



Klamath Basin Restoration Agreement  
(KBRA)

Informational Packet

## **CONTENTS**

KBRA two-page Synopsis.....	Page 1
List of Current Local Supporting Entities.....	Page 3
KBRA Summary.....	Page 4
Family Farm Alliance ‘Water Review’.....	Page 15
Frequently Asked Questions.....	Page 21
Fact Sheet – Water Rights and the KBRA.....	Page 27
Fact Sheet – Lease Lands and the KBRA.....	Page 31
Fact Sheet – Irrigation Power Resources Program.....	Page 35

# KWUA Settlement Synopsis

## Parties involved in Development-- 26 Groups:

States and Federal Agencies, Tribes,  
Environmental/Conservation Groups, Commercial  
Fishermen, Irrigators

## Benefits to Klamath Project Family Farmers, Ranchers and local Districts —

- Klamath Project gets first water from Klamath Lake.
- The remainder is divided between river flows and lake levels.
- Klamath Project diversion limitation is 80,000 acre feet for winter use (primarily KDD and Lower Klamath NWR).
- Average to wet years' diversion limitation (Project + Refuge) is 445,000 acre feet, down to 378,000 acre feet in dry years.
- Diversion limits apply only to diverted water from Klamath Lake and/ or Klamath River. Lost River flows do not count against this total. Amounts relate to irrigation and refuges (duties to deliver refuge allocation identified below).
- The allowed diversion would be based on March 1<sup>st</sup> forecast with a 50% exceedence factor.
- Extremely dry years (i.e. 1992 and 1994) are 'extreme droughts'. Parties will develop a plan. At a minimum, Klamath Project exposure will be reduced in these years.
- Based on the 40-year period of record, surface water alone should meet the demand in 50% of the years. The other 50% of years - \$2.5 million will be used to study how to make the Klamath Project more efficient and how to set up a permanent water bank for the short water years. Funding for this program estimated at \$100 million over 10 years. The money will be used for well water & payment for idling land. Irrigators and Districts will have the responsibility to design and implement this program. Until the program is complete, an additional \$10 million annually for an interim "water bank" will be administered by the BOR or Project water users similar to current programs.
- A-B-C- water rights contracts will not be altered, however, the purpose of the plan is to make contract differences irrelevant (i.e., a producer chooses to either irrigate or agrees not to irrigate and is compensated).
- Klamath Project gets 10,000 acre feet added to its dry years' amount if one of the following occurs: New Storage; 4 dams come out (Iron Gate, Copco 1 & 2, J.C. Boyle); Klamath Basin Coordinating Council (a group made up of all parties) agrees to the addition.

## Refuge & Leaseland Impacts—

- Fish and wildlife and refuges will become "purposes" of the Klamath Project. Summer period water allocation for Lower Klamath NWR and other wildlife uses will be 60,000 acre-feet in average to wet years; 48,000 in dry years, and met as necessary from water diverted from Upper Klamath Lake and Klamath River. During extremely dry years, the Refuge can buy 10,000 acre-feet of water from farmers. If there is then not enough water for the combined irrigation and refuge diversion, then the refuge allocation drops to 24,000 acre-feet. From that time on, the refuge allocation and Klamath Project irrigation take an equal % cut. Winter period refuge allocation 35,000 acre feet.

## Other Terms and Benefits to the Klamath Project—

- Unknown and un-quantified Klamath Project Debt is eliminated.
- Allocation of funds from leaseland revenues: On Tule leaselands—25% to counties, 10% to TID, 20% refuges & 45% for Project capital improvements. On Area K—25% to counties, 10% to KDD, 20% to Refuges, & 45% for Project capital improvements.
- "D" Plant Operation and Maintenance Cost will be split as follows: 31.25% for refuges; 37.5 % for flood control by BOR; 31.25 % for irrigation / Leaseland farmers.

- The Settlement Parties support continued leaseland farming consistent with innovative practices now being employed.

### **Bottom Line water use changes—**

- Reliable and known supply of water on March 1. More water and predictability than we would get under the Current Biological Assessments and Biological Opinions from Federal Agencies. No ESA guarantee but substantially greater certainty.
- Less Water than what we need in 50% of the years.
- No Permanent downsizing of the Project.
- Allows for true conjunctive use of groundwater, pump in dry years, and recharge in average and wet years.
- Adjudication Settlement with Klamath Tribes, No Tribal Trust ‘Call’ for additional water from Tribes who sign agreement.

### **Power—**

The Objective: \$0.03 cost of power delivered for irrigation/drainage pumping only.

Settlement parties will seek federal legislation to allocate and deliver 0.001% of the federal power produced on the Columbia system for Project pumping, but not including private pumps that apply water directly to the land. For those pumps, \$1 million will be used to research the most cost effective way to spend the projected \$33 million needed to keep our power at \$0.03/kWh utilizing investment in renewable generation, state and federal tax credits and incentives. (Until the new renewable power is operational, interim funding is being sought to keep the growers’ power rates at \$0.03.) This program will apply both on and off-Project.

### **Regulatory Assurances—**

- The Klamath Project will have support for protections from new or reintroduced species listings. However, the ESA is still in place. Habitat Conservation Plans will be developed to protect all Upper Basin landowners from new financial or regulatory burdens that could result.
- \$47 million of settlement funding has been identified for use in addressing these issues both on and off-project.

### **Community Concerns that Have Been Expressed—**

- This settlement must be funded and will require federal and state legislation. 60% of the funding could come from funds previously allocated in federal and state agencies. The remaining 40% will require new funds. (Total cost of settlement is approximately \$1 billion.)
- The Klamath Project will get less water in drier years.
- Permanent retirement of 30,000 af water rights in Upper Basin (UKL Tributaries).
- Implementing the water program will be a challenge and take considerable effort.
- Power costs will be more than 6 mills and may not stay below \$ 0.03. There will be a need to continually develop new programs.
- Parties that sign, will be agreeing to support:
  1. Taking out 4 dams—Iron Gate, Copco 1 & 2 & J.C. Boyle. Keno and Link River dams stay. Any changes needed must protect irrigation and won’t be reimbursable (charged to) irrigators.
  2. Klamath Tribes receive 2/3rds funding for the purchase of 90,000 acres of private land in the Mazama Forest (the property is currently owned by East Coast based Fidelity Investments).
- Threats from lawsuits will not be entirely eliminated.

## Klamath Basin Restoration Agreement – Supporting Local and Statewide Entities

Cal-Ore Produce  
City of Tulelake  
Enterprise Irrigation District  
Klamath Basin Improvement District  
Klamath County Economic Development Association  
Klamath Drainage District  
Klamath Irrigation District  
Klamath Tribes  
Klamath Water Users Association  
Malin Irrigation District  
Midland District Improvement Company  
Oregon Water Resource Congress  
Pioneer District Improvement Company  
Plevna District Improvement Company  
Shasta View Irrigation District  
Sunnyside Irrigation District  
Tulelake Irrigation District  
VanBrimmer Ditch Company  
Westside Improvement District  
Winema Hunting Lodge, Inc.

# Summary of the Klamath Basin Restoration Agreement

January 15, 2007

## Summary and Status

Klamath River Basin stakeholders have developed a Proposed Klamath Basin Restoration Agreement. The Agreement is intended to result in effective and durable solutions which: 1) in concert with the removal of four dams, will restore and sustain natural production and provide for full participation in ocean and river harvest opportunities of fish species throughout the Klamath Basin; 2) establish reliable water and power supplies which sustain agricultural uses, communities, and National Wildlife Refuges; and 3) contribute to the public welfare and the sustainability of all Klamath Basin communities.

For over two years the Klamath Settlement Group, representing 26 organizations, has been working to develop a comprehensive solution for the Klamath Basin. All parties agreed to public release of the Proposed Agreement to inform the public and, where appropriate, to enable public review and comment before taking final action.

The Klamath Settlement Group is also negotiating with PacifiCorp to reach agreement on the removal of the utility's four lower dams on the Klamath River. Dam removal is a necessary part of the overall restoration effort, and the Hydropower Agreement along with the Proposed Agreement will provide a comprehensive solution for the Basin. The group is working to finalize both agreements in February.

The Klamath Settlement Group organizations are listed at the end of this summary.

## Scope of the Agreement

**General Provisions:** Part I (Sections 1 - 7) details the general provisions. These include the purpose of the agreement, the parties' obligations to support and implement the agreement, funding, dispute resolution, governance, and other general provisions. The agreement establishes a Klamath Basin Coordinating Council and Technical Advisory Team to coordinate implementation. The term of the agreement is 50 years and can be extended by the parties to the agreement; some water provisions would be permanent.

**Hydropower Agreement:** Part II (Section 8) states the parties' obligations to support the Hydropower Agreement (Appendix D). This provides for the removal of the lower four Klamath River dams under conditions that protect and advance the public interest.

**Fisheries Program:** Part III (Sections 9 - 13) describes the Fisheries Habitat Restoration, Reintroduction, and Monitoring Program. This will contribute to the sustainability and robust harvestable surplus of anadromous and other fisheries throughout the Klamath Basin.

**Water Resources Program:** Part IV (Sections 14 - 19) describes the Water Resources Program. This consists of schedules, plans, and other provisions to substantially change the management of delivered water supply for irrigation and related uses in the Klamath Reclamation Project, upper Klamath Basin, and the National Wildlife Refuges.

