

# KlamBlog

The inside scoop on Klamath River Basin resources issues from someone who actually lives there!

## **The Facilities Removal EIS/EIR** **Key Issues - Proposed Actions - Realistic Alternatives** September 2011

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### **Introduction**

The most important thing to understand about the [EIS/EIR](#), the [decision](#) of Interior Secretary Salazar it is meant to inform and the [federal legislation](#) needed to implement the Interior Department's proposed [Klamath Dam and Water Settlements](#) is that it is not about whether or not 4 dams will be removed. That decision has already been made. Four dams owned by PacifiCorp – Iron Gate, Copco 1, Copco 2 and J.C.Boyle – will come down and a fifth dam - Keno - will be transferred to the Bureau of Reclamation because required fisheries and water quality mitigation requirements render them uneconomical. If PacifiCorp's Klamath Hydroelectric Project were relicensed, the company would lose an estimated \$20 million each year.

For PacifiCorp's electric customers and shareholders the obvious decision is to decommission the project and remove the dams. When the political noise is stripped away the dams will come down for economic reasons. The only real questions which remain are:

- Who will pay for removing PacifiCorp's aging dams and powerhouses? and
- What other decisions and provisions will catch a ride on the popular dam removal train?



*Copco Dam: The Klamath Dams are old, obsolete and will loose money if relicensed*

## **Who will pay for dam removal?**

If I own a billboard which must be removed from the roadside I must pay for the removal. One would think it would be the same if I owned a power dam. But that is not the case. For a utility like PacifiCorp, there is the option of getting electric customers to foot the bill for dam and powerhouse removal...that is, if the governing Public Utilities Commission agrees. There is also the option of getting taxpayers to foot the bill...if the state or federal governments agree.

The normal process for either relicensing or decommissioning a hydroelectric project on a public river is via the Federal Energy Regulatory Commission (FERC). If PacifiCorp had gone that route to deal with its money-losing Klamath River dams, however, it is likely that PacifiCorp shareholders – primarily the Berkshire-Hathaway investment firm and its principle shareholder Warren Buffett – would have been required to bear part of the cost of dam and powerhouse removal.

PacifiCorp decided not to go the FERC route. Instead the company negotiated a deal with the federal government, the states of Oregon and California and other parties. Known as the Klamath Hydroelectric Settlement Agreement or KHSA, that deal guarantees that PacifiCorp can continue to operate its antiquated Klamath River dams and powerhouses until 2020 without making substantial changes in operations to benefit fisheries and water quality. The Dam Deal also guarantees that Warren Buffett and other shareholders will not bear any of the cost for removing the dams and that they will not be liable for toxic legacies which may be lurking around century-old powerhouses. It's a great Deal for PacifiCorp shareholders: they get to operate the dams without modern mitigation requirements for another ten years and then walk away from a non-performing asset without paying a cent.

The KHSA Deal might actually get four dams down quicker than the normal FERC route...but not necessarily. In order for the deal to work, Congress must agree; only Congress can absolve PacifiCorp and its shareholders from all responsibility for dam and powerhouse removal and for toxic legacy liability. If Congress does not pass the required legislation, PacifiCorp will be forced to proceed via the FERC process. With thousands of aging dams across the country coming up for relicensing, how the Klamath's dams are dealt with will set an important precedent. If PacifiCorp gets Congress to go along with the sweetheart deal its managers negotiated, other power companies will expect the feds to make sure their investors do not bear any of the cost for facilities removal as well. That in turn will make it more difficult to actually get dams removed.

## **On the Dam Removal Train**

Some of the Klamath's federal and tribal bureaucrats and irrigation interests recognized more than a decade ago that the dams would likely be removed and that dam removal would be wildly popular. They decided then to attempt to hitch the things they most want onto the dam removal train. The first step was a propaganda effort to convince the public that "peace" had come to the Klamath. Well-healed and dominant irrigators who receive subsidized water courtesy of US taxpayers and tribal leaders were suddenly seen on TV declaring a newfound appreciation for each other. Formal negotiations followed and a complex water deal was negotiated. Those who did not see the deal as in their interests were kicked out of negotiations or marginalized within them.

The result was a complex, controversial and costly agreement known as the Klamath Basin Restoration Agreement or KBRA. Because it favors certain irrigation, tribal and environmental interests over other irrigation, tribal and environmental interests, the KBRA Deal's only real chance for approval and

funding is to catch a ride on Klamath dam removal legislation.

