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CONFIDENTIAL
MEMORANDUM

TO: Richard Dowd, Chairman, and Members of the Resighini Tribal Council
FROM: Lester J. Marston, Tribal Attorney
DATE: September 15, 2010
SUBJECT: The Right of Tribal Members to Fish Off of the Resighini Rancheria in the
Klamath River
Our File No. 98-9,8

QUESTION

You have asked whether enrolled members of the Resighini Rancheria ("Tribe") have the right to fish in the Klamath River, at usual and accustomed fishing stations, located off of the Resighini Rancheria, free of State regulation and control and free from regulation and control by the Yurok Tribe.

OPINION

I am of the opinion that when Congress created the Old Klamath River Reservation, as enlarged by the Extension of the Reservation, it reserved to the Yurok Indians of the Klamath River Reservation and their descendants, including the Yurok Indians who are now members of the Tribe, the right to fish in that portion of the Klamath River located within the exterior bounds of the Old Klamath River and Extension Reservations free of State regulation and control. I am of the further opinion that only the Congress of the United States has the authority to extinguish or terminate their reserved fishing rights and that neither the creation of the Resighini Rancheria nor the enactment of the Hoopa-Yurok Settlement Act extinguished the fishing rights of the Yurok Indians of the Resighini Rancheria to fish in the Klamath River in the same manner and to the same extent that they fished in those portions of the Klamath River located within the Old Klamath River and Extension Reservation prior to the enactment of the Hoopa-Yurok Settlement

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Act. Finally, I am of the opinion that the fishing rights of the Yurok Indians from the Resighini Rancheria, to fish off of the Resighini Rancheria, at their traditional and customary fishing sites along or in the Klamath River, in the same manner and to the same extent that they fished immediately prior to the passage of the Hoopa-Yurok Settlement Act, is not subject to State regulation or control, nor subject to the regulation and control of the Yurok Tribe.

FACTS OF THE CASE

I am basing my legal opinion upon the facts that I have set forth below. The majority of the facts of this case are set forth in great detail in the memorandum dated October 4, 1993, to the Secretary of the Interior from the Solicitor, which I have hereby incorporated by this reference and attached hereto as if set forth here in full as **Exhibit A**. For your convenience in reading this memorandum, I will set forth a summary of the pertinent facts which I relied upon in rendering this opinion.

1. Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been a mainstay of the life and culture of the Yurok Indians residing there, including their lineal descendants who are members of the Yurok Indian Tribe.¹ See, *Mattz v. Arnett*, 412 U.S. 481, 487 (1973); *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981).

2. The Indians' heavy dependence on the salmon fishery for their livelihood has been well documented.² "The salmon fishery permitted the [Klamath-Trinity Basin] tribes to develop a quality of life which is considered high among native populations." AITS (1982) at 10. The salmon resource was the primary dietary staple of the tribes, and was the center of their subsistence economy. As the Court noted in *Blake v. Arnett*, 663 F.2d at 909, the fishery was "not much less necessary to the existence of the [Yurok] Indians than the atmosphere that they

¹ Indians' reliance on fishing continues. As the Court noted in *United States v. Wilson*: "To modify Indians of the [pre-1988] Hoopa Valley Reservation, fishing remains a way of life, not only consistent with traditional Indian customs, but also as an eminently practical means of survival in an area which lacked the broad industrial or commercial base which is required to provide its population, Indian or otherwise, with predictable, full-time employment and income adequate to provide sufficient quantities and qualities of the necessity of life." *United States v. Wilson*, 611 F. Supp. 813, 818, n. 5 (N.D. Cal. 1985).

² See, e.g., *Anthropological Study of the Hoopa, Yurok, and Karuk Indian Tribes of Northwestern California: Final Report*, 10, 22, 67-68, 101-107 (American Indian Technical Services, Inc., January 1982) (prepared for the U. S. Department of the Interior) ("AITS (1982)").

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breathed," quoting *United States v. Winans*, 198 U.S. 371, 381 (1905).

3. During the pre-contact period, the salmon fishery also held significant commercial and economic value in Yurok and Hoopa cultures and economies. Both tribes appear to have held firm concepts of property rights associated with the fishery. Fishing rights were considered personal property and part of an individual's wealth. Rights to fishing sites could be owned privately, fractionally, or communally, and could be inherited, sold, or transferred to pay debts. AITS (1982) at 23, 49, 57, 72-73, 99, 105. Ownership of fishing rights gave owners the right to do what they wished with the fish taken, including sale or trade. Access to the fishery was the subject of trade and barter, and use of fishing sites not one's own might be paid for by providing a portion of the catch to the owner. Virginia Egan-McKenna, *Persistence with Change: The Significance of Fishing to the Indians of the Hoopa Valley Reservation in Northwestern California*, 74-75 (unpublished M.A. Thesis, University of Colorado (1983). Ownership and fishing rights associated with particular sites also may have given the owner control over downstream activities. *Id.*, at 69.

4. By the Act of March 3, 1853, 10 Stat. 238, the President was "authorized to make five military reservations from the public domain in the State of California or the territories of Utah and New Mexico, bordering on said State, for Indian purposes."

5. The Act of March 3, 1855, 10 Stat. 699, appropriated funds for "collecting, removing, and subsisting the Indians of California . . . on two additional military reservations, to be selected as heretofore . . . provided, That the President may enlarge the quantity of reservations heretofore selected, equal to those hereby provided for."

6. Pursuant to the authority granted to him by the Acts of March 3, 1853, and March 3, 1855, President Pierce issued an order on November 16, 1855, establishing the Klamath River Reservation. In the order, President Pierce stated: "Let the reservation be made, as proposed." I C. Kappler, *Indian Affairs - Laws and Treaties*, 817 (1904) (hereinafter "Kappler"). The Klamath River Reservation established by President Pierce encompassed "a strip of territory one mile in width on each side of the [Klamath] river, for a distance of twenty miles." Kappler, at 816. The Klamath River Reservation, as originally established by order of President Pierce, is depicted on the map entitled "Appendix to Opinion of the Court," which is hereby incorporated by this reference as if set forth here in full and attached hereto as **Exhibit B**. The lands comprising the Klamath River Reservation were occupied mostly by Yurok Indians, and the Reservation encompassed what is today the lower portion of the Yurok Reservation.

7. The original Hoopa Valley Reservation is a twelve-mile square extending six miles on each side of the Trinity River. The Superintendent of Indian Affairs for California

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located and proclaimed it in 1864, pursuant to legislation enacted that same year. The legislation authorized the President to set apart up to four tracts of land in California “for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to the adaptation to the purposes for which they are intended.” Act of April 8, 1864, § 2, 13 Stat. 39, 40; see, Kappler at 815 (“1864 Act”). The Reservation was mostly inhabited by Hoopa Indians. Although Congress itself thereafter recognized the existence of the Hoopa Valley Reservation as early as 1868, it was not until 1876 that President Grant issued an Executive Order formally setting aside the Reservation “for Indian purposes, as one of the Indian reservations authorized . . . by Act of Congress approved April 8, 1864.” Kappler at 815.

8. Between 1864 and 1891, the legal status of the Klamath River Reservation as an Indian reservation came into doubt. Although the Klamath Reservation had been created pursuant to the 1853 statute, the subsequent 1864 Act limited to four the number of reservations in California, and contemplated the disposal of reservations not retained under authority of the 1864 Act. See, 1864 Act, § 3, 13 Stat. at 40. By 1891, the Round Valley, Mission, Hoopa Valley, and Tule River Reservations had been set apart pursuant to the 1864 Act. *Mattz v. Arnett*, 412 U.S. 481, 493-494 (1973). Still, the Department of the Interior continued to recognize that the Klamath Reservation was critical to protecting the Indians who lived there and for protecting their access to the fishery, and continued to regard it as a Reservation throughout the period from 1864-1891.

9. Finally, in 1891, in order to eliminate any doubt regarding the status of the Reservation, and to expand the existing Reservation to better protect the Indians living there from encroachment by non-Indian fisherman, President Harrison issued an Executive Order under the authority of the 1864 Act. The Order extended the Hoopa Valley Reservation along the Klamath River from the mouth of the Trinity River to the ocean, thereby encompassing and including the Hoopa Valley Reservation, the original Klamath River Reservation, and the connecting strip between. Thereafter, the original Klamath River Reservation and the connecting strip have been referred to jointly as the “Extension” or the “Addition,” because they were added to the Hoopa Valley Reservation in the 1891 Executive Order. Kappler at 815. The validity of the 1891 Extension (“Extension”) and the continuing existence of the area included within the original Klamath Reservation were subsequently upheld by the United States Supreme Court in the cases of *Donnelly v. United States*, 228 U.S. 243, *modified and rehearing denied*, 228 U.S. 708 (1913), and in *Mattz v. Arnett*, 412 U.S. 481 (1973).

10. By deed dated January 7, 1938, Gus Resighini deeded to the United States in trust all that real property situated in the County of Del Norte, which presently constitutes the Resighini Rancheria (“Rancheria”). The warranty deed from Gus Resighini to the United States

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(in trust) was recorded on November 1, 1938, with the Del Norte County Recorder's Office in Volume 56 of Deeds, pages 450-551.

11. The purchase of the Rancheria by the United States in trust was made under the authority of § 5 of the Act of June 18, 1934 (Indian Reorganization Act), 25 U.S.C. § 465, which authorized the Secretary of the Interior "to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to land, within or without existing reservation, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

12. By Proclamation dated October 21, 1939, the Secretary of the Interior, under the authority of § 7 of the Indian Reorganization Act, 25 U.S.C. § 463, declared the land purchased from Gus Resighini to be an Indian Reservation. The Proclamation described the land as containing approximately 228 acres, more or less. The 1973 survey map recorded by Richard B. Davis shows the Rancheria as containing 238.78 acres.

13. The Tribe is a federally recognized Indian tribe organized under the authority of the Indian Reorganization Act of 1934, under a written Constitution which was ratified by its members on February 20, 1975, and approved by the Secretary of the Interior on April 10, 1975. On June 3, 1998, the Tribe amended its Constitution; these changes were adopted by the General Council of the Tribe on June 3, 1998, and approved by the Secretary of the Interior on July 3, 1998.

14. All of the lands that comprise the Rancheria are located within the exterior boundaries of the original Klamath River Reservation and is located at Highway 101 and the Klamath River in Del Norte County, Northern California.

15. In 1998, Congress enacted the Hoopa-Yurok Settlement Act, which partitioned the extended Hoopa Valley Reservation into the present Hoopa Valley Reservation, consisting of the original twelve-mile square bisected by the Trinity River and established under the 1864 Act, and the Yurok Reservation, consisting of the area along the Klamath River within the Old Klamath River Reservation, including the 1891 Extension (excluding the Resighini Rancheria). Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. § 1300i-1300i-11 (Sub. 1993).

16. Under the Hoopa-Yurok Settlement Act, Congress "recognized and established" each area as a distinct Reservation and declared that "[t]he unallotted trust land and assets" of each Reservation thereafter be held in trust by the United States for the benefit of the Hoopa Valley and Yurok Tribes, respectively. 25 U.S.C. § 1300i-1(b) & (c).

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17. The Tribe was recognized by the Secretary of the Interior as a federally recognized Indian tribe thirteen years before the establishment of the Yurok Reservation. The tribal governmental body of the Tribe is the Tribal Business Council and it has been in continuous operation since 1975.

18. Under Article I of the Tribe's Secretariially-approved Constitution, the jurisdiction of the Tribe, acting through its Tribal Council, extends to:

- (a) All land encompassing the ancestral territory of the Klamath River Tribe our people descended from, including all that area from Damnation Creek in the north, Little River Drainage Basin in the south, and from the Pacific Coast along the Klamath River from its mouth to the Bluff Creek Drainage in the east.
- (b) Notwithstanding the issuance of any patent, all lands, water, and other resources within the exterior boundaries of those lands constituting what is commonly known as the Resighini Rancheria purchased by the Secretary of the Interior on January 7, 1938, under the authority of the Wheeler-Howard Act, June 18, 1934;
- (c) All of the lands, water, and resources as may hereinafter be acquired by the Tribe, whether within or without said boundary lines, under any grant, transfer, purchase, adjudication, treaty, Executive Order, Act of Congress, or other acquisition;
- (d) All persons within any territory under the jurisdiction of the Tribe; and
- (e) All tribal members, wherever located.

19. From time immemorial to 1938, the ancestors of the Yurok Indians of the Tribe fished in the Klamath River within the Old Klamath River Reservation and Extension.

20. From 1938 to 1998, the members of the Tribe fished in the Klamath River within the Old Klamath River Reservation and Extension at traditional fishing sites located outside the boundaries of the Rancheria.

21. From 1998 to the present, members of the Tribe fished in the Klamath River within the Yurok Indian Reservation at traditional fishing sites located outside the boundaries of the Rancheria.

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LEGAL ANALYSIS

A. Creation Of The Old Klamath River Indian Reservation And Of The Extension Reserved To The Yurok Indians Of The Reservation, Including The Yurok Indians Of The Resighini Rancheria, The Right To Fish On The Reservation.

There is no doubt that when the Klamath River Reservation was created for Indian purposes, it reserved to the Indians of the Reservation, including the Yurok Indians who are currently members of the Resighini Rancheria, a federally reserved right to fish in the Klamath River.

To begin with, the People's broad claim that Yurok Indians enjoy no federally protected fishing rights in the Klamath River flies directly in the face of *all* of the recent federal and state decisions involving Yurok Indian fishing on the Hoopa Valley Reservation. As we have seen, in 1975, the California Court of Appeal specifically held in *Five Gill Nets*, *supra*, 48 Cal. App. 3d 454, *cert. denied*, (1976), 425 U.S. 907 [47 L.Ed.2d 757, 96 S.Ct. 1500], that state regulation of such on-reservation Indian fishing was preempted by the Indians' federally protected fishing rights; that holding, of course, is totally incompatible with the People's present contention that the Yurok Indians enjoy no federally protected fishing rights in the Klamath River. Similarly, more recent federal decisions have likewise expressly recognized that "[the] right to take fish from the Klamath River was reserved to the Indians when the Reservation was created." (*United States v. Eberhardt*, *supra*, 789 F.2d 1354, 1359; see, *Blake v. Arnett*, *supra*, 663 F.2d 906, 909; *Pacific Coast Fed. v. Secretary of Commerce* (N.D. Cal. 1980) 494 F. Supp. 626, 632-633.) And, of course, our *McCovey* decision also expressly held that the Yurok Indians possess federally reserved fishing rights in the Klamath River which were properly subject to federal regulation. (*McCovey*, *supra*, 36 Cal.3d at P. 534.).

Mattz v. Superior Court, 46 Cal.3d 355, 371 (1988).

Prior to the creation of the Resighini Rancheria, the Yurok Indians and their descendants who are members of the Resighini Rancheria, fished on the Klamath River within the Old Klamath River Reservation and Extension free of State regulation and control. In fact, both before and after the creation of the Resighini Rancheria, the Yurok Indians of the Resighini Rancheria fished on the Klamath River within the Old Klamath River Reservation and Extension at their usual and accustomed fishing stations pursuant to their federally reserved fishing right.

The Resighini Yurok's immunity from State law existed even though the State had been granted

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criminal jurisdiction over “Indian country” within California under Public Law 280, because that statute provides that it shall not “deprive any Indian of any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing, or the control, licensing, or regulation thereof.” 18 U.S.C. § 1162(b).³

Moreover, in *Blake v. Arnett*, *supra*, 663 F.2d 909, the Ninth Circuit Court of Appeals expressly held that it didn’t matter that federally reserved fishing rights were created by statute, as opposed to a treaty. Since, as the Court acknowledged, “both treaties and statutes are the supreme law of the land.” *Id.*, at 909.

Likewise, State law cannot be applied to Indian hunting and fishing rights in “Indian country” by way of the Assimilative Crimes Act, 18 U.S.C. § 13. *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980).

Finally, California is also preempted from prohibiting the possession or sale of fish off of the Reservation by Resighini Yuroks who take the fish on the Old Klamath River/Extension Reservation.

After reviewing the comprehensive nature of the federal regulatory scheme governing Indian fishing on the Hoopa Valley Reservation, we concluded in *McCovey* that, as in *Mescalero*, [there] is little question that the exercise of State criminal jurisdiction in this area will “disturb and disarrange” the federal scheme. [Citation.] Concurrent jurisdiction by the State would supplant the present federal regulatory scheme with an inconsistent dual system.

People v. McCovey, 36 Cal.3d at 531; see, *Mattz v. Superior Court*, 46 Cal.3d 355 (1980), *cert. denied*, 489 U.S. 1078 (1989).

In short, it is now well-established that the Yurok Indians of the Resighini Rancheria have federally reserved fishing rights to fish on what is now known as the Yurok Indian Reservation, initially created in the nineteenth century when the lands they occupied were set aside as the Old Klamath River/Extension Reservations for “Indian purposes.” Numerous court decisions have recognized that the United States intended to reserve for the Indians the rights and resources necessary for them to maintain their livelihood. As the Ninth Circuit has stated, the right

³The California Court of Appeal found that the Klamath River Reservation and the Extension was created by statute, within the meaning of the phrase “immunity afforded under Federal . . . statute,” *Arnett v. Five Gill Nets*, *supra*.

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includes “fishing for ceremonial, subsistence, and commercial purposes.” *United States v. Eberhardt*, 789 F.2d 1354, 1355 (9th Cir. 1986).

This federally reserved fishing right did not vest in the Yurok Indians of the Resighini Rancheria ownership of any fish, but a right to an opportunity to obtain possession of a portion of the resource, which can best be expressed by either the numbers of fish taken or an allocation of the harvestable resource. See, *United States v. Washington*, 520 F.2d 676, 687 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); see, also, *Puget Sound Gillnetters Ass'n v. United States District Court*, 573 F.2d 1123, 1129, n. 6 (9th Cir. 1978), vacated and remanded, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (vacating judgments of the Ninth Circuit and State Supreme Court and remanding for further proceedings not inconsistent with the United States Supreme Court’s opinion).

Since time immemorial, the ancestors of the Yurok Indians of the Resighini Rancheria have fished in the Klamath River at their traditional and usual and accustomed fishing stations located in what is now the Yurok Indian Reservation. They fished in the Klamath River before the Old Klamath River Reservation and Extension were created, after the Old Klamath River Reservation and Extension were created, before the Yurok Reservation was created, and after the Yurok Reservation was created. They have fished pursuant to their aboriginal right and pursuant to their federally reserved fishing right, which was created when the Old Klamath River Reservation and Extension were created for the Yurok Indians for “Indian purposes.”

Having established that the Yurok Indians of the Resighini Rancheria have federally reserved rights that were reserved to them with the creation of the Klamath River Reservation and Extension, the question now becomes: Has Congress, through the enactment of subsequent legislation, extinguished or limited those rights?

B. Absent An Act Of Congress Containing A Clear Congressional Intent To Terminate The Fishing Rights Of The Yurok Resighini Within The Yurok Reservation, The Yurok Resighini Retain The Right To Fish Off Of The Resighini Rancheria At Their Usual And Accustomed Fishing Stations On The Klamath River within the Yurok Reservation.

It is well settled that federally reserved fishing rights cannot be extinguished in the absence of a clear indication of Congressional intent to that effect. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *United States v. Felter*, 752 F.2d 1505 (10th Cir. 1985).

The federal courts generally require that Congress make its intent to abrogate reserved fishing rights clear and unambiguous. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S.

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172, 202 (1999); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968). In many cases, the Supreme Court has stated that Congress must make its intent to abrogate express through the use of “explicit statutory language.” *Washington v. Washington State Commercial Passenger Fishing Vessels Ass’n*, 443 U.S. 658, 690 (1979) (“[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights.”); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1960) (“[w]e find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred in a treaty.”). In other cases, the Supreme Court has allowed a somewhat lesser standard, finding it sufficient if Congress’ intent is “clear and plain.” *United States v. Dion*, 476 U.S. 334, 338 (1986). In any case, however, the Court has provided that: “The intention to abrogate or modify a treaty is not to be lightly impugned to the Congress.” *Id.*, at 739. The “essential factor is clear evidence that Congress actually considered the conflict between its intended action on one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.” *Id.*, at 739-740 (1986).

These standards are consistent with general principles regarding Congressional intent to extinguish Indian property rights. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-248 (1985). Although the vast majority of cases dealing with extinguishment of Indian fishing rights arose in the context of treaty fishing rights, under the Supremacy Clause of the United States Constitution, there is no difference between a fishing right reserved by treaty and a fishing right reserved by statute. Therefore, the rationale applicable to the extinguishment of Indian fishing rights reserved by treaty applies equally well to Indian fishing rights reserved by statute.

We do not think that the distinction between a treaty and a statute have great significance. Before 1871, relations between the United States and Indians were frequently established by treaties with Indian nations which were held to be independent sovereign powers under the protection of the United States. [Citation omitted.] In 1871, Congress determined that “no Indian nation or tribe within the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty. . . .”, 25 U.S.C. § 71. However, first, both treaties and statutes are the supreme law of the land. Const. Art. IV, cl. 2. Second, the real power had lain with the United States alone long before 1871. Some at least of the treaties were the embodiment of orders imposed on Indians by the Executive. On occasion, the United States invented tribes and appointed their chiefs. [Citation omitted.] Third, the change from treaty to statute was at least in part a result of political infighting in Congress. The House was excluded from the treaty making process under Const. Art. II § 2, cl. 2, and it wished to have a clear say in Indian policies. [Citation

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omitted.] Fourth, as regards Indians, there is no clear cut distinction between treaties and statutes, nor any clear division between what was done by treaty and what was done by statute. Both treaties and statutes were worded in a wide variety of ways, some explicitly granting fee simple interest to tribes, some explicitly granting only Indian title (a right of occupancy at the pleasure of the United States), some saying no more than that land was reserved for Indian occupancy, some expressly reserving or granting rights, some silent on the subject. [Citation omitted.] **For all of these reasons, we believe that whether the source of the right is in a treaty or in a statute is of little contemporary relevance.**

Blake v. Arnett, 663 F.2d 906, 909-910 (9th Cir. 1981)(Emphasis added) .

Through enactment of the Four Reservations Act, Congress expressly authorized the President to create no more than four reservations within the State of California for "Indian purposes." Pursuant to that authority, the President created and set aside first, the Klamath River Reservation, and then the Extension, reserving to the Yurok Indians the right to fish in the Klamath River free of State regulation and control.

Once Congress reserved to the Resighini Yurok the right to fish in the Klamath River, on what is now the Yurok Reservation, the Resighini Yurok retain the right to continue to fish in the Klamath River free of State and Yurok Tribe regulation and control unless, or until, Congress, by enactment of subsequent legislation, extinguishes or terminates the right, by clear and explicit language.

C. The Hoopa-Yurok Settlement Act Does Not Contain Express And Explicit Language Evidencing A Clear Congressional Intent To Extinguish The Resighini Yuroks' Right To Fish On Those Portions Of The Klamath River Lying Within the Yurok Reservation.

In 1988, Congress Enacted the Hoopa-Yurok Settlement Act ("Act"), which partitioned the Hoopa Valley Reservation into the present Hoopa Valley Reservation and the Yurok Reservation. 25 U.S.C. § 1300i-1300i-11.

The Act provided that no constitutionally protected right had vested in any tribe or individual to the communal lands and other resources of the 1891 Reservation, and provided for a fair and equitable resolution of disputes relating to ownership and management of the 1891 Hoopa Valley Reservation. Pursuant to and in accordance with the Act, the 1891 Reservation was partitioned between the Hoopa Valley Tribe and the Yurok Tribe. The section of the 1891 Reservation

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known as "the Square" was established as the Hoopa Valley Reservation, and the section known as old "Klamath River Reservation" and "the Extension" was established as the Yurok Reservation. The Act also created a settlement fund initially comprised of funds derived from economic ventures occurring on the 1891 Hoopa Valley Reservation and supplemented by additional funds appropriated by Congress. Particular benefits of the Act, i.e., the provisions relating to the partitioning of the Reservation, potential expansion of the newly formed Reservations, and participation in the Settlement Fund, were conditioned upon the Tribe's adopting individual tribal resolutions, granting their consent to the partition of the 1891 Reservation and waiving potential claims that tribes may have against the United States.

Under the Act, a Settlement Roll was to be prepared of the "Indians of the Reservation" not already included as enrolled members of the Hoopa Valley Tribe; persons on the Settlement Roll were to choose from among Hoopa tribal membership, Yurok tribal membership, and non-tribal membership options, each of which include a payment of various amounts of compensation; the Yurok Tribe was to receive the remainder of the Settlement Fund after payment of the Hoopa Valley Tribe's proportional share and deduction of sums paid to individuals; and upon the enactment of a resolution waiving claims that the Yurok Tribe might have against the United States arising out of the Act. In addition, the Yurok Tribe was to become eligible for various benefits, including land acquisition authority, appropriations, governmental organization and other federal benefits and programs provided to Indian tribes.

The Act established procedures for the organization of the Yurok Tribe, for the development of the Settlement Roll, and for the distribution of the Settlement Fund. As part of the tribal organizational process, the Act provided for the election of a "interim council" having limited powers, including the adoption of a resolution waiving any claim the Yurok Tribe may have against the United States arising out of the Act and affirming tribal consent to the contribution of Yurok escrow money to the Settlement Fund, and for the use as payments to the Hoopa Tribe, and to individual Hoopa members, as provided in the Act.

Among the specific benefits of the Act purportedly conferred on the Yurok Tribe were the transfer to the Yurok Tribe to be held in trust certain federal lands in the Six Rivers National Forest within the boundaries of the Old Klamath River Reservation and Extension; addition of lands to the Yurok Reservation through consensual acquisitions, the expenditure of not less than \$5 Million Dollars for the purpose of acquiring lands or interest in lands for the Tribe, and appropriation to the Yurok Tribe of the remainder of the Settlement Fund after distribution to the Hoopa Valley Tribe and individuals on the Settlement Roll.

Of all of the provisions in the Act, only subsection (c), paragraph (1), contains any language that one could argue expresses a Congressional intent to extinguish Yurok Resighini off-reservation

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fishing rights. That section provides that, effective with the partition as provided in subsection (a), that portion of the Hoopa Valley Reservation known as “the Extension” shall be recognized as the Yurok Reservation and shall be a reservation for the Yurok Tribe.

But, that section does not contain the express and explicit language necessary to effectuate an extinguishment of the Yurok Resighini off-reservation fishing rights. There is nothing in the language of the section that is inconsistent with creating a reservation for the Yurok Tribe out of the Extension lands and, at the same time, preserving valid pre-existing rights of third parties to use the lands and waters constituting the new Yurok Reservation.

Congress’s intent to preserve pre-existing third party rights in the newly created Yurok Reservation is clear from the language of the statute. First, subsection (c), paragraph (1), specifically provides that the creation of the new Yurok Reservation excludes “the lands of the Resighini Rancheria.” Congress knew at the time that it was creating the Yurok Reservation, that the Resighini Rancheria or Reservation existed and would be located totally within the boundaries of the Yurok Reservation. By excluding the lands of the Resighini Rancheria from the Yurok Reservation, Congress intended that the creation of the Yurok Reservation would not extinguish or terminate the Resighini Rancheria or any rights that the Indians of the Resighini Rancheria had within the Yurok Reservation prior to the creation of the Yurok Reservation.

Other sections of the Act manifest a clear Congressional intent not to extinguish the rights of third parties to the lands and waters of the newly created Yurok Reservation, that had vested or been reserved prior to the creation of the Reservation. For example, paragraph (2) of the Act provides that, **subject to all valid existing rights**, all National Forest lands on the Yurok Reservation and about fourteen acres of the Yurok Experimental Forest shall be transferred to the Yurok Tribe in trust. Thus, paragraph 2 evidences a clear Congressional intent to convey lands to the Yurok Tribe as part of the Yurok Reservation, but to preserve valid existing rights, such as off-reservation Yurok Resighini fishing rights.

Probably the clearest expression of Congress’s intent that the Act not terminate any pre-existing valid rights, including the right of the Yurok Resighini to fish in the Klamath River off of the Resighini Rancheria, is found in § 6 (d) of the Act. That section expressly provides that § 6 (d) is not a termination provision but, rather, merely offers a lump sum payment to persons on the Settlement Roll who wish to have no future interests or rights in the tribal, communal, or unallotted land, property, resources, or rights in the tribal, communal, or unallotted land, property, resources, or rights of the Hoopa Valley Reservation or the Yurok Reservation or the Hoopa or Yurok Tribes.

When the Yurok Resighini exercise their off-reservation right to fish in the Klamath River, they

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further submit that, although they were compensated for the Arapaho presence on the reservation in an amount equal to one-half the value of the land, including timber and mineral resources, [citation omitted], they were never compensated for the loss of their exclusive Treaty rights to hunt and fish.

We are not persuaded. The very principles of Indian law which dictate that the Shoshone have hunting and fishing rights notwithstanding the lack of an express Treaty provision dictate that the Arapaho have equivalent rights. The Arapaho have rights to the reservation derived from their status as occupants of the land confirmed by Congressional and Executive Acts. [Citation omitted.] The rights to hunt and fish are part of the tribe's larger rights of possession. See, *United States v. Winans*, 198 U.S. 371 (1905) ("the right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians . . . which were not much less necessary to the existence of the Indians than the atmosphere they breathed."); [citation omitted]. Whether by Treaty or Congressional and Executive Acts, the Shoshone and the Arapaho have equal rights to hunt on the reservation. See, Cohen's Handbook, *supra*, at 449; see also, *Arizona v. California*, 373 U.S. 546 (1963) ("establishment of a reservation reserves water rights to Indians, whether the reservation was established by Treaty or by Executive Order.").

Northern Arapaho Tribe v. Hodel, 808 F.2d 741, 748 (10th Cir. 1987).

As an attribute of its inherent sovereignty, the Tribe retains the right to regulate the conduct of its members. *New Mexico v. Mescalero Apache Tribe*, 463 U.S. 324, 330 (1983). It follows that the Tribe can regulate the off-reservation exercise of reserved fishing rights by its members. See, *Settler v. Lameer*, 507 F.2d 231, 236 (9th Cir. 1974); *United States v. Michigan*, 471 F. Supp. 192, 274 (W.D. Mich. 1979), *affirmed as modified*, 653 F.2d 277 (6th Cir. 1981); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 668 F. Supp. 1233, 1241 (W.D. Wis. 1987). Although tribes and states ordinarily possess concurrent authority to regulate the off-reservation tribal exercise of reserved fishing rights in the interests of conservation, effective tribal regulation of members off-reservation fishing rights will preclude concurrent state regulation. *United States v. Washington*, 520 F.2d 676, 686, n. 4 (9th Cir. 1975); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 668 F. Supp. 1233, 1241-1242 (W.D. Wis. 1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 707 F. Supp. 1034, 1055 (W.D. Wis. 1989) ("despite 'inadequacies' in tribal plan, tribes entitled to exclusive regulation of members' off-reservation fishing."). The principles that prohibit the State from regulating the Resighini Yuroks' off-reservation fishing applies equally as well to the Yurok Tribe. *Id.*

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The Yurok Tribe would retain the right to regulate the off-reservation fishing activities of Resighini Yuroks within the boundaries of the Yurok Reservation at any location other than the traditional and accustomed fishing stations of the Resighini Yurok. *United States v. Jackson*, 600 F.2d 1283 (9th Cir. 1979). That authority extends to the regulation of fishing by Resighini Yuroks on non-Indian fee lands located within the Yurok Reservation that are not the usual and accustomed fishing stations of the Resighini Yurok that they fished at prior to the creation of the Yurok Reservation. *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 827 (8th Cir. 1983); *cert. denied*, 464 U.S. 1042 (1984).

In addition, the federal government's plenary power over Indian affairs extends to the regulation of Indian fishing. The Secretary in the past has issued regulations governing Indian fishing on a few reservations, see 25 C.F.R. §§ 241 and 242, and has provided for identification of treaty Indians fishing off reservation, 25 C.F.R. § 249.

In fact, the Secretary has been held to be authorized under the trust power to ban commercial fishing by Yurok Indians on the Old Klamath River Reservation and Extension, and he need not show the kind of evident threat to conservation required for State regulation of reserved fishing. *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986).

However, in the absence of regulation by the United States, the Tribe retains the exclusive right to regulate the off-reservation fishing rights of its members. *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974).

CONCLUSION

Comment 1 -ITAs

In summary, the Yurok Indians of the Resighini Rancheria have the right to fish at all of their usual and accustomed fishing places in the Klamath River within the boundaries of what are now the Yurok Reservation in the same manner and to the same extent that they fished prior to the creation of the Yurok Reservation. The right of the Resighini Yurok to fish off of the Resighini Rancheria has never been extinguished by a subsequent Act of Congress and the Hoopa-Yurok Settlement Act does not manifest a clear Congressional intent to extinguish the Resighini Yuroks off-reservation fishing right. The right of the Resighini Yuroks to fish is subject to regulation by the Resighini Rancheria for all purposes and only by the Yurok Tribe and the State of California in order to conserve the fishing resources. However, neither the Yurok Tribe nor the State of California can regulate the Resighini Yuroks' off-reservation fishing rights on the Klamath River for conservation purposes, if the Resighini Rancheria is comprehensively regulating the right and have taken conservation of the resource into account in promulgating and enforcing its regulations.

LJM/cf

Enclosures: Exhibit A
Exhibit B

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Comment Author Marston, Lester
Agency/Assoc. Resighini Rancheria
Submittal Date October 26, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1026_069-1	Master Response TTA-4 1988 Hoopa-Yurok Settlement Act.	No



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LEONARD E. MASTEN JR
 CHAIRMAN

November 18, 2011

Via E-Mail to: KlamathSD@usbr.gov
 and Overnight Delivery

Ms. Elizabeth Vasquez
 U.S. Bureau of Reclamation
 2800 Cottage Way
 Sacramento, CA 95825

Re: Comments of Hoopa Valley Tribe on DEIS/DEIR for Klamath Facilities Removal

Dear Ms. Vasquez:

The Hoopa Valley Tribe submits the following comments on the Department of the Interior and California Department of Fish and Game's Draft EIS/EIR regarding Klamath Facilities Removal (the "DEIS"). The Tribe has previously submitted comments, dated July 14, 2010, on the Department of Interior's Notice of Intent to Prepare an EIS/EIR (the "Scoping Notice"). The Tribe also submitted extensive comments on the cooperating agency draft of the DEIS dated June 22, 2011. The Tribe incorporates those prior comments by reference, because the DEIS fails to incorporate or adequately address the vast majority of the Tribe's comments.

Interest of the Hoopa Valley Tribe

Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Hoopa Valley Tribe. The fishery was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The salmon fishery is integral to the customs, religion, culture, and economy of the Hoopa Valley Tribe and its members. The lower twelve miles of the Trinity River and a stretch of the Klamath River flow through the Hoopa Valley Reservation.

The federal government established the Hoopa Valley Reservation in 1864. The Hoopa Valley Reservation is located in the heart of the Tribe's aboriginal lands; lands the Tribe has occupied since time immemorial. The Hoopa Valley Tribe has fishing and water rights in the Klamath River with a priority date of 1864, as recognized by the United States in the Memorandum from Solicitor of the Department of the Interior to the Secretary of the Interior (Oct. 4, 1993); and the Memorandum from Regional Solicitor, Pacific Southwest Region to the Regional Director, Bureau of Reclamation, Mid-Pacific Region (July 25, 1995) (collectively, "Solicitors' Opinions"); and by federal courts in, for example, *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995). Congress has recognized and confirmed, for example in the Central Valley



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Project Improvement Act, Public Law 102-575, Section 3406(b)(23) (Oct. 30, 1992), that the United States has a federal trust responsibility to restore and maintain the fishery trust resources of the Hoopa Valley Tribe to specified standards. Those standards are recognized in federal law and have become a legal mandate. The Hoopa Valley Tribe's rights are unique. This is unlike the situation where several tribes signed a single treaty reserving rights in common. While other tribes in the Klamath Basin also have water and fishing rights, our rights are distinct in scope, derive from different authorities, and must be treated separately.

The fish and water resources of the Klamath River Basin have been severely and adversely affected by the federal authorization, construction, and operation of the Klamath Reclamation Project and the Klamath Hydroelectric Project upstream of the Hoopa Valley Reservation. The impacts associated with blocked fish passage, nutrient enrichment, loss of habitat, and inadequate instream flows due to the authorization, construction, and operation of the Klamath Reclamation Project and the Klamath Hydroelectric Project have contributed to the listing of the Southern Oregon/Northern California coast (SONCC) coho salmon and its critical habitat under the Endangered Species Act.

The Tribe has actively participated in all proceedings relating to the re-licensing of the Klamath Hydroelectric Project before the Federal Energy Regulatory Commission (FERC), and proceedings to enforce operation of the Klamath Reclamation Project in compliance with the Endangered Species Act and other applicable law. Protection of the Klamath and Trinity Rivers and the aquatic resources therein is of vital importance to the Hoopa Valley Tribe.

The Tribe participated in settlement negotiations leading to the Klamath Hydroelectric Settlement Agreement (KHSA) and Klamath Basin Restoration Agreement (KBRA). Although the Tribe favors the removal of the dams of the Klamath Hydroelectric Project for the purposes of improving water quality and restoring fish passage on the Klamath River, the Tribe did not sign, and enacted a resolution in opposition to the KHSA. The Tribe opposes the KHSA as drafted because it does not require the removal of any dams, but instead establishes an uncertain planning process that could potentially lead to commencement of dam removal in 2020 subject to the achievement of numerous contingent events that include, but are not limited to: (a) enactment of federal legislation; (b) California voter approval of a \$250 million bond package; (c) an affirmative determination by the Secretary of Interior that dam removal is in the public interest; and (d) separate concurrences by the states of California and Oregon that dam removal is in the public interest. To date, none of these contingencies have occurred.

The Tribe also opposes the KHSA because it suspends the FERC re-licensing proceeding, suspends the State of California and Oregon water quality certification proceedings, and permits the licensee PacifiCorp to continue operation of the Klamath Hydroelectric Project on terms of annual licenses until at least 2020. The KHSA also fails to provide for interim license measures that will bring the Project into compliance with current state, federal, tribal environmental laws, or applicable water quality standards, or that will adequately mitigate fishery impacts associated with operation of the Project.

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The Tribe also did not sign, and enacted a resolution in opposition to, the KBRA because the KBRA conflicts with tribal sovereignty, violates trust duties owed to the Hoopa Valley Tribe by the United States, subordinates tribal water and fishing rights in favor of junior non-Indian irrigation interests without tribal consent, provides inadequate flows for the protection of tribal trust resources, offers a speculative and unfunded program for fishery restoration and water conservation, encourages unsustainable use of groundwater in the Upper Klamath Basin, fails to abate acute nutrient pollution problems and is not based on best available, peer reviewed science. The Tribe also objects to the linkage of the KHSA and the KBRA.

Here, as in all other proceedings related to protection of the Klamath and Trinity Rivers, the Tribe is committed to ensuring that the United States and its respective departments and agencies fulfill their duties to the Tribe and to the Klamath and Trinity Rivers in accordance with applicable law, including NEPA, the Endangered Species Act, Clean Water Act, Federal Power Act, and the federal government's trust responsibility to the Hoopa Valley Tribe.

Comments on Draft EIS/EIR

I. **The DEIS Contains An Incomplete Evaluation of Alternatives, Fails to Evaluate the Impacts of the KBRA, and Ultimately Fails to Meet the Purpose of NEPA and CEQA to Facilitate Informed Decision-Making and Public Participation.**

The purpose of the NEPA and CEQA environmental review process is two-fold: "First, it places upon [the action] agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." *Kern v. United States Bureau of Land Management*, 284 F.3d 1062, 1066 (9th Cir. 2002). *See also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1997) (same); *Columbia Basin Protection Ass'n v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981) ("[T]he preparation of an EIS ensures that other officials, Congress, and the public can evaluate the environmental consequences independently."). Ultimately, an EIS does not satisfy NEPA unless "its form, content, and preparation substantially (1) provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences, and (2) make available to the public, information of the proposed project's environmental impacts and encourage participation in the development of that information." *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).

The DEIS here fails to meet the standards set forth above primarily through its failure to adequately disclose and evaluate the impacts associated with the KBRA. As the DEIS confirms, the KBRA is a connected and interdependent action. Yet, the DEIS does not adequately disclose the impacts of the KBRA. Nor does the DEIS consider or evaluate alternatives to the KBRA.

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The DEIS misleads the public and the decision-makers to believe that the KBRA is an agreement that will result in fishery protection and environmental restoration. The DEIS continually makes the incorrect statement that the KBRA “limits” irrigation water diversions below levels currently allowed by law. In fact, the KBRA will result in inadequate (and unlawful) flows for fish at critical times of dry water years, will result in a historic termination of the United States responsibilities to Indian tribes in the Klamath basin, will turn Western water law on its head by subordinating senior tribal water rights to junior irrigation interests, and will support otherwise unsustainable consumptive agricultural practices through hundreds of millions of dollars in public subsidies. In addition, the DEIS fails to inform the public and the decision-makers that any benefits that could derive from the KBRA for fish are speculative at best, given the need for congressional authorization and appropriations of funding that are not likely to occur.

The Tribe believes that dam removal is necessary and in the public interest. Improvements in water quality, volitional fish passage, and a free-flowing Klamath River are critical to support the Tribe and the river that runs through its homeland. However, the benefits of dam removal will not be achieved if tied to the KBRA. The proposed action may lead to a river without dams, but with the KBRA it will also lead to a river without sufficient water in the river for fish at critical times of the year. The impacts of the KBRA’s guaranteed diversions and associated tribal trust violations will not be evaluated in subsequent NEPA processes. The public, the Governors, the Departmental decision-makers, and Congress need to be made fully aware of the consequences of, and alternatives to, the KBRA. The DEIS fails in that regard.

II. The Purpose and Need Statement Should Delete Reference to Consistency with the KBRA.

CEQ Regulation 1502.13 requires that an EIS “briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” As stated in the DEIS, the purpose and need statement “is a critical part of the environmental review process because it helps to set the overall direction of an EIS/EIR, identify the range of reasonable alternatives, and focus the scope of analysis.” Final Alternatives Report, p. 2-1.

The DEIS describes the purpose of the Proposed Action as follows: “to achieve a free flowing river condition and full volitional fish passage as well as other goals expressed in the KHSA and KBRA.” The need is described as: “to advance restoration of the salmonid fisheries in the Klamath Basin consistent with the KHSA and the connected KBRA.” The Department should delete the references to consistency with the KHSA and KBRA. This EIS is being prepared to inform the Secretary of the Interior and the Governors of the States of Oregon and California whether “Facilities Removal (i) will advance restoration of the salmonid fisheries of the Klamath Basin, and (ii) is in the public interest, which includes but is not limited to consideration of potential impacts on affected local communities and Tribes.” KHSA, Sec. 3.3.1; DEIS, p. ES-2. Consistency with the KBRA is not a factor in the Secretarial Determination or the Governors’ concurrence and should not guide the selection of alternatives here.

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As the Tribe warned in its July 14 scoping comments, tying the purpose and need of the Proposed Action to KBRA implementation has resulted in an unreasonably narrow, and unlawful, alternatives analysis. As discussed in more detail below, an alternative that removes all four facilities without execution and implementation of the KBRA would achieve the purpose of “a free flowing river condition and full volitional fish passage” and would “advance restoration of the salmonid fisheries” and would be in the public interest. In addition, such an alternative would be feasible. However, by requiring consistency with the KBRA in the purpose and need statement, the Department was unable or unwilling to consider a no-KBRA alternative. *See* Final Alternatives Report, Section 2.3, Chapter 4 (establishing consistency with KBRA as factor for screening alternatives).

III. The Alternatives Analysis Fails to Comply With Requirements of NEPA and CEQA.

The alternatives analysis is the “heart of the environmental impact statement.” 40 C.F.R. § 1502.14. The EIS must “rigorously explore and objectively evaluate all reasonable alternatives,” and “devote substantial treatment to each alternative . . . so that reviewers may evaluate their comparative merits,” including “reasonable alternatives not within the jurisdiction of the lead agency. 40 C.F.R. § 1502.14(a),(b),(c); *see also* 43 C.F.R § 46.420(c) (defining “range of alternatives”).

