

April 18, 2022

Filed Electronically

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

Re: KWUA Comments on Draft Environmental Impact Statement for Hydropower License Surrender and Decommissioning of the Lower Klamath Project No. 14803-001 and Klamath Hydroelectric Project No. 2082-063

Dear Secretary Bose:

Please consider the following comments on behalf of the Klamath Water Users Association (KWUA) concerning the subject draft Environmental Impact Statement (DEIS).

The DEIS Fails to Evaluate Impacts Identified in Scoping

KWUA objects to the DEIS's failure to evaluate environmental impacts, including socioeconomic impacts, that KWUA identified in its scoping comments dated August 19, 2021. A copy of those comments is attached and hereby incorporated by reference.

The DEIS appears to have ignored the potential, and currently likely, negative impacts of dam removal related to agricultural communities. Those impacts will flow from regulatory demands and constraints that decrease the ability to divert and deliver water for irrigation. Associated negative impacts include loss of jobs and business activity, and the regional consequences that result therefrom. It is not appropriate or realistic to assume that there will be no such impacts.

The same regulatory constraints would also result in negative impacts to wildlife, on private land, in Klamath Irrigation Project canals and drains, and in Tule Lake and Lower Klamath National Wildlife Refuges, which rely on Project infrastructure for their water.

Our scoping comments included the statement that "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. We find no explicit recognition of this question or concrete information that answers the question, and request that this be disclosed. As with regulatory constraints that limit the ability to divert and use water, a demand for Klamath River flow makes less water available for irrigation and wildlife uses (or, for that matter, for retention in Upper Klamath Lake). Although KWUA does not believe that Upper Klamath Lake can (legally) or should be operated to provide flows related any dam removal activities, there is inadequate disclosure of whether and how the planning may contemplate that kind of operation.

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The first full paragraph on page 2-22 (section 2.1.2.12) of the DEIS states that “[a]dequate flows in the tributaries and the main river channel within reservoir areas are critical for active sediment evacuation activities.” We acknowledge that the text goes on to say that “[a]ctive measures to increase discharge in the river are infeasible.” But we do not know how to interpret that statement. Similarly, text on page 3-39 discusses operations of Upper Klamath Lake (“temporary flow control measures”) to facilitate dam removal, but it is at best ambiguous what this passage means. It is not appropriate to omit the evaluation of these issues; nor is proper to piecemeal the evaluation of impacts by deferring any consideration of direct and indirect impacts of changes in water availability for any use.

On page 3-44 (section 3.2.3.4) and Appendix A-15, the DEIS discusses an issue raised by KWUA in scoping comments that relates to potential consequences of eliminating the practice of “borrowing” from PacifiCorp’s reservoirs. The mathematics presented in support of the statement that removal “could result in a net gain of up to 6,200 acre-feet of water per year for the Klamath River” do not add up to a net gain of 6,200 acre-feet. The term “expected evapotranspiration” is not clear. In addition, the text does not address at all the question of *timing*. The borrow operation has been used to reduce releases from Upper Klamath Lake at specific times, to maintain water in Upper Klamath Lake, or to allow for diversion of water that otherwise would not occur. This operation can be especially important early in the irrigation season when crops need water. The rate of borrow is much greater than the season-long rate of evaporation that occurs from PacifiCorp’s reservoirs.

The DEIS’s Errors Should Be Corrected

The DEIS includes several assertions that are erroneous or at most subjects of disagreement or uncertainty. Where disagreement or uncertainty exists, FERC should so state, and explain its reasons for reaching conclusions on the matter in issue. Immediately below, we identify some specific instances where the DEIS text is not correct or omits a major fact.

Pages 2-60 (section 2.5) and 2-66 (section 2.5.3) refer to Klamath River flows required by a 2017 court order. That order has been ineffective since April of 2019. These pages also refer to flows required by a U.S. Fish and Wildlife Service biological opinion and that is not correct. Recent biological opinions by the National Marine Fisheries Service have not necessarily “required” specific flows, but have assumed specific flows would. Finally, the extent of the application of section 7(a)(2) to the operation of the Klamath Irrigation Project is in dispute.

Page 3-176 (section 3.4.2.1) discusses the nutrient content of return water from the Klamath Irrigation Project. This discussion is incomplete and not current. The Klamath Irrigation Project is a net nutrient sink, and there has been very minimal discharge from the Klamath Straits Drain in recent years. Thus, the Klamath Irrigation Project overall reduces the nutrient load in the Klamath River, and currently has little or no effect on nutrient concentrations at any location the river.

In the last full paragraph on page 3-474, the word “adjudicated” should be changed to “unadjudicated.”

In the ending paragraph at the top of page 3-475, there is no citation for the final sentence. The Treaty expressly reserves rights to hunt and fish on the reservation. In the Klamath Basin Adjudication, both the Oregon Water Resources Department and the Klamath County Circuit Court have ruled that the tribes have no water rights in waters that are not on or bordering the former reservation. The cases cited on page K-5 in

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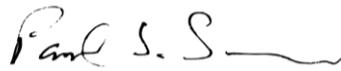
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support of the same assertion do not hold that there are hunting, fishing, and gathering rights along the Klamath River under the 1864 Treaty.

Sincerely,

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

Paul S. Simmons
Executive Director and Counsel
Klamath Water Users Association

Attachment



ATTACHMENT

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 removal¹ 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.

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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.

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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.

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None the commitments or measures³ 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.

