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**RIGHT NOW:**

**THE BEST PROCESS FOR REMOVING KLAMATH RIVER DAMS**

**Ironically, the Klamath Basin Restoration Agreement (KBRA) itself, has become the greatest, single impediment to the proposed removal of the Klamath River dams**

***Bottom Line:*** *The billion-dollar KBRA isn’t going anywhere, gives false hope to interests that would benefit from it, and is causing state and federal agencies to ignore worsening conditions for wildlife and endangered species in the basin for fear of upsetting the deal. As long as there appears to be some hope for the KBRA and the money that would come with it in Congress, government agencies and stakeholders in the Basin will continue to allow PacifiCorp to continue with the fish-killing status quo. No Act of Congress is necessary to remove the dams.*

***Topline Policy Matters:***

• The Klamath Basin Restoration Agreement (KBRA) is ***not*** necessary to be enacted or funded to achieve the removal of five PacifiCorp dams (two in OR, three in CA) on the Klamath River.

• Hope that the KBRA, and associated congressional funding, might someday come to pass has led the states of Oregon and California, and various other interests in the Klamath Basin, to stand with PacifiCorp, extending “temporary” annual operating licenses for the Klamath River dams since 2006. This has allowed PacificCorp to maintain the status quo, with no changes to address the lack of fish passage or terrible water quality problems their dams cause.

• Even if the KBRA is enacted/implemented, it does not directly authorize or fund dam removal. It simply allows the Klamath Hydroelectric Settlement Agreement (KHSA) to go forward, which itself contains a variety of potential off ramps and delaying tactics for PacifiCorp. Further, the KHSA is predicated upon additional state funding from California, which is highly unlikely to be provided.

• The KBRA:

(a) doesn’t provide legally enforceable requirements for adequate stream flows for fish (including 3 ESA-listed species) or the National Wildlife Refuges in the basin;

(b) would protect wildlife-harming commercial farming on the National Wildlife Refuges for another 50 years; and

(c) would use federal tax dollars to create new subsidies for agricultural special interests that would perpetuate the water quality and quantity problems facing the basin.

**A more Certain Path to Dam Removal**

To relicense the dams through the Federal Energy Regulatory Commission (FERC), PacifiCorp must comply with mandatory terms and conditions set forth by Fish and Wildlife Service and National Marine Fisheries Service, including installation of adequate fish passage and steps to improve water quality. These terms are mandatory—FERC has no discretion to alter or diminish them. *E.g., City of Tacoma v. FERC,* 460 F.3d 53 (D.C. Cir. 2006); *Escondido Mutual Water Co. v. La Jolla Band*, 466 U.S. 765 (1984). PacifiCorp has acknowledged that fully complying with these conditions costs more than the dams are worth.

PacifiCorp must also obtain federal Clean Water Act (CWA) Sec. 401 certifications from both Oregon and California (under the authority delegated to the states). These permits simply cannot be issued to the dams as they are now configured and operated given the horrendous water quality problems facing the Klamath River.

However, because the states of Oregon and California have deferred their 401 authorities and supported suspending the legally binding FERC relicensing process in favor of “temporary” annual licenses for PacifiCorp’s dams, the utility has been able to avoid complying with these mandatory requirements. Given the hurdles facing the KBRA in Congress, this could maintain the status quo over the dams for another decade or more, even as environmental conditions in the basin worsen.

FERC has completed environmental compliance and other steps preliminary to issuing a new (highly conditioned) license for the Klamath Project but has not acted because Oregon and California have not issued water quality compliance certifications.  The states have not done so because they feared it would undermine passage of the KBRA. Right now, Oregon's and California's federally elected representatives need to inform FERC, that Congress, for any number of reasons, is not going to adopt the KBRA.  As it becomes clear that the KBRA is not going to pass Congress in its current form, this could break loose the impasse it has caused and so the FERC process can restart.  PacifiCorp, that otherwise would then be faced with hundreds of millions of dollars in mandatory upgrades, were they to seek to continue to operate the dams, of course, would not want to continue to do so.

