

Summary of Klamath Settlement Agreement

Prepared by WaterWatch of Oregon – www.waterwatch.org -- 503-295-4039

I. General. The agreement stems from confidential negotiations originally commenced in conjunction with the relicensing of the PacifiCorps dams on the Klamath River, but quickly grew into a negotiation of basin-wide issues, many that are not typical in FERC negotiations. The Bush administration made it clear in the negotiations that for the administration's support for dam removal and strong conditions on a new license the Klamath Project irrigators must get their issues resolved in a manner acceptable to them. WaterWatch and Oregon Wild were involuntarily excluded from the negotiations because our positions on instream flow protection for ESA listed species and commercial farming on Lower Klamath and Tule Lake National Wildlife refuges were counter to the positions of the irrigators.

II. Agreement Structure. The proposed agreement has two parts, one part dealing with water, power subsidies for irrigators, commercial farming on the National Wildlife Refuges, regulatory assurances, fish reintroduction and restoration issues ("Restoration Agreement"), and a second part focused on removal of the lower four PacifiCorps dams ("Hydropower Agreement"). The two parts are to be signed simultaneously, yet *there is no Hydropower Agreement yet*. Some interests would like to move the so-called Restoration Agreement forward even without a dam removal deal (even though this conflicts with the Agreement itself), because it would deliver assurances and monies to certain parties. The so-called Restoration Agreement is being released for public feedback at this time even though there has not yet been any agreement reached with PacifiCorps on the removal of any dams.

III. Problems with the so-called Restoration Agreement

A. ESA & Flows.

1. The agreement guarantees water to irrigators who farm on the Bureau of Reclamation's Klamath Irrigation Project ("Project irrigators") at a set level in different water year types without any guarantees of water for fish. In wetter years, the amount of water guaranteed is more than has historically been used by irrigators. In drier years, irrigators would get less than they used historically before the coho salmon were protected under the Endangered Species Act (ESA), but more than they receive under the current biological opinions for coho in dry years. There are no minimum river flows or minimum quantities of water for fish – the river and fish get what is left over after the irrigators get their guaranteed water amounts. The agreement lasts for 50 years.

The projected river flows for fish assume actions such as upper basin water right buyouts and increased natural storage through restoration projects that have not yet occurred, and even then the flows are projected to be less at times in dry years than required under the current biological opinions.

The risk regarding whether the projected water for fish will actually be available, and the risk that is the project flows will be biologically insufficient even if available, is on the fish. Independent scientific review of the projected flows questioned the assumptions and the sufficiency of flows for fish.

This would most likely violate the ESA, yet the agreement provides that the parties believe this complies with the ESA and that they will support regulatory assurances (e.g. biological opinions) based on these set guaranteed diversions to irrigators. The language in the agreement is somewhat ambiguous, but may also require parties to support ESA sufficiency language (i.e. going to Congress to get an ESA exemption or rollback) if regulatory assurances cannot be provided to irrigators. In addition there is language in the agreement that is intended to be part of federal legislation that could be interpreted as ESA sufficiency language.

The guaranteed water to Project irrigators is intended to be a diversion limitation from the Klamath River, yet the agreement does not have an express covenant by them that they will only use that amount. Their only duty is to file in the Klamath adjudication a stipulation that they will be limited to that amount once certain contingencies have occurred. This does not have to be accepted by the adjudicator and individual irrigators could challenge it. In addition the duty to file the stipulation is conditioned on regulatory assurances, funding for a water plan, and other actions that might not occur, and they have until 2017 to do this.

B. Klamath Project Water Plan.

1. In order to reduce their Klamath River surface water diversions to the limitations set forth in the Agreement the irrigators want approximately \$100 million in funding to develop and implement a plan that they devise. The plan developed by the irrigators is to be supported by all parties though there is limited public involvement or oversight, and no one knows what it will be yet. There is no requirement that any portion of the funds actually be spent on permanent demand reduction.
2. It appears that the Project irrigators' water plan will rely heavily on the substitution of groundwater to make up for any reduction in surface water diversions, and public funds may very well be misspent on groundwater development that will just be taking the same Klamath water except from a different straw. Though the agreement recognizes there may be an impact on surface water from groundwater development, it would allow a level of development that would still harm springs and surface flows and most likely in violation of Oregon law.
3. Instead of being developed by a private entity with no public oversight, the water plan should be developed by a federal agency with appropriate NEPA analysis and oversight. The plan should actually have a goal of permanently reducing demand to solve the basin's overallocation problem rather than just shift the

demand to the Lost River, the Pit River, or back to the Klamath through groundwater development.

C. Lower Klamath and Tule Lake National Wildlife Refuges.

1. All parties to the agreement are to support continued leasing of 22,000 acres of refuge land for commercial farming for the next 50 years.
2. Lower Klamath National Wildlife Refuge's water allocation from the Klamath River is reduced if it obtains water from different sources, thus limiting the refuge's ability to ever do better than the allocation given in the agreement.
3. The refuges reduced dry year water allocation for refuge wetlands is cut back drastically in a drought situation, while there are no requirements to reduce water deliveries to irrigators farming refuge land during droughts.
4. Net revenues from leaseland farming are to go 10% each to two irrigation districts, 20% to the Fish & Wildlife Service and 60% to Reclamation to pay for capital costs of the Klamath Project. These capital costs would otherwise be recovered from project irrigators thereby reducing all project irrigator's costs as long as refuge lands are leased. This will increase the constituency to continue leaseland farming as all project irrigators, even those who do not lease refuge land would then benefit from refuge farming as they indirectly share in the revenue.
5. The water allocation to Lower Klamath National Wildlife Refuge is decreased by one acre foot for each acre of walking wetlands the refuge managers develop on leaselands or private lands, regardless of the actual amount of water applied to the walking wetlands.

D. Special Deals for Project Irrigators that will limit the ability to get demand reduction and phase out leaseland farming.

1. \$40 million over 6 years to cover power rate increase to market rates over the short term and to develop alternate energy over the long term.
2. Legislation to allow Project irrigators to get preferential power rates from the Columbia River Hydro System, thereby increasing the constituency that would be against dam removal and changes in dam operations on the Columbia River to favor salmon.
3. New cost sharing agreements with Bureau of Reclamation on sharing of operation, maintenance and power costs of the Klamath Project that may need an exemption from the Reclamation Reform Act of 1982.
4. The Bureau of Reclamation would assume all costs of maintenance and operation of Link River and Keno Dams to divert water for Project irrigators at no cost to

them. Currently PacifiCorps pays these costs, but is abandoning these facilities as part of the new license. Typically irrigators would be required to share in costs of maintenance and operation of facilities for their benefit.

E. Cost.

Cost is almost \$1 billion over 10 years. Additional funds will also be needed to reach a deal with PacifiCorp and to implement dam removal.

IV. Good Things in the so-called Restoration Agreement part of the deal.

- A. \$322 million for Fisheries Restoration over 10 years.
- B. \$53 million for Fish Reintroduction over 10 years.
- C. \$45 million for reducing demand above Upper Klamath Lake by 30,000 acre-feet over 10 years.
- D. \$117 million in Fisheries Monitoring over 10 years.
- E. \$80 million to Tribes.
- F. Steps will be taken to have instream flow protection put in place that will help limit further overappropriation of the basin.

And of course dam removal would be great, if an agreement can be reached to do it in a timely fashion.