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MEMORANDUM

TO: Parties to the Amended Klamath Hydroelectric Settlement Agreement

FROM: Paul Simmons, KWUA Executive Director and Counsel

SUBJECT: Attention to Klamath Project Interests

DATE: August 10, 2020

Klamath Water Users Association (KWUA) is following the progress of the amended Klamath Hydroelectric Settlement Agreement (Amended KHSA). We are aware of the considerable time and effort that has been committed to that process. At the same time, we are disappointed with the state of implementation of other commitments that, over a long period of time, made the Amended KHSA possible. The purposes of this memorandum are to describe our concerns, using the context of the events that led to the Amended KHSA, and to request you give attention to needs that are unaddressed.

In summary, we urge the parties' attention to section 1.9 of the Amended KHSA, which describes commitments to develop agreements related to water and provide economic stability for basin communities by 2017. We also explain our concern with the unsatisfactory state of implementation of key aspects of the Amended KHSA's sibling agreement, the 2016 Klamath Power and Facilities Agreement (KPFA). With the lack of implementation of these elements, removal of PacifiCorp's hydroelectric dams on the Klamath River would cause damage to Klamath Project water users. Finally, we also bring to your attention other bargained-for benefits for KWUA and its members that have not been realized.

KWUA's position on the Amended KHSA is non-opposition to the Amended KHSA in its current form. That commitment, made in the KPFA,¹ has been honored faithfully. With that said, and as discussed below, there is need for attention to several issues now.

The original draft of this memorandum was completed on July 13, 2020, just before the Federal Energy Regulatory Commission's (FERC) July 16, 2020 order on license transfer (172 FERC

¹ Section IV.A.2 of the KPFA states:

Each Party [to the KPFA] shall support and defend the Amended KHSA, in its current form as of April 6, 2016, and its objectives in each applicable venue or forum, including any administrative or judicial action, in which it participates. For purposes of this Section IV.A.2 only, the term "support and defend" means that the Party will advocate for the Amended KHSA or refrain from taking any action or making any statement in opposition to the Amended KHSA.

We are aware that the Amended KHSA was further amended in November of 2016. We are not aware of the specific nature of the amendment or amendments, but we have not identified changes that affect KWUA's members' interests.

¶ 61,062). We are also aware of the letter to Amended KHSA parties from PacifiCorp dated July 23, 2020. It is our understanding that the Amended KHSA will terminate on January 19, 2021, unless all Amended KHSA parties or, at minimum the federal and state parties, PacifiCorp, and the Klamath River Renewal Corporation (KRRC), have agreed on an amendment or to deem the July 13 FERC Order to conform to the Amended KHSA. We understand that the Amended KHSA parties will be in communication with one another about these issues. KWUA urges your attention to the issues below.

Background: KBRA and KHSA, and “Indivisibility”

There is considerable history related to the Klamath Basin Restoration Agreement (KBRA), the Klamath Hydroelectric Settlement Agreement (KHSA), the Amended KHSA, and the KPFA. Beginning more than a dozen years ago, KWUA was asked to take certain positions or actions, or refrain from taking positions or actions, so that other parties could leverage PacifiCorp toward an agreement on dam removal and/or otherwise help make dam removal possible. There were instances where KWUA was asked to, and did, take action, or refrain from taking action, in a manner that advanced the objectives of the parties seeking dam removal. This occurred at considerable personal, professional, and financial expense, and affected relationships in the community. I hasten to add that the past partnership with KHSA parties in that joint effort was a two-way street, with KWUA and its members receiving important and various support on various issues, in an atmosphere of trust.

The development of the KBRA and KHSA were interrelated. Few know or remember that, in early 2008, a public draft of the KBRA was released. At that time, there was no settlement, and not even a conceptual settlement, with PacifiCorp concerning the hydropower dams. However, the 2008 public draft KBRA contemplated that there would eventually be some type of settlement with PacifiCorp.

The political momentum associated with the January 2008 public draft KBRA was significant. At the time the 2008 public draft KBRA was completed, there was discussion of whether it would be appropriate to seek necessary congressional authorization for that agreement alone, while making certain elements of the KBRA contingent upon ultimate realization of an agreement with PacifiCorp concerning PacifiCorp’s hydropower dams. It was believed that the political environment was favorable for such legislation and that the legislation might further leverage PacifiCorp. However, some parties, primarily those whose major objectives focused on the downstream hydropower dams, were opposed to having the KBRA move by itself. Thus, it was agreed that the parties would turn their attention to pursuing a settlement with PacifiCorp related to the dams.