KBRA analysis is provided below in order to demystify what those who created the KBRA have shrouded in complexity, technical legal language and media spin. In order to get their deal, KBRA “parties” (the term being used for those who have signed onto the dam and water deals) need Congress to authorize it and provide close to \$1 billion over ten years to implement the deal’s provisions.

The dealmakers must now come out of the back rooms from which the public has been excluded. This is the opportunity for citizens both within and beyond the basin to weigh in and to make a difference. But to participate effectively citizens must know and understand the implications of these deals for the future of the Klamath River and Klamath Salmon.

The KBRA Deal is chock full of complex legal requirements. That appears to be a recipe for endless litigation to interpret its obscure language and complex, interrelated provisions. Below I explain those KBRA provisions which could most significantly affect public interests and Public Trust Resources like water, wildlife and salmon. For each major KBRA provision, I explain what is proposed, provide a pro and con discussion and describe alternatives to what the deal proposes.

The KBRA Deal includes substantial subsidies for “Project Irrigators” (those who receive subsidized water courtesy of the US government) and tribes. Subsidies are an important public issue since they would come from federal taxpayers and would have to be funded through cuts in the budgets of other agencies, programs and tribes. However, the subsidy issues are straightforward and are not discussed below.

## **Issue #1: Allocating Klamath River Water**

### **What is proposed**

The KBRA Deal proposes a settlement to conflict over how much Klamath River water will be diverted for irrigation and other purposes in the Upper Basin, and how much will be allowed to flow down river to sustain the River’s salmon, ecosystems and communities. Included is a water rights settlement between the Klamath Tribes and Project Irrigators. Essentially the deal:

- Caps the amount of Klamath water which the Bureau of Reclamation can divert during any year for irrigation and other purposes.
- Establishes flows in the Klamath River which the “parties” claim are better for salmon than flows obtained via the ESA and litigation.
- Puts the Bureau of Reclamation and the Project Irrigators it serves first in line for water ahead of fish and senior water right holders elsewhere in the Upper Basin, Scott and Shasta Basins.
- Provides for development of “new” water through conservation, buying water rights to reduce demand and additional storage which could mean new dams. Water right retirement is limited to “off-project irrigators”; retirement of water rights within the Klamath Project is prohibited.
- Allocates “new” water first to the Bureau of Reclamation and Project Irrigator and then to flows for the River.

- Terminates the federal government’s trust responsibility to protect the water rights of all six Klamath River Basin federal tribes whether or not those tribes hold referendums on termination or whether or not Tribal Councils agree to termination.

### **Water Allocation Pros and Cons**

While capping the amount of water the federal Klamath Project and its irrigators can divert is a plus, critics point out that the capped amount is more than the Bureau of Reclamation has been allowed to divert in most recent. They also point out that a cap on Bureau diversions would have occurred anyway via the Upper Basin Water Rights Adjudication. Critics also question providing the Bureau of Reclamation’s privileged irrigators with the first “new” water which is developed via conservation, water right purchase/retirement and new storage.

The KBRA Deal would restore federal water managers and the Project Irrigators they serve to dominance in the Basin. Even though their rights are junior to some non-federal irrigators, they would be first in line for water ahead of fish and those senior right holders. Critics say this is unfair to non-federal irrigators in the Upper Basin, Shasta and Scott. If the deal goes through and it turns out higher river flows are needed or that less water is available as a result of climate change, non-federal irrigators and fish will compete for scarce supplies while the Bureau and its irrigators get a guaranteed allocation. It might then be necessary during dry years for the federal government to lease water from irrigators in order to provide the flows salmon need.

Critics also question the river flows which were negotiated in the KBRA Deal. Those flows would be locked in if legislation authorizing the deal becomes law. KBRA flows are higher in some months and year types and lower in other months and year types as compared to court ordered river flows. Most importantly, the “parties” ignored recommendations of independent National Research Council scientists who have stated that river flows should not be set until a flow assessment that includes major tributaries like the Shasta and Scott is completed. The “parties” apparently oppose such a study and if their deal becomes law that study will most likely not take place.

The deal’s proposed termination of the federal government’s duty to protect tribal water rights is opposed by the Affiliated Tribes of Northwest Indians and the National Congress of American Indians – the nation’s top inter-tribal political association.

### **Water Allocation Alternatives**

Those promoting the KBRA Deal say the only alternative is a return to endless conflict and litigation over water. Critics point out, however, that the 30-year long Upper Basin water rights adjudication is nearly complete; they say that is the place for settlements to be worked out...not behind closed doors. Furthermore, the KBRA Deal itself is already creating escalating conflict. There has reportedly been shouting and fist fights at irrigation district meetings, legislation seeking to block the agreements has already being attempted and lawsuits to block the deals are planned.

