



Klamath Water Users Association
2455 Patterson Street, Suite 3
Klamath Falls, Oregon 97603
(541)-883-6100 FAX (541)-883-8893
kwua@cvcwireless.net
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.