

**KLAMATH POWER AND FACILITIES AGREEMENT SUPPORT ACT**  
**S. 482**

**ENHANCED SECTION-BY-SECTION ANALYSIS**  
**May 5, 2023**

The Klamath Power and Facilities Agreement Support Act was introduced in both the U.S. House of Representatives and Senate during the 117th Congress. However, it did not advance in either chamber, due, in part, to the lateness of introduction.

It has been introduced in the U.S. Senate in the 118th Congress as [S. 482](#). The need for the bill as well as a discussion of the specific provisions, follows.

**BACKGROUND AND NEED**

**KBRA and KHSA**

As the 2006 expiration date for the federal license for PacifiCorp’s Klamath River hydroelectric dams approached, Klamath Water Users Association (KWUA) and many other stakeholders in the Klamath Basin engaged in good faith negotiations in search of interest-based solutions to conflicts over water and related resources.

This process led to the concurrent signing, in February 2010, of the Klamath Basin Restoration Agreement (KBRA) and the Klamath Hydroelectric Settlement Agreement (KHSA).

At its core, the KBRA was a water right settlement, aimed at reducing potential conflicts between the Klamath Project and reserved tribal water rights in the Klamath Basin. A key element of that settlement was a “Limitation on Diversions” for the Project, including fairly significant reductions during drought.

A related commitment in the KBRA was the agreement by three basin tribes, and the United States as trustee for all tribes, that any senior tribal water rights could not be exercised in a manner that reduced Project diversions below agreed-upon levels.

To make the agreement durable, the KBRA also addressed the critical elements necessary for all parties to support that settlement. For Project water users, those elements included:

1. Programs to align irrigation supplies with demands, particularly during periods of drought;

2. Continuation of affordable power that Project water users had experienced since 1917 due to the fact that PacifiCorp dams generated power using Project facilities and Project water rights; and
3. Regulatory assurances, including measures that would ensure there would be minimal or no negative impacts to agriculture resulting from dam removal and attempts to bring anadromous fish into the Upper Basin.

The KHSA provides a path for potential removal of four privately-owned hydroelectric dams on the Klamath River. Under the February 2010 KHSA, dam removal could occur only if a number of conditions were satisfied, including the enactment of legislation to authorize the Secretary of the Interior to decide whether the dams would be removed and to act as the dam removal entity and for the Bureau of Reclamation (Reclamation) to take title to Keno Dam, which is owned and operated by PacifiCorp (though not a power generating facility).

Importantly, another condition on dam removal under the 2010 KHSA was that federal legislation also be enacted authorizing implementation of the KBRA, including its protections for Project water users. The parties supported a single federal legislative measure that would have authorized both Agreements.

The KBRA terminated automatically on December 31, 2015, in accordance with its terms, due to lack of congressional authorization.

The KHSA did not automatically terminate, but the lack of timely authorizing legislation was one of a handful of “potential termination events” that could lead to termination of the KHSA. Given its terms and the impossibility of enactment of legislation for the (now expired) KBRA, it appeared inevitable that the KHSA would also terminate. PacifiCorp would have to go back to the relicensing process and the parties to both agreements would have to re-engage if they wanted to return to the basin-wide stability promised in the suite of interrelated agreements.

However, dam removal proponents (including the states and the federal government) and PacifiCorp chose to disregard the indivisibility of the previous package of agreements. They negotiated an overhaul of the KHSA to make the KHSA go forward as a stand-alone agreement, divorced from the carefully negotiated package that had been necessary to make the KHSA possible.

Supporters of a “dam removal only” package thus scrapped and replaced the 2010 KHSA through amendments that fundamentally changed the KHSA approach and abandoned the concept of a comprehensive settlement.

In April of 2016, there was a second signing ceremony for a KHSA. The 2016 KHSA provided for dam removal to occur through a new non-profit organization created by the states of Oregon and California (the Klamath River Renewal Corporation), with federal approval by the Federal Energy Regulatory Commission.

## **KPFA**

In an effort to not be wholly left aside and subject to the regulatory measures that would likely come with dam removal and anadromous fish in the Upper Basin, KWUA scrambled to negotiate at least some protections and preserve some elements of the formerly-integrated package of agreements. These actions led to the Klamath Power and Facilities Agreement (KPFA), which includes as parties the Department of the Interior, the Department of Commerce, the states of Oregon and California, and several non-profit organizations, alongside KWUA and KWUA member entities.

The KPFA included certain express commitments by the Department of the Interior and Reclamation with respect to certain facilities. It also included broader commitments by all the parties to work to address issues related to fisheries and related resources.

