February 25, 2019

Hon. Doug LaMalfa
United States Congressman
322 Cannon House Office Building
Washington, DC 20515

Re: Decommissioning and Removal of Four PacifiCorp Hydroelectric Power Generating Dams Located on the Klamath River

Dear Representative LaMalfa:

I write out of conscience, as the former counsel retained during 2016 by two local Oregon and California state instrumentalities, the Klamath Irrigation District, Klamath Falls, Oregon, and the Siskiyou County Board of Supervisors, Yreka, California, and as the former counsel retained during 2016-2017, by a private citizens-operated nonprofit organization, the Siskiyou County Water Users Association. Each of these entities, during my tenure as retained counsel, was integrally involved in the public debate surrounding the removal of the above-referenced dams and decidedly against their removal.

The ITSSD and I write at this time to provide you and your congressional (House and Senate) colleagues with the legal analysis needed to prevent the States of Oregon[1] and California[2] from removing the four Klamath River hydroelectric power dams and impoundments, in contravention of Congress' authority under Article I, Section 8 (the Commerce Clause) and Article I, Section 10, Clause 3 (the Compact Clause) of the United States Constitution, and under relevant and applicable United States Supreme Court jurisprudence.

The federal government holds at least seven (7) paramount federal interests in the Klamath River that trump, subordinate and subjugate the rights of the States of California and Oregon to effectively reallocate Klamath River water and use rights among its citizens and the adjacent Indian nations by removing these dams and reservoir-impoundments, especially, in the interest of the privately-owned PacifiCorp, a Federal Energy Regulatory Commission licensee. These paramount federal interests include: 1) the federal navigation servitude; 2) the federal assurance of affordable power; 3) federal flood control; 4) the federal irrigation project operation and management; 5) the federal regulation of environmental protection and pollution control; 6) the federal protection of fish and wildlife; and 7) the federal trust obligation to protect tribal rights.

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[1] *See* State of Oregon, Office of Secretary of State, and Oregon Water Resources Department, *Notice of Proposed Rulemaking and Public Hearing*, Chapter 690 (1-29-19), available at: http://klamathbasincrisis.org/owrd/NoticeOfProposedRulemaking012919.pdf.

[2] *See* State of California, California State Water Resources Control Board, *Lower Klamath Project – Federal Energy Regulatory Commission (FERC) Project No. 14803, Draft Environmental Impact Report Released for Public Comment* (Dec. 27, 2018), available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/lower_klamath_ferc14803.html.

Furthermore, Congress' and the President's prior legally valid enactment of the Klamath River Basin Compact into federal law in 1957 reaffirmed these paramount federal interests, and further established Congress' primary jurisdiction over the disposition of the four (4) Klamath River hydroelectric power dams in question, pursuant to Article VI, Clause 2 (the Supremacy Clause) of the United States Constitution.

The following legal memorandum previously prepared for one of the undersigned's prior clients sets forth the legal bases for Congress to immediately step into this thirty (30)-year debate for the purpose of preventing the planned removal of four PacifiCorp Dams. Removal of these dams will have dire consequences for agricultural and other landowners who reside and/or operate their farming businesses along, proximate to and downstream from the Klamath River and its floodplain, as it flows from southern Oregon through northern California to the Pacific Ocean.

The legal memorandum concludes that the Klamath Basin Restoration Agreement ("KBRA"), Klamath Hydroelectric Settlement Agreement ("KHSA"), Upper Klamath Basin Comprehensive Agreement ("UKBCA"), the Amended Klamath Hydroelectric Settlement Agreement ("Amended KHSA"), Klamath Power Facility Agreement ("KPFA"), and the prior Wyden-Merkley legislation (SA 3288) collectively address the same federal interests the Klamath River Basin Compact ("KBRC"), which Congress and the President enacted into law in 1957, addressed. Since these agreements would collectively amend the 1957 KRBC, either directly through changes to the KRBC text, or indirectly, through supplements to (protocols implementing) the KRBC text, such agreements and their effective changes to the KRBC, a federal-interstate compact, require the consent and ratification of Congress and the signature of the President to enact such changes into federal law.

As former counsel to the entities identified above, I am intimately familiar with the toxic political environment created by the ongoing unilateral efforts of the progressive socialist governments of the States of Oregon and California, and their local government analogues, to effectively bypass the United States Constitution and usurp Congress' Article I authority and the individual private property rights of American citizens residing or operating businesses within these two states, which rights are recognized and guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. As a fellow concerned citizen, therefore, I beseech and expect you and your congressional colleagues to promptly review this information in order to adequately respond to the threat such unilateral Oregon and California state actions pose to our constitutional republic.

Once you have reviewed this memorandum, I believe you will understand the urgent need for Congress to intervene and call for a Senate inquiry into these matters in order to halt them. I trust that you and your colleagues will view that task as being consistent with your (and their) solemn Oath of Office to uphold the Constitution of the United States of America.[3]

[3] U.S. Constitution, Article V, Cl. 3 ("The Senators and Representatives before mentioned…shall be bound by Oath or Affirmation, to support the Constitution"). *See* United States Senate and House of Representatives Oath of Office, available at: https://history.house.gov/Institution/Origins-Development/Oath-of-Office/;

The ITSSD and I thank you, on behalf of the concerned citizen and resident farmers and other landowners in southern Oregon and northern California, for your thoughtful and immediate consideration and use of this information to support your forthcoming efforts to halt the Klamath River dam removal.

Very truly yours,

Lawrence A. Kogan

Lawrence A. Kogan
President

https://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm;
http://clerk.house.gov/member_info/index.aspx.

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MEMORANDUM OF LAW

THE FOUR KLAMATH RIVER HYDROELECTRIC POWER DAMS CANNOT BE REMOVED PURSUANT TO THE KLAMATH BASIN AGREEMENTS WITHOUT THE CONSENT AND RATIFICATION OF THE UNITED STATES CONGRESS

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DISCUSSION

I. Introduction

The following legal memorandum compares the 1957 Klamath River Basin Compact ("KRBC") with the Amended Klamath Hydroelectric Settlement Agreement ("Amended KHSA"), the new Klamath Power and Facilities Agreement ("KPFA") and the Upper Klamath Basin Comprehensive Agreement (and their predecessor agreements - the KBRA, KHSA and UKBCA) which cover many of the same issues. In addition, this legal analysis evaluates whether the prior Wyden-Merkley Amendment (SA 3288) created a new Federal-interstate compact (or an amended KRBC) from the intertwined provisions of the KPFA, Amended KHSA and UKBCA requiring the consent of Congress prior to federal agency implementation thereof. The Federal agencies involved include the U.S. Interior Department (and its sub-agencies - the Bureau of Reclamation, Fish and Wildlife Service, and Bureau of Indian Affairs) and the Commerce Department (and the National Marine Fisheries Service, a division of its sub-agency, the National Oceanic and Atmospheric Administration), and the Federal Energy Regulatory Commission.

The following legal memorandum concludes that the KPFA, Amended KHSA and UKBCA, which contain elements of the KBRA and KHSA collectively approximate a Federal-interstate compact requiring the consent of Congress prior to Federal agencies implementing those agreements. The States of California and Oregon and the Departments of Interior and Commerce, however, failed respectively, to invoke the termination and amendment provisions of the federal statute (P.L. 85-222) recognized as codifying the Klamath River Basin Compact, in violation of the Compact Clause of the U.S. Constitution. They proceeded, nonetheless, to develop and execute these agreements in non-transparent and non-inclusive public meetings without providing adequate prior notification.

These failures arguably constitute significant substantive and procedural constitutional and statutory violations that led to the violation of California and Oregon citizens'/residents' state-sanctioned and constitutionally protected private property (land and water use) rights. In other words, Federal and State agencies and officials rendered political decisions that were arguably inconsistent with Article I of the United States Constitution (the Commerce Clause and the Compact Clause), which led to the violation of private citizens' land and water rights inconsistent with the Takings and Due Process (and possibly also the Equal Protection) Clauses of the 5th and 14th Amendments to the United States Constitution. Similarly, to the extent county (Klamath and Siskiyou) and municipal (Klamath Falls, Yreka, etc.) governments in these states participated in such decision-making and perpetrated such procedural violations to secure federal grant-in-aid programs at the expense of their citizens'/residents' substantive U.S. Constitutional rights, their actions, as well, could be susceptible to judicial challenge.

II. The Law and Facts Surrounding Interstate Compacts

1. Interstate Compacts - Generally:

Article I, Section 10, Clause 3 of the United States Constitution is known as the Compact Clause. It provides that, "No state shall, without the consent of Congress enter into any agreement or compact with another state, or with a foreign power."[4] In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[5] the U.S. Supreme Court identified the interstate compact as one

> "of the two means provided by the Constitution for adjusting interstate controversies. The compact — the legislative means — adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies,[fn] was practiced by the States before the adoption of the Constitution […]"[6]

In *West Virginia ex rel. Dyer v. Sims*,[7] a decision preceding the execution and ratification of the Klamath River Basin Compact, the U.S. Supreme Court noted that, "[a] compact is more than a supple device for dealing with interests confined within a region[; t]hat it is also a means of safeguarding the *national* interest […]" (emphasis added).[8]

Indeed, in *Virginia v. Tennessee*,[9] an 1893 case involving the resolution of a border dispute between the States of Virginia and Tennessee, the U.S. Supreme Court held that the Compact Clause does "not apply to every possible compact or agreement between one state and another."[10] According to the Court, consent of Congress to an interstate compact may be required to prevent "the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States,"[11] and "in order to check any infringement of the rights of the national government"[12] (i.e., whether it "intrude[s] on a power reserved to Congress).[13]

In *U.S. Steel v. Multistate Tax Comm'n*,[14] involving an interstate tax agreement, the U.S. Supreme Court again reaffirmed that "not all agreements between States are subject to the strictures of the

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[4] *See* U.S. Const., art. I, §10, cl. 3.
[5] *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) ("and had been extensively practiced in the United States for nearly half a century before this Court first applied *the judicial means* in settling the boundary dispute in *Rhode Island v. Massachusetts*, 12 Pet. 657, 723-25[(1838)fn]" (emphasis added).)
[6] 304 U.S. at 104.
[7] *See West Virginia ex rel. Dyer v. Sims*, 341 US 22 (1951).
[8] 341 U.S. at 27.
[9] *See Virginia vs. Tennessee*, 148 U.S. 503 (1893).
[10] 148 U.S. at 518. *See also Northeast Bancorp., Inc. v. Board of Governors of the Fed. Res. Sys*., 472 U.S. 159, 105 S.Ct. 2545, 86 L.Ed.2d 112 (1985) (quoting its earlier decision in *Virginia v. Tennessee*, that "even if we were to assume that these state actions constitute an agreement or compact, not every such agreement violates the Compact Clause.")
[11] *Id*., at 519. *See also New Hampshire v. Maine*, 426 U. S. 363 (1976).
[12] 148 U.S. at 518.
[13] *See* The Council of State Governments, *Congressional Consent and the Permission for States to Enter into Interstate Compacts*, Capitol Research (June 2011), at p 1, available at: http://knowledgecenter.csg.org/kc/system/files/Congressional_Consent.pdf.
[14] *See U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

Compact Clause."[15] The Court held that, "[t]he relevant inquiry must be one of impact on our federal structure. […] This rule states the proper balance between federal and state power with respect to compacts and agreements among States."[16] In other words, the Court held that "the test is whether the Compact enhances state power *quoad* the National Government" (i.e., whether it purport[s] to authorize the member States to exercise any powers they could not exercise in its absence.")[17]

The specific facts surrounding the interstate compact in dispute, and the conclusions the Court's majority drew with respect to them follows:

- "[T]he multilateral nature of the agreement and its establishment of an ongoing administrative body do not, standing alone, present significant potential for conflict with the principles underlying the Compact Clause. The number of parties to an agreement is irrelevant if it does not impermissibly enhance state power at the expense of federal supremacy. As to the powers delegated to the administrative body, we think these also must be judged in terms of enhancement of state power in relation to the Federal Government." [18]
- "On its face, the Multistate Tax Compact contains no provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States. There well may be some incremental increase in the bargaining power of the member States *quoad* the corporations subject to their respective taxing jurisdictions. Group action, in itself, may be more influential than independent actions by the States. But the test is whether the Compact enhances state power *quoad* the National Government. This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, as noted above, each State is free to withdraw at any time."[19]
- "Appellants' various contentions that certain procedures and requirements of the Commission encroach upon federal supremacy with respect to interstate commerce and foreign relations and impair the sovereign rights of nonmember States, are without merit, primarily because each member State could adopt similar procedures and requirements individually without regard to the Compact. Even if state power is enhanced to some degree, it is not at the expense of federal supremacy."[20]

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[15] 434 U.S. at 469. *See also Id.*, at 470, citing *New York v. O'Neill*, 359 U. S. 1,6 (1959) ("'The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships. It is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution. Far from being divisive, this [reciprocal] legislation is a catalyst of cohesion. It is within the unrestricted area of action left to the States by the Constitution.'")
[16] 434 U.S. at 470-471.
[17] *Id*., at 473.
[18] 434 U.S. at 472.
[19] *Id*., at 472-473.
[20] *Id*., at Syllabus, p. 453.

- "Appellants' allegations that the Commission has abused its powers by harassing members of the plaintiff class in that it induced several States to issue burdensome requests for production of documents and to deviate from state law by issuing arbitrary assessments against taxpayers who refuse to comply with such orders, do not establish that the Compact violates the Commerce Clause or the Fourteenth Amendment. But even if such allegations were supported by the record, they are irrelevant to the facial validity of the Compact, it being only the individual State, not the Commission, that has the power to issue an assessment, whether arbitrary or not."[21]

Footnote 33 of the Court's decision further highlighted that it is the "threat to federal supremacy" and not the existence of a "federal interest" or a "federal concern" that is determinative of whether a compact requires congressional consent.[22] The Fourth Circuit Court of Appeals reaffirmed the U.S. Supreme Court's holding in the more recent case of *Star Scientific, Inc. v. Beales*,[23] involving Virginia's implementation of a multistate agreement to settle tobacco litigation.

The dissent in *U.S. Steel*, on the other hand, emphasized that the purpose for the Compact clause is for States to secure Congress' *political* judgment in ascertaining whether an agreement: 1) "is likely to interfere with federal activity in the area;" 2) "is likely to disadvantage other States to an important extent;" and 3) "is a matter that would better be left untouched by state and federal regulation."[24] According to the dissent, the act of securing Congressional approval of interstate compacts is necessary to address the *political* factors that are often involved and which must be appropriately balanced.[25]

> "Congress does not pass upon a submitted compact in the manner of a court of law deciding a question of constitutionality. Rather, the requirement that Congress approve a compact is to obtain its political

[21] *Id*.
[22] 434 U.S. at 479, footnote 33 ("The dissent appears to confuse potential impact on 'federal interests' with threats to 'federal supremacy.' […] The dissent's focus on the existence of federal concerns misreads Virginia v. Tennessee and New Hampshire v. Maine. The relevant inquiry under those decisions is whether a compact tends to increase the political power of the States in a way that "may encroach upon or interfere with the just supremacy of the United States." Virginia v. Tennessee, 148 U.S. at 148 U. S. 519. Absent a threat of encroachment or interference through enhanced state power, the existence of a federal interest is irrelevant. Indeed, every state cooperative action touching interstate or foreign commerce implicates some federal interest. Were that the test under the Compact Clause, virtually all interstate agreements and reciprocal legislation would require congressional approval. In this case, the Multistate Tax Compact is concerned with a number of state activities that affect interstate and foreign commerce. But as we have indicated at some length in this opinion, the terms of the Compact do not enhance the power of the member States to affect federal supremacy in those areas.
[23] *See Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002).
[24] 434 U.S. at 485.
[25] *Id*., at footnote 2/7 ("The pioneer article in the compact literature, Frankfurter & Landis, The Compact Clause of the Constitution -- A Study in Interstate Adjustments, 34 Yale L.J. 685 (1925), recognized the preferability of compacts to litigation in light of the political factors that could be balanced in the process of submitting and approving a compact. See id. at 696, 706-707. This Court has also observed the peculiar amenability of some problems to settlement by compact, rather than litigation. *See Colorado v. Kansas*, 320 U. S. 383, 320 U. S. 392 (1943). See also F. Zimmermann & M. Wendell, The Interstate Compact Since 1925, pp. 102-103 (1951).")

> judgment: [fn] is the agreement likely to interfere with federal activity in the area, is it likely to disadvantage other States to an important extent, is it a matter that would better be left untouched by state and federal regulation?"[26]

In *Virginia v. Tennessee*, the U.S. Supreme Court, furthermore, noted that "[t]he Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied."[27] The Court found that "[i]n many cases, the consent will usually precede the compact or agreement."[28] Where consent is express, Congress usually "is able to review, amend and/or revise the agreement and, as a result, is able to provide a clear determination of approval or disapproval."[29] The Court found that consent "is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them."[30] "Such actions usually include federal legislation supporting the terms of a compact or legislation that strengthens the objective of a specific compact."[31] "Congress may give its approval in advance by adopting legislation encouraging states to enter into an interstate compact for a specific purpose."[32] However, "pre-emptive consent deprives Congress the opportunity to review the compact and its objectives once it is drafted."[33]

Once Congress consents to an interstate compact it is "transformed" from state law into valid federal law.[34] "And from the date of its 'transformation,' […] its interpretation and construction present[s]

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[26] 434 U.S. at 485.
[27] 148 U.S. at 503, 521.
[28] *Id*., at 521.
[29] *See* Council of State Governments, *Congressional Consent and the Permission for States to Enter into Interstate Compacts*, Capitol Research (June 2011), *supra* at p. 2.
[30] 148 U.S. at 521.
[31] *See* Council of State Governments, *Congressional Consent and the Permission for States to Enter into Interstate Compacts*, Capitol Research (June 2011), *supra* at p. 2 (referencing *Georgia v. South Carolina* 497 U.S. 376 (1990) ("wherein Georgia brought suit against South Carolina over the location of their boundary along the Savannah River"); *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926) ("wherein suit was brought to determine the boundary between Michigan and Wisconsin from the mouth of the Montreal river at Lake Superior to this ship channel entrance from Lake Michigan into Green Bay"); *Vermont v. New Hampshire*, 289 U.S. 593 (1933) ("wherein Vermont brought suit against New Hampshire over the determination of the boundary line with involving the Connecticut River.")).
[32] *See* Council of State Governments, *Congressional Consent and the Permission for States to Enter into Interstate Compacts*, Capitol Research (June 2011), *supra* at p. 2 (referencing *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 281-82 (1959)).
[33] *Id*.
[34] *See Virginia v. Maryland*, 540 U.S. 56, 66 (2003) ("We interpret a congressionally approved interstate compact '[j]ust as if [we] were addressing a federal statute.') *New Jersey v. New York*, 523 U. S. 767, 811 (1998);" *see also ibid*. ('[C]ongressional consent 'transforms an interstate compact. . . into a law of the United States'' (quoting *Cuyler v. Adams*, 449 U. S. 433, 438 (1981))." *See also Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518 (1852) (holding that the Virginia-Kentucky Compact of 1789, was "a law of the Union", or a federal law, vesting the federal courts with jurisdiction); *Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey v. Colburn*, 310 U.S. 419 (1940) (holding that interstate compacts approved by Congress concern issues of federal law, thereby vesting federal courts with jurisdiction to review state court decisions interpreting such compacts).

federal, not state questions."[35] In *Edgar v. Mite Corp.*,[36] the U.S. Supreme Court held that pursuant to the Supremacy Clause of the Constitution (Article VI, Clause 2)[37] a validly enacted interstate compact supersedes inconsistent state laws, unless the Compact or Congress' consent legislation provides otherwise. The U.S. Supreme Court ruled more specifically, in *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*,[38] that an interstate compact's water allocation and management requirements prevailed over any conflicting provisions of state law concerning water resource allocation and management.[39]

In *Community-Service Broad. of Mid-America, Inc. v. Federal Communications Commission*,[40] the D.C. Circuit Court of Appeals held that once Congress has enacted federal legislation, it "is generally free to change its mind; in amending legislation Congress is not bound by the intent of an earlier body. But it is bound by the Constitution."[41] In *United States v. Lopez Andino*,[42] the First Circuit Court of Appeals added, that any "act of Congress […] may be repealed, modified, or amended at the unilateral will of future Congresses."[43] In *Arizona v. California*,[44] the U.S. Supreme Court acknowledged that Congress also "may amend or 'change the landscape' of a compact" to which it previously consented via subsequent legislation.[45]

However, in *Riverside Irrigation District v. Andrews*,[46] a Colorado Federal district court held that "congress cannot unilaterally reserve the right to amend or repeal an interstate compact."[47] In *United*

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[35] *See Bush v. Muncy*, 659 F. 2d 402, 410 (4th Cir. 1981), citing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278, 79 S.Ct. 785, 788, 3 L.Ed.2d 804 (1959); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28, 71 S.Ct. 557, 560, 95 L.Ed. 713 (1951); *State v. Boone*, 40 Md.App. 41, 388 A.2d 150.

[36] *See Edgar v. Mite Corp.*, 457 U.S. 624, 631 (1982). *See also Tarrant Regional Water District v. Herrmann*, U.S., No. 11-889, 2013 WLPM (6/19/13), Slip Op at 10-11, fn 8, citing *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U. S. 141, 152–153 (1982) ("the Supremacy Clause, Art. VI, cl. 2 […] ensures that a congressionally approved compact, as a federal law, pre-empts any state law that conflicts with the Compact.")

[37] *See* United States Constitution, Article VI, paragraph 2.

[38] *See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534-535 (1941) ("'Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield.' *Florida v. Mellon*, 273 U.S. 12, 17, 47 S.Ct. 265, 266, 71 L.Ed. 511. ... [T]he suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the "superior power" of Congress.").

[39] *Id. See also Bush v. Muncy*, 659 F. 2d at 410, citing *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 429-30, 60 S.Ct. 1039, 1041-1042, 84 L.Ed. 1287 (1940) ("once it became federal law, […] its provisions, interpreted as federal law, must prevail over any existing or subsequently created provisions of state law in direct conflict.")

[40] *See Community-Service Broad. of Mid-America, Inc. v. Federal Communications Commission*, 593 F.2d 1102 (D.C. Cir. 1978).

[41] 593 F.2d at 1113.

[42] *See United States v. Lopez Andino*, 831 F.2d 1164 (1st Cir. 1987).

[43] 831 F.2d at 1172.

[44] *See Arizona v. California*, 373 U.S. 546 (1963).

[45] *See* Council of State Governments, *Congressional Consent and the Permission for States to Enter into Interstate Compacts*, Capitol Research (June 2011), *supra* at p. 2 (referencing Arizona v. California, 373 U.S. 546, 556-557, 560-562 (1963), and emphasizing "wherein the Supreme Court held Congress acted within its realm of authority when it created a plan to manage and operate the Colorado River even though it had previously granted consent to the Colorado River Compact whose purpose was to assist in the management and operation of the body of water.").

[46] *See Riverside Irrigation District v. Andrews*, 568 F. Supp. 583 (D. Colo. 1983).

[47] 568 F. Supp. at 589-590, citing *Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir. 1962).

States v. Jones,[48] a more recent decision, the Federal district court for the western district of Virginia noted how the Federal Court of Appeals for the D.C. Circuit had expressed similar reservations in the earlier case of *Tobin v. United States*[49] (where the disputed compact's[50] terms had expressly authorized Congress to "alter, amend, or repeal" the compact).[51] The Virginia federal district court in *Jones* emphasized that, "[w]hen considering Congress's potential ability to alter, amend, or repeal its consent to state compacts under the Compact Clause," the *Tobin* Court had "demonstrated concern that "the suspicion of even potential impermanency would be damaging to the very concept of interstate compacts."[52] According to the *Tobin* Court, since congressional approval of an interstate compact "restore[s] states to that much of their original sovereignty as would permit them to enter into compacts with each other, federal action alone should not be sufficient to change or rescind such a compact's terms.[53]

The Virginia Federal district court in *Jones*, furthermore, noted the similar finding of the Third Circuit Court of Appeals in *Mineo v. Port Authority of New York & New Jersey*[54] on this issue. The *Mineo* Court concluded, based on its research, that "the power of Congress to 'alter, amend or repeal' is not currently part of the federal tradition" and that "no case holding that Congress possesses such a power [had been…] reveal[ed]."[55] Indeed, no fewer than "two federal circuits have expressed doubt whether Congress has such power, but have refrained, expressing reluctance to decide, unnecessarily, an issue of such far-reaching consequences."[56] Conversely, in only one case, *Milk Indus. Found. v. Glickman*,[57] did a federal district court suggest that Congress "may well have the authority to rescind or amend" an interstate compact to which it had previously consented.[58]

Apparently, the Federal district court for the District of Columbia in *Milk* had reached its conclusion because the compact's terms had expressly provided Congress with such authority.[59] Although the

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[48] *See United States v. Jones*, No. 1:08CR00024-51, 2008 WL 4279963 (W.D. Va. Sept. 12, 2008).
[49] *See Tobin v. United States*, 306 F.2d 270 (1962).
[50] *Id*., at 271 ("The Port of New York Authority is a bi-state agency established in 1921 and 1922 by compacts between the States of New York and New Jersey to provide for the efficient administration of the New York harbor, which is divided geographically between the two states.")
[51] *Id*. ("Pursuant to the compact clause of the Constitution, Congress consented to the compacts but expressly retained, among other matters, 'the right to alter, amend or repeal' its resolutions of approval.").
[52] *See United States v. Jones*, *supra*, citing *Tobin*, 306 F.2d at 273. ("We have no way of knowing what ramifications would result from a holding that Congress has the implied constitutional power 'to alter, amend or repeal' its consent to an interstate compact. Certainly, in view of the number and variety of interstate compacts in effect today, such a holding would stir up an air of uncertainty in those areas of our national life presently affected by the existence of these compacts. No doubt the suspicion of even potential impermanency would be damaging to the very concept of interstate compacts.")
[53] *See Tobin v. United States*, 306 F.2d at 273.
[54] *See Mineo v. Port Authority of New York & New Jersey*, 779 F.2d 939 (3rd Cir. 1985).
[55] 779 F.2d at 948. *See also Koterba v. Pennsylvania Department of Transportation*, 736 A.2d 761, 764 (Pa. Commw. Ct. 1999) (citing *Tobin* and *Mineo*).
[56] *See Koterba v. Pennsylvania Department of Transportation*, 736 A.2d at 764.
[57] *See Milk Indus. Found. v. Glickman*, 949 F. Supp. 882 (D.D.C. 1996).
[58] *See Milk Indus. Found. v. Glickman*, 949 F. Supp. at 892 ("Since Congress never stated in Section 147 that the Secretary would have the power to revoke his approval to implement the Compact consented to by Congress, it is obvious to the Court that the Secretary has no such authority.")
[59] *Id*. ("*See* Compact Art. VIII, § 22 ('Congress reserves the right to amend or rescind this interstate compact at any time.')"

KRBC, like the interstate compacts at issue in *Milk* and *Tobin*, expressly grants Congress the authority to amend, alter or repeal it, the *Milk* decision is unlikely to be of persuasive influence in the present case, because it is contrary to, and thus, in tension with the higher D.C. Federal Circuit Court of Appeals decision in *Tobin*.

2. Federal-Interstate Compacts

The Virginia Federal District Court in *Jones* also pointed out that even the perception "the federal government can alter, amend, or repeal its own involvement in a ***federal-state compact***" (emphasis added) could trigger "uncertainty about the longevity of such an agreement."[60] The Court's reference to federal-state compacts is significant given the emergence of federal-interstate compacts since the 1960's.

Indeed, for many years, legal commentators had documented the evolving trend toward greater federal-state cooperation. In the words of one legal commentator (Grad, 1963), "[t]he emergence of the federal-interstate compact may be viewed as a response to the asserted need for greater state participation in the development of policies of concern to the state, the region, and the nation."[61] He favorably cited the work of an earlier twentieth century commentator (Perry, 1938) who had previously concluded that "increased federal-state cooperation ha[d] resulted from the expansion of governmental interests in general, and from the broadening of the interests of the federal government in particular" – i.e., from a new form of federalism tracing itself back to the New Deal era.[62]

Thus, according to Grad, who apparently embraced this view, which also is arguably Wilsonian, it would be

> "futile to engage in controversy over the expansion of federal, or 'central,' power at the expense of the states or, even worse, to put the question in terms of 'states' rights.'[fn] For persons in government, intent on solving specific and pressing problems, the question of federal-state relations cannot be discussed, let alone resolved, in terms of abstract systems of power. [fn] *Within the limits of our constitutional framework, the question of federal-state relations has become essentially one of method*, and the methods of co-operation – or of drawing lines – between levels of government are a pragmatic business, *responding to changing needs and pressures*. [fn] Today federal-state co-operation takes place whenever federal and state action meet" (emphasis added).[63]

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[60] *See United States v. Jones*, Case No. 1:08CR00024-51 *supra* at p. 11.

[61] *See* Frank P. Grad, *Federal-State Compact: A New Experiment in Co-operative Federalism*, 63 Columbia L. Rev. 825, 829 (1963), available at: http://www.jstor.org/stable/1120532?seq=5#page_scan_tab_contents.

[62] *Id*., at pp. 829-830, citing Jane Perry Clark, "The Rise of a New Federalism" 4-5 (1938).

[63] *Id*., at p. 830, citing Anderson, "The Nation and the States, Rivals or Partners?" 3-15, 16-50, 185-190 (1955); White, "The States and the Nation" 78-79 (1953); Clark, "The Rise of a New Federalism," at 4-5; Council of State Governments, *Federal-State Relations*, S.Doc. No. 81, 81st Cong., 1st Sess. 128-30 (1949); W. Wilson, "Constitutional Government in the United States 173 (1908) ("'The question of the relation of the States to the federal government is the cardinal question of

Grad, furthermore, considered noteworthy the use of federal grants-in-aid programs to facilitate greater federal-state cooperation, in exchange for state compliance with Congressional standards.

> "[T]he relatively *new device of federal grants-in-aid is probably now the most significant way of shaping federal-state relations* [fn] […] What is noteworthy […] is that the federal government, with its broader sources of revenue, is stimulating greater activity by the states in areas often considered of primary state responsibility by providing the means for such increased activity, demanding in return compliance with standards established by Congress" (emphasis added).[64]

Grad, moreover, dismissed concerns, expressed by the Council of State Governments as far back as 1949, that the increasing use of the federal purse strings to control state activity was dangerous.[65] In defense of this use, he emphasized that "the central issue of co-operative federalism" was "*how to give a greater share of policy responsibility* – rather than mere administrative responsibility – *to the states* without loss of momentum and over-all direction of programs nationwide in their scope" (emphasis added).[66] He also emphasized how interstate and federal-state compacts had been urged as possible vehicles through which federal aid could be administered to address regional development needs.[67]

The Government Accounting Office (the Government Accountability Office since 2004[68]) is an independent, professional, nonpartisan agency in the legislative branch that is commonly referred to as the investigative arm of Congress.[69] In 1981, the GAO issued a report that examined the functions of numerous interstate compact commissions, including those bearing oversight responsibilities with respect to federal-interstate compacts. The report is useful, for purposes of this memorandum, because

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our constitutional system…It cannot…be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question.'").

[64] *Id*., at pp. 831-832, citing Council of State Governments, *Federal-State Relations*, S.Doc. No. 81, 81st Cong., 1st Sess. 128-30 (1949), *supra* at p. 135 ("'Through the grants-in-aid, the National Government influences, and to some extent controls, 75percent of the total activities of State governments.' The council regards some of this as having dangerous effects on the states' vigor.").

[65] *Id*. *See also Id*., at p. 832, citing Anderson, "The Nation and the States, Rivals or Partners?" at pp. 181-182 ("A defense of the growing system of federal grants-in-aid is not called for here. The argument in opposition is based largely on the erroneous premise of state and federal separateness, when, in fact, no such separateness exists – for the grants-in-aid programs complained of do, after all, originate in the Congress of the United States. It can hardly be argued that the states' point of view is not adequately represented in Congress, or that the states, though their representatives, have no opportunity to shape the policies they are required to carry out in order to qualify for federal contributions.[fn]").

[66] *Id*., at p. 833.

[67] *Id*.

[68] *See* Frederick M. Kaiser, *GAO: Government Accountability Office and General Accounting Office*, Congressional Research Service ("CRS") Report for Congress (RL30349) (Sept. 10 2008), at Summary, available at: https://fas.org/sgp/crs/misc/RL30349.pdf.

[69] *See* U.S. General Accounting Office, *The Role of GAO in Assisting Congressional Oversight* (GAO-02-816T) (June 5, 2002), available at: https://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-02-816T/html/GAOREPORTS-GAO-02-816T.htm.

of its description of federal-interstate compacts as "reflecting a significant departure from traditional" interstate compacts.

> "Federal-interstate compacts are formal agreements between two or more States *and the United States* to promote effective basin-wide water resources management. They reflect a significant departure from traditional compacts in that (1) the United States is a signatory party with the States and (2) extremely broad powers are granted to the compact commissions. The commissions are responsible for multipurpose planning, management, and development of the river basins' resources" (emphasis added).[70]

A more recent 2007 GAO report on interstate compacts found that, although compacts traditionally were negotiated by governor-appointed special joint commissions, they have increasingly "been formulated by interested groups of state officials *or other stakeholders*" (emphasis added).[71] Other stakeholders may include, besides commissioners and federal, state and local government officials, environmentalists, business community members and representatives of groups regulated by the commissions.[72] This 2007 GAO report, in other words, acknowledged that some recent federal-interstate compacts reflect a preference for the use of a less formal but more inclusive stakeholder model of joint governance led by entities bearing broadly defined duties comprised of representatives from federal, state and local governments and local, regional and national civil society groups.

The 2007 GAO report also found that "[o]ver one-third of the compacts that exist today deal with environmental and natural resource issues. Although a large number of these compacts deal with water allocation, they address other subjects as well."[73] "For example, the Klamath River Basin Compact []

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[70] *See* United States Office of the Comptroller General, General Accounting Office, *Federal-Interstate Compact Commissions: Useful Mechanisms For Planning And Managing River Basin Operations*, Report to the Congress of the United States (CED-81-34) (Feb. 20, 1981) at p. 1, available at: http://www.gao.gov/assets/140/132051.pdf (reviewing the effectiveness of the Delaware and Susquehanna River Basin Commissions created to provide a coordinated, comprehensive regional approach to interstate water problems.). *See also Id.* at p. 27 (concluding that "[a]lthough the commissions have not yet proven to be ideal remedies for settling water controversies, they are useful mechanisms for planning and managing river basin operations. They provide a forum for handling problems and taking advantage of opportunities across State boundary lines on a regular, systematic basis. They also contribute to consistency in water resources management throughout their respective basins and provide each basin State with a voice on interstate matters.")

[71] *See* United States Government Accountability Office Report to Congressional Requesters, *Interstate Compacts – An Overview of the Structure and Governance of Environment and Natural Resource Compacts* (GAO-07-519) (April 2007), at p. 6, available at: http://www.gao.gov/assets/260/258939.pdf.

[72] *Id*., at p. 3 ("we reviewed commission documents and activities, and interviewed compact stakeholders, including commission members; federal, state, and local government officials; environmentalists; and members of the business community, among others."); "Appendix I: Objectives, Scope and Methodology," at pp. 29-30 ("In addition, we interviewed compact stakeholders, such as commissioners; federal, state, and local government officials; environmentalists; business community members; and representatives of groups regulated by the commissions to obtain their views on the organizational structure and governance of their commissions.")

[73] *Id*., at p. 7.

manages water resources for irrigation, fish and wildlife protection, and domestic and industrial use, among other things…"[74]

III. Detailed Analysis of the Klamath River Basin Compact

1. Factual Description of the Klamath River Basin Compact ("KRBC"):

a. *The Purposes and Objectives of the KRBC*

The Klamath River Basin Compact ("KRBC") between California and Oregon, as codified into each state's laws (**ORS 542.620 and CA Water Code § 5900 et seq.**), was ratified by the United States Congress and signed into Federal law by President Eisenhower on September 11, 1957 (P.L. 85-222[75]). Article 1.A of the KRBC and related consent legislation set forth the KRBC's prime objective – "to facilitate and promote the orderly, integrated and comprehensive development, use, conservation and control [over…] the water resources of the Klamath River Basin" for various prescribed purposes. KRBC and consent legislation Article III.B.1 "established the following order of use for water: (1) domestic use, (2) irrigation use, (3) recreational use, including use for fish and wildlife, (4) industrial use, (5) generation of hydroelectric power, and (6) such other uses as are recognized under laws of the state involved."[76] In effect, the KRBC has "giv[en] domestic and irrigation users in the Klamath River Basin preference for use of water supplies over recreation, industrial, hydropower, and other uses."[77]

b. *The KRBC's Water Use Allocation Scheme*

KRBC and consent legislation Article III.B provides that waters unappropriated as of the Compact's effective date originating in the Upper Klamath River Basin can be acquired through appropriation by any individual residing in Oregon or California. Article III.B.1 provides that, in the event of conflicting appropriation applications, each state should give preference to those applications that involve preferred water uses (domestic and irrigation uses being granted the highest preference). Article III.B.2(a) proscribes all diversions of waters from the Upper Klamath River Basin in Oregon, except for out-of-basin diversions of waters that originate within the drainage area of Fourmile Lake. Article III.B.2(b) conditions the diversion of any unused water from Upper Klamath Lake and the Klamath River and its tributaries above Keno for use in Oregon, on the return of such waters thereto. Article III.B.3(a) prohibits diversions of water taken from the Upper Klamath River Basin for use in California

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[74] *Id*., at p. 11.

[75] *See* Pub. L. No. 85-222, 85th Cong., 71 Stat. 497 (Aug. 30, 1957), available at: https://www.gpo.gov/fdsys/pkg/STATUTE-71/pdf/STATUTE-71-Pg497.pdf.