The CEQ publication “NEPA’s Forty Most Asked Questions” confirms that in establishing a reasonable range of alternatives, “the emphasis is on what is ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative.” Question 2a. The CEQ publication adds that “an alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. . . . Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA’s goals and policies.” Question 2b.

For the reasons discussed below, the alternatives analysis in the DEIS is deficient:

A. The Description of the No-Action Alternative Is Inaccurate and Misleading and Does Not Facilitate Informed Decision-Making.

The alternatives analysis in an EIS is required to evaluate a No-Action Alternative. 40 C.F.R. § 1502.14(d). The No-Action Alternative is required to discuss both the existing conditions “as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved.” CEQA Guidelines Section 15126.6(e)(2). The DEIS states that “[f]or the purposes of this analysis, the No Action/No Project Alternative will continue current operations with the Four Facilities remaining in place and PacifiCorp operating under the current annual license.” DEIS, at ES-21. This is an inaccurate and misleading description of what would happen in the event of no-action, or a negative Secretarial Determination. As a result, the decision-makers and the public have not been presented with an accurate No-Action Alternative to compare with the other alternatives.

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In the event of a negative Secretarial Determination or adoption of the “No-Action” alternative the FERC licensing process will resume. All events in the FERC licensing process have been completed except for the completion of the Section 401 water quality certification (which is currently contractually barred from completion under the KHSA). If the KHSA and KBRA terminate, the States would resume the certification process and a new FERC license would issue “in the foreseeable future.” Indeed, the California State Water Resources Control Board Resolution No. 2011-0038, adopted August 16, 2011, makes clear that the Water Board expects that the environmental review process here “will facilitate completion of the State Water Board’s 401 certification process for the relicensing proceeding should that become necessary because the Secretarial Determination does not occur by April 30, 2012.”

The Departments of Interior and Commerce have already prescribed final and binding conditions pursuant to Section 4(e) and 18 of the Federal Power Act (including volitional fishway prescriptions) which must be included in the new license. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) (FERC must include the Departments mandatory conditions and prescriptions); *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006) (same).

It is not correct that the Klamath Hydroelectric Project would continue operating on annual licenses, with no protective terms and conditions, for “the foreseeable future” in the event that the KHSA terminates. The foreseeable No-Action scenario is not perpetual operation of the Klamath Hydroelectric Project under a long-expired license. Instead, the foreseeable No-Action scenario is one in which the Klamath Project is re-licensed, subject to the Departments’ mandatory Section 4(e) and 18 conditions and fishway prescriptions, as well as any conditions imposed under the authority of Section 401 of the Clean Water Act for compliance with water quality standards of the States of Oregon and California, and the Hoopa Valley Tribe.

By failing to describe the reasonably foreseeable No-Action scenario, the DEIS artificially makes the proposed action (dam removal plus KBRA implementation) seem more attractive than it really is. A properly framed No-Action alternative would describe issuance of, and project operations under, a FERC license that provided volitional passage and compliance with state and tribal water quality standards. In addition, the KBRA and its guaranteed water diversions and tribal claim waivers would not occur. Thus, the Klamath Reclamation Project would continue to be managed in accordance with existing and future limitations on diversion required by the Endangered Species Act and other applicable law.

The problems associated with the No-Action Alternative, as currently framed, are evident in the discussion of water quality impacts. The evaluation of the No-Action Alternative, in Section 3.2’s discussion of water quality repeatedly states that the “continued impoundment of water at the Four Facilities under the No Action/No Project alternative would result in no change from existing conditions.” This statement rests on the erroneous premise that the Project would be allowed to continue operating out of compliance with state and tribal water quality standards. In fact, under a properly framed No-Action Alternative, the FERC process would resume and the States of Oregon and California, and the Hoopa Valley Tribe, would impose conditions on continued operation designed to ensure compliance with the applicable standards. Under

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existing federal and state law, the Project could not be permitted to continue operating in a manner that violated the applicable water quality standards.

In summary, continued un-mitigated operation of the Klamath Hydroelectric Project is not likely, foreseeable, or reasonable if Facilities Removal fails to occur pursuant to the KHSA process. The No-Action Alternative should be modified to reflect the likely outcome of a resumption of the FERC licensing process.

B. Analysis of the Proposed Action Alternative Is Inadequate Because It Fails to Evaluate the Effects of the KBRA's Guaranteed Minimum Irrigation Diversions on the Fishery.

The Proposed Action is described as Facilities Removal (i.e., decommissioning and removal of Iron Gate Dam, Copco Dams 1 and 2, and J.C. Boyle Dam). The Department considers the KBRA to be connected to the Proposed Action; however, the DEIS and its supporting documents confirm that less water will be available for flows at Iron Gate Dam under the Proposed Action (i.e. Reclamation (2011), pages 6-9 and 6-10; Figure 1) but do not actually evaluate or disclose the adverse consequences to water flow and the fishery that will result from federal execution and implementation of the KBRA. Hydrology modeling in Reclamation (2011) shows that flows under the Proposed Action will be 200 - 400 cfs less than what would otherwise be available under the No Action alternative. Additionally, both the Proposed Action and the No Action alternative fall consistently short of the instream flow recommendations in Hardy et al. (2006), except during extremely wet hydrologic conditions (Figure 2). The DEIS must fully disclose to the decision-makers and to the public that dam removal tied to the KBRA will not achieve the goals of fishery restoration, because there will not be water of sufficient quantity and quality left in the river for the fish at critical times in dry water years.

Both before the KBRA and KHSA were signed, and throughout this NEPA process, the Hoopa Valley Tribe has urged that modeling be completed which compares the water flows needed for fish restoration to those projected to become available under the KBRA. For example, in Additional Modeling and Analytical Work Needed (February 5, 2008), the Hoopa Valley Tribe and others urged modeling "that will achieve modified Hardy II Iron Gate flow targets. . . . [and determine] the Project diversions allowable while meeting April 1 through September 30 Hardy II Iron Gate flow targets." The document further requested "a written procedure for operationalizing the Hardy II flows. . . . intended to help determine the amounts that will be available for diversion in time steps throughout the summer and winter months."

On June 16, 2009, Hoopa Tribal Fisheries Director, Mike Orcutt, wrote to Associate Deputy Secretary of the Interior, Laura Davis, urging the Department "to conduct the additional analyses discussed . . . to illuminate the feasibility of KBRA water management schemes . . . in advance of final federal decision-making and before KBRA legislation is introduced in Congress." On July 2, 2009, Hoopa Tribal Chairman Leonard E. Masten also wrote to Associate Deputy Secretary of the Interior, Laura Davis, urging completion of modeling and noting that "[s]uch modeling was also requested in the February 5, 2008, list of studies that we previously sent you." In response, Associate Deputy Secretary Laura Davis, on September 11, 2009, reported that work had been done "to identify additional scientific analyses that may better

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inform review of the draft KBRA.” Ms. Davis referred to the February 5, 2008, request and said “[o]ther issues will be addressed by additional modeling described above.” Nevertheless, the DEIS fails to disclose any modeling of implementation of the Hardy II flows recommended for fish restoration and does not examine how such flows could be operationalized to permit continued water diversions for the irrigation project.

The DEIS also misrepresents the facts, unsuccessfully attempting to claim the KBRA will be better for fish. For example, page 3.3-99 references Hetrick et al. (2009), citing that fall-run Chinook under “KBRA type flows showed the greatest benefits in years when production was low.” This summary conclusion in Hetrick et al. 2009 is stated in the Anadromous Fish Production section under PRE-DAM results. Modeling results for POST-DAM removal did not state the same result regarding the ratio of benefits to production in low production years (Hetrick et al. 2009).

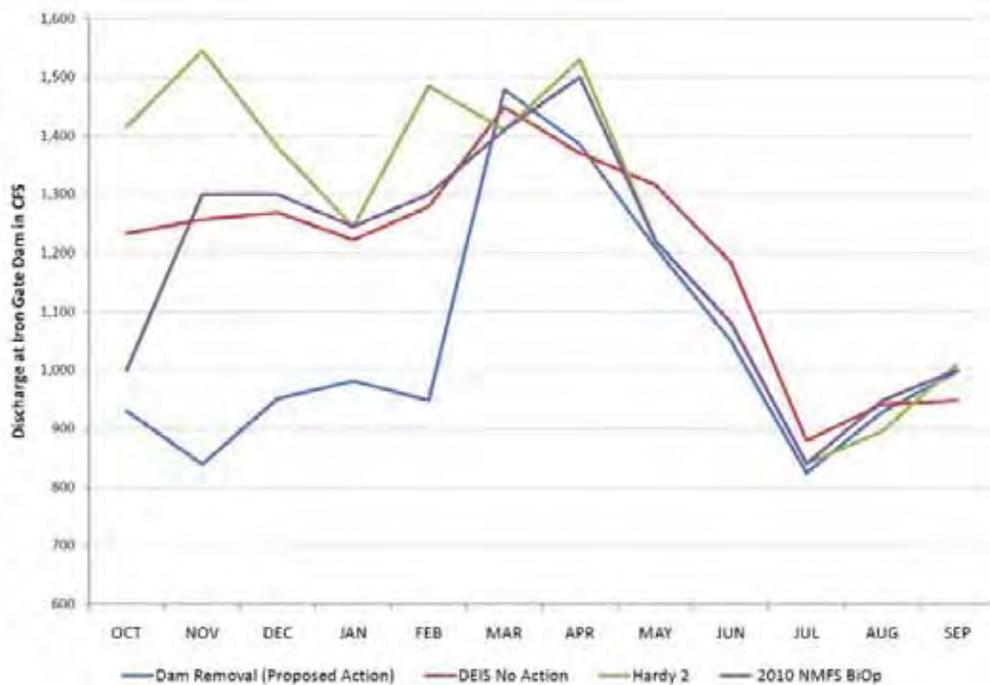


Figure 1. Comparison of 90% exceedance discharge at Iron Gate Dam for the DEIS Proposed Action, DEIS No Action, Hardy et al. (2006) and the NMFS Biological Opinion (2010). Note dry year Proposed Action flows are well below thresholds established in the NMFS Biological Opinion (2010) and Hardy et al. (2006) during most months, and especially during November through February. Chinook fry emerging beginning in December (Hardy et al. 2006) will be affected by insufferably low winter flows.

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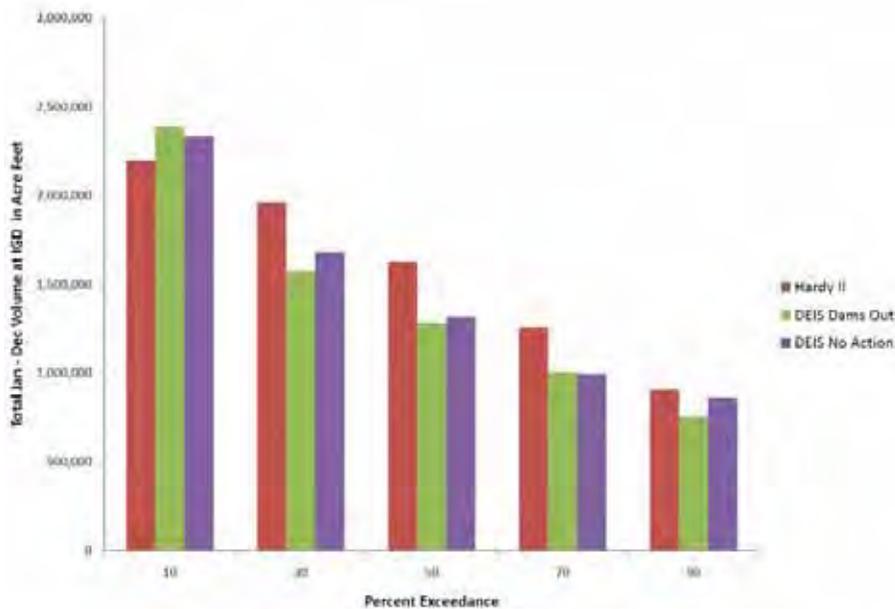


Figure 2. Hardy et al. (2006) Iron Gate Dam instream flow recommendation water volumes compared to both DEIS alternatives. Both the Proposed Action and No Action are well below Hardy et al. (2006) recommendations for instream fisheries needs in all exceedance year types except during extremely wet annual hydrologic conditions.

Throughout the DEIS, the effect of the KBRA Water Diversion “Limitation” is inaccurately described. For example, page ES-19 states that a key outcome of the KBRA is that the Klamath Reclamation Project’s water users have agreed to “accept reduced water deliveries.” At page 3.7-19, the DEIS states that “the Water Diversions Limitations program (KBRA Section 15.1) would reduce the availability of surface water for irrigation on Reclamation’s Klamath Project to 100,000 acre-feet less than the demand in the driest years to protect mainstem flows.” Similarly, page 3.8-20 states “Water Diversion Limitations would be implemented during dry years to increase flows for fisheries by reducing Reclamation’s Klamath Project Diversion up stream of approximately 100,000 acre-feet.”¹ Both of these statements are completely false. Not only is 100,000 acre-feet not reduced from current demand, the DEIS’s Proposed Action’s modeled water volume falls well below ESA requirements established in the 2010 National Marine Fisheries Service (NMFS) Biological Opinion (Figure 3) for dry water year types, requirements that limit diversions. A comparison of required versus available water volume totals for the January through December time period reveals water volumes established in the 2010 NMFS Biological Opinion would not be met in four out of six water year types (66%). None of the sections referring to the mythical 100,000 acre-feet or any other part of the DEIS,

¹ We find it unusual that the reference to this mysterious 100,000 acre feet water volume savings first appears in an earlier draft of Hetrick, et al. (2009) but is not included in the Final version of the same report.

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reveals that the existing legal limitations in the applicable Biological Opinions independently prevent the Project from satisfying irrigation demand in dry years. The analysis of the KBRA flows in the DEIS appears to rely on irrigator water usage from years *prior to* BiOp implementation. The large irrigation diversions noted in the DEIS occurred prior to the BiOp and are illegal now under the ESA. The KBRA would change that by guaranteeing a minimum diversion for irrigators to the detriment, not the benefit, of fish.

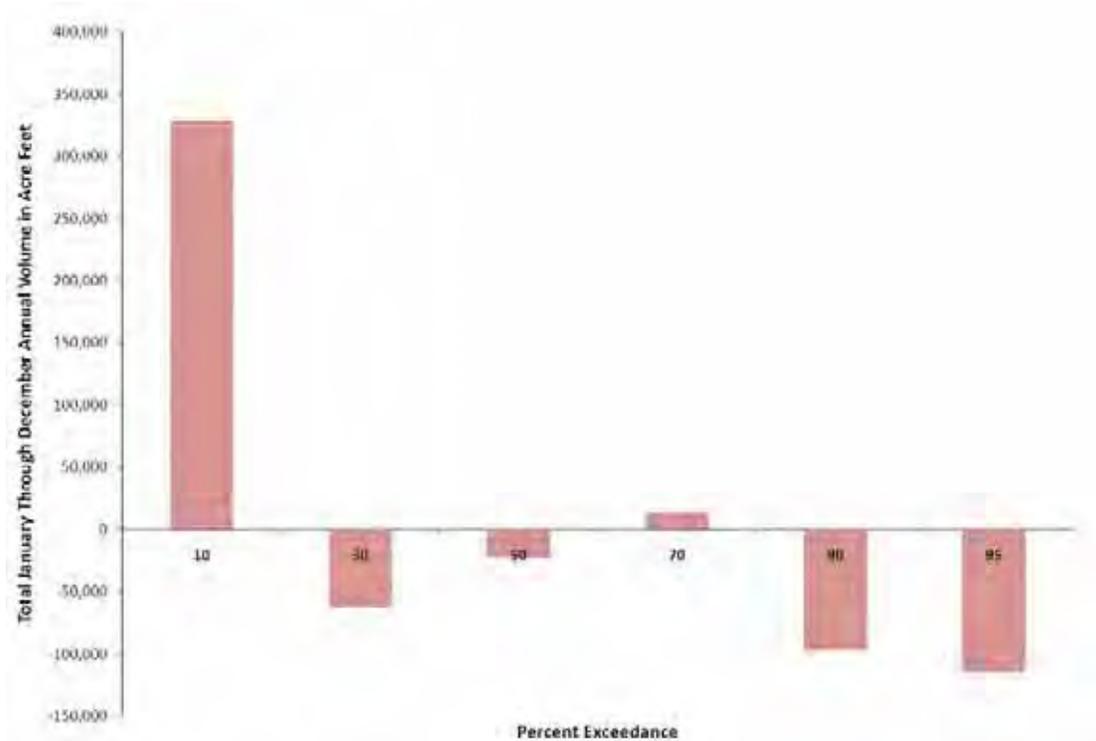


Figure 3. DEIS Proposed Action water volume² shortages when compared to volumes required to satisfy the 2010 NMFS Biological Opinion³ for January through December volumes. Volumes are calculated from Iron Gate Dam releases.

The purported “limitation” on diversions in the KBRA is nothing of the kind and will actually work to negate benefits of dam removal. The purpose of the KBRA is not to limit diversions, but to guarantee a firm minimum amount of water for irrigation diversions that exceeds currently legal levels. Those diversions, which under the KBRA would be 330,000 to

² DEIS Proposed Action water volumes were calculated from exceedance tables presented in Appendix F of (Reclamation 2011).

³ 2010 NMFS Biological Opinion water volumes were calculated from Table 18 of (NMFS 2010).

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385,000 acre-feet per year, would trump the in-stream flow needs of fish and other aquatic organisms, especially in drier water years (Figure 4). DEIS hydrology model results indicate that the Proposed Action will result in a buffering of Agricultural Supply water volumes in dry years above what would otherwise be available. Meanwhile, the river suffers a penalty of a volume reduction that violates the 2010 NMFS Biological Opinion (Figure 3). While the DEIS states ESA compliance will continue, it fails to describe *how* this will be achieved given the clear shortage of water volume under the KBRA. The United States would be legally obligated to defend the irrigators' diversion rights against the interests of fish and Indian tribes in the Klamath Basin. The KBRA thus subordinates senior tribal rights to water for fish in favor of junior irrigation interests. In the case of the Hoopa Valley Tribe, this subordination occurs without the Tribe's consent – effectively terminating Interior's trust obligation to the Tribe in this context. The DEIS leaves the wrong impression that the KBRA limits irrigation diversions below the level that can lawfully occur under the existing BiOp.

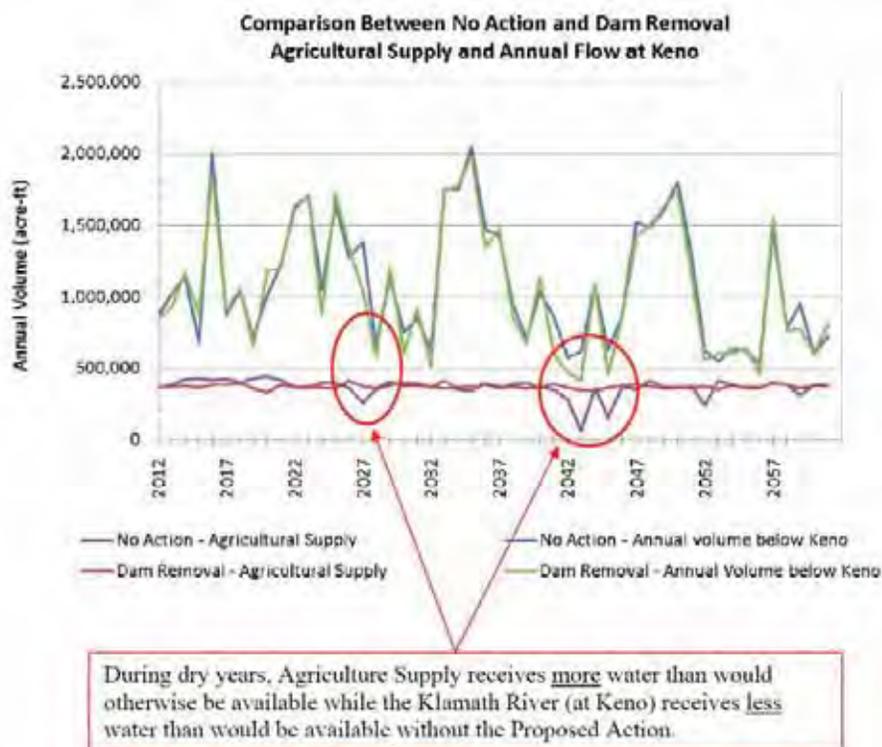


Figure 4. The DEIS Proposed Action favors Agricultural Supply in dry years, providing a guarantee of more water than would be available under the No Action Alternative, which includes the flow requirements established in the 2010 NMFS Biological Opinion. Conversely, the river is penalized by a decrease in available water under the Proposed Action. Adapted from Reclamation (2011), page 6-18. This modeling comparison does not indicate irrigation will be reduced by 100,000 acre feet from current demand, as erroneously represented in the DEIS (i.e. page 3.7-19).

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Analysis of the KBRA's guaranteed diversions shows that water flows in the vicinity of Iron Gate Dam would frequently fail to meet the requirements of the NMFS Biological Opinion for protection of salmon in the mainstem Klamath River (Figure 3). The flows in the BiOp are those necessary to avoid placing the fish in jeopardy of extinction. The guaranteed diversion of 330,000 acre-feet for irrigators will, in 66% of water years, leave too little water in the Klamath River to meet the requirements of the Coho Salmon BiOp flow requirements (Figure 3). Flows under the KBRA (Appendix E-5) will fall to below 450 cfs if water years similar to 1992 occur in the next 50 years. During the massive fish die-off in 2002 (in which 70,000 adult salmon died), flows in the river were 750 cfs. (Guillen 2003, CDFG 2004).

The Department cannot avoid analyzing the impacts of the diversion limitations in this EIS. The commitments related to the diversion limitations will become binding once the Secretary of the Interior signs the KBRA. Since the Secretary will be bound to honor the water balance and diversion guarantees prescribed in the KBRA upon signing, there will be no point in the future at which to analyze the effect of the diversion guarantees under NEPA. The Secretary will lack discretion to not honor the diversion guarantees once the necessary conditions are met.

The Department must analyze the effect of the KBRA and its diversion guarantees now. The Department concedes that the KHSA and KBRA are interdependent. The Department cannot tout the benefits of dam removal while ignoring the harm that will result from the associated KBRA. Nor can the Department fail to examine the KBRA water diversion impacts by analyzing the KBRA at a "programmatic" level. Examination of the KBRA at a programmatic level does not excuse the Department from analyzing and disclosing the known impacts associated with the program. The minimum diversions guaranteed by the KBRA are known now, will be non-discretionary once the KBRA is executed, have significant impacts associated with them, and therefore must be evaluated now.

C. The Alternatives Analysis is Incorrect in Concluding The Proposed Action Will Result in a Positive Geomorphic Effect

Fluvial geomorphic function is critical for habitat creation and maintenance for rearing and spawning anadromous salmonids. Geomorphic function is also essential for naturally functioning physical processes (i.e. bar development, scour) in a dynamic river system. Reclamation (2011) cites the existing condition median bed mobilization flows for Slight and Significant Bed Mobilization flows as 9,800 and 15,900 cfs respectively (Table 1). That is, to significantly mobilize the bed of the Klamath River below Iron Gate Dam, a median flow of 15,900 cfs is required.

Slight Mobilization is defined by Reclamation (2011) as "a small, but measurable, sediment transport rate. Armor layer is only minimally disturbed and there may be flushing of sand to a depth of the D_{90} ." Reclamation (2011) also defines Significant Mobilization as "many particles are moving and there is a significant sediment transport rate. Sand is mobilized in the interstitial spaces of the bed and to a depth of twice the D_{90} . The armor layer is significantly disturbed. Given these definitions, we believe a Significant Mobilization is required in river downstream of Iron Gate Dam to recover geomorphic function and mitigate bed armoring caused by Iron Gate Dam, constructed in 1962. While the geomorphic effect of Iron Gate Dam clearly

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extends beyond the first ten miles downstream, Table 1 includes only mobilization flows for the first ten river miles, for discussion purposes.

Reach	River Mile	Slight Bed Mobilization Flow (cfs)			Significant Bed Mobilization Flow (cfs)		
		Low	Median	High	Low	Median	High
Bogus Creek to Willow Creek	190.33-185.83	7,000	9,800	13,100	11,500	15,900	21,300
Willow Creek to Cottonwood Creek	185.23-182.95	7,700	9,800	13,100	12,500	17,200	22,900
Cottonwood Creek to Shasta River	182.95-179.17	5,900	8,400	11,300	9,700	13,800	18,400

Table 1. Bed mobilization flow requirements for the ten miles of river below Iron Gate Dam (Bogus Creek to the Shasta River). Mobilization flows reported in Reclamation (2011). River miles reported in Ayers (1999). Median discharge required for the first 4.5 miles downstream of Iron Gate Dam in bold for discussion purposes (see text).

The modeled hydrology for the period between 2011 and 2061 does not meet the flow threshold for a Significant Bed Mobilization flow (15,900 cfs) even once (Figure 5). As a result, the reaches downstream of Iron Gate Dam will suffer in their ability to recover from the harmful effects caused by sediment starvation and bed armoring over the past fifty years. Because neither the Proposed Action nor No Action Alternatives meet the geomorphic needs of the Klamath River downstream of Iron Gate Dam, additional flow management provisions will be required to ensure adequate geomorphic recovery. The additional coarse sediment provided by the upstream Iron Gate Reservoir will not be a benefit if there is not sufficient flow to mobilize it downstream over time.

Reclamation (2011) is incorrect when it concludes, “It is expected that the reach between Iron Gate and Cottonwood Creek will have improved habitat function under the Dam Removal Alternative than under the No Action Alternative.” Reclamation (2011) bases this future-condition geomorphic assessment off the Slight and not Significant Mobilization threshold. Given a Slight Mobilization event will do little more than flush sand (as defined by Reclamation), we find this conclusion to be in error.

Reclamation (2011) also asserts that the return period for future sediment mobilization flows will decrease – sediment is predicted to mobilize more frequently. We also find this conclusion incorrect. Reclamation’s (2011) model results for reach average D_{50} (coarse sediment) for the short distance between Iron Gate and Bogus Creek actually coarsens post-dam removal, while the Willow Creek to Bogus Creek reach does decrease in grain size slightly. The Cottonwood Creek to Willow Creek reach shows the greatest shift in grain size, but the Shasta to Cottonwood reach indicates no change in grain size. Given grain sizes for these reaches are not consistently (or significantly) trending downward, we find it dubious that the modeled return

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period (for a Slight Mobilization event) would actually decrease, as predicted by Reclamation (2011) and the DEIS. Model results for the Significant Mobilization return period would have been far different, resulting in a longer return period likely only to be met during extreme flood conditions (i.e. 100-year floods).

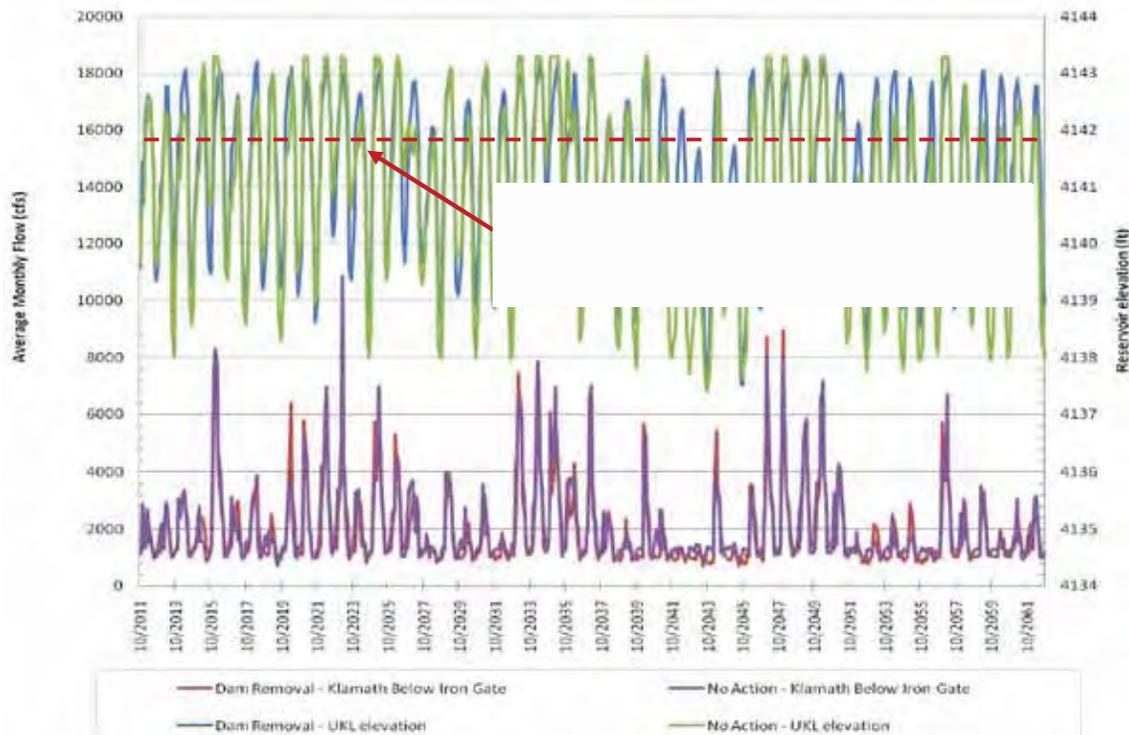


Figure 5. Modeled Iron Gate Discharge 2011-2061 contrasted with the median threshold (15,900 cfs) for Significant Bed Mobilization, which is never achieved. The low threshold for Significant Bed Mobilization (11,500 cfs) and the median threshold for Slight Bed Mobilization (9,800 cfs) is met only once in the fifty year forecast. Adapted from Reclamation (2011).

D. The Alternatives Analysis Is Inadequate Because It Fails To Evaluate A No-KBRA Alternative.

The EIS must evaluate an alternative of full Facilities Removal without execution or implementation of the KBRA. The omission of a Facilities Removal/No-KBRA alternative in the EIS renders it out of compliance with NEPA, because the No-KBRA alternative is both feasible and would be the alternative most likely to result in restoration of the fishery. Under this scenario, Klamath Hydroelectric Project dams would be removed, but diversions to the Klamath Reclamation Project would continue to be managed under currently applicable laws, such as the ESA, without the guaranteed diversions prescribed by the KBRA. The purpose of volitional

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passage and a free flowing river would be achieved and the flows would continue to be managed for the fish first, and irrigation second.

It is clear that the failure to analyze a No-KBRA alternative violates NEPA and CEQA requirements. The No-KBRA is both a reasonable and a feasible alternative. The Department's own analysis concedes that the No-KBRA alternative would (i) remove dams to allow the river to flow freely; (ii) provide for full volitional fish passage; (iii) provide access to more of the watershed; (iv) create a free-flowing river, which would reduce quality concerns within existing reservoirs; and (v) is technically feasible. Final Alternatives Report, Section 4.2.8.

The DEIS contends that it is reasonable to not evaluate the no-KBRA alternative because that alternative "does not meet the purpose and need under NEPA." But, as stated above, it is improper to tie the KBRA to dam removal. The purpose of the EIS evaluation is to determine what is best for the fish and the health of the river. Agricultural subsidies and guaranteed irrigation diversions have little to do with that analysis. Also, the failure to evaluate a no-KBRA alternative deprives the decision-makers and the public of the information needed to determine if the no-KBRA alternative would better achieve the fishery and river-restoration goals, and without the need for \$1 billion in subsidies, fundamental changes in existing law, and termination of tribal trust interests. The need to evaluate a no-KBRA alternative is especially important in light of the fact that the KBRA and KHSA require Congressional authorizations. Evaluation in this EIS of dam removal without the KBRA and its associated problems would assist the decision-makers in determining the best course of action.

E. The Alternatives Analysis is Inadequate Because It Fails to Evaluate a Federal Takeover Alternative.

The EIS must evaluate an alternative in which the Secretary does not render a Determination pursuant to the terms of the KHSA, but rather exercises authority to takeover the Klamath Hydroelectric Project pursuant to Section 14 of the Federal Power Act, 16 U.S.C. § 807 and/or supplemental Congressional authorization. Like the dam removal/no-KBRA alternative, this alternative would achieve the goals of volitional fish passage, improved water quality, and a free-flowing river without the harmful consequences and expense of the KBRA. The Final Alternatives Report, Section 4.2.13, contends that the Federal Takeover alternative is not superior to the Proposed Action because dam removal would occur on generally the same time-frame under both alternatives. There is no support for this statement. The KHSA artificially delays commencement of dam removal until 2020 or later solely to benefit the private hydropower licensee that has been operating on the terms of an expired 1950's era-license since 2006. There is simply no justifiable basis to allow PacifiCorp to continue its unmitigated operation of the Klamath Project for another decade. A federal takeover alternative, similar to that successfully implemented on the Lower Elwha River in Washington State, could disregard the KHSA terms solely designed to benefit the private licensee and commence dam removal years earlier for the benefit of the river and its resources.

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F. The Alternatives Analysis Is Inadequate Because It Fails to Evaluate, or Even Consider Evaluation of the Water Quality Improvement Strategy Alternative Recommended by the Tribe in Scoping, or Any Alternative That Will Ensure Compliance With Hoopa Valley Tribe Water Quality Standards.

In its July 2010 scoping comments, the Tribe recommended evaluation of a Dam Removal/Water Quality Improvement Strategy alternative that would replace the KBRA measures with an alternative approach consisting of refilling Lower Klamath Lake using Lost River winter water, somewhat expanding the footprint of Tule Lake, and restoring riparian zones along the entire lower Lost River and Keno Reach of the Klamath River. The Tribe's scoping comments referenced the Klamath Basin Tribal Water Quality Work Group comments on the Klamath River TMDL, found at <http://www.schlosserlawfiles.com/~hoopa/LostRiverTMDL.pdf>. The DEIS fails to address this proposed alternative or provide any explanation for why it was not evaluated.

The DEIS, as drafted, fails to evaluate any alternative that will result in full compliance with Hoopa Valley Tribe water quality standards. Section 3.2 notes the existence of applicable water quality standards enacted by the Hoopa Valley Tribe, but fails to adequately address whether the Proposed Action of dam removal with associated implementation of KBRA flows, (or some other alternative) will ensure compliance with the tribal standards. We attach an explanation, Patrick Higgins, "KHSA and KBRA Likelihood of Meeting Hoopa Valley Tribe Klamath River Water Quality Standards" (October 6, 2011), which details this problem. In fact, certain statements in the EIS confirm that the Proposed Action will continue to result in violations of Hoopa standards. *See* page 3.2-103 (stating that Total Nitrogen (TN) levels will continue to exceed Hoopa objectives).

G. The Alternatives Analysis Is Inadequate Because It Fails to Evaluate Any Alternatives to the KBRA.

The proposed action assumes that the KBRA will be executed and implemented. The proposed action assumes that the KBRA is an interdependent component of a comprehensive program to restore the Klamath River. Yet, in addition to failing to consider an alternative in which dams are removed without the KBRA, the DEIS also fails to consider or evaluate any substantive alternatives to the KBRA. The execution of the KBRA, as argued throughout these comments, is a major federal action with significant known environmental impacts. The failure to fully evaluate the impacts of, and alternatives to, the KBRA is a violation of NEPA.

Assertions that the impacts of the KBRA will be evaluated at a later time are incorrect given the non-discretionary nature of many of those programs, such as the diversion guarantees. In addition, the proposed legislation attached as an Exhibit to the KBRA and KHSA would exempt the KBRA execution from NEPA review. Of course, that legislation has not been enacted and thus the Department has a currently binding obligation to review the KBRA under NEPA. The public, Congress, and decision-makers in the Department must receive the benefit of a thorough alternatives analysis which considers the pros and cons of the KBRA and whether there are alternative approaches that would achieve the river restoration goals with less impact.

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IV. The EIS Fails to Evaluate the Impacts of the Proposals for Legislation, Which Are An Express Prerequisite of the KBRA and KHSA.

NEPA requires that federal agencies prepare an environmental impact statement for “every recommendation or report on proposals for legislation . . . significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). In this case, the action being analyzed is specifically tied to and dependent upon enactment of federal legislation containing specific elements proposed by the Department and other parties to the KHSA and KBRA. Pursuant to Section 3.3.4 of the KHSA, the Secretary will be barred from rendering any determination on dam removal unless Congress first enacts “federal legislation, which . . . is materially consistent with Appendix E [of the KHSA].” Appendix E of the KHSA is entitled “Elements for the Proposed Federal Legislation” and contains a detailed list of specific proposed elements for legislation related to both the KBRA and the KHSA. Even if the Secretary determines that dam removal is clearly in the public interest, will restore fisheries, and provide for a free-flowing river, the Secretary cannot, consistent with the KHSA, make any public determination about the benefits of dam removal unless the proposed legislation is enacted.

There are significant environmental consequences that will flow from the enactment of the KHSA and especially the KBRA that require complete analysis in the EIS. Of most significance are the effects associated with the guaranteed minimum diversions of the KBRA, the impacts of the \$1 billion in subsidies that encourage unsustainable agricultural practices, impacts on the Trinity River Restoration Program, and the historic termination of tribal trust rights. Given that the enactment of the proposed legislation is a direct prerequisite to the Secretary’s determination in this proceeding, the EIS must fully evaluate the impacts associated with the proposals for legislation that would authorize implementation of the KHSA and KBRA.

The proposed legislation, and execution of the KBRA, would also undermine enforcement and compliance with the Endangered Species Act. Although the EIS repeatedly states that the KBRA programs, and the irrigation diversions by the Klamath Reclamation Project, would need to comply with the ESA, this is clearly inconsistent with the text of the KBRA, which is designed to constrain NMFS and USFWS ability to protect threatened and endangered species. *See* KBRA, Sections 21.3.1 and 22.4. The objective of the parties under the KBRA is that reductions in flows to irrigators below those prescribed in the KBRA “will be a last and temporary resort to prevent jeopardy under the [ESA].” KBRA, § 21.3.1.B.ii.c. This objective is plainly inconsistent with the science (which shows flow to be the most significant factor affecting fish health) and the law (which mandates that the agencies protect endangered and threatened species based on the best available science).

Since Congress is not limited by the terms of the KBRA and KHSA, an EIS that accurately and completely describes and evaluates the full suite of reasonable and feasible alternatives, including a dam removal/no-KBRA alternative and a federal takeover and decommissioning alternative, is critical.

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V. The DEIS Fails To Adequately Evaluate and Disclose the Impacts of the KBRA, and Overstates Its Potential Benefits, Precluding Informed Public Participation and Decision-Making.

The DEIS states that the KBRA is a connected action requiring analysis under NEPA. It is true that the KHSA and KBRA have been drafted as interdependent components of a larger plan relating to Klamath Basin restoration. Although the DEIS states that the KBRA is a connected action, the DEIS then fails to adequately describe or evaluate its impacts. Even if the KBRA is evaluated at a more general, programmatic, level, the EIS still must evaluate those aspects of the KBRA that have known or foreseeable impacts, in addition to any components that will not be evaluated under NEPA in the future. Describing the KBRA as “programmatic” does not excuse the Department from actually evaluating the known impacts of the KBRA that are ripe for evaluation.

Some of the key elements of the KBRA that are not adequately described and evaluated are the minimum guaranteed water diversions, the potential impacts on the Trinity River Restoration Program, and the unconsented subordination and waiver of trust obligations relating to tribal water rights. There will not be any future NEPA analysis of the impacts of the guaranteed water diversions because implementation of those diversions will be non-discretionary; therefore, a full analysis must occur now prior to approval and execution of the KBRA. The DEIS also improperly assumes that the various fisheries restoration and other programs are likely to occur when, in fact, those programs depend entirely on funding from Congress that is unlikely to materialize. In summary, the impacts of the KBRA are either not evaluated or minimized, while the benefits of the KBRA are made to appear more certain than they actually are. The public and decision-makers need to be made aware that approval of the KBRA could result in a scenario in which dam removal occurs, but there is insufficient water left in the river for fish to survive and the promised programs for fisheries fail to materialize.

Due to the need for substantial Congressional appropriations, the purported benefits of the KBRA are highly speculative, especially in today’s political climate. The DEIS fails to adequately discuss the likely scenario in which the purported benefits from the KBRA are not achieved due to lack of Congressional funding. The KHSA and KBRA were signed in early 2010 and their implementation expressly depends on the enactment of federal legislation. Yet, we now approach the end of 2011 with no legislation. With good reason, there simply is not support from members of Congress to propose spending nearly \$1 billion on needless subsidies for unsustainable agricultural practices. Nor is there support in Congress to advance legislation that unilaterally terminates Indian trust obligations. The DEIS needs to more fully explain that the purported environmental benefits of the KBRA are highly speculative and may not ever occur to offset the impacts of the guaranteed diversions for irrigation.

Even if funding does occur, the DEIS fails to adequately explain that the KBRA does not contain any fish restoration goals. It establishes no target salmon sizes or harvest goals. The KBRA simply calls for funding without any definition of success. The failure to connect the funding to any defined performance measures is likely another obstacle to obtaining Congressional funding in the current economic and political environment.

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Numerous sections of the EIS require additional comprehensive discussion of the impacts of the KBRA on water, aquatic resources, and tribal trust rights, especially including Sections 3.2 (water quality), 3.8 (water supply/water rights), 3.12 (tribal trust) and 3.16 (environmental justice). These sections fail to openly disclose the negative consequences that will result from the KBRA's guaranteed minimum diversions and un-consented subordination of tribal trust rights, presenting only a one-sided view of the KBRA to the public and decision-makers.

VI. The DEIS Fails To Disclose That Execution and Implementation of the KBRA Would Result in a Historic Termination of the United States Trust Relationship With Klamath Basin Indian Tribes With Respect to Protection of Reserved Water and Fishing Rights and Would Unlawfully Result in an Un-consented Subordination of Senior Tribal Water Rights to Junior Water Rights of Non-Indian Irrigators.

In the KBRA, the United States provides assurances, without the consent or approval of the Hoopa Valley Tribe, that the United States will not assert the Hoopa Valley Tribe's tribal water, fishing, or trust rights, in a manner that will interfere with the Klamath Reclamation Project's annual diversion of 330,000 acre-feet of water from the Klamath River (the "Assurances"). These Assurances in favor of the Klamath Reclamation Project, once effective, are permanent regardless of: (a) whether federal appropriations are provided for anticipated fishery restoration and reintroduction programs; (b) the success or failure of anticipated fishery restoration and water quality improvement efforts; (c) future effects of climate change, or other environmental conditions, on water quality and quantity in the Klamath River; (d) the future fishery harvest needs of the Hoopa Valley Tribe; or (e) other unknown or unforeseeable events.

The Assurances in the KBRA effectively terminate most of the United States' fiduciary obligations to the Hoopa Valley Tribe by permanently subordinating the Tribe's senior water and fishing rights in the Klamath River to junior non-Indian irrigation interests in the Upper Klamath Basin, regardless of future impacts on tribal trust resources, and without the consent or approval of the Hoopa Valley Tribe. The Assurances become permanent if the Klamath dam facilities are removed pursuant to an Affirmative Secretarial Determination.

