



KWUA Summary Memorandum Re: Settlement Agreements January 11, 2010

INTRODUCTION

In 2004, PacifiCorp applied to the Federal Energy Regulatory Commission (FERC) for a 50-year license to operate its four primary power-producing dams and generating facilities located on the main stream of the Klamath River. The Klamath Water Users Association (KWUA) and other interested parties intervened in the FERC process to represent the interests of their members. KWUA retained attorneys and other consultants and has invested a substantial amount of resources in the FERC case. PacifiCorp's application and other information is available on its website at www.pacificorp.com under the tab "energy sources."

While the FERC process moved forward, various settlement processes began, and the scope of settlement discussion became broader than the relicensing. KWUA and other organizations ultimately negotiated two proposed agreements: the Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities (KBRA) and the Klamath Hydroelectric Settlement Agreement (Dam Agreement). Copies of those documents are available at www.edsheets.com and on www.kwua.org.

KWUA saw the negotiation process as one which could have adverse consequences for KWUA members if their interests were not represented. Further, the negotiation process provided a forum for advancing the interests of KWUA members. KWUA's board identified three primary goals for settlement:

1. The continuation of affordable power;
2. A reliable, predictable supply of irrigation water for the Klamath Project.
3. Avoidance of adverse consequences for irrigation if fish species not currently present in the Upper Klamath Basin arrive.

In the course of the negotiations, other goals were also pursued, including as a product of issues raised by other parties.

Following is an outline of several issues that are addressed in the KBRA and our best estimate of what will happen if the KBRA is not approved and the status quo is maintained versus what will happen if the KBRA is approved and fully implemented. This outline is based on the information available to us as of the date of this outline. It is not legal advice. Many of the elements, both under status quo and the KBRA, are beyond our control and are subject to change

in the future. It must be emphasized that the KBRA requires Congressional authorization and substantial, subsequent appropriations of money. In addition, implementation of the Dam Agreement will affect the ability to realize the objectives of the KBRA. (For example, if the Dam Agreement terminated prematurely based on its termination provisions, settlements of water rights between Indian Tribes and the Klamath Project would not be expected to occur.)

I. AFFORDABLE POWER

A. Preferential Contract Rate

1. **Status quo.** Klamath Basin irrigators enjoyed a preferential power rate under Contracts made between COPCO and USBR and the Klamath Water Users Protective Association. The contract benefitting Klamath Project irrigators expired in 2006, and all power users in the Project are now paying rates that ultimately will equal the applicable tariff rate. In the FERC process, KWUA asserted that the Contracts should continue from year to year as a condition of the interim annual licenses granted by FERC to PacifiCorp to operate the dams. However, KWUA's request was denied by FERC. We do not assume that there would be a new contract as a result of the FERC relicensing process.
2. **KBRA.** There are no provisions in the KBRA that apply to this issue.

B. Substitute Federal Power. Bonneville Power Administration (BPA) markets power at preferential rates certain users in Oregon. This can include public utility districts which operate delivery systems or Reclamation projects.

1. **Status quo.** While possible that an arrangement could be made to secure federal power without KBRA, no such initiative has started. There would likely not be support from other parties.
2. **KBRA.** The KBRA and Dam Agreement, in tandem, provide that the Bureau of Reclamation will pursue, and parties will support, an allocation of preference power to serve irrigation loads in Oregon, on and off-project; and that arrangement would be made with PacifiCorp for it to deliver this power (in lieu of delivery of power generated or bought by PacifiCorp). Based on the information we have, the cost for generation and transmission to a local substation would be approximately \$.03 per kilowatt hour, with additional costs for delivery by PacifiCorp. The overall saving in current markets appears to be about one cent per kilowatt hour for delivered power as compared to tariff, although this differential could grow. It is possible that such an arrangement could arise outside the settlements, but it would require either a commitment from PacifiCorp that currently exists only in the settlements, or purchase or condemnation of

PaciCorp distribution facilities. The latter alternatives would be very complex and challenging.

C. Pumping Power Program.

1. **Status quo.** Several Project districts entered into an Intergovernmental Agreement to form the Klamath Water and Power Authority (KWAPA) for the purpose of investigating opportunities for investment in power generation with a goal of using the income from KWAPA-owned and managed or partnered power projects to offset the cost of the power purchased by Klamath Project water users from PacifiCorp. KWAPA intends to move forward with that mission. Those studies and projects may require funding and other support from the member districts.
2. **KBRA.** In addition to the federal power provisions discussed above, the KBRA provides for the establishment of a “Management Entity” for the purpose of developing power generation and other investments to generate income to offset the cost of power paid by irrigation water users and districts to PacifiCorp. The Management Entity will be an independent entity composed of two representatives from the off-project water users and four representatives of on-project water user groups, two from Oregon and two from California. The KBRA provides that any act of the Management Entity must be approved of by at least one representative from each of those three groups.

