



Klamath Basin Issues



Situation Assessment & Prospects for Mediation



Prepared by
CDR Associates
Christopher Moore
J. Michael Harty
Peter Woodrow



On behalf of
Honorable Thomas M. Coffin
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Executive Summary

The Klamath Basin is a microcosm of the challenges arising from natural resource scarcity and use that confront citizens, decisions makers, and elected representatives in the United States. A simmering, decades-old conflict over water needs for Klamath Project irrigators, Native American tribes, wildlife refuges, and endangered species erupted in the spring of 2001 when the U.S. Bureau of Reclamation decided it could not release water for irrigation from Upper Klamath Lake. This decision provoked a range of responses within and outside the Klamath Basin. Local and national media provided extensive coverage, primarily of protest events at the A Canal head gates in Klamath Falls. A legal challenge filed by Project irrigators, *Kandra v. United States*, resulted in a ruling that affirmed the importance of the Endangered Species Act and tribal trust obligations for Project operations. The federal court denied relief to the irrigators and encouraged parties to pursue a negotiated solution. A mediation process began in late July 2001 under the supervision of U.S. Magistrate Judge Thomas M. Coffin, who subsequently retained CDR Associates, a conflict management and dispute resolution firm, to prepare this assessment of the prospects for a successful mediation process.

The issues that came to a head during 2001 are not new. Representatives of key interest groups have devoted countless hours, over many years, to pursuing solutions in a variety of forums, including the courts and federally authorized committees in the Basin. The *Kandra* mediation process offered a unique forum for key stakeholders from Washington, D.C., Salem, Sacramento, and the Basin to discuss potential short- and long-term solutions. All important perspectives were represented in this forum, meaning that any consensus decisions would have broad support. The mediation forum was a significant way to address the reluctance of key parties to discuss short-term measures without reliable commitments to longer-term solutions.

The mediation forum also afforded federal decision makers an opportunity to develop substantial buy-in for an operational approach to the Klamath Project for 2002 and beyond, by presenting substantive proposals, seeking input, and providing feedback. This buy-in would be different from that available through bilateral meetings because all parties would review proposals together and offer reactions for all to hear and evaluate. Broad support would likely reduce, but not eliminate, the threat of significant future legal challenges by addressing important procedural interests as well as more substantive concerns. The input process also might result in improvements to federal proposals, depending on their form and federal goals.

Mediation participants also would have had an opportunity to develop, within six months, a consensus vision for the Basin and a comprehensive set of recommended measures for implementing that vision. Most stakeholders agree that such a joint vision for the Basin is critical to building sustainable, long-term solutions.

Challenges for the *Kandra* mediation process included:

- Unilateral efforts by stakeholders to pursue legislative and policy solutions based on political influence
- Potentially significant biases in parties' evaluations of the strengths and weaknesses of their alternatives and those of other parties
- Competing views of what "fair" solutions would look like
- Uncertain commitments to the process
- Pressure for short-term solutions
- Deep suspicion about motives
- Fear that consensus solutions about the long-term future of the Project will require painful changes
- Polarization of parties, and
- Possible loss of the federal court forum if plaintiffs in the underlying litigation dismissed their case and no process agreement was in place.

After September 11th the mediation faced additional challenges that included (1) a shift in Congressional and executive branch attention toward national security issues, and (2) impacts on potential legislation and funding for the Basin.

CDR developed a "no mediation" scenario to assist participants in assessing their choices. Under this scenario (through May 2002):

- Federal decision making will occur without a joint forum for discussing options for the Project and providing input and feedback.
- A consensus-based, long-term vision for the Basin and strategy for its implementation will be put on hold, although there may be renewed efforts by existing groups in this direction.
- Organized interest groups will focus their attention on Congress and state legislatures, and on efforts to directly influence federal and state decision makers, either alone or in coalitions.
- States will act unilaterally, and perhaps jointly, to implement immediate measures intended to influence federal decisions about the Project.
- Federal decisions for the project in 2002 will be a significant factor influencing future actions. Once these are announced all parties will make decisions about how to proceed. Whether they will choose to pursue consensus is an open question for the near term.
- Additional litigation will be filed over the next set of federal decisions for the Project, and perhaps on other issues.
- Key relationships between individuals and organizations, already under strain, will be further damaged.

In early September the CDR Associates mediation team believed that, on balance, a non-traditional mediation process, as described initially at the August 15-16 mediation session and in detail in Section VII of the Interim draft report, could accomplish specific goals by March 2002 that reflected a high level of consensus.

The prospects for meeting mediation goals depended significantly on whether key mediability conditions were met. CDR advised the parties to make their decisions about pursuing a mediation process based on their assessment of the mediability conditions, their own internal conditions, and the available alternatives for attaining their goals.¹

The process proposed by CDR in early September is no longer feasible or realistic. The decisions, choices, perceptions, and actions of key stakeholders, along with the events of September 11th and subsequent consequences, have significantly changed prospects for achieving the goals identified in the Interim Draft report. We refer specifically to:

- The decision by the *Kandra* plaintiffs to dismiss their lawsuit in early October, thereby effectively depriving the Court of jurisdiction and ending the mediation process
- Uncertainty among other stakeholders about federal government support for and participation in a mediation process
- The filing by some Project irrigators of a “takings” action against the BOR in early October
- A perception among other stakeholders that the Klamath Water Users Association is not prepared to participate *at this time* in building consensus agreements for the Basin that include restructuring the Klamath Project
- A perception among most stakeholders that litigation over the BOR’s Operations Plan for 2002, and related federal decisions, is inevitable
- A shift in the attention of federal legislators and executive branch officials away from the Basin toward national security and related concerns
- Diminished prospects for Klamath Basin legislation this year and beyond, and
- Significant reductions in potential federal funding for Klamath initiatives.

CDR has identified four basic process options for consideration by stakeholders and the Court at this time. Numerous variations of these options can be imagined. The four basic options are:

1. **Shift the mediation effort to *Oregon Natural Resources Council v. Keys*, the inactive refuge water lawsuit in federal court.** The primary reason to consider this

¹ In the Interim draft report Executive Summary CDR presented five specific questions for parties to answer in making their decisions about participating in mediation:

1. *Does a mediation process under the auspices of the federal court offer an important forum for your group to pursue its interests at this time?*
2. *Are the potential products of a mediation process likely to be valuable to your group in the specified timeframe, i.e., March 2002?*
3. *Can a mediation process be structured to meet your group’s primary interests and those of other stakeholders?*
4. *Is your group better off devoting its resources to developing individual or coalition-based solutions through political advocacy at this time, as opposed to devoting resources to a mediation process?*
5. *Is your group prepared to commit at this time to making a good faith effort to participate in an input-feedback process on federal proposals for the Project and a consensus-building process on a long-term vision for the Basin and recommendations to implement that vision?*

approach is the potential benefit of conducting negotiations under the federal court's supervision. If this option were chosen it would be important to avoid replicating the structural problems of the *Kandra* process. One challenge would be the demonstrated unwillingness of the Klamath Water Users to participate in a mediation that does not address directly operation of the Project for 2002. If the KWU and other key Project irrigator groups do not participate, a court-supervised mediation may not be a useful forum to other stakeholders. Another question is whether the negotiations (and time) required to develop consensus solutions are best supported by a court forum that relies on an "old" lawsuit for jurisdiction.

2. **Combine the existing FACA committees in the Basin.** Two federally authorized committees, the Upper Basin Working Group and the Klamath River Task Force, have been working on various aspects of Basin issues over the past few years. An outside assessment of the Working Group recently was completed and may provide useful insights. The two committees held a joint session at the end of August. The possibility of pursuing Basin-wide, collaborative agreements through these committees came up during CDR's assessment process. This option has continued to receive attention among stakeholders. If this option were pursued, it would be important to address concerns that (1) a combined group would be too large for effective decision making, (2) the two committees are not representative of all key interests in the Basin, (3) there is a history of poor relationships and communication among some committee members and others in the Basin, and (4) members of the committees do not have the necessary authority to reach key decisions.
3. **Pursue a series of meetings at the government-to-government level.** Governments, whether federal, tribal, state, or local, have the power to make significant decisions impacting people in the Basin. The federal decisions for the Project have received extensive attention in this assessment. The States of California and Oregon also have important decisions to make, and there may be potential synergies if these reflect coordination with federal officials. Tribal governments must make key decisions about pursuing their interests, and will be key parties to any solutions. Local governments often have important relationships with watershed residents and elected officials. For these reasons, it may be useful to organize a series of government-to-government discussions over the short term. Initial topics of discussion could include the federal proposal for the Project in 2002, including a draft BA and draft BOs. Government officials could use the results of these discussions to organize meetings with key constituents in the Klamath Basin and possibly develop strategies for the longer term. Governments could independently meet with key constituent groups about progress and proposals resulting from this type of mediation effort as a way to test for consensus.
4. **Initiate a consensus-building effort sponsored by California and Oregon.** The two states are critical stakeholders for Basin solutions and could effectively convene a process aimed at developing a vision for the Basin and specific recommended measures to implement that vision. The two states have the power to take specific steps to affect the Basin and also are potential funding sources (on a modest scale).

This approach would have the benefit of distance from Washington, D.C. and the complexities of federal decision making.

CDR Recommendation: Conditions at this time are not conducive to a broad stakeholder mediation effort in the Basin. In the short-term an effort to continue the *Kandra* process faces significant obstacles. Such an effort may have better prospects once legal challenges, if any, to the BOR's Operations Plan for 2002 are raised and resolved. In the meantime, a series of discussions initiated and sponsored by key government entities deserve serious consideration. The structure for such discussions will depend on the interest of the federal government in sponsorship and participation. A joint process sponsored by Oregon and California is a viable option at this time. A state-sponsored process should focus initially on developing a proposed package of concrete measures for the Basin; this package should then be the subject of discussions with other government entities. This approach could be expanded or modified in response to anticipated litigation in 2002. The combined FACA committee option may be desirable in the long run; its feasibility requires further thought and discussion among key stakeholders.

CDR Associates is ready to address questions raised by this assessment report or support future mediation initiatives.

I. Introduction

In late July, 2001, the U.S. District Court for the District of Oregon asked a team of mediators from CDR Associates to assess the prospects for successfully mediating issues raised in *Kandra v. United States*.² This Situation Assessment Report represents the principal findings and recommendations of the CDR mediation team.

The broad purpose of a situation assessment is to develop an understanding of a dispute (or series of interrelated disputes) sufficient to answer the following questions:

1. Who are the parties directly and indirectly involved in the dispute?
2. What are the main issues that must be resolved?
3. What are the interests and needs of the parties in relation to the issues?
4. What kinds of concerns have the parties raised regarding information, data and science? How might those concerns be addressed?
5. Is mediation of these issues at this time a viable and appropriate alternative to other forms of dispute resolution?
6. If mediation is viable/appropriate, how should a mediation process be structured?

What are the mediation team's recommendations, in terms of:

- Goals and purpose of the mediation
- Parties participating "at the table," away from the table, and not participating
- Representation of parties
- Location, frequency, schedule and deadline of mediation sessions
- Discussion ground rules
- Decision making process
- Role of legal counsel
- Relationship of parties to their constituencies
- Structure of subcommittees or task groups
- Third party neutral assistance: roles of the Court and a mediation team?³

The situation assessment process and report for the *Kandra* mediation had several unusual characteristics. The assessment process began after the *Kandra* parties and others had begun meeting under the Court's supervision, and continued over the course of several "mediation" sessions. The high level of interest in Klamath Basin issues created significant pressure for an inclusive process, and the preliminary mediation sessions were attended by as many as 75-80 people representing parties and non-parties to the litigation. At the Court's request, CDR assisted in conducting two sessions of the mediation group (on August 15-16 and September 4-5). CDR presented an "Interim Draft" of this

² Members of the team were Christopher Moore, Ph.D., Partner; J. Michael Harty, JD, Senior Program Manager; and Peter Woodrow, MPA, Program Director for CDR Associates, 100 Arapahoe Avenue, Suite 12, Boulder, Colorado 80302.

³ These process questions are addressed in a draft Operating Agreement that was distributed separately to the mediation participants for their input and possible adoption as part of a mediation process.

assessment report at the latter session. The mediation sessions held under the Court's supervision effectively were part of the situation assessment process, and the CDR team used these sessions to present key questions to mediation participants about their level of commitment (*See* Fn. 1).⁴ CDR devoted significant time to creating a preliminary "issues map" and preliminary interest statements for review by potential stakeholders during the assessment process. The final versions of the issues map and interest statements are part of this report, and are intended to serve as a resource for future decision makers and negotiators. Finally, the District Court's decision denying preliminary injunctive relief to the *Kandra* plaintiffs made the underlying case a doubtful vehicle for a mediated effort to develop long-term solutions for the Basin. These doubts were borne out in early October, when the *Kandra* plaintiffs dismissed their case and effectively ended the mediation.

This report is based on interviews conducted during August-September 2001 with:

- Representatives of all parties and intervenors in *Kandra v. United States* participating in the mediation process as of late July, 2001.
- Additional organizations and individuals important for a sustainable resolution of key issues in the Basin whose interests may be affected by potential mediation proposals or solutions.

A list of people interviewed is presented in Appendix A.

The final situation assessment report will be distributed to mediation participants in early November, 2001. Events since September 5th, including those of September 11th, have obvious relevance for the report's conclusions and recommendations. Perhaps the greatest change is the shift in Congressional and Executive branch attention away from the Basin, and the limits on potential funding for solutions over the next few years. We have attempted to update the report sufficiently to assist those looking to the future.

