Oregon State Bar CLE Seminars

2021 Environmental and Natural Resources Law: Year in Review

Cosponsored by the Environmental & Natural Resources Section

Thursday, October 14, 2021
8:30 a.m.–4:30 p.m.

5.5 General CLE credits and 1 Ethics credit
(ID 82669)

SECTION PLANNERS

Caylin Barter, *Wild Salmon Center, Portland*
Olivier Jamin, *Davis Wright Tremaine LLP, Portland*
Laura Kerr, *Stoel Rives LLP, Portland*
John Mellgren, *Western Environmental Law Center, Eugene*
Cassie Roberts, *Perkins Coie LLP, Portland*
Avalyn Taylor, *Pearl Legal Group, Portland*

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OREGON STATE BAR
16037 SW Upper Boones Ferry Road
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SCHEDULE

8:30 Introductory Remarks

Caylin Barter, *ENR Section Chair-Elect, CLE Chair, Wild Salmon Center, Portland*
Maura Fahey, *ENR Section Chair, Crag Law Center, Portland*

8:35 Transition

8:40 Brownfield and Superfund Site Redevelopment

- ✦ Recent brownfield redevelopment projects in Oregon
- ✦ Managing environmental risk and liability associated with redevelopment of contaminated properties

Cheyenne Chapman, *Oregon Department of Environmental Quality, Portland*
Seth Otto, *Maul Foster & Alongi, Portland*
Ted Wall, *Maul Foster & Alongi, Portland*
Kat West, *Skeo Solutions, Portland*

9:40 Transition

9:45 Climate Change and Clean Electricity in Oregon: HB 2021, Wildfires, and Impacts on Oregon Utilities and Vulnerable Communities

- ✦ Challenges and opportunities associated with implementation of Oregon's new clean electricity standards
- ✦ Differing perspectives from the agency side, utilities, and vulnerable communities focusing on a problem that impacts all Oregonians

Angela Crowley-Koch, *Oregon Solar and Storage Industries Association, Portland*
Riley Peck, *PacifiCorp, Portland*
Allie Rosenbluth, *Rogue Climate, Medford*
Richard Whitman, *Oregon Department of Environmental Quality, Portland*

10:45 Break

10:55 The First 10 Months of the Biden EPA: Accomplishments, Challenges, and Practical Impacts on the Pacific Northwest

- ✦ Key actions to date under the Biden EPA
- ✦ Implementation challenges and impacts on practitioners in the Pacific Northwest

William Funk, *Lewis & Clark Law School, Portland*
Andrew Hawley, *Western Environmental Law Center, Seattle*
L. John Iani, *Perkins Coie, Seattle*

11:55 Transition

Noon Keynote: A Conversation with Congressman Earl Blumenauer on the Future of the Columbia-Snake River Basin

Following a short video, Congressman Blumenauer will speak about his efforts to address the unsustainable cycle of conflicts over salmon and energy in the Columbia-Snake River Basin, in light of a recent proposal released by Congressman Mike Simpson.

Congressman Earl Blumenauer, *US House of Representatives, Third Congressional District of Oregon, Portland*

12:40 Lunch

1:10 Tribal Law and Natural Resources: Recent Developments in Tribal Treaty Rights Implementation and Sovereignty Issues

- ✦ Legal issues associated with in lieu and treaty access fishing sites along the Columbia River
- ✦ The recent Ninth Circuit decision in *Deschutes River Alliance v. Portland General Electric Company* concerning tribal sovereignty in environmental litigation
- ✦ Other timely issues at the intersection of tribal and natural resources law

Howard Arnett, *Karnopp Petersen LLP, Bend*
Robert "Bobby" Brunoe, *General Manager for the Branch of Natural Resources, Confederated Tribes of Warm Springs, Warm Springs*
Robert Lothrop, *Columbia River Inter-Tribal Fish Commission, Portland*
Stephanie Lynch, *Office of the Solicitor, US Department of Interior, Portland*

2:10 Transition

2:15 Klamath Water: More Complex Than Ever?

- ✦ A look back at the legal complexities involved with the construction and operation of Link River Dam, which turns 100 this year
- ✦ The "ESA re-assessment" and its demise: current ambiguities about the regulatory framework for project operations
- ✦ Summary of active litigation in the basin

Moss Driscoll, *US Bureau of Reclamation, Klamath Falls*
Paul Simmons, *Somach Simmons & Dunn, Sacramento*
Jay Weiner, *Rosette LLP, Chandler, Arizona*

3:15 Break

3:25 Recent Developments in Ethics Law

Professor Lininger will discuss various ethical matters of interest to practitioners in the area of environmental law and will address both the ABA Model Rules of Professional Conduct and the Oregon Rules of Professional Conduct.

Tom Lininger, *University of Oregon School of Law, Eugene*

4:25 Closing Remarks

4:30 Adjourn

FACULTY

Howard Arnett, *Karnopp Petersen LLP, Bend.* Mr. Arnett is senior counsel at the firm. He is also an adjunct professor at the University of Oregon School of Law. He teaches courses on American Indian Law, Tribal Courts and Tribal Law, Contemporary Issues in American Indian Law, and Comparative Law of Indigenous Peoples. Mr. Arnett has represented the Confederated Tribes of Warm Springs for over 40 years.

Congressman Earl Blumenauer, *US House of Representatives, Third Congressional District of Oregon, Portland.* Representative Blumenauer was elected in 1996. He is a member of the Ways and Means Committee, chair of the subcommittee on Trade, and a member of the subcommittee on Health. Issues he has promoted include Medicare for All and the Green New Deal. Representative Blumenauer has been a champion for rebuilding and renewing our nation's infrastructure, economic security for families, protection of public lands, stopping gun violence, ending the prohibition of marijuana, and criminal justice reform. As a Multnomah County Commissioner and member of the Portland City Council, his accomplishments in transportation with light rail, bicycles and the street car, planning and environmental programs, and public participation helped Portland earn an international reputation as one of America's most livable cities.

Robert "Bobby" Brunoe, *General Manager for the Branch of Natural Resources, Confederated Tribes of Warm Springs, Warm Springs,* Mr. Brunoe is the General Manager of the Confederated Tribes of Warm Springs Natural Resources Branch. He is also the Tribal Historic Preservation Officer for purposes of the National Historic Preservation Act. He oversees the protection and enhancement of the Confederated Tribes of Warm Springs' natural and cultural resources, including the protection of the tribes' treaty-reserved rights both on and off the Warm Springs Reservation. Mr. Brunoe is an enrolled member of the Confederated Tribes of Warm Springs.

Cheyenne Chapman, *Oregon Department of Environmental Quality, Portland.* Ms. Chapman serves as Legal Policy Analyst with the Oregon Department of Environmental Quality. As the statewide Prospective Purchaser Agreement (PPA) Program Coordinator, she has facilitated more than 100 PPA agreements around the state with developers, local governments, and nonprofits. Ms. Chapman holds an advanced law degree in Environment and Natural Resources from Lewis & Clark Law School.

Angela Crowley-Koch, *Oregon Solar and Storage Industries Association, Portland.* Ms. Crowley-Koch is Executive Director of the Oregon Solar and Storage Industries Association. She has spent the last two decades in public policy and advocacy. Previously the Legislative Director at Oregon Environmental Council, her work was instrumental in passing the Toxic-Free Kids Act, renewing the Clean Fuels Program and getting coal out of Oregon's electricity mix, among other bills. She worked for Senator Jeff Merkley as part of his Blue Wave Project in 2018. While in D.C., she negotiated policy for Oregon in the Food Safety Modernization Act and the MAP-21 transportation package. Ms. Crowley-Koch is also Executive Director of Oregon Physicians for Social Responsibility.

Moss Driscoll, *US Bureau of Reclamation, Klamath Falls.* Mr. Driscoll began working for the U.S. Bureau of Reclamation as a water contracts specialist in 2012, after spending two years in the Peace Corps in Tanzania. His work often requires searching through the Bureau of Reclamation's extensive records, which has given him a unique insight into the history of the Klamath Project.

William Funk, *Lewis & Clark Law School, Portland.* Professor Funk is a Distinguished Professor of Law Emeritus. He is the author of American Constitutional Structure and a coauthor of Administrative Procedure and Practice: Problems and Cases, Administrative Law: Examples & Explanations, the Federal Administrative Procedure Sourcebook, and Legal Protection of the Environment. He has published numerous articles on administrative and environmental issues. Professor Funk is active in the American Bar Association, where he is a Fellow and past chair of the Administrative Law and Regulatory Practice Section. Professor Funk is also a Center for Progressive Reform Scholar, a member of the American Law Institute, and a Fellow of the American Bar Foundation, and he has chaired both the Administrative Law Section and Natural Resources Law Section of the American Association of Law Schools. Professor Funk has been admitted to practice in New York and the District of Columbia and before the U.S. Supreme Court.

Andrew Hawley, *Western Environmental Law Center, Seattle.* Mr. Hawley joined WELC in 2017 as a staff attorney; he focuses on working with Oregon legislators to change the law so that beavers are no longer classified as "predatory animals." The result of this change would be to create an environment where beavers can be better protected and accounted for and to encourage their presence on the landscape, which would improve Oregon's resilience to wildfire, water security, and overall ecological health. He previously was with the Northwest Environmental Defense Center as the organization's first staff attorney, where he focused on Clean Water Act enforcement and protecting the wildlife of the Pacific Northwest.

L. John Iani, *Perkins Coie, Seattle.* Mr. Iani is a partner with the firm's Environment, Energy & Resources practice. He focuses his practice on helping clients in developing and structuring business and commercial endeavors, particularly in the areas of project development, energy, natural resources, and fisheries. He also represents clients in environmental and regulatory issues before Congress, federal and state agencies, administrative bodies, and the courts. Mr. Iani served as the Regional Administrator for Region 10 of the Environmental Protection Agency (EPA), where he was responsible for managing the EPA's offices in Alaska, Idaho, Oregon, and Washington. While at the EPA, he took the lead on implementing several major initiatives, including a compromise with the U.S. Forest Service that resolved environmental concerns for harvesting fire-damaged salvage timber, water quality programs to protect endangered salmon, and implementing enhanced and streamlined environmental safeguards for future oil, gas, and mining development in the Pacific Northwest and Alaska.

Tom Lininger, *University of Oregon School of Law, Eugene.* Professor Lininger's research has focused on the intersection of environmental law, ethics, and criminal procedure. As a former prosecutor of environmental crime and a plaintiff's attorney who sued polluters, he is interested in customizing ethical and procedural rules for the unique context of environmental advocacy. He has served on the state board of directors for the Oregon Natural Resources Council, has been an ethics advisor for the Oregon State Bar Sustainable Future Section, and has been a member of the American Bar Association Section on Environment, Energy and Resources Ethics Committee. Another of Professor Lininger's research interests is the Confrontation Clause of the Sixth Amendment, particularly the application of the clause to prosecutions of domestic violence and sexual assault, and his latest scholarship has advocated revisions to ethical and evidentiary codes in order to promote access to justice and ensure fair treatment of indigent parties in court. Professor Lininger is a frequent speaker and author.

Robert Lothrop, *Columbia River Inter-Tribal Fish Commission, Portland.* Mr. Lothrop manages the commission's Policy Development and Litigation Support Department. The commission was established by the Yakama, Warm Springs, Umatilla, and Nez Perce Indian tribes in 1977. The Commission assists these tribes with comprehensive management of their treaty fisheries and protecting the Columbia Basin's salmon resources. In addition to in-house legal services, the Commission's Policy Department assists the four tribes with state, federal and international fishery management, hydropower mitigation, water quantity and quality management, oil spill response and protecting treaty secured tribal access to the River. Mr. Lothrop is the 2004 recipient of the Lewis & Clark Law School Distinguished Environmental Graduate award.

Stephanie Lynch, *Office of the Solicitor, US Department of Interior, Portland.* Ms. Lynch's practice includes various aspects of Indian law, including off-reservation treaty fishing rights, water and irrigation issues, and trespass to Indian lands. Ms. Lynch is particularly interested in working on legal issues associated with the Bureau of Indian Affairs's mission to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes, and Alaska Natives.

Seth Otto, *Maul Foster & Alongi, Portland.* Mr. Otto is a principal planner and leader of the firm's planning team. He is experienced in community development, urban revitalization, and environmental conservation. He has worked in and for communities in almost every region of the state. He recently managed several policy research studies focused on the scale and impact of brownfield properties on local and statewide levels. Several of the recommendations from this research have been implemented by the Oregon Legislature and signed into law, including the brownfield land bank authority, brownfield tax incentive authority, and brownfield cleanup grant program.

Riley Peck, *PacifiCorp, Portland.* Mr. Peck has focused his practice on energy-related issues since graduating law school.

Allie Rosenbluth, *Rogue Climate, Medford.* Ms. Rosenbluth's focus is on working with communities across the region to stop the proposed Jordan Cove LNG export terminal while building effective campaigns to transition to clean, affordable, accessible, and just energy in southern Oregon and the South Coast. Rogue Climate was a member of the Oregon Clean Energy Opportunity Campaign Frontline Steering Committee that passed three energy justice bills, including 100% Clean Energy for All (HB2021), in the 2021 legislative session. Ms. Rosenbluth also recently served on the Department of Environmental Quality Rulemaking Advisory Board for the proposed Climate Protection Program, where she advocated for stronger rules that reduce harmful pollution in Black, Indigenous, people of color, rural, and low-income communities. She is the 2019 recipient of the Community Sentinel Awards for Environmental Stewardship.

Paul Simmons, *Somach Simmons & Dunn, Sacramento.* Mr. Simmons focuses on water rights and environmental issues affecting water resources. He has extensive involvement in the Klamath Basin of Oregon and California, where he represents irrigation interests from both states and has led a coalition of 20 parties in an ongoing general stream adjudication involving hundreds of parties; and counseled, litigated, and represented clients in state and federal legislative forums on matters involving bistate water rights, endangered species, water quality, tribal, and public land issues. He has been a lead negotiator for multi-party settlement agreements. He has served clients throughout California and in other states on surface and groundwater rights, endangered species, and water quality matters. Mr. Simmons, with support from his firm, recently decided to focus on work for the Klamath Water Users Association as its Executive Director and Counsel. He is a frequent speaker on issues of water and environmental law. Mr. Simmons is admitted to practice in California, New York, and Oregon.

Ted Wall, *Maul Foster & Alongi, Portland.* Mr. Wall is vice president of the firm. He has over 30 years of project strategy and project management experience in the brownfields, civil engineering, and environmental engineering fields. He has been responsible for a wide range of investigation, design, and construction programs and projects on sites with economic opportunities stymied by environmental impairments. Mr. Wall has led or supported all firm brownfields efforts in Oregon and many throughout the Northwest. He has applied regulatory and policy analysis to site conditions, risk assessment, planned remedial actions, and systems compliance. These analyses have involved CERCLA, RCRA, TSCA, and other local, state, and federal hazardous waste, solid waste, contaminated-site cleanup, stormwater, and resource-conservation programs.

Jay Weiner, *Rosette LLP, Chandler, Arizona.* Mr. Weiner is of counsel to the majority Indian-owned firm Rosette LLP and has worked with tribes and tribal governments since law school. He has developed extensive expertise in the area of federal Indian water law, has worked on multiple Indian water rights settlements, and has represented clients in adjudications and other water-related proceedings in Arizona, California, Montana, and Oregon. He practices in areas of federal environmental law as well, including the Endangered Species Act and the National Environmental Policy Act. In addition to his private practice work, he now serves as an administrative law judge for the Montana Department of Natural Resources and Conservation, hearing contested cases regarding DNRC water rights permit and change decisions.

Kat West, *Skeo Solutions, Portland.* Ms. West is an environmental attorney with experience in contaminated property revitalization, environmental policy, and program development. She previously served as a senior enforcement attorney at the U.S. Environmental Protection Agency (EPA). As the Land Revitalization Legal Coordinator for EPA's Southeast Region, she helped create national policies and guidance for Superfund enforcement and site reuse. She is one of the creators of the Prospective Purchaser Inquiry process, which bridges the gaps between government, business, and community interests to accelerate the revitalization of contaminated properties. Ms. West is certified in Environmental and Natural Resources Law.

Richard Whitman, *Oregon Department of Environmental Quality, Portland.* Mr. Whitman is Director of the Oregon Department of Environmental Quality. He previously was the Policy Director for the Governor's Natural Resources Office under both Governor Kate Brown and Governor John Kitzhaber, and before that served as Director of the Oregon Department of Land Conservation and Development.

Chapter 1A

Risk and Liability Overview

Seth Otto
Maul Foster & Alongi
Portland, Oregon

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Oregon State Bar 2021

ENVIRONMENTAL AND NATURAL RESOURCE LAW: YEAR IN REVIEW

OCTOBER 14, 2021

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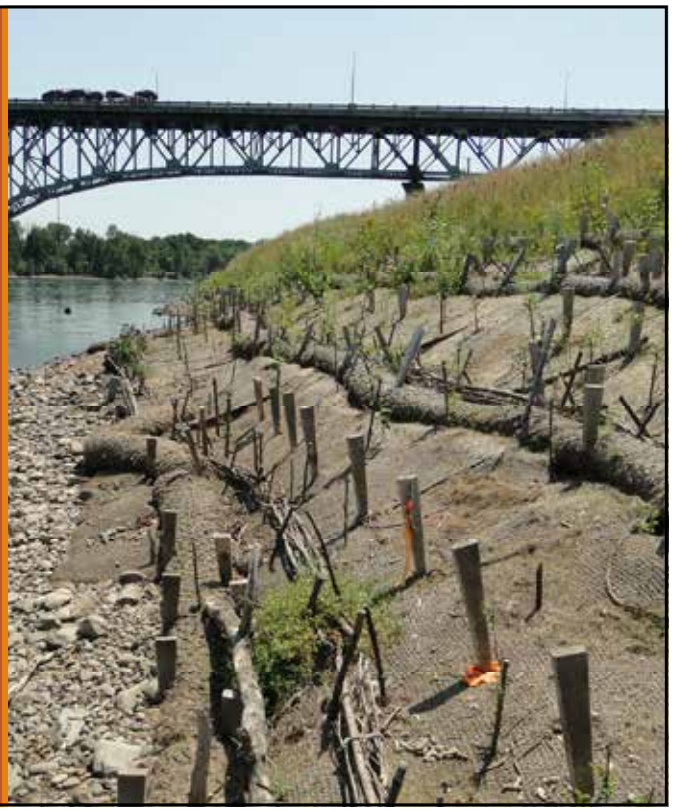

Agenda

- Risk and Liability Management Overview
- CERCLA Liability Protections
- Oregon DEQ Prospective Purchaser Agreements
- Case Studies
- Discussion

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Risk and Liability Overview

Environmental Liability

Financial Risk

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Environmental Liability

- Strict
- Joint and Several
- Retroactive

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Liable Parties
• The current owner or operator of a facility;
• An owner or operator at the time of disposal;
• A person who arranged for the disposal or treatment of hazardous substances (generator or arranger); and
• A person who accepted a hazardous substance for transport to a disposal or treatment facility or to a site and such person selected the facility or site.
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Financial Risk
• The potential financial viability of different redevelopment scenarios
• The relative effect of various cost and revenue assumptions on profitability
• The amount of subsidy or incentive needed to attract a developer or make a project profitable

Risk and Liability Management Tools

- Property Activities
- Transactional Activities
- Insurance
- Regulatory Protections

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Property Activities

- Due Diligence / All Appropriate Inquiry (Phase I)
- Environmental Investigation (Phase II)
- Alternatives Analysis (RI/FS, ABCA)
- Cleanup Action Plan
- Cleanup (ICP, VCP)
- Institutional Controls

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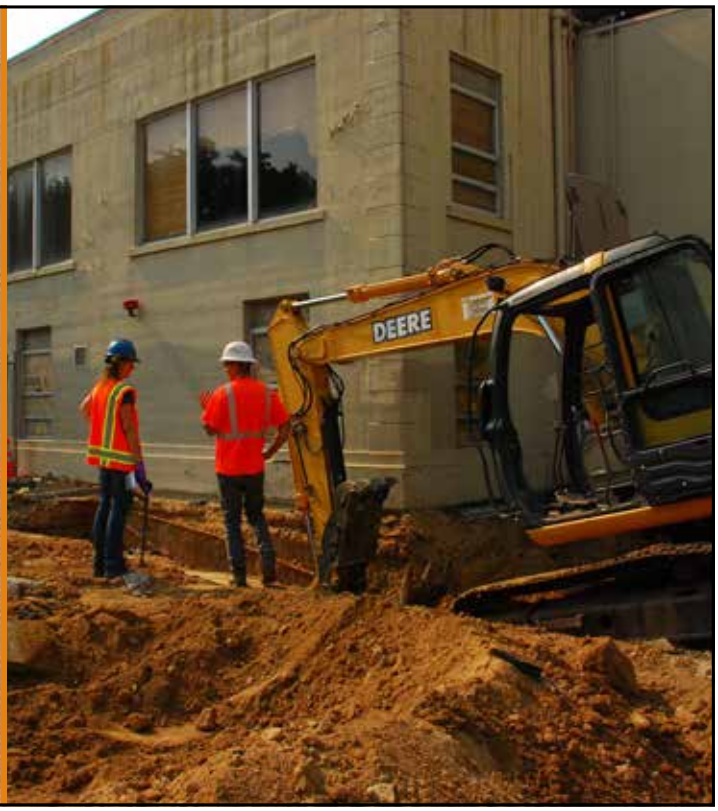

Transactional Activities

- Price Negotiation
- Indemnification
- Public/Private Partnerships
- Tax Benefits
- Redevelopment Authorities
- Land Banks

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Insurance

- Comprehensive General Liability
- Pollution Liability
- Errors & Omissions
- Cost Cap

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Regulatory Protections

- Protections
  - 3rd Party & Innocent Landowner
  - BFPP
- Tools
  - No Further Action (NFA)
  - Comfort Letter
  - Consent Order/Judgement
  - Prospective Purchaser Agreement (PPA)

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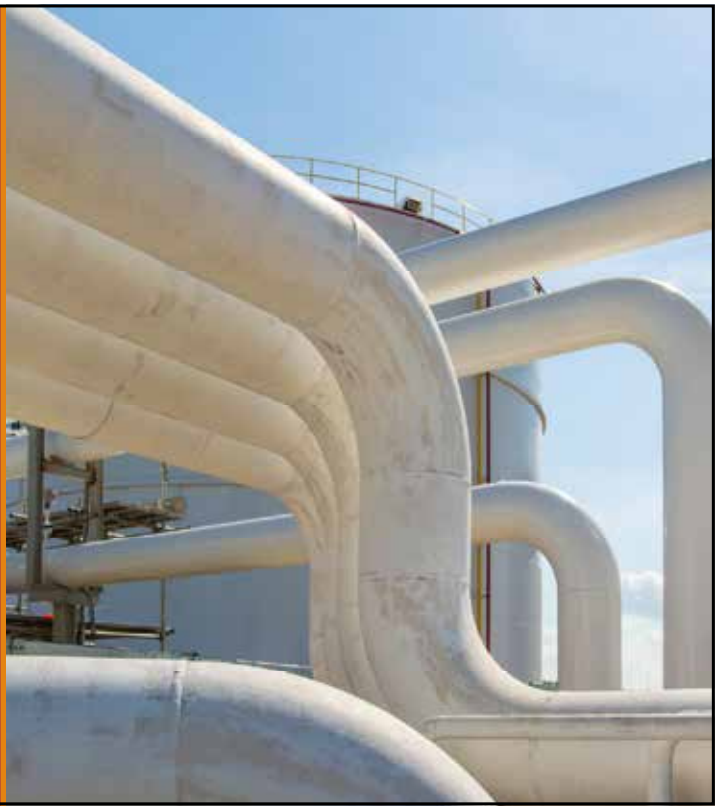

Links to Documents for Discussion

EPA Prepared Workbook: Process for Risk Evaluation, Property Analysis, and Reuse Decisions—For Local Governments Considering the Reuse of Contaminated Properties
https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100C9D3.TXT

EPA Revitalization Handbook Addressing Liability Concerns at Contaminated Properties
https://www.epa.gov/sites/default/files/2020-06/documents/revitalization-handbook-final-2020.pdf

Chapter 1B

Brownfield and Superfund Site Redevelopment

Kat West
Skeo Solutions
Portland, Oregon

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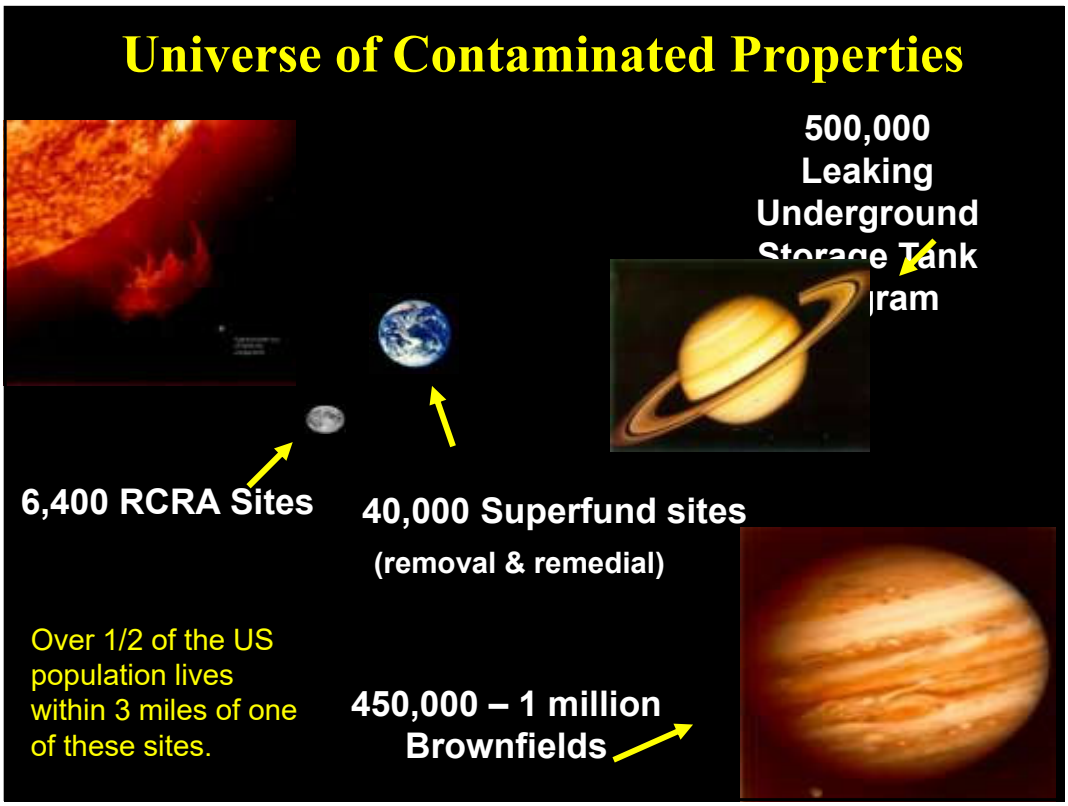
A McDonald's fast food restaurant and playground now occupies the former hazardous waste site, providing many positive benefits to the community.


Universe of Contaminated Properties
500,000
Leaking
Underground
Storage Tank
ram
6,400 RCRA Sites
40,000 Superfund sites
(removal & remedial)
Over 1/2 of the US
population lives
within 3 miles of one
of these sites.
450,000 – 1 million
Brownfields


Superfund Liability

CERCLA Liability Protections for Prospective Purchasers/Acquirers

2002 Brownfield Amendments to Superfund law

- Bona Fide Prospective Purchaser (BFPP) status

2018 BUILD Act amended Superfund law

- State & Local Government Acquisition exemption, includes redevelopment auth. & land banks

EPA Settlement Agreements

- Prospective Purchaser Agreements (PPA) / Bona Fide Prospective Purchaser Agreements (BFPPA)

BFPP Status

Section 101(40) and 107(r)

- Self-implementing protection from feds, state & third party contribution suits for existing contamination
- Must:
  - Buy site property after 1/11/02
  - Satisfy 8 statutory criteria for as long as potential liability exists (looong time at most NPL sites)
- Potential for an EPA windfall lien

Note: Savvy brownfield developers achieve BFPP status

BFPP Status: 8 Statutory Criteria

1. Not a PRP or affiliated with a PRP
2. Disposal occurred before purchase
3. All appropriate inquiries (AAI)

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4. Provide all legally required notices
5. *Appropriate Care: Take reasonable steps* to stop releases, prevent releases and exposure
6. Provide access, cooperation, assistance
7. Compliance w/ institutional controls & no interference with cleanup
8. Compliance with information requests/subpoenas

Federal PPA/BFPPA Guidance & Context

- Gold standard for Superfund liability protection
- No cost to negotiate, but at EPA discretion
- $ consideration can be put into a Special Account for site (maybe not in a BFPP Work Agreement)
- Can settle Superfund lien and Windfall liens
- Public Notice/Comment & US DOJ has to co-sign

Solitron Microwave SF Site

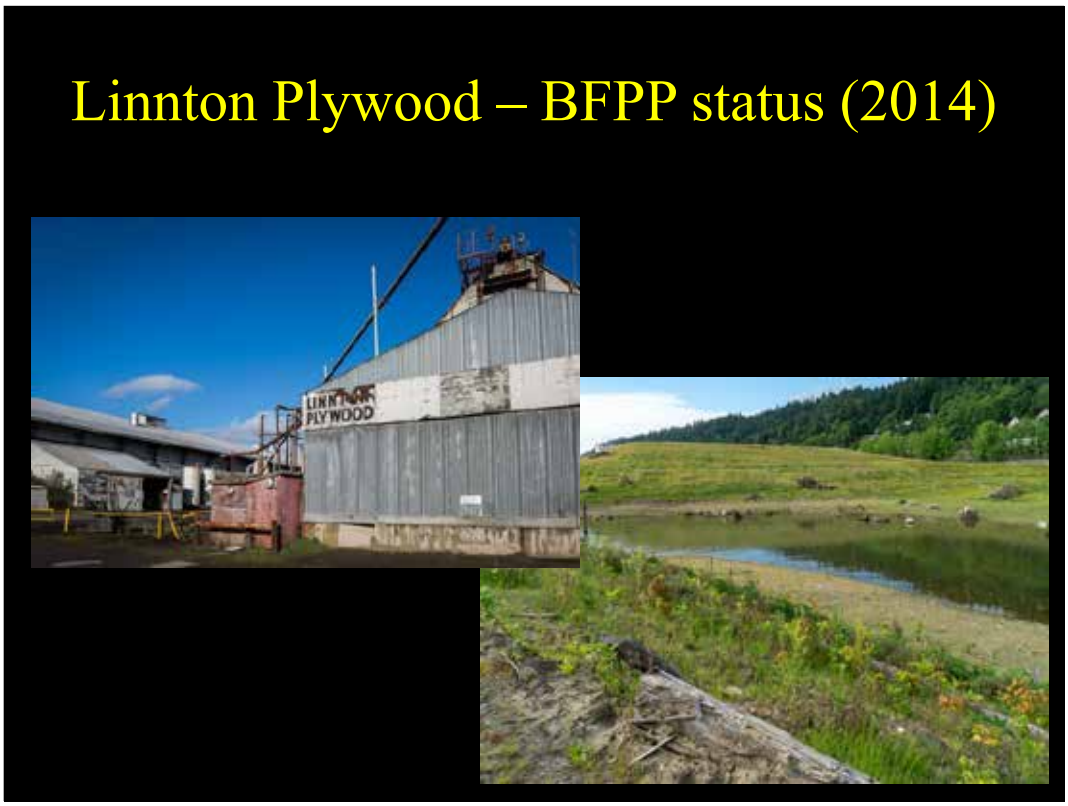
Newest PPA Guidance

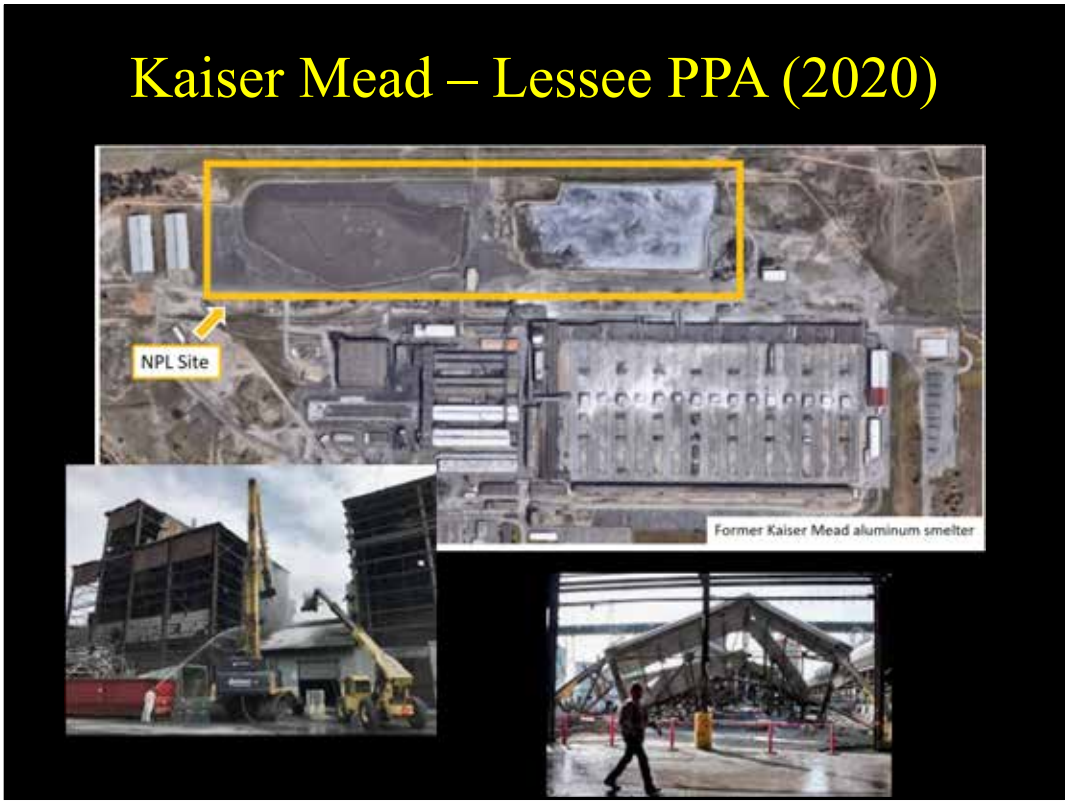
2002 : EPA believes BF Amendments make PPAs largely unnecessary…with few exceptions: 1) PPA is necessary to ensure that the transaction will be completed + 2) project will provide substantial public benefits (threshold evaluation, not as consideration).

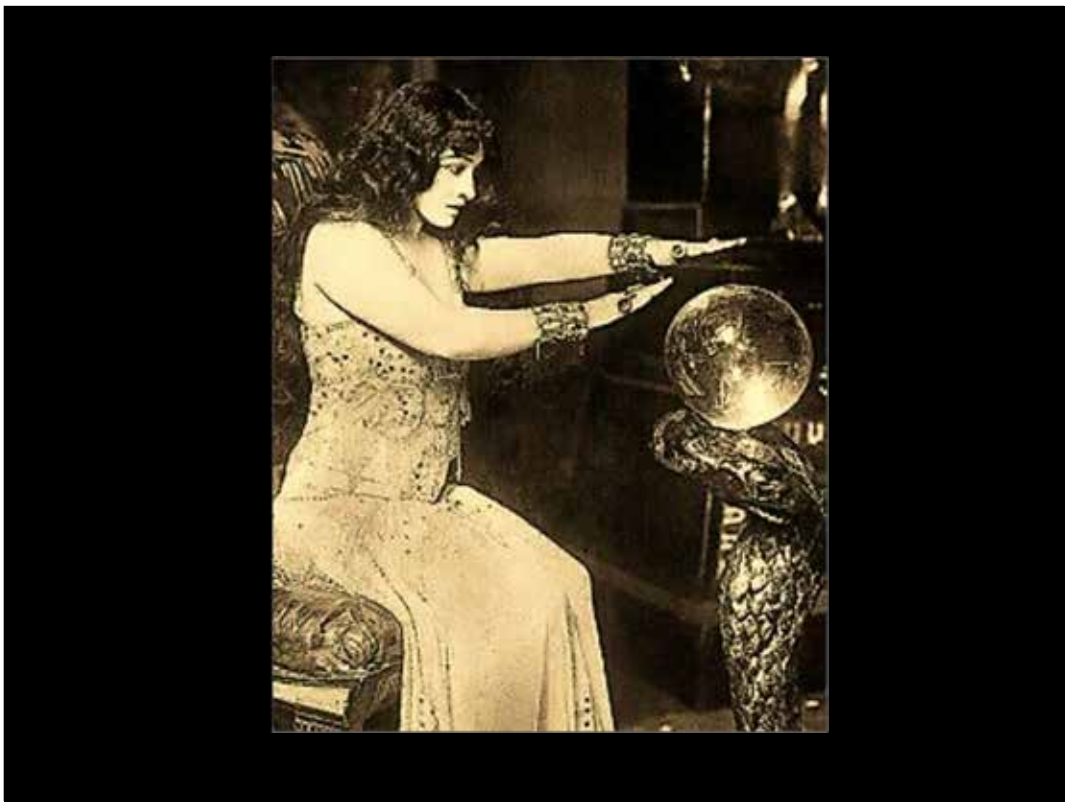
2018: EPA / DOJ are encouraging Regions to consider more frequent use of site-specific agreements as appropriate. Emphasis - to address liability and foster cleanup and reuse at sites on the NPL.