Although this issue has been a highly publicized area of controversy, the Draft EIS fails to mention it. Section 3.12 purports to discuss impacts on tribal trust resources. Yet, that section says nothing about the fact that the United States, in the KBRA, has agreed to subordinate tribal water rights to junior irrigation interests. Section 3.12 asserts that the Hoopa Valley Tribe will be eligible for KBRA funding "upon becoming a party" but fails to mention that the Tribe would be required to enact claim waivers and take other acts inconsistent with its trust resources in order to obtain those "benefits." The DEIS fails to mention that the Tribal Council of the Hoopa Valley Tribe enacted a resolution in February 2010 that finds in relevant part:

WHEREAS: The Assurances in the *Klamath Basin Restoration Agreement* effectively terminate the United States' fiduciary obligation to the Hoopa Valley Tribe by permanently subordinating the Hoopa Valley Tribe's senior water and fishing rights in the Klamath River to junior non-Indian irrigation interests in the Upper Klamath Basin, regardless of future impacts on tribal trust resources, and without the consent or approval of the Hoopa Valley Tribe; and

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WHEREAS: The Assurances in the *Klamath Basin Restoration Agreement* conflict with the National Congress of American Indians (NCAI) Resolution #PSP-09-051 (October 2009), and Affiliated Tribes of Northwest Indians (ATNI) Resolution #09-63 (September 2009) in which the NCAI and ATNI each resolved to oppose “any policy of the United States to terminate the rights of, or impose adverse consequences upon, a tribe that chooses to retain its water rights instead of settling on terms desired by the federal government”; and

WHEREAS: The *Klamath Basin Restoration Agreement* requires the Hoopa Valley Tribe, as a condition of the Tribe’s participation and receipt of funding and benefits in the Agreement, to relinquish and release claims against the United States relating to water management in the Klamath Basin and associated impacts on Hoopa Tribe water, fishing, and trust rights; and . . .

WHEREAS: The *Klamath Basin Restoration Agreement* thus conflicts with tribal sovereignty, violates trust duties owed to the Hoopa Valley Tribe by the United States; subordinates tribal water and fishing rights in favor of junior non-Indian irrigation interests without tribal consent; provides inadequate flows for the protection of tribal trust resources; offers a speculative and unfunded program for fishery restoration and water conservation; encourages unsustainable use of groundwater in the Upper Klamath Basin; and is not based on the best available, peer reviewed science; and . . .

NOW, THEREFORE BE IT RESOLVED: The Hoopa Valley Tribal Council, acting under its sovereign authority on behalf of the Hoopa Valley Tribe, hereby rejects, opposes, and disapproves of the *Klamath Basin Restoration Agreement* and the *Klamath Hydroelectric Settlement Agreement*

If the priority given by the KBRA to Klamath River surface diversions has the effect of preventing fish restoration (which is likely), the United States will not only be unable to protect Indian fishing rights under the terms of the KBRA, but it will be legally required to defend the irrigation interests against the tribes and trust resources. In other words, the United States would be enforcing the priority for water diversions even if that leaves too little water to restore the fish on which the Indian tribes rely. By contrast, under existing law “Reclamation is obligated to ensure that project operations not interfere with the Tribes’ senior water rights. This is dictated by the doctrine of prior appropriation as well as Reclamation’s trust responsibility to protect tribal trust resources. . . . Reclamation must, pursuant to its trust responsibility and consistent with its other legal obligations, prevent activities under its control that would adversely affect [the Tribes’ fishing] rights.” Memorandum of Regional Solicitor (July 25, 1995). The KBRA would preclude the trustee United States from preventing such adverse effects to tribal trust resources. The KBRA changes the tribal right (enforceable by the federal trustee) from a right to sufficient water to produce the fish on which the Tribes rely, into a right to water left over after diversion per Appendix E-1 of the KBRA, regardless of what the habitat results may be. The effect is thus similar to termination provisions such as the one for the Klamath Tribes of Oregon, which provided “statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the Tribes.” 25 U.S.C. § 564q(a). The

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KBRA will abridge the Government-to-Government relationship between the United States and the Hoopa Valley Tribe.

In the DEIS, the public and decision-makers learn nothing about the impacts on Hoopa Valley Tribe's trust rights and resources. The Executive Summary asserts that there are no impacts to tribal trust flowing from the Proposed Action. This is patently false. The DEIS simply accentuates the "positives" in order to promote the KBRA and KHSR in accordance with the interests of the Department, while setting aside the anticipated termination and subordination of tribal trust rights. This also implicates environmental justice impacts. The failure to properly and fully disclose the impacts to the Tribe's rights results in an unlawfully deficient EIS.

VII. Conclusion.

The Tribe supports dam removal; however, the linkage of dam removal to the KBRA will result in non-achievement of the desired fish restoration goals. Thus, the Tribe requests that the EIS evaluate alternatives that do not include execution and implementation of the KBRA. We thank you for your consideration to these comments. We will continue to work with the Department to achieve a solution that will protect the Trinity River, restore the Klamath fishery, remove the dams of the Klamath Hydroelectric Project, and preserve Hoopa water and fishing rights.

Sincerely,

HOOPA VALLEY TRIBAL COUNCIL



Leonard E. Masten, Jr., Chairman

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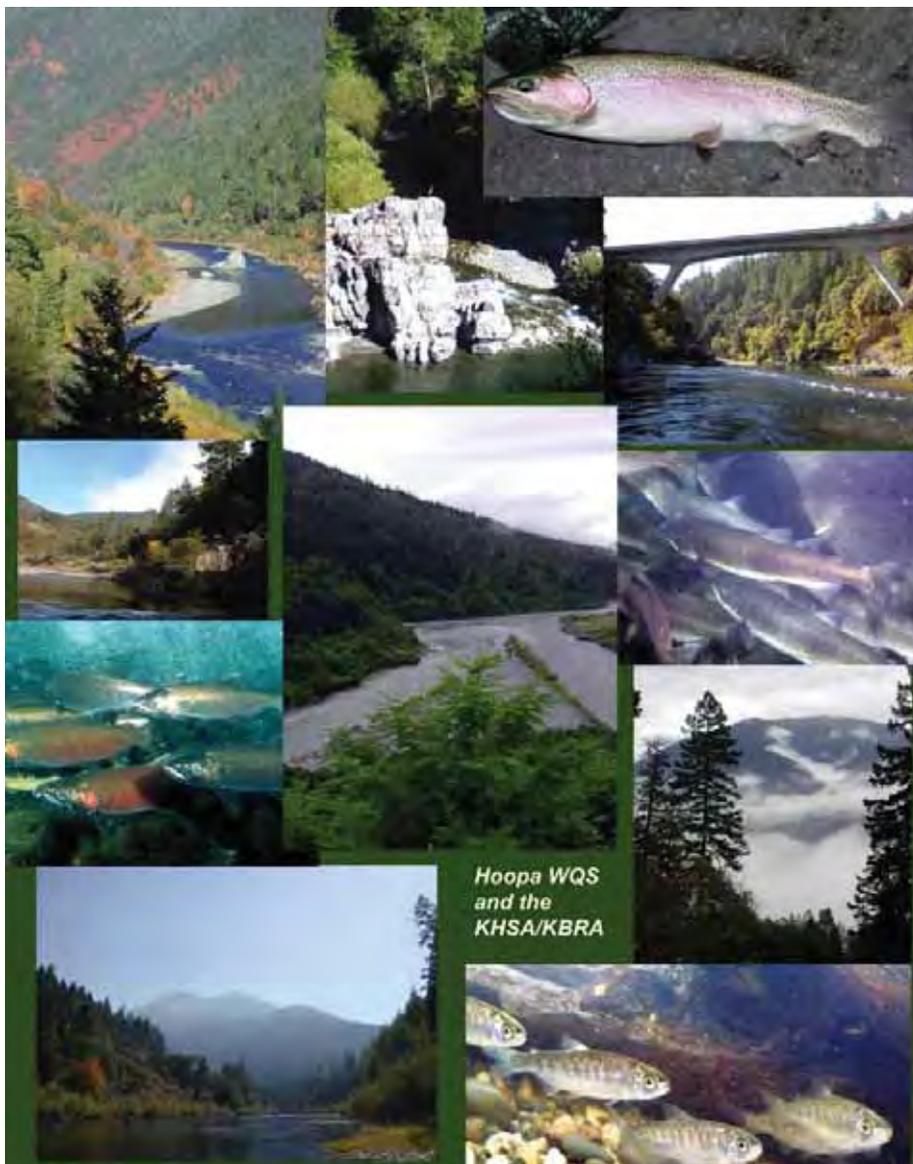
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KHSA and KBRA Likelihood of Meeting Hoopa Valley Tribe Klamath River Water Quality Standards



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**Prepared for:
Hoopa Tribal Environmental Quality Agency**

October 6, 2011

Patrick Higgins, Consulting Fisheries Biologist: *KHSA and KBRA Likelihood of Meeting
Hoopa Valley Tribe Klamath River Water Quality Standards*

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Foreword

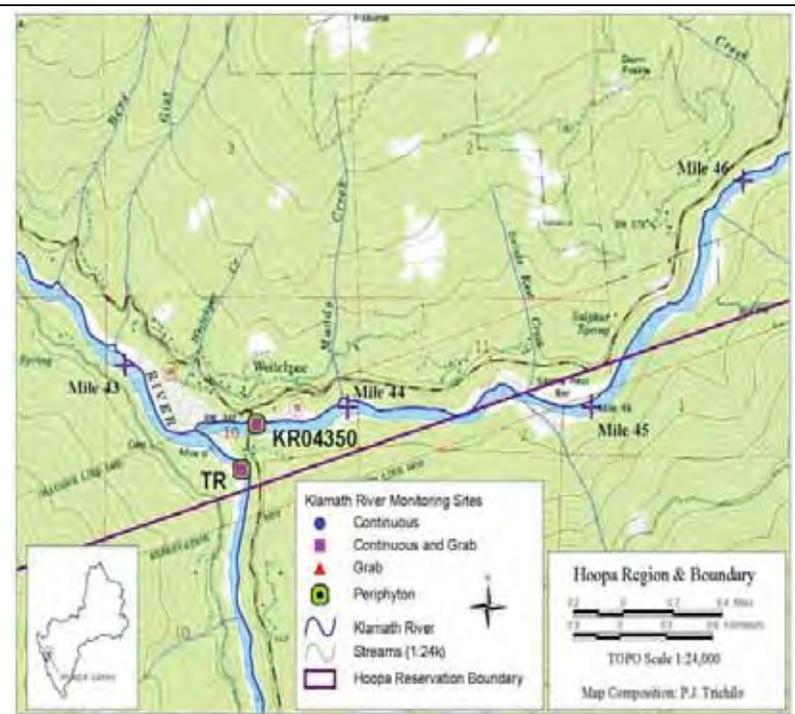
The purpose of this report is to provide the following information for the Hoopa Tribal Environmental Protection Agency (TEPA) in response to their request:

- Provide a clear over view of whether water quality management under the Klamath Hydropower Settlement Agreement (KHSA) and Klamath Basin Restoration Agreement (KBRA) will attain Hoopa Valley Tribe (2008) Klamath River Water Quality Standards (WQS),
- Provide recommendations for exercising the Hoopa Valley Tribe's WQS authority under the KHSA/KBRA water quality management process, and
- Identify options other than the KHSA/KBRA for the Hoopa Valley Tribe that achieve dam removal.

These are section headers in the report below, but sections on the origin of the KHSA/KBRA and using ecological restoration to attain Hoopa WQS are also included.

The Hoopa Indian Reservation includes a segment of the mainstem Klamath River just upstream of its confluence with the Trinity River (Figure 1 at right).

Hoopa Valley Tribe water quality authority that allows them to create water quality standards (WQS) for the Klamath River is based on U.S. EPA (2002) approval.



Origin of the KHSA and KBRA

The KHSA is a negotiated settlement in lieu of following the Federal Energy Regulatory Commission (FERC, 2007) relicensing process for the Klamath Hydroelectric Project (KHP) (FERC #P-2082). The KHP is owned and operated by PacifiCorp and the company has pursued settlement because the outlook of their relicensing process did not look favorable (Brockbank 2010). The deposition of PacifiCorp Executive Vice President Dean Brockbank (2010) supplies much of the information in this section about the chronology of settlement talks (see also Alternatives for KHP Dam Removal).

PacifiCorp first announced its intention to relicense the KHP in December 2000 and held a series of public meetings before filing its Final License Application in February 2004. Table 1 provides a time line that chronicles steps in relicensing, other processes that have bearing on relicensing (i.e., 401 certification) and KHSA and KBRA development. Red highlights in the table indicate unfavorable components of relicensing of the KHP from PacifiCorp's perspective. In particular, PacifiCorp was apprehensive about obtaining necessary State water quality certification (SWRCB 2007) and the cost of fish passage facilities for Pacific salmon species mandated by the National Marine Fisheries Service (NMFS 2006).

PacifiCorp began informal settlement talks in October 2004 that became a "mediated" settlement in January 2005. The settlement process took over five years to complete and ironically PacifiCorp dropped out of talks in mid-2006 as other "stakeholders" crafted the KBRA. The Energy Policy Act of 2005 (Public Law 109-58) allowed entry into settlement at any time within the licensing process for PacifiCorp. This new law also allowed PacifiCorp to challenge NMFS' authority to require KHP fish passage but their challenge was rejected by an administrative law judge (McKenna, 2006). PacifiCorp's KHP license expired on March 1, 2006 and FERC has been issuing 1 year extensions since. The company reengaged with state and federal agencies regarding potential decommissioning through an Agreement in Principle (AIP) in July 2008 (CA, OR, USDOJ and PacifiCorp 2008) that was superseded by their signing the KHSA in February 2010. PacifiCorp is not a signatory to the KBRA, but all Parties signing the KBRA also signed the KHSA.

The creation of the KBRA involved dozens of meetings spanning several years, all behind closed doors with participants bound by a confidentiality agreement. Although the process involved several counties, Tribes, environmental organizations and government agencies, key participants were excluded from participation, including Del Norte County and the federally recognized Resighini Rancheria and the Quartz Valley Indian Reservation. The Hoopa Valley Tribe participated in the Settlement, but declined to sign the final KBRA or KHSA because they would require giving up water rights and the ability to take legal action to abate water quality problems to protect fisheries (KBRA 15.3.9). The KBRA and KHSA are arcane documents written by lawyers with tedious cross references and a myriad of contradictions. Ultimately important decisions regarding public trust and Indian Treaty Rights and Trust responsibilities are embodied in these documents that were made out of public view and excluded legitimate stakeholders.

Table 1. Time Line for Klamath Settlement Process

Process Steps	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
PacifiCorp Announces Intent to Relicense	=====												
PacifiCorp Holds Public Meetings		=====											
PacifiCorp Files Final License Application				=====									
FERC Scoping					=====								
PacifiCorp Begins Settlement Talks						=====							
PacifiCorp Mediated Settlement Talks							=====						
PacifiCorp License Expires								=====					
PacifiCorp Files 401 Certification Request									=====				
PacifiCorp Drops Out of Settlement										=====			
“Stakeholders” Continue w/o PacifiCorp											=====		
Federal Agencies Issue Terms & Conditions												=====	
PacifiCorp Challenges NMFS in Court													=====
Court Rules Against PacifiCorp													=====
FERC DEIS													=====
Federal Agencies Revise Terms & Conditions													=====
PacifiCorp Signs MOU w/ SWRCB													=====
FERC Issues FEIS													=====
NMFS/USFWS Final BiOps Issued													=====
KBRA Released													=====
PacifiCorp & Govt. in AIP													=====
CA Klamath TMDL Draft													=====
PacifiCorp Signs KHSA													=====
OR and CA Klamath/Lost TMDLs Final													=====
EIS/EIR Secretarial Decision Process (EIS/EIR)													=====
Secretarial Decision (Mar 2012)													=====

Patrick Higgins, Consulting Fisheries Biologist: *KHSA and KBRA Likelihood of Meeting Hoopa Valley Tribe Klamath River Water Quality Standards*

In April 2007 during the Settlement that preceded the KBRA, Klamath Project irrigators made an ultimatum with regard to their continuing participation; any Settlement would have to include farming in the Lease Lands of Tule Lake and Lower Klamath National Wildlife Refuges. Oregon Water Watch (OWW 2010) and Oregon Wild (OW) were expelled from Settlement talks because they would not agree to this condition. Talks continued without OWW and OW, but their expulsion sent a clear message and restricted subsequent consideration of viable ecological restoration options under the KBRA.

Although the KBRA is separate from the KHSA and deals with issues largely unrelated to KHP relicensing, the agreements are intertwined due to KBRA (7.2.1 C) and KHSA (8.1) “severability” clauses that state that neither can be implemented separately. Therefore, both the KHSA and KBRA are discussed below with regard prospects of meeting Hoopa TEPA (2008) WQS. The *Klamath River and Lost River Total Maximum Daily Load (TMDL)* (NCRWQCB 2010) and *Upper Klamath and Lost River TMDL and Water Quality Management Plan* (ODEQ 2010) are integral to improving water quality, so their potential to improve conditions is also considered.

KHSA and KBRA Actions Insufficient to Meet Hoopa TEPA WQS

The KHSA has to do with dam decommissioning and pollution associated with KHP operation while the KBRA would deal with fishery restoration and potential remediation of water quality problems. Both the KHSA and KBRA will require federal authorizing legislation, including \$1 billion or more in funding. Legislation has not been passed. Pollution associated with KHP dam operation will continue under the KHSA until 2020, but there is also a question as to whether measures taken under the KBRA after dam removal will be sufficient to abate nutrient pollution and meet Hoopa TEPA (2008) WQS. Interim Measures to abate water quality problems under the KHSA are pertinent to the Klamath River TMDLs and are discussed in that section below. Table 2 lists beneficial uses recognized by the NCRWQCB (2007) *Basin Plan* and Hoopa TEPA (2008) and their likelihood of being met under the KBRA/KHSA before and after 2020.

Table 2. Likelihood of meeting Klamath River beneficial uses under the North Coast Basin Plan (NCRWQCB 2007) or Hoopa TEPA (2008) WQS before and after 2020 under the KBRA/KHSA. Green indicates beneficial uses are restored and red indicates that they are not.

Beneficial Use	Key	Before 2020	After 2020
COLD	Cold freshwater habitat		
SPAWN	Fish spawning		
MIGRATION	Fish migration		
RARE	ESA and CESA Fish		
COMM	Commercial & Sport Fishing		
FISH	Subsistence Fishing		
CUL	Cultural Use		
REC-1	Recreational Contact		
REC-2	Recreational Boating		

KHSA

The KHSA does not directly call for KHP dam removal but rather sets up a March 2012 Secretary of Interior Decision as to whether decommissioning is in the public interest and will benefit the environment, including Klamath River native fish species. A major effect of the KHSA is to delay the 401 processes of California (PacifiCorp 2008, SWRCB 2008) and Oregon that had the potential to force expeditious dam decommissioning (Brockbank 2010), if either State withheld certification. The serious nuisances caused by KHP reservoirs is justification for swift dam removal (SWRCB 2007), but instead under the KHSA the project will operate until 2020 on a year to year extension of its 1956 FERC license (Brockbank 2010). Numerous problems have been identified with regard to KHP operation that lead to major negative impacts on salmonids and other beneficial uses (Hoopa TEPA 2008), and to a large extent these cannot be mitigated without dam removal (SWRCB 2007, FERC 2007).

Fish Passage: Fish passage for anadromous species is considered as part of the COLD beneficial use according to the SWRCB (2007), and migration for Pacific salmon species (MIGR) will continue to be blocked until at least 2020 under the KHSA and KBRA (see Alternatives for Dam Removal). Coho salmon that are affected by the KHP are listed as Threatened under the federal Endangered Species Act (ESA); therefore, the RARE beneficial use is also compromised. The impediment to migration also continues to compromise the commercial and sport fishing beneficial use (COMM) and tribal subsistence fisheries (FISH).

Thermal Problems Created by Iron Gate Reservoir: The mass of water within Iron Gate Reservoir creates thermal problems that delay Chinook salmon spawning (SPAWN) in fall and impair juvenile rearing conditions (COLD) in spring. This will continue until drawdown of the reservoir or Iron Gate Dam removal. Klamath River fall temperatures remain above suitable for spawning three weeks later than if the river were free flowing (Figure 4). The KBRA Chinook Expert Panel (Goodman et al. 2011) noted high “pre-spawning mortality documented in the mainstem river may be related to high water temperature and moderately low dissolved oxygen”, which are both side effects of reservoir operation. Increased fall water temperatures and associated stress are also likely to reduce fecundity. Fry from eggs laid later in the season emerge later in spring and their growth is then suppressed by artificially depressed Klamath River temperatures. Smaller fry migrate more slowly as the Klamath River water temperature rises and water quality becomes adverse. With their resistance compromised by water quality related stress, these fish also face much greater exposure to the disease organisms (see below). The thermal lag at Iron Gate appears to have shifted spawn timing of fall Chinook later and the losses of juveniles are sometimes in the hundreds of thousands (USFW 2001, Nicholas and Foott 2005). While temperature effects of Iron Gate Reservoir do not extend downstream to the Hoopa Reservation, maintaining Iron Gate Dam through 2020 leads to unacceptably high risk to the Klamath River fall Chinook population. Continued depressed Chinook populations blocks attainment of commercial and sport fishing (COMM) and tribal subsistence fishing (FISH) beneficial uses.

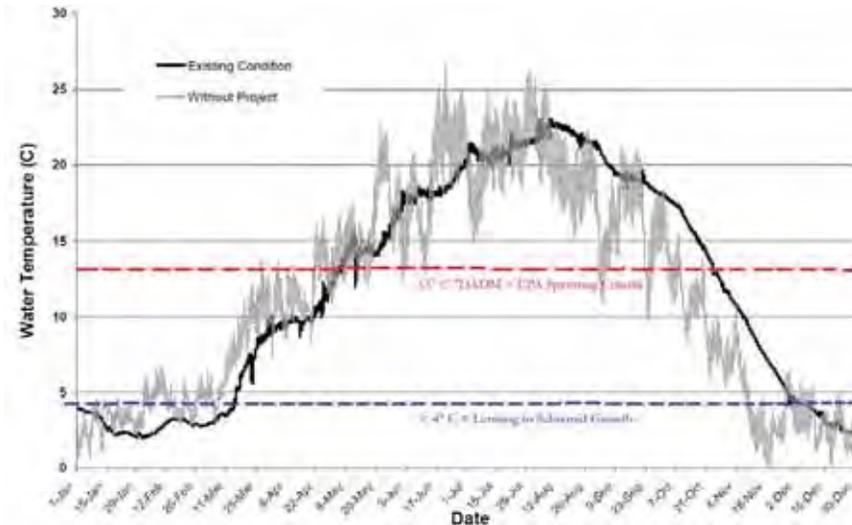


Figure 2. Temperatures below Iron Gate Dam (bold) versus without dam scenario (grey). Warmer fall temperatures create a three week lag for suitability of spawn timing and rearing temperatures remain below optimal for a month. Reference thresholds from U.S. EPA (2003).

Fish Disease Cycles: One of the main impediments to restoring COLD, COMM, RARE and FISH beneficial uses of Pacific salmon in the Klamath River, particularly Chinook salmon and coho salmon, is the extremely high prevalence of disease organisms below Iron Gate Dam (Foott et al. 2003, Stocking and Bartholomew 2004, Nichols and Foott 2005, Nichols and True 2007, Nichols et al. 2008, Bartholomew 2008, Stocking et al 2006, Stone et al. 2007). Two myxozoan disease organisms, *Ceratomyxa shasta* and *Parvicapsula minibicornis*, are endemic to the Klamath River and the Pacific salmon species have co-evolved with them and have developed substantial resistance. However, nutrient enrichment from the Upper Klamath Basin and from within Iron Gate Reservoir sets up conditions that cause extraordinarily high production of disease organisms that can overwhelm otherwise healthy fish (Nichols and Foott 2005).

The green algae species *Cladophora* is recognized as an indicator of nutrient pollution and there are areas below Iron Gate Dam where this species is dominant (Stocking et al. 2006). A polychaete worm, *Manayunkia speciosa*, which thrives in *Cladophora* beds also serves as an intermediate host for the deadly diseases. Fall Chinook spawning is concentrated below Iron Gate Dam and adults carry myxospores that cause a vicious cycle as *M. speciosa* captures them and then releases actinospores when Chinook juveniles are migrating downstream (Stocking et al. 2006, Bartholomew 2008). Stocking et al. (2006) concluded that actinospores remain viable during the 5 days required for water to pass from Iron Gate Dam to the Klamath estuary. Therefore, it is likely that disease problems will continue for fish migrating through the Hoopa Reservation portions of the Klamath River until at least 2020. Disease effects can extend downstream of the Trinity River and there indications of major impacts to juvenile Chinook from that river (Figure 3); therefore, Hoopa Valley Tribe Trinity River fish harvest is also directly impacted.

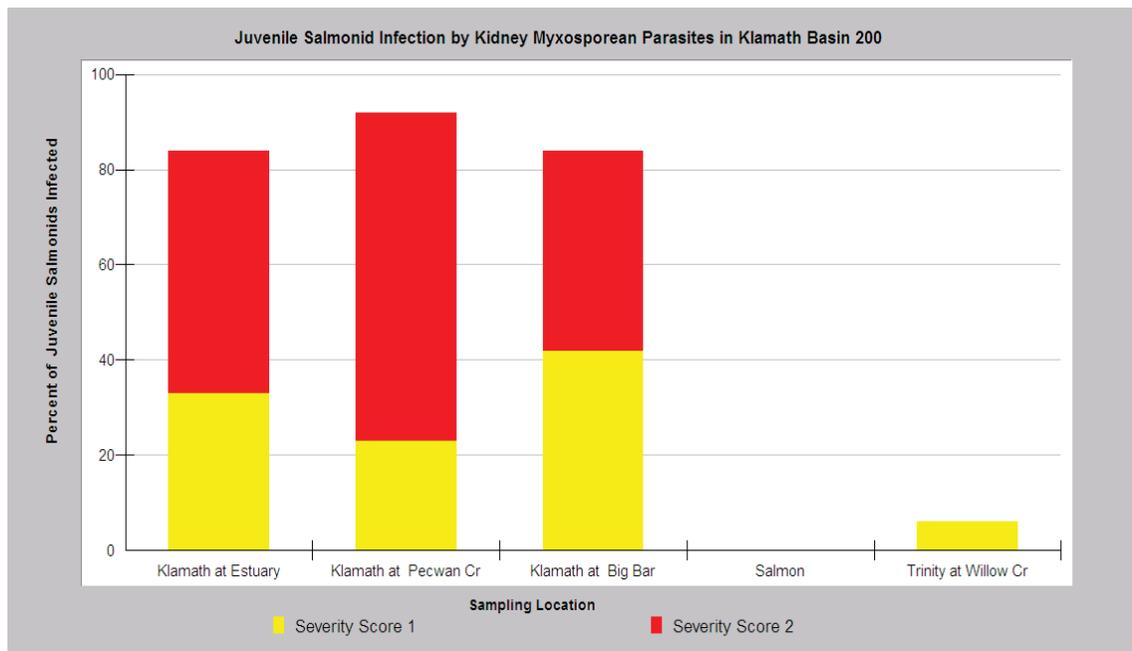


Figure 3. Chart shows the percentage of juvenile salmonids infected by kidney myxosporean parasites. High severity (2) score indicates likely mortality. While Trinity River infection is low, Pecwan and estuary high disease incidence suggests Trinity fish are becoming infected. Most of the juvenile salmonids sampled were Chinook salmon. Data from Foott et al. (2003).

Water Quality Stress: Fish susceptibility to disease is a function of cumulative stress caused by multiple water quality factors (Hoopa TEPA 2008). In addition to temperature, impairment below Iron Gate Dam can include elevated pH, algal toxins and dissolved ammonia as well as depressed dissolved oxygen (D.O.), all of which are linked to KHP dam operation (SWRCB 2007, FERC 2007). These conditions will continue to cause impairment until at least 2020 as a result of KHP operation and lack of attainment of the COLD, FISH, COMM, and RARE beneficial uses. The manifestation of nutrient pollution and associated problems for fish health may remain after dam removal, but that prospect is more fully explored under the KBRA section below.

Toxic Algae: Kann (2006) found the toxic algae species *Microcystis aeruginosa* to be prevalent within Copco and Iron Gate reservoirs but in low abundance or absent from the outlet of Upper Klamath Lake to below J.C. Boyle Reservoir within the Klamath Project. The SWRCB (2007) points out that there is little chance for remediation of toxic algae in the lower two KHP reservoirs before 2020; therefore, NCRWQCB (2011) staff do not recommend PacifiCorp carry out Interim Measures within the reservoirs aimed at treating algae problems (see TMDL discussion).

Kann and Corum (2009) found evidence of *Microcystis* downstream at Orleans and samples from the Yurok Reservation indicate it is present downstream to the estuary (Yurok 2009). Kann (2008) also reported bioaccumulation of microcystin toxin in Iron Gate Hatchery Chinook salmon juveniles. Yellow perch from Copco and Iron Gate

Reservoirs and mussels downstream of the KHP had such high levels due to bioaccumulation that they would pose a human health risk, if consumed. Emerging epidemiological evidence suggests that the substance BMAA (beta-methylamino-L-alanine) that is prevalent in toxic blue-green algae species may be linked to neurological disorders, such as Amyotrophic Lateral Sclerosis (ALS) (Lou Gehrig's disease), Parkinson's disease and Alzheimer's disease (Caller et al. 2009). Impairment of Hoopa Reservation waters on the Klamath River from toxic algae will continue through at least 2020 with the recreational (REC-1) beneficial use compromised and ceremonial use (CUL) in certain seasons inadvisable.

Keno Reservoir Operation: The KHSA (7.5.4, 7.5.5) stipulates that the U.S. Bureau of Reclamation (BOR) will assume ownership of the Keno Reservoir and will continue to operate it in the same way that PacifiCorp has since 1968. Keno Reservoir has major problems with seasonal anoxia (Deas and Vaughn 2006, Sullivan et al. 2009, 2010) and riparian marsh restoration needed to combat this problem will, therefore, be prevented. Historically a lava bedrock sill at the location of Keno Dam caused the Klamath River to back up and form a vast connected wetland with Lower Klamath Lake. Diking off of wetlands and farming up to the margin of the reservoir has disrupted river processes that could otherwise assist with nutrient processing and reduction, similar to the findings of Bernot and Dodds (2005). Dredging of the reservoir to increase water storage capacity circa 1968 likely contributed to a decreased ability for ecological function and an increased propensity for anoxia.

Goodman et al. (2011) call attention to persistent problems of prolonged anoxia in Keno Reservoir (Figure 4) that they believe will not be alleviated under the KBRA. Figure 5 shows a map from PacifiCorp (2004) of riparian vegetation of the Keno Reservoir just above Keno Dam and Figure 6 is an aerial photo of the same area showing the pattern of land use. Continuing this land use and pattern of operation of Keno Reservoir under the KHSA will prevent improved ecosystem function by riparian marshes that could otherwise assist with clean up of nutrient pollution (Lytle 2000, Mayer 2005).

The ODEQ (2010) TMDL found that the suspended load from Upper Klamath Lake is a major driver of anoxia in Keno Reservoir; however, they also found the waste load from the Straits Drain to be a major source of pollution. ODEQ (2010) provided a schematic of flow diversions from the Klamath River and flow contributions to Keno Reservoir (Figure 7). Waste water from the Klamath Straits Drain in August 2002 constituted 48% of flows to the reservoir, which is similar to NRC (2004) findings. The Lost River and Tule Lake were originally a sink and did not discharge into the Klamath River; therefore, the high level of nutrients contributed by them today help push the river past the tipping point where ecosystem processes are insufficient for the river to clean itself. This results not only in anoxia within the Keno Reservoir but also in very adverse water quality impacts in the lower Klamath River.

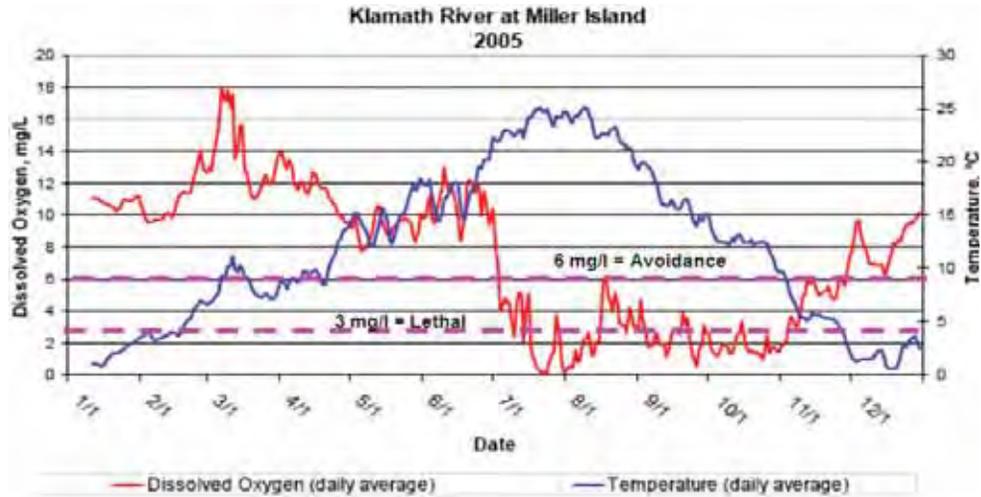


Figure 4. This chart shows fluctuations of water temperature and dissolved oxygen in Keno Reservoir in 2005 with lethal levels extending from July through October. Taken from Goode et al. 2011 where it appears as Figure 4. Threshold reference annotations added based on WDOE (2002).

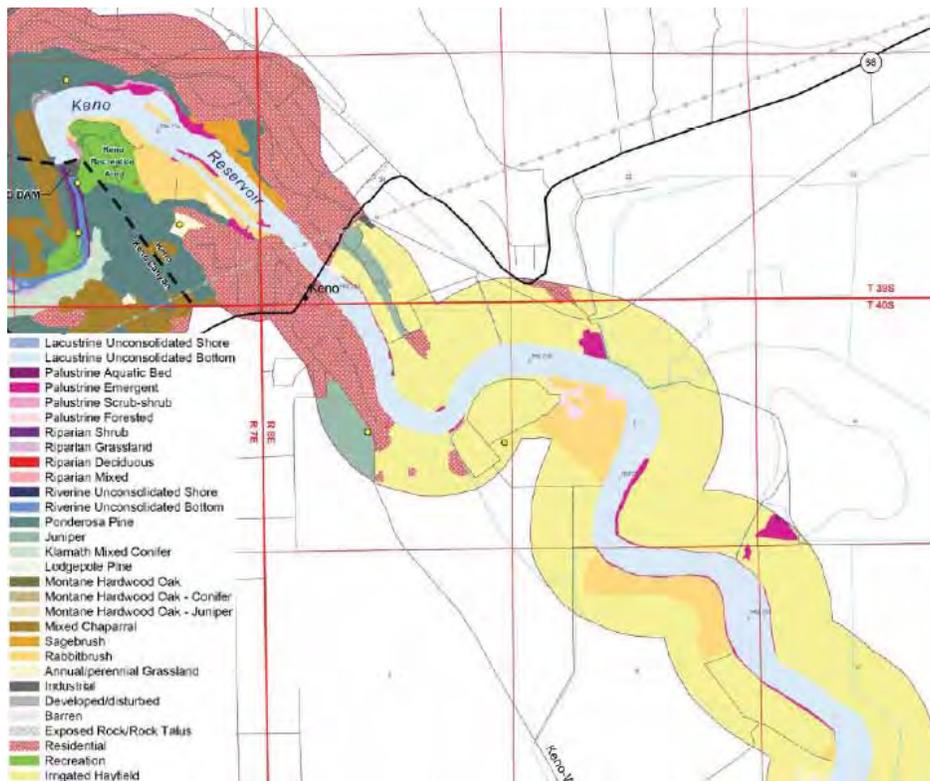


Figure 5. Keno Reservoir riparian vegetation map from PacifiCorp (2004) showing irrigated hayfields right up to the margin with no marsh buffer to help absorb nutrients and to provide other ecosystem services.



Figure 6. Aerial photograph of Keno Reservoir with Keno Dam below center and the old Lower Klamath Lake bed in the distance (red oval).

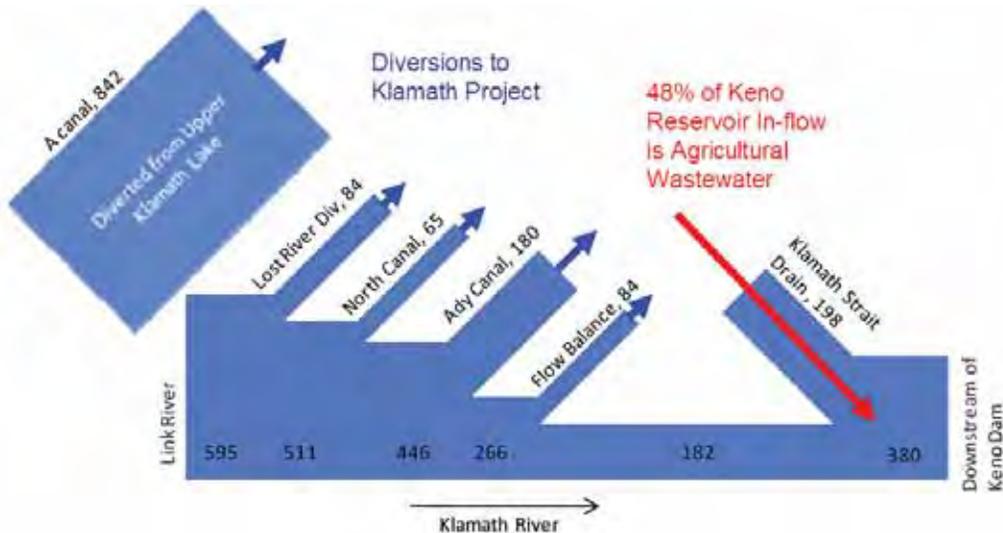


Figure 7. Average daily flow in August 2002 into the Klamath Project and Keno Reservoir. From ODEQ (2010) where it appears as Figure 2-21.

Agricultural discharges from the Lost River through the Lost River Diversion (LRD) canal are known to occur in winter (Deas and Vaughn 2006); however, ODEQ (2010) also found substantial nutrient contributions from that source in summer and fall of 2000 and 2008. ODEQ (2010) model runs of D.O. depletion in Keno Reservoir (Figure 9) show that the contributions from the LRD in September and October 2008 had substantial impacts in addition to discharges from the Klamath Project through the Straits Drain.

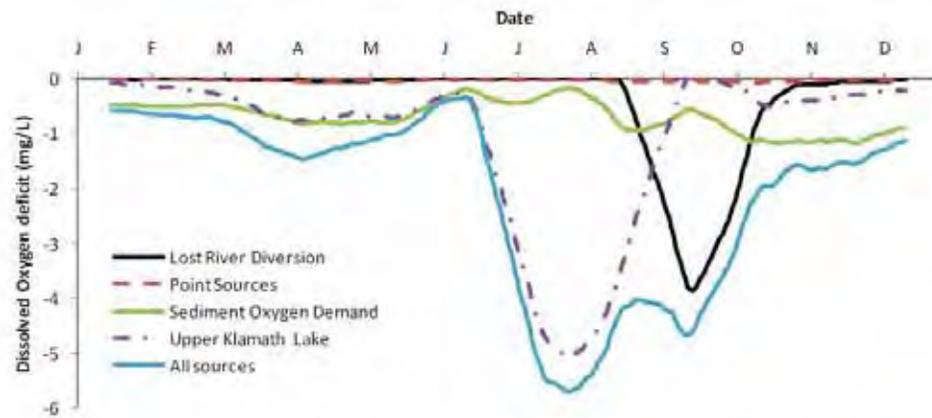


Figure 8. This chart is taken from ODEQ (2010) and shows model results of the D.O. deficits in Keno Reservoir by month in 2008 with a substantial contribution from the LRD Canal in fall, which likely extended conditions lethal to salmonids for two months.

KBRA

The KBRA does not have a water quality plan and has a very broad and ill defined strategy for clean up of nutrient pollution in the Upper Klamath Basin (Dunne et al. 2011, Goodman et al. 2011). Flows under the KBRA (Appendix E-5) will drop further from historic norms (Dunne et al. 2011), which will cause water pollution and fish health problems to persist or even worsen (Goodman et al. 2011). Lost River surface flows are likely to also be reduced under the KBRA resulting in direct impacts to ESA listed suckers and increased nutrient concentrations in waste discharges sent to the Keno Reservoir. The greatest KBRA effect on water quality, however, is that it guarantees continued agricultural land use over vast areas, including sites critically needed for ecological restoration. Major subsidy for maintaining low cost power for Upper Basin water users is also part of the KBRA, when the footprint of agriculture might otherwise shrink due lack of profitability (Jaeger 2004) helping to lower water demand and nutrient pollution.

Klamath River KBRA Flows to Increase Water Quality Problems: The KBRA convened Expert Panels (Dunne et al. 2011, Goodman et al. 2011) to judge the sufficiency of action in restoring conditions favorable for different fish species in the Klamath Basin. The Coho Salmon and Steelhead Expert Panel (Dunne et al. 2011) expressed concern that there would be no consideration under the KBRA of trying to restore historic flows in the Klamath River. Before the Klamath Project was created, Lower Klamath Lake (LKL) would fill in winter and then augment Klamath River flows from May through July (Weddell 2000). Dunne et al. (2011) charted flows before and after Klamath Project construction to show the departure from historical patterns (Figure 9). A return to historic flows would reduce water temperature and nutrient concentrations, which in turn would reduce algae blooms and fish diseases. Figure 9 is annotated to show where departures from the natural flow regime of the Klamath River since the construction of the Klamath Project increase water temperatures and water quality problems as well as

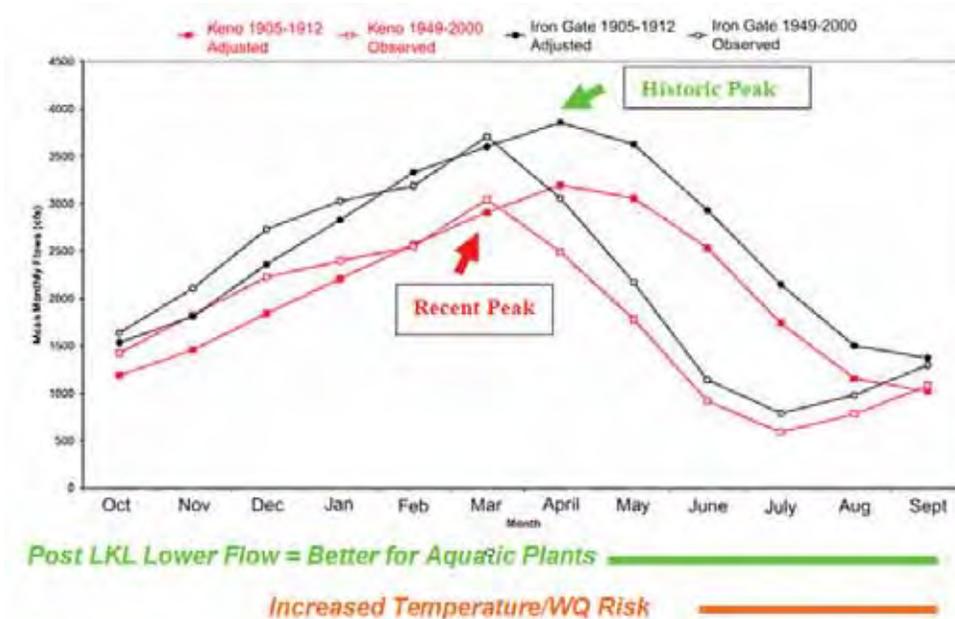


Figure 9. Chart of historic seasonal flows versus those after the construction of the Klamath Project and the disconnection of Lower Klamath Lake. Annotations include historic and recent peaks as well as periods likely to increase algal growth, temperature and nutrient pollution (WQ) added. Taken from Dunne et al. (2011) where it occurs as Figure 3.

promoting conditions that favor growth of algae beds. Continued agricultural activity in the Lower Klamath National Wildlife Refuge (LKNWR) under the KBRA forecloses the option of refilling the lake and increasing spring and early summer flows; instead KBRA flows will depart even further from historic norms.

Flows under the KBRA will be less than those called for under the Klamath Project operations NMFS (2010) Biological Opinion (B.O.) for coho salmon and Hardy et al. (2006). Figure 10 shows Klamath River flows at Iron Gate Dam for the 90% exceedance (very dry) water year with the KBRA WRMS R32 model run, the NMFS (2010) Biological Opinion (B.O.) flows and minimums recommended in the Hardy et al. (2006) Phase II study (Hoopa Tribe Fisheries Department 2011). Annotations once again show periods when very low flow conditions will foster increased algae growth and trigger more adverse water quality. Algae build up has the potential to be most injurious during prolonged droughts when there is insufficient water for flushing flow releases in spring.

