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## Dewatering Trust Responsibility: The New Klamath River Hydroelectric and Restoration Agreements

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## DEWATERING TRUST RESPONSIBILITY: THE NEW KLAMATH RIVER HYDROELECTRIC AND RESTORATION AGREEMENTS

Thomas P. Schlusser\*

*Abstract:* In order to protect Indian property rights to water and fish that Indians rely on for subsistence and moderate income, the Interior Department Solicitor has construed federal statutes and case law to conclude that the Department must restrict irrigation in the Klamath River Basin of Oregon and Northern California. Draft legislation, prescribed by the February 18, 2010 Klamath River Hydroelectric Agreement and the Klamath Basin Restoration Agreement, would release the United States from its trust duty to protect the rights of Indian tribes in the Klamath River Basin. The agreements will also prolong the Clean Water Act Section 401 application process to prevent the Federal Energy Regulatory Commission from issuing a properly-conditioned license for dams in the Klamath River that will protect the passage of vital fish populations. This article argues that the agreements prioritize the water rights of non-Indian irrigation districts and utility customers over first-in-time Indian water and fishing rights.

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I. INTRODUCTION

In 1905, Congress authorized the Secretary of the Interior to drain and reclaim lakebed lands in Lower Klamath and Tule Lake, located in south central Oregon and northern California.<sup>1</sup> The resulting extensive irrigation development in the high desert area surrounding Upper Klamath Lake may no longer be sustainable.<sup>2</sup> Excessive water consumption and use of wildlife refuges for row crop agriculture are stretching the ecosystem to the breaking point.<sup>3</sup> Further, the new Klamath River Hydro and Restoration Agreements fail to resolve these ecological problems and ignore legal requirements protecting tribal rights to Klamath River fisheries, resulting in an inequitable distribution of risks.

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1. Act of February 9, 1905, ch. 567, 33 Stat. 714 (1905).

2. See *Klamath Irrigation v. U.S.*, No. 2007-5115, 2011 WL 537853 (Fed. Cir. Feb. 17, 2011) (finding takings claims from water cut-off due to Biological Opinion and flow allocations for Indian fishing rights).

3. See *Pacific Coast Fed. of Fishermen's Ass'n v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1085-86, 1092-95 (9th Cir. 2005).

A. *A Brief Overview of The Klamath Basin Restoration Agreement*

The February 18, 2010 Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities (“KBRA”)<sup>4</sup> was signed by approximately twenty negotiating parties. The United States, PacifiCorp,<sup>5</sup> the Hoopa Valley Tribe, the Quartz Valley Reservation and the Resighini Rancheria did not to sign the KBRA. This agreement seeks to settle the substantial differences between tribes, irrigators and the United States over water flows and habitat. Additional stated goals of this agreement are to restore and sustain natural production for “Full Participation in Harvest Opportunities of Fish Species through the Klamath Basin; [and to] establish reliable water and power supplies for agricultural purposes, communities and National Wildlife Refuges.”<sup>6</sup>

The KBRA seeks approximately one billion dollars of federal funding for the first ten years of implementation.<sup>7</sup> This funding is for the development of a fisheries restoration and reintroduction plan, and is designed without numerical restoration goals.<sup>8</sup> Approximately \$300 million dollars of the package is devoted to an on-project water users program to economize surface water use and increase groundwater pumping, and an off-project water program to acquire surface water rights, and power subsidies for farmers to adjust irrigation costs below market rates.<sup>9</sup> Parties to the KBRA also agreed to support approvals under the Endangered Species Act to legalize diversions from the river of water volumes

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4. See Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities, Feb. 18, 2010 [hereinafter Klamath Basin Restoration Agreement], available at <http://www.doi.gov/news/pressreleases/upload/Klamath-Basin-Restoration-Agreement-2-18-10.pdf>.

5. PacifiCorp is a major electric power company operating throughout the Northwestern United States and the owner of the Klamath Hydroelectric Project that is undergoing the Federal Energy and Regulatory Commission (FERC) relicensing process. From 2001 to 2006, Scottish Power owned PacifiCorp. Since 2006, PacifiCorp has been a wholly owned subsidiary of MidAmerican Energy Holdings Company, itself owned by Berkshire Hathaway.

6. *Id.* at 4.

7. See Klamath Basin Restoration Agreement, *supra* note 4, at App.c.6.

8. *Id.* at C-6, 34-49.

9. *Id.* at 50-120.

dedicated to irrigation.<sup>10</sup> Most importantly, the KBRA gives first priority to on-project surface water diversions of 330,000 or more acre-feet (“af”) per year.<sup>11</sup>

### B. *The Klamath Hydroelectric Settlement Agreement*

Approximately twenty parties signed The Klamath Hydroelectric Settlement Agreement (“KHSA”) on February 18, 2010. The parties to this agreement include the United States, and PacifiCorp, but not the Hoopa Valley, Quartz Valley or Resighini tribes of the Klamath Basin.<sup>12</sup> The KHSA establishes a planning process that may call for removal of PacifiCorp’s four lower dams on the Klamath River by 2020 or later.<sup>13</sup> Financing provisions in the KHSA call for a surcharge on PacifiCorp customers’ power bills in order to raise \$200 million dollars, plus a California bond measure to raise an additional \$250 million dollars for dam removal costs.<sup>14</sup> This dam removal provision of KHSA faces several difficult steps prior to execution. In addition to state legislation for removal costs, Congress must approve legislation authorizing the Secretary of the Interior to determine whether to remove the dams and immunize PacifiCorp from environmental liabilities.<sup>15</sup>

Together, the KBRA and the KHSA are an attempt to achieve slight increases in Klamath River flows while preserving priority water use by the Klamath Irrigation District. The agreements halt the dam licensing proceedings before the Federal Energy Regulatory Commission and protect PacifiCorp from certain costs and liabilities in the Basin. However, these stakeholder benefits will result in a loss of certain ecosystem services and tribal rights in the region.

In the KBRA, the United States guarantees subordination of senior tribal water and fishing rights to certain junior water

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10. *Id.* at 149.

11. *Id.* at E.25.

12. Klamath Hydroelectric Settlement Agreement, Feb. 17, 2010 [hereinafter Klamath Hydroelectric Settlement Agreement], available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>.

13. *Id.* at 19-22.

14. *Id.* at 23-31.

15. See Klamath Hydroelectric Settlement Agreement, *supra* note 12, at 20.

diversions for the Klamath Irrigation District.<sup>16</sup> Two tribes with recognized water and fishing rights (Klamath and Yurok), and one without such rights (Karuk), agreed to this proposed division of Klamath River water and offered similar assurances to the signatories. Three other tribes of the Klamath River Basin (Hoopa Valley, Quartz Valley and Resighini) refused to agree and did not sign the Klamath Basin agreements.

The federal agencies have not signed the KBRA at the time of this publication, but they did sign the KHSA, the related hydroelectric agreement. The Interior Department, the three signatory tribes, and other stakeholders drafted legislation that is necessary to implement the KBRA and are currently seeking a sponsor to introduce it in Congress. The Interior Department's "drafting service" bill would authorize the federal agencies to act on the assurances within the KBRA, and to sign the agreement.<sup>17</sup> The provisions of the agreement would then become binding on the federally recognized tribes that have refused to sign the KBRA. These binding provisions will include the prioritized water rights of the Basin's non-Indian irrigation district users at the expense of first-in-time Indian water and fishing rights—rights that the United States has a trust duty to protect.

Part II of this article summarizes the water and fishing rights of federally recognized Klamath Basin Indian tribes, and Part III addresses the unilateral limitation of the United States' existing duties to enforce those rights. Part IV of this article argues that the authorization of these limitations in the draft KBRA legislation is reminiscent of the 1950s federal policies of terminating tribal rights. Finally, this article examines how the agreements use the Clean Water Act for an unintended purpose and subsume the Klamath Hydroelectric Project relicensing proceedings and dam decommissioning.

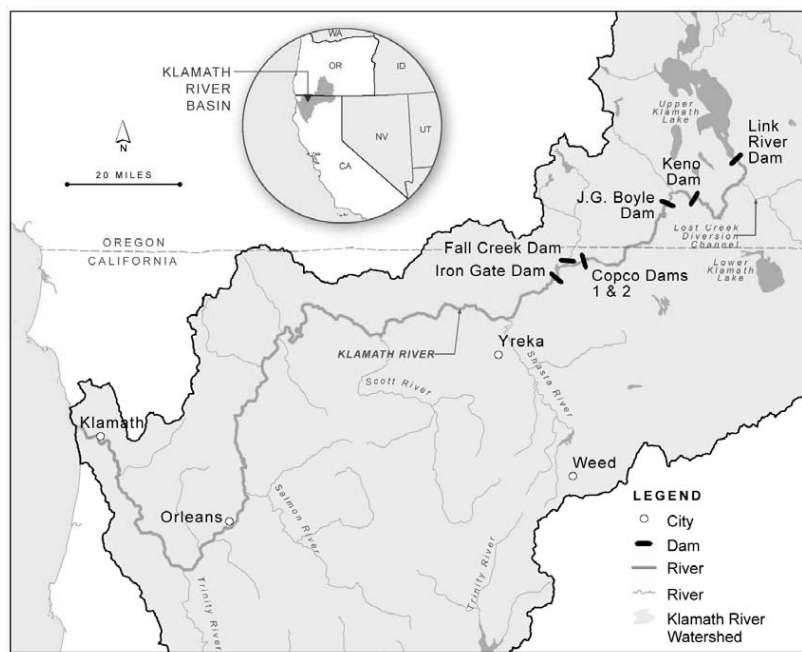
## II. THE KLAMATH RIVER BASIN AND ITS FEDERALLY RECOGNIZED INDIAN TRIBES

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16. Klamath Basin Restoration Agreement, *supra* note 4.