The Situation Assessment report is the product of the CDR mediation team. It reflects our views on key issues, dynamics, and prospects for solutions based on extensive interviews, reading, and discussion. This final version of the Situation Assessment, particularly the Background section and Interest Statements appendix, has benefited from review and input by a number of the mediation participants. *The views presented in this report may differ from those of the mediation participants, and we have not sought approval of this report from any individual or group.*

⁴ CDR also organized and facilitated a working session of approximately 25 stakeholders on October 5-6 with the goal of developing recommendations for the larger group. This session resulted in several useful products, including a comprehensive table of technical and other measures, that have been made available to the participants.

II. Background of the Dispute

A. The Significance of Perspective

Today the Klamath River Basin is one of the most controversial areas in the western United States. Since April 2001 national attention has been drawn to heated confrontations and conflicts among irrigators, tribes, commercial fishermen, county and local governments, two states, multiple federal agencies, and various issue-groups from outside the Basin. While they have received national media coverage, recent events in the Basin do not represent a “new” conflict. Rather, they are the current manifestations of deeper conflicts whose origins reach back to the 19th century.

This Background section of the report is intended to introduce readers to some of the historical, cultural, ecological, and legal events and dynamics that make up the fabric of the present conflict. A second, equally important goal is to introduce readers to a variety of significant perspectives about the Basin held by key stakeholder groups. These perspectives reflect vastly different timeframes. Some groups look back hundreds, if not thousands, of years; others look back only several decades, and still others focus narrowly on events in 2001. Some perspectives are personal, others are cultural, and yet others are ecological. These perspectives reflect the profoundly different ways that groups have experienced events in the Basin’s history, and influence the views of different groups about the causes of the current conflict and the range of appropriate solutions.

It is not possible to fully describe all the significant perspectives in the Basin in this report. A more modest goal is to sensitize readers to the importance of perspective in thinking about the Basin’s past and seeking sustainable, consensus solutions for its future. This latter task will require acknowledgment that no single perspective represents truth for all groups, and sincere efforts to accommodate different truths. Proposed solutions that reflect only a single perspective will not receive broad support and may increase conflict.

B. Summary of the Landscape and Hydrology

The Klamath River begins in a remote region of Oregon north of the border with California, flows for over 260 miles, and empties into the Pacific Ocean in northern California. The river and its basin drain over 9,000 square miles. There are three primary tributaries in the Upper Basin: the Wood, Williamson, and Sprague Rivers. These rise in the mountains of south central Oregon and flow into Upper Klamath Lake, a natural body of water historically surrounded by wetlands and home to many species of flora and fauna including waterfowl, the shortnose sucker, Lost River sucker, and rainbow trout. The Klamath River flows out of Upper Klamath Lake and meanders through several steep valleys in Northern California on its way to the Pacific Ocean at Requa, south of Crescent City. The river is fed by four main tributaries in the lower part of the Basin: the Shasta, Scott, Salmon and Trinity Rivers.

The Klamath River historically fed both Lower Klamath Lake and extensive reaches of wetlands. The Lost River, although essentially a separate basin from the Klamath despite ephemeral connections, historically was the source for water to Tule Lake, a huge shallow lake and wetlands area, and habitat for the Lost River sucker. The Lost River Basin is now extensively and perennially connected to the Klamath Basin through various canals, tunnels and pumping stations of the U.S. Bureau of Reclamation's Klamath Project.

C. The Basin's Different Cultures

According to the tribes that settled there, humans have occupied the Basin "from time immemorial." The Klamath Basin has historically been the home of a number of independent Native American tribes. These include the Klamath Tribes, the Yuroks, the Hupas, and the Karuks. Ancestral tribal lands covered millions of acres across the Basin. These tribes organized themselves in hunting, fishing, and gathering cultures that relied heavily on the Basin's natural resources. The rich fisheries of the Basin, including coho salmon, shortnose and Lost River suckers, steelhead and other species, were—and remain—the center of tribal identities. The significance of this tribal identification with fisheries across the Basin cannot be over-emphasized.

In the mid-19th century non-Indian settlers moved into the Upper Basin to eke out livings as miners, farmers, ranchers and loggers. These settlers, and federal policy, soon came into conflict with the native peoples. The Gold Rush period was particularly damaging to the tribes. Tribal populations were ravaged by disease and violence, and tribal access to fisheries and other natural resources was increasingly limited.

Two tribes, the Yuroks and Klamath Tribes, entered into treaties with the United States during this difficult period as a way to preserve their cultures and lands. These treaties are critical pieces of the current conflict. The Yurok Tribe entered into a Treaty of Peace and Friendship with the United States in 1851 in order to secure a permanent territory. Congress enacted legislation establishing the Klamath River reservation for the Yuroks in 1853. The reservation expressly included water and timber rights.

The United States and the people known today as the Klamath Tribes entered into the Treaty of 1864. An important perspective on this Treaty is that the Klamath Tribes ceded some 12 million acres of their ancestral lands and reserved certain property rights, including water rights, to assure their continued well being on approximately 800,000 acres that included the Klamath Marsh.

Over the following 130 years non-Indians exercised increasing power over the Basin's natural resources, and the Basin's Native American cultures were threatened in a variety of ways. The General Allotment Act (1887) and later the Klamath Termination Act (1954) had profound impacts on the nature of tribal property in the Basin. As just one example, the Klamath Tribes effectively lost their entire reservation in return for cash payments to individual tribal members under the Termination Act. The United States eventually purchased most of the former Klamath Reservation lands, and the current

Winema National Forest includes some of these lands. While the Yuroks retained a land base, their economy, heavily reliant on the salmon fishery, has not changed appreciably since the Great Depression of the 1930s. Some tribal members have no access to electricity or running water. The Karuk Tribe experienced many of the same impacts.

From the tribal perspective, the organizing identification of native people with the Klamath Basin's waters and fisheries has been consistently ignored or sacrificed for over 100 years. The Basin's tribes believe strongly that the U.S. Government has failed to honor treaty commitments and fulfill tribal trust obligations.

Over the past three decades the tribes have fought for recognition of their rights through the courts with increasing effectiveness. A series of favorable court decisions are forcing a shift in the balance of power in the Basin to accommodate tribal rights. This shift, coupled with drought conditions and endangered species concerns, is a key part of the current conflict. The shift is occurring amidst resistance and resentment. There are reports of significantly increased tensions between Tribal members—for whom change represents vindication of basic legal rights—and other residents of the Basin, for whom change represents a potential threat to their way of life.

D. Drainage, Irrigation, and Agriculture

In 1868, two farmers dug the first irrigation ditch in the Klamath Basin. Agriculturists began the development of irrigation systems and water companies in the Upper Basin, which supplied water for crops and municipal uses in the area. Because a significant portion of the Upper Basin was composed of lakes and wetlands, farmers and ranchers performed vast amounts of diking and draining so that land could be planted or used for grazing. The scale of this task was daunting for the small-scale farmers of that era.

In 1902, Congress passed the Reclamation Act, creating what eventually became the U.S. Bureau of Reclamation (BOR). This federal agency was charged with reclaiming land in the western U.S. for agricultural use through the construction of dams, irrigation systems, and drainage of wetlands. In 1905, Congress authorized the second BOR project in the West, the Klamath Project, and mandated the development of an irrigation system to expand agriculture in the Upper Basin. Between 1905 and today, BOR built (or arranged for the building of) dams, reservoirs, and canals, rerouted and connected rivers, and drained lakes and wetlands. Link River Dam was built at the mouth of Upper Klamath Lake (which was physically lowered during construction) in 1921. From one perspective the result of these efforts has been an agrarian “miracle” in the arid West. From another perspective the massive drainage effort reflects a failure to appreciate the role of these lakes and wetlands in the Basin's hydrology and ecology, i.e., for water quality, storage, and habitat. According to this view the result has been an ecological, cultural, and economic disaster for the Basin.

The seemingly abundant water (and use of chemical fertilizers) made the high plains desert bloom with irrigated crops. Farmers successfully lobbied for a railroad in 1909, and the subsequent completion of the line in 1918 enabled them to grow more crops for

export to markets in California and other parts of Oregon. Klamath Valley products such as high-grade alfalfa became famous and were prized by dairy farms seeking to increase milk production.

After the Second World War the U.S. Government provided financial incentives for veterans to homestead in the Upper Basin. The Klamath Project was expanded to meet the needs of this new group of farmers and ranchers, reaching its “full” size of approximately 200,000 acres in 1966. The actual number of acres under agricultural production within the Project varied from year to year depending on weather, commodity prices, and other factors.

One recent phenomenon is the development of agriculture in the Upper Basin outside the Project, particularly along the northern portion of Upper Klamath Lake and within the Sprague and Williamson watersheds. These activities have impacted water quality and quantity in Upper Klamath Lake, which in turn has harmed impacts for tribes, listed species, and Project irrigators. The State of Oregon has initiated a process to adjudicate and quantify water right claims in the Upper Basin, including those of the Klamath Tribes and the Klamath Project, as a necessary step to regulate water users. There has been federal litigation over the Tribe’s claims, i.e., *Adair*, which have significant implications for all water users in the Basin. Oregon’s adjudication process will be a critical aspect of any long-term solution for the Basin. The adjudication could take another five years (or longer) to finally resolve all claims. Earlier settlement of the Tribe’s claims likely would improve prospects for broader Basin solutions.

E. Fisheries and Dams

Agriculture was not the first or only beneficial economic activity in the Klamath Basin. As noted above, Native Americans relied for centuries on the sucker fishery in the Upper Basin, and on the Basin-wide salmon fishery. According to some estimates the Klamath River produced between 600,000 to 1.1 million adult salmon of all species annually. Some descriptions of the salmon fishery rank its annual run as third, behind only the Columbia and Sacramento Rivers. The fishing attracted visitors from around the world during the early 20th century. Non-Indian settlers took advantage of these seemingly abundant fisheries and developed a commercial and recreational fishery. Canneries eventually were built along the river, and a number of small communities grew up to support them.

During the 1920s-1960s period the energy demands from new communities in northern California and southern Oregon prompted the construction of a number of dams downstream of Upper Klamath Lake. Keno, John C. Boyle, and Copco I & II dams were built to provide power to the area. While the dams provided a needed resource, they severely impacted migratory fish species such as coho salmon. Iron Gate Dam, located in the river’s lower reach, was completed in 1962 for flow regulation purposes. Because Iron Gate has no fish passage it is viewed by many as physically cutting off the Upper and Lower Basins to salmonids, thereby eliminating spawning and rearing habitat for species such as Coho. The effects of this cutoff reverberate today. Iron Gate Dam also is

impassable to steelhead trout, another part of the historic Klamath fishery, and is a focus for concerns about water quality.

Downstream, the salmon fishery was in decline throughout the 20th century. There are reports that the spring Chinook run was decimated as early as 1905. The full impacts of these declines were felt during the 1970s and 1980s by tribes and commercial and recreational fishing interests. The impacts were seen in the Klamath and its major tributaries, including the Scott, Shasta, and Trinity Rivers. These declines led to significant regulation on the Klamath River and in the Pacific Ocean to prevent the further decline and extinction of salmon. In 1985, commercial fishing of ocean salmon was banned from Fort Bragg to Port Orford to protect declining Klamath Basin Chinook salmon. These restrictions caused many fishermen to go out of business; the economic decline of some inland and coastal towns and communities followed. The downstream fisheries declines also had profound, continuing impacts on Yurok and Karuk cultures that relied on Coho and other fish as a food source and focus for traditional ceremonies.

The decline of the downstream and Pacific Ocean fisheries are a critical reference point for long-term solutions. Tribes and other communities that have suffered through the loss of their livelihoods feel their concerns deserve attention at least equal to that being directed toward Project irrigators in 2001. Moreover, downstream communities point to water management practices in the Upper Basin as primary causes of harm to downstream resources. Their concerns include activities in the Shasta and Scott watersheds that have harmed fish habitat and reduced flows. Given this history, proposals perceived to address mainly Upper Basin concerns likely will face strong opposition from downstream residents and communities.

The upstream fishery also experienced severe declines in during the 20th century. These declines, marked by the federal listing of two sucker species as endangered under the ESA, had profound consequences for the Klamath Tribes. In 1986 the Klamath Tribes suspended fishing activities of tribal members and others on the Upper Klamath Lake due to a significant decline in the numbers of shortnose sucker. Historically, suckers had been an important aspect of tribal culture, were part of the economy and livelihood of the tribe, and provided significant sources of protein in the tribal diet. Today ceremonies and traditions around fishing and fish harvest are, for all practical purposes, non-existent.

F. National Wildlife Refuges

The importance of the Klamath Basin for migrating birds cannot be overstated. The Basin is on the Pacific Flyway where some two million birds, including ducks, geese, and swans, pass annually. Significant portions of the wetland habitat relied on by these species were impacted by construction of the Klamath Project. President Theodore Roosevelt created the nation's first waterfowl refuge, Lower Klamath National Wildlife Refuge, in 1908. In 1911 he created Clear Lake National Wildlife Refuge. Tule Lake and Upper Klamath Lake National Wildlife Refuges were established in 1928. Today the Lower Klamath Refuge is the most important of the group, in part because it hosts the largest wintering concentration of bald eagles in the lower 48 states. A significant

percentage of the Tule Lake Refuge is utilized for agriculture, including cereal grains that form a portion of the diet for migratory waterfowl.

