it is to watch our basin – from its people to its environment to its wildlife – crumble around me. There are families sitting around the dining room table who are in a kind of shock and not at all sure whether the larger world, especially people in the cities who once dined on the food we used to grow, remotely understand, let alone care.

Beyond the stress within families, there is stress among neighbors, for as things get worse, people must choose between taking care of their children or helping their best friend.

This year will be bad – again. And 2023 will be even more of the same unless a new operations plan that actually works is adopted before then.

We know that fish populations and fish-based communities are hurting. We respect those communities' very legitimate and fundamental interests.

With that said, we do believe it is important to manage water prudently for all interests.

Farmers are careful observers. We now have a decades-long history of shorting Klamath Project irrigation and refuges to increase water supplies for ESA-listed species, but that strategy has failed.

One cannot identify any consequential benefit to ESA-listed fish populations that has come from all the pain inflicted on the farming communities. Our reality is that if there is a problem, the

go-to solution is regulating the Klamath Project, because that is something that can be done. It is not fair. It is not effective.

The very dysfunctional operations plan that controls the Klamath Project is a dramatic example of the problem. By attempting to micromanage every single drop of water in the Upper Klamath Basin based on dates on a calendar and providing zero flexibility, the government has created a failed system for listed species, farmers, and wildlife.

To more fully illustrate these facts, KWUA has published a memorandum dated February 1, 2022, that details the deficiencies in the current plan for operations of the Klamath Project. That paper is attached to my testimony.

A critical point I hope you take away from this testimony and our memorandum is that we fully understand that we collectively as stakeholders in the basin will not have success unless we have the ability to set aside positions and come together to work out solutions. We have been there before.

Not that long ago, there were very strong and trusting relationships built among key interests in the Klamath Basin. KWUA was a major player, and I would say a major leader in the negotiation of the Klamath Basin Restoration Agreement (KBRA), which has been mentioned.

Unfortunately, the KBRA terminated at the end of 2015 because its continued effectiveness was contingent on congressional authorization of the agreement by that time, but no authorizing legislation was enacted. As we developed that agreement and fought for its approval, there were very strong and functional relationships up and down the river.

Now, we deal with one another more cautiously, and at arm's length, rather than standing up for one another as we once did. This is distressing to many, and we need help.

Respectfully, we feel like our partners in the basin have turned their backs on farmers. Pieces of the KBRA continue to move forward today, while other parts have been left to "die on the vine" so to speak. KWUA has addressed this concern in many settings, including the attached letter to the Federal Energy Regulatory Commission dated August 19, 2021, and its enclosure, an August 10, 2020 memorandum to parties to the Klamath Hydroelectric Settlement Agreement (KHSA).

KWUA very much wants to get back to that environment of collaboration and trust that generated that agreement.

Opportunities

Today's hearing topics include "opportunities." Like other parties, we are very grateful to Congress for the resources made available in the bipartisan infrastructure law. We support the prudent use of dollars for environmental restoration, and hope to work with others to identify priorities and projects. We believe there are exciting, multi-benefit project opportunities that could be done with Project infrastructure.

We know that the Oregon Senators have made it clear that they hope this will be a catalyst for collaboration.

We hope that will prove true. However, when we hear parties talking about "fixing" Klamath, we do not necessarily hear that everyone wants to fix things for farmers who are suffering.

Representative Bentz has referred several times to the need for "a plan." We echo that sentiment. With that in mind, we believe it is important to state clear goals, then plan to achieve them.

We have identified our goals, subgoals, and necessary actions, as follows:

Goals

1. Strong, stable communities – tribal, agricultural, and other resource-dependent communities – up and down the entire Klamath Basin.

2. Mutually supportive and respectful relationships in the basin.

3. Rebrand the Klamath Basin as success and durable model of collaboration rather than the poster child for conflict and strife.

Necessary Subgoals

1. Predictable, reliable, and adequate water for irrigation and wildlife including refuges.

2. Reasonable and appropriate regulatory protection for agricultural parties affected by restoration activities.

3. Affordable power for water management.

4. Robust, self-sustaining populations of fish and wildlife.

Elements and Necessary Actions for a Plan Directed to these Goals

General, and Process Steps

1. Complete unfinished business and commitments: prioritize the full implementation of the Klamath Power and Facilities Agreement, and section 1.9 of the KHSA, to no less degree that KHSA parties have prioritized dam removal.

2. Learn from the past: complete an honest assessment of successes and failures that have resulted from restoration actions and modified water management over the past 30 years.

3. Unless and until there is broad-based, joint planning processes directed to achieving the above-stated goals and subgoals, funding agencies should prioritize projects and activities that:

a. Meaningfully help in getting the most out of the water that is actually available (*for irrigation, this includes storage, irrigation efficiency*), and other actions.

b. (For restoration projects) target population bottlenecks for important species (e.g., sucker recruitment).

c. Do not have a negative effect on water availability for any given interest.

d. Do not have principled opposition from any of the significant basin interests.

4. State and federal agencies must promote and actively incentivize interest-based negotiations oriented around the above-stated goals and subgoals.

5. State and federal agencies must provide a continuous, engaged policy presence that is equally accessible to all parties and that will be durable irrespective of who is in political power in the legislative and executive branches.

Elements of Current and Ultimate Plans and Planning Processes

1. Recognize that it is neither fair nor effective to treat irrigated agriculture as the default solution or backstop for the basin's environmental issues:

   a. Prioritize non-flow/non-lake level measures.

   b. In the immediate term, loosen the regulatory grip on irrigated agriculture. It is not helping the fish and it is destroying agricultural communities.

   c. Advocate that agriculture do its part, but not more than its part, in addressing fishery and environmental issues.

2. Support irrigation communities having tools to advance the above-stated goals:

   a. Resources to plan and implement actions to be able to "live with" anticipated shortages.

   b. Resources to control power costs.

3. Insist on accountability in environmental restoration.

In the recent past, the Department of the Interior has assigned a Klamath Basin lead to coordinate the activities of federal agencies and be the Secretary's eyes, ears, and voice "on the ground." It is not possible to do that job on an intermittent basis. We submit that a skilled person or small team must roll up their sleeves, become fully informed and understand the dynamics of the Klamath Basin, and get their hands dirty. This is not a plea for "top down" solutions. It is a recognition that there can be no solutions without hands-on, engaged, federal leadership.

KWUA supports Secretary Haaland's identification of Elizabeth Klein to be Interior's overall policy point person. We believe it would be optimal if this position were the point for all federal agencies. This has occurred, in differing fashions, through the past three Administrations.

Historically, times when collaborative progress has been made in the basin, there has been such a person in place.

We would recommend that the states also have these kinds of teams in place. Dedicated, focused, get your hands dirty.

We want to work with the other interests in the basin to bring stability to all of our communities. Tribes and farmers want the same things. They want to do what they do best. They want to pass on their traditions and way of life to their kids. We in the Klamath Project want that for the tribes and other communities, period, and we want to fight side by side with those parties to get there.

Attachments:

A KWUA paper dated February 1, 2022, Deficiencies of the Interim Operations Plan for the Klamath Project

B KWUA Letter to Federal Energy Regulatory Commission dated August 19, 2021

ATTACHMENT A

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DEFICIENCIES OF THE INTERIM OPERATIONS PLAN FOR THE KLAMATH PROJECT

February 1, 2022

This paper outlines technical deficiencies of the "Interim Operations Plan" for the Bureau of Reclamation's (Reclamation) operation of the Klamath Project. The Klamath Project (Project) is a federal water project authorized in 1905 that serves over 1,200 farms comprising 230,000 acres in southern Oregon and northern California.

In 1992, after 85 years of operation, Reclamation began restricting irrigation water deliveries to the Project based on the federal Endangered Species Act (ESA). Initially, Reclamation's consultation addressed the effects of Project operations on Lost River and shortnose suckers and bald eagles. Today, bald eagles are no longer considered threatened or endangered under the ESA, but Reclamation consults on the effect to Lost River and shortnose suckers, the Southern Oregon/Northern California Coastal (SONCC) Distinct Population Segment (DPS) of coho salmon, the southern DPS of North American green sturgeon, the southern DPS of Pacific eulachon, and the southern resident DPS of killer whales.