[76] *See* Ron Hathaway and Teresa Welch, *Background*, in William S. Braunworth, Teresa Welch and Ron Hathaway, *Water Allocation in the Klamath Reclamation Project, 2001: An Assessment of Natural Resource, Economic, Social, and Institutional Issues with a Focus on the Upper Klamath Basin*, Oregon State University Extension Service Special Report 1037 (2002, 2004), at p. 38, available at: https://catalog.extension.oregonstate.edu/sites/catalog/files/project/pdf/sr1037.pdf

[77] *See* U.S. Department of the Interior Bureau of Reclamation, *SECURE Water Act Section 9503(c)-Reclamation Climate Change and Water 2016, Chapter 5: Klamath River Basin* (March 2016), at p. 5-4, available at: https://www.usbr.gov/climate/secure/docs/2016secure/2016SECUREReport-chapter5.pdf.

outside the Upper Klamath River Basin, while Article III.B.3(b) precludes California from preventing return flows and waste water from these diversions from flowing back into the Klamath River.

Compact Article III.C.1 recognizes the superiority of water rights acquired after the effective date of the Compact for use *within* the Upper Klamath River Basin over water rights acquired after the Compact's effective date for use *outside* the Upper Klamath River Basin by diversion in California or for non-domestic or irrigation uses. Article III.C.1 also limits the use of water for irrigation purposes to the amount of water necessary to irrigate 200,000 and 100,000 acres of land in Oregon and California, respectively. Article III.C.2. does not, however, preclude the storage for any purpose of waters originating in the Upper Klamath Basin for later use, provided said storage does not interfere with the direct diversion or storage of Upper Klamath basin waters for domestic use or irrigation in the Upper Klamath Basin.

Article XIII.B.1 of the Compact and the consent legislation states that "[t]he United States shall not, without payment of just compensation, impair any rights to the use of the water for [domestic or irrigation uses] within the Upper Klamath River Basin by the exercise of any powers or rights to use or control water (i) for any purpose whatsoever outside the Klamath River Basin by diversions in California or (ii) for any purpose within the Klamath River Basin other than" for domestic or irrigation uses.[78] However, in *Klamath Irrigation Dist. v. United States*,[79] the Federal Court of Claims failed to recognize that Klamath irrigators had a right to water deliveries "recognized and vested by the interstate agreement known as the Klamath Basin Compact."[80]

The Court of Claims in that decision granted the government's motion for summary judgment dismissing Klamath irrigators' claim that the Federal government's actions in terminating their water deliveries through the Klamath Project in 2001 had impaired their water rights in violation of the Klamath River Basin Compact.[81] It reasoned that, "[a]lthough Congress consented to this compact, the United States was not a party thereto."[82] In addition, it reasoned that Compact Article XI which provided that "[n]othing in this compact shall be deemed: [t]o impair or affect any rights, powers, or jurisdictions in the United States, its agencies or those acting by or under its authority, in, over and to the waters of the Klamath River Basin," as 'preserv[ing] all federal rights, powers and jurisdiction except as explicitly conceded.'"[83]

c. *KRBC's Allocation of Water for Hydroelectric Power*

Compact Article IV provides that

[78] *See* Compact at Art. XIII.B.1.
[79] *See Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005) (Case 1:01-cv-00591-FMA).
[80] *See Id*., at Case 1:01-cv-00591-FMA, at p. 11.
[81] *Id*., at p. 48. *See also Klamath Irrigation District v. United States* (Fed. Cl. 2016), (Consol. Case #s) at p. 5, available at: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2001cv0591-474-0.
[82] *See Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005) (Case 1:01-cv-00591-FMA), *supra* at p. 47.
[83] *Id*., at pp. 47-48, citing Compact Art. XI and quoting *United States v. Adair*, 723 F.2d 1394, 1419 (9th Cir. 1984).

> "It *shall be* the objective of each state, in the formulation and the execution and the granting of authority for the formulation and execution of plans for the distribution and use of the waters of the Klamath River Basin, to provide for the most efficient use of available power head and its economic integration with the distribution of water for other beneficial uses *in order to secure* the most economical distribution and use of water and *lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells*" (emphasis added).[84]

Commentators appear to agree that the "expansion of hydroelectricity generation in the Klamath Basin and claims by COPCO to unappropriated water triggered the negotiations between Oregon and California that created the Klamath River Basin Compact."[85] They also agree that,

> "[t]he negotiation of the Klamath River Basin Compact—under circumstances that appeared to pit irrigators against hydroelectric power while underestimating the significance of the legal rights retained by the Tribes—played an important part in the early basin dynamics of human conflict over water and foreshadowed interactions between resource allocation and law that would serve to lessen basin resilience over time."[86]

In their challenge against PacifiCorp's proposal to raise electric rates in 2005 before the Oregon Public Utility Commission, the Klamath Water Users Association ("KWUA") had argued that Article IV imposed a mandatory requirement to provide a low electricity rate for irrigation. According to the KWUA,

> "[Article IV] statutorily mandated […] that any [hydroelectric] developer, in order to have any authority from the State of Oregon to use [Klamath River] water, must use the water to make power available to the Klamath Irrigators at the lowest reasonable rates. The plain language of Article IV singles out the Klamath Irrigators both by geographic location and by end-use."[87]

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[84] *See* Compact at Art. IV.

[85] *See* Brian C. Chaffin, Robin Kundis Craig and Hannah Gosnell, *Resilience, Adaptation, and Transformation in the Klamath River Basin Social-Ecological System*, 51 Idaho L. Rev. 157 (2014), at pp. 171-172, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2449381##, citing Holly Doremus & Dan Tarlock, *Water War in the Klamath Basin: Macho Law, Combat, Biology and Dirty Politics* 59–70 (2008), at p. 42.

[86] *See Id*., at p. 172, citing Holly Doremus & Dan Tarlock, *Water War in the Klamath Basin: Macho Law, Combat, Biology and Dirty Politics* 59–70 (2008), at p. 42-43 "(discussing how COPCO claimed that there was unappropriated water available for hydropower, spurring '[u]pper Basin irrigators, supported by the United States, [to take] the traditional position, a legacy of the progressive conservation era, that any power development should be both public and subordinate to irrigation')."

[87] *See* Oregon Public Utility Commission, *In the Matter of PacifiCorp*, Klamath Water Users Association Reply Brief, Docket No. UE 170 (Sept. 16, 2005), at pp. 5-6, available at: http://edocs.puc.state.or.us/efdocs/HBC/ue170hbc163122.pdf.

> "Article IV of the Compact provides that the hydroelectric potential of the Klamath River shall be used to provide the Klamath Irrigators 'the lowest power rates which may be reasonable.' This language is strikingly similar to numerous contemporaneous federal statutes that create a geographic preference for hydroelectric power at 'the lowest possible rate' or 'the lowest rate reasonably possible.' […T]he Compact reflects and perpetuates the long-standing policy and agreement that the hydroelectric potential of the Klamath River Basin would be developed in substantial part, whether by public or private developers, to provide low-cost power to the Klamath Irrigators."[88]

As a matter of historical reference, the Oregon Public Utility Commission recognized that when PacifiCorp acquired Copco in 1961, it "became a successor to the On-Project and Off-Project Contracts" that Copco had previously entered into with the U.S. Interior Department and the predecessor to the Klamath Water Users Association representing Klamath Basin irrigators. These contracts, respectively, had "required Copco to furnish electric power to On-Project irrigators at a rate of 0.6 cents per kWh," and "to provide service to Off-Project irrigators at a rate of 0.75 cents per kWh."[89]

The KWUA had relied on this evidence, in part, to establish PacifiCorp's obligation under Compact Article IV to provide Klamath irrigators with a hydroelectricity rate preference. Notwithstanding such evidence, the Oregon Public Utility Commission ruled that, "Article IV sets forth [only] a generalized 'objective' that Oregon and California must consider in 'the formulation and execution of plans for the distribution and use of the water of the Klamath River Basin;' [it did] create new, or modify existing, Commission ratemaking authority."[90] It also ruled that "[t]he Compact contains no […] directive requiring the operator of a hydroelectric project to provide preferential rates for electric service to Klamath River Basin irrigators."[91]

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[88] *See* Oregon Public Utility Commission, *In the Matter of PacifiCorp*, Klamath Water Users Association Opening Brief, Docket No. UE 170 (Aug. 29, 2005), at pp. 7-8, available at: http://edocs.puc.state.or.us/efdocs/HBC/ue170hbc122520.pdf. *See also Id*., at p. 11 (arguing that Compact Article IV must be read together with the 1956 Contract executed between PacifiCorp and the U.S. Bureau of Reclamation. "The ink was barely dry on the 1956 Contract when the Compact was negotiated and drafted. The two documents deal, at least, in part, with precisely the same question: Under what terms may PacifiCorp or anyone else use the waters of Klamath River to generate hydroelectric power? There are two basic terms: (1) PacifiCorp's use of the water to generate hydroelectric power is subordinate to the Klamath Irrigators' use of the water for irrigation, and (2) PacifiCorp must make power available to the Klamath Irrigators from any hydroelectric development of the Klamath River at the lowest reasonable cost of producing the power.").

[89] *See* Oregon Public Utility Commission, *In the Matter of PacifiCorp*, Order – Transitional Rates Established for Klamath Basin Irrigators, No. 06-172 (4/12/06), at p. 6, available at: http://apps.puc.state.or.us/orders/2006ords/06-172.pdf.

[90] *See* Oregon Public Utility Commission, *In the Matter of PacifiCorp*, Order – Rate Standard Established, No. 05-1202, Docket No: UE 170 (11-8-05), at pp. 5-6, available at: http://apps.puc.state.or.us/orders/2005ords/05-1202.pdf.

[91] *Id*., at p. 7. *See also Id*., at pp. 6-7 (finding that since Compact Article IV is unambiguous, KWUA's reliance on the 1956 Contract ("reliance on matters outside the terms of the Compact was misplaced") because such extrinsic evidence "was not based on legislative history, but rather historical information related to the development of PacifiCorp's hydroelectric

In January 2006, the Federal Energy Regulatory Commission ("FERC") had denied an Interior Department request for a declaratory ruling that the 1956 contract "between Interior and PacifiCorp pertaining to the use of Upper Klamath Lake and the Klamath River for power and irrigation [was] included in the license for the Klamath Hydroelectric Project No. 2082."[92] In its subsequent April 2006 denial of the Interior Department's request for a rehearing, the FERC elaborated on its reasoning and interpreted Klamath River Basin Compact Article IV in the same manner as the Oregon Public Utility Commission had in 2005. It characterized Article IV as "simply describ[ing] in general terms the objectives of the two concerned states with respect to hydroelectric power."[93]

2. Why the KRBC is a Federal-Interstate Compact for Which Congressional Consent was Required:

At least one commentator has noted how, "federal participation in interstate compact commissions was designed to protect a federal interest"[94] and "[t]he protection of the national interest has been advanced also by the participation of federal representatives in compact negotiations."[95]

a. *Federal Government Participated in KRBC Negotiations*

Several features of the Klamath River Basin Compact indicate that it is better characterized as a federal-interstate compact rather than as a simple interstate compact. The facts arguably demonstrate that the U.S. government previously participated, through the Bureau of Reclamation, as a party actively engaged in the agreement's negotiation and subsequent implementation. As the preface to the Compact shows, Frank A. Banks, who was the U.S. government representative during the Compact's negotiations, had previously served as the lead Bureau of Reclamation construction engineer "who supervised the construction of the Owyhee, Grand Coulee and other dams."[96]

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projects on the Klamath River Basin […describing actions which] were not linked to the drafting of the Compact and are not even mentioned in the agreement.")

[92] *See* Federal Energy Regulatory Commission, Order Denying Petition for Declaratory Order and Issuing Notice of Proposed Readjustment of Annual Charges for the Use of a Government Dam, *In Re PacifiCorp*, Project Nos. 2082-039 and 2082-040, 114 FERC ¶ 61,051 (Jan. 20, 2006), available at: https://www.ferc.gov/whats-new/comm-meet/011906/H-1.pdf.

[93] *See* Federal Energy Regulatory Commission, *In Re PacifiCorp*, Order Denying Rehearing, Project No. 2082-041 (April 20, 2006), at par. 22, available at: http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11005320.

[94] *See* Frank P. Grad, *Federal-State Compact: A New Experiment in Co-operative Federalism*, 63 Columbia L. Rev. 825 (1963), *supra* at p. 837.

[95] *Id*., at p. 838. ("Federal involvement in interstate compacts prior the Delaware River Basin Compact has thus consisted, in part, of rendering technical assistance to the states involved – a form of state aid – and, in larger part, of protecting the national interest in a major area of federal jurisdiction, such as navigation.") *Id*.

[96] *See* Washington State University WSU Libraries Digital Collections, *Frank A. Banks Collection*, available at: http://content.libraries.wsu.edu/cdm/landingpage/collection/banks. *See also* Karin Ellison, *Abstract of "Explaining Hoover, Grand Coulee, and Shasta Dams: Institutional Stability and Professional Identity in the USBR,"* (3/11/03), at pp. 15-16, available at: http://www.riversimulator.org/Resources/USBR/ReclamationHistory/EllisonKarin.pdf ("Frank Banks, described by Chief Engineer Walter as 'our best construction engineer,' followed the education and career path of other USBR leaders. Banks studied for his degree in civil engineering at the University of Maine. He joined the USRS immediately upon graduation in 1906 and retired in 1957, after 51 years of service. He supervised the construction of

b. *Federal Government Participated in Administration of KRBC*

The facts reveal that the Federal government had participated in the administration of the KRBC through its representative seat on the Klamath River Basin Compact Commission. However, the Federal Court of Claims has ruled that "[a]lthough Congress consented to this compact, the United States was not a party thereto."[97]

Compact/consenting legislation Article IX.A.1[98] established a commission (the Klamath River Basin Compact Commission) to administer the Compact consisting of three representatives - one each from the States of Oregon (Oregon State Water Resources Board) and California (the California Department of Water Resources), and one from the federal government who would serve as chairman.[99] The Commission was intended to reflect a "cooperative relationship between Oregon, California, and Interior's Bureau of Reclamation."[100] Article IX.A.2 provided that the state representatives would each have one vote on Commission matters, while the federal representative appointed by the President would not vote.[101] Although the President's appointee does not vote, he/she can set the right tone and demeanor at Commission meetings and could actually define the Commission agenda in line with the President's policies. Article IX.A.10 provided that where the state representatives are unable "to agree

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several USBR major dams including Owyhee Dam in Oregon in the 1920s and Grand Coulee Dam in Washington State in the 1930s.")

[97] *See Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005) (Case 1:01-cv-00591-FMA), *supra* at p. 47.

[98] *See* Compact at Art. IX.A.1.

[99] The federal representative and chairperson during the Clinton administration was Alice Kilham, granddaughter of Dr. Edward P. Geary, assistant surgeon for the Oregon-California Railroad, conscientious land user who supported protection of hawks and owls, former speaker of the Oregon House of Representatives, and force behind the establishment of the Klamath River Basin Compact Commission. *See* Heather Vail, *Kilham Works to Improve Klamath and its Water*, Herald and News (July 10, 2000), available at: http://www.heraldandnews.com/kilham-works-to-improve-klamath-and-its-water/article_6f8d511c-6b6c-5f6f-96b3-db45b2ffc26c.html. Debra Lynn Crisp served as the federal representative and chairperson to the commission during the latter part of the Bush administration. *See* White House., Office of the Press Secretary, *Personnel Announcement of President George Bush* (Oct. 5, 2006), available at: http://www.klamathbasincrisis.org/compact/DebCrispAppt100506.htm and https://www.gpo.gov/fdsys/pkg/WCPD-2006-10-09/pdf/WCPD-2006-10-09-Pg1761.pdf (Former President Obama "intend[ed] to appoint Debra Lynn Crisp, of Oregon, to be a Member of the Klamath River Compact Commission (Federal Representative) and upon appointment, designate Chairman"). *See also* White House Correspondence, *Appointment of Debra Lynn Crisp as the Federal Representative on the Klamath River Compact Commission* (Oct. 16, 2006), available at: http://www.klamathbasincrisis.org/compact/PresLetterCrisp101606.pdf. Chrysten Lambert previously served as the federal representative and chairperson of the commission for the Obama administration. *See* The White House Office of the Press Secretary, *President Obama Announces More Key Administration Posts* (Feb. 2015), available at: https://www.whitehouse.gov/the-press-office/2015/02/05/president-obama-announces-more-key-administration-posts ("Today, President Barack Obama announced his intent to appoint the following individuals to key Administration posts: […] Chrysten Lambert – Federal Representative, Klamath River Compact Commission […] Chrysten Lambert is the Klamath Basin Rangeland Trust's (KBRT) Director of Water Transactions, a position she has held since 2010. Prior to this, Ms. Lambert was the Director of Procurement and Planning from 2007 to 2010 and the Global Sourcing Manager from 2005 to 2007 for the Sabroso Company. From 2003 to 2005, she was the Executive Director of the KBRT.")

[100] *See* Federal Energy Regulation Commission, Order Denying Rehearing, *In re PacifiCorp* Project No. 2082-041 (April 20, 2006), at par. 20, available at: https://www.ferc.gov/whats-new/comm-meet/042006/H-5.pdf.

[101] *See* Compact at Art. IX.A.2.

on any matter relating to the administration of the Compact[,…] the representative from each state shall appoint one person and the two appointed persons shall appoint a third person."[102] Together, "[t]he three appointees shall sit as a [binding] arbitration forum [where…m]atters on which the two voting members of the Commission have failed to agree shall be decided by a majority vote of the members" thereof.[103]

Compact Article IX.8(a)-(d) empowered the Commission to: "borrow, accept or contract for" personnel services from governmental, intergovernmental or other entities;[104] accept for any permissible purpose under the Compact all donations, gifts, grants of money, equipment, supplies, materials and services offered or provided by any such parties;[105] acquire, hold and dispose of real and personal property needed to perform its functions;[106] and make studies, surveys and investigations needed to carry out the Compact's provisions.[107]

Compact Article IXC.1. empowered the Commission to adopt, amend or repeal such rules and regulations to effectuate the Compact's purposes as it may judge to be appropriate.[108] Article IX.C.2 conditions the exercise of these powers, generally, on the Commission's prior Convening of public hearings "at which any interested person shall have the opportunity to present his views on the proposed action in writing."[109]

As the Congressional Research Service ("CRS") has reported, during the Bush administration, the Klamath River Basin Compact Commission had been "fairly inactive beyond supporting [public] workshops, signing a Memorandum of Understanding with Reclamation to study water storage, and holding public meetings on water quality."[110] For example, the CRS has reported that, in March 2002, the Klamath River Basin Federal Working Group ("comprised of the Secretary of Agriculture, the Secretary of the Interior, the Secretary of Commerce, and the Chair of the Council on Environmental Quality") was formed. Said working group inter alia announced measures to improve water quality and availability, including […] completion of Biological Opinions for the operation of the Project on a highest priority basis[,] and the acceleration of fish screen construction to minimize the number of fish entering the A Canal (the major water diversion from Upper Klamath Lake)."[111] In addition, during October 2004, the Departments of the Interior, Agriculture and Commerce, and the U.S. Environmental Protection Agency signed the *Klamath River Watershed Coordination Agreement*[112] pursuant to which

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[102] *See* Compact at Art. IX.A.10.
[103] *Id*.
[104] *See* Compact at Art. IX.A.8.a.
[105] *See* Compact at Art. IX.A.8.b.
[106] *See* Compact at Art. IX.A.8.c.
[107] *See* Compact at Art. IX.A.8.d.
[108] *See* Compact at Art. IX.C.1.
[109] *See* Compact at Art. IX.C.2.
[110] *See* Kyna Powers, Pamela Baldwin, Eugene Buck and Betsy Cody, *Klamath River Basin Issues and Activities: An Overview*, CRS Report for Congress RL33098 (Sept. 22, 2005), at p. CRS-35, available at: available at: http://www.energy.ca.gov/hydroelectric/klamath/documents/CRS_REPORT_RL33098.PDF.
[111] *Id*., at p. CRS-36.
[112] *See* U.S. Department of Interior News Releases, *The Klamath River Watershed Coordination Agreement* (Oct. 13, 2004), available at: https://www.doi.gov/sites/doi.gov/files/archive/news/archive/04_News_Releases/klamathagreement.pdf

the State and Federal Klamath Basin Coordination Group was formed to tackle Klamath Basin issues through "coordination and communication with one another and with Tribal governments, local governments, private groups and individuals."[113]

Given the Commission's growing level of activity, at least one academician had envisioned the federal-state cooperation the Commission had fostered as forming the basis for recognizing and considering "the legitimate interests of Native Americans, irrigators, and endangered species," and "establish[ing] a sustainable trajectory for the area over time."[114] Significantly, this academician concluded that the Klamath River Basin Compact Commission provided the platform through which such cooperation could be pursued; i.e., it remains

> "one of the few institutions [capable of] assembl[ing] all, or most of the major interests in the area. While the commission itself has limited means to address certain problems, it may have unrealized potential as a forum and an incubator for ideas."[115]

This academician therefore recommended that, "*[c]onsideration should be given to enabling a robust and viable commission*, or some comparable group, to play such a role" (emphasis added).[116]

The Obama administration's vision for the Commission was arguably quite different, as it effectively placed the Commission into a condition of stasis - as there were few, if any, Commission meetings convened from 2009-2016. It apparently followed the advice of other commentators who had dismissed the Compact and the Compact Commission as grossly "inadequate" to address all Klamath Basin parties' issues, given the "significant water disputes" that have animated the region "for over a decade and the continuing litigation and uncertainty for all affected interests."[117] According to these commentators, the ongoing "litigation and resulting water restrictions [imposed] under the federal Endangered Species Act" in the Klamath Basin could be attributed to the Compact's failure to provide proactive ecosystem protection."[118]

c. *Federal Government Interests Were Addressed in the KRBC*

(executed by the States of California and Oregon, the U.S. Departments of Agriculture, Commerce and the Interior, and the U.S. Environmental Protection Agency).

[113] *See* Kyna Powers, Pamela Baldwin, Eugene Buck and Betsy Cody, *Klamath River Basin Issues and Activities: An Overview*, CRS Report for Congress RL33098 (Sept. 22, 2005), *supra* at p. CRS-36.

[114] *See* Emery Castle, *A Synthesis: Policy Analysis and Public Institutions*, in William S. Braunworth, Teresa Welch and Ron Hathaway, *Water Allocation in the Klamath Reclamation Project, 2001: An Assessment of Natural Resource, Economic, Social, and Institutional Issues with a Focus on the Upper Klamath Basin*, Oregon State University Extension Service Special Report 1037 (2002, 2004), *supra* at p. 401.

[115] *Id*.

[116] *Id*.

[117] *See* Watermark Initiative, LLC, *U.S. Water Stewardship: A Critical Assessment of Interstate Watershed Agreements* (Feb. 2009), *supra* at pp. 84-85.

[118] *Id*.

The U.S. government clearly had various federal/national interests at stake in the Klamath River Basin Compact and they are significant. The Congressional Research Service ("CRS") has noted, for example, that "[t]he role of the federal government in the Klamath Basin centers largely on operation of the Bureau of Reclamation's Klamath project, management of several national wildlife refuges and other fish and wildlife resources under the ESA, and tribal trust responsibilities." [119] However, the Federal government's national interests in the Klamath Basin were broader as discussed below.

i. Federal Navigation Servitude

First, there is the federal navigation servitude, pursuant to which the Congress under the commerce clause,[120] and federal agencies under delegations from Congress, have the power to regulate and control how the navigable waters of the United States and adjacent riparian lands can be used and developed. Its purpose is to guarantee the peoples' "use of the nation's water resources to persons engaged in activities related to commerce."[121] "The navigation servitude is the paramount right of the federal government, under the commerce clause of the United States Constitution, to compel the removal of any obstruction to navigation, without the necessity of paying 'just compensation' ordinarily required by the fifth amendment of the Constitution."[122] In other words, the navigation servitude "allows Congress to impair or destroy private property interests without paying just compensation when it exercises its power to control and regulate navigable waters in the interest of commerce."[123]

"Under the federal standard of navigability, a navigable waterway is held in the public trust […] deemed open for use by the public] to the ordinary high-water mark. […T]he test of navigability is

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[119] *See* Charles Stern, Cynthia Brougher, Harold Upton and Betsy Cody, *Klamath Basin Settlement Agreements*, Congressional Research Service Report R42158 (Sept. 9, 2014), at p. 9, available at: https://www.fas.org/sgp/crs/misc/R42158.pdf. *See also Id.*, at p. 1 ("federal activities in the Klamath Basin related to operation of the Bureau of Reclamation's Klamath Project; management of federal lands (including six national wildlife refuges, managed by the Fish and Wildlife Service); and implementation of Endangered Species Act (ESA) and other federal laws)); p. 10 ("federal involvement, including operation of the Klamath Project, implementation of ESA, and management of fisheries and federal lands, is central to the issues in the basin"). *See also* Congressional Research Service Report for Congress, *Klamath River Basin: Background and Issues* (June 7, 2012), available at: https://www.everycrsreport.com/files/20120607_R42157_85310f989fd0c99aef07f0607a966a26db6d9368.pdf.

[120] *See* U.S. Constitution, Art. I, sec. 8.

[121] *See* Bruce H. Johnson, *Enforcing the Federal Water Resource Servitude on Submerged and Riparian Lands*, 347 Duke L. J. 347 (1977), available at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2617&context=dlj.

[122] *See* Eugene Morris, *The Federal Navigation Servitude: Impediment to the Development of the Waterfront*, 45 S. John's L. Rev. 189 (1970), available at: http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=3237&context=lawreview.

[123] *See* Randolph Ruff, *The Navigation Servitude: Post Kaiser-Aetna Confusion*, 20 Valparaiso Univ. L. Rev. 445 (1986), available at: http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1536&context=vulr, citing *United States v. Rands*, 389 U.S. 121, 124 (1967) ("Although it has a weak theoretical foundation, this century-old [judge-made] doctrine standards as an exception to the express fifth amendment proscription on the taking of private property for public purposes without just compensation. […] *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) (value of riparian land as a hydroelectric site held not compensable); *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945) (pier); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907) (bridge); *West Chicago Street R.R. v. Chicago*, 201 U.S. 506 (1906) tunnel under river).")

whether the waterbody may be used as a highway for commerce."[124] Indeed, in *The Daniel Ball*,[125] the U.S. Supreme Court held that rivers

> "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel and travel are or may be conducted in the customary modes of trade and travel on water."[126]

The U.S. Army Corps of Engineers to which Congress delegated authority to promulgate regulations governing the navigability of federal waterways, considers several factors in determining navigability. "These factors include past, present, or potential presence of interstate or foreign commerce, physical capabilities for use by commerce, and defined geographical limits of the waterbody."[127] "The determinative factor is the waterbody's capability of use by the public for commerce."[128]

Article I.A of the Compact/consent legislation stated that one of the "major purposes of this compact are, with respect to the water resources of the Klamath River Basin: A. To facilitate and promote […] the use and control of water for navigation […]"[129] Article XIV, Section 4(c) of the consent legislation provides that "[n]othing in this Act or in the compact shall be construed as […i]mpairing or affecting any existing rights of the United States of waters of the Klamath River Basin now beneficially used by the United States.'[130]

The Klamath River has been designated by the U.S. government and by the States of Oregon and California as a navigable waterway. For example, the San Francisco District of the U.S. Army Corps of Engineers determined in 1971 that 39 miles of the Klamath River beginning from the Oregon-California border was "[n]avigable to the foot of Tulley Rapids."[131] In 1986, the Oregon State Land Board declared that that the Klamath River was navigable from the Oregon-California border to Keno.[132] Previously, in 1983, the Oregon State Land Board Division of State Lands had proposed a

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[124] *See* Clinton Lancaster, *Property Law - The Recreational Navigation Doctrine - The Use of the Recreational Navigation Doctrine to Increase Public Access to Waterways and Its Effect on Riparian Owners*, 33 U. Ark. Little Rock L. Rev. 161 (2011), at pp. 162-163, available at: http://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1080&context=lawreview.

[125] *See The Daniel Ball*, 10 Wallace 557, 563; 19 L. Ed. 999 (1871).

[126] *Id*.

[127] *See* Clinton Lancaster, *Property Law - The Recreational Navigation Doctrine - The Use of the Recreational Navigation Doctrine to Increase Public Access to Waterways and Its Effect on Riparian Owners*, 33 U. Ark. Little Rock L. Rev. 161 (2011), *supra*, at p. 163, fn 19, citing 33 C.F.R. 329.5.

[128] *Id*. at p. 163.

[129] *See* Compact at Art. 1.A.

[130] *See* Compact at Art. XIV, sec. 4(c).

[131] *See* United States Army Corps of Engineers, San Francisco California District, *Navigable Waterways as of 2 August 1971*, at p. 2, available at: http://www.spn.usace.army.mil/Portals/68/docs/regulatory/1%20-%20Sect10waters.pdf ("Klamath River […] Navigable Length in Miles 39.0 […] Remarks […] Navigable to the foot of Tulley Rapids").

[132] *See* Oregon Department of State Lands, *Oregon's Publicly-Owned Waterways*, available at: https://www.oregon.gov/dsl/NAV/Pages/navigwaterways.aspx ("Following is a list of Oregon waterways that have been determined to meet the federal test of navigability for purposes of State ownership of the underlying submerged and submersible land. […] Klamath River - RM 208 to 233 (California border to Keno) - State Land Board declaration 1986"). *Cf.* James Farnell, Oregon Division of State Lands, *Klamath Basin Rivers Navigability Study* (Dec. 1980), at pp. 54-55,

declaration that the Klamath River from Klamath Falls to Keno Bridge (RM 233) was navigable, but not the Klamath Strait.[133] The U.S. Coast Guard's Thirteenth District also has weighed in on the issue of Klamath River navigability. It recently determined that the Klamath River at the Lake Ewuana bridge site was non-navigable.[134]

Notwithstanding the federal determination of navigability states, as their own sovereigns, "can either expand or hold fast to the federal definition of navigability as it relates to those waterways."[135] For example, the States of California and Oregon have expanded the definition of navigability to include recreational use. "California has recognized that its streams are a vital recreational resource of the state."[136] "The California recreational doctrine provides that 'members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below the ordinary high-water mark on waters capable of being navigated by oar or motor-propelled small craft."[137] "In other words, the definition of navigability in California rests on whether the river is capable of floating a canoe or kayak."[138] "The Oregon Supreme Court has recognized that boating or sailing for pleasure, as well as boating for mere pecuniary profit should be considered navigation."[139] The Oregon Supreme Court also has held that a "boat used for the transportation of pleasure seeking passengers is, in a legal sense, as much engaged in commerce as is a vessel transporting a shipment of lumber."[140] In other words, the States of California and Oregon would likely consider recreational uses such as whitewater rafting by means of kayaks, canoes and other oared craft as being engaged in commerce for purposes of finding the Klamath River "navigable."

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available at: http://library.state.or.us/repository/2010/201010011255155/index.pdf ("During the years when the citizens of the Klamath Basin were eagerly awaiting the arrival of the railroad in order to turn the timbered treasure of their basin into gold, they optimistically expected that the rivers of the region would serve as an important transportation medium. […] Necessity of the time was the reason for many modes of transportation in our earlier history, certainly of rivers, and we hope that the actuality of commercial transport on the rivers of Klamath Basin falls somewhere between these two poles. A summary of the lengths used follows. *Their susceptibility to navigation is confirmed by current recreational usage* described in the last section of this report. […] Klamath River, River Mile Vessel Reaches, 233 – Lake Ewauna; River Mile Log Reaches, 232.5 – Lake Ewauna" (emphasis added)).

[133] *See* Oregon Division of State Lands, Report and Recommendation on the Navigable Waters of Oregon (Jan. 1983), at pp. 58-66, available at: https://www.oregon.gov/dsl/NAV/docs/nav_waters_rpt.pdf. *Id*., at p. 66 ("Klamath River: The Division recommends that the Klamath River be declared navigable from Klamath Falls to Keno Bridge (RM 233)." […] Klamath Strait: Because this short reach is subject to being filled and was not meandered, the Division recommends that the State not claim ownership to any portion of Klamath Strait" (emphasis in original).

[134] *See* United States Coast Guard, *Navigability Determinations for the Thirteenth District*, at pp. 6, 8, available at: https://www.uscg.mil/d13/docs/CG_Navigable_Waterways.pdf.

[135] *See* Clinton Lancaster, *Property Law - The Recreational Navigation Doctrine - The Use of the Recreational Navigation Doctrine to Increase Public Access to Waterways and Its Effect on Riparian Owners*, 33 U. Ark. Little Rock L. Rev. 161 (2011), *supra* at pp. 163-164, citing *Pollard v. Hagan*, 44 U.S. 221, 215-216, 223 (1845).

[136] *Id*., at p. 166, citing *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 1050 (1971).

[137] *Id*., at pp. 166-167, citing *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 1050 (1971).

[138] *See* American Whitewater, *Navigability Primer*, available at: http://www.americanwhitewater.org/content/Wiki/stewardship:navigability#fnt__4, (citing *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 1050 (1971)).

[139] *See* Clinton Lancaster, *Property Law - The Recreational Navigation Doctrine - The Use of the Recreational Navigation Doctrine to Increase Public Access to Waterways and Its Effect on Riparian Owners*, 33 U. Ark. Little Rock L. Rev. 161 (2011), *supra* at p. 166, citing *Guilliams v. Beaver Lake Club*, 175 P. 437, 442 (Or. 1918).

[140] *Id*., at p. 166, quoting *Luscher v. Reynolds*, 56 P.2d 1158, 1162 (Or. 1936).

This conclusion is supported by a 2005 Congressional Research Service Report for Congress which states that

> "[p]ortions of the Upper Klamath River support a major trout fishery and other recreational activities. In particular, 11 miles of the Upper Klamath River – from the J.C. Boyle Powerhouse to the California-Oregon border – are designated as a Wild and Scenic River. Fed [by] year-round releases from the J.C. Boyle Dam, this section of the river contains more than 20 rapids rate class III or higher, making a major destination for commercial and private white-water rafting and kayaking."[141]

ii. Federal Assurance of Affordable Hydropower

As discussed above, when PacifiCorp acquired Copco in 1961, it "became a successor to the On-Project and Off-Project Contracts" that Copco had previously entered into *with the U.S. Interior Department* and the predecessor to the Klamath Water Users Association representing Klamath Basin irrigators. These contracts, respectively, had "required Copco to furnish electric power to On-Project irrigators at a rate of 0.6 cents per kWh," and "to provide service to Off-Project irrigators at a rate of 0.75 cents per kWh."[142] These discounted rates had been provided in exchange for the COPCO's use of on-project and off-project irrigator water rights to generate the hydroelectricity.

iii. Federal Irrigation Project Operation and Management

Third, Congress has jurisdiction, which it delegated to the Secretary of the Interior in the Reclamation Act of 1902,[143] to reclaim swamps and lakes to increase irrigable agriculture, and ultimately, to the Reclamation Service (U.S. Bureau of Reclamation ("BOR")) which BOR implemented by initiating the Klamath Irrigation Project in 1906.[144] While the Project had been initially constructed for irrigation

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[141] *See* Kyna Powers, Pamela Baldwin, Eugene Buck and Betsy Cody, *Klamath River Basin Issues and Activities: An Overview*, CRS Report for Congress RL33098 (Sept. 22, 2005), *supra* at p. CRS-7.

[142] *See* Oregon Public Utility Commission, *In the Matter of PacifiCorp*, Order – Transitional Rates Established for Klamath Basin Irrigators, No. 06-172 (4/12/06), *supra* at p. 6. *See also Klamath Off-Project Water Users, Inc. v. PacifiCorp*, 0604877CV A139104 (OR CA 2010), available at: http://www.publications.ojd.state.or.us/docs/A139104.htm ("On April 30, 1956, Copco entered into an agreement to sell electric power to the Klamath Basin Water Users Protective Association, Inc. (the association), an association of *individuals who reside* in and around the Upper Klamath River Basin, but *outside the boundaries of the Klamath Reclamation Project*. The agreement is known as the *'off-project agreement'* or just 'the agreement.' That agreement specified, in part, that, '[i]n consideration for an increased flow of water caused by the development of lands for agricultural purposes within the Upper Klamath River Basin * * * Copco agrees to provide power rates for agricultural pumping for all off-project users in the Upper Klamath River Basin, as follows:' '10 Horsepower motors or over * * * [0.75 cents] per KWH[.]'" (emphasis added)).

[143] *See* P.L. 57-161, *An Act Appropriating the Receipts from the Sale and Disposal of Public Lands in Certain States and Territories to the Construction of Irrigation Works for the Reclamation of Arid Lands*, Ch. 1093, 32 Stat. 388, 57th Cong., 1st Sess. (June 17, 1902), available at: http://legisworks.org/sal/32/stats/STATUTE-32-Pg388.pdf.