+ EPA revising models and guidance.

Triangle Park– BFPPA (2006)


Linnton Plywood – BFPP status (2014)
LINNTON PLYWOOD


Kaiser Mead – Lessee PPA (2020)
NPL Site
Former Kaiser Mead aluminum smelter




What's New and Coming Soon?
Top 10 Questions to Ask When Buying a Superfund Site
Prospective Purchaser Agreements
Reducing the Liability Risks of Contaminated Property
ENVIRONMENTAL JUSTICE
Superfund Sites at Risk from Climate Change
EPA Comfort Letters
• No previous Federal Superfund Interest Letter
• No Current Federal Superfund Interest Letter
• Federal Interest letter
• State Action Letter

Take Aways…

- Layer, layer, layer liability protections.
- Don't be shy about asking EPA regions & HQ for tools & support!
- Request & negotiate your federal PPA based upon:
    1. Evaluative criteria (2002/2018 guidance buzz words)
    2. Consideration criteria ($ and direct site benefits)
- Build a compelling narrative … motivated staff will move mountains for you!

Kat West
Skeo Solutions
kwest@skeo.com
503-917-0648

Links to Documents for Discussion

EPA Top 10 Questions to Ask When Buying a Superfund Site
https://www.epa.gov/sites/default/files/documents/top-10-ques.pdf

EPA Memorandum: Agreements with Third Parties to Support Cleanup and Reuse at Sites on the Superfund National Priorities List
https://www.epa.gov/sites/default/files/2018-04/documents/sftf25-memo-ppa-bfpp-final-2018_2.pdf

EPA Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners ("Common Elements")
https://www.epa.gov/sites/default/files/2019-08/documents/common-elements-guide-mem-2019.pdf

Chapter 1C

Brownfield and Superfund Site Redevelopment: Oregon DEQ Prospective Purchaser Agreements

Cheyenne Chapman
Oregon Department of Environmental Quality
Portland, Oregon

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Brownfield and Superfund Site Redevelopment: Oregon DEQ Prospective Purchaser Agreements

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Cheyenne Chapman | Oregon Department of Environmental Quality

Grand Ronde tribe reclaims Willamette Falls, as work begins to tear down Oregon City mill

OREGONLIVE The Oregonian

Updated: Sep. 22, 2021, 10:22 a.m. | Published: Sep. 22, 2021, 10:22 a.m.

ECSI 227

Old plywood mill becomes oasis among industry

KGW8

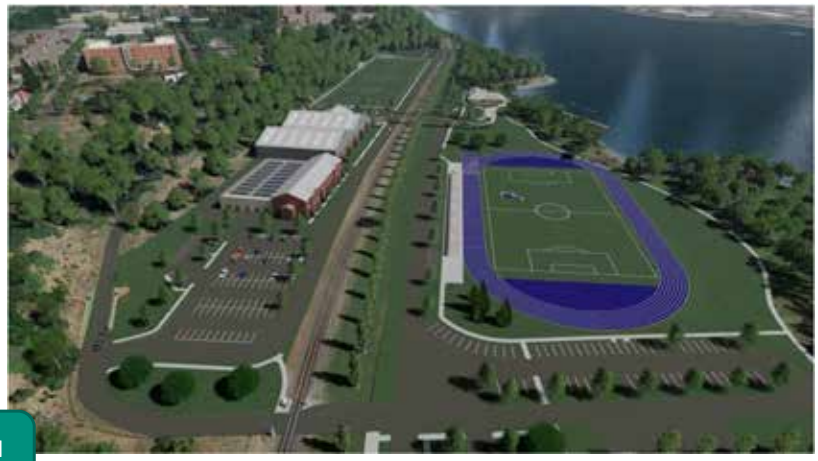
June 2, 2021

ECSI 2373

River property to be named 'Franz Campus'

The Beacon

By Rachel Rippetoe | March 7, 2018 10:23pm



ECSI 4811

Oregon DEQ Prospective Purchaser Program

Objective is to negotiate

Liability Protection

In Exchange For

Substantial Public Benefit

5

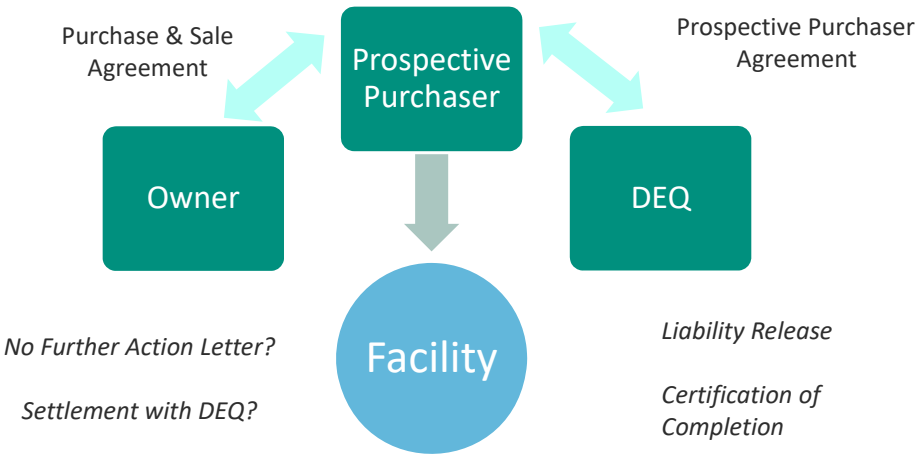
Statutory Requirements for PPA ORS 465.327(1)(a) – (d)

- Prospective Purchaser is not currently liable
- Removal or remedial action is necessary to protect human health or environment
- Redevelopment or reuse will not make the situation worse
- Substantial public benefit will result

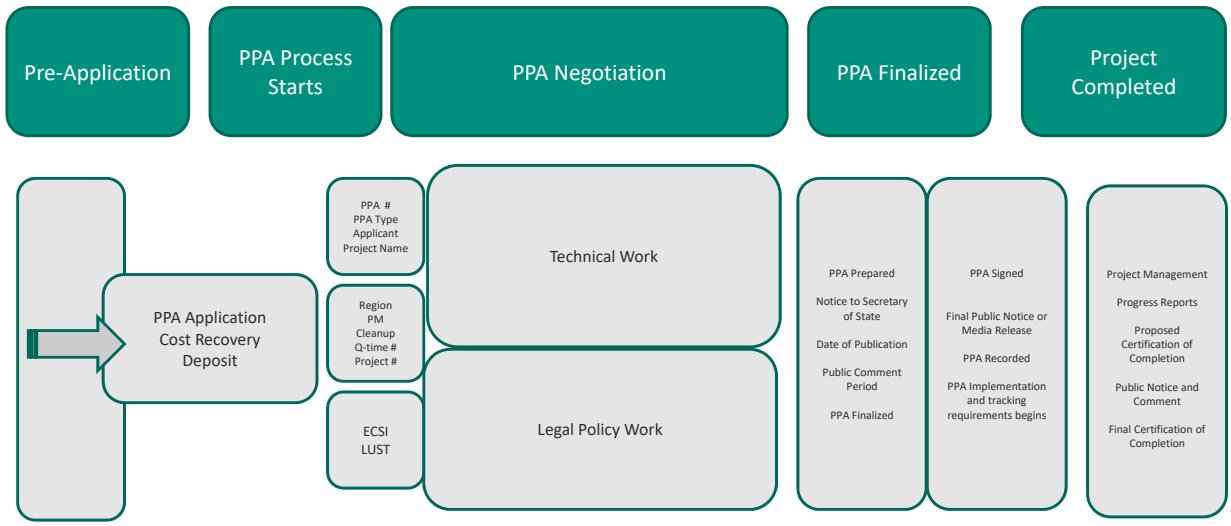
Substantial Public Benefit ("including but not limited to") ORS 465.327(1)(d)(A)-(D)

- Generation of substantial funding to facilitate remedial measures at facility
- Commitment to perform substantial remedial measures at facility
- Productive reuse of vacant or abandoned industrial or commercial facility
- Development of facility by government or nonprofit to address "important public purpose"

Projects with PPA Applications: Who's Negotiating What?



PPA Process



PPA Types and Liability Protections

Administrative Agreement

Consent Order

Consent Judgment


Oregon Department of Environmental Quality
Summary of Liability Protections and Public Notice Requirements Associated with Prospective Purchaser Agreement Types

PPA Administrative Agreement

PPA Administrative Agreement

Release from Liability

Pursuant to ORS 465.327, and subject to Subsection 5.B. and the satisfactory performance by [Party] of its obligations under this Agreement, [Party] is not liable to the State of Oregon under ORS 465.200 to 465.545 and 465.900, 466.640, or 468B.310 regarding Existing Hazardous Substance Releases.

PPA Consent Order

Effect of PPA Consent Order

DEQ and Respondent intend for this Consent Order to be construed as an administrative settlement by which Respondent has resolved its liability to the State of Oregon, within the meaning of Section 113(f)(2) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f)(2), regarding Existing Hazardous Substance Releases, and for Respondent not to be liable for claims for contribution regarding Existing Hazardous Substance Releases to the extent provided by Section 113(f)(2) of CERCLA, 42 U.S.C. §§ 9613(f)(2).

Release from Liability

Pursuant to ORS 465.327, and subject to Subsection 8.B. and the satisfactory performance by Respondent of its obligations under this Consent Order, Respondent is not liable to the State of Oregon under ORS 465.200 to 465.545 and 465.900, 466.640, or 468B.310 regarding Existing Hazardous Substance Releases.

Third-Party Actions

Subject to the satisfactory performance by Respondent of its obligations under this Consent Order, Respondent is not liable to any person under ORS 465.200 to 465.545, 466.640, or 468B.310 regarding Existing Hazardous Substance Releases

PPA Consent Judgment

Effect of PPA Consent Judgment

DEQ and Defendant intend for this Consent Judgment to be construed as a judicially-approved settlement by which Defendant has resolved its liability to the State of Oregon, within the meaning of Section 113(f)(2) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9613(f)(2), regarding Matters Addressed, and for Defendant not to be liable for claims for contribution regarding Matters Addressed to the extent provided by Section 113(f)(2) of CERCLA, 42 U.S.C. §§ 9613(f)(2).

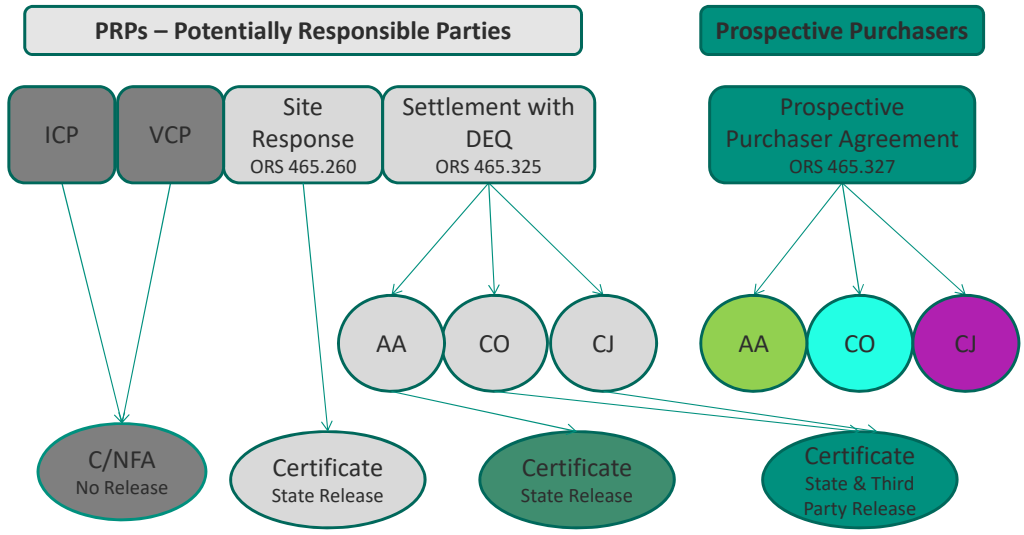
Releases from Liability and Covenant Not to Sue

Pursuant to ORS 465.327(3), this Consent Judgment is a "prospective purchaser agreement" entered as a judicial consent judgment in accordance with ORS 465.325. Thus, this Consent Judgment contains related but independent liability provisions pursuant to both ORS 465.327 and 465.325. The ORS 465.327 liability provisions are set forth below in Subsections 5.B. and 6.B. The ORS 465.325 liability provisions are set forth below in Subsections 5.D., 6.A., and 6.C. In addition to these state law provisions, this Consent Judgment may affect Defendant's rights and liabilities under federal and other laws, as described in Paragraph 4.N.(6) and Subsection 5.E.

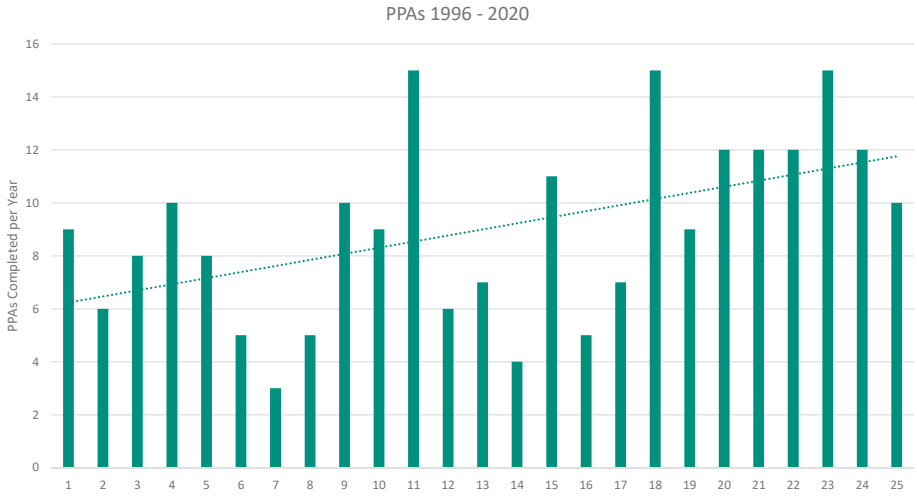
Pursuant to ORS 465.327, and subject to Subsection 5.C. and the satisfactory performance by Defendant of its obligations under this Consent Judgment, Defendant is not liable to the State of Oregon under ORS 465.200 to 465.545 and 465.900, 466.640, or 468B.310 regarding Existing Hazardous Substance Releases.

Pursuant to ORS 465.325, subject to satisfactory performance by Defendant of its obligations under this Consent Judgment, the State of Oregon covenants not to sue or take any other judicial or administrative action against Defendant under ORS 465.200 to 465.545 and 465.900 regarding Matters Addressed, except that the State of Oregon reserves all rights against Defendant with respect to claims and liabilities described in Subsection 5.C.

PPA Types and Liability Protections



PPA Portfolio by Year (1996-2020)



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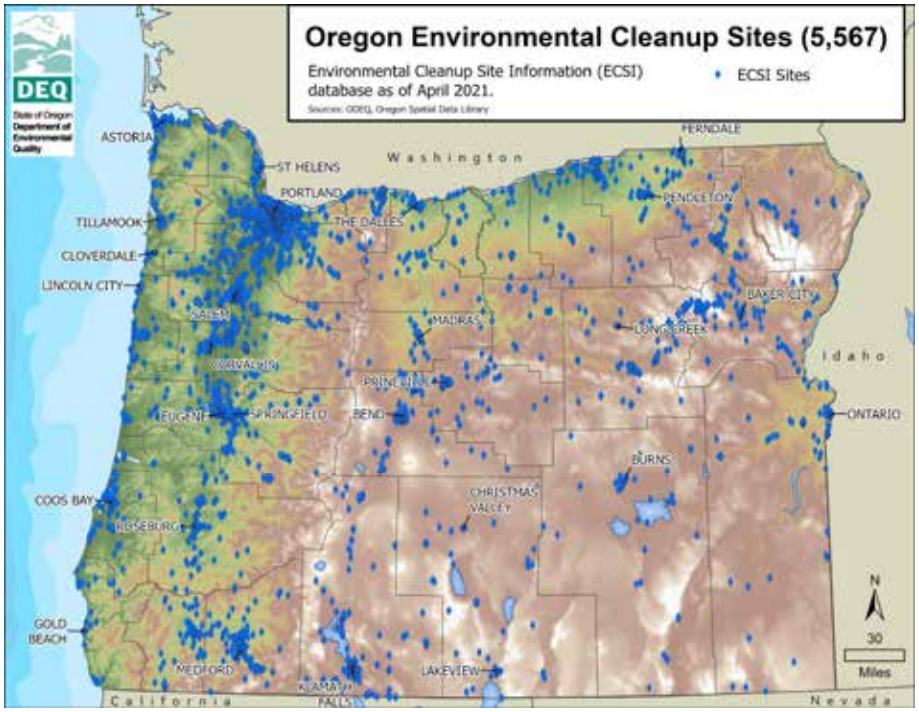


Commercial to Public Use and Residential
Rose City Plating to Sellwood Public Library and Lofts

ECSI 269

Commercial Upgrade
McVay Auto to Sequential BioFuels in Eugene

ECSI
4444

Commercial to Public Use
Texaco Station to Prineville City Hall

ECSI
2145

Commercial to Community and Economic Development
Franko #6 to MC Chuckwagon in Lakeview

LUST
19-91-2013

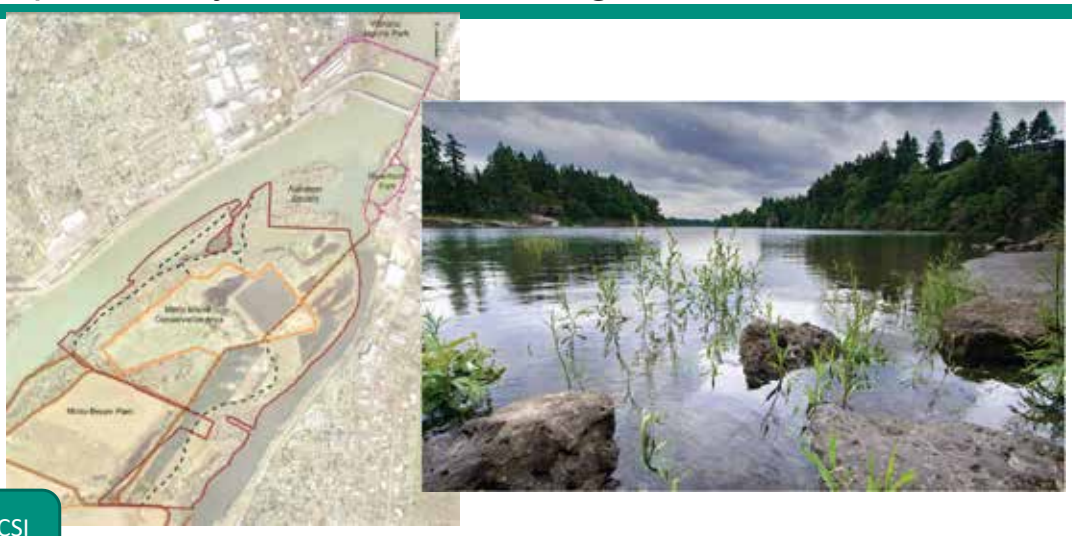
Industrial to Residential
The Yards at Union Station in Portland

ECSI
1885

Industrial to Residential
Astoria Plywood Facility to Mill Pond Village

ECSI 1370

Industrial to Natural Habitat
Pulp & Paper Facility to Minto Island Mitigation, Salem



ECSI 355

Landfill to Commercial
Rossman's Landfill to Home Depot

ECSI 674

PPA Program and Cleanup Program Resources

- Regional Solutions Teams
  - http://www.oregon.gov/DEQ/Pages/rst.aspx
- DEQ Brownfields Program
  - http://www.deq.state.or.us/lq/cu/brownfields/index.htm
- DEQ Prospective Purchaser Agreements
  - http://www.deq.state.or.us/lq/cu/ppa.htm

And coming soon – YOUR DEQ ONLINE!

- Annual Cleanup Reports
- http://www.deq.state.or.us/lq/pubs/docs/cu/AnnualCUReporttoLegislature2014.pdf
- Environmental Cleanup Site Information (ECSI) Database http://www.deq.state.or.us/lq/ecsi/ecsi.htm
- Leaking Underground Storage Tank (LUST) Cleanup Site Database http://www.deq.state.or.us/lq/tanks/lust/LustPublicLookup.asp
- Facility Profiler http://deq12.deq.state.or.us/fp20/

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Oregon DEQ Prospective Purchaser Agreements

Liability protection ↔ Substantial Public Benefit

Thank you!

Cheyenne Chapman, JD, LLM
Oregon DEQ PPA Program Coordinator

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503-229-6461 office & 503-957-9885 cell

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Prospective Purchaser Program Guidance

Oregon's Environmental Cleanup Law: ORS 465.327

December 2011

October 2017 – Updated format, contact information, and website links

Environmental Cleanup Program
700 NE Multnomah St.
Suite 600
Portland, OR 97232
Phone: 503-229-6461
800-452-4011
Fax: 503-229-5850
Contact: Cheyenne Chapman
www.oregon.gov/DEQ

DEQ is a leader in restoring, maintaining and enhancing the quality of Oregon's air, land and water.

DEQ
State of Oregon Department of Environmental Quality

Documents can be provided upon request in an alternate format for individuals with disabilities or in a language other than English for people with limited English skills. To request a document in another format or language, call DEQ in Portland at 503-229-5696, or toll-free in Oregon at 1-800-452-4011, ext. 5696; or email deqinfo@deq.state.or.us.

I. Disclaimer

DEQ reserves the right and the discretion to approve or disapprove Prospective Purchaser Agreements. This document provides information and technical assistance to the public and DEQ employees about DEQ's cleanup program. This information should be interpreted and used in a manner fully consistent with the state's environmental cleanup laws and implementing rules. This document does not constitute rulemaking by the Oregon Environmental Quality Commission and may not be relied on to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person, including DEQ employees. DEQ may take action at variance with this guidance.

II. Approval

This guidance document has been approved for use by the Department of Environmental Quality Land Quality Division.

[Signed copy on file with DEQ]	12-08-2011
Wendy Wiles, Division Administrator	Date

Table of Contents

1. Introduction

1.1 Purpose

This document provides an overview of Oregon DEQ's Prospective Purchaser Program and explains the process for applying for and executing a Prospective Purchaser Agreement. This guidance replaces prior Prospective Purchaser Program Guidance dated Nov. 20, 1997.

1.2 Program Overview: What is a "Prospective Purchaser Agreement"?

The term Prospective Purchaser Agreement describes an agreement (referenced to Oregon Revised Statute (ORS) 465.327) between a prospective purchaser of contaminated property and the Oregon Department of Environmental Quality. Individuals or entities who may negotiate a PPA with DEQ are not limited to prospective "purchasers" per se, but may also include prospective holders of other interests in a property, such as a prospective lessee.

PPAs are designed to facilitate cleanup and productive reuse of contaminated property. Existing contamination is often an obstacle to the transfer and redevelopment of property. PPAs provide certainty to purchasers about the extent of their cleanup obligations and liability for existing contamination and thereby encourage the transfer, cleanup and reuse of contaminated property.

PPAs can benefit the purchaser, community, local jurisdictions, and the state in many ways. Benefits of a PPA may include:

- A facility is cleaned up or closer to being cleaned up because of contributions from the purchaser, thereby enhancing protection of human health and the environment.
- A property is returned to productive use and returned to the tax base.
- Jobs are often created and blight is addressed.
- Neither state nor local government is burdened with all of a facility's cleanup costs.
- It may be easier for the purchaser to acquire financing with cleanup actions and liability protections addressed in the PPA.
- A property will be clean, and liability protections in the PPA run with the land (i.e., are transferred to subsequent purchasers).

2. Qualifying Criteria

2.1 Qualifying Criteria

As provided in Oregon law (ORS 465.327), DEQ may approve PPAs "to facilitate cleanup and reuse of contaminated property" if all of the following criteria are met:

1) The prospective purchaser is not currently liable under any of the three following statutory authorities for an existing release of hazardous substances at the property to be purchased: ORS 465.255; ORS 466.640; or ORS 468B.

2) Contamination exists and removal or remedial action is necessary at the property under ORS 465.

3) The proposed use of the property will not contribute to or exacerbate existing contamination, increase health risks or interfere with necessary remedial action measures at the facility.[1]

4) A substantial public benefit [described below] will result from the PPA.

While the decision to enter into a PPA is solely within DEQ's discretion, DEQ cannot enter into a PPA if any one of the conditions listed above cannot be satisfied.

2.2 Substantial Public Benefit

Of the criteria listed above, determining if a PPA would provide a "substantial public benefit" is perhaps the key to approval. Substantial public benefit will be a site-specific question because each property presents a unique set of cleanup and redevelopment issues. DEQ evaluates each property and the proposed public benefits on a case-by-case basis.

The statute describes four types of substantial public benefits acceptable for a PPA, listed below, with examples for illustrative purposes:

1) Generation of substantial funding or other resources for remedial measures at the facility.

   Example 1A: A portion of sale proceeds from the property transaction will be dedicated to remedial measures, in an amount that DEQ deems sufficient to meaningfully facilitate necessary remedial measures.

   Example 1B: The current owner is conducting the cleanup but has insufficient resources to complete the work. The purchaser agrees to supplement the current owner's work to significantly advance or complete remedial action at the facility.

   DEQ expects that – regardless of a development's end use – that sale proceeds will be dedicated to cleanup of the facility as necessary to complete the cleanup. If a PPA would result in less than 100 percent cleanup, buyers and sellers should expect that DEQ will want to know the value of the transaction and that DEQ will compare this transaction value to the cost to fully clean up the facility. DEQ will not enter into PPAs that do not fully address cleanup needs and thereby might provide a "windfall" to a liable seller.

2) A commitment to perform substantial remedial measures at the facility.

   Example 2: The prospective purchaser agrees to perform removal or remedial measures necessary to implement, advance or complete cleanup. Measures of this type may include, but are not limited to: soil removal, capping or treatment; groundwater treatment; long term monitoring; and restrictions on property use.

[1] This guidance uses the term "facility" consistent with ORS 465.200(13), to reflect the extent of contamination requiring environmental investigation or cleanup. The "facility" might be larger than but encompass all or part of the "property" subject to a PPA transaction.

3) Productive reuse of vacant or abandoned industrial or commercial property.

   Example 3: The property has been out of use or underused for a long time and the purchaser agrees to develop the property so that it returns to productive use, creates jobs, and/or becomes aesthetically pleasing.

5) Development of the property by a government entity or nonprofit organization to address an important public purpose.

   Example 4: The intended land use is for bridges, roads, boat access, open space, public recreation, public housing, public schools, public safety, community centers and similar non-profit public uses. The city and county in which the proposed use will be located support the development, and the transaction will help remediate existing contamination.

The above listing of substantial public benefit types is not exhaustive. Any number of factors at a particular property can be combined to result in a substantial public benefit. DEQ encourages parties to be creative.

Example 5: A prospective purchaser proposes an innovative pollution- prevention or toxics-use-reduction approach for a yet-to-be constructed operation, for the businesses to be operated at the property, or for industry in general. The approach must exceed currently established local, state and federal environmental requirements and must offer the potential for significant environmental benefits that otherwise would not be achieved.

3. Additional Factors Affecting PPA Negotiations

3.1 Amount of Information Available About Environmental Contamination

Except in extraordinary circumstances, DEQ will not enter into a PPA until contamination at the facility has been fully investigated (including, as applicable, any off- site migration from the property). While DEQ encourages buyers to contact DEQ as soon as they begin thinking about the PPA program, the nature and extent of contamination at the facility must be fully defined before the important terms of a PPA can be developed. DEQ and the buyer both need to understand the full extent of contamination at the facility so that DEQ can identify necessary removal or remedial actions. The extent of contamination and extent/cost of cleanup actions are key factors influencing the transaction and the PPA.

In most cases, buyers and sellers negotiate who will perform the site investigation. DEQ strongly encourages the party performing the investigation to do so under DEQ oversight, both to make sure the investigation is done correctly and to begin scoping cleanup actions. Failure to involve DEQ early in the process may cause delays in a transaction, especially if DEQ determines that additional site investigation is required.

DEQ strives for an efficient and timely PPA process, and prospective purchasers should allow adequate time for full site investigation in their transaction planning and purchase agreements. Standard due-diligence periods of 60 or 90 days are almost always inadequate to complete site investigation of contaminated

properties. Similarly, anticipated closing dates should be set with an understanding of the time required to investigate a site, develop a cleanup plan, and complete all public notice and comment requirements.

3.2 Performance-Based Commitments to Cleanup Preferred

DEQ strongly prefers defining the purchaser's cleanup contribution in terms of performance of specific actions, rather than dollars. In most cases, a Record of Decision will describe cleanup necessary at the facility, and the purchaser's cleanup duties will be described in a Scope of Work incorporated into the PPA. Where the prospective purchaser will be performing cleanup actions, the purchaser will usually engage an environmental cleanup contractor to assist in the transaction by coordinating with DEQ's cleanup staff, performing investigations, developing and providing cost estimates for cleanup actions, etc. Generally, DEQ does not provide cleanup cost estimates.

3.3 Cleanup Leading to Site Closure Preferred (No Further Action determination)

DEQ prefers PPAs that lead to full cleanup of the facility, because it is in the best interests of all concerned: the buyer, seller, state, local jurisdictions and neighbors. If the transaction cannot provide enough resources for a full cleanup, DEQ has experience working with a variety of funding partners to bring additional funds to the cleanup.

3.4 Long-term Obligations and Restrictions on Use

Buyers should understand that, under Oregon's risk-based cleanup approach, remedies for many sites include "institutional controls." Buyers may be required to enter into a separate agreement with DEQ, called an "Easement and Equitable Servitudes" in which the buyer will, for example, agree to: maintain a cap over contaminated soil; maintain a building ventilation system; restrict use of groundwater; restrict use of the property to industrial uses; and similar measures. These restrictions run with the land and bind future owners. At some properties.

3.5 Financial Viability

DEQ may ask the purchaser to demonstrate that it is financially capable of fulfilling its PPA obligations.

3.6 Land Use

Oregon statute requires DEQ to consult with affected land-use planning jurisdictions and consider reasonably anticipated future land uses at a facility and surrounding properties. Early in the negotiation process, DEQ will require the prospective purchaser to consult with the appropriate jurisdiction to determine whether the purchaser's proposed use is consistent with land-use plans for the area and to provide DEQ with a record of that consultation.

3.7 Consultation with Other State Agencies

When contamination from a property affects lands owned by the state of Oregon (primarily submerged or submersible lands), DEQ will consult with the Oregon Department of State Lands about a proposed PPA. Similarly, if past contamination may have damaged natural resources, DEQ will consult with the Oregon Department of Fish and Wildlife about the proposed PPA, especially if the PPA includes a release from the state

of Oregon for natural resource damage claims. DEQ will coordinate with the Oregon Department of Transportation or local governments when contamination extends into a public right-of-way.

3.8 Recording Requirements

PPAs must be recorded in the real property records of the county where the property is located. The prospective purchaser is responsible for properly recording the documents in the appropriate office and providing DEQ with evidence of such recording. PPAs "run with the land," meaning that subsequent owners are both bound by, and benefit from, terms of the PPA.

3.9 Statutorily Required Terms of the PPA

- The purchaser commits to undertake measures constituting a substantial public benefit.
- Remedial measures required under the PPA must be performed under DEQ's oversight. (The purchaser must enter the appropriate DEQ cleanup program and is responsible for paying for DEQ oversight costs.)
- The purchaser must waive any claim or cause of action against the state of Oregon arising from contamination at the facility existing as of the date of ownership or operation of the facility.
- The purchaser must grant an irrevocable right of entry to DEQ and its authorized representatives for the purposes of the agreement or for remedial measures.
- An express reservation of rights as to an entity not a party to the agreement.
- The PPA must include a legal description of the property.

3.10 Additional Terms

DEQ has the discretion to include additional terms that are necessary. Standard language for the different forms of PPAs (see below) is available on DEQ's PPA web page (http://www.oregon.gov/deq/Hazards-and-Cleanup/env-cleanup/Pages/Prospective-Purchaser-Agreements.aspx) or by request to DEQ. Many terms of a PPA are standard and not subject to negotiation, making the process more efficient for the prospective purchaser and DEQ.

4. Forms and Effect of PPAs

A PPA is a legally binding agreement between DEQ and a prospective purchaser of contaminated property. PPAs may be executed in three different forms: as an administrative **Agreement**, as an administrative **Consent Order**, or as a judicial **Consent Judgment**. The form of each agreement is available on DEQ's Prospective Purchaser web page or by contacting DEQ.

DEQ will consult with the prospective purchaser and its attorney regarding the form of agreement that would be most appropriate for a particular property. However, ***DEQ strongly advises every prospective purchaser who desires to enter into a PPA to seek advice and representation from a qualified attorney. DEQ cannot and will not provide legal advice to prospective purchasers.***

4.1 Administrative Agreement PPA

An Administrative Agreement PPA defines and limits the extent of a purchaser's liability to the state of Oregon for environmental cleanup under various state laws (ORS 465.200 et seq., 466.640, and 468B.310). The protection provided by the PPA is a "release of liability," which is a promise from the state not to require the purchaser to perform or pay for environmental cleanup at the facility of any contamination existing at the time of property purchase, provided that the purchaser fulfills all obligations under the PPA. The PPA does not provide liability protection as to any additional contamination that may occur after property purchase. An Administrative Agreement PPA also does not protect the purchaser from potential legal actions by third parties under state law against the purchaser with respect to the contamination.

4.2 Consent Order PPA

A Consent Order PPA provides a release from liability to the state of Oregon and also provides protection from actions by third parties that might be brought under the following state laws: 1) claims under ORS 465.255; 2) claims for contribution under ORS 465.257; and 3) claims under ORS 466.640 and ORS 468B.310 related to spills.

4.3 Consent Judgment PPA

A Consent Judgment PPA provides the same liability protections as a Consent Order PPA, in the form of a covenant not to sue and a liability release. The difference is that DEQ executes Consent Orders, while the circuit court in the county where the property is located executes Consent Judgments.

4.4 CERCLA (Federal Regulations) Liability

None of the PPAs provide liability protection from the federal government (U.S. EPA) for claims under the federal cleanup law (CERCLA/Comprehensive Environmental Response, Compensation and Liability Act). Prospective purchasers should consult with an attorney about liability management under federal law, including the CERCLA "bona fide prospective purchaser" provision. DEQ intends that all PPAs will be "settlements" for purposes of third-party contribution protection under Section 113(f)(2) of CERCLA.

5. Public Participation

The degree of required public participation varies with the form of the PPA.

For Administrative Agreement PPAs, DEQ notifies the public of the PPA after it has been finalized. This notice is published in one or more newspapers in the community of the subject property. The purchaser pays for the cost for this notice publication. While there is no legal requirement for public notice before an Administrative Agreement PPA is executed, there may be instances where public involvement is advisable. DEQ will make a case-by-case determination about the need for taking additional actions to ensure meaningful community involvement, and these additional actions may lengthen the time required to complete a PPA.

Consent Order and Consent Judgment PPAs are executed only after completion of the public notice and comment process set out in ORS 465.320, and DEQ's consideration of public comments. Requirements include publication of an opportunity to comment on the proposed PPA in the Secretary of State's Bulletin and a local newspaper, with a required 30-day public comment period. A public meeting may be required or advisable for some PPAs. ***In planning transaction timelines, prospective purchasers should take into account the additional time required for the notice and comment process of Consent Order and Consent Judgment PPAs.***

Entering into a PPA does not alter requirements for public involvement during the cleanup process. Public notice for remedy selection will be followed as required by Oregon law.

6. Application and Review and Negotiation Costs

A prospective purchaser's first step is to consult with DEQ's Prospective Purchaser Program coordinator about the proposed project to determine whether the property and proposed benefits meet minimum PPA qualifications. There is no cost for this initial consultation.

