

MEMORANDUM

Date: April 8, 2016
From: Lawrence Kogan
To: KID Board Members
Re: Relationship Between BOR C Flume Replacement Financing Contract and Basin Agreements

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The one-sided [C Canal Flume Replacement Financing Contract](#) which the BOR has insisted the KID sign immediately and the Klamath Basin agreements (the [Amended KHSA](#), the new [KPFA](#) and the [UKBCA](#)) two of which were signed on April 6, 2016, were initially perceived to be isolated and unrelated matters. However, for reasons largely beyond the control of the Board, these items have quickly become closely intertwined and interlinked. The purpose of this memorandum is to analyze and explain this evolving relationship.

I. Relationship Between Amended KHSA and KPFA

A. *Relevant Provisions of Amended KHSA*

Upon reviewing the text of the 3-31-16 draft of the Amended KHSA, it will be apparent to you that Article 1.9 specifically refers to the KPFA:

“The States, the Federal Parties, and other entities are concurrently entering into the 2016 Klamath Power and Facilities Agreement. Each Party, other than PacifiCorp, shall support and defend the 2016 Klamath Power and Facilities Agreement and its objectives in each applicable venue or forum, including any administrative or judicial action in which it participates. [...] More broadly, the Parties are committed to engage in good faith efforts to develop and enter into a subsequent agreement or agreements pertaining to other water, fisheries, land, agriculture, refuge and economic sustainability issues in the Klamath Basin *with the goal to complete such agreement or agreements within the next year*” (emphasis added).

It is quite clear that this Amended KHSA provision requires Amended KHSA parties to support the KPFA, thus rendering the Amended KHSA and the new KPFA intertwined and interlinked.

B. *Relevant Provisions of New KPFA*

Upon reading the text of the secret 3-31-16 draft of the executed KPFA, you will note that the second sentence of the 6th Recital paragraph, consistent with Amended KHSA Article 1.9, refers to the Amended KHSA as being one among a number of agreements that are necessary to address water and resource-related issues.

“[...] the Federal Agency Parties agree with other Parties that *a broader approach to water and resource related issues, going well beyond the Amended KHSA, is called for*, and this Agreement is appropriate as a step in

the direction toward addressing the legitimate interests of irrigation-related parties, including in relation to the Amended KHSA and expiration of the KBRA. The Parties recognize that authorizations will still be needed for Federal Agency Parties to fully participate in broader resources resolutions similar to the KBRA and UKBCA and for certain actions supported in this Agreement” (emphasis added).

Similarly, KPFA Article I.B specifically defines the “Amended KHSA” as,

“the Klamath Hydroelectric Settlement Agreement, which was entered into by certain parties effective February 18, 2010, as amended effective April 6, 2016.”

Consistent therewith, KPFA Subsection A.2 (“Amended KHSA”) of Article IV entitled “Miscellaneous Provisions” provides that,

“The States, the Federal Parties, and other entities are concurrently entering into an amendment to the KHSA. Each Party shall support and defend the Amended KHSA and its objectives in each applicable venue or forum, including any administrative or judicial action, in which it participates.”

This provision clearly requires KPFA parties to support the Amended KHSA. Together with the Amended KHSA provisions requiring Amended KHSA parties to support the KPFA, it is beyond dispute that the Amended KHSA and the new KPFA are intertwined and interlinked.

II. Relationship Between Amended KHSA, New KPFA, UKBCA, Senate Amendment 3288 and the C Flume Contract

A. *New KPFA and Senate Amendment 3288*

A close inspection of KPFA Article II entitled, “PROVISIONS RELATED TO KLAMATH RECLAMATION PROJECT,” reveals Subsection C entitled, “SUPPORT FOR AUTHORIZATION AFFECTING OTHER SPECIFIC ISSUES.”