[144] *See* The Oregon Encyclopedia, *Klamath Basin Project (1906)*, available at: https://oregonencyclopedia.org/articles/klamath_basin_project_1906_/#.XHQU1ehKiUk.

purposes, it has been managed by Reclamation with an eye towards compliance with federal flood control, environmental protection and wildlife statutes. Article XIII of the Compact and of Congress' consent legislation (P.L. 85-222) expressly recognized this federal interest by imposing rather extensive obligations upon the U.S. Bureau of Reclamation's ongoing operation of the Project.[145]

In particular, the Compact/consent legislation obliged Reclamation to: 1) abide by the recognized vested rights to the use of waters originating in the Upper Klamath River Basin validly established and subsisting as of the effective date of the Compact, including rights to the use of all waters reasonably required for domestic and irrigation uses which can be made within the Klamath Project, consistent with the provisions of subdivision A of Article III of the Compact/consent legislation;[146] 2) to pay just compensation for the "impair[ment of] any rights to the use of water for domestic or irrigation use within the Upper Klamath Basin by the exercise of any powers or rights to use or control water for any non-domestic use or irrigation purpose" outside or within the Klamath River Basin;[147] 3) abide by the limitation on diversions from waters from Jenny Creek basin;[148] 4) abide by the prohibition against diversion of waters from the Upper Klamath River Basin consistent with paragraph 2(a) of subdivision B of Article III of the Compact/consent legislation;[149] 5) abide by the limitations on diversion of non-consumed waters from the Upper Klamath Lake and Klamath River and its tributaries upstream from Keno, Oregon – i.e., the obligation to return waters to the Klamath River, consistent with paragraph 2(b) of subdivision B of Article III of the Compact/consent legislation;[150] 6) abide by the prohibition against taking diverted Klamath River waters for use in California outside the Upper Klamath River Basin, consistent with paragraph 3(a) of subdivision B of Article III of the Compact/consent legislation;[151] and 7) to provide that substantially all of the return flows and waste water finally resulting from diversions and use of surface waters for irrigation or reclamation development are drained so that they eventually return to the Klamath River upstream from Keno.[152]

iv. Flood Control

Fourth, Article I.A of the 1957 Klamath River Basin Compact expressly includes among its major purposes "the use and control of water for […] flood prevention."[153] In addition, Congress holds preemptive authority pursuant to the 1936 Flood Control Act, as amended,[154] to ensure the construction

[145] *See* P.L. 85-222, at Art. XIV, Sec. 2 (a) ("The term 'United States' shall mean collectively or separately, as the case may be, the United States, *any agency thereof*, and any entity acting under any license or other authority granted under the laws of the United States" (emphasis added)).
[146] *See* Compact, at Art. XIII.B(1).
[147] *See* Compact, at Art. XIII.B(2).
[148] *See* Compact, at Art. XIII.B(3).
[149] *See* Compact, at Art. XIII.B(4).
[150] *Id*.
[151] *Id*.
[152] *See* Compact, at Art. XIII.B(5).
[153] *See* P.L. 85-222, *Klamath River Basin Compact*, 71 Stat. 497, at Art. 1.A (Aug. 30, 1957), available at: https://www.govinfo.gov/content/pkg/STATUTE-71/pdf/STATUTE-71-Pg497.pdf.
[154] *See* P.L. 74-738, *An Act Authorizing the Construction of Certain Public Works on Rivers and Harbors for Flood Control and Other Purposes*, Chap. 688, 74th Cong., 2nd Sess., (June 22, 1936), available at: http://www.legisworks.org/congress/74/publaw-738.pdf, as amended by P.L. 75-406, *An Act to Amend an Act Authorizing*

and maintenance of certain public works on rivers and harbors for flood control. Congress again exercised its federal authority over flood control on the lower Klamath River at and in the vicinity of Klamath, California, in 1966, when it authorized the appropriation of $2,460,000 to implement the flood control recommendations of the Chief of the U.S. Army Corps of Engineers, as set forth "in House Document Numbered 478, Eighty-ninth Congress."[155]

v. Federal Environmental Protection/ Pollution Control

Fifth, there is the jurisdiction exercised by Congress, and through it, the jurisdiction exercised by the Interior Department and the Environmental Protection Agency, under the Clean Water Act (the Federal Water Pollution Control Act Amendments of 1972)[156] over navigable waters.[157] Although these federal statutes had not been enacted at the time the Compact had been signed into federal law, they became an overriding federal interest thereafter. This expression of the navigation servitude is focused on "keeping the waters of the United States in a pristine state for the public and for commercial users […] by regulating private activities that affect water quality."[158] In the recent case of *ONRC Action v. U.S. Bureau of Reclamation*,[159] the Ninth Circuit Court of Appeals held that the Klamath River (including

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the Construction of Certain Public Works on Rivers and Harbors for Flood Control, and for Other Purposes, Approved June 22, 1936, Chap. 877, 75th Cong., 1st Sess. (Aug. 28, 1937), at Sec. 5, 75 Stat. 880, available at: https://www.loc.gov/law/help/statutes-at-large/75th-congress/session-1/c75s1ch877.pdf.

[155] *See* P.L. 89-789, *An Act Authorizing the Construction, Repair, and Preservation of Certain Public Works on Rivers and Harbors for Navigation, Flood Control, and for Other Purposes*, at Title II – Flood Control, Sec. 203, 80 Stat. 1421 (Nov. 7, 1966), available at: https://www.govinfo.gov/content/pkg/STATUTE-80/pdf/STATUTE-80-Pg1405.pdf ("Sec. 203 - The following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and the supervision of the Chief of Engineers in accordance with the plans in the respective
reports hereinafter designated and subject to the conditions set forth therein. The necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this title with funds from appropriations hereafter made for flood control so as to be ready for rapid inauguration of a construction program. The projects authorized in this title shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements […] Klamath River Basin.").

[156] *See* Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816, codified at 33 U.S.C. 1251 et seq.

[157] *See e.g.*, U.S. Department of the Interior Bureau of Reclamation, Reclamation Manual Directives and Standards ENV-06-01 - *Non-Agricultural Discharges into Bureau of Reclamation Facilities – Requirements and Procedures for Obtaining Authorization from Reclamation* (1/31/14), available at: https://www.usbr.gov/recman/env/env06-01.pdf.
See also U.S. Department of the Interior Bureau of Land Management, *Water Quality*, available at: https://www.blm.gov/wo/st/en/prog/more/soil2/water/water_quality0.print.html ("Section 313 of the CWA states that each federal department and agency having jurisdiction over any property or facility or engaged in any activity that may result in the discharge or runoff of pollutants is subject to, and must comply with, all Federal and State requirements and administrative authority respecting the control and abatement of water pollution in the same manner, and to the same extent, as any nongovernmental entity. EPA has delegated the establishment and enforcement of water quality standards (WQS) to the States. Therefore, the BLM is required to meet the WQS of each State in which it administers public lands.")

[158] *See* Bruce H. Johnson, *Enforcing the Federal Water Resource Servitude on Submerged and Riparian Lands*, 347 Duke L. J. 347 (1977), *supra* at pp. 361-362.

[159] *See ONRC Action v. Bureau of Reclamation*, 798 F.3d 933 (9th Cir. 2015).

the Klamath Straits Drain) is a federal navigable waterway for environmental protection (as opposed to navigational) purposes.[160]

Article VII.A of the Compact/consent legislation entitled, "Pollution Control" provided that, "[t]he states recognize further that protection of the beneficial uses of the waters of the Klamath River Basin requires cooperative action of the two states in pollution abatement and control." Article VII.B.1. provides that, "[t]o aid in such pollution abatement and control, the commission shall have the duty and power: 1. To cooperate with the states or agencies thereof or other entities *and with the United States for the purpose of promoting effective laws and the adoption of effective regulations for abatement and control of pollution of the waters of the Klamath River Basin*, and from time to time to recommend to the governments reasonable minimum standards for the quality of such waters" (emphasis added).

vi. Federal Protection of Fish and Wildlife

Sixth, there is the federal interest of the Interior Department and Bureau of Reclamation in protecting *fish* and wildlife. Article I.A of the Compact and consent legislation stated that one of the "major purposes of this compact are, with respect to the water resources of the Klamath River Basin: To facilitate and promote […] the protection and enhancement of fish, wildlife, and recreational resources […]."[161] Indeed, Article III.B.1 of the Compact/consent legislation identifies "recreational use, including use for fish and wildlife," as the third highest use to which Klamath River Basin waters should be placed, after domestic and irrigation uses.[162] In addition, Article VIII.B of the Compact/consent legislation provided that, "[e]ach state shall exercise whatever administrative, judicial, legislative or police powers it has that are required to provide any necessary re-regulation or other control over the flow of the Klamath River downstream from any hydroelectric power plant for protection of fish […] from damage cause by fluctuations resulting from the operation of such plant."[163] This purpose of the Compact and the federal government's obligation to fulfill it has rapidly expanded since the Compact went into force following Congress' enactment of the Endangered Species Act.[164]

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[160] 798 F.3d at 935-938 ("Before the engineering of the Project, Lower Klamath Lake and the Klamath River were connected by the Klamath Straits. […] For a period of time early in the 20th Century, that link was severed. […] In the 1940's, however, the Bureau restored the link. As noted earlier, the Project moves water from the Klamath River and the Lost River Basin, along with runoff added along the way, into Lower Klamath Lake. There was no outlet for the added waters from Lower Klamath Lake, and that lake could not contain all the extra water volume. Instead of simply opening the headgates, the Bureau decided to control the flow of water by making improvements that essentially followed the historic path of the Straits. It excavated and channelized the Straits and some of the nearby marshland, turning it into what is now called the Klamath Straits Drain ('KSD'). […] The CWA makes unlawful the addition from a point source of any pollutant to navigable waters without a permit. 33 U.S.C. § 1311(a). *The Klamath River is a navigable water*. […] *In considering whether the KSD [Klamath Straits Drain] was a navigable water covered by the CWA, the district court found that 'the [KSD], like the Klamath Straits, creates a hydrological connection between the Klamath River and Lower Klamath Lake'*") (emphasis added).

[161] *See* Compact, at Art. I.A.

[162] *See* Compact, at Art. III.B.1.

[163] *See* Compact at Art. VIII.B.

[164] *See Endangered Species Act*, P.L. 93-205, as amended; 16 U.S.C. §§1531-1543.

The above-referenced 2005 Congressional Research Service report, for example, noted how one of the federal government's primary roles in the Klamath Basin has since been "implementation of federal laws, such as the Endangered Species Act (ESA), Clean Water Act (CWA), and National Environmental Policy Act (NEPA)." [165] This same report emphasized how federal implementation of the ESA has been a driving force behind the Interior Department's greatly expanded role in the Klamath Basin.

> "A *primary* factor driving issues in Klamath Basin water management is the interplay between federal project operations and the federal ESA. The 1973 ESA is intended to protect species at risk of extinction. Under the ESA," species (or distinct population segments) of plants and animals may be listed as either endangered or threatened according to assessments of the risk of their extinction. Under the ESA, officials are required to "conserve" listed species: i.e. to recover their numbers to the point that they no longer need the protections of the ESA. In furtherance of this goal, federal agencies are to consult with either the Fish and Wildlife Service (FWS) — for terrestrial and freshwater species — or the National Marine Fisheries Service (NMFS) — for marine species and anadromous fish — on agency actions (e.g., project operations for a given year) that might affect a listed species, and are to avoid jeopardizing its continued existence. When a federal agency proposes an action, the action is analyzed in a 'Biological Assessment' and the FWS or NMFS issues a 'Biological Opinion' as to whether the proposed agency action is likely to jeopardize a species. If jeopardy is likely, FWS or NMFS identifies 'reasonable and prudent alternatives' (RPAs) to the proposed agency action that would avoid jeopardy. If jeopardy cannot be avoided, the agency must forego the proposed action, seek an exemption, or, as the Supreme Court has noted, proceed at its 'own peril' in light of the civil and criminal penalties applicable under the ESA."[166]

The 2005 report also noted how the lower portion of the Klamath River system has been used for recreational fishing and is protected under the California Wild and Scenic Rivers designation in implementation of California's obligations under the Wild and Scenic Rivers Act ("WSRA").[167]

> "*Recreational* activities are also prevalent throughout the Lower Basin. For example, *recreational* fishing occurs in the ocean off the mouth of the Klamath River and upstream within the Klamath Basin. Further,

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[165] *See* Kyna Powers, Pamela Baldwin, Eugene Buck and Betsy Cody, *Klamath River Basin Issues and Activities: An Overview*, CRS Report for Congress RL33098 (Sept. 22, 2005), *supra* at p. CRS-1.

[166] *Id*., at CRS-2 and CRS-3.

[167] *See* P.L. 90-542, 82 Stat. 906 (1968), codified at 16 U.S.C. §§ 1271 et seq. Section 2(a) of the Act provides that, "The national wild and scenic rivers system shall comprise rivers (i) that are authorized for inclusion therein by Act of Congress, or (ii) that are designated as wild, scenic or recreational rivers by or pursuant to an act of the legislature of the State or States through which they flow…"

> much of the lower Klamath River and its tributaries are part of California's Wild and Scenic River System" (emphasis added).[168]

In 1981, the State of California and/or the Federal government designated 286 miles of the Klamath River under each of the three WSRA categories: "wild" (11.7 miles); "scenic" (23.5 miles); and "recreational" (250.8 miles).[169] In 1994, the State of Oregon and/or the Federal government designated 11 miles of the Klamath River "[f]rom the J.C. Boyle Powerhouse to the California-Oregon border" as "scenic" within the meaning of the WSRA,[170] which the City of Klamath Falls, Oregon, thereafter, unsuccessfully challenged in Federal District Court in Washington, D.C.[171]

The national policy underlying the Wild and Scenic Rivers Act ("WSRA") appears in Section 1(b) of the Act:

> "It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, *shall be preserved in free-flowing condition*, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations" (emphasis added).[172]

As can clearly be seen, the Federal government has multiple interests in ensuring the proper implementation of the WSRA.

In general, rivers falling within this designation must be preserved. The Act defines a river as "free-flowing" if it "exist[s] or flow[s] in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway."[173] One (2009) CRS Report discussed how "[t]he Wild and Scenic Rivers Act of 1968 […has] allowed the federal government to ensure protection of certain waters […under federal jurisdiction…] from development."[174] This designation has "allow[ed]

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[168] *Id*., at CRS-15.

[169] *See* National Wild and Scenic River System, *Klamath River – California*, available at: https://www.rivers.gov/rivers/klamath-ca.php ("From the mouth to 3,600 feet below Iron Gate Dam. The Salmon River from its confluence with the Klamath to the confluence of the North and South Forks of the Salmon River. The North Fork of the Salmon River from the Salmon River confluence to the southern boundary of the Marble Mountain Wilderness Area. The South Fork of the Salmon River from the Salmon River confluence to the Cecilville Bridge. The Scott River from its confluence with the Klamath to its confluence with Schackleford Creek. All of Wooley Creek.")

[170] *See* National Wild and Scenic River System, *Klamath River – Oregon*, available at: https://www.rivers.gov/rivers/klamath-or.php.

[171] *See City of Klamath Falls, Or. v. Babbitt*, 947 F. Supp. 1 (D.D.C. 1996).

[172] *See* P.L. 90-542, 82 Stat. 906 (1968) at Sec. 1(b).

[173] *See* 16 § 1286(b).

[174] *See* Betsy A. Cody and Nicole T. Carter, *35 Years of Water Policy: The 1973 National Water Commission and Present Challenges*, Congressional Research Service ("CRS") Report for Congress (R40573) (May 11, 2009), at p. 61, available at: http://digital.library.unt.edu/ark:/67531/metadc700749/m1/1/high_res_d/R40573_2009May11.pdf.

the federal government to recognize aesthetic and recreational ["social"] values of the rivers and prevent uses that would diminish those values."[175]

However, as another 2009 CRS Report reveals, "a river may be included in the Wild and Scenic River System even if minor structures such as low dams or diversion works already exist along the section of the river proposed for inclusion."[176]

> "The Congress declares that the established national policy of dam and other construction *at appropriate sections of the rivers* of the United States needs to be complemented by a policy *that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality* of such rivers and to fulfill *other vital national conservation* purposes" (emphasis added).[177]

In other words, where dams have been constructed along portions of rivers so designated, Congress recognized that Federal agencies must engaged in a balancing of the U.S. national dam policy and the general "free-flowing condition" preservation policy of the WSRA.

As indicated, the WSRA entails three distinct river classifications: "wild", "scenic" and "recreational." "Wild" river areas or sections thereof are "free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted."[178] "Scenic" river areas or sections thereof are "free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads."[179] "Recreational" river areas or sections thereof are "readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past."[180]

Whether a river is designated as "wild," "scenic" or "recreational" will often determine the "amount of water needed [by the Federal government in the form of "federal reserved water rights"] to protect the values of each section."[181] "For example, water usage related to a protected waterway presumably would be most restricted if the river were designated as wild […and a] recreational river would have the fewest [water] restrictions of the three types."[182]

vii. Federal Trust Obligation to Protect Tribal Water Rights

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[175] *Id*.
[176] *See* Cynthia Brougher, *The Wild and Scenic Rivers Act and Federal Water Rights*, Congressional Research Service ("CRS") Report for Congress (RL30809) (Jan. 9, 2009), at p. 1, available at: https://www.rivers.gov/documents/crs-water-rights-2009.pdf.
[177] *Id*.
[178] *See* 16 §1273(b)(1).
[179] *Id.*, at (b)(2).
[180] *Id*., at (b)(3).
[181] *See* Cynthia Brougher, *The Wild and Scenic Rivers Act and Federal Water Rights*, Congressional Research Service ("CRS") Report for Congress (RL30809) (Jan. 9, 2009), *supra* at pp. 2, 8, 11.
[182] *Id*., at p. 2.

Seventh, there is the federal interest of the Interior Department and the Bureau of Reclamation in protecting Indian tribes and tribal members. Compact/consent legislation Article X.A.3 stated that "[n]othing in this compact shall be deemed […t]o affect the obligations of the United States of America to the Indians, tribes, bands, or communities of Indians, and their reservations."[183] Article XIV, Section 4(a) of the consent legislation recognized this obligation. It stated that, "[n]othing in this Act or in the compact shall be construed as […a]ffecting the obligations of the United States to the Indians or Indian tribes, bands, or communities of Indians, or any right owned by or held by or for the Indians or Indian tribes, bands or communities of Indians, which is subject to control by the United States."[184] In addition, Article XI.A of the Compact/consent legislation provided that, "[n]othing in this Act/Compact shall be deemed […] to impair or affect any rights, powers or jurisdictions of the United States, its agencies *or those acting by or under its authority*, in, over and to the waters of the Klamath River Basin…" (emphasis added).[185]

Similarly, Compact/consent legislation Article X.A.1 and 2 stated that nothing in the Compact shall be deemed to: (1) "affect adversely the rights of any individual Indian, tribe, band or community of Indians to the use of the waters of the Klamath River Basin for irrigation" or to (2) "deprive any Indian, tribe, band or community of Indians of any ***rights, privileges or immunities afforded under federal treaty***, agreement or statute."[186] Compact/consent legislation Article X.A.4 provided that nothing in the Compact shall be deemed to "alter, amend or repeal any of the provisions of the Act of August 13, 1954 (68 Stat. 718),[187] as it may be amended."[188] This latter provision of the Compact/consent legislation effectively recognized Section 14 of the Klamath Termination Act [189]which is of particular significance to the issues in the present case. It provided that,

> "(a) *Nothing in this Act shall abrogate any water rights of the tribe and its members*, and the laws of the State of Oregon with respect to the abandonment of water rights by nonuse shall not apply to the tribe and its members until fifteen years after the date of the proclamation issued pursuant to section 18 of this Act. (b) *Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal Treaty*" (emphasis added).

In *United States v. Adair*, 23 F. 2d 1394, 1419 (1983 9th Cir.), the Federal Court of Appeals for the Ninth Circuit noted how Compact Article X "explicitly preserves Indian water rights, including irrigation rights that are more fully exercised after the Compact's ratification, from diminution[, and how Article XI…] further preserves all federal rights, powers and jurisdiction except as explicitly

[183] KRBC at Art. X.A.3.
[184] *See* P.L. 85-222, Art. XIV, Sec. 4(a).
[185] *See* P.L. 85-222, Art. XI.A; Compact, Art. XI.A.
[186] Compact Art. X.A.1-2.
[187] *See* P.L. 587, Chap. 732 ("Klamath Indians, Termination of Federal Supervision) 68 Stat. 718 (Aug. 13, 1954), available at: http://digital.library.okstate.edu/kappler/Vol6/html_files/v6p0635.html#mn1, codified at 25 U.S.C. § 564 et seq.(1976).
[188] Compact Art. X.A.4.
[189] *See* 25 U.S.C. § 564m(a)-(b).

conceded."[190] The Court thus concluded that, "Congress did not intend to make the terms of the Compact control the government's acquisition of Indian irrigation rights or the Tribe's continued enjoyment of hunting and fishing rights."[191] This *Adair* Court holding supported the Court's other holdings concerning the status of the tribal members' reserved on-reservation irrigation water rights and of their off-reservation water rights supporting their fishing and hunting rights. With respect to on-reservation water rights, the *Adair* Court held that individual Klamath Indian allottees had a right to use, in the present and future, a portion of the Klamath Tribes' reserved water right to sufficient water with a priority date of 1864 (the Treaty execution date) "to irrigate all the practically irrigable acreage on the reservation."[192] With respect Klamath tribal members' off-reservation rights, the *Adair* Court held that,

> "within the 1864 Treaty is a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle on the Klamath Reservation. Such water rights necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights."[193]

In a 1993 memorandum, former Solicitor of the Interior Department, John Leshy,[194] concluded that California and Ninth Circuit federal case law "confirm[] that when the United States set aside in the nineteenth century what are today the Yurok and Hoopa Valley Indian Reservations along the Klamath and Trinity Rivers, it reserved for the Indians federally protected fishing rights to the fishery resource in the rivers running through the reservations."[195] The memo added that Interior Department legal

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[190] *See United States v. Adair*, 23 F. 2d 1394, 1419 (1983 9th Cir.).

[191] 23 F. 2d at 1415, citing *Arizona v. California*, 373 U.S. 546, 566, 83 S.Ct. 1468, 1480-81, 10 L.Ed.2d 542 (1963).

[192] 23 F. 2d at 1415-1416, citing *United States v. Powers*, 305 U.S. 527, 531, 59 S.Ct. 344, 346, 83 L.Ed. 330 (1939); *Colville Confederated Tribe v. Walton*, 647 F.2d at 51; *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir.1956).

[193] 23 F.2d at 1414, citing *Washington v. Fishing Vessel Ass'n*, 443 U.S. at 678-81, 99 S.Ct. at 3070-72; S*tate v. Coffee*, 97 Idaho 905, 908, 556 P.2d 1185, 1188 (1976); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823). "To assign the Tribe's hunting and fishing water rights the later, 1864, priority date […] would ignore one of the fundamental principles of prior appropriations law – that priority for a particular water right dates from the time of its first use. […] Furthermore, the 1864 priority date might limit the scope of the Tribe's hunting and fishing water rights by reduction for any pre-1864 appropriations of water. This could extinguish rights the Tribe held before 1864 and intended to reserve to itself thereafter. Thus, we are compelled to conclude that where, as here, a tribe shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use.") *Id*.

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[195] *See* United States Department of the Interior, Office of the Solicitor, *Memorandum – Fishing Rights of the Yurok and Hoopa Valley Tribes*, M-36979 (Oct. 5, 1993), at p. 2 fn 2, available at: https://www.fws.gov/arcata/fisheries/reports/tamwg/meeting15_march06/Fishing%20Rights%20of%20the%20Yurok%20and%20Hoopa%20Valley%20Tribes%20October%205,%201993%20%20Solicitor.pdf, citing *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986); *Pacific Coast Federation of Fishermen's Ass'n v. Secretary of Commerce*, 494 F. Supp. 626, 632 (N.D. Cal. 1980); *Mattz v. Superior Court*, 46 Cal. 3d 355, 758 P.2d 606 (1988); *People v. McCovey*, 36 Cal. 3d 517, 685 P.2d 687, *cert. denied*, 469 U.S. 1062 (1984); *Arnett v. 5 Gill Nets*, 48 Cal. App. 3d 454, 121 Cal. Rptr. 906

opinions and policy statements had since "acknowledged the fishing rights of the Yurok and Hoopa Valley Indians and the Department's corresponding obligations,"[196] and that a review of "the now-substantial body of case law examining the history of the present-day Hoopa Valley and Yurok reservations "confirm[s] the reservation Indians' fishing rights […]"[197]

Despite Compact Article X's use as a placeholder, commentators have since remarked that the construction of the four dams along the Klamath River "culminat[ing] with the completion of Iron Gate dam in 1962," following the termination of the Klamath Tribes Reservation in 1954, effectively "marginaliz[ed…] the native Klamath peoples that solidified the entrenched status quo of Euro-American agriculture (farming, ranching, and commercial fishing) as the dominant political and economic drivers in the basin."[198] Moreover, other commentators have since emphasized that the Compact largely isolated the four federally recognized Indian tribes in the Klamath Basin (the Klamath, Hoopa Valley, Yurok and Karuk tribes) from the decision processes about the river even though they held senior water rights.[199]

> "Tribes were included only as users the federal government was obligated to protect. Reflecting the power structure of the time, irrigation was assigned priority above all uses except drinking water. Federal regulation of in-stream quality and flow and tribal assertions of sovereignty (the Klamath Reservation was in the process of being disbanded) had no foothold in the social concept of the Klamath Basin in the mid-1950s." [200]

As the result of Klamath Basin water allocation having been generally "left to state law" and Native American water rights having been largely dependent on federal policy, these commentators claimed that tribal water rights had become "particularly vulnerable to the ebbs and flows of federal water

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(1975), *cert. denied*, 425 U.S. 907 (1976); *Donahue v. California Justice Court*, 15 Cal. App. 3d 557, 93 Cal. Rptr. 310 (1971).

[196] *Id*., at p. 2, fn 3 (identifying a host of department memoranda and correspondences re this subject matter).

[197] *Id*., at p. 3 fn 4, citing *Crichton v. Shelton*, 33 I.D. 205 (1904) "(history or Klamath River and Hoopa Valley Reservations); *Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians*, S. Rep. No. 564, 100th Cong., 2d Sess. 2-9 (1988) (same); and *Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians*, H. Rep. No. 938, pt. 1, 100th Cong., 2d Sess. 8-15 (1988) (same)."

[198] *See* Brian C. Chaffin, Robin Kundis Craig and Hannah Gosnell, *Resilience, Adaptation, and Transformation in the Klamath River Basin Social-Ecological System*, 51 Idaho L. Rev. 157 (2014), *supra* at p. 173.

[199] *See* George Woodward and Jeff Romm, *A Policy Assessment of the 2001 Klamath Reclamation Project Water Allocation Decisions*, in William S. Braunworth, Teresa Welch and Ron Hathaway, *Water Allocation in the Klamath Reclamation Project, 2001: An Assessment of Natural Resource, Economic, Social, and Institutional Issues with a Focus on the Upper Klamath Basin*, Oregon State University Extension Service Special Report 1037 (2002, 2004), *supra* at pp. 354, 355. See also Felice Pace, Decommissioning the Dams is Not Enough, Klamath Forest Alliance (April 8, 2005), available at: http://www.klamathforestalliance.org/Newsarticles/newsarticle20050508.html (claiming that the "Klamath Compact – established by federal and state legislation – does not acknowledge the Basin's federally recognized tribes and the Compact's Commission has no seats for them.").

[200] *See* George Woodward and Jeff Romm, *A Policy Assessment of the 2001 Klamath Reclamation Project Water Allocation Decisions*, in William S. Braunworth, Teresa Welch and Ron Hathaway, *Water Allocation in the Klamath Reclamation Project, 2001: An Assessment of Natural Resource, Economic, Social, and Institutional Issues with a Focus on the Upper Klamath Basin*, Oregon State University Extension Service Special Report 1037 (2002, 2004), *supra* at pp. 354, 355.

allocation."[201] Since the operation of the four dams and the Klamath Project did not respect the tribes' on- and off-reservation water rights which were to remain unaffected by the implementation of the Klamath River Basin Compact, the U.S. government (supported by commentators) has, over time, increasingly asserted its national interest in upholding its federal trust obligation to protect these tribal water rights.

The U.S. government's significant federal interests in protecting fish and Indian tribes in the Klamath River Basin, which are reflected in the Compact and congressional consent legislation discussed above, have been restated and updated on the U.S. Department of Justice ("DOJ") website as follows:

> "The Klamath Project ("the Project") is located in the Klamath River and Lost River Basins in southern Oregon and northern California. In accordance with applicable Oregon and California state law and the Reclamation Act, *the United States through the Bureau of Reclamation* 'appropriated all available water rights in the Klamath River and Lost River and their tributaries in Oregon and began constructing a series of water diversion projects.' Water is drawn out of Upper Klamath Lake via the A-canal above the Link River Dam, which regulates flows in the lower Klamath River as well as Upper Klamath Lake levels. […] The Klamath Project does not have a major water-storage reservoir backed up behind a large dam. Upper Klamath Lake is relatively shallow and too small to capture and store large quantities of spring runoff. The Project thus lacks facilities to store water in wet years to meet all water needs in dry years. […] As a consequence of the lack of storage in the Basin, Reclamation must base its various water management decisions each year on runoff-forecasts issued by the Natural Resources Conservation Service between January and June based on that winter's precipitation in the basin. […] *The Secretary of the Interior, through Reclamation, must manage and operate the Klamath Project pursuant to various legal responsibilities, including the Reclamation Act of 1902, the Endangered Species Act (ESA), and the federal trust responsibility to Indian tribes*. Reclamation's water management decisions for the Project are constrained by the presence of three fish species listed under the ESA in Upper Klamath Lake and in the Klamath River in California. *Reclamation's obligations to comply with ESA requirements may override the delivery of water to the Project irrigators*" (emphasis added).[202]

Thus, the federal government's various significant national interests in the Klamath River Basin and its participation in the Commission's administration of the Compact and in Compact negotiations strongly

[201] *Id* ("The differences of interest that exist within this state—Indian—federal triangle of relationships create inherent fault lines and have caused state attention to tribal rights to depend heavily on federal representation of those rights.")
[202] *See* United States Department of Justice, *Klamath Project*, available at: https://www.justice.gov/enrd/klamath-project.

suggests that the Klamath River Basin Compact has long functioned as a federal-interstate compact. These features of the KRBC would seem to explain why the KRBC parties had originally sought to secure congressional consent of the Compact.

IV. Detailed Analysis of the Klamath Basin Restoration Agreement, Klamath Hydroelectric Settlement Agreement and Upper Klamath Basin Comprehensive Agreement

The facts reveal that the Klamath River Basin Compact Parties and other stakeholders were dissatisfied with the Compact's ability to adequately address environment, fish and wildlife protection and tribal trust issues in addition to irrigation-related water allocation issues. The States of California and Oregon, however, did not choose to exercise their Compact Article XIV authority to terminate the Compact by mutual consent. Because of the significant evolving Federal interests at stake in the Klamath River Basin Compact, the USG and the States, along with other stakeholders (tribal governments and nongovernmental organizations representing irrigators, fishermen and environmental groups), proceeded during 2008-2010 to develop three new interrelated agreements to address these issues comprehensively. These efforts resulted in the Parties' execution of the Klamath Basin Restoration Agreement ("KBRA")[203] and the Klamath Hydroelectric Settlement Agreement[204] on February 18, 2010,[205] and of the Upper Klamath Basin Comprehensive Agreement ("UKBCA") on April 18, 2014.[206]

The federal government's klamathrestoration.org website and the website of the Klamath Basin Coordinating Council identify the objectives of each of these agreements. A summary of the relevant provisions of the KBRA, KHSA and UKCA follows.

1. Factual Summary Description of the KBRA:

KBRA Article 1.7 and Appendix D-1.II established the Klamath Basin Coordinating Council ("KBCC") as the coordinating entity "for all Parties to the KBRA."[207] Both KBRA Appendix D-

[203] *See* Ed Sheets Consulting, the *Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities* (Feb. 18, 2010), available at: http://www.edsheets.com/Klamath/Klamath%20Basin%20Restoration%20Agreement%202-18-10signed.pdf. See also *Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities* (Feb. 18, 2010, with amendments approved on Dec. 29, 2012), available at: http://www.klamathcouncil.org/Klamath/2012/KBRA%20Feb%202010%20with%20Dec%202012%20amendments.pdf.

[204] *See* Ed Sheets Consulting *Klamath Hydroelectric Settlement Agreement*, available at: http://www.edsheets.com/Klamath/Klamath%20Hydroelectric%20Settlement%20Agreement%202-18-10signed.pdf.

[205] *See* Ed Sheets Consulting, *Summary of the Klamath Basin Settlement Agreements* (Updated Dec. 2011), available at: http://www.edsheets.com/wp-content/uploads/2015/11/Summary-of-the-Klamath-Settlement-Agreements.pdf.

[206] *See* Klamath Council, *Upper Klamath Basin Comprehensive Agreement*, available at: http://www.klamathcouncil.org/index.php/upper-klamath-basin-comprehensive-agreement/ ("Upper Klamath Basin irrigators, the Klamath Tribes, and officials from Oregon and several Federal agencies signed a final Upper Klamath Basin Comprehensive Agreement on April 18, 2014.").

[207] *See* KBRA at Art. 1.7; Appendix D-1.II.A.

1.II.C[208] and the KBCC Protocols adopted on October 7, 2010 state that the KBCC's "purpose [was] to coordinate continued collaboration, cooperation, and consultation among Parties and others in the **implementation** of the Restoration Agreement, *including related provisions of the Klamath Hydroelectric Settlement Agreement*" (emphasis added).[209] Its role was to "serve as a primary forum for public involvement in implementation of the Agreement."[210] However, the KBCC "[did] not provide advice or recommendations to Federal Agency Parties," and arguably, therefore, was not subject to the Federal Advisory Committee Act ("FACA") transparency and public disclosure requirements.[211]

KBCC Chairman, Edward Sheets,[212] a Bureau of Reclamation contractor (the agent of the Federal government principal),[213] had noted that the KBRA had three objectives which effectively reallocate water usage in the Klamath Basin between and among the States of Oregon and California, the federal government, tribal governments and private parties. These objectives were:

> 1) "[to] restore and sustain natural fish production and provide for full participation in ocean and river harvest opportunities of fish species throughout the Klamath Basin; 2) [to] establish reliable water and power supplies which sustain agricultural uses, communities, and National Wildlife Refuges; and 3) [to] contribute to the public welfare and the sustainability of all Klamath Basin communities."[214]

In service to the first objective, KBRA Article 1.7 introduced the concepts of "environmental water" and "managed environmental water." Environmental Water is defined as "the quantity and quality of water produced pursuant to Section 20 or other provisions of this Agreement to benefit Fish Species and other aquatic resources." Managed Environmental Water is a subset of Environmental Water. It is defined as "the quantity and quality of Environmental Water that is legally stored or maintained, or could legally be stored or maintained, in Upper Klamath Lake or any subsequently-developed stored water under the authority of Reclamation or other federal agency."[215] KBRA Article 20 "addresse[d]

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[208] *See* KBRA at Appendix D-1.II.C ("The KBCC shall have the flexibility to establish additional subgroups as necessary and appropriate to address specific issues and needs on a periodic, ad hoc, temporary, or long-term basis, and to implement provisions of the Agreement, *including the separate but related Hydroelectric Settlement*.")

[209] *See also* Klamath Basin Coordinating Council, *Klamath Basin Coordinating Council Protocols* (Adopted, Oct. 7, 2010), at p. 1, available at: http://216.119.96.156/Klamath/Protocols2010-10-7.pdf.

[210] *See* KBRA at Appendix D.II.A.

[211] *Id.*

[212] *See* Klamath Basin Coordinating Council, *Summary of the Klamath Basin Settlement Agreements* (May 2010), at p. 1, available at: http://www.edsheets.com/Klamath/Summary%20of%20Klamath%20Settlement%20Agreements%204-5-10.pdf ("Key provisions of the agreements are summarized below; for a copy of both agreements please go to the following website: http://www.**edsheets**.com/Klamathdocs.html.")

[213] *See* We The People Radio, *Ed Sheets, U.S. Government Operative & Mediator. Paid $$ Big Bucks to Secure Favorable Water Rights Deals for Tribes at Northwestern Irrigators' Expense*, available at: http://www.wethepeopleradio.us/mr-ed/.

[214] *See* Klamath Basin Coordinating Council, *Summary of the Klamath Basin Settlement Agreements* (May 2010), *supra* at p. 1.