Reclamation's current ESA compliance for operation of the Project is covered by separate biological opinions (BiOp) issued by the National Marine Fisheries Service (NMFS) in 2019 and the U.S. Fish and Wildlife Service (USFWS) in 2020. These BiOps evaluated Reclamation's proposed actions described in a biological assessment dated December 21, 2018, as modified by four separate amendments, dated February 15, 2019, March 22, 2019, October 11, 2019, and March 27, 2020.

The 2020 biological assessment, as modified, constitutes the Interim Operations Plan (IOP). The IOP was adopted to address an error in the development of a predecessor plan that had become the subject of litigation and was in effect a placeholder to allow time for completion of a new consultation with NMFS and USFWS. The IOP expires on September 30, 2022. In recent discussions, Reclamation has indicated a desire to potentially renew the IOP for some indeterminate period, possibly related to removal of four utility-owned hydroelectric dams on the Klamath River in California and Oregon.

Implementation of the IOP in 2020 and 2021 demonstrated that the assumed hydrologic outcomes of the IOP are routinely unachievable, with required river flows conflicting with required lake levels and as a result, anticipated irrigation supplies proving elusory. All indications so far are that 2022 will play out similarly, with the lake levels and river flows that diverge from the assumed hydrologic outcomes of the IOP, and irrigation supplies likely to be cut as a result. The IOP has proven effectively impossible to carry out. To simply extend it would be poor policy.[1]

1. Procedural Context of the IOP

The history surrounding the IOP helps explain why the plan does not work. The IOP is based on a hydrologic model, referred to as the Klamath Basin Planning Model (KBPM), which a technical team of hydrologists and scientists representing Reclamation, USFWS, NMFS, Klamath Basin tribes, and

[1] Legal issues associated with the IOP are not the subject of this paper.

Klamath Project water users developed between 2010 and 2012. Beyond simply being a predictive tool to evaluate different operational scenarios and the potential effects on listed species, the KBPM was intended to facilitate agreement among the parties based upon mutually acceptable hydrologic outcomes with respect to water surface levels in Upper Klamath Lake, flows in the Klamath River, and water supplies available for diversion to the Project. The KBPM formed the basis of Reclamation's 2012 biological assessment, and NMFS' and USFWS' 2013 coordinated "non-jeopardy" BiOps.[2]

This novel approach to achieving consensus over Project operations was predicated in part on the assumption that the formulaic logic of the KBPM would eventually be replaced with an operational regime governed by the Klamath Basin Restoration Agreement (KBRA), once Congress authorized the agreement. Under the terms of the KBRA, subject to certain conditions and considerations, the Project was assured a reliable supply of water from Upper Klamath Lake and the Klamath River.

The KBRA expired on its own terms in 2016 due to lack of congressional authorization. Shortly thereafter, the Hoopa Valley and Yurok Tribes filed litigation against the United States in the U.S. District Court for the Northern District of California, alleging that Reclamation had failed to reinitiate consultation after the amount of "incidental take" of coho salmon in 2014 and 2015—as measured by infection rates in juvenile Chinook salmon—exceeded the limit NMFS designated in its 2013 BiOp.

In March 2017, the U.S. District Court issued an injunction requiring that, pending completion of a new ESA consultation, Reclamation provide certain types of flows in the Klamath River downstream of Iron Gate Dam in order to mitigate the effects of *Ceratanova shasta* infection rates in coho and Chinook salmon. Reclamation operated the Project in accordance with this injunction in both 2017 and 2018, resulting in significant restrictions in the timing and quantity of water available for irrigation and national wildlife refuges.

In December 2018, Reclamation issued a new biological assessment for operation of the Project between April 2019 through September 2029. Reclamation's proposed action carried forward the formulaic rules of the KBPM with the addition of approximately 50,000 acre-feet of water designated for producing a "surface flushing flow" at Iron Gate Dam of at least 6,030 cubic feet per second (cfs) for 72 hours.

After initial informal feedback from NMFS and tribal stakeholders, in February 2019 Reclamation modified its proposed action, committing an additional 20,000 acre-feet of water for flows in the Klamath River in May and June in certain year types. Reclamation also reduced the period of the proposed action from ten years to five. The following month, Reclamation again modified its proposed action, this time deducting another 7,436 acre-feet from the supply potentially available for irrigation and refuge purposes and further committing the agency to provide $3.4 million for riparian restoration activities in the lower Klamath River over the five-year term of the proposed action. After these modifications, NMFS and USFWS issued separate non-jeopardy BiOps in March 2019.

In July 2019, the Yurok Tribe and other parties filed litigation in the U.S. District Court for the Northern District of California challenging NMFS' 2019 BiOp and Reclamation's compliance with the National Environmental Protection Act. In September 2019, the plaintiffs amended their complaint, further alleging that Reclamation and NMFS' analysis was based on erroneous technical data on available

[2] Although the biological assessment had been developed through a collaborative approach, subsequent communications and the ultimate BiOps introduced additional constraints. These included minimum flow requirements for the Klamath River identified by NMFS, which in turn led USFWS to compute "thresholds" for Upper Klamath Lake. The thresholds were not biologically-based and were not adopted to be binding operational requirements, but came to be treated as such.

coho habitat. In substance, this error resulted in an overestimation of modelled physical habitat below Iron Gate Dam under certain flow conditions, invalidating NMFS' analysis of the extent to which Reclamation's proposed flows resulted in at least 80 percent of the maximum available habitat being available for coho salmon.[3]

The plaintiffs were made aware of the flawed data by the same consultant who had provided the data to Reclamation and NMFS under contract with the federal government.

Based on this erroneous data, in November 2019 Reclamation requested a new consultation with NMFS and USFWS. In the meantime, the Yurok Tribes and other plaintiffs filed a motion with the District Court for an injunction requiring Reclamation to operate in accordance with the court's March 2017 injunction, including provision for up to 50,000 acre-feet to be available from Upper Klamath Lake for disease mitigation flows on the Klamath River. To avoid this potential outcome, Reclamation, NMFS, USFWS, the Yurok Tribe, and KWUA entered discussions on developing a temporary operating plan for the Project while consultation activities continued. These discussions ultimately led to a stipulated stay of the litigation which was to be in effect so long as Reclamation operated consistent with the IOP. The IOP essentially follows the 2018 biological assessment, as modified, but with the addition of up to 40,000 acre-feet of water in certain year types for further augmenting flows in the Klamath River in May and June. Of this total, up to 23,000 acre-feet could be realized by reduction of the supply otherwise available for irrigation and refuge use.

KWUA's stated position at the time was that the IOP was preferable to operating under the 2017 injunction, particularly given the delays in starting irrigation that occurred under the injunction. According to Tricia Hill, KWUA's president at the time, "We do not like the place it leaves us, but it's the least of a few evils, and at least creates time to do things right the next time."[4]

2. Implementation of the IOP

a. 2020

Following consultation with USFWS and NMFS and formal adoption of the IOP in March 2020, Reclamation immediately ran into issues implementing the plan. As described further below, one "boundary condition" to USFWS' non-jeopardy BiOp was that water surface elevations in Upper Klamath Lake remain above 4,142.0 feet in April and May of each year. The lake's water surface elevation surpassed 4,142.0 on the last day of March, remaining largely flat in the days after. The April 15 deadline established in the IOP for implementation of a surface flushing flow came and passed.

On April 22, 2020, Reclamation had PacifiCorp make releases from Link River Dam to support a flow of over 6,000 cfs below Iron Gate Dam for slightly more than 24 hours. Flows dropped to approximately 5,000 cfs on April 23, and to 4,500 cfs the last day of the event. These conditions did not match the assumed 6,030 cfs flow event for 72 hours specified in the IOP. Following the event, the reduction in releases at Iron Gate Dam exceeded the maximum "ramping rates" specified in the IOP.

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[3] Since 2010, NMFS has relied upon the assumption that at least 80 percent of ***maximum*** available habitat in the mainstem of the Klamath River provides for the conservation needs of coho salmon and that flows that provide at least such an amount are beneficial for maintaining physical or biological features of critical habitat and meeting the habitat needs of individual coho salmon. There is, however, no evidence that physical habitat in the mainstem Klamath River is a limiting factor for populations of the species.

[4] KWUA Press Release, "Agreement Buys Time on New Klamath Project Ops Plan" (Mar. 30, 2020).

Reclamation coordinated these modified operations with tribes and key stakeholders, attributing them to extraordinary hydrologic conditions.