The executive orders creating the refuges allowed for agricultural use but did not allocate specific amounts of water for the refuges. In 1964 Congress addressed issues associated with management of the refuges, including farming on leased lands within refuge boundaries, in the Kuchel Act. Pub. L. 88-567, 16 U.S.C. 695k-695r. The Act states that all lands owned by the United States lying within refuge boundaries are dedicated “to wildlife conservation,” and that such lands “shall be administered . . . for the major purpose of waterfowl management, but with full consideration to optimum agricultural use that is consistent therewith.” The Act further directs that the Interior Secretary “shall, consistent with waterfowl management, continue the present pattern of leasing the reserved lands” described in the statute and located within the Lower Klamath and Tule Lake refuges. All other reserved public lands described in the statute “shall continue to be managed by the Secretary for waterfowl purposes, including the growing of agricultural crops by direct planting and sharecrop agreements with local cooperators where necessary.” The Act also directs that sump levels in the Tule Lake refuge be maintained consistent with regulations issued by the Secretary pursuant to a 1965 contract between the United States and the Tulelake Irrigation District, and that such regulations “shall accommodate to the maximum extent practicable waterfowl management needs.” The Kuchel Act represents a unique agricultural exemption on a national wildlife refuge in the United States.

A key issue for the Basin’s future will be waterfowl impacts. Agriculture, both on and off the refuges, provides a food source for numerous species, and declines in grain production are a concern. Managing the Basin’s resources for all species, rather than only ESA listed species, will also be a challenge.

G. Over-Allocation of Water

One significant point of agreement among many mediation parties is that the Basin’s water is over-allocated. There are multiple perspectives on the causes of this situation and on what should be done. Two important factors that will influence water allocation decisions going forward are discussed below.

The Federal Endangered Species Act and State Species Protection

In 1973, Congress passed the Endangered Species Act (ESA), which authorized the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to take measures to protect and recover species listed as either threatened or endangered. The shortnose and Lost River suckers were listed as “endangered” in 1988. The coho salmon was listed as a “threatened” species under the ESA in 1997. The bald eagle, currently listed as “threatened,” also inhabits the Basin. NMFS has indicated its intent to list steelhead trout in southern Oregon and northern California as an endangered species. State laws protecting endangered species also have potential significance in the present situation,

particularly in California, where there is a likelihood that the coho will be listed during 2002.

One view is that these federal listings precipitated competition for water in the Basin, especially during inevitable dry years. But in key respects competition for water began decades earlier with non-Indian settlement, the development of irrigated agriculture, and construction of the Klamath Project. These activities, while beneficial to some humans, harmed fish and bird species by altering the natural hydrology, reducing water quantity and impairing water quality. These species never “competed” with Klamath Project irrigators and other humans in the Basin for scarce water in a meaningful sense prior to their listings under the ESA. Even listing did not guarantee steps would be taken to protect them from extinction and promote their recovery as required by federal law.

The ESA increasingly has been a significant factor influencing the actions of federal agencies in the Basin over the past decade. As described below, two biological opinions prepared by the U.S. Fish and Wildlife Service and National Marine Fisheries Service in 2001 forced the BOR to significantly limit water deliveries for irrigation from the Project (Upper Klamath Lake) in 2001. The ESA continues to have significance as BOR makes decisions about project operations for 2002. As a result, the conflict in the Basin has been joined by some external groups and individuals seeking significant modification or elimination of the ESA. A narrow focus on the ESA as the sole or primary cause of the conflict, whether sincere or strategic, will not yield sustainable, consensus solutions.

Tribal Reserved Water Rights

The Klamath, Yurok and Karuk Tribes all suffered serious political blows and economic setbacks during the 1950s and 1960s. Loss of tribal lands, resources, and, in one case, federal recognition, left them at a low point culturally, politically and economically. However, legal victories by other Native Americans spurred the tribes in Oregon and northern California to push for restoration of their rights to natural resources and, in some cases, access to or ownership of land. Beginning in the 1970s, Native American tribes experienced changes in their expectations regarding federal tribal trust obligations. Tribes pursued litigation to defend or restore their historic lands and rights to natural resources on both public and private lands.

In 1979, a federal District Court ruled in *U.S. v. Adair* that the Klamath Tribes retained their treaty rights to “hunt, fish and gather and to be consulted in land management decisions that affect their treaty rights.” In 1983 the U.S. Court of Appeals confirmed that the Tribes’ rights to hunt and fish on former reservation lands include the necessary water to support those rights, and that the tribes’ priority date is from “time immemorial.” However, the federal courts limited their rulings to ordering the priority among reserved water rights arising under federal law. They left actual quantification of those rights to the State of Oregon, directing that the quantification be consistent with the federal decree. As noted elsewhere, quantification of this water right remains open and is a source of ongoing litigation.

The unquantified tribal water rights are a significant factor for the Basin's future. While much of the recent focus has been on the ESA, these claims are critical in terms of future water allocations. Legal rulings to date support tribal claims to sufficient water to support fisheries and other activities. While these rights have been ignored in the past, they cannot be ignored if the goal is a sustainable, consensus agreement about water allocation for the future.

H. Litigation and the Legal Framework for Future Actions

In the spring of 2001 several key decisions, including *U.S. v. Adair* and *Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation*, 138 F.Supp.2d 1228 (N.D. Cal. 2001) appeared to offer clear rules for Klamath Project operations and for overall management of the Basin's waters in the eyes of some parties. Others rejected this view and signaled determination to continue challenging existing precedents and develop and pursue new legal claims. This dynamic likely will continue over the near term, at least until the costs of continuing to litigate outweigh potential benefits, and a worthwhile alternative is available.

I. The 2001 Water Year

On April 6, 2001, the Bureau of Reclamation issued a 2001 Annual Operations Plan for the Klamath Project. The Plan was based in part on the Natural Resource Conservation Service April forecast indicating that inflow volume to Upper Klamath Lake would be 108,000 AF from April through September, the smallest amount of inflow in 40 years. The Plan identified minimum Upper Klamath Lake levels and Klamath River flows below Iron Gate Dam intended to be consistent with ESA requirements and BOR's obligation to protect Tribal trust resources. The Plan also specified minimum elevations for Clear Lake Reservoir, Tule Lake Sump 1A, and Gerber Reservoir. The Plan stated that only "limited deliveries of Project water will be made for irrigation" and that deliveries of Project water to the Tule Lake NWR would be made "only for endangered sucker species needs." The Bureau stated that project water deliveries to areas served by Gerber and Clear Lake Reservoirs were projected to be 70,000 AF for irrigation needs. The Plan variously cited the requirements of biological opinions issued by USFWS and NMFS, current drought conditions, and tribal trust obligations as reasons for limited agricultural deliveries in 2001.

One result of this decision was to galvanize the States of Oregon and California, counties, and irrigators to identify and develop additional sources of water, primarily groundwater. In August the Secretary of Interior authorized the release of an additional 75,000 AF from Upper Klamath Lake for agricultural purposes. By several estimates the Project will receive approximately 200,000 AF of water, approximately 50% of a "full" allocation, during 2001. The timing of these deliveries, and the amounts and procedures for allocation to individual irrigators, have been a source of significant problems.

The Bureau's 2001 Operations Plan represented a significant reordering of Project priorities. The importance of different perspectives on this re-ordering of priorities cannot

be overemphasized. For some this re-ordering represented vindication of legal rights long ignored; for others it represented a threat to the existence of their community and way of life. The cut-off of water to Project farmers for endangered species protection and tribal trust responsibilities was both a shock and an affront to many in the Upper Basin. It appeared to some that the federal government had breached its contract with irrigators to provide them with water. Responses ranged from lawsuits by irrigators, environmentalists, and property owners; demonstrations and media events in Klamath Falls and its environs; and occupation of the head gates of the A Canal by irrigators, their local supporters, and people from outside the Basin espousing a range of causes. Some families and businesses have suffered severe hardships as a result of limited (or no) irrigation deliveries. Procedures for distributing available water have strained community relationships. Federal employees working and living in Klamath Falls and its environs have been threatened, as have others. Armed federal law enforcement personnel are stationed at the A Canal head gates.

Some Project irrigators filed *Kandra v. United States*, seeking preliminary injunctive relief to bar BOR from implementing the 2001 Operations Plan. Efforts were made to reach a mediated settlement before a legal ruling but these were not successful. The Court denied plaintiffs' request for preliminary relief in April 2001, holding that BOR's operation of the Project is subject to the requirements of the ESA and tribal trust obligations. The Court refused to set aside the two biological opinions in question. In concluding its opinion the Court stated:

*The scarcity of water in the Klamath River Basin is a situation likely to reoccur. It is also a situation which demands effort and resolve on the part of all parties to create solutions that provide water for the necessary protection of fish, wildlife and tribal trust resources, as well as the agricultural needs of farmers and their communities. Continued litigation is not likely to assist in such a challenging endeavor.*⁵

During the May-July 2001 period efforts were made to organize a mediation effort that would yield the types of integrative, sustainable solutions identified by the District Court, under the supervision of U.S. Magistrate Judge Thomas M. Coffin. As noted above, the high level of interest in Klamath Basin issues, and the importance of non-*Kandra* parties such as Oregon and California to any solutions, created pressure for an open process, rather than one strictly limited to the *Kandra* parties. Mediation sessions were held in mid-August and early September, and up to 75 people participated. Congressional staff attended the September session, reflecting the potential significance of legislative options. During August a lawsuit filed by environmental and other parties over water for the Lower Klamath refuge, *Oregon Natural Resources Council v. Keys*,⁶ resulted in largely successful efforts by mediation participants to ensure deliveries to the refuge, although the discussions did not occur at formal mediation sessions.

⁵ 145 F.Supp.2d 1192 (D. Or. 2001).

⁶ Civil No. 01-6250-AA (D. Or.)

CDR Associates presented a preliminary recommendation for a modified mediation process at the August 15-16 session, and delivered an Interim Draft assessment report on September 5th. In the draft report CDR emphasized the importance of mediation participants addressing five key questions about their individual commitments of resources to a mediation process (as opposed to lobbying and litigation) (*See* Fn. 1).

The events of September 11, 2001 changed the dynamics of the mediation effort. Legislative attention shifted to national security and related concerns, as did the attention of the Executive branch. Prospects for federal funding sufficient to support a comprehensive solution of Basin issues diminished significantly.

In early October the *Kandra* mediation effort effectively ended when the plaintiffs dismissed their action. During an October 17th conference call with Magistrate Coffin there was general agreement on the need to keep talking even though the Court was effectively divested of jurisdiction. Participants were given until mid-November to submit options for future discussions to the Court. Also in early October some Klamath Project irrigators filed a “takings” action against the United States in the Court of Federal Claims, arguing that the BOR’s failure to deliver water to irrigators due to ESA constraints in 2001 constituted a taking of property entitling them to compensation.⁷

⁷ *Klamath Irrigation District v. United States*, Case No. 01-591L (Ct. Fed. Cl.)

III. Parties Directly and Indirectly Involved

The *Kandra* case brought many stakeholders forward to engage in a mediation process. These included:

Direct Parties to the Kandra Case:

1. Plaintiffs: Steven L. Kandra, David Cacka, Klamath Irrigation District, Tulelake Irrigation District, and Klamath Water Users Association.

2. Defendants: United States

Department of the Interior

- Bureau of Reclamation (principal operator of the Klamath Project)
- Fish & Wildlife Service

Department of Commerce

- National Marine Fisheries Service

Intervening Parties (and *amici*) on Behalf of the Plaintiffs or Defendants:

1. On behalf of plaintiffs:

- Klamath County, Oregon
- City of Klamath Falls
- Modoc and Siskiyou Counties, California
- California Waterfowl Association

2. On behalf of defendants:

- Klamath Tribes
- Yurok Tribe
- Environmental Interests Coalition:
 - WaterWatch of Oregon
 - Klamath Forest Alliance
 - Oregon Natural Resources Council
 - North Coast Environmental Center
 - Institute for Fisheries Resources
 - Wilderness Society
 - Earthjustice Legal Defense Fund
- Pacific Coast Federation of Fishermen's Associations

Other Parties Participating

- State of Oregon
- State of California
- Bureau of Indian Affairs
- Karuk Tribe
- PacifiCorp
- Humboldt County, CA
- Klamath River Compact Commission
- Klamath Project irrigators who are not plaintiffs

Parties Identifies as Affected, But Not Yet Participating

- Water diverters/farmers/ranchers in the Wood, Sprague and Williamson River Basins above Upper Klamath Lake (outside the Project)
- Water diverters/farmers/ranchers in the Scott, Shasta and Trinity River Basins
- Department of Agriculture /U.S. Forest Service
- Political interests: Congressional delegations, state legislators

IV. Mapping of Issues

The following section presents an overview of key water, environmental, socioeconomic and cultural issues that have been identified by stakeholders in the Klamath River Basin. Most or all of these issues must be addressed in a long-term vision for the Basin. Many of these same issues will confront federal agencies as they develop proposals for operation of the Klamath Project in 2002 and beyond.

These issues are familiar to many in the Basin, but we felt it was important to present a broad picture showing linkages and complexity as a common resource for future decision makers and stakeholders.

The stakeholder groups participating in the mediation sessions—and other affected groups that are not participating—have interests in relation to the issues outlined below. The mediation team compiled these in Appendix B. Individual groups were given an opportunity to review and revise their interest statements.

A. Overarching Issues

1. Balancing Competing Demands for Water

- How can adequate water supplies be made available for federally listed species, tribal trust responsibilities, and agricultural, refuge, recreational and fishing needs in the Klamath River Basin?
- How can adequate water be made available for multiple uses in the Upper Basin and still meet downstream water needs?
- How can costs, adverse impacts, and constraints due to water shortfalls in dry years be shared fairly among all water users?