[215] *See* KBRA at Art. 1.7.

the management, protection, and monitoring of Environmental Water."[216] Significantly, KBRA Article 20.2.1 treated dam removal as a necessary measure to produce environmental water, to the extent it obligated ALL Parties to support the KHSA "which includes, among other provisions, a process for potential Facilities Removal."[217] KBRA Article 20.3.1 required the management of "Managed Environmental Water" to be consistent with Reclamation and other Parties' obligations *inter alia* "under the ESA [Endangered Species Act]" and "with senior water rights," namely Tribal time-immemorial aboriginal reserved water rights extending beyond federally recognized reservation boundaries and inferred from treaties the U.S. government previously negotiated with Indian Tribes.[218]

KBRA Article 2.1 stated that, in implementing the KBRA, all "Public Agency Parties shall comply with all applicable legal authorities, including [*inter alia* …the] Endangered Species Act."[219] KBRA Article 9.1.1 reflected ALL Parties' acknowledgement that "coho salmon, Lost River and shortnose suckers and bull trout are presently listed under the Federal Endangered Species Act."[220] KBRA Articles 15.1.2.A.iv and 15.1.2.G.i.b imposed upon the Tulelake Irrigation District of the Klamath Irrigation Project the obligation to comply with the Endangered Species Act when maintaining water surface elevations and managing water allocations to the Tule Lake and Lower Klamath National Wildlife Refuges.[221] KBRA Articles 15.3.3, 15.3.6.A and 15.3.7.A recognized the ability of the Klamath, Yurok and Karuk Tribes to pursue their legal rights to protect their off- and on-reservation fishing rights through enforcement of the Endangered Species Act.[222] KBRA Article 21.4.1 also confirmed how these Tribes had reserved their rights to enforce any Regulatory Approval, including biological opinions under the Endangered Species Act."[223]

KBRA Article 21.3 reaffirmed that

> "[t]he limitations related to Klamath Reclamation Project diversions identified in Section 15.3.1.A and provided in Appendix E-1, and any other applicable provisions of this Agreement, are intended in part *to ensure durable and effective compliance with the Endangered Species Act* or other Applicable Law related to the quantity of water for diversion, use and reuse in the Klamath Reclamation Project" (emphasis added).[224]

KBRA Article 21.3.1.B.ii.c reaffirmed each nongovernmental Parties' understanding that any activity that reduces the diversion, use or reuse of water in the Klamath Project beyond Appendix E-1

[216] *See* KBRA at Art. 20.
[217] *See* KBRA at Art. 20.2.1.
[218] *See* KBRA at Art. 20.3.1.
[219] *See* KBRA at Art. 2.1.
[220] *See* KBRA at Art. 9.1.1.
[221] *See* KBRA at Arts. 15.1.2.A.iv and 15.1.2.Gi.b.
[222] *See* KBRA at Arts. 15.3.3, 15.3.6.A and 15.3.7.A.
[223] *See* KBRA at Art. 21.4.1.
[224] *See* KBRA at Art. 21.3.

limitations would "be a last and temporary resort to prevent jeopardy under the Endangered Species Act."[225]

KBRA Article 22.1.1 required "Federal agencies to increase water storage in Upper Klamath Lake as provided in Section 18," by engaging in consultation with FWS or NMFS as applicable under ESA section 7 and implementing regulations.[226] KBRA Article 22.1.2 required Reclamation to submit a request for re-initiation of ESA section 7 consultation to the FWS and NMFS for purposes of reviewing the consistency of Reclamation's proposed action of operation of the Klamath Reclamation Project with the Upper Klamath Lake and Klamath River diversion limitations imposed by Appendix E-1.[227] KBRA Article 22.1.3 directed the NMFS and FWS, upon receipt of such a request, to prepare and issue a biological opinion on the proposed action as required by ESA section 7.[228]

KBRA Article 22.2 recognized that non-Federal Parties would need to apply for incidental take permits through ESA section 10(a)(1)(B) to secure regulatory approval for actions occurring above the current site of Iron Gate Dam] "that may result in incidental take of species that are currently listed or that may become listed under the ESA [...]"[229] KBRA Article 22.2.1 recognized that other non-Federal Parties associated with the Klamath Reclamation Project also would need to apply for such incidental take permits for similar reasons because of actions resulting in the diversion, use and re-use of water consistent with the limitations imposed by KRBA Appendix E-1.[230]

In service to the first and second objectives, the KBRA would have facilitated an "increase [in] the amount of water to improve instream flows and maintain the elevation of Upper Klamath Lake." For example, the KBRA had called for a federally funded "water leasing and purchase program to reduce surface water diversions from the Klamath River and from its tributaries above Upper Klamath Lake and to apply the water obtained toward improving the status of anadromous and resident fish."[231] The KBRA also had called for "Klamath Water and Power Agency (KWAPA) [… -] "establishe[d] limitations on the quantity of water diverted from Upper Klamath Lake and the Klamath River for use in the Klamath Reclamation Project," which would have "result[ed] in the availability of water for irrigation being approximately 100,000 acre feet less than [then] current demand in the driest years."[232] The KBRA would have "increase[d] the allocation of water to the Klamath Reclamation Project in some years by 10,000 acre feet if the four PacifiCorp dams are removed or additional storage is available."[233]

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[225] *See* KBRA at Art. 21.3.1.B.ii.c.
[226] *See* KBRA at Art. 22.1.1.
[227] *See* KBRA at Art. 22.1.2.
[228] *See* KBRA at Art. 22.1.3.
[229] *See* KBRA at Art. 22.2.
[230] *See* KBRA at Art. 22.2.1.
[231] *See* Klamath Basin Coordinating Council, *Summary of the Klamath Basin Settlement Agreements* (May 2010), *supra* at p. 3.
[232] *Id*.
[233] *Id*., at p. 6.

In addition, the KBRA had called for a voluntary Upper Klamath Basin program "for water use retirement in the Wood River, Sprague River, Sycan River […] and the Williamson River […] that w[as…] designed to secure 30,000 acre feet of water for additional inflow to Upper Klamath Lake."[234] This feature of the KBRA ultimately was expanded and executed as a separate agreement in 2014 – the Upper Klamath Basin Comprehensive Agreement – discussed below. Furthermore, the KBRA had provide[d] water rights assurances related to water diversions from the Klamath Tribes, Karuk Tribe, and Yurok Tribe, and the United States as a trustee of the tribes to the Klamath Reclamation Project and includes resolution of certain contests in the Klamath Basin Adjudication."[235] Moreover, the KBRA had "establishe[d] steps designed to comply with the Endangered Species Act, including the preparation of biological opinions on specific federal actions called for in the agreement. The agreement also establishes a process to develop general conservation plans or habitat conservation plans."[236]

In satisfaction of the second objective of providing affordable power for irrigation, the KBRA would have endeavored to secure "a delivered power cost target level at or below the average cost of similarly situated Reclamation irrigation and drainage projects in the surrounding area."[237] For example, the KBRA had called for "an interim power program, access to federal power, and a long-term program to implement energy efficiency and new renewable resource generation."[238] KBRA Article 17.1 confirms the *quid pro quo* of "provid[ing] power cost security [for…] maintaining sustainable agricultural communities in the Upper Klamath Basin. *A general policy furthering low-cost power for irrigation use is consistent with provisions of the Klamath River Basin Compact*" (emphasis added).[239]

In satisfaction of the third objective, the KBRA had "addresse[d] primarily tribal fishing and water matters," and would have provided funding "to each tribe that [was] a party for the development and planning of long-term economic revitalization projects […that would have enabled such tribes] to meet a reasonable standard of living, a standard recognized in the reservation of tribal fishing and other related rights, until the fisheries are restored to a level that allows full participation in harvest opportunities."[240]

The KBRA was signed by representatives of the same two States that executed the original Klamath River Basin Compact. The following representatives from the States of California and Oregon executed the KBRA: California Governor Arnold Schwarzenegger, California Department of Fish and

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[234] *Id*., at p. 4.
[235] *Id*., at p. 6.
[236] *Id*., at p. 7.
[237] *Id*., at p. 8. *See also* KBRA at Art. 17.1 ("[…] This Section 17 includes measures and commitments based on a delivered power cost target that will be at or below the average cost for similarly situated Reclamation irrigation and drainage projects in the surrounding area, for eligible power users as provided in Section 17.3. […]").
[238] *Id*., at p. 8. *See also* KBRA at Art. 17.2 ("The Power for Water Management Program consists of three elements: (i) Interim Power Program; (ii) Federal Power; and (iii) Renewable Power Program. The combined benefits of these three program elements are intended to ensure power cost security for all eligible power users as provided in Section 17.3").
[239] *See* KBRA at Art. 17.1.
[240] *See* Klamath Basin Coordinating Council, *Summary of the Klamath Basin Settlement Agreements* (May 2010), *supra* at p. 8.

Game Acting Director John McCamman, Oregon Governor Theodore R. Kulongoski, Oregon Department of Environmental Quality Director Dick Pedersen, Oregon Department of Fish and Wildlife Director Roy Elicker, and Oregon Water Resources Department Director Phillip C. Ward.[241] In addition, a number of other governmental parties that were not signatories to the Compact signed onto the KHSA. They included the Chairpersons from the Klamath, Yurok and Karuk Tribal governments, various California and Oregon county governments, and local California and Oregon irrigation districts.[242]

The federal government did not sign or otherwise bind itself to the KBRA, however.[243] As KBRA Articles 1.1.2 and 1.7 reveal, the USG would not sign the KBRA "[p]rior to the enactment [by Congress[244]] of Authorizing Legislation "that authorize[d] and direct[ed] federal agencies to become parties to this Agreement."[245] The facts show that Congress never passed legislation authorizing and directing the Secretaries of the Interior, Agriculture or Commerce to execute the KBRA.[246]

2. Factual Summary Description of the KHSA:

KHSA Preamble paragraphs 2, 6, and 11 effectively stated that: 1) "certain Parties believe that decommissioning and removal of the Facilities [i.e., the four Klamath River dams identified in the executed 2008 Agreement in Principle ("2008 AIP") the purpose of which was "to reach a final settlement in order to minimize adverse impacts of dam removal on affected communities, local property values, and businesses, and to specify substantive rights, obligations, procedures, timetables, agency and legislative actions, and other steps for Facilities Removal"] will help restore Basin natural resources, including anadromous fish, fisheries, and water quality;"[247] and 2) "the Tribes and the Federal Parties agree[d] that this Settlement advances the trust obligation of the United States to protect Basin Tribes' *federally reserved fishing and water rights* in the Klamath and Trinity River Basins" (emphasis added).[248]

These preambular provisions signify that the KHSA *begins with the presumption* that dam removal is necessary to restore the Klamath River Basin for environmental and wildlife purposes and to uphold the U.S. federal Indian trust obligation to protect Indians' time-immemorial aboriginal off-reservation reserved water and fishing rights, both of which evidence substantial Federal interests in the Klamath River Basin.

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[241] *See* KBRA, at p. 174.
[242] *Id*., at pp. 174-180.
[243] *See* Klamath Coordinating Council, *Fourth Annual Report Klamath Basin Agreements* (July 2014), at p. 5, fns 1-2, available at http://216.119.96.156/wp-content/uploads/2015/11/KBCC-Fourth-Annual-Report-2014.pdf.
[244] *See* KBRA, Part I, Art. 1.7.
[245] *See* KBRA, Part I, Art. 1.1.2.
[246] *See* Klamath Council, *Klamath Basin Restoration Agreement-Terminated*, available at: http://www.klamathcouncil.org/index.php/agreements/kbra/ ("The Klamath Basin Restoration Agreement (KBRA) terminated on December 31, 2015 because the federal authorizing legislation was not enacted.")
[247] *See* KHSA at Preamble, paras.2 and 6.
[248] *See* KHSA at Preamble, para. 10.

Indeed, KBCC Chairman Sheets identified the KHSA's prime objective as dam removal. According to Sheets, the KHSA

> "establishe[d] a process for the potential removal of Iron Gate, J.C. Boyle, Copco 1 and Copco 2 dams on the Klamath River. These dams block coho salmon, Chinook salmon, steelhead, and Pacific lamprey from migrating above Iron Gate Dam. Removal of these dams would give salmon access to an additional 300 miles of habitat in the Klamath River Basin. […] "[249]
>
> In furtherance of the primary goal of dam removal, the KHSA provided for The *Secretary of the Interior*, in cooperation with the Secretary of Commerce and other Federal agencies, [to]: Use existing studies and other appropriate data, including those in the FERC record for this project; Conduct further appropriate studies, including but not limited to an analysis of sediment content and quantity; Undertake related environmental compliance actions, including environmental review under NEPA; and Take other appropriate actions as necessary *to determine* whether to proceed with facilities removal" (emphasis added).[250]

Most importantly, the KHSA "describe[d] the conditions that need[ed] to be satisfied before the Secretarial Determination: *Passage of federal legislation materially consistent with the proposed legislation to implement the Hydroelectric Settlement and the Restoration Agreement* […]" (emphasis added).[251]

KHSA Article 6.2.1 recognized that PacifiCorp would need to apply to the NMFS and FWS to incorporate their Interim Conservation Plan measures (as set forth in Appendix C) into an incidental take permit pursuant to Endangered Species Act ("ESA") Section 10 and applicable implementing regulations for protection of listed sucker species.[252] KHSA Articles 6.2.2 and 6.2.3 reaffirmed the authority of these agencies to review such applications and directed them to provide notice to the Parties upon issuance of any incidental take permit issued pursuant to the ESA regarding such measures.[253]

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[249] *See* Klamath Council, *Klamath Basin Restoration Agreement-Terminated*, *supra* at p. 1.
[250] *Id*., at pp. 9-10. *See also Id*., at p. 10 ("Facilities removal is defined as the physical removal of all or part of each of the four PacifiCorp dams to achieve at a minimum a free-flowing condition and volitional fish passage, site remediation and restoration, including previously inundated lands, measures to avoid or minimize adverse downstream impacts, and all associated permitting. […] The Secretary of the Interior will use this information, in cooperation with the Secretary of Commerce and other Federal agencies, to determine whether, in his judgment the conditions of the Hydroelectric Settlement have been satisfied, and whether facilities removal: 1) will advance restoration of the salmonid fisheries of the Klamath Basin; and 2) is in the public interest, which includes but is not limited to consideration of potential impacts on affected local communities and tribes. […] ").
[251] *Id*., at p. 10.
[252] *See* KHSA at Art. 6.2.1.
[253] *See* KHSA at Arts. 6.2.2, 6.2.3.

The KHSA signatories represented the same parties as did the signatories of the original Klamath River Basin Compact. They included Interior Secretary Ken Salazar, Commerce UnderSecretary for Oceans and Atmosphere and NOAA Administrator, Jane Lubchenco, California Governor Arnold Schwarzenegger, California Department of Fish and Game Acting Director John McCamman, Oregon Governor Theodore R. Kulongoski, Oregon Department of Environmental Quality Director Dick Pedersen, Oregon Department of Fish and Wildlife Director Roy Elicker, and Oregon Water Resources Department Director Phillip C. Ward.[254] In addition a number of other governmental parties that were not signatories to the Compact signed onto the KHSA. They included the Chairpersons from the Klamath, Yurok and Karuk Tribal governments, various California and Oregon county governments, and local California and Oregon irrigation districts.[255]

KHSA Article 2.2 stated that "[e]ach Party, other than PacifiCorp and the Federal Parties, shall execute this Settlement and the KBRA concurrently."[256] KHSA Article 8.2 stated that the KHSA "shall take effect upon execution on February 18, 2010 […] concurrently with the KBRA."[257]

3. Factual Summary Description of the UKBCA:

The UKBCA consummated the voluntary non-Klamath Irrigation Project Program features of the KBRA (see KBRA Article 16)[258]] designed to resolve water rights disputes between Off-Project irrigators, Klamath Tribes and the Bureau of Indian Affairs.[259] The UKBCA was intended to increase inflows into Upper Klamath Lake […] by reducing water use in key reaches of the tributaries above the lake."[260] The UKBCA consists of three components: 1) a voluntary Water Use Program ("WUP"); 2) a Riparian Program ("RP"); and 3) a Klamath Tribes Economic Development Program ("EDP").

As set forth in UKBCA Article 3,[261] the WUP "permanently increased the flows into Upper Klamath Lake by 30,000 acre-feet by decreasing the net consumptive use of water. […] The WUP will reduce water use through permanent water right retirement [i.e.,…] by 30,000 acre-feet […] and also through other ongoing measures that will reduce net consumptive use of water," such as "[w]ater right leasing,"

[254] *See* KHSA, *supra* at pp. 68-69.
[255] *Id*., at pp. 70-75.
[256] *See* KHSA at Art. 2.2.
[257] *See* KHSA at Art. 8.2.
[258] *See* KBRA, Art. 16 – "Off-Project Water Program."
[259] *See* KBRA, Art. 16.1. *See also* Klamath Basin Coordinating Council, *Fifth Annual Report* (Nov. 2015), at p. 24, available at: http://www.klamathcouncil.org/wp-content/uploads/2015/04/KBCC-Fifth-Annual-Report-2015.pdf ("Section 16 of the KBRA called for an Off-Project Water Settlement between off-project irrigators and the Klamath Tribes and provided a framework supported by the KBRA Parties; however, there was not much progress on such a settlement until Upper Basin irrigators, the Klamath Tribes, and officials from Oregon and several Federal agencies began meeting in the summer of 2013.")
[260] *See* Klamath Council, *Upper Klamath Basin Comprehensive Agreement*, *supra* at Summary.
[261] *See* UKBCA at Art. 3.

water use rotation agreements, and improved water conservation, efficiency and management.[262] The WUP also imposed water use "performance standards" to regulate water uses above Upper Klamath Lake to protect Tribal water rights, and set forth a plan for regulating groundwater wells[263] "in years when stream flows [were] not met."[264]

As set forth in UKBCA Article 4,[265] the RP called for compensating irrigators with riparian lands vis-à-vis riparian agreements "for managing riparian areas in ways that improve conditions through tools such as flash grazing, fencing, reseeding, vegetation management, and other restoration actions."[266] "At least eighty percent of the land area along streams that is irrigated and zoned for agriculture must be enrolled in the program in order for the performance standards to be met."[267]

The UKBCA EDP called for establishment of an Economic Development Fund "to create economic opportunities for the Klamath Tribes and its members, including increased opportunities for the exercise of tribal cultural rights."[268] UKBCA Article 2.4 stated that this EDF would be established by Congress and subsequently funded in the amount of $40 million. It also would include an additional payment from the Interior Department of $1 million annually, for a period of five years to address Tribal needs during the transition period beginning in 2014.[269]

UKBCA Articles 9.1, 9.2 and 9.4 discussed how non-Federal Parties could secure regulatory assurance of compliance with said agreement or with the KBRA for actions occurring in the Off-Project area. Assurance was possible by securing "coverage under an incidental take permit using General Conservation Plans (GCP) or Habitat Conservation Plans (HCP) […based upon a conservation strategy for the species] under Section 10(a)(1)(B) of the Endangered Species Act."[270] UKBCA Article 9.3 reaffirmed that WUP-related Water Use Agreements and RP-related Riparian Management Agreements would include "coverage for individual landowners under an incidental permit."[271] UKBCA Article 9.4.1 indicated that GCPs were developed by the NFMS and FWS, while UKBCA Article 9.4.2 indicated that HCPs were developed by the Landowner Entity formed pursuant to UKBCA Article 8.1[272] (by Off-Project landowners holding water rights) to implement the WUP and RP.[273]

UKBCA Article 9.6 indicated that a GCP and/or HCP could cover activities including, but not limited to, "diversion and application of water, agricultural operations, grazing, road construction and

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[262] *See* Klamath Basin Council, *Proposed Upper Klamath Basin Comprehensive Agreement*, at p. 2, available at: http://www.klamathcouncil.org/wp-content/uploads/2015/11/2014-3-4-Summary-of-Agreement.pdf. *See also* UKBCA at Arts. 3.2.1, 3.3 and 3.6.
[263] *See* UKBCA at Art. 3.11.
[264] *See* Klamath Basin Council, *Proposed Upper Klamath Basin Comprehensive Agreement*, *supra* at pp. 2-3.
[265] *See* UKBCA at Art. 4.
[266] *See* Klamath Basin Council, *Proposed Upper Klamath Basin Comprehensive Agreement*, *supra* at p. 3.
[267] *Id*.
[268] *Id*., at pp 2-3.
[269] *See* UKBCA at Art. 2.4.
[270] *See* UKBCA at Arts. 9.1, 9.2 and 9.4.
[271] *See* UKBCA at Art. 9.3.
[272] See UKBCA at Art. 8.1.
[273] *See* UKBCA at Arts. 9.4.1 and 9.4.2.

maintenance, vegetation management, timber management, and actions associated with restoration, management, and maintenance of the riparian corridor."[274] This provision also indicated that measures for minimization and mitigation of incidental take under a GCP and/or HCP could include, but not be limited to, "screening of diversions, management of livestock access, irrigation practices that prevent stream dewatering, protection and enhancement of riparian vegetation, fish passage improvement, culvert replacement, and reduction of erosion and sedimentation from streambanks and roads."[275]

The federal government did not sign or otherwise bind itself to the UKBCA, however.[276] UKBCA Articles 10.1 and 10.1.13 stated that the UKBCA will not become permanent until *inter alia* "[t]he United States has signed this Agreement pursuant to the Federal Authorizing Legislation." UKBCA Article 12.9, furthermore, stated that, "Prior to the enactment of Authorizing Legislation, neither the United States nor any of its agencies, officers, or employees shall be a Party to this Agreement, or shall be required to implement any obligation under this Agreement."

4. Analyzing the Intertwined Provisions of the KBRA, KHSA and UKBCA:

The facts reveal that the KBRA, KHSA and UKBCA were intertwined agreements executed by multiple federal, state and local governmental and nongovernmental parties that evidenced a level of interrelatedness that Federal and State government officials were loath to admit during the March 2016 stakeholder meeting convened at the Sacramento offices of the USEPA. Each agreement contained provisions that were cross-referenced in the other agreements and required support from the Parties to that specific the agreement and from the Parties to the other agreements. The KBRA and KHSA also contained identical appendices (KBRA Appendix A; KHSA Appendix E) setting forth the need for specific federal authorizing legislation. In addition, the KBRA and KHSA imposed certain obligations on the Non-Federal Parties (the States of California and Oregon), including the proposal, adoption and implementation of specific new or existing legislation to support implementation of the agreements. Each State Party also was obligated to support the proposal and enactment by the other State Party of legislation, as well as, that Party's related proposed authorization and appropriation of funds needed to implement such legislation. It is not likely that the States of California and Oregon would or could have pursued such activities and exercised such authorities *but for* the coordinated and mutually supporting execution of the KBRA and KHSA with Federal government involvement and consent.

a. *Intertwined Provisions of the KBRA*

KBRA Appendix D-1.I set forth a "coordination and oversight framework" through which the KBRA governmental and nongovernmental Parties would "assure elements of the Agreement [were] carried out effectively [and timely…] to forward sustainable restoration and renewal of the Klamath River Basin."[277] KBRA Appendix D-1.I also stated that this coordination and oversight mechanism "does not

[274] *See* UKBCA at Art. 9.6.
[275] *Id*.
[276] *See* Klamath Coordinating Council, *Fourth Annual Report Klamath Basin Agreements* (July 2014), *supra* at p. 5, fns 1-2.
[277] *See* KBRA at Appendix D-1.I.

provide for new decision-making authorities or change existing local, state and/or federal law."[278] This latter statement, however, can be debated.

KBRA Article 1.7 and Appendix D-1.II established the Klamath Basin Coordinating Council ("KBCC") as the coordinating entity "for all Parties to the KBRA."[279] KBRA Appendix D-1.II.A stated that the Klamath Basin Coordinating Council ("KBCC") "[was] the coordinating body for all Parties of the Agreement. […] Its purpose [was] to promote continued collaboration, cooperation, coordination, and consultation among Parties and others as elements of the Agreement are implemented."[280] KBRA Appendix D-1.II.A. also stated that the KBCC would "establish protocols to implement elements of the KBRA."[281] Although the Federal government was not a Party to the KBRA, a number of Federal agencies were members of the KBCC. KBRA Appendix D-1.II.B revealed that KBCC members had included the U.S. Interior Department's Fish & Wildlife Service and the Bureaus of Land Management, Reclamation and Indian Affairs, the U.S. Commerce Department's National Oceanic and Atmospheric Administration/National Marine Fisheries Service, and the U.S. Agriculture Department..[282] KBRA Appendix D-1.II.C stated that the "KBCC shall have the flexibility to establish additional subgroups as necessary and appropriate to address specific issues and needs on a periodic, ad hoc, temporary, or long-term basis, and *to implement provisions of the Agreement [KBRA], including the separate but related Hydroelectric Settlement*" (emphasis added).[283]

KBRA Article 8.1. provided that the "Parties *shall support* the Hydroelectric Settlement" (emphasis added).[284] KBRA Article 8.2.1 stated that "each Non-Federal Party *shall execute* this Agreement and the Hydroelectric Settlement concurrently" (emphasis added).[285] KBRA Article 8.2.2 stated that the "Parties *shall implement* this Agreement and the Hydroelectric Settlement *in a coordinated and Timely manner*, to the maximum extent reasonably practicable, recognizing that such performance is necessary to assure the bargained-for benefits" (emphasis added).[286] KBRA Article 15.3.5.A.iii stated that the Klamath Tribes "relinquish and release […as] against the United States, its agencies, or employees, relating to actions in the Klamath River […] all claims relating to the negotiation, execution or adoption of this Agreement *and* the Hydroelectric Settlement" (emphasis added).[287]

KBRA Articles 15.1.1 confirmed that the KBRA "provides for limitations on specific diversions [set forth in Appendix E-1] for the Klamath Reclamation Project […] intended, particularly in drier years, to increase water availability for Fisheries purposes, while […] provid[ing] terms for the allocation and

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[278] *Id*.
[279] *See* KBRA at Art. 1.7; Appendix D-1.II.A.
[280] *See* KBRA at Appendix D-1.II.A.
[281] *Id*. *See also Klamath Basin Coordinating Council Protocols* (Adopted Oct. 7, 2010), available at: http://216.119.96.156/Klamath/Protocols2010-10-7.pdf.
[282] *See* KBTA at Appendix D-1.II.B and Appendix Table D-1.
[283] *See* KBRA at Appendix D-1.II.C; *Klamath Basin Coordinating Council Protocols* (Adopted Oct. 7, 2010), *supra* at Sec. 3.5.
[284] *See* KBRA at Art. 8.1.
[285] *See* KBRA at Art. 8.2.1.
[286] *See* KBRA at Art. 8.2.2.
[287] *See* KBRA at Art. 15.3.5.A.iii.

delivery of water to National Wildlife Refuges" (i.e., the Tule Lake and Lower Klamath National Wildlife Refuges[288]) served by the Project.[289] KBRA Article 15.2.1 stated that the "purpose of the On-Project Plan for the Klamath Reclamation Project is *to align water supply and demand* for the areas that rely in whole or in part on water diverted from the Settlement Points of Diversion identified in Appendix E-1 […] consistent with the diversion limitations " established in this Agreement (Appendix E-1 and Article 15.3.1.A) (emphasis added).[290]

KBRA Article 17.3.1.B stated that certain individual "On-Project Users shall be eligible for the benefits of the Power for Water Management Program […] *provided* that the KBCC will create a mechanism by which a Power User within […a Klamath Project Water Entity which does not enter into this Agreement] may become [an] eligible [Power User individually] by supporting this Agreement and the Hydroelectric Settlement" (italicized emphasis in original; underlined emphasis added).[291] KBRA Article 17.3.2.A stated that "Off-Project Power Users shall be eligible to receive the benefits of the Power for Water Management Program" inter alia if the "Off-Project User shall *support* this Agreement and the Hydroelectric Settlement. For this purpose, the KBCC shall adopt *procedures for the Off-Project Power User to provide written support of these agreements and specification of such obligations*" (emphasis added).[292]

KBRA Article 17.4.1 stated that the Klamath Water and Power Agency ("KWAPA"), Upper Klamath Water Users Association ("UKWUA") and Klamath Off-Project Water Users ("KOPWU") "if a Party to this Agreement and the Hydroelectric Settlement, shall timely form an organization to administer benefits of the Power for Water Management Program and its elements, known for purposes of this Agreement as the 'Management Entity.' The Parties hereby consent to the Management Entity […] becoming a Party to this Agreement and the Hydroelectric Settlement, *provided* that the Management Entity supports both agreements" (italicized emphasis in original; underlined emphasis added).[293]

KBRA Article 3.1.1.A acknowledged the obligations assumed by the USG and the States of California and Oregon to secure authorizing legislation.[294] KBRA Article 3.1.1.B.i obligated all non-Federal Parties "to request and to *support* the proposal and enactment of federal, California, and Oregon legislation materially consistent with Appendices A and B" (emphasis added).[295] KBRA Article 3.1.1.B.ii obligated ALL parties to "periodically confer in order *jointly to promote legislation* materially consistent with Appendices A and B, including evaluation of introduced bills and amendments for material consistency with this Agreement and Appendices A and B, and, as necessary, propose recommendations for amendment of bills, *to preserve the bargained-for benefits of this Agreement*" (emphasis added).[296]

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[288] *See* KBRA at Art. 15.1.2.
[289] *See* KBRA at Art. 15.1.1.
[290] *See* KBRA at Art. 15.2.1.
[291] *See* KBRA at Art. 17.3.1.B.
[292] *See* KBRA at Art. 17.3.2.A.
[293] *See* KBRA at Art. 17.4.1.
[294] *See* KBRA at Art. 3.1.1.A.
[295] *See* KBRA at Art. 3.1.1.B.i.
[296] *See* KBRA at Art. 3.1.1.B.ii.

KBRA Article 3.2.4.B.vi reiterated ALL Parties' acknowledgment that the proposed federal and state legislation contained in KBRA Appendices A and B *which they must support* is "necessary to implement certain obligations in this Agreement as well as the Hydroelectric settlement" (emphasis added).[297] KBRA Article 4.1.1 obligated non-Federal Parties to "*support* authorizations and appropriations of public funds […and the] reprogramming of existing funds to implement this Agreement" (emphasis added).[298] Similarly, KBRA Article 4.1.2.A obligated all non-Federal Parties to "*support* authorizations and appropriations of Federal and state funds, as well as, the securing of nonpublic funds to cover this proposed budget" initially amounting to more than $970 million (*approximately $1 billion*) for 2012-2021, as set forth in KBRA Appendix C-2 (emphasis added),[299] and later claimed (but not verified) by Ed Sheets, Chair of the Klamath Basin Coordinating Council and facilitator of the Klamath Basin Agreements, as having been reduced to approximately $800 million for 2012-2026 [300]). KBRA Article 4.4.1 also obligated all non-Federal Parties "to *support* efforts to secure additional funding if the [Klamath Basin Advisory Committee] KBAC or KBCC, as applicable, determines that such funding [was] needed to support this Agreement" (emphasis added).[301]

KBRA Article 9.3 obligated the non-Federal Parties to "*support* authorization and appropriation of funds as estimated in Appendix C-2, to implement the Fisheries Program" (emphasis added).[302] KBRA Article 14.3 obligated the non-Federal Parties to "*support* authorization and appropriation of funds as estimated in Appendix C-2, to implement the Water Resources Program," and to "*support* legislation that would establish" the "Water Management Fund," "Water Use Retirement and Off-Project Reliance Fund," and "Klamath Drought Fund" (emphasis added).[303] These were programs ultimately employed in the subsequently enacted UKBCA.

KBRA Article 15.2.2.A obligated the non-Federal Parties to "*support* authorization and appropriation of funds in the amounts estimated by Appendix C-2 for the development, implementation, and administration of the On-Project Plan, including completion of any required environmental review" (emphasis added).[304] KBRA Article 15.2.2.B.ii obligated the non-Federal Parties to *support* the authorization and appropriation of funds, as estimated in Appendix C-2, for
KWAPA to implement and administer the approved and adopted On-Project Plan" (emphasis added).[305]

KBRA Article 31.3 obligated the non-Federal Parties to "*support* authorizations and appropriations, in addition to existing funds, as estimated in Appendix C-2 to implement the Tribal Program" (emphasis added).[306] KBRA Articles 32.1 and 32.2 obligated the non-Federal Parties to "*support* authorization and

[297] *See* KBRA at Art. 3.2.4.B.vi.
[298] *See* KBRA at Art. 4.1.1.
[299] *See* KBRA at Art. 4.1.2.A and Appendix C-2.
[300] *See* Klamath Basin Coordinating Council, *Fifth Annual Report - Klamath Basin Settlements* (Nov. 2015), *supra* at p. 16.
[301] *See* KBRA at Art. 4.1.4.
[302] *See* KBRA at Art. 9.3.
[303] *See* KBRA at Art. 14.3.
[304] *See* KBRA at Art. 15.2.2.A.
[305] *See* KBRA at Art. 15.2.2.B.ii.
[306] *See* KBRA at Art. 31.3.

appropriation of funds, as estimated in Appendix C-2," for Tribal participation in the Fisheries and other programs (emphasis added).[307] KBRA Articles 32.1-32.2 obligate non-Federal Parties to "*support* authorization and appropriation of funds to support Tribal participation in the Fisheries and other programs under this Agreement" (emphasis added).[308] KBRA Article 32.3.1. obligates the Interior Secretary to consult with the respective Tribes regarding whether to provide additional funds appropriated pursuant to the Fisheries Program "for implementation of restoration, monitoring, reintroduction and conservation management actions, through "638 contracts" with the Tribes "or through grants, cooperative agreements or other arrangements."[309] KBRA Article 33.2.1 obligates the non-Federal Parties to *support* the authorization and appropriation of, or otherwise Timely provision to, the Klamath Tribes of $21,000,000 toward the acquisition of the Mazama Forest Project in Klamath County, Oregon" (emphasis added).[310]

KBRA Appendix A set forth the elements of the proposed authorizing legislation relating to the KBRA.[311] It provided *inter alia* that such legislation needed to: 1) "Authorize and direct the Secretary of the Interior, Secretary of Commerce, and the Secretary of Agriculture or their designees to execute and implement the KBRA;"[312] 2) "Confirm that execution of the KBRA by the Secretary of the Interior, Secretary of Commerce, and the Secretary of Agriculture or their designees is not a major federal action for purposes of the National Environmental Policy Act, 42 U.S.C. § 4321;"[313] 3) "Authorize Federal Agency Parties to enter into contracts, cooperative agreements, and other agreements in implementation of the KBRA;" 4) "Authorize appropriation of such sums as are necessary to carry out the programs, projects, and plans of the KBRA. Costs associated with any actions taken pursuant to this Agreement shall be non-reimbursable to Reclamation Project contractors;"[314] 5) "Provide that the purposes of the Klamath Reclamation Project include irrigation, reclamation, domestic, flood control, municipal, industrial, power (as necessary to implement the KBRA), National Wildlife Refuge, and fish and wildlife;"[315] and 6) "Confirm the commitments made in the KBRA […as applicable for the United States and the signatory Tribes], including the Assurances in Section 15.3 of the KBRA […relating to Upper Klamath Lake diversion limitations]" which assurances were triggered upon the satisfaction of four conditions identified in KBRA Sec. 15.3.1.A(i)-(iv).[316] **KBRA Appendix A is identical to KHSA Appendix E**.

The KBRA Article 15.3 assurances were to have consisted *inter alia* of Klamath Project Water Users, Reclamation and FWS filing with the OWRD or the Circuit Court a stipulated water rights settlement by, as set forth in KBRA Appendix E-1, in exchange for an authorization granted to the Klamath

[307] *See* KBRA at Art. 32.1; 32.2.
[308] *See* KBRA at Art. 32.1-32.2.
[309] *See* KBRA at Art. 32.3.1.A-B.
[310] *See* KBRA at Art. 33.2.1.
[311] *See* KBRA, *Appendix A – Elements for the Proposed Legislation - Elements Related to the Klamath Basin Restoration Agreement*, at pp.A.1 to A.3.
[312] *Id*., at para. A.
[313] *Id*., at para. B.
[314] *Id.*, at para. F.
[315] *Id*., at para. G.
[316] *Id*., at para. I.1; KBRA at Art. 15.3.1.A(i)-(iv).

"Tribes to issue the voluntary relinquishment and release of claims against the United States [except for treaty rights upon which relinquished claims were premised and State water rights claims capable of being asserted in the Klamath Basin Adjudication and *United States v. Adair*] as provided in Section 15.3 of the KBRA."[317] They also consisted of the Klamath Tribes' commitment to not assert tribal water or fishing rights theories or tribal trust theories, or Klamath tribal water or trust rights in California, whatever they may be, in a manner that would interfere with the diversion, use or reuse of water for the Klamath Project consistent with KBRA Appendix E-1.[318]

The KBRA Article 15.3 assurances were also to have consisted of relinquishment and release of water claims against the USG by the Yurok and Karuk Tribes as set forth in KBRA Articles 15.3.6 and 15.3.7, respectively.

KBRA Article 15.3.6.A-B set forth the following *quid pro quo*. In exchange for the Yurok Tribe *not* asserting tribal water or fishing rights theories or tribal or trust water rights, whatever they may be (except for rights upon which the relinquished claims are premised, and claims for water rights or fishing rights the Tribe or the USG as Tribal trustee could assert), in a manner that would interfere with the diversion, use or reuse of water for the Klamath Reclamation Project consistent with KBRA Appendix E-1, and for relinquishing all claims against the USG concerning certain activities above the Oregon-California border and relating to adoption of the KBRA and KHSA, the Klamath Project Irrigators would make commitments not to challenge those rights and the Yurok Tribe would receive certain benefits.[319]

KBRA Article 15.3.7.A-B set forth a similar *quid pro quo*. In exchange for the Karuk Tribe *not* asserting tribal water or fishing rights theories or tribal or trust water rights, whatever they may be (except for rights upon which the relinquished claims are premised, and claims for water rights or fishing rights the Tribe or the USG as Tribal trustee could assert), in a manner that would interfere with the diversion, use or reuse of water for the Klamath Reclamation Project consistent with KBRA Appendix E-1, and for relinquishing all claims against the USG concerning certain activities above the Oregon-California border and relating to adoption of the KBRA and KHSA, the Klamath Project Irrigators would make commitments not to challenge those rights and the Karuk Tribe would receive certain benefits.[320]

KBRA Article 15.3.9 set forth the recognition by the Klamath, Yurok and Karuk Tribes that the implementation of the KBRA was consistent with the U.S. trust responsibility in the Klamath Basin, and that the collective purposes of the KBRA and KHSA served to enhance fisheries.[321] This provision also set forth the USG commitment to Project Water Users, that, as trustee for such Federally recognized tribes, the USG would not assert tribal water or fishing rights theories or tribal or trust water

[317] *Id*., at para. I.2; KBRA at Arts. 15.3.1.A and 15.3.5.A.
[318] *See* KBRA at Art. 15.3.3.
[319] *See* KBRA at Arts. 15.3.6.A; 15.3.6.B.i; 15.3.6.B.ii.a and d.
[320] *See* KBRA at Arts. 15.3.7.A; 15.3.7.B.i; 15.3.7.B.ii.a and d.
[321] *See* KBRA at Art. 15.3.9.

rights, whatever they may be, in a manner that would interfere with the diversion, use or reuse of water for the Klamath Reclamation Project consistent with KBRA Appendix E-1.[322]

KBRA Appendix B-1 prescribed amendments the California legislature would make to the California Environmental Quality Act ("CEQA") ("Division 13 of the Public Resources Code") to ensure implementation of the KBRA and KHSA. These included exempting the public agency's execution of both agreements from the definition of a "project" to avoid triggering the law's environmental review provisions. It also included exempting from the definition of a "project" any request made to the California Public Utilities Commission to establish a surcharge to fund KHSA dam removal activities, and the CPUC's response to said request. [323] Such amendments to CEQA also would ensure that it applied to the Secretarial decision "to remove any or all of the dams" described in the KHSA, and all decisions whether to approve KBRA-proposed projects following said agreement's execution.[324]

KBRA Appendix B-2 prescribed amendments the California legislature would make to the California water bond legislation enacted in November 2009 to ensure implementation of the KBRA and KHSA.[325] These changes included setting a cap within that fund of $250 million that would be "available for dam removal and related measures in the Klamath River watershed," so long as the USG and the States had taken certain steps toward dam removal and authorization of ratepayer funds. It also allocated, at least, an additional *$20 million of such fund* "to *Siskiyou County* for the purpose of economic development" – i.e., for dam removal mitigation (emphasis added).[326] **KBRA Appendix B-2 is practically identical to KHSA Appendix G-1**. KBRA Article 28.1.1 acknowledged California's bond legislation obligation to Siskiyou County,[327] while KBRA Article 28.2. offered Siskiyou County the opportunity to meet and confer with the California Department of Fish & Game if the environmental impacts from dam removal "related to Siskiyou County roads, infrastructure or other property" were not adequately mitigated.[328]

KBRA Appendix B-3 prescribed legislation the Oregon legislature would propose and enact that established "an Oregon Klamath Basin Restoration Agreement Fund," as separate and distinct from the General Fund, and authorized and directed the Oregon Department of Administration to issue lottery bonds up to a principal amount of $3.4 million to secure monies therefor. The Fund was authorized to use the lottery bond monies to fund Oregon's fulfillment of its KBRA-related commitments and to further economic development in Oregon's portion of the Klamath River.[329] The State of Oregon would use the lottery bond proceeds only to compensate Oregon landowners, farmers and ranchers for the severe drop in land values that would result from the State's KBRA implementation. The legislation

[322] *Id*.
[323] *See* KBRA at Appendix B-1(a). Public Resources Code section 21065 defines a "project" as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."
[324] *See* KBRA at Appendix B-1(b).
[325] *See* KBRA at Appendix-B-2.
[326] *Id*.
[327] *See* KBRA at Art. 28.1.1.
[328] *See* KBRA at Art. 28.2.
[329] *See* KBRA at Appendix B-3.1 thru B-3.3, and B-5.

would ensure that such funds would *not* be applied toward any other purposes, including for any activity or cost associated with KHSA implementation.[330] Oregon Senate Bill 265 was introduced during the 78th Oregon Legislative Assembly in January 2015, consistent with this obligation,[331] but expired at the end of the session.[332] This bill, which would have procured initially only $3.4 million, was a blatant admission by the State of Oregon that the enactment and implementation of the KBRA would have effectively resulted in an indirect regulatory taking of private property for a public use for which just compensation was due and would have been provided.