17. See Klamath Hydroelectric Settlement Agreement, *supra* note 12, at 20.

The Klamath River originates in southern Oregon and flows through northern California to meet the Pacific Ocean at Requa in Del Norte County, California. The Klamath River Basin comprises over ten million acres of Southern Oregon and Northern California, including approximately ninety-six thousand acres of tribal trust lands.<sup>18</sup> Forty-four percent of the watershed lies within Oregon, while the remaining fifty-six percent of the Basin is within California.



**Figure 1: Klamath River Basin<sup>19</sup>**

The Klamath River Basin is of vital economic and cultural importance to the states of Oregon and California, the Klamath Tribes in Oregon, the Hoopa, Karuk and Yurok Tribes in California, the Quartz Valley Indian Reservation in

18. See NAT'L OCEANIC AND ATMOSPHERIC ADMIN., KLAMATH RIVER BASIN - 2009 REPORT TO CONGRESS 2 (2009), available at <http://www.nmfs.noaa.gov/pr/pdfs/klamath2009.pdf>.

19. California Water Resources Control Board, *Notice of Preparation and of Scoping Meetings for an Environmental Impact Report for 401 Water Quality Certification of the Klamath Hydroelectric Project 1*, available at [http://www.swrcb.ca.gov/water\\_issues/programs/cwa401/docs/notice\\_klamath\\_nop.pdf](http://www.swrcb.ca.gov/water_issues/programs/cwa401/docs/notice_klamath_nop.pdf)

California, and the Resighini Rancheria in California.<sup>20</sup>

In 1851, reservation settlement treaties were negotiated by federal representatives with the tribes living in California. Treaties were made with representatives of the Hoopa, Karuk, Quartz Valley, and Yurok Tribes.<sup>21</sup> These, together with other California treaties, were transmitted to the Senate by President Fillmore on June 1, 1852. However, the Senate rejected them by resolution on July 8, 1852.<sup>22</sup> As a result, Indian reservations in California were established by statutes and executive orders, rather than by treaty.

On November 10, 1855, the Commissioner of Indian Affairs recommended, and the President approved, setting aside a reservation encompassing a “strip of territory one mile in width on each side of the (Klamath River) for a distance of twenty miles.”<sup>23</sup> This reservation continues to exist as a portion of the Yurok Indian Reservation. In *Mattz v. Arnett*, the Court ruled that the Lower Klamath River portion of the Yurok Reservation was Indian country despite legislation allowing the sale of portions of it to non-Indians.<sup>24</sup> The present-day Yurok Reservation is defined in and expanded by Section 2 of the Hoopa-Yurok Settlement Act.<sup>25</sup>

On April 8, 1864, Congress authorized four Indian reservations in California.<sup>26</sup> Under the 1864 Act, the Hoopa Valley Reservation was created; a twelve-mile square extending six miles on each side of the Trinity River just south of the confluence of the Trinity and Klamath Rivers and including a portion of the Klamath River. The impressive fish stocks of the rivers defined the life and culture of the Hoopa Valley and Yurok Indian Tribes. The decision to establish these reservations along the Trinity and Lower Klamath Rivers was based in large part on the Tribes’ reliance on these

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20. DAVID R. MONTGOMERY, *KING OF FISH: THE THOUSAND-YEAR RUN OF SALMON* 39-58 (2003).

21. See Treaty with the Pohlik or Lower Klamath, etc., October 6, 1851 (unratified) in IV CHARLES J. KAPPLER *INDIAN AFFAIRS LAWS AND TREATIES* 1117 (1976); Treaty with the Upper Klamath, Shasta and Scott’s River, November 4, 1851 (unratified) in IV CHARLES J. KAPPLER *INDIAN AFFAIRS LAWS AND TREATIES* 1121 (1976).

22. *Id.* at 1081 n.1.

23. *Id.* at 816.

24. *Mattz v. Arnett*, 412 U.S. 481 (1973).

25. Hoopa-Yurok Settlement Act, Pub. L. 100-580, §2, 102 Stat. 2924 (1988).

26. Act of April 8, 1864, 13 Stat. 39-41.



resources. The abundance of the region's fishery resources also supported the economy and way of life for people beyond the reservations' borders. When Congress authorized separation of the Hoopa Valley and Yurok Indian Reservations in Pub. L. 100-580, it emphasized the value of the tribal fishing right appurtenant to the Yurok Reservation.<sup>27</sup>

Separately from the establishment of the Hoopa Valley Reservation—acting under the Indian Reorganization Act of 1934 and various appropriations—the Secretary acquired land in 1939 for what was to become the Resighini Rancheria Reservation.<sup>28</sup> This land was purchased from Gus Resighini, a non-Indian who had acquired property within the boundaries of the Yurok Reservation near the mouth of the Klamath River. The Resighini Reservation was created as and remains a separate reservation within the Yurok Reservation.<sup>29</sup>

In 1937 and 1939, the Interior Department purchased land at the mouth of Shackelford Creek (a tributary to the Scott River, and a tributary to the Klamath) under the Indian Reorganization Act. For a time, these lands constituted the Quartz Valley Indian Reservation. Then, in 1953, Congress enacted the California Rancheria Act to end federal responsibilities for certain Indian lands.<sup>30</sup> As a result, numerous Indian land parcels in California, including the Quartz Valley Reservation, passed out of federal ownership and were no longer held in trust for the Tribes by the United States. However, in 1983 the termination was declared unlawful and the Reservation was legally reinstated.<sup>31</sup>

The Karuk Indian Tribe is the beneficiary of a number of small tracts held in trust by the United States as well as properties in fee simple. These non-contiguous parcels of land are primarily located near the Klamath River and within the cities of Yreka, Happy Camp and Orleans, California. On March 7, 1994, the Interior Department issued an opinion rejecting the existence of federally-reserved Karuk fishing

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27. S. Rep. 100-564 at 14 (1988).

28. *Coast Indian Comm. v. United States*, 550 F.2d 639, 642 (Ct.Cl. 1977).

29. Public Law 100-580 also authorized the Resighini Rancheria to merge with the Yurok Tribe, but the Rancheria members voted to reject that option. *See* 25 U.S.C. § 1300i-10(b) (2010).

30. Act of August 18, 1958, Pub. L. 85-671, §2(a), 72 Stat. 619 (1958).

31. *Stipulation and Order, Tillie Hardwick, et al. v. United States*, 2006 U.S. Dist. LEXIS 90855 (N.D. Cal. 1979) (No. C-79-1710 SW).

rights related to these lands.<sup>32</sup> The Solicitor's Office was asked to revisit that opinion in 2000 in light of new information concerning the trust lands. Although the United States still does not recognize a Karuk federal reserved fishing right, the California Fish and Game Department recognizes a small Karuk tribal fishery at one location.<sup>33</sup>

The Treaty of October 14, 1864 defined the Klamath and Modoc Reservation in southern Oregon.<sup>34</sup> That ratified Treaty expressly reserved the Klamath's exclusive right to fish, and included rights to hunt and trap on the Reservation. In 1954, Congress passed the Klamath Termination Act, which became fully effective in 1961.<sup>35</sup> The Act's purpose was to end federal supervision over the Klamath Tribes of Indians, to dispose of federally owned property, and terminate the provision of federal services to Indians solely because of their status as Indians. Under the Act, adult members could elect to withdraw from the Tribe or retain their interests in land and participate in a Land Management Plan. About 80% of the members elected to withdraw. The treaty rights to hunt, trap and fish on the former Indian land were retained by both those who withdrew and those who did not.<sup>36</sup>

In *United States v. Adair*, the Klamath Tribes' right to sufficient water to support a moderate livelihood based upon hunting and fishing was upheld.<sup>37</sup> The court held that the priority date of that right was "time immemorial."<sup>38</sup> Proceedings to quantify those rights are the subject of complex litigation in the Matter of the Determination of the Relative Rights of the Waters of the Klamath River in Oregon.<sup>39</sup> As

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32. *Hearing on H.R. 2785 A Bill to Amend the Klamath River Basin Fishery Resources Restoration Act Before the Subcomm. on Fisheries Conservation, Wildlife and Oceans*, 106th Cong. 3 (2000) (statement of Michael J. Anderson, Principal Deputy Assistant Secretary for Indian Affairs, Dep't of the Interior), available at [http://naturalresources.house.gov/UploadedFiles/Michael\\_Anderson\\_testimony\\_5.4.00.pdf](http://naturalresources.house.gov/UploadedFiles/Michael_Anderson_testimony_5.4.00.pdf).

33. CAL. CODE REGS. tit. 14, § 7.50(b) (2010).

34. Treaty with the Klamath, etc., Oct. 14, 1864, 16 Stat. 707 (1864).

35. 25 U.S.C. §§ 564-564w (2010).

36. *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974).

37. *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984).

38. *Id.* at 1415.