2. Restoration of the Basin Ecosystem

- What steps should be taken to restore key components of the Basin ecosystem, including, but not limited to, water quality and federally listed species?

3. Basin-wide Management

- What steps should be taken to develop a vision of the Klamath Basin as a total system?
- What mechanisms need to be continued or developed and implemented to manage the Basin as a total system?

B. Preservation and Enhancement of Communities and Mitigation of Socioeconomic Impacts

1. The Agricultural Community

- How can an agricultural way of life and community be sustained in the Basin?
- Given competing demands for water, how can land in the Basin be kept in agricultural production?
- What measures can be taken, and in what timeframes, to provide more predictability regarding amounts and timing of water availability for Project irrigators and others with water rights?
- What programs should be established to mitigate socioeconomic impacts on irrigators of the water crisis in the Klamath Basin?

2. Tribes

- What measures should be taken to assure that tribes can preserve/enhance a vibrant culture in the Klamath River Basin, and assure a sustainable livelihood for their members?
- What measures need to be taken to assure that tribes maintain access to natural resources guaranteed by treaties and tribal trust obligations of the federal government?
- What steps need to be taken to address tribal land and resource claims and access issues in the Klamath Basin?

3. The Commercial Fishing Community

- What procedures should be put in place to mitigate the socioeconomic impacts of the water crisis on communities dependent on fish and fishing in the Klamath Basin and North Pacific Ocean?
- What should be the role of the federal, state and local governments in financially mitigating adverse impacts, and in managing programs to address local needs?
- What alternative economic activities could either augment or replace jobs or businesses lost from the fisheries sector?
- What needs to be done to restore a sustainable Klamath Basin fishery?

4. The Recreation Community

- What are the impacts on the recreation community, businesses and recreationists, in the Klamath River Basin during dry years?

- What approaches or procedures should be initiated to address adverse impacts on sport fishing and recreation?

5. Municipal and County Governments and Services and the Business Community in Agricultural and Fishing Counties

- What procedures should be put in place to mitigate the socioeconomic impacts of the water crisis on *communities* (governments, businesses and other services) dependent on agriculture and/or commercial or sport fishing in the Klamath Basin or nearby ocean areas?
- What steps should be taken to mitigate socioeconomic impacts on the Basin's tribes of degradation of their fisheries, economies, and culture?
- What should be the role of the federal, state and local governments in mitigating adverse impacts and managing programs to address local needs?
- What alternative economic activities could either augment or replace jobs or businesses lost from the agricultural sector and commercial and sport fishing?

C. Listed Species

1. Habitat Protection, Preservation, and Enhancement

- What are the types and locations of habitat in the Klamath River Basin that should be the targets of protection, preservation, or enhancement to support endangered species and other flora and fauna of concern?
- What specific goals should be set for habitat?
- What activities will most positively impact the habitat of listed species for the least effort, lowest cost, and in the shortest timeframe?
- What measures should be taken to enhance or restore wetlands?
- What measures or activities should be initiated on specific reaches of the Klamath River to promote habitat goals?

2. Water Quantity Issues

- What information is needed to develop acceptable solutions to water quantity issues in the Basin?
- What amounts of water are needed in lakes, reservoirs, and the Klamath River and its tributaries at different times of the year to preserve and/or recover listed species?

- What measures need to be taken to ensure that adequate amounts of water are available for listed species and their habitats at various time of the year?

3. Water Quality Issues

- What measures need to be taken to improve water quality for TMDL areas such as the Upper Klamath Lake watersheds and the Lost, Klamath, Scott, Shasta and Trinity Rivers?
- What role should wetlands play in addressing water quality issues, and which wetlands should be targeted for enhancement, recovery or new development?
- What other riparian improvements will reduce water temperatures and improve water quality?
- What measures can or should be taken to address land application of treated effluent by dischargers?

D. National Wildlife Refuges (NWR)

1. Habitat Requirements for Migratory Birds and Other Wildlife

- What are the best habitats for migratory birds and what measures are needed to preserve or enhance these habitats on NWRs?
- What are the monthly water needs to preserve and sustain habitat for birds and other fauna and flora that use the NWRs?
- What measures need to be taken to assure that the NWRs receive adequate water to protect and sustain listed and other species, their habitats and food sources?
- What are the best crops to grow to support migratory birds?

2. Refuge Management, Habitat, Leased Lands and Lands Adjacent to NWRs

- What should be the future policy and practice regarding leased agricultural land on Refuges?
- What future options are available to provide food sources for waterfowl?
- If Refuge land is to be taken out of agricultural production, what should be the process and how can this be done to minimize negative impacts on the agricultural community and waterfowl?
- If Refuge land is to remain in agricultural production, how can the land be best managed to achieve wildlife habitat goals and meet agricultural interests?

- How can private lands adjacent to Refuges best be managed to achieve Refuge goals, wildlife benefits and meet the agricultural interests?
- What steps can be taken to address the water delivery system on the Refuges?

3. Relationships between Refuges and Farmers

- How can positive working relationships and active cooperation be developed and maintained between the Refuges and farmers?

E. BOR Klamath Project Management

1. Project Deliveries of Water

- Can a schedule of expected water releases for all uses and all water year types be developed as part of a multi-year operating plan for the Project?
- What measures need to be taken to provide irrigators with reliable information as early as possible regarding water availability and timing of releases in any given year?
- What measures can be taken to ensure that the Project delivers some water to agriculture, even in the driest years?

2. Operating Plans

- What measures need to be taken to develop timely annual and multi-year operating plans?
- What strategies should be put in place to address either lack of data or changes in circumstances that may affect plan outcomes?

3. Relationship among Federal Agencies

- What measures should be taken to improve the working relationships among federal agencies that must consult with each other on the development of operating plans and implementation of other measures?

4. Preparation of a Biological Assessment and Biological Opinions

- In what ways, if any, can the BOR process for preparing a Biological Assessment(s) for the Klamath Project be more responsive to concerns of key stakeholders?

- In what ways, if any, can the USFWS and NMFS processes for preparing Biological Opinions for the Klamath Project be more responsive to concerns of key stakeholders?
- How can acceptance of, and support for, BAs and BOs be increased among stakeholders, including the public?
- How can concerned parties be assured that the best science available is being used in the preparation of BAs and BOs?
- What are the opportunities, if any, for non-federal parties to raise concerns over the scientific basis of BOs outside the courts?

5. Project Structure and Management

- Does the Project need to be restructured to address and accommodate changes in requirements for water use and delivery, and constraints imposed by dry years?
- If the Project were to be restructured, what would this look like?
- What are the necessary legal requirements, procedures and steps to implement Project restructuring?

F. Water Supply Augmentation

1. Groundwater

- What role can or should groundwater play in augmenting water supplies for multiple uses in the Klamath Basin?
- What role should groundwater play in dry years? Wet years?
- What groundwater capacities exist?
- How can groundwater be used to augment supply during either dry or wet years, and not deplete the aquifer(s), adversely affect surface water or harm the environment?
- How should the location, drilling and pumping of groundwater be monitored and regulated in Oregon and California?
- How should water from groundwater wells be allocated fairly to farmers or other users who need water?
- What should be the roles of the federal government, states and counties in deciding upon and/or implementing groundwater development?

2. Increasing Water Storage

- What role can or should increased water storage play in augmenting water supply for multiple uses in the Klamath Basin?
- How can the capacities of existing facilities be increased to collect and store more water without adversely affecting the environment?
- How can existing facilities in the Project and hydroelectric dams be operated differently to allow for more storage?
- What existing storage sites on the river channel should be considered for possible storage augmentation?
- What new sites on or off the river channel should be considered for possible storage augmentation?
- Which storage options will result in the greatest amount of water, for the lowest cost, and least negative impact on the environment?
- What engineering, environmental and other objective standards should be used in selecting existing or new water storage sites for expansion or construction?
- Should ground water recharge and banking be incorporated into water augmentation plans?
- What role should wetlands play in storing and augmenting water supply?
- What scientific information is needed and will be widely credible on the role of wetlands as water storage facilities?
- What financial arrangements and support are needed or available to fund water storage enhancements?

3. Reduction of Inter-Basin Transfers

- Can inter-Basin transfers augment the Klamath Basin water supply?
- Should inter-Basin water transfers be reduced or eliminated in a way that will minimize adverse impacts on current inter-Basin transfer water users?
- What legal and other procedures would be needed to reduce or eliminate inter-Basin transfers?

G. Water Conservation and Planning

1. Drought Contingency Planning

- What role should comprehensive drought planning play in addressing water and environmental issues in the Basin?
- What steps need to be taken to initiate comprehensive drought contingency planning?
- What resources will be needed, and what possible funding sources exist, to execute comprehensive drought contingency planning?

2. Conservation Plans and Water Management

- What role should conservation plans in irrigation districts or other agricultural areas play in addressing water and environmental issues in the Basin?
- What steps need to be taken to develop and implement effective conservation plans in all irrigation districts and watershed?
- What resources will be needed, and what possible funding sources exist, to implement effective conservation plans and irrigation improvements in each area, including refuges?

H. Water Demand Management and Reduction

- What role should water demand management and reduction play in addressing water and environmental issues in the Basin?
- What mechanisms could be put in place to assess and monitor current water demand and diversions in the Upper Basin?
- How can water demand be reduced in the agricultural sector, and still maintain a viable agricultural community and economy?
- What positive inducements exist or can be developed that will lower water demand in the agricultural sector?
- What alternatives or mechanisms exist that will allow water acquisition and transfer from agricultural parties in the Upper Basin?
- What legal changes would be required to facilitate water transfers?
- What alternatives exist that will allow temporary short-term or dry-year water acquisition, transfer or leasing and still continue agricultural activities in the Basin during wet years?
- What mechanisms and standards should be used to set compensation levels for water that is acquired, transferred or leased?

- What assurances can be developed to prevent irrigators from being forced to sell their land and/or water rights, either temporarily or for the long-term, because of failures of the Project to deliver water?
- What financial mechanisms need to be developed to assist in short- or long-term water acquisition, transfer or leasing?
- What mechanisms need to be developed to assure that water acquired through reduced irrigation demand is used for the purposes for which it was acquired (i.e., not simply returned to the irrigation system and used by other diverters)?

I. Reaching Agreements and Implementing Settlements

1. Reaching Agreements

- What form(s) will final agreements take?
- How will final agreements be approved or ratified?

2. Implementing Agreements

- What entities will need to be involved in the implementation of agreements?
- What specific roles and responsibilities will they have in implementation?
- What steps will need to be taken to implement and monitor agreements?
- How will adequate funding be secured to implement agreements?
- If legislation is required to implement agreements, how will it be developed and shepherded through the legislative process?

V. Issues Regarding Information, Data & Science

Public policy decision making on natural resource issues has become increasingly complex in the United States over the past two decades. The Klamath Basin is a high profile example of the challenges of reconciling law, policy, and science in an environment of uncertainty, and doing so in ways that are understandable to the public. Conflicts over “science” burned brightly during 2001, fueled by the biological opinions issued by the U.S. Fish and Wildlife Service and National Marine Fisheries Service.

There was criticism, often bitter, on all sides. Scientists from the federal government, Native American tribes, and universities, as well as paid consultants, all became targets, as did federal decision makers (who were often not scientists). In return, some scientists expressed scorn for “five-minute experts” who asked a single, simplistic question in an effort to embarrass and were unwilling to listen to detailed answers or unable to cope with uncertainty. The criticism became personal, and CDR heard that some relationships between scientists had been permanently harmed by the bitter public denunciations. Some honest individuals acknowledge a fear of science and indicated their preference to drive it out of decision making.

Criticism of the biological opinions and of the two federal agencies takes several forms and comes from a variety of interest groups:

- Some criticize the process for developing the biological opinions as closed, late, and outcome-oriented
- Some criticize the agencies for drawing unnecessarily conservative conclusions from the available data, or from limited data
- Some criticize the credentials and professional competence of individuals in the federal agencies
- Some allege that the agencies refused to consider research and ideas that were inconsistent with a predetermined outcome
- Some allege that the agencies failed to use the best available scientific information

As noted above, uncertainty is a factor for scientists, decision makers, and the public seeking solutions to Basin issues. Scientists are quite comfortable with uncertainty; policy makers tend to demand a level of clarity and certainty from scientists that is unrealistic. Scientists deal in probability, but policymakers find it difficult to explain choices based on probability to the public, and the public finds them difficult to understand. The problem for FWS and NMFS is that they are required to reach conclusions under a legal standard, i.e., jeopardy, even when they have limited or incomplete data and significant uncertainty. Moreover, they are required to err on the side of listed species in drawing conclusions in the face of uncertainty.

A consistent question asked during CDR’s interviews was “what can we do about disagreements over science?” The Klamath Basin dynamics, while painful to many well-intentioned people, are not unusual in natural resource conflicts. Some of the same

dynamics have been seen in conflicts in California's Central Valley and the Cal Fed process and in the Northwest over logging and endangered species. Efforts to build consensus solutions in these and other conflicts have produced useful insights and lessons in how to approach disagreements over science. These lessons are a potential resource for stakeholders seeking to build consensus on a long-term vision and strategy for the Klamath Basin.

There are at least three types of disagreements involving science:

1. **Genuine disagreements over the scientific process and conclusions.** The disagreements may be over the quality and sufficiency of data, analysis, assumptions, or interpretation and related conclusions. Some criticism of the recent BOs falls into this category, and CDR's interviews suggest that experts on all sides of the conflict privately would agree with some of the criticisms. Disputes in this category cover both past decisions and the way future decisions will be made.