Once the prospective purchaser and DEQ determine that it is appropriate to begin discussing PPA details, the prospective purchaser must apply to the program by submitting the following:

1) a completed Prospective Purchaser Application (available on DEQ's PPA webpage at http://www.oregon.gov/deq/Hazards-and-Cleanup/env-cleanup/Pages/Prospective-Purchaser-Agreements.aspx);

2) a signed Cost Recovery Letter Agreement (available on DEQ's PPA webpage at http://www.oregon.gov/deq/Hazards-and-Cleanup/env-cleanup/Pages/Prospective-Purchaser-Agreements.aspx); and

3) a $2,500 deposit, payable to "DEQ, Hazardous Substance Remedial Action Fund."

DEQ staff involved in negotiating PPA terms will charge their time against the purchaser's deposit. Staff involved in negotiations will include, at a minimum, the program coordinator and a technical staff person from the DEQ regional office where the property is located. Depending on the PPA's complexity, DEQ managers and the Oregon Attorney General's office may also be asked to review terms of the PPA. More complex PPAs will typically take longer to complete because of additional review required.

When negotiations are complete, DEQ will either return any unspent funds to the applicant or transfer them to their cleanup account, if the purchaser is performing cleanup activities at the facility as part of the PPA. If the deposit is depleted, the Cost Recovery Letter Agreement authorizes DEQ to invoice the applicant monthly for expenditures above the $2,500 deposit.

7. Process for Review and Approval of PPAs

The Land Quality Division, at DEQ's headquarters office in Portland, coordinates negotiation, review and approval of PPAs, in consultation with appropriate regional or headquarters staff.

Note that the time required to execute a final PPA varies widely, depending on project specifics and complexity, amount of technical data to be reviewed, status of site investigation and remedy selection, and availability of DEQ staff. In most cases, PPA documents themselves can be prepared relatively quickly. However, cleanup process requirements, including site investigation and remedy selection, will take longer.

7.1 Typical Steps in PPA Review and Approval

1) DEQ's program coordinator discusses the PPA process with potential applicants and provides them with the program packet. The discussion should include an evaluation of whether the proposed project meets minimum PPA requirements. This may require an internal inquiry into file information about the facility and property. It may also be helpful to have the likely DEQ project manager attend the initial meeting, to address technical concerns or questions. If the purchaser's proposal and property is a good candidate for a PPA, DEQ's program coordinator will encourage the purchaser to submit a formal application.

2) DEQ's program coordinator reviews the submitted Application and Cost Recovery Letter Agreement to verify that it is complete, accurate to the best of staff's knowledge, and includes a legal description of the property.

3) DEQ's program coordinator processes the deposit and Cost Recovery Letter Agreement, if applicable, and opens a project account for the PPA.

4) DEQ's program coordinator meets with applicant and DEQ project manager to discuss the facility, including known or suspected contamination, the degree to which the facility has been investigated and the need for any additional investigation, whether removal or remedial actions have been selected or approved by DEQ, and proposed redevelopment plans for the property.

5) Based on initial meetings and DEQ review of any facility documents, including Phase I site assessment and other reports, DEQ's program coordinator discusses with the applicant the steps and process required to develop and complete a PPA.

6) Prospective purchaser (or seller) completes all necessary investigation and works with DEQ to develop removal and remedial actions for the facility. In most cases the purchaser will perform the removal or remedial actions after the PPA is executed and the property transaction closes.

7) Prospective purchaser consults with the appropriate land-use jurisdiction about purchaser's proposed use of the property, as compared to current and future land-use plans for the area.

8) DEQ and prospective purchaser agree on terms of the PPA.

9) DEQ drafts the PPA. In most cases, DEQ will negotiate and draft Administrative Agreement and Consent Order PPAs. However, DEQ may involve the state Attorney General's office as needed for PPAs that: 1) are complex; or 2) might affect other state agencies; or 3) require advice or assistance regarding unusual legal issues. Because Consent Judgment PPAs must be filed in circuit court, the Attorney General's office is always involved in this type of PPA.

10) DEQ's program coordinator sends a draft PPA to the purchaser for review and schedules any necessary meetings for further negotiation.

11) As necessary and appropriate, DEQ staff complete the public notice and comment period. For agreements requiring public notice and opportunity for comment, DEQ staff prepare a memorandum or other agency record showing consideration of any public comments and the DEQ program coordinator's recommendation about the PPA.

12) For Administrative Agreement and Consent Order PPAs, the purchaser and DEQ's Land Quality Division administrator sign two originals. The date of the last signature becomes the PPA execution

date. One fully executed PPA is provided to the purchaser and the other is retained in DEQ's central PPA files. A copy of the PPA is also provided to the DEQ project manager for the facility. DEQ will provide the prospective purchaser with a draft Public Notice of Agreement, to be sent to local publications for public notification purposes and identify other appropriate local or statewide venues or publications for notification (e.g., League of Oregon Cities newsletter).

13) For Consent Judgment PPAs, the purchaser and DEQ sign the Consent Judgment. Then the Attorney General's office files the Consent Judgment and a complaint (for jurisdictional purposes) with the circuit court. Once the Consent Judgment is lodged by the court (the PPA execution date), DEQ provides a copy to the purchaser.

14) DEQ's program coordinator forwards project information to the appropriate regional Environmental Cleanup Site Information Coordinator, for entry into the ECSI database.

15) The purchaser records the PPA. (As mentioned previously, PPAs must be recorded in the real property records of the county in which the property is located. The purchaser is responsible for properly recording the documents in the appropriate office and providing DEQ with evidence of such recording.)

8. Performing Obligations Under the PPA

In most cases, after execution of the PPA and closing of the property transaction, the purchaser will perform cleanup actions under the PPA. Those actions will be completed under the oversight of a DEQ project manager, usually in either the Voluntary Cleanup or Leaking Underground Storage Tank programs.

When the purchaser has completed PPA obligations, DEQ will issue a letter (for Administrative PPAs) or a Certificate of Completion (for Consent Order and Consent Judgment PPAs) stating that the prospective purchaser has complied with all PPA obligations. DEQ may also make a No Further Action determination, provided the property meets requirements for an NFA. That decision usually will be made separately from a letter or Certificate of Completion.

9. Additional Information

To obtain further information about the program, visit DEQ's PPA web page at http://www.oregon.gov/deq/Hazards-and-Cleanup/env-cleanup/Pages/Prospective-Purchaser-Agreements.aspx, which includes contact information for the PPA program coordinator.

Chapter 1D

Presentation Slides: Brownfield and CERCLA Site Redevelopment

Ted Wall
Maul Foster & Alongi
Portland, Oregon

Oregon State Bar 2021

Environmental and Natural Resource Law: Year in Review

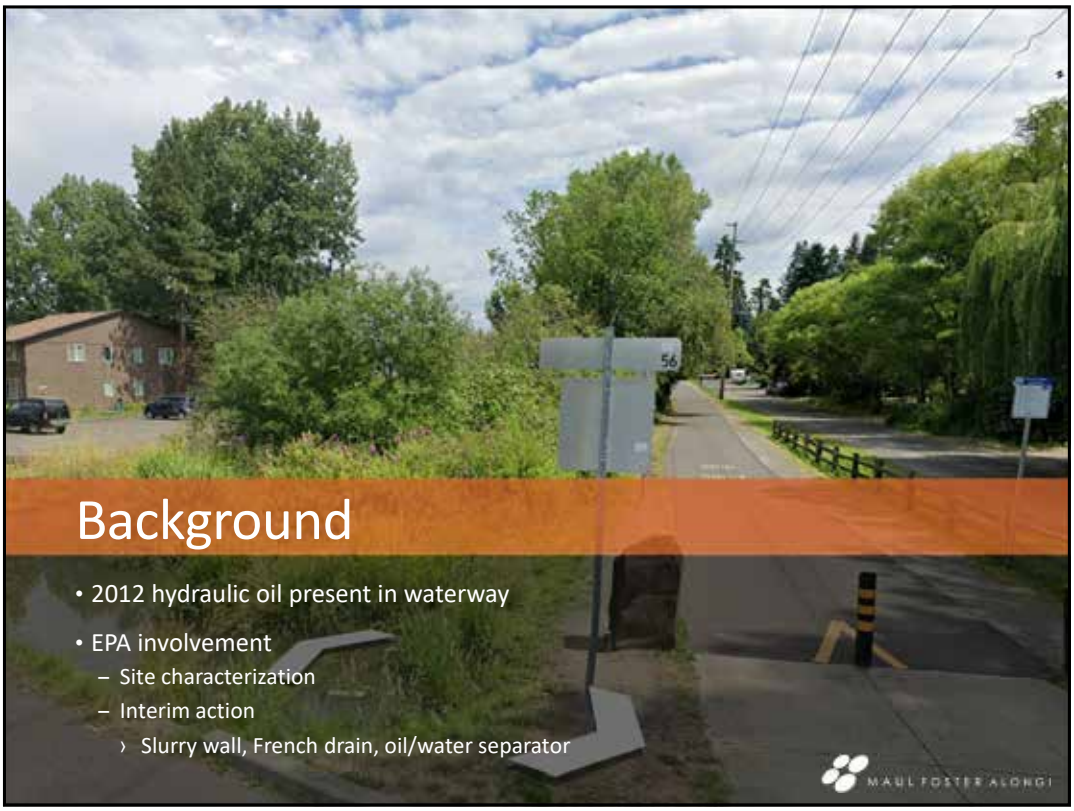
Brownfield and CERCLA Site Redevelopment

Case Studies

MAUL FOSTER ALONGI

Milwaukie, Oregon

MAUL FOSTER ALONGI


Background
• 2012 hydraulic oil present in waterway
• EPA involvement
– Site characterization
– Interim action
› Slurry wall, French drain, oil/water separator
MAUL FOSTER ALONGI


Background
• Seller
– Unwilling/unable to address environmental problems
• Buyer
– Small business owner
– Finite capital available
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Problem Statement

- Can we develop a remedial action that is:
  - Acceptable to DEQ, and
  - Within client's financial, technical, and risk tolerance limits?

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Solution

- DEQ Prospective Purchaser Agreement
  - ✓ Client financial limits
  - ✓ Client technical abilities
  - ✓ Client risk tolerance
- CERCLA BFPP
  - ✓ Client risk tolerance

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Remedial Action

- Decommission hydraulic lifts
- Remove reservoirs and accessible pipes
- Backfill
- Cap, seal
- Annual OWS maintenance for 5 years

MAUL FOSTER ALONGI

Benefits/ Outcomes

- Environmental
  - Removed source
  - Capped residual
  - Managed impacted groundwater
- Economic
  - Employment
  - Taxes

MAUL FOSTER ALONGI

Keys to Success

Open dialogue with Oregon DEQ

- Productive cleanup within fiscal limits

Limited uncertainty and risk

- Prospective Purchaser Agreement
- BFPP Protection

MAUL FOSTER ALONGI

Eugene, Oregon

MAUL FOSTER ALONGI

Background

- Bulk oil and fuel storage
- Auto repair
- Ice cream production
- More auto repair
- Broom manufacturer
- Vehicle storage

MAUL FOSTER ALONGI

Problem Statement

- Can we develop a remedial action that is:
  - Acceptable to DEQ, and
  - Within client's (and future buyer's) financial, technical, and risk tolerance limits?

MAUL FOSTER ALONGI

Solution

- DEQ Prospective Purchaser Agreement
  - ✓ Client financial limits
  - ✓ Client technical abilities
  - ✓ Client risk tolerance
- CERCLA BFPP
  - ✓ Client risk tolerance

MAUL FOSTER ALONGI

Remedial Action

- Groundwater use prohibition
- Vapor barrier (or show not needed)
- Follow CMMP

MAUL FOSTER ALONGI

Contaminated Media Management Plan

- Cap as soil barrier
- Vapor barrier (or show not needed)
- Stormwater management
- Soil and groundwater management during construction and repairs

MAUL FOSTER ALONGI

Benefits/ Outcomes

- Environmental
  - Cap residual soil
  - Mange vapor and stormwater
- Economic (pending sale)
  - Provides certainty
  - Limits impact to redevelopment
  - Employment
  - Taxes

MAUL FOSTER ALONGI

Keys to Success

Open dialogue with Oregon DEQ

- Productive cleanup within fiscal limits

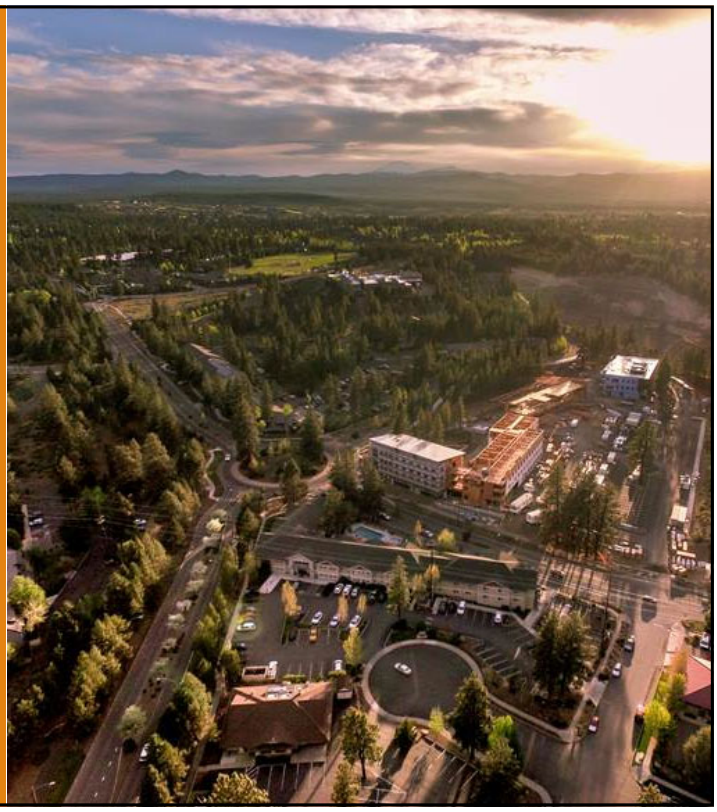
Limited uncertainty and risk

- Prospective Purchaser Agreement
- BFPP Protection

MAUL FOSTER ALONGI

OSU Cascades

Bend, Oregon



MAUL FOSTER ALONGI

Background

- 72-acre pumice mine turned County landfill
- 46-acre pumice mine
- 10-acre developed campus
- 2016 due diligence

MAUL FOSTER ALONGI

Proposed Development

- 128-acre campus
- 5,000 students
- Four-year degrees
- Innovation District

MAUL FOSTER ALONGI

Problem Statement

- Can we develop a remedial action that is:
  - Acceptable to DEQ, and
  - Within client's financial, technical, and risk tolerance limits?

MAUL FOSTER ALONGI

Solution

- DEQ Prospective Purchaser Agreement
  - ✓ Client financial limits
  - ✓ Client technical abilities
  - ✓ Client risk tolerance
- CERCLA BFPP
  - ✓ Client risk tolerance

MAUL FOSTER ALONGI

Remedial Action

- Permittee, joint operator with County
- Phased site development
- Manage waste, soil
- Cap

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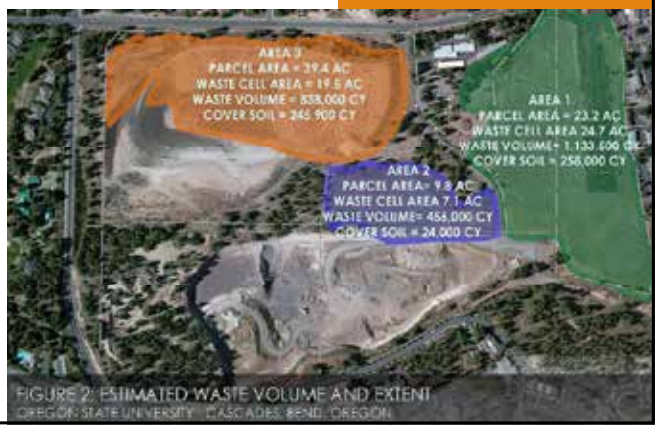

FIGURE 2: ESTIMATED WASTE VOLUME AND EXTENT
OREGON STATE UNIVERSITY - CASCADES, BEND, OREGON

SWINERTON 2020 WOHESC 070620

Benefits/Outcomes

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Keys to Success

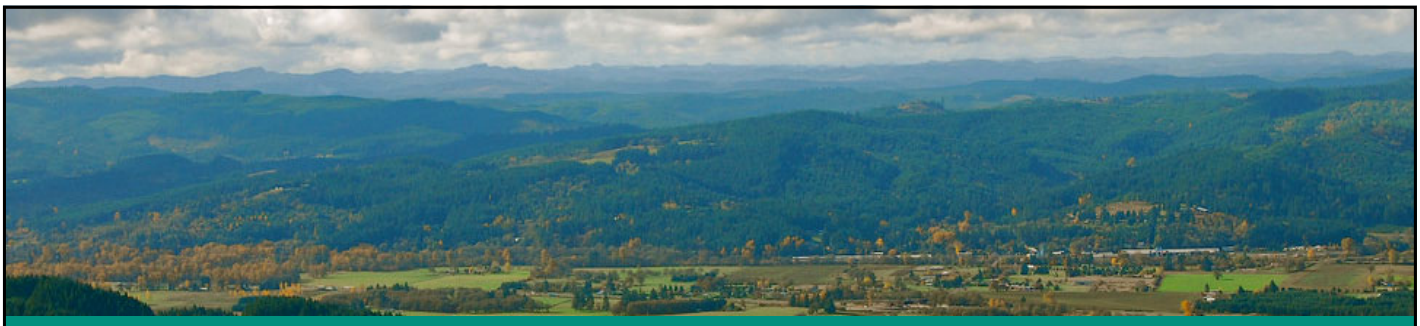
- Early engagement with Oregon DEQ
- Design charrettes
- Strategic public outreach
- Prospective Purchaser Agreement and BFPP Protection

MAUL FOSTER ALONGI

Chapter 2A

Presentation Slides: Climate Change and Clean Electricity in Oregon

Richard Whitman
Oregon Department of Environmental Quality
Portland, Oregon



Climate Change and Clean Electricity in Oregon

Oregon State Bar, Environment and Natural Resources Section 2021 Year in Review

Richard Whitman,
Director, Oregon Dept. of Environmental Quality

The Climate Crisis in Oregon

WILDFIRES & SMOKE
More frequent and intense

SEA LEVEL RISE
Coastal flooding, impacting habitats and infrastructure

DROUGHT, HEAT & DISEASE
Stresses to the environment, human health, fisheries and wildlife

SNOWPACK & STREAMFLOW
Harm to fisheries, water quality, water supply

We Are Running Out of Time to Reduce GHG Emissions

- Increasing temperatures and their cascading effects threaten our resources, our health, and our communities. Without further action, ***average*** temperatures will rise by as much as 9˚F over the course of this century, with even higher increases in extremes.
- To avoid catastrophic impacts from climate change, we must limit global warming to less than 4˚F (2.2°C). Remaining below this threshold requires global action to accelerate reductions in GHG emissions to at least 80 percent below 1990 levels by 2050.

3

IEA Sees 'Viable but Narrow' Pathway to Avoid Catastrophic Impacts of Climate Change by 2050

- A "viable but narrow" path exists for the world to avoid the most catastrophic impacts of climate change, the International Energy Agency (IEA) said earlier this year.
- The path includes an immediate end to new investments in oil, gas and coal production, an end to sales of gas-powered cars by 2035, and installation of renewable energy at four times last year's record-breaking pace.

4

Oregon's Climate Programs Are Creating Our State's Pathway to Needed GHG Reductions

Oregon already has many pieces of the GHG reduction puzzle in place:

- CA Light Duty Vehicle Standards
- OR Clean Fuels
- OR Clean Vehicle Incentives
- Renewable Portfolio Standard/Coal to Clean
- Energy Trust
- Landfill Methane Standards

5

Oregon's Climate Programs Are Creating Our State's Pathway to Needed GHG Reductions

Oregon is about to fill in most of the remaining gaps:

- HB 2021 (100% Clean Electricity)
- DEQ's Climate Protection Program (Transportation and Natural Gas/Propane Cap & Reduce)
- Advanced Clean Trucks
- DLCD Climate Friendly & Equitable Communities

6

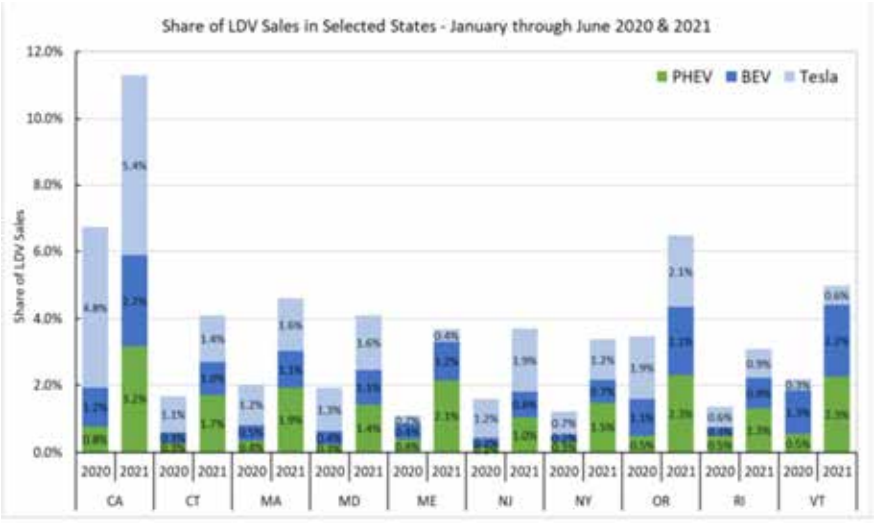
Roadmap to 2050

- Electricity (30% of Oregon GHG Emissions in 2019)
  - HB 2021 (80% by 2030, 90% by 2035, 100% by 2040)
  - RPS and Coal to Clean
- Transportation (36% of Oregon GHG Emissions in 2019)
  - Cleaner Fuels (LCFS)
  - Cleaner Vehicles (CA standards, OR EV incentives)
  - Less Driving (DLCD programs; ODOT STS and other investments in transit and multimodal)
- Natural Gas/Other Fuels (Res/Com/Ind)(19% of Oregon GHG Emissions in 2019)
  - Energy Efficiency (ETO, NEWA)
  - Conversion to Clean Electricity (CCIs, Utility Programs, Incentives)
  - Renewable Natural Gas and Green Hydrogen
- Other Industrial Process Emissions (6% of Oregon GHG Emissions in 2019)
  - Best Available Emissions Reductions (BAER)

7

Early Signs of Success

- Amidst a national surge in EV sales, **Oregon moves to #2 in the nation in % of new vehicle sales that are BEVs/PHEVs**
- Renewables already account for more than 60% of Oregon's electricity
- OCFP has reduced carbon intensity of gas by 5 percent, at a cost of $0.04/gallon



8

Equity

Environmental justice communities (urban and rural) face more risks

- ↑ Greater pollution exposure
- ↑ Greater impacts of climate change
- ↓ Less representation in public processes
- ↓ Less access to new, clean technologies

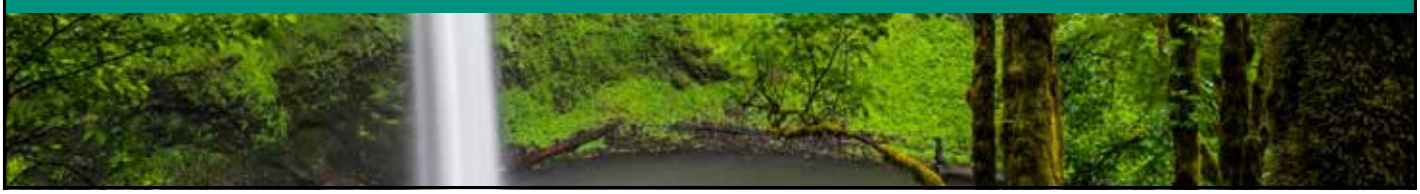
Support EJ communities by accelerating their move to cleaner energy sources for heating and transportation

Reduce co-pollutants to improve health in communities disadvantaged by air pollution

9

Contact: **Richard Whitman, Director**
Richard.Whitman@deq.state.or.us

More information: www.oregon.gov/deq/ghgp/Pages/capandreduce.aspx



Chapter 2B

Presentation Slides: HB 2021: Oregon's 100% Clean Electricity Law

Riley Peck
PacifiCorp
Portland, Oregon

HB 2021: Oregon's 100% Clean Electricity Law

Riley Peck, PacifiCorp
riley.peck@pacificorp.com

All views are mine – not representing PacifiCorp today.

PACIFIC POWER
POWERING YOUR GREATNESS

What else happened this session?

- **SB 762 - Wildfire planning**
  - Comprehensive wildfire bill, but utility-specific provisions require electric utilities to develop wildfire protection plans, approved by PUC (for IOUs) or their governing body (COUs).
- **HB 2165: Electric Vehicles**
  - Requires PGE and PacifiCorp to collect 0.25% of total revenues and devote it to transportation electrification, expands and extends existing incentives for EVs
- **HB 3141: Public Purpose Charge reform**
  - Requires all customers to contribute equally to energy efficiency – eliminates a longstanding exemption for the largest customers
  - Maintains funding for schools and low-income weatherization, expands funding for above-market renewables to include grid-connected reliability and resiliency assets (storage)
- **HB 2475 - Low income rates and environmental justice**
  - Allows for differential utility rates to mitigate energy burden and creates intervenor funding for groups representing customers that are low income or members of environmental justice communities.

And lots more – see ODOE 2021 Legislative Report for comprehensive review of energy bills.

2

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HB 2021: the basics

- Requires PGE and PacifiCorp to reduce emissions by 80% by 2030, 90% by 2035, and 100% by 2040. Similar provisions for electric service suppliers (ESSs), which supply electricity to certain large customers.
- Reductions are from a baseline of average 2010-12 emissions, as reported to DEQ. ESSs have a different metric.
- In both DEQ statutes and regs, as well as HB 2021, "wind is wind and gas is gas." This means that the disposition of a REC is irrelevant to compliance with the law.
- No new natural gas generation in OR.

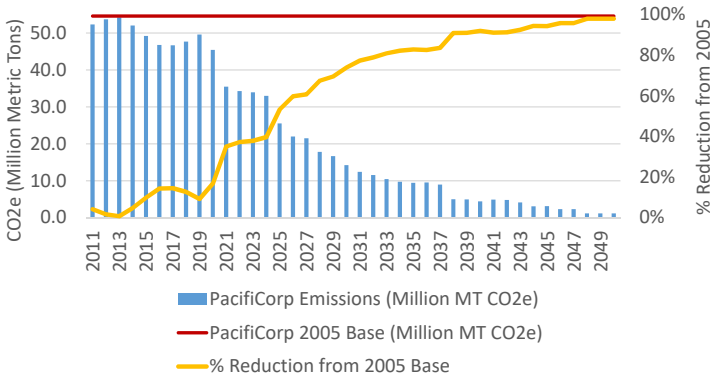


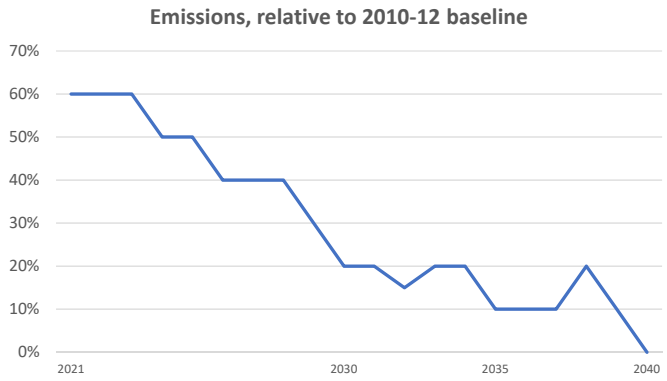
Chart is based on PacifiCorp's 2021 IRP Preferred Portfolio – not Oregon-specific emissions, and not intended to show HB 2021 compliance

3

POWERING YOUR GREATNESS

Planning, compliance, and offramps

- Planning to meet targets is done in Clean Energy Plans (CEPs), which will be a component or appendix to utility integrated resource plans.
- The 2030, 2035, and 2040 targets are "check points": compliance is strictly required in each of these three years, but no strict mandate in other years – though there is a "continual progress" requirement for planning.
- Offramps: unexpected low generation, load growth, reliability. Not permanent exemptions, law requires utilities to return to compliance relatively quickly.



4

POWERING YOUR GREATNESS

Environmental Justice Provisions

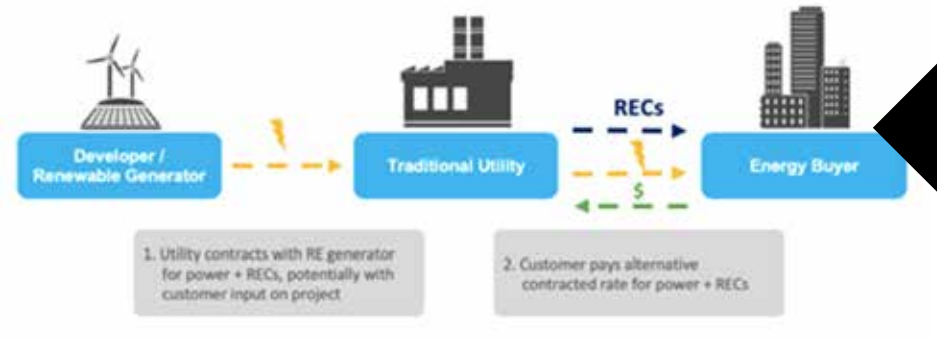
- Sets state policy to implement HB 2021 "in a manner that minimizes burdens for [EJ] communities."
- Requires utilities to convene a Community Benefits and Impacts Advisory Group – focuses on utility impacts in environmental justice communities and opportunities for actions within those communities to reduce energy burden, increase resilience/reliability, improve/increase investment, etc.
- $25 million in funding for renewable energy projects in environmental justice communities.
- New labor standards for all projects larger than 10 megawatts.

5

POWERING YOUR GREATNESS

Community Renewables and Competition

- Expands existing voluntary renewable provisions to allow local governments to work with utilities to develop community green tariffs, so all small customers can be served with resources selected by the community.
- Modifications to longstanding language restricting utilities from offering products in areas "likely to be competitive" – PUC must authorize programs that will help utilities meet the HB 2021 targets or assist with state GHG goals.



Now, this can be local government, on behalf of its residential and small commercial customers

6

POWERING YOUR GREATNESS

Small Resources, Economic Development, and Labor

- Increases small scale renewable mandate from 8% of utility capacity by 2025 to 10% of utility capacity by 2030.
  - *Note that "capacity" is about what a resource is technically capable of generating, not actual production of energy. Does not require purchase of RECs.*
  - *Resources can be sited inside or outside Oregon.*
  - *Currently subject to rulemaking before Oregon PUC – AR 622.*
- Requires a study of small-scale renewable potential, including impacts on economic development, utility rates.
- $50 million of state money to support planning, development, and construction of small renewable/storage/resiliency projects.
  - *The $25 million for EJ communities referenced on slide 5 is part of this $50 million.*

7

POWERING YOUR GREATNESS

Key Policy Choices

- Focus on emissions.
  - *Avoid confusion about renewable procurement, resource preferences, etc.*
  - *HB 2021 specifically states that reported emissions matter – not RECs, which are a procurement tool.*
- Build on existing, well-functioning laws, processes and regulations.
  - *DEQ reporting statutes and regulations work well, and their continued use forms the basic framework for HB 2021. Same with IRPs for planning.*
  - *For community green tariffs, using existing voluntary programs statutes imported significant important consumer protection provisions, avoiding a need to draft new language.*
- Avoid legal uncertainty and ambiguity.
  - *No in-state construction mandate – violates dormant commerce clause and unconstitutional. Wyoming v. Oklahoma, 502 U.S. 437, 455 (1992).*
  - *Specifically states that there is no effect on existing renewable portfolio standard – policies are complementary, but have different aims.*
- Maintain compatibility with existing markets.
  - *Focusing on reported emissions works because it is ambivalent to resource type/source of emissions, whether it's owned generation, long-term power purchase agreements, or market purchases.*

8

POWERING YOUR GREATNESS

Appendix Slides

Compliance obligation and baseline

SECTION 1. Definitions. As used in sections 1 to 15 of this 2021 Act:

(1) "Baseline emissions level" means:

(a) For an electric company, the average annual emissions of greenhouse gas for the years 2010, 2011 and 2012 associated with the electricity sold to retail electricity consumers as reported under ORS 468A.280, or rules adopted pursuant thereto.

SECTION 3. Clean energy targets. (1) A retail electricity provider shall reduce greenhouse gas emissions, measured for an electric company as greenhouse gas emissions reported under ORS 468A.280, and measured for an electricity service supplier as greenhouse gas emissions per megawatt-hour as reported under ORS 468A.280, to the extent compliance is consistent with sections 1 to 15 of this 2021 Act, by the following targets:

(a) By 2030, 80 percent below baseline emissions level.

(b) By 2035, 90 percent below baseline emissions level.

(c) By 2040, and for every subsequent year, 100 percent below baseline emissions level.

(2) Nothing in sections 1 to 15 of this 2021 Act may be construed as establishing a standard that requires a retail electricity provider to track electricity to end use retail customers.

SECTION 7. Treatment of generation resources; greenhouse gas emissions accounting. For the purposes of determining compliance with sections 1 to 15 of this 2021 Act, electricity shall have the emission attributes of the underlying generating resource.

Planning for Continual Progress

(4) A clean energy plan must:

(a) Incorporate the clean energy targets set forth in section 3 of this 2021 Act;

(b) Include annual goals set by the electric company for actions that make progress towards meeting the clean energy targets set forth in section 3 of this 2021 Act, including acquisition of nonemitting generation resources, energy efficiency measures and acquisition and use of demand response resources;

(c) Include a risk-based examination of resiliency opportunities that includes costs, consequences, outcomes and benefits based on reasonable and prudent industry resiliency standards and guidelines established by the Public Utility Commission;

(d) Examine the costs and opportunities of offsetting energy generated from fossil fuels with community-based renewable energy;

(e) Demonstrate the electric company is making continual progress within the planning period towards meeting the clean energy targets set forth in section 3 of this 2021 Act, including demonstrating a projected reduction of annual greenhouse gas emissions; and

(f) Result in an affordable, reliable and clean electric system.

11

POWERING YOUR GREATNESS

Environmental Justice definitions

(4) "Environmental justice" means equal protection from environmental and health hazards and meaningful public participation in decisions that affect the environment in which people live, work, learn, practice spirituality and play.

(5) "Environmental justice communities" includes communities of color, communities experiencing lower incomes, tribal communities, rural communities, coastal communities, communities with limited infrastructure and other communities traditionally underrepresented in public processes and adversely harmed by environmental and health hazards, including seniors, youth and persons with disabilities.

12

POWERING YOUR GREATNESS

Chapter 2C

Presentation Slides: Climate Change and Clean Electricity in Oregon: The Potential for Solar

Angela Crowley-Koch
Oregon Solar and Storage Industries Association
Portland, Oregon

OSSIA

OREGON SOLAR + STORAGE INDUSTRIES ASSOCIATION

Climate Change and Clean Electricity in Oregon: the Potential for Solar

Executive Director, Angela Crowley-Koch

Oregon's 2021 Legislative Session: the Good News!

- Solar+Storage rebate - $10 million
- Updated funding for ETO incentives
- Renewing the PILOT
- HB 2475
- 100% clean
  - Increase in the small-scale renewable carve-out
  - $50 million in funding for community renewable projects

Oregon's 2021 Legislative Session: the Just OK News

- HB 2021 does not include:
  - Policy support for large-scale in-state renewable projects
  - Policy support for Distributed Generation
  - Policy support for advancing storage
- Protections for a competitive market were weakened

What about the Public Utility Commission?