**Regulatory Assurances:** Part V (Sections 20 - 24) states the regulatory assurances under the federal Endangered Species Act and other laws, related to the performance of the Fisheries and Water Resources Programs.

**Power Resources Program:** Part VI (Sections 25 - 28) describes the Power Resources Program. This will provide power security for the irrigators participating in the agreement and for the National Wildlife Refuges. The Program will result in conservation and efficiency improvements as well as new renewable power generation.

**Counties Program:** Part VII (Sections 29 – 32) describes the Counties’ Impacts Mitigation and Benefits Program. This will assure that the removal of the four dams and the performance of other obligations under the agreement occur in a manner that benefits the interests of Klamath County, Oregon; Humboldt and Siskiyou Counties, California, and their residents.

**Tribal Program:** Part VIII (Sections 33 - 36) describes the Tribal Program. This will assure that the removal of the four dams and the performance of other obligations under the Agreement occur in a manner that benefits the interests of the Hoopa Valley Tribe, Karuk Tribe, Yurok Tribe, and Klamath Tribes and their members.

Key provisions of the agreement are summarized below; for a copy please go to the following website: <http://www.edsheets.com/Klamathdocs.html>.

## **Rebuilding Fisheries**

**Goal:** The purpose of the Fisheries Program is to restore and sustain natural production of fish species throughout the Klamath River Basin. The program: 1) provides for reintroduction of anadromous species above the current site of Iron Gate Dam, including tributaries to Upper Klamath Lake; 2) establishes conditions that, combined with effective implementation of the Water Resources Program and removal of the four lower dams on the Klamath River, will contribute to the natural sustainability of fisheries and full participation in harvest opportunities, as well as the overall ecosystem health of the Klamath River Basin; 3) assesses status and trends of fish and their habitats; and 4) assesses the effectiveness of actions and provides for adaptive management.

**Approaches:** The Fisheries Program will use collaboration, incentives, and adaptive management as preferred approaches. In the basin above Upper Klamath Lake, program planning will involve and reflect collaboration among Upper Basin irrigators, Tribes, and other appropriate parties. It will emphasize strategies and actions to restore and maintain properly functioning lake and river processes and conditions, while also striving to

maintain or enhance economic stability of adjacent landowners. Further, it will prioritize habitat restoration and monitoring actions to ensure the greatest return on expenditures

**Geographic Scope:** The focus of restoration and monitoring will be the Klamath River Basin, excluding the Trinity River watershed above its confluence with the Klamath River. The focus of reintroduction program will be the Upper Klamath Basin. The Agreement is not intended and will not be implemented to establish or introduce populations of salmon, steelhead, or Pacific Lamprey in the Lost River or its tributaries, or to the Tule Lake Basin.

**Fisheries Restoration:** The agreement provides a detailed process to restore fish in the Klamath Basin. Elements include:

- **Phase I Plan:** The plan will establish restoration priorities and criteria for selecting restoration projects over the next ten years. Specific elements will include, but may not be limited to, restoration and permanent protection of riparian vegetation, restoration of stream channel functions, remediation of fish passage problems, and prevention of entrainment of fish into diversions.
- **Phase II Plan:** Within seven years, the fish managers will develop a long-term plan based on the monitoring results of the Phase I actions. The Phase II plan will establish elements, restoration priorities, and an adaptive management process for the remainder of the agreement. The fish managers will revise the plan as appropriate.

**Dam Removal:** In the Klamath Basin Restoration Agreement, the parties commit to support a separate Hydropower Agreement to remove Iron Gate, J.C. Boyle, Copco 1 and Copco 2 Dams on the Klamath River. These dams block coho salmon, Chinook salmon, steelhead, and Pacific Lamprey from migrating above Iron Gate Dam. Removal of these dams will give salmon access to an additional 300 miles of habitat in the Klamath River and improve water quality.

The Klamath Settlement Group is negotiating with PacifiCorp to reach a Hydropower Agreement on the removal of the utility's dams. That agreement would address all of the steps necessary to safely remove the dams, including mitigation of the environmental and other impacts. The Hydropower Agreement will become part of the overall restoration effort.

**Fisheries Reintroduction:** The agreement includes a program to reintroduce fish to the areas currently blocked by the hydroelectric dams (except the Lost River). The Oregon Department of Fish and Wildlife will recommend a policy to the Oregon Fish and Wildlife Commission by May, 2008 to establish self-sustaining, naturally-produced populations of Chinook, steelhead, coho, and lamprey that were historically present in the Upper Klamath Basin.

- **Phase I:** This plan will address the near-term investigations, facilities, actions, monitoring, and decisions necessary to initiate and accomplish the reintroduction of

anadromous fish species. Key investigations that do not require fish passage through the PacifiCorp dams will begin as early as 2009.

- Phase II: This plan will address the management of re-established fish populations in presently un-occupied habitats and as part of the fisheries of the Klamath River Basin.
- Screening Program: One objective for the reintroduction program is to prevent reintroduced salmon and other aquatic species from entering irrigation diversions. The Bureau of Reclamation will evaluate appropriate methods and locations to screen Klamath Reclamation Project diversions, including: Lost River diversion channel or associated diversion points; North Canal, ADY Canal, and other diversions from Reclamation or Reclamation contractor-owned facilities diverting water from the Klamath River/Lake Ewauna.

**Additional Water for Fish:** The agreement includes a number of actions to increase the amount of water to improve instream flows and maintain the elevation of Upper Klamath Lake; these measures include:

- Interim Program: The parties to the agreement will support funding for an interim water bank program to provide interim Klamath River flows and maintain Upper Klamath Lake levels.
- Permanent Increase in Water for Fish Management: The agreement establishes limitations on the quantity of water diverted from Upper Klamath Lake and the Klamath River for use in the Klamath Reclamation Project. The agreement calls for the Klamath Water and Power Agency (KWAPA)—a joint powers entity comprised of irrigation districts—to develop a long-term plan which will include measures to stay within the permitted diversion. Once the plan is complete, the limitations will become permanent and enforceable. The Department of Interior and Yurok Tribe have estimated that the limitation will result in the availability of water for irrigation being 100,000 acre feet less than current demand in the driest years, with irrigation water availability increasing on a sliding scale with increasingly wet conditions.
- Upper Klamath Basin Water Program: The agreement establishes a voluntary program for the retirement water rights or water uses for the Wood River, Sprague River, Sycan River (excluding the drainage from the Sycan Marsh upstream), and the Williamson River (from the confluence with the Sprague River upstream to Kirk) that will be designed to secure 30,000 acre feet of water for additional inflow to Upper Klamath Lake. The program also includes a voluntary program to improve fisheries habitat and provides federal regulatory assurances to landowners in these sub-basins in a manner that seeks to maintain landowner economic stability.
- Additional Water Supply, Conservation, and Storage: The agreement includes additional obligations to enhance water conservation and provide for further water storage. Measures to increase water supply in Upper Klamath Lake include completion of the breaching of levees in the Williamson River Delta to add

approximately 28,800 acre feet of storage; reconnecting Barnes Ranch and Agency Lake Ranch to Agency Lake to add approximately 63,700 acre feet of storage; and reconnecting Wood River Wetlands to Agency Lake to provide approximately 16,000 acre feet of storage. The parties to the agreement will also support completion of the feasibility report under the Klamath Basin Water Supply Enhancement Act of 2000, ongoing investigations of additional storage, and criteria for the use of water from such storage.

- **Protection for Additional Water:** The agreement has provisions to ensure that all the additional water generated by the programs will remain in Upper Klamath Lake or the Klamath River to benefit fish.
- **Management of Environmental Water:** All of the additional water will be managed for the benefit of fisheries in the Upper Klamath Lake and Klamath River. The agreement establishes a Technical Advisory Team that will develop an Annual Water Management Plan that will provide recommendations to the Secretary of the Interior. During each water year, the Technical Advisory Team will also recommend ongoing, real-time operations to adjust for changing conditions.
- **No Adverse Impacts from Groundwater Use:** The agreement includes provisions to ensure that groundwater use does not have significant impacts on river flows important to fisheries. If investigations by the U.S. Geological Service identify defined adverse impacts, the agreement provides procedures to implement a remedy. The agreement also sets up a process if further investigations warrant other measures to respond to effects on fisheries.

**Additional Water for Wildlife Refuges:** The agreement provides specific allocations and delivery obligations for water for the Lower Klamath and Tule Lake National Wildlife Refuges. It also increases the water availability and reliability above historical levels.

**Drought Plan:** The United States, California, Oregon, KWAPA, each Tribe, off-project water users, commercial fishers, and other interested parties will develop a Drought Plan. This Plan will include a process to ensure increasingly intensive water management for agricultural, National Wildlife Refuges, and in-lake and in-river fishery purposes in drought years, and in preparation for the potential of an extreme drought to avoid or minimize adverse impacts to Klamath Basin communities and natural resources in response to increasingly dry conditions.

**Climate Change:** As early as practicable, the parties will determine whether and, if so, how long-term climate change will affect the fisheries and communities of the Klamath Basin. The parties will re-convene to negotiate in good faith any supplemental terms to the agreement which may be necessary to address changes in the climate in order to achieve the parties' goal of maintaining sustainable fisheries and communities.

**Monitoring:** The fish managers will develop a fish monitoring plan that will assess the status and trends of fish populations and their habitats; this effort will also evaluate factors that are limiting the restoration of fish populations. It will provide information for the restoration actions and the management of fisheries.