In total, approximately 30,000 acre-feet of stored water was released from Upper Klamath Lake to support the flushing flow. The elevation of Upper Klamath Lake plummeted during the event, dropping more than a quarter-foot in a week. The decline continued, with Upper Klamath Lake elevations dropping to below 4,141.5 by the end of April.

As the flushing flow wound down, the Natural Resources Conservation Service (NRCS) issued an updated May 1 forecast for inflows to Upper Klamath Lake during the May through September period. Compared to the April 1 forecast, the May 1 forecast represented a 108,000 acre-foot or 48 percent reduction in the anticipated May through September inflow. Based on that forecast, Reclamation stated that it would unlikely be able to deliver the 144,000 acre-foot "locked in" irrigation supply available according to the IOP and announced just weeks earlier in Reclamation's *2020 Operations Plan*. According to Reclamation, the irrigation supply was likely to be only 80,000 acre-feet, roughly one-fifth the Project's historical annual demand.

As districts and farmers scrambled to address the reduced irrigation supply, the Yurok Tribe and Pacific Coast Federation of Fishermen's Associations filed a motion with the U.S. District Court for the Northern District of California to lift the stay of their 2019 litigation and put back in place the March 2017 injunction, requiring operation in accordance with the 2013 BiOp with the addition of the disease mitigation flows. The court scheduled a hearing for the end of May, creating the prospect for an immediate shutdown of irrigation deliveries if the motion was granted. The plaintiffs subsequently modified the motion for preliminary injunction, and ultimately the modified motion was denied.

Following NRCS' issuance of its June 1 inflow forecast, Reclamation announced that it again anticipated being able to deliver approximately 140,000 acre-feet of water to the Project during the 2020 season. At roughly the same time, in an attempt to dilute salmon disease spore concentrations in the river, Reclamation directed PacifiCorp to more than double releases out of Upper Klamath Lake, producing another pulse flow of over 1,800 cfs below Iron Gate Dam. Upper Klamath Lake dropped another quarter-foot over the course of this ten-day event, falling below 4,141.0 feet. By July 15 – a key date in terms of "boundary conditions" for USFWS' 2020 BiOp – the water surface elevation in Upper Klamath Lake had dropped another two-thirds of a foot, to 4,140.34 feet.

In late August, Reclamation informed the Yurok Tribe that it would not release the additional 7,000 acre-feet from Upper Klamath Lake included in the IOP for the tribe's "Boat Dance" ceremony, on top of the 400,000 acre-feet already committed for release to the river from March through September. The Yurok Tribe filed a new federal lawsuit over the agency's decision. Ultimately, PacifiCorp voluntarily provided the water for the ceremony from its hydroelectric reservoirs (which the company then later refilled on its own accord from Upper Klamath Lake).

Finally, to meet remaining irrigation demands within the Project and to provide limited supplies to Tule Lake and Lower Klamath National Wildlife Refuges, Reclamation made available an additional 15,000 acre-feet of water from Upper Klamath Lake. Part of this water was used to stem a major outbreak of avian botulism in Tule Lake National Wildlife Refuge, which ultimately was attributed to killing more than 60,000 ducks. The additional water initially diverted from Upper Klamath Lake was subsequently paid back by releases from Clear Lake and Gerber reservoirs during the fall and early winter period. Upper Klamath Lake ended September at an elevation of 4,138.29 feet and a seasonal low of 4,138.18 feet.

b. 2021

Last year proved even more challenging than 2020, and again exposed deficiencies of the IOP. Early in the year, Reclamation began coordinating with tribal and other key stakeholders on how to deal with the extremely dry conditions. By March, it was apparent that between existing storage levels in Upper Klamath Lake and anticipated inflows over the spring and summer, it would be physically impossible to satisfy the IOP's "requirements" with respect to lake levels and river flows, even with no irrigation diversions. By April 1, 2021, the water level in Upper Klamath Lake was at 4,140.84 feet and dropping.

On April 13, Reclamation announced that it would not produce a surface flushing flow unless Upper Klamath Lake's elevation reversed course and climbed to over 4,141.6 feet, and even then, such an event was likely to be reduced in both magnitude and duration. The lake elevation continued its decline, and no surface flushing flow was released.

For the Project, Reclamation initially announced a Project Supply of 33,000 acre-feet, in accordance with the "locked in" calculation under the IOP. Reclamation anticipated that this volume would become available after May 15. On May 13, 2021, Reclamation advised districts that the Project's main diversion, the A Canal, would remain closed for the entire year, with no deliveries for the first time in the Project's history. Notwithstanding the Project being almost entirely shut off, the lake's elevation continued to fall, dropping to 4,140.31 feet by the end of May.

In early June, Reclamation determined that even with no deliveries to the Project, the likelihood remained that Reclamation would be unable to provide the minimum flows at Iron Gate Dam and still maintain Upper Klamath Lake above a seasonal low of 4,138.0 feet, another "boundary condition" in USFWS' 2020 BiOp. Reclamation issued a temporary plan for how to adjust river flows and lake levels below the established minimums in such an event. The elevation of Upper Klamath Lake fell to 4,039.42 feet by mid-July, also violating another "boundary condition."

As a result of no deliveries to the Project, Reclamation also found itself at odds with minimum water levels required for endangered suckers in Tule Lake Sump 1A. Tule Lake Sump 1A receives water principally from return flows from the Project, has a sizable population of endangered suckers, and serves as the primary waterfowl habitat within Tule Lake National Wildlife Refuge. In early June, Reclamation, USFWS, and the Tulelake Irrigation District determined that it would likely be impossible to maintain water levels in Sump 1A and the better course was to drain the remaining water and relocate suckers into the smaller Sump 1B. Sump 1A had never been fully drained in the Project's history; in fact, this ground had not likely been dry in millions of years.

In August, after moving all the water it could from Sump 1A to Sump 1B, Tulelake Irrigation District advised Reclamation that water levels in Sump 1B could not be maintained without some source of additional water and that conditions were threatening another major outbreak of avian botulism. After coordination with PacifiCorp, USFWS, and NMFS, Reclamation approved a "borrow" of up to 15,000 acre-feet of water from PacifiCorp's reservoirs. This exchange has subsequently been repaid by forbearance of diversions of Lost River and Klamath River water that would otherwise have occurred in accordance with the IOP.

Timely precipitation in late August was the only reason Reclamation was able to provide minimum river flows downstream of Iron Gate Dam and simultaneously maintain Upper Klamath Lake above 4,138.0 feet through the end of the year.

3. Current Sufficiency of the IOP

Under Section 7 of the ESA, NMFS and USFWS are required to conduct an analysis and provide an opinion as to whether a federal agency's proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. Notwithstanding the issuance of a BiOp, the action agency is required to reinitiate consultation if new information reveals effects to listed species or critical habitat that were not considered in NMFS and/or USFWS' original BiOp. Reconsultation is also required if the agency's action is subsequently modified in a manner that causes effects to listed species or critical habitat that were not considered in NMFS and/or USFWS' BiOp.

For its part, USFWS was explicitly clear in its 2020 BiOp that its analysis of the impacts to Lost River and shortnose suckers from Reclamation's proposed action relied upon certain hydrologic conditions. According to USFWS' BiOp, "[c]onditions outside [the bounds to the hydrological conditions expected under this BiOp] may result in greater adverse effects than analyzed in this BiOp and exceedance of the take anticipated in the Incidental Take Statement . . . . Based on the [period of record], these conditions are extremely unlikely to occur during the term of this BiOp."

The explicit "boundary conditions" for Upper Klamath Lake water surface elevations identified by USFWS were:

1. Two consecutive years in which the surface elevation falls below 4,142.0 feet in April or May; or any year in which surface elevations fall below 4,142.0 feet in April or May when "EWA augmentation" is provided.
2. Surface elevations below levels observed in April and May of 2010 (i.e., 4,141.00 feet by April 30 and 4,141.28 feet by May 31).
3. On July 15: any year when surface elevations are less than 4,140.0 feet; more than one year when elevations fall below 4,140.5 feet; or more than two years when surface elevations fall below 4,140.8 feet.
4. More than one water year when surface elevations drop below 4,138.25 feet in September.
5. Surface elevations below 4,138.00 feet at any time.