- Implementation of HB 2021
- Gov. Brown Executive Order 20-04
- Community Solar Program

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OREGON SOLAR + STORAGE INDUSTRIES ASSOCIATION

Oregon Solar + Storage Industries Association

www.ORSSIA.org

Chapter 3

The First 10 Months of the Biden EPA: Accomplishments, Challenges, and Practical Impacts on the Pacific Northwest

William Funk
Lewis & Clark Law School
Portland, Oregon

Andrew Hawley
Western Environmental Law Center
Seattle, Washington

L. John Iani
Perkins Coie
Seattle, Washington

There Are No Materials for This Presentation

Chapter 4

Keynote: A Conversation with Congressman Earl Blumenauer on the Future of the Columbia-Snake River Basin

Congressman Earl Blumenauer
US House of Representatives
Third Congressional District of Oregon
Portland, Oregon

There Are No Materials for This Presentation

Chapter 5A

Presentation Slides: Legal Overview—COVID Response Measures and In-Lieu and Treaty Fishing Access Sites

Stephanie Lynch
Office of the Solicitor
US Department of Interior
Portland, Oregon

In Lieu and Treaty Fishing Access Sites along the Columbia River, Legal Overview

2021 Environmental and Natural Resources Law: Year in Review
Tribal Law and Natural Resources: Recent Developments in Treaty Rights Implementation and Sovereignty Issues
October 14, 2021

Stephanie L. Lynch*
Senior Attorney
Office of the Regional Solicitor
Pacific NW Region
U.S. Department of the Interior

*The views expressed in this presentation are the author's own and are not intended to represent or reflect the positions of the Office of the Solicitor or the Department of the Interior.

Outline of Today's Presentation

- Overview of the Sites
  - Types and Location
  - Statutes
- Legal Foundation
  - Treaties
  - *United States v. Winans* and *Seufert Bros. Co. v. United States*
- Selected Issues
  - Permitted Users and Uses
  - Jurisdiction

Overview of the Sites

Types and Location

Statutes

Location

Bureau of Indian Affairs (BIA) has administrative jurisdiction over:

- In Lieu Sites
- Treaty Fishing Access Sites

Columbia River Inter-Tribal Fish Commission (CRITFC) contracts with BIA under *Indian Self-Determination and Education Assistance Act,* 54 U.S.C. 5301 et seq., to perform important work at sites, including:

- Law Enforcement
- Operation and Maintenance
- Fisheries Services

In Lieu Sites

- 1945 Act authorized Secretary of War to acquire lands and provide facilities "to replace Indian fishing grounds submerged or destroyed as a result of construction of Bonneville dam… " Act of March 2, 1945, 59 Stat. 10, 22.
- Act directed transfer of In Lieu Sites to U.S. Department of the Interior "***subject to same conditions, safeguards, and protections as the treaty fishing grounds submerged or destroyed***." 59 Stat. at 22.

Bonneville Dam – Photo courtesy of University of Idaho

Treaty Fishing Access Sites

- 1988 Statute directed United States Army Corps of Engineers to acquire and improve treaty fishing access sites along the Columbia River "***to be administered to provide access to usual and accustomed fishing areas and ancillary fishing facilities***." Pub. L. 100-581
- Once improved, sites transferred to Interior (BIA)

Photo courtesy of King5.com

LEGAL FOUNDATION

TREATIES

> The exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said confederated tribes and bands of Indians, ***as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; …***

United States and Yakama Treaty of 1855, Art. III. 12 Stat. 951, 953*

* **Virtually identical reservations of off-reservation fishing rights in treaties between United States and Nez Perce, Umatilla and Warm Springs Tribes.**

United States v. Winans,
198 U.S. 371 (1905)

Facts: Non-Indian owner of fee land bordering Columbia River denied Yakama member access to usual and accustomed fishing site by stationing large fish wheel at site.

Held: Servitude on fee land existed providing a right of access to Yakama Nation members to exercise reserved off-reservation fishing treaty fishing right

Fish wheel circa 1880s – Photo courtesy of University of Idaho

"...the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted." *Winans*, 198 U.S. at 381

Seufert Bros. Co. v. United States, 249 U.S. 194 (1919)

Treaty right reserved in Yakima treaty of 1855 "of taking fish at all usual and accustomed places in common with citizens of the territory" construed according to natural meaning and understanding at treaty time to mean fishing on either side of the Columbia River

Photo courtesy of chinookobserver.com

SELECTED ISSUES

Permitted Users and Uses

Jurisdiction

PERMITTED USERS

- In Lieu Sites reserved for exclusive use of Yakama Nation, Warm Springs and Umatilla Tribes "and such other Columbia River Indians, if any, who had treaty fishing rights at locations inundated or destroyed by Bonneville Dam, to be used in accordance with treaty rights."
  25 C.F.R. § 248.2
- Treaty Fishing Access Sites reserved for exclusive use of Yakama Nation, Warm Springs, Umatilla and Nez Perce Tribe
  25 C.F.R. § 247.3(a)
- Families of eligible users may camp at sites. 25 C.F.R. §§ 247.3(c), 248.2

Photo Courtesy of St. Helens Chronicle.

Permitted Uses at Both Sites

- To access usual and accustomed fishing areas and ancillary fishing facilities
- Camping
- Fish Processing (including construction of drying sheds)

Pasture Point Treaty Fishing Access Site. *Photo Courtesy of CRITFC*

Uses Unique to In Lieu Sites

- 1945 Act states sites:

"***subject to the same conditions, safeguards, and protections as the treaty fishing grounds submerged or destroyed.***"

Sohappy v. Hodel, 911 F.2d 1212,1315 (9th Cir. 1990)

Court: (1) Congress intended use of sites subject to same conditions as on treaty fishing grounds, and (2) treaties did not prohibit year-round use of treaty fishing grounds

Result: BIA amended 25 CFR Part 248 regulations in 1997 to permit structures. 25 C.F.R. § 248.6 [59 Fed. Reg. 16757, April 7, 1994]

Jurisdiction – It's Complicated

- 4 Tribes
- 3 Federal districts
- 2 sets of BIA regulations
  - 25 CFR Part 247
  - 25 CFR Part 248
- 2 states
- 9 counties

- Public Law 280
  - Applicable in Oregon. 18 U.S.C. § 1162(a)
  - Washington's partial assumption of jurisdiction under P.L. 280 does not extend to sites in Washington
  - P.L. 280 contains exception, nothing therein shall:

... deprive any Indian or Indian tribe, band, or community of any right privilege, or immunity afforded under Federal treaty, agreement or statute with respect to hunting, trapping or fishing or the control, licensing or regulation thereof.

18 U.S.C. § 1162(b)

SELECTED CASES:

- *United States v. Sohappy,* 770 F.2d 816 (9th Cir. 1985)(Cooks In Lieu Site equivalent to Indian reservation)
- *State v. Sohappy, 110 Wash.2d 907,* 757 P.2d 509 (Wash. 1988) (State lacks jurisdiction for criminal prosecution of enrolled member of Yakama Nation for acts occurring on Cooks In Lieu Site)
- *State v. Jim,* 173 Wash. 2d 672, 273 P.3d 434 (Wash. 2012) (P.L. 280 case. Sites set aside for exercise of treaty fishing rights are established "reservations." Thus, State has no criminal jurisdiction).
- *Settler v. Lameer,* 507 F.2d 231 (9th Cir. 1974) (Under Treaty Yakama Nation retained regulatory and enforcement powers with respect to tribal fishing at all U&As)
- *State v. Jim,* 178 Or. App. 553, 37 P.3d 241 (Or. App. 2002) (P.L. 280 case. State of Oregon had authority to prosecute member of Yakama Nation for driving offenses committed on public road in Celilo Indian Village).


The End
Contact Information:
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Chapter 5B

Presentation Slides: Overview Briefing—COVID Response Measures and In-Lieu and Treaty Fishing Access Sites

Robert Lothrop
Columbia River Inter-Tribal Fish Commission
Portland, Oregon

Overview Briefing

COVID Response Measures and In-lieu and Treaty Fishing Access Sites

Presentation for the Oregon Bar, Environment and Natural Resources Section, 2021 Year in Review. Rob Lothrop, Mgr. Policy Dept. CRITFC. The views expressed are the author's not necessarily those of CRITFC.

Sept. 21, 2021

Columbia River Inter-Tribal Fish Commission

Project History

1855
Treaties

1889
Gordon Report

1905 & 1919
Supreme Court decisions

1934
Bonneville Dam construction begins

1945
Rivers and Harbors Act

In-lieu sites authorized
(5 sites; 40 acres)

1952
The Dalles Dam construction begins

1958
John Day Dam construction begins

1972
1972 Settlement

1976
CTUIR v Callaway

1988
P.L. 100-581
Treaty Fishing Access Site authorization

Columbia River Inter-Tribal Fish Commission

Authorizations

P.L. 78-14 *Mar 1945*	In-lieu site authority
P.L. 100-581, Title IV *Nov 1988*	Columbia River Treaty Fishing Access Sites
P.L. 104-109, Sec. 15 *Feb 1996*	O&M Funding and Site Transfer Authority
P.L. 104-303, Sec. 512 *Oct 1996*	WRDA 1996 Boundary Adjustments
P.L. 106-541, Sec. 555 *Dec 2000*	2000 Acquisition Cap Increase
P.L. 108-204, Sec. 108 *Mar 2004*	Celilo Village Redevelopment

Columbia River Inter-Tribal Fish Commission

Implementing Sites Improvement Post 1988

- P.L.100-581 (1988)
- Tribal Representation through Task Force
- Site Tours with the Corps and others
- April 1995 Evaluation Report
  - negotiations w/ Federal, State & local interests
  - plans & cost estimates
  - environmental compliance documents
  - phased implementation plan

Columbia River Inter-Tribal Fish Commission

Status of Sites

- The BIA considers the In-lieu and TFA sites as federal property, owned by the US and managed by the BIA for the benefit of Indian Tribes named in PLs 78-14 and 100-581.
- BIA regulations 25 CFR Part 248 apply to the 5 original in-lieu sites and 25 Part 247 apply to TFA Sites. The Regional Director may prescribe special regulations for any TFAS.
- Complex jurisdictional issues.

Columbia River Inter-Tribal Fish Commission

Preacher's Eddy TFAS

Columbia River Inter-Tribal Fish Commission

Preacher's Eddy TFAS

Columbia River Inter-Tribal Fish Commission

Operation & Maintenance

- Historical lack of O&M at 5 original sites
- After P.L. 100-581, BIA expressed reluctance to assume O&M at new sites
- 1995 CoE/BIA MOA on transfer and O&M
- BIA lacked investment authority
- 2003 BIA & CRITFC enter into 638 Agreement for Sites O&M, pursuant to 25 U.S.C. 5301, et. seq.

Columbia River Inter-Tribal Fish Commission

O&M Objectives

- Maximize the time horizon over which the O&M can be provided for the sites
- Perform the O&M for the sites in a cost-effective manner that also ensures they are maintained in good condition.
- Provide for tribal member employment

Columbia River Inter-Tribal Fish Commission

O&M Issues at the Sites

- Design assumptions did not anticipate level of use
- Funding assumptions failed (funds run out in FY '22)
- Abandoned property accumulates
  - Titled property (vehicles, boats, etc.)
  - Personal property (tents, equipment, etc.)
- Law enforcement issues, vandalism
- CRITFC Testified before the Senate Committee on Indian Affairs in 2016 on the above Tribal concerns. https://www.indian.senate.gov/sites/default/files/upload/images/9.14.16%20Paul%20Lumley%20Testimony.pdf

Columbia River Inter-Tribal Fish Commission

Sites Assessment and Improvements Act

- Conditions at the Sites are widely publicized.
  https://www.critfc.org/blog/2016/04/06/congressional-visit-to-zone-6-tribal-fishing-sites/ https://www.seattletimes.com/pacific-nw-magazine/covid-and-squalor-threaten-tribal-members-living-in-once-abundant-indian-fishing-sites-along-the-columbia-river/
- Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act, Pub. L. 116-99 (2019)
  - Authorizes BIA to assess current sanitation and safety conditions at the sites and to make improvements
  - BIA is funding CRITFC to perform the assessment

Columbia River Inter-Tribal Fish Commission

CRITFC has contracted with a Akana Engineering to Perform Safety and Sanitation Assessment for the Sites

Assessment will document prior assessments, utility conditions, real property inventories, solid waste management issues, social issues at the sites, input from the tribes and individuals using the sites and provide recommendations for safety and sanitation improvements. The assessment is scheduled to be completed by summer of 2022.

Columbia River Inter-Tribal Fish Commission

Tribal COVID Response

- Tribes retain Sovereignty to Protect the Health and Welfare of their members
- Sites are heavily used during fishing and some Tribal Members are living at some of the IL/TFAS sites year-round
- No Indian Health Service Clinics along the Columbia River
- Tribes promote Fisher Safety policies by
  - Issuing public safety orders
  - Providing safety supplies
  - Directing CRITFC response

Columbia River Inter-Tribal Fish Commission

CRITFC's COVID Response on the Columbia River

- Partnered with community organizations to
  - Host testing and vaccination events
  - Distribute PPE (face masks, etc,)
  - Distribute food
  - Provide COVID Information
- Obtained a CDC Grant to
  - Partner with OneCommuntyHealth (an FQHC)
  - Increase sanitation at the sites

Columbia River Inter-Tribal Fish Commission

Taking COVID Help to the River

- Commission advised staff to take solutions to the River, including support for mobile medical services
- CRITFC secured grant for a mobile medical clinic now owned and staffed by OneCommunityHealth

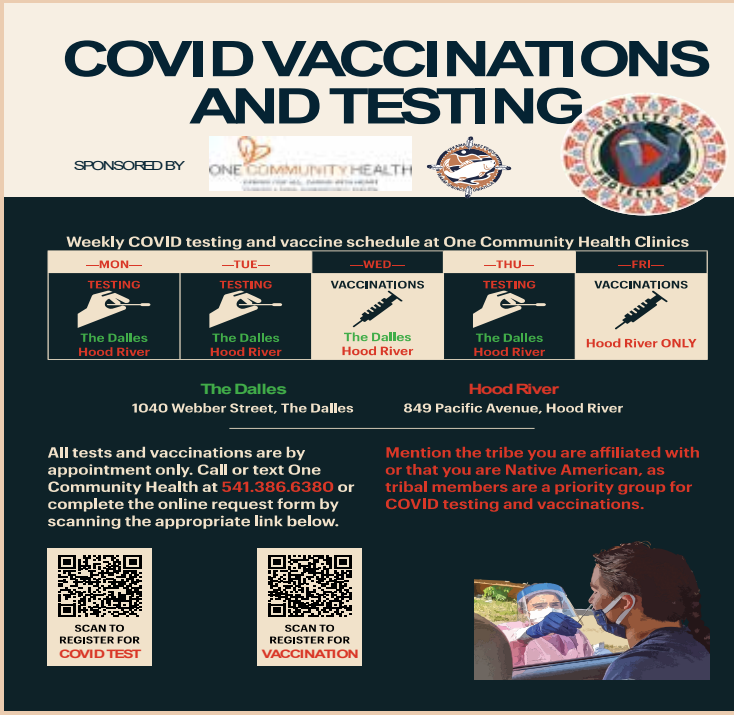
Columbia River Inter-Tribal Fish Commission

Food box and water distribution

Together with The Wave Foundation and other community partners we have distributed

- 17,000+ food boxes
- 4,500+ pounds of fresh fruit
- 9,000+ pounds of fish (Col R Salmon, cod, Alaska lingcod and sablefish)
- 161,000+ bottles of water
- 38,000+ masks
- Hand sanitizer & gloves
- Hygiene products

Columbia River Inter-Tribal Fish Commission



Columbia River Inter-Tribal Fish Commission

Chapter 5C

Presentation Slides: Tribal Sovereignty and the Clean Air Act

Howard Arnett
Karnopp Petersen LLP
Portland, Oregon

Robert "Bobby" Brunoe
General Manager for the Branch of Natural Resources
Confederated Tribes of Warm Springs
Warm Springs, Oregon

Tribal Sovereignty and The Clean Water Act:

Deschutes River Alliance v. Portland General Electric et al., 1 F.4th 1153 (9th Cir. 2021)

A presentation to the Oregon State Bar and the Environmental & Natural Resources Section, October 14, 2021

KARNOPP PETERSEN LLP

Overview of Presentation

- The Confederated Tribes of Warm Springs
- Pelton Round Butte Hydroelectric Project
- Tribal Sovereignty, Including Immunity From Suit
- Deschutes River Alliance v. Portland General Electric et al.

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Sherars Falls, Deschutes River, Oregon
Photo courtesy of Bobby Brunoe

KARNOPP PETERSEN LLP

The Confederated Tribes of Warm Springs – The People

- The Wascoes - the Wascoes were principally a salmon people located along the Columbia River.
- The Warm Springs - The Warm Springs lived along the Columbia's tributaries. Like the Wascoes, the Warm Springs were principally a salmon people, but they also depended more on game, roots and berries than the Wascoes.
- The Paiutes - The Paiutes lived in southeastern Oregon. The lifestyle of the Paiutes was considerably different from that of the Wascoes and Warm Springs. Their high-plains existence required that they migrate further and more frequently for game, and fish was not an important part of their diet.

KARNOPP PETERSEN LLP

The Culture

- Resources important to the tribes:
  - Water, fish, wildlife, roots and berries. These are in an order that was given to the tribes by the Creator.
- Why is this important for you to know?
  - These are what guide our way of life spiritually. They provide our connection to the land and help guide us with management decisions.

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Tribal fisherman at Celilo Falls on the Columbia River circa 1950s

Photo courtesy of the Columbia River Inter-Tribal Fish Commission

KARNOPP PETERSEN LLP

The Confederated Tribes of Warm Springs – Treaty of 1855

- The Confederated Tribes of Warm Springs is the legal successor in interest to the Indian signatories of the Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963
- The Treaty cedes approximately 10 million acres of land to the United States
- The Treaty reserves a 640,000 acre reservation in the Deschutes Basin in north central Oregon as a permanent homeland The Confederated Tribes of Warm Springs
- The Treaty reserves certain sovereign rights to go outside (or "off") the reservation to hunt, fish, gather roots, berries, medicines and to pasture livestock

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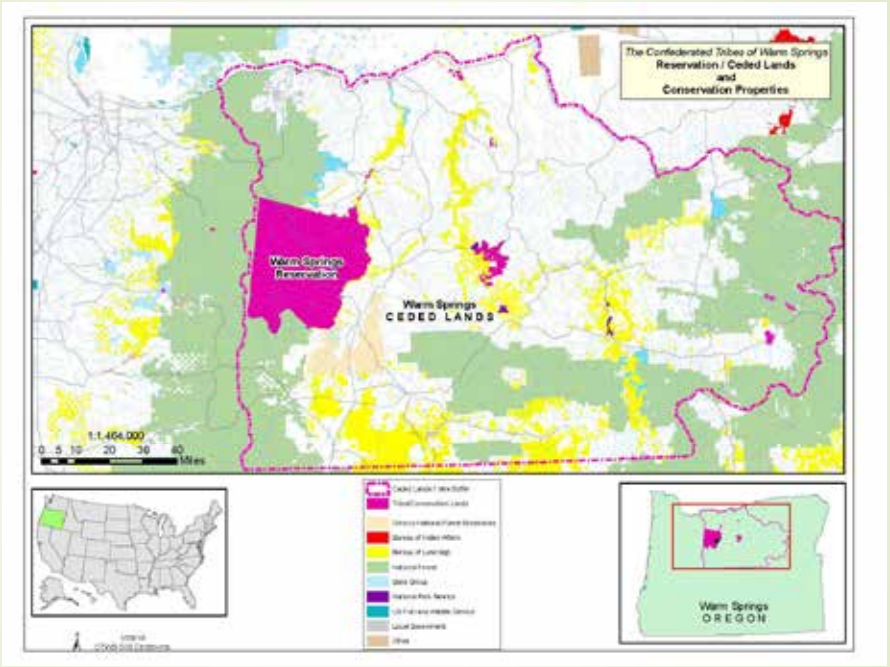

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Pelton Round Butte Hydroelectric Project

- Tribe and Portland General Electric co-own the Pelton Round Butte Hydroelectric Project (Pelton Project).
- The Pelton Project is located on the Deschutes River adjacent to, and partially within, the Warm Springs Reservation.
- An important part of the Pelton Project license is a fish passage plan, which aims to restore self-sustaining runs of anadromous fish in the upper Deschutes River above the Project.

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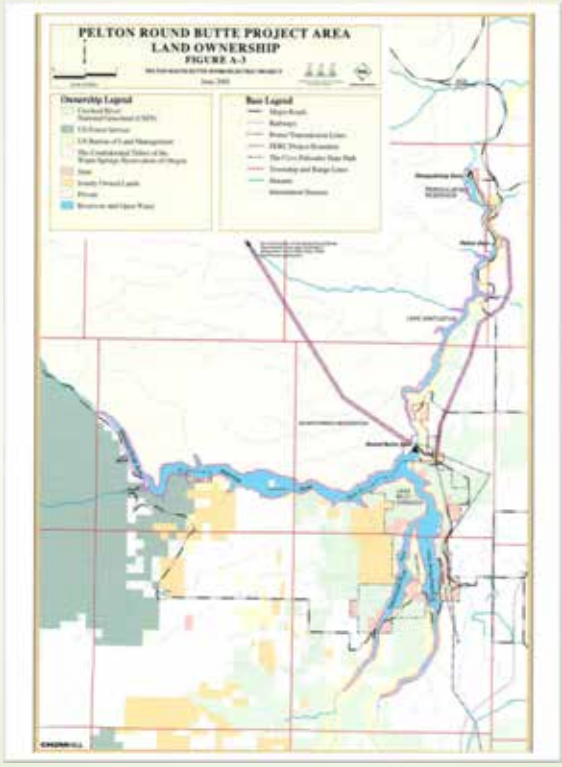

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ATTORNEYS AT LAW

Tribal Sovereignty, Including Immunity From Suit

- Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of self-government. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).
- An Indian tribe is subject to suit "only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).
- Tribal immunity is the "baseline position" and "[t]o abrogate [such] immunity, Congress must 'unequivocally express that purpose.'" *Bay Mills Indian Community*, 572 U.S. 782, 790 (2014).

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ATTORNEYS AT LAW

Deschutes River Alliance v. Portland General Electric et al., 1 F.4th 1153 (9th Cir. 2021)

- DRA brought CWA citizen suit against PGE (not Tribe) alleging that the Pelton Project was in violation of Section 401 certification issued by ODEQ.
- Tribe and PGE moved to dismiss pursuant to Rule 19(b) for failure to join the Tribe as a required party.
- District court denied motion on grounds that Congress had abrogated tribal sovereign immunity for purposes of CWA citizen suits.
- The Ninth Circuit agreed that the Tribe was a required party but disagreed that Congress had abrogated tribal sovereign immunity for purposes of CWA citizen suits.

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Deschutes River Alliance v. Portland General Electric et al. - cont.

- Ninth Circuit determined that a court must be able to say with "perfect confidence" that Congress intended to abrogate tribal sovereign immunity." Deschutes River Alliance, 1 F.4th at 1159.
- The Court held that the text of the CWA did not "provide the required 'perfect confidence.'" Id.
  - Text of CWA citizen suit statute does not mention Indian tribes. See 33 U.S.C. 1365(a).
  - The statutory definitions of "person" (which includes municipality) and "municipality" (which includes Indian tribes) are not a "clear and unequivocal expression of Congressional intent to abrogate" tribal sovereign immunity. Deschutes River Alliance, 1 F.4th at 1160.
- The Ninth Circuit remanded the case with instructions to vacate the judgment and dismiss for failure to join the Tribe.

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Questions?

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Authority

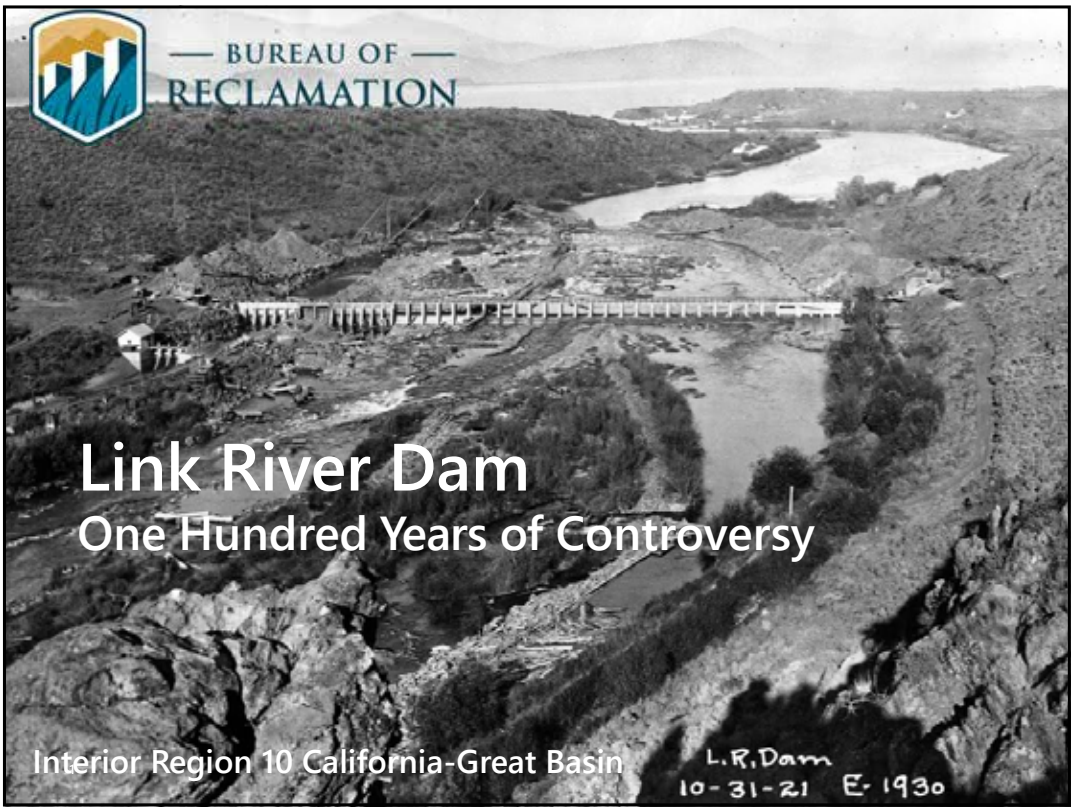
- Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963
- Confederated Tribes of Warm Springs Website https://warmsprings-nsn.gov/ [last visited 9/22/2021]
- Deschutes River Alliance v. Portland General Electric Company et al., Ninth Circuit Court of Appeals, Lead Case No. 18-35867, Slip Opinion (June 23, 2021)
- Clean Water Act, Subchapter V, General Provisions (incl. §§ 1362, 1365)

KARNOPP PETERSEN LLP

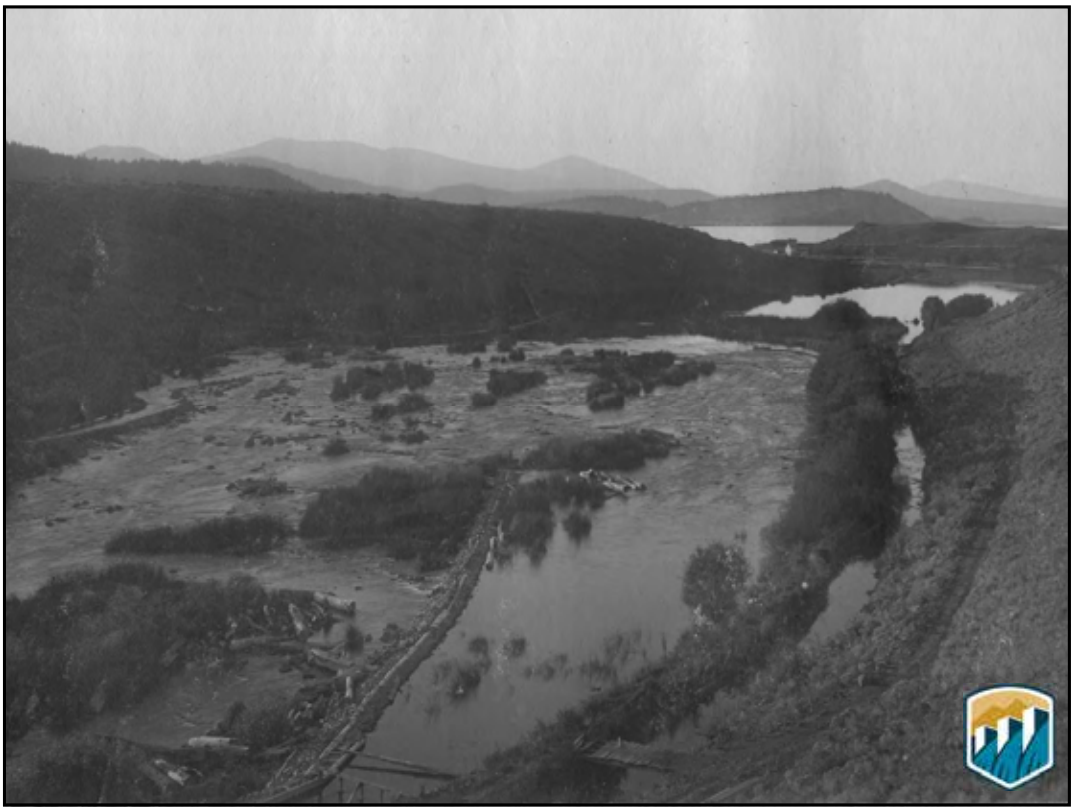
Chapter 6A

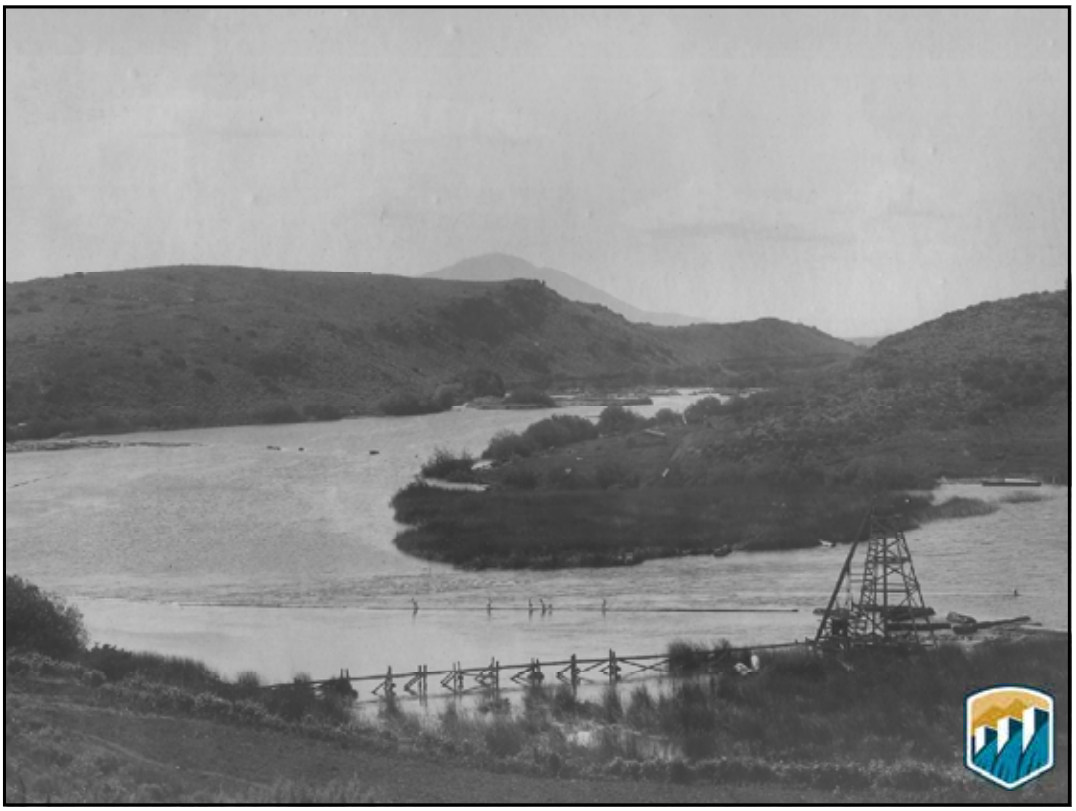
Presentation Slides: Link River Dam: 100 Years of Controversy

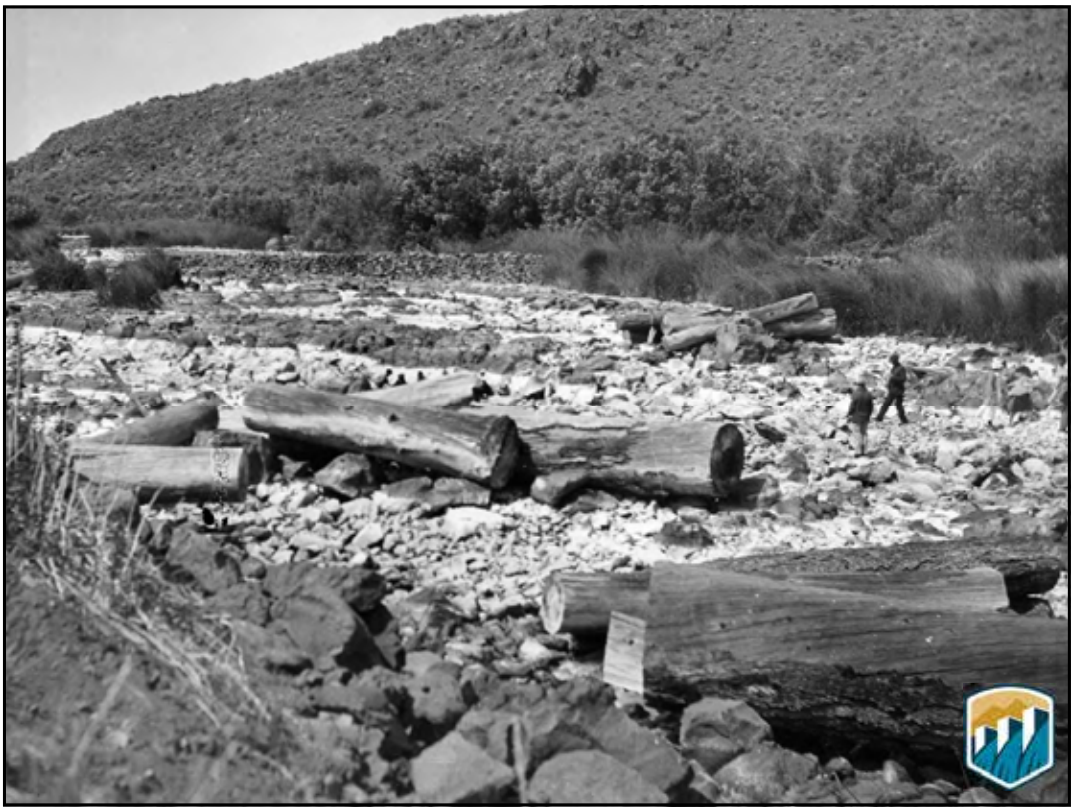
Moss Driscoll
US Bureau of Reclamation
Klamath Falls, Oregon

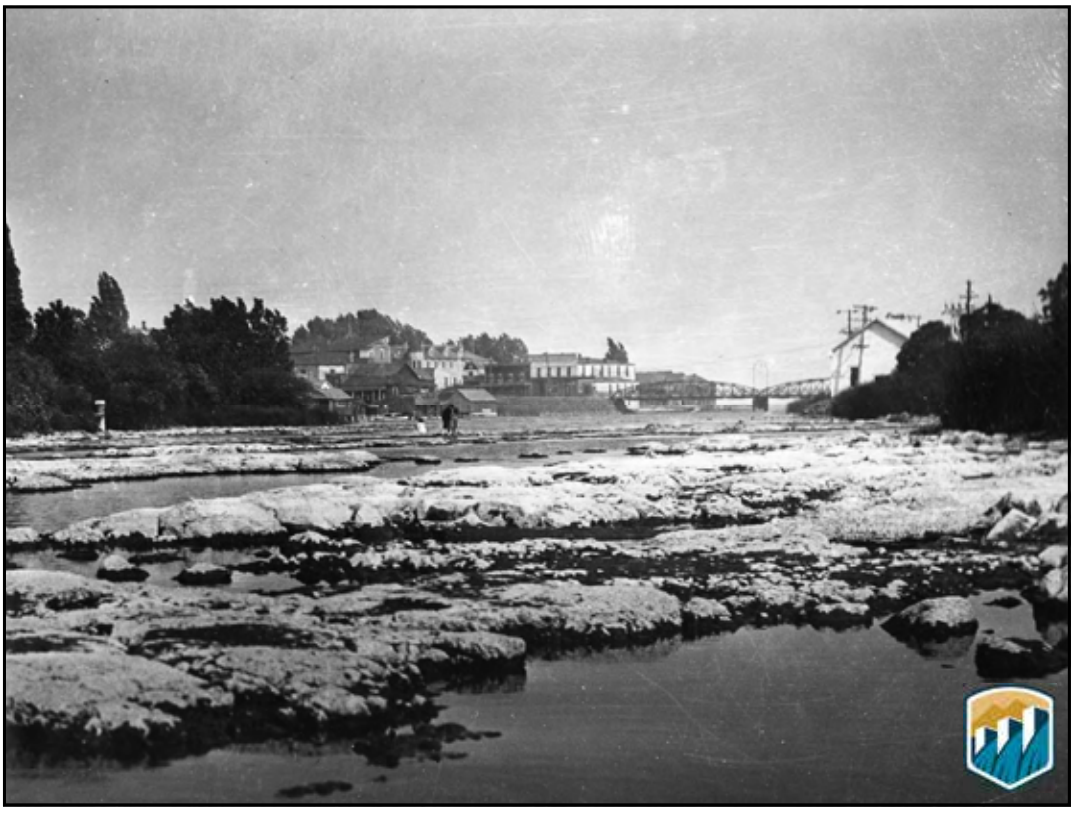

BUREAU OF
RECLAMATION
Link River Dam
One Hundred Years of Controversy
Interior Region 10 California-Great Basin
L.R.Dam
10-31-21 E-1930

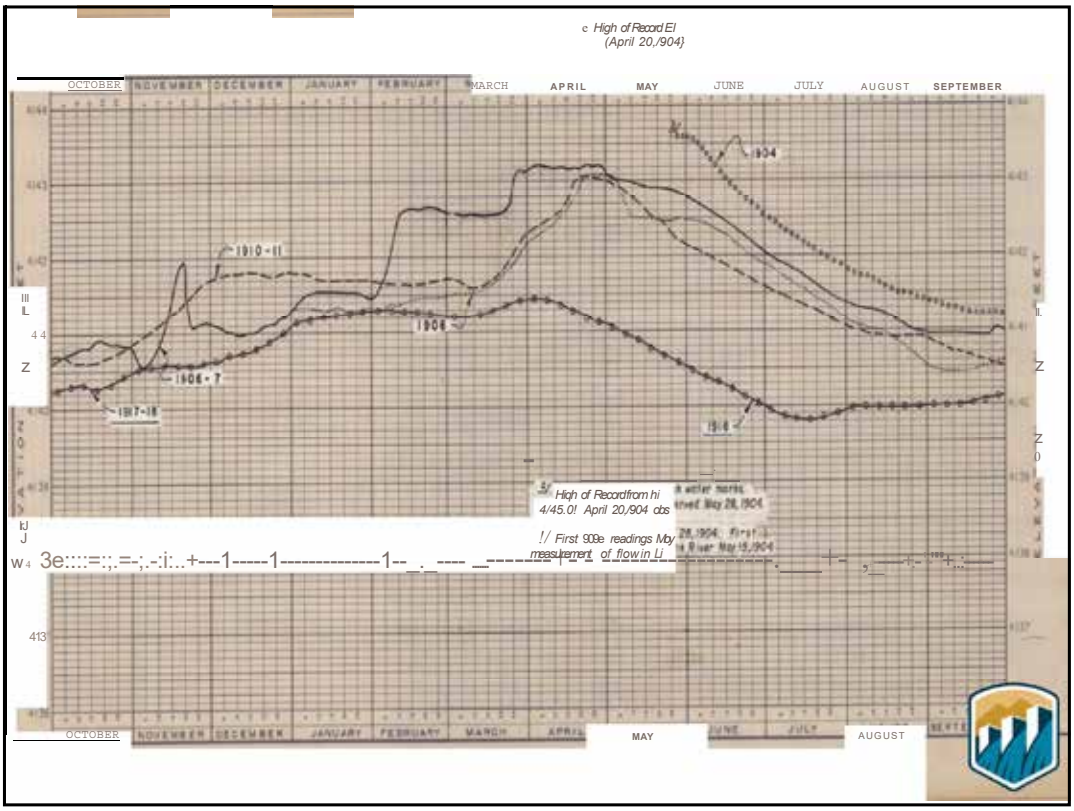

Overview
Pre-Dam Conditions
Why Reclamation? Why Copco?
Controversy over Copco & Storage Operations
Effects of Lake Regulation







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(April 20,/904)
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AUGUST


L.R. Dam
8-20-21
E-1601

POWERMEN FORM GIGANTIC MERGER

Siskiyou Company Gets Monopoly in Northern California and Southern Oregon

Owning power plants and controlling the power of Rogue river, Klamath river and the little Shasta river, besides that of smaller streams, the combination is the most gigantic ever made in this part of the state.