The Department of the Interior's express commitments with respect to Klamath Project facilities are to:

1. Operate and maintain Keno Dam consistent with historical practices at no cost to Project water users;
2. Continue to operate and maintain Link River Dam consistent with historical practices;
3. Construct "fish entrainment alleviation facilities" as necessary to prevent fish from entering Project facilities; and
4. Otherwise minimize new regulatory burdens that could result from the presence of anadromous fish in currently unoccupied areas.

***Additionally, the KPFA included a commitment by the non-federal parties to support federal legislation to carry out the above measures and further provide that Reclamation's costs in connection with Link River Dam also not be reimbursable by Project water users.***

The broader commitments by all parties in both the KPFA and KHSAs (as amended) are to work to address issues related to water quality, habitat restoration, and conflicts related to water use, fisheries, and related resources.

A more concrete commitment of the parties to both the KHSAs and KPFA is to "develop and complete an agreement or agreements to address issues affecting their interests and resolving resources conflicts and related issues." The parties even stated their intent "to conclude the agreement or agreements within the next year." This commitment, of course, has not been fulfilled.

Some key elements of the KPFA-supported terms were enacted by Congress in 2018.

The proposed legislation, S. 482, completes the process begun in 2018 and would enact the remaining provisions of the KPFA, as the parties to the agreement committed.

## SECTION-BY-SECTION SUMMARY

The bill has only two sections.

### Section 1. Short Title

Section 1 provides that the title of the Act is the “*Klamath Power and Facilities Agreement Support Act.*”

### Section 2. Klamath Project Water and Power

Section 2 consists of two subsections. Subsection (a) is the substantive part, in that it amends section 4 of the Klamath Basin Water Supply Enhancement Act of 2000 (Enhancement Act),<sup>1</sup> as further described below. Subsection 2(b)(2) provides a “savings” clause that addresses the administrative effect of these amendments: it requires compliance with existing federal law; that the legislation shall have no effect on water rights or tribal trust, or treaty obligations; and, the unavailability of federal funding and funding authorization for dam removal activities.

The amendments in subsection (a) to section 4 of the Enhancement Act address certain concerns with existing authorities, and also adds specific new authorities, which can be categorized as follows:

#### **Programs to Align Irrigation Supplies and Demands**

Under S. 482, subsection (b) of section 4 of the Enhancement Act would be amended by restating, verbatim, the existing subsection, which authorizes programs to align irrigation supplies and demands, with the exception of omitting a sentence in the current law that imposes a \$10 million average annual limit on expenditures under the subsection. A new subsection (e) would also further elaborate on the goals of such programs.

Rationale: The existing cost cap has proven to be difficult for Reclamation to administer and impractical for Project water users in light of severe drought and significant reductions in Project allocations. Reclamation has supported and expended upwards of \$27 million in a single year (2021) under the existing authority, with the result of being constrained in subsequent years to implement effective programs in light of continued drought and other constraints. By striking the current cost cap, Reclamation will have flexibility to address repeated years of severe drought, as has recently been experienced.

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<sup>1</sup> <https://www.govinfo.gov/content/pkg/PLAW-106publ498/html/PLAW-106publ498.htm>. The Enhancement Act, in its section 6, authorizes nonreimbursable appropriations for purposes of the Enhancement Act. The Enhancement Act was amended in 2018 to include some of the terms supported in the 2016 KPFA. See section 4308 of Public Law No. 115-270 (<https://www.congress.gov/115/bills/s3021/BILLS-115s3021enr.pdf>). In 2020, a technical corrections bill was enacted. Pub. L. No. 116-191 (<https://www.govinfo.gov/content/pkg/BILLS-116s3758enr/html/BILLS-116s3758enr.htm>).

The nature and the scope of existing programs is not expected to change if the cost cap is eliminated. However, the subsection may be a basis of authority for use of appropriations under other laws such as the Inflation Reduction Act (which appropriated \$4 billion to Reclamation for expenditure under existing authorities).

### **Affordable Power**

Subsection (c) of section 4 of the Enhancement Act would be amended to add new language authorizing implementation of the recommendations for achieving affordable power that previously were transmitted to Congress, including through cooperative agreements and financial assistance.

Rationale: For over 90 years, Project water users received affordable power rates under the various contracts between the United States and PacifiCorp and its predecessors. Affordable power was furnished to water users in recognition that it was necessary to fulfill the Project's purpose and that Project facilities and water rights were being used to generate power at the hydroelectric facilities on the Klamath River. With the expiration of that arrangement, Project water users are among the very few PacifiCorp tariff customers for irrigation pumping, and do not have a meaningful opportunity for lower-cost power such as from the Bonneville Power Administration.

A 2020 study required by Congress concluded that Klamath irrigation pumpers in Oregon pay double, and Klamath irrigation pumpers in California pay triple, the average rate for power paid by customers in similarly situated reclamation projects in the northwest.