For "boundary condition" 1, Reclamation failed to satisfy the second prong in 2020, and the first prong in 2021. Condition 2, Reclamation failed to meet in 2021. For condition 3, the first two prongs were violated in 2021 (likely setting the stage for violating the third prong in 2022). Reclamation has not yet technically violated the conditions 3 and 4, although that was largely due to timely precipitation in the late summer of 2021.

For its part, NMFS' 2019 BiOp also relied upon a "set of key assumptions that are critical to [the agency's] effects analysis on listed species and their critical habitat." According to NMFS, "[i]f new information indicates [one of these key assumptions] is invalid, Reclamation and NMFS may be required to reassess the effects of the proposed action on listed species and their critical habitat, and reinitiate consultation, if warranted."

NMFS' "key assumptions" are broader and more general than the specific lake level criteria that USFWS' identified; however, Reclamation's operation of the Project in 2020 and 2021 has also shown several of these assumptions to be flawed. NMFS' assumptions are as follows:

1. Upper Klamath Lake inflows will be within the range observed in the 1980-2018 period of record.
2. Accretions from Link River Dam to Iron Gate Dam will be consistent with accretion timing, magnitude, and volume for the period of record.
3. Upper Klamath Lake bathymetry and storage capacity is accurately modelled in the KBPM.
4. Water deliveries to the Project and off the Project will be consistent with average historical distribution patterns for the period of record.
5. Link River Dam releases, for purposes of meeting Iron Gate Dam flow targets, will not be regulated by the Upper Klamath Lake "control logic" at a greater magnitude or duration than observed in the KBPM results.

The first of these assumptions is the most critical, and in this respect, while the net annual volume of inflows in 2020 and 2021 was within the range observed between 1980 and 2018, the inflow pattern observed in 2020 and 2021 was unlike any in the period of record. Low inflows particularly in the winter and early spring in both years made it physically impossible to produce a surface flushing flow, even at flows far less than 6,030 cfs for 72 hours, without resulting in a significant drop in Upper Klamath Lake water surface elevations, including below 4,142.0 feet in April and May. This scenario of a reduced flushing flow only occurred in one year under the period of record (1992) and even then, it did not cause lake levels to fall below 4,142.0 feet in April and May. NMFS did not anticipate or analyze a scenario like 2021, where not only a flushing flow was absent, but there were also no material flows above designated minimums. In addition to violating NMFS' first "key assumption," hydrologic conditions in 2021 also violated the last one, regarding regulation of Link River Dam releases due to the Upper Klamath Lake "control logic."

Looking ahead towards the next consultation, it is also important to note that USFWS has proposed to breach dikes around Agency Lake and Barnes Ranches, thereby inundating 14,000 acres that are currently separated from Upper Klamath Lake. This action will change the storage capacity and bathymetry associated with Upper Klamath Lake, which is another "key assumption" that NMFS' 2019 BiOp depended upon.

4. Conclusion

Despite Reclamation's stated intention, the agency cannot simply "extend" the IOP, as the critical hydrologic assumptions relied upon by Reclamation, NMFS, and USFWS have proven to be invalid. NMFS and USFWS' BiOp expire on September 30, 2021, and some new form of stand-alone biological analysis will unquestionably be required.

Reclamation's previously proposed action has proven physically impossible to carry out. The modelled results of the IOP have been shown to not comport with the hydrologic reality. Any analysis by USFWS and NMFS on the effects to listed species will have to contain new or modified operations, new hydrologic assumptions, or likely both.

ATTACHMENT B

KWUA Klamath Water Users ASSOCIATION

Phone (541) 883-6100 Fax (541) 883-8893 ~ 2312 South Sixth Street, Suite A, Klamath Falls, Oregon 97601

August 19, 2021

Ms. Kimberly D. Bose
Secretary, Federal Energy Regulatory Commission
888 First Street NE, Room 1A
Washington, DC 20426

Re: Klamath Hydroelectric Project (Project No. P-2082);
Lower Klamath Hydroelectric Project (Project No. P-14803);
Status Report and Comments on NOI to Prepare EIS for Proposed Lower Klamath Project Surrender and Removal, Project Nos. 14803-001 and P-2082-063;
Comments on Scoping Document 1 for Proposed Surrender and Decommissioning of Lower Klamath Project, P-14803-001

Dear Ms. Bose:

Klamath Water Users Association (KWUA) offers this letter for the information and record of the Federal Energy Regulatory Commission ("FERC" or "Commission") in these proceedings. As applicable, this submission is for purposes of Environmental Impact Statement (EIS) scoping. We attach as Attachment 1, as part of this submission, a memorandum that KWUA sent to the parties to the Klamath Hydroelectric Settlement Agreement (KHSA) one year ago, and invite your attention to that memorandum. We also attach as Attachment 2 a figure that is explained in the body of this letter.

In short, the Commission must be mindful of the damage that has occurred and is occurring to irrigation communities as a consequence of the obsessive, singular focus on dam removal as the only objective or interest that matters in the Klamath Basin. Dam removal has evolved into an unacknowledged "bait and switch" for farmers and ranchers who were willing to set aside positions and honor other parties' interests and objectives, thereby putting KHSA parties in a position where dam removal became possible. Proponents borrowed and spent the credibility of constructive leaders in the agricultural community but have turned their backs on those leaders. Klamath Basin agriculture is experiencing extreme hardship and internal strife. Not long ago, when dam removal proponents needed agricultural support, farms and ranches mattered. That time has passed, and the perpetuation of this situation will only make things worse.

The overall context is relevant to National Environmental Policy Act (NEPA) scoping. At minimum, the previous EIS evaluating the effects of dam removal[1] was prepared in a setting

[1] U.S. Dept. of the Interior & Cal. Dept. of Fish & Game, Klamath Facilities Removal Final Environmental Impact Statement/Environmental Impact Report (Dec. 2012), State Clearinghouse No. 2010061060.

that included measures and protections provided by the Klamath Basin Restoration Agreement (KBRA) and a dramatically different iteration of the KHSA. In addition, there are negative and potentially negative impacts that were not evaluated previously.

BACKGROUND

KWUA has represented the interests of agricultural communities in the Upper Klamath Basin for nearly 70 years. Its members, contractors of the Bureau of Reclamation's (Reclamation) Klamath Reclamation Project (Project), provide irrigation water to over 170,000 acres of productive land in Klamath County, Oregon, and Modoc and Siskiyou Counties, California.

The catalyst for KWUA's formation in 1953 was the application, by the California-Oregon Power Company, to the Federal Power Commission for a license to construct and operate the Big Bend No. 2 hydroelectric facility, now known as J.C. Boyle. The ultimate license for this facility and other elements of Project 2082 included critical water and power cost protections for Upper Basin irrigators.

As the 2006 expiration date for that license approached, KWUA and many other interested parties took interest and, ultimately, engaged in committed, interest-based negotiations. Former adversaries developed trust and respect and support for one another's needs and communities.

This process led to the concurrent signing, in February 2010, of the KBRA and the KHSA. The KBRA included critically important measures for irrigation parties, such as: sufficient and reliable irrigation water availability; continuation of low-cost power that Upper Basin irrigators had experienced since 1917 due to their relationship and history with the PacifiCorp dams; and other regulatory assurances, including measures that would ensure there would be minimal or no negative impacts to agriculture resulting from dam removal.

Under the February 2010 KHSA, dam removal could occur only if a number of conditions were satisfied. First, the Secretary of the Interior (Secretary), rather than FERC through its existing license surrender and decommissioning process, would make the determination of whether dams would be removed. Second, and closely related, implementation of the KHSA was contingent on Congress enacting legislation that would effectively repeal the Federal Power Act in the Klamath Basin, substituting the Secretary and pre-negotiated KHSA terms for the FERC process that applies across the United States. Third, dams could not be removed unless Congress enacted as federal law certain heavily negotiated language that would exempt PacifiCorp from any liabilities associated with dam removal. Fourth, the KHSA was contingent on inclusion, in the authorizing legislation, of authority for the Bureau of Reclamation (Reclamation) to take title to Keno Dam as a part of the Klamath Irrigation Project. Fifth, funds had to be approved for dam removal, but to prevent open-ended liability for ratepayers, there was a hard cap on customer contributions to dam removal, and customers and states could not be responsible for cost overruns.