KBRA Appendix D-1.II.E obligated non-Federal Parties to "support authorizations and appropriations in the amount estimated in Appendix C-2 to fund the [KBCC's] coordination and oversight structure for the first ten years after the Effective Date."[333]

b. *Intertwined Provisions of the KHSA*

KHSA Article 2.1.1.A provided that "[e]ach non-Federal Party shall *support* the proposal and enactment of legislation materially consistent with Appendix E […which] legislation is necessary to provide certain authorizations and appropriations to carry out this Settlement as well as the KBRA" (emphasis added).[334] **KHSA Appendix E is identical to KBRA Appendix A**.

KHSA Article 2.3 obligated ALL Parties to "*support* implementation of the Oregon legislation enacted in 2009 authorizing the collection of a customer surcharge for the costs of Facilities Removal, […] enacted as Senate Bill 76, 2009 Or. Session Laws Chapter 690" (emphasis added).[335] KHSA Article 4.1.1.G obligated the non-Federal Parties to "*support* the California Klamath Surcharge and the Oregon Klamath Surcharges [established "to generate funds for the purpose of Facilities Removal" pursuant to KHSA Articles 4.1.1A[336] and 4.1.1.B[337]] in the [PacifiCorp-requested] proceedings conducted by the

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[330] *See* KBRA at Appendix B-3.4. ("The use of lottery bond proceeds is authorized based on the following findings:
a. That *water right retirements and reduced water delivery in the Klamath River Basin in Oregon through the Klamath Basin Restoration Agreement will negatively affect land values and the agricultural land base in Oregon's Klamath River Basin* and that the use of the lottery bond proceeds will further economic development by *mitigating the negative impact of such water right retirements and reduced water delivery on the economy of the region*" (emphasis added)). *See also* KBRA at Appendix B-3.8.

[331] *See* Oregon Senate Bill 265, A BILL FOR AN ACT Relating to the Klamath Basin Restoration Agreement of 2010; and declaring an emergency, 78th Oregon Legislative Assembly (2015), available at: https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB265/Introduced.

[332] *See* The Oregonian - Your Government, *Senate Bill 265* (2015 Session), available at: http://gov.oregonlive.com/bill/2015/SB265/; TrackBill, *OR-SB265*, available at: https://trackbill.com/bill/or-sb265-authorizes-issuance-of-lottery-bonds-to-finance-implementation-of-klamath-basin-restoration-agreement-of-2010/750507/.

[333] *See* KBRA at Appendix D-1.II.E; *Klamath Basin Coordinating Council Protocols* (Adopted Oct. 7, 2010), *supra* at Sec. 7.

[334] *See* KHSA at Art. 2.1.1.A.

[335] *See* KHSA at Art. 2.3.

[336] *See* KHSA at Art. 4.1.1.A ("the Oregon J.C. Boyle Dam Surcharge and the Oregon Copco I and II/Iron Gate Dams Surcharge (together, the "Oregon Klamath Surcharges")).

[337] *See* KHSA at Art. 4.1.1.B.

California PUC and the Oregon PUC, respectively, to the extent the proposed Surcharges are consistent with this Settlement" (emphasis added).[338]

The Oregon Klamath Surcharge, which covers ALL four Klamath River dams, three of which are in California, arguably imposed a total cost on Oregon ratepayers that was higher than what would have been the case, had SB 76 not been approved by the Oregon PUC. As the Oregon PUC acknowledged, "**the cost to Oregon customers of [dam removal] is large and disproportionate—as typically the costs of relicensing would be allocated across Pacific Power's entire service territory spanning six states**" (emphasis added).[339] The California Surcharge was approved initially on February 22, 2011,[340] and upheld on May 5, 2011[341] in two separate California Public Utility Commission proceedings.

KHSA Articles 4.1.1.C thru E indicated that the Oregon Klamath Surcharges and the California Klamath Surcharges should total no more than $200 million in the aggregate with $184 million allocated to Oregon and $16 million allocated to California.[342] KHSA Article 4.1.2.B obligated the non-Federal Parties to "support the Klamath bond language in Appendix G-1."[343] **KHSA Appendix G-1 is practically identical to KBRA Appendix B-2**.

KHSA Article 4.2.1.A obligated the Oregon PUC to "establish two interest-bearing accounts where funds collected by PacifiCorp pursuant to the Oregon Klamath Surcharges shall be deposited until needed for Facilities Removal purposes."[344] KHSA Article 4.2.2.A obligated the State of California to request, and the non-Federal Parties to "*support* the request, that the California PUC establish two interest-bearing trust accounts where funds collected by PacifiCorp pursuant to the California Klamath Surcharge for the purpose of Facilities Removal shall be deposited until needed for Facilities Removal purposes" (emphasis added).[345]

KHSA Article 6.2.2 obligated ALL Parties to "*support* PacifiCorp's request for a license amendment [from FERC] or incidental take permit [from the Services, defined by KHSA Article 1.4 to include the National Marine Fisheries Service and National Fish & Wildlife Service] to incorporate the Interim Conservation Plan measures" (emphasis added).[346]

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[338] *See* KHSA at Art. 4.1.1.G.
[339] *See* Public Utility Commission of Oregon, *In the Matter of PACIFICORP, dba PACIFIC POWER – Application to Implement the Provisions of Senate Bill 76*, ORDER NO. 10-364 (9/16/10), at pp. 11-12, available at: https://apps.puc.state.or.us/orders/2010ords/10-364.pdf.
[340] *See* David Smith, *California Judge Approves Klamath Dam Removal Surcharge*, Siskiyou Daily News (Feb. 24, 2011), available at: http://www.klamathbasincrisis.org/settlement/legal/cajudgapprovessurcharge022411.htm.
[341] *See* California Public Utility Commission, FINAL DECISION 134812 (May 5, 2011), available at: http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/134812-10.htm.
[342] *See* KHSA at Art. 4.1.1.C, D and E.
[343] *See* KHSA at Appendix G-1.
[344] *See* KHSA at Art. 4.2.1.A.
[345] *See* KHSA at Art. 4.2.2.A.
[346] *See* KHSA at Art. 6.2.1 ("including both Appendix C (ICP Interim Measures) and the Interim Conservation Plan measures for protection of listed sucker species not included in Appendix C").

KHSA Appendix E set forth the elements of the proposed authorizing legislation relating to the KHSA.[347] **KHSA Appendix E was identical to KBRA Appendix A**.[348] It provided *inter alia* that such legislation needed to: 1) "Authorize and direct the Secretary of the Interior (Secretary), Secretary of Commerce, and Federal Energy Regulatory Commission (FERC) to implement the Klamath Hydroelectric Settlement Agreement (KHSA);"[349] 2) "Authorize and direct the Secretary to make the determination […] whether facilities removal will advance restoration of the salmonid fisheries of the Klamath Basin and is in the public interest, which includes but is not limited to consideration of potential impacts on affected local communities and Tribes," provided the conditions specified in Section 3.3.4 of the KHSA have been satisfied;[350] 3) "Authorize and direct the Secretary, if the Secretarial determination provides for facilities removal, to designate as part of that determination a dam removal entity (DRE) with the capabilities and responsibilities set forth in" KHSA Section 7;[351] and 4) "Provide that Facilities Removal shall be subject to applicable requirements of State and local laws respecting permits, certifications and other authorizations, to the extent such requirements are consistent with the Secretarial determination and the Definite Plan, including the schedules for Facilities Removal."[352]

c. *Intertwined Provisions of the UKBCA*

UKBCA Article 2.4 stated that as

> "consideration for the settlement of the Provisionally Settled Tribal Water Right Claims and conditional relinquishments of Tribal claims related to certain water resources […], the Klamath Tribes and the United States […expect…] certain benefits, in addition to those enumerated in the Klamath Basin Restoration Agreement (KBRA) and Klamath Hydroelectric Settlement Agreement (KHSA), will be received by the Klamath Tribes before settlement is complete."[353]

UKBCA Article 3.23 stated that Non-Federal Parties will *support* good faith discussions to resolve potential conflicts over water use and management between the Klamath Reclamation Project and the Non-Federal Parties, considering how such Parties have worked to maintain the benefits of the KBRA for the Project.[354] UKBCA Article 6.2 stated that the "Parties, other than the United States, agree[d] mutually to Timely promote, *support*, strive, and use Best Efforts to obtain funding and authorizations

[347] *See* KHSA *Appendix E - Elements for the Proposed Legislation - Elements Related to the Klamath Hydroelectric Settlement Agreement*, at pp. E-4 to E.6.
[348] *See* KBRA, *Appendix A – Elements for the Proposed Legislation - Elements Related to the Klamath Hydroelectric Settlement Agreement*, at pp.A.4 to A.6.
[349] *Id*., at para. A.
[350] *Id.*, at paras. B-C.
[351] *Id.*, at para. D. KHSA Sections 7.1.1 and 7.1.2 identified the capabilities and responsibilities of the DRE that the Interior Secretary would designate.
[352] *Id*., at para. I.
[353] *See* UKBCA at Art. 2.4.
[354] *See* UKBCA at Art. 3.23.

necessary to implement the KBRA and this Agreement" (emphasis added).[355] UKBCA Article 6.2 also stated that non-USG Parties agreed not to oppose authorization and implementation of the KBRA or the KHSA, including legislation authorizing or implementing said agreements.[356] UKBCA Article 2.5.3 stated that "[t]he promise in KBRA Section 15.3.5.A.iii [of the Klamath Tribes] to relinquish 'all claims relating to the negotiation, execution, or adoption of this Agreement" applies to this Agreement as well as to the KBRA and KHSA."[357]

UKBCA Article 10.1[358] sets forth the conditions that must be satisfied before the agreement will become permanent. The Interior Secretary must file a public notice in the Federal Register which must specify the achievement *inter alia* of the following events: 1) Enactment of Federal legislation authorizing Federal participation in the WUP that is materially consistent with the UKBCA;[359] 2) Enactment of Federal legislation authorizing Federal participation in the RP that is materially consistent with the UKBCA;[360] 3) Enactment of Federal legislation authorizing execution and implementation of the KBRA and KHSA in a manner that is materially consistent with KBRA Appendix A.;[361] 4) Enactment of Federal legislation authorizing Federal participation as a voting member of the Joint Management Entity ("JME") that is materially consistent with Article 7 of the UKBCA;[362] 5) "Federal funds have been appropriated and made available for implementation of this Agreement in the amounts provided for in Section 2 of this Agreement [i.e., "a Tribal economic development fund in the amount of $40 million;" plus "$1 million annually from […] Interior to the Tribes, for a period of five years, to address Tribal needs during the Transition Period beginning in 2014"] and in the water, fisheries, and tribal sections of the KBRA as established in" KBRA Appendix C-2 [$970,452,000 "(2007 Thousands)" from 2012-2021];[363] and 6) "The United States has signed this Agreement pursuant to the Federal Authorizing Legislation."[364] If the Interior Secretary determines that it is unlikely these and the other conditions can be satisfied, UKBCA Article 10.2 directs the Parties to invoke the "Meet and Confer" provisions to arrive at an agreeable amendment to the UKBCA that can improve the likelihood that the conditions will be satisfied.[365]

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[355] *See* UKBCA at Art. 6.2.
[356] *Id*.
[357] *See* UKBCA at Art. 2.5.3.
[358] *See* UKBCA at Art. 10.1.
[359] *See* UKBCA at Art. 10.1.1.
[360] *See* UKBCA at Art. 10.1.2.
[361] *See* UKBCA at Art. 10.1.3.
[362] *See* UKBCA at Art. 10.1.4. *See also* UKBCA Art. 7.2 ("The JME will have overall responsibility for implementation of this Agreement including the design, development and oversight of the WUP described in section 3, the Riparian Program described in section 4, and the Transitional Water Use and Transitional Riparian Programs described in section 5.")
[363] *See* UKBCA at Art. 10.1.6. *See also* Klamath Basin Coordinating Council, *Fifth Annual Report - Klamath Basin Settlements* (Nov. 2015), at p. 16, available at: http://www.klamathcouncil.org/wp-content/uploads/2015/04/KBCC-Fifth-Annual-Report-2015.pdf (In its Fifth-Annual-Report released in 2015, the KBCC had "reduced the cost estimate for implementing the KBRA from $970 million to $799 million for 2012 through 2026; this was an 18 percent reduction from the cost estimates in the 2010 KBRA").
[364] *See* UKBCA at Art. 10.1.13.
[365] *See* UKBCA at Art. 10.2. ("If the Secretary determines that one or more of the conditions in subsection 10.1 has not been or cannot be achieved, the Secretary shall inform the Parties of that preliminary determination by letter. Thereafter, any Party may initiate the Meet and Confer procedures of section 11 of this Agreement to seek to take the

V. Analyzing the Klamath Basin Water Recovery and Economic Restoration Act of 2015 Which Explicitly Sought Congress' Consent to Combine the Intertwined Provisions of the KBRA, KHSA and UKBCA into a Single Federal-Interstate Compact

The Klamath Basin Water Recovery and Economic Restoration Act of 2015 (S.133)[366] effectively combined the intertwined provisions of the KBRA, KHSA and UKBCA into one master federal-interstate compact bearing the collective features discussed above. Although this proposed legislation expired on December 31, 2015,[367] it is useful to review various of its provisions for purposes of comparing it to the Klamath River Basin Compact which remains the only defining federal legislation governing water allocations within the Klamath Basin.

1. Klamath Basin Water Recovery and Economic Restoration Act of 2015 (S.133) Expressed Congress' Explicit Consent to Establish a New Federal-Interstate Compact:

Section 3(a)(1) of Senate bill 133 (S.133) "authorized, ratified and confirmed" the Settlements, defined by Section 2(23) as including the "Hydroelectric Settlement," "Restoration Agreement" and the "Upper Basin Agreement," to the extent they did not conflict with the Act.[368] Section 3(a)(2) of the Senate bill "authorized, ratified and confirmed" any amendment to the Settlements needed to make them consistent with the Act, to the extent such amendments were consistent with the Act.[369] Section 3(a)(3) of the Senate bill "authorized, ratified, and confirmed" any amendments made to the Settlements after the Act's enactment, following the expiration of 90 days from the non-Federal Parties' agreement of said amendment, provided the amendment "is not inconsistent with this Act or other provisions of law," "is executed in a manner consistent with the terms of the particular Settlement," and "*does not require congressional approval pursuant to* section 2116 of the Revised Statutes (25 U.S.C. 177) *or other applicable Federal law*" (emphasis added).[370]

2. The Federal Government Helped to Shape Klamath Basin Water Recovery and Economic Restoration Act of 2015 (S.133) and Predecessor Bill S.2379:

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necessary actions outside of this Agreement or to amend this Agreement to provide a reasonable likelihood that the events in subsection 10.1 will occur.")

[366] *See S.133 - Klamath Basin Water Recovery and Economic Restoration Act of 2015*, 114th Cong. 1st Sess. (Jan. 8, 2015), available at: https://www.congress.gov/114/bills/s133/BILLS-114s133is.pdf ("a Bill To approve and implement the Klamath Basin agreements, to improve natural resource management, support economic development, and sustain agricultural production in the Klamath River Basin in the public interest and the interest of the United States, and for other purposes").

[367] *See* Will Houston, *Klamath Basin Agreements Die in Congress*, Eureka Times-Standard (01/01/16), available at: http://www.times-standard.com/article/NJ/20160101/NEWS/160109999.

[368] *See* S.133 at Sec. 3(a)(1); 2(23).

[369] *Id*., Sec. 3(a)(2).

[370] *Id*., at Sec. 3(a)(2)(A)-(C).

On June 3, 2014, the Subcommittee on Water and Power of the U.S. Senate Committee on Energy and Natural Resources convened a public hearing on the Klamath Basin Water Recovery and Economic Restoration Act of 2014 (S.2379),[371] the predecessor bill to S.133. During that hearing, John Bezdek, then Senior Advisor to the Deputy Secretary U.S. Department of the Interior, provided the following testimony, in part, evidencing the agency's deep knowledge and approval of the bill's concretization of the intertwined provisions of the KBRA, KHSA and UKBCA.

> "Thus, *we support S. 2379 and the Agreements that it will implement, including the provisions on costs provided that all parties understand that full implementation of the Klamath Agreements will need additional, meaningful, non-federal cost-share that will reduce the overall costs to the United States. Over the course of implementing S. 2379, the Administration will work closely with all the parties to secure additional non-federal sources of funding*…S. 2379 also establishes tribal economic development funds to compensate the Klamath Tribes for additional commitments made in the UKBCA that were not made in the KBRA or KHSA, to implement a water management program in the upper basin… The economic development funds authorized under S. 2379 will provide support to help the Tribes in their commitment to build a viable tribal economy, restore their homeland, and increase the opportunities for the exercise of tribal treaty and cultural rights. The funds will accomplish this through the purchase of timber and other lands to be brought back into Trust and the restoration of their subsistence fishery that is central to who they are as a people. This will also provide significant movement towards self-determination that has been so elusive since the restoration of federal recognition…The KHSA is a unique combination of environmental and economic interests striking an agreement that combines both business sense and protection of natural resources…*The irrigators who could benefit comprise about half the irrigation loads in the basin; however, passage of S. 2379 would be needed to serve irrigators that are north of the Klamath Project*. While these discussions *may* lead to near-term reductions in power costs, we also note that the KBRA includes programs that require S. 2379's authorization and budget to provide more substantial long-term power relief…The *KBRA* is a restoration agreement that includes water allocation and fish habitat restoration actions, *predicated on, and working in conjunction with dam removal*. The KBRA includes agreements among tribal and non-tribal entities resolving water rights disputes and provides the means for Reclamation's Klamath Project to conserve water supplies and develop sources of power that will

[371] *See* U.S. Senate Committee on Energy & Natural Resources Subcommittee on Water and Power, *Hearing on S. 2379, the Klamath Basin Recovery and Economic Restoration Act of 2014* (June 3, 2016), available at: http://www.energy.senate.gov/public/index.cfm/2014/6/subcommittee-hearing-klamath-basin-water-recovery-and-economic-restoration-act-of-2014-s-r-2379.

> place the Project on par with other similarly sized irrigation projects in the West. The KBRA provides a reliable supply of water to the two national wildlife refuges that currently receive adequate water supplies in less than one out of 10 years. If funded, the KBRA will put tribal members to work on habitat restoration actions needed in the basin…" (emphasis added).[372]

At a minimum, Bezdek's testimony confirmed the intertwined nature of the KBRA, KHSA and UKBCA as a collective effort to reallocate water rights among residents of the Klamath Basin through a series of *quid pro quos* set forth in the respective agreements that could not have been reached without Federal government involvement and approval.

3. S.133 Directed Federal Government Agencies (DOI, USDA, DOC, DOE, DOD, U.S. Treasury to Administrate and Implement Portions of the KBRA, KHSA and UKBCA:

Section 3(b)(1)(A) of S.133 obligated the *Secretaries of Interior, Commerce and Agriculture* to execute and implement the KBRA and UKBCA.[373] Section 3(b)(1)(B) of S.133 obligated these Secretaries to implement the KHSA in consultation with other applicable Federal agencies, to the extent the KHSA did not conflict with this Act.[374]

Section 3(d) of S.133 mandated that, in implementing the KBRA, KHSA and UKBCA ("the Settlements") *all Federal agencies* must comply *inter alia* with National Environmental Policy Act ("NEPA")[375] and the Endangered Species Act ("ESA").[376] Sections 9(h)(4) and (5) of S.133 required the *Interior and Commerce Secretaries* to file a report with Congress each year describing how such implementation fulfills Federal agencies' ESA obligations.[377]

Sections 8(a)(1) and (2) of S.133 modified the Interior Secretary's responsibilities under KHSA Article 3.2.1. KHSA Art. 3.2.1 had required the *Interior Secretary*, "in cooperation with the *Secretary of Commerce and other Federal agencies* as appropriate," to "(i) use existing studies and other appropriate data, […] (ii) conduct further appropriate studies, […] (iii) undertake related environmental compliance actions, including environmental review under NEPA; and (iv) take other appropriate actions as necessary to determine whether to proceed with Facilities Removal pursuant to Section 3.3 (emphasis added)."[378] Sections 8(a)(1) and (2) of S.133, instead, required the Interior Secretary and the

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[372] *See Statement of John C. Bezdek, Senior Advisor to the Deputy Secretary U.S. Department of the Interior, before the Committee on Energy and Natural Resources United States Senate, S.2379 Klamath Basin Water Recovery and Economic Restoration Act of 2014* (113th Cong.) (June 3, 2014), at pp. 2-4, available at http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=962447C3-E51D-4FFF-8581-DA2529D18DEC.
[373] *Id*., at Sec. 3(b)(1)(A)(i)-(ii).
[374] *Id*., at Sec. 3(b)(1)(B).
[375] *See* National Environmental Policy Act, Pub. L. 91-190, 42 U.S.C. 4321-4347 (Jan. 1970), as amended, codified at 42 U.S.C. §§ 4321-4370.
[376] *See* S.133 at Sec. 3(d).
[377] *See* S.133 at Secs. 9(h)(4) and (5).
[378] *See* KHSA at Art. 3.2.1.

Governors of California and Oregon to *jointly determine* whether to proceed with facilities (dam) removal *and to jointly designate* the dam removal entity.[379] Section 8(a)(3) of S.133 also stated that "[t]he Secretary *and* the Governors may not make or publish the determination under this section, unless the conditions specified in section 3.3.4 of *the Hydroelectric Settlement, as modified by this Act* as applicable, have been satisfied" (emphasis added).

Perhaps, a joint State-Federal determination of whether to proceed with dam removal and a joint State-Federal designation of the DRE rather than mere State concurrence with a Federal action (as KHSA Articles 3.3.4.E(ii) and 3.3.5.A(iii) reflected) had been required because it had been presumed that a non-Federal dam removal entity would be designated. **Arguably, the States of California and Oregon would not have had the authority, themselves, to undertake such decisions without the Interior Department support and the consent Congress would have provided in this now expired proposed legislation**.

Section 8(b)(5)(A)(i) of S.133, consistent with KHSA Article 7.4.2,[380] directed the *Federal Energy Regulatory Commission ("FERC"), a division of the U.S. Department of Energy ("DOE")*, to issue PacifiCorp annual licenses authorizing it to operate the four dams until title to all such dams had been transferred to the DRE,[381] to terminate each license upon title transfer.[382]

Sections 7(a) and (k) of S.133, consistent with UKBCA Article 2.4, stated that the *U.S. Treasury* would establish a Klamath Tribes Tribal Resource Fund in an amount not to exceed $40 million upon receipt of annual Congressional appropriations of $8 million per year over a five-year period.[383] These funds were to be disbursed to the Tribes provided certain conditions were satisfied.[384]

Sections 2(6), 2(19) and 2(24)[385] of S.133 defined the terms "Hydroelectric Settlement Agreement," "Restoration Agreement" and "Upper Basin Agreement," respectively, as consisting of the complete texts of the KHSA, KBRA and the UKBCA, including any amendments thereto. This means that the KBRA, for purposes of this proposed legislation, included Appendix D-1 of that Agreement addressing the roles and responsibilities of the Klamath Basin Coordinating Council and the Klamath Advisory Councils and their respective subgroups. It also means that, for purposes of the proposed legislation,

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[379] *See* S.133 at Sec. 8(a)(1)(A) ("(A) […] in accordance with section 3 of the Hydroelectric Settlement, *the Governors and the Secretary shall jointly*— (A) as soon as practicable after the date of enactment of this Act, determine whether to proceed with facilities removal […]"); Sec. 8(a)(1)(B) ("and (B) *if the Governors and the Secretary determine* under subparagraph (A) to proceed with facilities removal, include in the determination the designation of a dam removal entity […]"); Sec. 8(a)(2)(A) ("[…] For purposes of making a determination under paragraph (1)(A), *the Governors and the Secretary*, in cooperation with the Secretary of Commerce and other appropriate entities, shall— (A) use existing information; (B) conduct any necessary additional studies; (C) comply with the [NEPA…]; and (D) take such other actions *as the Governors and the Secretary determine* to be appropriate to support the determination […]"); Section 8(a)(3) (" (emphasis added).

[380] *See* KHSA at Art. 7.4.2.

[381] *See* S.133 at Sec. 8(b)(5)(A)(i).

[382] *Id*., at Sec. 8(b)(5)(A)(ii).

[383] *See* S.133 at Secs. 7(a) and (k).

[384] *See* S.133 at Secs. 7(d)(2), (e)(4) and 7(g)(1).

[385] *See* S.133 at Secs. 2(6), 2(19) and 2(24).

the UKBCA also included Article 7 of that Agreement addressing the roles and responsibilities of the Joint Management Entity and its sub-entities.

Section 2(7) of S.133 defined the term "Joint Management Entity" as the entity that […] is comprised of the Landowner Entity, the Klamath Tribes, the United States, and the State of Oregon […and] is responsible for overseeing implementation of the Upper Basin Agreement."[386] Section 2(8) of S.133 defined the term "Joint Management Entity Technical Team" as "the group of specialists appointed by the Joint Management Entity."[387]

To recall, KBRA Appendix D-1 reveals that the Klamath Basin Coordinating Council ("KBCC") and the Klamath Basin Advisory Council, along with their respective subgroups and technical teams, were charged with collectively "facilitate[ing] [federal-state-local government and community] coordination, cooperation, collaboration, decision-making, and accountability by Parties to the Agreement," and with "*assur[ing] elements of the Agreement are carried out effectively and at the appropriate scales* to forward sustainable restoration and renewal of the Klamath River Basin" (emphasis added).[388] The coordination and oversight framework they established was "the mechanism by which state and federal agencies, local governments, tribes, conservation groups and community members work[ed] together to collaboratively develop *and implement* long-term solutions for the Klamath River Basin" (emphasis added).[389]

Furthermore, it may be recalled that UKBCA Article 7.1 stated that the "JME will include a Board of Directors (Board) responsible for decision-making, and shall appoint a JME Technical Team to conduct analyses, gather information, and make recommendations to the Board." UKBCA Article 7.1.6 provided that the "JME will assume the obligations of the Upper Basin Team for purposes of the KBRA." Moreover, UKBCA Article 7.2 stated that, the "JME *will have overall responsibility for implementation of this Agreement* including the design, development and oversight of the WUP described in section 3, the Riparian Program described in section 4, and the Transitional Water Use and Transitional Riparian Programs described in section 5" (emphasis added), in addition to more specific functions set forth in Articles 7.2.1 thru 7.2.11.

It also should be recalled that, although the Federal government was not a Party to the KBRA, a number of Federal agencies were members of the Klamath Basin Coordinating Council, a public forum to oversee implementation of the KBRA and KHSA. KBRA Appendix D-1.II.B revealed that KBCC members had included the U.S. Interior Department's Fish & Wildlife Service and the Bureaus of Land Management, Reclamation and Indian Affairs, the U.S. Commerce Department's National Oceanic and Atmospheric Administration/National Marine Fisheries Service, and the U.S. Agriculture Department.[390] KBCC voting member decisions were to be made on a supermajority basis on all matters other than those relating to the On-Project Plan and Power for Water Management Fund

[386] *See* S.133 at Sec. 2(7).
[387]
[388] *See* KBRA at Appendix D-1.I.
[389] *Id*.
[390] *See* KBRA at Appendix D-1.II.B and Appendix Table D-1.

described in KBRA Article 14.3.1, and those relating to the exercise of water rights with respect to tribal water claim assurances described in KBRA Article 15.3.8.B. In the event KBCC decisions must be made with respect to these matters, a decision panel comprised of one representative from each of KWAPA, the Klamath Tribes and the States of California and Oregon was charged with reviewing the dispute and deciding the matter.[391] Presumably, the Federal Government had a BIA representative assisting or advising the Klamath Tribes.

KBRA Appendix D-1.II.C stated that the "KBCC shall have the flexibility to establish additional subgroups as necessary and appropriate to address specific issues and needs on a periodic, ad hoc, temporary, or long-term basis, and *to implement provisions of the Agreement [KBRA], including the separate but related Hydroelectric Settlement*" (emphasis added).[392] The flexibility with which the KBCC could expand its scope of operations strongly suggests that it played a significant role in developing and implementing the subsequently executed UKBCA.

KBRA Appendix D-1.II.C. described the KBCC's functions as follows:

> "The KBCC will function to link and coordinate Agreement programs and actions with other actions and programs required through the federal ESA (Biological Opinions and Recovery Plans) and with other watershed working groups within the entire Klamath River Basin in Oregon and California (e.g., Trinity River Working Group, Upper Klamath Basin Working Group, subbasin watershed organizations and resource conservation districts)."[393]

The Federal government agencies that were Parties to the KBRA, KHSA and UKBCA also were members of the Klamath Basin Advisory Council ("KBAC"). The KBAC was a federal advisory committee established pursuant to the Federal Advisory Committee Act ("FACA") to "provide advice and recommendations for Federal Agency Parties […] as necessary and appropriate for implementing the Agreement."[394] Federal Party representatives also were members of the Interim Advisory Council that functioned prior to the execution of the KBAC FACA charter.[395] KBRA Appendix D-1.III.C clearly revealed that KBAC was authorized to

> "establish additional subgroups as necessary and appropriate to address specific issues and needs on a periodic, ad hoc, temporary, or long-term basis. Unless separately Chartered, subgroups of the KBAC that develop advice or recommendations for the Federal Agency Parties shall provide such advice or recommendations only to the KBAC (e.g., Upper Basin

[391] *See* KBRA Appendix D-1.II.D.
[392] *See* KBRA at Appendix D-1.II.C; *Klamath Basin Coordinating Council Protocols* (Adopted Oct. 7, 2010), *supra* at Sec. 3.5.
[393] *See* KBRA at Appendix D-1.II.C.
[394] *See* KBRA at Appendix D-1.III.A and C.
[395] *Id*.

> Team). Subgroups that provide advice or recommendations directly to Federal Agency Parties shall be Chartered pursuant to FACA and these Charters shall be linked to the KBAC Charter as appropriate (e.g., Technical Advisory Team)."[396]

KBRA Appendix D-2 revealed the establishment of a Technical Advisory Team ("TAT") as "a [FACA] Chartered subgroup of the KBAC [to] provide recommendations for the identified Federal Agency Lead Parties, or other Parties, and to the KBAC or KBCC, as provided in the Agreement pursuant to […] Appendix D-2."[397] Until a TAT Charter was executed an Interim Technical Team had functioned.[398] The TAT's purpose was "to utilize the technical expertise of the Parties and others with interest and expertise in water management and fisheries to inform the implementation of the Agreement as it relates to *Managed Environmental Water and other aquatic resource issues*" (emphasis added).[399] Each TAT Party representative was a voting member on all matters, except that Federal Agency Party representatives could not vote on recommendations made to the specific Federal Agency they represented.[400]

KBRA Appendix D-2 also revealed the establishment of an Upper Basin Team ("UBT") that provided recommendations for the Federal Lead Party directly to the KBAC. In other words, it functioned as a KBAC subcommittee and did not require an independent FACA charter.[401] The UBT's purpose was "to oversee the planning and implementation of the Water Use Retirement Program (WURP)" as provided for in KBRA Article 16.2.2.[402] The UBT was comprised of four voting members – two representatives from the Klamath Tribes and two representatives from the Upper Klamath Water Users Association. The Federal Lead Party representative was "a non-voting member."[403]

The KBAC and Interim Advisory Council operations procedures provided that all Federal, State and Local Government Parties, as well as, nongovernmental Parties represented had a vote on all matters other than specific recommendations made to specific Federal Parties, with respect to which those specific Federal Parties did not have a vote.[404]

Furthermore, although the Federal government was not a member of the UKBCA, the Federal government was to have had one of four voting directors representing Federal Klamath Basin interests sitting on the Joint Management Entity ("JME") Board of Directors the UKBCA established.[405] The Klamath Tribes, the Landowner Entity and the State of Oregon also had voting representatives on the

[396] *See* KBRA at Appendix D-1.III.C.
[397] *See* KBRA at Appendix D-2.I; Appendix D-2.II.D.
[398] *See* KBRA at Appendix D-2.II.D.
[399] *See* KBRA at Appendix D-2.II.A.
[400] *See* KBRA at Appendix D-2.II.D; Appendix Table D-2.
[401] *See* KBRA at Appendix D-2.I; Appendix D-2.IV.A.
[402] *See* KBRA at Appendix D-2.IV.A and C.
[403] *Id*.
[404] *See* KBRA at Appendix D-1.III.D; Appendix Table D-1.
[405] *See* UKBCA at Art. 7.1.1.

JME Board.[406] The JME was vested with "overall responsibility for implementation of [the UKBCA], including the design, development and oversight of the WUP [Water Use Program…], the Riparian Program […] and the Transitional Water Use and Transitional Riparian Programs."[407] The JME would "assume the obligations of the Upper Basin Team *for purposes of the KBRA. The USFWS is the 'Federal Lead Party' for purposes of Section 16 of the KBRA, and as such must provide oversight for the expenditure of Federal funding for the WUP*, to the extent that the funding is provided under the KBRA." (emphasis added).[408] Section 3(l)(3) of S.133 provided that neither the JME nor the JME Technical Team are subject to the Federal Advisory Committee Act ("FACA").[409]

Since S.133 was never passed, the U.S. government was never authorized by Congress to participate as a voting member of the JME. Consequently, the USG never actually had a formal vote on the JME.[410] Nevertheless, since 2014, it has had "five non-voting representatives participate on the JME, "including a designee of the Secretary and representatives of the BIA, National Marine Fisheries Service (NMFS), USFWS, and USGS."[411] Once such Federal legislation is passed, the USG "will appoint the Secretary's designee as the voting director and four non-voting directors, representing the BIA, NMFS, USFWS, and the USGS, and the five Federal directors will collectively decide how the voting director votes."[412]

It should be emphasized here that, although the KBCC's Fifth Annual Report claimed that "the KBRA d[id] not create any new governmental entities,"[413] the KBCC and KBAC, along with their subgroups and technical teams, had been charged with as many or more responsibilities relating to the implementation of the KBRA and KHSA than the Klamath River Basin Compact Commission has borne with respect to the implementation of the Klamath River Basin Compact! Similarly, it should be emphasized that, although the UKBCA had not established any governmental entities, the JME, along with its Technical Team, had been charged with as many or more responsibilities relating to the implementation of the UKBCA than the Klamath River Basin Compact Commission has borne with respect to the implementation of the Klamath River Basin Compact!

4. <u>S.133 Addressed the Federal Government National Interests Set Forth Within the Intertwined KBRA, KHSA and UKBCA</u>:

S.133 had multiple stated purposes. These included: 1) "[t]o approve and implement the Klamath Basin Agreements"; 2) "to improve natural resource management […] in the Klamath Basin;" 3) to "support economic development […] in the Klamath Basin;" and 4) to "sustain agricultural production in the Klamath Basin."[414] Consistent with these purposes, S.133 broadly addressed the Federal

[406] *See* UKBCA at Arts. 7.1.2, 7.1.3, 7.1.4.
[407] *See* UKBCA at Art. 7.2.
[408] *See* UKBCA at Arts. 7.1.6; 7.2.9.
[409] *See* S.133 at Sec. 3(l)(3).
[410] *See* UKBCA at Art. 7.1.5.
[411] *Id*.
[412] *Id*.
[413] *See* Klamath Basin Coordinating Council, *Fifth Annual Report* (Nov. 2015), at p. 12, available at: http://www.klamathcouncil.org/wp-content/uploads/2015/04/KBCC-Fifth-Annual-Report-2015.pdf.
[414] *See* S.133, Long Title.

government's interests in the Klamath River Basin in a more comprehensive manner than had been achieved in the Klamath River Basin Compact. As gleaned from the intertwined provisions of the KBRA, KHSA and UKBCA, these five interests engendered: a Federal obligation to maintain navigation servitude; a Federal assurance of affordable power; a Federal obligation to operate and manage or oversee operation and management of the Klamath Irrigation Project; a Federal environmental obligation to protect the environment and ensure pollution control; a Federal obligation to protect fish and wildlife; and a Federal trust obligation to protect federal reserved tribal water rights.

a. *Federal Navigation Servitude*

Section 2(3) of S.133 addressed the Federal navigation servitude through its provisions equating removal of the four Klamath River Dams/Facilities (John C. Boyle, Copco 1, Copco 2 and Iron Gate) with a free-flowing river that enabled volitional fish passage and ecosystem restoration.