Table 3 captures KBRA model (Appendix E-5) projections for Klamath River flows at the location of Iron Gate Dam Flows during extreme drought years similar to 1992 and 1994. Flows could fall as low as 442 cubic feet per second (cfs) (Figure 11) while the adult salmon kill of September 2002 was triggered by flows of 758 cfs (Guillen 2003, CDFG 2003). Reduced flow decreases the volume of water which in turn increases water temperature and nutrient concentration. Although the KBRA states that the Drought Plan would define higher flows for fish needs, the draft Drought Plan circulated in May 2011 does not have alternative levels to those in Appendix E-5 (Resighini Rancheria 2011a).

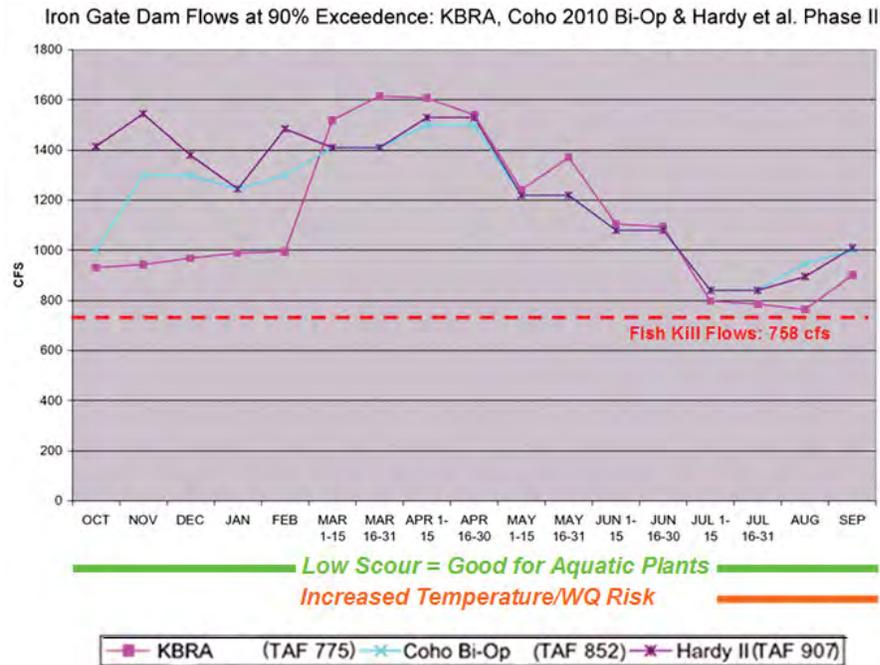


Figure 10. Flows at Iron Gate Dam in a 90% exceedance flow year comparing the KBRA WMRS R32 model flows, NMFS (2010) BO flow levels and Hardy et al. (2006) Phase II. Data from the Hoopa Fisheries Department. Reference is USGS Iron Gate September 2002 fish kill flow release.

Table 3. KBRA WRMS model flow simulations at Iron Gate Dam for years similar to 1992 and 1994 under KBRA flow allocations. R32 = primary run. R33 = with additional storage. R34 = with additional storage and climate change. Yellow indicates lower than September 2002 fish kill flows (758 cfs).

Period	R32_1992	R32_1994	R33_1992	R33_1995	R34_1992	R34_1994
Jan	854	959	819	1106	846	1106
Feb	809	928	800	1025	809	1025
Mar_1_15	1022	1239	800	996	800	996
Mar_16_31	1021	1151	800	860	826	924
Apr_1_15	1063	1184	800	824	786	847
Apr_16_31	1022	1125	800	821	767	813
May_1_15	807	924	800	813	701	798
May_16_31	843	1069	800	812	668	823
Jun_1_15	698	913	800	811	581	773
Jun_16_30	646	873	800	809	610	753
Jul_1_15	509	629	700	706	515	607
Jul_15_30	524	574	700	705	537	561
August	442	485	800	804	533	548
Sept	512	577	800	808	519	552
Oct	549	582	800	811	800	811
Nov	647	690	829	800	829	800
Dec	774	762	914	800	914	800

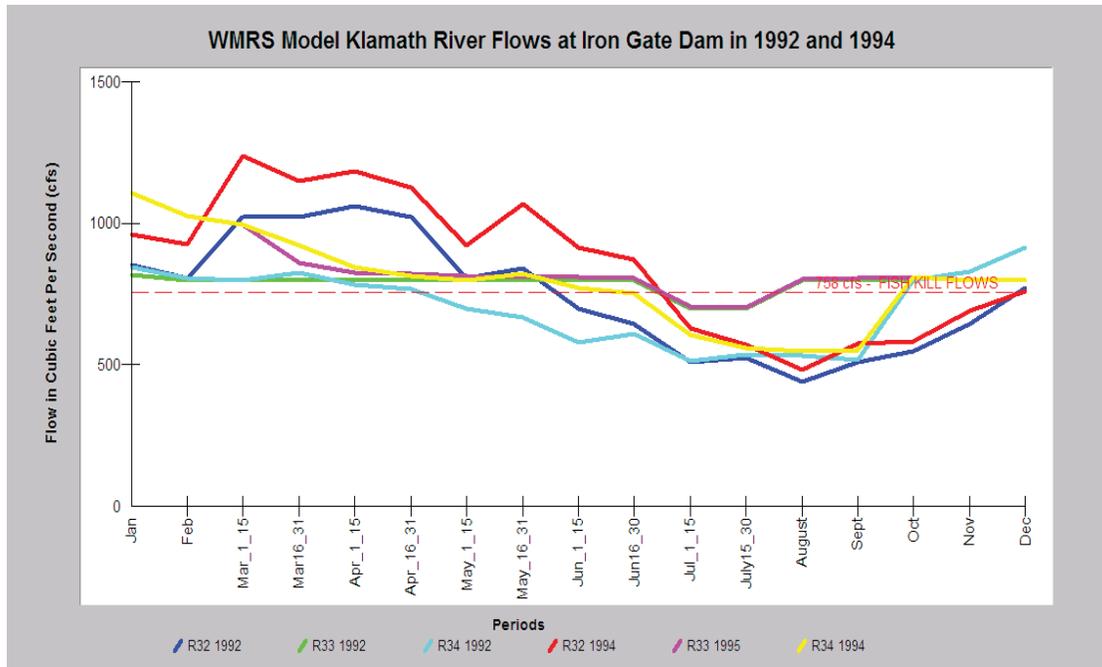


Figure 11. KBRA WRMS model run for flows at the location of Iron Gate Dam in years of Extreme Drought, with similar Upper Klamath Lake in-flow to 1992 and 1994. Data from KBRA (E-5, Tables 2, 4, 6).

Moving flows further away from their historic range of variability poses greater risk due to processes described in the FERC (2007) Final Environmental Impact Statement (FEIS) for the KHP relicensing:

“Over time, the overall limitations on water availability and dynamic hydrographs contribute to conditions that result in a channel that becomes stable and prone to other undesirable consequences to water quality and aquatic resources.”

Although nutrient concentrations are reduced by greater water volume (Asarian et al. 2010), the KBRA (Section 25.1.4) states that increasing flows will be the last option for improving water quality:

“The Parties shall support all reasonably available alternative or additional water quality measures before considering any action for the purpose of water quality compliance that would reduce water supplies beyond the limitations provided in this Agreement.”

Restricted Klamath River flows under the KBRA in and of themselves substantially lower chances of attaining Hoopa TEPA (2008) WQS, especially during drought or extreme drought years even after dams are removed.

Lost River Flow Reduction Impacts Under KBRA: The KBRA will likely reduce surface flows in the Lost River, which will have a direct impact on Lost River and shortnose suckers but will also increase nutrient concentrations in Straits Drain and LRD waste water sent to Keno Reservoir. The KBRA provides substantial resources that allow irrigation districts to bind together and create an On-Project Plan for water and power. This publicly funded document may not undergo public review and yet it will govern Lost River flows for the life of the KBRA. Lost River surface and groundwater have been used to make up for Klamath River shortfalls since 2001 through the U.S. Bureau of Reclamation (BOR) water bank. According to USGS (2005) “Water bank activities have resulted in an approximately eight-fold increase in ground-water pumping in the vicinity of the Klamath Valley and Tule Lake sub-basins.” Gannett et al. (2007) measured water table drops from 2001-2004 of greater than 15 feet in the lower Lost River in California and stated that this was likely reducing surface flows. California State agencies and Siskiyou County do not actively manage groundwater and are not likely to prevent future adverse Lost River drought impacts. Increased nutrient concentrations in tail waters sent to Keno reservoir will promote continuing acute water pollution there with radiating negative impacts downstream.

KBRA Nutrient Reduction Insufficient: The U.S. EPA (2000) notes that “restoration should reestablish in so far as possible the ecological integrity of degraded aquatic ecosystems.” A restored system would meet the following criteria: “Its key ecosystem processes, such as nutrient cycles, succession, water levels and flow patterns, and the dynamics of sediment erosion and deposition, are functioning properly within the natural range of variability” (U.S. EPA 2000). As noted above, the KBRA will cause flows to depart further from their historic range of variability and the amount of functioning marsh and area of shallow lakes that formerly helped improve water quality will remain at just a fraction of their historic extent.

Dunne et al. (2011) pointed out that the KBRA has no assured strategy for reducing nutrient pollution (emphasis added):

“Experience from other locations where eutrophication is a major problem suggests that, at a minimum, drastic reductions in loading from the watershed must accompany local amelioration. These reductions must account for the apparently high natural nutrient inputs from the local watersheds, and the unavoidable leakage occurring in watersheds heavily altered for urban and agricultural use. *Thus, it would be premature to conclude that any problems caused by these blooms, including low dissolved oxygen, will be substantially reduced by KBRA*” (p. 39).

Goodman et al. (2011) urge consideration of more extensive wetland and lake restoration to recover the Klamath River’s limnological balance:

“Evaluate reductions in irrigated agriculture for lands draining to UKL and the Lost River for their feasibility to reduce summer and fall nutrient additions from those waters. Consider managing the refuges to further emphasize their benefits

for fish and wildlife, which can be in contrast to their agricultural objectives.”
(Page 12, Section 2.1)

Goodman et al. (2011) also express doubt that problems with extremely low D.O. in Keno Reservoir will be resolved by KHSA and KBRA measures and as result that “a fully self-sustaining run of Chinook salmon to the upper basin is unlikely” even with KHP dam removal.

Asarian et al. (2010) project that available nitrogen at the location of Iron Gate Dam after removal of KHP reservoirs will increase in the months of July through September by 45-58%. Asarian et al. (2010) note that nutrient assimilation of periphyton and macrophytes will increase in the Klamath River below the location of Iron Gate Dam in response to increased nitrogen availability and state that “These increased retention rates downstream would then partially offset the effects of increased Iron Gate load on nitrogen concentrations in reaches farther downstream.” The problem is that the process of photosynthesis associated with assimilating a 50% increase in nitrogen will continue to cause water quality perturbations that create stressful conditions for salmonids and disease rates similar to those experienced in the recent past (Halstead 1997, USFWS 2001, Nichols and Foott 2005).

Goodman et al. (2011) acknowledged the potential significance of the increased nutrient load in the Lower Klamath River:

“Releasing these excessive amounts of nutrients to the Klamath River in the absence of the four lower dams means that the river, versus the reservoirs, will process the nutrients, perhaps in the form of excessive *Cladophora* biomass or increased periphyton production down river. These changes could elevate pH, lower night time dissolved oxygen, and cause gas supersaturation during afternoons in local areas.”

The FERC (2007) FEIS also poses the same hypothesis as Goodman et al. (2011) with regard to nutrient surpluses and fish disease risk:

“Continued high nutrient levels in the Klamath River that create ideal colonization conditions for *Cladophora*, at sites with favored flow and substrate conditions, would enable the host polychaete to become reestablished, and *C. shasta* and *P. minibicornis* would likely continue to pose a serious threat to downstream salmon for the foreseeable future.”

As pointed out in the Fish Disease Cycles section above, no matter where the new fish disease node is below Keno Reservoir after dam removal, actinospores will be viable and increase exposure to *C. shasta* and *P. minibicornis* downstream to the estuary even after dam removal. Thus, Hoopa TEPA (2008) WQS beneficial uses will not likely be met and the Hoopa Valley Tribe will also likely continue to suffer fisheries losses both at Klamath River and Trinity River fishing sites.

Pulse Flow Mitigation Measures: The NMFS 2010 Biological Opinion for the Klamath Project envisions using strategic pulse flows to prevent algae build up. One of the few accomplishments of the biological opinion was a pulse flow release for one day of 5000 cfs in February 2011, which was an attempt to scour algae beds. However, no data on bedload movement was conducted so the effectiveness of this particular pulse flow is unknown. Since 2011 is very wet, it is very likely that algae and disease problems would be delayed by natural conditions and associated juvenile salmonid mortality likely to be modest. As pointed out above, the most severe water quality problems will arise during drought or extreme drought, particularly when there are several dry years in a row (e.g., 1986-1992), when excess water for flushing flows will not be available. There are no hard requirements within the KBRA or its associated Drought Plan for such flow releases.

Potential Effectiveness of Klamath and Lost River TMDLs

Unfortunately both the California (NCRWQCB 2010) and Oregon (ODEQ 2010) TMDLs have very little chance of success in abating nutrient pollution in the course of the 50 year KBRA and KHSAs. A fundamental flaw in both is their lack of recognition of the need to restore ecosystem function of the lakes and marshes of the Upper Klamath in order to help the Klamath River clean itself. Both TMDLs assume that incremental reduction of non-point source pollution from each farm field will eventually solve the problem, but their models do not account for the fact that nitrogen fixing blue-green algae can make up for any reduction unless ecosystem services suppress its growth. Both over-rely on voluntary measures for implementation and neither has expected compliance dates for meeting water quality standards. As noted above, the KBRA provisions that continue Lease Land farming on Tule Lake NWR and Lower Klamath NWR and support continued full use of the 200,000 acre Klamath Project through power subsidy essentially block TMDL implementation because they do not allow reduction of nutrient contributions and water demand. They also block strategic restoration of marshes and lakes needed for water storage and filtration.

TMDLs Ignores Need for Marsh and Lake Ecosystem Function

Conversion of marsh land around Upper Klamath Lake has augmented phosphorous for aquatic plant growth and caused nitrogen to become potentially more limiting. However, the nitrogen fixing blue-green algae *Aphanizomenon flos aquae* colonized Upper Klamath Lake (UKL) and can transform nitrogen gas from the air into a form usable by plants. Research indicates that mild acids from decaying material within marshes causes the cells of blue-green algae, including *A. flos-aquae*, to break down when exposed to sunlight (ASR/WRC 2005, WRC 2009). Blue-green algae species were not present in UKL before the 20th Century (Bradbury et al. 2004, Eilers et al. 2001) likely because marsh ecosystem function suppressed them. PacifiCorp (2004) estimates that nitrogen exiting UKL is on the order of 2.5 times higher than water entering. In other words, UKL has been transformed from an ecosystem that helps clean up water to one that is a major engine for nutrient pollution. ODEQ (2010) TMDL does not recognize the need to reverse these processes and does not address restoring riparian function in the Keno

Reservoir reach to help improve water quality, the importance of which is discussed above.

Agricultural water supply from Upper Klamath Lake through the A Canal continually inoculates the Lost River and Tule Lake with *A. flos-aquae* and marsh complexes there need to be re-expanded to stifle its growth. Neither the U.S. EPA (2008) Lost River TMDL or the NCRWQCB (2010) Klamath and Lost River TMDL implementation recognize the need for these restored ecosystem functions and processes. The KBRA guarantees water delivery and continued agricultural use of the Lease Lands within the TLNWR (15.1.2 B i) and LKNWR (15.1.2 B i), which constitutes 21,000 acres (Figure 12) and is the only such arrangement on any wildlife refuge in the nation. Tule Lake was originally 110,000 acres whereas Tule Sump occupies between 10,000-14,000 acres and Lower Klamath Lake was 95,000 acres and is now only 4,000 to 7,000 acres depending on the water year (Figures 13-14). This essentially blocks ecological recovery of both areas; therefore, confounds successful abatement of pollution.

Dam removal will help ecosystem function of the Klamath River in the restored KHP reach, including elimination of toxic algae. However, the huge excess of nutrients from Keno Reservoir will continue to overwhelm the river's capacity for assimilation causing major algae blooms downstream. As noted above, this has consequences for fish diseases as well as exceedance of water quality standards. Lower Klamath River recovery also requires that flows and ecosystem function of the Shasta and Scott rivers also be restored, but conditions there have not improved since adoption of those TMDLs (Higgins 2011).

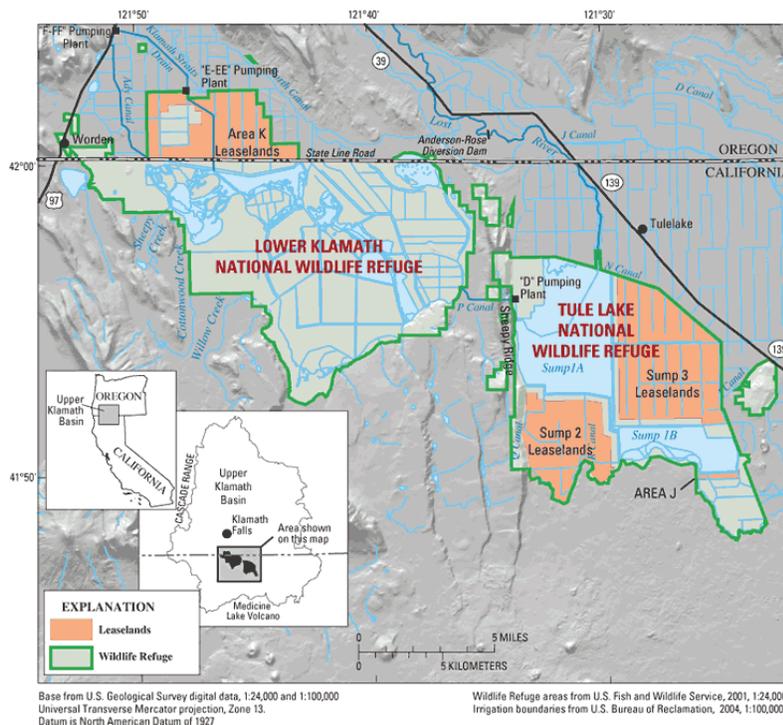


Figure 13. USFWS and BOR map of TLNWR and LKLNWR Lease Lands occupy 21,000 acres.

Patrick Higgins, Consulting Fisheries Biologist: *KHSA and KBRA Likelihood of Meeting Hoopa Valley Tribe Klamath River Water Quality Standards*



Figure 13. Historic map of Tule Lake and Lower Klamath Lake from Oregon Wild website at www.oregonwild.org/waters/klamath/klamath-photos-and-maps/interactive_maps



Figure 14. Aerial photo of Tule Lake and Lower Klamath Lake from Oregon Wild website.

The Tule Lake basin also has the highest use of pesticides in Siskiyou County (Figure 15) with up to 7,500 pounds per acre in use within the TLNWR on the Lease Lands.

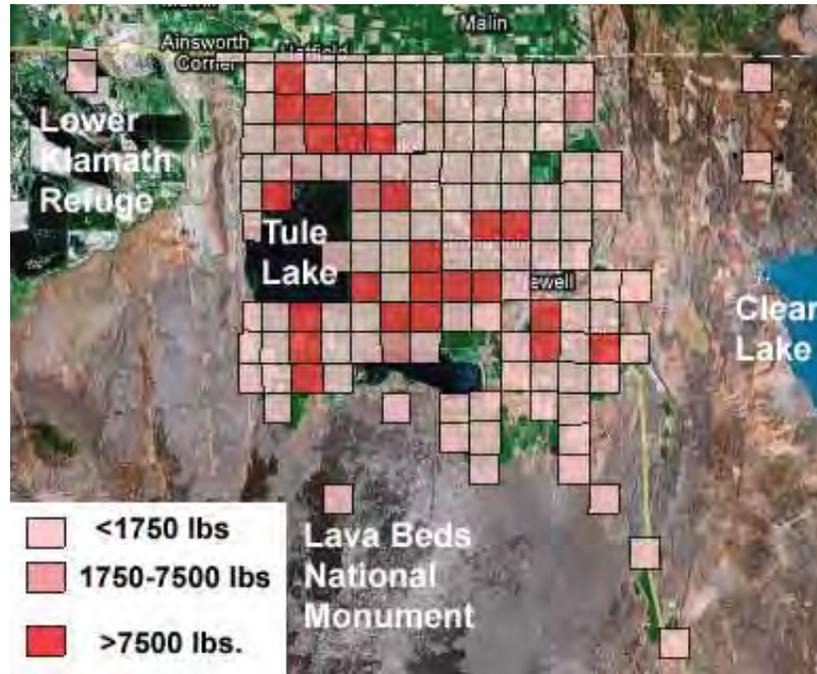


Figure 15. Tule Lake pesticides in pounds per year, including within the TLNWR Lease Lands adjacent to Tule Lake. Data from CA Department of Pesticide Regulation (DPR).

Recent studies have shown that even low levels of some chemicals can be injurious to coho salmon when acting together (Laetz et al. 2009). The KHSA and KBRA do not even mention the topic of pesticides but high contributions to the Keno Reservoir reach could be another factor that could impede Upper Basin salmon recovery. Laetz et al. (2009) found combinations of diazinon, malathion, chlorpyrifos, carbaryl and carbofuran in many Pacific Northwest rivers and exposing coho salmon juveniles to equivalent levels in a lab induced mortality. All of these chemicals are used in Siskiyou County where in 2007 an estimated 1,287,800 pounds of pesticides were applied to 187,595 acres, most of them within the Klamath Basin (CDPR 2008). Conversion to organic farming techniques needs to be pursued as part of any final settlement, especially on Lease Lands if farming there continues.

Technical Fix of Water Quality Problems is Experimental and Unlikely to Succeed

The NCRWQCB (2010) frames the strategy for nutrient pollution as follows:

“Explore engineered treatment options such as treatment wetlands, algae harvesting, and package wastewater treatment systems to reduce nutrient loads to the Klamath River and encourage implementation of these options where feasible.”

These technical approaches to nutrient pollution all require intensive capital investments for implementation and also have substantial on-going costs for electricity for water pumping or purification. It is very unlikely with the current budget crisis that funds will be available for construction and availability of capital for operation and maintenance in the future casts doubt on the ability of this approach to succeed. Furthermore, harvest of algae at the outlet of Upper Klamath Lake in perpetuity makes far less sense economically than abating algae blooms through ecological restoration. Similarly, operating a waste water treatment plant at the Keno Reservoir is not cost-competitive with reducing nutrient loads by eliminating farming on the TLNWR and LKNWR and expanding marshes to clean the water.

Meyer (2005) found that water passed through the LKNWR marsh complex had a 55-77% reduction in total nitrogen (N) and 19-51% reduction in total phosphorous with permanent wetlands having a much greater retention rate than seasonal wetlands. Lytle (2000) assessed the potential for use of a treatment wetland to reduce nutrient loads from the Klamath Straits Drain:

“With an estimated wetland treatment area ranging between 1,633 and 3,114 acres, according to the Kadlec and Knight Model, the wetland could achieve a 61% reduction in total P concentration (0.41 to 0.16 mg/L) and a 90% reduction in total nitrogen including NH₃-N.”

The problem with operation of such a treatment wetland is that it requires a flow rate of 70-130 cubic feet per second, which would require additional water storage. Thus, even operation of a treatment wetland at the Straits Drain would require expansion of Lower Klamath Lake or Tule Lake, both of which are blocked by the KBRA. The report from Lytle (2000) remains in draft and there has been no action with regard to its implementation.

TMDLs Rely on Voluntary Cooperation and Have No Timelines for Compliance

Both the California (NCRWQCB 2010) and the Oregon (ODEQ 2010) TMDLs are overly reliant on voluntary measures for compliance. TMDLs from both States lack any projections for when water quality compliance will occur or when beneficial uses will be fully restored. The Final KHP EIS (FERC 2007) expressed the following concern with regard to potential for success of TMDLs in the Upper Klamath to remediate pollution:

“The TMDL program relies on voluntary involvement for loads identified from non-point sources; therefore, nutrient load reductions to the allocated size may not be fully realized as farmers and ranchers choose between converting portions of their land to best management practices or maximizing their property’s agricultural potential.” (3.3.2.3)

ODEQ (2010) states the TMDL “does not attempt a timeline addressing the many ongoing and voluntary efforts.”

The prospect of enforcement in Oregon is more remote than in California because ODEQ (2010) must delegate authority for implementation to designated management agencies (DMAs). The lead DMA is the Oregon Department of Agriculture (ODA), which is charged with both promoting agriculture and regulation of agricultural activities that affect water quality. Other DMAs include the U.S. BOR and irrigation districts. A program that relies on polluters to oversee abatement of pollution has a very low likelihood of success.

Interim Measures for KHP Will Not Improve Reservoir or Lower Klamath River Water Quality Conditions

PacifiCorp has complied with Section 6.3.2 of the KHSA and submitted a TMDL implementation plan to the NCRWQCB. Appendix C and D of the KHSA lay out the 21 Interim Measures and they are reflected in PacifiCorp's (2011) *Plan for Implementing Management Strategies and Water Quality-Related Measures*. The NCRWQCB (2010b) response to the proposed measures states that in-reservoir actions will not abate nutrient pollution or toxic algae problems there. The PacifiCorp (2011) actions pursuant to TMDL implementation relevant to this report are as follows.

Interim Measure 2 requires that PacifiCorp provide \$500,000 per year for coho salmon habitat restoration or acquisition, but these measures will have small water quality benefits and will target projects below the KHP. The improvement of cold water refugia at the mouths of Klamath River tributaries is very laudable and worthwhile, but it does not fully mitigate impacts of the operation of KHP dams as PacifiCorp (2011) claims: "The thermal refugia actions to be implemented under the Coho Enhancement Fund will mitigate the continuing effect of the reservoirs on water temperature during the interim period." This measure will help coho salmon, but the major impact to fall Chinook of reservoir operation described above will remain huge as long as Iron Gate Dam remains. Also, increased flows in the Shasta and Scott rivers is needed to restore coho salmon habitat there, which has much greater potential to increase carrying capacity for these fish (Higgins 2011)

Interim Measure 3 calls for turbine venting at Iron Gate Dam to improve dissolved oxygen (D.O.) levels that may improve lower Klamath River conditions within a short distance of the dam. Even if such measures were implemented, excess nutrients from the reservoir will continue to be released that stimulate profuse algae growth leading to D.O. sags stressful for salmonids downstream, when algae respire nocturnally.

Interim Measure 5 calls on PacifiCorp to consult with agencies and tribes and to carry out experiments with different flow levels in fall and early winter to benefit salmonids. In February 2011 5,000 cfs was released for one day under the theory that such a peak would increase scour and potentially reduce algae beds. These short term events are aimed at offsetting potential problems from low fall and winter flows planned under the KBRA as described above. No experimental design is in place, so whether this isolated action had any benefit is unknown.

Interim Measure 10 requires that PacifiCorp provide \$100,000 to hold a conference “that focuses on the design and implementation of nutrient and organic matter reduction projects. The conference should assess the appropriateness and feasibility of various centralized pollutant removal technologies, including wetland treatment systems, wastewater treatment systems with energy recovery capabilities, aquatic plant harvesting, as well as agricultural best management practices” (NCRWQCB 2010). Planning for this event has been restricted to Parties to the KBRA and KHSA.

Interim Measure 11 is entitled Interim Water Quality Improvements, but there will be no significant improvements to Lower Klamath River that result. PacifiCorp is to spend \$250,000 a year on one or more of the following: 1) developing a water quality accounting framework, 2) constructing pilot treatment wetlands for evaluation, 3) assessing in-reservoir water quality control techniques, and 4) improving J.C. Boyle D.O.

The NCRWQCB (2011) is asking that PacifiCorp increase resources to fully develop the water quality accounting framework that will help evaluate TMDL implementation, which is good. In lieu of reservoir projects, the NCRWQCB staff recommends pilot projects for nutrient reduction that could be expanded and implemented under the KBRA. While treatment wetlands have the potential to reduce nutrient contributions (Lytle 2000), they are unlikely to be able to offset continuing high contributions of nutrients (see Ecological Restoration).

The KHSA would set up an Interim Measures Implementation Committee (IMIC) to work with PacifiCorp comprised only of signatories or “Parties” to the settlements. The committee would also appoint and oversee a Fisheries Technical Working Group and a Water Quality Technical Working Group. These processes would prevent involvement of the Hoopa Tribe and other legitimate stakeholders who did not sign onto the KHSA and KBRA. The Hoopa Tribe has used government-to-government consultations and Freedom of Information Act requests to try to keep abreast of activities within the IMIC. Exclusion of the Hoopa Tribe and other non-Parties will lead to a continuing bias against any solutions to water quality problems that require more land retirement or higher flows than agreed to in the KBRA.

Sucker “Beneficial Use” Recovery Required by TMDLs Unlikely Under KBRA

Both the Lost River and shortnose suckers are endemic to the lower Lost River, Tule Lake and Lower Klamath Lake and they are, thus, both considered beneficial uses under the Clean Water Act and the Lost River TMDL (U.S. EPA 2008). Both species have been extirpated in Lower Klamath Lake (LKL)(USFWS 2001b). The NRC (2004) recommended consideration of refilling LKL to re-establish sucker populations to reduce regional extinction risk and to improve ecological function of the Klamath River. As noted above, this option is precluded by KBRA provisions that guarantee farming in the lake bed and the LKNWR Lease Lands. Therefore, this aspect of TMDL implementation is not likely to occur within the 50 year life of the program.

Shortnose suckers are no longer present in the lower Lost River (Delineas et al. 1996). Although there is an adult population of Lost River suckers in Tule Lake, there is no viable spawning habitat for them in the lower Lost River (Delineas et al. 1996, Shively et al. 2000). The source population for Tule Lake may be partially supplied by Upper Klamath Lake larvae entrained in the A Canal (Scoppettone et al. 1995), and colonists will likely decrease as fish screens are improved. Consequently, with no ability to reproduce and a diminishing source of colonists, the Tule Lake Lost River sucker population is also likely to be lost over time. Marsh and lake restoration in the lower Lost River, Tule Lake and LKL basins would not only allow re-establishment of sucker populations to lessen species extinction risk, it would help attain algae suppression and nutrient reduction that will likely prove elusive otherwise.

Ecological Restoration Approach to Restoring the Klamath River

An ecosystem based approach to resolving Klamath River water quality impairment is in keeping with current best-science principles: “Management of the freshwater habitat of Pacific salmon should focus on natural processes and variability rather than attempt to maintain or engineer a desired set of conditions through time” (Bisson et al. 2009). Major Upper Klamath Basin anthropogenic alteration and reengineering have overwhelmed ecosystem function and caused the Klamath River to develop acute water pollution. Ecosystem services that stifle algae blooms, absorb nutrients and provide water storage need to be regained, which will then allow Pacific salmon and sucker species recovery. The U.S. EPA (2000) gives similar guidance with regard to restoration:

- “Restoration strives for the greatest progress toward ecological integrity achievable within the current limits of the watershed, by using designs that favor the natural processes and communities that have sustained native ecosystems through time.
- Restoring the original site morphology and other physical attributes is essential to the success of other aspects of the project, such as improving water quality and bringing back native biota.”

Despite naturally high phosphorous levels because of volcanic activity in its headwaters, the Klamath River was known as the “river of renewal” because of its ability to clean itself (NCRWQCB 2010). Marshes filtered run off, trapped nutrients and suppressed blue-green algae as described above. Lower Klamath Lake acted as the water storage system capturing winter flows and releasing them in late spring. The river bed itself, in a free-flowing condition, helped capture nitrogen from the water and release it back into the atmosphere similar to processes described by Sjödin et al. (1997). None of these ecological functions can be substituted for through technical fixes.

The Klamath River has passed its tipping point in terms of nutrient balance due to several changes:

- Changes within Upper Klamath Lake leading to *A. flos-aquae* domination,
- Blocking the connection to Lower Klamath Lake and drying it up,
- Pollution of the Lost River and Tule Lake and artificial connection to the Klamath River in the Keno Reservoir, and
- Keno Reservoir reach alteration that stopped denitrification and added to eutrophication.

The goal of ecological restoration as applied to the Klamath River is not to return the watershed to pristine conditions but rather to take strategic actions to restore the natural balance so that beneficial uses as defined by the Clean Water Act can be attained. If the natural system is restored to a level where its ecosystem processes clean the water, then it will be largely powered by gravity and far less expensive than technological fixes.

Studies are needed that go beyond those of Lytle (2000) and Mayer (2005) to determine quantitatively how strategic, large scale marsh and lake restoration would reduce water demand, increase water storage and resolve nutrient pollution as a result of improved ecosystem function. The current state of knowledge would suggest priorities include re-establishment of a marsh perimeter around Upper Klamath Lake, restoring the riparian marsh in the Keno Reservoir and in the lower Lost River, and expansion of Tule Lake and Lower Klamath Lake. The KBRA has hundreds of millions of dollars earmarked for restoration, which could be used for acquisition of wetlands for restoration. However, the obvious solution is to restore wetland and lake functions in TLNWR and LKNWR since there are 21,000 acres of wetlands there in public ownership. Costs of easements and acquisitions for areas in addition to the Lease Lands would be one time investments that lead to ecosystem function that has modest or no need for on-going maintenance.

Hoopa Valley Tribe Alternatives to KHSA/KBRA for Dam Removal

The two most promising avenues for promoting KHP dam removal are to return to the FERC relicensing process and by pressing for a speedy decision by the California SWRCB regarding 401 certification.

The Hoopa Valley Tribe challenged continuing operation of the KHP on a year to year basis without implementation of mitigation measures (HVT vs. FERC 2010). While the challenge was rejected (U.S. Court of Appeals District of Columbia 2010), trying to re-initiate the FERC licensing process should provide benefits with regard to promoting decommissioning. PacifiCorp felt imminent KHP decommissioning and loss of their power generating facility was a possibility under the relicensing process (Brockbank 2010):

“Throughout these negotiations, the federal government and the states of Oregon and California have expressed a strong policy preference that PacifiCorp’s dams on the Klamath River be removed.”

If the KHP relicensing process re-opens, NMFS’ (2006) fish passage requirements at dams will be part of terms and conditions. Administrative Law Judge Parlen McKenna

(2006) upheld NMFS authority and PacifiCorp (2008) estimates that fish passage at all KHP dams would cost \$267 million, which is far more than project revenue justifies. This will likely throw the project into the “uneconomic” category. Brockbank (2010) explains PacifiCorp’s options: “The applicant may accept the uneconomic license, decommission and remove the facility, or pursue litigation and challenge the mandatory conditions.”

The California SWRCB (2008) suspended the 401 certification process after entering into an Agreement in Principle with PacifiCorp and subsequently signing the KHSA. The Hoopa Valley Tribe (2011a) pointed out that the most recent SWRCB Resolution (2010-0024), which held the KHP 401 process in abeyance, required federal KBRA/KHSA legislation be enacted by May 17, 2011, which it was not. Therefore, the SWRCB should re-start its 401 certification process. Oregon and northern California environmental groups (Cascadia Wildlands et al. 2011) and the Resighini Rancheria (2011d) also made similar requests to the SWRCB, which is likely to consider the matter at its August 2011 meeting.

If the relicensing and 401 process restart, the SWRCB will likely prevent FERC from issuing a new KHP license by withholding 401 certification because water pollution problems associated KHP reservoirs cannot be remedied (SWRCB 2006). The inability of PacifiCorp to acquire a new license would also force abandonment and decommissioning.

Hoopa TEPA (2008) WQS for the Klamath River must be considered by the SWRCB in the 401 certification process. When the 401 process is reopened, the Hoopa Valley Tribe should continue to provide the SWRCB with evidence that shows the need for immediate removal of KHP dams due to toxic algae problems and alarming continuing impacts to salmon resources, particularly in drier years.

Conclusion

There is substantial concern that the lack of nutrient reduction at the source in the Upper Klamath Basin under the KBRA will cause a failure to remediate water quality problems even after dam removal (Dunne et al. 2011, Goodman et al. 2011). The chances that Hoopa WQS standards will be met appear low and all fisheries-related beneficial uses will continue to be compromised under the KBRA even after dams are removed. As noted above, a rigorous testing and reporting program to measure compliance with Hoopa WQS will be essential.

There is urgent need for action in promoting an ecologically sound restoration alternative. Current conditions have lead to a fish kill of 33,000-70,000 adult Chinook salmon (CDFG 2004) and the level of mortality of juvenile Chinook salmon in some recent years has had an equivalent impact (Nichols and Foott 2005). High levels of fish disease threaten the existence of remnant runs of spring Chinook and coho salmon and these problems are not likely to be remedied either before dam removal or afterward. Continuing operation of the KHP without mitigation poses high risk to these at-risk fish

populations and insufficient actions under the KBRA to abate nutrient pollution virtually assure the extirpation of these species before 2062.

A critical consideration is the urgent need for action given short term climate regime known as the Pacific decadal oscillation cycle (Hare et al. 1999, Collison et al. 2003) that affects Pacific salmon species:

“If current patterns prevail, with shifts in the PDO occurring every 20 to 30 years (Hare et al. 1999), the next negative shift in the PDO for California is likely to occur in the 2015 to 2020 timeframe If fresh water habitats have not recovered by that time, the fish will simultaneously face both degraded freshwater habitats and an unproductive ocean. The result could shift the stocks to endangered status or result in extinctions” (Collison et al. 2003).

This suggests that dam removal needs to be in advance of 2020 for the highest potential of success. Toxic algae from reservoirs will also continue to pose unacceptably high health risk for recreational or ceremonial use of the Klamath River until at least 2020, and this condition in and of itself should be sufficient cause for speedy KHP dam decommissioning.

“We must restore impaired ecosystems if we are ever to regain the natural capital necessary to prevent continued economic and social decay and to approach economic and ecological health and sustainability” (Society for Ecological Restoration 2004).

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LEONARD C. MASTEN JR.
CHAIRMAN

July 14, 2010

Ms. Tanya Sommer
Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

and to KlamathSD@usbr.gov

Re: Comments of Hoopa Valley Tribe on Notice of Intent to Prepare an Environmental Impact Statement/Environmental Impact Report on the Klamath Hydroelectric Settlement Agreement Secretarial Determination

Dear Ms. Sommer:

The Hoopa Valley Tribe submits the following comments in response to the Department of Interior's ("Department") Notice of Intent to Prepare an Environmental Impact Statement/Environmental Impact Report ("EIS") regarding the Klamath Hydroelectric Settlement Agreement ("KHTSA") Secretarial Determination (the "Scoping Notice").

I. Interest of the Hoopa Valley Tribe

Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Hoopa Valley Tribe. The fishery was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The salmon fishery is integral to the customs, religion, culture, subsistence, and economy of the Hoopa Valley Tribe and its members. The lower twelve miles of the Trinity River and a stretch of the Klamath River flow through the Hoopa Valley Reservation.

The federal government established the Hoopa Valley Reservation in 1864. The Hoopa Valley Reservation is located in the heart of the Tribe's aboriginal lands; lands the Tribe has occupied since time immemorial. The Hoopa Valley Tribe has fishing and water rights in the Klamath River with a priority date of 1864, as recognized by the United States in the Memorandum from Solicitor of the Department of the Interior to the Secretary of the Interior (Oct. 4, 1993); and the Memorandum from Regional Solicitor, Pacific Southwest Region to the Regional Director, Bureau of Reclamation, Mid-Pacific Region (July 25, 1995) (collectively, "Solicitors' Opinions"); and by federal courts in, for example, *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995). Congress has recognized and confirmed, for example in the Central Valley Project Improvement Act, Public Law 102-575, Section 3406(b)(23) (Oct. 30, 1992), that the United States has a federal trust responsibility to protect the fishery trust resources of the Hoopa Valley Tribe. The Hoopa Valley Tribe's rights are unique. This is unlike the situation where several tribes signed a single treaty reserving rights in common. While other tribes in the



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Klamath Basin also have water and fishing rights, our rights are distinct in scope, derive from different authorities, and must be treated separately.

The fish and water resources of the Klamath River Basin have been severely and adversely affected by the federal authorization, construction, and operation of the Klamath Reclamation Project and the Klamath Hydroelectric Project upstream of the Hoopa Valley Reservation. The impacts associated with blocked fish passage, nutrient enrichment, loss of habitat, and inadequate instream flows due to the authorization, construction, and operation of the Klamath Reclamation Project and the Klamath Hydroelectric Project have contributed to the listing of the Southern Oregon/Northern California coast (SONCC) coho salmon and its critical habitat under the Endangered Species Act.

The Tribe has actively participated in all proceedings relating to the re-licensing of the Klamath Hydroelectric Project before Federal Energy Regulatory Commission (FERC), and proceedings to enforce operation of the Klamath Reclamation Project in compliance with the Endangered Species Act and other applicable law. Protection of the Klamath and Trinity Rivers and the aquatic resources therein is of vital importance to the Hoopa Valley Tribe.

The Tribe participated in settlement negotiations leading to the Klamath Hydroelectric Settlement Agreement (KHSA) and Klamath Basin Restoration Agreement (KBRA). Although the Tribe favors the removal of the dams of the Klamath Hydroelectric Project for the purposes of improving water quality and restoring fish passage on the Klamath River, the Tribe did not sign, and enacted a resolution in opposition to the KHSA. The Tribe opposes the KHSA as drafted because it does not require the removal of any dams, but instead establishes an uncertain planning process that could potentially lead to commencement of dam removal in 2020 subject to the achievement of numerous contingent events that include, but are not limited to: (a) enactment of federal legislation; (b) California voter approval of a \$250 million bond package; (c) an affirmative determination by the Secretary of Interior that dam removal is in the public interest; and (d) separate concurrences by the states of California and Oregon that dam removal is in the public interest. The Tribe also opposes the KHSA because it suspends the FERC re-licensing proceeding, suspends the State of California and Oregon water quality certification proceedings, and permits the licensee PacifiCorp to continue operation of the Klamath Hydroelectric Project on terms of annual licenses until at least 2020. The KHSA also fails to provide for interim license measures that will bring the Project into compliance with current state, federal, tribal environmental laws, or applicable water quality standards, or that will adequately mitigate fishery impacts associated with operation of the Project.

The Tribe also did not sign, and enacted a resolution in opposition to, the KBRA because the KBRA conflicts with tribal sovereignty, violates trust duties owed to the Hoopa Valley Tribe by the United States, subordinates tribal water and fishing rights in favor of junior non-Indian irrigation interests without tribal consent, provides inadequate flows for the protection of tribal trust resources, offers a speculative and unfunded program for fishery restoration and water conservation, encourages unsustainable use of groundwater in the Upper Klamath Basin, fails to abate acute nutrient pollution problems and is not based on best available, peer reviewed science. The Tribe also objects to the linkage of the KHSA and the KBRA.

Here, as in all other proceedings related to protection of the Klamath and Trinity Rivers, the Tribe is committed to ensuring that the United States and its respective departments and agencies fulfill their duties to the Tribe and to the Rivers in accordance with applicable law,

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including NEPA, the Endangered Species Act, Clean Water Act, Federal Power Act, and the federal government's trust responsibility to the Hoopa Valley Tribe.

II. Comments on Scoping Notice

A. Description of Proposed Action

The Scoping Notice describes the Proposed Action as "a determination, pursuant to the KHSA, as to whether removal of the four lower dams on the Klamath River to achieve a free-flowing condition and allow full volitional passage of fish is in the public interest, will advance restoration of the salmonid fishery and is consistent with statutory obligations and tribal rights."¹

The definition of the Proposed Action should be revised to read as follows: "an Affirmative Determination that removal of the four lower dams on the Klamath River to achieve a free-flowing condition and allow full volitional fish passage is in the public interest, will advance restoration of the salmonid fishery and is consistent with statutory obligations and tribal rights." The question is not only whether the Secretary will make a determination, but what that determination should be. The purpose of this NEPA analysis is to guide the Secretary's determination. To be useful, the EIS should compare the consequences of an Affirmative Determination favoring dam removal with other alternatives.