Sixth and finally, the February 2010 KHSA could not be implemented unless federal legislation was enacted that authorized the implementation of KBRA terms dependent on congressional authorization. The parties supported a single federal legislative measure that would have authorized both agreements. Later, other parties negotiated the Upper Klamath Basin Settlement Agreement, which was signed in 2014 and was subject to the same, mutual interdependence as the KBRA and KHSA.

The KBRA terminated at midnight on December 31, 2015, because, by its terms, termination would occur if Congress had not enacted necessary authorizing legislation by that time. The KHSA did not automatically terminate, but the lack of timely authorizing legislation was one of a handful of "potential termination events" that would eventually lead to termination. Given its terms and the impossibility of enactment of legislation for the (terminated) KBRA and KHSA, it was inevitable that the KHSA would terminate. The parties to both agreements would have to re-engage if they wanted to return to the basin-wide stability promised in the suite of interrelated agreements.

To its surprise and dismay, KWUA was soon informed by dam removal proponents, including the states and the federal government, that they intended to carry the KHSA forward, as a stand-alone agreement, divorced from the carefully negotiated package that had been necessary to make the KHSA possible. Supporters of a "dam removal only" package scrapped and replaced the February 2010 KHSA, by amendments that fundamentally changed the KHSA approach and the concept of packaged agreements for the benefit of a broad range of parties.

Thus, in April of 2016, there was a second signing ceremony for a KHSA. The April 2016 KHSA did away with five of the six pillars of the original KHSA discussed immediately above, retaining only the state cost cap and protection of ratepayers. The April 2016 KHSA also provided that the dam removal entity would be a newly created non-profit corporation, the Klamath River Renewal Corporation. We acknowledge and appreciate that the 2016 Klamath Power and Facilities Agreement (KPFA) was also negotiated at this time and signed concurrently with the April 2016 KHSA. However, the KPFA provided none of the major bargained-for benefits or protections of the KBRA.

KWUA was at that time assured by KHSA parties, including the Secretary and the states, that irrigation would not be left behind. Dam removal proponents represented that KHSA parties would "come back and get you [irrigators]" but the April 2016 KHSA just had to be signed and go on its own. The KHSA parties' commitment to irrigation communities was stated in various ways, including defined support for the KPFA. With respect to the most important KBRA issue of all, a sufficient and reliable water supply for irrigation, the 2016 KHSA states, in section 1.9:

> **[T]he Parties are committed to engage in good faith efforts to develop and enter into a subsequent agreement or agreements pertaining to other water, fisheries, land, agriculture, refuge and economic sustainability issues in the Klamath Basin with the goal to complete such agreement or agreements within the next year.**

UPDATED DEVELOPMENTS

As you will observe, the attached August 10, 2020 memorandum expressed serious concerns about the KHSA parties' adherence to commitments in the April 2016 version of the KHSA, most particularly those that relate to the interests of irrigated agriculture in the Project. Those interests had been addressed in the KBRA, which had, between 2008 and 2016, been indivisible—legally, politically, operationally—from the KHSA.

The response to the August 10, 2020 memorandum has been deafening silence and pronounced indifference. No party to the 2016 KHSA can reasonably contend that it has honored the commitments in section 1.9 of that agreement. At most, 2016 KHSA parties could point to polite attendance at a handful of meetings that have occurred over the last five and one-half years. No party to the KHSA could reasonably contend that it has given a moment's attention or concern to the negative impacts to Project agriculture that **will** occur if the lower four dams on the Klamath River are removed. These matters had been addressed in the KBRA. But the KHSA parties no longer need Project agriculture: not for creating leverage on PacifiCorp that enabled the original dam removal settlement; not for obtaining necessary legislation such as Senate Bill 76 in Oregon; not for acquiescing in (and even supporting) a dam removal surcharge on power bills; and not for honoring, during the Trump Administration, prior commitments not to oppose the 2016 KHSA even after the KHSA had been severed from the KBRA.

However, 2016 KHSA parties *have* given attention and effort to a new agreement that changes the KHSA from its April 2016 terms. That new agreement is, of course, the November 2020 Memorandum of Agreement (MOA) between PacifiCorp, California, Oregon, the Yurok Tribe, the Karuk Tribe, and the Klamath River Renewal Corporation. The new agreement yielded the third public signing ceremony and wave of media coverage regarding dam removal. All the while, KHSA parties continued to ignore the agricultural communities they had rolled over in 2016 by severing the indivisible dam removal agreement from any need to care about agricultural interests.

The cornerstones of the MOA are the states' agreements to become co-licensees and the states' and PacifiCorp's agreement to backstop cost overruns. These terms have the effect of eliminating section 4.1.3 of the KHSA, and partially modifying section 7. Section 4.1.3 had capped the financial commitments of states and PacifiCorp and PacifiCorp's ratepayers. The capped contributions for states and ratepayers had for ten years been a core selling point for the KHSA, both in political and regulatory contexts. It was also a provision that allowed agricultural leaders to defend the KHSA.

The 2016 KHSA itself requires that certain parties agree to any amendment of the 2016 KHSA. *See* sections 8.4, 8.11.3.A(2), and 8.11.D. One of those parties is the United States and the United States did not agree to the elimination of section 4.1.3 or the provisions that require that the United States be a signatory to an amendment of the 2016 KHSA. We can only presume that the MOA parties were concerned that Secretaries Bernhardt and Ross might not have supported the amendment and, based on that concern, chose to bypass the requirements of the KHSA.

Related, when the original KHSA and KBRA were paired, KWUA supported inclusion, in California Proposition 1, of $250 million in bond funding to fulfill California's obligations under "[a]ny intrastate or multiparty settlement agreement related to water acted upon or [sic] before December 31, 2013." Cal. Wat. Code, § 79736(e). We remained silent on whether the completely overhauled KHSA in 2016 could still meet the test of having been acted upon before the end of 2013. The MOA, however, flouts the good faith of leaders in the agricultural community without whom the KHSA parties would not be where they are today.

While KHSA parties ignore their section 1.9 water-sharing commitments, Project irrigators are without water, period. Never since 1907 has the A Canal, the major artery for agriculture, been zeroed out. Until this year. As demonstrated in Attachment 2 to this letter, with implementation of the KBRA, there would have been a meaningful amount of Upper Klamath Lake water available for irrigation and Project wildlife refuges, even in this drought year.[2] But there is none. Instead, some KHSA parties advocate that agriculture in the basin just go away.

The elevation of dam removal to an end unto itself, and the overt disregard and disrespect for the interests of agricultural communities, are not acceptable.

SPECIFIC NEPA SCOPING COMMENTS

The Commission is undertaking the second Environmental Impact Statement (EIS) for facilities removal. In the first EIS, implementation of the KBRA was, for NEPA purposes, a related action. It is important that the Commission analyze and consider negative impacts associated with implementation of the 2016 KHSA and MOA on agricultural communities and wildlife associated with the Klamath Project and related national wildlife refuges. The socioeconomic effects would include any such effects associated with decreased agricultural activity.

The 2016 KHSA contemplates the transfer of title to Keno Dam to Reclamation, which would then operate the dam. It is foreseeable that Reclamation would also assume operation of Link River Dam. The KPFA (section II.A) contemplates certain actions to prevent the costs of operation and maintenance, rehabilitation, improvement, or other costs from being borne by water users in the Klamath Project. Those protections have not been fully implemented. Accordingly, the socioeconomic impacts of any increased costs to Project contractors and individual water users should be considered.

[2] Attachment 2 to this letter is a figure that depicts the amount of water from the Klamath system available for Project irrigation and wildlife refuges under three scenarios: (1) KBRA implementation; (2) operations plans and biological opinions adopted in 2013; and (3) the "Interim" Plan adopted by Reclamation in April of 2020 for application through September 2022. The year 1992 is quite similar to 2021 in terms of anticipated water availability under these scenarios.