Potential Strategies. Conflicts in the first category may be the easiest to address even if resolution of the underlying disagreements will be time-consuming and difficult.

- One useful strategy already is being employed. The FWS and NMFS BOs on operation of the Klamath Project are under review by the National Academy of Science, an organization widely recognized as offering high-quality peer review. Stakeholders may decide to pursue similar forms of high-quality peer review for future scientific decisions.
- A second strategy already receiving attention is a change in the process for preparing biological opinions. Stakeholders could attempt to develop a consensus set of recommendations for federal policy makers on specific steps to "open" the process without compromising its integrity. These recommendations could be developed by internal experts, or stakeholders could look to external experts for advice.
- A third strategy is to create a scientific panel tasked with identifying all data needs associated with a long-term strategy for the Basin and recommending steps to address those needs. This panel could work in conjunction with the stakeholder process, and should seek to develop a broad consensus for its recommendations.

CDR can offer other suggestions to stakeholders as they focus on specific issues having a science component.

2. **Disagreements over policy decisions and specific actions based on science.** One aspect of the "science" conflict is a disagreement over policy decisions based on science. Decisions about operating the Klamath Project during 2002, including lake levels and the amounts and timing of releases, fall into this category. Judge Aiken alluded to conflicts over such decisions in her *Kandra* opinion and encouraged the parties to pursue joint solutions as an alternative to continued litigation. These disagreements are not genuinely about the quality of the science, but about translation of the science into decisions and actions. Many Project water users whose operations were affected by Reclamation's operation of the project this year understandably looked at federal scientists in their effort to place blame. For many of these water

users, proving the quality of the science (or improving the process) would be an empty exercise, unless the result was to make Project water available. These decisions are also perceived to be susceptible to political pressure by most parties interviewed during this assessment process, and interested parties have devoted considerable resources to applying such pressure.

Potential Strategies. One important strategy for parties seeking to build agreements is to separate, as much as possible, policy decisions from the primarily scientific issues described in #1 above. Blurring policy making and science makes it difficult to stop debating. A second strategy is to develop, with decision makers, clear processes for (1) input into the decision, including evaluation of the underlying science, and (2) feedback from the decision maker about how decisions were made. Proposals for making draft BOs available for public comment are an example of an input process. A high-quality feedback process is one way to begin building trust in the integrity of policy decisions. Typically these processes require the participation of the actual decision maker or a high-level, well informed representative (or team) that is involved in the decision process. One or more sessions where the decision maker explains the rationale, acknowledges different options and points of view, and answers questions can be challenging but yield long-term rewards.

- 3. Strategic manipulation of scientific disagreements for other purposes.** CDR's interviews indicate there is a perception that at least some criticism of science is essentially strategic rather than genuine. Some groups reportedly have focused on the Klamath Basin to promote specific agendas, and have attempted to manipulate differences about science as part of their larger efforts. If this is the case, simply changing the scientific process will not be an effective response.

Potential Strategies. Decisions about whether and how to address this type of criticism depend primarily on an assessment of goals or interests. If there is a genuine scientific disagreement and willingness to seek solutions, the strategies discussed under #1 above may be the best route. If the goal is to *increase* conflict for other purposes, acknowledging the problem and jointly ignoring it in the short-term may be the only viable strategy. In the long term, if stakeholders are able to develop joint measures to address issues raised in the first two categories, they may be able to jointly isolate and challenge parties whose primary goal is conflict.

Public Education. In the long term, a well informed public is an asset to policy makers facing difficult choices in an uncertain scientific environment. Stakeholders should consider developing coordinated public education initiatives around the Basin as part of their long-term vision and strategy. One possible topic for public education is the process for federal agency consultation under the ESA and what factors influence biological opinions by the FWS and NMFS.

VI. Options for Mediation and Key Conditions

On September 5th CDR delivered an “Interim draft” of this report to participants in the *Kandra* mediation. The draft report characterized the *Kandra* mediation supervised by the District Court as a “unique” forum for developing long-term solutions because of participation by key representatives from the Klamath Basin, Salem and Sacramento, and Washington, D.C. The draft report proposed a modified mediation process in which:

- Federal decision makers would develop a proposed approach to operating the Klamath Project in 2002 and beyond;
- Federal proposals would be brought to the mediation forum for review and input (but not approval); and
- Mediation participants concurrently would develop a vision for the Basin, and specific recommended steps to implement that vision, by March 1, 2002.

The draft report also identified a series of key conditions that created uncertainty about prospects for success. These conditions would have to be addressed by mediation participants in order to reduce uncertainty and enhance prospects for success.

Events since September 5th, both unforeseen and anticipated, have significantly changed near term prospects for mediation. The tragedies of September 11th shifted the attention of elected and appointed officials away from the Basin, re-ordered spending priorities, and diminished prospects for significant Klamath Basin legislation in the current legislative session. Other events and decisions were anticipated by the mediation conditions identified in the draft report. The *Kandra* plaintiffs dismissed their lawsuit in early October, essentially ending the federal court mediation effort. Some Project irrigators filed a new lawsuit in October, seeking damages from the federal government for a “taking.” Mediation participants devoted significant resources to lobbying federal decision makers about BOR’s operations plan for 2002, its draft BA, and BOs from FWS and NMFS.

In a conference call with the Court on October 17th most participants stated their belief that collaborative solutions for the Basin are needed and agreed to submit suggestions for a future process to the Court by November 19th. One exception was the *Kandra* plaintiffs, and by extension the Klamath Water Users, who are not prepared to participate in a consensus process at this time. Another exception was the federal government, which has not taken a clear position regarding a future process. This section of the report identifies four process options for consideration by mediation participants and the Court, along with an updated review of key mediation conditions.

A. Process Options:

There are numerous examples of successful efforts to develop and implement consensus, long-term solutions for watersheds previously characterized by significant distrust and conflict. One example is the Red River of the North Basin in Minnesota, where stakeholders engaged in an eight-month negotiation in 1998 to reach consensus agreements on ways to address flood damage reduction and natural resource goals. One

outcome of this process was an inclusive approach to watershed management as a way of incorporating key perspectives on problems, priorities, and potential solutions. Agricultural interests, environmental groups, and state officials were key participants in this process. While the Red River process is not a perfect map for the Klamath Basin, it is one place to look for ideas and inspiration.

Most stakeholders believe that lasting solutions for the Klamath Basin should reflect a broad set of interests and that efforts to develop collaborative agreements are a priority. The following options reflect different ways to move toward such agreements.

1. **Shift the mediation effort to *Oregon Natural Resources Council v. Keys*, the inactive refuge water lawsuit in federal court.** The primary reason to consider this approach is the potential benefit of conducting negotiations under the federal court's supervision. If this option were chosen it would be important to avoid replicating the structural problems of the *Kandra* process. One challenge would be the demonstrated unwillingness of the Klamath Water Users to participate in a mediation that does not address directly operation of the Project for 2002. If the KWU and other key Project irrigator groups do not participate, a court-supervised mediation may not be a useful forum to other stakeholders. Another question is whether the negotiations (and time) required to develop consensus solutions are best supported by a court forum that relies on an "old" lawsuit for jurisdiction.
2. **Combine the existing FACA committees in the Basin.** Two federally authorized committees, the Upper Basin Working Group and the Klamath River Task Force, have been working on various aspects of Basin issues over the past few years. An outside assessment of the Working Group recently was completed and may provide useful insights. The two committees held a joint session at the end of August. The possibility of pursuing Basin-wide, collaborative agreements through these committees came up during CDR's assessment process. This option has continued to receive attention among stakeholders. If this option were pursued, it would be important to address concerns that (1) a combined group would be too large for effective decision making, (2) the two committees are not representative of all key interests in the Basin, (3) there is a history of poor relationships and communication among some committee members and others in the Basin, and (4) members of the committees do not have the necessary authority to reach key decisions.
3. **Pursue a series of meetings at the government-to-government level.** Governments, whether federal, tribal, state, or local, have the power to make significant decisions impacting people in the Basin. The federal decisions for the Project have received extensive attention in this assessment. The States of California and Oregon also have important decisions to make, and there may be potential synergies if these reflect coordination with federal officials. Tribal governments must make key decisions about pursuing their interests, and will be key parties to any solutions. Local governments often have important relationships with watershed residents and elected officials. For these reasons, it

may be useful to organize a series of government-to-government discussions over the short term. Initial topics of discussion could include the federal proposal for the Project in 2002, including a draft BA and draft BOs. Government officials could use the results of these discussions to organize meetings with key constituents in the Klamath Basin and possibly develop strategies for the longer term. Governments could independently meet with key constituent groups about progress and proposals resulting from this type of mediation effort as a way to test for consensus.

4. **Initiate a consensus-building effort sponsored by California and Oregon.** The two states are critical stakeholders for Basin solutions and could effectively convene a process aimed at developing a vision for the Basin and specific recommended measures to implement that vision. The two states have the power to take specific steps to affect the Basin and also are potential funding sources (on a modest scale). This approach would have the benefit of distance from Washington, D.C. and the complexities of federal decision making.

CDR Recommendation: Conditions at this time are not conducive to a broad stakeholder mediation effort in the Basin. In the short-term an effort to continue the *Kandra* process faces significant obstacles. Such an effort may have better prospects once legal challenges, if any, to the BOR's Operations Plan for 2002 are raised and resolved. In the meantime, a series of discussions initiated and sponsored by key government entities deserve serious consideration. The structure for such discussions will depend on the interest of the federal government in sponsorship and participation. A joint process sponsored by Oregon and California is a viable option at this time. A state-sponsored process should focus initially on developing a proposed package of concrete measures for the Basin; this package should then be the subject of discussions with other government entities. This approach could be expanded or modified in response to anticipated litigation in 2002. The combined FACA committee option may be desirable in the long run; its feasibility requires further thought and discussion among key stakeholders.

Factors for Consideration. The draft report identified several factors that influenced CDR's preliminary process recommendation. These factors remain significant and should be considered in the design of any new process.

- a. Certain federal agencies are required by law to make decisions that affect operation of the Klamath Project. In other words, there are *federal decisions to be made*, and these will remain a federal responsibility. The Bureau of Reclamation must make substantive and procedural decisions about operating the Project in 2002 and beyond. Reclamation must consult under section 7 of the ESA, which involves preparing a Biological Assessment and forward this to the Fish & Wildlife Service and National Marine Fisheries Service. These two agencies must make decisions about Reclamation's proposed operations plan and Biological Assessment under the Endangered Species Act. Reclamation must then make final decisions about operating the Project.

Given the intense level of scrutiny these decisions will face, the Secretary of the Interior, the Commerce Secretary, and senior departmental officials and staff will play significant roles in the decision process. Given this situation, it would be unrealistic to propose a formal, consensus-building process regarding the interrelated federal decisions for the Project, particularly for 2002. Other federal agencies, such as the U.S. Forest Service, will also have key decisions to make in connection with solutions for related Basin issues.

- b. There is *significant polarization* between certain stakeholders, accompanied by deep suspicion and lack of trust. These dynamics mean that, given a choice, stakeholders are unlikely to be willing to take the kinds of risks needed to reach speedy resolution of issues.
- c. Many people have expended considerable time over the past ten to fifteen years working on solutions in different forums. The mediation team heard many times that people are “*process weary*” and reluctant to participate in yet another effort, particularly one that appears open-ended and unlikely to yield concrete results.
- d. There are *opportunities for significant public involvement and comment on proposed federal decisions* over the next few years through NEPA and the FERC re-licensing processes. A NEPA process will most likely be required in connection with a multi-year operating plan for the Project. The NEPA process is likely to cover many, if not all, of the issues of concern to interested individuals and groups. The FERC re-licensing process for the Klamath River dams will present another significant opportunity for public input about issues of concern. The opportunities likely to be presented by these processes suggest a representative structure (rather than an open, public structure) for the Stakeholder Working Group would be appropriate for developing a long-term strategy document.

Mediation Participants. The following groups should be part of any future effort to build consensus solutions for the Basin, although their roles and specific makeup are open to discussion:

- ◆ Klamath Project irrigators: federal lease lands, non-lease lands. Project irrigators represent a diverse set of interests, and efforts to include all key interests are important.
- ◆ Native American Tribes: Klamath Tribes, Yurok Tribe, Karuk Tribe
- ◆ Counties in the Klamath Basin
- ◆ States of California and Oregon
- ◆ Federal agencies: Department of Commerce (NOAA/NMFS), Department of Interior (Bureau of Reclamation, Fish & Wildlife Service, Bureau of Indian Affairs), and possibly Department of Agriculture/Forest Service
- ◆ Environmental and conservation interest groups
- ◆ Pacific Coast fishing interests

- ◆ Klamath River Compact Commission
- ◆ Upper Klamath watershed and Scott and Shasta watershed water users

“No Mediation” Scenario. If a critical mass of parties decide not to pursue mediation during the next six months the following remains a reasonable scenario (through May 2002):

- Federal decision making will occur without a joint forum for discussing options for the Project and providing input and feedback.
- A consensus-based, long-term vision for the Basin and strategy for its implementation will be put on hold, although there may be renewed efforts by existing groups in this direction.
- Organized interest groups will focus their attention on Congress and state legislatures, and on efforts to directly influence federal and state decision makers, either alone or in coalitions.
- States will act unilaterally, and perhaps jointly, to implement immediate measures intended to influence federal decisions about the Project.
- Federal decisions for the project in 2002 will be a significant factor influencing future actions. Once these are announced next spring all parties will make individual decisions about how to proceed. Whether they will choose to pursue consensus is an open question.
- Additional litigation will be filed over the next set of federal decisions for the Project, and perhaps on other issues.
- Key relationships between individuals and organizations, already under strain, will be further damaged.