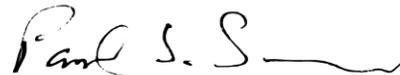
In addition, currently, the operable storage in PacifiCorp's reservoirs is often used to provide releases to the Klamath River in order to limit the releases from Upper Klamath Lake. This "borrowing" practice, which is undertaken for environmental purposes, would not be possible if the operable storage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

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.

Parties to the Amended Klamath Hydroelectric Settlement Agreement

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¶ 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 KHSAs 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 KHSAs, and various benefits to agriculture (e.g., tribal settlements) would not be realized unless dams were actually removed pursuant to the KHSAs.

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

The KBRA and KHSAs 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 KHSAs 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 KHSAs were signed in February of 2010.

Various members of Congress drafted or introduced legislation to provide approval and implementation of both the KBRA and KHSAs. 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 KHSAs 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 KRRRC'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.

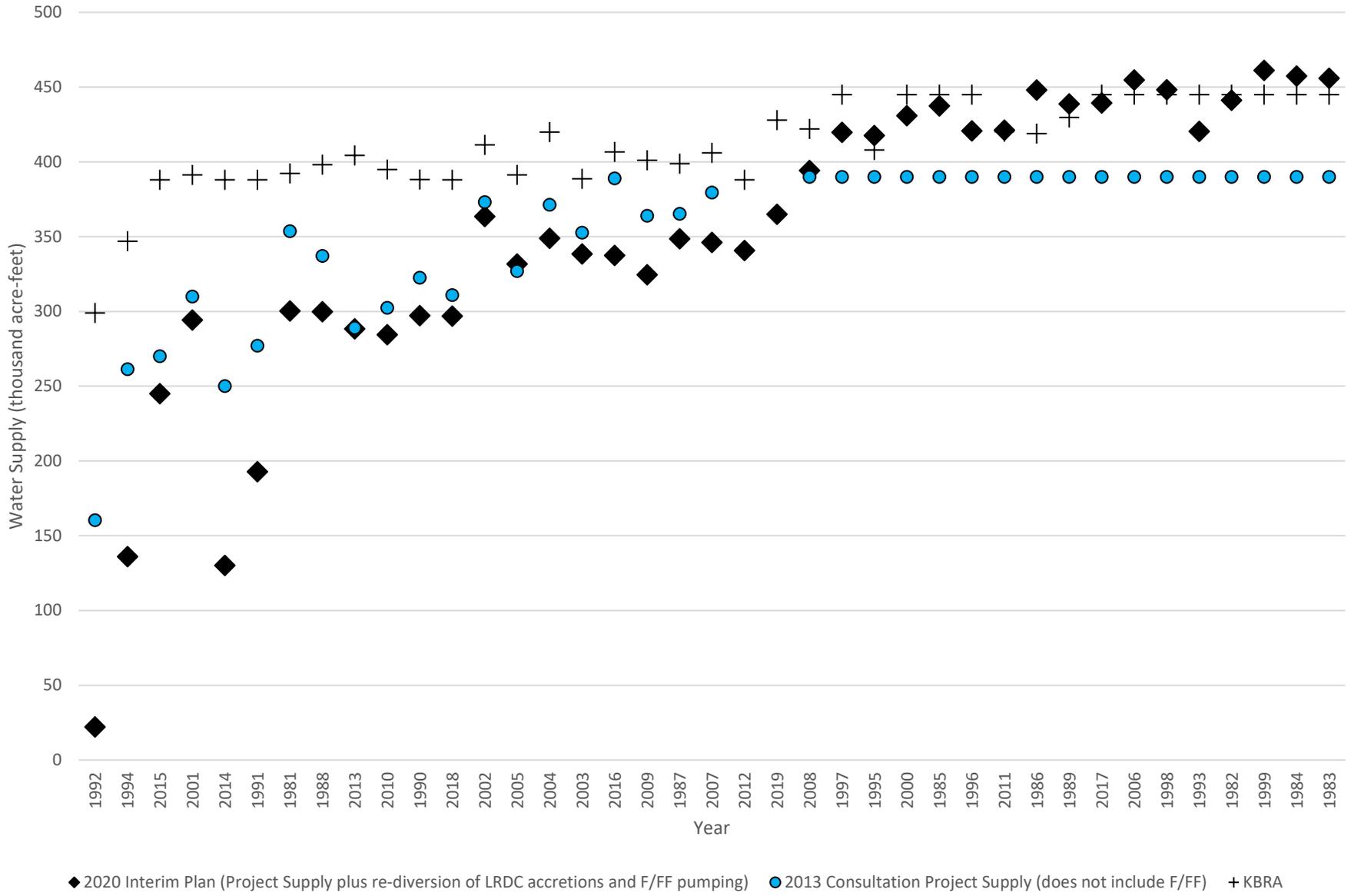
Conclusion

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.

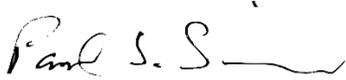
Water Supply Comparison (Klamath Project Irrigation and Refuge) 2020 Interim Plan, 2013 Consultation, and KBRA



CERTIFICATE OF SERVICE

April 18, 2022

I hereby certify that I have caused the Klamath Water Users Association's comments on the Draft Environmental Impact Statement for Hydropower License Surrender and Decommissioning of the Lower Klamath Project No. 14803-001 and Klamath Hydroelectric Project No. 2082-063 to be electronically served upon each person designated on the official service list compiled by the Secretary in this proceeding.

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

Paul S. Simmons
Executive Director and Counsel
Klamath Water Users Association