In addition, dam removal and related activities may result in the presence of fish in the vicinity of Project diversions or other infrastructure. Section II.B of the KPFA provides:

> The Parties anticipate substantial programs for introduction or reintroduction of species not currently present in the Upper Klamath Basin, and substantial habitat restoration activities or programs, resulting in unique circumstances that could have potential regulatory or other legal consequences for users of water and land in the Upper Klamath Basin under Applicable Law, including new or modified regulatory obligations that could affect the ability to divert or use or dispose of water or the ability to utilize land productively. Further, the Parties affirm that interests in the Upper Klamath Basin with potential exposure to regulatory obligations have in good faith over a period of time preceding this Agreement, and preceding the KBRA: played a substantial role in bringing about the circumstances that make reintroduction possible; and that the other Parties through such period have confirmed the need to provide such assurances; and, if there were to be adverse consequences for regulated parties due to reintroduction or restoration, it would undermine the general goal that regulated parties promote and facilitate environmental restoration. The Parties make the commitments in Section II.B.2 below with full awareness that portions of the Klamath River and its tributaries currently present certain conditions harmful to fish. These conditions include degraded riparian habitat and stream channels, passage barriers, diversions resulting in entrainment, adverse water quality conditions, adverse hydraulic conditions, fluctuating water levels, and other impacts, known and unknown. Nothing in these commitments is intended to relieve pre-existing regulatory obligations . . . .
>
> The Parties commit to take every reasonable and legally permissible step to avoid or minimize any adverse impact, in the form of new regulation or other legal or funding obligation that might occur to users of water or land associated with the Klamath Reclamation Project from introduction or reintroduction of aquatic species to currently unoccupied habitats or areas, or from habitat restoration activities. At this time, the Parties have identified those measures in Sections II.B.2.b and c below to realize this commitment with respect to interests associated with the Klamath Reclamation Project. If unforeseen consequences to interests associated with the Klamath Reclamation Project result from reintroduction or restoration activities, the Parties agree to meet and confer in light of this commitment to determine any necessary future actions, including but not limited to, consideration of whether narrowly tailored regulations or legislation is necessary to ensure the realization of commitments in the first sentence of this Section II.B.2.a of this Agreement. With respect to the UKBCA, the Parties to UKBCA commit to seek regulatory assurances as provided in the UKBCA.

None the commitments or measures[3] referenced in the above passage from the KPFA have been implemented or even initiated. The negative effects to agriculture and wildlife refuges from the reasonably foreseeable, increased regulatory burdens resulting from species occupying or migrating in new areas must be analyzed and considered.

In addition, currently, the operable storage in PacifiCorp's reservoirs is often used to provide releases to the Klamath River in order to limit the releases from Upper Klamath Lake. This "borrowing" practice, which is undertaken for environmental purposes, would not be possible if the operable storage in the PacifiCorp reservoirs is eliminated.

Further, the EIS must consider whether and how dam removal could create a demand for Klamath River flows to flush sediment or otherwise facilitate the proposed action or its overall objectives. KWUA maintains that the Project cannot be required to provide any such water. However, there are repeated demands that the Project be operated to mitigate environmental conditions that the Project does not cause, and in several circumstances, these demands have been honored. The Project's responsibility was constrained under the once-indivisible KBRA.

Thank you for consideration of these comments. We are aware that there is a political wind at the back of dam removal efforts. However, there are significant, other issues that require attention at this time.

Sincerely,

Klamath Water Users Association

Paul S. Simmons
Executive Director and Counsel

Attachments

[3] The specific measures identified in the KPFA to reduce adverse consequences to Project agriculture and wildlife include: facilities to minimize fish entrainment associated with Project infrastructure; and excluding the Lost River and Tule Lake basins from the areas for introduction or reintroduction of species not currently present.

Klamath Water Users Association
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Klamath Falls, Oregon 97601

MEMORANDUM

TO: Parties to the Amended Klamath Hydroelectric Settlement Agreement

FROM: Paul Simmons, KWUA Executive Director and Counsel

SUBJECT: Attention to Klamath Project Interests

DATE: August 10, 2020

Klamath Water Users Association (KWUA) is following the progress of the amended Klamath Hydroelectric Settlement Agreement (Amended KHSA). We are aware of the considerable time and effort that has been committed to that process. At the same time, we are disappointed with the state of implementation of other commitments that, over a long period of time, made the Amended KHSA possible. The purposes of this memorandum are to describe our concerns, using the context of the events that led to the Amended KHSA, and to request you give attention to needs that are unaddressed.

In summary, we urge the parties' attention to section 1.9 of the Amended KHSA, which describes commitments to develop agreements related to water and provide economic stability for basin communities by 2017. We also explain our concern with the unsatisfactory state of implementation of key aspects of the Amended KHSA's sibling agreement, the 2016 Klamath Power and Facilities Agreement (KPFA). With the lack of implementation of these elements, removal of PacifiCorp's hydroelectric dams on the Klamath River would cause damage to Klamath Project water users. Finally, we also bring to your attention other bargained-for benefits for KWUA and its members that have not been realized.

KWUA's position on the Amended KHSA is non-opposition to the Amended KHSA in its current form. That commitment, made in the KPFA,[1] has been honored faithfully. With that said, and as discussed below, there is need for attention to several issues now.

The original draft of this memorandum was completed on July 13, 2020, just before the Federal Energy Regulatory Commission's (FERC) July 16, 2020 order on license transfer (172 FERC

[1] Section IV.A.2 of the KPFA states:

> Each Party [to the KPFA] shall support and defend the Amended KHSA, in its current form as of April 6, 2016, and its objectives in each applicable venue or forum, including any administrative or judicial action, in which it participates. For purposes of this Section IV.A.2 only, the term "support and defend" means that the Party will advocate for the Amended KHSA or refrain from taking any action or making any statement in opposition to the Amended KHSA.

We are aware that the Amended KHSA was further amended in November of 2016. We are not aware of the specific nature of the amendment or amendments, but we have not identified changes that affect KWUA's members' interests.

¶ 61,062). We are also aware of the letter to Amended KHSA parties from PacifiCorp dated July 23, 2020. It is our understanding that the Amended KHSA will terminate on January 19, 2021, unless all Amended KHSA parties or, at minimum the federal and state parties, PacifiCorp, and the Klamath River Renewal Corporation (KRRC), have agreed on an amendment or to deem the July 13 FERC Order to conform to the Amended KHSA. We understand that the Amended KHSA parties will be in communication with one another about these issues. KWUA urges your attention to the issues below.

Background: KBRA and KHSA, and "Indivisibility"

There is considerable history related to the Klamath Basin Restoration Agreement (KBRA), the Klamath Hydroelectric Settlement Agreement (KHSA), the Amended KHSA, and the KPFA. Beginning more than a dozen years ago, KWUA was asked to take certain positions or actions, or refrain from taking positions or actions, so that other parties could leverage PacifiCorp toward an agreement on dam removal and/or otherwise help make dam removal possible. There were instances where KWUA was asked to, and did, take action, or refrain from taking action, in a manner that advanced the objectives of the parties seeking dam removal. This occurred at considerable personal, professional, and financial expense, and affected relationships in the community. I hasten to add that the past partnership with KHSA parties in that joint effort was a two-way street, with KWUA and its members receiving important and various support on various issues, in an atmosphere of trust.

The development of the KBRA and KHSA were interrelated. Few know or remember that, in early 2008, a public draft of the KBRA was released. At that time, there was no settlement, and not even a conceptual settlement, with PacifiCorp concerning the hydropower dams. However, the 2008 public draft KBRA contemplated that there would eventually be some type of settlement with PacifiCorp.

The political momentum associated with the January 2008 public draft KBRA was significant. At the time the 2008 public draft KBRA was completed, there was discussion of whether it would be appropriate to seek necessary congressional authorization for that agreement alone, while making certain elements of the KBRA contingent upon ultimate realization of an agreement with PacifiCorp concerning PacifiCorp's hydropower dams. It was believed that the political environment was favorable for such legislation and that the legislation might further leverage PacifiCorp. However, some parties, primarily those whose major objectives focused on the downstream hydropower dams, were opposed to having the KBRA move by itself. Thus, it was agreed that the parties would turn their attention to pursuing a settlement with PacifiCorp related to the dams.

In the fall of 2008, PacifiCorp, the two states, and the United States announced an "agreement in principle" (AIP) related to the hydropower dams and a process that could result in dam removal. Notably, PacifiCorp and other parties had insisted and agreed that the existing FERC process was not suitable to the kind of complex settlement needed for this specific situation. Rather, federal legislation would be required to establish a workable procedure. Additionally, it was a nonnegotiable condition for PacifiCorp that the KHSA would not advance unless Congress had, by statute, granted immunity to PacifiCorp from any potential liabilities resulting from dam removal. The KHSA was then negotiated.