39. See Oregon Water Resources Department, *Water Resources Department Klamath Basin Adjudication/ADR*, <http://www.oregon.gov/OWRD/ADJ/index.shtml> (last visited April 7, 2011). In Oregon, water adjudications are conducted initially by the Oregon

discussed below,<sup>40</sup> in this state adjudication proceeding, the United States has stipulated its willingness to abide by the water rights priorities, and to subordinate tribal water rights to junior, non-Indian irrigation interests, as set forth in the KBRA.<sup>41</sup>

On October 4, 1993, Interior Solicitor John Lesly issued a Memorandum Opinion confirming the fishing rights of the Yurok and Hoopa Tribes.<sup>42</sup> The Solicitor concluded that at the time the reservations were created in 1855-91, the United States was well aware of the Hoopa and Yurok Indians' dependence upon the Klamath River fishery:

“A specific primary purpose for establishing the reservation was to secure to the Indians the access and right to fish without interference from others. As against third parties, the Indians' reserved rights were of no less weight because they were created by executive orders pursuant to statutory authority rather than by treaty.”<sup>43</sup>

The Solicitor went on to hold that the United States had reserved for the Tribes “a federally protected right to the fishery resource sufficient to support a moderate standard of living,” an entitlement that “is limited to the moderate living standard or 50% of the harvest of Klamath-Trinity Basin salmon, whichever is less.”<sup>44</sup>

Shortly after the Lesly Opinion, the Ninth Circuit upheld a Department of Commerce interpretative rule adopting the Solicitor's Opinion as applicable law under the Magnuson-Stevens Act and restricting ocean harvest of salmon

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Water Resources Department, then proceed to court. An adjudication is a legal process to determine the extent and validity of existing rights to use water and thereby settle the water rights within a particular area among various water right holders.

40. See *infra*, Section VI; see also *infra* note 133.

41. Stipulation of Conditional Withdrawal of KPWU's Contests to Claim 616 and 622 and Conditional and Interim No-Call Provisions by the United States and Klamath Tribes, In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River (2009) (No. 286) [hereinafter Stipulation of Conditional Withdrawal], available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>.

42. Fishing Rights of the Yurok and Hoopa Valley Tribe, Op. Dept. of Interior M-37979 (October 4, 1993), available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>.

43. *Id.* at 15-16.

44. *Id.* at 32; see also *id.* at 7 (not addressing the rights of the Resighini Rancheria or other tribes in the Klamath River Basin.).

to make fish available on the reservations.<sup>45</sup> The Court rejected the argument that tribal fishing and water rights secured by Executive Orders were entitled to less protection than those of treaty tribes. “We have noted with great frequency,” the Court said, “that the federal government is the trustee of the Indian tribes’ rights, including fishing rights. This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole.”<sup>46</sup>

### III. THE UNITED STATES IS A TRUSTEE IN MANAGING TRIBAL RESOURCES

The Klamath Basin Agreements concern the trust responsibilities of three Interior Department bureaus—Reclamation, Land Management, and the Fish and Wildlife Service—as well as those of FERC<sup>47</sup> and the National Marine Fisheries Service,<sup>48</sup> part of the Department of Commerce. A trustee typically holds property for the benefit of another and has duties of loyalty and fiduciary responsibility to the beneficiary of the trust. The application of the federal trust responsibility has been found to include these same duties. A classic case applying federal trust responsibilities is *Pyramid Lake Paiute Tribe v. Morton*.<sup>49</sup> There, the Court rejected diversions of water for a federal irrigation project that adversely affected the Pyramid Lake Tribe. The Court found the diversions to be a violation of the Secretary’s trust responsibility:

In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake. The United States, acting through the Secretary of the Interior, “has charged itself with moral obligations of the highest

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45. *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995).

46. *Id.* at 546 (citations omitted).

47. *E.g.*, *Covello Indian Cmty. v. F.E.R.C.*, 895 F.2d 581 (9th Cir. 1990).

48. *E.g.*, Secretarial Order No. 3206—American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act (signed by the Secretaries of the Department of Interior and the Department of Commerce June 5, 1997), available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>.

49. 354 F. Supp. 252 (D.D.C. 1972) (finding that failure to take action to protect tribal water rights was breach of trust).

responsibility and trust. Its conduct, as disclosed in the acts of those who represented it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards.”<sup>50</sup>

The United States has a fiduciary duty to protect and preserve each individual Tribe’s trust rights and assets.<sup>51</sup> When administering the trusts, the government must use the reasonable care, skill, and caution that a prudent person would use in the conduct of a similar activity under similar circumstances.<sup>52</sup> The federal trustee has the power to prosecute or defend actions, claims, or proceedings for the protection of trust property, and must take reasonable steps to enforce claims and defend actions that may result in trust losses.<sup>53</sup>

Under trust law, a trustee also has a duty of loyalty, which includes the duties to avoid conflicts of interests and to avoid self-dealing. Therefore, a trustee dealing with trust property for his own benefit violates the duty of loyalty.<sup>54</sup> He also violates the duty by self-dealing unless the trust instrument waives that duty or the beneficiary approves the act. In addition, exculpatory clauses—clauses in the trust instrument that waive a trustee’s liability—cannot waive a trustee’s liability for intentional acts.<sup>55</sup> Beneficiaries may limit a trustee’s liability by consenting to the act, releasing the trustee, or affirming the trustee’s acts.<sup>56</sup> These defenses require that the beneficiaries have capacity, know their rights, are not pressured, and are treated fairly. This means, in general, that if the United States subordinates tribal interests to other public interests in such a way as to cause harm to a Tribe’s interests, the tribe may bring an action for breach of

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50. *Id.* at 256 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)); see also *Gila River Pima-Maricopa Indian Cmty. v. United States*, 684 F.2d 852 (Ct. Cl. 1982).

51. See generally *Johnson v. M’Intosh*, 21 U.S. 543 (1823); FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW (2005) at Ch. 5 *Tribal/Federal Relationship*, and Ch. 15, *Tribal Property*.

52. See, e.g., *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475, (2003); *Osage Tribe of Indians of Oklahoma v. United States*, 72 Fed.Cl. 629, 643 (Fed.Cl. 2006)

53. See, e.g., *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

54. See, e.g., CAL. PROB. CODE § 16004 (1991).

55. See, e.g., *id.* § 16461.

56. See, e.g., CAL. PROB. CODE §§ 16463, 16464, 16465 (1991).

applicable trust duties.<sup>57</sup>

The federal trustee in the Klamath Basin has several conflicting responsibilities. The most senior trust duty is to protect the first-in-time tribal water and fishing rights. However, other projects in the area require a dependable water supply as well.<sup>58</sup> The Klamath Irrigation District,<sup>59</sup> a Congressionally-authorized Bureau of Reclamation project in the high elevation area south of Upper Klamath Lake, irrigates about 200,000 acres.<sup>60</sup> Congressionally-established wildlife refuges in the area, now operated by the U.S. Fish and Wildlife Service, also need water.

In 1955, Congress also authorized the Trinity River, the largest tributary of the Klamath, to divert surplus water into the Sacramento River and the federal Central Valley Project. Because the Bureau of Reclamation's excessive water diversions decimated Trinity River salmon runs, Congress mandated the Trinity River Restoration Project and emphasized that action was required "in order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe."<sup>61</sup>

The Solicitor's Office in the Department of Interior assessed the conflicting demands for Klamath water and, prior to the KBRA negotiations, steadfastly adhered to trust principles in line with tribal interests: "The United States has a trust responsibility to protect tribal trust resources. . . . In general, the trust responsibility requires the United States to protect tribal fishing and water rights, which are held in trust for the benefit of the tribes."<sup>62</sup> The Solicitor found these principles

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57. *E.g.*, *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252, 255-256 (D.C. Cir. 1973). Because of variations among treaties and statutes, precisely which laws create the applicable duties will vary from tribe to tribe.

58. See ERIC A. STENE, *THE KLAMATH PROJECT* 33-35 (1994), [http://www.usbr.gov/projects/Project.jsp?proj\\_Name=Klamath%20Project&pageType=ProjectHistoryPage](http://www.usbr.gov/projects/Project.jsp?proj_Name=Klamath%20Project&pageType=ProjectHistoryPage).

59. Act of Feb. 9, 1905, 43 U.S.C. § 601-612, 33 Stat. 714.

60. See STENE, *supra* note 58.

61. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 3406(b)(23), 106 Stat. 4600, 4720 (1992).

62. Memorandum of Regional Solicitor, Pacific Southwest Region to Regional Director, Bureau of Reclamation Mid-Pacific Region Re Certain Legal Rights and Obligations Related to the U.S. Bureau of Reclamation, Klamath Project (July 25, 1995) (citing *Pyramid Lake Paiute Tribe v. Department of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990)), available at <http://www.law.washington.edu/wjelp/issues/>

directly applicable to the Klamath Irrigation Project:

Reclamation is obligated to ensure that project operations not interfere with the Tribes' senior water rights. This is dictated by the doctrine of prior appropriation as well as Reclamation's trust responsibility to protect tribal trust resources.

With respect to the Tribes' fishing rights, Reclamation must, pursuant to its trust responsibility and consistent with its other legal obligations, prevent activities under its control that would adversely affect those rights, even though those activities take place off-reservation. Thus, Reclamation must use any operational discretion it may have to ensure that those rights are not diminished. In doing so, Reclamation, in formulating any operating plan, must minimize unnecessary waste and take such other steps within its legal and contractual authority as are necessary to protect tribal rights.<sup>63</sup>

In *Klamath Water Users Protective Ass'n v. Patterson*,<sup>64</sup> water users challenged an operating plan for the Klamath Irrigation District that adjusted water flows for the benefit of endangered species and also recognized Klamath, Yurok and Hoopa Valley Tribes' fishing and water rights in the Basin. The Court rejected the water users' claim and ruled "[s]imilar to its duties under the ESA, the United States, as a trustee for the Tribes, has a responsibility to protect their rights and resources."<sup>65</sup> As Circuit Judge Canby, who was not on the appellate panel, put it, "Once a tribe establishes priority water rights, the Bureau of Reclamation has a trust responsibility to honor those rights in allocating water in the operation of an irrigation project."<sup>66</sup> Nevertheless, although the first-in-time

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v001i01/docs/; *Mitchell v. United States*, 463 U.S. 206, 224-26 (1982); *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 425-26 (1991); *Joint Board of Control of the Flathead, Mission and Joeko Irr. Dist. v. United States*, 862 F.2d 195 (1988); see also Memorandum to Regional Director from Regional Solicitor, Pacific Southwest Region Re Oregon Assistant Attorney General's March 18, 1996 letter (Jan. 9, 1997), available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>.