Section 6 of S.133 would have amended the Klamath Basin Water Supply Enhancement Act of 2000 (Public Law 106–498; 114 Stat. 2221) by inserting new Section 4(b)(1)(C). It authorized the Interior Secretary "to carry out activities, including entering into an agreement […] or otherwise making financial assistance available […] to restore any ecosystem […] in the Klamath Basin watershed.[415] Section 2(3)(A) of S.133 defined "Facilities Removal" as meaning, in part, "physical removal of all or part of each facility to achieve, at a minimum, a free-flowing condition and volitional fish passage."[416] Section 2(3)(B) of S.133 defined the term "Facilities Removal" as meaning, in part, "site […] restoration, including restoration of previously inundated land."[417] **These provisions reproduced the definition of "Facilities Removal" contained in KBRA Article 1.7 and KHSA Article 1.4**.

Section 8(b)(4)(D)(i)-(ii) of S.133 authorized PacifiCorp to transfer title and other rights to the Facilities and associated lands to a dam removal entity ("DRE") prior to commencing Facilities Removal for purposes of both Facilities Removal and disposition of Facilities lands following removal, "as provided for" in KHSA Article 7.6.4.[418] KHSA Article 7.6.4.A had required the States of California and Oregon ultimately to manage the lands falling within the FERC Project boundaries of each of the four Klamath River Dams, following Facilities Removal, "for public interest purposes such as […] public recreational access."[419]

Section 8(b)(4)(D)(i)-(ii) of S.133 also tracked to KHSA Appendix D, Interim Measure 21, which required PacifiCorp to fund U.S. Bureau of Land Management activities, including recreational

[415] *See* S.133 at Sec. 6, adding new Sec. 4(b)(1)(C) to P.L. 106-498.
[416] *See* S.133 at Sec. 2(3)(A).
[417] *See* S.133 at Sec. 2(3)(B).
[418] *See* S.133 at Secs. 8(b)(4)(D)(i)-(ii).
[419] *See* KHSA at Art. 7.6.4.A (indicating that PacifiCorp would transfer ownership of lands falling within the FERC Project boundaries of each of the four Klamath River Dams, before Facilities Removal begins, to the respective States, which shall thereafter be managed, in part, for recreational purposes.) Section 8(b)(4)(D)(i)-(ii) would have permitted the transfer of title initially to a DRE, which, upon completion of Facilities Removal, would have been required, consistent with KHSA Article 7.6.4.A, to transfer the lands back to the States.

activities, until transfer of the J.C Boyle Dam.[420] Presumably, such access would have ensured recreational whitewater rafting by means of kayak, canoe and other oared craft which, in turn, would have been deemed supportive of a free-flowing river that enabled the volitional fish passage and environment and ecosystem restoration S.133 envisioned.

Section 8(b)(4)(D)(i)-(ii) of S.133, furthermore, tracked to KBRA Article 27.3.1.B. KBRA Article 27.3.1.B required Klamath County to establish an economic development plan "associated with the restoration of the Klamath River and reintroduction of anadromous fisheries into Klamath County and the headwaters of the Klamath River in Lake County, Oregon."[421] The Klamath County plan KBRA Article 27.3.1.B required must have "use[d] appropriate methods to determine economic development opportunities associated with fisheries enhancement, tourism and recreational development…"[422]

Consequently, it may be confidently concluded that S.133 had envisioned recreational whitewater rafting and tourism as among the economic development opportunities that would arise from the free-flowing river, volitional fish passage and ecosystem restoration that Klamath River Facilities Removal enabled, consistent with the Federal government's interest in maintaining navigational servitude.

b. *Federal Assurance of Affordable Power*

Section 6 of S.133 would have amended the Klamath Basin Water Supply Enhancement Act of 2000 (Public Law 106–498; 114 Stat. 2221) by inserting new Section 4(b)(1)(B). It authorized the Interior Secretary to "carry out any activities, including by entering into an agreement or contract or otherwise making financial assistance available to […] limit the net costs of power used to manage water (including by arranging for delivery of Federal power, consistent with the [KBRA] and the [UKBCA] for (i) the Klamath Project […] (ii) the On-Project Power Users; (iii) irrigators in the Off-Project area; and (iv) the Klamath Basin National Wildlife Refuge Complex."[423]

Section 6 of S.133 would have amended the Klamath Basin Water Supply Enhancement Act of 2000 (Public Law 106–498; 114 Stat. 2221) by inserting new Section 4(b)(2). It stated that "[p]urchases of power by the Secretary under paragraph (1)(B) shall be considered an authorized sale under Section 5(b)(3) of the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 839c(b)(3)."[424]

Section 8(a)(6) of S.133 *modified KHSA Article 7.1.1* by inserting two additional conditions before a dam removal entity ("DRE") may be designated as "capable" to undertake dam removal activities, which *conditions were moved from KHSA Article 3.3.4.E(i) and (iii)*. In addition to meeting the KHSA Article 7.1.1 conditions, the DRE also must have "[been] otherwise qualified to perform facilities

[420] *See* KHSA at Appendix D, Interim Measure 21: BLM Land Management Provisions.
[421] *See* KBRA at Art. 27.3.1.
[422] *See* KBRA at Art. 27.3.1.B.
[423] *See* S. 133 at Sec. 6, adding new Sec. 4(b)(1)(B)(i)-(iv) to P.L. 106-498.
[424] *Id.*, at Sec. 6, adding new Sec. 4(b)(2) to P.L. 106-498.

removal,"[425] and must "have committed […] to perform facilities removal within the State Cost Cap *as described in section 4.1.3 of the Hydroelectric Settlement*" (emphasis added).[426] It may be recalled that the State Cost Cap referred to in KHSA Article 4.1.3 is comprised of the $200 million California & Oregon public utility ratepayer increase ("customer contribution") described in KHSA Article 4.1.1, plus the $250 million California general obligation bond ("California bond funding") described in KHSA Article 4.1.2.

Section 8(b)(2)(C) of S.133, if enacted, would have required that the $450 million State Cost Cap for dam removal referred to in KHSA Article 4.1.3 include (i.e., also cover) "reasonable compensation for property owners whose property or property value is directly damaged by facilities removal, consistent with State, local, and Federal law."[427] The sponsors of the Senate bill likely recognized that the State Cost Cap would be insufficient to cover such property owner damages, but proceeded anyway to insert said provision knowing full well that Klamath and Siskiyou Counties had, pursuant to KBRA Articles 27.3.3 and 28.6.1, already relinquished all claims such local governments may have had against the Federal government and the States of Oregon and California "arising from any decrease in property tax revenue or alleged business or economic losses, including property values, due to Facilities Removal."[428] Presumably, the bill's sponsors thought it highly unlikely that property owners, themselves, would succeed in filing such claims.

Section 8(b)(4)(C)(i) of S.133 stated that dam removal, including the determination to proceed with dam removal the Interior Secretary and Governors had jointly made, would be subject to the applicable requirements of State and local laws relating to permits and other authorizations, "to the extent not in conflict with Federal law."[429] Section 8(b)(4)(C)(ii) of the Senate bill stated that each State's exercise of authority concerning whether to concur in the determination favoring dam removal, and the exercise of authority of each State's public utility commission to concur in the funding of dam removal, would be considered not to be in conflict with federal law.

Section 8(b)(4)(D)(ii) of S.133 effectively waived the license transfer requirements of Section 8 of the Federal Power Act ("FPA" - 16 U.S.C. 801[430]) that ordinarily would have been applied to ensure that PacifiCorp's transfer to a non-Federal Dam Removal Entity ("DRE") of the licenses to operate the four dams, even briefly, was in the public interest.[431] In other words, this provision would likely have deemed the conditions imposed by Section 8(a)(6) of the Senate bill, which had modified KHSA Article 7.1.1 as noted above, as adequate to fulfill FPA Section 8's license transfer standards.

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[425] *See* S.133 at Sec. 8(a)(6)(A) and (B); KHSA Art. 3.3.4.E(i).
[426] *Id.*, at Sec. 8(a)(6)(A) and (C); *See also* KHSA Art. 3.3.4.E(iii).
[427] *Id*., at Sec. 8(b)(1)(C).
[428] *See* KBRA at Arts. 27.3.3 and 28.6.1.
[429] *Id*., at Sec. 8(b)(4)(C)(i).
[430] *See Federal Power Act*, The Act of June 10, 1920, as amended through P.L. 114-94 (Dec. 4, 2015), at Sec. 8, codified at 16 U.S. 801.
[431] *See* S.133 at Sec. 8(b)(4)(D)(ii).

Section 8(b)(5)(A)(i) of S.133, consistent with KHSA Article 7.4.2,[432] directed the *Federal Energy Regulatory Commission ("FERC"), a division of the U.S. Department of Energy ("DOE")*, to issue PacifiCorp annual licenses authorizing it to operate the four dams until title to all such dams had been transferred to the DRE.[433] Sections 8(b)(5)(A)(ii)-(iii) of the Senate bill directed the FERC, upon title transfer, to terminate each license,[434] and to treat all license conditions as no longer in effect.[435] Section 8(5)(B) of the Senate bill, consistent with KHSA Article 7.7, provided that FERC's jurisdiction over each dam and dam operating license would terminate upon the transfer of title to such dam to the DRE.[436]

Section 8(e)(1) of S.133 would have shielded PacifiCorp from ALL liability for damages arising from dam removal or operations in any way related to dam removal, "including any damage caused by the release of any material or substance (including a hazardous substance.),"[437] consistent with KHSA Article 2.1.1.E.[438] Section 8(e)(3) of the Senate bill would have preempted State liability laws by waiving the liability provisions of Federal Power Act Section 10(c)[439] that ordinarily rendered dam licensees liable under State and Local laws for "damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license […]"[440] Without this shield from legal liability, removal of the four Klamath River Dams via the KHSA would not have been possible.

c. *Federal Irrigation Project Operation and Management*

Section 4(a) of S.133, prioritized the purposes of the Klamath Project, consistent with KBRA Appendix A(G), which differ from those of the entire Klamath River Basin, as set forth in Klamath River Basin Compact Articles 1.A and 3.B.1.[441] Section 4(a)(2)(A) of S.133 prohibited the least prioritized purposes of fish and wildlife and National Wildlife Refuge-related water deliveries from adversely affecting the primary irrigation purpose of the Project.[442] Section 4(c) of the Senate bill prescribed, consistent with KBRA Appendix A(H), how net revenues from the leasing of national wildlife refuge lands would be distributed among KBRA/KHSA Parties.[443]

Section 6 of S.133 would have amended the Klamath Basin Water Supply Enhancement Act of 2000 (Public Law 106–498; 114 Stat. 2221) by inserting new Section 4(b)(1)(A). It authorized the Interior Secretary to "carry out any activities, including by entering into an agreement or contract or otherwise

[432] *See* KHSA at Art. 7.4.2.
[433] *See* S.133 at Sec. 8(b)(5)(A)(i).
[434] *See* S.133 at Sec. 8(b)(5)(A)(ii).
[435] *See* S.133 at Sec. 8(b)(5)(A)(iii)(I).
[436] *Cf.* S.133 at Sec. 8(5)(b) with KHSA at Art. 7.7.
[437] *See* S.133 at Sec. 8(e)(1).
[438] *See* KHSA at Art. 2.1.1.E.
[439] *See* FPA Section 10 (c), codified at 16 U.S.C. 803(c).
[440] *See* S.133 at Sec. 8(e)(3).
[441] *Id*., at Sec. 4(a). *Cf.* Compact at Arts. 1.A and 3.B.1.
[442] *See* S.133, *supra* at Sec. 4(a)(2)(A).
[443] *Id*., at Sec. 4(c).

making financial assistance available to […] reduce water consumption and demand consistent with the [KBRA] or the [UKBCA]," referring to both On-Project and Off-Project water programs.[444]

d. *Federal Environmental Protection/ Pollution Control*

Section 3(d) of S.133 mandated that, in implementing the KBRA, KHSA and UKBCA ("the Settlements") *all Federal agencies* must comply *inter alia* with National Environmental Policy Act ("NEPA")[445] and the Endangered Species Act ("ESA").[446] Section 3(l)(1)(C)-(D) of S.133 stated that nothing in this Act supersedes, modifies or otherwise affects the ESA and NEPA.[447] Section 5(h)(1)(A) of the Senate bill reaffirmed that no tribal settlement of water claims affected the U.S. government's ability to take any action capacity authorized by law in its sovereign capacity, including any health, safety or environment-related laws such as the CWA, Safe Drinking Water Act ("SDWA"), Solid Waste Disposal Act ("SWDA"), Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") or Endangered Species Act ("ESA.")[448]

Section 3(l)(1)(E)[449] and Section 8(b)(4)(A)(ii)[450] of S.133, consistent with KBRA Appendix A (at p. A-4) and KHSA Appendix E (at p. E-4), would have modified the Federal Water Pollution Control Act (Clean Water Act – 33 U.S.C. 1251 et seq.) by requiring the DRE to obtain a Clean Water Act Section 404 (33 U.S.C. 1344) permit for dredging and depositing fill material incident to its future dam removal activities. This federal legislative amendment would have required coordinated amendments to existing EPA and/or U.S. Army Corps of Engineers implementing regulations (these agencies have jurisdiction to enforce various portions of the CWA). The Corps is a division of the U.S. Department of Defense.

Section 6 of S.133 would have amended the Klamath Basin Water Supply Enhancement Act of 2000 (Public Law 106–498; 114 Stat. 2221) by inserting new Section 4(b)(1)(C). It authorized the Interior Secretary to "carry out any activities, including by entering into an agreement or contract or otherwise making financial assistance available to […] restore any ecosystem […] consistent with the [KBRA] and [UKBCA]."[451]

e. *Federal Protection of Fish and Wildlife*

Section 6 of S.133 would have amended the Klamath Basin Water Supply Enhancement Act of 2000 (Public Law 106–498; 114 Stat. 2221) by inserting new Section 4(b)(1)(C). It authorized the Interior Secretary to "carry out any activities, including by entering into an agreement or contract or otherwise

[444] *See* S.133 at Sec. 6, adding new Sec. 4(b)(1)(A) to P.L. 106-498.
[445] *See* National Environmental Policy Act, Pub. L. 91-190, 42 U.S.C. 4321-4347 (Jan. 1970), as amended, codified at 42 U.S.C. §§ 4321-4370.
[446] *See* S.133 at Sec. 3(d).
[447] *See* S.133 at Secs. 3(l)(1)(C) and (D).
[448] *See* S.133 at Secs. 5(h)(1)(A)(i)-(v).
[449] *See* S.133 at Sec. 3(l)(1)(E).
[450] *See* S.133 at Sec. 8(b)(4)(A)(ii).
[451] *See* S.133 at Sec. 6, adding new Sec. 4(b)(1)(C) to P.L. 106-498.

making financial assistance available to […] otherwise protect fish and wildlife in the Klamath Basin watershed, including tribal fishery resources […] consistent with the [KBRA] and [UKBCA]."[452] **This provision, in other words, encompassed the purpose and spirit of fisheries restoration envisioned by UKBCA Articles 2.3, 4 and 9, and KBRA Article 15.2.1 and Appendix D-1.II.C.[453]**

Sections 9(h)(4) and (5) of S.133 required the *Interior and Commerce Secretaries* each year to submit to the appropriate authorizing committees of the U.S. House and Senate a report that described *inter alia* the "achievements in advancing the purposes of complying with the ESA […] under the Settlements" and the "additional achievements in restoring fisheries under the Settlements."[454]

f. *Federal Trust Obligation to Protect Tribal Water Rights*

Section 3(f) of S.133 ensured the eligibility of all Settlement Agreement Parties, including Indian Tribes, to receive funds procured through said Agreements, notwithstanding any other provision of law.[455] Section 3(g)(2) of S.133 ensured the Klamath Basin Indian Tribes that neither the Act nor the Settlement Agreements, unless they so provided, "amend[ed], alter[ed] or limit[ed]" their authority "to exercise any water rights the Tribes hold or may be determined to hold."[456]

Section 6 of S.133 would have amended the Klamath Basin Water Supply Enhancement Act of 2000 (Public Law 106–498; 114 Stat. 2221) by inserting new Section 4(b)(1)(C). It authorized the Interior Secretary to "carry out any activities, including by entering into an agreement or contract or otherwise making financial assistance available to […] otherwise protect […] tribal fishery resources held in trust, consistent with the [KBRA] and [UKBCA]."[457]

Section 5(a)(1) of S.133, **consistent with KBRA Articles 15.3.5.A and 15.3.5.B and Appendix E-1**, acknowledged the Klamath Tribes' relinquishment of water rights claims in exchange for the resolution of Klamath Project Water User objections to the water rights claims of the Klamath Tribes and of the U.S. acting as trustee for the Tribes, in exchange for other Klamath Project Water User commitments, and for other benefits described in the KBRA and this Act.[458] Section 5(a)(2) of S.133, **consistent with UKBCA Articles 2.4 and 2.5.3**, acknowledged the Klamath Tribes' relinquishment of water rights claims in exchange for the resolution of Off-Project Irrigator objections to the water rights claims of the Klamath Tribes and of the U.S. acting as trustee for the Tribes, for other Off-Project Irrigator commitments, and for other benefits described in the UKBCA and this Act.[459]

Sections 5(b)(1) and 5(c)(1) of S.133, *consistent with KBRA Articles 15.3.6.A, 15.3.6.B 15.3.7.A, 15.3.7.B, and Appendix E-1*, acknowledged the Yurok and Karuk Tribes' relinquishment of water rights

[452] *Id.*
[453] *See* KBRA at Art. 15.2.1 and Appendix D-1.II.C.
[454] *See* S.133 at Secs. 9(h)(4) and (5).
[455] *See* S.133 at Sec. 3(f)(1).
[456] *See* S.133 at Sec. 3(g)(2).
[457] *See* S.133 at Sec. 6, adding new Sec. 4(b)(1)(C) to P.L. 106-498.
[458] *See* S.133 at Sec. 5(a)(1).
[459] *See* S.133 at Sec. 5(a)(2).

claims (excluding those secured by a treaty, Executive order or other law) in exchange for the resolution of Klamath Project Water User objections to the water rights claims of those Tribes and of the U.S. acting as trustee for the Tribes, in exchange for other Klamath Project Water User commitments, and for other benefits described in the KBRA and this Act.[460] Section 5(c)(1) of the Senate bill, furthermore, acknowledged the similar *quid pro quo* the Klamath Tribes had made pursuant to *UKBCA Article 2.5*.[461]

Section 5(f) of S.133 acknowledged the commitments the USG made as trustee for the Federally recognized Klamath, Yurok and Karuk Tribes, in exchange for the commitments made by the Klamath Project Water Users and the Off-Project Irrigators, and for other benefits described in the KBRA (Articles 15.3.5 15.3.6, 15.3.7 and 15.3.9) and this Act.[462]

Sections 7(a) and (k) of S.133, consistent with UKBCA Article 2.4, stated that the *U.S. Treasury* would establish a Klamath Tribes Tribal Resource Fund in an amount not to exceed $40 million upon receipt of annual Congressional appropriations of $8 million per year over a five-year period.[463] Sections 7(d)(2), (e)(4) and 7(g)(1) of S.133 stated that funds would be disbursed to the Tribes upon the Interior Secretary's approval of the tribal investment plan, and/or the Interior Secretary's approval of an economic development plan which includes a resource acquisition and enhancement plan that meets certain requirements, and upon the Interior Secretary's determination that the Klamath Tribes had made the commitments set forth in the KBRA, KHSA and UKBCA and complied with those commitments.[464]

g. *Conclusion*

Clearly, the federal government recognized its significant national interests in the Klamath River Basin and endeavored to secure congressional consent for the KBRA, KHSA and UKBCA. As the GAO's 2007 report confirms, where a compact "affects the balance of power between the federal government and the states, the states must obtain the consent of Congress for the compact to be valid."[465] Hence, had the Klamath Basin Water Recovery and Economic Restoration Act of 2015 (S.133), which combined the intertwined provisions of the KBRA, KHSA and UKBCA, been passed by Congress and signed into federal law by the president, it would have evidenced Congress' explicit grant of consent to a new Federal-interstate compact or an amendment of the Klamath River Basin Compact that effectively superseded the 1957 Agreement.

[460] *See* S.133 at Secs. 5(b)(1) and 5(c)(1).
[461] *See* S.133 at Sec. 5(c)(1).
[462] *See* S.133 at Secs. 5(f)(1)-(2).
[463] *See* S.133 at Secs. 7(a) and (k).
[464] *See* S.133 at Secs. 7(d)(2), (e)(4) and 7(g)(1).
[465] *See* United States Government Accountability Office Report to Congressional Requesters, *Interstate Compacts – An Overview of the Structure and Governance of Environment and Natural Resource Compacts* (GAO-07-519) (April 2007), *supra* at p. 6.

VI. Detailed Analysis of the Klamath Power and Facilities Agreement and the Amended Klamath Hydroelectric Settlement Agreement

Federal, state, local and tribal governments executed the Klamath Power and Facilities Agreement ("KPFA")[466] on April 6, 2016, concurrently with the Amended Klamath Hydroelectric Settlement Agreement ("Amended KHSA").[467] The KPFA's Preamble succinctly summarizes the status of the three prior agreements (KBRA, KHSA and UKBCA discussed above) which the Klamath Basin Water Recovery and Economic Restoration Act of 2015 (S.133) had intended to transform into Federal law with Congressional consent. The relevant portions of the KPFA's Preamble state as follows:

> "***Federal legislation authorizing all three agreements*** was proposed, but not enacted by, the end of 2015. Under its terms, the KBRA expired due to the lack of timely Federal authorizing legislation. The States of Oregon and California, the United States, and PacifiCorp have subsequently pursued amendments to the KHSA that would provide for implementation in a different manner. *The termination of the KBRA and lack of Federal authorizing legislation is a potential basis for termination of the UKBCA*. However, the UKBCA contains provisions for parties to meet and confer in order to propose ways of addressing the termination of the KBRA.
>
> […] The Federal Agency Parties actively participated in the negotiation and drafting of the KBRA and UKBCA, but did not sign the KBRA or UKBCA based on their determination that authorizing legislation was necessary in order for the Federal Agency Parties to legally commit to certain terms. However, the Federal Agency Parties agree with other Parties that a broader approach to water- and resource-related issues, going well beyond the Amended KHSA, is called for, and *this Agreement is appropriate as a step in the direction toward addressing the legitimate interests of irrigation-related parties, including in relation to the Amended KHSA and expiration of the KBRA. The Parties recognize that authorizations will still be needed for Federal Agency Parties to fully participate in broader resources resolutions similar to the KBRA and UKBCA and for certain actions supported in this Agreement*" (emphasis added).[468]

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[466] *See* U.S. Department of the Interior, *Klamath Power and Facilities Agreement* (April 6, 2016), available at: https://www.doi.gov/sites/doi.gov/files/uploads/REVISED%204-6-2016%20Yurok%20DRAFT%202016%20Klamath%20Power%20%26%20Facilities%20Agrmt%20%20CLEAN.pdf.

[467] *See* U.S. Department of the Interior, *Amended Klamath Hydroelectric Settlement Agreement* (April 6, 2016), available at: https://www.doi.gov/sites/doi.gov/files/uploads/FINAL%20KHSA%20PDF.pdf.

[468] *See* KPFA at Preamble, paras. 3 and 6.

Like the three prior agreements, the new KPFA, the Amended KHSA and the ongoing UKBCA collectively arguably constitute a federal-interstate compact requiring the consent of Congress.

1) Factual Summary Description and Intertwined Provisions of the KPFA:

KPFA Article I.A.1 and KPFA Article V indicated that the KPFA was signed on April 6, 2016 by the following federal and state governmental parties: the U.S. Secretaries of the Interior and Commerce, the Governors of California and Oregon, the California Natural Resources Agency and Department of Fish and Wildlife, and the Oregon Departments of Environmental Quality, Fish and Wildlife and Water Resources.[469] KPFA Article I.A.2 stated that any person or entity who signed the KBRA or UKBCA or who is a Klamath Reclamation contractor (a local irrigation district) may become a Party to the KPFA if such person or entity signed the Agreement by December 31, 2016.[470]

KPFA Article II.A.1 anticipated the transfer of both ownership (title) of and operational responsibility for Keno Dam from PacifiCorp to the USG, and operational responsibility for Link River Dam from PacifiCorp to the USG.[471] **This KPFA provision largely reproduced the language of KBRA Article 15.4.5.A.i.** KPFA Article II.A.3.a and accompanying Attachment A para. 1 provided that, upon Reclamation assuming operational responsibility for Link River Dam, it will provide water for diversion to the Project consistent with existing Project contracts, and for flood control subject to Reclamation law, and that Project contractors will not be held responsible for any associated Link River Dam transfer costs.[472] Arguably, the KPFA's reference to flood control readily admits Congress' preemptive authority to ensure the construction and maintenance of certain public works on rivers and harbors for flood control, pursuant to the 1936 Flood Control Act, as amended,[473] and pursuant to Article I.A of the 1957 Klamath River Basin Compact.[474]

These KPFA provisions, together, largely reproduced the language of KBRA Article 15.4.5.A.ii. KPFA Article II.A.3.b and accompanying Attachment A para. 2 provided that, upon PacifiCorp's transfer of Keno Dam to Reclamation "pursuant to the Amended KHSA" (*presumably, pursuant to Amended KHSA Article 7.5.2*[475]), Reclamation must operate Keno Dam "to maintain water levels upstream [of such facility] to provide for diversion and canal maintenance and flood control consistent with PacifiCorp's 1968 FERC operating license and historic practice. These provisions also provided

[469] *See* KPFA at Arts. I.A.1 and V.
[470] *See* KPFA at Art. I.A.2.
[471] *See* KPFA at Art. IIA.1.
[472] *See* KPFA at Art. IIA.3.a.
[473] *See* P.L. 74-738, *An Act Authorizing the Construction of Certain Public Works on Rivers and Harbors for Flood Control and Other Purposes*, Chap. 688, 74th Cong., 2nd Sess., (June 22, 1936), available at: http://www.legisworks.org/congress/74/publaw-738.pdf, as amended by P.L. 75-406, *An Act to Amend an Act Authorizing the Construction of Certain Public Works on Rivers and Harbors for Flood Control, and for Other Purposes*, Approved June 22, 1936, Chap. 877, 75th Cong., 1st Sess. (Aug. 28, 1937), at Sec. 5, 75 Stat. 880, available at: https://www.loc.gov/law/help/statutes-at-large/75th-congress/session-1/c75s1ch877.pdf.
[474] See P.L. 85-222, *Klamath River Basin Compact*, 71 Stat. 497, at Art. 1.A (Aug. 30, 1957), available at: https://www.govinfo.gov/content/pkg/STATUTE-71/pdf/STATUTE-71-Pg497.pdf.
[475] *See* Amended KHSA at Art. 7.5.2.

that Project contractors would not be held responsible for any associated Keno Dam transfer costs.[476] **These KPFA provisions, together, largely reproduced the language of KBRA Article 15.4.5.A.iii. All of these KPFA provisions are also consistent with Sections 8(d)(1)(A)-(B) of the unsuccessful S.133 (2015).**

KPFA Article II.A.3.c assured that any Party or non-Party to which Reclamation may ultimately transfer or assign operational responsibility will take such assignment or transfer subject to the obligations and conditions of KPFA Article IIA.3.[477] **This KPFA provision reproduced the language of KBRA Article 15.4.5.A.iv**.

KPFA Article II.B.1 anticipated the imposition of "substantial programs" for the introduction or reintroduction of species not currently present in the Upper Klamath Basin, and substantial habitat restoration activities or programs" that "could have […adverse] potential regulatory or other legal consequences on water and land users in the Upper Klamath Basin under applicable federal law (e.g., Endangered Species Act).[478] These consequences "could affect the ability to divert or use or dispose of water or the ability to utilize land productively."[479] KPFA Article II.B.1, furthermore, reaffirmed that those Parties who would be regulated were willing to bear these adverse consequences in exchange for promoting and facilitating environmental restoration, "with full awareness that portions of the Klamath River and its tributaries current present certain conditions harmful to fish."[480] **This KPFA provision reproduced and obliquely referred to the KBRA Fisheries Program set forth in KBRA Part III, in particular, Articles 9.1.1, 9.1.2, 9.2, 9.2.4 and 9.2.6 and 10. This KPFA provision also reproduced and tracked the "regulatory assurance" language of KBRA Articles 21.1.A-B.**

KPFA Article II.B.2.a reflected the commitment of Federal and state governmental Parties to Upper Klamath Reclamation Project water or land users "to take every reasonable and legally permissible step to avoid or minimize any adverse impact" arising from regulations or other legal or funding obligations associated with the "introduction or reintroduction of aquatic species to currently unoccupied habitats or areas, or from habitat restoration activities."[481] The Federal and state governmental Parties then identified measures described in KPFA Article II.B.2.a for purposes of mitigating such adverse impacts to Project nongovernmental Parties.[482] Off-Project nongovernmental Parties committed, in exchange for making these sacrifices, "to seek regulatory assurances as provided in the UKBCA"[483] (i.e., UKBCA Article 9 – use of USG-approved General Conservation Plans or Habitat Conservation Plans). **This KPFA provision reproduced and tracked the "avoidance or minimization of adverse impact" language of KBRA Articles 21.1.2 and 21.2.**

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[476] *See* KPFA at Art. II.A.3.b.
[477] *See* KPFA at Art. II.A.3.c.
[478] *See* KPFA at Art. II.B.1.
[479] *Id.*
[480] *Id* ("These conditions include degraded riparian habitat and stream channels, passage barriers, diversions resulting in entrainment, adverse water quality conditions, adverse hydraulic conditions, fluctuating water levels, and other impacts, known and unknown."). *Id*.
[481] *See* KPFA at Art. II.B.2.
[482] *Id*.
[483] *Id*.

KPFA Article II.B.2.b.i indicated that Reclamation, in consultation with other governmental Parties, including NMFS, USFWS and Oregon Department of Fish and Wildlife, ("ODFW") would "evaluate appropriate methods, locations, priorities and schedules to address [fish] entrainment" at specific Klamath Project-related diversion points, including those extracting water from the Klamath River/Lake Ewauna.[484] Reclamation defined "fish entrainment" as "fish being transported along with the flow of water and out of their normal river, lake or reservoir habitat into unnatural or harmful environments."[485] "The diversion of river water for irrigation or power-generating purposes [also] ha[s] deleterious effects on fish populations. Fish either become entrained into water diversion intakes or become impinged on intake screens."[486] In exchange for such efforts, non-Federal Parties were obliged to support Interior and Commerce Department requests for Congressional appropriations that Reclamation could then use to extend *non-reimbursable* loans to Project irrigation districts and their contractors for purposes of evaluating, designing, constructing, replacing, enlarging and maintaining entrainment reduction facilities at such diversions.[487] **This KPFA provision reproduced the language of KBRA Article 21.1.3.A. It also broadly tracked KBRA Articles 10.1, 10.2, 11.1 and 11.2, respectively, with respect to its reference to consultation with the NMFS, USFWS, ODFW concerning the fisheries restoration plans and procedures they developed.**

KPFA Article II.B.2.b.ii stated the Reclamation also would evaluate measures necessary to prevent reintroduced salmon and other fish in the Klamath River from entering into the Klamath Straits Drain.[488] In exchange for such efforts, non-Federal Parties were obliged to support Reclamation requests for funding "for construction, replacement, additions, and extraordinary maintenance of facilities to prevent any such adverse effects from" such entry "on a *non-reimbursable* basis to Project contractors" (emphasis added).[489] **This KPFA provision reproduced the language of KBRA Article 21.1.3.B.**

KPFA Article II.B.2.c confirmed that the fish species (salmon, steelhead or Pacific lamprey) reintroduction and management activities would not cover the geographic area including the Lost River or its tributaries or the Tule Lake Basin encompassing the Klamath Irrigation Project.[490] **This KPFA provision reproduced the language of KBRA Article 9.2.3, which also reaffirmed that "the focus of reintroduction shall be the Upper Klamath Basin [and t]he focus of habitat restoration and monitoring shall be the Klamath River Basin, excluding the Trinity River watershed above its confluence with the Klamath River."[491] As further confirmation, KBRA Article 11.2.2.B also had**

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[484] *See* KPFA at Art. II.B.2.b.i.
[485] *See* U.S. Bureau of Reclamation, *Quantification of Fish Entrainment at Water Diversions to Develop Fish Protection Systems and Maintain Water Deliveries*, Project ID:687 (2004-2006), available at: http://www.usbr.gov/research/projects/detail.cfm?id=687.
[486] *See* U.S. Bureau of Reclamation, *Evaluating an Innovative Fish Weir for Preventing Fish Entrainment*, Project ID:5166 (2015), available at: http://www.usbr.gov/research/projects/detail.cfm?id=5166.
[487] *See* KPFA at Art. II.B.2.b.i.
[488] *See* KPFA at Art. II.B.2.b.ii.
[489] *Id*.
[490] *See* KPFA at Art. II.B.2.c.
[491] *See* KBRA at Art. 9.2.3.

stated that the reintroduction plan would "not propose to introduce anadromous Fish into the Lost River and Tule Lake subbasin."[492]

KPFA Article II.C .1 obligated all non-Federal Parties *to support the Wyden-Merkley Amendment ("S.Amdt. 3288") and actions and appropriations to implement it*.[493] Should the Wyden Merkley Amendment fail to become law, non-Federal Parties were obligated to support other legislative measures containing authorizations and directives consistent with those of SA 3288, whenever and however the opportunity to propose such other measures arises.[494] It is more than likely that such other measures could potentially be proposed as amendments to other than the Senate energy bill S.2012, such as to an omnibus federal budget and/or appropriations bill. KPFA Article II.C.2 obligated ALL KPFA Parties to "consider in good faith the support of other legislative measures or initiatives that relate to the interests of one or more of the Parties" (e.g., PacifiCorp).[495]

KPFA Article III.B, focusing on water quality and habitat, obligated ALL Parties "to support appropriate studies and collaborative actions to address: (i) coarse sediment management in the Klamath River between Keno Dam and the Shasta River confluence; and (ii) management and reduction of organic and nutrient loads in and above Keno Reservoir and in the Klamath River downstream."[496] **This KPFA provision tracked the language of KBRA Article 10.1.2.**

KPFA Article III.C reiterated a portion of the framework set forth in the KBRA which the Parties expressly intended to incorporate within one or more new agreements "that will provide for binding permanent settlement of disputed matters including pertaining to water rights."[497] It stated that the "Parties contemplate this/these agreement(s) will consist of "involved programs [that] will include a fisheries program, a water resources program, a regulatory assurances program, a tribal program, and a counties program, each to be developed by parties (or entities' representatives of parties) with direct interests and stake in the relevant activities."[498] KPFA Article III.C. also stated that "[s]uch agreement(s) may […] restate, expand upon, or modify terms provided in this Agreement."[499] **This KPFA language tracked that part of the KBRA framework consisting of Parts III (fisheries program), IV (water resources program), V (regulatory assurances program), VI (counties program) and VII (tribal program).**

KPFA Article III.D indicated that the UKBCA Parties "intend to work under the meet and confer provisions of the UKBCA to resolve outstanding issues concerning the implementation of that agreement," including, "continue[d] funding of implementation of the UKBCA."[500] It is this Counsel's understanding, based on an email communication recently received from Ed Sheets, facilitator of the

[492] *See* KBRA at Art. 11.2.2.B.
[493] *See* KPFA at Art. II.C.1.
[494] *Id*.
[495] *See* KPFA at Art. II.C.2
[496] *See* KPFA at Art. III.B.
[497] *See* KPFA at Art. III.C.
[498] *Id*.
[499] *Id*.
[500] *See* KPFA at Art. III.D.

Klamath Basin Agreements, that "the UKBCA has not been amended and no amendments are pending."[501]

KPFA Article IV.A.1. reaffirmed that ALL governmental Parties had committed to complying with NEPA, ESA and CWA requirements when implementing the terms of this Agreement,[502] as they had previously committed in implementing the KBRA and KHSA. KPFA Article IV.A.3.g also reaffirmed that the KPFA was not intended and should not be construed as modifying the application of NEPA or CEQA "to the environmental review of any program, plan, or action (or project) under this Agreement."[503]

KPFA Article IV.A.2 obligated ALL Parties to the KPFA *to "support and defend the Amended KHSA* […] and its objectives in each applicable venue or forum, including any administrative or judicial action, in which it participates" (emphasis added).[504] This meant that ALL Parties must "advocate for the Amended KHSA or refrain from taking any action or making any statement in opposition to the Amended KHSA."[505] This also meant, consistent with the 11th recital paragraph of the Amended KHSA's Preamble, that *ALL Parties obligated to support the Amended KHSA must support dam removal*.[506] Indeed, Amended KHSA Article 1.9 obligated all Amended KHSA Parties "to support and defend" the KPFA.[507]

KPFA Article IV.A.3.b tellingly declared that, **"<u>All actions required of any Federal Agency Party in implementing this Agreement are subject to appropriations by Congress</u>"** (emphasis added).[508] KPFA Article IV.A.3.e absolved Federal Parties from legal responsibility if they failed to seek or request appropriations from Congress to implement any KPFA provision. [509]

KPFA Article IV.A.3i *inter alia* stated that nothing in the Agreement would preclude ANY Party from continuing to assert their previously asserted legal positions in the Klamath Basin Adjudication, "subject to the terms of the KBRA that remain in effect."[510] KBRA Article 7.6.3 stated that "[t]he provisions of Sections 2.2.9,[511] 15.3.2.B,[512] and 15.4.5.A and C insofar as Section 15.4.5.C relates to

[501] *See* Email Correspondence from Ed Sheets to Lawrence Kogan, *Re Status of Amended UKBCA* (Nov. 30, 2016).
[502] *See* KPFA at Art. IV.A.1.
[503] *See* KPFA at Art. IV.A.3.g.
[504] *See* KPFA at Art. IV.A.2.
[505] *Id*.
[506] *See* Amended KHSA at Preamble, para. 11 ("WHEREAS, in 2016, PacifiCorp, the United States, and the States signed the 2016 Agreement in Principle to signify their intent to negotiate *an amended KHSA that would facilitate Facilities Removal* through the existing authority of FERC under the Federal Power Act" (emphasis added)).
[507] *See* Amended KHSA at Art. 1.9.
[508] *See* KPFA at Art. IV.A.3.b.
[509] *See* KPFA at Art. IV.A.3.e.
[510] *See* KPFA at Art. IV.A.3.i.
[511] *See* KBRA at Art. 2.2.9 ("[…] Except as provided in Section 15.3, nothing in this Agreement precludes any Party, including any Federal Agency Party, from continuing to assert their previously asserted legal positions in the Klamath Basin Adjudication (KBA). This section shall survive any termination of this Agreement").
[512] *See* KBRA at Art. 15.3.2.