Others believe that it is bad practice and bad precedent to provide irrigation interests with the first right to water ahead of fish. They point out that the ancient doctrine of the Public Trust, as codified in US and California law, provides salmon and river ecosystems with an absolute first right to the river flows needed to maintain salmon stocks and river ecosystems in good condition. They claim that the KBRA Deal seeks to undermine Public Trust law and precedent.

A realistic and scientifically preferable process to allocate Klamath River water would include:

- Priority completion of the full-basin flow assessment recommended by the National Academy of Science and setting river flows for fish based on that assessment.
- Faithful adherence to western water law, a prompt completion of the Upper Basin Adjudication and an open, public process for all water allocation decisions.
- A plan to reduce demand for Klamath River water by purchasing and retiring water rights from willing sellers throughout the basin including within the boundaries of the federal Klamath Project.
- Restricting the Bureau of Reclamation's Klamath Project to providing water only for agricultural and wildlife refuge purposes. Currently the Bureau provides water to a golf and country club, a community college, a wood products mill, a hunting lodge, redeveloped industrial land and suburban developments.

## **Issue #2: Salmon Restoration and Recovery**

### **What is proposed**

The KBRA Deal establishes a salmon restoration program including an active program to reintroduce salmon into the Upper Klamath River Basin once the dams are removed or breached. The deal allocates roughly a quarter million dollars to restoration over ten years. It also determines where in the basin those funds can be spent. Upper Basin restoration is prioritized while the Shasta, Scott and Salmon Rivers would be a lower priority and receive less funding.

### **Salmon Restoration and Recovery Pros and Cons**

“Parties” and other KBRA promoters point out that the deal will reestablish a basin-wide restoration program which has been missing in the Basin since 2006. They argue that a unified, basin-wide restoration program will be more effective than the piecemeal approach currently being followed.

Under the KBRA Deal, however, allocation of restoration funds is pre-determined and favors those “parties” who made the deal. Congressional authorization of the deal would create first and second class citizens and sub-basins in the restoration arena.

The deal asserts that the Endangered Species Act and the Clean Water Act will be followed. Under it, however, salmon that are actively reintroduced to the Upper Basin will not enjoy full ESA protection but will be an “experimental population” which could be removed by bureaucrats or a future federal administration at any time and for any reason. The alternative is passive restoration – taking down the dams and waiting a while to see if salmon repopulate the Upper Basin on their own. If ESA listed salmon find their own way back to the Upper Basin they will receive full ESA protection.

Critics also point out that, while the Clean Water Act may be technically unaffected, the deals limit both what PacifiCorp must do to restore water quality and options for cleaning up agricultural pollution within more than 200,000 acres located within the federal Klamath Project. Within the Klamath Project all planning, compliance and restoration would be controlled by irrigation interests.

### **Salmon Restoration and Recovery Alternative**

The alternative to the political allocation of restoration funds is ecological restoration: an approach which prioritizes restoration needs and allocates funding using best available restoration science. A critical aspect of ecosystem restoration is independent evaluations of all restoration projects to inform

future restoration efforts.

In the Klamath River Basin and elsewhere, restoration funds are too often diverted to benefit landowners, governments and organizations at the expense of what salmon most need to survive and thrive. Ecological restoration using the best available science and with mandated project evaluation would end the boondoggles which have become commonplace in Klamath River Basin restoration.



*Klamath fishreies and watershed restoration funds have often been diverted to benefit irrigators. For example, as on this Scott Valley farm, many irrigators received expensive new center pivot irrigation systems without being required to forebear use of surface diversions.*

The alternative to active salmon reintroduction, i.e. to humans moving salmon, raising them in pens, etc., is passive restoration - allowing the salmon to find their own way home. Where dams have been removed on salmon rivers, salmonids have recolonized the newly available habitat quickly. The passive approach should be followed in the Klamath River Basin because it is cheaper and because naturally recolonizing ESA-listed salmon would enjoy full ESA protection. Active restoration remains an option if the passive approach fails to deliver results.