The Department should also clarify whether it intends to analyze the Proposed Action (i.e., an Affirmative Determination favoring dam removal) under the assumptions: (a) that the Secretary will execute and authorize implementation of the KBRA and (b) that Congress will provide full or partial appropriations for funding that is required to fulfill the terms of the KBRA. This clarification is necessary in order to conduct a meaningful alternatives analysis. The Department must make this clarification in order to establish a clear baseline proposed action to compare with other alternatives, such as an alternative that encompasses an Affirmative Determination favoring dam removal without KBRA execution.

The Department should also clarify whether it intends to analyze the Proposed Action using alternative approaches to fish restoration. As discussed in part D, below, the EIS should evaluate addressing the acute water quality problems in the Keno Reservoir Reach. A proposal that includes refilling Lower Klamath Lake and expanding Tule Lake to improve fisheries conditions and water quality should be included.

¹ The Hoopa Valley Tribe has cautioned that the Department's description of the Proposed Action is misleading in its emphasis on the Secretarial Determination. This is because, as discussed in these comments, the proposal is connected to harmful 50-year water allocation agreements and inadequate and unfunded provisions of the KBRA.

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B. Description of Purpose and Need

The Scoping Notice describes the purpose of the Proposed Action as follows: "to advance restoration of the salmonid fisheries in the Klamath Basin [sic] that is in the public interest, and is consistent with the KHSA and the KBRA." The Department should delete the clause that reads "and is consistent with the KHSA and the KBRA." The purpose of the Proposed Action is solely to advance restoration of the salmonid fisheries in the Klamath Basin in a manner that is in the public interest. Consistency with the KBRA is not a factor in the Secretarial Determination.

Section 3.3.1 of the KHSA requires only that the Secretary determine whether "Facilities Removal (i) will advance restoration of the salmonid fisheries of the Klamath Basin, and (ii) is in the public interest, which includes but is not limited to consideration of potential impacts on affected local communities and Tribes." Requiring the purpose of the Proposed Action to be consistent with the KBRA could unreasonably narrow the scope of the alternatives analysis. For example, one reasonable alternative to consider in this EIS is an Affirmative Determination supporting dam removal, but without execution or implementation of the KBRA. The Department's NEPA analysis should not assume (for all alternatives) that Congress will approve the KBRA or direct the Secretary to sign the KBRA, or that the Secretary will ultimately execute and implement the KBRA. The scope of this EIS must be broad enough to analyze alternatives that are not dependent on approval of the KBRA, in whole or in part.

C. Alternatives Analysis

The alternatives analysis is the "heart of the environmental impact statement." 40 C.F.R. § 1502.14. The EIS must "rigorously explore and objectively evaluate all reasonable alternatives," and "devote substantial treatment to each alternative . . . so that reviewers may evaluate their comparative merits," including "reasonable alternatives not within the jurisdiction of the lead agency. 40 C.F.R. § 1502.14(a),(b),(c); see also 43 CFR 46.420(c) (defining "range of alternatives").

The CEQ publication "NEPA's Forty Most Asked Questions" confirms that in establishing a reasonable range of alternatives, "the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative." Question 2a. The CEQ publication adds that "an alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. . . . Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies." Question 2b.

In addition, each alternative should make clear that the Secretary will continue to carry out the Trinity River Restoration Program, as required by existing law.

The Hoopa Valley Tribe requests analysis of the following reasonable alternatives in the EIS:

1. No Action Alternative: The No Action Alternative in this proceeding should evaluate the consequences of the Secretary failing to make any determination under the KHSA. In that event, the KHSA would be terminable under Section 8.11 and key provisions of

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the KBRA, such as the guaranteed diversions and claim waivers would not become effective. Parties would likely withdraw from the KBRA under Sections 15.3.4.C and 7.5 of that Agreement. The likely result of No Action would be the resumption of the FERC re-licensing proceeding, conclusion of the State of Oregon and California Section 401 water quality certification proceedings, imposition of Section 18 and Section 4(e) conditions under the Federal Power Act, and management of the Klamath Reclamation Project in accordance with existing and future limitations on diversion required by the Endangered Species Act and other applicable law.

2. Proposed Action Alternative – Affirmative Determination With KBRA Implementation: As discussed above, the Proposed Action Alternative should evaluate the consequences of an Affirmative Determination in favor of dam removal. The Proposed Action Alternative should also examine the effects of executing and implementing the KBRA, because as the Agreements are currently drafted, the rendering of an Affirmative Determination is a prerequisite to implementation of KBRA provisions. The lack of restoration goals and standards in the KBRA must inform the description of those effects. Also, when analyzing the KBRA, the EIS must consider the likelihood that the KBRA will not be fully funded by Congress. The EIS should evaluate the implications of an under-funded or unfunded KBRA on the restoration objectives of that agreement. The EIS should evaluate and compare the environmental consequences of a KBRA that is 100% funded, 66% funded, and 33% funded. In addition, the EIS should evaluate the environmental consequences of a KBRA that is funded solely from existing appropriations.² To be clear, the Proposed Action Alternative will not necessarily be the same as the Preferred Alternative – particularly in light of the negative consequences/impacts of the KBRA.

3. Affirmative Determination Without KBRA Implementation: The EIS should evaluate an alternative scenario in which the KBRA is not approved by Congress, executed by the Secretary, or implemented, but the Secretary still renders an Affirmative Determination in favor of dam removal. Under this scenario, the Secretary would render a determination in favor of dam removal, but diversions to the Klamath Reclamation Project would continue to be managed under currently applicable laws, such as the ESA, without the guaranteed diversions prescribed by the KBRA.

4. Negative Determination Alternative: The EIS should evaluate the environmental consequences of a Negative Determination. Under the structure of the KHSA and KBRA, a Negative Determination would likely have the same result as the No Action Alternative or No Determination Alternative discussed above.

5. Federal Power Act Takeover and Decommissioning Alternative: The EIS should evaluate an alternative in which the Secretary does not render a Determination pursuant to the terms of the KHSA, but rather exercises authority to takeover the Klamath Hydroelectric Project pursuant to Section 14 of the Federal Power Act, 16 U.S.C. § 807 and/or supplemental Congressional authorization. Under this alternative, the Secretary, on behalf of the United States, would acquire the facilities of the Klamath Hydroelectric Project from PacifiCorp and

² The Hoopa Valley Tribe has been advised by the House of Representatives' Natural Resources Committee staff that the Interior Department has identified as available from existing appropriations only 25% of funds called for by the KBRA.

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would commence the decommissioning and removal of the facilities as soon as possible, but no later than June 30, 2015.

6. Affirmative or Negative Determination with Water Quality Improvement Strategy: The EIS should evaluate an alternative in which the Secretary does not render a Determination based upon the inadequate terms of the KBRA, but by incorporating the modified approach recommended below: refilling Lower Klamath Lake using Lost River winter water, somewhat expanding the footprint of Tule Lake, and restoring riparian zones along the entire lower Lost River and Keno Reach of the Klamath River. For further information, please see the Klamath Basin Tribal Water Quality Work Group comments on the Klamath River TMDL process, found at <http://www.schlosserlawfiles.com/~hoopa/LostRiverTMDL.pdf>.

D. Scope of EIS – Evaluation of KBRA

The Scoping Notice states that "the potential impacts of any connected actions, including any actions under the KBRA, will be analyzed." The Tribe agrees that this EIS must analyze the impacts of actions resulting from execution of the KBRA. The KHSA and KBRA have been drafted as interdependent components of a larger plan relating to Klamath Basin restoration. See, e.g., KBRA Section 8.2.2 (discussing relationship between KHSA and KBRA). An Affirmative Determination by the Secretary is not only a first step towards dam removal under the KHSA, but it is a necessary prerequisite to implementation of key provisions of the KBRA, including the controversial guaranteed diversions and waivers/subordination of tribal rights. When determining whether to render an Affirmative Determination, the Secretary must be fully aware of the environmental consequences associated with the execution and implementation of the KBRA. The consequences of the KBRA should be evaluated as part of the Proposed Action Alternative. In analyzing the KBRA, the following issues should be addressed in the EIS:

1. Impacts to Trinity River Restoration Program

The EIS should evaluate whether and/or how execution and implementation of the KBRA could adversely impact the Trinity River Restoration Program. Implementation of the KBRA will cost over \$1 billion for fiscal years 2012-2022. Available information indicates that much of this funding will come from the reprogramming of existing Departmental funds rather than new appropriations from Congress. See, e.g., KBRA Section 4.1.1 (committing parties to support reprogramming of existing funds to implement KBRA). The EIS must analyze whether execution and implementation of the KBRA will likely result in the redirection of existing restoration funds for Klamath and Trinity River programs towards KBRA programs designed to benefit irrigation interests. The EIS must analyze the consequences of redirecting Trinity River restoration funds to KBRA programs that primarily benefit irrigation and farming interests.

The EIS must also evaluate the impacts to the Klamath and Trinity River fishery that will result from the guaranteed diversions allowed to the Klamath Reclamation Project by the KBRA. Specifically, the EIS should evaluate whether implementation of the KBRA and its guaranteed diversion of 330,000 acre-feet for the Klamath Reclamation Project will result in flows harmful to the health of the Klamath fishery, resulting in decreased Klamath stocks and increased harvest pressures on Trinity river fish stocks.

The EIS must evaluate the consequences of implementing a KBRA that has no quantified fish restoration goals; that permanently guarantees the Klamath River has too little

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water for natural fish populations to be restored, let alone be maintained in harvestable quantities, and that limits all harvest on Klamath-origin stocks forcing those fisheries to target Trinity-origin fish.

2. Implications of Inadequate Appropriations to Fund KBRA Measures

Many of the purported environmental benefits of the KBRA are speculative and entirely dependent on future funding, either through new appropriations or the reprogramming of existing Department funds. It is not reasonably certain that Congress will authorize or appropriate funds to fulfill the KBRA. See, e.g., KBRA Section 2.2.2 (noting need and uncertainty of federal appropriations); Section 7.2.1 (acknowledging possibility of inadequate funding to implement KBRA provisions). The EIS must analyze the consequences of an executed KBRA that is under-funded by Congress – in other words, an agreement that results in the guaranteed diversions for the Klamath Reclamation Project, but that fails to result in the anticipated environmental benefits which are entirely dependent on speculative funding. See CEQ Forty Most Asked Questions, Question 18 (requiring good faith effort to address uncertain effects of a decision).

The EIS should analyze the implications of an under-funded KBRA on the purported fishery restoration objectives. The EIS should evaluate and compare the environmental consequences of a KBRA that is 100% funded, 66% funded, and 33% funded. In addition, the EIS should evaluate the environmental consequences of a KBRA that is funded solely from existing appropriations. The issue of KBRA funding is relevant in this EIS, because if the restoration concepts of the KBRA cannot be achieved due to lack of sufficient appropriations, the need for an Affirmative Secretarial Determination calling for prompt dam removal will be even more imperative. The Secretary must be aware of the possible lack of sufficient funds to carry out the KBRA, and the consequences of insufficient funding on the purported restoration objectives.

3. Unconsented Subordination and Waiver of Tribal Water Rights

In the KBRA, the United States provides assurances, without the consent or approval of the Hoopa Valley Tribe, that the United States will not assert the Hoopa Valley Tribe's tribal water, fishing, or trust rights, in a manner that will interfere with the Klamath Reclamation Project's annual diversion of 330,000 acre-feet of water from the Klamath River (the "Assurances"). These Assurances in favor of the Klamath Reclamation Project, once effective, are permanent regardless of: (a) whether federal appropriations are provided for anticipated fishery restoration and reintroduction programs; (b) the success or failure of anticipated fishery restoration and water quality improvement efforts; (c) future effects of climate change, or other environmental conditions, on water quality and quantity in the Klamath River; (d) the future fishery harvest needs of the Hoopa Valley Tribe; or (e) other unknown or unforeseeable events.

The Assurances in the KBRA effectively terminate the United States' fiduciary obligation to the Hoopa Valley Tribe by permanently subordinating the Tribe's senior water and fishing rights in the Klamath River to junior non-Indian irrigation interests in the Upper Klamath Basin, regardless of future impacts on tribal trust resources, and without the consent or approval of the Hoopa Valley Tribe. The Assurances become permanent only if the Klamath dam facilities are removed pursuant to an Affirmative Secretarial Determination. The unconsented waiver of tribal

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water rights must be considered in the EIS' evaluation of tribal trust obligations, and the sections on socioeconomics and environmental justice.

4. Evaluation of an Alternative or Additional Approach to Fish Restoration Focused on Water Quality

A key issue that the KBRA and KHSR avoid is the acute water quality problem in the Keno Reservoir reach of the Klamath River and its linkage to the Lost River, Tule Lake and Lower Klamath Lake. The Keno Reservoir exhibits anoxic conditions for up to five weeks a year (Deas and Vaughn, 2007). This reach lies immediately below Lake Ewauna, the City of Klamath Falls and the outlet of Upper Klamath Lake. The nitrogen fixing bacteria *Aphanizomenon flos-aquae* took over Upper Klamath Lake after marshes that maintained pH balance were filled. The resulting nitrogen fixation causes acute nutrient pollution that then feeds the Link River and is also pumped through the A-Canal into the Lost River basin to irrigate the Klamath Project. High pH and water temperature also create a substantial conversion of ammonium ions to dissolved ammonia that can be lethal to fish species. Water from Tule Lake is pumped directly through Sheepy Ridge and into the Klamath Straits Drain and the Keno Reservoir in summer.

Even if the Klamath Hydroelectric Project dams below Keno Dam are removed, acute water quality problems in the Keno Reservoir reach are likely to confound lower Klamath River recovery unless alternative strategies are incorporated. The nutrient pollution problems below Iron Gate Dam that create stressful or toxic conditions for Pacific salmon will persist but the location of problems will move. Similarly, the ideal conditions for the deadly fish pathogen *Ceratomyxa shasta* and its polychaete host *Manayunkia speciosa* will similarly relocate upstream to reaches below Keno Reservoir.

The winter water flushed from the Lost River into the Klamath River and the Keno Reservoir should instead be used to refill Lower Klamath Lake. This could serve as a major water supply source. Current practices shunt winter Lost River water into the Klamath River (Deas and Vaughn 2007) when it is not needed and in turn this practice contributes to Keno Reservoir pollution. Work on the Lower Klamath Lake Wildlife Refuge by Mayer (2005) found that wetlands have very high nutrient retention capacity, indicating that refilling the lake and restoring surrounding marshes could play a major role in abating Klamath River pollution. Tule Lake nutrient filter and buffer capacity also needs to be restored through expansion of a healthy marsh ecosystem to maintain the necessary pH balance to help prevent *A. flos aquae* blooms. Similar buffers also need to be established along the Lost River and the Keno Reservoir reach of the Klamath River, if water quality problems are to be reversed.

Refilling Lower Klamath Lake and expanding Tule Lake were not considered in Klamath Settlement discussions. Leaving the Klamath Project at 200,000 acres, including allowing lease land farming adjacent to Tule Lake and in the bed of Lower Klamath Lake for the next 50 years, makes little sense for fish restoration. It may be better to shrink the footprint of farming and expand wetlands and riparian zones that can promote water quality objectives.

E. Issues for Evaluation

The EIS should analyze the following issues and questions to assist with selection of a Preferred Alternative:

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1. Water Quality

- How does the current existence of the Klamath Hydroelectric Project ("Klamath Project") dams, and the associated reservoirs, impact water quality in the Klamath River?
- How does the current operation of the Klamath Project dams, including minimum flows, and ramping, impact water quality in the Klamath River?
- Whether and/or how applicable water quality standards, including those found in the Hoopa Valley Tribe's water quality control plan, could be achieved with the Klamath Project dams in place?
- How does the current existence and operations of the Klamath Reclamation Project dams impact water quality in the Klamath River?
- How will the guaranteed diversion of 330,000 acre-feet provided in the KBRA impact water temperatures in the Klamath River?

2. Hydrology

- How will the guaranteed diversion of 330,000 acre-feet provided in the KBRA impact flows in the Klamath River downstream of the Reclamation Project?
- What specific level of flow is anticipated to be available for fish if the guaranteed diversion of 330,000 acre-feet is implemented?
- How would removal of the Klamath Project dams affect the flow regime in the Klamath River?
- How is climate change expected to change or impact Klamath River flows?

3. Air Quality

- To what extent do the reservoirs behind the Klamath Project dams contribute to greenhouse gas emissions?

4. Biological Resources

- Whether removal of Klamath Project dams would result in increased habitat for all life functions of Klamath fish stocks, and how will such access to additional habitat benefit Klamath fish stocks?
- Whether removal of Klamath Project dams is likely to reduce incidence of disease in Klamath fish stocks?
- Would removal of Klamath Project dams have a positive impact on food supply for Klamath fish stocks?
- Would removal of Klamath Project dams result in additional sediment supply for spawning?
- Would anticipated benefits associated with removal of Klamath Project dams result in increased abundance of Klamath fish stocks?
- How will implementation of the KBRA and its guaranteed diversions for the Klamath Reclamation Project impact Klamath fish stocks?
- What regulatory process will be used to implement the harvest restrictions required in the KBRA to protect fish stocks introduced above Iron Gate Dam?

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- Will implementation of the KBRA and its guaranteed diversions for the Klamath Reclamation Project result in flows necessary to achieve the Ecological Base Flows as described in "Evaluation of Instream Flow Needs in the Lower Klamath River" (2006) by Hardy, Addley and Saraeva?
- Whether the KBRA and its guaranteed diversions can be implemented in a manner consistent with the Endangered Species Act?
- How is climate change expected to impact fishery resources of the Klamath River?

5. Tribal Trust Obligations

- How does federal licensing, and continued permission to operate, the Klamath Project impact the Hoopa Valley Tribe's established rights to water and fish in the Klamath and Trinity Rivers?
- Would an Affirmative Determination favoring dam removal be consistent with the United States' fiduciary trust obligation to protect the Hoopa Valley Tribe's fishing rights in the Klamath and Trinity Rivers?
- How does execution of the KBRA and the unconsented subordination of Hoopa Valley Tribe senior water rights to junior irrigation interests comport with the United States' fiduciary trust obligations to the Tribe and its members?

6. Socioeconomics and Environmental Justice

- Will removal of Klamath Project dams result in increased abundance of Klamath fish stocks and increased opportunities for harvest by tribal fishermen?
- Will implementation of the KBRA and the reduced flows for fish reduce abundance of Klamath fish stocks and increase pressures on Trinity River harvests?
- What specific socioeconomic benefits will result to the Hoopa Valley Tribe and its members from the execution of the KBRA?
- What impacts will result from the anticipated reprogramming of funds from existing programs relating to Klamath and Trinity River restoration to Upper Basin irrigation and farming interests?
- Is the unconsented subordination of the Hoopa Valley Tribe's reserved water rights consistent with principles of environmental justice?

Thank you for your consideration to these comments on the Department's Scoping Notice. We look forward to working towards a solution that will protect the Trinity River, restore the Klamath fishery, remove the dams of the Klamath Hydroelectric Project, and preserve Hoopa water and fishing rights.

Sincerely,

HOOPA VALLEY TRIBAL COUNCIL



Leonard E. Masten, Jr., Chairman

Comment Author Masten, Leonard
Agency/Assoc. Hoopa Valley Tribe
Submittal Date November 18, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1118_084-1	The Lead Agencies responses to Hoopa Valley Tribe comments on the Draft EIS/EIR and any revisions to the EIS/EIR generated by those comments are included in this Final EIS/EIR. Additionally comments received from the Tribe and other Cooperating Agencies on the Cooperating Agency Draft EIS/EIR were considered during development of the Draft EIS/EIR released on September 22, 2011. Many of the comments received from the Cooperating Agencies generated changes in the Draft EIS/EIR.	No
IT_LT_1118_084-2	Master Response TTA-1 Federal Trust Responsibility and the Klamath Basin Restoration Agreement (KBRA).	Yes

FUNDING

National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) are planning processes partly used to inform decisionmakers on whether to proceed with a project. Full funding is not a requirement to initiate NEPA or CEQA.

KBRA PROGRAMMATIC

For purposes of CEQA, relevant parts of the KBRA analysis are programmatic, as described in Section 15168 of the CEQA Guidelines. This decision was made because many of its component elements have not been specified to a degree where the associated impacts would be reasonably foreseeable for purposes of this environmental analysis. The parties recognize that future project-specific analysis may be required for various components of the KBRA as they become more clearly defined and if an Affirmative Determination is identified. A program-level document is appropriate when a project consists of a series of smaller projects or phases that may be implemented separately. Under the programmatic EIR approach, future projects or phases may require additional, project-specific environmental analysis.

Thus, out of an abundance of caution, and to ensure full transparency, the CEQA Lead Agency, California Department of Fish and Game (CDFG), has agreed to consider significance determinations for those portions of the KBRA elements located within California consistent with CEQA Guideline Section 21080(b)(14) of the Public Resources Code, and CEQA Guidelines Section 15277 in a programmatic fashion. The CEQA Lead Agency recognizes that in the event subsequent analysis is deemed appropriate, it would be required to consider any feasible

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	<p>alternatives, mitigation measures, and any other elements required by CEQA as the basis for any approval of such KBRA project or phase in accordance with existing law.</p> <p>Master Response N/CP-22 How KBRA Was Analyzed.</p> <p>Ground water use in the Upper Klamath Basin</p> <p>EIS/EIR Section 3.7 noted the KBRA provisions for groundwater monitoring and prevention of adverse groundwater effects. The KBRA analysis presented in Section 3.7 has been revised in this EIS/EIR to add clarity on the interaction of any short-term changes in groundwater pumping and the KBRA's provisions prohibiting adverse groundwater effects.</p> <p>Master Response GRO-1 Groundwater Use.</p> <p>Fails to abate acute nutrient pollution problems</p> <p>Draft EIS/EIR Section 3.2.4.3.2.10 KBRA (p. 3.2-125 to 3.2-132) presents a programmatic analysis of potential KBRA effects on water quality. Several projects under KBRA would help to decrease nutrient loading to Upper Klamath Lake, which is particularly important since the Upper Basin possesses soils that are naturally high in phosphorus. Human activities in the Upper Basin, including wetland draining, agriculture, ranching, logging, and water diversions have altered seasonal stream flows and water temperatures, increased concentrations of nutrients (nitrogen and phosphorus) and suspended sediment in watercourses, and degraded other water quality parameters such as pH and dissolved oxygen (Draft EIS/EIR Section 3.2.3.1 Existing Conditions Water Quality) (see in particular p. 3.2-19).</p> <p>Research published in peer reviewed journals demonstrates that although levels of naturally occurring phosphorus are elevated in Upper Klamath Lake, historical land use activities in the Upper Klamath Basin resulted in increased nutrient loading to the lake, subsequent changes in its trophic status, and associated degradation of water quality (Bradbury et al. 2004, Coleman et al. 2004, Eilers et al. 2004) (see Draft EIS/EIR [Appendix] Section C.3, p. 3-20).</p> <p>As described in Draft EIS/EIR Section 3.2.4.3.2.10 KBRA (p. 3.3-125 to 3.2-132), resource management actions implemented under KBRA as part of the Proposed Action would accelerate long-term improvements in water quality, including those anticipated under the California and Oregon total maximum daily loads (TMDLs). Additional detail on the interaction of the TMDLs</p>	

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IT_LT_1118_084-3	<p>and the Alternatives is provided by the Water Quality SubTeam (2011) (also referred to as the Water Quality SubGroup), as cited in Draft EIS/EIR Section 3.3.5, p. 3.3-241. This document, entitled "Assessment of Long Term Water Quality Changes for the Klamath River Basin Resulting from the Klamath Hydroelectric Settlement Agreement (KHSA), KBRA, and TMDL and National Park Service (NPS) Reduction Programs" can be found at http://klamathrestoration.gov/keep-me-informed/secretarial-determination/role-of-science/secretarial-determination-studies.</p> <p>Linkage between KHSA and the KBRA</p> <p>As noted in EIS/EIR Chapter 1, the federal Lead Agency is analyzing the KBRA as a connected action. NEPA defines connected actions as those actions that are closely related or cannot or would not proceed unless other actions are taken previously or simultaneously (40 CFR 1508.25(a)(1)(ii)). Some actions or component elements of the KBRA are independent obligations and thus have independent utility from the KHSA, but the implementation of several significant elements of the KBRA package would be different, if the determination under the KHSA is not to pursue full dam removal. Recognizing that implementation of many elements of the KBRA are unknown and not reasonably foreseeable at this time, the connected action analysis is being undertaken at a programmatic level.</p> <p>Master Response ALT-4 Elimination of Alternative 8 – Dam Removal Without KBRA from Detailed Study.</p> <p>Best Available Science</p> <p>Master Response GEN – 3 Best Available Science.</p> <p>Because this comment addresses several different issues, the response is grouped by the various topics addressed in the comment. Subheadings refer the reader to the sections of the comment.</p> <p>Meet Purpose of NEPA and CEQA:</p> <p>The KBRA is analyzed as a connected action. NEPA defines connected actions as those actions that are closely related or cannot or would not proceed unless other actions are taken previously or simultaneously (40 CFR 1508.25(a)(1)(ii)). Some actions or component elements of the KBRA are independent obligations and thus have independent utility from the KHSA, but the implementation of several significant elements of the KBRA package would be different, if the determination under the KHSA is</p>	Yes

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	<p>not to pursue full dam removal (see Table 1-1). Recognizing that implementation of many elements of the KBRA are unknown and not reasonably foreseeable at this time, the connected action analysis is being undertaken at a programmatic level. The KBRA analysis in this EIS/EIR is programmatic, as described in Section 15168 of the CEQA Guidelines. A program-level document is appropriate when a project consists of a series of smaller projects or phases that may be implemented separately. Under the programmatic EIR approach, future projects or phases may require additional, project-specific environmental analysis including an evaluation of compliance with federal laws such as the Clean Water Act and the Endangered Species Act. Consequently, appropriate NEPA compliance would be completed for the separate KBRA components in the future.</p> <p>Both NEPA and CEQA include provisions that the draft environmental review analyze a reasonable range of alternatives that meet most of the purpose and need/project objections, and are potentially feasible (40 CFR § 1502.14; 43 CFR § 46.420(b); Pub. Resources Code, sec. 21002; CEQA Guidelines, sec. 15126.6(a), (c), (f)). Alternatives should be limited to ones that avoid or substantially lessen the Proposed Action's significant environmental effects (CEQA Guidelines secs. 15126.6(a), (c), (f), sec. 15204(a); EIS/EIR, Section 2.3). The Lead Agencies are not required to consider all conceivable alternatives to the Proposed Action. (Pub. Resources Code, § 21091(d)(2)(B); CEQA Guidelines, sec. 15126.6(a); sec. 15204(a). Nor are the Lead Agencies required to analyze an alternative whose effects cannot be reasonably ascertained and whose implementation is remote and speculative. (CEQA Guidelines, sec. 15126.6(f)(3). The Lead Agencies developed a list of 18 preliminary alternatives that were screened down to five. These five alternatives were analyzed in the EIS/EIR because they best meet the NEPA purpose and CEQA objectives, minimize negative effects, and are potentially feasible (EIS/EIR, Section 2.3). (A full description of the alternatives and the rationale for screening the alternatives is presented in Appendix A, the Alternatives Formulation Report).</p> <p>The purpose of the NEPA and CEQA environmental review process is to disclose to decision makers and the public the significant environmental effects of a Proposed Action or project (40 CFR Section 1502.1). In this case, the Proposed Action is the removal of the Four Facilities from the Klamath River. While the KBRA is a connected action, it is not the Proposed Action.</p>	

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	<p>There are some components of the KBRA that would occur without an Affirmative Determination on dam removal. These elements are described and analyzed in the EIS/EIR under the No Action/No Project Alternative. Furthermore, while it is technically possible that other elements of the KBRA could be implemented without an Affirmative Determination on dam removal, implementation of many of those actions would not occur because many of its provisions, in particular those related to diversion limitations and associated flows in the lower Klamath and lake levels in Upper Klamath lake, are predicated on the ecological benefits of removing Klamath dams. Guessing which provisions might be implemented and which might not without an Affirmative Determination on dam removal would be speculative and is beyond the scope of this EIS/EIR.</p> <p>Analysis of KBRA:</p> <p>The KBRA does not supersede existing laws or regulations and does not exempt any actions from compliance with NEPA, CEQA, ESA, or CESA. As plans and programs are developed under the KBRA, they would be made in compliance with existing laws and regulations including opportunities for public review and comment.</p> <p>The KBRA does not waive tribal rights. The tribes that are parties to the KBRA would agree to not exercise their water rights, but they would not waive them. Federal executive orders require government-to-government consultation with federally recognized tribes on decisions that could affect tribes and those consultations would continue including with tribes that are not parties to the KBRA.</p> <p>Implementation of programs under the KBRA would improve the timing of flows in the Klamath River to more closely mimic natural conditions and would better maintain the elevation of Upper Klamath Lake. Potential effects of proposed programs on fish are discussed Sections 3.3.</p> <p>KBRA was negotiated and signed by a diverse array of over 40 parties with an interest in resolving Klamath Basin issues including the allocation of water between in-river uses and water diversions for irrigation. Under full implementation of the KBRA, tribes that are parties to the agreement would agree to not exercise their senior water rights within the basin and to relinquish claims for natural resources damages (KBRA Section 15) in exchange for increases in fisheries (dam removal and fisheries habitat restoration programs).</p>	

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	<p>Master Response GEN-3 Best Available Information.</p> <p>Master Response GEN-16 Public Involvement.</p> <p>Master Response AQU-9 Minimum Flows for Fish.</p> <p>Master Response ALT-4 Elimination of Alternative 8 - Dam Removal Without KBRA from Detailed Study.</p> <p>Master Response N/CP-13 KBRA Analyzed as a Connected Action.</p> <p>Master Response N/CP-22 How KBRA Was Analyzed.</p>	
IT_LT_1118_084-4	<p>Master Response N/CP-26 KHSA and KBRA Settlement Parties.</p> <p>Master Response ALT-7 Elimination of KBRA and KHSA Including Alternatives 16 - Dredge Upper Klamath Lake and 18- Partition of Upper Klamath Lake from Detailed Study.</p>	No
IT_LT_1118_084-5	<p>The Lead Agencies have received the following statement from the California State Water Resources Control Board on the Draft EIS/EIR's No Action/No Project Alternative: "For the CEQA No Project alternative, the EIS/EIR correctly states that the appropriate alternative is existing conditions and what would reasonably be expected to occur if the Proposed Action is not approved. If the Proposed Action is not approved, the facilities would operate under the current license for an unspecified period of time, and the water quality certification process for the Commission's relicensing proceeding would continue. Because federal agencies have set mandatory conditions requiring modifications to the hydroelectric facilities, it is reasonable to anticipate that the relicensing process would result in structural differences from the current configuration. The State water quality certification agencies and the Commission have not yet issued their decisions. These decisions could obviate the need for some of the modifications required by the federal agencies' mandatory conditions. The water quality certification agencies and the Commission also have authority to deny approval of Reclamation's Klamath Project. Accordingly, the ultimate result of the Commission's relicensing proceeding is uncertain."</p> <p>The Lead Agencies believe that the No Action/No Project Alternative accurately forecasts the future conditions that would be reasonably expected to occur in the foreseeable future without the project. The State Water Resources Control Board and the Federal Energy Regulatory Commission are independent agencies with the authority to approve or deny approval of PacifiCorp's new</p>	No

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IT_LT_1118_084-6	<p>license. Assuming that they would approve or deny the license would be highly speculative at this time. Additionally, the timeframe in which a new license would be approved or denied is unknown. Therefore, the Lead Agencies feel that the foreseeable future without the Proposed Action is the continuation of current operations under the terms of an annual license.</p> <p>Until such time as a new license is approved or denied, the Klamath Hydroelectric Project would continue to operate under terms of FERC's annual licenses and water quality issues would continue as described in Section 3.2 Water Quality in the Draft EIS/EIR.</p> <p>The EIS/EIR also includes Alternative 4, Fish Passage at Four Dams, which includes information from the <i>United States Department of the Interior and National Marine Fisheries Service Modified Prescriptions for Fishways and Alternatives Analysis Pursuant to Section 18 and Section 33 of the Federal Power Act for the Klamath Hydroelectric Project</i> (FERC Project No. 2082) (DOI 2007; NOAA Fisheries Service 2007) and from the <i>Modified Terms and Conditions and Prescriptions for Fishways</i> filed pursuant to Sections 4(e) and 18 of the Federal Power Act (DOI 2007). These fishway prescriptions and mandatory conditions were developed during the FERC relicensing process. This alternative was analyzed as an alternative under the EIS/EIR in order to better inform the public and decision makers on the effects of actions that would be expected to happen under that alternative, and the analysis of that alternative provides the public and decision makers a basis for comparison with the effects of actions under other alternatives.</p> <p>The comment specifically questions the description of the No Action/No Project Alternative related to water quality, which is discussed in:</p> <p>Master Response WQ-22 TMDLs and the No Action/No Project Alternative (and Alternative 4).</p> <p>Masters Response WQ-4C Hydroelectric Project Impacts to Water Quality & Anticipated KHSA/KBRA Improvements.</p> <p>Master Response AQU – 9 Minimum Flows for Fish.</p> <p>The KBRA contains an agreement to limit diversions to Reclamation's Klamath Project in exchange for certain assurances among the parties in the Oregon water rights adjudication process and with respect to the exercise of certain tribal water rights. A description of the Programmatic Measures under KBRA is also provided in Section 2.4.3.9 of the EIS/EIR. Among other things,</p>	Yes

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	<p>the Water Resources Program of the KBRA requires development of a plan for Reclamation's Klamath Project to align water supply and demand in order to meet the diversion limits (see KBRA Section 15.2). Before implementation of this plan, the KBRA provides for consultation under Section 7 of the ESA to consider the effects on listed species and designated critical habitat, including the SONCC ESU of coho salmon and its critical habitat, that would result from implementation of the plan and diversion limits (see KBRA Section 22.1.2).</p>	
	<p>Master Response AQU – 11E NOAA Fisheries Service BO, ESA and KBRA Water Management.</p>	
	<p>The Hardy (2006) Phase II flow recommendations do not consider physical, biological, and chemical alterations to the Klamath system resulting from dam removal. The anticipated future changes to the system that would occur under the KHSA and KBRA led Hardy (2008) to conclude that future flow releases as described in the KBRA was a logical extension of the Hardy Phase 2 Flow recommendations, balancing multiple needs, including those of anadromous salmonids. Improved water quality and water temperature conditions, restoration of sediment transport processes, potential reductions in disease, restored access to thermal refugia and instream habitats upstream are all factors that led Hardy (2008) to conclude "that the threshold flow at which significant concerns over thermal and disease factors will drop well below 1,000 cfs to something on the order of 700 to 800 cfs." Consistent with these findings the Federal Team incorporated minimum base flows of 800 cfs into the KBRA flow simulations during the period from October through February (Reclamation 2012d, Appendix E). Base flows of 800 cfs would provide greater than 75 percent of the currently available Chinook salmon spawning habitat from the R-Ranch study site downstream to the Brown Bear study site in every year (Hardy et al.2006) and flow levels of this magnitude should be adequate allow adult coho salmon to migrate freely upstream. However, under real time flow management that is envisioned by the KBRA incorporation of variable flows during the spawning season would increase spawning habitat above what would be provided under a static flow condition.</p>	
	<p>Results of this hydrology modeling analysis indicate that the average monthly flows at Iron Gate are generally similar between the No Action Alternative and Alternatives 2 and 3. The exceptions to this are the months of October to December, where the average flows are about 200 to 400 cfs less under Proposed Action than</p>	

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	<p>under the No Action Alternative, and in April, where the flows are about 300 cfs higher under Alternatives 2 and 3 than under the No Action Alternative. The comment fails to specify that the reduction in flows under Alternatives 2 and 3 is only relevant for the months from October through December.</p> <p>The annual flow at Keno Dam is generally similar between the two alternatives except for the few driest years on record. In these dry years, the agricultural supply is reduced under the No Action Alternative, whereas the agricultural supply is much less severely impacted under Alternatives 2 and 3; therefore, more flow is released to the Klamath River under the No Action Alternative than under Alternatives 2 and 3. At Iron Gate Dam from July through November, the flows are commonly around 800 cfs under Alternatives 2 and 3 during these extremely dry years whereas the flows are more commonly between 1,000 and 1,300 cfs under the No Action Alternative. However, under Alternatives 2 and 3 a more natural thermal regime would exist eliminating the current thermal shift caused by the presence of the dams. Sediment transport would be restored and additional spawning habitat would be available to adult anadromous salmonids upstream of Iron Gate Dam and anadromous salmonids would also have access to additional thermal refugia.</p> <p>Reclamation (2012d) also found that the 50 percent exceedance flows (normal years) under Alternatives 2 and 3 are about 5 to 15 percent greater for the months of April and June to August and about 15 to 20 percent less for the months of October to December. The 90 percent exceedance flows (dry years) are similar for the two alternatives from March to September, but for the months of October to February, the No Action Alternative 90 percent exceedance flows are about 20 to 30 percent larger (290 to 360 cfs larger).</p> <p>During February and March the modeled KBRA simulated flows at the 90% exceedance are less than the 2010 BO flow simulation in February, are greater in March, and are similar in April. The KBRA simulations are very similar to Hardy Phase II flows (slightly lower or higher) from May through September. For the KBRA flow simulation (Reclamation 2012d, Appendix E) minimum base flows equal to the Ecological Base Flow (EBF) levels recommended by Hardy (2006) were incorporated into Alternatives 2 and 3 hydrologic simulation for the periods from March through June, and from August through September to insure adequate protection of anadromous fish during dry water years. Flow targets that were a component of the WRIMS Run 32 Refuge model described in Hetrick et al. (2009) were also adjusted as described in Appendix E of Reclamation (2012d) to reduce the threat of a fish</p>	

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	<p>kill similar to the one that occurred in 2002. Those adjustments included reducing the target from 921 to 840 cfs for July 1 to 15, increasing the target from 806 to 840 cfs for July 16 to 31, increasing the target from 895 to 1,110 cfs in August, and increasing the targets from 1,010 to 1,110 cfs in September.</p> <p>These flow targets exceed those recommended by Hardy Phase II for years with exceedences greater than 75 percent. In general, KBRA flow simulations and WRIMS Run 32 Refuge flow simulations have similar seasonal flow patterns with the exception of drier water years when flows during August and September tend to be slightly higher under the KBRA simulation.</p> <p>The comment claims that the EIS/EIR also misrepresents the facts, unsuccessfully attempting to claim the KBRA would be better for fish. As an example, the comment points out that the findings of Hetrick et al. (2009) are discussed in the Pre Dam Removal section of their report and that the modeling results for POST-DAM removal did not state the same result regarding the ratio of benefits to production in low production years.</p> <p>The modeling results for Chinook salmon production presented in Hetrick et al. (2009) were conducted by USGS Fort Collins Science Center using the Systems Impact Assessment Model (SIAM). SALMOD provides the fish production estimates within the SIAM framework and included that section of the Klamath River from Iron Gate Dam downstream to the confluence of the Scott River. SIAM was run using several water management scenarios that were under consideration during the negotiation of the KHSA and KBRA agreements. Three of the water management scenarios that were run through the model included the WRIMS Run-32 Refuge, Hardy Phase II, and historic flows at Iron Gate for the period from 1961 through 2000. The results, which are first discussed in the Pre Dam Removal section of the report, indicated that Chinook salmon production is improved under WRIMS Run-32 Refuge (45%) and Hardy Phase II (50%) relative to historic flows in drier water years (see Table V-2; Hetrick et al. 2009). As mentioned previously, KBRA hydrologic results are generally similar to WRIMS Run-32 Refuge flows with exception to the incorporation of minimum base flows (EBF) in spring and increases to the flow targets during late August and September.</p> <p>In the Post Dam Removal section of the report, Hetrick et al. (2009) state that "Adult spawning and juvenile rearing habitat gains above IGD, as provided under the Agreements, are in addition to gains that would result below IGD in response to</p>	

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	<p>implementation of the KBRA's water allocation. Based on analyses presented previously, we conclude that the production potential of fall Chinook salmon would significantly improve prior to dam removal in years resembling low and average historical production years in response to implementing the water allocation proposed in the KBRA. In years where modeled historical production was high, potential for improvement under both Run-32 Refuge and Hardy et al. (2006a) Phase II flow schedules was consistently low as habitat availability modeled in SALMOD was at or near the maximum values (Figure V-4). With the removal of Klamath River dams, this habitat-induced bottleneck to production would be greatly reduced, creating opportunity to increase production over that experienced in historically high production years. In general, gains in habitat availability and associated production potential that would occur as a result of removal of the Klamath River dams, including the reestablishment of spring Chinook and coho salmon and steelhead in the upper basin, far exceed gains that could be achieved below IGD through manipulation of flows alone." The reference to Hetrick et al. (2009) has been corrected in the EIS/EIR to more accurately reflect their findings.</p> <p>The comment, in the title for Figure 1, states that Chinook fry emerging in December (Hardy et al. 2010) would be affected by insufferably low winter flows. The life stage periodicities presented in Table 15 in Hardy et al. (2010) do not show Chinook salmon fry to be present in the Klamath River during the month of December.</p> <p>The National Research Council (2004) found that in the main stem Klamath River Chinook salmon alevins emerge from early February through early April. Consistent with the findings of the National Research Council (2004), Section 3.3 of the EIS/EIR describes the timing for Chinook salmon fry emergence from early February through early April.</p> <p>In response to the concern that the effect of the KBRA Water Diversion "Limitation" is inaccurately described in the Draft EIS, text in the EIS/EIR has been modified to more accurately describe this program. To clarify, the water diversion limitations described in the KBRA are limitations on the amount of water that may be diverted from the Klamath River to Reclamation's Klamath Project. The KBRA does not contain minimum guaranteed diversions. Depending on the March 1 Natural Resources Conservation Service 50 percent exceedance forecast for net inflow to Upper Klamath Lake during the period April 1-September 30, the allowable diversions vary up to the specified amounts.</p>	

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	<p>There are many steps that must occur before the water diversion limitations and the various assurances are made permanent. KBRA Section 15.3.4 describes the milestones that need to happen before the Secretary of the Interior can publish a Notice making the United States' assurances permanent. These steps are described in the EIS/EIR in Figure 2- 14 found in Section 2.4.3.9 and they include the passage of authorizing legislation, funding for fisheries programs, tribal programs, and various measures to increase storage in Upper Klamath Lake and water use retirement programs.</p> <p>Master Response AQU-11 A,B NOAA Fisheries Service BO, ESA and KBRA Water Management.</p> <p>The KBRA does not supersede existing laws or regulations and does not exempt any actions from compliance with NEPA, CEQA, ESA, or CESA. As plans and programs are developed under the KBRA, they would be made in compliance with existing laws and regulations including opportunities for public review and comment. The current NOAA Fisheries Service 2010 Biological Opinion has been developed for current operating conditions with dams in place. Comparisons of flow simulations between the Proposed Action Alternative and the No Action Alternative are not appropriate since the environmental conditions between these two alternatives differ substantially. Comparisons of total annual volumes of water that are predicted to result from any alternative is not an effective method to evaluate the effect of instream flows on the life history needs of salmonids because it is the magnitude, distribution and frequency of flows throughout the year that affect salmon, not volumes of water provided.</p> <p>If KBRA legislation is enacted by Congress and certain Federal agencies become parties to the KBRA, there are a number of sections of the KBRA that clarify that Federal agencies must comply with all applicable laws, regulations, and other legal requirements, including the Endangered Species Act (ESA), when implementing the KBRA (see, for example, KBRA Sections 2.1, 2.2, and 7.4.3). Section 22.5 of the KBRA specifically clarifies that the KBRA does not supercede NOAA Fisheries Service and USFWS' obligations under the ESA and related regulations. Section 22.5 of the KBRA provides, "By entering into this Agreement, NOAA Fisheries Service and USFWS are not prejudging the outcome of any process under the ESA and NOAA Fisheries Service and USFWS implementing regulations, and NOAA Fisheries Service and USFWS expressly reserve the right to make determinations and take actions as necessary to meet the requirements of the ESA and implementing regulations." In addition, the KBRA specifically describes processes that are</p>	

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available and would be used by parties to comply with requirements under the ESA (see, for example, KBRA Sections 22.1 and 22.2).