In parallel, there were refinements and updates, and conforming amendments, negotiated for the final KBRA.

One core principle for both the KBRA and KHSA was "indivisibility" – that is, the parties agreed that the two settlements would be legally and politically linked so that neither could advance without the other also advancing. For example, the KBRA could not be fully implemented unless legislation had been enacted authorizing the KHSA, and various benefits to agriculture (e.g., tribal settlements) would not be realized unless dams were actually removed pursuant to the KHSA.

The KHSA was "indivisible" from the KBRA because of the common need for legislation for both agreements. To make the KHSA indivisible from the KBRA, section 3.3.4.A of the KHSA provided that the "Secretarial Determination" necessary for dam removal under the KHSA process could not occur unless legislation authorizing the KBRA had been enacted.

The KBRA and KHSA thus both included an appendix identifying the elements of federal legislation to be supported by the parties. The appendix was identical for both agreements, and identified the substance of authorizations needed for both agreements.

Each of the KBRA and KHSA required that any party to either agreement also, concurrently, sign the other agreement. The lone exceptions were: PacifiCorp (which did not participate in the KBRA) and the federal parties who, we learned late in the process, would sign the KBRA only after authorizing federal legislation had been enacted.

Both the KBRA and KHSA were signed in February of 2010.

Various members of Congress drafted or introduced legislation to provide approval and implementation of both the KBRA and KHSA. This occurred in extremely close coordination with the settlement parties. The first bills were introduced in both the Senate and House in 2011. The last-introduced bill was in 2015, and would have also approved the "off-project" settlement that had been reached in 2014.

Notwithstanding the lack of federal legislation for implementation of the two agreements, several developments related to the KHSA occurred with KWUA's support: KWUA honored its commitments toward support of both agreements and indivisibility by supporting (and testifying in favor of) state legislation authorizing a dam removal surcharge on PacifiCorp's Oregon customers' power bills, intervening in public utilities commissions' proceedings that ordered the surcharge, and support of the authorization for further funding in California's Proposition 1.

Indivisibility Discarded

The KBRA provided that, if authorizing federal legislation was not enacted by December 31, 2015, the agreement would terminate. Because no legislation was enacted by that date, the KBRA terminated.

Under the KHSA, the failure of "timely" enactment of federal authorizing legislation triggered a process that could, but would not necessarily, lead to termination. This process was triggered in late 2015/early 2016. Also, under the KHSA, the so-called "big four" (PacifiCorp, California, Oregon, and the United States) could amend the KHSA without other parties' agreement. The big four developed principles under which the KHSA would be "amended" so as not to require federal legislation for implementation. Meanwhile, funding secured based on the original KHSA would remain available for dam removal under the processes of the Amended KHSA.

This development was not well-received by KWUA or its members. Despite all parties having been informed, and advocated to Congress, FERC, and others, that PacifiCorp could not make an agreement unless there was federal legislation to make it work, the non-irrigation parties pivoted and proposed to enter a new agreement on dam removal that did not require federal legislation. This agreement would make use of the fruits of prior collaboration with KWUA, including the leveraging of PacifiCorp and $450 million that would not have materialized absent the linkage of the original agreements.

Despite this significant let-down, KWUA and other irrigation parties were asked to "go along and get along," and thus let the Amended KHSA move by itself. In fact, the Amended KHSA would accomplish all that the original KHSA would accomplish, but it was to be divorced from any consideration of irrigation interests. We were asked to try to find ways that we could live with an abandonment of indivisibility and a fundamental overhaul of the KHSA. For better or worse, we accepted that invitation and placed trust in our partners, and we have taken no action to hinder or oppose the Amended KHSA.

The main consolation prizes for KWUA and its members at this time were included in the 2016 KPFA and certain representations in the Amended KHSA.

In April 2016, KWUA participated in the signing ceremony for the Amended KHSA and the KPFA, along with the Secretary of the Interior, both Governors Brown, and others.

Commitments Lacking Implementation

Un-addressed Injuries to Project Irrigation if Dams Are Removed

In early 2016, as it was being proposed that the Amended KHSA proceed on its own, KWUA was assured that other parties would, expeditiously, address issues important to KWUA. Far and away the most important of those was an adequate and reliable water supply, which was a core element of the KBRA. Section 1.9 of the April 6, 2016 Amended KHSA states:

> **[T]he Parties are committed to engage in good faith efforts to develop and enter into a subsequent agreement or agreements pertaining to other water, fisheries, land, agriculture, refuge and economic sustainability issues in the Klamath Basin with the goal to complete such agreement or agreements within the next year.**

A dominant purpose of this provision was to assure irrigation parties that they would not be left behind. We urge that all Amended KHSA parties review their actions since April of 2016 that relate to compliance with this commitment. At minimum, section 1.9 has not been honored with the same vigor as other aspects of the Amended KHSA.

Amended KHSA supporters contend that Amended KHSA implementation will have general benefits for the basin, including water supply for irrigation. When the Amended KHSA was paired with the KBRA, the benefits for irrigation were known. The most important of these was an adequately, reliable water supply. Currently, one can only hope that might return, but there has not been a committed effort to return to that sort of stability. Realistically, the opposite has occurred.

In this regard, Amended KHSA supporters emphasize that the hydropower dams do not store water used for Klamath Project irrigation or other irrigation. This is true. The principal function of the dams is to maintain water levels to provide head for what is largely run-of-the-river power generation.

That said, in recent years, the hydropower dams have provided water supply benefit for Klamath Project irrigation. Specifically, the limited operational storage in those facilities has allowed the U.S. Bureau of Reclamation (Reclamation) to reduce releases from Upper Klamath Lake for a period of time when Upper Klamath Lake elevations are considered important for suckers. As a result, risks to irrigators' ability to draw on Upper Klamath Lake have been avoided. These operations, and other limited system flexibility afforded by the dams, will not exist if the dams are removed. We can hope that this detriment would be overwhelmingly offset by a water supply benefit. But, it is a strong reason for concern that hope is all that we can have. Robust implementation of the commitments in Amended KHSA section 1.9 could have addressed and eliminated that concern.

Un-addressed Injuries to Project Irrigation if Dams Are Removed

Several parties to the Amended KHSA are also parties to the KPFA. All parties to the Amended KHSA agree (in section 1.9) to support or at least not oppose, the KPFA. KWUA largely agrees with KRRC's website's characterization of the KPFA: "the KPFA addresses the continued operations of other PacifiCorp facilities that will be transferred to Bureau of Reclamation. The agreement also commits parties to protect Klamath Basin irrigators from financial and regulatory burdens associated with fish returning to the Upper Klamath Basin and also commits parties to continue efforts to resolve water disputes."

For Klamath Project water users, there are two major sources of injury due to dam removal that have not yet been resolved: (1) new costs and potential liabilities associated with Keno and Link River Dams; and (2) new regulatory burdens. These are discussed in turn, below.

New Economic Burdens and Liability Risks: Keno and Link River Dams

There is a rich history of the interrelationship of the Klamath Project and PacifiCorp. PacifiCorp owns and operates Keno Dam and operates Link River Dam. Both of these facilities are important to Project irrigators and the current legal arrangements are based on arm's length negotiations.

Beginning 14 years ago, it has been understood and agreed by all parties to the settlement efforts – including federal parties – that if KWUA (and its members) were to facilitate dam removal, Klamath Project water users would not be saddled with costs related to the facilities currently operated by PacifiCorp. This principle was reflected in the very earliest conceptual settlement term sheets through the final KBRA. Notably, the January 2008 public draft KBRA included terms (pp. 28-29) to protect Project water users from bearing any costs for Keno or Link River Dams in the event PacifiCorp would discontinue operation (and discontinue ownership in the case of Keno Dam). (See pages 28-29 of the 2008 public draft KBRA.)

Similarly, under section 15.4.5 of the final KBRA, Keno and Link River Dams were to be operated by Reclamation consistent with historic practice, and Project water users would not bear any costs associated with these facilities. The contemplated federal legislation for KBRA implementation would have authorized these terms to the extent congressional authorization was required. The KHSA provided for the transfer of title to Keno Dam to Reclamation, and the parties supported legislation that would allow Reclamation to receive title to Keno Dam as part of the Klamath Project.

