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**TESTIMONY OF TRACEY LISKEY, PRESIDENT
KLAMATH WATER USERS ASSOCIATION
IN SUPPORT OF H.R. 7938
“THE KLAMATH BASIN WATER AGREEMENT SUPPORT ACT OF 2024”**

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON WATER, WILDLIFE AND FISHERIES**

HEARING TO RECEIVE TESTIMONY ON PENDING LEGISLATION

May 22, 2024

Chairman Bentz, Ranking Member Huffman, and Members of the Subcommittee, thank you for holding this important hearing and for allowing me the honor of providing testimony before this Subcommittee.

My name is Tracey Liskey. I am a farmer in the Klamath Project, a member of the Boards of Directors of Klamath Drainage District and Klamath Water Users Association (KWUA), and the President of KWUA’s Board of Directors. I am pleased to provide this testimony in support of H.R. 7938, “*The Klamath Basin Water Agreement Support Act of 2024.*”

This legislation will provide important tools and protections for farms and fish that are imminently needed, especially in light of the ongoing non-federal dam removal activities on the Klamath River. The bill will also provide tools for agencies and irrigators to address ongoing challenges in the difficult circumstances of the Klamath River Basin.

Last summer, KWUA provided written testimony in support of S. 482, which is very similar to H.R. 7938. We look forward to working with you and your colleagues in the Senate to realize enactment of this much needed legislation at the earliest possible time.

I am a fourth-generation farmer in the Klamath Basin. My family on the Liskey side came to the Basin in 1886 and my grandfather on my mother’s side was a World War I homesteader. My families came to this Basin along with many other families when it was still undeveloped and they put in an unbelievable amount of effort to turn the Basin into the highly productive agricultural region of today with the promise from our federal government of ample water to irrigate these lands.

KWUA is a nonprofit corporation, formed in 1953, whose members are irrigation districts who are contractors of the United States Bureau of Reclamation’s (Reclamation) Klamath Project (Project). Our members use water from the Klamath River and Upper Klamath Lake and deliver

that water to approximately 175,000 acres of high-quality agricultural land in Klamath County, Oregon, and Siskiyou and Modoc Counties in California. KWUA member districts also operate the infrastructure that delivers water to Tule Lake and Lower Klamath National Wildlife Refuges, critical areas in the Pacific Flyway.

In the testimony below, I provide background and context for the legislation, as well as KWUA's summary of the need and basis for the specific provisions of the bill. As an initial matter, I want to thank Chairman Bentz for his authorship and introduction of this legislation. It is very important to KWUA's members, and indicative of the Chairman's tireless work to support constructive and stable solutions for the Klamath Basin. We also thank Representative LaMalfa for your support of previous iterations of this legislation, and for your continued support of Project irrigators.

BACKGROUND AND NEED

The Klamath Basin and Klamath Project

The Klamath Basin comprises about 10 million acres, 200,000 of which are the irrigated lands of the Project. (See Attachment A, map with shading of the Klamath Basin and circle around Project area.) The Project, which straddles the Oregon-California border, was developed by Reclamation under the 1902 Reclamation Act, and Reclamation maintains some operational and oversight responsibilities for delivery of Project water via irrigation districts to the end user landowners (farmers). The Project relies on water from the Klamath and Lost River systems, including regulated storage in Upper Klamath Lake, Clear Lake, and Gerber Reservoir. Consumptive use of water on Project lands is almost certainly less than what occurred in undeveloped conditions. This is because there were areas of open water and marsh on what are now irrigated lands, and the evaporation and evapotranspiration rates on those lands were greater than the rate of evapotranspiration on cropland.

The irrigated lands of the Project support family farms and ranches that produce cereal grains, potatoes, pasture and hay, beef and dairy, and several specialty crops including horseradish, mints (for both oil and tea), strawberry rootstock, and others. Agricultural production supports local businesses and rural communities built on farming. The area of irrigated land today is not significantly different than it was in the early 1940's, although there have been major investments by growers and irrigation districts who constantly improve the efficiency of irrigation infrastructure. The Project is known for its extreme efficiency in water use, attributable largely to repeated re-use of the irrigation water supply.

Project facilities are the sole means for delivery of water to two longstanding and highly valued federal wildlife refuges – Lower Klamath and Tule Lake National Wildlife Refuges – managed by the U.S. Fish and Wildlife Service.

Our agricultural communities share the Klamath Basin with tribes in both Oregon and California. Three of these tribes (Klamath Tribes, Yurok Tribe, Hoopa Valley Tribe) have fishing rights as a matter of federal law. Others (for example, Karuk Tribe) also have a powerful interest in fisheries that have been part of the tribes' lifestyle and cultures for time immemorial. There are

also threatened and endangered fish species in the Klamath Basin. Unfortunately, the basin has become known for conflict, largely centered on allocation of water, with these interests and others all active.

Also, and very topical now, for over a century, there have been hydroelectric dams in the mainstem Klamath River: the first, Copco I, was constructed around 1915, and the newest (Iron Gate Dam) was constructed in the early 1960's. All four dams are covered under a license issued in 1956 (with amendments) by the Federal Energy Regulatory Commission (FERC). The hydroelectric dams have had a functional and legal relationship with the Project since 1917. The FERC license expired in 1956. Based on the dam owner's (PacifiCorp) timely application for renewal, and as provided in the Federal Power Act, the original license has been automatically renewed one year at a time, pending FERC action on the renewal application. The re-licensing process was a catalyst for activities and agreements discussed immediately below.

Commitments to Project Irrigators in 2010

As the 2006 expiration date for PacifiCorp's FERC license approached, KWUA and many other stakeholders in the Klamath Basin engaged in good faith negotiations in search of interest-based solutions to conflicts over water and related resources.