Section 15.4.5.A, shall survive termination of this Agreement."[513] In effect, this KPFA provision subjected the Project water users', Klamath Tribes' and USG's previously asserted legal positions to the terms of the amended stipulations and proposed orders they filed in the Klamath Basin Adjudication following the 90th day after the KBRA's effective date, to implement KBRA Articles 15.3.3 and 15.3.8.B.[514]

In sum, it appears rather clear that the KPFA largely reproduced the key portions of the now expired KBRA, and refers to various provisions of both the Amended KHSA and the ongoing UKBCA.

2) Factual Summary Description and Intertwined Provisions of the Amended KHSA:

The Amended KHSA was executed on April 6, 2016, concurrently with the KPFA, by the following federal, state and tribal governmental Parties: the U.S. Secretaries of Interior and Commerce, the Governors of California and Oregon, the California Natural Resources Agency and Department of Fish and Wildlife, the Oregon Departments of Environmental Quality, Fish and Wildlife and Water Resources, and the Karuk, Klamath and Yurok Tribal governments.[515] The Amended KHSA, itself, was amended by these same governmental parties on November 30, 2016,[516] in exercise of Amended KHSA Article 8.4.[517]

> "The November 30th amendment changed the recipient for the portion of the funding for dam removal that comes from PacifiCorp customer surcharges. Those funds will be disbursed directly from the trust accounts established by the Oregon and California PUCs to the Klamath River Renewal Corporation (KRRC) (the non-profit public benefit corporation that is carrying out dam removal). Such disbursements will occur as provided in agreements between KRRC and the PUCs, and pursuant to joint trustee instructions from the PUCs. At the time the Amended KHSA was developed KHSA had the PacifiCorp trust funds being disbursed to the Oregon Department of Fish and Wildlife (ODFW) as an intermediary. As a result of the November 30th amendment the PUCs will deal directly with the KRRC."[518]

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[513] *See* KBRA at Art. 7.6.3.

[514] *See* KBRA at Art. 15.3.2.B.i-ii.a. *See also* KBRA at Art. 15.3.2.B.iv ("This Section 15.3.2.B shall survive termination of this Agreement under Section 7.6.")

[515] *See* Amended KHSA at pp. 1-2, 60-64.

[516] *See* Amended KHSA (11/30/16) at Cover Page; *See also* Email from Ed Sheets, Facilitator for the Klamath Basin Agreements to the Signatory Parties of the 2010 KHSA, *Re Reminder: December 31, 2016 signature date for the 2016 Amended Klamath Hydroelectric Settlement Agreement (KHSA)* (Dec. 2, 2016) (indicating inter alia "[o]n November 30, 2016, the signatories to the Amended KHSA agreed to an amendment.").

[517] *See* Amended KHSA at Art. 8.4 (unchanged in Amended KHSA (11/30/16)).

[518] *See* Email from Ed Sheets, Facilitator for the Klamath Basin Agreements to the Signatory Parties of the 2010 KHSA, *Re Reminder: December 31, 2016 signature date for the 2016 Amended Klamath Hydroelectric Settlement Agreement (KHSA)* (Dec. 2, 2016), *supra*.

These amendments impacted only Amended KHSA Articles 3.2, 4.12.1 and 4.12.2.[519] All other provisions of the Amended KHSA remain the same.

Amended KHSA Preamble paras. 2, 6, 10 and 11 effectively stated that: 1) "certain Parties believe that decommissioning and removal of the Facilities [i.e., the four Klamath River dams identified in the executed 2008 Agreement in Principle ("2008 AIP") the purpose of which was "to reach a final settlement in order to minimize adverse impacts of dam removal on affected communities, local property values, and businesses, and to specify substantive rights, obligations, procedures, timetables, agency and legislative actions, and other steps for Facilities Removal"] will help restore Basin natural resources, including anadromous fish, fisheries, and water quality;"[520] 2) "PacifiCorp, the United States and the States signed the 2016 Agreement in Principle [("2016 AIP")] to signify their intent to negotiate an amended KHSA *that would facilitate Facilities Removal* through the existing authority of FERC under the Federal Power Act;"[521] and 3) "the Tribes and the Federal Parties agree[d] that this Settlement advances the trust obligation of the United States to protect Basin Tribes' federally reserved fishing and water rights in the Klamath and Trinity River Basins" (emphasis added).[522]

These preambular provisions were identical to the corresponding preambular provisions of the original KHSA. They signified that the Amended KHSA, like the original KHSA, *began with the presumption* that dam removal is necessary to restore the Klamath River Basin for environmental and wildlife purposes and to uphold the U.S. federal Indian trust obligation to protect Indians' time-immemorial aboriginal off-reservation reserved water and fishing rights, both of which evidence substantial Federal interests in the Klamath River Basin.

Amended KHSA Article 1.2 reaffirmed this presumption by setting forth the purpose of the Agreement as the "resol[ution of] pending FERC relicensing by establishing a process for potential Facilities Removal and operation of the Project until that time."[523] **It was identical to Article 1.2 of the original KHSA**.

Amended KHSA Article 1.4 defined the term "Authorizing Legislation" as relating exclusively to state laws – "statutes enacted by the Oregon and California Legislatures, respectively, to authorize and implement certain aspects of this Settlement, if necessary" (emphasis added).[524] **This was a marked change from the original KHSA definition of "Authorizing Legislation,"** which included <u>*both* federal *and* state laws</u> – "the *statutes enacted by Congress and* the Oregon and California Legislatures, respectively, to authorize and implement this Settlement" (emphasis added). The original KHSA also included within such definition a list of federal authorizing legislation proposals intertwined with the KBRA as set forth in KHSA Appendix E and KBRA Appendix A.[525] Amended KHSA Article 2.1.1.A

[519] *See* Amended KHSA (11/30/16) at Arts. 3.2, 4.12.1 and 4.12.2.
[520] *See* Amended KHSA at Preamble, paras.2 and 6.
[521] *See* Amended KHSA at Preamble, para. 11.
[522] *See* Amended KHSA at Preamble, para. 10.
[523] *See* Amended KHSA at Art. 1.2.
[524] *See* Amended KHSA at Art. 1.4.
[525] *See* KHSA at Art. 1.4.

further reaffirms that, "[t]he Parties understand and agree that *federal legislation is not necessary to carry out this Settlement*" (emphasis added).[526]

It is unmistakable that the governmental Parties to the Amended KHSA intended that the Amended KHSA be viewed as a State-State agreement evidencing a *minimal* Federal governmental interest so as not to be construed as an Interstate Compact *requiring* Congressional consent. **However, the Amended KHSA, in reality, was NOT such an agreement.** It was intertwined and closely related to the KPFA and the UKBCA which required Federal Authorizing legislation and showed substantial Federal interests at stake in the Klamath River Basin.

Amended KHSA Article 1.5 evidenced, in part, the substantial Federal interests at stake in the Klamath River Basin. It obligated *Federal, State and Local* Public Agency Parties to comply not only with State Authorizing Legislation and State laws, but with *NEPA, ESA, CWA and the Wild and Scenic Rivers Act*, as well.[527] **This provision also was identical to Article 1.5 of the original KHSA**.[528]

Amended KHSA Article 1.6.9 also evidenced, in part, these substantial Federal interests by reaffirming the right of each Party "to protect, defend and discharge its interests and duties in any federal administrative, regulatory, legislative or judicial proceeding, including but not limited to" the Interior Secretary Determination regarding dam removal, the FERC processes for Project relicensing, license surrender and Facilities Removal, and the Clean Water Act Section 401 discharge and fill permit application process.[529] **This provision was identical to Article 1.6.9 of the original KHSA except that the word "Decommissioning" was omitted**.[530]

Amended KHSA Parties would not, however, need to protect, defend and discharge their interests and duties in connection with the Secretarial Determination, *because no "official" Secretarial Determination was ever made*. The facts revealed only that the scientific studies and the Final Environmental Impact Statement ("EIS") informing the Secretarial Determination, which EIS "identifie[d] the preferred alternative as full removal of all four facilities," were issued.[531] Original KHSA Article 3.3 and Appendix E.B and E.E (at p. E-4) had previously required Congress to first authorize and direct the Secretary to make such a determination by publishing a notification of it in the Federal Register *before* the Secretary could actually file the Federal Register notice announcing the

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[526] *See* Amended KHSA at Art. 2.1.1.A.
[527] *See* Amended KHSA at Art. 1.5.
[528] *See* KHSA at Art. 1.5.
[529] *See* Amended KHSA at Art. 1.6.9.
[530] *See* KHSA at Art. 1.6.9.
[531] *See* U.S. Department of the Interior Klamath Secretarial Determination Process, *Interior Department Releases Final Environmental Analysis on Klamath River Dam Removal* (April 4, 2013), available at: https://klamathrestoration.gov/sites/klamathrestoration.gov/files/Additonal%20Files%20/04-04-13%20Klamath%20FINAL.pdf. *See also* U.S. Department of the Interior Klamath Secretarial Determination Process, *Transmittal Letter for Final Secretarial Determination 'Overview Report'* (Feb. 1, 2013), available at: https://klamathrestoration.gov/sites/klamathrestoration.gov/files/2013%20Updates/Final%20SDOR%20/c.sdor.cover.letter.pdf; U.S. Departments of Interior and Commerce, *Final Klamath Dam Removal Overview Report for the Secretary of the Interior – An Assessment of Science and Technical Information* (Version 1.1 March 2013), available at: https://klamathrestoration.gov/sites/klamathrestoration.gov/files/Full%20SDOR%20accessible%20022216.pdf.

determination.[532] Since Congress never enacted *any* KHSA implementing legislation, the Secretary never filed the Federal Register Notice. Consequently, in the absence of a "final agency action" within the meaning of the Administrative Procedure Act, non-Parties would have been unable to legally challenge the Secretary's failure to make a Secretarial Determination, unless it can be successfully argued that this non-action constituted an "agency action" for APA purposes.

Amended KHSA Article 1.9 declared that ALL Parties "are concurrently entering into the 2016 Klamath Power and Facilities Agreement."[533] It also obligated each Party, other than PacifiCorp, to support and defend the 2016 Klamath Power and Facilities Agreement […] and its objectives in each applicable venue or forum in which it participates, including any administrative or judicial action."[534] This meant that each Party "will advocate for the 2016 [KPFA] or refrain from taking any action or making any statement in opposition to [it.]"[535] **KHSA Article 2.2 similarly declared that "[e]ach Party other than PacifiCorp and the Federal Parties, shall execute this Settlement and the KBRA concurrently."[536]**

Amended KHSA Article 2.1.1.A reflected the Parties' understanding and agreement that "federal legislation is not necessary to carry out this Settlement."[537] **By comparison, KHSA Article 2.1.1.A stated that "[t]he Parties acknowledge that legislation is necessary to provide certain authorizations and appropriations to carry out this Settlement as well as the KBRA."[538]**

Amended KHSA Article 2.2 obligated each Party to "support implementation of the Oregon Surcharge Act enacted as Senate Bill 76 2009 […] and authorizing the collection of a customer surcharge for the costs of Facilities Removal […] as codified […in] Appendix F."[539] It also provided that the "Parties understand and agree that the costs of Facilities Removal shall be funded as specified in Section 4 of this Settlement."[540] **Amended KHSA Article 2.2 was identical to KHSA Article 2.2.[541]**

Amended KHSA Articles 4.1.1.A-G were identical to Articles 4.1.1.A-G of the original KHSA.[542] They called for PacifiCorp to request from the Oregon and California PUCs the establishment of Oregon and California Klamath Surcharges to generate funds for the purpose of Facilities Removal, and also to ensure the creation of Oregon and California trust accounts for each. For Oregon, there should be two surcharges – the Oregon J.C. Boyle Dam Surcharge and the Oregon Copco I and II/Iron Gate Dams Surcharge, each with its own trust account. For California, there should be only one surcharge, and two trust accounts. In the aggregate, the Oregon and California Klamath surcharges,

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[532] *See* KHSA at Arts. 3.3 and Appendices E.A. and E.E.
[533] *See* Amended KHSA at Art. 1.9
[534] *Id*.
[535] *Id*.
[536] *See* KHSA at Art. 2.2.
[537] *See* Amended KHSA at Art. 2.1.1.A.
[538] *See* KHSA at Art. 2.1.1.
[539] *See* Amended KHSA at Art. 2.2.
[540] *Id*.
[541] *Cf.* Amended KHSA at Art. 2.2; KHSA at Art. 2.2.
[542] *Cf.* Amended KHSA at Arts. 4.1.1.A-G with KHSA at Arts. 4.1.1.A-G.

referred to as the "Customer Contribution," should not exceed $200 million, $184 million of which should be allocated to Oregon and $16 million of which should be allocated to California. These provisions also obligate each non-Federal Party to support both states' surcharges.

Amended KHSA Articles 4.1.2-4.1.3 were identical to Articles 4.1.2-4.1.3 of the original KHSA.[543] They acknowledge California's approval of a general bond measure containing a provision that would authorize the use of no more than $250 million of such funds to make up the difference between the $200 million Customer Contribution and the actual amount required to complete removal of all four dams. These provisions also obligate each non-Federal Party to support the Klamath bond language contained in such legislation, as set forth in Appendix G-1. Furthermore, these provisions define the "State Cost Cap" as consisting of both the Customer Contribution and the California Bond Funding.

Amended KHSA Articles 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, 4.8, 4.9, 4.10, and 4.11 were virtually identical to the same provisions in the original KHSA. Amended KHSA Article 4.2 (re: establishment and management of Oregon & California Klamath Trust Accounts and California bond funding");[544] Amended KHSA Article 4.3 (re: California-Oregon-Federal Gov't consultation regarding surcharge adjustments);[545] Amended KHSA Article 4.4 (re: disposition of unnecessary/unused Klamath Trust Account funds);[546] Amended KHSA Article 4.5 (re: customer recovery of net investment in Klamath River dams);[547] Amended KHSA Article 4.6 (re: PacifiCorp's recovering costs of ongoing operations and replacement of Klamath River dams);[548] Amended KHSA Article 4.7 (re: need to meet and confer about the extent to which customers will bear costs related to climate change emissions requirements & renewable portfolio standards);[549] Amended KHSA Article 4.8 (re: States' non-breach of agreement due to lack of control over independent PUCs);[550] Amended KHSA Article 4.9 (re: PacifiCorp's confidential consultation with State PUCs to explain "protective order-shielded" economic bases and other data underlying requested Klamath Dam removal surcharges);[551] Amended KHSA Article 4.10 (re: USG nonliability for costs of Klamath River dam removals);[552] and Amended KHSA Article 4.11 (re: the general limitation that all funds collected needed for Klamath River dam removals shall be used only for such purposes and no other).[553] **These provisions indicated that neither the Secretarial Determination nor the USG serving as the DRE were issues to be addressed.**

As discussed above, Amended KHSA Articles 4.12.1 and 4.12.2 directed *the Dam Removal Entity* (rather than the Oregon State agency designated by the Secretary, as indicated in the original KHSA) to enter into agreements with the Oregon PUC. Such agreements would have addressed the Oregon

[543] *Cf.* Amended KHSA at Arts. 4.1.2-4.1.3 with KHSA at Arts. 4.1.2-4.1.3.
[544] *Cf.* Amended KHSA at Art. 4.2 with KHSA at Art 4.2.
[545] *Cf.* Amended KHSA at Art. 4.3 with KHSA at Art. 4.3.
[546] *Cf.* Amended KHSA at Art. 4.4 with KHSA at Art. 4.4.
[547] *Cf.* Amended KHSA at Art. 4.5 with KHSA at Art. 4.5.
[548] *Cf.* Amended KHSA at Art. 4.6 with KHSA at Art. 4.6.
[549] *Cf.* Amended KHSA at Art. 4.7 with KHSA at Art. 4.7.
[550] *Cf.* Amended KHSA at Art. 4.8 with KHSA at Art. 4.8.
[551] *Cf.* Amended KHSA at Art. 4.9 with KHSA at Art. 4.9.
[552] *Cf.* Amended KHSA at Art. 4.10 with KHSA at Art. 4.10.
[553] *Cf.* Amended KHSA at Art. 4.11 with KHSA at Art. 4.11.

entity's disposition (use) of Customer Contribution surcharge funds (Oregon Klamath Trust Accounts).[554] They also would have addressed the California Natural Resources Agency ("CNRA")'s disposition (use) of Customer Contribution surcharge funds (California Klamath Trust Accounts) *and* California bond funds,[555] consistent with the Amended KHSA and the applicable Oregon and California laws and regulations. Amended KHSA Articles 4.12.3 and 4.12.4 directed the DRE to enter into separate agreements with CNRA for general funding[556] and to secure additional grant funding.[557] **Amended KHSA Articles 4.12.3 and 4.12.4 were identical to KHSA Articles 4.12.3 and 4.12.4.[558]**

Amended KHSA Article 5 was concerned with the effort to secure reduced rates of electric power for the benefit of the Klamath Basin. Reduced rates would have been secured, in part, through access to the wholesale rates of USG's Bonneville Power Administration, and, in part, through use of renewable energy (other than hydro from Bonneville), from third party sources for delivery to irrigators and landowners once the Klamath River dams have been taken off-line. Amended KHSA Article 5.3.6 noted that there would have been a need to "transition eligible loads from full retail service" to federal power.[559] **Amended KHSA Articles 5 and 5.3.6 were identical to KHSA Articles 5 and 5.3.6.[560]**

Amended KHSA Article 5.1.1 focused on power development and procurement. It specifically referred to the joint development and ownership of renewable generation resources by, and PacifiCorp's purchase of power from, renewable energy projects developed by Klamath Project and Off-Project irrigators (through such entities as the Upper Klamath Water Users Association ("UKWUA") and interested Public Agency Parties, such as the now-defunct intergovernmental agency formerly known as the Klamath Water and Power Agency ("KWAPA").[561] Amended KHSA Article 5.1.2 described how the Interior Secretary and the States of California and Oregon would endeavor to designate Siskiyou and Klamath Counties as Western Renewable Energy Zones and to expand transmission capacity for renewable resources in these counties.[562] **Amended KHSA Articles 5.1.1. and 5.1.2 were identical to KHSA Articles 5.1.1 and 5.1.2.[563]**

Amended KHSA Article 5.3 identified the Interior Department's commitment, as part of an effort to meet power cost targets for Upper Klamath Basin irrigation, to undertake an "open and transparent process" to "acquire power from the Bonneville Power Administration to serve all 'eligible loads' located within Bonneville's authorized geographic area," for the benefit of both Klamath Project and Off-Project irrigators. It also noted how the now-defunct KWAPA, the private nongovernmental group

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[554] *See* Amended KHSA at Art. 4.12.2.
[555] *See* Amended KHSA at Art. 4.12.1.
[556] *See* Amended KHSA at Art. 4.12.3.
[557] *See* Amended KHSA at Art. 4.12.4.
[558] *Cf.* Amended KHSA at Arts. 4.12.3-4.12.4 with KHSA at Arts. 4.12.3-4.12.4.
[559] *See* Amended KHSA at Art. 5.3.6 ("At such time as the eligible loads are prepared to and technically able to receive federal power, PacifiCorp, Interior, KWAPA, KWUA and UKWUA agree to work cooperatively with each other to transition the eligible loads from full retail service on a mutually agreeable basis.")
[560] *Cf.* Amended KHSA Arts. 5 and 5.3.6 with KHSA at Arts. 5 and 5.3.6.
[561] *See* Amended KHSA at Art. 5.1.1.
[562] *See* Amended KHSA at Art. 5.1.2.
[563] *Cf.* Amended KHSA at Arts. 5.1.1-5.1.2 with KHSA Arts. 5.1.1-5.1.2.

Klamath Water Users Association ("KWUA"), the UKWUA and PacifiCorp would "identify and implement a mutually agreeable approach for delivering acquired federal power to eligible loads."[564] **Amended KHSA Article 5.3 was identical to KHSA Article 5.3.[565]**

Amended KHSA Article 5.3.2 emphasized that the terms and conditions of PacifiCorp's power distribution system would remain subject to the jurisdiction of the California and Oregon PUCs, respectively, for facilities located within each State. It also indicated how these PUCs had approved "unbundled delivery service tariffs," which meant that the cost of the electricity, and the cost of transmitting it from where it was generated to irrigators and landowners were no longer combined into a single cost. The rationale given was that "these unbundled delivery service tariffs could enable the delivery of federal power."[566] "To the extent that PacifiCorp's existing tariffs require revision in order to allow PacifiCorp to implement the mutually agreeable approach, PacifiCorp shall request such revision by the Commission having jurisdiction."[567] The design of this approach was intended to avoid the federal jurisdiction of the Federal Energy Regulatory Commission ("FERC") over *interstate* transmission line tariffs, which jurisdiction could still potentially be invoked by disgruntled California and Oregon retail consumers.[568] **Amended KHSA Article 5.3.2 was identical to KHSA Article 5.3.2.[569]**

Amended KHSA Article 5.3.3 noted how PacifiCorp will endeavor to work in good faith "to develop mutually agreeable *revisions to existing provisions of* state or *federal law, if necessary*, to implement the mutually agreeable approach" (emphasis added).[570] The region's reliance upon Bonneville power demonstrates, once again, the significant ongoing Federal interest involved in the Klamath River Basin. **Amended KHSA Article 5.3.3 was identical to KHSA Article 5.3.3[571]**

Amended KHSA Article 5.3.7 stated that "Interior, in consultation with [now-defunct] KWAPA, KWUA and UKWUA, shall […] identify[] the final eligible loads for purposes of Section 5.3."[572] Amended KHSA Article 5.3.8 stated that Interior would "work cooperatively to assign or delegate or transition functions of Interior to KWAPA or another appropriate entity subject to the terms of this Section."[573] Amended Article 5.3.9 indicated that if any of these entities could acquire power from other than Bonneville Power for eligible loads in Oregon or California, they will work cooperatively to arrive at an agreeable transmission and delivery method.[574] This left open the opportunity for renewable

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[564] *See* Amended KHSA at Art. 5.3.
[565] *Cf.* Amended KHSA at Art. 5.3 with KHSA at Art. 5.3.
[566] *See* Amended KHSA at Art. 5.3.2.
[567] *Id*.
[568] *See American Electric Power Service Corporation*, 153 FERC ¶ 61,167 at para. 1, footnotes 4-5, p. 2, Docket No. ER07-1069-006 (Nov. 12, 2015), available at: https://www.ferc.gov/CalendarFiles/20151112164022-ER07-1069-006.pdf ("As discussed below, the Commission concludes that, as courts have recognized, retail customers may file complaints and protest transmission rates and wholesale sales rates before the Commission.").
[569] *Cf.* Amended KHSA at Art. 5.3.2 with KHSA at Art. 5.3.2.
[570] *See* Amended KHSA at Art. 5.3.3.
[571] *Cf.* Amended KHSA at Art. 5.3.3 with KHSA at Art. 5.3.3.
[572] *See* Amended KHSA at Art. 5.3.7.
[573] *See* Amended KHSA at Art. 5.3.8.
[574] *See* Amended KHSA at Art. 5.3.9.

energy providers owned by PacifiCorp or its corporate affiliates to provide power to the Klamath Basin – i.e., a Warren Buffett windfall.[575] **Amended KHSA Articles 5.3.7, 5.3.8 and 5.3.9 were identical to KHSA Articles 5.3.7, 5.3.8 and 5.3.9.[576]**

Similarly, Amended KHSA Articles 5.3.1, 5.3.4 and 5.3.5 were identical to KHSA Articles 5.3.1, 5.3.4 and 5.3.5.[577]

Amended KHSA Articles 1.4, 6.1 and 6.1.1[578] and Appendices C and D described the types of "interim measures" that PacifiCorp must perform to ensure their operation of the four Klamath River dams adheres to the Endangered Species Act during the period between the Effective Date and decommissioning. Appendix C identified six interim measures included within PacifiCorp's Interim Conservation Plan ("ICP") filed at the FERC during November 2008.[579] Appendix D identified fifteen additional interim measures not included within the ICP that PacifiCorp must undertake in collaboration with the Interim Measures Implementation Committee ("IMIC"),[580] formed and tasked in fulfillment of the first interim measure set forth in Appendix B.[581] "In addition, the ICP included certain measures for protection of listed sucker species not included as part of this Settlement."[582] Amended KHSA Article 6.1.2 obligated each Party to "support the Interim Measures set forth in Appendices C and D."[583] **Amended KHSA Articles 1.4, 6.1, 6.1.1 and 6.1.2 and Amended KHSA Appendices C and D were identical to KHSA Articles 1.4, 6.1, 6.1.1 and 6.1.2 and KHSA Appendices C and D.[584]**

Amended KHSA Article 6.2.1 directed PacifiCorp to apply to the Interior and Commerce Departments (i.e., U.S. Fish & Wildlife Service and the National Marine Fisheries Service) for an Endangered Species Act ("ESA") Section 10 "incidental take" permit that incorporates the Interim Conservation Plan measures, "including both Appendix C (ICP Interim Measures) and the Interim Conservation Plan measures for protection of listed sucker species not included in Appendix C."[585] Amended KHSA Article 6.2.1 also permitted PacifiCorp to "apply in the future to FERC to incorporate some or all of the

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[575] *See, e.g.*, Liam Denning, *Buffett's Cash Overshadows Solar*, BloombergGadfly (March 3, 2016), available at: https://www.bloomberg.com/gadfly/articles/2016-03-03/warren-buffett-s-utilities-overshadow-solar-power; Jim Polson and Mark Chediak, *Buffett: Wind and Solar Power Competition Challenges Utilities*, Blooomberg (Feb. 27, 2016), available at: https://www.bloomberg.com/news/articles/2016-02-27/buffett-wind-and-solar-power-competition-challenges-utilities.
[576] *Cf.* Amended KHSA at Arts. 5.3.7, 5.3.8 and 5.3.9 with KHSA at Arts. 5.3.7, 5.3.8 and 5.3.9.
[577] *Cf.* Amended KHSA at Arts. 5.3.1, 5.3.4 and 5.3.5 with KHSA at Arts. 5.3.1, 5.3.4 and 5.3.5.
[578] *See* Amended KHSA at Arts. 1.4, 6.1 and 6.1.1.
[579] *See* Amended KHSA at Appendix C.
[580] *See* Amended KHSA at Appendix D, Measures 7, 8, 11, 13, 15 17.
[581] *See* Amended KHSA at Appendix B.1 and B.2.
[582] *See* Amended KHSA at Art. 6.1.
[583] *See* Amended KHSA at Art. 6.1.2.
[584] *Cf.* Amended KHSA at Arts. 1.4, 6.1, 6.1.1, 6.1.2, Appendices C and D, with KHSA at Arts. 1.4, 6.1, 6.1.1, 6.1.2, Appendices C and D.
[585] *See* Amended KHSA at Art. 6.2.1.

[ICP] measures as an amendment to the current annual license for the Project."[586] **Amended KHSA Article 6.2.1 was identical to KHSA Article 6.2.1.[587]**

Amended KHSA Article 6.2.2 indicated that the USFWS and NMFS would review said application. However, the Agency Services "reserve[d] their right to reassess these interim measures, as applicable, in [inter alia]: developing a biological pursuant to ESA Section 7 or reviewing an application for an incidental take permit pursuant to ESA Section 10 and applicable implementing regulations […] or [] revoking any final incidental take permit pursuant to the ESA, applicable implementing regulations, or the terms of the permit."[588] Amended KHSA Article 6.2.3 indicated that the Services could issue a biological opinion or incidental take permit that modifies the interim measures. If PacifiCorp agreed to such modification(s), it would cause the interim measures in the Amended to KHSA to "be deemed modified to conform to the provisions of the biological opinion or incidental take permit."[589] **Amended KHSA Articles 6.2.2 and 6.2.3 were identical to KHSA Articles 6.2.2 and 6.2.3.[590]**

Amended KHSA Article 6.3 (concerning PacifiCorp's Total Maximum Daily Load ("TMDL") implementing obligations assigned the Project under the States' respective Klamath River TMDLs, and with respect to Keno Dam until the time PacifiCorp transfers Keno Dam to Reclamation) was virtually identical to KHSA Article 6.3.[591]

Amended KHSA Article 6.4.1 confirmed that PacifiCorp would apply to the FERC "for an order approving partial surrender of the Project license for the purpose of decommissioning […with FERC's approval] the East Side/West Side generating facilities unless PacifiCorp, in consultation with the state of Oregon, the Federal Parties, and the Tribes, agreed to an alternative disposition of these facilities."[592] The "PacifiCorp's Eastside and Westside Powerhouses receive water diverted into canals on each side of the Klamath River at the Bureau of Reclamation's Link River Dam."[593] This meant that the hydroelectric generating capabilities of Link River Dam would be terminated, but that it "would continue to provide water to the Klamath Reclamation Project."[594] Amended KHSA Article 6.4.2 indicated that PacifiCorp will ultimately transfer title and license to the Fall Creek hydroelectric facility

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[586] *Id*.
[587] *Cf.* Amended KHSA at Art. 6.2.1 with KHSA at Art. 6.2.1.
[588] *See* Amended KHSA at Art. 6.2.2.
[589] *See* Amended KHSA at Art. 6.2.3.
[590] *Cf.* Amended KHSA at Arts. 6.2.2 and 6.2.3 with KHSA at Arts. 6.2.2 and 6.2.3.
[591] *Cf.* Amended KHSA at Art. 6.3. with KHSA at Art. 6.3. However, Amended KHSA Art. 6.3.4A sets forth other conditions enabling PacifiCorp to initiate termination, and Amended KHSA Article 6.3.4.C describes additional rights to contest TMDL-related determinations that Parties don't waive. Amended KHSA Article 8.11.1 grounds for termination are diminished in number from the original KHSA Article 8.11.1.
[592] *See* Amended KHSA at Art. 6.4.1.
[593] *See* U.S. Fish & Wildlife Service Yreka Fish and Wildlife Office Pacific Southwest Region, *Description of PacifiCorp's Klamath Hydroelectric Project Facilities Within the Klamath Hydroelectric Project: Link River*, available at: https://www.fws.gov/yreka/hydroprojectdescription.html.
[594] *See* Ed Sheets Consulting, *Summary of the Klamath Basin Settlement Agreements* (Updated Dec. 2011), *supra* at p. 7.

under FERC jurisdiction to a third party under applicable law.[595] **Amended KHSA Articles 6.4.1 and 6.4.2 were identical to KHSA Articles 6.4.1 and 6.4.2.[596]**

Amended KHSA Article 7.1.1 declared that the DRE would become a Party to the Agreement on July 1, 2016. The signature pages indicated that the DRE actually became a Party on August 30, 2016.[597]

Amended KHSA Article 7.1.8 stated that "[t]he DRE will perform Facilities Removal in accordance with the Definite Plan, as approved and as may be modified by the FERC surrender order and other applicable Regulatory Approvals."[598] KHSA Article 7.1.2B originally stated that the DRE would perform Facilities Removal "in accordance with the Definite Plan and applicable permits and other environmental compliance requirements."[599]

Amended KHSA Article 7.2.1 stated that the "DRE would develop a Definite Plan for Facilities Removal [that…] must be consistent with this Settlement."[600] Amended KHSA Article 7.2.1.A stated that the Definite Plan "may be based on all elements of the Detailed Plan described in Section 7.2.2, and will be consistent with the FERC requirements for surrender."[601] Amended KHSA Article 7.2.1.C statesdthat the DRE "must incorporate the Definite Plan, once completed, into any FERC application to surrender the Facilities license."[602] The original KHSA described the elements of the Detailed Plan in KHSA Article 3.3.2. **Amended KHSA Article 7.2.2 stated that the Interior Secretary developed the Detailed Plan, while KHSA Article 3.3.2 stated that "the Secretary shall develop a Detailed Plan." The elements of the Detailed Plan described in Amended KHSA Article 7.2.2 were virtually identical to those described in KHSA Article 3.3.2.[603]**

VII. Analyzing the Wyden-Merkley Amendment (SA 3288) as Indirectly Incorporating the Intertwined Provisions of the KPFA, Amended KHSA and UKBCA into a Single New Federal-Interstate Compact or a *De Facto* Klamath River Basin Compact Amendment

The Wyden-Merkley Amendment was introduced by its sponsors (Senators Ron Wyden (OR-D) and Jeff Merkley (OR-D)) into the Senate Committee on Energy and Natural Resources on February 4, 2016. It was introduced as Senate Amendment ("S.A.") 3288 to SA 2953 proposed by Senate Energy Committee Chair Murkowski[604] for insertion into the massive 800-page House-Senate omnibus energy

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[595] *See* Amended KHSA at Art. 6.4.2.
[596] *Cf.* Amended KHSA at Arts. 6.4.1 and 6.4.2 with KHSA at Arts. 6.4.1 and 6.4.2.
[597] *See* Amended KHSA at Art. 7.1.1; Signature Pages, p. 62.
[598] *See* Amended KHSA at Art. 7.1.8.
[599] *See* KHSA at Art. 7.1.2B.
[600] *See* Amended KHSA at Art. 7.2.1.
[601] *See* Amended KHSA at Art. 7.2.1.A.
[602] See Amended KHSA at Art. 7.2.1.C.
[603] *See* Amended KHSA at Art. 7.2.2 with KHSA at Art. 3.3.2.
[604] *See* Congress.gov, *S.Amdt.3288 to S.Amdt.2953*, 114th Cong. (2015-2016), available at: https://www.congress.gov/amendment/114th-congress/senate-amendment/3288/text (The operative language was contained at the end of subtitle E of title IV of SA 2953 entitled, "The Native American Energy Act" as "Section 44__X," as "Section

bill. When the Senate passed that massive energy bill in April 2016, which became known as the *Energy Policy Modernization Act of 2016* (S.2012es),[605] **it contained SA 3288**.[606] S.2012es was subsequently placed, together with the House version of S.2012 – the *North American Energy Security and Infrastructure Act of 2016* (S.2012eah)[607] – into a House-Senate Conference Committee for reconciliation of their differing provisions.[608]

The House-Senate Conference Committee failed to reconcile the differing versions of S.2012 by the time 114th Congress had adjourned.[609] Nevertheless, it is useful to undertake a textual review of proposed SA 3288 and its discrete role in almost indirectly facilitating Congress' consent to a new Federal-interstate compact incorporating the intertwined provisions of the KPFA, Amended KHSA and UKBCA, because SA 3288 can be reintroduced in the 115th session of Congress. Such an analysis also is useful for purposes of comparing the Federal-interstate compact SA 3288 would have indirectly sanctioned to the substantially more detailed but previously unsuccessful Klamath Basin Water Recovery and Economic Restoration Act of 2015, and to the Klamath River Basin Compact which remains the only defining federal legislation governing water allocations within the Klamath Basin.

1. Indirect Congressional Consent Sought via SA 3288 for KPFA/Amended KHSA/UKBCA:

Unlike Section 3(a)(1) of Senate bill 133 (S.133), which "authorized, ratified and confirmed" the Settlements (and multiple federal agencies' implementation of them), defined by Section 2(23) as including the "Hydroelectric Settlement," "Restoration Agreement" and the "Upper Basin Agreement," SA 3288, by comparison, did ***not*** explicitly authorize Federal government agencies to execute the

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44__X." SA 3288 provides for the amendment of the *Klamath Basin Water Supply Enhancement Act of 2000* via insertion of new Section 4 – "Power and Water Management").

[605] *See Energy Policy Modernization Act of 2016* (S.2012es) (Engrossed Senate), 114th Cong., 2d Sess. (4/20/16), available at: https://www.congress.gov/114/bills/s2012/BILLS-114s2012es.pdf.

[606] SA 3288 had been neatly tucked into Subtitle D ("Water Infrastructure and Related Matters"), Part III ("Basin Water Management"), Subpart B ("Klamath Project Water and Power") Section 10329 ("Klamath Project") of **S.2012es**.

[607] *See North American Energy Security and Infrastructure Act of 2016* (S.2012eah) (Engrossed Amendment House), 114th Cong., 2d Sess. (5/25/16), available at: https://www.congress.gov/114/bills/s2012/BILLS-114s2012eah.pdf.

[608] *See* U.S. Senate Committee on Energy & Natural Resources, *Republican News - Chairman Murkowski and Ranking Member Cantwell Issue Joint Statement on Energy Conference* (Nov. 25, 2016), available at: http://www.energy.senate.gov/public/index.cfm/2016/11/chairman-murkowski-and-ranking-member-cantwell; U.S. Senate Committee on Energy & Natural Resources, *Hearings and Business Meetings - Meeting of Senate and House Conferees on S. 2012, the Energy Policy Modernization Act of 2016* (Sept. 8, 2016), available at: http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=99CEC33E-9EB4-447C-AAD4-E0EDC5C42301; Geof Koss, *Murkowski Urges Dems Not to Bury Conference Committee*, E&E Publishing, LLC (June 7, 2016), available at: http://www.eenews.net/stories/1060038380.

[609] *See* Devin Henry, *Republican Senator: House GOP Killed Energy Bill to Go to a Party*, The Hill (Dec. 20, 2016), available at: http://thehill.com/policy/energy-environment/311172-republican-senator-house-gop-killed-energy-bill-to-go-to-a-party; Elwood Brehmer, *Murkowski: House Chose Party over Policy*, Alaska Journal of Commerce (Dec. 19, 2016), available at: http://www.alaskajournal.com/2016-12-19/murkowski-house-chose-party-over-policy#.WGU9VxsrKUk; Brian Dabbs, *House Departure Seals Fate of Failed Energy Negotiations*, BloombergBNA (Dec. 8, 2016), available at: https://www.bna.com/house-departure-seals-n73014448320/; *Sen. Baldwin: Delist Grey Wolves Now*, Wisconsin State Farmer (Dec. 8, 2016), available at: http://www.wisfarmer.com/news/; *Senators Blame House Leadership For Killing Omnibus Energy Bill*, Natural Gas Intelligence (Dec. 8, 2016), available at: http://www.naturalgasintel.com/articles/108672-senators-blame-house-leadership-for-killing-omnibus-energy-bill.