The Monitoring Plan will collect data on instream flows and Upper Klamath Lake elevations to evaluate the outcomes of the Water Resources Program. This information will also be used by the Technical Advisory Team in developing the Annual Water Management Plan.

The Monitoring Plan will also assess the effectiveness of the restoration actions. This information will be used to determine restoration priorities and other adaptive management actions.

**Implementation:** The agreement establishes an annual process to determine funding needs, funding availability, and set priorities for the Fisheries Program. The fish managers will also prepare annual reports on all activities that were implemented.

## **Sustainable Communities**

**Water Supply Certainty:** The agreement contains a number of measures to provide water supply certainty:

- **On-Project Plan:** The parties to the agreement have agreed to a permanent limitation on the amount of water that will be diverted from Upper Klamath Lake and the Klamath River for the Klamath Reclamation Project. KWAPA will have the sole responsibility to develop and implement the On-Project Plan. The plan will align irrigation water supply and demand for the project consistent with the diversion limits. KWAPA will evaluate the following measures to meet the purpose of the plan: conservation easements, forbearance agreements, conjunctive use programs, efficiency measures, land acquisitions, water acquisitions, groundwater development, groundwater substitution, other voluntary transactions, water storage, and any other applicable measures.
- **Funding:** The parties will support the funding estimates for the plan that are in the agreement. Reclamation will consider whether funds made available for the interim flow and lake level program that are not expended in a year should be made available to accelerate the implementation of the On-Project Plan.
- **Additional On-Project Water:** The agreement would increase the allocation of water to the Klamath Reclamation Project in some years by 10,000 acre feet once the four PacifiCorp dams are removed or additional storage is available. The Klamath Basin Coordinating Council could also provide this increase after February 2020 after receipt of recommendations from the Technical Advisory Team.

- Change in Authorized Purposes of the Klamath Reclamation Project: The agreement would provide support for federal legislation which would add fish and wildlife and national wildlife refuges as authorized purposes of the Klamath Reclamation Project, with terms to protect the existing agricultural uses that are consistent with the agreement. The change will facilitate the ability to provide reliable water supplies to the National Wildlife Refuges.
- On-Project Water Rights Assurances: The Agreement includes provisions to provide water rights assurances related to water diversions from the Klamath Tribes, the Karuk, Yurok, and Hoopa Tribes, and the United States as a trustee of the tribes to the Klamath Reclamation Project and, includes resolution of certain contests in the Klamath Basin Adjudication.
- Drought Plan: The agreement identifies a number of strategies that would be used to deal with extreme drought conditions including voluntary water conservation measures, additional stored water, leasing water on a willing-seller basis, the use of groundwater (for irrigation purposes or to replace water that would otherwise be diverted), and reduction of water diversions by exercise of water rights priorities. Water diversions to the Klamath Reclamation Project could only be limited in an Extreme Drought (e.g. 1992 or 1994) and if these other measures were not sufficient.
- Upper Basin Water Adjudication: The agreement establishes a process to develop an Off-Project Water Settlement (OPWAS) to 1) resolve claims between Off-Project Irrigators, the Klamath Tribes, and the Bureau of Indian Affairs in the Klamath Basin Adjudication in Cases 277, 279, 280, 281, 282, 284, 285 and 286; 2) provide reciprocal assurances for maintenance of instream flows and reliable irrigation water deliveries, notwithstanding the outcome of any unresolved contests; and 3) provide for a voluntary Water Use Retirement Program. This program will be designed to maintain the economic character of the Off-Project agricultural community and to not adversely impact the water rights of any remaining contestants who are not signatories to the OPWAS.

**Keno and Link River Dams:** The parties will support provisions in the Hydropower Agreement to transfer Keno Dam to the Bureau of Reclamation. Keno and Link River dams would continue to provide water to the Klamath Reclamation Project.

**Maintain Lease Land Farming:** The parties to the agreement support continued lease land farming on Lower Klamath and Tule Lake National Wildlife Refuge that uses practices that enhance waterfowl management while optimizing agricultural use and maximizing lease revenues.

**Maintain Walking Wetlands and Other Wildlife and Agriculture Partnerships:** The agreement would continue a refuge-approved program that incorporates managed wetlands into agricultural crop rotations on the Wildlife Refuge as well as on private lands in the Klamath Reclamation Project. Such wetlands support the diversity of waterfowl species endemic to the Upper Klamath Basin. Walking wetlands that are

returned to agricultural production enhance agricultural crop yields and reduce or eliminate the need for chemical inputs by enhancing soil fertility and reducing soil pests and diseases to crops.

**Consistency with State Water Law:** The agreement would not limit the authority of the Oregon Water Resources Department to administer existing water rights or determine water rights in the ongoing Klamath Basin Water Rights Adjudication. The agreement also will not affect the California Water Resources Control Board's regulatory authority, as it will not be a signatory.

**Regulatory Assurances:** The parties to the agreement 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 upstream of Iron Gate Dam from introduction or reintroduction of aquatic species to currently unoccupied habitats or areas.

- Unforeseen Circumstances: If unforeseen consequences result from reintroduction during the course of the agreement, the parties will meet and confer to determine any necessary future actions, including, but not limited to, consideration of whether narrowly tailored regulations or legislation is necessary to minimize any impacts.
- Endangered Species Act: The agreement establishes steps designed to comply with the Endangered Species Act, including the preparation of biological opinions on specific federal actions called for in the agreement. The agreement also establishes a process to develop a General Conservation Plan(s) or Habitat Conservation Plans that would be designed to assist non-federal parties to comply with the ESA. Participation in these plans would be voluntary.
- Before seeking any further limitations on diversion, use and reuse of water related to the Klamath Reclamation Project beyond the limitations in the agreement, NMFS and FWS will consider, to the maximum extent consistent with the ESA and any other applicable law, whether increased water supply in Upper Klamath Lake and all other relevant obligations for the protection of the affected resources have been implemented. NMFS and FWS will also consider whether there are any alternatives, including additional habitat restoration actions or alternative sources of water. If other parties believe that listed species are in jeopardy of extinction, the agreement also describes the steps that the parties would take to ensure timely implementation of the measures in the agreement, explore other alternatives, and pursue dispute resolution before a party would initiate litigation that could limit the diversions.

**Power Resources Program:** The purpose of this program is to provide power cost security to assist in maintaining sustainable agricultural communities in the Upper Klamath Basin, including water efficiency and conservation practices in the Klamath Reclamation Project and power for water management by and for National Wildlife Refuges.

The Program includes a number of actions that are designed to maintain a power cost target level of approximately three cents per kilowatt-hour (in 2007 dollars). The Program includes an interim program, support for legislation to secure federal reserve power to serve specific pumping facilities associated with the Klamath Reclamation Project, and a long-term program to implement energy efficiency and new renewable resource generation.

This program will provide benefits to on-project customers. It will also provide benefits to off-project customers that support the Basin Agreement and Hydropower Agreement and/or participate in the water rights retirement program, the fish restoration program, or the regulatory assurance programs when they are available.

**Counties Program:** This program contains elements to ensure that the Hydropower Agreement addresses mitigation and other protections for the residents of Humboldt, Klamath, and Siskiyou counties. It also includes programs to address specific economic impacts associated with removal of the four dams, including programs to offset potential property tax losses in Klamath and Siskiyou Counties.

**Tribal Program:** The Parties support the goals of each tribe to achieve the revitalization of tribal subsistence and related economies. The parties support the Tribes as they strive to meet a reasonable standard of living, a standard recognized in the reservation of tribal fishing and other related rights, until the fisheries are restored to a level that allows full participation in harvest opportunities. Under the agreement, the parties will support funding to assist the Tribes in developing the capacity to participate as grantees and in the collaborative management of the Fisheries Program.

The parties acknowledge that the agreement addresses primarily tribal fishing and water matters, and accordingly agree that they will also support efforts by the Tribes to secure economic revitalization programs and funds such that the Tribes may achieve long-term economic self-sufficiency. Funding will be provided to each Tribe for the development and planning of long-term economic revitalization projects. The parties also support funding for the Mazama Forest Economic Development Project in Klamath County, Oregon.

## **Implementation and Funding**

A key feature is a commitment by the parties to the agreement to cooperate fully in its implementation. The agreement requires each Party to perform its obligations in good faith and with diligence, zeal, and loyalty.

**Governance:** The agreement establishes the Klamath Basin Coordinating Council to facilitate coordination, cooperation, collaboration, and accountability by the parties to ensure that elements of the Klamath River Basin Restoration Agreement are carried out effectively. The Council will provide for general implementation oversight, including activity and program coordination, information sharing, priority setting, fund seeking,

and dispute resolution related to implementation of the agreement. It will also serve as the primary forum for public involvement.

**Dispute Resolution:** The agreement establishes a process to resolve issues among the parties. The process includes four steps 1) clear notice of a dispute; 2) informal meetings to resolve the dispute; 3) referral of the dispute to the Klamath Basin Coordination Council; and 4) mediation. The agreement also includes enforcement provisions and a party may take actions to enforce any contractual obligation under the agreement after complying with the dispute resolution procedures.

The parties to the agreement acknowledge that resorting to litigation will be a last resort, made only after careful consideration of the potential collateral consequences for the agreement.