The KBRA provides approximately \$7.7 million over the first three years of the funding for a KBRA interim power program intended to offset annual power rate increases and maintain a target. The KBRA also provides \$1 million for use by the Management Entity in developing a renewable power program and engineering plans, and \$40.5 million for investment and implementation of the power program. This would include investment in renewable energy projects to produce revenue or otherwise offset the cost of power. In addition, the KBRA provides support for energy efficiency measures to reduce the costs of electrical power for on and off-project water users.

The proposed KBRA states that the (delivered) power cost target for the power-related programs is a cost “that will be at or below the average cost for similarly situated irrigation and drainage projects in the surrounding area for eligible powers users.”

II. KLAMATH RIVER ADJUDICATION

Neither the KBRA nor the Dam Agreement determine any water rights or otherwise change, alter, or affect the duties and responsibilities of the Oregon Department of Water Resources and Oregon courts to complete the Klamath River Adjudication.

- A. **Status Quo.** Klamath Project districts using Klamath water (referred to as “KPWU”) filed Claims in the Adjudication for irrigation water rights on land in the Klamath Project. The United States also filed similar Claims, and many off-Project water users have contested those Claims. KPWU will continue to litigate those Claims in the Klamath River Adjudication and defend their Claims against Contests of the United States and off-Project water users.

KPWU filed Contests against Claims made by some off-Project water users and will continue to litigate those Contests unless settled.

KPWU also filed Contests against Claims made by The Klamath Tribes and the United States BIA for tribal water rights in Upper Klamath Lake and the Klamath River. Those parties entered into an Interim Agreement whereby KPWU conditionally withdrew their Contests and The Tribes and the United States conditionally agreed to make no call against water deliveries to the Klamath Project. Initially, this no-call agreement applies to all Project diversions; after the deadline for implementation of the On-Project Water Plan, the no-call applies to stipulated limits. If the KBRA does not move forward, then KPWU may file exceptions to any portions of the Adjudicator’s Order with respect to the tribal Claims and litigate those exceptions in the Circuit Court. In the meantime, The Tribes will not assert calls against water rights with a priority date prior to August 9, 1909. If conditions of the KBRA triggering permanent water tribal water settlements do not occur, then after such time as the KPWU Contests have been litigated in Circuit Court, The Tribes will be free to exercise whatever rights they may be awarded in the Adjudication.

- B. **KBRA.** The KBRA does not determine any water rights or eliminate the necessity for KPWU to assert and defend its Claims for irrigation water for the Klamath Project, nor does the KBRA impact in any manner the Contests of KPWU against non-tribal off-Project water users. The KBRA does, however, affect the Contests of tribal rights in the following manner:
1. The withdrawal of KPWU’s Contests to Upper Klamath Lake and Klamath River Tribal Claims will become permanent if certain events occur.
 2. The Klamath Project will, if certain conditions occur (including those necessary for the tribal settlement) limit diversions from specified points on Upper Klamath Lake and Klamath River to certain limits. The limit is expressed as a combined total for irrigation and refuge uses with a minimum of 378,000 acre-feet and a maximum of 445,000 acre-feet per irrigation season (March through October). Between 48,000 and 60,000 acre-feet of the total water available would be provided for refuge uses.

3. If the provisions of the KBRA are not fully implemented, then KPWU's agreement to limit the exercise of its rights to the quantities described above will not become effective, and the parties will be subject to whatever rights and limitations that are included in the decree entered in the Adjudication.

III. PREDICTABLE, RELIABLE WATER ALLOCATION

A. Annual Water Availability Prediction

1. **Status Quo.** The Bureau of Reclamation, using input of other agencies, will continue to annually determine the projected inflows to Upper Klamath Lake, the amount of water required for ESA purposes, and the amount of water remaining for delivery to the Klamath Project.
2. **KBRA.** The KBRA delegates to KWAPA the responsibility for gathering historic information that may help determine the amount of water that will be available to Project irrigators and used by Project irrigators each year. The KBRA provides \$100,000 to KWAPA to do its initial evaluation and then \$8,000 a year thereafter to update that information. It also provides \$200,000 to KWAPA to develop a program that better predicts the availability of water, and \$20,000 per year thereafter to update the predictive techniques. Using the information developed by it, KWAPA will provide to a technical assistance team its estimates of the amount of water that will be required for Project irrigation and the amount of water likely to be available for instream use.