The comment states that: "Flows under the KBRA (Appendix E-5) will fall to below 450 cfs if water years similar to 1992 occur in the next 50 years." The Modeled KBRA Hydrology that is described in Reclamation (2012d) and used in the analysis for the Proposed Action Alternative in the EIS/EIR and are not identical to the KBRA hydrology found in Appendix E5 of the KBRA. The text on p. 2-20 of the EIS/EIR had been corrected to read "Operation of Reclamation's Klamath Project and the related river flows, measured at the United States Geological Survey gauge downstream from Iron Gate Dam, would be according to the hydrologic model outputs in Reclamation (2012d)." Flows under the Proposed Action Alternative include minimum based flows equal to the Ecological Base Flow (EBF) levels recommended by Hardy (2006) for the periods from March through June, and from August through September to insure adequate protection of anadromous fish during dry water years. In addition, flow targets were increased above those EBF flows recommended by Hardy (2006) from 895 to 1,110 cfs in August, and from 1,010 to 1,110 cfs in September to further reduce the likelihood of another adult fish kill similar to the one that occurred in 2002. As a result of these changes daily flows at Iron Gate never drop below 950 cfs in September in the driest water years. In addition, under KBRA there is anticipated to be additional operational flexibility to optimize water use through the development of a drought plan and implementation of real time water management through the Technical Advisory Team's management of environmental water.

KBRA

The KBRA is analyzed as a connected action to KHSA. NEPA defines connected actions as those actions that are closely related or cannot or would not proceed unless other actions are taken previously or simultaneously (40 CFR 1508.25(a)(1)(ii)). Some actions or component elements of the KBRA are independent obligations and thus have independent utility from the KHSA, but the implementation of several significant elements of the KBRA package would be different, if the determination under the KHSA is not to pursue full dam removal (see Table 1-1). Recognizing that implementation of many elements of the KBRA are unknown and not reasonably foreseeable at this time, the connected action analysis is being under taken at a programmatic level. The KBRA analysis in this EIS/EIR is programmatic, as described in Section 15168 of the CEQA Guidelines. A program-level document is appropriate when a project consists of a series of

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IT_LT_1118_084-7	<p>smaller projects or phases that may be implemented separately. Under the programmatic EIR approach, future projects or phases may require additional, project-specific environmental analysis including an evaluation of compliance with federal laws such as the Clean Water Act and the Endangered Species Act.</p> <p>Consequently, appropriate NEPA compliance would be completed for the separate KBRA components in the future. The KBRA does not supersede existing laws or regulations and does not exempt any actions from compliance with ESA or CESA. Reclamation's Klamath Project level actions and decisions would continue to be made in compliance with existing laws and regulations.</p> <p>Master Response N/CP-13 KBRA Analyzed as a Connected Action.</p> <p>Master Response N/CP-22 How KBRA Was Analyzed.</p> <p>Three different sediment mobilization analyses were performed using three different conditions: 1) Current Conditions 2) Future No Action Conditions 3) Future Conditions under the Proposed Action.</p> <p>Table 5-7 and Table 5-8 in Reclamation (2012d) contain the mobilization flows for "slight" and "significant" mobilization under the current conditions. The mobilization flows for various reaches after dam removal is given in Figure 9-79. The slight mobilization flow decreases from approximately 10,000 cfs in the reach from Bogus Creek to Cottonwood Creek to 6,000 to 7,000 cfs after dam removal. The return period of slight mobilization in these reaches would decrease from 4 years to approximately 2 years. The return period for the significant mobilization period decreases from 10 to 12 years under current conditions to approximately 4 years after dam removal. Dam removal is expected to increase significantly the mobilization of the bed material downstream from Iron Gate from Bogus Creek to the Shasta River. Downstream from Shasta River there would be essentially no effect of dam removal on bed mobilization.</p> <p>The decrease in mobilization flow is because the bed material size decreases after dam removal. Since the construction of Copco I in 1920s and especially since the construction of Iron Gate dam in the 1960s, the Klamath River below these dams has been deprived of sand and gravel supply. After the supply of sand and gravel was stopped, the river flows gradually depleted the bed of sand and gravel and left the larger cobbles and boulders in the bed. When the gravel and sand supply resumes after dam removal, the bed would be replenished with sand and gravel.</p>	No

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IT_LT_1118_084-8	<p>The comment author stated that they do not believe that the bed material sizes would become smaller upon dam removal. The only support given for this conclusion is that the simulation results for one reach (Iron Gate to Bogus Creek) did not show bed material fining and therefore the other reaches should not be finer. Reaches respond differently and that is why reaches are analyzed separately. More importantly, the reach from Iron Gate to Bogus Creek is only 0.5 miles and there are only 4 cross sections that represent this reach. The other reaches are 2.7 miles or longer. Therefore, the Iron Gate to Bogus Creek reach is a small portion of the simulated river and therefore may not be representative of the entire river. To extrapolate a small variation in a small reach to a much larger reach is not reasonable.</p> <p>PacifiCorp (2004) reached a similar conclusion to Reclamation (2012d) regarding the change in bed material after dam removal. In PacifiCorp's (2004) Water Resources appendix (p. 6-19), PacifiCorp estimated that the median bed material size without dams would be 34 mm, which is somewhat smaller than the estimate in Reclamation (2012d), which ranged between 40 to 55 mm for the reach between Bogus Creek to Shasta River.</p>	No
IT_LT_1118_084-9	<p>Master Response ALT-4 Elimination of Alternative 8 - Dam Removal Without KBRA from Detailed Study.</p> <p>Master Response ALT-3 Elimination of Alternative 13 - Federal Takeover of the Klamath Hydroelectric Project from Detailed Study, describes in detail the reasons that the Federal Takeover Alternative (Alternative 13) was not carried forward for more detailed analysis in the EIS/EIR. Additionally, Alternative 13 would fail to resolve some of the long-standing problems related to water supply in the Klamath Basin (see Chapter 10). Alternative 13 would fail to achieve many of the long-term environmental benefits related to implementing the KBRA, which include benefits to water quality, algae, flood hydrology, groundwater, recreation, and aquatic resources. (See EIS/EIR, Sections 3.2, 3.3, 3.4, 3.6, 3.7, 3.20.)</p>	No
IT_LT_1118_084-10	<p>The comment author suggests that the Lead Agencies consider water quality improvement alternatives other than the KBRA. The Lead Agencies recognize that restoring the Klamath Basin is a complicated process and that there are several approaches that can be taken towards restoration. But as explained more fully in Master Response ALT-4 Elimination of Alternative 8 - Dam Removal Without KBRA from Detailed Study, dam removal contemplated under the KHSA cannot be implemented without implementing the KBRA. Therefore, an alternative that would implement a restoration project other than the KBRA is not</p>	No

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IT_LT_1118_084-11	<p>feasible. Also as explained in Master Response ALT-4, KBRA as it is contemplated in the actual agreement is a whole program and one cannot implement some KBRA components but not others and still expect to yield the same benefits as full implementation of the KBRA.</p> <p>The comment's assertion that "Section 3.2 notes the existence of applicable water quality standards enacted by the Hoopa Valley Tribe, but fails to adequately address whether the Proposed Action of dam removal with associated implementation of KBRA flows, (or some other alternative) will ensure compliance with the tribal standards" is incorrect. Draft EIS/EIR Section 3.2.4.3 includes consideration of whether Hoopa Valley Tribe water quality objectives would be met under both the No Action/No Project Alternative and the Proposed Action for nutrients, dissolved oxygen, pH, chlorophyll-a and algal toxins (see p. 3.2-58 to 3.2-71 and 3.2-100 to 3.2-118). The Draft EIS/EIR presents a programmatic analysis of KBRA under the Proposed Action (Section 3.2.4.3.2.10, p. 3.3-125 to 3.2-132), and indicates resource management actions implemented under KBRA as part of the Proposed Action would accelerate long-term improvements in water quality, including those anticipated under the TMDLs.</p> <p>Additional detail on the interaction of the TMDLs and the Alternatives is provided by the Water Quality SubTeam (2011) (also referred to as the Water Quality SubGroup), as cited in Draft EIS/EIR Section 3.3.5, p. 3.3-241. This document, entitled "Assessment of Long Term Water Quality Changes for the Klamath Basin Resulting from KHSA, KBRA, and TMDL and NPS Reduction Programs" can be found at: http://klamathrestoration.gov/keep-me-informed/secretarial-determination/role-of-science/secretarial-determination-studies.</p>	No
	<p>The comment author suggests that the EIS/EIR should include restoration alternatives other than the KBRA. The Lead Agencies recognize that restoring the Klamath Basin is a complicated process and that there are several approaches that can be taken towards restoration. But as explained more fully in Master Response ALT-4 Elimination of Alternative 8 - Dam Removal Without KBRA from Detailed Study, dam removal contemplated under the KHSA cannot be implemented without implementing the KBRA. Therefore, an alternative that would implement a restoration project other than the KBRA is not feasible. Also as explained in Master Response ALT-4, KBRA as it is contemplated in the actual agreement is a whole program and one cannot implement some KBRA components but not others and still expect it to yield the same benefits as full implementation of the KBRA.</p>	

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IT_LT_1118_084-12	<p>The comment also requests an evaluation of the KBRA under NEPA. The EIS/EIR does fully evaluate the environmental impacts under NEPA and CEQA at a programmatic level. There would be many discretionary actions associated with the KBRA; even if legislation is passed to provide authorization, there are many points where the government would provide funding or permits or federal agencies would take actions. The Lead Agencies cannot speculate on what Congress would pass; therefore, the evaluation is based on the best currently available information.</p> <p>The comment author is correct in noting that the EIS/EIR is not a legislative EIS. However, 40 CFR § 1506.8 only requires a legislative EIS for legislation that is proposed by the Executive Branch of government to Congress. In this instant, both S. 1851 and H.R. 3398 were introduced into their respective chambers of Congress by members, duly elected by their constituents.</p> <p>The EIS/EIR indeed, does, evaluate the impacts of the Proposed Action, as well as action alternatives and a No Action/No Project Alternative.</p>	No
IT_LT_1118_084-13	<p>There are many programs within the KBRA that are intended to improve in-stream flows and provide environmental water for fisheries support. The KBRA does not supersede existing laws or regulations and does not exempt any actions from compliance with applicable laws including NEPA, CEQA, ESA, or CESA. As plans and programs are developed under the KBRA, they would be evaluated for compliance with existing laws and regulations and include opportunities for public review and comment.</p> <p>The KBRA does not constrain NOAA Fisheries Service and USFWS; rather it requires them to consider whether all of the programs that are intended to increase water supply in Upper Klamath Lake have been implemented and to consider other alternatives to support flows before requiring further reductions in diversions to Reclamation's Klamath Project. The KBRA does not require regulatory agencies to act inconsistently with best available science or with applicable laws.</p> <p>KBRA Section 22.1.2 requires Reclamation, at an appropriate time, to reinitiate consultation under Section 7 of the ESA on the effect of operation of Reclamation's Klamath Project.</p>	No

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IT_LT_1118_084-14	<p data-bbox="488 432 1081 464">Master Response AQU-9 Minimum Flows for Fish.</p> <p data-bbox="488 491 1268 579">Section 2.2.12 of the KBRA states that neither the KBRA nor the Trinity River Restoration Program (TRRP) shall affect the other. It does not subordinate TRRP to KBRA.</p> <p data-bbox="488 615 1154 674">Master Response GEN-1 Interplay between Trinity River Restoration Program and KBRA</p> <p data-bbox="488 705 1211 764">Master Response TTA-1 Federal Trust Responsibility and the KBRA.</p> <p data-bbox="488 800 1268 947">Implementation of the water diversion limitations would occur through the On-Project Plan that is yet to be developed. Approval of this plan for use on Reclamation's Klamath Project would require compliance with NEPA at such future time as the plan is developed.</p> <p data-bbox="488 982 1268 1041">Many fisheries restoration activities are currently underway and, in fact, are included in the No Action/No Project Alternative.</p> <p data-bbox="488 1077 1268 1377">The KBRA analysis in this EIS/EIR is programmatic, as described in Section 15168 of the CEQA Guidelines. A program-level document is appropriate when a project consists of a series of smaller projects or phases that may be implemented separately. Under the programmatic EIR approach, future projects or phases may require additional, project-specific environmental analysis including an evaluation of compliance with federal laws such as the Clean Water Act and the Endangered Species Act. Consequently, appropriate NEPA compliance would be completed for the separate KBRA components in the future.</p> <p data-bbox="488 1413 1268 1829">There are some components of the KBRA that would occur without an Affirmative Determination on dam removal. These elements are described and analyzed in the EIS/EIR under the No Action/No Project Alternative. Furthermore, while it is technically possible that other elements of the KBRA could be implemented without an Affirmative Determination on dam removal, implementation of many of those actions would not occur because many of its provisions, in particular those related to diversion limitations and associated flows in the lower Klamath and lake levels in Upper Klamath lake, are predicated on the ecological benefits of removing Klamath dams. Guessing which provisions might be implemented and which might not without an Affirmative Determination on dam removal would be speculative and is beyond the scope of this EIS/EIR.</p>	Yes

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Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1118_084-15	<p>Under the KBRA, fish restoration goals and harvest limits would be developed in future fish restoration and fisheries reintroduction plans that are yet to be drafted. Speculating on what those plans may or may not contain when they are drafted is beyond the scope of the analysis for the EIS/EIR.</p> <p>Master Response N/CP-13 KBRA is Analyzed as a Connected Action.</p> <p>Master Responses TTA-1 Federal Trust Responsibility and the KBRA.</p> <p>Master Response AQU-9 Minimum Flows for Fish.</p> <p>Master Response KBRA-4 Proposed Legislation.</p> <p>Section 3.16 of the EIS/EIR addresses Environmental Justice issues including effects on tribes within the Klamath Basin. Section 3.12 specifically addresses effects on Tribal Trust responsibilities.</p>	No
IT_LT_1118_084-16	<p>The Notice of Availability of the Draft EIS/EIR published September 21, 2011, stated Purpose and Need statement had changed since publication of the Notice of Intent to prepare an EIS/EIR, which included the notice of public scoping in the Federal Register on June 14, 2010 (75 FR 33634). To provide further clarification regarding the need for action: "These changes are not substantive and do not warrant consideration of additional alternatives. The proposed action is to remove the four lower PacifiCorp dams on the Klamath River. The need for the proposed action is to advance restoration of the salmonid fisheries in the Klamath Basin consistent with the KHSA and the connected KBRA. The purpose is to achieve a free-flowing river condition and full volitional fish passage as well as other goals expressed in the KHSA and KBRA. By the terms of the KHSA, the Secretary would determine whether the Proposed Action is appropriate and should proceed. In making this determination, the Secretary would consider whether removal of the four facilities would advance the restoration of the salmonid fisheries of the Klamath Basin, and is in the public interest, which includes, but is not limited to, consideration of potential impacts on affected local communities and Tribes."</p>	

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Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1118_084-17	<p>Alternatives 4 and 5 do not include analysis of KBRA; however, the Lead Agencies included these alternatives in this analysis because they have the potential to minimize some types of environmental effects or help create a reasonable range of alternatives for consideration by decision-makers.</p> <p>Master Response ALT-4 Elimination of Alternative 8 - Dam Removal Without KBRA.</p> <p>The Notice of Availability of the Draft EIS/EIR published September 21, 2011, stated Purpose and Need statement had changed since publication of the Notice of Intent to prepare an EIS/EIR, which included the notice of public scoping in the Federal Register on June 14, 2010 (75 FR 33634). To provide further clarification regarding the need for action: "These changes are not substantive and do not warrant consideration of additional alternatives. The proposed action is to remove the four lower PacificCorp dams on the Klamath River. The need for the proposed action is to advance restoration of the salmonid fisheries in the Klamath Basin consistent with the KHSA and the connected KBRA. The purpose is to achieve a free-flowing river condition and full volitional fish passage as well as other goals expressed in the KHSA and KBRA. By the terms of the KHSA, the Secretary would determine whether the proposed action is appropriate and should proceed. In making this determination, the Secretary would consider whether removal of the four facilities would advance the restoration of the salmonid fisheries of the Klamath Basin, and is in the public interest, which includes, but is not limited to, consideration of potential impacts on affected local communities and Tribes."</p> <p>Alternatives 4 and 5 do not include analysis of KBRA; however, the Lead Agencies included these alternatives in this analysis because they have the potential to minimize some types of environmental effects or help create a reasonable range of alternatives for consideration by decision-makers.</p> <p>Master Response ALT-4 Elimination of Alternative 8 - Dam Removal Without KBRA.</p>	No
IT_LT_1118_084-18	<p>Master Response GEN-3 Range of Alternatives Considered.</p> <p>Master Response N/CP-18 Process to Select Alternatives for Detailed Analysis.</p> <p>1. NEPA's Forty Most Asked Questions from CEQ include a discussion of the No Action Alternative. It describes what should be included for different types of projects, including projects involving federal decisions on proposals for projects, which is</p>	No

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Comment Code	Comment Response	Change in EIS/EIR
	<p>relevant for this Draft EIS/EIR. “No action’ in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward.”</p> <p>Under the Alternative 1 as described in the EIS/EIR Section 2.4.2, PacifiCorp would need to obtain a long-term operating license from the Federal Energy Regulatory Commission (FERC) to replace the existing annual license. PacifiCorp would continue the relicensing proceedings with FERC to obtain the required long-term operating license. Until that unknown time, PacifiCorp would continue to operate under an annual license. The No Action/No Project Alternative, as described, is the most reasonable assumption of future conditions. Among the action alternatives, Alternative 4: Passage at Four Dams, as described in Final EIS 2.4.5, describes a scenario where KHSA terminates and the requirements for fish passage as set forward by the prior FERC relicensing proceedings are implemented.</p> <p>2. The Proposed Action, Alternative 2, analyzes facilities removal consistent with the KHSA and analyzes KBRA as a programmatic connected action.</p> <p>Master Response N/CP-13 KBRA is Analyzed as a Connected Action</p> <p>Master Response N/CP-22 How KBRA Was Analyzed.</p> <p>3. Master Response ALT-4 Elimination of Alternative 8 - Dam Removal Without KBRA from Detailed Study.</p> <p>4. Among the action alternatives, Alternative 4: Passage at Four Dams and Alternative 5: Fish Passage at J.C. Boyle and Copco 2, Remove Copco 1 and Iron Gate describe a scenario where KHSA terminates and the requirements for fish passage as set forward by the prior FERC relicensing proceedings are implemented.</p> <p>5. Master Response ALT-3 Elimination of Alternative 13 - Federal Takeover of the Klamath Hydroelectric Project from Detailed Study.</p> <p>6. Master Response ALT- 7 Elimination of KBRA without KHSA Including Alternatives 16 – Dredge Upper Klamath Lake and Alternative 18 - Partition of Upper Klamath Lake from Detailed Study</p>	

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Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1118_084-19	<p>Master Response ALT-4 Elimination of Alternative 8 - Dam Removal Without KBRA from Detailed Study.</p> <p>Master Response N/CP-13 KBRA is Analyzed as a Connected Action</p> <p>Master Response WQ-22 TMDLs and the No Action/No Project Alternative (and Alternative 4).</p> <p>The TMDLs are designed to be compatible with the Hoopa Valley Tribe's water quality control plan. Attainment of the TMDLs would meet applicable standards; however implantation and timing are unknown. To date, no proposed action has been identified by PacifiCorp to achieve the temperature allocations assigned to Copco 1 and Iron Gate reservoirs.</p>	No
IT_LT_1118_084-20	<p>Master Response GEN-27-Interplay between Trinity River Restoration Program (TRRP) and KBRA.</p> <p>For this analysis the best available information from the KBRA agreement and subsequent updates to KBRA Appendix 2E were used to evaluate socioeconomic effects in Section 3.15 Socioeconomics. Ultimately funding of KBRA would be determined by congressional action and therefore any scenario where the KBRA is partially funded is too speculative to be included in this analysis. In making the Secretarial Determination, cost (and available funding for implementation) would be considered when making the Determination on whether or not the Proposed Action is in the public interest.</p> <p>Master Response ALT-8 Inclusion of Alternatives Solely Based on Cost.</p> <p>Master Response AQU-5 Will Benefit all Salmonids.</p> <p>Master Response AQU-26 Increased Abundance for Harvest and Tribes.</p> <p>Master Response TTA-3 Federal Trust Responsibilities and Fisheries.</p>	No

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Agency/Assoc. Hoopa Valley Tribe
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Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1118_084-21	<p>used to evaluate socioeconomic effects in Section 3.15 Socioeconomics. Ultimately funding of KBRA would be determined by congressional action and therefore any scenario where the KBRA is partially funded is too speculative to be included in this analysis. In making the Secretarial Determination, cost (and available funding for implementation) would be considered when making the Determination on whether or not the Proposed Action is in the public interest.</p> <p>Master Response N/CP-13 KBRA is Analyzed as a Connected Action.</p> <p>Master Response N/CP-22 How KBRA Was Analyzed.</p> <p>Master Response TTA-1 Federal Trust Responsibility and the KBRA.</p> <p>Master Response AQU-26 Increased Abundance for Harvest and Tribes.</p> <p>Master Response AQU-5 Will Benefit all Salmonids.</p> <p>Master Response WQ-4 Hydroelectric Project Impacts to Water Quality and Anticipated KHS/KBRA Improvements.</p> <p>Master Response AQU-8 Climate Change, Fisheries, Predator Control, Reintroduction.</p> <p>Master Response AQU-24 Chinook Climate Change and Marine Survival.</p> <p>Master Response TTA-1 Federal Trust Responsibility and the KBRA.</p> <p>Master Response TTA-3 Federal Trust Responsibilities and Fisheries.</p> <p>Master Response TTA-7 Tribal Involvement in Future Discussions of Water Management.</p> <p>Environmental Justice effects to Indian Tribes have been analyzed in Section 3.16 Environmental Justice. The impact of Alternatives 2 and 3 were found to be beneficial in the long-term to Indian Tribes because of potential improvement to Klamath Basin fisheries and water quality.</p>	Yes

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Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1118_084-22	<p>Effects to Tribal Trust resources have been analyzed in Section 3.12 Tribal Trust. The impact of Alternatives 2 and 3 were found to be beneficial in the long-term to Tribal Trust because of long-term benefits to water rights, aquatic resources, and terrestrial resources.</p> <p>Effects to reserve rights have been analyzed in Section 3.8 Water Rights/Water Supply.</p> <p>Master Response N/CP-13 KBRA is Analyzed as a Connected Action</p> <p>Master Response N/CP-22 How KBRA Was Analyzed.</p> <p>Master Response WQ-4 A, C, D Hydroelectric Project Impacts to Water Quality & Anticipated KHSA/KBRA Improvements.</p> <p>Master Response WQ-22 TMDLs and the No Action/No Project Alternative (and Alternative 4).</p> <p>Appendix C in Vol. II of the EIS/EIR provides details of water quality in Reclamation's Klamath Project study area. As stated in Section C.3.1.3, "[a] recent study on nutrient cycling the Lower Klamath National Wildlife Refuge indicates that refuge wetland management is simultaneously reducing nutrient loads and increasing the proportion of bioavailable P in wetland outflows, which then enter the Klamath River through the Klamath Straits Drain (RM 240.5) (Mayer 2005)." Appendix C was updated in response to comments with the following: "Although variability in the historical phosphorus and nitrogen data is high, due to the varying numbers of samples collected per location (as noted above), the relatively high nutrient and organic matter concentrations in the Keno Impoundment just downstream from the Klamath Straits Drain indicate that inputs from the Lost River Basin via Klamath Straits Drain and the Lost River Diversion Channel have been an important historical source of nutrients to the Upper Klamath River. More recently collected data agree with this trend (Mayer 2005, Lytle 2000; see also Sullivan et al. 2009, et al. 2011; Kirk et al. 2010, as referenced in Section C.4.1.3)." See also Master Response WQ-16 regarding land use practices and water quality.</p>	No
IT_LT_1118_084-23	<p>Master Response WQ-4 Hydroelectric Project Impacts to Water Quality and Anticipated KHSA/KBRA Improvements.</p> <p>Master Response WQ-15 Klamath Dams Do Not Supply Cool Summertime Water to Downstream River Reaches.</p>	No

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Agency/Assoc. Hoopa Valley Tribe
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Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1118_084-24	<p>Master Response WQ-27 Nutrient Retention With Dams, Nutrient Release Without Dams, and Periphyton.</p> <p>Master Response WQ-4C and D Hydroelectric Project Impacts to Water Quality & Anticipated KHSA/KBRA Improvements.</p> <p>Master Response WQ-22 TMDLs and the No Action/No Project Alternative (and Alternative 4).</p> <p>The TMDLs are designed to be compatible with the Hoopa Valley Tribe's water quality control plan. Attainment of the TMDLs would meet applicable standards; however implantation and timing are unknown. To date, no proposed action has been identified by PacifiCorp to achieve the temperature allocations assigned to Copco 1 and Iron Gate reservoirs.</p>	No
IT_LT_1118_084-25	<p>There are two "Klamath Projects" within Reclamation's Klamath Project study area. The Klamath Hydroelectric Project (KHP) located in Oregon and California is owned by PacifiCorp, a private entity, and regulated by the FERC. The four facilities proposed for removal are part of this "Klamath Project". The Bureau of Reclamation's Klamath Project is the other "Klamath Project", and consists of water storage and delivery facilities, located above the KHP in Modoc, Siskiyou, and Klamath Counties</p> <p>All facilities are required to comply with the Clean Water Act, as administered by the States of Oregon and California. As described in Water Quality Section 3.2.2, these States have approved TMDLs for segments of the Klamath River, to improve water quality in the Klamath River.</p> <p>Master Response WQ-4A, C, and D Hydroelectric Project Impacts to Water Quality and Anticipated KHSA/KBRA Improvements.</p> <p>Master Response WQ-16 Upper Klamath Basin Historically Productive but Land Use Exacerbates Problem.</p>	No
IT_LT_1118_084-26	<p>The 330,000 acre-feet diversions are included in the hydrologic and hydraulic modeling efforts used to evaluate different alternatives in this EIS/EIR. The evaluation of flow effects in the Klamath River is influenced by a variety of actions including among others ESA and interim operation of Klamath Hydroelectric Project; the hydrology and hydraulic modeling took all these factors into account.</p>	No

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Comment Code	Comment Response	Change in EIS/EIR
	Master Response WQ-19 Water Temperature Models and General Predictions.	
	Master Response AQU-11 NOAA Fisheries Service BO, ESA and KBRA Water Management.	
IT_LT_1118_084-27	The 330,000 acre-feet diversions are included in the hydrologic and hydraulic modeling efforts used to evaluate different alternatives in this EIS/EIR. The evaluation of flow effects in the Klamath River is influenced by a variety of actions including among others ESA and interim operation of Klamath Hydroelectric Project; the hydrology and hydraulic modeling took all these factors into account.	No
	Master Response AQU-11 NOAA Fisheries Service BO, ESA and KBRA Water Management.	
IT_LT_1118_084-28	Master Response AQU-11 NOAA Fisheries Service BO, ESA and KBRA Water Management.	No
IT_LT_1118_084-29	In the Section 3.10 Greenhouse Gases/Climate Change on Draft EIS/EIR page 3.10-9, a description of potential flow effects from climate change is included. The results of the hydraulic, hydrologic and sediment studies conducted to support this document show that the climate change scenarios are not sufficiently refined to determine effects to peak flows and therefore it is difficult to determine if climate change would have an impact on flood risk or geomorphology. The EIS/EIR goes on to describe the likely scenarios given the ambiguous model results. Generally, if the future climate is wetter and with a faster snowmelt runoff during the spring, then peak flows would likely increase as well. However, if the climate is drier, faster snowmelt may result in peak flows that are not substantially higher (Reclamation 2012d). Master Response AQU-8 Climate Change, Fisheries, Predator Control, Reintroduction. Master Response AQU-24 Chinook Climate Change and Marine Survival. Master Response HYDG-3 Minimum Flows in the Klamath River Master Response AQU-11 NOAA Fisheries Service BO, ESA and KBRA Water Management.	No

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Agency/Assoc. Hoopa Valley Tribe
Submittal Date November 18, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1118_084-30	<p>Section 3.10 Greenhouse Gases/Global Climate Change describes in detail the effects of dams and the associated reservoirs remaining in place in the analysis of Alternative 1, Alternative 4, and Alternative 5.</p> <p>If all four dams and reservoirs remain in place, methane would be released from the reservoirs. Since the dams would remain in place, methane from the impounded water would continue to be emitted. Methane emissions from the reservoirs would range from 4,000 to 14,000 Metric Ton Carbon Dioxide Equivalent.</p>	No
IT_LT_1118_084-31	Master Response AQU-25 Habitat Upstream of Iron Gate Dam	No
IT_LT_1118_084-32	<p>Master Response AQU-27 Disease.</p> <p>Master Response AQU-28 FERC Conclusions for Disease.</p>	No
IT_LT_1118_084-33	The Proposed Action would have significant short-term effects for macroinvertebrates; based on substantial reduction in the abundance of a year class. Effects in the long term would be beneficial based on increased habitat availability and improved habitat quality (EIS/EIR Section 3.3.4.3). While a large proportion of macroinvertebrate populations in the Hydroelectric Reach and in the mainstem Klamath River downstream from Iron Gate Dam would be affected in the short term by the Proposed Action, their populations would be expected to recover quickly because of the many sources for recolonization and their rapid dispersion through drift or aerial movement of adults. Dam removal would increase connectivity between Upper Klamath Basin and the Hydroelectric Reach and would create additional riverine habitat within the Hydroelectric Reach.	No
IT_LT_1118_084-34	Master Response AQU-20 Bedload Sediment and Fish Habitat.	No
IT_LT_1118_084-35	Master Response AQU-23 Evaluation of Dam Removal and Restoration and Anadromy (EDRRA) Model.	No
IT_LT_1118_084-36	Master Response AQU-11 NOAA Fisheries Service BO, ESA and KBRA Water Management.	No
IT_LT_1118_084-37	While the Federal and State authorities to restrict fish harvests during implementation of the Phase I Reintroduction Plan are clearly established, the specific tools that the regulatory agencies would utilize for these restrictions have not been specified. As such the Lead Agencies did not speculate in this EIS/EIR on what tools the regulatory agencies would utilize.	No

Comment Author Masten, Leonard
Agency/Assoc. Hoopa Valley Tribe
Submittal Date November 18, 2011

Comment Code	Comment Response	Change in EIS/EIR
	<p>The Pacific Fishery Management Council (PFMC) was established by the Magnuson Fishery Conservation and Management Act of 1976 and has regulatory jurisdiction over salmon fishing within the 317,690 square mile exclusive economic zone from 3 miles to 200 miles off the coast of Washington, Oregon and California. Jurisdiction over commercial and recreational salmon fishing regulations in nearshore areas, within 3 miles of shore, lies with the respective States. However, the States generally adopt regulations consistent with those established by the PFMC. The Salmon Fishery Management Plan developed by the PFMC describes the goals and methods for salmon management. Management tools such as season length, quotas, and bag limits vary depending on how many salmon are present. There are two central parts of the Plan: Conservation objectives, which are annual goals for the number of spawners of the major salmon stocks ("spawner escapement goals"), and allocation provisions of the harvest among different groups of fishers (commercial, recreational, tribal, various ports, ocean, and inland). The Council must also comply with laws such as the Endangered Species Act.</p> <p>Since the management of salmon considers many factors that can fluctuate greatly from year to year (population abundance and environmental conditions) it is impossible to predict how future management decisions regarding the specific harvest of Klamath Basin salmon might change as a result of the proposed action.</p>	
IT_LT_1118_084-38	Master Response AQU-11 NOAA Fisheries Service BO, ESA and KBRA Water Management.	No
IT_LT_1118_084-39	Master Response AQU-11: NOAA Fisheries Service BO, ESA and KBRA Water Management	No
IT_LT_1118_084-40	<p>Master Response AQU-8 Climate Change, Fisheries, Predator Control, Reintroduction.</p> <p>Master Response AQU-24 Chinook Climate Change and Marine Survival.</p>	No
IT_LT_1118_084-41	<p>Master Response TTA-3 Federal Trust Responsibilities and Fisheries.</p> <p>The No Action/No Project effects on Hoopa Valley Tribe's established rights to water and fish in the Trinity would be No Change from existing conditions.</p>	Yes
IT_LT_1118_084-42	Master Response TTA-1 Federal Trust Responsibility and the KBRA.	Yes

Comment Author Masten, Leonard
Agency/Assoc. Hoopa Valley Tribe
Submittal Date November 18, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1118_084-43	<p>Master Response AQU-26 Increased Abundance for Harvest and Tribes</p> <p>Master Response TTA-3 Federal Trust Responsibilities and Fisheries.</p> <p>Master Response TTA-1 Federal Trust Responsibility and the KBRA.</p>	Yes
IT_LT_1118_084-44	<p>Master Response TTA-3 Federal Trust Responsibilities and Fisheries.</p> <p>Master Response AQU-5 Will Benefit all Salmonids.</p>	No
IT_LT_1118_084-45	<p>Master Response AQU-26 Increased Abundance for Harvest and Tribes.</p> <p>Master Response TTA-3 Federal Trust Responsibilities and Fisheries.</p> <p>Master Response AQU-5 Will Benefit all Salmonids. With an increase in Klamath fish stocks, there would not be an increase of fishing pressure on Trinity River fish.</p> <p>The Pacific Fishery Management Council (PFMC) was established by the Magnuson Fishery Conservation and Management Act of 1976 and has regulatory jurisdiction over salmon fishing within the 317,690 square mile exclusive economic zone from 3 miles to 200 miles off the coast of Washington, Oregon and California. Jurisdiction over commercial and recreational salmon fishing regulations in nearshore areas, within 3 miles of shore, lies with the respective States. However, the States generally adopt regulations consistent with those established by the PFMC. The Salmon Fishery Management Plan developed by the PFMC describes the goals and methods for salmon management. Management tools such as season length, quotas, and bag limits vary depending on how many salmon are present. There are two central parts of the Plan: Conservation objectives, which are annual goals for the number of spawners of the major salmon stocks ("spawner escapement goals"), and allocation provisions of the harvest among different groups of fishers (commercial, recreational, tribal, various ports, ocean, and inland). The Council must also comply with laws such as the Endangered Species Act. Since the management of salmon considers many factors that can fluctuate greatly from year to year (population abundance and environmental conditions) it is impossible to predict how future management decisions regarding the specific harvest of Klamath Basin salmon might change as a result of the proposed action.</p>	No

Comment Author Masten, Leonard
Agency/Assoc. Hoopa Valley Tribe
Submittal Date November 18, 2011

Comment Code	Comment Response	Change in EIS/EIR
	<p>Master Response GEN-27-Interplay between Trinity River Restoration Program (TRRP) and KBRA.</p> <p>Master Response AQU-26 Increased Abundance for Harvest and Tribes.</p> <p>Master Response TTA-3 Federal Trust Responsibilities and Fisheries.</p>	
IT_LT_1118_084-46	<p>Draft EIS/EIR Section 3.15 p. 65 Socioeconomics describes effects on the Hoopa Valley Tribe. Additionally the Economics and Tribal Summary Technical Report for the Secretarial Determination on Whether to Remove Four Dams on the Klamath River in California and Oregon has information on the socioeconomic effects on the Hoopa Valley Tribe (Reclamation 2012c).</p>	No
IT_LT_1118_084-47	<p>Master Response GEN-27-Interplay between Trinity River Restoration Program (TRRP) and KBRA.</p> <p>Master Response COST-1 Cost Estimate</p> <p>For this analysis the best available information from the KBRA agreement and subsequent updates to KBRA Appendix 2E were used to evaluate socioeconomic effects in Section 3.15 Socioeconomics. Ultimately funding of KBRA would be determined by congressional action and therefore any scenario where the KBRA is partially funded is too speculative to be included in this analysis.</p>	No
IT_LT_1118_084-48	<p>Environmental Justice effects to Indian Tribes have been analyzed in Section 3.16 Environmental Justice. The impact of Alternatives 2 and 3 were found to be beneficial in the long-term to Indian Tribes because of potential improvement to Klamath Basin fisheries and water quality.</p> <p>Effects to Tribal Trust resources have been analyzed in Section 3.12 Tribal Trust. The impact of Alternatives 2 and 3 were found to be beneficial in the long-term to Tribal Trust because of long-term benefits to water rights, aquatic resources, and terrestrial resources.</p> <p>Effects to reserve rights have been analyzed in Section 3.8 Water Rights/Water Supply.</p> <p>Master Response TTA-1 Federal Trust Responsibility and the KBRA.</p>	Yes

Comment Author Masten, Leonard
Agency/Assoc. Hoopa Valley Tribe
Submittal Date November 18, 2011

Comment Code	Comment Response	Change in EIS/EIR
	Master Response TTA-3 Federal Trust Responsibilities and Fisheries.	

IT_MC_1027_049

KLAMATH DAM REMOVAL
DRAFT EIS/EIR HEARING
OCTOBER 27, 2011
PUBLIC TESTIMONY
KLAMATH, CALIFORNIA

My name is Raymond Mattz. I guess I put
"Ray Mattz" down on paper. R-a-y M-a-t-t-z.

I'm a Yurok, and I have been involved with
fishery all my life. I'm 68 years old. And I went to
the Supreme Court and won the fishing rights back on the
lower 40 miles. And I have seen a lot of things happen
on the river. I have seen when they logged. I was a
young man then. And they --

I was saying, you know, the
winch work and logging, when I was a kid, you know, they
did a lot of damage on the river, lots, and still affect
us now.

When I was a kid, there was so much water. You
know, we would go down and swim in it. And you couldn't
swim in the eddies because the bark would be filled up.
Every eddy was that way on the lower part of that river.

And, you know, the fish is taking the blame all
the time, you know. You know, like the candlefish, they
are gone now. They're extinct. They're gone. And, in
my opinion, when you put the dam on the Trinity River and
they took the winter flow high water away from us, the
candlefish came in at wintertime, when the river is high,

bank to bank. And you don't get bank to bank no more.

You know, and I went up in the -- when Kennedy was swearing that dam in, I was about that far away, where you guys are, standing by him. I seen him. You know, and so, I kept a close tab on that, you know, and seven years later, the cows had just arrived, after that dam got filled. And it moved down the line, you know.

The troll boats. Poor Ronnie Paris (phonetic spelling) -- she was a biologist -- me and her was going to the PMC meetings. And I asked for -- or I had the 15,000 statement, and they gave it to us, and that stopped the troll boats out in the ocean. The troll boats had the -- they stopped them, and they got different areas they can fish in. They still got them areas now.

And I see what's doing the most damage is the algae. It's killing more fish than the logging, the troll boats. And, you know, people has got to look at that.

Our river is the only one that has got wild fish in it still. Look at the Sacramento, all hatchery fish. They were shut down, because they didn't have no fish come back. And people got to look at it -- you know, that amount of jobs you showed up on the screen earlier, that don't mean nothing to having wild fish in your river. You should be proud if you got wild fish in your

river still, because there aren't very many places in this world that has got wild fish, especially this Pacific Coast, you know.

And I get pretty upset with the whole program, you know, with you showing up there the jobs that are going to be lost up in the Upper Basin. You know, you got to look at the big picture, in my opinion, and the big picture is having wild fish in the Klamath River.

Thank you.



Comment 1 - Approves of
Dam Removal

Comment Author Mattz, Raymond
Agency/Assoc. Yurok Tribe
Submittal Date October 27, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1027_049-1	EIS/EIR Section 3.3, Aquatic Resources, evaluates the effects to fisheries of the Proposed Action and alternatives.	No

Klamath Settlement
EIS/EIR PROCESS

Speaker Card

Please fill out this card and hand it to someone with a name tag if you would like to make a verbal comment of up to three minutes. Your verbal comments will be recorded by a court reporter. All recorded verbal comments, along with written comments, received by November 21, 2011, will become part of the official record. Verbal and written comments are weighted equally. To submit written comments, see reverse side of this card.

Name (please print) Ashley N. McAllister
Representing Karuk medicine people / council members wife

Notes: It is humbling to see such a mighty giant reconsider its use on this land. I am thankful for that and hope to see a happier, healthier river with the dam removal.

*Please read the speaker guidelines on the back side of this card

IT_MF_1025_043

Comment 1 - Approves of Dam Removal



Comment Author McAllister, Ashley
Agency/Assoc. Karuk Tribe
Submittal Date October 25, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MF_1025_043-1	Master Response GEN-1 Comment Included as Part of Record.	No

Klamath Settlement



EIS/EIR PROCESS

Comment Form

IT_MF_1020_034

Please mail your comments to:

Ms. Elizabeth Vasquez
Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

OR

Mr. Gordon Leppig
California Dept. of Fish and Game
Northern Region,
619 Second Street
Eureka, CA 95501

Email:
KlamathSD@usbr.gov

Website:
KlamathRestoration.gov

Fax:
(916) 978-5055

All comments on the Draft EIS/EIR must be received by November 21, 2011.
(Please print legibly)

Name: Crispen K. McAllister

Organization: Karuk Tribe

Title: Council member

Address:

Email: cmcallister@karuk.us

Comments: We are so thankful and humbled to see this breath of history, with its hope of a healthier future. Thank you

for helping the river, ^{the} land and the people with your support in DAM removal. Yootva (thank you)

Comment 1 - Approves of Dam Removal

Public Disclosure: It is not required that you submit personal information. If you decide to do so, please note that this information may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comment Author McAllister, Crispen
Agency/Assoc. Karuk Tribe
Submittal Date October 20, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MF_1020_034-1	Master Response GEN-2 Some People Approve of Dam Removal and Others Oppose Dam Removal.	No

Klamath Settlement



EIS/EIR PROCESS

Comment Form

IT_MF_1025_028

Please mail your comments to:

Ms. Elizabeth Vasquez
Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

OR

Mr. Gordon Leppig
California Dept. of Fish and Game
Northern Region,
619 Second Street
Eureka, CA 95501

Email:

KlamathSD@usbr.gov

Website:

KlamathRestoration.gov

Fax:

(916) 978-5055

All comments on the Draft EIS/EIR must be received by November 21, 2011

(Please print legibly)

Name: Skyler McNeal

Organization: Member of the Karuk Tribe

Title: Youth Council co-Chair

Address: Coit Lewis Dr. Eureka CA 95501

Email: woffmneal@yahoo.com

Comments: Comment 1 - Approves of Dam Removal

I Believe the Dam's Should
be Removed to bring back
the Original Flow of the Klamath River.
I know as a youth from the Karuk
tribe that I'm not getting the education
that I need traditionally because the
Dam's have stoped Salmon Runs and
made the Runs of the Salmon very poor.
I also hear alot of people talk about Real
Estate Values going down from the Dam
Removal, That's not the only Reason Real Estate
Is Down every were!!! And you can't live and
Survive of of your Real Estate Value, you need
the Salmon and all the animals that depend
on the River to ~~survive~~ survive and live
on. Thank you for listing to me and my
Opinions.

Public Disclosure: It is not required that you submit personal information. If you decide to do so, please note that this information may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comment Author McNeal, Skyler
Agency/Assoc. Karuk Tribe
Submittal Date October 25, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MF_1025_028-1	Master Response GEN-2 Some People Approve of Dam Removal and Others Oppose Dam Removal.	No

Jeff Mitchell (Highlights)

Terry (2)
10/19/11

IT_LT_1019_072

Name & Introduction

Jeff Mitchell Tribal Councilman
KTNT Member

Comment 1 - Approves of
Dam Removal

“I am here and I support the findings of the Draft EIS/EIR & Agreements”

The Klamath Agreements represent an incredible achievement given that troubled history.