63. Memorandum of Regional Solicitor, *supra* note 62, at 8 (citing *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 255-56 (1973)).

64. 204 F.3d 1206 (9th Cir. 1999).

65. *Id.* at 1213.

66. WILLIAM CANBY, *AMERICAN INDIAN LAW* 48 (5th ed. 2009).

priority for the water rights of the Klamath, Yurok, and Hoopa Valley Tribes is clear, the quantity of those rights is undefined because water rights quantification remains incomplete in Oregon and has not been commenced in California.

Because of the differing circumstances, statutes, and executive actions by which the United States set aside resources for the six federally-recognized tribes of the Klamath Basin, the United States has six different trust relationships, one with each Basin tribe. A trustee with multiple beneficiaries has a duty to act impartially and cannot, for example, allow one beneficiary to use the trust property without providing a similar benefit to other beneficiaries. Nor can a trustee reward one beneficiary for his or her cooperation with the trustee at the expense of another trust beneficiary.

In litigation concerning restoration activities on the Trinity River, which also compete with the federal Central Valley Project for water, the courts faulted the federal government for its long delays in taking action to restore tribal fisheries. The district court found that the government conduct breached its general and specific independent federal trust obligation to the Hoopa and Yurok Tribes. The Central Valley Project Improvement Act,<sup>67</sup> which seeks to fulfill “trust responsibilities to protect the fishery resources,”<sup>68</sup> in part gave rise to that finding. The Appeals Court found the findings “significant in that they provide support for the court’s order implementing portions of the Preferred Alternative as injunctive relief.”<sup>69</sup> The district court concluded that restoration of the Trinity River fishery was “unlawfully long overdue.”<sup>70</sup> The federal trustee’s renewed effort to back away from its obligations to Klamath Basin origin salmonids is remarkable in light of these recent judicial reprimands.

#### IV. THE DARK CHAPTER OF FEDERAL TERMINATION POLICIES

As illustrated in the cases of the Klamath and Quartz Valley

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67. Pub. L. 102-575, § 3406(b)(23).

68. *Westlands Water Dist. v. U.S. Dept. of Interior*, 275 F.Supp.2d 1157, 1167 n.3 (E.D. Cal. 2002), *rev'd on other grounds*, 376 F.3d 853 (9th Cir. 2004).

69. *Westlands*, 376 F.3d 853, 877.

70. *Westlands*, 275 F.Supp.2d at 1232.



tribes, the post-war years, particularly 1948-60, featured a federal policy of terminating trusteeship over American Indians and their property. Perhaps the public was bothered that the degree of success in assimilating immigrants had failed with the Indian people.<sup>71</sup> Perhaps at the same time, the Cold War, anti-communism, and the Joseph McCarthy era produced dissatisfaction with the Indian communalism adopted by the progressive movement and leaders such as John Collier and Felix Cohen. Some thought the government had been too protective, keeping the Indians apart from the rest of the country in reservations. For these and other reasons, when the Eisenhower Administration took office in 1953, with Republican majorities in both Houses of Congress, an extensive congressional effort began to reduce federal government involvement in Indian affairs.<sup>72</sup>

On June 9, 1953, the House considered House Concurrent Resolution 108, which declared the policy of Congress: “as rapidly as possible to make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens.”<sup>73</sup> The resolution quickly passed. Among the first tribes to be terminated were the Shivwitz and other Bands of Paiutes. Public Law 262, enacted in September 1954, directed the Bureau of Indian Affairs to sell the Band’s approximately 4,000 acres of land as soon as possible and to establish individual home sites for the members. Asked later why they had not objected to termination, a Kanosh Paiute man explained that the people had not understood what was happening.<sup>74</sup> Much the same thing happened to many other Indian tribes. For the Klamath Tribes of Oregon, termination meant that the Department of the Interior would offer the land for sale on the basis of competitive bids with terms as prescribed by the Secretary of Interior in conjunction with the Secretary of Agriculture, with a reversion leading the lands to become national forest lands.<sup>75</sup>

Beyond termination, Congress also emphasized the city as a school for the Indians of the 1950s. Under the Relocation

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71. MONROE E. PRICE, LAW AND THE AMERICAN INDIAN 582 (1973).

72. *Id.* at 583.

73. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

74. PRICE, *supra* note 71, at 585.

75. 25 U.S.C. § 564w-1(b) (1976).

Program, named the Employment Assistance Program, many young adult Indians were encouraged with financial grants to leave the reservation area. Taking away the lifeline of traditional means of livelihood, community integrity, and shared cultural practices often proved disastrous.

Tribes fought back against federal termination efforts and, as a result, reservation Indian communities have persisted. By the late 1960s, the disaster the termination policy created became well recognized. The Supreme Court interpreted termination provisions narrowly in *Menominee Tribe v. United States*<sup>76</sup> and *Bryan v. Itasca Cty.*,<sup>77</sup> and Congress and the courts began limiting and undoing the abuses of the termination policy. In the early 1970s, Richard Nixon enunciated the policy of Indian Self-Determination, a concept signed into law as the Indian Self-Determination and Education Assistance Act by President Ford in 1975.<sup>78</sup> Under this law tribes contract to perform management functions otherwise conducted by federal employees, and the tribes have proved themselves more adept and efficient than the federal government. Tribes in the Pacific Northwest and the Great Lakes areas fought battles in the courts and in Congress to uphold their treaty rights to take fish, leading to victory in *United States v. Washington*.<sup>79</sup> A series of bills were introduced in Congress to rescind or limit the Tribes' fishing rights, but none was enacted.<sup>80</sup>

In 1986, Congress restored the Klamath Tribes of Oregon to federal recognition.<sup>81</sup> Litigation based on the Secretary's failure to meet the preconditions of the California Rancheria Termination Act freed the Quartz Valley Tribe of certain aspects of termination.<sup>82</sup> The Hoopa Valley, Karuk, Resighini

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76. 391 U.S. 404 (1968) (not terminating treaty rights).

77. 426 U.S. 373 (1976) (narrowly construing Public Law 280).

78. Pub. L. No. 93-638, 88 Stat. 2203 (1975).

79. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (more commonly known as *United States v. Washington*, the lead case in the Western District of Washington).

80. *E.g.*, H.R. 9054, 95th Cong. (1977) ("Native Americans Equal Opportunity Act"); H.R. 9175, 95th Cong. (1977) ("Washington State Fishing and Hunting Equal Rights Act"); H.R. 9951, 95th Cong. (1977) ("Quantification of Federal Reserved Water Rights for Indian Reservations Act"); H.R. 13329, 95th Cong. (1977) ("Native Americans Equal Opportunity Act").

81. Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (1986).

82. *Stipulation and Order, Tillie Hardwick, et al. v. United States*, 2006 U.S. Dist.

and Yurok Tribes were fortunate enough to have escaped formal termination by the federal government.

The resumption of federally-protected fishing brought with it a resurgence of cultural vitality and livelihood on Indian reservations. Congress enacted legislation directing restoration of fish populations in the Trinity River, including Pub. L.102-575, §3406(b)(23), which directs action “to meet federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe.” A Department of the Interior Record of Decision in 2000<sup>83</sup> governs the Trinity River Restoration Program. Its success is hampered by under-funding, low water flows, and fish disease conditions in the portion of the Klamath River through which the Trinity runs must pass. Today, a new drive toward Indian self-governance and self-determination has produced a return of Indians to their traditional land bases, protection of subsistence resources and cultural preservation, and a new era, via reinforced tribal sovereignty, of economic development in Indian country.

Paradoxically, the Interior Department seems poised to return to the failed termination era of unilaterally abrogating tribal rights by adopting legislation necessary to implement the KBRA. While the current proposed legislation would not terminate all tribal land rights, as termination acts usually did in the 1950s, it would substantially abrogate tribal water and fishing rights, much like the proposed legislation in the 95th Congress in 1977.<sup>84</sup> Public and private interests that compete with tribal rights in the Klamath River Basin have produced the Klamath River Hydro and Restoration Agreements; together the agreements block or delay federal environmental protections for fish and deny to anadromous fish the water needed for restoration and fulfillment of tribal reserved rights.

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LEXIS 90855 (N.D. Cal. 1979) (No. C-79-1710 SW); *see also* *Duncan v. United States* 667 F.2d 36 Ct.Cl. 1981 (awarding damages for failure to follow the California Rancheria Act)

83. U.S DEP'T OF THE INTERIOR, RECORD OF DECISION, TRINITY RIVER MAINSTREAM FISHERY RESTORATION, FINAL ENVIRONMENTAL IMPACT STATEMENT/ENVIRONMENTAL IMPACT REPORT (Dec. 19 2000), *available at* <http://www.trrp.net/documents/ROD.pdf>.

84. *See supra* note 80.