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

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

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

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

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

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

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

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

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

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

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

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

The 2016 KPFA

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

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

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

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

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

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

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

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

The proposed legislation, H.R. 7938, completes the process begun in 2018 and would enact the remaining provisions of the KPFA, as the parties to the agreement committed.

SECTION-BY-SECTION SUMMARY

The bill has only three sections.

Section 1. Short Title

Section 1 provides that the title of the Act is “*The Klamath Basin Water Agreement Support Act of 2024.*”

Section 2. Findings

Section 2 consists of congressional findings that describe the background and context for the legislation's substantive provisions.

Section 3. Klamath Project Water and Power

Section 3 consists of two subsections. Subsection (a) is the substantive part, in that it amends section 4 of the Klamath Basin Water Supply Enhancement Act of 2000 (Enhancement Act),¹ as further described below. Subsection 2(b)(2) provides a "savings" clause that addresses the administrative effect of these amendments: it requires compliance with existing federal law; that the legislation shall have no effect on water rights or tribal trust, or treaty obligations; and, the unavailability of federal funding and funding authorization for dam removal activities.

The amendments in subsection (a) of section 3 of H.R. 7938 address certain concerns with existing authorities, and adds specific new authorities, which can be categorized as follows.

Programs to Align Irrigation Supplies and Demands

Under H.R. 7938, subsection (b) of section 4 of the Enhancement Act would be amended by restating, verbatim, the existing subsection, which authorizes programs to align irrigation supplies and demands, with the exception of very minor wording changes as well as the omission of a sentence in the current law that imposes a \$10 million average annual limit on expenditures under the subsection. A new subsection (e) would also further elaborate on the goals of such programs.

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

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

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

Affordable Power

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

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

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

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

Restoration Activities

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

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

Pumping Plant D

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

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

Keno and Link River Dams

A new subsection (g)(1) would be added to section 4 of the Enhancement Act authorizing Reclamation to carry out the terms of the KPFA with respect to not requiring reimbursement by Project water users for any costs incurred in connection with Keno and Link River Dams.

Rationale: In the 2016 KHSA, the Department of the Interior agreed for Reclamation to take title to Keno Dam from PacifiCorp and operate and maintain the dam in perpetuity. In late 2022, Reclamation and PacifiCorp entered into an agreement specifying the title and related conditions for this transfer to be consummated. On July 5, 2023, PacifiCorp filed for a license amendment with FERC to remove Keno Dam from the existing federal license based on this transaction. In December, FERC approved the removal of Keno from the license, although provided that its order will not be effective until Reclamation has taken title. It appears inevitable that the transfer will occur, notwithstanding lingering questions about Reclamation's subsequent authority to operate and maintain Keno Dam, particularly at no cost to Project water users.

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

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

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

Realization of Benefits

Subsection (g)(2) of the new section 4 of the Enhancement Act would incentivize parties, including federal and state agencies, to keep important commitments that they made in 2010 and renewed in 2016.

Specifically, and echoing a term from the KBRA, the first sentence of section II.B.2.a of the KPFA states that the parties “commit to take every reasonable and legally permissible step to avoid or minimize any adverse impact, in the form of new regulation or other legal or funding obligation that might occur to users of water or land associated with the Klamath Reclamation Project from introduction or reintroduction of aquatic species to currently unoccupied habitats or areas, or from habitat restoration activities.” We are aware of no action that has been taken to honor this commitment, even though it was first made 14 years ago. Additionally, recognizing that there would have been no KHSA without a parallel agreement on water, and that Project irrigators were losing the benefit of their bargain when the KHSA was subsequently made divisible from the KBRA, the parties to the KPFA and the 2016 KHSA committed to reconvene in good faith to re-establish a water settlement. There has been no meaningful effort to attempt to honor that commitment.

The new section 4(g)(2) would disallow modifications to Keno Dam to improve fish passage until such time as the Secretary has certified to Congress that the above commitments have been kept. Under the new section 4(g)(3), the Secretary would be required to furnish a draft certification to the parties to the KPFA and KHSA at least 180 days prior to providing certification to Congress.

Rationale: Federal agencies and other parties have made commitments to irrigators that they have failed to keep. Further, these commitments were made in recognition of lost benefits to Project water users that occurred when other parties abandoned commitments that the KHSA would be indivisible from its sibling agreement, and for the purpose of preserving at least part of Project irrigators’ bargained-for benefits. Moreover, it would be especially inappropriate to take action that would increase the abundance or likely presence of new aquatic species until longstanding commitments regarding regulatory protections are actually in place.

C Canal Flume Replacement

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

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

C Canal Flume crossed over a state highway, underneath a railroad overpass, and was immediately adjacent to a public high school.

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

Cost Allocation Accounting

Subsection (g)(5) of the new section 4 of the Enhancement Act would provide that past and future costs incurred by the Secretary for compliance with federal environmental laws not explicitly referenced in contracts with Project contractors shall not be allocated to such contractor or accounted as being reimbursable costs to be repaid to the federal government.

Rationale: Over decades, Reclamation has requested and received appropriations for compliance with certain laws, primarily the Endangered Species Act. Reclamation does not consult with contractors in making its budget requests or in the expenditure of congressionally appropriated sums. The contracts between Reclamation and its contractors provide no requirement or mechanism for the contractors to reimburse these costs. However, as an accounting and budgeting matter, these costs may be categorized as "reimbursable" simply because the Project's authorized purpose is limited to irrigation. This accounting mechanism creates confusion and can become an obstacle to contractors' ability to conduct other activities such as current efforts to transfer title to transferred works.

Again, thank you for the opportunity to provide testimony in support of the enactment of H.R. 7938 in the United States House of Representatives. I would be happy to answer any questions the Subcommittee has on this important bill.

Attachment