B. Conditions Likely to Affect Future Mediation of Klamath Basin Issues

This section is intended primarily as a resource for the Court, stakeholders, and others making decisions about the feasibility of a future mediation process, i.e. “Should we proceed?” Most stakeholders possess information related to one or more of these conditions that is not known to other stakeholders (or CDR). This information gap is typical when trust is an issue. Readers should evaluate each condition in light of their best information about their own group and others. *These conditions have been revised to reflect events since early September. If stakeholders are unable to find ways to jointly address these conditions, this will be an important signal that they are not yet prepared to pursue collaborative solutions for the Basin.*

1. Doubts About the Level of Commitment to Mediation (Revised from Draft).

Stakeholders are uncertain about the prospect for a successful mediation because there has been no joint commitment to that approach. Doubt about the commitment of others has caused stakeholders to hedge their own commitment and pursue other alternatives. This dynamic is likely to continue so long as commitment to seeking collaborative solutions is in doubt. Decision making organizations in the Project, such as the Klamath Water Users Association (KWUA), have stated their unwillingness to participate in discussions that do not

directly address water supplies for 2002 and beyond. Moreover, some stakeholders (but not all) perceive the KWUA, and irrigation district leadership, as being unwilling *at this time* to discuss changes to the Project that appear necessary for a sustainable future. Some other Project irrigators have taken a different approach, and these individuals would be an important voice in any future discussions.

- 2. Perceptions About Federal Government’s Support for Mediation (New since Draft).** Several key stakeholders have expressed doubts about the federal government’s commitment to mediation of Klamath Basin issues as a result of actions (or perceived inaction) since mid-August. The failure to fill top spots within DOI and USFWS has contributed to these doubts. The events of September 11th, and subsequent re-direction of federal resources toward national security, are a complicating factor. Uncertainty about a federal commitment to pursuing collaborative agreements will significantly reduce prospects for success; clarity will be useful, even if the desired level of federal support is not forthcoming. Such clarity will allow other stakeholders to make informed decisions about how to move ahead, while ambivalence or ambiguity about federal support likely will create frustration, confusion, and distrust.
- 3. Uncertainty about Process Boundaries (Revised from Draft).** One of the major issues for the Basin is that of participation, or “who is in and who is out” of any negotiations. Participation in the District Court’s *Kandra* process was open essentially to any individual or group asserting an interest. While this open approach served an important purpose at the time, the size of the group was not conducive to decision making. One smaller working session was held in early October among 25 stakeholder representatives. This session hinted at the possibility of future progress if other conditions are addressed. Any future process should build on the *Kandra* experience and structure participation to maximize effectiveness.
- 4. Uncertain Future for Federal Court Involvement (Revised from Draft).** If the federal court forum is used for a future process no party should have the power unilaterally to end a mediation by dismissing its case. One option would be for parties to adopt agreements committing to a specific period of time for mediation. Moreover, the *Kandra* experience raises questions about whether the federal court’s potential power can be exercised effectively when there is little at stake in the underlying action. This question should be given careful thought in the event of litigation over BOR’s Operations Plan for 2002 and any proposal for mediation. (*See discussion above regarding refuge water lawsuit option*)
- 5. Overestimation of Strengths and Underestimation of Weaknesses (No Change from Draft).** Several key stakeholder groups, as well as individuals, show signs of *overestimating* the strength of their alternatives to negotiating mutually acceptable agreements, and *underestimating* the strength of alternatives available to other stakeholders. The extensive resources being devoted to

independent political lobbying are only one example. Some stakeholders also show signs of overestimating what solutions or outcomes would be “fair.” This is a common phenomenon in negotiations and can result in impasse. The phenomenon is often neither deliberate nor strategic. There is a risk in the present situation that the persistence of this phenomenon will be a significant barrier to building consensus agreements.

- 6. Responsiveness, Timeliness, and Openness of Federal Government in Developing Proposals (Revised from Draft).** Any long-term settlement package will be driven by federal decisions and proposals – from the Department of Interior, Bureau of Reclamation, Fish and Wildlife Service, National Oceanic and Atmospheric Administration, and National Marine Fisheries Service. Delays in federal decision making and proposal development will have a significant adverse impact on a negotiated/mediated settlement. It will appear that federal entities are disorganized, cannot reach internal agreement, and are not responsive to critical needs of the non-federal stakeholders. This emphasis on responsiveness must be balanced against the need for time to prepare proposals that have significant internal support, at least in principle, by all agencies and the administration. Premature presentation of options that will not conceivably be supported broadly by federal agencies will increase dissension and undermine efforts to build a consensus. It will be helpful if, in presenting any federal proposals, its representatives identify points where (1) modifications are not possible, (2) input on choices can be made, and (3) totally new suggestions are welcome. Increased ownership and acceptance will be gained through opportunities to review and have a hand in customizing the proposals. Conversely, inflexibility in federal proposals will undermine prospects for buy-in, even though the proposals are the result of extensive discussions away from the mediation table.
- 7. Lobbying or Deal Making Away from the Mediation Table (No Change from Draft).** To stay in the mediation process—and keep others in—each of the key parties must perceive and believe that there is not a better alternative, and that someone is not making a better deal elsewhere. No deal to be struck in Washington, D.C. and no litigation solution should realistically offer a better outcome than solutions the parties can develop jointly. This is not a criticism of such alternatives. In fact, any party convinced that its goals can be better accomplished by pursuing one or more of these alternatives should do so, without creating the impression it is seeking a mediated approach to the same goals. If multiple parties actively are looking elsewhere to meet their needs, the mediation likely will flounder.
- 8. Managing Political Dynamics (Revised from Draft).** Because of the magnitude of the crisis in the Basin there was tremendous pressure on elected officials to develop immediate legislative responses in 2001. Staff for some elected officials addressed the September 4-5 mediation session. After September 11th attention shifted from the Basin to national security and other concerns. Nevertheless, the Basin’s elected representatives will continue to be a factor for future solutions

given the need for federal legislation. One barrier to a cooperative approach is the focus of both national political parties on control of the Senate, and the potential impact of next year's likely race in Oregon. Absent a political agreement among individual politicians to "neutralize" Klamath Basin initiatives the larger national politics may overwhelm efforts, such as the mediation, to develop solutions at a local level. There were some indications in September and October that congressional delegations were trying to work jointly. Whether this can continue is an open question.

Short-term legislative measures, now less likely, continue to carry risks for a long-term consensus. Hurried political deals reached in Washington, D.C. may not address the core problems. They may also reduce opportunities for "trades" in future negotiations by taking the easiest path now and leaving difficult issues without trade-offs to balance them. Hurried solutions also may inhibit Congress from committing at a later time to a larger settlement package because members feel they "already gave at the office." Finally, hurried proposals may be perceived as mainly partisan and cause an escalation of political efforts to score points at the expense of rivals that could harm efforts to bridge current conflicts and build solutions.

- 9. Balancing Development and Implementation of Short- and Long-Term Solutions (No Change from Draft).** Immediate, short- and long-term solutions potentially are available to address the range of issues in the Basin. A final package will need to have all components. Care should be taken that agreement on and implementation of short-term settlements does not take the pressure off to find long-term solutions and encourage parties to back away from the table once their immediate needs are met. Some parties will not agree to short-term solutions unless there are solid, concrete, believable and structural ways to bind others to find and implement long-term solutions. At the same time, support for short-term options that will make a significant difference in addressing pressing problems should not be withheld unreasonably.

- 10. Existing or New Lawsuits During the Mediation Process (No Change from Draft).** The courts have been a frequent forum for efforts by various interests in the Klamath Basin to achieve their goals. Some have used litigation to establish or clarify legal rights; others have used litigation to challenge the legality of federal decisions or actions. The *Adair* litigation is an example of the former; *PCFFA* and *Kandra* are examples of the latter. Some would argue that these actions have clearly defined the legal landscape for future negotiations by, for example, affirming the role of the ESA and tribal rights. Others would dispute this assertion and suggest that past rulings are of limited significance, and that numerous questions remain unresolved.

There is little reason to believe that key stakeholders in the Basin are willing to defer or abandon their legal strategies in favor of building consensus solutions in the near term. Most mediation participants anticipate litigation over the BOR's

operations plan for the 2002 water year. A federal district court ruling in *Adair* also seems likely at some point in 2002. The “takings” case filed by some Project irrigators also seems likely to proceed. A recent federal court decision in Oregon on the listing of Coho salmon has raised the possibility of a similar suit for the Klamath River population. While litigation can be useful in establishing a framework for potential solutions, its solutions are rights-based. Federal and state courts lack the power to order the types of flexible, integrative, and sustainable solutions identified as necessary for the Basin.

At best, continued litigation will be a distraction during a mediation effort, as well as a drain on limited resources. What is more likely is that stakeholders will doubt the commitment to a mediated solution of parties who initiate, threaten to initiate, or actively pursue litigation. The Oregon water adjudication process, and related *Adair* litigation, is an exception.

- 11. Flexibility in the Development of Scientific Documents (No Change from Draft).** See the discussion of scientific issues in Section V.
- 12. Coordination between Upper and Lower Basin Interests, and Formation of Coalitions between Parties with Similar Interests (No Change from Draft).** It will be important for all parties to explore where they have common interests with others and begin to build coalitions that bridge historic divisions in the Basin. This will mean overcoming distrust of motives, past actions, and negative assumptions or stereotypes, as well as geography and man-made barriers. There are existing forums that offer the potential for such bridging. Whether this potential can be realized is an open question.
- 13. “Something for Everyone”: Positive Benefits and Minimal Costs to Accept a Package Solution (No Change from Draft).** A consensus agreement, e.g., on recommendations to implement a long-term vision for the Basin, must at least *address* and to a significant extent *meet* all of the key parties’ major interests. This will involve some trade-offs on the means to satisfy interests. However, as a whole, the package must contain enough benefits that it will be acceptable to all, and that no party can benefit more by pursuing another approach to get interests met.
- 14. Clearly Defined Timelines and Timeliness of Decisions (Revised from Draft).** It will be important for parties to establish both mutually acceptable and realistic timelines and deadlines and stick to them. Timeframes that are too short can be just as detrimental to a satisfactory process as timelines that are too long. Without clearly defined timelines and deadlines, negotiations may drift and no decisions will be made. Parties should explain to each other, and reach agreements about, *when* they will have adequate data to make proposals and decisions, *why* they need the time to develop them, *what* forms the resulting proposals will take, and *how much* time is needed for deliberations and decision making both at the table and with constituent groups. Timelines, to the greatest extent possible, should be

coordinated with other critical decisions that need to be made by parties, e.g., seed purchases, planting, irrigating, and financing.

15. Local vs. State vs. National Solutions (No Change from Draft). There is tension about the proper locus of decision making regarding Klamath Basin issues. Some individuals at all levels (in the Basin, in state capitals and in Washington, D.C.) assert that decisions should be made by the people most directly affected, and push for local control. Others point out that local decision making processes have failed to resolve fundamental Klamath Basin issues despite many years of effort and millions of dollars, and assert, with equal force, the need for decisions at the highest levels of government. A third perspective acknowledges that the various groups each have just enough power and influence to block disfavored proposals, but that no one can impose their preferred solution on others. In this situation, only collaborative efforts among all parties and at all levels can successfully craft solutions incorporating joint gains.

CDR Associates is ready to address questions raised by this assessment report or support future mediation initiatives.

Appendix A: List of People Interviewed for this Situation Assessment

Note: Interviews varied in length from 10 minutes to several hours, and were either individual or in groups. CDR has not talked with all relevant representatives of key interest groups due to time constraints. It may be possible to conduct additional interviews before the final report is complete.