In the fall of 2008, PacifiCorp, the two states, and the United States announced an “agreement in principle” (AIP) related to the hydropower dams and a process that could result in dam removal. Notably, PacifiCorp and other parties had insisted and agreed that the existing FERC process was not suitable to the kind of complex settlement needed for this specific situation. Rather, federal legislation would be required to establish a workable procedure. Additionally, it was a nonnegotiable condition for PacifiCorp that the KHSA would not advance unless Congress had, by statute, granted immunity to PacifiCorp from any potential liabilities resulting from dam removal. The KHSA was then negotiated.

In parallel, there were refinements and updates, and conforming amendments, negotiated for the final KBRA.

One core principle for both the KBRA and KHSA was “indivisibility” – that is, the parties agreed that the two settlements would be legally and politically linked so that neither could advance without the other also advancing. For example, the KBRA could not be fully implemented unless legislation had been enacted authorizing the KHSA, and various benefits to agriculture (e.g., tribal settlements) would not be realized unless dams were actually removed pursuant to the KHSA.

The KHSA was “indivisible” from the KBRA because of the common need for legislation for both agreements. To make the KHSA indivisible from the KBRA, section 3.3.4.A of the KHSA provided that the “Secretarial Determination” necessary for dam removal under the KHSA process could not occur unless legislation authorizing the KBRA had been enacted.

The KBRA and KHSA thus both included an appendix identifying the elements of federal legislation to be supported by the parties. The appendix was identical for both agreements, and identified the substance of authorizations needed for both agreements.

Each of the KBRA and KHSA required that any party to either agreement also, concurrently, sign the other agreement. The lone exceptions were: PacifiCorp (which did not participate in the KBRA) and the federal parties who, we learned late in the process, would sign the KBRA only after authorizing federal legislation had been enacted.

Both the KBRA and KHSA were signed in February of 2010.

Various members of Congress drafted or introduced legislation to provide approval and implementation of both the KBRA and KHSA. This occurred in extremely close coordination with the settlement parties. The first bills were introduced in both the Senate and House in 2011. The last-introduced bill was in 2015, and would have also approved the “off-project” settlement that had been reached in 2014.

Notwithstanding the lack of federal legislation for implementation of the two agreements, several developments related to the KHSA occurred with KWUA’s support: KWUA honored its commitments toward support of both agreements and indivisibility by supporting (and testifying in favor of) state legislation authorizing a dam removal surcharge on PacifiCorp’s Oregon customers’ power bills, intervening in public utilities commissions’ proceedings that ordered the surcharge, and support of the authorization for further funding in California’s Proposition 1.

Indivisibility Discarded

The KBRA provided that, if authorizing federal legislation was not enacted by December 31, 2015, the agreement would terminate. Because no legislation was enacted by that date, the KBRA terminated.

Under the KHSA, the failure of “timely” enactment of federal authorizing legislation triggered a process that could, but would not necessarily, lead to termination. This process was triggered in late 2015/early 2016. Also, under the KHSA, the so-called “big four” (PacifiCorp, California, Oregon, and the United States) could amend the KHSA without other parties’ agreement. The big four developed principles under which the KHSA would be “amended” so as not to require federal legislation for implementation. Meanwhile, funding secured based on the original KHSA would remain available for dam removal under the processes of the Amended KHSA.

This development was not well-received by KWUA or its members. Despite all parties having been informed, and advocated to Congress, FERC, and others, that PacifiCorp could not make an agreement unless there was federal legislation to make it work, the non-irrigation parties pivoted and proposed to enter a new agreement on dam removal that did not require federal legislation. This agreement would make use of the fruits of prior collaboration with KWUA, including the leveraging of PacifiCorp and \$450 million that would not have materialized absent the linkage of the original agreements.

Despite this significant let-down, KWUA and other irrigation parties were asked to “go along and get along,” and thus let the Amended KHSA move by itself. In fact, the Amended KHSA would accomplish all that the original KHSA would accomplish, but it was to be divorced from any consideration of irrigation interests. We were asked to try to find ways that we could live with an abandonment of indivisibility and a fundamental overhaul of the KHSA. For better or worse, we accepted that invitation and placed trust in our partners, and we have taken no action to hinder or oppose the Amended KHSA.

The main consolation prizes for KWUA and its members at this time were included in the 2016 KPFA and certain representations in the Amended KHSA.