B. Water Bank / On-Project Water Management Plan

1. **Status Quo.** KWAPA is currently administering a Water User Management Plan (WUMP) funded by a BOR grant. The purpose of that program is to provide money for use in substituting pumped ground water for surface water at times when there is insufficient surface water available to meet on-Project irrigation demands. The initial WUMP agreement provided approximately \$10 million to KWAPA over a five-year period to pay ground water pumpers. However, KWAPA did not obtain any pumped water during the initial year of the contract, and the Bureau reallocated \$1 million for other purposes. Therefore, KWAPA will have available approximately \$9 million to obtain ground water during years 2010 through 2012, unless some or all of that money is also reallocated by the Bureau of Reclamation. At this time, the Bureau has no other money available in its budget for acquisition of water, land set aside, or other purposes to balance the available supply and the demand to the Klamath Project. Further, the water supply issues in the Central Valley of California could adversely impact the availability of BOR funding for Klamath Project water in the future.

2. KBRA

- a. **On-Project Water Plan.** The KBRA provides \$2.5 million to KWAPA in the first funding year to develop a plan for new water storage, water use efficiency, ground water use, and land idling to balance the available water supply and the water demand within the Klamath Project. It then provides approximately \$90 million to fund the On-Project Water Plan at approximately \$10 million per year.
- b. **D Pumping Plant.** The KBRA provides for offset of some of the cost of the operation of the D Pumping Plant and allocates some of the cost of the D Pumping Plant operation and power cost to the Fish and Wildlife Service and the Bureau of Reclamation.
- c. **Interim Flow and Lake Level Program.** The KBRA provides an additional \$10 million a year for ten years for use in a land idling or other programs to reduce the amount of water used for irrigation and other purposes to increase the inflows to Upper Klamath Lake and the lake level. That funding can also be used on an interim or permanent basis in connection with the on-Project plan developed by KWAPA. The interim program would end when permanent programs have been put in place.

IV. INFLOWS TO UPPER KLAMATH LAKE

- A. **Status Quo.** Upon the entry of the Adjudicator's Order, predicted to occur in the year 2012, all water users found to have valid water right claims by the Adjudicator will be able to exercise those rights, and the findings of the Order will be enforceable by the Oregon Department of Water Resources. If the Project Claims made either by the Districts or the United States are found to be valid, then the Project irrigators will be able to make a call on junior water right holders to stop irrigating and allow that water to flow into Upper Klamath Lake, where it then becomes available for Project irrigation. There are lands above Upper Klamath Lake holding State water rights with a priority date later than 1909 against which a call for Project water may be made. Further, if any of the Claims made by The Klamath Tribes, which include not only Claims for water in Upper Klamath Lake and the Klamath River but in nearly all of the tributaries, including the major tributaries of the Wood, Williamson, and Sprague Rivers, then The Klamath Tribes will also be able to exercise those rights. Any Tribal rights awarded by the Adjudication Order will have a priority date of time immemorial, which is the best priority date. Under normal circumstances, The Klamath Tribes could exercise any rights awarded to it in Upper Klamath Lake and the Klamath River by making a call on Project water. However, the Interim Agreement

referenced in section **II.A.**, above, prevents The Tribes from making that call against Project diversions up to the limits discussed previously.

B. KBRA

1. **Interim Flow and Lake Level Program.** The KBRA provides \$10 million per year for ten years as an interim program to pay irrigation water users, both on and off-project, to forego the use of that water when circumstances dictate such action. The program may therefore increase inflow to Upper Klamath Lake on an interim basis.
2. **Permanent Voluntary Retirement of 30,000 Acre-Feet of Water Use Above UKL.** The KBRA includes \$45 million to increase inflow to Upper Klamath Lake by 30,000 acre-feet per year on average. The means to retire water use include but are not necessarily limited to the voluntary acquisition of consumptive water rights from water users located upstream of Upper Klamath Lake and the transfer those rights instream to permanently increase the flow of water unto UKL.
3. **Real Time Water Management.** The KBRA includes approximately \$18 million for infrastructure such as river gauges and snowpack gauges, and for the development of a program and monitoring system that will allow for real time water management. That system, together with KWAPA's water management program, should provide better estimates of the amount of water that will be available each year in the Upper Basin for all purposes and should allow the parties to know in a timely manner what programs need to be initiated or modified to meet the needs of all water users.