Those concerned deny the merger is the work of the Western Power company, the so called power trust, of which Colonel Frank Ray, owner of the Rogue River Electric, is vice president. It is known, however, that the Western Power company has acquired control of practically all the power plants in northern California, and that its eyes have been on Oregon.

CHURCHILL IN CITY ON PLEASURE TRIP

HEAD OF POWER COMPANY AND PARTY MAKE AUTO TRIP TO VIEW GRANDEUR OF KLAMATH COUNTY SCENERY

"This is almost purely a pleasure trip," continued Mr. Churchill. "We are looking over the work now in progress, as a side issue of the trip.

"The work of improvements now being carried on by the Oregon & California Power company is progressing rapidly."

We may take an auto trip around the lake to Harriman Lodge, but we have not yet decided."

Symbol No. Ilr-406

THIS AGREEMENT made this twenty-fourth day of February, 1917, in pursuance of the Act of June 17, 1902, (32 Stat., 388) and acts amendatory thereof and supplementary thereto, between the United States of America, hereinafter styled the United States, by Franklin K. Lane, Secretary of the Interior, and the California-Oregon Power Company, a California corporation, hereinafter styled the Company.

3. The Company, after constructing said dam, may regulate the water level of Upper Klamath Lake between elevations 4143.3 and 4137, but the water level shall not be raised above elevation 4143.3 and shall not be lowered below elevation 4137. Within two years from the date of this contract the Company must elect whether or not to construct said dam, and within one year after such election the dam shall be so constructed as to permit of the raising of the elevation of the lake to a height of 4141.5, and within 10 years shall be constructed to its ultimate elevation for providing a lake level of 4143.3. The Company may be permitted to lower the level of the lake to below 4137 at such times and upon such conditions as may be satisfactory to the Secretary of the Interior.

5. The lowering and raising of the waters of the lake below or above the normal fluctuations while in a state of nature shall be undertaken by the Company only after making satisfactory adjustments at its own expense in regard to all interests which may be affected thereby, whether of the State for navigation or other purposes, or of any private individuals, or Indians.

7. The Company assumes any and all liability for damage to the property or rights of any person or corporation or the property or rights of the State of Oregon or of the Indians due to the operation of said dam by said Company or to the regulation and control of the levels of said lake by said Company and hereby undertakes to hold the United States harmless from any and all liability for damage due to such regulation and control.

LINK RIVER DAM STOPPED; CREW PAID OFF

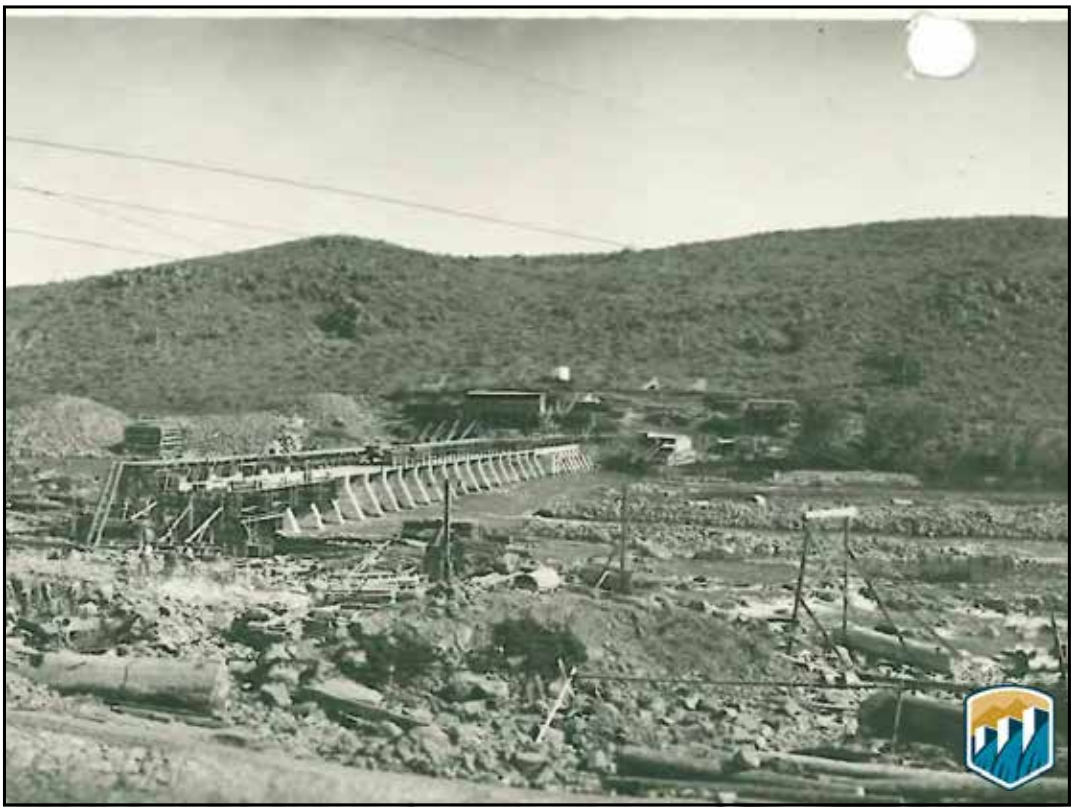
Construction of the Link river dam by the California-Oregon Power company came to an abrupt stop today, when John Boyle, engineer in charge, obeying telegraphic orders from San Francisco, discharged the entire crew of 125 men who have been working on the dam for several weeks.

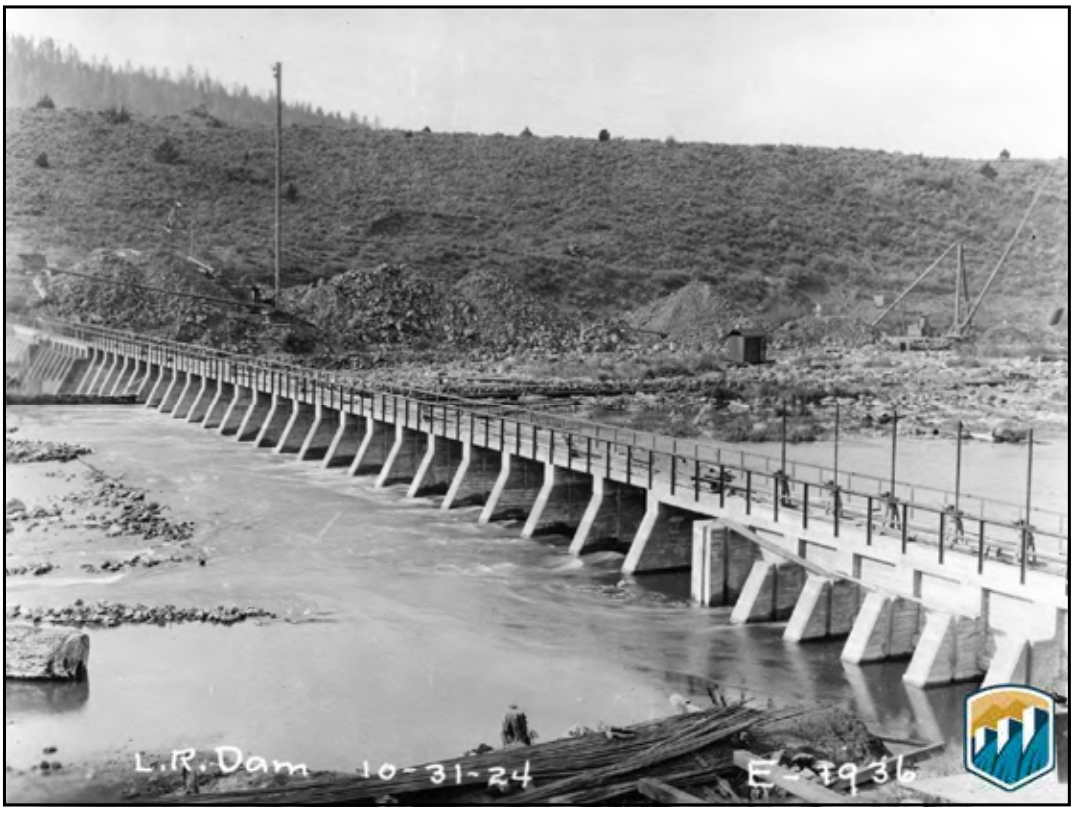
The most serious question, to my mind, is the taking of water from the lake, after construction of the dam, past Oregon lands that are involved in the original reclamation scheme and the inability of the government thereafter to use any portion of these waters for irrigation of Oregon lands. This may mean the loss of millions of dollars to the government on lands susceptible of irrigation, which will be deprived of reclamation by reason of the taking the waters from Upper Klamath lake directly into California over the Keno and Copco dams."

"It is fair to state to you that I have talked with officials of the reclamation service here and they feel that the rights of the government as to reclamation of lands below the dam in Oregon, and the lands that will be flooded above the dam, will be fully protected but in this view I do not concur."

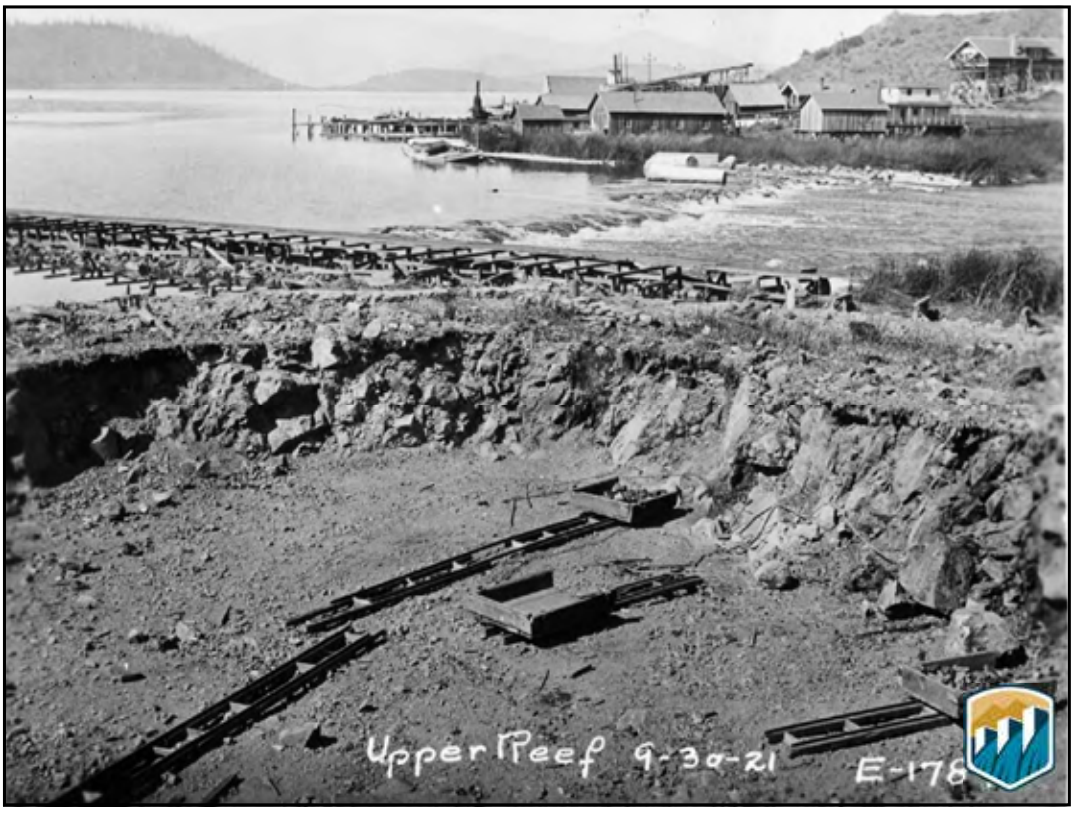
The telegram concludes—"I have great confidence in your fairness and great legal ability. I am not at all satisfied with the conclusion reached by your predecessor."

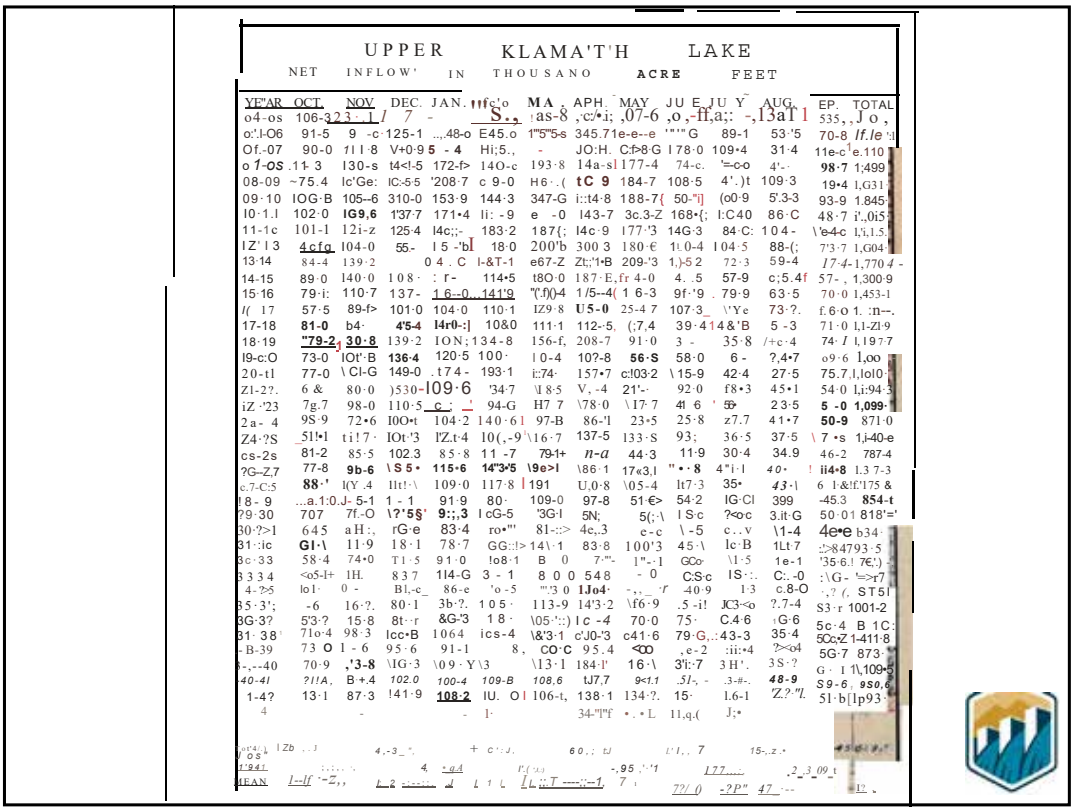
10. Nothing in this agreement shall curtail or be in anywise construed as curtailing the rights of the United States to the waters of Upper Klamath Lake and its tributaries or the lands under or along the margin of the lake. None of the waters of said lake or its tributaries or the Klamath River shall be used by the Company for any other purpose when the same may be needed or required by the United States or any irrigation or drainage district, person, or association obtaining water from the United States under the blanket filings of May 17, 1905, and May 17, 1909, for irrigation of lands lying within the boundary of the Klamath Reclamation Project as shown by the plans of the United States Government filed with the State Engineer of Oregon, May 6, 1908; provided, that nothing in this contract shall be construed to interfere with water rights acquired prior to May 17, 1905.




L.R. Dam 10-31-24 E-1936


Upper Reef 11-26-21 E-2011


Upper Reef 9-30-21 E-176



UPPER KLAMATH LAKE

NET INFLOW IN THOUSAND ACRE FEET

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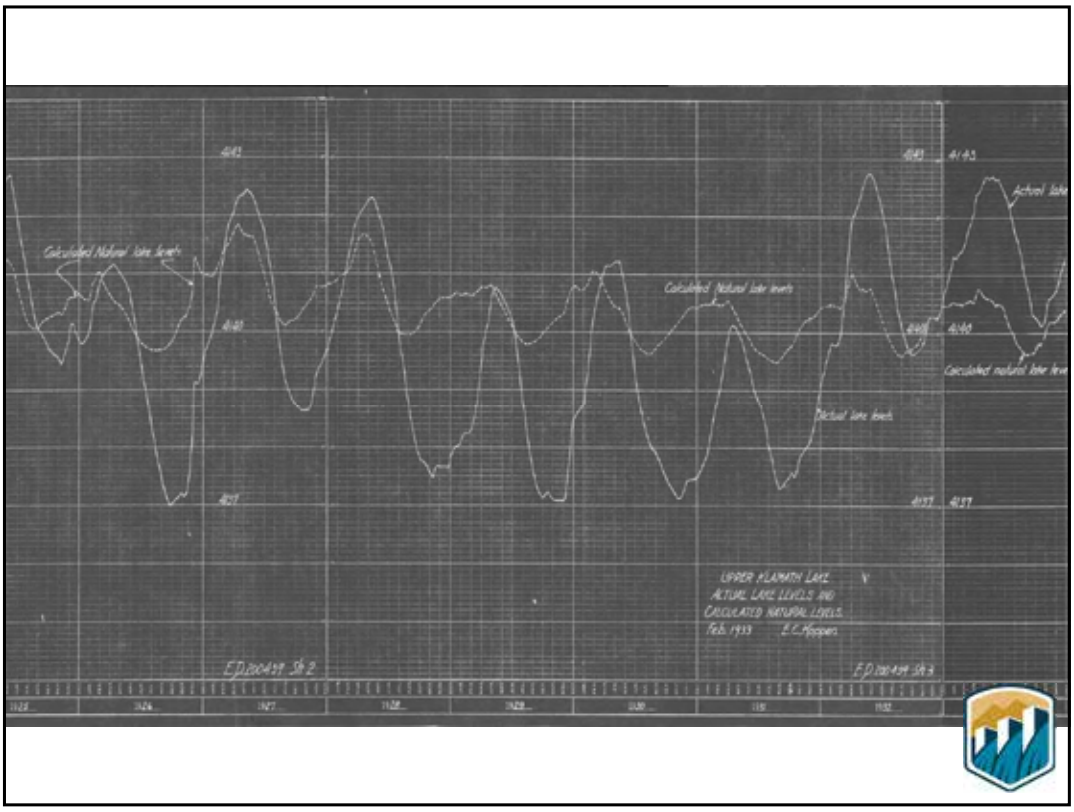

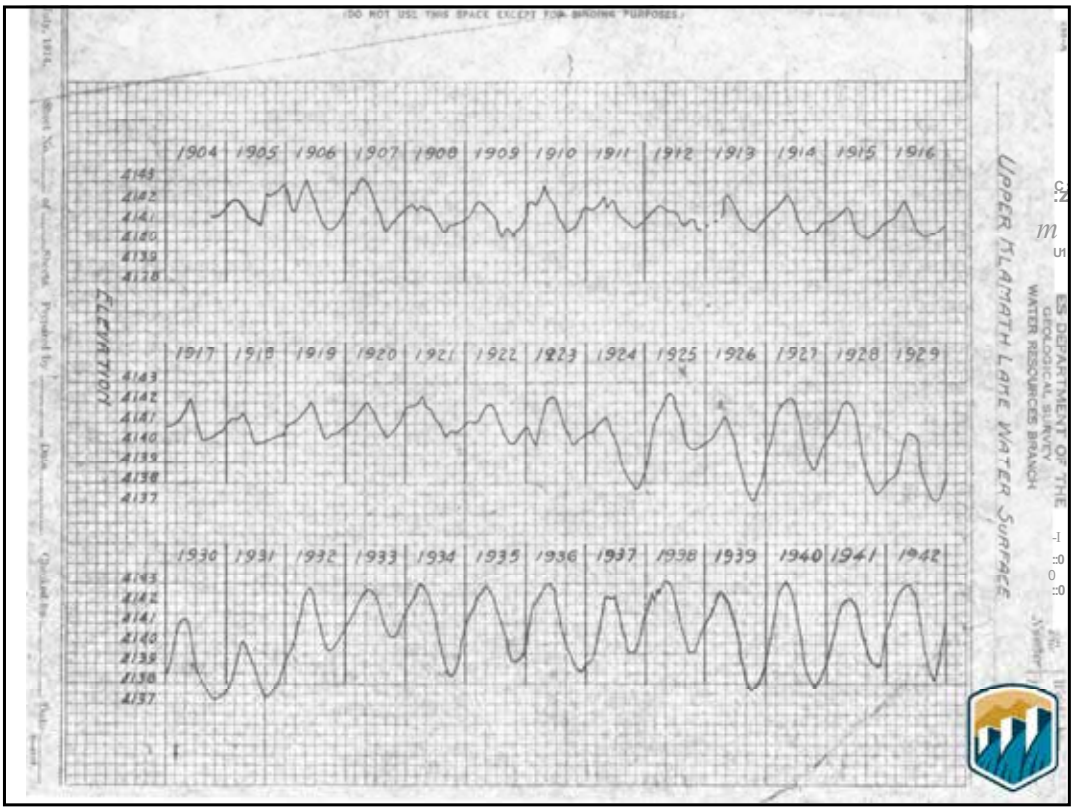
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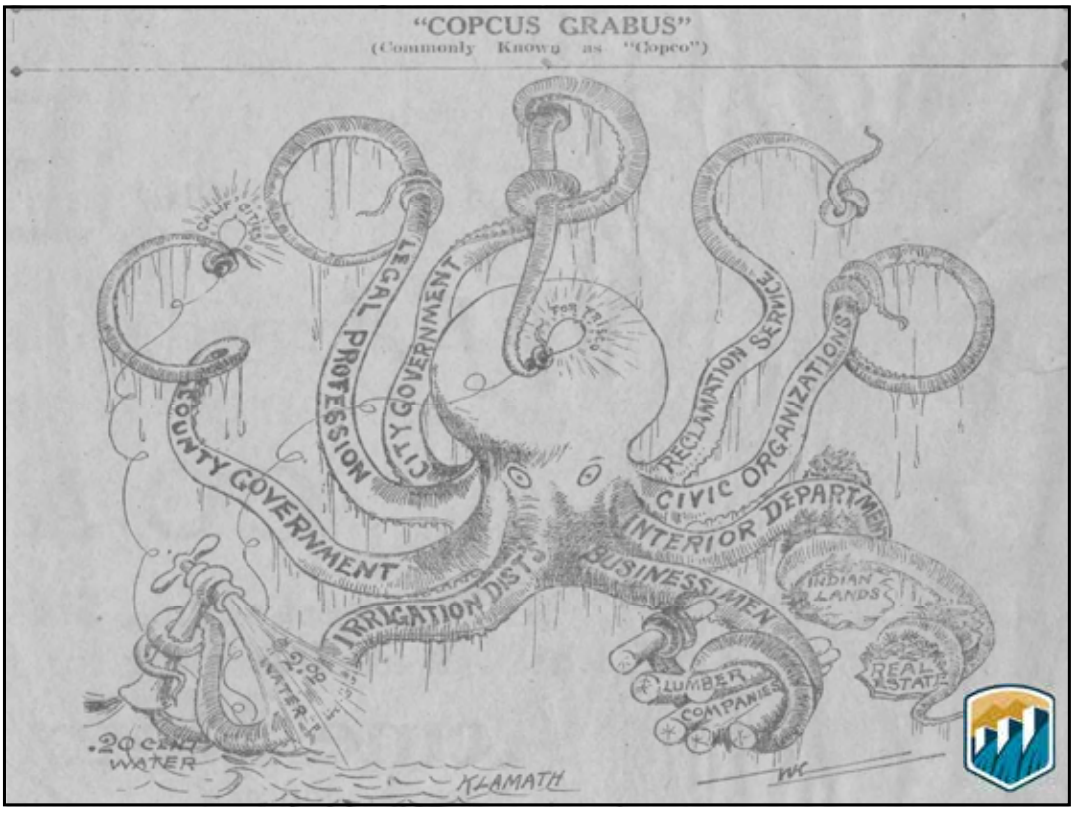
U.S. DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WATER RESOURCES BRANCH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(Commonly Known as "Copco")
CALIF. CITIES
COUNTY GOVERNMENT
LEGAL PROFESSION
CITY GOVERNMENT
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CIVIC ORGANIZATIONS
INTERIOR DEPARTMENT
IRRIGATION DISTS
BUSINESSMEN
INDIAN LANDS
REAL ESTATE
LUMBER COMPANIES
2.00 WATER
.20 CENT WATER
KLAMATH

Chapter 6B

The ESA Reassessment and Its Demise: Current (Large) Ambiguities About the Regulatory Framework for Klamath Project Operations

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Klamath Water
THE ESA RE-ASSESSMENT AND ITS DEMISE: CURRENT (LARGE) AMBIGUITIES ABOUT THE REGULATORY FRAMEWORK FOR KLAMATH PROJECT OPERATIONS

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Year in Review
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The Klamath Basin has been described as "ground zero" for threatened and endangered species conflicts, "America's aquatic Jerusalem," and any number of labels that evoke conflict and distress. The Endangered Species Act of 1973[1] issues co-exist with other sources of conflict in this bi-state basin that is home to irrigation development, four federally recognized tribes with powerful fishing interests, prized wildlife refuges, hydropower development, and two significant projects that export water to other basins. For all its recent history of conflict, the basin is a magnificent place, in no small part because of its diverse communities and the interests they all value.

The focus of this paper[2] is the current, rudderless approach to federal implementation of the ESA and other federal responsibilities as related to the Klamath Irrigation Project (Project). So long as there is a lack of any discernible regulatory framework for Project operations, the basin will face only the continuation of the chaotic condition that prevails today.

The discussion below describes the Klamath Basin and Klamath Project, tribal interests relevant to this paper, applicable mechanics of the ESA, the history of implementation of the ESA in the Project, and efforts to bring legal clarity to that process, involving both old and new issues.

[1] 16 U.S.C. §§ 1531-1544 (ESA).

[2] All statements and opinions and errors are the author's alone.

I. The Klamath Basin and Klamath Project

A. Basic Geography

The Klamath River basin occupies about 10,000,000 acres in southern Oregon and northern California.[3] Various streams, springs, and other tributaries flow into Upper Klamath Lake. Near the city of Klamath Falls, the lake's outlet is Link River, which becomes the Klamath River. Joined by numerous tributaries in California, the Klamath River discharges into the Pacific Ocean at a point about 220 miles from Klamath Falls.

B. Klamath Project and its Water Rights

The Project provides water for approximately 200,000 irrigated acres. Of this, the great majority is served by diversions from Upper Klamath Lake and points just below on the Klamath River. Its irrigated lands straddle the Oregon-California border. Remaining Project land is supplied exclusively by the Lost River system. This paper focuses on the "Klamath" or "west" side of the Project.

Irrigated agriculture in the area that is now the Klamath Project began in the nineteenth century. Various private concerns initiated appropriations of water for irrigation under the customs and procedures followed at that time. The 1902 Reclamation Act[4] provided for federal financing of irrigation works, with construction costs to be repaid over time by Project water users. The federal project overlaid and hastened the private development that was in motion by the beginning of the twentieth century.

Water rights for reclamation projects must be acquired in accordance with state law.[5] The involved states enacted statutes to encourage the development of federal reclamation projects generally and the Klamath Project specifically. In 1905, Oregon enacted 1905 Or. Laws ch. 228, providing that whenever the United States files notice of intent to utilize certain waters in a reclamation project, the water so described is not subject to further appropriation.

With respect to the Klamath Project specifically, both Oregon and California ceded then-submerged land to the federal government for the purpose of having the land drained and reclaimed for irrigation use by homesteaders.[6] The Oregon Legislature also authorized the raising and lowering of Upper Klamath Lake in connection with the Project, and allowed the use of the bed of Upper Klamath Lake for storage of water for irrigation.[7]

Beginning in 1904, the Reclamation Service—predecessor of Reclamation—gave notices of appropriation of water for the Project in accordance with then-existing practices. In May of 1905, the Secretary of the Interior authorized the development of the Project pursuant to the

[3] *See* accompanying PowerPoint.

[4] 32 Stat. 88 (1902 Act).

[5] 43 U.S.C. § 383.

[6] Ch. 5, Or. Laws of 1905; 1905 Cal. Stat. at 4.

[7] Ch. 5, Or. Laws of 1905, § 1.

1902 Act.[8] Also in May of 1905, Reclamation filed notices of appropriation of waters of the Klamath River and its tributaries for use in the Project under chapter 228.[9] In addition to the filing for Klamath water in 1905 under chapter 228, Reclamation also acquired, by purchase from private parties, water rights with earlier priorities for the benefit of the Project.

The major water storage facility on the Project is Link River Dam on Upper Klamath Lake. The active storage capacity of Upper Klamath Lake is roughly 500,000 acre-feet. Project water users have repaid their share of the costs of construction of the Project. They continue to pay operation and maintenance costs for the works still operated by Reclamation. In the overall development of the Klamath Project, Reclamation constructed substantial works, but also numerous contractors of Project water were obliged to construct their own delivery systems and in some cases the diversion works to either take water from Project conveyance facilities or from the Klamath River. In addition, responsibility for operation and maintenance of a number of federally constructed Project works has been transferred to irrigation districts, particularly Klamath Irrigation District and Tulelake Irrigation District.

Water becomes available to national wildlife refuges through the operation of Klamath Project facilities. Substantial national wildlife refuge acreage in Tule Lake and Lower Klamath National Wildlife Refuges is leased for agricultural production, consistent with a unique development and legal history specific to those lands. These "lease lands" are part of the Klamath Project. Other national wildlife refuge land receives water through the operation of Project facilities, but has inferior rights to water and there are no specific commitments to deliver water to those lands through Project facilities.

In the Klamath Basin Adjudication (KBA), water rights claims associated with Project lands were filed by Reclamation, the U.S. Fish and Wildlife Service (USFWS), and Project contractors (including irrigation districts and similar entities, on behalf of their patrons). In general, the KBA findings of fact and order of determination (FFOD), replaced in 2014 by the amended and corrected findings of fact and order of determination (ACFFOD), recognizes water rights with priority of 1905 (and in some cases earlier priorities) for land in the Project. The rights include rights to live flow and stored water. The ACFFOD finds that Reclamation owns the storage right, but districts and water users have legal and equitable interests in the use rights.[10]

C. Tribal Fishing and Water Rights and Claims

There is overlap between ESA-listed species and rights and claims of tribes in the basin. In turn, the tribes' interests in these resources results in increased intensity and complexity of the ESA issues. The interest or claims of two tribes in particular are a basis for their attempts to have irrigation water users' new litigation dismissed.

[8] *See* Reclamation Act of February 9, 1905, 58 P.L. 66, 33 Stat. 714, 58 Cong. ch. 567 (1905 Act).

[9] *See* ch. 228, 1905 Or. Laws; *In re Waters of the Umatilla River*, 88 Or. 376, 172 P. 97 (1918).

[10] *See* https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx (last visited Sept. 27, 2021).

The area upstream of Upper Klamath Lake is associated with the Klamath Tribes. In 1864, the Klamath Tribes (Modoc, Klamath, and Yahooskin Band of Snake Indians, now as a recognized tribe called the "Klamath Tribes") entered a treaty with the United States which established a reservation and, among other things, preserved to the Tribes rights to hunt and fish on that reservation. While the reservation itself no longer exists (the former reservation land is owned by private individuals and in national forests), the Tribes still have federally-protected rights to hunt and fish on the former reservation. Also, in the notable *Adair* case, the Ninth Circuit Court of Appeals held that the Tribes hold water rights, with priority of time immemorial, to support fisheries.[11] In the ongoing KBA, the Oregon Water Resources Department (OWRD) has determined that the United States, as trustee for the Klamath Tribes, holds substantial rights to instream flows in tributaries of Upper Klamath Lake for the benefit of tribal fisheries. The ACFFOD also recognizes a right to elevations in Upper Klamath Lake, based on that water body bordering the former reservation. However, until exceptions to the ACFFOD have been adjudicated and the Klamath County Circuit Court issues a final judgment, the approved claim for Upper Klamath Lake water levels cannot be a basis for regulation of water rights, such as the Klamath Project, having a priority before August 9, 1908.[12]

On the lower river, the Yurok Tribe and the Hoopa Valley Tribe have reservations, established by executive order in the nineteenth century and formally divided into distinct reservations for the two tribes by Congress in 1988.[13] The Hoopa Valley Tribe's reservation straddles the Trinity River, the Klamath River's largest tributary, and borders the Klamath River. The Yurok reservation runs from the Trinity River, on both sides of the Klamath River, to the river's mouth. The two tribes have federally-protected fishing rights, *Parravano v. Masten*, 70 F.3d 539 (9th Cir. 1995), and considerable interests in the waters and habitats upon which the fisheries depend. Both tribes assert federal reserved water rights to support the fisheries. There have been no adjudicatory proceedings to determine the nature, location(s), source(s), priority, or quantity of any such rights.

