

ADVERSE EFFECTS OF THE KLAMATH BASIN WATER AND HYDROELECTRIC AGREEMENTS ON TRINITY RIVER RESTORATION

The Klamath River flows through California's Hoopa Valley Indian Reservation. The Klamath's largest tributary, the Trinity River, bisects the Hoopa Valley Reservation en route to its confluence with the Klamath River approximately 45 miles upstream of the Pacific Ocean. The Trinity River produces most of the anadromous fish in the Klamath River basin. The Klamath River provides essential water and habitat for fish migrating between the ocean and the Trinity River. The Hoopa Valley Tribe has vested fishing rights in the Klamath/Trinity fishery that the United States holds in trust pursuant to congressional, judicial, and administrative authority.

In 1984 Congress found that the Central Valley Project's Trinity River Division caused a "drastic reduction in anadromous fish populations." In the quarter century since then, bipartisan congressional and administration actions in conjunction with the Hoopa Valley Tribe produced the Trinity River Restoration Program.

In the past decade, conflicts over water rights and hydroelectric licensing proceedings in the upper basin of the Klamath River have presented a new threat to the Trinity River fishery and the restoration program. The principal source of the conflict lies with the Bureau of Reclamation's Klamath Project and the proposed allocation of water for irrigation. The new proposed Klamath River Agreements present three challenges to the Hoopa Valley Tribe's vested rights: (1) failure to fund and implement restoration as prescribed by the December 19, 2000 Trinity River Mainstem Fishery Restoration [Record of Decision \(ROD\)](#); (2) infection of salmon smolts by parasites in the main stem Klamath River causing death or debilitation of smolts; and (3) disease epidemics near the mouth of the Klamath River occurring from insufficient water flows in the main stem Klamath as a result of federal irrigation diversions in the Upper Klamath Basin, near Klamath Falls, Oregon.

The proposed Klamath River Restoration Agreement ([KBRA](#)) and the Klamath Hydroelectric Settlement Agreement ([KHSA](#)) threaten success of the Trinity River Restoration Program in several ways.

First, parties to the Klamath River water rights adjudication pending in Oregon state court advocate that the proposed Klamath River Basin Restoration Agreement (KBRA) include limits on the federal government's authority and responsibility to administer and divert water to the Bureau of Reclamation's Klamath Project. However, if adopted, those limits would come at the expense of water and fishing property rights and interests in California for which the Federal government is also responsible. The nature, extent and priority of the federal responsibilities for tribal rights in California and Klamath Project administration are set forth in, among other documents, two Pacific Southwest Regional Solicitor's opinions dated July 25, 1995 and January 9, 1997. Among other things the opinions concluded that "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 . . ." ([1995 Opinion](#) at 8), and that tribes' rights are "superseding obligations" ([1997 Opinion](#) at 8) that are "senior and enforceable against junior uses, and adjustments may be required in how the Klamath Project is operated to be consistent

with the tribes' rights." (*Id.* at 5, n.6.) [Resolution 09-63](#) of the Affiliated Tribes of Northwest Indians supports the sovereign authority of tribes to enter into water agreements and "opposes any policy of the United States to terminate the rights of, or impose adverse consequences upon, a tribe that chooses to retain its water rights instead of settling on terms desired by the federal government." [Proposed section 15.3.7](#) of the KBRA is the provision objected to by the Tribe that would have that effect.

Second, the KBRA guarantees irrigation diversions of water for the Klamath Irrigation District Project in Oregon. Those diversions--330,000 to 385,000 acre-feet per year--would trump the in-stream flow needs of fish and other aquatic organisms. Fish would get whatever water flow remains after those diversions. This imbalance in the allocation of risk in the KBRA stands the reserved rights doctrine on its head with real adverse consequences for the fishery. Analysis of the guaranteed diversions makes clear that the water flows in the vicinity of Iron Gate Dam (near Interstate 5, in California) would [frequently fail](#) the requirements of the National Marine Fisheries Services' Biological Opinion for protection of salmon in the mainstem Klamath River. Such low flows caused the fish die-off in 2002, adversely affecting Trinity River spring and fall Chinook populations. The 2002 event was the [largest adult salmon die-off in recorded history](#)--in September 2002 up to 70,000 adult salmon, [principally of Trinity River origin](#), died in the lower Klamath River.

Third, the 1955 act authorizing the Trinity Division of the Central Valley Project includes a provision that "not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users." That water supply could be critical to fish survival and restoration in the Klamath basin.

Fourth, the estimated \$1 billion price tag for the KBRA likely will divert funds from the already under funded Trinity restoration program. (For example, the FY 2010 budget is \$11.02 million, \$6.4 million below the Program requirements.)

Fifth, a lengthy dam removal planning process is authorized by the KHSA and minimal operational changes will be made by PacifiCorp to its fish-blocking dams during the next 11 to 25 years. None of the measures prescribed by the federal and tribal fisheries agencies pursuant to the Federal Power Act will be implemented except a few items listed in Appendices C and D of the KHSA, called the "interim measures." Thus, nearly all of the river's flow (and fish) will pass through PacifiCorp's turbines during that time. A minimal addition of gravel to the Klamath River below Iron Gate Dam will not aid fish survival. This is important because that area is a major disease breeding ground for the parasites that infect both juvenile and adult Trinity River salmonids when they enter the Klamath. Despite the concerns expressed by fisheries biologists, the PacifiCorp interim measures will not be re-examined for a number of years, far longer would be the case if the PacifiCorp Project proceeded through the normal Federal Energy Regulatory Commission relicensing/decommissioning process.

Fulfillment of the government's trust obligations and statutory duties to restore, replace and enhance the Trinity River fishery will require revision of the KBRA and KHSA.