## V. THE EXPIRED KLAMATH HYDROELECTRIC PROJECT LICENSE CANNOT BE RECONCILED WITH ENVIRONMENTAL CONSTRAINTS

The Klamath Hydroelectric Project consists of six project dams spanning sixty-four miles of the Klamath River in northern California and southern Oregon. The Federal Energy Regulatory Commission licenses the Klamath Hydroelectric Project as required by the Federal Power Act.<sup>85</sup> The dams lie downstream of the Klamath and Modoc Reservation but upstream of all of the California Tribes' reservations. The Klamath River is listed as a water quality impaired river under Section 303(d) of the Clean Water Act.<sup>86</sup> The Klamath Project dams and associated reservoirs significantly contribute to water quality impairment.<sup>87</sup>

Warm and calm surface water created by the shallow reservoirs of the Project provide an ideal environment for the growth of large algal blooms. In recent years, the government has issued public health alerts due to outbreaks of the toxic algae *Microcystis aeruginosa* within and downstream of the Klamath Hydroelectric Project. For example, in July-October 2005-2007, scientists recorded the toxic algae at levels that exceeded World Health Organization standards for recreational use by 10 to over 1000 times.<sup>88</sup> The United States Environmental Protection Agency has listed the upper Klamath River in California as impaired for excess microcystin toxins.<sup>89</sup>

Combinations of stagnant water conditions, low dissolved oxygen, and increased water temperature caused, in part, by dams have also had lethal consequences for fish. In 2002, Klamath River communities witnessed the largest adult fish kill recorded in U.S. history. Over 30,000 chinook, coho, and

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85. 16 U.S.C. § 792 *et seq.* (1960).

86. 33 U.S.C. § 1313(d) (2000).

87. FED. ENERGY REGULATORY COMM'N, OFFICE OF ENERGY PROJECTS, DIVISION OF HYDROPOWER LICENSING, KLAMATH HYDROELECTRIC PROJECT FERC PROJECT NO. 2082-027, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR HYDROPOWER LICENSE 3-95-98 (2007) [hereinafter FERC FEIS], available at <http://www.ferc.gov/industries/hydropower/enviro/eis/2007/11-16-07.asp>.

88. Expert Report of Jacob Kann, PhD, *McConnell v. PacifiCorp*, No. C07-02382 WHA (N.D. Calif. filed Mar. 27, 2007).

89. FERC FEIS, *supra* note 87, at 3-152-3-161.

steelhead salmon were found dead due in part to degraded water quality in the Klamath River between September 20 and 27, 2002.<sup>90</sup>

Degraded water conditions persist in the Klamath River. The Klamath River's water quality and ability to support healthy fisheries is declining. There is substantial evidence to indicate an increase in fish disease on the river, an increase in the toxic blue-green algae *Microcystis aeruginosa*, and an overall decline in fish populations.<sup>91</sup> The Hoopa Valley Tribe is a "State" for Clean Water Act purposes. Yet the Tribe's federally-approved water quality standards<sup>92</sup> for the portion of the reservation through which the Klamath River runs are not being met.<sup>93</sup> In sum, water quality conditions in the Klamath River are seriously impaired and pose an ongoing threat to the health of fish and aquatic species relied upon by both tribal and non-tribal communities.

The 1956 FERC license for operation of the Klamath Project expired several years ago on March 1, 2006.<sup>94</sup> PacifiCorp has continued to operate the Project under the authority of FERC with annual licenses that do not include terms or conditions to protect water quality or other affected resources. Other than completion of the Section 401 water quality certification process, the Project is ready to be re-licensed with conditions that will provide significant protection, mitigation, and enhancement of environmental resources. The current delay in issuance of the water quality certification allows the Project to continue operating and generating power revenues without the inclusion of the necessary environmental conditions and without complying with water quality standards.<sup>95</sup>

#### A. *FERC Proceedings on the Klamath Hydroelectric Project*

PacifiCorp applied for relicensing its Klamath Hydroelectric

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90. See Pacific Coast Fed. of Fishermen's Ass'n v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1089 (9th Cir. 2005) (citing unexplained fish kill).

91. Expert Report of Jacob Kann, *supra* note 88, at 3, 5, 13.

92. See Letter from Alexis Strauss, Director, Water Division, EPA, to Clifford Marshall, Hoopa Valley Tribal Council (Feb. 14, 2008), available at <http://www.hoopansn.gov/documents/WQCP2008EPALetter.pdf>.

93. Interview with Hoopa Tribal Environmental Protection Agency (Jan. 19, 2010).

94. Hoopa Valley Tribe v. F.E.R.C., 629 F.3d 209, 210 (D.C. Cir. 2010).

95. See California Trout v. F.E.R.C., 313 F.3d 1131 (9th Cir. 2002).

Project, and in November 2007, the Federal Energy Regulatory Commission issued a Final Environmental Impact Statement for Hydropower License.<sup>96</sup> The FEIS examined PacifiCorp's application with the Commission for a new license for the Klamath Hydroelectric Project, which has a capacity rating of 169 megawatts (MW), about two percent of PacifiCorp's total capacity, and generates about one percent (716,800 MWh) of PacifiCorp's average electricity production.

On March 29, 2006, the U.S. Departments of Commerce and Interior submitted joint preliminary fishway prescriptions.<sup>97</sup> These called for full volitional upstream and downstream fish passage. There are currently no salmon runs above Iron Gate Dam, the lowest structure in the Klamath Hydroelectric Project, since no fish passage was included when Iron Gate was built in 1961.<sup>98</sup> PacifiCorp filed alternative fishway prescriptions and also requested an administrative hearing pursuant to the Energy Policy Act of 2005.<sup>99</sup> That 2006 hearing—one of the first of its kind under the new EPAct hearing procedures—culminated in a series of orders and findings upholding the prescriptions.<sup>100</sup>

On January 29, 2007, the Departments of Commerce and Interior submitted joint modified fishway prescriptions that took into consideration the results of the EPAct proceeding. FERC, which at times has shown a propensity to overlook settled law,<sup>101</sup> noted in the FEIS that the prescriptions “*may* need to be included in a new license for this project.”<sup>102</sup> Plainly,

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96. See FERC FEIS, *supra* note 87.

97. See 16 U.S.C. § 811 (2005).

98. See Cal. Ore. Power Co. 25 F.P.C. 579 (Mar. 27, 1961).

99. Beth Ginsberg, Sandi Nichols, Laurie K. Beale, Attorneys for PacifiCorp, Stael Rives, PacifiCorp's Combined Request for Hearing on Disputed Issues of Material Fact Regarding U.S. Fish and Wildlife Service Section 18 Prescriptions and Bureau of Land Management and Bureau of Reclamation Section 4(e) Conditions and Request to Consolidate All Hearings Regarding the Klamath Hydroelectric Project (Apr. 25, 2006), available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>.

100. See Klamath Hydroelectric Project EPAct Proceeding, No. 2006-NMFS-0001 (indexing orders, findings, and transcripts), available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>.

101. See, e.g., *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984); *City of Tacoma v. F.E.R.C.*, 460 F.3d 53 (D.C. Cir. 2006) (holding that FERC has no discretion to reject prescriptions promulgated by Departments of Interior or Commerce pursuant to Section 4(e) or 18, respectively, of the Federal Power Act).

102. See FERC FEIS, *supra* note 87, at xxvi (emphasis added).

the conditions and prescriptions must be included.<sup>103</sup>

The FEIS considered retirement of the Copco No.1 and Iron Gate Dams, as well as retirement of J.C. Boyle, Copco I, Copco II and Iron Gate developments.<sup>104</sup> Table ES-1 summarizes the effects of various alternatives, showing that incorporating the mandatory fishway conditions produces a net annual loss of \$20.2 million, retirement of Copco I and Iron Gate Dams would produce a net annual loss of \$6.6 million; and retirement of all of the dams, a net annual loss of \$13.2 million.<sup>105</sup> Because, as discussed below,<sup>106</sup> measures needed to obtain certifications under the Clean Water Act have not yet been defined, the FERC FEIS could not evaluate the net benefits, if any, of a relicensed project that complies fully with current law. Nevertheless, the FEIS makes clear that substantial savings can be achieved by removing at least two of the four dams: Copco I and Iron Gate.

*B. Clean Water Act Certifications Are a Precondition to Relicensing*

Missing from the Klamath Hydroelectric relicensing proceeding to date are certifications under Section 401 of the Clean Water Act.<sup>107</sup> Without those certifications, FERC cannot issue a new license. A 1972 amendment to the Clean Water Act,<sup>108</sup> Section 401 requires compliance with applicable clean water requirements and sets forth procedures for obtaining certification. It states:

Any applicant for a Federal license or permit to conduct any activity including. . . operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates. . . that any such discharge will comply with the applicable provisions. . . of this title. . . If the State.

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103. *American Rivers v. F.E.R.C.*, 201 F.3d 1186, 1210 (9th Cir. 1999) (finding that NEPA analysis of McKenzie River project relicensing was adequate but, if license issues, the Secretary's conditions must be included).

104. *See See FERC FEIS, supra* note 87, at xxxiii.

105. *See id.* at 7.

106. *See infra* note 115.

107. *See* 33 U.S.C. § 1341(1977) (requiring § 401 certifications).

108. Pub. L. 92-500 added § 401, codified at 33 U.S.C. § 1341(1977).

. . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such federal application. *No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.*<sup>109</sup>

As Justice O'Connor explained, the Clean Water Act establishes distinct roles for the federal and state governments.<sup>110</sup> Section 303 of the Act requires States, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals.<sup>111</sup> A state water quality standard consists of the "designated uses of the navigable waters involved and the water quality criteria for those waters based upon such uses."<sup>112</sup> Section 401 carries out those standards.<sup>113</sup> Because Indian tribes are treated as States pursuant to Section 518 of the Act, Section 401 also enforces approved tribal water quality standards.