V. LINK RIVER AND KENO DAMS

- A. **Status Quo.** PacifiCorp operates the Keno and Link River Dams. It has sought to exclude Keno Dam from its licensed hydroelectric project in the FERC relicensing.
- B. **KBRA.** The KBRA and Dam Agreement contemplate for the ultimate transfer of ownership, operation, and maintenance of the Keno and Link River Dams to the Bureau of Reclamation. The KBRA provides for the elimination of any existing debt that may be owed by the Klamath Project water users to the Bureau of Reclamation for construction, operation, and maintenance, and it provides that Klamath Project water users will not be responsible for the cost of any operation, maintenance, or improvement to those dams after transfer of ownership or operation to the Bureau of Reclamation. However, it also dedicates a portion of the lease revenues to the Bureau of Reclamation to pay the costs of operating and maintaining those dams. Under the traditional understanding of the status quo, those revenues should be available to Klamath Project districts to make

infrastructure improvements and pay major maintenance costs within the Project. However, there have been conflicting views within the Department of the Interior about the use of such revenues, and deficiencies in BOR accounting make questionable the amount of money available or that may be available in the future under the status quo scenario,

Further, the KBRA provides funding to screen the Keno Reservoir diversions, including the North Canal and provides that the parties will support this funding as a non-reimbursable expense.

VI. ESA

- A. **Status Quo.** Implementation of the reasonable and prudent alternatives under the Biological Opinions for sucker fish and salmon continue to directly impact Project water diversions. Project districts, through the KWUA, will continue to incur significant annual costs for litigation, negotiation, and consultation with the Bureau of Reclamation and the agencies issuing the Biological Opinions. The coho BO expires in 2012. Significant participation will be required by KWUA to minimize the adverse impact of the BO on Klamath Project operations. It is likely that KWUA will also need to continue its legislative and lobbying programs and may determine it appropriate to look at other water users who should bear responsibility for providing ESA water but have not been called upon to do so to this point in time.
- B. **KBRA.** The KBRA provides for reinstating consultations between the Bureau of Reclamation and the Services to update and modify the existing Biological Opinions. In addition, it provides that there will be habitat conservation plans which may have a term of “substantially beyond the [50 year] term of the Agreement” to provide greater security than the current section 7 consultation process. It also contains several hundred million dollars for restoration activities intended to improve water quality, aquatic habitat, and make other environmental improvements that are expected to lead to healthy populations of endangered species and alleviate the burden caused by existing Biological Opinions. The parties who negotiated the KBRA believe that implementation of the KBRA will allow a a reliable flow of water to the Klamath Project and other water users in the Upper Klamath Basin and affirmatively state that they will support regulatory approvals that would protect Project diversions at agreed amounts identified in II.B.2 above, subject to conditions stated in the agreement.

VII. TRIBAL WATER RIGHTS AND TRUST OBLIGATIONS

- A. **Status Quo.** In addition to the Klamath Tribes, other tribes in the Klamath Basin, including the Yurok, Karuk, and Hoopa Valley Tribes, assert rights to water for instream use for fisheries. Recognition or enforcement of such rights could adversely affect Klamath Project water supplies. In addition, the United States, as

trustee for these tribes, has trust responsibilities to tribes with fishing and water rights, and has identified such responsibilities as a factor in Project operations.

- B. **KBRA.** Under the KBRA, the Yurok Tribe and Karuk Tribe would make commitments not to assert water rights or trust responsibilities against the Project, upon terms similar to the Klamath Tribes discussed above. The United States as trustee for all the tribes in the Klamath Basin would make the same commitments. The Hoopa Valley Tribe is presently not identified as a party and could attempt to assert rights against the Project. The KBRA provides an on-ramp for the Hoopa Valley Tribe to become a party if it elects to do so.

VIII. OTHER PROVISIONS OF THE AGREEMENTS

This outline is intended to address many of the issues and provisions in the KBRA and Dam Agreement that have the most direct impact on Klamath Project irrigators. There are many other provisions in the Agreements that will affect our community, and the fact that they are not addressed in this outline should not be interpreted as an indication that we believe they are not important. In addition, as stated above, the outline assumes that provisions of the KBRA are implemented. You are encouraged to carefully review each of the Agreements and all terms of the Agreements. If you have questions, please address them to the Klamath Water Users Association, and we will make every effort to answer them for you.