



Hoopa Valley Tribal Council

HOOPA VALLEY TRIBE

Regular Meetings on the First and Third Thursday of Each Month

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Summary of Draft #11 of Proposed Klamath River Basin Agreement

Hoopa Valley Tribe

January 22, 2008

STATUS OF DRAFT

On January 15, 2008, Klamath River Basin stakeholders released a 256-page partial agreement, the proposed Klamath River Basin Restoration Agreement (“Basin Agreement” or “draft #11”). The Basin Agreement, which includes 116 pages of appendices, is one of two proposed agreements intended to improve water quality and fisheries of the Klamath River Basin. The second agreement would be with PacifiCorp, the owner and operator of six dams on the Klamath River, to remove the lower four dams: Iron Gate, Copco I, Copco II and J.C. Boyle. These four dams have no effect on the Bureau of Reclamation’s Klamath Irrigation Project, which is served by the upper two dams, Link River and Keno.

PacifiCorp’s FERC license expired in 2006, but the utility continues to operate the 161-megawatt project under annual licenses, which do not require fish and water improvements. The lowest three dams were built without any fish passage facilities whatsoever so salmon and other anadromous fish are cut off from over 300 miles of habitat of the Klamath River Basin at Iron Gate Dam, in California. Negotiations toward a dam removal agreement with PacifiCorp are proceeding slowly. PacifiCorp demands complete indemnification for itself and rate payers. While the Basin Agreement seeks \$985 million over ten years, it includes no funding for dam removal yet.

The proposed Basin Agreement, intended to be signed concurrently with a PacifiCorp dam removal agreement, covers a variety of topics including fisheries programs; water allocation in Oregon among irrigators, Upper Klamath Lake, and national wildlife refuges; measures to limit the effects of the Endangered Species Act (“ESA regulatory assurances”); power subsidies for federal and private irrigation interests; measures to minimize adverse effects on Humboldt, Siskiyou and Klamath Counties; and tribal fisheries program funding. This memorandum will not describe each of these sections in detail. The full text of Basin Agreement draft #11 and a more complete summary are available at <http://www.edsheets.com/Klamathdocs.html> or <http://www.waterwatch.org>.

FISHERIES PROVISIONS

Section 8 of the Basin Agreement incorporates the anticipated dam removal agreement with PacifiCorp and provides for continued operation of Link River Dam and Keno Dam. Sections 9-11 of the Basin Agreement provide for development of plans to restore fish habitat and to reintroduce anadromous species to habitat opened by dam removal, which it is hoped would commence by 2015.

Section 12.2.7 calls for scientific reviews, beginning in 2020 and 2030, to determine the success of restoration efforts in achieving fish habitat envisioned by the Settlement Group Tech Team Assignment X Flow Report (Jan. 6, 2007) and other hydrologic modeling. Here and elsewhere, the Basin Agreement draft #11 does not establish target salmon run sizes or harvest goals. By comparison, the 1984 Trinity Basin Act, 98 Stat. 2721, and its 1996 amendment, 104 Stat. 143, requires restoration of fish and wildlife populations to levels approximating those that existed immediately before Reclamation's dam construction began and to reestablish tribal, ocean, and sport harvests of those populations.

WATER PROVISIONS

The water resources program of Basin Agreement draft #11 is the heart of the document. The focus of these sections is upon allocating water rights claimed in Oregon by the Klamath Irrigation Project, the Klamath Tribes of Oregon, two federal wildlife refuges, and individual irrigators. These wildlife refuges are partially leased to commercial farming by the U.S. Fish and Wildlife Service and the continuation of this controversial practice is provided for by Section 15.4.3. Lease revenues will be applied to project capital costs otherwise payable by irrigators.

Draft #11 guarantees water to the Oregon irrigation and refuge users but does not guarantee water for Upper Klamath Lake or instream flow of the Klamath River downstream of the irrigation project. Water diversions under the Basin Agreement would authorize diversion from Upper Klamath Lake and river of 330,000 af during the summer plus 50,000 af for refuges. *See* Section 15.1.1.B and Appendix E-1. The authorized diversion amount under the proposed agreement would be greater than the actual Project diversions in 2003, 2004 and 2005, years during which ESA requirements restricted water withdrawals to protect threatened and endangered coho salmon and other fish. Note that, prior to establishment of those ESA restrictions, Project diversions often exceeded the diversions that would be authorized by the Basin Agreement. The diversion limitations proposed under the agreement would not become effective until approximately 2017, so they would not contribute to requirements for fisheries in the near term. Section 15.3.1 provides that Project irrigation parties' diversion limitations will become enforceable approximately 10 years in the future, following implementation of a \$100 million demand reduction plan, the funding for which is also subject to appropriations, and occurrence of certain other events.

The Basin Agreement would not protect water rights for the Hoopa Valley and Yurok Tribes whose reservations date from 1855 and 1864. The jurisdiction of the Oregon state adjudication does not extend into California. Instead, the Basin Agreement, as mentioned, would establish guaranteed amounts of water for the junior water users in the Upper Basin. The federal representatives and irrigation interests have strongly opposed setting minimum instream flows

for the benefit of the downstream, California fisheries. The basis for such instream flows was set out in the Thomas Hardy, et al. Phase II Report, (which was endorsed by the recent National Research Council Klamath Report). If they were adopted, a much lower volume (i.e., less than 300,000 af), would be available for irrigation diversions. In addition the Hardy study could be the basis for a scientific process which the Secretary could use to allocate additional water to irrigators based on annual hydrological conditions.