While Section 401 plays an important role in many situations, its interaction with hydropower licensing is particularly important.<sup>114</sup> As the *Jefferson County* case illustrates, water quality standards incorporated into a Section 401 certification may change the profitability of a proposed hydroelectric project; however, the tables may turn during project relicensing because under Section 15 of the Federal Power Act,<sup>115</sup> annual licenses automatically issue while a relicensing proceeding remains pending. Thus, delay in obtaining a Section 401 certification has the effect of delaying a new license and continuing hydro operations under the old, expired license terms and conditions.

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109. 33 U.S.C. § 1341 (1977) (emphasis added).

110. P.U.D. No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 704 (1994).

111. 33 U.S.C. § 1313(d) (2000).

112. P.U.D. No. 1 of Jefferson County, 511 U.S. at 704.

113. 33 U.S.C. 1341 (1977).

114. *Id.* (Section 401 applies to "any applicant for a Federal license or permit" involving a discharge into navigable waters, so it affects a wide range of activities.); *cf.* *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (narrower scope for NPDES permits).

115. 16 U.S.C. § 808(a) (1986).



*S.D. Warren Co. v. Maine Board of Environmental Protection*<sup>116</sup> illustrates the problem. Warren operates several hydropower dams on the Presumpscot River in Maine. In 1999, Warren sought to renew its federal license for the project. Warren contended that its project did not result in any discharge into the river and was thus exempt from a Section 401 certification. Maine disagreed and issued a certification that required minimum flows and passage for migratory fish and eels. FERC eventually licensed the five dams subject to the Maine Section 401 certification conditions. The Supreme Court unanimously ruled that Section 401 applies because water flowing through the hydropower project results in a discharge into navigable waters of the United States.

The Section 401 certificates have not been issued for the Klamath Project because the parties to the settlement discussions, described below, agreed that Section 401 proceedings would be halted indefinitely, or at least until the hydroelectric settlement terminates. While PacifiCorp made applications in 2006 for Section 401 certifications from the States of Oregon and California, those applications did not address the mandatory federal fishway conditions nor did they analyze whether discharges would affect the waters of the Hoopa Valley Indian Reservation, which is an “other state” within the meaning Section 401(a)(2).<sup>117</sup>

From 2006 to 2008, PacifiCorp and the California State Water Resources Control Board engaged in a long colloquy about providing consultants to assist with scoping the California Environmental Quality Act and with preparing an Environmental Impact Report. Finally, Entrix, a consulting firm, was hired.

On September 30, 2008, the State Water Resources Control Board announced planning times and locations for scoping meetings for the requested Section 401 water quality certification, to commence on October 20, 2008.<sup>118</sup> However,

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116. 547 U.S. 370 (2006).

117. Hoopa Valley Indian Tribe, *Water Quality* (Jan. 7, 2008), <http://www.hoopan-sn.gov/departments/tepa/waterquality.htm>; see also *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996).

118. Notice of Preparation and of Scoping Meetings for an Environmental Impact Report for 401 Water Quality Certification of the Klamath Hydroelectric Project (Sept. 30, 2008), available at <http://www.klamathriver.org/Documents/CWB-Scoping-Notice-93008.pdf>.

PacifiCorp withdrew its application for water quality certification, “to facilitate settlement negotiations for a long-term settlement of the Project.”<sup>119</sup> The abrupt halt to Section 401 proceedings in California alarmed the Hoopa Valley and Karuk Tribes, among others, but it became permanent when PacifiCorp’s Agreement-In-Principle (“AIP”) with the Interior Department and the governors of Oregon and California was publicly announced. The AIP provided that “imposition on PacifiCorp of significant regulatory costs for a Clean Water Act certification of the relicensing project during the [settlement process] shall give PacifiCorp a right of withdrawal from the Agreement-In-Principle.”<sup>120</sup> In other words, the parties to the AIP agreed that PacifiCorp could stopwork on the Section 401 proceedings while settlement discussions continued. Because no FERC license can issue without Section 401 certifications, this agreement halted the FERC relicensing process as well. In essence, Section 401 has been used to block water quality improvements rather than to promote compliance with water quality standards.

### *C. The KBRA and Dam Removal Negotiations*

Following completion of the AIP, settlement parties agreed that dam removal required approval of the KBRA. Because the KBRA depends on about one billion dollars in federal appropriations and leaves too little water in the river for fish restoration to occur, this agreement now presents a major barrier to retirement of the obsolete Klamath dams.

In November 2006, the California Energy Commission in cooperation with the Department of the Interior released a report on Klamath dam decommissioning costs.<sup>121</sup> PacifiCorp

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119. Letter from Robert E. Donlan, Counsel for PacifiCorp, Ellison Schneider and Harris, to Dorothy Rice, Executive Director, State Water Resources Control Board (July 11, 2008), *available at* [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/water\\_quality\\_cert/docs/klamath\\_ferc2082/klamath401withdrawal\\_july2008.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/klamath_ferc2082/klamath401withdrawal_july2008.pdf).

120. Agreement in Principle Between PacifiCorp, State of Oregon, California Resources Board and Department of Interior, (Nov. 13, 2008), *available at* [http://www.doi.gov/archive/news/08\\_News\\_Releases/klamathaip.pdf](http://www.doi.gov/archive/news/08_News_Releases/klamathaip.pdf).

121. M CUBED & U.S. BUREAU OF RECLAMATION TECHNICAL SERVICES CENTER, CAL. ENERGY COMM’N, ECONOMIC MODELING OF RELICENSING AND DECOMMISSIONING OPTIONS FOR THE KLAMATH BASIN HYDROELECTRIC PROJECT (Nov. 2006), *available at* [http://act.americanrivers.org/site/DocServer/Klamath\\_CEC\\_Report.pdf?docID=5181](http://act.americanrivers.org/site/DocServer/Klamath_CEC_Report.pdf?docID=5181).

responded to the report by retaining Christensen Associates Energy Consulting, LLC to review the report. Christensen contended that it found several flaws and argued that, with their corrections to the CEC Report, relicensing the Klamath Hydro Project would cost \$46 million less than decommissioning.<sup>122</sup> The CEC replied by issuing an addendum to its original report. The CEC insists that relicensing, including mitigation costs, creates the highest risk for PacifiCorp rate payers.<sup>123</sup> The CEC Report supports the FERC FEIS conclusion that decommissioning is cheaper than relicensing, but goes even farther, to conclude that the cheapest alternative is removal of all four dams, not just two.

The negative economic benefits of relicensing the Project while complying with Indian fishing rights, the Clean Water Act, and the Endangered Species Act, created an opportunity for the parties to negotiate concerning retirement and removal of some or all of the dams. This coincided with the Bureau of Reclamation's and irrigation interests' (led by the Klamath Water Users Association and the Klamath Off-Project Water Users Association) wish to establish the seniority of their water rights over those of the Indian tribes. However, as noted above,<sup>124</sup> the tribes currently have senior rights because their water rights were reserved many years before the irrigation project was created. What followed was a long series of negotiation sessions, at first presided over by the Interior Department's representatives, but later by mediator Ed Sheets.

On January 15, 2008, approximately 20 negotiating parties (not including the licensee, PacifiCorp) released Draft 11 of the KBRA. That partial agreement proved both incomplete and controversial. It was substantially incomplete because it depended for its effectiveness upon completion of a Klamath Hydroelectric Project Settlement Agreement, enactment of federal legislation, and one billion dollars in federal funding. It was controversial for several reasons, including the fact that analysis of the water flows projected to reach California

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122. See DANIEL G. HANSEN ET AL., CHRISTENSEN ASSOCIATES ENERGY CONSULTING, EVALUATION OF THE KLAMATH PROJECT ALTERNATIVES ANALYSIS MODEL (Mar. 2007) available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>.

123. *Id.*

124. See *supra* Section II.

showed that Coho salmon will be jeopardized, not restored, due to the water diversions authorized in the KBRA. The Hoopa Valley Tribe argued vigorously for revision of KBRA Draft 11, and the Resighini Rancheria also adopted resolutions and public statements opposing the agreement in that form. In addition, environmental groups, such as Water Watch of Oregon and Oregon Wild, opposed the KBRA provisions guaranteeing commercial farming of the federal wildlife refuges.

#### *D. Klamath Hydroelectric Settlement Agreement*

On September 30, 2009, the negotiating parties released the draft Klamath Hydroelectric Settlement Agreement (“KHSA”).<sup>125</sup> The KHSA amplifies the Agreement-In-Principle entered into by PacifiCorp, the U.S. Department of Interior, and the governors of California and Oregon in November 2008. If Congress approves the requisite federal legislation, the Secretary of the Interior would proceed to a determination, perhaps as soon as 2012, concerning whether dam removal is in the public interest, and if so, whether removal should be carried out by a federal agency or by a private Dam Removal Entity (“DRE”).<sup>126</sup>

The settlement processes culminated with the simultaneous execution of both the KBRA and the KHSA, by approximately 20 parties, on February 18, 2010.<sup>127</sup>

The KHSA has been submitted to FERC for informational purposes but no review or approval of it has been sought. After the agreements were signed, PacifiCorp sought permission from the Oregon Public Utility Commission to implement a customer surcharge of approximately 2% on power sales within Oregon. PacifiCorp also seeks approval for such surcharges from the California Public Utilities Commission. In addition,

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125. Ed Sheets Consulting, *Draft Klamath Hydroelectric Settlement Agreement* (Sept. 30, 2009), available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>.

126. In this respect, the KHSA departs from the AIP which specifically precluded a federal DRE, a reflection of the policies of the Interior Department under the previous federal administration.