**Funding:** The parties have developed estimates for the costs of implementing the agreement and will support authorization and appropriation of funds from federal and state governments. The Klamath Settlement Group estimates that the cost of implementing the agreement in FY 2008 would be approximately \$32 million. The long-term cost of the habitat, water programs, and other measures in the Basin Restoration Agreement would be about \$96 million dollars per year. Of the total, over 90 percent is budgeted for fisheries restoration and reintroduction and actions to enhance the amount of water for fish. The group believes that current fisheries efforts can be reallocated so the total additional funding would be approximately \$40 million per year.

## **Organizations in the Klamath Settlement Group**

### **United States**

U.S. Department of Agriculture, Forest Service

U.S. Department of Commerce's National Marine Fisheries Service

U.S. Department of the Interior, including Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, and Fish and Wildlife Service

### **State of California**

California Department of Fish and Game

### **State of Oregon**

Oregon Department of Environmental Quality

Oregon Department of Fish and Wildlife

Oregon Water Resources Department

### **Tribes**

Hoopa Valley Tribe

Karuk Tribe

Klamath Tribes

Yurok Tribe

## **Counties**

Humboldt County, California  
Klamath County, Oregon  
Siskiyou County, California

## **Parties Related to Klamath Reclamation Project**

Tulelake Irrigation District  
Klamath Irrigation District  
Klamath Drainage District  
Klamath Basin Improvement District  
Ady District Improvement Company  
Enterprise Irrigation District  
Malin Irrigation District  
Midland District Improvement Company  
Pine Grove Irrigation District  
Pioneer District Improvement Company  
Poe Valley Improvement District  
Shasta View Irrigation District  
Sunnyside Irrigation District  
Don Johnston & Son  
Modoc Lumber Company  
Bradley S. Luscombe  
Randy Walthall and Inter-County Title Company  
Reames Golf and Country Club  
Winema Hunting Lodge, Inc.  
Van Brimmer Ditch Company  
Collins Products, LLC  
Plevna District Improvement Company  
Klamath Water Users Association  
Klamath Water and Power Agency

## **Klamath Off-Project Water Users Association**

### **Non-Governmental Organizations**

American Rivers  
California Trout  
Friends of the River  
Klamath Forest Alliance  
National Center for Conservation Science and Policy  
Northcoast Environmental Center  
Northern California/Nevada Council Federation of Fly Fishers  
Pacific Coast Federation of Fishermen's Associations  
Salmon River Restoration Council  
Trout Unlimited.

# Water Review

*A Perspective On Western Water Issues Prepared By The Family Farm Alliance And Its Members*

OREGON, CALIFORNIA

## The Klamath Settlement Pact Includes Key Elements Between Basin Tribes And Reclamation Project

### OVERVIEW

**E**arlier this month, negotiators representing the diverse communities of the Klamath Basin (OREGON, CALIFORNIA), along with federal, state, and county governments, released a proposed agreement to rebuild fisheries, sustain agricultural communities, and resolve other longstanding disputes related to allocation of basin water resources. The proposed agreement would have a 50-year term and identifies a purpose as establishing “peace on the river”. The Klamath Settlement Group has developed this proposed agreement in two years of negotiations.

On the January 15 agreement release date, Greg Addington of the Klamath Water Users Association said, “The result is a series of compromises and commitments between farmers, tribes, conservationists, counties and state and federal agencies aimed at keeping all of the Klam-

*(Continued on Page 2)*



Wikimedia

The Klamath River watershed.

# Klamath: Tribal Claims Are Key Settlement Element

(Continued from Page 1)

ath's rural communities economically and ecologically viable."

Of interest to many – and an issue of considerable controversy – are provisions in the proposed Klamath Basin Restoration Agreement (KBRA) that are structured to settle tribal water rights claims between tribes in the Klamath Basin and the Klamath Irrigation Project. This edition of the *Family Farm Water Review* has been prepared with the assistance of the Klamath Water Users Association, one of the parties that has helped develop the proposed agreement over the course of two years of negotiations.

## WATER RIGHTS SUMMARY

Under the proposed agreement, water users in the Klamath Project would essentially agree to limit the quantity of water diverted from Upper Klamath Lake and the Klamath River from the Project's points of diversion to a specified amount. The KBRA also provides for funding of a program so that project water users will be able to "live within" the agreed quantity.

The settling Tribes, and the United States as their trustee, would agree not to assert tribal rights so as to interfere with diversion and use of this agreed Project use of water, making it guaranteed as far as tribal water rights and trust obligations of the Bureau of Reclamation ("Reclamation") are concerned; this aspect of the agreement would have permanent effect. In the Klamath Basin Water Rights Adjudication, where claims of the Klamath Tribes are scheduled to be litigated in the next few years, the KBRA terms would be implemented through documents filed with the state.

The agreement would not result in granting any tribal water rights to any tribe or affect the ability of any opponent of tribal claims other than Project water users to contest any tribal claims. The agreement only deals with:

- Whether or to what extent the Klamath Tribes can make a call against, or

Compiled by:

Klamath Water Users Association

## Summary of Other Agreement Provisions

Other key provisions of the Klamath River Basin Restoration Agreement include:

- A reliable and certain allocation of water sufficient for a sustainable agricultural community and national wildlife refuges.
- A program to stabilize power costs for the Upper Klamath Basin's family farms, ranches and the national wildlife refuges.
- A program for counties that may be impacted by the removal of the hydroelectric facilities.
- A program to rebuild fish populations sufficient for sustainable tribal, recreational, and commercial fisheries. Elements include actions to restore fish populations, including a program to reintroduce anadromous species in currently-blocked parts of the basin; actions to improve fish survival by enhancing the amount of water available for fish, particularly in drier years; and other efforts to support tribes in fisheries reintroduction and restoration efforts.

The Klamath Settlement Group is still working to refine some details in the agreement. The group is also negotiating with PacifiCorp to reach agreement on the removal of the utility's four lower dams in the Klamath Basin. That eventual hydropower settlement agreement will become part of the overall restoration effort.

demand water from, the Klamath Project based on the Klamath Tribes rights in Upper Klamath Lake and the Klamath River, whatever those rights may be.

(Continued on Page 3)



# Klamath: State Of Oregon Water Rights Adjudication

Wocus Bay on  
Upper Klamath Lake.

Oregon Historical County Records Guide

*(Continued from Page 2)*

- Whether tribes on the lower river can demand the Project use less water than what would be agreed upon.

In both cases, the answer is “no”, says KWUA attorney Paul Simmons (CALIFORNIA). “No one else is affected in any way.”

There are, in the meantime, various interim protections for the Project. Until the water users have implemented their on-project plan, the Tribes would not be able to assert a demand based on tribal water rights against any water use in the Klamath Project. There are also various provisions that ensure that, if the agreement is not implemented, Klamath Project irrigators and the tribes will simply return to their positions that exist today and be able to assert their arguments against one another, just as they can today.

## BACKGROUND

The State of Oregon is currently conducting an adjudication of water rights that is to determine the nature and extent of water rights of the Klamath Tribes to have water remain in streams and lakes. This proceeding is in an administrative phase.

Following the issuance of the “Findings of Fact and Order of Determination” (FFOD) by the Water Resources Department, parties have the opportu-

ity to file exceptions in Klamath County Circuit Court, where further litigation would occur before the issuance of a decree. In the meantime, however, the state will regulate water rights based on the FFOD unless that order has been stayed.

In 1983, the United States Court of Appeals for the Ninth Circuit, in the Adair case, ruled that the Klamath Tribes have water rights for fisheries purposes on the Tribes’ former reservation with the priority of “time immemorial.”. The federal court further stated that the actual scope and quantification of the Klamath Tribes rights would be decided in the state adjudication.

In the adjudication, the Klamath Tribes, and United States as trustee, have filed various claims for instream flows including for:

- Tributaries of Upper Klamath Lake.
- Water to maintain Upper Klamath Lake elevations.
- Flows in the Klamath River from Link River Dam to the Oregon-California border.

Irrigation interests are contesting these claims because approval of the claims could have major adverse consequences for irrigators. Klamath Project irrigators are contesting only the claims for Upper Klamath Lake and the Klamath River because these are the only claims that could adver-

*(Continued on Page 4)*

# Klamath: Water Settlements Within The Agreement

*(Continued from Page 3)*

sely affect the Project.

Irrigators in the Upper Klamath Lake watershed are contesting those same claims, as well as the claims for water in the tributaries of Upper Klamath Lake.

These claims are all currently scheduled to go to hearing within the next few years.

“The costs of opposing these claims would be very significant, and the outcomes are uncertain for all involved,” says Mr. Addington.

There is no adjudication process in progress related to water rights of Tribes on the lower Klamath River.

Federal courts have held that the Yurok and Hoopa Valley Tribes have federal reserved fishing rights on the Klamath River.

The tribes assert water rights for those fisheries as well as trust obligations of Reclamation to provide flows.

The Solicitor of the Department of the Interior has issued opinions that conclude that the tribes in fact hold water rights for Klamath River flows, with 19<sup>th</sup>-century priority. The scope of any such rights is of course a matter of debate.



U.S. Bureau of Reclamation

The Klamath River

## WATER SETTLEMENTS

The proposed KBRA deals with tribal water rights issues in several areas. One provision that is central to permanent resolution of the water rights issues involving tribes, provides interim assurances that the tribes will not demand water from the Klamath Project that interferes with diversion of the agreed water use for the Project. This specific assurance becomes permanent if certain conditions occur

*(Continued on Page 5)*

## **Klamath:** ‘Common Approach’ In Such Cases

before December 31, 2012. The Secretary of the Interior would be obliged to publish a finding if those conditions occur.