Along with inadequate stream flow, the number one factor limiting salmon restoration and recovery basin-wide is poor water quality related to agricultural pollution. PacifiCorp's dams make poor quality water coming down from agriculture in the Upper Basin even worse. The alternative to the deals' limitations on how water quality is restored is full implementation of Klamath River Basin TMDL Clean Up Plans. Under those plans, PacifiCorp would have to do more to improve water quality while the dams still stand and ecological restoration of Lower Klamath Lake – the single most effective approach to fixing the Upper Basin's poor water quality – would be possible. The KBRA Deal effectively prevents ecological restoration of Lower Klamath Lake by giving planning and land use control to federal irrigation interests. Those interests want to limit marsh restoration in order to maximize agricultural use of former wetlands and lakebeds.



*Some salmon advocates want PacifiCorp to do more to clean up the highly polluted water it discharges from its reservoirs*

### **Issue #3: National Wildlife Refuges**

#### **What is proposed**

The five national wildlife refuges located in the Upper Basin – Tule Lake NWR, Lower Klamath NWR, Bear Valley NWR, Upper Klamath NWR and Klamath Marsh NWR – host 80% of Pacific Flyway Birds during migration, wintering or breeding. Before the Upper Basin’s marshes were drained for agriculture, up to 7 million birds visited these marshes each year providing what explorers and naturalists described as one of the major wildlife displays occurring in North America. Even now after 70% of the marshes have been drained, the refuges still host up to 3 million birds per year.

The Lower Klamath and Tule Lake Refuges currently depend on the Bureau of Reclamation for water. When water has been short the Bureau has cut refuge water deliveries dewatering the marshes while full irrigation water delivery continued. This prompted some refuge managers to plan for an independent water supply. The KBRA Deal prohibits development of an independent refuge water supply. If Congress endorses the deal, Lower Klamath and Tule Lake NWRs will remain under the control of the Bureau of Reclamation and Project Irrigators.



*The Klamath Refuges play a key role in the Pacific Flyway which extends from the Arctic to Central America*

### **National Wildlife Refuges Pros and Cons**

If Congress authorizes the KBRA, Tule Lake and Lower Klamath NWRs become an official “purpose” of the Klamath Project along with agriculture. Tule Lake and Lower Klamath are also assigned a specific water allocation which appears to be adequate for refuge needs. Under the deal, however, refuge water rights are subject to complex limitations which render them junior to irrigation water users. In times of shortage, Tule Lake and Lower Klamath NWRs could still be dewatered.

KBRA ratification by Congress would also lock-in commercial farming on refuge lands and give those irrigators with commercial operations on the refuges water priority over wildlife. Ratification would lock-in the rotation of on-refuge commercial agriculture with seasonal marshes. This is an improvement over the practice of allowing refuge land to be used year after year for commercial agriculture. However, commercial agriculture even with wetland rotation does not deliver wildlife benefits comparable to those which would be realized if refuge lands were not farmed commercially. Critics of the deal say wildlife – not commercial agriculture – should have priority on refuge land.

### **National Wildlife Refuges Alternative**

In addition to making them a purpose of the Project, Klamath legislation should clearly designate the refuges as equal to commercial agriculture in water allocation priority within the Klamath Project. That is the only way to assure that these refuges will not be sacrificed in order to maintain irrigation deliveries as they have been sacrificed so often in the past.

An alternative to the KBRA would encourage refuge managers to develop an independent water supply for those years when available Klamath River water is not sufficient to meet all needs. Klamath legislation should end commercial farming on the refuges. As is the case with all other US wildlife refuges, Tule Lake and Lower Klamath NWRs should be managed for the full benefit of wildlife.

Klamath legislation should authorize and fund a feasibility study for ecological restoration of Lower Klamath Lake. In addition to obvious wildlife benefits, ecological restoration of Lower Klamath would provide better flood protection for Klamath River Communities, major additional water storage without new dams and improved Klamath River water quality. Lower Klamath Lake marshes have

been shown to be effective at sequestering phosphorus – the top nutrient polluting the Klamath River.

## **Issue #4: Water and Restoration Governance**

### **What is proposed**

The KBRA seeks to establish structures and procedures for the ongoing management of water and restoration for the entire Klamath River Basin. The complex governance structure it establishes includes both closed-door inter-governmental bodies and public committees which would be established pursuant to the Federal Advisory Committee Act.

### **Governance Pros and Cons**

There is currently no committee or other body coordinating Klamath River Water management. The same is true for restoration. KBRA adoption by Congress would change that. However, the proposed KBRA structures are problematic. For one thing, while water is a Public Trust Resource consultations and decisions about how to manage that public good will take place behind closed doors with the public excluded. The advantage to this approach is that water will be managed by professionals; the disadvantage is that those professionals will all be agency and tribal bureaucrats working without effective public oversight. If history is any indication, that is a recipe for mischief.