II. The ESA and Application in the Klamath Project Generally

A. Basic ESA Mechanics

While familiar to many, the substantive and procedural requirements of the ESA are restated here, for context for the remainder of this paper.

Section 9(a)(i)[14] generally prohibits unpermitted take of animals listed as endangered and certain animals listed as threatened.[15] Section 7(a)(2)[16] applicable only to federal agencies, provides that agencies must ensure that their actions not jeopardize the continued existence of listed species in all or part of their range, or adversely modify designated critical habitat. Procedurally, the

[11] *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983).

[12] *See* https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_04938.PDF (last visited Sept. 27, 2021).

[13] 25 U.S.C. § 1300i.

[14] 16 U.S.C. § 1538(a)(1).

[15] *See* 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3.

[16] 16 U.S.C. § 1536(a)(2).

"action agency" must consult with either the USFWS or the National Marine Fisheries Service (NMFS) (collectively, "the Services"). Depending on the species in issue, one or both Services renders a biological opinion (BiOp), opining as to whether the proposed action would cause jeopardy. If so, it must also articulate any reasonable and prudent alternatives (RPAs) which would meet the underlying purpose of the action.[17] A non-jeopardy BiOp or jeopardy opinion with RPAs, must also include an "incidental take statement" (ITS) which has the effect of authorizing take that may occur, subject to certain conditions.[18] Upon receipt of the BiOp, the action agency decides whether and how to proceed in light of its substantive obligation (avoid jeopardy) under Section 7(a)(2).[19]

B. Application in the Klamath Project

1. Species

For over two decades, three species of fish listed as endangered or threatened have affected or had the potential to affect water availability for the Project. The shortnose sucker and Lost River sucker, both listed as endangered in 1988, inhabit Upper Klamath Lake and other local water bodies. Significant issues include the depth of water that must be maintained in the reservoirs/lakes to benefit suckers. The Southern Oregon Northern California coho salmon (coho), listed as threatened in 1997, resides in the Klamath River, downstream in California, below Iron Gate Dam (a barrier to fish passage) and in tributaries of the Klamath River in California. The significant water quantity issue related to coho and the Project concerns volumes of water that must flow in the mainstem Klamath River below Iron Gate Dam.

This year, a mammal has also been the subject of Section 7 consultation; the endangered Southern Resident Killer Whale Distinct Population Segment (Southern Residents). Part of the diet of the Southern Residents is Chinook salmon, including Klamath River Chinook salmon. Reclamation has taken the position that Project operations are not likely to adversely affect the ocean-dwelling Southern Residents, but NMFS disagrees, and the 2019 ESA consultation evaluated effects of Project operations on Southern Residents.

2. Recent Approaches to Section 7 Consultation

Between approximately 1991 and 2012, the regulatory approach to Section 7 consultation at the Klamath Project was fairly simple, and sequential. Reclamation would propose an action that ordinarily described operation of Klamath Project facilities to provide water to meet irrigation demand. The Services would provide BiOps, typically "jeopardy" opinions with RPAs. USFWS's RPAs would identify minimum Upper Klamath Lake elevations to avoid jeopardy to listed suckers. NMFS's RPAs would identify minimum flows at Iron Gate Dam to avoid jeopardy to listed coho salmon. Reclamation would then adopt the RPAs.

This approach proved unsatisfactory, and not simply because of effects to the Project. The fact that there were two distinct regulatory agencies effectively prescribing water allocation (through

[17] 16 U.S.C. § 1536(a)(2), (b)(3).

[18] 16 U.S.C. § 1536(b)(4).

[19] 50 C.F.R. § 402.15(a).

RPAs) resulted in inconsistencies and confusion. The familiar example was the year 2001. That spring, Reclamation issued a biological assessment (BA). The BA described Reclamation's proposed action as the delivery of water to Project irrigation and wildlife refuges, and it identified the instream water levels that would result in various year types. On April 6, 2001, USFWS and NMFS respectively opined that resultant Upper Klamath Lake levels and Klamath River flows would threaten jeopardy to the listed species and identified new inflexible lake elevations and river flows as RPAs. Reclamation adopted an operations plan for 2001 implementing the Services' Upper Klamath Lake levels and Klamath River flows as operating criteria. If implemented in the future, the RPAs in these opinions would result in significant water shortage to the Project in many years. In the drought of 2001, there was not even enough water to meet the RPAs in both opinions. It was a given that the Project would receive zero, but the lack of coordination between agencies meant that RPAs were issued that were impossible to achieve.

This general approach still persisted through 2012. However, roughly during 2005-2015, there was relative calm and little or no conflict (at least not any new litigation) concerning Project operations. This was a period during which a great number of parties negotiated (2005-2009), signed (2010), and sought (2010-2015) to implement and obtain congressional approval and authorization of the Klamath Basin Restoration Agreement (KBRA). The KBRA would have provided a path to long-term water stability for the Project, and the parties' joint efforts created an atmosphere of cooperation. However, the KBRA terminated at the end of 2015 due to the lack of congressional authorization by December 31, 2015. The first new lawsuits were filed in 2016. Overall, between 2005 and 2015, there was no new ESA litigation, and between 2016 and the present, 12 lawsuits have been filed that implicate water and ESA issues in the Project.

In the meantime, in 2013, Reclamation and the Services pursued a different approach to ESA consultation. In general, the agencies consulted informally, and negotiated a proposed action for Reclamation's BA that was expected to produce non-jeopardy opinions from both of the Services. In that way, there would not be potentially conflicting or inconsistent or disabling RPAs, and Reclamation would know that it would have a functionally-operable Project operation. Klamath Project irrigators did not necessarily concur with the philosophy of this approach because the "proposed action" of Reclamation would itself result in water shortage for irrigation in certain years, and sometimes very significant shortage. With that said, irrigators are pragmatic. Reclamation's approach would allow districts and water users to know what they would have to work with, at the beginning of the irrigation season rather than the end.

The 2013 consultation negotiation was an iterative, complex undertaking, supported by considerable modeling and input of interested parties. It occurred in the context of key parties having signed the KBRA, which had been a product of collaborative, interest-based negotiations that occurred over several years.[20] Ultimately, although not without some blemishes, Reclamation produced a BA containing a proposed operation, and both Services issued non-jeopardy opinions in 2013. It is arguable whether the process achieved its goal of foreseeability

[20] There were approximately 40 parties to the KBRA, including three tribes, California and Oregon, Project irrigation parties, and several conservation groups. Signed in 2010, the agreement provided that it would terminate if Congress had not, by December 31, 2015, enacted authorizing legislation necessary for full implementation of the KBRA. Congress did not enact the needed legislation, and the KBRA terminated.

for Project water users, due to late changes and so-called "thresholds" for Upper Klamath Lake, but this approach has been held out as a good model, and adopted elsewhere.

The 2013 consultation was intended to last ten years, but due to exceedances in 2014 and 2015 of a specified surrogate for incidental take of coho, it was necessary to reinitiate consultation.[21] In fact, a court issued an injunction modifying Project operations until re-consultation was completed.[22]

Reclamation and the Services decided, in late 2018, to complete the required re-consultation before the beginning of the 2019 irrigation season. The general approach was the same that was followed in 2013: Reclamation and the Services negotiated a proposed action that would be sufficient for non-jeopardy opinions. The BA was completed in December of 2018, and amended in February of 2019. As discussed above, this was the first consultation to cover the Southern Residents as well as the endangered suckers and threatened coho salmon that have been part of the regulatory picture for two decades. The BA and the BiOps specified that they covered Project operations for the 2019-2023 irrigation seasons. However, and in connection with a stipulated stay of litigation related to the 2019 BiOps and operations plan, in the spring of 2020, Reclamation adopted a modified, "Interim Operations Plan" to cover operations through September 30, 2022.

The Klamath Basin has experienced drought in 2020 and 2021. In each year, there has been sufficient water physically available to meet the demands of Project irrigation and the national wildlife refuges reliant on Project facilities. However, the ESA-driven Interim Plan resulted in severe shortage in 2020 and absolute shortage (zero Project water) in 2021.

III. DIAGNOSING THE MESS

A. How Things Got Here

Officially, over the past few decades, Project operations have been guided generally by a memorandum dated July 25, 1995, from the Regional Solicitor of the Pacific Southwest Region of the Department of the Interior (1995 Memorandum).[23] In addition, there was a January 9, 1997 supplement by the Regional Solicitors of the Pacific Southwest Region and the Pacific Northwest Region (1997 Memorandum),[24] which responded to a 1996 letter from the Oregon

[21] 50 C.F.R. § 1402.16.

[22] *See Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106 (N.D. Cal 2017); *Yurok Tribe v. U.S. Bureau of Reclamation*, 231 F. Supp. 3d 450, 468 (N.D. Cal. 2017) (collectively, "2017 Cases").

[23] Memorandum from Regional Solicitor, Pacific Southwest Region, to Regional Director, Bureau of Reclamation, Mid-Pacific Region, Subject: Certain Legal Rights and Obligations Related to the U.S. Bureau of Reclamation, Klamath Project for Use in Preparation of the Klamath Project Operations Plan (KPOP) (July 25, 1995).

[24] Memorandum from Regional Solicitor, Pacific Southwest Region and Regional Solicitor, Pacific Northwest Region, to Regional Director, Region 1, U.S. Fish and Wildlife Service, Regional Director U.S. Bureau of Reclamation, Mid-Pacific Region, Area Director, Portland Area Office, Bureau of Indian Affairs, Area Director, Sacramento Area Office, Bureau of Indian Affairs, Oregon Attorney General's March 18, 1996 Letter Regarding Klamath Basin Water Rights Adjudication and Management of the Klamath Project (January 9, 1997).

Department of Justice.[25] The common shorthand for those memoranda's conclusions was that Reclamation was obligated: first, to "provide" sufficient water for ESA-listed species; second, to protect tribal water rights or fulfill trust obligations; third, to meet the irrigation demands of Reclamation's Project contractors; and fourth, to meet wildlife refuge needs. This characterization of priorities has not always been stated in that same way. In addition, the first "priority" of providing sufficient water for ESA-listed species was functionally treated as subsuming Reclamation's responsibilities toward tribes.

1. The "Patterson Curse"

As discussed above, the ESA Section 7 obligation of the Klamath Project has sometimes been viewed as a duty to assure or deliver sufficient water levels in Upper Klamath Lake and sufficient flows in the Klamath River to support listed species, even if necessary to mitigate impacts not caused by the Klamath Project. That, of course, does not reflect the requirements of Section 7. Past BiOps, including the 2001 opinions discussed below, prescribed the maintenance of specific river flows at Iron Gate and lake elevations at Upper Klamath Lake through the year. Under this approach, the Project would be eligible to receive whatever was left over after these instream prescriptions were met. Owing to many variables that can affect overall basin water supply during the course of an irrigation season, it was not possible to anticipate, in the spring for example, how much water would turn out to be available for irrigation. This not only creates risk of shortage, but it makes it extremely difficult to plan at the beginning of the irrigation season.

To a significant extent, the regulatory logic for ESA application in the Project has its roots in a 1999 decision of the Ninth Circuit Court of Appeals, in *Klamath Basin Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 2000) (*Patterson*). In that case, the legal issue was "whether . . . irrigators in the Klamath Basin . . . are third-party beneficiaries to a 1956 contract . . . between the United States Bureau of Reclamation . . . and the California Oregon Power Company (Copco) that governs the management of the Link River Dam[.]" The Ninth Circuit held that the answer was no. However, it went on to offer a general statement about the ESA, as follows: "Because Reclamation retains authority to manage the Dam, and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the Dam when necessary to meet the requirements of the ESA[.]"[26] Respectfully, this passage is somewhat circular, and it is not clear to which specific section or sections of "the ESA" it refers. The statement is classic *dicta*, but it has been cited and quoted in subsequent lower court decisions.[27] (The *Kandra* order was a ruling on preliminary injunction, and the case was ultimately dismissed without prejudice.)

[25] Letter from Stephen E.A. Sanders, Assistant Attorney General, Natural Resources Section, State of Oregon Department of Justice, to Martha Pagel, Director, Water Resources Division (March 18, 1996), Subject: Klamath Adjudication (Sanders Letter) (on file with the Office of the Solicitor).

[26] *Id*. at 1213.

[27] *See, e.g.*, *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001) (*Kandra*).

2. A Negative Side Effect of Settlement

As discussed in section II.B.2 above, since 2013, the approach to ESA consultation at the Project has involved a negotiated approach to developing a "proposed action" that would result in non-jeopardy BiOps. In other words, Reclamation, based on dialogue with NMFS and USFWS, develops a proposed action that would result in a water volume in the Klamath River (flows) and Upper Klamath Lake (lake elevations) that are satisfactory to NMFS and USFWS, and adopts that action upon receipt of non-jeopardy opinions.

This approach has its roots in the process that led to the KBRA, a negotiated settlement. In that settlement negotiation, parties largely set aside legal positions and technical argument. They negotiated a volume of water that would be available for Project irrigation and national wildlife refuges, varying by year-type. In the drier years, the volume would be well below the need, but there was to be a program to enable irrigators to best operate with the limited supplies. This approach would in turn result in the availability of varying amounts of water for management for Upper Klamath Lake elevations and Klamath River flows. The overall division of available water did not reflect how a typical ESA consultation would proceed. Rather, it was a question of what key parties could live with as part of a settlement package.

That settlement-style approach was carried into the 2012-2013 ESA consultation, which included significant participation by the same stakeholder parties who had been active in negotiation of the KBRA. Thus, the 2012-2013 consultation employed an interest-based, "I can live with the outcome" approach, which resulted in non-jeopardy BiOps. The final products proved far from perfect, but that was the mindset that drove the approach.

By 2019, which was the next time ESA consultation occurred, the collaborative atmosphere that had produced the KBRA and 2013 BiOps was completely gone. However, Reclamation and the Services continued to use a "division" or "allocation" of water approach that was not based on the mechanics of the ESA itself. The work in 2019 was completed quickly, with effectively no engagement of stakeholders. And this consultation consisted of Reclamation iteratively offering what it had to offer in order to satisfy the Services and receiving non-jeopardy BiOps. In that setting, the regulatory agencies (NMFS and USFWS) have no cause to be reasonable, and possess all the leverage. As a result, the 2019 (and subsequent) ESA consultations have led to dramatically less water being available for Project irrigation and wildlife refuges than was available under the 2013 consultation.

B. Where Things Are

Reclamation's 2019 BA, provides that the purpose of its proposed action include:

> 1. Store waters of the Upper Klamath Basin[.]
>
> 2. Operate the Project, or direct the operation of Project facilities, for the delivery of water for irrigation purposes . . . subject to water availability; while maintaining conditions in [Upper Klamath Lake] and the Klamath River that meet the legal requirements under section 7 of the ESA.

Element 2 is further defined to have two major components:

1. UKL elevations and storage . . . to protect sucker habitat and ensure adequate storage to meet the needs of listed species in UKL and the Klamath River and water supply for the Project; and

2. Klamath River flows, specifically [flows] to support coho needs and to produce flows for disease mitigation or protection of coho habitat during the spring/summer operational period (between March 1 and September 30), and a formulaic approach for calculating [releases to the Klamath River] in the fall/winter (October 1-February 28/29).[28]

These statements from the 2019 BA effectively characterize Reclamation's duty under Section 7 as being to provide adequate river flows and Upper Klamath Lake elevations. This approach has no anchor in, or resemblance to, the proper approach to ESA consultation. Under a proper approach, Reclamation would articulate a proposed action, and the Services would evaluate the effects of that action, comparing conditions with and without the action. But the 2019 approach does not require any evaluation of effects at all. Rather, Reclamation is tasked with guaranteeing "sufficient" water for listed species, which can include (and has included) water to mitigate for conditions not caused by the Project.

In addition, past consultations have all assumed that all activity associated with the Project is an "action" to which the obligations of Section 7(a)(2) apply. As discussed below, that assumption is not consistent with the ESA or case law.

IV. The Request for Re-Assessment

Beginning over four years ago, Klamath Water Users Association (KWUA) began requesting that the Department of the Interior conduct an updated analysis of Reclamation's obligations under Section 7 at the Klamath Project. The basis for the request was, fundamentally, that prior analyses and Klamath precedents have not involved a rigorous analysis of the proper application of the specific substantive requirements of Section 7(a)(2) in the unique facts and circumstances of the Project, resulting in confusion over Reclamation's legal obligations and authority relative to conflicting demands on the water supply. Also, the requests pointed to developments related to the ACFFOD and Section 7(a)(2) jurisprudence subsequent to *Patterson*.

The discussion immediately following explains why an in-depth and up-to-date assessment of the application of Section 7(a)(2) was appropriate and warranted.

A. Evolution of Case Law Defining Agency Action under Section 7(a)(2)

1. "Discretionary Federal Involvement or Control" under 50 C.F.R. § 402.03

Although lower courts have frequently invoked the admonition from *TVA v. Hill* that the language of Section 7(a)(2) "admits of no exception," there is significantly more nuance in the regulatory framework that defines "agency action" for purposes of the ESA consultation

[28] *Final Biological Assessment on the Effects of the Proposed Action to Operate the Klamath Project from April 1, 2019 through March 31, 2029 on Federally-Listed Threatened and Endangered Species* (Dec. 2018) at 4-13.

requirement.[29] Even before the Court decided *TVA v. Hill* (in June 1978), the Services had promulgated regulations on the procedures for consultations under Section 7.[30] In that rulemaking, the Services interpreted Section 7 to apply to "all activities or programs where Federal involvement or control remains which in itself could jeopardize the continued existence of a listed species or modify or destroy its critical habitat."[31] Thus, from the beginning, the Services recognized that a consultation would only be meaningful if the action agency had some power to modify the action. In the 1986 amendments to the ESA regulations, the Services revised the language in Code of Federal Regulations, title 50, section 402.03 to state: "Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control."[32] The current regulation includes identical language.[33]

The Ninth Circuit has frequently decided cases concerning the question whether an action qualifies as an "agency action" under Section 7(a)(2) triggering the requirement to consult. For example, in *Pacific Rivers Council*,[34] the Ninth Circuit expanded the concept of agency action when it rejected the arguments of the Forest Service that a land and resource management plan (LRMP) establishing forest-wide standards is only an "agency action" at the time it is adopted, revised, or amended. The Ninth Circuit reasoned that these plans "have an ongoing and long-lasting effect even after adoption" and that the LRMP represents an "ongoing agency action" subject to the continuing obligation to consult under Section 7.[35]

In other cases, courts have addressed circumstances where: (i) a federal agency had, prior to the enactment of Section 7 or prior to the listing of a species entered a contract with a non-federal party or authorized some non-federal activity via permit or license; and (ii) a subsequent or continuing activity by the non-federal party was alleged to be subject to consultation requirements. In *Babbitt*,[36] the court evaluated whether the Bureau of Land Management (BLM) violated the ESA when it did not consult regarding the effects on the threatened spotted owl before a permittee with an existing right-of-way agreement began a road construction project to access its private property. The Ninth Circuit phrased the question presented as: "[t]o what extent does section 7 apply where the BLM granted right-of-way by contract to a private entity *before* passage of the ESA *and* the agency's continuing ability to influence the private conduct is limited to three factors unrelated to the conservation of the threatened spotted owl."[37] The court

[29] The ESA regulations define "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.02.

[30] Final Rulemaking, 43 Fed. Reg. 870 (Jan. 4, 1978).

[31] *Id.* at 875 (publishing 1978 version of 50 C.F.R. § 402.03).

[32] Final Rule, 51 Fed. Reg. 19,926, 19,937, 19,958 (June 3, 1986).

[33] 50 C.F.R. § 402.03 (last revised May 4, 2009).

[34] *Pacific Rivers Council v. Thomas,* 30 F.3d 1050, 1054-55 (9th Cir, 1995).

[35] *Id.* at 1053, 1056; *see also Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 977 (9th Cir. 2003) (holding the agency's continued issuance of fishing permits under the High Seas Fishing Compliance Act constitutes ongoing agency action); *Wash. Toxics Coal. v. U.S. Envtl. Prot. Agency*, 413 F.3d 1024 (9th Cir. 2005) (holding the EPA's registration and regulation of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act constitutes ongoing agency action).

[36] *Sierra Club v.Babbitt*, 65 F.3d 1502 (9th Cir. 1995) (*Babbitt*).

[37] *Id.* at 1508.

answered that Code of Federal Regulations, title 50, section 402.03 "suppl[ies] the answer."[38] Here, the agency considered its obligations under "the right-of-way agreement, the regulations, and the statute, and determined there was no discretionary federal action to which section 7(a)(2) could apply."[39] This was because BLM could take no further action to benefit the spotted owl under a right-of-way agreement that was granted prior to the enactment of the ESA.[40] In this way, the court stated that the agency's "inability to influence [the construction project] is what sets this case apart from *Pacific Rivers*."[41]

The court also rejected the environmental plaintiffs' arguments that the ESA "implicitly abrogates preexisting agreements such as the one at issue here."[42] While acknowledging that Congress has the power to legislatively alter contractual arrangements to which the federal government is a party, the Ninth Circuit found this was not the case with Section 7(a)(2) "where Congress specifically limited the application of section 7(a)(2) to cases where the federal agency retained some measure of control over the private activity."[43]

The Ninth Circuit applied the reasoning from *Babbitt* in other cases.[44] The most relevant of these precedents to the unique facts of the Project is *Environmental Protection Information Center v. Simpson Timber Company*.[45] In *EPIC*, plaintiffs brought suit against the USFWS for its refusal to reinitiate consultation regarding the effects of an incidental take permit (ITP) for the northern spotted owl on two other, newly listed species.[46] The court concluded that *Babbitt* provided the appropriate test: the plaintiff "must allege facts to show that the [Service] retained sufficient discretionary involvement or control over [the] permit 'to implement measures that inure to the benefit of the' species."[47] In contrast to the LRMP at issue in *Pacific Rivers*, the ITP, "like the right-of-way agreement in *Sierra Club*, involves agency authorization of a private action and a more limited role for the [Service]. In such a case, the issue of ongoing agency involvement turns on whether the agency has retained the power to 'implement measures that inure to the benefit of the protected species.' "[48]

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[38] *Id.* at 1509.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 1510.

[43] *Id.*

[44] *See, e.g.*, *Cal. Sportfishing Prot. Alliance v. Fed. Energy Regulatory Comm'n*, 472 F.3d 593, 597-99 (9th Cir. 2006) (granting of a license to operate hydroelectric project is not "ongoing agency action" because there is no ongoing program of issuing new permits, the granting of the permit was completed in 1980, a private party operates the project, and the reopener provisions in the license "no more than give the agency discretion to decide whether to exercise discretion, subject to the requirements of notice and hearing" and are not "in and of themselves . . . sufficient to constitute any discretionary agency 'involvement or control' ").

[45] *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) (*EPIC*).

[46] *Id.* at 1075-76.

[47] *Id.* at 1080.

[48] *Id.*

The court in *EPIC* also distinguished the ruling in *Natural Resources Defense Council v. Houston*.[49] The court acknowledged the holding in *Houston* that negotiating and executing contracts constitutes "agency action" because Reclamation retained the discretion to set contract terms and decrease the available water quantities. The court clarified that it "did not suggest in *Houston* that once the renewed contracts were executed, the agency had continuing discretion to amend them at any time to address the needs of endangered or threatened species."[50] The court concluded that the agency did not have a duty to reinitiate because the Service did not retain the discretion in the permit to impose an amendment that would benefit the new species.[51]

2. Evolution from *Defenders* to *Home Builders*

Jurisprudence regarding the scope of Section 7(a)(2) and the meaning of "discretionary Federal involvement or control" came into sharp focus in *Defenders of Wildlife v. United States Environmental Protection Agency*.[52] The case involved the transfer of permitting authority under the Clean Water Act (CWA) from the United States Environmental Protection Agency (USEPA) to the State of Arizona. Under the CWA, USEPA initially administers the National Pollution Discharge Elimination System (NPDES) program for each state. A state may then apply to USEPA to administer the NPDES program and must demonstrate certain criteria are met related to whether the responsible state agency has the requisite authority under state law. If the nine statutory criteria are met, the transfer to the state must be approved.[53]

In 2002, the State of Arizona applied for transfer of NPDES permitting authority.[54] It was undisputed that the state met all nine criteria.[55] USEPA engaged with USFWS in a Section 7 consultation to determine whether transfer of the program would jeopardize listed species or adversely modify their critical habitat. After deliberation between the two agencies, USFWS issued a BiOp that recognized that although no federal agency would have the legal authority to consult with permit applicants concerning potential impacts to species, the transfer would not cause jeopardy.[56] Environmental plaintiffs then challenged the transfer of the permitting program under the CWA as well as the BiOp supporting the transfer.[57]

The Ninth Circuit framed the issue in *Defenders* as follows: "[d]oes the Endangered Species Act authorize—indeed, require—the EPA to consider the impact on endangered and threated species

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[49] *Nat. Res. Def. Council v. Houston,* 146 F.3d 1118 (9th Cir. 1998) (*Houston*).

[50] *Id.* at 1082.

[51] *Id.* at 1081-82.

[52] *Defs. of Wildlife v. U.S. Envtl. Prot. Agency*, 420 F.3d 946 (9th Cir. 2005) (*Defenders*).

[53] *Id.* at 950.

[54] *Id.* at 952.

[55] *Id.* at 963 n.11.

[56] *Id.* at 953-55. The BiOp reasoned that:

> "[T]he loss of section 7-related conservation benefits . . . is not an indirect effect of the authorization action," because "loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather the absence of the section 7 process that exists with respect to Federal [Clean Water Act] permits reflects Congress' decision to grant States the rights to administer these programs.

[57] *Home Builders*, 551 U.S. at 654-55.

and their habitat when it decides whether to transfer water pollution permitting authority to state governments?"[58] It answered that question in the affirmative. The Ninth Circuit held that Section 7 confers authority on federal agencies to protect listed species that "goes beyond that conferred by agencies' own governing statutes."[59] "We conclude that the obligation of each agency to 'insure' that its covered actions are not likely to jeopardize listed species is an obligation in addition to those created by the agencies' own governing statute."[60]

The Ninth Circuit then moved to the question of which actions are covered by Section 7(a)(2). On that point, the Ninth Circuit interpreted the language in Code of Federal Regulations, title 50, section 402.03 related to discretionary actions to be "congruent with the statutory reference to actions 'authorized, funded, or carried out' by the agency."[61] Ultimately, the Ninth Circuit found that USEPA failed to understand its own authority under Section 7(a)(2) to act on behalf of listed species and that the Section 7(a)(2) consultation that did occur was inadequate.[62]

The Supreme Court reversed the Ninth Circuit's *Defenders* decision. Before that reversal, however, other judges in the Ninth Circuit expressed their concern with the panel's decision in *Defenders* in a unique order in which the author of the panel opinion defended the decision against six judges dissenting from the denial of petition for rehearing en banc.[63] The dissent remarked that the panel decision nullified the ESA regulation and erroneously "transformed the ESA into an overriding mandate that trumps an agency's obligations under its own governing statute."[64]

By reversing *Defenders* in *Home Builders*, the Supreme Court set the record straight on the reach of Section 7(a)(2). The Court acknowledged the panel's "substantive construction of the statutes at issue" and its holding that "the ESA granted the EPA both the power and the duty to determine whether its transfer decision would jeopardize threatened or endangered species."[65] The Court also acknowledged the dissent from the denial of rehearing en banc and the decisions of other courts of appeal that conflicted with the Ninth Circuit's construction of Section 7(a)(2).[66]

The Supreme Court explained that the Ninth Circuit's reading of Section 7(a)(2) "would effectively repeal § 402(b)'s statutory mandate by engrafting a tenth criterion onto the CWA."[67] The Supreme Court extended this reasoning to all other statutes: "[r]eading the provision broadly would thus partially override every federal statute mandating agency action by subjecting such action to the further conditions that it pose no jeopardy to endangered species."[68] The Court

[58] *Defenders*, 420 F.3d at 950.

[59] *Id.* at 964; *see also id.* ("section 7 includes an affirmative grant of authority to attend to protection of listed species within agencies' authority when they take actions covered by section 7(a)(2)").

[60] *Id.* at 967.

[61] *Id.* at 968; *see also id.* at 970 (explaining the regulation is "coterminous" with Section 7(a)(2)).

[62] *Id.* at 977.

[63] *See Defs. of Wildlife v. U.S. Envtl. Prot. Agency*, 450 F.3d 394 (9th Cir. 2006).

[64] *Id.* at 398.

[65] *Home Builders*, 551 U.S. at 656.

[66] *Id.* at 656-57.

[67] *Id.* at 663.

[68] *Id.* at 664.

found that this interpretation runs counter to the presumption against implied repeals and could not stand.[69] The Court then turned to the agencies' attempt to resolve the "tension" through its regulations implementing Section 7(a)(2).

Under Code of Federal Regulations, title 50, section 402.03, the "ESA's requirements would come into play only when an action results from the exercise of agency discretion."[70] The Court found the regulation harmonizes statutes "by applying § 7(a)(2) to guide the agencies' existing discretionary authority, but not reading it to override express statutory mandates."[71] The Court found this interpretation to be reasonable, entitled to deference under the *Chevron* framework,[72] and consistent with other Supreme Court precedent.[73]

Thus, the Supreme Court rejected a reading of Section 7(a)(2) which would grant federal agencies affirmative authority under the ESA to take actions to benefit listed species that goes beyond the authority granted by the agencies' governing authorities. Instead, the Court articulated an interpretation of Section 7(a)(2) which limits its application to actions that an agency takes under its governing statutes that involve its discretion.[74]

3. Subsequent Application of *Home Builders* and *EPIC* to Similar Federal Water Projects and Water Supply Contracts

Home Builders is the applicable Supreme Court precedent on the scope of Section 7(a)(2) and when consultation is required. Following the decision, lower courts and federal agencies have reconsidered and adjusted their approaches to Section 7(a)(2) consultations. Two examples that are relevant to the Project are discussed below.

a. California: Sacramento River Settlement Contracts and the *NRDC v. Bernhardt* Litigation

Unlike the Klamath Project, the Central Valley Project (CVP) is authorized for multiple purposes, including fish and wildlife restoration.[75] In 2004, Reclamation prepared an operation plan for the CVP, known as "OCAP," to serve as the basis for an ESA consultation with both Services to support the renewal of different forms of water supply contracts that were set to expire in 2004

[69] *Id.*

[70] *Id.* at 665.

[71] *Id.* at 666.

[72] *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[73] *Home Builders*, 551 U.S. at 666-67.

[74] *Home Builders* also implicitly affirms statements in Ninth Circuit decisions prior to *Defenders* and the decisions of other courts of appeal noted by the Court that were in conflict with *Defenders*. *See Home Builders*, 551 U.S. at 656-57 (citing *Platte River Whooping Crane Critical Habitat Maint. Tr. v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27, 33-34 (D.C. Cir. 1992) (*Platte River*) (holding that Section 7 "does not *expand* the power conferred on an agency by its enabling act") (emphasis in original)); *see also County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081, 1085 (9th Cir. 2003) ("There is authority that the ESA does not grant powers to federal agencies they do not otherwise have.") (citing *TVA v. Hill*, 437 U.S. at 183); *Babbitt*, 65 F.3d at 1510 (agreeing with construction of Section 7 announced in *Platte River*).

[75] Central Valley Project Improvement Act of 1992, Pub. L. No. 102-575, § 3406, 106 Stat. 4714.

and 2005.[76] Specifically, Reclamation proposed to renew a set of long-term contracts that it had executed in the 1960s with senior water right holders in the Sacramento Valley in order to settle these water users' protests to the water right applications for the CVP. These contracts are known as the "Sacramento River Settlement Contracts" (SRS Contracts).[77] The BiOps issued in 2004 and 2005 by the USFWS and NMFS analyzing the effect of the 2004 OCAP were found invalid in separate district court cases.[78] USFWS issued a new BiOp in 2008, and NMFS issued a new BiOp in 2009.[79]

In 2008, environmental plaintiffs amended their complaint in the *NRDC* litigation to specifically challenge the renewal and implementation of the SRS Contracts based on the consultations that occurred in 2004 and 2005.[80] Following a trip to the Ninth Circuit in which they obtained a favorable ruling,[81] the plaintiffs again amended their complaint in 2016. Plaintiffs added the "Fifth Claim for Relief," which alleged that in response to specific events in 2009, 2011, 2014, and 2015, Reclamation "unlawfully failed to request re-initiation of consultation with NMFS on the impacts of the SRS Contract renewals on the winter-run and spring-run Chinook" salmon.[82] Federal defendants moved to dismiss this claim, arguing that Reclamation did not retain sufficient discretionary control or involvement over implementing the terms of the SRS Contracts to trigger reinitiation of consultation.[83]

In deciding the federal defendants' motion to dismiss, the court carefully reviewed the pleadings and summarized the claim alleging that "Reclamation retains discretionary involvement or control over SRS Contract implementation and that the new information alleged in the complaint regarding impacts of SRS Contract implementation on salmonids requires re-initiation of consultation regarding SRS Contract adoption."[84] The court then carefully explained the authority that controls the disposition of the claim: *EPIC*.

> *EPIC* generically holds that "to survive a Rule 12(b)(6) motion to dismiss, [a plaintiff] must allege facts to show that [the action agency] retained sufficient discretionary involvement or control over [the permit or contract in question] to implement measures that inure to the benefit of the [relevant species]." *EPIC*, 255 F.3d at 1080. Plaintiffs point to numerous contract provisions and other aspects of law they claim grant to Reclamation the discretion to take action to

[76] *NRDC v. Norton*, 236 F. Supp. 3d 1198, 1204-05 (E.D. Cal. 2017). The *NRDC* case began in 2005, and the case name has changed with the appointment of Secretaries over time. Herein, the case is referred to in text as "*NRDC* litigation" or "*NRDC v. Bernhardt* litigation."

[77] *Id.* at 1204-05, 1208-09.

[78] *Id.* at 1205-07.

[79] *Id.* at 1207.

[80] *Id.* at 1206-07.

[81] *See Nat. Res. Def. Council v. Jewell*, 749 F.3d 776 (9th Cir. 2014) (*NRDC v. Jewell*); *see also NRDC v. Norton*, 236 F. Supp. 3d at 1207-09 (describing procedural history).

[82] *NRDC v. Norton*, 236 F. Supp. 3d at 1210.

[83] *Id.* at 1212. The regulation on the requirement to reinitiate consultation includes the same qualifying language—"discretionary Federal involvement or control"—to define for which action the agency must reinitiate consultation. *See* 50 C.F.R. § 402.16.

[84] *NRDC v. Norton*, 236 F. Supp. 3d at 1207-09.

> implement the SRS Contracts in ways that would benefit winter-run and spring-run Chinook salmon and their habitats. [Citation.]
>
> Federal Defendants advocate for a more narrow reading of EPIC, based in part on *EPIC*'s application of *Houston* . . . Federal Defendants advocate for turning [the ruling in *Houston*] into an affirmative rule that would require allegations that the agency retained continuing discretion to amend the renewed contracts to address the needs of endangered or threatened species. [Citation.] According to Federal Defendants, *EPIC*'s generic holding—that "to survive a Rule 12(b)(6) motion to dismiss, [a plaintiff] must allege facts to show that [the action agency] retained sufficient discretionary involvement or control over [the permit or contract in question] to implement measures that inure to the benefit of the [relevant species]," 255 F.3d at 1080—is further limited by the more specific requirement that the type of discretion the action agency must retain under the circumstances is discretion to modify the contracts themselves to benefit the species.
>
> A close examination of how the *EPIC* court evaluated the terms of the ITP at issue in that case suggests Federal Defendants are correct. *EPIC* focused on examining the ITP to determine whether the action agency retained discretionary control to modify or add to the ITP's terms by: "mak[ing] new requirements to protect species that subsequently might be listed as endangered or threatened"; "expand[ing] the conservation goals of the [ITP]"; and "demand[ing] additional measures to protect new species." *Id*. at 1081-82 (emphasis added). See *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1170 (W.D. Wash. 2004) (emphasizing that *EPIC* involved a completed contract between the agency and a private entity and interpreting *EPIC* as holding that FWS did not " 'retain discretionary control [under the permit] to make new requirements to protect' the marbled murrelet or the coho salmon . . . or impose new requirements on the company" (quoting *EPIC*, 255 F.3d at 1081-83)). **In other words, in order to trigger the requirement for re-consultation under *EPIC* and 50 C.F.R. § 402.16 in the context of an executed and otherwise valid contract, the action agency must have retained sufficient discretion in that contract to permit material revisions to it that might benefit the listed species in question.**[85]

Plaintiffs in *NRDC v. Norton* contended that more than a dozen different provisions in the SRS Contracts were sources of discretion to take actions that could benefit species. In response, the court examined each provision, analyzing the contract language to determine whether Reclamation retained discretion to impose revisions to the executed contract to address the needs of protected species.[86] For example, article 3(i) of the SRS Contracts provides that if there is a "shortage of Project Water because of actions taken by the Contracting Officer to meet legal obligations then . . . no liability shall accrue against the United States or any of its officers, agents, or employees for any damage direct or indirect, arising therefrom."[87] Plaintiffs argued

[85] *Id.* at 1216-17 (bold emphasis added; other emphasis in original).