IDENTIFICATION	NAME/TITLE
Federal Court	Hon. Thomas M. Coffin Hon. Ann Aiken (short phone discussion)
Klamath Project Water Users from Klamath Water Users Association, Irrigation/Drainage Districts, and Growers Association	Jim Moore, Van Brimmer Irrigation District Tracy Lisky, Klamath Drainage District Dave Solem, Klamath Irrigation District Bob Byrne, Tulelake Irrigation District Fred Schwartz Don Russell, Klamath Irrigation District Marty Macy, Tulelake Growers Association Earl Danosky, Tulelake Irrigation District Sam Henzl, Klamath Drainage District Bob Byrne, Tulelake Irrigation District Harold Hartman, Malin Irrigation Dist/Sunnyside Irrigation Dist Steve Kandra, Klamath Irrigation District Bill Graham, Sunnyside Irrigation District Deb Crisp, Tulelake Growers Association John Crawford, Tulelake Irrigation District Bruce McKay Paul Simmons (Counsel)
Klamath Project Property Rights Advocates	Keith Buckingham Shelley Buckingham Jeanne Anderson
Klamath Tribes	Allen Foreman, Tribal Council Chairman The Klamath Tribes Bud Ullman, Klamath Tribes Water Adjudication Project
Yurok Tribe	Troy Fletcher, Executive Director Dave Hillemeier, Fisheries Biologist
Karuk Tribe	Ronnie Pierce, Fisheries Consultant
State of California	Dwight Russell, Chief, Northern District Office Department of Water Resources Donald Koch, Regional Manager Department of Fish and Game Jonas Minton, Deputy Director, Department of Water Resources Mike Spear, Deputy Secretary, Resources Agency

IDENTIFICATION	NAME/TITLE
State of Oregon	Paul Cleary, Director, Water Resources Department Reed Marbut, Water Resources Department Roger Wood, Governor's Natural Resources Office
California Waterfowl Association	Bill Gaines
Public Interest Environmental and Conservation Groups	Robert Hunter, WaterWatch Todd True, EarthJustice Legal Foundation (brief preliminary phone call only) Felice Pace, Klamath Forest Alliance Tim McKay, North Coast Environmental Center Lauren Ward, American Land Conservancy
Pacific Fisheries	Glen Spain, Pacific Coast Federation of Fishermens Associations
Sprague River	Bob Sanders, Rancher Edward Bartell, Sprague River Rancher Resource Conservancy
Wood River	Roger Nicholson, Wood River Rancher Resource Conservancy
Williamson River	Becky Hatfield-Hyde, Rancher Wally Watkins, Rancher
Klamath County	John Elliott, Supervisor Al Switzer, Supervisor
Siskiyou County	Bill Hoy, Supervisor Joan Smith, Supervisor Frank DeMarco, County Counsel Mary Frances McHugh, Deputy County Counsel Don Langford, Deputy County Counsel Howard Moody, County Administrator
Humboldt County	Jimmy Smith, Supervisor
Modoc County	Nancy Huffman, Supervisor Vicki Cochran, County Counsel
Klamath River Compact Commission	Alice Kilham
Upper Klamath Basin Working Group	Marshall Staunton (and Alice Kilham)

IDENTIFICATION	NAME/TITLE
U.S. Department of Interior	Sue Ellen Wooldridge, Deputy Chief of Staff to the Secretary Scott Bergstrom, Acting Deputy Director, Indian Water Rights Office
U.S. Fish and Wildlife Service	Sam Hamilton, Acting Dep. Director Steve Thompson, Acting Director, California/Nevada Operations Office (brief preliminary discussion) Steve Lewis, Project Leader, Klamath Field Office John Engbring, California/Nevada Operations Office, Klamath Fish and Wildlife Offices Supervisor Phil Norton, Wildlife Refuges Supervisor, Klamath Falls David Cottingham
U.S. Bureau of Reclamation	John Keys, Commissioner Kirk Rogers, Acting Regional Director, Mid-Pacific Region Mike Ryan, Acting Deputy Regional Director Eric Glover, Klamath Area Office Jim Bryant, Klamath Area Office Bob Davis, Klamath Area Office
National Marine Fisheries Service	Don Reck, Biologist Christopher Keifer, NOAA General Counsel's Office
U.S. Department of Justice	Stephen M. Macfarlane, Trial Attorney, Environment and Natural Resources Division Charles R. Shockey, Trial Attorney, Environment and Natural Resources Division
Federal Elected Officials	Valerie West, Office of U.S. Sen. Gordon Smith, Washington, DC Sarah Bittleman, Office of U.S. Senator Ron Wyden, Washington, DC Troy Tidwell, Office of U.S. Representative Greg Walden, Washington, DC
Council on Environmental Quality	William Leary
PacifiCorp	Todd Olson, FERC Relicensing Coordinator Peter Mostow, Counsel

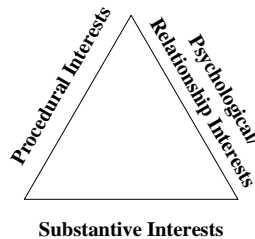
Appendix B: Interests of the Parties

The parties involved in Klamath River issues are seeking to develop solutions to critical water, environmental, and socioeconomic problems in the basin. To craft acceptable options, they will need a firm understanding of each other's concerns and interests.

Interests are needs that parties want to have addressed and/or met in a solution. To reach acceptable agreements, parties will need to develop solutions that meet each other's individual and group interests to the greatest extent possible. Being willing to meet another's interests does not mean that a party necessarily agrees with them. Meeting a party's interests means an acknowledgment that the need must be addressed in order to reach an agreement.

Interests are distinct from **positions**. Positions typically constitute the demands or most favored outcome by a party to a dispute—in other words, their preferred path to meeting their interests. For example, a labor group might demand a \$3.00/hour raise in wages and the best available health insurance. In this situation, their underlying interests might be attaining a living wage, keeping pace with inflation and cost of living increases, and maintaining access to decent health care without burdensome personal costs. There might be several ways to meet those interests, whereas gaining acceptance of the specific demands for a \$3.00/hour increase and a costly insurance package would be difficult.

There are three types of interests that must be addressed for a satisfactory agreement to emerge: **substantive, procedural, and relationship/psychological interests**. These are identified in the “Triangle of Satisfaction” below.



Triangle of Satisfaction

Substantive Interests are tangible and concrete needs that a party must have met in an acceptable solution. For example, a party may have substantive interests in levels of stream flow to protect endangered species, quantities of water delivered by the Project for irrigation, amount of funding available for socioeconomic relief or development, etc.

Procedural Interests are needs or preferences for *how* a problem is discussed and decisions are made. For example, a party may have interests about how and when information is exchanged, transparency of the decision making process, forms of input procedures used, timeliness of decision making processes, and levels and types of participation in the decision making process.

Relationship/Psychological Interests are needs concerning how a party wants to be treated before, during and after a problem solving process, and what kinds of relationship

a party expects to result from engagement with other parties. For example a party may want to be treated with respect, gain recognition of its interests, be seen as negotiating in good faith, and be trusted.

The following list of interests, identified through interviews conducted by the mediation team with involved parties and a review of secondary documents, is provided to assist parties in clarifying key interests of others, and facilitating development of possible solutions. The list represents a spectrum of views from specific stakeholder groups; probably no single individual will subscribe to all of the interests attributed to his or her group.

Some parties' interests are presented in more detail or are more numerous than others. This may be due to a party's interest in a wider or narrower range of issues, or more or less information provided by them to the mediators about their needs. As deliberations proceed, additional information and refinements of interests will no doubt emerge. In the course of negotiations regarding Klamath issues, the parties will need to explore, probe and deepen their understanding of each other's interests in order to craft mutually acceptable solutions.

The following statements present the interests of most key stakeholders for Klamath Basin issues. The statements were made available to mediation participants in draft form for comment and revision. The Federal Government's interest statement is not available at this time. The interests of irrigators on tributary watersheds, such as the Scott and Shasta, are not included (for different reasons) and would need to be clarified for any future process.

The Agricultural Community within the BOR Klamath Project

Substantive Interests

- ◆ Preserve a viable and vibrant agricultural community and culture in the Klamath River Basin.
- ◆ Promote economically sustainable agriculture in the basin.
- ◆ Utilize environmentally sustainable agricultural practices in the basin.
- ◆ Use water wisely and prudently in the basin.
- ◆ Assure a predictable water supply for next year, and into the future.
- ◆ Provide water to meet needs of Project irrigators every year.
- ◆ Develop means for increasing water resources to meet both emergency dry-year needs and long-term demand. Consider development of groundwater resources and additional storage.
- ◆ Maintain the agricultural land in production in the Project.
- ◆ Avoid taking agricultural land permanently out of production, either through sale of land or water.

- ◆ If it is necessary to idle agricultural land, do so only for short periods of time during dry years for compensation on agreed terms, on an interim basis, while augmentation and restoration activities develop.
- ◆ Compensate farmers who have lost income during dry years, due to voluntary land idling and/or participation in BOR demand reduction efforts.
- ◆ Preserve the right to lease federal lands for agricultural use.
- ◆ Keep leased lands in agricultural production, as they are considered some of the best land in the area and major contributors to agricultural communities.
- ◆ Promote sustainable species, productive wetland habitats and sustainable agriculture on National Wildlife Refuges.
- ◆ Continue arrangements for sharing crops between agriculturists and wildlife.
- ◆ Allow some flexibility in methods controlling noxious weeds in lease lands near or on the Wildlife Refuges.
- ◆ Provide at least some water to refuges in any given year.

Procedural Interests

- ◆ Create open, transparent and fair federal decision-making processes regarding water availability and allocation in the basin for agriculture and other uses, including Biological Assessment (BA) and Biological Opinion (BO) processes.
- ◆ Secure opportunities to influence decision-making processes that affect water availability for agriculture in the basin, including BAs and BOs.
- ◆ Develop clear procedures for how agricultural and other water needs will be addressed by the BOR in all years.
- ◆ Receive information as early as possible about projected water availability and a schedule of releases to agriculture.
- ◆ Maintain ability to coordinate information and decisions about water availability, timing of releases, which crops to select, when planting should occur, and timing for securing loans.
- ◆ Receive timely information about water availability so that decisions about loans and other production issues can be made.
- ◆ Use high quality, objective science to guide decision-making.
- ◆ Obtain regulatory equity.
- ◆ Receive credit for completed and ongoing restoration activities.
- ◆ Continue a fair process for allocating leased land.
- ◆ Do not arbitrarily or precipitously terminate lease land arrangements.
- ◆ Rescind ill-conceived compatibility limitations concerning water use.

Relationship/Psychological Interests

- ◆ Gain acknowledgement by other parties and the federal government that the lack of water released from the project has caused severe hardship for members of the agricultural community, including from families, businesses, farm workers, local communities and local governments..
- ◆ Attain acknowledgement by non-agricultural parties that agricultural tradition is important to many peoples' cultural roots and identity, and that they do not want to lose this important component of their lives.
- ◆ Recognize that members of the agricultural community have supported efforts to address water quality and quantity issues in the upper basin.
- ◆ Recognize the tremendous waterfowl/wildlife benefits of irrigated land in the Klamath Project.
- ◆ Recognize the mutual dependence of agriculture and the refuges.
- ◆ Avoid using the term "willing seller" when many of those going out of business and selling their land are being forced to do so by economic circumstances.
- ◆ Recognize the contribution of agriculture to protecting and sustaining wildlife.
- ◆ Recognize that lease lands are a vital part of the overall agricultural economy and culture.
- ◆ Recognize that agriculture on leased lands can benefit wildlife.

The Klamath Tribes

Substantive Interests:

- ◆ Preserve, enhance and sustain a robust Klamath tribal culture in the Klamath River Basin.
- ◆ Restore the ecosystem in the Klamath River Basin and its tributaries.
- ◆ Restore the tribes' sucker fishery on Upper Klamath Lake and in upper reaches of the basin.
- ◆ Renew traditional ceremonies and community traditions associated with fishing on the Klamath River and Upper Klamath Lake.
- ◆ Provide and sustain an economic livelihood for members of the Klamath Tribes.
- ◆ Reaffirm and expand traditional tribal legal hunting and fishing rights in the basin.
- ◆ Manage water demand to achieve a sustainable environment in the basin.
- ◆ Improve water quality in the Klamath River Basin through lowering nutrient pollution and restoring wetlands and riparian corridors.
- ◆ Return land to the tribes for a homeland and economic base.

- ◆ Develop comprehensive long-term solutions to Klamath Basin issues that addressed multiple parties' needs, and avoid creating short-term piecemeal solutions that address the interests of only a few parties.

Procedural Interests

- ◆ Be directly involved in finding solutions to Klamath River Basin water issues.
- ◆ Address long-term solutions, not exclusively short-term options.
- ◆ Recognize the importance, guiding influence and legality of tribal trust responsibilities of the federal government and how they should influence the process and outcomes of negotiations.
- ◆ Utilize the traditional legislative process, to the greatest extent possible, to develop a package proposal to be presented to Congress, and avoid short term-proposals that are attached to riders to current legislation.
- ◆ In order to reach agreement on an acceptable package of proposals, avoid implementing short-term actions that will be needed as components of a wider settlement.
- ◆ Use the best science available to guide decision making.

Relationship/Psychological Interests

- ◆ Gain recognition by non-Indian parties that the Klamath Tribes are full members of the Klamath Basin community, that their interests and needs are as valid and important as those of other stakeholders, and that they should not be invited to participate in decisions either last or as an afterthought.
- ◆ Attain appreciation by non-Indian parties that the Klamath Tribes have lost both a valuable fishery, and other important aspects of their culture, and that the tribes have a valid need to provide members with a decent livelihood.
- ◆ Gain understanding by non-Indian parties that the tribes' approaches or positions on Klamath Basin issues are not intentionally "obstructionist," but are motivated by a genuine desire to meet long-term sustainable solutions for all parties, as well as meet the tribes' needs for access to resources and traditional lands.

The Karuk Tribe

Substantive Interests

- ◆ Preserve, enhance and sustain a robust Karuk tribal culture in the Klamath River Basin.
- ◆ Restore the ecosystem in the Klamath River Basin and its tributaries.
- ◆ Develop holistic solutions to water and fisheries issues in the Klamath River basin.

- ◆ Restore and protect sustainable salmon populations and fisheries habitat in the Klamath River and its tributaries.
- ◆ Maintain and enhance traditional ceremonies and community traditions related to fish and other natural resources of the Klamath River by putting cultural management areas and special use permit areas in trust.
- ◆ Provide and sustain an economic livelihood for members of the Karuk Tribe through enhanced employment opportunities in natural resource protection.
- ◆ Federal recognition of Karuk tribal fishing rights.
- ◆ Gain recognition by upper basin parties that their water use practices are having adverse impacts on downstream ecology and fisheries.
- ◆ Manage water demand in the upper basin and Klamath tributaries to achieve a healthy aquatic environment in the main stem of the river and its tributaries.
- ◆ Assure viable anadromous fish passage and spawning throughout the Klamath River Basin and its tributaries.

Procedural Interests

- ◆ Direct involvement in finding solutions to Klamath River Basin water issues.
- ◆ Develop long-term solutions, and not focus exclusively on short-term or temporary options.
- ◆ Recognize the importance, guiding influence and legality of tribal trust responsibilities of the federal government and how they should influence the process and outcomes of negotiations.
- ◆ In order to reach agreement on an acceptable package of proposals, avoid implementing short-term actions that will hamper or negate the necessary components of a wider settlement.
- ◆ Use the best science available to guide decision making.