127. See Ed Sheets Consulting, *Summary of the Klamath Basin Settlement Agreements 1* (2010), available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>

the KHSA parties will seek federal legislation which must carry out the provisions of both the KHSA and the KBRA. They will also seek voter approval of \$270 million via a water bond in California.<sup>128</sup>

Under the KHSA, if the Secretary of the Interior approves dam removal, then permitting and preparation will begin and dam removal could commence as soon as 2020. However, if removal actually occurs in 2020, additional compensation must be made to PacifiCorp pursuant to KHSA Section 7.3.3. That provision suggests that PacifiCorp nets \$27 million per year for each year of continued operation of the project under the annual licenses, as conditioned by “interim measures” which are part of the KHSA. Thus, from the utility’s perspective, the KHSA (1) caps customer contributions, (2) provides PacifiCorp complete immunity from liability associated with dam removal or conditions found within the project area, and (3) provides PacifiCorp profitable operations for as long as it takes to enact the federal legislation and obtain decommissioning permits.

The KHSA prohibits the Secretary of Interior from choosing dam removal until, among other things, both California and Congress pass legislation to authorize and fund it.<sup>129</sup> Thus, while the “restoration” activities of the KBRA, will require \$985 million in federal funds, none of those funds would be available to perform the most important fish restoration activity in the Basin—dam removal. Dam removal will depend on private and state funds.

The KHSA minimizes PacifiCorp’s required operational changes until at least 2021. It seeks to strip FERC of jurisdiction to require actions for the protection of fish and wildlife during the long hiatus in relicensing. It also protects the utility from unconsented steps to comply with measures to improve water quality.<sup>130</sup> Most important, the KHSA halts the Section 401 state water quality certification proceedings which are currently underway in California and Oregon—Section 6.5—thus blocking completion of the new FERC license.

In addition, the KHSA lists numerous events that may

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128. See Klamath Hydroelectric Settlement Agreement, *supra* note 12, at 23-26; see also PacifiCorp Application to Implement the Provisions of Senate Bill 76, UE 219, No. 10-364 (Pub. Util. Comm’n of Or. Sept. 16, 2010) (order), available at <http://apps.puc.state.or.us/orders/2010ords/10-364.pdf>.

129. Klamath Hydroelectric Settlement Agreement, *supra* note 12, § 3.3.4.

130. See *id.* §§ 6.1.1, 6.3.4.A

terminate the dam removal planning process. In the event of termination, the FERC relicensing proceedings will resume.<sup>131</sup> In essence, because of the suspension of the Section 401 certification, the KHSA provides an indefinite stay of FERC relicensing proceedings, coupled with automatic issuance of annual licenses, at least through 2021. This stay can potentially last much longer, because amendments to the KHSA to extend deadlines for compliance can continue indefinitely with the agreement of certain key parties.<sup>132</sup>

As noted above, FERC, like other arms of the federal government, exercises trust responsibilities to Indian tribes.<sup>133</sup> The Commission works with tribes on a government-to-government basis and seeks to address the effects of proposed projects on tribal rights and resources pursuant to statutes governing the Commission's authority and the Commission's environmental and decisional documents. These duties should lead FERC here to conclude that the State parties' agreement in the KHSA to suspend processing of Section 401 certification applications, for a decade or more, constitutes waiver of that precondition to issuance of a FERC license. 40 C.F.R. § 121.16 provides that the certification requirement with respect to an application for a license shall be waived upon notification by the licensing agency "of the failure of the State. . . concerned to act on such request for certification within a reasonable period of time after receipt of such request. . . (which period shall generally be considered to be 6 months, but in any event shall not exceed 1 year)." Thus far, FERC has chosen not to act. FERC has also declined to consider or to approve the KHSA.

## VI. THE FEDERAL GOVERNMENT SEEKS TO CHANGE ITS TRUSTEE DUTIES THROUGH THE KBRA

Parties to the Klamath River water rights adjudication pending in the Oregon State administrative process have stipulated that KBRA provisions should limit the federal government's authority and responsibility to administer and divert water to the Bureau of Reclamation's Klamath Project.

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131. *See id.* § 8.11.1.

132. *See id.* § 8.11.3.D.

133. 104 F.E.R.C. ¶ 61, 108 (2003).

However, if adopted, the KBRA provides that these limits would come at the expense of Indian water and fishing property rights and interests in California, over which the Oregon proceedings have no jurisdiction, and for which the federal government has trustee responsibilities. While the Conditional Stipulation<sup>134</sup> would take effect only upon ratification of KBRA, the Conditional Stipulation starkly illustrates the United States' willingness to weaken the authority and obligation of the Secretary of the Interior and the Secretary of Commerce to administer programs and facilities, including the Klamath Irrigation Project, to protect the water and fishing rights and claims of the non-signatory Indian tribes. The KBRA would preclude the United States, as trustee, from asserting tribal water or fishing rights theories or tribal trust theories on behalf of those tribes in any proceeding unless the Project exceeds its guaranteed water diversion amounts.

*A. KBRA Provisions Require United States' Federal Trustee to Abdicate its Trust Responsibility*

In the KBRA provisions that are included in the Klamath Basin adjudication Stipulation, the United States, acting in its trust capacity, warrants that it will not assert tribal water or fishing rights in a manner that will interfere with diversion of water by the Klamath Reclamation Project, so long as those diversions are permitted by a document called "AppendixE-1."<sup>135</sup> That proposed commitment is to be ratified by Section 109(g) of the Interior Department's "drafting service" bill, (not yet introduced in Congress) as follows:

(g) ACTIONS OF THE UNITED STATES ACTING IN ITS CAPACITY AS TRUSTEE. — In return for the Klamath Project Water Users' commitments. . . and other benefits as set forth in the Restoration Agreement and this Act, the United States, as trustee on behalf of the federally recognized tribes of the Klamath Basin and allottees of reservations of federally recognized tribes of the Klamath Basin in California, is authorized to make the commitments provided in the Restoration

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134. See Stipulation of Conditional Withdrawal, *supra* note 41.

135. See Klamath Basin Restoration Agreement, *supra* note 4, § 15.3.9.

Agreement, including the assurances in section 15 of the Restoration Agreement. Such commitments are confirmed as effective and binding without further action by the United States.<sup>136</sup>

The federal trustee's proposed abrogation of its responsibility to protect Indian water and fishing rights is dubious public policy. The Affiliated Tribes of Northwest Indians<sup>137</sup> and the National Congress of American Indians<sup>138</sup> have adopted resolutions opposing this step. Congress should exercise caution about any proposed unconsented termination of the federal trustee's duty to restore and protect the Indians' right to a moderate livelihood based upon the taking of anadromous fish of the Klamath River.

*B. The KBRA's Limitations on Water Diversions to the Klamath Project*

The nature, extent and priority of the federal responsibilities for tribal rights in California and Klamath Project administration are defined in case law and set forth in three Interior Department Solicitor's opinions of 1993, 1995 and 1997.<sup>139</sup> The federal government's authority and responsibility to administer and divert water to the Klamath Project is already limited by the government's trustee responsibilities to tribes. The KBRA's "limitations" on water diversions to the Klamath project functionally guarantee a delivery amount below which the federal government agrees not to assert its trust responsibilities to tribes.

The KBRA guarantees irrigation diversions of water for the Klamath Irrigation Project in Oregon. The guarantee of those diversions—330,000 to 385,000 acre-feet (af) per year—would

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136. See H.R. ---, 111th Cong, 2d Sess., at 12 (discussion draft not yet introduced in Congress), available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>.

137. See Danny Jordan, Affiliated Tribes of NW Indians, *Resolution No. 09-63, Support for Sovereign Authority of Tribes to Enter Water Agreements* (Sept. 21, 2009), available at <http://atntribes.org/PDF%20Docs/resolutions/2009/annual/res-09-63.pdf>.

138. See Brian Cladoosby, The National Congress of American Indians, *Resolution No. PSP-09-051, Support for Sovereign Authority of Tribes to Enter Into Water Agreements* (Oct. 12, 2009), available at [http://www.ncai.org/fileadmin/resolutions/PSP-09-051\\_final.pdf](http://www.ncai.org/fileadmin/resolutions/PSP-09-051_final.pdf).

139. See Fishing Rights of the Yurok and Hoopa Valley Tribe, *supra* note 42; see Memorandum of Regional Solicitor, *supra* note 62; see Memoranda to Regional Director from Regional Solicitor, *supra* note 62.



trump the instream flow needs of fish and other aquatic organisms in the Klamath River.<sup>140</sup> Fish would get whatever water remains after those diversions. This imbalance in the allocation of risks in the KBRA stands the reserved rights doctrine on its head and portends serious adverse consequences for the fishery and tribal rights.

Analysis of the guaranteed diversions makes clear that the water flows in the vicinity of Iron Gate Dam<sup>141</sup> would frequently fail to protect salmon in the mainstream Klamath River. After California tribes' instream flow rights were established, the Interior Department commissioned a study to determine the volume of Klamath River flows needed to support fish runs that would satisfy the tribes' moderate living requirements. The result was the Hardy II Report, which can be viewed as an attempt to quantify scientifically the water required to support the federally protected fish harvesting rights reserved to the tribes.<sup>142</sup> The Hardy recommendations "specify flow regimes that will provide for the long-term protection, enhancement, and recovery of the aquatic resources within the main stem Klamath River in light of the Department of the Interior's trust responsibility to protect tribal rights and resources as well as other statutory responsibilities, such as the Endangered Species Act."<sup>143</sup> Dr. Hardy's analysis represents the best available science concerning fish flow requirements in the Klamath River.<sup>144</sup> Under the KBRA, the water flows remaining in the river after irrigation project diversions will not satisfy the Hardy flow standards. For example, modeling of the KBRA flows at the site of Iron Gate Dam shows they would have provided less than the Hardy flows in all Octobers of water years 1961–2000 and nearly all Novembers. Violations of required flows would

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140. Klamath Basin Restoration Agreement, *supra* note 4, at E.25.