In April 2016, KWUA participated in the signing ceremony for the Amended KHSA and the KPFA, along with the Secretary of the Interior, both Governors Brown, and others.

Commitments Lacking Implementation

Un-addressed Injuries to Project Irrigation if Dams Are Removed

In early 2016, as it was being proposed that the Amended KHSA proceed on its own, KWUA was assured that other parties would, expeditiously, address issues important to KWUA. Far and away the most important of those was an adequate and reliable water supply, which was a core element of the KBRA. Section 1.9 of the April 6, 2016 Amended KHSA states:

[T]he Parties are committed to engage in good faith efforts to develop and enter into a subsequent agreement or agreements pertaining to other water, fisheries, land, agriculture, refuge and economic sustainability issues in the Klamath Basin with the goal to complete such agreement or agreements within the next year.

A dominant purpose of this provision was to assure irrigation parties that they would not be left behind. We urge that all Amended KHSA parties review their actions since April of 2016 that relate to compliance with this commitment. At minimum, section 1.9 has not been honored with the same vigor as other aspects of the Amended KHSA.

Amended KHSA supporters contend that Amended KHSA implementation will have general benefits for the basin, including water supply for irrigation. When the Amended KHSA was paired with the KBRA, the benefits for irrigation were known. The most important of these was an adequately, reliable water supply. Currently, one can only hope that might return, but there has not been a committed effort to return to that sort of stability. Realistically, the opposite has occurred.

In this regard, Amended KHSA supporters emphasize that the hydropower dams do not store water used for Klamath Project irrigation or other irrigation. This is true. The principal function of the dams is to maintain water levels to provide head for what is largely run-of-the-river power generation.

That said, in recent years, the hydropower dams have provided water supply benefit for Klamath Project irrigation. Specifically, the limited operational storage in those facilities has allowed the U.S. Bureau of Reclamation (Reclamation) to reduce releases from Upper Klamath Lake for a period of time when Upper Klamath Lake elevations are considered important for suckers. As a result, risks to irrigators' ability to draw on Upper Klamath Lake have been avoided. These operations, and other limited system flexibility afforded by the dams, will not exist if the dams are removed. We can hope that this detriment would be overwhelmingly offset by a water supply benefit. But, it is a strong reason for concern that hope is all that we can have. Robust implementation of the commitments in Amended KHSA section 1.9 could have addressed and eliminated that concern.

Un-addressed Injuries to Project Irrigation if Dams Are Removed

Several parties to the Amended KHSA are also parties to the KPFA. All parties to the Amended KHSA agree (in section 1.9) to support or at least not oppose, the KPFA. KWUA largely agrees with KRRRC's website's characterization of the KPFA: "the KPFA addresses the continued operations of other PacifiCorp facilities that will be transferred to Bureau of Reclamation. The agreement also commits parties to protect Klamath Basin irrigators from financial and regulatory burdens associated with fish returning to the Upper Klamath Basin and also commits parties to continue efforts to resolve water disputes."

For Klamath Project water users, there are two major sources of injury due to dam removal that have not yet been resolved: (1) new costs and potential liabilities associated with Keno and Link River Dams; and (2) new regulatory burdens. These are discussed in turn, below.

New Economic Burdens and Liability Risks: Keno and Link River Dams

There is a rich history of the interrelationship of the Klamath Project and PacifiCorp. PacifiCorp owns and operates Keno Dam and operates Link River Dam. Both of these facilities are important to Project irrigators and the current legal arrangements are based on arm's length negotiations.

Beginning 14 years ago, it has been understood and agreed by all parties to the settlement efforts – including federal parties – that if KWUA (and its members) were to facilitate dam removal, Klamath Project water users would not be saddled with costs related to the facilities currently operated by PacifiCorp. This principle was reflected in the very earliest conceptual settlement term sheets through the final KBRA. Notably, the January 2008 public draft KBRA included terms (pp. 28-29) to protect Project water users from bearing any costs for Keno or Link River Dams in the event PacifiCorp would discontinue operation (and discontinue ownership in the case of Keno Dam). (See pages 28-29 of the 2008 public draft KBRA.)

Similarly, under section 15.4.5 of the final KBRA, Keno and Link River Dams were to be operated by Reclamation consistent with historic practice, and Project water users would not bear any costs associated with these facilities. The contemplated federal legislation for KBRA implementation would have authorized these terms to the extent congressional authorization was required. The KHSA provided for the transfer of title to Keno Dam to Reclamation, and the parties supported legislation that would allow Reclamation to receive title to Keno Dam as part of the Klamath Project.