[86] *Id.* at 1219-30 (evaluating contract provisions on quantity, beneficial use, shortage, rates, and charges, among other provisions).

[87] *Id.* at 1219 (internal citation omitted).

that this provision allows Reclamation to reduce diversion of Project Water to meet other legal obligations. The court disagreed, finding that the provision was a force majeure clause that limited legal liability in the event of certain shortages. More pertinent, the court found the force majeure language did not qualify as "discretionary Federal involvement or control" under the *EPIC* standard.[88] The court concluded that plaintiffs had identified no contract provision and no other source of authority that would have permitted Reclamation to modify contract terms to increase protections for listed species, and dismissed the claim.

b. New Mexico: Army Corps' Approach Leading to *WildEarth Guardians*

In 2013, the Chief Counsel for the U.S. Army Corps of Engineers (Corps) issued a legal memorandum to all offices of the Corps providing ESA guidance.[89] Specifically, the 2013 Corps Memorandum directs agency counsel to conduct careful legal review of ESA consultations involving the Corps:

> [S]o that measures that the Corps adopts to implement . . . ESA responsibilities will be within Corps' legal authorities . . . this requires accurate description of the action being proposed by the Corps, a careful determination regarding what to include in the environmental baseline, as well as thoughtful adoption of measures designed to meet the requirements and intent of the ESA.[90]

The 2013 Corps Memorandum notes the frequent "challenges" present in ESA consultations for Civil Works projects that were authorized and constructed before the enactment of the ESA in 1973 and are now operated and maintained by the Corps.[91] "Determining the Corps' ESA legal responsibilities for such existing Civil Works projects requires care and precision."[92] Additionally, the 2013 Corps Memorandum acknowledges the importance of the Services' responsibilities under the ESA, but notes that the Corps must ensure that it "can plan, design, build, operate, and maintain Civil Works projects that serve the purposes for which Congress authorized each project (such as navigation, flood control, water supply, hydropower, etc.) . . . ."[93]

The 2013 Corps Memorandum provides specific directions to accomplish these objectives, including the careful identification and definition of the "action" that must comply with the ESA, and that the Corps, not the resource agencies, define the "action" at issue. "[I]t is important for the Corps to define and describe [the] agency's 'action' in a precise manner, to ensure that any measures intended to minimize adverse impacts pursuant to the ESA accurately account for only

[88] *Id.* at 1219-20.

[89] Memorandum from Chief Counsel, U.S. Army Corps of Engineers, to All Counsel HQ, DIV, DIST, CENTER, LAB & FOA Offices re: ESA Guidance (June 11, 2013) (Corps Memorandum).

[90] *Id.* at 1.

[91] *Id.* at 1-2.

[92] *Id.* at 2.

[93] *Id.*

those activities over which the Corps has discretion."[94] Other conclusions from the 2013 Corps Memorandum include:

- "It is the view of the Corps that the responsibility to maintain Civil Works structures so that they continue to serve their congressionally authorized purposes is inherent in the authority to construct them and is therefore non-discretionary."[95]

- "Because the Corps has a non-discretionary duty to maintain those Civil Works structures for which it has O&M responsibilities, the fact that the Corps perpetuates the structure's existence is not an action subject to consultation. The how and when of the maintenance activities may be subject to Section 7 consultation if the process of maintenance (as opposed to the results of maintenance) could affect listed species or designated critical habitat."[96]

- "[T]he Corps' positions on important matters such as what activities are included in the agency action and what conditions are included in the environmental baseline should be presented clearly and forcefully in the biological assessment (BA) that the Corps prepares and submits to the resource agency at the beginning of the consultation process."[97]

The 2013 Corps Memorandum concludes by stating the importance of following the legal guidance so that "the Corps can try to ensure that the Civil Works budget is not inappropriately diverted to pay for large-scale environmental restoration projects that Congress has not authorized or funded, in the guise of alleged ESA responsibilities that are not legitimately the Corps' responsibilities under the ESA."[98]

The Corps' approach was tested in litigation challenging the agency's compliance with the ESA in operating certain works in the Middle Rio Grande Project. In *WildEarth Guardians v. United States Army Corps of Engineers*,[99] environmental plaintiffs alleged that the Corps, in operating the Middle Rio Grande Project, violated Section 7(a)(2) by failing to consult with USFWS on the effects of operations on the listed Rio Grande silvery minnow and southwestern willow flycatcher.[100] The Corps operates four dams in the Middle Rio Grande Project, and each dam is authorized for limited purposes of flood control, sediment control, or storing specific pools of water.[101] Reclamation also operates project works, and the agencies had traditionally initiated joint Section 7(a)(2) consultations with USFWS. In 2013, the Corps desired to consult solely on

[94] *Id.*

[95] *Id.* at 2-3.

[96] *Id.* at 3.

[97] *Id.*

[98] *Id.* at 5.

[99] *WildEarth Guardians v. U.S. Army Corps of Eng'rs,* 314 F. Supp. 3d 1178 (D.N.M. 2018) (*WildEarth Guardians I*).

[100] *Id.* at 1184-85.

[101] *Id.* at 1185-86.

Corps-specific actions. USFWS did not agree, and the Corps proceeded to withdraw from the consultation. In response to the Corps Memorandum (described above), the Corps reassessed its actions and legal obligations in the Middle Rio Grande Project.[102]

The ultimate result was the "2014 Reassessment," which identified 13 actions that the Corps undertakes when operating the four dams of the Middle Rio Grande Project, and then analyzed whether the Corps had discretion over any of the 13 actions.[103] In evaluating whether it has discretion to take actions to benefit species for environmental purposes, the Corps "looked to caselaw . . . ; statutes (for example, parsing the text of the [Flood Control Act of 1960]) . . . ; and its own expertise (for example, noticing that Galisteo Reservoir, as an unregulated outlet structure, is physically incapable of retaining carryover storage) . . . . ."[104] The Corps concluded that it did not "need to consult on 11 of 13 identified actions, because those actions are either non-discretionary, not Corps actions, or not applicable given certain facts . . . ."[105] The remaining two actions involved maintenance, which the Corps also considered to be nondiscretionary, but recognized that the manner in which those actions are executed could require consultation if the execution affected listed species or their habitats.[106]

The court found the 2014 Reassessment to be the "result of thorough, careful, and expert analysis," and largely upheld the Corps' approach and conclusions.[107] Specifically concerning the various flood control acts under which the dams were authorized, the court found *Home Builders* to be "directly on point."[108] The court agreed with the Corps' position that the flood control acts "entirely stifle [the Corps'] ability to deviate in its operations" as the Corps "is directed to only consider flood and sediment control; [and] Congress explicitly provided a way to deal with environmental issues in the statutes . . . ."[109] The court also applied the precedent in *Home Builders* and explained that the ESA did not implicitly repeal or modify the Flood Control Act of 1960.[110]

The Tenth Circuit affirmed the district court's decision.[111] The appellate court also invoked *Home Builders* in analyzing whether discretion existed under the flood control acts:

> [T]he Corps is only required to engage in consultations under § 7(a)(2) when it has discretion to pursue objectives under the [ESA]. Under the Flood Control Acts' statutory mandates, the Corps does not have discretion. Because the Acts are silent

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[102] *Id.* at 1186.

[103] *Id.* at 1186-91 (listing the 13 actions, such as "Flood Control Operation" or "Release of Carryover Storage" and summarizing the Corps' conclusions on discretion from the 2014 Reassessment).

[104] *Id.* at 1194.

[105] *Id.* at 1191.

[106] *Id.*

[107] *Id.* at 1194-98. The court reversed and remanded to the Corps on the issue of consultation over the maintenance operations in the Abiquiu Dam tunnel and the Jemez Canyon Dam stilling basin, and denied the remainder of plaintiff's motion. *Id.* at 1205.

[108] *Id.* at 1196.

[109] *Id.* at 1195.

[110] *Id.*

[111] *WildEarth Guardians II*, 947 F.3d 635.

> on any consultation requirements, we would have to interpret them as including an implicit consultation requirement. We cannot interpret the Acts this way.[112]

The court concluded that the Corps lacks discretion to act on behalf of the minnow and flycatcher and thus did not have to engage in a Section 7(a)(2) consultation.[113]

The Corps' approach and the *WildEarth Guardians* cases from the Tenth Circuit stand in contrast to the 2008 decision from the Ninth Circuit in *National Wildlife Federation v. National Marine Fisheries Service*,[114] in which the Ninth Circuit reviewed the Section 7(a)(2) consultation for the Federal Columbia River Power System dams on listed fish in the Columbia and Snake Rivers. In that case, the Ninth Circuit agreed with the district court's determination that the agencies' treatment of discretionary and nondiscretionary dam operations was objectionable.[115] However, *NWF v. NMFS* is distinguishable from the Corps' recommended approach on ESA consultations on multiple grounds.

First, the Ninth Circuit noted that the BiOp in that case "offer[ed] little detail on the nature and extent of the purportedly nondiscretionary obligations of NMFS's basis for finding them to be nondiscretionary."[116] In the *WildEarth Guardians I* litigation, the Corps, as the action agency, was "meticulous and thorough" in its documentation of its statutory authorities and operations in the 2014 Reassessment.[117] In *NWF v. NMFS*, the court cautioned that "NMFS may not avoid determining the limits of the action agencies' discretion by using a reference operation to sweep so-called 'nondiscretionary' operations into the environmental baseline, thereby excluding them from the requisite ESA jeopardy analysis."[118] The Corps' approach tested in *WildEarth Guardians I* is not about avoiding an effects analysis, but rather delineating which actions the Corps has statutory authority to take and which it does not.[119] And the Ninth Circuit in *NWF v. NMFS* was concerned with an agency action intended to further a "broad Congressional mandate," which it found, by definition, to be discretionary.[120] For the dams operated by the Corps at issue in *WildEarth Guardians I*, there are no broad congressional mandates, but rather very specific statutory directives on how to operate facilities.[121] And in the Project, there are specific contracts, and a specific authorization that is only for 1902 Reclamation Act purposes, that direct that the holding in *NWF v. NMFS* is not on point.

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[112] *Id.* at 641.

[113] *Id.* at 641-42.

[114] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008) (*NWF v. NMFS*).

[115] *Id.* at 928-29.

[116] *Id.* at 926.

[117] *WildEarth Guardians I*, 314 F. Supp. 3d at 1194.

[118] *NWF v. NMFS*, 524 F.3d at 929.

[119] *WildEarth Guardians I*, 314 F. Supp. 3d at 1185-91.

[120] *NWF v. NMFS*, 524 F.3d at 929.

[121] *See, e.g., WildEarth Guardians I*, 314 F. Supp. 3d at 1186-91.

c. Key Conclusions Regarding Application of the ESA to the Project

(1) No Precedent to Date has Considered Precisely How Section 7(a)(2) Applies to Project Operations, Particularly under Modern Authority

Statements in prior court decisions that involve the Klamath Project and suggest that Reclamation can act solely under the ESA to benefit species would be in conflict with the now-controlling precedent announced in *Home Builders*, and as further developed in the lower courts.[122] Thus, there is limited value in looking to these cases for direction in crafting a current framework for ESA consultation for the Project.

(2) The ESA Is Not an Independent Source of Authority for Reclamation to Take Action that Benefits Protected Species or Their Critical Habitat

Under the line of authority related to the Supreme Court's decision in *Home Builders*, the ESA does not grant independent statutory authority to a federal agency to take action to benefit protected species.[123] The agency must have authority under its governing statutes to take any such action, or have reserved discretion to impose measures to benefit listed species. With respect to the Klamath Project, the Project was authorized for the purposes of the 1902 Act; there is no other enabling legislation to consider.[124] The Project's water rights are defined according to the ACFFOD. The only purposes for which storage by Reclamation is authorized are "domestic use and irrigation."[125] Reclamation does not have authority to store water or release stored water from Link River Dam for the purpose of benefitting ESA-listed species.

(3) Based on Current ESA Jurisprudence, the Requirement to Consult under Section 7(a)(2) Does Not Apply to Many Aspects of Project Operations

At a general level, the operation of the Project can be described as two components: storage of water in Project reservoirs including LRD, Clear Lake, and Gerber Reservoirs to ensure diversion and delivery to all land served pursuant to permanent contracts between Reclamation and Project contractors; and diversion and delivery of live flow and stored water from Project

[122] *See, e.g.*, *Patterson II*, 204 F.3d at 1213 ("we hold that the district court did not err in concluding that Reclamation has the authority to direct Dam operations to comply with the ESA"); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1206-07 (D. Or. 2001).

[123] *Id.* at 656-57 (citing *Platte River*, 962 F.2d at 33-34); *Babbitt*, 65 F.3d at 1510 (agreeing with construction of Section 7 announced in *Platte River*).

[124] *See* section I.B, *supra*.

[125] KBA_ACFFOD_07117-07118.

reservoirs, the Klamath River, and Lost River to all land served pursuant to permanent contracts between Reclamation and Project contractors.[126]

To determine whether Section 7(a)(2) applies to these actions and whether Reclamation must engage in a consultation with the Services, Reclamation must evaluate whether it has some discretion to take action for the benefit of a protected species. Reclamation diverts and stores water in Upper Klamath Lake and other reservoirs according to its water rights obtained under state law. Under the ACFFOD, the purpose of use for water diverted to storage is irrigation. There is no discretion to take action to manage storage for the benefit of listed species over the interests of Project irrigators. Moreover, Reclamation is bound by legal obligations in permanent contracts with irrigation districts and individual contractors to supply the amount of water necessary for irrigation. These permanent contracts also represent legal obligations that restrict Reclamation's discretion; Reclamation may not restrict deliveries under those contracts unless, and only to the extent that, it has retained discretion to amend the contracts in a manner that inures to the benefit of listed species.

Reclamation has transferred the responsibilities for many Project works to irrigation districts and no longer operates them. Other works have been owned and operated by the irrigation districts for decades. To the extent that there is any federal involvement in the operation of Project works, *EPIC* provides the relevant standard to determine whether this is the type of discretionary involvement or control that would trigger a Section 7(a)(2) consultation regarding the ongoing operations of these facilities. The *EPIC* standard, as recently interpreted in *NRDC v. Norton*, provides that in the context of a permanent contract, the action agency must have retained sufficient discretion in that contract to permit material revision to it that might benefit the listed species in question.[127]

Based on a review of major Project contracts,[128] Reclamation does not provide sufficient discretion over the second component of Project operations (diversion and delivery of water to Project lands) to require a Section 7(a)(2) consultation for this aspect of Project operations.[129] This evaluation was a major trigger for requesting that Reclamation conduct the sort of legal analysis and reassessment that had been completed by the Corps in its 2013 guidance and its operations on the Rio Grande.

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[126] There are other incidental Project operations such as flood control, maintenance, delivery of water to refuges, and delivery of water under temporary contracts that are not the subject of the immediate analysis and conclusions here, but that should be separately considered in accordance with the conclusion of this paper.

[127] *NRDC v. Norton*, 236 F. Supp. 3d at 1216-17.

[128] There are over 200 contracts with Project water users, and review of each contract for this purpose was not performed as part of the analysis described in this paper.

[129] The lack of requirement for Section 7 consultation for certain Project-related activities does not mean that federal or nonfederal actors are exempt from Section 9, the ESA take prohibition. However, it is likely that consultation is required for certain aspects of Project operations and, as a result, there would be an ITS covering a range of activities. In addition, the discretionary or nondiscretionary aspect of a federal activity may be relevant to whether that activity can be alleged to be the legal and proximate cause of take. *See NRDC v. Norton*, 236 F. Supp. 3d at 1240-41 (federal agency undertaking a nondiscretionary activity cannot be the proximate cause of take).

V. Completion and Conclusions of the Re-Assessment

In the spring of 2020, Project water users' requests for a re-assessment of Project legal obligations began to get traction, and the Department of the Interior's Office of the Solicitor began to conduct a legal analysis. This activity gained considerable momentum after a visit to the Klamath Basin by Secretary David Bernhardt in July of 2020.

The Solicitor's office determined that legal and regulatory developments since 1997 "compel a new analysis of Reclamation's obligations."[130] The Solicitor's office Memorandum dated October 29, 2020, relies upon contemporary legal authority, including the United States Supreme Court decision in *National Association of Home Builders v. Defenders of Wildlife*.[131] Following the issuance of the October 29, 2020 Memorandum, Reclamation completed its Reassessment of U.S. Bureau of Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act (2021 Reassessment) in January 2021. The Reassessment also relied on follow-up memoranda from the Solicitor dated January 14, 2021, and January 16, 2021.[132]

The re-assessment and supporting memoranda examined the potential sources of Reclamation's discretionary that would trigger the application of Section 7(a)(2) to Project operations. This evaluation included consideration of the authorized purposes of the Project, the nature of water rights for use of water stored in Upper Klamath Lake, the terms of contracts between Reclamation and the Project contractors, and Reclamation's obligations relevant to unadjudicated claims to tribal water rights for flows in California.

In sum, the key conclusions from the re-assessment were:

(1) based on contemporary law, Section 7 of the ESA does not require or authorize the curtailment of the irrigation water deliveries for the Project; for these elements of Project operation, Reclamation lacks the discretion necessary to trigger ESA consultation;

(2) consistent with the ACFFOD, the only legally authorized use of water stored in Upper Klamath Lake is irrigation;

(3) downstream tribes holding federally-protected fishing rights also have water rights to flows in the Klamath that are senior to the water rights for the Project; and

(4) those downstream rights, which are unadjudicated and thus unquantified, do not include the right to have lawfully stored water released to augment Klamath River flows.

The re-assessment also concluded that some aspects of Project operations *are* subject to ESA consultation, thus its implementation would still have required identification of a proposed action

[130] November 12, 2020 Letter from David Bernhardt, Secretary of the Interior, to Klamath Water Users Association.

[131] *Home Builders*, 551 U.S. at 644.

[132] Memorandum from Solicitor to Secretary of Interior re: Use of Water Previously Stored in Priority for Satisfaction of Downstream Rights (Jan. 14, 2021) (Stored Water Memorandum); Memorandum from Solicitor to Secretary of Interior re: Analysis of Klamath Project contracts to determine discretionary authority in accordance with the November 12, 2020 Letter of the Secretary of the Interior (Jan. 14, 2021) (Discretion Memorandum).

(discretionary activities) which would become the subject of BiOps. For example, although Reclamation may not deprive irrigators of lawfully stored water, it has some discretion as to when and how water will be stored as necessary to meet the demands.

The re-assessment provided a grounded basis for future consultations and Project operations.

VI. Demise of the Re-Assessment, the Return to Nowhere

The Re-assessment was completed at the end of the Trump Administration. On April 8, 2021, Secretary of the Interior Deb Haaland withdrew it and its supporting legal memoranda. The Secretary's withdrawal order stated that the re-assessment process had not included adequate and necessary consultation with tribes, and that it was not consistent with long-standing Department policy. The withdrawal was not "on the merits."

This, obviously, is a disappointment for Project irrigators, who had urged the Biden Administration that the mere fact of issuance during the Trump Administration did not mean the re-assessment was bad, or wrong. Now, an ESA consultation scheduled for completion by fall of 2022 is dominated by bargaining for acre-feet, in a process untethered to any regulatory construct.

Project water users have urged that the Department at least recognize that the approach taken prior to the re-assessment, and now, is not necessarily right. There are, however, no signs that there will be attention to the issue of whether the current approach is actually appropriate. There are similar problems related to "the science" applied in ESA consultation, a topic not addressed here.

The author of this paper typically grasps all available reasons for optimism, but there are few to be found. Absent a dose of fierce and fearless leadership that demands solutions, the contentious chaos surrounding Klamath Project operations is due to continue.

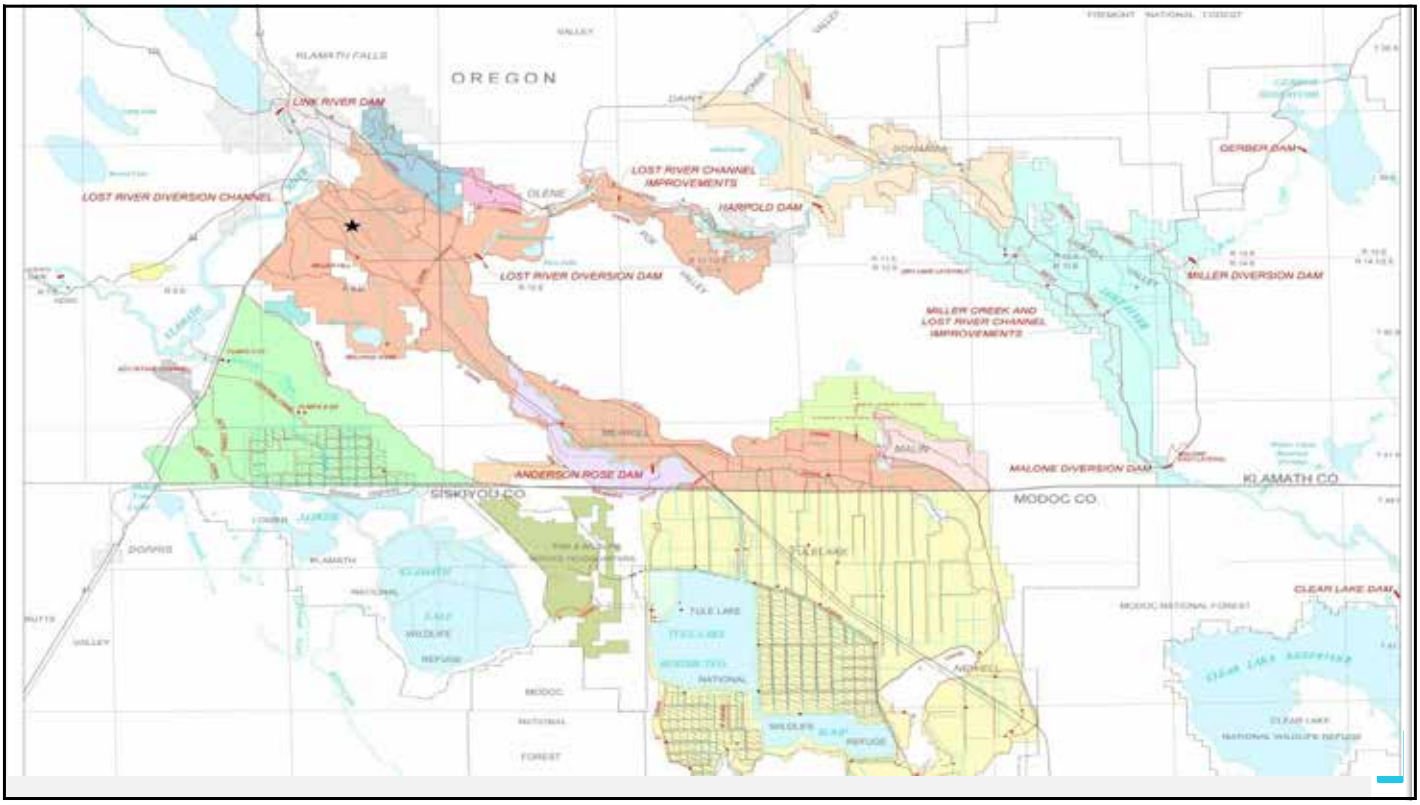
KWUA
Klamath Water Users
ASSOCIATION

Paul Simmons
Executive Director

Klamath Project Operations /Legal Guidance: The ESA Re-Assessment and its Demise

2


OREGON
CALIFORNIA
Pacific Ocean
Williamson
Sycan
Sprague
Chiloguin
Upper Klamath Lake
Klamath Falls
Lost
Keno
Willow Cr.
Boles Cr.
Tule Lake
Clear Lake
Klamath
Happy Camp
Yreka
Montague
Fort Jones
Shasta
Butte Cr.
Weed
Scott
Salmon
Klamath
Willow Creek
Trinity Lake
Weaverville
North Fork
South Fork
Hayfork Cr.
Trinity
Hayfork
About 150 miles (241 km) across


OREGON
LINK RIVER DAM
LOST RIVER DIVERSION CHANNEL
LOST RIVER CHANNEL IMPROVEMENTS
HARPOLD DAM
LOST RIVER DIVERSION DAM
GERBER DAM
MILLER DIVERSION DAM
MILLER CREEK AND LOST RIVER CHANNEL IMPROVEMENTS
ANDERSON ROSE DAM
MALONE DIVERSION DAM
KLAMATH CO
SISKIYOU CO
MODOC CO
CLEAR LAKE DAM

Klamath Project Development

- Major Infrastructure and Acreage Built Out by 1940s
- Contracts Entered Between 1909 and 1965 Provide for:
  - Water Delivery
  - Repayment and Reimbursement Obligations
  - Transfer O&M Responsibilities for Certain Federally-Owned Works
  - Contractor Construction of Certain Works
  - Perpetual Term

5

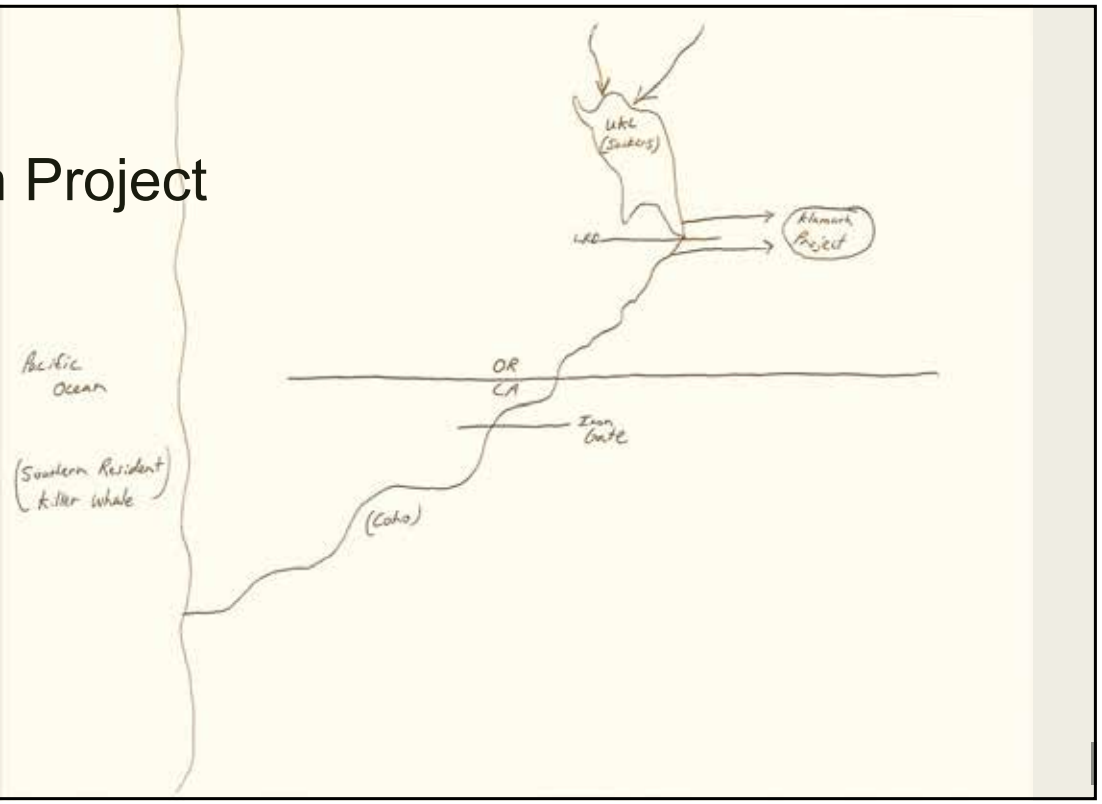
ESA Section 7(a)(2)

Federal agencies shall ensure that their actions not jeopardize the continued existence of listed species or destroy/adversely modify critical habitat

For actions that may affect listed species:

- "Consult"
  - Prepare a Biological Assessment
  - Receive a Biological Opinion from NMFS or USFWS as applicable
    - Non-Jeopardy; or
    - Jeopardy with RPAs
- Decide how to proceed in light of Section 7(a)(2) obligations

Current Klamath Project ESA Species



THE PATTERSON CURSE

The Patterson Case, 204 F.3d 1206 (9th Cir. 2000)

Issue: "whether . . . irrigators in the Klamath Basin . . . are third-party beneficiaries to a 1956 contract . . . between the United States Bureau of Reclamation . . . and the California Oregon Power Company ("Copco") that governs the management of the Link River Dam[.]"

Held: "No."

But there is more: "Because Reclamation retains authority to manage the Dam, and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the Dam when necessary to meet the requirements of the ESA[.]" Id. at 1213.

9

2013 Consultation

A non-jeopardy "proposed action" was negotiated and included in the biological assessment. Intended to provide relative certainty regarding Project supplies under varying hydrology.

April 2019 “Non-Jeopardy” BiOps


RECLAMATION
Managing Water in the West

Final Biological Assessment

The Effects of the Proposed Action to Operate the Klamath Project from April 1, 2019 through March 31, 2029 on Federally-Listed Threatened and Endangered Species

Cover photo: Lost River Diversion Channel with Upper Klamath Lake in the background

U.S. Department of the Interior
Bureau of Reclamation

December 2018


Biological Opinion on the Effects of Proposed Klamath Project Operations from April 1, 2019, through March 31, 2024, on the Lost River Sucker and the Shortnose Sucker

Prepared By:

U.S. Fish and Wildlife Service
Southwest Region
Klamath Falls Fish and Wildlife Office


UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

11

The Purpose of the “Proposed Action” for Recent ESA Consultation

- “Operate the Project, or direct the operation of Project facilities, for the delivery of water for irrigation purposes . . . while maintaining conditions in [Upper Klamath Lake] and the Klamath River that meet the legal requirements under section 7 of the ESA.”

- Questions Raised: what’s the authority to do that (at least without compensation)?

12

Babbitt, EPIC, Homebuilders ("Actions" Means "Discretionary Actions")

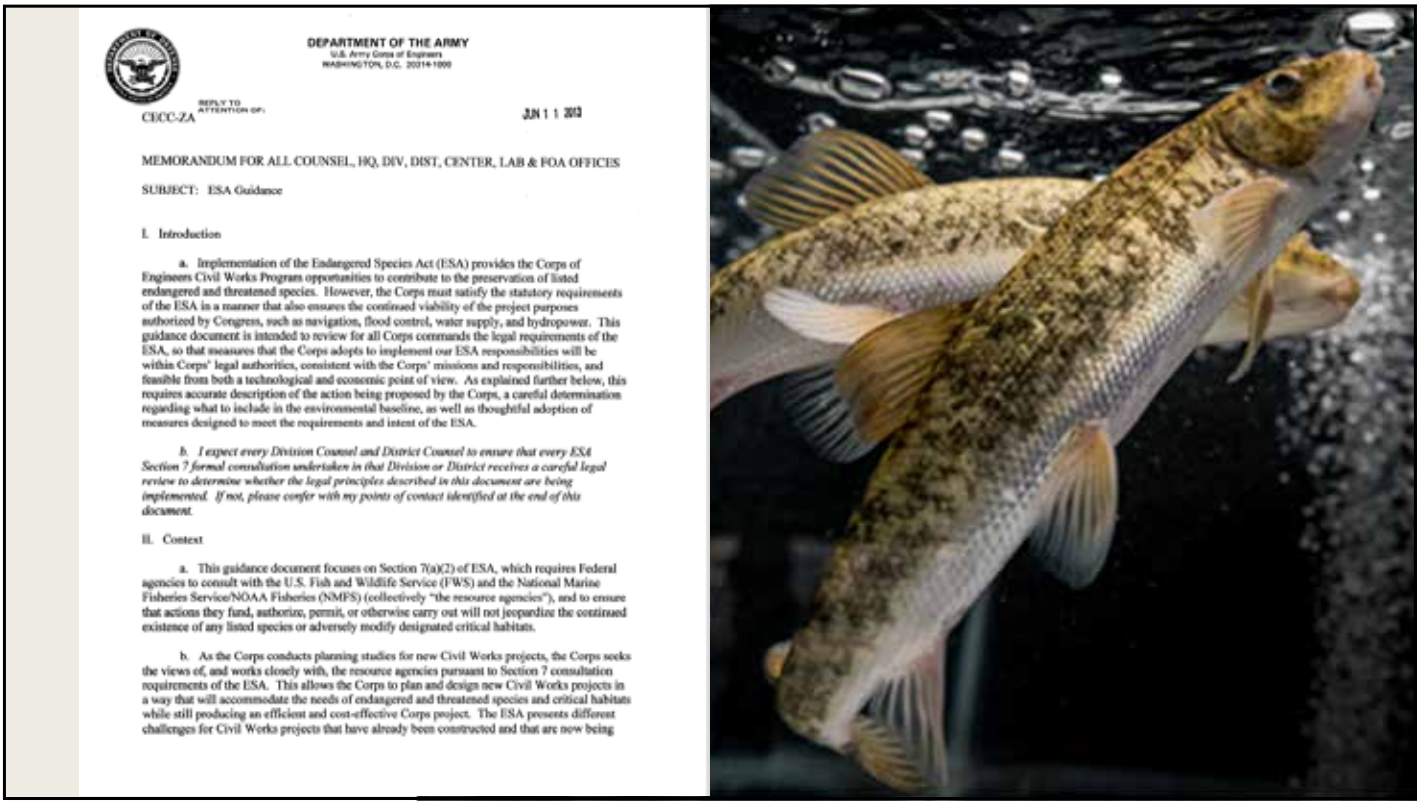
Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995) and *Envtl. Info. Protection Ctr. v. Simpson Timber*, 255 F.3d 1073 (9th Cir. 2001)

Together: Where federal agency has previously authorized a non-federal activity (e.g., permit), new or additional ESA consultation is required only if the federal agency has retained discretionary control over the authorized activity to implement measures that inure to the benefit of listed species.

Nat'l Ass'n of Homebuilders v. Defs. of Wildlife, 554 U.S. 644 (2007)

ESA Section 7(a)(2) is not a source of power to protect species; Section 7(a)(2) only applies where a federal agency has discretion to protect species under separate authority.

13



DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

CECC-ZA

REPLY TO ATTENTION OF:

JUN 1 1 2013

MEMORANDUM FOR ALL COUNSEL, HQ, DIV, DIST, CENTER, LAB & FOA OFFICES

SUBJECT: ESA Guidance

I. Introduction

a. Implementation of the Endangered Species Act (ESA) provides the Corps of Engineers Civil Works Program opportunities to contribute to the preservation of listed endangered and threatened species. However, the Corps must satisfy the statutory requirements of the ESA in a manner that also ensures the continued viability of the project purposes authorized by Congress, such as navigation, flood control, water supply, and hydropower. This guidance document is intended to review for all Corps commands the legal requirements of the ESA, so that measures that the Corps adopts to implement our ESA responsibilities will be within Corps' legal authorities, consistent with the Corps' missions and responsibilities, and feasible from both a technological and economic point of view. As explained further below, this requires accurate description of the action being proposed by the Corps, a careful determination regarding what to include in the environmental baseline, as well as thoughtful adoption of measures designed to meet the requirements and intent of the ESA.

b. I expect every Division Counsel and District Counsel to ensure that every ESA Section 7 formal consultation undertaken in that Division or District receives a careful legal review to determine whether the legal principles described in this document are being implemented. If not, please confer with my points of contact identified at the end of this document.