KPFA, Amended KHSA and UKBCA. Instead, SA 3288 expressed Congress' indirect authorization of *Interior and Commerce Department* programs identified in the KPFA, the Amended KHSA (which mirrored those described in the KBRA and original KHSA) and the UKBCA.

SA 3288 Section 4(b)(1) authorized the Interior Secretary, consistent with "the reclamation laws and subject to appropriations and required environmental reviews, [to…] "carry out activities, ***including entering into an agreement*** or contract, or otherwise making financial assistance available" to certain parties for specified purposes.[610] These parties and purposes are set forth in Sections 4(b)(1)(A),(B) and (C).

SA 3288 Section 4(b)(1)(A) states that contracts can be executed and financial assistance provided "to plan, implement and administer programs to align water supplies and demand for irrigation water users associated with the Klamath Project."[611] **This language is very similar to the opening text of KBRA Article 15.2.1, concerning the purpose of the On-Project Plan for the Klamath Reclamation Project, the spirit of which is carried forward in KPFA Article II.B.[612]** SA 3288 Section 4(b)(1)(B) stated that contracts also can be executed and financial assistance provided "to plan and implement activities and projects that avoid or mitigate environmental effects of irrigation activities[,] or restore habitats in the Klamath Basin watershed, including restoring tribal fishery resources held in trust."[613] **In addition to conveying the purpose and scope of KPFA Article II.B, this language encompassed also the language, purpose and spirit of environmental and fisheries restoration envisioned by Amended KHSA Articles 6.1-6.3, UKBCA Articles 2.3, 4 and 9, KPFA Article III and KBRA Appendix D-1.II.C.[614]** SA 3288 Section 4(b)(1)(C), furthermore, stated that contracts can be executed and financial assistance provided "to limit the net delivered cost of power for covered powered uses."[615] **This provision echoed the purposes and objectives and targeted the same beneficiaries of Amended KHSA Article 5.3.[616]**

2. Federal Government Participated in and Approved of SA 3288 Drafting:

Clearly, the U.S. Departments of Interior and Commerce, as parties that executed the KPFA (and the Amended KHSA), had participated in and/or approved of the drafting of SA 3288, which had been explicitly incorporated by reference into KPFA Article II.C. KPFA Article II.C, entitled, "Support for Authorizations Affecting Other Specific Issues" clearly demonstrates how SA 3288 was intended to broadly cover "other specific issues" addressed in greater detail in the KPFA, the Amended KHSA and the UKBCA. It is for this reason that KPFA Article II.C.1 required ALL non-Federal Parties to support SA 3288 AND "authorizations and directives consistent with those of" SA 3288 "in other [comparable] legislative measures whenever and however the opportunity may arise," as well as, to "support actions and appropriations to implement" SA 3288 "or comparable provisions." Indeed, the KPFA Preamble

[610] *See* SA 3288 at Sec. 4(b)(1).
[611] *See* SA 3288 at Sec. 4(b)(1)(A).
[612] *See* KPFA at Art. II.B; KBRA at Art. 15.2.1.
[613] *See* SA 3288 at Sec. 4(b)(1)B(i)-(ii).
[614] *See* KPFA at Arts. II.B and III; KBRA at Art. 15.2.1 and Appendix D-1.II.C.
[615] *See* SA 3288 at Sec. 4(b)(1)(C).
[616] *See* Amended KHSA at Art. 5.3.

admitted that "[t]he Parties recognize that authorizations will still be needed for Federal Agency Parties to fully participate in broader resources resolutions similar to the KBRA and UKBCA and for certain actions supported in this Agreement." In addition, KPFA Article IV.3.b explicitly stated that "[a]ll actions required of any Federal Agency Party in implementing this Agreement are subject to appropriations by Congress." SA 3288 discusses some of those actions and authorization/appropriation needs.

3. Federal Government Was Authorized via SA 3288 to Participate in Administration and Implementation of the Intertwined KPFA/Amended KHSA/UKBCA:

SA 3288 Section 4(b)(1) authorized the Interior Secretary, consistent with "the reclamation laws and subject to appropriations and required environmental reviews, [to…] "carry out activities, ***including entering into an agreement*** or contract, or otherwise making financial assistance available" (emphasis added) to certain parties for specified purposes.[617] These parties and purposes were set forth in Sections 4(b)(1)(A),(B) and (C). SA 3288 Section 4(b)(1)(A) stated that contracts can be executed and financial assistance provided "to plan, implement and administer programs to align water supplies and demand for irrigation water users associated with the Klamath Project."[618] SA 3288 Section 4(b)(1)(B) stated that contracts also could be executed and financial assistance provided "to plan and implement activities and projects that avoid or mitigate environmental effects of irrigation activities[,] or restore habitats in the Klamath Basin watershed, including restoring tribal fishery resources held in trust."[619] SA 3288 Section 4(b)(1)(C), furthermore, stated that contracts could be executed and financial assistance provided "to limit the net delivered cost of power for covered powered uses."[620]

SA 3288 Sections 4(b)(2)(A)-(B) stated that "[n]othing in Section 4(b)(1)(A) or (B) authorized the Secretary to develop or construct new facilities for the Klamath Project without appropriate approval from Congress […], *or to carry out activities* [e.g., making agreements] *that ha[d] not otherwise been authorized*" (emphasis added).[621] Were SA 3288's sponsors implying that Congress had previously authorized the Interior Secretary's execution and partial implementation of the (water reallocation, fisheries reintroduction and restoration, habitat rehabilitation and environmental mitigation programs originally called for in the KBRA, KHSA and UKBCA)? This is not possible given Congress' refusal to consent to these Agreements before the end of 2015. Or, are SA 3288's sponsors saying that the Interior Secretary's act of executing third party contracts and agreements referenced *within* these Klamath Basin Agreements (and carried forward in the KPFA, Amended KHSA and UKBCA), rather than these Klamath Basin Agreements themselves, falls within the Secretary's existing statutory authorities? Rather, it is arguable that SA 3288's sponsors knew quite well that the Interior Secretary had been required to secure the consent of Congress through passage of S. 2012, and of SA 3288 incorporated within it (which contained indirect references to the KPFA, Amended KHSA, and the UKBCA), if she was to implement these latter Basin Agreements legally. Most likely, the Interior

[617] *See* SA 3288 at Sec. 4(b)(1).
[618] *See* SA 3288 at Sec. 4(b)(1)(A).
[619] *See* SA 3288 at Sec. 4(b)(1)B(i)-(ii).
[620] *See* SA 3288 at Sec. 4(b)(1)(C).
[621] *See* SA 3288 at Sec. 4(b)(2)(A)-(B).

Secretary and her lawyers knew quite well that the process for Congress consenting to the KPFA/Amended KHSA/UKBCA as a combined federal-interstate compact is a process that is distinct from and more extensive than the effort Interior waged to broadly authorize these agreements indirectly through passage of an omnibus energy bill (S.2012).

SA 3288 Section 4(c) discussed the Interior Secretary's commitment to ensure the procurement of power for Klamath Basin irrigators at a reduced rate. SA 3288 Section 4(c)(1) directed the Interior Secretary, "in consultation with interested irrigation interests […] eligible for covered power use" and organizations representing such interests, to prepare and submit a report to the Senate Committee on Energy and Natural Resources and House Committee on Natural Resources within 180 days of the passage of the *Energy Policy Modernization Act of 2016*.[622] This report was required to identify the power cost benchmark, and to recommend actions the Secretary deemed "necessary and appropriate to ensure that the net delivered power costs for covered power use is equal to or less than the power cost benchmark."[623]

SA 3288 Section 4(c)(2) directed the Interior Secretary to implement the report recommendations which she determines will ensure that the net delivered power cost for covered power is less than or equal to the power cost benchmark, *subject to the availability of appropriations*. This implementation shall occur on an expeditious basis within 180 days of the report's submission.[624] SA 3288 Section 4(c)(3) directs the Interior Secretary to submit annual implementation progress reports to each of the Senate and House Committees noted above.[625]

SA 3288 Section 4(d)(1) effectively authorized the Interior Secretary to purchase electric power generated by the Federal Columbia River Power System managed by the Bonneville Power Administration ("BPA") of the U.S. Department of Energy, consistent with the provisions of the Pacific Northwest Power Planning and Conservation Act (16 U.S.C. 839c(b)(3)).[626]

It may be recalled that the Klamath Basin Coordinating Council and the Klamath Basin Advisory Council consisting of representatives from all Parties, along with their subgroups and technical teams, collectively had been responsible for implementing the KBRA and KHSA, including any amendments thereto. Similarly, the Joint Management Entity and the Joint Management Entity Technical Team were responsible for implementing the provisions of the UKBCA, including any amendments thereto. Since various KBRA provisions had survived termination and others were incorporated within the KPFA, the KHSA was amended, and the UKBCA still survives, the KBCC and KBAC entities, as well, still survive and continue to play an important role in the oversight and implementation of the KPFA, Amended KHSA and the UKBCA. Indeed, the KBCC had reported the Parties' execution of the KPFA

[622] *See* SA 3288 at Sec. 4(c)(1).
[623] *See* SA 3288 at Sec. 4(c)(1)(A).
[624] *See* SA 3288 at Sec. 4(c)(2).
[625] *See* SA 3288 at Sec. 4(c)(3).
[626] *See* SA 3288 at Sec. (4)(d)(1).

and Amended KHSA,[627] and of the Agreement-in-Principle[628] preceding it on the organization's website.

4. SA 3288 Addressed the Federal Government National Interests Set Forth Within the Intertwined Provisions of the KPFA/Amended KHSA/UKBCA:

SA 3288 Sections 4(e)(1) and (2) identify the goals of the activities pursued under SA 3288 Section 4(b) ("Water, Environmental and Power Activities") and Section 4(c) ("Reducing Power Costs"). These goals include water conflict resolution in the Klamath Basin watershed,[629] and ensuring "compatibility and utility for protecting natural resources throughout the Klamath Basin watershed, including the protection, preservation, and restoration of Klamath River tribal fishery resources, particularly, through collaboratively developed agreements."[630] These activities are identified as the goals of the KPFA,[631] Amended KHSA[632] and UKBCA,[633] and future agreements the Parties to these Agreements have not yet entered into.[634] SA 3288 Section 4(c), calls for the Interior Secretary to report to Congress concerning his/her recommended plan of action for reducing power costs in the Klamath Basin, which presumes that power will be needed to replace the hydroelectric power currently generated by the four Klamath River Dams the Secretary has slated for removal. Hence, SA 3288 broadly addresses the five Federal government national interests the Klamath River Basin engenders which are addressed, albeit differently, in the Klamath River Basin Compact: Federal navigation servitude; Federal assurance of affordable power; Federal irrigation project operation and management; Federal environmental protection/pollution control; Federal protection of fish and wildlife; and Federal trust obligation to protect tribal water rights.

a. *Federal Navigation Servitude*

SA 3288 was much more oblique than S. 133 had been in addressing the Federal navigation servitude. As the result, it is much more challenging, but still possible, to relate the former's goal of habitat restoration to the removal of the four Klamath River Dams/Facilities (John C. Boyle, Copco 1, Copco 2 and Iron Gate), a free-flowing river and volitional fish passage.

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[627] *See* Klamath Basin Coordinating Council, *Klamath Power and Facilities Agreement*, available at: http://www.klamathcouncil.org/index.php/klamath-power-and-facilities-agreement/; Klamath Basin Coordinating Council, *Hydroelectric Settlement Agreement, Amended Klamath Hydroelectric Settlement Agreement*, available at: http://www.klamathcouncil.org/index.php/agreements/khsa/.

[628] *See* Klamath Basin Coordinating Council, *Parties Agree to New Path to Advance Klamath Agreement: Agreement-in-Principle Explores Process through Federal Energy Regulatory Commission*, Press Release (Feb. 2, 2016), available at: http://www.klamathcouncil.org/wp-content/uploads/2015/04/Klamath-AIP-Press-Release-Final.pdf.

[629] *See* SA 3288 at Sec. 4 (e)(1).

[630] *See* SA 3288 at Sec. 4 (e)(2).

[631] *See* KPFA at Art. III.A, III.C.

[632] *See* Amended KHSA at Art. 1.3, 4th Recital;

[633] *See* UKBCA at Statement of Purpose para. (d), and Arts. 1.1, 2.3, 3.23.

[634] *See* KPFA at Art. IV.A.2.

SA 3288 Section 4(b)(1)(B)(ii), like Section 6 of S.133, authorized the Interior Secretary "to carry out activities, including entering into an agreement […] or otherwise making financial assistance available […] to plan, implement, and administer programs to […] restore habitats [rather than ecosystems] in the Klamath Basin watershed…"[635] **SA 3288 Section 4(b)(1)(B)(ii) tracked to Amended KHSA Article 1.4's definition of "Facilities Removal," which closely related "site […] restoration, including previously inundated lands," "a free-flowing condition and volitional fish passage" with "physical removal of all or part of each of the Facilities."[636]**

SA 3288 Section 4(b)(1)(B)(ii) also tracked to Amended KHSA Articles 7.2.2.A and 7.6.4.A. Amended KHSA Article 7.2.2.A stated that the Detailed Plan the Interior Secretary had been required to develop needed to describe the "physical methods undertaken to effect Facilities Removal […] as defined in Section 1.4."[637] Amended KHSA Article 7.6.4.A required the States of California and Oregon ultimately to manage the lands falling within the FERC Project boundaries of each of the four Klamath River Dams, following Facilities Removal, "for public interest purposes such as […] public recreational access."[638] **Amended KHSA Article 7.6.4.A was substantially similar to KHSA Art. 7.6.4.A.[639]**

SA 3288 Section 4(b)(1)(B)(ii), furthermore, tracked to Amended KHSA Appendix D, Interim Measure 21, which required PacifiCorp to fund U.S. Bureau of Land Management activities, including recreational activities, until Decommissioning of the J.C Boyle Dam.[640] **Appendix D, Interim Measure 21 was substantially similar to Appendix D, Interim Measure 21 of the original KHSA (which required PacifiCorp to fund such activities until the transfer of the J.C. Boyce Dam)**. Presumably, such access would have ensured recreational whitewater rafting by means of kayak, canoe and other oared craft which, in turn, would have been deemed supportive of the environment and habitat restoration SA 3288 envisioned.

SA 3288 Section 4(b)(1)(B)(ii), moreover, tracked to KBRA Article 27.3.1.B. KBRA Article 27.3.1.B required Klamath County to establish an economic development plan "associated with the restoration of the Klamath River and reintroduction of anadromous fisheries into Klamath County and the headwaters of the Klamath River in Lake County, Oregon."[641] The Klamath County plan KBRA Article 27.3.1.B required must have "use[d] appropriate methods to determine economic development opportunities associated with fisheries enhancement, tourism and recreational development…"[642]

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[635] *See* SA 3288 at Section 4(e)(1)(B)(ii).
[636] *See* Amended KHSA at Art. 1.4.
[637] See Amended KHSA at Art. 7.2.2.A.
[638] *See* Amended KHSA at Art. 7.6.4.A (indicating that PacifiCorp would transfer ownership of lands falling within the FERC Project boundaries of each of the four Klamath River Dams to the DRE before Facilities Removal begins, and then, the DRE would transfer ownership of such lands to the respective States upon completion of Facilities Removal.)
[639] *See* KHSA at Art. 7.6.4.A (indicating that PacifiCorp would transfer ownership of lands falling within the FERC Project boundaries of each of the four Klamath River Dams to the States of Oregon and California before Facilities Removal begins.)
[640] *See* Amended KHSA at Appendix D, Interim Measure 21: BLM Land Management Provisions.
[641] *See* KBRA at Art. 27.3.1.
[642] *See* KBRA at Art. 27.3.1.B.

KBRA Articles 27.3.1 and 27.3.1.B presaged KPFA Article III.C, which reflected the Parties' commitment to complete a "[c]ooperatively-[d]eveloped [s]ettlement [agreement or agreements] and [p]rograms [that would have…] include[d…] a counties program."

Consequently, it may be confidently concluded that SA 3288, like S.133, had envisioned recreational whitewater rafting and tourism as among the economic development opportunities that would arise from the free-flowing river, volitional fish passage and habitat restoration that Klamath River Facilities Removal enabled, consistent with the Federal government's interest in maintaining navigational servitude.

b. *Federal Assurance of Affordable* Power

SA 3288 Section 4(b)(1)(C) would have authorized the Interior Secretary to execute agreements and/or contracts "to limit the net delivered cost of power for covered power uses."[643] **This provision echoed the purposes and objectives and targeted the same beneficiaries as did Amended KHSA Article 5.3.**[644] SA 3288 Section 4(a)(1)(A) defined the term "covered power use" as power used "to develop or manage water for irrigation, wildlife purposes or drainage on land that is associated with the Klamath Project, including the National Wildlife Refuge System."[645] SA 3288 Section 4(a)(1)(B) stated that "covered power use" included power used for land "irrigated by the class of [water] users covered by the agreement dated April 30, 1956, between the California Oregon Power Company and Klamath Basin Water Users Protective Association and within the *Off-Project Area* (*as defined in the Upper Basin Comprehensive Agreement*)" (emphasis added), provided the "applicable owner and holder of a possessory interest of the land is a party to that agreement."[646] **This provision confirmed that SA 3288 was intended to implement the UKBCA which covered Off-Project irrigators**. **KBRA Article 1.7 similarly defined "Off-Project Power User"** as "any user of power within the class described in the agreement dated 1956 between the California Oregon Power Company, predecessor of PacifiCorp, and Klamath Basin Water Users Protective Association, *as the predecessor in interest of the Klamath Off-Project Water Users Association*" (emphasis added). **These SA 3288 provisions, taken together, approximated the more direct references made to the KBRA and UKBCA replacement power program described within similarly worded Section 6 of unsuccessful S.133 (2015) discussed above.**

SA 3288 Section 4(a)(3) defined the term "power cost benchmark" as "the average net delivered cost of power for irrigation and drainage at Reclamation projects in the area surrounding the Klamath Project that are similarly situated to the Klamath Project."[647] This includes "Reclamation projects that are [] located in the Pacific Northwest [and…] receive project-use power."[648]

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[643] *See* SA 3288 at Sec. 4(b)(1)(C).
[644] *See* Amended KHSA at Art. 5.3.
[645] *See* SA 3288 at Sec. 4(a)(1)(A).
[646] *See* SA 3288 at Sec. 4(a)(1)(B). *See also Klamath Off-Project Water Users, Inc. v. PacifiCorp*, 0604877CV A139104 (OR CA 2010), *supra*.
[647] *See* SA 3288 at Sec. 4(a)(3).
[648] *See* SA 3288 at Sec. 4(a)(3)(A)-(B).

As previously discussed, SA 3288 Section 4(c) emphasized the Interior Secretary's commitment to ensure the procurement of power for Klamath Basin irrigators at a reduced rate. SA 3288 Section 4(c)(1) directed the Interior Secretary, "in consultation with interested irrigation interests […] eligible for covered power use" and organizations representing such interests, to prepare and submit a report to the Senate Committee on Energy and Natural Resources and House Committee on Natural Resources within 180 days of the passage of the *Energy Policy Modernization Act of 2016*.[649] This report must have identified the power cost benchmark, and recommended actions the Secretary deemed "necessary and appropriate to ensure that the net delivered power costs for covered power use is equal to or less than the power cost benchmark."[650] The actions recommended must have described:[651] 1) "actions to immediately reduce power costs and to ensure the net delivered power costs for covered power is less than or equal to the power cost benchmark;[652] 2) actions prioritizing water and power conservation and efficiency measures and, to the extent actions involving power generation development or acquisition "are included, renewable energy technologies (including hydropower);"[653] 3) "the potential costs and timelines for the actions recommended under "Article 4(c)(1);[654] 4) "provisions for modifying the actions and timelines to adapt to new information or circumstances;"[655] and 5) "the public input regarding the proposed actions, including input from waters users that have covered power use and the degree to which those water users concur[red] with the recommendations."[656]

SA 3288 Section 4(c)(2) directed the Interior Secretary to implement the report recommendations which she determined would ensure that the net delivered power cost for covered power was less than or equal to the power cost benchmark, *subject to the availability of appropriations*. It required implementation to have occurred on an expeditious basis within 180 days of the report's submission.[657] SA 3288 Section 4(c)(3) directed the Interior Secretary to submit annual implementation progress reports to each of the Senate and House Committees noted above.[658]

As previously noted, SA 3288 Section 4(d)(1) effectively authorized the Interior Secretary to purchase electric power generated by the Federal Columbia River Power System managed by the Bonneville Power Administration ("BPA") of the U.S. Department of Energy, consistent with the provisions of the Pacific Northwest Power Planning and Conservation Act (16 U.S.C. 839c(b)(3)).[659] This statute *inter alia* authorized the [Department of Energy] BPA Administrator to sell electric power to Federal agencies in the region.[660] **This SA 3288 provision substantially restated Section 6 of the unsuccessful S.133 (2015)**.

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[649] *See* SA 3288 at Sec. 4(c)(1).
[650] *See* SA 3288 at Sec. 4(c)(1)(A).
[651] *See* SA 3288 at Sec. 4(c)(1)(A)-(B).
[652] *See* SA 3288 at Sec. 4(c)(1)(B)(i).
[653] *See* SA 3288 at Sec. 4(c)(1)(B)(ii).
[654] *See* SA 3288 at Sec. 4(c)(1)(B)(iii).
[655] *See* SA 3288 at Sec. 4(c)(1)(B)(iv).
[656] *See* SA 3288 at Sec. 4(c)(1)(B)(v).
[657] *See* SA 3288 at Sec. 4(c)(2).
[658] *See* SA 3288 at Sec. 4(c)(3).
[659] *See* SA 3288 at Sec. (4)(d)(1).
[660] *See Pacific Northwest Power Planning and Conservation Act*, P.L. 96-501, 94 Stat. 2697 (Dec. 5, 1980), codified at 16 U.S.C. 839c(b)(3).

SA 3288 Section 4(d)(2) stated that nothing in SA 3288 Section 4 authorizes BPA to sell "power from the Federal Columbia River at rates, terms, or conditions *better than* those afforded *preference customers* of the Bonneville Power Administration" (emphasis added).[661] According to BPA representatives,

> "BPA's principal customer base consists of Northwest public utility districts *(PUDs), municipalities and electric cooperatives*. These entities *are referred to as 'preference customers'* because they are entitled to a statutory preference and priority in the purchase of available federal power. *Preference customers are eligible to purchase power at BPA's priority-firm (PF) rate* for most of their loads" emphasis added).[662]
>
> "Priority Firm (PF) Rates [are] BPA's lowest cost, statutorily-designated rate class."[663]

SA 3288 Section 4 (d) tracked back directly to Amended KHSA Article 5.3 and KBRA Article 17.6. These Amended KHSA and KBRA articles discussed the Interior Secretary's assurance of low-cost power (consistent with Klamath River Basin Compact goals) for eligible load On-Project and Off-Project irrigators in the Upper Klamath Basin that would be generated, in part, by and procured from the BPA-managed Federal Columbia River Power System, and delivered to irrigator by PacifiCorp transmission systems. **SA 3288 Section 4(c) tracked back directly to Amended KHSA Article 5.1's "power development" program** which seeks joint development and ownership of renewable energy generation resources by local Klamath Basin entities, including counties, from which PacifiCorp would purchase power. **SA 3288 Section 4 also tracked back directly to KBRA Articles 17's water management program** intended to ensure power cost security for eligible users (KBRA Article 17.1-17.3), partly by BPA Columbia River System-generated electricity and managed by representative organizations of irrigation interests such as KWUA, KWAPA, etc. (KBRA Article 17.4), **and KBRA Article 17.7's renewable power program** through which low-cost power would have been developed through a renewable energy fund as provided for in KBRA Article 14.3.1 and Appendix C-2.

SA 3288 Sections 4(c)-(d) which provide for procurement of BPA Federal Columbia River Power System-generated energy and the Klamath Basin-developed and generated renewable energy only make sense if it is understood that these new sources of electric generation are intended to replace the hydroelectric power currently generated by the four Klamath River Dams (the John C. Boyle, Copco 1, Copco 2 and Iron Gate Dams), which will no longer continue to generate hydroelectric power due to

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[661] *See* SA 3288 at Sec. 4(d)(2).

[662] *See* Corrina Ikakoula, *BPA Overview*, DOE Tribal Energy Program Review (Jan. 2016), at p. 4, available at: http://energy.gov/sites/prod/files/2016/01/f28/0911review_ikakoula.pdf.

[663] *See Bonneville Power Administration Overview – Investor Package* (April 10, 2015), at p. 5, available at: https://www.bpa.gov/news/Investor/InvestorDocuments/Investor%20Package%20for%20BPA%20Website%204%2010%2015%20FINAL.pdf.

their being decommissioned and removed with the authorization and approval of the Federal Energy Regulatory Commission.[664]

c. *Federal Irrigation Project Operation and Management*

As discussed above, SA 3288 Section 4(b)(1)(A) would have authorized the Interior Secretary, consistent with "the reclamation laws," to "carry out activities, including entering into an agreement or contract, or otherwise making financial assistance available" "to plan, implement and administer programs to align water supplies and demand for irrigation water users associated with the Klamath Project."[665] **This provision was substantially similar to Section 6 of the unsuccessful S.133 (2015) which expressly referred to the KBRA and UKBCA. The language of this provision, therefore, was very similar to the opening text of KBRA Article 15.2.1, concerning the purpose of the On-Project Plan for the Klamath Reclamation Project, the spirit of which was carried forward in KPFA Article II.B.[666]**

SA 3288 Sections 4(b)(2)(A) stated that "[n]othing in Section 4(b)(1)(A) or (B) authorized the Secretary to develop or construct new facilities *for the Klamath Project* without appropriate approval from Congress under Section 9 of the Reclamation Projects Act of 1939 (43 U.S.C. 485h)" (emphasis added).[667]

SA 3288 Section (f) authorized the Interior Secretary to enter into one or more agreements with the Tulelake Irrigation District to reimburse TID up to 69 percent of the cost it incurred to operate and maintain Pumping Plant D to the extent such O&M reimbursement benefits the USG.[668] **This section sought to resurrect KBRA Article 15.4.2 which directed Reclamation to reimburse TID 37.5 percent of those O&M costs and USFS to reimburse TID 31.25 percent of such costs.[669]**

SA 3288 Section 4(g)(2)(A) authorized the establishment and use of an entity contracted with the U.S. government for Klamath Project works of facilities operations and maintenance ("O&M") that receives Klamath Project water.[670] This entity could include a local government entity such as a Project irrigation district or PacifiCorp while it continued to operate and maintain the Link River and Keno Dams – to "use any of the Klamath Project works or facilities to convey non-Klamath Project water for any authorized purpose of the Klamath Project."[671] SA 3288 Section 4(g)(2)(B) indicated that such use(s) would be authorized provided proper state and local permits were secured, and all water

[664] These provisions also anticipate that the Link River and Keno River Dams will be decommissioned and eventually stop generating hydroelectric power for the Klamath Project and Basin.
[665] *See* SA 3288 at Sec. 4(b)(1)(B)(i).
[666] *See* KPFA at Art. II.B; KBRA at Art. 15.2.1.
[667] *See* SA 3288 at Sec. 4(b)(2)(A)-(B).
[668] *See* SA 3288 at Sec. 4(f).
[669] *See* KBRA at Art. 15.4.2.A.
[670] *See* SA 3288 at Sec. 4(g)(2)(A).
[671] *Id*.

delivered to and taken out of the Project was properly measured.[672] **This provision tracked directly back to KBRA Article 15.4.5.B.**

d. *Federal Environmental Protection/ Pollution Control*

SA 3288 Section 4(b)(1)(B)(i) authorized the Interior Secretary "to carry out activities, including entering into an agreement […] or otherwise making financial assistance available […] to plan, implement, and administer programs to […] avoid or mitigate environmental effects of irrigation activities."[673] SA 3288 Section 4(e)(2) stated that the goals of the authorized activities under Sections 4(b) and 4(c) included the assurance of compatibility and utility for protecting natural resources throughout the Klamath Basin watershed.[674] **These provisions, taken together, were substantially similar to Section 6 of the unsuccessful S.133 (2015) which expressly referred to the KBRA and UKBCA. This language, therefore, conveyed the purpose and scope of KPFA Article II.B.1 identifying "adverse water quality conditions" in portions of the Klamath River.[675] This language also conveyed the purpose of KPFA Article III.B, which required KPFA Parties to support "appropriate studies and collaborative actions to address" such adverse conditions, including studies to address: "(i) coarse sediment management in the Klamath River between Keno Dam and the Shasta River confluence; and (ii) management and reduction of organic and nutrient loads in and above Keno Reservoir and in the Klamath River downstream."[676] This language, furthermore, conveyed the purpose of Amended KHSA Article 6.3 which required PacifiCorp to "implement load allocations and targets assigned the [Hydroelectric] Project under the State's respective Klamath River TMDLs [total maximum daily loads].[677]**

e. *Federal Protection of Fish and Wildlife*

SA 3288 Section 4(b)(1)(B)(ii) authorized the Interior Secretary "to carry out activities, including entering into an agreement […] or otherwise making financial assistance available […] to plan, implement, and administer programs to […] restore habitats in the Klamath Basin watershed…"[678] Presumably, Klamath Basin watershed natural resources to be protected consistent with the goals of SA 3288 Section 4(e)(2) included fish and wildlife habitats. **These provisions, taken together, were substantially similar to Section 6 of the unsuccessful S.133 (2015) which expressly referred to the KBRA and UKBCA. The language of these provisions, therefore, indirectly encompassed the purpose and spirit of fisheries restoration envisioned by Amended KHSA Articles 6.1-6.2, UKBCA Articles 2.3, 4 and 9, KPFA Articles II.B.1, II.B.2, and III.C, and KBRA Article 15.2.1 and Appendix D-1.II.C.[679]**

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[672] *See* SA 3288 at Sec. 4(g)(2)(B)(i)-(ii).
[673] *See* SA 3288 at Sec. 4(b)(1)(B)(i).
[674] *See* SA 3288 at Sec. 4(e)(2).
[675] *See* KPFA at Art. II.B.2.b.
[676] *See* KPFA at Art. III.B.
[677] *See* Amended KHSA at Art. 6.3.
[678] *See* SA 3288 at Sec. 4(b)(1)(B)(ii).
[679] *See* KBRA at Art. 15.2.1 and Appendix D-1.II.C.

f. *Federal Trust Obligation to Protect Tribal Water Rights*

SA 3288 Section 4(b)(1)(B)(ii) also authorized the Interior Secretary to carry out activities by entering into agreements or contracts or providing financial assistance to "restor[e] tribal fisheries resources held in trust" in the Klamath Basin watershed.[680] SA 3288 Section 4(e)(2) stated that the goal of protecting, preserving, and restoring "Klamath River tribal fishery resources" was to be included among the Klamath Basin watershed natural resources that were to be protected under SA 3288 Sections 4(b) and 4(c) through collaboratively developed agreements.[681] **These provisions, taken together, were substantially similar to Section 6 of the unsuccessful S.133 (2015) which expressly referred to the KBRA and UKBCA. These provisions, therefore, tracked back to the 10th Recital set forth in Amended KHSA Article 1.1, and the 11th Recital set forth in KHSA Article 1.1,** which evidenced the Parties' agreement that the "Settlement advance[d] the trust obligation of the United States to protect Basin Tribes' federally reserved fishing and water rights in the Klamath and Trinity River Basins."[682] **These provisions also track back to KPFA Article III.C** which referred to the Parties' intent to ensure *inter alia* that a tribal program would be included in any future agreement(s) to resolve resource conflicts in the Basin.[683] **These provisions, furthermore, tracked back to KBRA Article 12.2.7** which required periodic meetings between Federal Agency Parties and the Tribes "to review whether the intended fisheries outcomes […were] being realized for tribal trust…"[684] **Moreover, these provisions tracked back to KBRA Article 15.3** containing the KBRA Parties' tribal water right assurances. **Finally, these provisions tracked back to UKBCA Article 15's definition of "tribal water rights"** as including *inter alia* "only the water rights jointly held by the Klamath Tribes and the BIA, in its capacity as trustee of the Klamath Tribes in the Klamath Adjudication…"[685]

g. *Conclusion*

In sum, the Wyden-Merkley Amendment (SA 3288) indisputably relates closely to and reinforces the intertwined UKBCA, KPFA and Amended KHSA, and seeks to resurrect parts of the KBRA. The KPFA and Amended KHSA, in turn, reproduce or track many of the provisions of the KBRA and original KHSA.

Granted, SA 3288, the KPFA, Amended KHSA and UKBCA have not created any new governmental entities. However, the KBCC, KBAC and JME (along with their subgroups and technical teams) which had been charged with implementing the KBRA, KHSA and UKBCA still survive to this day, and the responsibilities these entities would have borne with respect to the implementation of the newer KPFA and Amended KHSA and the ongoing UKBCA are no less or greater than the responsibilities the Klamath River Basin Compact Commission has borne with respect to the implementation of the Klamath River Basin Compact, which also still survives! Indeed, the Klamath River Basin Compact

[680] *See* SA 3288 at Sec. 4(b)(1)(B)(i).
[681] *See* SA 3288 at Sec. 4(e)(2).
[682] *See* Amended KHSA at Art. 1.1, Recital 10.
[683] *See* KPFA at Art. III.C.
[684] *See* KBRA at Art. 12.2.7.
[685] *See* UKBCA at Art. 15, p. 87.

continues to control the allocation of water between the States of California and Oregon, subject to the standards of federal environment and wildlife statutes such as the Clean Water Act, the Endangered Species Act and the Wild and Scenic Rivers Act.

SA 3288 served as the glue that would have facilitated Congress' authorization of the Interior Secretary's execution of the KPFA, Amended KHSA and UKBCA, and provided the foundation for securing current and future Congressional appropriations to implement each of these basin agreements. The evidence shows that: 1) indirect Congressional consent had been sought via SA 3288 for the KPFA/Amended KHSA/UKBCA; 2) the Federal government had approved and likely participated in the drafting of SA 3288; 3) SA 3288 would have authorized the Federal government to participate in the administration and implementation of the intertwined KPFA/Amended KHSA/UKBCA; and 4) SA 3288 addressed the Federal government's national interests set forth within the intertwined KPFA/Amended KHSA/UKBCA in as much as the KRBC had addressed those similar interests at an earlier point in Klamath Basin history.

Had a reconciled S.2012 included SA 3288, been passed by Congress, and enacted into law by presidential signature, Congress would have indirectly consented to a Federal-interstate compact that authorized the reallocation of water rights within the Klamath Basin and the largest dam removal project in American history. However, it would have done so without having engaged in the extensive due diligence review process that Congress is required to undertake before granting consent to explicit or *de facto* federal-interstate compacts.

VIII. Conclusion

This memorandum of law makes clear that the execution of the Klamath Basin Agreements authorizes, *by political means* rather than through legislation or litigation, the reallocation of use rights to Klamath Basin waters between and among basin stakeholders. The Federal governments' role(s) in formulating these Agreements and the level of Federal government participation in the administration of these Agreements has been and remains rather extensive to ensure that multiple Federal interests are preserved. Therefore, consistent with the dissenting opinion in *U.S. Steel*, it is arguable that Congress must weigh in and grant consent to these Agreements which collectively constitute a federal-interstate compact.

The Council of State Governments views the need for obtaining Congressional consent of interstate compacts similarly, consistent with the dissent in *U.S. Steel*. It has argued that,

> "Congress does not pass upon a compact in the manner as a court of law deciding a question of constitutionality. The requirement that Congress approves a compact is an act of political judgment about the compact's potential impact on national interests and, if approved, to impose any conditions necessary to ensure that those national interests are not harmed by the compact. In short, the Congressional consent requirement is an exercise of political judgment as to the appropriateness of the

> compact vis-à-vis national concerns, not a legal judgment as to the correctness of the form and substance of the compact. As a rule, there are virtually no limitations on Congress's substantive right to grant, withhold, or condition the granting of its consent, save perhaps a finding that the compact itself somehow violated constitutional principles."[686]

P.L. 85-222 is recognized as codifying the Klamath River Basin Compact into Federal law. The State and U.S. executive agencies' failure, respectively, to invoke the termination and amendment provisions of that federal statute, especially as they proceeded to execute a new federal-interstate compact vis-à-vis non-transparent and non-inclusive meetings without proper notification, arguably constitutes a significant procedural failure that led to the violation of California and Oregon citizens'/residents' substantive U.S. Constitutional rights. Federal and State agencies' rendering of political decisions resulting in a substantial reallocation of Klamath Basin water rights was arguably inconsistent with the U.S. Constitution Article I's Commerce and Compact Clauses. Such actions also arguably facilitated the violation of California and Oregon citizens'/residents' constitutionally protected land and water rights, in contravention of the Takings and Due Process Clauses of the U.S. Constitution's 5th and 14th Amendments. Similarly, to the extent county (Klamath and Siskiyou) and municipal (Klamath Falls, Yreka, etc.) governments in these states participated in such decision-making and perpetrated constitutional violations to secure federal grant-in-aid programs in violation of their citizens'/residents' substantive and procedural federal and state constitutional rights, their actions, as well, could be susceptible to judicial challenge in the Federal courts.

Therefore, Congress must do its job and conduct investigations into the intentional violation by the States of Oregon and California of the United States Constitution and its Bill of Rights. The bottom line is that the four Klamath River hydroelectric power dams cannot be removed without Congressional consent and ratification.

[686] *See* Council of State Governments – National Center for Interstate Compacts, *Congressional Consent and other Legal Issues*, at p. 3, available at: http://www.cglslgp.org/media/1304/congressional_consent_and_other_legal_issues-csgncic.pdf.