Under the Federal Power Act, when dam owners conclude that they can no longer economically operate dams under applicable law, they go through a well-established procedure to remove the dams. For example, PacifiCorp, itself, removed Condit Dam in 2011 pursuant to a Federal Energy Regulatory Commission (FERC) order under the Federal Power Act, not a new Act of Congress. Were the current impasse to be broken, this is the likely course that PacifiCorp would follow to avoid the tremendous costs, and liabilities, associated with continuing to operate the dams under a new, stringent FERC license.

**Background Information from WaterWatch[[1]](#footnote-1)**

The [KBRA and KHSA] agreements result from confidential negotiations originally about relicensing PacifiCorp’s Klamath River dams, but which quickly grew to include basin-wide issues unrelated to the dams. WaterWatch was a party to the negotiations until being involuntarily expelled, along with Oregon Wild, for expressing disagreement with the proposed (now final) deal term mandating that parties support [commercial farming on the basin’s National Wildlife Refuges]. Despite stated willingness to continue to negotiate in good faith, WaterWatch [and Oregon Wild were] excluded from the talks for failing to support this destructive practice.

In its last months in office, the Bush administration moved to lock in the KBRA by linking it to the KHSA agreement regarding PacifiCorp’s Klamath dams. Full implementation of the agreements will require federal legislation, substantial federal funding (nearly one billion dollars), and other key steps. WaterWatch is continuing to work to address the problems with these agreements.

While WaterWatch fully supports dam removal, WaterWatch does not support the KBRA and does not support linking the KBRA to the KHSA.

**Key Problems With The Klamath River Basin Restoration Agreement (KBRA)**

1. The KBRA attempts to guarantee water deliveries for the Klamath Project Irrigators but contains no water guarantees or minimum stream flow levels for fish (including three fish species listed under the Endangered Species Act). The KBRA water guarantees for the Klamath Project Irrigators in wet years would deliver more water to the irrigators than they historically used in wet years, and in dry years would deliver more water to the irrigators than allowed under current Endangered Species Act protections for coho salmon;

2. The Klamath River flows which are predicted (by the deal’s proponents) to result from the KBRA would be at levels below those needed for salmon, including the river flow levels currently required under the Biological Opinion for coho salmon and the flows recommended for salmon by the best available science;

3. The Klamath Project Irrigators would receive $92.5 million under the KBRA to develop and implement their own private water plan without public oversight. A significant concern is that much of this money could be used for unsustainable groundwater development;

4. Commercial farming on 22,000 acres of Lower Klamath and Tule Lake National Wildlife Refuges would be supported by all non-federal KBRA parties for 50 years when the practice needs to be phased out;

5. The KBRA’s attempted water allocation to Lower Klamath National Wildlife Refuge may never occur, is insufficient, limits the refuge from otherwise improving its water situation, and puts a heavy burden on the refuge during droughts. Under the KBRA, water deliveries to refuge wetlands would be cut before reducing water deliveries used to irrigate refuge land for commercial farming;

6. The KBRA would eliminate the best tools to secure water for Lower Klamath National Wildlife Refuge;

7. Klamath Project Irrigators would receive $41 million in power subsidies, plus lower cost BPA power, plus special contracts that allow them to continue to drain important National Wildlife Refuge lands for commercial agriculture; and

8. The KBRA’s price tag is over a $1 billion, yet it fails to address key problems in the basin and none of this money is for dam removal.

**Key Improvements Needed In The Klamath Hydroelectric Settlement Agreement (KHSA)**

Though the KHSA could lead to dam removal, it is not an agreement to remove any dams, but to study whether or not any of the dams should be removed. The KHSA should be modified to address the following problems:

1. Dam removal is unnecessarily linked to the KBRA and if KBRA legislation does not pass, dam removal would be derailed;

2. There is no agreement to remove dams, only to go through a new process to determine whether dams should be removed or not;

3. No dam removal would occur before 2020, while PacifiCorp would be allowed to continue operations that degrade water quality and harm salmon, including Endangered Species Act listed coho with minimal operational changes in the interim;

4. There are a large number preconditions that provide PacifiCorp with many opportunities to abandon dam removal; and

5. There is no definite date to return to the Federal Energy Regulatory Commission dam relicensing process if dams are not being removed.

1. http://waterwatch.org/programs/restoring-the-klamath/the-klamath-settlement-agreements-agreements-summary-and-analysis [↑](#footnote-ref-1)