When the KHSA was severed from the KBRA, the Amended KHSA and KPFA carried forward the arrangements that had been provided in the prior agreements. That is, Reclamation would take title to Keno (Amended KHSA § 7.5) and Project water users would not bear any costs or liabilities associated with Keno or Link River Dams. The provisions concerning Link River Dam and Keno Dam in the 2016 KPFA (KPFA § II.A and Attachment A) are a major reason that KWUA and many Project districts signed the KPFA. Full implementation of these provisions requires federal legislation that would make effective the terms of Attachment A to the KPFA.[2]

The legislation necessary to provide protections for irrigators has not been enacted. The necessary measure passed the Senate in 2016, and has been proposed in other bills, but has not been enacted. As a consequence, dam removal will have negative effects on Project irrigation. Accordingly, we urge your aggressive support, in this Congress, of the necessary legislative measure.

New Regulatory Burdens Unaddressed

Another long-standing concern of irrigation parties is that dam removal not result in new regulatory burdens. A key objective of dam removal is to expand habitats of salmonids to areas that they do not currently inhabit. The KBRA provided protections against new regulatory burdens associated with the presence of these species in the Klamath Project area. Those protections are, of course, gone.

[2] The Amended KHSA, like the original KHSA, provides a process for transfer of title to the Keno facility to Reclamation. Unlike the original KHSA, the Amended KHSA does not assume a need for federal legislation in order for this to occur. We are unaware of why this is so, other than the Amended KHSA parties' desire to effect its implementation without need of authorizing legislation.

However, section II.B.1 of the KPFA, which is still in effect, states:

> The Parties anticipate substantial programs for introduction or reintroduction of species not currently present in the Upper Klamath Basin, and substantial habitat restoration activities or programs, resulting in unique circumstances that could have potential regulatory or other legal consequences for users of water and land in the Upper Klamath Basin under Applicable Law, including new or modified regulatory obligations that could affect the ability to divert or use or dispose of water or the ability to utilize land productively. Further, the Parties affirm that interests in the Upper Klamath Basin with potential exposure to regulatory obligations have in good faith over a period of time preceding this Agreement, and preceding the KBRA: played a substantial role in bringing about the circumstances that make reintroduction possible; and that the other Parties through such period have confirmed the need to provide such assurances; and, if there were to be adverse consequences for regulated parties due to reintroduction or restoration, it would undermine the general goal that regulated parties promote and facilitate environmental restoration.

Section II goes on to commit the parties to support protections from new regulatory burdens, including federal funding of facilities to limit regulatory consequences of the occurrence of new species in the Project area. These protections have yet to be realized or approved, in federal legislation or otherwise. Again, this means that, under the *status quo*, there would be adverse impacts to Klamath Project agriculture from dam removal. If the Amended KHSA is to be pursued further, the parties should be diligent to prevent adverse impacts to Project agriculture.

Other, Unrealized Bargained-for Benefits

As discussed above, for irrigation parties, the core benefit of the overall, indivisible KBRA-KHSA settlement package was a sufficient, reliable water supply. Section 1.9 the Amended KHSA includes commitments to return expeditiously to addressing those types of issues. But, as part of the overall bargained-for benefits the KBRA also included other terms of significant importance to irrigators that have limited or no consequence for other settlement parties. The recitals in the KPFA reflect this circumstance.

> Components of the KBRA as related to agriculture in the Upper Klamath Basin included the cost of power for irrigated agriculture and the operation of facilities related to irrigated agriculture. State and Federal and other Parties are committed to realization of processes and benefits contemplated under the three agreements, recognizing that certain outcomes were not guaranteed or are more uncertain than others and recognizing also that certain measures have independent merit.

In addition to the KPFA terms discussed above, the parties' commitments include support for specific legislative measures that would produce some of the results that would have derived from KBRA implementation. These actions are described in section II.C.1 of the KPFA. A few, but by no

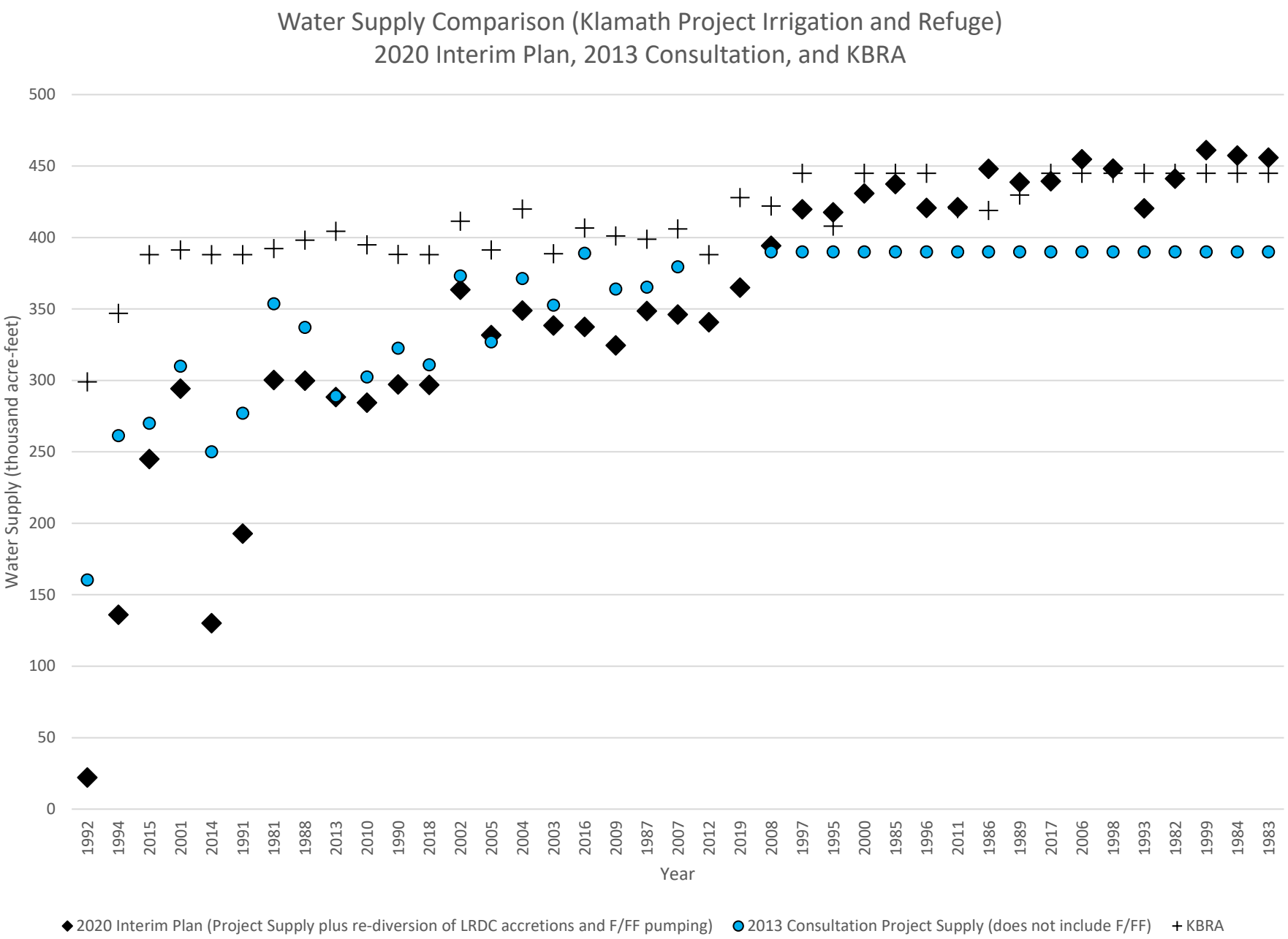
means all, of these legislative measures have subsequently become law. But the majority remain. Thus, again, KWUA requests your active support to accomplish these measures now.

Conclusion

We understand that KHSA parties believe that dam removal will provide broad benefits for the basin, including the Klamath Project. For all the reasons identified above, that perspective is too limited.

KWUA has intermittently identified some of the above issues to individual Amended KHSA parties. It is important that all of those parties are informed of all of these issues at this time.

Despite the very considerable concerns and realities above, KWUA remains non-opposed to the Amended KHSA in its current form. However, if implementation of that agreement is to continue, the Amended KHSA parties must address other priority issues.



ATTACHMENT 2