141. Iron Gate dam is the fish-blocking dam farthest downstream on the Klamath River, located near Interstate 5 in California.

142. THOMAS HARDY, ET. AL., U.S. DEP'T OF THE INTERIOR, EVALUATION OF INSTREAM FLOW NEEDS IN THE LOWER KLAMATH RIVER, PHASE II FINAL REPORT (2006), available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>.

143. *Id.* at ii.

144. See NAT'L RESEARCH COUNCIL, HYDROLOGY, ECOLOGY AND FISHES OF THE KLAMATH BASIN (2008); Nat'l Marine Fisheries Serv., *Biological Opinion, Operation of the Klamath Project between 2010 and 2018* (2010), available at [http://swr.nmfs.noaa.gov/klamath/FINAL-Klamath\\_Ops\\_031510.pdf](http://swr.nmfs.noaa.gov/klamath/FINAL-Klamath_Ops_031510.pdf).

also be common in July, August, and September of those same years.<sup>145</sup>

In response to the public outcry over ESA-required reductions in Klamath irrigation in 2001, Vice-President Cheney intervened to restore water to farmers.<sup>146</sup> The Department of the Interior pressed the National Marine Fisheries Service (“NMFS”) to revise its Biological Opinion and assign to the federal irrigation project only 57% of the responsibility for releasing water.<sup>147</sup> NMFS complied (though its lead biologist, Michael Kelly, resigned in protest).<sup>148</sup> The resulting low flows caused by irrigation diversions led to a massive fish die-off in September 2002, the largest loss of adult salmon in United States’ history. In *Pacific Coast v. Bureau of Reclamation*,<sup>149</sup> the Court found that the ESA had been violated and it directed issuance of an injunction against reductions below the long-term flows required by the Biological Opinion. Nevertheless, the 2002 adult salmon die-off hurt Trinity River spring and fall chinook populations and harvests: up to 70,000 adult salmon, principally of Trinity River origin, died of a disease epidemic in the hot shallow waters of the lower Klamath River.<sup>150</sup>

Establishing a policy of permanent, excessive, and guaranteed diversions for irrigation interests, relegating fish and aquatic resources to whatever is left, is especially troubling as we enter the uncertain era of climate change.<sup>151</sup>

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145. HOOPA VALLEY TRIBAL FISHERIES DEPT, SUMMARY OF SCIENTIFIC CONCERNS REGARDING FISHERIES IMPACTS OF THE KBRA, (2009), available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>.

146. The Vice-President’s efforts not coincidentally aided a Republican Senate candidate, Gordon Smith. See Jo Becker & Barton Gellman, *Leaving No Tracks*, WASHINGTON POST, June 27, 2007 at A01, available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>

147. *Pac. Coast Fed’n of Fishermen’s Ass’ns v. United States Bureau of Reclamation*, 426 F.3d 1082, 1088, 1093 (9th Cir. 2005)

148. See *Oversight Hearing on Crisis of Confidence: The Political Influence of the Bush Administration on Agency Science and Decision-Making: Hearing Before the H. Natural Resources Comm.*, 110th Cong. (2007) (statement of Mike Kelly Former USFWS and NOAA Fisheries Biologist), available at [http://www.peer.org/docs/noaa/07\\_30\\_07\\_mike\\_kelly\\_testimony\\_nr\\_committee.pdf](http://www.peer.org/docs/noaa/07_30_07_mike_kelly_testimony_nr_committee.pdf).

149. 426 F.3d 1082, 1095 (9th Cir. 2005).

150. See Tom Schlosser, *Irrigation Interests Threaten Precious Hoopa Tribal Fisheries*, available at <http://www.law.washington.edu/wjelp/issues/v001i01/docs/>.

151. Klamath Basin Restoration Agreement, *supra* note 4, at 133 (The KBRA parties agreed to determine as early as practicable how long-term climate change may affect

The KBRA guarantees the federal irrigation project may divert 378,000 af annually no matter how low the inflow to Upper Klamath Lake has been.<sup>152</sup> Evidently, the federal agencies involved in the KBRA believe that the funding promised in the KBRA justifies overriding California tribes' interests in protection of their water and fishing rights.

## VII. POST-SETTLEMENT PROCEEDINGS

The Oregon Department of Environmental Quality and the California State Water Resources Control Board, the agencies that would consider PacifiCorp's Section 401 certification applications, were not parties to the KBRA or the KHSA, but the State Governors were. On May 18, 2010, the California State Water Resources Control Board adopted Resolution No. 2010-0024, granting a request to hold in abeyance the processing of PacifiCorp's water quality certification application.<sup>153</sup> However, the Resolution imposed a series of conditions to provide assurance that the KHSA process was proceeding as planned, including the requirement that federal legislation to implement the KHSA and KBRA be introduced by June 18, 2010.<sup>154</sup>

No legislation to implement the KBRA or the KHSA has been introduced, probably because of the large federal appropriations required and because of the strenuous opposition of the Hoopa Valley Tribe and the Resighini Rancheria. Further, the California Water Bond measure, intended to provide \$270 million dollars toward possible costs under the KHSA, was removed from the ballot by legislative action and will not be voted on before 2012, at the earliest.

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the fisheries and communities of the Klamath Basin and to incorporate those assessments into Endangered Species Act reviews, as applicable.)

152. *See id.* (The KBRA calls for preparation of a drought plan to address water shortfalls but no plan has been prepared as of the date of this publication. The KBRA also provides, however, that a drought plan may not restrict federal irrigation project diversions except in the extremely dry conditions represented by only two years since 1961. The KBRA also obligates signatories to support revision of Biological Opinions as necessary to achieve the diversion amounts guaranteed to the irrigation project.)

153. California State Water Resources Control Board, *Resolution No. 2010-0024, Request for Abeyance in Processing the Water Quality Certification Application of the Klamath Hydroelectric Project* (May 18, 2010), [http://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2010/rs2010\\_0024.pdf](http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2010/rs2010_0024.pdf).

154. *Id.*

Meanwhile, action plans to adopt Klamath River Total Maximum Daily Loads (“TMDL”) are complete in California and in Oregon.<sup>155</sup> The California action plan addresses temperature, dissolved oxygen, nutrient and microcystin impairments in the Klamath River. However, the KHSA, while it remains in effect, immunizes PacifiCorp from the responsibility to address those temperatures, nutrients or microcystin standards. Instead, PacifiCorp need only provide funding for certain studies and conferences described in an appendix to the KHSA. Nevertheless, PacifiCorp presented detailed comments opposing the TMDL action plan in California. Despite that, the California State Water Resources Control Board approved the TMDL action plan setting limits on nutrients, algae, and water temperature over PacifiCorp’s objections.<sup>156</sup>

In 2008, the California State Water Resources Control Board conducted scoping sessions to determine the impacts of issuance of a Section 401 certification to PacifiCorp.<sup>157</sup> Due to the Agreement-in-Principle and the KHSA, no draft environmental impact report has yet been prepared or circulated. Because the milestones toward completion of the KHSA process have not been achieved, the Water Board revised its resolution to further postpone processing of the Section 401 certification until at least May 2011.<sup>158</sup>

Without enactment of the requisite legislation, the new Klamath River Hydro and Restoration Agreements will have to be substantially changed. The agreements themselves call for termination of their effectiveness if the required legislation does not pass.<sup>159</sup> As noted above, termination of the KHSA will lead to resumption of the FERC licensing proceedings and, very likely, dam decommissioning. Meanwhile, the Oregon

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155. *E.g.*, State Water Resources Control Board, *Resolution No. 2010-0043, Approving Amendments to the Water Quality Control Plan for the North Coast Region (Basin Plan)* (Sept. 7, 2010) [http://www.swrcb.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2010/rs2010\\_0043.pdf](http://www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/2010/rs2010_0043.pdf).

156. *Id.*

157. *See S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 547 U.S. 370 (2006)

158. California State Water Resources Control Board, *Resolution No. 2010-0049, Regarding Further Abeyance in Processing the Section 401 Water Quality Certification of the Klamath Hydroelectric Project* (Oct. 5, 2010) [http://www.swrcb.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2010/rs2010\\_0049.pdf](http://www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/2010/rs2010_0049.pdf).

159. *E.g.*, Klamath Hydroelectric Settlement Agreement, *supra* note 12, at 62.

water adjudication continues to move slowly toward determination of water rights in Oregon. Biological opinions, issued pursuant to the Endangered Species Act, set minimum standards to protect threatened and endangered fish but do little for restoration.

## VIII. CONCLUSION

The proposed limitation of federal trust responsibilities to protect Indian tribal resources in the Klamath River Basin followed from the Bush Administration's political decision to elevate the interests of the Bureau of Reclamation and its allied farming community over other federal responsibilities.<sup>160</sup> It was made possible in part by downplaying sound science and overruling the consequences for protected fish and wildlife species. Further, the Klamath Hydroelectric Project offers a stark example of how Clean Water Act Section 401 certifications are used by licensees and willing agencies to delay implementation of effective environmental enhancement measures. The recently-signed KBRA and KHSA do not fulfill their promises because they depend upon enactment of ambiguous restoration provisions and require \$1 billion in federal appropriations. The agreements will substantially delay the decommissioning of facilities that cannot reasonably comply with current law. In short, the Government has failed its trust obligations through the KBRA and KHSA process. A change in direction is required to protect the fisheries and water resources of the Klamath River Basin.

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160. See *Leaving No Tracks*, *supra* note 146.