- **LOCAL SOLUTIONS.** The Klamath Agreements put many decisions regarding restoration back in the hands of those who live and work in the Basin without usurping the authority of State or local government. The States of California and Oregon, Indian tribes, counties, irrigators and conservation and fishing entities have worked tirelessly for many years to resolve their conflicts at the local level

Many have asked the question What are the

- **TRIBAL OBLIGATIONS & CONTRIBUTIONS TO THE AGREEMENTS?**

The Agreements are a compromise by all parties. For the Klamath Tribes after much analysis it is our considered opinion that the pros outweigh the cons and the Agreements create a win-win-win plan for the Tribes and the Klamath Basin.

- Not to exercise of senior water rights that may interfere with specified agricultural diversions.
- Support for “Interim Measures” for management of hydro project and mitigation for water quality problems pending dam removal.
- Settle 40 years of water rights litigation over Basin water uses.
- Assist in developing “regulatory assurances” to benefit water diverters as anadromous species are reintroduced.

Comment 1 cont.

BENEFITS Received

- Revitalized fisheries resulting from dam removal and reliably funded, long-term habitat restoration.
- Revitalized fisheries mean restored spiritual, economic and physical wellbeing.
- Greater participation in resource management decisions; tribal agencies better funded to enable participation.
- Klamath Tribes reacquire a portion of their homeland lost to Termination; forest related jobs for Indians and non-Indians.

COST OF DOING NOTHING

- Continued fishery declines, probably to extinction; tribal economies even worse than currently, with no solutions in sight.
- Loss of livelihoods, cultural identity, spiritual well-being, financial foundations. • Historical resource conflicts will multiply and intensify.
- Continued costly and contentious litigation.
- Inability to work toward resource restoration.

CONCLUSION

I appreciate the opportunity to provide my comments and reiterate my support for Alternative 2 or at a minimum Alternative 3, full or partial dam removal and for the enactment of legislation to effectuate and implement the KBRA and KHSA. Without a doubt it will be a blessed day when the salmon and steelhead return to the waters of the Klamath Tribes and the C'waam populations are once again healthy.

Comment Author Mitchell, Jeff
Agency/Assoc. The Klamath Tribes
Submittal Date October 19, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1019_072-1	Master Response GEN-2 Some People Approve of Dam Removal, Others Oppose Dam Removal.	No

Klamath Falls Hearing - 10-18-2011

---o0o---

STATEMENT PROVIDED BEFORE PUBLIC HEARING

(Directly to Court Reporter)

MR. JEFF MITCHELL: Good evening. My name is Jeff Mitchell, M-i-t-c-h-e-l-l.

I'm a member of the Klamath

Tribe. I represents Klamath Tribe as a member of Klamath

Tribal Council.

First thing I want to say is that one thing we can

all agree upon is that water is life and life is water.

Comment 1 - Approves of Dam Removal

On behalf of the Klamath Tribes I'm here to support

the findings of the draft EIS, EIR and subsequent

agreements.

Generally the draft EIS/EIR confirms that the KBRA,

KHSA are good for the Klamath Tribe and Klamath Basin as a

whole. The reports and studies clearly demonstrate that

the removal for privately owned dams, dams owned by the

KHSA party, nonetheless, will, one, advance restoration of

our sacred Klamath Basin salmonid fisheries and, two, is

in the public interest and specifically in the interest of

the Klamath Tribes.

The agreements represent a light at the end of the

tunnel. The draft EIS studies and reports bear out

proactive local solutions that dynamic and diverse

coalitions can and will work, of which dam removal is just one piece of the solution.

The Klamath agreements represent the best alternative of the status quo of continued conflict.

Supporters of and parties to the agreements reject the status quo in favor of a lasting and durable solution

Comment 2 - Approves of Dam Removal

to the ongoing Klamath crisis. Accordingly, we support Alternative 2 and at a minimal Alternative 3 for full or partial removal of the lower dams of the Klamath River.

This is the best way to return our salmon and steelhead to the Klamath homelands. And one thing I wanted to say is no action is not a viable action.

Comment 3 - ITAs

The Klamath Tribes believe that the present and future of the KBRA and KHSA will provide for the restoration of treaty resources. The agreement attempts to effectuate the treaty of 1864 by restoring the ecological functionality and connectivity of restoring the fish habitat and re-establish and maintain naturally sustainable and viable populations of fish due to full capacity of restored habitats. They provide for the full participation and harvest opportunities for fish species.

In conclusion, I appreciate the opportunity to provide my comments and reiterate my support for Alternative 2 and at a minimum Alternative 3, full or

partial dam removal for the enactment of legislation due to effectuate the implementation of the KBRA and KHSR. Without a doubt it will be a blessed day when salmon and steelhead return to the waters of the Klamath Tribes and the populations are healthy once again. Last thing I want to say is let's bring the salmon home. Thank you.

Comment Author Mitchell, Jeff
Agency/Assoc. The Klamath Tribes
Submittal Date October 18, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1018_004-1	Master Response GEN-2 Some People Approve of Dam Removal, Others Oppose Dam Removal.	No
IT_MC_1018_004-2	Master Response GEN-2 Some People Approve of Dam Removal, Others Oppose Dam Removal.	No
IT_MC_1018_004-3	Master Response GEN-1 Comment Included as Part of the Record.	No

PUBLIC HEARING ON THE KLAMATH DAM

---o0o---
CHILOQUIN, OREGON
OCTOBER 19, 2011
---o0o---

MR. JEFF MITCHELL: Good evening. My name is Jeff Mitchell, M-i-t-c-h-e-l-l. I'm a member of the Klamath Tribal Council. I'm also a member of Chiloquin City Council. So on behalf of both entities I want to welcome everybody here night.

I'm here and I support the findings of the Draft EIS/EIR Agreement.

Comment 1 - Approves Dam Removal

Comment 2 - KBRA

I want to share a few comments with you and those comments first being that Klamath agreements, in my opinion, represent an incredible achievement given the troubled history of the Klamath Basin. My reasons for saying that are that one of the biggest things that came out of this whole process is that it started here locally with local solutions.

Klamath agreements put many decisions regarding restoration back into the hands of those who live and work in the Basin, without usurping the authority of the state and the local government, the states of California, Oregon, Indian tribes, counties, irrigators, conservation, fishing entities. We have all worked tirelessly for many years to resolve our conflicts at a local level.

Comment 3 - ITAs

Last night, and over the last few years we've had
many people ask the question to the tribes, what are the
tribal obligations and contributions to these agreements?
And I want to share some of those contributions with you
tonight.

First I want to say that the agreements are
compromised by all parties. For the Klamath Tribes, after
much analysis it is our considered opinion that the pros
and cons, the pros outway the cons; and the agreements
create a win-win plan for the tribes in the Klamath Basin.
In addition, the Klamath Tribes, we agreed not to
exercise our senior water rights that might interfere with
specific agricultural diversions.

The Klamath Tribes agreed to support interim
measures for management of hydro project and mitigation
for water quality problems pending dam removal.

The Klamath Tribes agree to settle 40 years of
water rights litigation in the Basin over water uses.

The Klamath Tribes agree to assist in developing
regulatory assurances to benefit water diverters as
anadromous fisheries are reintroduced.

Comment 4 - ITAs

I want to talk briefly about some of the benefits
that we believe are going to be received.

First, the revitalization of fisheries resulting

from dam removal that are reliably funded will receive

long term habitat restoration.

Will receive revitalized fisheries as a means to

restore spiritual, economic and physical well-being.

Will have regular participation and resource

Comment 5 - KBRA

management decisions. Tribal agencies will be better

funded to be able to participate in future processes.

The Klamath Tribes will reacquire a portion of our

homeland that was lost during termination. Forest-related

jobs for tribal members and non-Indians will come from

that land being reacquired.

Comment 6 - General/Other

What's the cost of doing nothing? Big cost.

First, the continued fishery declines, probably to

extinction. Tribal economies will continue to worsen than

they are currently. And we probably won't have any

solutions in sight.

There will be loss of livelihoods, cultural

identities, spiritual well-being, financial foundations

will continue to erode.

Historical resource conflicts will probably

multiply and intensify. And continued costly and

contentious litigation will go on. And there will be an

inability to work towards resource restoration.

In conclusion, you know, I appreciate the

opportunity for being able to provide my comments here.

I want to reiterate my support for Alternative 2 or
at a minimum Alternative 3 for full and partial dam
removal and for enactment of legislation to effectuate and
implement the KBRA, KHSa. Without a doubt it will be a
blessed day when salmon and steelhead return to the waters
of the Klamath Tribes and the C'waam populations are
healthy once again.

Thank you.

Comment Author Mitchell, Jeff
Agency/Assoc. The Klamath Tribes
Submittal Date October 19, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1019_012-1	Master Response GEN-2 Some People Approve of Dam Removal and Others Oppose Dam Removal.	No
IT_MC_1019_012-2	This project is intended to resolve long-standing water conflicts in the Basin by restoring fisheries and supporting local economies. The local solutions were certainly a key to its successful development.	No
IT_MC_1019_012-3	Master Response GEN-1 Comment Included as Part of the Record.	No
IT_MC_1019_012-4	Master Response GEN-1 Comment Included as Part of the Record.	No
IT_MC_1019_012-5	The United States believes the KBRA and KHSA provide the best opportunity to restore the Klamath Basin and its fishery. Reference: General Response AQU-26: Increased Abundance for Harvest and Tribes.	No
IT_MC_1019_012-6	Master Response GEN-2 Some People Approve of Dam Removal, Others Oppose Dam Removal.	No

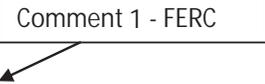
IT_WI_1113_080

From: s.morty1965@yahoo.com[SMTP: S.MORTY1965@YAHOO.COM]
Sent: Monday, November 14, 2011 5:28:56 AM
To: BOR-SHA-KFO-Klamathsd; werner@wrinkl edog.com
Subject: Web Inquiry: Klamath Dam removal project Auto forwarded by a Rule

Name: Sheila Mortenson
Organization: Shasta Indian Nation

Subject: Klamath Dam removal project

Comment 1 - FERC



Body: I support Alternative 4. Don't remove the dams but add fish passage to the dams. Leave the tribal sites intact. I support clean energy.

Comment Author Mortenson, Sheila
Agency/Assoc. Shasta Indian Nation
Submittal Date November 13, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_WI_1113_080-1	<p>Master Response GEN-2 Some People Approve of Dam Removal and Others Oppose of Dam Removal.</p> <p>The effects of each Alternative in regard to providing fish passage are disclosed in Section 3.3 (Aquatic Resources) as well as Section 4.4.2 of the EIS/EIR. The effects of each Alternative in regard to tribal burial sites are disclosed in Sections 3.13 and 4.4.12.</p> <p>Master Response GHG-1 Green Power.</p>	No

IT_MC_1027_053

KLAMATH DAM REMOVAL
 DRAFT EIS/EIR HEARING
 OCTOBER 27, 2011
 PUBLIC TESTIMONY
 KLAMATH, CALIFORNIA

MS. MYERS: Iyee que. Hello. My name is Georgiana Myers. Georgiana, G-e-o-r-g-i-a-n-a. Myers, M-y-e-r-s. I'm going to try to make it through this without crying. I'm eight months pregnant, so that happens, like, at the drop of a hat.

In a few weeks, I will give birth to my first son, and I am excited, to say the least. My family comes from upriver, but my son's father and his family come from down here. Fishing is one of the greatest traditional practices that his father and I can pass on to him.

We made the decision to live on the Reservation, to work for our Tribe, and to raise our family and to raise our son amongst his family, amongst his people, and, most importantly, close to his river.

Comment 1 - Approves
of Dam Removal

I have traveled all over. I've been to Omaha.

I've been to Grenada. I've been to Portland, like, three times, Sacramento probably five. I've even asked the richest man in the world to please un-dam the Klamath and help restore it.

Some people say that dam removal is an attack on rural America. How can they say this and be serious?

The indigenous people of the Klamath are the ones who are still and were being attacked. Klamath River people have always been here, and we will remain.

Today our river looks pretty good. The scenery up and down the river can sometimes mask the toxic water, the sick fish, the water levels that are too low and much too warm. But those of us that live here know that our river is sick, and those of us that feel connected to it in a way that we cannot explain feel its pain.

Like my Chairman said before me, we know that this river is our lifeline, not just for today or for the next fishing season but forever. My son will learn how to fish, eel, and gather from the river. We will never stop. We have no other choice but to continue our way of life so that our people will remain Yurok.

Thank you.

Comment Author Myers, Georgiana
Agency/Assoc. Yurok Tribe
Submittal Date October 27, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1027_053-1	Master Response GEN-2 Some People Approve of Dam Removal and Others Oppose Dam Removal.	No

Klamath Settlement



EIS/EIR PROCESS

Comment Form

IT_MF_1020_036

Please mail your comments to:

Ms. Elizabeth Vasquez
Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

OR

Mr. Gordon Leppig
California Dept. of Fish and Game
Northern Region,
619 Second Street
Eureka, CA 95501

Email:
KlamathSD@usbr.gov

Website:
KlamathRestoration.gov

Fax:
(916) 978-5055

All comments on the Draft EIS/EIR must be received by November 21, 2011.

(Please print legibly)

Name: Melissa S. Myers
Organization: People of the Yurok Tribe
Title: People advocat
Address: Yurok Res. Hwy 1169 Wlet Hupa
Ca 95546
Email:
Comments: Please Hear Our Plea.
I am reall.

Dear Mr. Gordon Leppig,

Comment 1 - Approves of Dam Removal

Please read through our Comments and request to UNDam The Klamath. I know our river looks ~~so good~~ clean and pretty but underneath and along the banks has thick green algae blooming all year growing and over taking our whole river bank. It's gross. During the summer our river is sick. Our whole Nation is sick. Please help keep America healthy. UNDam The Klamath. Indians need your help. Please.

Public Disclosure: It is not required that you submit personal information. If you decide to do so, please note that this information may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comment Author Myers, Melissa
Agency/Assoc. Yurok Tribe
Submittal Date October 20, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MF_1020_036-1	Master Response GEN-2 Some People Approve of Dam Removal, Others Oppose Dam Removal.	No

IT_LT_1026_068



Hoopa Valley Tribal Council

P.O. Box 1348 • Hoopa, California 95546
PH: (530) 625-4211 • Fax: (530) 625-4594
website: www.hoopa-nsn.gov



LEONARD E. MASTEN JR
CHAIRMAN

October 3, 2011

Senator Jeff Merkley
313 Hart Senate Office Building
Washington, D.C., 20510-3705

Re: Draft Klamath Basin Community and Economic Recovery Act of 2011; meeting request

Dear Senator Merkley:

← Comment 1 -ITAs

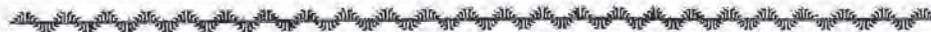
The bill you have drafted to authorize the Klamath water rights settlement provides for the unilateral subordination of our Tribe's rights in Klamath River water and the anadromous fish that originate in that river. If enacted, the bill will terminate the Federal trust responsibility for our rights and curtail the associated Federal authority to protect and enforce them.

The bill will also adversely affect the Tribe's rights to fish in the Trinity River, the largest tributary and source of Klamath River fish. Those rights are based on a legal framework that the Tribe has spent decades in developing and enforcing. The capstone of that framework is the Trinity River Mainstem Fishery Restoration Record of Decision that Congress specifically authorized the Secretary and the Tribe to adopt. It is our 20th Century Treaty with the United States. Our stewardship of the fishery resources of the Trinity and Klamath River system is well-recognized and has been publicly commended by Senator Feinstein. We cannot accept legislation that will impair those treaty commitments.

The proposed settlement arose from the desire of water claimants who are subject to the jurisdiction of the Oregon courts to resolve a costly general stream adjudication. The parties in Oregon were so occupied with that goal that they failed and then refused to design a settlement whose reach was limited to parties in Oregon and protected the rights of those in California. During the negotiations, the Tribe repeatedly identified the destructive outcomes to our rights in various drafts of the settlement agreement and offered solutions to avoid them. Our efforts were to no avail. The parties know that; that is why you are being asked to have Congress impose an outcome that the courts lack the authority to bring about.

The draft bill would take Federal Indian policy back down a path the Federal government abandoned more than 50 years ago. We find this both offensive and unacceptable and will oppose the bill if it is introduced in its current form. We request an opportunity to meet with you before you proceed any further with this legislation.

The Hoopa Valley Tribe has a long record, through administrative, legislative, and judicial action, of defense of our rights in the Klamath and Trinity Rivers. We will not rest until



Honorable Jeff Merkley
 October 3, 2011
 Page - 2

our rights are secured. Congress has formally acknowledged that the degrading U.S. policies of the past, based on exercising power to unilaterally strip tribes and Indian people of rights that are protected by treaties and agreements with the United States, brought dishonor to the Nation and were inconsistent with the obligations of the Nation to Native American people, as trust beneficiaries. This proposed legislation seems to be a resurrection of discarded plenary powers of the Nation--once again forced upon Native people. We strongly urge that you give serious consideration to the probable adverse reaction that will come from Indian Country to any legislative proposal that reopens the historic wounds of failed U.S. Indian policies against Native people.

The following provides details of our concerns with the bill:

Comment 2 - KBRA

1. Section 101's approval of the KBRA ratifies the "intent that the Trinity River Restoration Program not adversely affect" the KBRA (p. 16). This subordination of the goals of the TRRP to the funding requirements and low water flows of the KBRA will delay the Trinity restoration goals far into the future and could lead to failure of the program itself. For example, most of the fall Chinook salmon that died in the 2002 fish kill in the lower Klamath were of Trinity River origin.
2. Section 101's approval of the KBRA will impose on the Basin a KBRA that has no quantified fish restoration goals (p. 37); that permanently guarantees the River has too little water for natural fish populations to be restored, let alone be maintained in harvestable quantities (p. 52-55); and that limits all harvest (p. 44) on Klamath-origin stocks forcing those fisheries to target Trinity-origin fish.
3. Section 101's approval of the KBRA requires KBRA signatories to support securing a Biological Opinion under the Endangered Species Act that approves the flow regime in the KBRA (p. 149). This puts the cart before the horse by attempting to predetermine the scientific analysis required by the ESA of the biological effects of the KBRA on fisheries.
4. Section 101(b) and (c) distinguish between signing and implementing the Klamath Basin Restoration Agreement ("KBRA"), with signing exempted from an environmental impact statement. But signing the commitments in the KBRA, particularly the water diversion provisions of Appendix E-1, has huge impact. We expect legislation to require full NEPA compliance on all of the KBRA commitments, including water diversions by the Klamath Irrigation District, changing the Project purposes, continuing commercial farming of refuges, reallocating federal revenues, etc.
5. Section 101(d) should also expressly require compliance with section 3406(b)(23) of the Central Valley Project Improvement Act, Pub. L. 102-575, and with the Trinity River Basin Fish and Wildlife Management Reauthorization Act of 1995, Pub. L. 104-143.

Honorable Jeff Merkley
October 3, 2011
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Comment 3 - KBRA

6. Section 104 evidently authorizes appropriations of up to \$800 million for fiscal years 2012-2027 pursuant to Appendix C-2. In the KBRA negotiation, the federal agencies also promised to reallocate appropriated funds to cover some of those costs, a process which directly threatens the under-funded Trinity River Restoration Program. The remaining costs in the draft Act present a major budget problem.

Comment 4 - KBRA

7. Section 105's approach to project purposes sharply contrasts to the Central Valley Project Improvement Act, Pub. L. 102-575, which made fish and wildlife restoration a project purpose that is coequal to irrigation. This legislation subordinates the fishery to irrigation and refuge water deliveries. Furthermore, section 104(d) changes existing legal requirements that water development be based on the "user pay" principle by approving that mitigation of impacts will be borne by the U.S. taxpayer, instead of the water developers.

Comment 5 - KBRA

8. Section 105(d) includes direct spending obligations that would require cuts in other programs to offset new spending. This section also conflicts with President Obama's announcement of a three-year freeze on discretionary spending.

Comment 6 - KBRA

9. Section 106(a) recognizes a bargain and exchange (consideration) for the Klamath Tribe's settlement as a basis for authorizing the Klamath Tribes to make "commitments" in the KBRA. There is no such similar provision for the non-signatory California tribes; the United States would unilaterally declare that the tribes are satisfactorily compensated. Congress has not acted toward tribes in this manner in more than half a century since it abandoned the tribal termination policy of the 1950s.

10. Section 106(c) provides that many of the actions required to occur before the United States compromises its trust duties are output in nature (spend money) rather than outcome oriented (restore fish). Thus waivers could occur without any assurance that the restoration has taken place. The Office of Management and Budget has long evaluated federal programs on the basis of their outcomes. The waivers should not be effective for the United States, or for tribes choosing to grant them, until restoration has occurred.

11. Section 106(f) authorizes the unilateral and unconsented waiver by the United States of rights and benefits on behalf of the Hoopa Valley Tribe as set out in the 1995 and 1997 Interior Department Solicitor's opinions on Klamath River water rights. It would approve limitation of the United States' trust responsibility to protect Hoopa fisheries. In Section 106(f) the United States, as trustee for all federally recognized tribes of the Klamath Basin (including Hoopa), would be required to allow diversions of Klamath River water in Oregon and other commitments under the KBRA, notwithstanding the resulting adverse effects on our rights and other interests in California.

Honorable Jeff Merkley
 October 3, 2011
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Comment 6 cont.- KBRA

12. Sections 106(h)(1)(C), (F), (G), and (2) and (3) suggest an even broader waiver by the United States that would proscribe Klamath River claims in California that are inconsistent with the federal assurances to the Klamath Project and other federal commitments in the KBRA.
13. Section 106(j) gives funding priority to Party Tribes at the expense of other Tribes.
14. Section 106(l) purports to protect non-party tribes but its language is specific to "the authority of" non-signatory tribes. It does not protect against loss of the existing trust duty of the United States to protect those tribes' water and fishing rights. Since the intent of the bill is to ratify the KBRA and authorize and direct the United States to sign it, the United States' rights as a trustee would be limited to rights retained under the Restoration Agreement. As a result, if the priority given by the KBRA to Klamath River surface water diversions of 378,000 acre-feet per year has the effect of preventing fish restoration, then not only will the United States be unable to protect Indian fishing rights, it will be moved to the other side of the "v." In other words, the United States would be enforcing the priority for water diversions even if that leaves too little water to restore the fish on which the Indian tribes rely. By contrast, under existing law "Reclamation is obligated to ensure that project operations not interfere with the Tribes' senior water rights. This is dictated by the doctrine of prior appropriation as well as Reclamation's trust responsibility to protect tribal trust resources. . . . Reclamation must, pursuant to its trust responsibility and consistent with its other legal obligations, prevent activities under its control that would adversely affect [the Tribes' fishing] rights." Memorandum of Regional Solicitor (July 25, 1995). This would be changed by KBRA and subsection (l) would not preserve the trustees' duty to prevent such adverse effects.

The KBRA makes this elimination of federal trust responsibility explicit for all Basin tribes, signatories or not. For example, in section 15.3.9:

The United States, acting in its capacity as trustee for the Federally-recognized tribes of the Klamath Basin, hereby provides . . . Assurances that it will not assert: (i) tribal water or fishing right theories or tribal trust theories in a manner, or (ii) tribal water or trust rights, whatever they may be, in a manner that will interfere with the diversion . . . of water for the Klamath Reclamation Project that is . . . provided in Appendix E-1.

Congressional ratification of this KBRA provision changes the tribal right (enforceable by the federal trustee) from a right to sufficient water to produce the fish on which the Tribes rely, into a right to water left over after diversion per Appendix E-1, regardless of what the habitat results may be. It is thus similar to termination provisions such as the one for the Klamath Tribes of Oregon, which

Honorable Jeff Merkley
October 3, 2011
Page - 5

← Comment 6 cont.

provided "statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the Tribes." 25 U.S.C. § 564q(a). This bill would abridge the Government-to-Government relationship between the United States and the Hoopa Valley Tribe.

Comment 7 - KBRA

15.

Section 108(b)(1) and section 203(c) appear to prevent nonparties to the Agreements from enforcing any protections of their interests, or the public interest, found in the bill.

Comment 8 - KBRA

16.

Title II would terminate Federal Energy Regulatory Commission jurisdiction over certain Klamath River dams and specially authorize their removal. But the existing FERC licensing process provides a mechanism that, in appropriate cases, leads to dam removal. E.g., FERC Project No. 2342. There is no need for new, or further circumscribed, authority.

Comment 9 -
KHSA

17.

Section 206 and the Klamath Hydroelectric Settlement Agreement ("KHSA") authorize PacifiCorp to avoid compliance with Clean Water Act requirements before dams are removed, if ever (p. 41). Further, title II of the draft Act, is unlikely to produce dam removal, because of the many contingencies in the KHSA (p. 20-21, 62-65).

Please let me know when we can meet with you at your earliest convenience. Thank you for your attention to this matter.

Sincerely,
HOOPA VALLEY TRIBAL COUNCIL



Byron Nelson, Jr., Vice-Chairman

Enclosure

cc: Sen. Dianne Feinstein
Sen. Barbara Boxer
Hon. Mike Thompson
Hon. Dale Kildee
Hon. Greg Walden
Secretary Ken Salazar
Attorney General Eric Holder

Comment Author Nelson, Byron Jr.
Agency/Assoc. Hoopa Valley Tribe
Submittal Date October 26, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1026_068-1	<p>Master Response TTA-1 Federal Trust Responsibility and the KBRA.</p> <p>Master Response GEN-27 Interplay Between Trinity River Restoration Program (TRRP) and KBRA.</p>	No
IT_LT_1026_068-2	<p>These comments would appear to be on a proposed bill that may not accurately reflect the KBRA rather than on the EIS/EIR analysis of the KBRA.</p> <p>For example:</p> <ol style="list-style-type: none"> 1. Section 2.2.12 of the KBRA states that neither the KBRA nor the Trinity River Restoration Program shall affect the other. It does not subordinate TRRP to KBRA. 2. Under the KBRA, fish restoration goals and harvest limits would be developed in future fish restoration and fisheries reintroduction plans that are yet to be drafted. Speculating on what those plans may or may not contain when they are drafted is beyond the scope of the analysis for the EIS/EIR. 3, 4, and 5. The KBRA does not supersede existing laws or regulations and does not exempt any actions from compliance with NEPA, CEQA, ESA, or CESA. As plans and programs are developed under the KBRA, they will be made in compliance with existing laws and regulations including opportunities for public review and comment. Consultation under ESA for various elements of the KBRA does not presume that there will be approval of any particular flow regime. The KBRA is analyzed in this EIS/EIR programmatically. The KBRA includes programs that would undergo detailed development and analysis in the future. The KBRA analysis, however, is programmatic, as described in Section 15168 of the CEQA Guidelines, because the details of this plan are unknown and not reasonably foreseeable at this time. A program-level document is appropriate when a project consists of a series of smaller projects or phases that may be implemented separately. These programs would likely undergo detailed development and analysis in the future. Therefore, it is anticipated additional NEPA and CEQA analyses for the suite of actions contained in KBRA will be tiered as appropriate to this EIS/EIR. 	No
IT_LT_1026_068-3	<p>These comments would appear to be on a proposed bill that may not accurately reflect the KBRA rather than on the EIS/EIR analysis of the KBRA. Section 2.2.12 of the KBRA states that neither the KBRA nor the Trinity River Restoration Program shall affect the other.</p>	No

Comment Author Nelson, Byron Jr.
Agency/Assoc. Hoopa Valley Tribe
Submittal Date October 26, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1026_068-4	<p>These comments would appear to be on a proposed bill that may not accurately reflect the KBRA rather than on the EIS/EIR analysis of the KBRA.</p> <p>The KBRA does not supersede existing laws or regulations and does not exempt any actions from compliance with applicable laws including NEPA, CEQA, ESA, or CESA. As plans and programs are developed under the KBRA, they would be made in compliance with existing laws and regulations including opportunities for public review and comment.</p>	No
IT_LT_1026_068-5	<p>These comments would appear to be on a proposed bill that may not accurately reflect the KBRA rather than on the EIS/EIR analysis of the KBRA.</p> <p>The KBRA does not supersede existing laws or regulations and does not exempt any actions from compliance with applicable laws including NEPA, CEQA, ESA, or CESA. As plans and programs are developed under the KBRA, they would be made in compliance with existing laws and regulations including opportunities for public review and comment.</p>	No
IT_LT_1026_068-6	<p>The Klamath Agreements were negotiated and designed to resolve longstanding legal disagreements over the use of natural and water resources in the Klamath Basin. This is what occurred in the negotiations over PacifiCorp's Klamath Hydroelectric Project, as well as the related Klamath Basin Restoration Agreement. The Federal Government often times has a vested interest in resolving litigation as well. In this case, the Federal Government made the calculated decision that the KHSA and KBRA would purport with its responsibility to act in the best interest the public and tribal trust.</p> <p>Master Response TTA-1 Federal Trust Responsibility and the KBRA.</p>	No
IT_LT_1026_068-7	<p>These comments would appear to be on a proposed bill that may not accurately reflect the KBRA rather than on the EIS/EIR analysis of the KBRA.</p> <p>The KBRA does not supersede existing laws or regulations and does not exempt any actions from compliance with applicable laws including NEPA, CEQA, ESA, or CESA. As plans and programs are developed under the KBRA, they will be made in compliance with existing laws and regulations including opportunities for public review and comment.</p>	No

Comment Author Nelson, Byron Jr.
Agency/Assoc. Hoopa Valley Tribe
Submittal Date October 26, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1026_068-8	<p>These comments would appear to be on a proposed bill that may not accurately reflect the KBRA rather than on the EIS/EIR analysis of the KBRA.</p> <p>The KBRA does not supersede existing laws or regulations and does not exempt any actions from compliance with applicable laws including NEPA, CEQA, ESA, or CESA. As plans and programs are developed under the KBRA, they will be made in compliance with existing laws and regulations including opportunities for public review and comment.</p>	No
IT_LT_1026_068-9	Master Response KBRA-4 Proposed Legislation.	No

KLAMATH DAM REMOVAL
DRAFT EIS/EIR HEARING
OCTOBER 27, 2011
PUBLIC TESTIMONY
KLAMATH, CALIFORNIA

MR. NORRIS: Good evening. It's Josh Norris,
J-o-s-h N-, as in Native, o-r-r-i-s. I got to gather my
thoughts here after that.

So, after hearing about the possibility of dam
removal, about, oh, five years ago or so, of course my
gut reaction was that I was all for it. Yes, take down
all the dams as soon as possible. Restore our fisheries.
Restore our clean water, our ceremonies, our traditions,
our people's health, and our livelihood, our economy.

Comment 1 -
Approval of Dam
Removal

But I'm also the kind of person who likes to
make an informed decision, so I have looked at the issue
of dam removal and how it has affected communities in
other locations. And I have not yet seen any reason to
keep dams up. I have not found one instance of
decommissioned dam removal where the community regretted
the decision, where the water quality worsened, or
conditions worsened or the economy worsened. There's
just simply no case.

So, the only reason that I can think of that
there is any resistance to this at all is just good
old-fashioned thinking that came from the era of the '20s
and '30s, where, I mean, these were economic development

projects that helped get the country back on its feet.

And it did provide a good percentage of the power that
was needed. But that's no longer the case. 3 percent of
the power provided is negligible. It can be -- it can be
made up just through simple energy conservation.

So, I think, you know, if there is any
resistance, it's because of sort of these old-fashioned
ideas that said something to the effect of, you know,
"Why let this water just flow down and go to waste down
at the ocean?"

We're in a new era now, and the new project is
removing these dams. I see it as beneficial to our
economy, in the same way that building them was.

And I also want to reiterate that this is a
long-term project, that these Agreements and our plans
for the future need to be ongoing. And I'll be in it for
the long haul.

Thank you.

Comment Author Norris, Josh
Agency/Assoc.
Submittal Date October 27, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1027_051-1	Master Response GEN-2 Some People Approve of Dam Removal, Others Oppose Dam Removal.	No

IT_MC_1027_044

KLAMATH DAM REMOVAL
DRAFT EIS/EIR HEARING
OCTOBER 27, 2011
PUBLIC TESTIMONY
KLAMATH, CALIFORNIA

MR. O'ROURKE: All right. Thomas O'Rourke,
Chairman of the Yurok Tribe, T-h-o-m-a-s O apostrophe
R-o-u-r-k-e.

You know, they would ask to me what the
Klamath River means to me and to our people. The
Klamath River is our lifeline. You know, it is like our
heart, that the Klamath River is sick, it's in despair.
And everyone knows that when something becomes sick, like
your heart, a vital organ, that everything else fails
behind it.

Our dams serve as incubators to what we call
blue-green algae. I'm not quite sure how to pronounce
the science word for it.

So, anyway, you know that our people suffer in
many ways from the dam, and the main reason for it is
water quality. Our neighbors up the river are deprived
from an essential food to their health. Everyone knows
that salmon help to prevent diabetes and other illnesses
and sicknesses. And they are deprived from something
that The Creator put there for them in the beginning.

You know that certain times a year now, that our
river -- the algae becomes so toxic that we can't enter

the water. Our salmon are not fit to be eaten, and so that we have to quit fishing and harvesting.

Our people depend on these fish for our livelihood, for our health. And we have since the time of beginning, time immemorial. We have been here. We have always used the river. We have always fished and fed our families.

We are still very dependent upon these salmon for our livelihood, for our health, for our subsistence, for our ceremonies. We depend on them. And each year, year by year, our fish dwindle, and our river becomes more sick. And so that I believe that the dam removal is the first big positive step in revitalizing, restoring the health to the river, water quality.

When something is well and thrives, everything that depends on it thrives, also. It is a main lifeline to an ecosystem, a major ecosystem that effects many other ecosystems around us. All right. When one ecosystem this major fails, many other ecosystems around it begin to fail. And so, the animals that depend on the fish and the other resources, water resources, species, when it becomes extinct, then they become extinct. An ecosystem become desert. And so that little by little we are going that way.

Well, this is what that means to our people. We were put here as caretakers, in the beginning, of the

water and the river and the resources.

And it's not just this small portion. You know, we work with our neighbors up and down the river. We work together to manage in a responsible way, to utilize in a responsible manner.

Every year, there was as much as there was the year before. We had systems to count the fish through what we call weirs. We call them weirs now. And so that we were able to monitor the fish that went up the river.

We had ceremonies that didn't allow us to fish until our neighbors caught fish up the river. We had different methods of management that worked, thousands and thousands of years. And they will continue to work if we are allowed once again to practice these methods of management, through collaboration with many different agencies, traditional knowledge, western science, what we say modern science, through collaboration of different agencies and entities.

Comment 1 - Approves of Dam Removal

I believe that, by working together, we can once again become successful, and "successful" being the restoration of the Klamath River. I believe, to even begin that success, that the dams need to be removed to begin to restore the quality back, the water quality, that will sustain salmon runs for the length of the Klamath River and the upper regions.

I believe that we were entrusted, as the first

caretakers on the river, to make sure that our neighbors
had fish, and so, we work hard to achieve that objective,
that goal. And we will continue to work, because it is
our lifeline and our livelihood.

Thank you.

Comment Author O'Rourke, Thomas
Agency/Assoc. Yurok Tribe
Submittal Date October 27, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1027_044-1	Master Response GEN-2 Some People Approve of Dam Removal, Others Oppose Dam Removal.	No

KLAMATH DAM REMOVAL
DRAFT EIS/EIR HEARING
OCTOBER 27, 2011
PUBLIC TESTIMONY
KLAMATH, CALIFORNIA

Comment 1 - Approves
of Dam Removal

MR. OLIVER: Hello. My name is Merk Oliver. I

want you to know that I'm here to ask these people to
take down the dams, because they are no good for our
river or for anybody else. And for the life of me, I
can't understand, from my own heart, that -- why it is so
hard for you people to see that those dams are no good
for us, for anybody. They're poisoning the water.
They're poisoning everything.

They're even poisoning the fish, the sturgeon
and eel, candlefish, everything. They're even poisoning
people with those dams.

I've got pictures to prove that you can see all
the green water up there. But you people, how come you
can't see that and do something about that? Because --
maybe it's because you've been so used to being against
certain people. And it's no good to be like that.

You've got to be honest with yourself that the
dams were no damn good. And I hope you can see to it
that they are taken down. There's nothing -- I can't
understand. How come we have to -- we won the suit. How
come we have to wait for another ten years for these to
come down? And it's not right, the way you people are

Comment 2 -
Alternatives

going about your business.

Thank you.

Comment Author Oliver, Merk
Agency/Assoc.
Submittal Date October 27, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1027_056-1	Master Response GEN-2 Some People Approve of Dam Removal, Others Oppose Dam Removal.	No
IT_MC_1027_056-2	Master Response ALT-3 Elimination of Alternative 13 - Federal Takeover of the Klamath Hydroelectric Project from Detailed Study.	No

IT_MC_1026_061

KLAMATH DAM REMOVAL
 DRAFT EIS/EIR HEARING
 OCTOBER 26, 2011
 PUBLIC TESTIMONY
 ARCATA, CALIFORNIA

MR. ORCUTT: Yeah. For the record, my name is Mike Orcutt, spelled O-r-c-u-t-t. And my position is the fisheries director for the Hoopa Valley Tribe.

And I really wasn't going to say much tonight, but I would -- someone put my name in, a council member, so I work for her, so the --

The role that I played has been one in which I've been involved with restoration. I'm one of the original members of the Klamath Task Force. I continue to be involved with the Trinity Management Council. I frequently represent the Tribe there. I was a party -- excuse me -- a participant in all the settlement discussions. Comment 1 - General/Other

So, my only couple of comments are that, you know, that the Tribe, unfortunately, because of media and all these different things and forces that are coming to bear -- it is very unfortunate that throughout the process I think we were very, very clear on what we wanted; we simply wanted adequate acknowledgment, analysis, and protection of Trinity River restoration.

The Tribe went against some pretty large forces in the San Joaquin Valley and the hydropower industries that exist in the Central Valley to secure, by law now,

restoration of the Trinity River. And so, from day one,
that was our stated goal.

There are provisions in the -- both in the
Agreement and in the legislation that Hayley referenced.
But, again, a lot of that is what we call the law of the
river for Trinity.

And I have just a couple of points there that I
think are very important. The lion's share of fall
Chinook are produced in the Trinity River. We fought
hard and long to try to get an analysis of the
composition in the fish kill, but we did an analysis that
shows that a good number of those fish were destined for
the Trinity River. And, in fact, our harvest was one of
the lowest on record that year.

The lion's share of spring run Chinook in the
Basin today -- everybody talks about reintroduction of
fish into the Upper Klamath. The lion's share of
Trinity River -- are produced in the Trinity River and,
to a lesser degree, in the South Fork Trinity River.
But, by and large, the fish that are caught that are
spring-raised fish are destined to enter into the
Trinity River. The lion's share of steelhead are
Trinity River origin fish.

Trinity River hatchery, on occasions, produces
30,000 Coho salmon. They're not listed, but,
nonetheless, they're a major component of resources in
the Basin.

So, I would say this, in closing, that I saw
some articles about the workshop last week and about the
balancing of the Klamath. I would make the following
observation, that the Klamath River is in a perpetual
balance ecologically. Two years ago, it was drastic
reductions in project deliveries. They freed up some
water. And what did they look for for a safety guard,
safety net? It was the Trinity River water and --

MS. JONES: Thank you, Mr. Orcutt.

MR. ORCUTT: -- specifically the 50,000 acre
feet that is owed to Humboldt County. And our comments
are in the back. Thank you.

Comment Author Orcutt, Mike
Agency/Assoc. Hoopa Valley Tribe
Submittal Date October 26, 2011

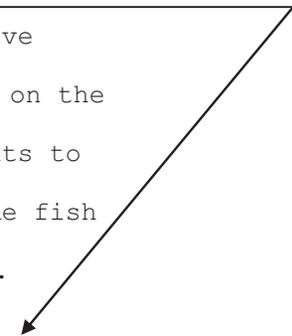
Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1026_061-1	Master Response GEN-27 Interplay between Trinity River Restoration Program (TRRP) and KBRA.	No

IT_MC_1026_063

KLAMATH DAM REMOVAL
 DRAFT EIS/EIR HEARING
 OCTOBER 26, 2011
 PUBLIC TESTIMONY
 ARCATA, CALIFORNIA

MS. REDNER: My name is Barbara Redner,
 R-e-d-n-e-r. I am Klinkit (phonetic spelling) from the
 Raven House.

Comment 1 - Approves of Dam Removal



I'm married to a Redwood Creek Indian. We have
 no fishing rights on the Klamath. I am dependent on the
 well-being of the people that have fishing rights to
 provide salmon for me. As an elder, they bring me fish
 on a regular basis. I am grateful for that.
I believe that the Klamath River should be
returned to a wild river, in its entirety; not the four
dams that you propose but the entire river.

When we were here before, we took care of this
 land. When you signed the treaties, you guaranteed us
 our right to keep this land, in perpetuity, in its
 natural state. That's not been done.

Comment 2_- Fish



Not only are the tribal rights being infringed
upon by this act, but the salmon's rights are being
imposed upon. There is nothing in this act, the part
that you are proposing tonight, that guarantees that the
salmon will be restored.

You claim -- and I am sorry that you have gone
to all this work, with nothing to show that the salmon
will be protected, because there is significant

agricultural runoff from the Upper Klamath, and that --
those chemicals flow downstream. They don't stop at
the -- at that -- I don't know what that dam is called
upriver. But it doesn't stop there. It continues to go
downriver. And it continues to go all the way to the
ocean.

Comment 3 - Alternatives

And it affects all of the fish, not only in the
river but clear to the ocean. And I think that is a
travesty. And I firmly believe that the dams all the way
up the Klamath River should be done away with, and I do
not believe that any of the alternatives that you have
proposed don't account for any of that.

And with that, thank you for your time.

MR. LYNCH: Thank you.

Comment Author Redner, Barbara
Agency/Assoc. Redwood Creek Tribe
Submittal Date October 26, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1026_063-1	Master Response GEN-2 Some People Approve of Dam Removal and Others Oppose Dam Removal.	No
IT_MC_1026_063-2	Master Response AQU – 5 Will Benefit all Salmonids. Master Response AQU – 6 Expert Panel Coho, Steelhead and Chinook. Master Response AQU – 19 Chinook Expert Panel Proposed Action Better Than No Action. Master Response AQU – 7 Expert Panel Uncertainty Likelihood of Success. Master Response AQU – 23 Evaluation of Dam Removal and Restoration Anadromy (EDRRA) Model. Master Response AQU – 16 Benefits to Coho. Master Response AQU – 21 NRC Dam Removal Help Coho. Master Response AQU – 31 Thermal Lag and Diel Temperatures. Master Response WQ-4 Hydroelectric Project Impacts to Water Quality Anticipated KHSA/KBRA Improvements.	No
IT_MC_1026_063-3	Appendix A, Final Alternatives Report, from the Draft EIS/EIR describes the alternatives considered during development of the document. Alternative 15, Full Removal of Six Dams, considers the removal of Keno Dam and Link River Dam in addition to the Four Facilities. Alternative 15 was not carried forward for more detailed analysis in the EIS/EIR because it would not avoid or lessen environmental effects of the Proposed Action. Implementation of Alternative 15 would also not be likely to meet Endangered Species Act requirements or tribal trust water rights within Upper Klamath Lake.	No

PUBLIC HEARING ON THE KLAMATH DAM
REMOVAL DRAFT EIS/EIR
---o0o---
YREKA, CALIFORNIA
THURSDAY, OCTOBER 20, 2011

MR. RON REED: My name is Ron Reed, R-o-n R-e-e-d.

I'm a Karuk tribal member. My Karuk name is

Macatha (phonetic), given to me by a medicine person from

the Karuk people.

Comment 1 - ITAs

My people resided at Tee Yuke Curo (phonetic)

for thousands of years, hundreds of generations.

I live, right now, at Catamean (phonetic), the

center of the world, the Karuk people, above our fishery,

a fishery that isn't very healthy.

I, and the Karuk people, are much like what

somebody said about the Coho, we were not recognized in

this basin. In 1979, we became federally recognized, so

we are now recognized, and now we can spread the word

about how the Karuk people have lived in the Klamath River

Basin for a very long time.