Restoration could clearly benefit from basin-wide coordination as proposed in the KBRA. However, the KBRA also pre-establishes priorities and allocates restoration funds to benefit “parties” at the expense of non-parties. Essentially KBRA promoters seek to recreate the Klamath Fisheries Restoration Program which operated for 20 years in the basin pursuant to the 1986 Klamath Act. That restoration program, however, was plagued by political deals. As a result and in spite of expenditure of \$40 million dollars, the #1 restoration target species – Klamath River Chinook Salmon – continued to decline. The KBRA would establish a restoration program with the same approaches and problems which rendered the previous Klamath Fisheries Restoration Program a failure.



*The Klamath Task Force's 20 year fisheries restoration program failed to stem the decline of Klamath Salmon because political deals - not restoration science - determined where and how taxpayer funds were expended.*

## **Governance Alternatives**

The alternative to closed-door management by government bureaucrats is open, democratic management as is fitting when the resource to be managed is water – a Public Trust Resource. The way this has been traditionally done in the American West is through irrigation districts at the local level and river compacts at the river basin level.

A river compact is the law of the river for rivers that flow through more than one state. Water compacts must be ratified by Congress and the states through which the river passes. No state or other entity gives up authority; compacts harmonize water management under existing legal authorities.

A river compact could also be used to manage restoration. Legislation establishing the compact could mandate the use of best restoration science to prioritize restoration projects and evaluate results. Under a compact all decisions about public resources are made in public and with public participation.

The Klamath River has a compact but that compact is obsolete, unfunded and ineffective; it also does not provide a voice for federal tribes or for counties which in California have authority to manage groundwater. A new compact for the Klamath River would provide seats not only for Oregon, California and the federal government but also for the Basin's six federal tribes and six counties. It would be mandated to coordinate and harmonize water management under existing authorities and to manage restoration programs using the best restoration science. A compact of this type would bring Klamath water management into the light of day - a good way to forestall bureaucratic mischief.

## **Conclusion**

The Klamath Dam and Water Deals – the Klamath Hydroelectric Settlement Agreement or KHSA and the Klamath Basin Restoration Agreement or KBRA – are the result of a major effort to bring competing interests together to forge a way forward which will lead to less conflict over water, restoration of the Klamath River and recovery for Klamath Salmon. The effort has produced complex, costly and controversial plans with implications which cannot be projected with assurance.

The convoluted legal language in these plans may well provide fodder - unrecognized at this point - for future conflict and lawsuits. That is inevitable with an approach which aims to settle all issues up front. The alternative is to establish an effective process which does not attempt to pre-decide all issues but which provides an effective means to manage conflict and forge compromises in the future.

Complex prescriptive deals like the KHSA and the KBRA inevitably have winners and losers. In the case of the Klamath deals, the winners are those who are promoting the deals and the losers are those who oppose them. Now it is up to Congress to decide if they will back the winners or try to level the playing field. Congress must also decide whether it wants to lock in future management by endorsing the KBRA or establish a good process for handling water conflicts which arise in the future.

The KHSA and KBRA have dedicated promoters and others who are equally dedicated to scuttling them. Always tuned to conflict, the media presents the issue as two sided – us v them. There are many in and outside the basin, however, who are not on either of these sides. Those in the middle want the dams down; they want water management coordination and basin-wide restoration. But they also believe there are major flaws in these deals which – unless fixed by Congress – will lead to more conflict and preclude restoration of the Klamath River and full recovery of Klamath Salmon.

For those in the middle the most critical flaws are keyed to the four issues discussed above - Water Allocation, Salmon Restoration and Recovery, National Wildlife Refuges and Governance. Working to fix those flaws as Klamath legislation moves through Congress could spell the difference between restoration success and failure, more rather than less conflict and democratic rather than bureaucratic water governance.

As the focus shifts to Washington, DC and legislation, KlamBlog will continue to inform interested citizens about what is being proposed. We will measure developments in terms of core principles:

- Equity for all interests and individuals.
- The Health and Recovery of river ecosystems, salmon fisheries, refuges and river communities.
- Open and Democratic water and restoration governance.

These three principles are the key to real “Peace on the River”. If they are honored by Congress and prevail, the way forward in the Klamath River Basin will be less competitive and more cooperative. That could only lead to a healthier river and a healthier river basin society going forward.