“This is an approach used in other recent Indian water rights settlements, including one just concluded in Arizona where the requisite finding of the Secretary of the Interior was made in December of 2007,” said Mr. Simmons.

With respect to the Klamath Tribes, the mechanics of the proposed KBRA are as follows:

- Project water users “provisionally” agree to withdraw contests of the Klamath Tribes claims for water in Upper Klamath Lake and the Klamath River.
- The Klamath Tribes provisionally agree not to assert rights against the Project that would interfere with the agreed water use for the Project.
- Both of these commitments will become permanent if specified conditions are met.

In the meantime, there are also additional assurances by the Klamath Tribes that apply whether or not the permanent commitments occur:

- Beginning on the effective date of the KBRA, the Klamath Tribes would agree not to assert any tribal demands against ANY use of water in the Klamath Project. This commitment would remain in effect until the water users

**(Continued on Page 6)**

Compiled by:

## **Water Rights Elements Dividing Ag Community**

As with any intensely-debated and agreed upon settlement between divergent interests, the Klamath settlement doesn’t make everyone happy.

The massive settlement document – over 250 pages in length – has completely satisfied no one, and has ignited some real brush fires in other Klamath Basin camps. A group that calls itself the Klamath Off-Project Water Users (those who are not within the Klamath Project and generally ranch upstream of Upper Klamath Lake) is campaigning against the settlement.

Off-Project interests believe the agreement does not resolve adjudication, and have run newspaper ads and created websites to broadcast their concerns. They are concerned that the agreement recognizes the Tribal water rights at the claimed amounts and with the priority date of time immemorial. One website claims that if the full Tribal claims are drafted as proposed, those claims would “eliminate virtually all water use outside the Klamath Project.” The site goes on to claim that if the Tribes find a “loophole” in the agreement not to enforce these claims against the Klamath project, the Klamath Project will be shut down as well.

**KWUA ATTORNEYS** disagree. “This settlement provision simply reflects that the Project water users are not going to contest the Tribes’ claims further,” said KWUA attorney Paul Simmons (CALIFORNIA). “In other words, Project water users will effectively acquiesce to those claims, but subject to all the other conditions.” Simmons and others at KWUA also believe that the terms of the KBRA will not and legally could not, affect the rights of any other party who is currently contesting the tribal claims in the adjudication.

“Those parties will have the ability to present evidence and argument of any kind against those claims, and the Water Resources Department, and later the court, will decide what the Klamath Tribes’ water rights are,” said Mr. Simmons.

The Project water users would not, however, be participating in this process.

**THE SETTLEMENT WITH** other settling tribes is similar, while recognizing that there is no pending adjudication to determine the water rights of tribes on the lower river. Project water users would be agreeing that the rights of downstream tribe have not been determined or quantified. But also, the tribes on the lower river would agree not to assert whatever water rights they have against the Klamath Project, with the interim and permanent commitments structured similarly to those of the Klamath Tribes.

# Klamath: Federal Legislation Will Be Required

(Continued from Page 5)

have completed the steps to implement the “on-project plan” which is to be developed to live with the agreed water quantity for diversion.

- There are terms that address what happens if certain conditions are not met by 2012. In this circumstance, the Klamath Tribes could not make a water right call against the Klamath Project until after the Project water users have had the opportunity to litigate their contests against the Klamath Tribes claims in Klamath County Circuit Court.

The specific legal mechanics for implementing these terms are to be provided in documents that will be filed in the Adjudication.

## NEXT STEPS

A final piece of the settlement in this regard would be that each tribe agrees to waive any claims it has against the United States associated with the Klamath Project.

“These waivers also are contingent on the realization of certain events,” says Mr. Simmons.

As with the majority of tribal water rights settlements, federal legislation would be required to ensure all of these commitments are effective.

“Legislation will be prepared to address that issue as well as implementation of other aspects of the settlement,” said Mr. Addington.

Finally, the Hoopa Valley Tribe has indicated that it does not support the KBRA. If the Hoopa Valley Tribe is not a party to the final KBRA, the described commitments presumably would not apply as related to that tribe although it is not certain what other modifications may occur.

For now, the state of Oregon has suspended the water adjudication process to provide time for those affected by the agreement to consider their

## Parties Identified in Draft Klamath Agreement

- U.S. Department of Agriculture
- U.S. Department of Commerce
- U.S. Department of the Interior
- California Department of Fish and Game
- Oregon Department of Environmental Quality
- Oregon Department of Fish and Wildlife
- Oregon Water Resources Department
- Karuk Tribe
- Klamath Tribes
- Yurok Tribe
- Humboldt County, California
- Klamath County, Oregon
- Siskiyou County, California
- Klamath Water Users Association and multiple USBR contractors
- American Rivers
- California Trout
- Friends of the River
- Klamath Forest Alliance
- National Center for Conservation Science and Policy
- North Coast Environmental Center
- Northern California/Nevada Council Federation of Fly Fishers
- Pacific Coast Federation of Fishermen’s Associations
- Salmon River Restoration Council
- Trout Unlimited

options: settle – or begin water adjudication legal proceedings in a state where that process can continue for half a century.

**FOR MORE INFORMATION** on the KBRA, including the full agreement and summary documents, visit either of these websites: <http://www.edsheets.com/Klamathdocs.html> or [www.kwua.org](http://www.kwua.org). In addition, you can contact Greg Addington, KWUA Executive Director, at (541)-883-6100 or [greg@kwua.org](mailto:greg@kwua.org).

*The Klamath Water Users Association helped prepare this edition of the “Water Review”, which is intended for general informational purposes. It is not a legal analysis or legal advice. The views in this Family Farm Water Review reflect those of KWUA and do not reflect any position of the Family Farm Alliance.*

VISIT OUR REDESIGNED WEBSITE

[www.familyfarmalliance.org](http://www.familyfarmalliance.org)



**Klamath Water Users Association**  
2455 Patterson Street, Suite 3  
Klamath Falls, Oregon 97603  
(541)-883-6100 FAX (541)-883-8893  
[kwua@cvcwireless.net](mailto:kwua@cvcwireless.net)  
[www.kwua.org](http://www.kwua.org)

## 1/30/08: FREQUENTLY ASKED QUESTIONS REGARDING THE PROPOSED KLAMATH BASIN RESTORATION AGREEMENT

- Q: Will the proposed Klamath Basin Restoration Agreement (KBRA) grant Tribes ultimate control over water in the Klamath Basin?**
- A: No, the KBRA would not result in granting any tribal water rights to any tribe or affect the ability of any opponent of tribal claims other than Project water users to contest any tribal claims. The KBRA would only resolve questions related to: whether or to what extent tribes can make a call against, or demand water from, the Klamath Project.
- Q: Does the KBRA affect off-Project irrigators and their case in the Adjudication?**
- A: No. The KBRA is structured to result in settlement of water rights disputes between the Klamath Tribes and Project water users. However, the terms of the KBRA will not, and legally could not, affect the rights of any other party who is currently contesting the tribal claims in the ongoing Klamath River adjudication. Those parties will have the ability to present evidence and argument of any kind against those claims, and the Water Resources Department, and later the courts, will decide what the Klamath Tribes water rights are. The Project water users would not, however, be participating in this process.
- Q: Doesn't the KBRA unilaterally grant the Klamath Tribes a priority date of 'time immemorial'?**
- A: No, it is legally impossible for the KBRA to create or grant water rights. The State of Oregon will, in the adjudication, decide what the water rights of the Klamath Tribes are. In 1983, the United States Court of Appeals for the Ninth Circuit, in the *Adair* case, ruled that the Klamath Tribes have water rights with the priority of "time immemorial" to support hunting and fishing on the former reservation. The federal court further stated that the actual scope and quantification of the Klamath Tribes' rights would be decided in the state adjudication. The state adjudication is in progress.

**Q: But section 15.3.2.B of the KBRA says that Project irrigators will file a document in the Adjudication that “recognizes” the Klamath Tribes’ claims including the ‘time immemorial’ priority date at the full quantity claimed.**

A: This simply reflects that the Project water users are not going to contest the Klamath Tribes’ claims further (unless certain conditions, specified in section 15.3.4 of the KBRA, are not met). In other words, Project water users will effectively consent to those claims, but SUBJECT TO all the other conditions of the KBRA; that is, those conditions in sections 15.3.3.B and 15.3.9 which provide that the Klamath Tribes will not make a call or tribal trust demand against the Klamath Project, either for more water than the agreed Project use that is the basis for the settlement, or, in the interim, for any water diverted by the Project. These terms will also be implemented through a stipulation in the adjudication.

**Q: Where can I read more about the tribal water rights issue?**

A: The proposed KBRA deals with tribal water rights issues in multiple sub-sections of section 15.3.

**Q: Can you explain the process that would occur to settle these claims with the Tribes?**

A: One provision that is central to permanent resolution of the water rights issues involving tribes is section 15.3.4. Specific assurances by tribes become permanent if certain conditions, delineated in section 15.3.4, occur before December 31 of 2012. The Secretary of the Interior would be obliged to publish a finding if those conditions occur.

With respect to the Klamath Tribes, the mechanics of the proposed KBRA are as follows. First, the Project water users “provisionally” agree to withdraw contests of the Klamath Tribes’ claims for water in Upper Klamath Lake and the Klamath River. (Sections 15.3.2.B and 15.3.3.A.)