When the KHSA was severed from the KBRA, the Amended KHSA and KPFA carried forward the arrangements that had been provided in the prior agreements. That is, Reclamation would take title to Keno (Amended KHSA § 7.5) and Project water users would not bear any costs or liabilities associated with Keno or Link River Dams. The provisions concerning Link River Dam and Keno Dam in the 2016 KPFA (KPFA § II.A and Attachment A) are a major reason that KWUA and many Project districts signed the KPFA. Full implementation of these provisions requires federal legislation that would make effective the terms of Attachment A to the KPFA.²

The legislation necessary to provide protections for irrigators has not been enacted. The necessary measure passed the Senate in 2016, and has been proposed in other bills, but has not been enacted. As a consequence, dam removal will have negative effects on Project irrigation. Accordingly, we urge your aggressive support, in this Congress, of the necessary legislative measure.

New Regulatory Burdens Unaddressed

Another long-standing concern of irrigation parties is that dam removal not result in new regulatory burdens. A key objective of dam removal is to expand habitats of salmonids to areas that they do not currently inhabit. The KBRA provided protections against new regulatory burdens associated with the presence of these species in the Klamath Project area. Those protections are, of course, gone.

² The Amended KHSA, like the original KHSA, provides a process for transfer of title to the Keno facility to Reclamation. Unlike the original KHSA, the Amended KHSA does not assume a need for federal legislation in order for this to occur. We are unaware of why this is so, other than the Amended KHSA parties' desire to effect its implementation without need of authorizing legislation.

However, section II.B.1 of the KPFA, which is still in effect, states:

The Parties anticipate substantial programs for introduction or reintroduction of species not currently present in the Upper Klamath Basin, and substantial habitat restoration activities or programs, resulting in unique circumstances that could have potential regulatory or other legal consequences for users of water and land in the Upper Klamath Basin under Applicable Law, including new or modified regulatory obligations that could affect the ability to divert or use or dispose of water or the ability to utilize land productively. Further, the Parties affirm that interests in the Upper Klamath Basin with potential exposure to regulatory obligations have in good faith over a period of time preceding this Agreement, and preceding the KBRA: played a substantial role in bringing about the circumstances that make reintroduction possible; and that the other Parties through such period have confirmed the need to provide such assurances; and, if there were to be adverse consequences for regulated parties due to reintroduction or restoration, it would undermine the general goal that regulated parties promote and facilitate environmental restoration.

Section II goes on to commit the parties to support protections from new regulatory burdens, including federal funding of facilities to limit regulatory consequences of the occurrence of new species in the Project area. These protections have yet to be realized or approved, in federal legislation or otherwise. Again, this means that, under the *status quo*, there would be adverse impacts to Klamath Project agriculture from dam removal. If the Amended KHSA is to be pursued further, the parties should be diligent to prevent adverse impacts to Project agriculture.

Other, Unrealized Bargained-for Benefits

As discussed above, for irrigation parties, the core benefit of the overall, indivisible KBRA-KHSA settlement package was a sufficient, reliable water supply. Section 1.9 the Amended KHSA includes commitments to return expeditiously to addressing those types of issues. But, as part of the overall bargained-for benefits the KBRA also included other terms of significant importance to irrigators that have limited or no consequence for other settlement parties. The recitals in the KPFA reflect this circumstance.

Components of the KBRA as related to agriculture in the Upper Klamath Basin included the cost of power for irrigated agriculture and the operation of facilities related to irrigated agriculture. State and Federal and other Parties are committed to realization of processes and benefits contemplated under the three agreements, recognizing that certain outcomes were not guaranteed or are more uncertain than others and recognizing also that certain measures have independent merit.

In addition to the KPFA terms discussed above, the parties' commitments include support for specific legislative measures that would produce some of the results that would have derived from KBRA implementation. These actions are described in section II.C.1 of the KPFA. A few, but by no

means all, of these legislative measures have subsequently become law. But the majority remain. Thus, again, KWUA requests your active support to accomplish these measures now.

Conclusion

We understand that KHSAs parties believe that dam removal will provide broad benefits for the basin, including the Klamath Project. For all the reasons identified above, that perspective is too limited.

KWUA has intermittently identified some of the above issues to individual Amended KHSAs parties. It is important that all of those parties are informed of all of these issues at this time.

Despite the very considerable concerns and realities above, KWUA remains non-opposed to the Amended KHSAs in its current form. However, if implementation of that agreement is to continue, the Amended KHSAs parties must address other priority issues.