Relationship/Psychological Interests

- ◆ Gain recognition by non-Indian parties that the Karuk Tribe is a member of the Klamath Basin community, that their interests and needs are as valid and important as those of other stakeholders, and that they should not be invited to participate in decisions either last or as an afterthought.
- ◆ Attain appreciation by non-Indian parties that the Karuk Tribe has lost both a valuable fishery and other important aspects of their culture, and that the tribe has a valid need to provide members with a decent livelihood.
- ◆ Gain understanding by non-Indian parties that the tribe's approaches or positions on Klamath Basin issues are not intentionally "obstructionist," but are motivated by a genuine desire to meet long-term sustainable solutions for all parties, as well as meet the tribes' needs for access to resources and traditional lands.

The Yurok Tribe

Substantive Interests

- ◆ Respect and restore the Klamath River so that the vital role of the river in the cultural, social and economic way of life of the Yurok people is sustained.
- ◆ Preserve, enhance and sustain Yurok culture in the Klamath River Basin.
- ◆ Restore the ecosystem in the Klamath River Basin and its tributaries.
- ◆ Develop holistic solutions to water and fisheries issues in the Klamath River basin.
- ◆ Restore and create salmon and fishery populations and habitat in the Klamath River and its tributaries to levels sufficient to meet the ceremonial, subsistence, and commercial needs of the Yurok Tribe.
- ◆ Restore the tribe's coho salmon fishery and other species on the Klamath River.
- ◆ Strengthen traditional ceremonies and community traditions related to fishing on the Klamath River.
- ◆ Provide and sustain an economic livelihood for members of the Yurok Tribe.
- ◆ Protect and expand tribal reserved fishing rights in the basin.
- ◆ Gain recognition by upper basin parties that their water use practices are having adverse impacts on downstream ecology and fisheries.
- ◆ Manage water demand to achieve a sustainable environment in the basin.
- ◆ Assure that fish passage and spawning is possible throughout the Klamath River and its tributaries.

Procedural Interests

- ◆ Direct participation in finding solutions to Klamath River Basin water issues.
- ◆ Develop and implement long-term solutions, at the same time that short-term measures are adopted.
- ◆ Recognize the importance, guiding influence and legality of Yurok reserved fishing and water rights and the tribal trust responsibilities of the federal government and how these legal doctrines should influence the process and outcomes of negotiations.
- ◆ In order to reach agreement on an acceptable package of proposals, avoid implementing short-term actions that will be needed as components of a wider settlement.
- ◆ Use the best science available to guide decision making.

Relationship/Psychological Interests

- ◆ Gain recognition by non-Indian parties that the Yurok Tribe is a member of the Klamath Basin community, that their interests and needs are as valid and important as those of other stakeholders.
- ◆ Attain appreciation by non-Indian parties that the Yurok Tribe has lost both a valuable fishery and other important aspects of their culture, and that the tribe has a valid need to provide members with a decent livelihood.
- ◆ Gain understanding by non-Indian parties that the Tribe's approaches or positions on Klamath Basin issues are not intentionally "obstructionist," but are motivated by a genuine desire to achieve long-term sustainable solutions for all parties, as well as meet the Tribe's needs for resources and additional lands.

Local and County Governments⁸

Substantive Interests

- ◆ Preserve agricultural communities and agricultural lifestyles.
- ◆ Develop solutions that will create hope, alleviate human suffering, and protect the needs of all peoples who rely on water for farming and fishing as well as the species affected.
- ◆ Craft long-range solutions that are just to all concerned.
- ◆ Provide relief to the entire community for adverse financial impacts of the drought.
- ◆ Balance the allocation of water between irrigators and for species protection.
- ◆ Fund and conduct a comprehensive socioeconomic study for the area affected by the present crisis.
- ◆ Transfer farm relief funds to local government entities, such as Boards of Supervisors or Commissioners who are familiar with local situations, for disbursement to affected parties.
- ◆ Assure adequate financial assistance to support solutions to meet both agricultural and species needs.
- ◆ Manage all water uses efficiently and limit the use of demand reduction as a long-term strategy to address water shortages.
- ◆ Develop all reasonable water resources, including groundwater, but with care to assure that groundwater is used only as an emergency source of water.
- ◆ Avoid groundwater depletion and/or sinkholes.
- ◆ Create additional surface water storage capacity and improved water management practices.

⁸ . Only county commissioners and supervisors were interviewed. However, it seems logical that local town officials would have similar interests.

- ◆ Develop best management practices for land that may be taken out of agricultural production.
- ◆ Adapt farming methods to respond to and reflect the availability of water in dry years.
- ◆ Obtain agreement of fishermen to reduce their take in dry years.
- ◆ Gain agreement that species preservation should be the goal in dry years, not bringing species to harvestable levels.
- ◆ Develop solutions that protect the tax base of cities and counties, so that they can continue to function and provide services to citizens.

Procedural Interests

- ◆ Develop a set of commonly held principles that will guide the parties in future negotiations and interactions.
- ◆ Implement an expeditious negotiation process that strikes a balance among competing water interests.
- ◆ Provide immediate relief and generate stable, predictable long-term resolutions.
- ◆ Avoid forcing people to be “willing sellers” because they are unable to continue working in agriculture due to lack of water.
- ◆ Respect individual property rights, and the right of individuals to sell their land or water.

Relationship/Psychological Interests

- ◆ Protect the sense of community that could be destroyed if people are forced to leave the land.
- ◆ Direct involvement in finding solutions to Klamath Basin water issues.

Environmental Groups Currently Involved in the Mediation Process

Substantive Interests

- ◆ Develop and implement restoration activities linked to providing healthy ecosystem for fish and wildlife.
- ◆ Develop a list of long-term sustainable solutions to water, agricultural, refuge, and fisheries issues in the Klamath Basin to provide for a biologically sound, healthy and functioning ecosystem.
- ◆ Protect and recover endangered species found in the Klamath River basin (coho salmon, Lost River and shortnose suckers, and bald eagle) and other listed or to be listed species.

- ◆ Insure compliance with the federal Endangered Species Act (ESA), Clean Water Act (CWA), the Kuchel Act, National Wildlife Improvement Act, Migratory Bird Treaty Act, and other environmental laws.
- ◆ Obtain secure and adequate water for the National Wildlife Refuges and managed refuge lands to maximize wildlife benefits.
- ◆ Restore water natural storage and wetlands in the basin, particularly the Lower Klamath and Tule Lake National Wildlife Refuges.
- ◆ Reduce agricultural demands for water to a sustainable level that is in balance with the needs of a healthy Klamath River Basin ecosystem.
- ◆ Avoid solutions that may have long-term adverse impacts on the environment, or institute significant mitigation measures for solutions, such as wetlands restoration, water quality improvements, and additional water storage or use of groundwater where feasible.
- ◆ Meet water quality standards.
- ◆ Protect and restore instream flows, lake levels and wetlands.
- ◆ Eliminate ongoing long-term government subsidies.

Procedural Interests

- ◆ Direct involvement in finding solutions to Klamath Basin water issues.
- ◆ Develop both short-and long-term solutions for addressing environmental issues.
- ◆ Build a consensus among stakeholders to the greatest extent possible, with decisions by either federal agencies or federal courts if concerned parties cannot agree.
- ◆ Use the best science available to guide decision-making.

Relationship/Psychological Interests

- ◆ Build coalitions with other stakeholder groups whenever possible to enhance the satisfaction of common interests.
- ◆ Meet the expectations of organizational members for strong advocacy of environmental concerns.

Wildlife Conservation Organizations

Substantive Interests

- ◆ Secure a reliable and adequate supply of high quality water for the National Wildlife Refuges in the Upper Klamath Basin.
- ◆ Restore, maintain and enhance wetlands and other waterfowl habitat throughout the Klamath Basin.

- ◆ Protect the integrity of existing National Wildlife Refuges.
- ◆ Resolve the short- and long-term issues facing the Klamath Basin in a manner that will assure the economic, ecological, cultural and social health of the Basin.

Procedural Interests

- ◆ Assure equitable information sharing and opportunities for participation.
- ◆ Maintain access to and timely receipt of information provided to other parties in the mediation process.
- ◆ Being afforded the same opportunities to participate fully in the mediation process as other parties.
- ◆ Expeditious completion of the mediation process.

Relationship/Psychological Interests

- ◆ Gain recognition by other parties of wildlife conservation organizations' substantive interests.
- ◆ Be seen as negotiating in good faith for an outcome that will benefit all parties to the mediation.
- ◆ Contribute significantly and constructively to the mediation process and its outcome.
- ◆ Be listened to and trusted by others and be seen as participants who listen to and respect the interests of others.

The Commercial Pacific Fishing Community

Substantive Interests

- ◆ Sustain robust fishing communities and viable salmon fishing industries in northern California and Oregon.
- ◆ Restore the ecosystem of the Klamath River basin, returning coho salmon to harvestable levels and remove it from the endangered species list.
- ◆ Obtain assured down river flows of sufficient volume and quality to support abundant spawning and rearing of all salmonid species affected by Klamath River flows.
- ◆ Preserve existing and develop new jobs in the salmon fishing industries.

Procedural Interests

- ◆ Develop agreements that consider the needs of all parties in the basin and in coastal areas.
- ◆ Be directly involved in finding solutions to Klamath Basin water issues that also satisfy down river needs.

- ◆ Using the best science available to guide decision-making.

Relationship/Psychological Interests

- ◆ Gain recognition by upstream water users that their practices have an impact on downstream ecology.
- ◆ Attain acknowledgement by the agricultural community that the fishing community has suffered from impacts on species and harvestable fish, due to inadequate stream flows and degraded water quality, some of which is attributable to agricultural demands on the resource and to current agricultural practices.

State of Oregon (The Governor, Department of Water Resources and Department of Agriculture)

Substantive Interests

- ◆ Attain economic and biological sustainability for the Klamath Basin.
- ◆ Respond in an effective and timely way to the needs of all interests affected by water resource shortages and declining fish and wildlife populations in the Klamath Basin.
- ◆ Develop and implement comprehensive basin-wide programs and actions that address water supply and demand, habitat restoration and water quality.
- ◆ Implement regulation methods, such as monitoring water diversions, hiring water masters, and developing new stream gauging stations to enhance water management.
- ◆ Implement water conservation measures, such as drought contingency planning, development of irrigation district conservation plans, and improved irrigation efficiency.
- ◆ Implement demand reduction approaches through willing seller-willing buyer water acquisitions, leases, transfers, banking, etc.
- ◆ Pursue sustainable groundwater production to supplement surface supplies in dry years.
- ◆ Enhance water storage, including such possibilities as raising the levels of dams and reservoirs, storing water on agricultural lands during winter months, and development of new storage.
- ◆ Explore other water management practices including modified operation of hydroelectric dams and modification of trans-basin water transfers to the Rogue Basin.
- ◆ Establish and implement Total Minimum Daily Loads for all Klamath Basin watersheds.
- ◆ Restore wetland and riparian areas on public and private lands in the Klamath basin.
- ◆ Reduce entrainment and improve passage for suckers.

- ◆ Secure adequate resources for implementing agreed upon solutions.

Procedural Interests

- ◆ Establish time limits for the mediation that allow it to inform ongoing administrative and legislative processes.
- ◆ Develop collaborative processes for the federal government, the tribes and the States of Oregon and California to work together with Basin interests to solve common problems.
- ◆ Avoid unnecessary litigation.

Relationship/Psychological Interests

- ◆ Preserve and/or build working relationships with all interested parties

State of California Resources Agency, Department of Water Resources and Department of Fish and Game

Substantive Interests

- ◆ Conserve, protect, restore and enhance fish and wildlife, including endangered and threatened species and their habitat.
- ◆ Respond in an effective and timely way to the needs of citizens affected by the crisis relating to water resource allocation and listed species in the Klamath Basin.
- ◆ Protect the economic well being of the Klamath River System water users and fishery dependent communities throughout the lower river and the North Coast.
- ◆ Meet tribal trust responsibilities in California and Oregon.
- ◆ Consistent with the above obligations, meet all reasonable and beneficial uses of water.

Procedural Interests

- ◆ Develop collaborative processes to allow California to work with the United States, Oregon, Tribal governments, local governments, irrigators, environmental organizations and others affected by the conflicts within the basin.
- ◆ Create a focused, relevant and effective mediation process to craft a plan within the next six months that will begin to address the long-standing problems of the basin.

Relationship/Psychological Interests

- ◆ Build working relationships with all concerned parties.

PacifiCorp

Substantive Interests

- ◆ Develop a broad-based, long-term Plan for the Klamath basin that provides guidance to other decisional processes such as the Federal Energy Regulatory Commission licensing process for the Klamath Hydroelectric Project.
- ◆ Maintain the ability and the certainty to operate the Klamath Hydroelectric Project as a low-cost electrical generation resource to meet customer demands.

Procedural Interests

- ◆ Avoid duplication, conflict, and contradiction between the mediation process and the ongoing FERC licensing process.
- ◆ Use best science to inform policy decisions.
- ◆ Target future investments and actions to achieve and maximize resource benefits.

Relationship/Psychological Interests

- ◆ Improve PacifiCorp's reputation as a good corporate citizen, contributing to solutions and positive actions in the Klamath basin.
- ◆ Maintain and enhance good relationships with the parties to the mediation, especially those also engaged in the FERC licensing process.