The Klamath Tribes provisionally agree not to assert rights against the Project that would interfere with the agreed water use for the Project. Both of these commitments will become permanent if the specified conditions in section 15.3.4 are met. (Section 15.3.3.B.)

In the meantime, there are also additional assurances by the Klamath Tribes. First, beginning on the effective date of the KBRA, the Klamath Tribes would agree not to assert any tribal demands against ANY use of water in the Klamath Project. If the conditions of section 15.3.4 are met, this commitment would remain in effect until the water users have completed the steps to implement the “on-project plan” which is to be developed to live with the agreed water quantity for diversion. (Section 15.3.9.B.)

**Q: What if the certain “conditions” in Section 15.3.4 do not occur?**

A: In this circumstance, the Klamath Tribes could not make a water right call against the Klamath Project until after the Project water users have had the opportunity to litigate their contests against the Klamath Tribes’ claims in Klamath County Circuit Court. In other words, there will either be a final settlement or the parties will revert to their current positions, but in the meantime, tribal claims could not be asserted against the Project. (Section 15.3.9.C.)

**Q: Has this type of water rights settlement involving a Secretarial finding been proven or done before?**

A: Yes, this is a common approach in recent Indian water rights settlements, including one just concluded in Arizona where the requisite finding of the Secretary of the Interior was made in December of 2007.

**Q: I have heard that tribes are ‘sovereign’ nations and as such any agreement with them could not be legally enforced. Is this true?**

A: It is true that tribes are sovereign entities and cannot be sued unless there has been a waiver of sovereign immunity. However, the promises related to water rights will be enforceable. With respect to the Klamath Tribes, there is a waiver of sovereign immunity in an Act of Congress (the McCarran Amendment) that results in tribes being bound by state adjudication decisions, and the water rights settlement involving the Klamath Tribes and the Klamath Project will be implemented in the state adjudication proceeding. In addition, if a settling tribe were to file a lawsuit seeking more water from the Klamath Project than is agreed on in the KBRA, water users would assert the KBRA promises as a defense to that lawsuit and thereby enforce them. The KBRA contemplates enactment of legislation to ensure that the commitments are effective.

**Q: The KBRA is complicated and hard to understand. Who has reviewed it and how do we know these statements are accurate?**

A: The KBRA was negotiated by many parties; most were represented by legal counsel as well. No less than eight attorneys representing multiple districts and water users within the Klamath Project have performed numerous reviews of the document and its preceding drafts. These local attorneys have a duty and ethical responsibility to look out for the best interests of their clients.

**Q: Will the KBRA jeopardize the use of groundwater in the Klamath Basin?**

A: The KBRA will not create any new state law or regulatory system regarding groundwater. It does contain contractual promises related to groundwater which could affect the plan to be developed by Project water users in order to adjust to the agreed amount of surface water diversions. Under the KBRA, it is expected that

funding provided to develop and implement this plan will result in payments for using groundwater in lieu of surface water in certain years. There are limitations on the degree of impact on certain springs in Upper Klamath Lake and the Klamath River that can result from the pumping that occurs under this “on-project” plan. The limitations will relate only to the on-project plan itself and do not affect anyone who is not a party to the KBRA. The KBRA also supports research and monitoring related to groundwater, including groundwater-surface water interactions.

**Q: Does the KBRA supersede state water law or is it somehow illegal?**

A: No. The KBRA itself does not and could not amend any state or federal laws. It specifically requires consistency with existing applicable law including state water law. (Section 14.2.) If, nevertheless, a term of the KBRA were found to be inconsistent with state water law, state water law would control. The KBRA does include support for state and federal legislation. The Oregon state legislation to be supported would authorize instream leasing by the owner of irrigation water rights that have been recognized in an order in the Klamath Basin adjudication but which are not yet recognized in a decree. (Appendix A-3.) This would be a change in state law.

**Q: Is the KBRA consistent with the Klamath River Basin Compact?**

A: We believe the answer is yes, but the Klamath River Basin Compact Commission is conducting their own review. The basis for our answer is found in the answer to the preceding question.

**Q: How can Project irrigators think the KBRA gives them stability or certainty on water deliveries when the ESA does not go away?**

A: The KBRA does not guarantee that there will be no impacts from the ESA. To have an absolute guarantee would require repeal, or at least major amendment, of the ESA, which is extremely improbable. The KBRA does, however, contain numerous provisions to ensure the greatest possible protection under existing law from ESA and other regulatory impacts, in order to make a considerable reduction in risk. Among other things, these provisions: are designed to move away from the approach of looking to the Klamath Project to solve species concerns; support stable and long-term regulatory mechanisms to reduce risk; and reduce exposure to, and adverse consequences of, any potential litigation. These provisions include sections 3.2.4, 5.4, 6.4, 20.3, 21.1.3, and 21.2.

**Q: Why wasn't PacifiCorp at the table?**

A: The KBRA deals with issues which do not involve commitments from PacifiCorp. PacifiCorp will not be a signatory to the KBRA.

PacifiCorp facilitated the first several meetings of all parties including PacifiCorp itself. Parties at that table, for the most part, were those who had filed paper work to be involved in the relicensing process for the Klamath River Dams. PacifiCorp did not need or want to be involved with issues such as water allocation for Project irrigators. The Settlement group and PacifiCorp essentially split off the negotiations that involve PacifiCorp directly, to a parallel process. This parallel process was deferred for a time in 2006 based on FERC-related hearings, but was not abandoned.

Issues resolved in the KBRA do not affect PacifiCorp or their ratepayers. Issues that may have an impact on PacifiCorp or ratepayers or those issues that FERC will need to approve will be part of a separate negotiation and settlement between KBRA parties and PacifiCorp.

**Q: Was PacifiCorp unaware of the issues being discussed in the KBRA?**

A: No. PacifiCorp knew the nature of negotiations. Additionally, representatives from the KBRA group had no less than 16 formal meetings with PacifiCorp leadership over the last two years related to the separate negotiation with PacifiCorp, as well as less formal contacts.

**Q: I am a PacifiCorp ratepayer. Will the KBRA increase my power bill?**

A: Irrespective of the future of the dams, there will be consequences for PacifiCorp ratepayers. If PacifiCorp obtains a new license to operate the Klamath Hydro electric project, it will have no choice other than to make significant investment in fish passage at all four dams based on mandatory conditions prescribed by federal agencies. The estimated cost is on the order of \$300 million. Additionally, power generation will decrease due to other license conditions. These costs would be borne by ratepayers in relevant states. FERC and the California Energy Commission have estimated that the least cost alternative for PacifiCorp and its ratepayers is dam decommissioning. Irrespective of argument over these matters, PacifiCorp will be obliged to demonstrate to the Public Utilities Commissions that it has proceeded prudently in the interest of ratepayers before seeking recovery of any cost from its ratepayers for any alternative course of action.

**Q: Were off-Project irrigators represented in these talks?**

A: The Klamath Off-Project Water Users Association (KOPWU) was at the table and involved from the beginning. In addition, there were other representatives from off-project representing water interests who attended regularly and fully participated in all aspects of the negotiations.

**Q: Did KOPWU have opportunities to come up with a program similar to the Klamath Project?**

**A:** Yes. KOPWU and their representatives did not reach mutually agreeable terms of water right settlements with tribes or other parties.

*NOTE: This document is for general information purposes and is not a formal legal analysis or legal advice. Parties evaluating the KBRA should consult with legal counsel.*



**Klamath Water Users Association**  
2455 Patterson Street, Suite 3  
Klamath Falls, Oregon 97603  
(541)-883-6100 FAX (541)-883-8893  
[kwua@cvcwireless.net](mailto:kwua@cvcwireless.net)  
[www.kwua.org](http://www.kwua.org)

## **Water Rights Settlements Between Basin Tribes and Klamath Reclamation Project**

### **Key Elements of the Proposed Klamath Basin Restoration Agreement**

**January 29, 2008**

#### **Summary**

The proposed Klamath Basin Restoration Agreement released on January 15, 2008, (KBRA) is structured to settle tribal water rights claims between tribes in the Klamath Basin and the Klamath Project. In essence, water users in the Klamath Project would agree to limit, to a specified amount, the quantity of water diverted from Upper Klamath Lake and the Klamath River from the Project's points of diversion identified in Appendix E-1 of the KBRA. The KBRA also provides for funding of a program so that Project water users will be able to "live within" the agreed quantity. (Section 15.2 and Appendix B-2.) Tribes, and the United States as their trustee, would agree not to assert tribal rights so as to interfere with this agreed Klamath Project use of water, making it guaranteed as far as tribal water rights and trust obligations of the Bureau of Reclamation are concerned. In the Klamath Basin Water Rights Adjudication, where claims of the Klamath Tribes are scheduled to be litigated in the next few years, the KBRA terms would be implemented through documents filed with the state.

The KBRA would not result in granting any tribal water rights to any tribe or affect the ability of any opponent of tribal claims other than Project water users to contest any tribal claims. The KBRA only deals with: whether or to what extent the Klamath Tribes can make a call against, or demand water from, the Klamath Project based on the Klamath Tribes' rights in Upper Klamath Lake and the Klamath River, whatever those rights may be; and whether tribes on the lower river can, based on water rights or federal trust obligations, demand the Project use less water than what would be agreed upon. In both cases, the answer is no. No one else is affected in any way.