II. Context

a. This guidance document focuses on Section 7(a)(2) of ESA, which requires Federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service/NOAA Fisheries (NMFS) (collectively "the resource agencies"), and to ensure that actions they fund, authorize, permit, or otherwise carry out will not jeopardize the continued existence of any listed species or adversely modify designated critical habitats.

b. As the Corps conducts planning studies for new Civil Works projects, the Corps seeks the views of, and works closely with, the resource agencies pursuant to Section 7 consultation requirements of the ESA. This allows the Corps to plan and design new Civil Works projects in a way that will accommodate the needs of endangered and threatened species and critical habitats while still producing an efficient and cost-effective Corps project. The ESA presents different challenges for Civil Works projects that have already been constructed and that are now being

Wildearth Guardians v. Corps of Engineers, 947 F.3d 635 (10th Cir. 2020)

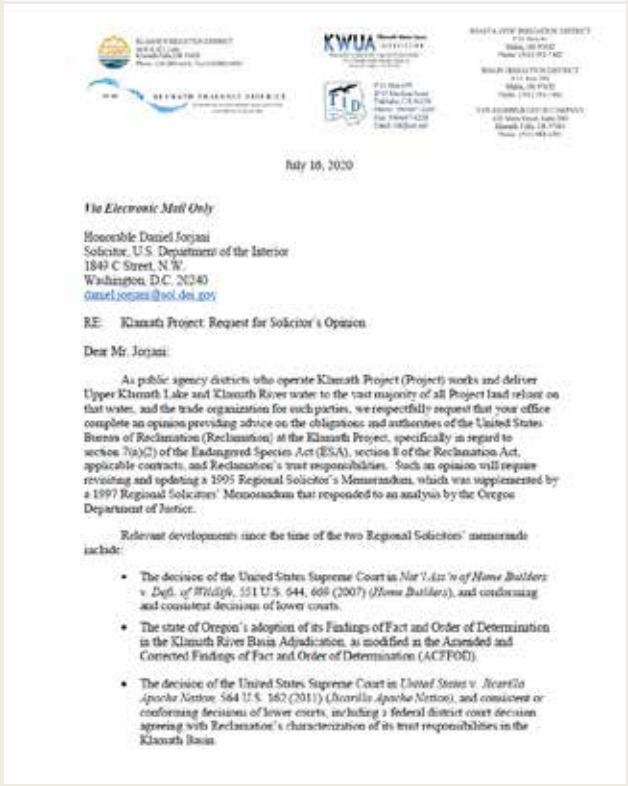
Case-by case examination of statutes authorizing USACOE Rio Grande reservoir operations to ask/answer the question: for which activities is there retained discretion to benefit species?

15

NRDC v. Norton, 236 F. Supp. 3d 1198 (E.D. Cal 2017)

Case-by-case examination of Reclamation contracts with Sacramento River “Settlement Contractors” to determine whether Reclamation had retained discretion in contracts to impose measures on the non-federal contractors to benefit listed species

16



July 16, 2020

Via Electronic Mail Only

Honorable Daniel Jorjani
Solicitor, U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
daniel.jorjani@sol.doi.gov

RE: Klamath Project: Request for Solicitor's Opinion

Dear Mr. Jorjani:

As public agency districts who operate Klamath Project (Project) works and deliver Upper Klamath Lake and Klamath River water to the vast majority of all Project land reliant on that water, and the trade organization for such parties, we respectfully request that your office complete an opinion providing advice on the obligations and authorities of the United States Bureau of Reclamation (Reclamation) at the Klamath Project, specifically in regard to section 7(a)(2) of the Endangered Species Act (ESA), section 8 of the Reclamation Act, applicable contracts, and Reclamation's trust responsibilities. Such an opinion will require revisiting and updating a 1995 Regional Solicitor's Memorandum, which was supplemented by a 1997 Regional Solicitors' Memorandum that responded to an analysis by the Oregon Department of Justice.

Relevant developments since the time of the two Regional Solicitors' memoranda include:

- The decision of the United States Supreme Court in *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668 (2007) (*Home Builders*), and conforming and consistent decisions of lower courts.
- The state of Oregon's adoption of its Findings of Fact and Order of Determination in the Klamath River Basin Adjudication, as modified in the Amended and Corrected Findings of Fact and Order of Determination (ACFFOD).
- The decision of the United States Supreme Court in *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) (*Jicarilla Apache Nation*), and consistent or conforming decisions of lower courts, including a federal district court decision agreeing with Reclamation's characterization of its trust responsibilities in the Klamath Basin.

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Contentions in Support of Request to Solicitor

Solicitor's Guidance from mid-1990s is outdated

Under contemporary law, Reclamation lacks authority or discretion to:

- *Order operators of diversion works/transferred works to desist from diversion*
- *Operate other facilities to impose shortage on the Project in order to benefit species*
- *Use stored water for any purpose other than irrigation (authorized Project purpose and authorized use of water under state water law)*

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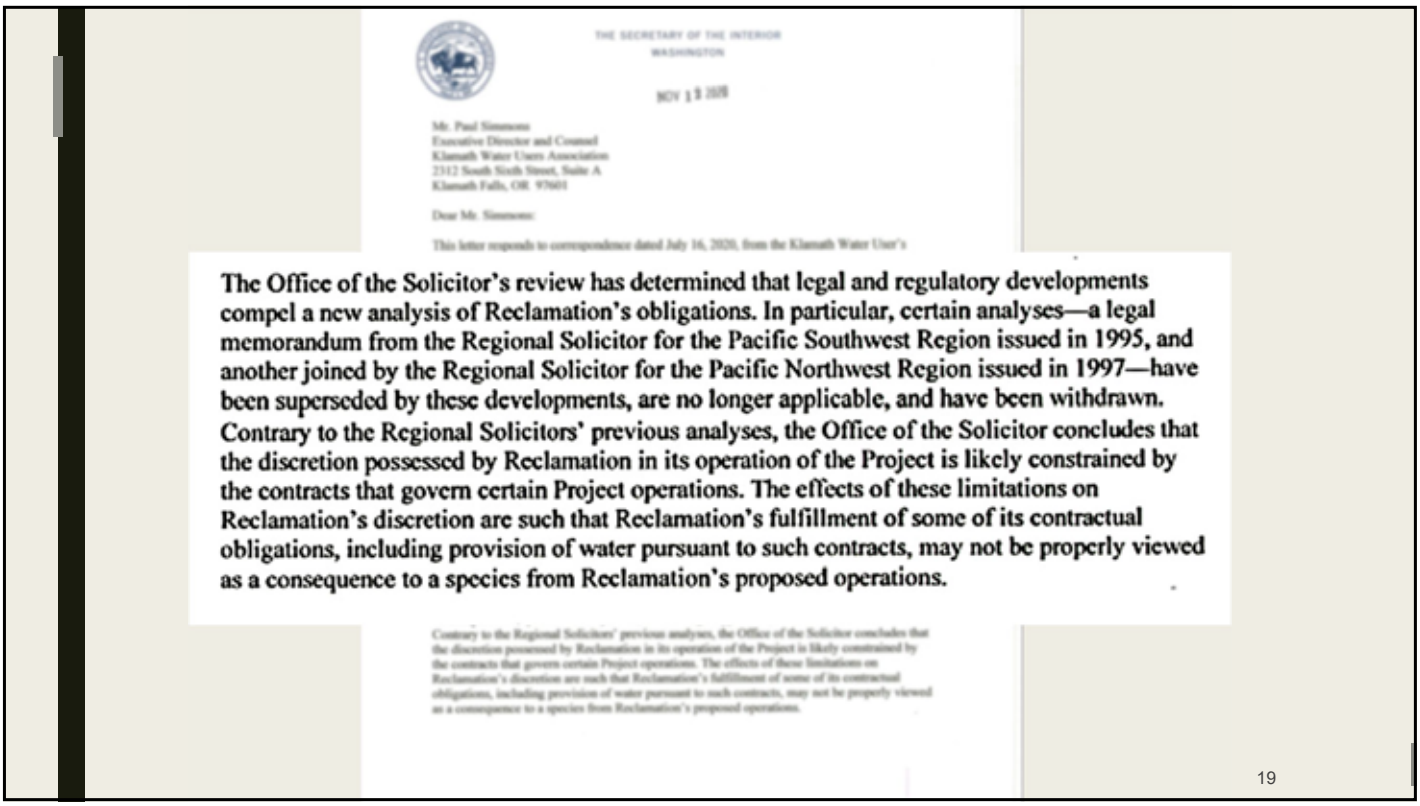


THE SECRETARY OF THE INTERIOR
WASHINGTON

NOV 13 2020

Mr. Paul Simmons
Executive Director and Counsel
Klamath Water Users Association
2312 South Sixth Street, Suite A
Klamath Falls, OR 97601

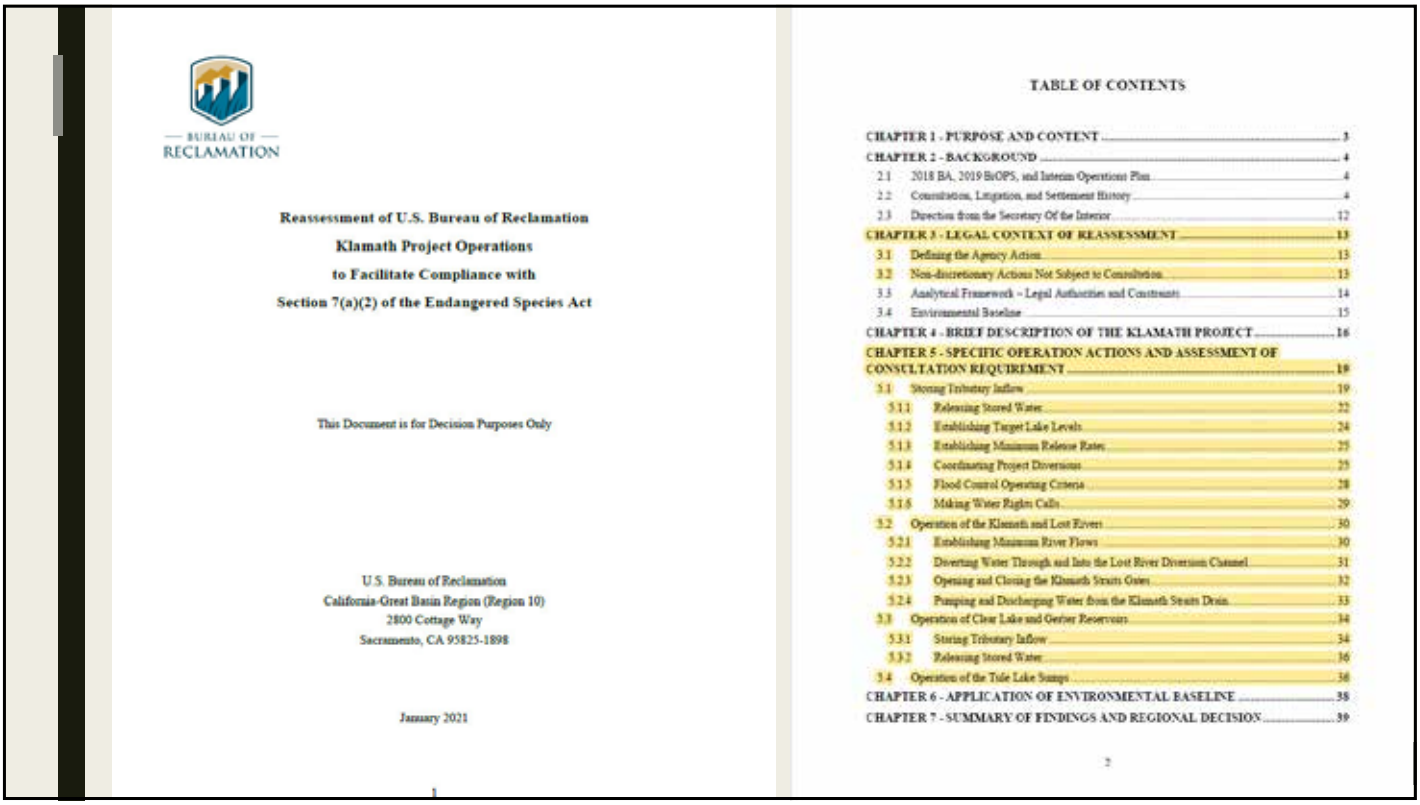
Dear Mr. Simmons:

This letter responds to correspondence dated July 16, 2020, from the Klamath Water Users's

The Office of the Solicitor's review has determined that legal and regulatory developments compel a new analysis of Reclamation's obligations. In particular, certain analyses—a legal memorandum from the Regional Solicitor for the Pacific Southwest Region issued in 1995, and another joined by the Regional Solicitor for the Pacific Northwest Region issued in 1997—have been superseded by these developments, are no longer applicable, and have been withdrawn. Contrary to the Regional Solicitors' previous analyses, the Office of the Solicitor concludes that the discretion possessed by Reclamation in its operation of the Project is likely constrained by the contracts that govern certain Project operations. The effects of these limitations on Reclamation's discretion are such that Reclamation's fulfillment of some of its contractual obligations, including provision of water pursuant to such contracts, may not be properly viewed as a consequence to a species from Reclamation's proposed operations.

Contrary to the Regional Solicitors' previous analyses, the Office of the Solicitor concludes that the discretion possessed by Reclamation in its operation of the Project is likely constrained by the contracts that govern certain Project operations. The effects of these limitations on Reclamation's discretion are such that Reclamation's fulfillment of some of its contractual obligations, including provision of water pursuant to such contracts, may not be properly viewed as a consequence to a species from Reclamation's proposed operations.

19



— BUREAU OF —
RECLAMATION

Reassessment of U.S. Bureau of Reclamation
Klamath Project Operations
to Facilitate Compliance with
Section 7(a)(2) of the Endangered Species Act

This Document is for Decision Purposes Only

U.S. Bureau of Reclamation
California-Great Basin Region (Region 10)
2800 Cottage Way
Sacramento, CA 95825-1898

January 2021

1

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2020-221 ESA Re-Assessment for Klamath Project Operations

1) section 7 of the ESA does not require or authorize the curtailment of irrigation water deliveries for the Project;

2) the only legally authorized use of water stored in Upper Klamath Lake is irrigation;

3) downstream tribes holding federally-protected fishing rights also have water rights to flows in the Klamath River that are senior to the water rights for the Project;

4) those downstream rights, which are unadjudicated and thus unquantified, do not include the right to have lawfully stored water released to augment Klamath River flows.

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THE SECRETARY OF THE INTERIOR
WASHINGTON

APR 08 2021

Memorandum

To: Deputy Solicitor – Indian Affairs[1]
Principal Deputy Assistant Secretary – Water and Science
Principal Deputy Assistant Secretary for Fish and Wildlife and Parks
Principal Deputy Assistant Secretary – Indian Affairs
Senior Counselor to the Secretary

From: Secretary

Subject: Withdrawal of Klamath Project-Related Memoranda, Letters, and Analyses

On January 20, 2021, President Biden signed Executive Order (EO) 13990, entitled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," 86 Fed. Reg. 7037 (Jan. 25, 2021). EO 13990 affirms the new administration's commitment to organize and deploy the full capacity of its agencies to combat the climate crisis, increasing resilience to the impacts of climate change; protecting public health; conserving our lands, waters, and biodiversity; and delivering environmental justice. Among other things, the EO directs agencies to "immediately review and, as appropriate and consistent with applicable law, take action to address" certain regulations or other agency actions that conflict with national objectives set forth in the EO. The Biden-Harris administration has also made clear its commitment to respect Tribal sovereignty and self-governance and to fulfill Federal trust and treaty responsibilities to Tribal Nations through regular, meaningful, and robust consultation.

The Klamath Basin in southern Oregon and northern California is facing one of the worst drought years in 4 decades. Water flowing from the Upper Klamath Lake and in the Klamath River is critically important to communities in this region, including farmers and ranchers, sport and commercial fishermen, and multiple Tribes in the Klamath Basin that depend on these waters, fisheries, and other natural resources for their livelihoods. Given the dire and unprecedented drought conditions that we are facing, we know that difficult decisions will need to be made in the coming days and weeks to address water shortages. Through this memorandum, I am directing each of you to work collaboratively, across our agency and across the Federal Government, and with our State, local, Tribal, and community partners to identify steps that can be taken to minimize the impacts of upcoming water allocation decisions and develop a long-term plan to facilitate conservation and economic growth in the Klamath Basin.

[1] The Principal Deputy Solicitor is recused from this matter.

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KWUA Klamath Water Users ASSOCIATION

NEED FOR IMPROVED AND EXPEDIENT ESA RE-CONSULATION

July 7, 2021

Klamath Water Users Association (KWUA) is aware of an
of Reclamation (Reclamation) leadership regarding the process and
Endangered Species Act (ESA) Section 7 consultation for Klamath
that this process be completed as expeditiously as possible, befo
that the framework for the proposed action and consultation ch
current approach.

The Project has been operated for the last two years under an
latest iteration of the current approach to ESA consultation. The last
Interim Plan have been a catastrophe for the Klamath Project. The c
consultation has not accomplished its intended purposes, and has resulted in unworkable conflicts in operations and a lack of flexibility and reliability for water users.

In KWUA's opinion, this is largely because the Services have lost track of the reasons for cooperative efforts to develop "non-jeopardy" operations. For context, up until approximately ten years ago, the approach to consultation was different, and commonly resulted in jeopardy opinions. For example, in 2001, the proposed action described in Reclamation's biological assessment was the operation of the Project for irrigation. Both Services prepared jeopardy opinions with reasonable and prudent alternatives (RPAs). The RPAs prescribed river flows below Iron Gate and elevations for Upper Klamath Lake (UKL) that, together, called for more water than physically existed.

The competing and irreconcilable RPAs in past biological opinions were among the significant reasons for adopting a different approach in the 2012-2013 Section 7 consultation. The 2012-2013 Section 7 consultation sought to address intra-annual certainty for irrigators and districts and mid-season curtailment by identifying a known, reliable water supply for irrigators based on the April 1 UKL inflow forecast. Thus, Reclamation and the Services, with collaborative input from others, worked to develop a non-jeopardy operation that would assure irrigation water in known amounts and result in variable outcomes for UKL elevations.

Unfortunately, this approach has, incrementally, reached the point of failure. "Non-jeopardy" operations are negotiated, but the operations are not reliable. And biologically, the opinions no longer make sense, focusing on hydrologic proxies rather than biological requirements. This year captures the problem tragically: the Project is using no water, yet the Project is considered to be the cause of exceedances of inflexible rules regarding Upper Klamath Lake levels and other "terms and conditions" of the Service's biological opinions.

Pages 4 through 12 of the January 2021 Reassessment of U.S. Bureau of Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act

(2021 Reassessment) comprehensively document how the once-collaborative process came to be, including the negotiations of the non-jeopardy opinions. We believe those pages also illustrate how the process has lost sight of its purpose and deteriorated to the point that it is has become untethered from any regulatory construct. We understand and accept that the 2021 R
withdrawn because of the specific legal d

We understand and accept that the 2021 Reassessment has been withdrawn because of the specific legal determinations upon which it is based. That, however, does not mean that the current approach is appropriate.

empowered to define a Proposed Action
effects of the Project rather than one where the Project is the backstop for all habitat issues from the Upper Basin to the Pacific Ocean. KWUA, districts, and individuals in the Project also have deep concerns with the quality of science relied upon for agency decisions. We will continue to communicate on these issues and encourage Reclamation to continue its work updating the science that guides operations.

Last, we aware that there are proposals to continue the status quo based on various justifications, such as waiting until a new operations plan can account for the anticipated dam removals in the Klamath River. KWUA cannot stress enough that the status quo is untenable, and another year of unreliability, chaos, and low water supply can only cause further ruin to Klamath Project communities.

These problems are difficult, but must be tackled now. There are compelling reasons for action, and no good reason for inaction.


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Thank You
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Chapter 6C

Litigation Developments in the Klamath Basin

Jay Weiner
Rosette LLP
Chandler, Arizona

Documents for Discussion

***Klamath Tribes v. BOR*—Case No. 1:21-cv-00556-CL, D. Or (2021)**

Order Denying Preliminary Injunction Motion:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/2021+KT+v.+BOR+-+(53)+2021-5-6+Order+denying+PI+motion.pdf

***Yurok Tribe v. BOR*—Case No. 3:19-cv-04405-WHO, N.D. Cal (2019)**

Order Lifting the Stay:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/(961)+2021-9-30+Order+Lifting+the+Stay.pdf

Proposed Order Granting Motion for Limited Lifting of the Stay:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/(951-1)+2021-8-18+YT-US-KT+Stip+re.+US+M2Lift+Stay.Ex.+A+(Proposed+Order).pdf

***KID/SVID v. BOR*—Case No. 1:19-cv-00451-CL/No. 1:19-cv-00531-CL (Consolidated), D. Or 2019**

Magistrate's Report and Recommendations Granting Motions to Dismiss:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/2019+KID-SVID+v.+BOR+-+(89)+2020-5-15+Mag+Rpt+and+Rec.+Granting+Mtns+to+Dismiss.pdf

Order Adopting Findings and Recommendations:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/2019+KID-SVID+v.+BOR+-+(97)+2020-9-25+Order+adopting+F%26Rs.pdf

***KID v. OWRD*—Case No. 20CV17922, Marion County Circuit Court (2020)**

Order and Letter Opinion Granting in Part KID Motion for Summary Judgment:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/2020+KID+v.+OWRD+(Marion+County)+-+2020-7-30+Order+and+Letter+Opinion+Granting+in+Part+KID+MSJ.pdf

Order Granting Petitioner's Partial Motion for Summary Judgment:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/2020+KID+v.+OWRD+(Marion+County)+-+2020-10-13+Bennett+Order.pdf

Letter Opinion Denying OWRD Motion for Stay:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/2020+KID+v.+OWRD+(Marion+County)+-+2020-12-17+Bennett+Opinion+Letter+denying+OWRD+mtn+for+stay.pdf

***KID v. BOR*—Case No. 1:21-cv-00504-AA, D. Or. (2021)**

KID Motion to Remand:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/2021+KID+v.+BOR+-+2021-4-20+KID+Motion+to+Remand.pdf

Opposition to KID Motion to Remand:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/2021+KID+v.+BOR+-+2021-5-4+BOR+Opposition+to+KID+M2Remand.pdf

KID Reply in Support of Motion to Remand:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/2021+KID+v.+BOR+-+2021-5-11+KID+Reply+ISO+M2Remand.pdf

***Hawkins v. Haaland*—Case No. 20-5074, D.C. Circuit Court of Appeals (2021)**

Final DC Circuit Opinion:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/2021-3-19+Hawkins+FINAL+DC+Circuit+Opinion.pdf

***Brooks v. Byler*—Case No. 19CV27798, Marion County Circuit Court (2019)**

Order Granting Petitioners' Motion for Partial Summary Judgment:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/Brooks+v+Byler+19CV27798+-+ORDER+Granting+Brooks'+Mot+for+PMSJ+2020-03-10.pdf

General Judgment:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/Brooks+v+Byler+19CV27798+-+GENERAL+JUDGMENT+(2020-05-05).pdf

***Baley v. US*—Case No. 18-1323, Federal Circuit (2019)**

Opinion:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/2019-11-14+Baley+v+US+-+Fed+Cir+%E2%80%93+Opinion.pdf

***Fort Klamath Critical Habitat Landowners v. Byler*—Case No. 21CV37688, Marion County Circuit Court (2021)**

Amended Petition for Judicial Review of Final Order:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2021/ENV21-7/2021-9-22+FKCHL+v+OWRD+(21CV37688)+Am+PJR+(inc.+OWRD+FO).pdf

Chapter 7

Presentation Slides: Ethics

Tom Lininger
University of Oregon School of Law
Eugene, Oregon

Ethics Presentation for ENR Section's CLE in October 2021

Professor Tom Lininger
University of Oregon School of Law

About the presenter

- I am a law professor at the University of Oregon.
- I am an inactive member of the Oregon State Bar, so I cannot provide legal advice.
- I do not have authority to speak on behalf of the OSB, and no official affiliated with the OSB has approved the representations I am making in this presentation.
- Before entering academia, I practiced for nearly a decade as a civil litigator and as a federal prosecutor. I handled some environmental cases in both positions.

Topics covered in this presentation

- Solicitation of prospective clients
- Confidentiality and exceptions
- Environmental justice
- Miscellaneous issues relating to ownership and management of law practices

Topic #1: Solicitation of prospective clients

- Solicitation is especially important for practitioners of environmental law.
- Basically solicitation means approaching a person presently known to need legal services, and then proposing to represent that person.
- We'll begin by considering the ABA Model Rule on solicitation, which Oregon followed until recently.
- Next we'll discuss Oregon's amended rule on solicitation.
- The Oregon State Bar issued an ethics opinion in 2021 with further guidance about solicitation.

ABA's strict rules for first tier of solicitation

- Applies to live person-to-person contact, including a face-to-face approach or live telephonic contact.
- Under ABA Model Rule 7.3(a), these means can't be used to solicit professional employment from a prospective client when a significant motive for the lawyer's solicitation is pecuniary gain.
- Consider what motivations are distinct from pecuniary gain.
- Exceptions to the ban on for-profit solicitation include solicitations of 1) another lawyer, 2) a family member, 3) a close personal friend, or 4) another person with whom the lawyer or the lawyer's firm has a prior professional relationship, or 5) "a person who routinely uses for business purposes the type of legal services offered by the lawyer."
- Another exception is solicitation sanctioned by law or court order.

ABA's more lenient rules for second tier of solicitation

- Applies to any other sort of solicitation, including written communication, recorded verbal communication, and electronic communication such as email.
- These categories of solicitation are less intrusive. It's easier for a prospective client to throw away a letter or delete an email than it is to decline a live person-to-person solicitation by an overbearing lawyer.
- Solicitation in the second tier is not subject to the blanket ban in Rule 7.3(a).
- They are still subject to the content requirements of Rule 7.1, and the advertising requirements in Rule 7.2 (where the soliciting attorney distributes material taking the form of an advertisement).

ABA's rules that apply to both tiers

- Rule 7.3(c) forbids solicitation involving harassment, coercion, duress.
- Rule 7.3(c) also prohibits unwanted solicitation (i.e., "the prospective client has made known to the lawyer a desire not to be solicited by the lawyer").
- Lawyer's agents are subject to the same solicitation rules when they act on behalf of lawyers (see Rule 8.4(a), which we'll study later).
- Under Rule 7.3(e), "a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer," and that organization may use all types of solicitation to obtain memberships or subscriptions, so long as the organization does not target people who are known to need legal services.

Oregon has gone further than the ABA in liberalizing solicitation rules

Consider Oregon's amended of Rule 7.3:

A lawyer shall not solicit professional employment by any means when:

(a) the lawyer knows or reasonably should know that the physical, emotional or mental state of the subject of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;

(b) the person who is the subject of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(c) the solicitation involves coercion, duress or harassment.

OSB's Formal Ethics Opinion 2021-196 provided further guidance in February 2021

- Even if an attorney's motivation is financial gain, the attorney may mail solicitations to people known to need legal services, provided that the materials are not false or misleading
- Even if an attorney's motivation is financial gain, the attorney may make phone calls to people known to need legal services, provided that the calls do not involve coercion or harassment
- It's NOT okay, however, for an attorney to solicit (by phone, email, or any other means) a prospective client who has indicated that this person does not want to have further contact with the attorney
- Formal Ethics Opinion 2021-196 expressly recognizes "the lawyer's freedom of speech under the First Amendment to the United States Constitution and Article 1, section 8 of the Oregon Constitution"

Topic #2: Confidentiality and exceptions

- Lawyers have an ethical duty to forbear from disclosing client information (Rule 1.6).
- The attorney-client privilege could prevent the evidentiary use of confidential communication between attorney and client.
- The deliberative process privilege could prevent evidentiary use of certain "predecisional" government deliberations.
- The next several slides will examine each of these doctrines and will emphasize possible exceptions.

Ethical duty of confidentiality

- See Rule 1.6 of the ABA Model Rules.
- Here's the basic rule in 1.6(a): "A lawyer shall not reveal information relating the representation of a client . . ."
- First element: Has the lawyer acquired information in the course of representing the client?
- Second element: Does the information relate to the representation of the client?
- The scope of this duty is very expansive, at least in theory.
- The practical reality is that many lawyers interpret the scope of this duty to be nearly coextensive with the scope of the attorney-client privilege, but that view is mistaken.

Exceptions to ethical duty of confidentiality

- First exception: client gives informed consent for disclosure (Rule 1.6(a)(1)).
- Second exception: disclosure is "impliedly authorized" in order to carry out representation (Rule 1.6(a)(2)).
- Third exception: disclosure is necessary to reveal "the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime" (Rule 1.6(b)(1)).
- Fourth exception: disclosure is necessary to avert death or substantial bodily harm (Rule 1.6(b)(2)).
- Fifth exception: disclosure is necessary for lawyer to obtain legal advice about ethical duties (Rule 1.6(b)(3)).
- Sixth exception: lawyer's services are at issue (Rule 1.6(b)(4)).
- Seventh exception: disclosure is required by a court or by law (Rule 1.6(b)(5)).
- Eighth exception: disclosure is necessary to screen for conflicts incidental to firm switching or sale of law practice (Rule 1.6(b)(6)).
- Ninth exception: disclosure is necessary to comply with terms of diversion agreement, probation, conditional reinstatement or conditional admission (Rule 1.6(b)(7)).

Should state bars add an exception for imminent environmental harm?

- Prof. Victor Flatt believes that the current language in Rule 1.6(b)(1) could extend to harm to humans resulting from climate change.
- Others have advocated for new exception to Rule 1.6 (e.g., for "imminent, substantial and irremediable harm to the environment")
- Some environmentalists are urging that all states adopt this exception that many states approved, but the ABA rejected: "[a lawyer may] disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime." (Oregon has this exception.)

Attorney-client privilege

- Basically, the attorney-client privilege protects against evidentiary use of communication between the client and the attorney (or the attorney's staff) if the communication was made in confidence for the purpose of obtaining or providing legal services to the client.
- Element one: right parties?
- Element two: right setting?
- Element three: right purpose?

Exceptions to attorney-client privilege

- First exception: lack of confidentiality at time of communication.
- Second exception: communication for purposes other than obtaining or rendering legal services.
- Third exception: waiver of privilege by voluntary disclosures.
- Fourth exception: communication in furtherance of crime or fraud (the client must intend to commit a crime or fraud, and the communication must be for the purpose of furthering the crime or fraud, so usually we're talking about future crimes or frauds)
- Fifth exception: attorney's services at issue.

Notes on crime-fraud exception

- This exception is potentially quite expansive.
- The use of this exception seems to have increased in recent years (e.g., Cohen-Trump case).
- Note that any sort of crime, including a misdemeanor, could potentially qualify.
- Either a federal or state crime could qualify.
- A significant number of civil environmental law violations also criminal violations (at least misdemeanors).
- Completion of the crime is not necessary.
- In some circumstances, the client's attempt to commit the crime could be sufficient, whether or not the lawyer provides the assistance sought by the client.
- The government need not have charged the crime.
- Fraud could also trigger the exception, and need not amount to a crime.
- For more information about the modern crime-fraud exception and its potential utility in environmental cases, see Tom Lininger, *No Privilege to Pollute: Expanding the Crime-Fraud Exception to the Attorney-Client Privilege*, 105 MINN. L. REV. 133 (2020).

New SCOTUS ruling on deliberative process privilege

- This privilege is an exception to FOIA and state analogs; it is also a basis for excluding evidence in court under certain circumstances.
- Basic requirements are that materials at issue be 1) predecisional and 2) deliberative.
- In U.S. Fish & Wildlife Service v. Sierra Club, SCOTUS applied privilege to final draft of biological opinion – this ruling strengthened privilege by interpreting "predecisional" broadly.

How can outsiders overcome deliberative process privilege?

- Point to sharing of materials with outsiders (although interagency sharing may be okay).
- Remember that underlying facts are not privileged – just predecisional opinions and tentative conclusions.
- Look for government misconduct that could vitiate privilege
- Look for evidence that agency decision was indeed final, not subject to further deliberation.
- Argue that document at issue was not deliberative.
- Argue for redaction in order to get portions of document.
- Note that some agencies require sign-offs for invocation.

How can government attorneys preserve privilege claims most effectively?

- Label documents more specifically: valuable notations might include "draft," "predecisional," and "deliberations ongoing."
- Exercise caution when reducing deliberations to writing.
- Record discoverable facts in separate documents, so that protected docs will consist solely of privileged materials.
- Make sure routing of documents is consistent with deliberation.
- Be careful sharing with outsiders, especially those who are adversarial or who have stake in pending matter.

Topic #3: Environmental justice (EJ)

- This is potentially a vast topic. I will only focus on three aspects of it here.
- First, I will discuss recent efforts to improve access to justice among low-income and BIPOC communities.
- Second, I will discuss the recent liberalization of the rule limiting "maintenance" of low-income clients.
- Third, I will discuss (without necessarily endorsing) some more radical proposals for limiting attorneys' assistance of clients in conduct that is contrary to environmental justice.

Improving access to justice

- Studies show that low-income lack attorneys to handle approximately 80% of their legal needs; presumably the percentage is similar for EJ cases.
- Oregon cited concerns about access to justice when approving reforms to solicitation rules.
- The Oregon Supreme Court is also considering an OSB proposal that would establish alternate routes to bar admission, including an "experiential pathway" and a "supervised practice pathway"; proponents have argued that the reforms would improve equity, both among bar applicants and their future clients.
- Many jurisdictions are considering proposals to expand the ability of nonlawyers to handle certain tasks formerly handled by lawyers.
- Other proposals include 1) make *pro se* litigation easier, 2) allowing pro bono hours to count as CLE hours, 3) requiring pro bono work during law school as a condition for bar admission, etc.

ABA's new revision of maintenance rule

- ABA Model Rule 1.8(e) formerly prevented a lawyer from giving financial assistance to a client in connection with pending or contemplated litigation. It was still permissible, however, for a lawyer to advance costs and expenses of litigation, with the expectation that these expenses would be repaid in the event the client prevailed. Also, of course, lawyers for indigent clients could pay their clients' costs and litigation expenses.
- In August 2020, the ABA amended Model Rule 1.8(e) to indicate that when a lawyer represents an indigent client on a pro bono basis, the lawyer may provide "modest gifts to the client for food, rent, transportation, medicine and other basic living expenses," so long as the lawyer does not use such gifts as an inducement for continuing the lawyer-client relationship, the lawyer does not seek or accept reimbursement for the gifts, and the lawyer does not hold out the possibility of such gifts as a enticement for prospective clients to sign on with the lawyer. The fact that a statute authorizes fee shifting does not disqualify a lawyer from providing the modest gifts permitted under the new version of Rule 1.8(e).
- Note that Oregon has not yet adopted the new version of the maintenance rule.

Should ethical rules prohibit lawyers from assisting conduct contrary to EJ?

- There are at least two places where such a rule could go in the ethics codes.
- The first would be Rule 1.2(c), which is Rule 1.2(d) in the ABA version: *A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent . . .*
- The second would be Rule 8.4(a)(7) — 8.4(g) in the ABA version — which currently provides that it is professional misconduct for a lawyer *in the course of representing a client, knowingly intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.*
- Would it be wise to amend those rules so that they expressly forbid lawyers from undertaking work that undermines EJ?
- While well intentioned, the idea seems very difficult to codify: there would be problems with defining EJ, with constraining legitimate advocacy, with preserving lawyers' First Amendment freedoms, etc.

Topic #4: Ownership and management of law practices

- Again, this is a potentially sprawling topic, so I will limit my focus to two subtopics.
- First, I will discuss experimentation with "alternative business structures."
- Second, I will discuss rules for registration of in-house counsel.

ABA Rule 5.4: Professional independence of lawyers (Oregon has a similar rule)

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

ABA Rule 5.5: Unauthorized practice of law (Oregon has a similar rule)

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Growing interest in “alternative business structures"

- Nonlawyers can be at least partial owners of law firms in Australia, New Zealand, England, Singapore, Italy, Spain, Denmark and some Canadian provinces.
- Some U.S. jurisdictions (e.g., AZ, DC, and UT) have experimented with rules allowing minority ownership of law firms by nonlawyers.
- ABA has convened several working groups to study changes to Rule 5.4, but there was strong opposition
- California Bar is now asking for public comment on proposal to allow nonlawyer ownership if nonlawyers do not control professional judgment of lawyers.
- Another proposal under consideration in California would allow fee sharing with nonlawyers if clients consent.
- In September 2021, ABA Formal Opinion 499 authorized a lawyer to be a “passive investor” in an out-of-state ABS even if the lawyer’s own state does not allow such an ABS.

Annual certification for in-house counsel

- The ABA and some state bars have exceptions to UPL rules so that in-house counsel may engage in limited practice on behalf of their employers in states other than the states in which those lawyers are licensed.
- Bar officials want to check periodically that in-house counsel remain affiliated with employers so that this UPL exception should still apply.
- The Oregon Supreme Court is now considering a rule change that would “create a new regulatory requirement for house counsel licensees, to annually certify that they are employed by the same employer and that their client still understands the limitations placed upon this type of license, and that they continue to meet all of the requirements for maintaining their house counsel license.”
- For its part, the ABA House of Delegates voted in August 2021 to approve a new Model Rule for Registration of In-House Counsel, and the basic idea is to make sure the UPL exception is not abused.

Thanks to ENR Section!

- I just want to close by thanking the leaders of the OSB's ENR Section for the important work they are doing.
- If I can be of any help with future programs sponsored by the ENR Section, please keep me in mind.