Section 15.2 may curtail the groundwater pumping that is anticipated as a supplement to surface water diversions for irrigation uses. *See also* Power Subsidies, below. Section 15.2.4 defines adverse impacts to groundwater as 6% reduction or more from certain named water bodies and calls for additional technical analyses by U.S. Geological Survey. Kamman Hydrology & Engineering Inc., which prepared one of the two technical analyses of the Basin Agreement, criticized section 15.2.4 as too limited in its geographic applicability. Both Kamman and Dr. William Trush (the other December 2007 reviewer) questioned the hydrological modeling used in the Basin Agreement because it ignored effects of water withdrawals from hydrologically connected groundwater sources.

Sections 16-18 provide for retirement of 30,000 af of water rights in the drainages above Upper Klamath Lake through open market purchases; funding for investigation of new storage opportunities; and preparation of plans for responding to droughts.

Section 19, “environmental water,” is the operational heart of the agreement with respect to fisheries during the next decade. Section 19.4.4 calls for Reclamation to provide \$10 million per year to lease, purchase or otherwise reduce surface water diversions from the Klamath River on the basis of recommendations of a Technical Team. The Team will be guided by the lake level and flow outputs derived from a hydrologic model, WRIMS Run 32/Refuge, which is detailed in Appendix E-5, but the \$10 million per year is subject to appropriations, and also the agreement does not obligate the Bureau of Reclamation to implement the Technical Team recommendations. The \$10 million annual expenditure would occur in the absence of any determination that the uses in the upper basin are senior to the tribal rights lower in the basin in California. Also, even if the WRIMS Run 32 flows are achieved, many fisheries scientists believe they will be insufficient to restore anadromous fish. The federal and state fish agencies have refused to document or otherwise provide any biological rationale behind the Basin Agreement water program.

TRIBAL CLAIM WAIVERS

Section 15.3 provides assurances that tribal water rights will not be asserted to prevent the diversions of surface water and groundwater authorized by the Basin Agreement. That section also releases the United States of any breach of trust based claims by tribes which might conclude that federal agencies in the past (or by negotiating this agreement) have interfered with reserved tribal fishing and water rights. Section 15.3.3 quantifies water rights of the Klamath Tribes of Oregon that are at issue in the Klamath Basin adjudication being conducted by Oregon Water Resources Department. The “interim assurances” of Sections 15.3.3 and 15.3.9 will be replaced by permanent assurances given by the United States and the Klamath Tribes of Oregon upon the occurrence of certain events, including an undefined commitment toward dam removal, events that should occur by 2012.

Section 15.3.6 provides similar assurances that tribal trust water rights will not be asserted by the Yurok Tribe and the United States and that the Yurok Tribe will release the United States of any claims of damage, interference with or other injury to fish, wildlife, land or other resources of the Klamath River Basin above the Oregon-California border. Section 15.3.7 would require similar assurances and releases from the Hoopa Valley Tribe and 15.3.8 from the Karuk Tribe of California. Unlike the Klamath Tribes of Oregon, whose water rights are at issue in the Klamath Basin adjudication, the three California tribes would not receive any quantified tribal water rights under draft #11, although the Klamath River flows across the Hoopa Valley Reservation and flows through the 45-mile length of the Yurok Reservation. Both the Hoopa Valley and the Yurok tribes hold federally reserved rights to take fish sufficient to support a moderate livelihood, together with the instream flows necessary to support those fish runs. That fishing right has further been defined by Congress in the Central Valley project Improvement Act and the 1984 and 1996 Trinity River restoration acts previously referred to. The Hoopa Valley Tribe has advised the participants in the discussion of the basin Agreement that Section 15.3.7 is unacceptable, but the section is included in the Basin Agreement at pages 73-75 nevertheless.

LIMITATION OF ENDANGERED SPECIES ACT RESTRICTIONS ON AGRICULTURE

Sections 20-24 began as an effort use Habitat Conservation Plans to protect landowners from the effects of reintroduced species in habitat that has been inaccessible due to the PacifiCorp dams. Now, Section 20.3 requires much more -- stakeholders must support the out-of-stream diversion amounts authorized by the Basin Agreement against ESA limitations and not seek restrictions on such diversions through citizen suits under the Endangered Species Act prior to completing preliminary steps. Stakeholders seeking to avoid jeopardy to fish must certify the status of the water rights retirement programs, seek available alternatives for restricting diverters outside the Project, give notice, and go through dispute resolution procedures, etc., before filing suit. None of the foregoing would be prerequisites to citizens suits under the ESA in the absence of the Basin Agreement.

POWER SUBSIDIES

Sections 25-28 state a purpose to maintain power costs for irrigation pumping at approximately \$0.03 per kilowatt hour, delivered, in 2007 dollars. This rate is below that charged to other irrigation pumping in Oregon and California and has been rejected by both state PUCs. Interim and long term subsidy funding is provided, plus legislation authorizing use of power for federal agency purposes as federal project use power/reserve power is anticipated in Section 27. Introducing as yet unresolved power issues into the Basin Agreement discussions without including the existing constituencies of the affected power supply is likely to result in additional causes of controversy with new parties.

COUNTY AND TRIBAL PROGRAMS

Sections 29-32 call for measures to insulate Klamath County, Siskiyou County and Humboldt County from adverse effects of dam removal. Sections 33-36 direct funding for tribal participation in fisheries and other programs and \$21 million for acquisition of the Mazama Forest Project by the Klamath Tribes of Oregon.

GOVERNANCE

Decision making under the Basin Agreement is left to the relevant state and federal agencies as advised by two groups, the Klamath Basin Coordinating Council and the Technical Advisory Team, which are intended to become chartered under the Federal Advisory Committee Act. *See* Section 5 and Appendix C. The November National Research Council Report on the Klamath criticized balkanized decision making in the Klamath Basin, noting the lack of consideration of all the river's tributaries and the absence of studies that are basin wide. The Basin Agreement does not address these shortcomings.

Further Information:

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