There are, in the meantime, various interim protections for the Project. Until the water users have implemented their on-project plan described in section 15.2 of the KBRA (anticipated to be roughly 2017), the tribes would not be able to assert a demand based on tribal water rights against any water use in the Klamath Project. There are also various

provisions that ensure that, if the agreement is not implemented, Klamath Project irrigators and the tribes will simply return to their positions that exist today and be able to assert their arguments against one another, just as they can today.

## **Background**

The State of Oregon is currently conducting an adjudication of water rights which will determine the nature and extent of water rights of the Klamath Tribes to have water remain in streams and lakes. This proceeding is in an administrative phase. Following the issuance of the “Findings of Fact and Order of Determination” (FFOD) by the Water Resources Department, parties have the opportunity to file exceptions in Klamath County Circuit Court, where further litigation would occur before the issuance of a decree. In the meantime, however, the state will regulate water rights based on the FFOD unless that order has been stayed.

In 1983, the United States Court of Appeals for the Ninth Circuit, in the *Adair* case, ruled that the Klamath Tribes have water rights for fisheries purposes with the priority of “time immemorial.” The U.S. Supreme Court declined any further review in the case. The federal court further stated that the actual scope and quantification of the Klamath Tribes’ rights would be decided in the state Adjudication.

In the Adjudication, the Klamath Tribes, and United States as trustee, have filed various claims for instream flows including: for tributaries of Upper Klamath Lake (including Wood and Sprague Rivers); for water to maintain Upper Klamath Lake elevations; and for flows in the Klamath River from Link River Dam to the Oregon – California border. Irrigation interests are contesting these claims because approval of the claims could have major adverse consequences for irrigators. Klamath Project irrigators are contesting only the claims for Upper Klamath Lake and the Klamath River (identified as Cases 282 and 286 in the Adjudication). Irrigators in the Upper Klamath Lake watershed are contesting those same claims, as well as the claims for water in the tributaries of Upper Klamath Lake.

These claims are all currently scheduled to go to hearing within the next few years, with deadlines for discovery imminent and a very active process thereafter. The costs of opposing these claims would be very significant, and the outcomes are uncertain for all involved.

There is no adjudication process in progress related to water rights of tribes on the lower Klamath River. Federal courts have held that the Yurok and Hoopa Valley Tribes have federal reserved fishing rights on the Klamath River. The tribes assert water rights for those fisheries as well as trust obligations of the Bureau of Reclamation to provide flows. The Solicitor of the Department of the Interior has issued opinions which conclude that the tribes in fact hold water rights for Klamath River flows, with 19<sup>th</sup>-century priority. The scope of any such rights is of course a matter of debate.

## **Description of Water Settlements in Proposed KBRA**

The proposed KBRA deals with tribal water rights issues in multiple sub-sections of section 15.3.

One provision that is central to permanent resolution of the water rights issues involving tribes is section 15.4. In essence, other parts of the proposed KBRA provide interim assurances that tribes will not demand water from the Klamath Project that interferes with diversion of the agreed water use for the Project. This specific assurance becomes permanent if certain conditions, delineated in section 15.4, occur before December 31 of 2012. The Secretary of the Interior would be obliged to publish a finding if those conditions occur. This general approach is common in recent Indian water rights settlements, including one just concluded in Arizona where the requisite finding of the Secretary of the Interior was made in December of 2007.

With respect to the Klamath Tribes, the mechanics of the proposed KBRA are as follows. First, the Project water users “provisionally” agree to withdraw contests of the Klamath Tribes’ claims for water in Upper Klamath Lake and the Klamath River (sections 15.3.2.B. and 15.3.3A.). The Klamath Tribes provisionally agree not to assert rights against the Project that would interfere with the agreed water use for the Project. Both of these commitments will become permanent if the specified conditions in section 15.3.4 are met. (Section 15.3.3.B.)

In the meantime, there are also additional assurances by the Klamath Tribes that apply whether or not the permanent commitments occur. First, beginning on the effective date of the KBRA, the Klamath Tribes would agree not to assert any tribal demands against ANY use of water in the Klamath Project. This commitment would remain in effect until the water users have completed the steps to implement the “on-project plan” which is to be developed to live with the agreed water quantity for diversion. (Section 15.3.39.B.) Second, there are terms that address the potential that the conditions of section 15.3.4 may not be met; i.e., that address what happens if certain conditions are not met by 2012. In this circumstance, the Klamath Tribes could not make a water right call against the Klamath Project until after the Project water users have had the opportunity to litigate their contests against the Klamath Tribes’ claims in Klamath County Circuit Court. In other words, there will either be a final settlement or the parties will revert to their current positions, but in the meantime, tribal claims could not be asserted against the Project (section 15.3.9.C.).

The specific legal mechanics for implementing these terms are to be provided in documents that will be filed in the Adjudication (sections 15.3.2.B. and 15.3.B.). At the time of public release of the proposed KBRA, these documents were not complete. They will, however, be attached to the final KBRA and will be filed in the Adjudication within 60 days.

It has been pointed out that the KBRA states in section 15.3.2.B. that the document to be filed by Project water users in the state Adjudication will recognize the tribal claims

including the time immemorial priority and the full quantity claimed. This simply reflects that the Project water users are not going to contest the Klamath Tribes' claims further (unless the section 15.3.4. conditions are not met). In other words, Project water users will effectively acquiesce to those claims, but SUBJECT TO all the other conditions; that is, those conditions which provide that the Klamath Tribes will not make a call or tribal trust demand against the Project, either for more water than the agreed Project use that is the basis for the settlement, or, in the interim, for any water diverted by the Project.

The terms of the KBRA will not, and legally could not, affect the rights of any other party who is currently contesting the tribal claims in the Adjudication. Those parties will have the ability to present evidence and argument of any kind against those claims, and the Water Resources Department, and later the court, will decide what the Klamath Tribes' water rights are. The Project water users would not, however, be participating in this process.

The settlement with other settling tribes is similar, while recognizing that there is no pending adjudication to determine the water rights of tribes on the lower river. Project water users would be agreeing that the rights of downstream tribes have not been determined or quantified, which is factually true. But also, the tribes on the lower river would agree not to assert whatever water rights they have against the Klamath Project, with the interim and permanent commitments structured similarly to those of the Klamath Tribes. (Sections 15.3.6.A., 15.3.7.A., 15.3.8.A., and 15.3.9.B.)

A final piece of the settlement in this regard would be that each tribe agrees to waive any claims it has against the United States associated with the Klamath Project. These waivers also are contingent on the realization of certain events. Those events include the same events that must occur for final settlement between the tribes and Project irrigators, as well as additional contingencies. (Sections 15.3.5.B., 15.3.6.B., 15.3.7.B., and 15.3.8.B.)

As with the majority of tribal water rights settlements, federal legislation would be required to ensure all of these commitments are effective. Legislation will be prepared to address that issue as well as implementation of other aspects of the settlement.

Finally, the Hoopa Valley Tribe has indicated that it does not support the KBRA. If the Hoopa Valley Tribe is not a party to the final KBRA, the described commitments presumably would not apply as related to that tribe although it is not certain what other modifications may occur.

*Note: Klamath Water Users Association has prepared this document for general informational purposes. It is not a formal legal analysis or legal advice. Entities that are considering the approval of the KBRA should obtain advice of their counsel.*



Klamath Water Users Association  
2455 Patterson Street, Suite 3  
Klamath Falls, Oregon 97603  
(541) 883-6100 FAX (541) 883-8893  
[kwua@cvcwireless.net](mailto:kwua@cvcwireless.net)  
[www.kwua.org](http://www.kwua.org)

## **Klamath Basin Restoration Agreement: Lease Lands in the Klamath Reclamation Project**

### **Summary**

The Klamath Basin Restoration Agreement (KBRA) addresses the “lease lands” within the Klamath Reclamation Project. These lands exemplify co-existence of agriculture and wildlife in the Klamath Reclamation Project, both functionally and historically. The lands are: part of the traditional “reclamation” project authorized in 1905; within national wildlife refuges; and within irrigation district boundaries.

This productive farmland has been leased to growers for generations. Unlike other public land developed under the Reclamation Project, the lease lands were not homesteaded, and thus provide expansive open space as well as substantial benefit for wildlife. This unique arrangement is addressed in Section 15.4.3 of the KBRA, in which the parties: (i) recognize the unique history and circumstances of the lease lands, (ii) recognize practices such as “walking wetlands” and others that enhance waterfowl management while maximizing “lease revenues” and optimizing agricultural use, (iii) seek to further the beneficial partnerships that have developed between growers and wildlife refuges. The Parties express their support for continued lease land farming managed as described in (ii).

### **Background**

At its inception, the Klamath Reclamation Project was a partnership between Oregon and California and the United States. In 1905, the two states ceded submerged land to the United States for the purpose of reclamation and irrigation. Shortly thereafter, the Secretary of the Interior authorized the Project and work began.

As land was uncovered and irrigation systems were being developed, the Bureau of Reclamation began leasing land for agriculture; over 50,000 acres were leased in the Tule Lake portion of the Project in the 1920s. Through time, “lease lands” were then homesteaded. The homesteaders remain a source of pride in the area; most homesteads were awarded to veterans of the two world wars, who took over lease lands on a permanent basis through complying with homestead laws, and building the communities that exist today.



The lease lands that exist today have been included in various official acts and statutes beginning as early as 1908. In the early days, intense hunting pressure to bird populations occurred on lands that had been ceded for reclamation development. Under executive orders beginning in 1908 for the Lower Klamath Area, and 1928 for the Tule Lake area, protected areas or “bird refuges” were established. The orders made the delineated refuge areas subject to irrigation development under the 1902 Reclamation Act. Irrigation development meanwhile continued in the Project, including further infrastructure for all leased lands, and homesteading of a considerable area that had been lease lands.