The amendments to subsection (c) would authorize Reclamation to implement measures to develop alternative sources of or measures for affordable power for Project water users.

### **Restoration Activities**

A new subsection (d) would be added to section 4 of the Enhancement Act authorizing the Secretary of the Interior to undertake projects to reduce fish entrainment, reduce or avoid impacts to aquatic resources due to operation of the Project, and restore fishery habitat in the Klamath Basin. The Secretary would also be authorized to undertake feasibility studies in connection with such projects. A new subsection (e) would further elaborate on the goals of such projects.

Rationale: This section is necessary to allow Reclamation to sponsor the construction of fish entrainment alleviation facilities (e.g., fish screens) at no cost to Project water users in accordance with the terms of the KPFA. These facilities are not currently required but are desired by dam removal proponents, and may be demanded by regulators, when anadromous fish are present in the Upper Klamath Basin.

## **Pumping Plant D**

A new subsection (f) would be added to section 4 of the Enhancement Act authorizing the Secretary of the Interior to reimburse Tulelake Irrigation District for up to 69 percent of the costs incurred by the district in operating and maintaining this facility, in relation to the benefits conferred to the United States.

Rationale: Pumping Plant D is the primary means of managing water levels in both Tule Lake and Lower Klamath National Wildlife Refuges, which were two of the nation's first refuges established for migratory birds. This section is necessary to allow the Department of the Interior to reimburse Tulelake Irrigation District for Pumping Plant D costs to the extent that such operations benefit the United States.

## **Keno and Link River Dams**

A new subsection (g) would be added to section 4 of the Enhancement Act authorizing Reclamation to carry out the terms of the KPFA with respect to not requiring reimbursement by Project water users for any costs incurred in connection with Keno and Link River Dams.

Rationale: In the 2016 KHSA, the Department of the Interior agreed for Reclamation to take title to Keno Dam from PacifiCorp and operate and maintain the dam in perpetuity. In late 2022, Reclamation and PacifiCorp entered into an agreement specifying the title and related conditions for this transfer to be consummated. PacifiCorp is preparing to file for a license amendment with the Federal Energy Regulatory Commission (FERC) to remove Keno Dam from the existing federal license based on this transaction. Under the KHSA, Reclamation will take title to Keno once the Klamath River Renewal Corporation provides a notice that it is prepared to commence dam removal. It now appears inevitable that the transfer will occur, notwithstanding lingering questions about Reclamation's subsequent authority to operate and maintain Keno Dam, particularly at no cost to Project water users.

Based on discussions with Reclamation and the state of Oregon, it is anticipated that Reclamation would, if the law is enacted, undertake a feasibility study on the future of Keno Dam in accordance with the authority provided in the new subsection (d) to section 4. It is commonly understood that there are likely less expensive and more environmentally friendly alternatives to operating and maintaining Keno Dam in perpetuity. Any feasibility study recommending new construction would have to be presented to Congress for further authorization.

Reclamation owns Link River Dam.

However, Reclamation has never been directly responsible for the operation and maintenance of Link River Dam, which was constructed and operated by PacifiCorp and its predecessors. As such, Project water users have generally not incurred costs in connection with the dam over its 102-year existence.

Under present conditions, the dam is operated primarily to produce certain downstream flows and achieve certain lake levels. Originally, such operations benefited power production and accordingly, were covered by the power company. Parties to the various settlements have appropriately acknowledged that their advocacy for PacifiCorp's departure from the Klamath Basin should not result in irrigators taking on cost obligations historically borne by PacifiCorp. In addition, Link River Dam is operated largely to benefit fish.

### **C Canal Flume Replacement**

A new subsection (h) would be added to section 4 of the Enhancement Act directing Reclamation to enter into an amendatory contract with Klamath Irrigation District designating as nonreimbursable 35 percent of the existing repayment obligation for replacement of the C Canal Flume.

Rationale: Klamath Irrigation District replaced the C Canal Flume in 2016, with a portion of the costs covered by the United States pursuant to a repayment contract with Reclamation. The C Canal serves over 70,000 acres within the Project, which generate return flows that have historically been the primary source of water for Tule Lake and Lower Klamath National Wildlife Refuges. As originally constructed, the elevated C Canal Flume crossed over a state highway, underneath a railroad, and was immediately adjacent to a public high school.

In 2013, Reclamation designated the flume's replacement as critical to human safety and protection of public infrastructure, which we believe should have triggered the 35 percent nonreimbursable authority for extraordinary operation and maintenance projects designated as emergency work under current law (Pub. L. No. 111-11). Considerable support was provided for Reclamation to make that designation, but it failed to act. Therefore, this provision is necessary to give effect to authority provided by Congress relative to emergency, extraordinary operation and maintenance.