We took care of the resources in this basin for

a very long time, and the great creator of all things, of

all of us here, told us how to manage this land. It

wasn't by damming up the dams, not by cutting off our

relations: World renewal, all the relations we depend on,

is us, our way of life.

The things that we are taught by our elders,
 that do not happen today, have a lot to do with social
 responsibility. Sure, you see a lot of atrocities
 happening to Karuk people before now and now and maybe in
 the future. But, then, we need to fix this problem. We
 can fix it in a sustainable away.

And in the beginning of this process, I came
 into the room and I felt like I had a lot of enemies.
 Since then, across the line, we let our issues be known.
 We have shaken hands, we have introduced our kids to one
 other, we are trying to make the things good here.
 Sustainable process, sustainability, you show
 me sustainable process in this world and I don't have to
 question it.

The Karuk people have a sustainable way about Comment 2 - Fish
 us and you need to listen to us. The Karuk people have
been here, much like the Coho. The Coho has been in our
language just as long as our people have been on this
basin. There is a great story about the Coho and the
turkey buzzard, it goes way back. People can laugh,
people can laugh, it's the truth. Comment 3 - ITAs

It's not that we have been here for two, three,
four generations; we have been here for thousands of
years, and our people need to be recognized.

This is the first time in a natural resources management forum that the Karuk people have been able to address our issues and concerns the way the Karuk people need to address our issues and concerns.

We went to Scotland to fight this animal. They sold it. We are coming here, we went to Warren Buffett.

We'll go anywhere, this is our way of life.

The people do not teach me the things now and I'll not be able to teach my children the same things, these traditional pathways, the social responsibilities that God has given us, the same things that are in the constitution, we are human beings, we have a say-so in this world.

So I say we can fix this problem. In the beginning, I wanted to do away with agriculture, I wanted to do away with all these different things that I was opposed to. Now there's a sustainable process that we need to address together, and we can address this together so we can all continue our culture, our traditional values that all of us -- that encompass all of us. We can do all of this together if we do it right.

Comment Author Reed, Ron
Agency/Assoc. Karuk Tribe
Submittal Date October 20, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1020_016-1	Master Response GEN-1 Comment Included as Part of the Record.	No
IT_MC_1020_016-2	Master Response GEN-1 Comment Included as Part of the Record.	No
IT_MC_1020_016-3	Master Response GEN-1 Comment Included as Part of the Record.	No

KLAMATH DAM REMOVAL
DRAFT EIS/EIR HEARING
OCTOBER 25, 2011

PUBLIC TESTIMONY
ORLEANS, CALIFORNIA

MR. REED: Good evening. I'm Ron Reed,
R-o-n R-e-e-d. I'm a Karuk tribal member. I come from a
traditional family.

I think I have told you folks everything I could
probably possibly tell you about the importance of the
river. The river is a way of life. World renewal imbeds
the river as its life.

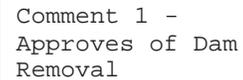
The health of the people run parallel to the
health of the river. And I do -- and that's the Karuk
people, or the indigenous people. It runs to the health
of all the river-ing communities in all this great
Klamath River Basin.

World renewal ceremonies represent the
connection between the Karuk people, the Yurok, the Hupa,
and other tribes, as well, the value of the importance of
working together. We have one opportunity in a lifetime.

Taking the dams out of the Klamath River is huge.

The Karuk people, we have been federally
recognized by the federal government since 1979. And
it's the first time we've been able to talk about federal
water policy. I think we have displayed the importance

Comment 1 -
Approves of Dam
Removal



of the river to us.

Today I speak from -- by way of traditional family, but I also speak for the practitioners and the people who walk before us but, more importantly, the people who walk after us. We have one opportunity in a lifetime to do what somebody else said, to right a lot of wrongs.

I'm a grandfather. I'm a husband. I'm a father. I'm a son. I'm a grandson. And those are the things that are most important to me in this world, is my family, which is directly connected to world renewal, which is directly connected to the river. How are we supposed to connect the next generation to our way of life, if we do not have the resources necessary to be who we are?

There's not much more to say, except for there's a lot of traditional knowledge that has been thrown at you folks, and I think that it can be taken -- it could be taken in the western science world and be not only acknowledged, but, also, we need to know how -- we need to understand the natural resource management that made this great Basin this great Basin.

We have an opportunity to fix the wrongs and make it right. The other night in Yreka, it was very contentious, but they are very passionate with the culture and tradition that they live, they know. But we

cannot forget about the people on the river. You cannot
forget about the Karuk people because we do not have a
reservation, we don't have fishing or hunting or
gathering rights, but we, we breathe the air, we live off
the earth, and we depend on this great river to be who we
are.

And we don't want to become the next endangered
species. We are already threatened. We need a way of
life. It depends on this river. If we don't get that,
we're -- we are exactly where we're at today; we don't
know. A lot of goods, a lot of bads about the dam
relicensing. The dams have to come out.

World renewal concepts stretch from the top of
the Basin to the mouth, unimpeded. Our message goes to
the Great Creator, and that river needs to run free.

Thank you very much.

MR. LYNCH: Thank you, Ron.

Comment Author Reed, Ron
Agency/Assoc. Karuk Tribe
Submittal Date October 25, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1025_042-1	<p>Master Response GEN-2 Some People Approve of Dam Removal, Others Oppose Dam Removal.</p> <p>The United States believes the KBRA and KHSAs provide the best opportunity to restore the Klamath Basin and its fishery. (See EIS/EIR Sections 3.12, Tribal Trust Assets and Section 3.13, Cultural and Historical Resources).</p> <p>General Response AQU-26 Increased Abundance for Harvest and Tribes.</p>	No

Karuk Community Health Clinic
64236 Second Avenue
Post Office Box 316
Happy Camp, CA 96039
Phone: (530) 493-5257
Fax: (530) 493-5270

Karuk Tribe



Karuk Dental Clinic
64236 Second Avenue
Post Office Box 1016
Happy Camp, CA 96039
Phone: (530) 493-2201
Fax: (530) 493-5364

Administrative Office
Phone: (530) 493-1600 • Fax: (530) 493-5322
64236 Second Avenue • Post Office Box 1016 • Happy Camp, CA 96039

December 10, 2011

Elizabeth Vasquez
Bureau of Reclamation
U.S. Department of the Interior
2800 Cottage Way
Sacramento, CA 95843

Gordon Leppig
California Department of Fish and Game
619 Second Street
Eureka, CA 95501



RE: Comments on Klamath Secretarial Determination Cultural Resources Report

Ayukii Ms. Vasquez and Mr. Leppig:

The Karuk Tribal Historic Preservation Office appreciates the opportunity to comment on the *Secretarial Determination Cultural Resources Report* for Klamath Facilities Removal, released November 19, 2010. This report is designed to comply with the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA).

Specifically, Section 106 of NHPA requires that:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertakings shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

National Register eligible resources must possess both significance and integrity, and must meet one or more of four criteria defined as a) association with events and broad historical patterns, b) associated with historically important persons, c) embodying distinct artistic or architectural characteristics, and d) potentially yielding important prehistoric or historic data. Criteria A has been broadly defined to include Traditional Cultural Properties and Ethnographic Landscapes, and is further discussed in National Register Bulletin 38 (Parker and King 1998).

Classification	ENV-3.00
Project	12
Control No.	12-12-12
Folder I.D.	1160435
Date Input & Initials	12/14/2011 AD

SCANNED

NHPA amendments and implementing regulations strengthen Native American consultation in the Section 106 process; THPO duties include “advise and assist” activities associated with Federal and other agency implementation of their historic preservation responsibilities. Within this framework, the Karuk THPO offers the following comments:

Comment #1: The Karuk THPO strongly concurs with the identification of the entire length of the Klamath River as a “riverscape” Gates (2003) and King (2004), which is potentially eligible as an ethnographic landscape for inclusion in the National Register of Historic Places. This office however does not concur with the recommendation that “removal of dams could have an adverse effect on the Klamath River TCP or riverscape as identified by Gates (2003) and King (2004) and other sites associated with traditional cultural practices of the Klamath Tribes, Shasta, Karuk, Hoopa, and Yurok that could be eligible for inclusion on the NRHP.” The removal of the dams is specifically designed to restore health to the riverscape and its contributing elements. Therefore, the cultural resources report should recognize the perspective that the Project could enhance and preserve the TCP eligible for the National Register.

Comment 1 -
Cultural Resources

Comment #2: This office acknowledges that dam removal has the potential to expose cultural resources and archaeological sites inundated by the reservoirs associated with dam construction. These prior adverse effects were unmitigated and likely have resulted in either silt overlay or exposure of cultural materials through erosion. It will be imperative to incorporate provisions in any MOA or Programmatic Agreement that provide resources for site identification and mitigation of adverse effects due to potential looting, erosion, and invasive, noxious weeds.

Comment 2 -
Cultural Resources

Comment #3: Methodology should have included a records search at the Northwest Information Center in Rohnert Park. This CHRIS IC houses the records of Karuk cultural sites in Humboldt County. The NCIC does not contain site records and surveys for areas within Karuk aboriginal territory. Also, Section 3.2.5 (Yurok) has several inaccurate references and appears to confuse “Karuk” and “Yurok” throughout this section.

Comment 3 - Cultural Resources

Comment #4: According to Deur (2004) the Klamath Tribe is concerned about access to the Link River TCP, and the potential impacts of the Project on this access. These Tribal concerns should be identified and evaluated in consultation with tribal representatives, and appropriate mitigation measures developed as part of Programmatic Agreement or site specific Memorandum of Agreement. This office recognizes that culture is process and changing practices are no less authentic, traditional, or important to those who value them.

Comment 4 - ITAs

In conclusion, the Karuk THPO is impressed with the thoroughness and quality of the *Secretarial Determination Cultural Resources Report* for Klamath Facilities Removal. This office is also confident that identified effects can be successfully resolved using the regulatory framework of Section 106 of NHPA and best practices of Cultural Resources Management. It is imperative that the resources to achieve these results be incorporated in the final Project agreement(s) and implementation.

The Karuk Tribal Historic Preservation Office appreciates the commitment and hard work of your agencies and individuals in developing the studies and documents for restoration of the Klamath River and ecosystem. I look forward to working with you on this very important project.

Yootva,



Hélène Rouvier
Tribal Historic Preservation Officer
Karuk Tribe

Comment Author Rouvier, Helene
Agency/Assoc. Karuk Tribe
Submittal Date December 14, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1214_092-1	The Lead Agencies acknowledge that the comment author believes that the river could be eligible as a riverscape (cultural landscape or traditional cultural property) and that the removal of the dams will restore the health of the riverscape. EIS/EIR Section 3.13, Cultural and Historic Resources, identifies potential impacts within the area of potential effect which would include these sections of riverscape, potential adverse effects may occur to sites associated with the riverscape. Mitigation Measure CHR-3 would specifically address these effects through additional consultation under the NHPA Section 106 as applicable.	No
IT_LT_1214_092-2	The Lead Agencies acknowledge that Yurok TCP may be adversely affected under the No Action Alternative. However, under this alternative compliance with Section 106 of the NHPA would apply for federal actions not related to removal of the dams or the proposed affirmative alternatives. The tribal trust section of the Draft EIS/EIR however does address effects on the Klamath River resultant from past and present dam operations. EIS/EIR Section 3.13, Cultural and Historic Resources, acknowledges that the affirmative alternatives have the potential to adversely affect historic properties and addresses this in Mitigation Measures CHR-1, CHR-2, CHR-3, and CHR-4. Additional consultations with ACHP, SHPO, tribes, and other interested parties under NHPA Section 106 will lead to a Programmatic Agreement of Memorandum of Agreement to resolve adverse effects with mitigation measures.	No
IT_LT_1214_092-3	The Norwest Information Center records were searched and EIS/EIR Section 3.13, Cultural and Historic Resources was updated to add in these sites. Changes were made to correct the use of "Karuk" and "Yurok" in Section 3.2.5 of the Draft EIS/EIR.	Yes
IT_LT_1214_092-4	The Draft EIS/EIR addresses potential impacts to cultural resources. The potential for vandalism of exposed sites was considered and is addressed in Mitigation Measure CHR-2 through the development of management plans and discovery plans, through consultations under the NHPA Section 106, as applicable. In addition, Shasta people would be included in the additional consultations under NHPA Section 106 for each mitigation measure.	No

IT_WI_1107_075

From: MAILER-DAEMON
Sent: Monday, November 07, 2011 4:57:06 PM
To: BOR-SHA-KFO-Klamathsd; werner@wrinkledog.com
Subject: Web Inquiry: Klamath Dams Draft EIS/EIR Auto forwarded by a Rule

Name: Helene Rouvier
Organization: Karuk Tribe

Subject: Klamath Dams Draft EIS/EIR

Comment 1 - Approves of Dam Removal

Body: I would like to extend my support for "Alternative 2" - full dam removal. This will help to restore the Klamath River and Region both ecologically and economically. Dam removal will support the return of healthy fish population, provide employment, and address the health risks that have resulted from toxic algae blooms and bacteria. From my readings on this issue, the science is solid for dam removal, and the benefits for all stakeholder communities have been demonstrated.

Comment Author Rouvier, Helene
Agency/Assoc. Karuk Tribe
Submittal Date November 07, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_WI_1107_075-1	Master Response GEN-2 Some People Approve of Dam Removal, Others Oppose Dam Removal.	No

Klamath Settlement



EIS/EIR PROCESS

Comment Form

IT_MF_1102_058

10/31/2011

Please mail your comments to:

Ms. Elizabeth Vasquez
Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

OR

Mr. Gordon Leppig
California Dept. of Fish and Game
Northern Region,
619 Second Street
Eureka, CA 95501

Email:
KlamathSD@usbr.gov

Website:
KlamathRestoration.gov

Fax:
(916) 978-5055

SCANNED

11/27/13:00
11/27/12
1153734
11/27/2011

All comments on the Draft EIS/EIR must be received by November 21, 2011.

(Please print legibly)

150 ✓

Name: Sarah Schaefer
Organization: Quartz Valley Indian Reservation
Title: Biologist
Address: 13601 Quartz Valley Road, Fort Jones, CA 96032
Email: epubiol@qvir.com

Comments: The Quartz Valley Tribe is very concerned about the ecological health of the Klamath Basin, as the tribe is dependent upon clean water for ceremonial, recreational, and domestic use. Additionally, the Klamath Basin once supported salmonid and lamprey fisheries that was/is inherent to the survival of tribal ways.

Comment 1 - Approves of Dam Removal

I personally support Alternative 2, as it is my scientific and personal belief that this is a necessity to Klamath Basin recovery and restoration. Although there is not much data on the impacts of dam removal, I believe the mighty Klamath and its beautiful tributaries will prevail in time, providing local jobs through tourism with the recovery of native fisheries and paddling tourism. If Alternative 2 should be selected, there should be ample money set aside for monitoring and documentation of recovery efforts. Thank You.

Public Disclosure: It is not required that you submit personal information. You may ask us in your comment to withhold your personal information from public review.

Comment 2 - Proposed Project

This information may be made publicly available at any time. We cannot guarantee that we will be able to do so.

Comment Author Schaefer, Sarah
Agency/Assoc. Quartz Valley Indian Reservation
Submittal Date November 02, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MF_1102_058-1	Master Response GEN-2 Some People Approve of Dam Removal, Others Oppose Dam Removal. Master Response GEN-3 Best Available Information.	No
IT_MF_1102_058-2	Alternative 2 includes the connected action of implementing the KBRA, which includes efforts to monitor fish recovery. Congress would need to appropriate funds for implementation of the KBRA actions, including monitoring and documentation of recovery efforts.	No

PUBLIC HEARING ON THE KLAMATH DAM
REMOVAL DRAFT EIS/EIR
---oOo---
YREKA, CALIFORNIA
THURSDAY, OCTOBER 20, 2011

MS. FLORRINE SUPER: F-l-o-r-r-i-n-e, S-u-p-e-r.

Thank you for taking time to hear our issues.

Comment 1 - Approves of Dam Removal

I support dam removal and the restoration agreement.

I've been raised all my life in Yreka. Because
I am a tribal member it takes me to the river and I've
been there to witness ceremonies, fishing, smoke fishing.
And today it's hard for me to get any fish which means I
am losing my culture.

I don't know if you guys seen me bring my son
in, but he's going to lose his culture. All you who are
learning and trying to live their culture, is going to
lose.

So it is time to remove the dams and make our
river healthy.

Thank you.

Comment Author Super, Florrine
Agency/Assoc.
Submittal Date October 20, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1020_021-1	Master Response GEN-2 Some People Approve of Dam Removal and Others Oppose Dam Removal.	No

IT_WI_1108_076

From: rsuper@karuk.us[SMTP: RSUPER@KARUK.US]
Sent: Tuesday, November 08, 2011 9:03:56 AM
To: BOR-SHA-KFO-KlamathSD; werner@wrinkledog.com
Subject: Web Inquiry: alternative 2 full dam removal Auto forwarded by a Rule

Name: Robert Super
Organization: karuk tribe

Subject: alternative 2 full dam removal

Body: I am in favor of alternative 2 full dam removal



Comment 1 - Approves of Dam Removal

Comment Author Super, Robert
Agency/Assoc. Karuk Tribe
Submittal Date November 08, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_WI_1108_076-1	Master Response GEN-2 Some People Approve of Dam Removal and Others Oppose Dam Removal.	No

IT_WI_1229_095

From: talleyhome@earthlink.net [SMTP: TALLEYHOME@EARTHLINK.NET]
Sent: Thursday, December 29, 2011 6:11:14 PM
To: BOR-SHA-KFO-Klamathsd; werner@wrinkledog.com
Subject: Web Inquiry: Remove all 4 Klamath Dams Auto forwarded by a Rule

Name: Bari G.M. Talley
Organization:

Subject: Remove all 4 Klamath Dams

Comment 1 - Approves of Dam Removal

Body: Ayukîi, my name is Bari Gayle Morehead Talley. I am a Karuk tribal member as well as a citizen of the town of Orleans along the Klamath River. It is my heartfelt belief that a decision to completely remove all four dams and restore the river would benefit the region for long into the future, as well as to bring hope to others around the world.

Historically, human environmental policies have either ignorantly damaged ecosystems or overlooked scientific evidence in favor of populous areas and those with more financial power. Clearly, that hasn't worked out very well for the environment, the animals, indigenous peoples or fisherman. Upholding the findings would be a step in the direction to make reparations and provide sustainability for future generations.

Dam removal would also provide opportunities for scientific study that could help restore watersheds in other places. Possibilities for eco-tourism, as well as traditional fishing would greatly benefit the region. Job opportunities to do work that people can feel good about, rather than resource depletion would be an excellent change.

Abundance of salmon, a traditional and healthy food, would benefit the people in many ways. Humans have wiped out salmon runs all over the world. This is one place where we can really turn that around and really restore those great numbers—not just see old film reels, and hear about how many there used to be. We would take great pride in being part of that change.

Jobs. Hope. Health. It is in your power to make the right decision. Please help us and all of our children.

Yoōtva - Thank you for your consideration.

Comment Author Talley, Bari G.M.
Agency/Assoc. Karuk Tribe
Submittal Date December 29, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_WI_1229_095-1	Comment Noted. Master Response GEN-2 Some People Approve of Dam Removal, Others Oppose Dam Removal.	No

Klamath Settlement



EIS/EIR PROCESS

Comment Form

IT_MF_1020_037

Please mail your comments to:

Ms. Elizabeth Vasquez
Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

OR

Mr. Gordon Leppig
California Dept. of Fish and Game
Northern Region,
619 Second Street
Eureka, CA 95501

Email:
KlamathSD@usbr.gov

Website:

Comment 1 - Approves of
Dam Removal

(916) 978-5055

All comments on the Draft EIS/EIR must be received by November 21, 2011.

(Please print legibly)

Name: SANDI TRIPP
Organization: KAPUK TRIBE
Title: TRANSPORTATION DIRECTOR
Address: PO BOX 1016, HAPPY CAMP, CA 95503
Email: STRIPP@KAPUK.US

Comments:

I note clear scientific evidence for removal of the Klamath Hydro Electric dams. In regards to community I recognize dam removal as a means to economic health. Removal will truly bring the salmon populations back drift boat ^{STEEL HEAD} tourism will return and all local business will prosper. We will have cold water flowing the river will be healthy again + so will we. People must understand that although change is hard some times it will allow for better times in our future.

Public Disclosure: It is not required that you submit personal information. If you decide to do so, please note that this information may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comment Author Tripp, Sandi
Agency/Assoc. Karuk Tribe
Submittal Date October 20, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MF_1020_037-1	Comment Noted. Master Response GEN-2 Some People Approve of Dam Removal, Others Oppose Dam Removal.	No

Klamath Settlement



EIS/EIR PROCESS

Comment Form

IT_MF_1020_031

Please mail your comments to:

Ms. Elizabeth Vasquez
Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

OR

Mr. Gordon Leppig
California Dept. of Fish and Game
Northern Region,
619 Second Street
Eureka, CA 95501

Email:
KlamathSD@usbr.gov

Website: Comment 1 - Approves of
Klamath Dam Removal

Fax:
(916) 978-5055

All comments on the Draft EIS/EIR must be received by November 21, 2011.

(Please print legibly)

Name: Hunter Iso

Organization: Self

Title:

Address: P.O. Box 153 Orleans CA 95556

Email: ~~Si~~ringmyster@hotmail.com

Comments: I am for Alternative 2 because
I believe that the dams are taking away
from the indigenous tribes that have been there

before the dams were put up. As a member of the Hopi tribe in Arizona
~~we~~ we Hopi's believe that we were put on this earth to take care
of these lands and I feel that the dams are harming the environment.

Public Disclosure: It is not required that you submit personal information. If you decide to do so, please note that this information may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comment Author Tso, Hunter
Agency/Assoc. Hoopa Valley Tribe
Submittal Date October 20, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MF_1020_031-1	Master Response GEN-1 Comment Included as Part of Record. The Secretary of the Interior will consider this comment along with all others in making his determination relative to the KHSA and KBRA.	No

PUBLIC HEARING ON THE KLAMATH DAM
REMOVAL DRAFT EIS/EIR
---o0o---
YREKA, CALIFORNIA
THURSDAY, OCTOBER 20, 2011

MR. CRAIG TUCKER: I am Craig Tucker, C-r-a-i-g,
T-u-c-k-e-r.

I'm the Klamath Coordinator for the Karuk Tribe.

First off, I commend Dennis's team. The document is
exhaustively comprehensive. I'm impressed of the breadth
and scope. I have gone through the EIS, there is a lot to
this one. Thanks for the hard work that went into that.

That doesn't mean I won't complain about
something. And I complain a little bit about real estate,
too.

Comment 1 - Real Estate

It turns out there is a lot of people whose real
estate values are being harmed down river because for
sometimes weeks and sometimes months in the summer there
is a sign that says don't touch the water along the river
all the way to the ocean. And that is harming -- there is
people trying to run fishing lodges, there is people with
waterfront property down there. It is harming their
property values, their toxic algae being in that river,
that stems from dams.

Comment 2 - Water Rights/Supply

Likewise this agreement goes along with the
KBRA. Farmers in the Upper Basin who now have new

security for water deliveries to their farms. That will enhance their property values if we implement these agreements. That needs to be considered, too.

The criteria for the Secretary to make a

Comment 3 - Fish

positive determination is, one, does the dam removal enhance fish population? The analysis in the agreement is that it enhances falls runs, Chinook salmon about 81 percent. It expands the habitat for Coho salmon. And I would be interested in numbers on the Pacific Lamprey, which are reported to the tribes, and green sturgeon. We will assume they will benefit as well.

The other criteria for the Secretary to make a position is in the public interest. As the other analysis, this agreement would create 4600 jobs over the next 15 years.

There's a very good diagram over there that describes --

The agreement also says removal of the dam will alleviate the massive toxic algae bloom that's experienced in the reservoirs this summer. It says it will increase the water security for the 1400 family farmers in the Klamath Irrigation Project. It also says you're getting the cheapest power bill as well. Not only I say that, but PacifiCorp says it and the

Public Utilities Commissions of California and Oregon say

it.

Comment 4 - Water Rights/Supply

Last thing I want to say, where does this water

come from that enables this miraculous water security for

farmers? We're adding more water storage to the Klamath

Basin with these agreements that we are taking out. We

are adding 97,000 acre feet of storage to Upper Klamath

Lake, and we are taking out 12,000 acre feet of active

storage in the dams.

There will be more water storage for farming,

for fish and more capacity for flood control because we

are adding 97,000 acre feet of storage. Thank you.

Comment Author Tucker, Craig
Agency/Assoc. Karuk Tribe
Submittal Date October 20, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1020_017-1	The Draft EIS/EIR acknowledges in the Effects Determination (3.15.4.2 pages 3.15-48, 3.25-64, 3.15-81,3.15-85 and 3.15-87 that water quality, specifically toxic algae could have negative impacts to property values in the long term and full and partial dam removal could reverse that situation. However, how long from now and to what extent is too speculative to quantify.	No
IT_MC_1020_017-2	The Draft EIS/EIR, Section 3.15, as well as the Dam Removal Real Estate Evaluation Report (BRI 2011) evaluate the potential effects on property values. The net value of the changes, and the time over which such changes might be observed in market prices, is uncertain.	No
IT_MC_1020_017-3	Conclusions regarding the effects of Alternatives 2 (and 3) on Pacific lamprey and green sturgeon are found in the Draft EIS/EIR, Section 3.3.4.3, starting on p. 3.3-120 (Pacific lamprey) and 3.3-124 (green sturgeon).	No
IT_MC_1020_017-4	Comment noted	No

Hoop Valley Tribe's position on the KHSA/KBRA and DEIS/DEIR

Comment 1 - Alternatives

The DEIS is deceptive with inadequate alternatives analysis. Dam removal cannot occur under the DEIS unless Congress also passes unacceptable legislation. Alternative 1— No Action/No Project is in fact the best route to dam removal because it re-starts the FERC process. The DEIS did not examine Alternative 8—Full Facilities Removal of Four Dams without KBRA—but it should have.

Hoop Valley participated in Klamath Settlement talks but refused to give up rights to protect water quality and flows in order to maintain its fishery as guaranteed by federal law. Section 15.3.9 of the KBRA and the authorizing legislation drafted by Senator Merkley will terminate the federal trust responsibility for our Federal reserved rights. Here is how that happens. Sec. 15.3.9 says:

"The United States, acting in its capacity as trustee for the Federally-recognized tribes of the Klamath Basin, hereby provides... Assurances that it will not assert: (i) tribal water or fishing right theories or tribal trust theories in a manner, or (ii) tribal water or trust rights, whatever they may be, in a manner that will interfere with the diversion, use or reuse of water for the Klamath Reclamation Project that is [permitted by] Appendix E-1 in any administrative context or proceeding, or judicial proceeding, or otherwise."

Comment 2 - FERC

Returning to the FERC Licensing Process is Better:

Fish passage will cost more than \$200 million and PacifiCorp is required to provide it which will render the Klamath Hydroelectric Project uneconomical. Therefore, PacifiCorp will have to abandon its FERC license and pay for decommissioning. Reservoir water quality problems (like toxic algae) can't be remedied without dam removal. Therefore, the California SWRCB will not issue a 401 Certification for continued operation of the dams. Therefore, PacifiCorp can't get a license, must abandon and decommission.

Federal Legislation:

Comment 3 - ITAs

Senator Merkley of Oregon has drafted authorizing legislation implementing the Klamath Hydropower Settlement Agreement (KHSA) and Klamath Basin Restoration Agreement (KBRA). Legislation is needed for the Secretary of Interior to choose dam removal under the KHSA. The Hoop Valley Tribe in the attached letter to Senator Merkley of October 3, 2011 found the bill "offensive and unacceptable" and vowed to oppose it if it is introduced in its current form. The bill's Klamath water rights settlement is a "unilateral subordination of our Tribe's rights in Klamath River water and to the anadromous fish that originate in that river."

"If enacted, the bill will terminate the Federal trust responsibility for our rights and curtail the associated Federal authority to protect and enforce them." The letter makes the case that under current law the U.S. government must protect senior water rights of

Comment 3 - cont.

Tribes necessary for fish production but that under the legislation and the KBRA “the United States would be enforcing the priority for water diversions even if that leaves too little water to restore the fish on which the Indian tribes rely.”

The Hoopa Valley Tribe believes that the KBRA threatens Trinity restoration goals as exemplified by the fact that the majority of fall Chinook mortalities in the lower Klamath September 2002 fish kill were of Trinity River origin.

Legislation that unilaterally terminates the trust relationship is unacceptable to the Hoopa Valley Tribe. Two major intertribal organizations (National Congress of American Indians and Affiliated Tribes of the Northwest Indians) have enacted resolutions opposing this outcome.

The current legislation does not conform to ecological restoration principles and will not solve fisheries and water quality problems. Future legislative efforts must be improved in this regard if Klamath River fisheries and Indian culture are to survive and thrive into the future.

Comment Author Unidentified
Agency/Assoc. Hoopa Valley Tribe
Submittal Date October 26, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_LT_1026_067-1	<p>Congressional approval is only one step in the process needed for dam removal. An EIS can be prepared in advance of congressional approval because the analyses can be used to support decisions. The KBRA is considered a connected action to the KHSA and therefore is not analyzed separately.</p> <p>Master Response ALT-4 Elimination of Alternative 8-Dam Removal Without KBRA from Detailed Study.</p>	No
IT_LT_1026_067-2	<p>The question before the DOI is whether analysis of dam removal without the KBRA (Alternative 8) must be fully evaluated in order to ensure that the EIS/EIR contains analysis of reasonable alternatives consistent with 40 CFR § 1502.14, or whether Alternative 8 can be documented in the EIS/EIR as an alternative that has been eliminated from detailed study with a brief discussion of the reasons for its elimination. DOI has carefully considered this question and has concluded that a number of factors contribute to the conclusion that inclusion of Alternative 8 is not necessary to ensure full analysis of a range of reasonable alternatives. The CEQ guidance implementing NEPA clearly establishes that what constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case. Among the primary factual reasons for DOI's conclusion that evaluating dam removal in the absence of the KBRA is not reasonable are the following reasons:</p> <ol style="list-style-type: none"> 1) The KHSA is a settlement of a broad range of claims and interests and the settlement parties have agreed to require support for KBRA as a requirement for settlement under the KHSA. 2) The dams in question are privately owned dams and the owner of these dams has documented and publicly expressed they will only move forward with dam removal if there are certain protections in place—protections that are expressly provided in the KHSA. 3) These protections include capping rate payer costs, protection from any harm or claims that might be caused or alleged as a result of decommissioning, and the need to recover some of the capital value of the dams by operating through 2020. 4) Under the KHSA, dam removal is to be paid for by a surcharge on the ratepayer that is capped at \$200 million with California paying any additional amounts up to \$450 million. 5) Without the funding requirements in the KHSA, and the rate payer protections that are associated with it, the only reasonably 	No

Comment Author Unidentified
Agency/Assoc. Hoopa Valley Tribe
Submittal Date October 26, 2011

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	<p>foreseeable approach to potential dam removal would be through an administrative action before FERC.</p> <p>6) If in a hypothetical absence of the KHSA, a dam removal or relicensing proceeding commences before FERC, a key criteria for the tribal relinquishment of claims against the United States in the KBRA would not be fulfilled. In such a case, the United States would not proceed with finalizing certain portions of the KBRA, leading to a likely withdrawal by the United States and potentially other parties, including specifically, the tribes.</p> <p>7) There would be no liability protection for PacifiCorp in a FERC administrative action.</p> <p>8) PacifiCorp has made it clear without these protections; it will pursue re-licensing and will not pursue removal. A conditioned alternative was presented in FERC's 2007 Final EIS/EIR for relicensing of the Klamath Hydroelectric Project. FERC indicated in its Policy Statement on Dam Decommissioning at Relicensing:</p> <p>After examining the legislative history and the relevant statutory provisions, the Commission concludes that it has the legal authority to deny a new license at the time of relicensing if it determines that, even with ample use of its conditioning authority, no license can be fashioned that will comport with the statutory standard under Section 10(a) of the Federal Power Act (the Act) and other applicable law. The Commission anticipates that, where existing projects are involved, license denial would rarely occur. 69 FERC 61,336 (12/14/1994).</p> <p>9) Given that the applicant would pursue relicensing, a conditioned license has been proposed and the rarity of license denial, we believe that dam removal is unlikely without the KHSA and we likewise believe it unreasonable that the KHSA would survive without the KBRA. Consequently, it is unreasonable to evaluate an alternative on removal without the KBRA being a connected action as defined in 40 CFR Part 1508.25(a)1.</p>	
IT_LT_1026_067-3	<p>Master Response TTA-1 Federal Trust Responsibility and the KBRA.</p> <p>Master Response GEN-27 Interplay Between Trinity River Restoration Program (TRRP) and KBRA.</p> <p>Appendix D-2 of the KBRA provides for establishment of a Technical Advisory Team (TAT) whose purpose is to inform the implementation of the KBRA as it relates to the management of environmental water and aquatic resources. To determine whether</p>	No

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to store water at any particular time, the parties would need to understand the real-time water budget of the basin. Implementation of real-time water management would occur through installation of tools such as water flow monitoring gauges and snowpack gauges. Since environmental water would be managed in real time in response to existing environmental and hydrologic conditions, it is impossible to predict how that water might actually be managed into the future. Therefore, the hydrology modeling presented in Reclamation (2012d), and referenced in the EIS/EIR, attempts to simulate one possible scenario of how environmental water might be managed given the likelihood that actual management of environmental water in the future may differ and would not be constrained by monthly time steps. This would provide managers with the ability to mimic natural flow variability in near real time.

During development of the hydrologic model for the Proposed Action the Federal team determined that it was necessary to establish minimum flow targets to insure adequate protection of fish habitats and provide conditions to reduce the potential for the creating adverse conditions similar to those that were present during the 2002 adult fish die off that occurred in the lower river. A list of those instream flow targets is provided in Reclamation (2012d) Appendix E. To reduce the potential for an adult fish kill in the future the hydrologic model increased the flow targets for August and September at Iron Gate Dam to 1,100 cfs, a flow that exceeds the Hardy Phase II recommendations (Table 27) for a 90 percent exceedance criteria (Hardy et al. 2006). The 1,100-cfs value is consistent with recommendations developed by CDFG in their analysis of the 2002 adult fish kill in the lower Klamath River (CDFG 2004).

IT_LT_0126_101

Wednesday-January 11, 2012

Government to Government Meeting between Resighini Rancheria and the Department of Interior.

ITA and Cultural Resources (36 CFR Part 800)

National Historic Preservation Act Section 106

Comment 1 - ITAs

- Concern is on the oversight of **natural resources and cultural uses of Resighini Rancheria Tribe on the Klamath River.**

Comment 2 - ITAs

- A. Water and Fishing Rights:
 - 1. **Resighini Rancheria did not participate in any negotiations of the KBRA/KHSA agreement from the beginning nor did we agree on anything concerning this process.**
 - 2. **The history of the Klamath River Reservation (KRR) is well-described in the US Supreme Court Case of Mattz vs Arnett.** In that case, the Court held that the KRR was not terminated by the Act of June 17, 1892, which opted the KRR to entry and settlement by non-Indians. Instead, the Court ruled that **KRR had continuously remained Indian Country since its creation by executive order in 1855, and therefore obviously under federal jurisdiction in 1934.**
 - 3. Cited in **Mattz Case at 487- "The Resighini Rancheria is located within the boundaries of what was first known as the Klamath Indian Reservation and what is today is the Yurok Reservation.**
 - 4. **The historical link between the Klamath River Indians and the Tribe is further illustrated by a provision of the Hoopa-Yurok Settlement Act (25 U.S.C. ss 1300i et seq.) which permitted a merger with the Yurok Tribe if a majority of the adult members of any several local Rancheria, including the Resighini Rancheria, so approved within 90 days after October 31, 1988 (25 U.S.C. ss1300i)**
 - 5. **Resighini Rancheria is primarily descended from the Klamath River Indians.** BIA records can show our original list consisted of Klamath River Tribe and was under federal jurisdiction in 1934.

← Comment 2 cont.

- 6. There is no record that Resighini Rancheria Tribe consented or terminated our water or fishing rights on the Klamath River.

Comment 3 - KBRA

- 1. Question- What is the adverse effect of the KBRA Agreements on Resighini Rancheria Tribe on water and fishing rights on the Klamath River?
- 2. Question-Will Section 15.3.9 of the KBRA Agreement change the tribal trust obligation by the Department of the Interior if an affirmative Secretarial Decision in conjunction with authorized legislation terminate or alter Resighini Rancheria Tribe's water and fishing right?
- 3. Question-Were all the six tribes in the Klamath River basin given the opportunity to participated on the KBRA/KHSA ?

Historic Properties: Water Change deliveries

← Comment 4 - Hydrology

- 1. Concern-The water levels during heavy wet seasons- original Fort Tewel and the old Waukel Village are within the Resighini Rancheria properties; as well as Waukel Cemetery and Resighini Cemetery.
- 1. Question –Will dam removal adversely affect these properties? Or for that matter any old villages and cemeteries along the Klamath River.

Cultural Use :

← Comment 5 - Cultural Resources

- 1. Concern- The water level during dry seasons-We gather willow roots along the banks of the Klamath River for making baskets, we use brush from the willow trees that grow within a quarter mile from the river for brush dances, we catch and eat fish such as salmon and sturgeon; these are several cultural ways that help us continue our traditional way of life.

← Comment 5 cont.

○ 1. Question-Is their enough water guaranteed for the Klamath River during dry season for us to continue to utilize the Klamath River for our traditional way of life?

○ 2. Question -When will we see the benefits of dam removal?

○ 3. Question-Will these KBRA/KHSA agreement s change water delivery priority from Tribes to Klamath project irrigators?

Comment 6 - KHSA

Comment 7 - Water Rights/Supply

Comment Author Unidentified
Agency/Assoc. Resighini Rancheria
Submittal Date January 26, 2012

Comment Code	Comment Response	Change in EIS/EIR
IT_LT_0126_101-1	Natural resources and cultural uses of the Resighini Rancheria are described in Section 3.12.3.4.	No
IT_LT_0126_101-2	<p>Government to government consultation was held with the six federally recognized tribes in the Basin, including the Resighini Rancheria.</p> <p>Section 3.12 and the 1) Current Effects of Implementing the KHSA and KBRA on Indian Trust Resources and Cultural Values and 2) Potential Effects of Implementing the KHSA and KBRA on Trust Resources and Cultural Values describe the history, cultural values and tribal trust resources of the Resighini Rancheria.</p> <p>Master Response TTA-4 1988 Hoopa-Yurok Settlement Act</p> <p>See Draft EIS/EIR Section 3.8.2.1 Federal Water Law The Reserved Rights Doctrine: The reserved rights doctrine provides that when lands are set aside as Indian or other federal reservations, sufficient water to fulfill the purposes of the reservation is reserved as well. Federal reserved water rights arise expressly or by implication from federal treaties, statutes, and executive orders, and vest no later than the date the reservation was established. Unlike state appropriative rights, federal reserved water rights are for present and future uses and may be exercised at any time and are not lost through non-use. While federal reserved water rights may be quantified and administered by states in the context of comprehensive state water adjudication, they are otherwise governed by federal, not state, law. The Resighini Rancheria has a reserved, unquantified water right associated with the Rancheria.</p>	No
IT_LT_0126_101-3	<p>1. Master Response TTA-4 1988 Hoopa-Yurok Settlement Act.</p> <p>2. Master Response TTA-1 Federal Trust Responsibility and the KBRA.</p> <p>The Federal government's Trust responsibility to the tribe would not be changed by an affirmative Secretarial Determination on dam removal, authorizing legislation and implementation of the KBRA Section 3.12.</p> <p>3. Master Response TTA-7 Tribal Involvement in Future Discussions of Water Management.</p> <p>Master Response KHSA-1 Negotiations of KHSA and KBRA.</p>	No

Comment Author Unidentified
Agency/Assoc. Resighini Rancheria
Submittal Date January 26, 2012

Comment Code	Comment Response	Change in EIS/EIR
IT_LT_0126_101-4	<p>The sites identified by the comment author are located on the Resighini Rancheria near the mouth of the Klamath River. The Lead Agencies evaluation of changes in flood levels following dam removal identified no change in flood levels in this area. Therefore, no impacts would occur to the properties and cemeteries on Resighini land.</p> <p>Section 3.13 Cultural and Historic Resources of the Draft EIS/EIR addresses potential impacts to village and burial sites. Additional details regarding potential impacts to buried sites and management of those sites were added to Sections 3.13.4.3 and 3.13.4.4. The potential for vandalism of exposed sites was considered and is addressed in Mitigation Measure CHR-2 through the development of management plans and discovery plans, through consultations under NHPA Section 106, as applicable</p> <p>Master Response HYDG-1 Flood Protection.</p>	No
IT_LT_0126_101-5	<p>EIS/EIR Section 3.12, Tribal Trust Assets, discusses tribe's history, cultural practices, and trust resources. Dam removal and implementation of the Klamath Basin Restoration Agreement (KBRA) would allow more flexibility in managing flows in the river below the Iron Gate Dam site, particularly for creating more short-term natural flow variability and periodic higher-flows. As noted on p. 3.3-99 of the Draft EIS/EIR, the Proposed Action would establish a flow regime that more closely mimics natural conditions in the Lower Klamath Basin. Flows under the Proposed Action are intended to benefit fall-run Chinook salmon. Future minimum flow rates would be governed by future biological opinions rather than existing biological opinions, and the exact contents are currently uncertain.</p>	No
IT_LT_0126_101-6	<p>The dams would be removed in 2020. The Draft EIS/EIR discusses impacts and benefits expected in the short-term (less than 2 years) and the long-term.</p>	No
IT_LT_0126_101-7	<p>Master Response WSWR-5 Klamath Adjudication.</p> <p>Master Response TTA-1 Federal Trust Responsibility and the KBRA.</p>	Yes

KLAMATH DAM REMOVAL
DRAFT EIS/EIR HEARING
OCTOBER 27, 2011
PUBLIC TESTIMONY
KLAMATH, CALIFORNIA

MS. WATKINS: Sunshine Watkins, S-u-n-s-h-i-n-e
W-a-t-k-i-n-s. I am the Treasurer of the Resighini
Business Council, which is a federally recognized tribe
at the top of the Klamath River Estuary.

Comment 1 - ITAs

Even though we are part of this river, we are
excluded from Klamath settlement discussions, and, yet,
our right to protect our fisheries and our water quality
will be terminated by the Secretary of the Interior if he
makes an affirmative decision on dam removal. We will
have no ability to participate as co-managers on water
quality, our fisheries, for 50 years.

The Klamath Basin Restoration Agreement is like
feeding poison to our people with a side of dam removal.
It terminates our rights of Natives of the river from top
to bottom and does not secure enough water flow for
salmon. It does not cure water pollution issues or
restore enough marshes or lakes for restoration of the
sucker fish.

Comment 2 - FERC

We are -- we are in favor of speedy dam removal
but not through secretarial decision and KHSA. We are
working through the Federal Energy Regulatory Commission
process, with the California State Water Resources

Control Board, instead. Under the 401 certification
process, the State will force dam removal, because they
will block issuance of a license. This because pollution
from the Klamath hydroelectric power reservoirs cannot be
stopped unless dams are removed.

Our people have not seen anything like the
September 2002 fish kill or the fish disease epidemics
killing our young salmon.

If we want our salmon to survive into the future
and stop toxic algae now, we need the dams out before
2020, and we need to start restoration immediately, while
our river and our salmon still have a chance. We need
ecological restoration now, which the government process
does not attempt.

Thank you.

Comment Author Watkins, Sunshine
Agency/Assoc. Resighini Rancheria
Submittal Date October 27, 2011

Comment Code	Comment Response	Change in EIS/EIR
IT_MC_1027_046-1	Master Response TTA-1 Federal Trust Responsibility and the KBRA.	No
IT_MC_1027_046-2	Master Response FERC-1 FERC Process Status.	No