Over time, issues arose related to homesteading of the areas comprising the current lease lands. In the 1930s, a statute was passed mandating completion of homesteading of lease lands in the Lower Klamath Lake area; this statute was later repealed, and a permanent preclusion of homesteading on then-remaining lease lands was established under the Kuchel Act in 1964. In the late 1950s and early 1960s, there had been a substantial public debate about whether the remaining lease lands should be homesteaded versus remaining as lease lands. In general, many local interests favored homesteading as the final step in full development of the Project. Others favored continued leasing and preclusion of homesteading, which would minimize disturbance to waterfowl using the lease lands. A law enacted in 1956 mandated continued leasing pending a final decision on the question of whether the remaining lease lands would be homesteaded.

Congress resolved the matter in 1964 in the Kuchel Act (Public Law 88-567). This law contained terms addressing all of the lands within four wildlife refuges, including the two which include the lease lands. The Kuchel Act generally provided all lands within the four refuges were to be “administered for the major purpose of waterfowl management but with full consideration to the optimum agricultural use that is consistent therewith.” The Kuchel Act disallowed homesteading of the lease lands within Tule Lake and Lower Klamath Refuges, to “stabilize ownership” of land within the Klamath Project and “preserve intact the necessary existing habitat for migratory waterfowl.” In this regard, it further stated:

“The Secretary shall, consistent with proper waterfowl management, continue the present pattern of leasing the [lease lands]... Leases for these lands shall be at a price or prices designed to obtain the maximum lease revenues. The leases shall provide for the growing of grain, forage, and soil-building crops, except that not more than 25 per centum of the total leased lands may be planted to row crops. All other reserved public lands included in section 2 of this Act [16 USCS § 6951] shall continue to be managed by the Secretary for waterfowl purposes, including the growing of

agricultural crops by direct planting and sharecrop agreements with local cooperators where necessary.” (U.S. Code, title 16, section 695n.)



In Tule Lake National Wildlife Refuge, lease lands comprise approximately 16,000 of the total 39,000 acres within the refuge boundary. In Lower Klamath National Wildlife Refuge, the lease lands comprise approximately 7,000 acres of the total 53,000 acres within the refuge boundary. The lease lands are approximately 25 percent of the irrigated lands within the boundaries of both Tulelake Irrigation District and Klamath Drainage District.

### **Lease Lands Today**

Lease lands continue to be leased for agricultural production, as they were before and at the time of the Kuchel Act. The Bureau of Reclamation conducts the leasing program, subject to administrative authority of the Fish and Wildlife Service. Tulelake Irrigation District and Klamath Drainage District provide water delivery. The lease lands are highly productive. Agricultural production on the lease lands generates crop values of approximately \$15 million per year. As required by the Kuchel Act, local counties receive 25 percent of the net “lease revenues” (rent) paid to the federal government by the growers. Under the KBRA, the Parties support the Fish and Wildlife Service receiving 20 percent of the net lease revenues, to be used for wildlife management purposes. This will require a change in law.

The lease lands provide food and habitat for migratory waterfowl and other wildlife. Also, irrigation practices on the lease lands within Klamath Drainage District provide open water during winter making the lands very attractive to waterfowl and eagles. Strict integrated pest management practices are applicable to farming on the leases lands. The leasing program also provides incentives for growers to pursue organic farming practices and other prudent ‘Best Management Practices’. The high level of stewardship practiced by growers also helps to control invasive species.



In recent years, collaboration between growers and wildlife managers has led to the highly successful “walking wetlands” program. Walking wetlands provide a rotation of new

highly productive areas for waterfowl and shore birds. Land that has been flooded is eventually returned to agricultural production with increased crop benefits.

In addition to the walking wetlands, other partnerships have developed. On Tule Lake



*PHOTO BY BOB SHANKS*

National Wildlife Refuge, large water and wetland areas known as Tule Lake or Sumps 1A and 1B, which comprise approximately 13,000 acres, experienced declines in productivity for wetlands due to maintenance of relatively stable water elevations. In partnership with Tulelake Irrigation District, the Fish and Wildlife Service has instituted a program under which infrastructure was installed and can be operated to drain and refill Sump 1B. This has resulted in creation of high quality habitat. On Lower Klamath National Wildlife Refuge, lessees have initiated modifications to traditional farming methods to enhance fall wildlife use and hunting. Adjacent landowners are also providing hundreds of acres for walking wetlands, which benefit waterfowl and other species.



For more information visit [www.kwua.org](http://www.kwua.org) or [www.fws.gov/klamathbasinrefuges](http://www.fws.gov/klamathbasinrefuges)



**Klamath Water Users Association**  
2455 Patterson Street, Suite 3  
Klamath Falls, Oregon 97603  
(541)-883-6100 FAX (541)-883-8893  
[kwua@cvcwireless.net](mailto:kwua@cvcwireless.net)  
[www.kwua.org](http://www.kwua.org)

## **Power Resources Program of Klamath River Basin Agreement: Prepared by KWUA**

### **Summary**

Stabilizing power costs is an important component of the Klamath Basin Restoration Agreement and is closely related to the Water Resources Program. This document provides background and a program summary as related to the Klamath Reclamation Project.

### **Background**

The Bureau of Reclamation's Klamath Reclamation Project is unique and has had a longstanding relationship with PacifiCorp's Hydroelectric Project. Original plans for the Klamath Reclamation Project contemplated the development of power by the Bureau of Reclamation for use in the Klamath Reclamation Project. In 1917, PacifiCorp's predecessor entered an agreement by which it constructed Link River Dam and agreed to sell power at low cost to irrigators and Reclamation in lieu of Reclamation developing power on the river. In the 1950s, when PacifiCorp's predecessor sought a license for PacifiCorp's hydroelectric project including the planned J.C. Boyle facility, Reclamation initially voiced objection that the license would preclude development of low-cost federal power to benefit the irrigation project. This concern was resolved through a license term requiring extension of the 1917 contract including its power terms, for at least the term of the FERC license. The long relationship was reflected and codified in the Klamath River Basin Compact adopted enacted by California and Oregon, and ratified by Congress, in 1957, which provides that it is the objective of the states, in connection with the development of hydroelectric resources on the Klamath River "to secure...the lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells."

In the FERC relicensing process for PacifiCorp's hydroelectric dams, Reclamation has proposed a license condition that would substantially continue the historic relationship for the Klamath Reclamation Project, by requiring the company to deliver power to the Klamath Reclamation Project based on the cost associated with providing power from PacifiCorp's hydro dams specifically (the predecessor contract is based on cost of generating power at the dams). The condition is opposed by PacifiCorp and others and would preclude settlement. Additionally, other mandatory license conditions would drive up the cost of generation considerably; Klamath Reclamation Project irrigators, in the settlement process, agreed with other parties that they would not pursue action that could

diminish license conditions related to fish protection, and effectively agreed to allow the cost of generation to increase.

In other Reclamation projects, low costs “reserved” or “project use” power is made available for certain loads. Also, many irrigators in the PacifiCorp Northwest have access to BPA power or similar alternatives through PUDs or similar entities. These types of arrangements were neither necessary nor pursued in the history of the Klamath Reclamation Project due to the long-standing relationship with the hydroelectric project.

The plumbing of the Klamath Project is also unique; low cost power is a part of its infrastructure. A significant portion of the power goes to recirculate water (achieving efficiencies), provide water to national wildlife refuges, to pump water back into the Klamath River for use by fish, and to operate pressurized sprinkler systems that use less water than flood irrigation. These pumping operations are essential for water efficiency and successful pursuit of the Water Resources Program. Already, Klamath Reclamation Project irrigators faced with potentially considerable power cost increases have considered or in some cases undertaken changes in practices that reduce historic water efficiencies.

## **Program Summary**

The Power Resources Program as related to the Klamath Reclamation Project consists of three elements.

First, for the short-term, funding is provided to stabilize total power costs as other components of the program are brought on line. The Parties have supported the Interim Power Sustainability program as part of the KRBA with funding estimated at \$7.69 million for 2008-2010. This program would also provide benefits for irrigation water users outside the Klamath Reclamation Project.

Second, “Project Use” power from the Columbia River system would be authorized by federal legislation for specified loads in the Klamath Reclamation Project, not including pumps owned by individuals to apply water to land unless the individual is required by contract with Reclamation to install the pump to take water from Klamath Reclamation Project facilities. The program would reduce BPA power supplies by less than 0.01 percent. The KRBA also contemplates an agreement with PacifiCorp to deliver this power from substations within the Klamath Reclamation Project to the loads served.

Third, funding would be provided for energy efficiency/conservation and renewable generation opportunities and investment. The activities that would be expected include installation of efficiency measures, such as additional improvements in water pumping and piping efficiency, solar photovoltaic development and net metering programs, investment in renewable generation on a broader scale, and other practices. Settlement parties, with considerable expert assistance provided by the State of Oregon and the Bureau of Reclamation, worked diligently to evaluate alternatives that would leverage expenditures through tax credits and available regulatory programs. The program cost including engineering and planning costs is just over \$34 million, over fiscal years 2010 through 2013. The benefits and objectives of this program are designed to serve irrigation interests both inside and outside of the Klamath Reclamation Project in the Upper Klamath Basin.