I have below, for the benefit of ALL Board members, restated the language of this Subsection:

“The Non-Federal Parties will support certain [congressional] authorizations, and implementation of activities pursuant to such authorization, as follows:

1. The Parties are aware of amendment S. Amdt. 3288, filed on February 4, 2016, as a proposed amendment to SA 2953 proposed to S. 2012. The Non-Federal Parties support and will support S. Amdt. 3288 and, should the amendment not become law, the Non-Federal Parties will support authorizations and directives consistent with those of S. Amdt. 3288 in other legislative measures whenever and however the opportunity may arise; provided that nothing in this Agreement is intended or shall be construed to

require a Party to support a legislative measure that includes authorizations or terms unrelated to those provided in S. Amdt. 3288. Further, the Non-Federal Parties shall support actions and appropriations that implement S. Amdt. 3288 or comparable provisions. For purposes of this Section II.C.1 only, 'support' as to the obligations of the States means that the States will support or will refrain from taking any action or making any statement in opposition to S. Amdt. 3288 or comparable provisions.”

This provision unequivocally requires non-federal parties supporting the KPFA, and as noted above, the Amended KHSA by implication, to also support [Senate Amendment 3288](#) or legislation comparable to it. In addition, this provision makes it abundantly clear that if SA 3288 or comparable legislation is passed, those same non-federal parties must support actions and congressional appropriations that implement SA 3288 or comparable legislation. Furthermore, this provision states the inverse of this proposition - namely, that non-federal parties shall not be obligated to support legislation with terms and/or appropriations unrelated to those provided in SA 3288. In other words, this provision expressly intertwines and interlinks the KPFA and the Amended KHSA with SA 3288 or comparable legislation containing terms related to SA 3288.

B. *Senate Amendment 3288 and C Flume Contract*

A review of the text of proposed SA 3288 known as the Merkley/Wyden Bill reveals the intertwined and interlinked relationship between the Amended KHSA, the KPFA, and the C Flume Financing Contract. Proposed SA 3288 would add new Section 4 “Power and Water Management” to [The Klamath Basin Water Supply Enhancement Act of 2000](#) (Public Law 106-498, 114 Stat 2221).

Subparagraph 3 of the Subsection designated as “(b) *Conveyance of Non-Project Water; Replacement of C Canal*” at pages 4-5 of the attached bill states as follows:

“(3) REPLACEMENT OF C CANAL FLUME – The replacement of the C Canalflume within the Klamath Project shall be considered to be, and shall receive the treatment authorized for, emergency extraordinary operation and maintenance work in accordance with Federal Reclamation law (the Act of June 17, 1902 (32 Stat. 388, chapter 1093), and Acts supplemental to and amendatory of that Act (43 U.S.C. 371 et seq.).”

This provision must be read in light of Subparagraphs 1(A)-1(B) of Subsection (b), pursuant to which the C flume would be considered included in the definition of the term “Klamath Project:”

“The term “Klamath Project” [[which] “means the Bureau of Reclamation project in the States of California and Oregon”] includes any dams, canals and other works and interests for water diversion, [...] delivery, [...] that are part of the project.”

The “Replacement of C Flume” provision above also must be read in light of the other Subsection (b) entitled, “*Water Environmental and Power Activities*” at page 2 of the bill. It provides *inter alia* that,

“Pursuant to the reclamation laws and subject to appropriations and required environmental reviews, the Secretary may carry out activities including entering into an agreement or contract or otherwise making financial assistance available –

(A) to plan, implement, and administer programs to align water supplies and demand for irrigation water users associated with the Klamath Project, with a primary emphasis on programs developed or endorsed by local entities comprised of representatives of those water users;

B) to plan and implement activities and projects that –

(i) avoid or mitigate environmental effects of irrigation activities; or

(ii) restore habitats in the Klamath Basin watershed, including restoring tribal fishery resources held in trust; and

C) to limit the net delivered cost of power for covered power uses.”

This sub-provision indicates that the Interior Secretary possesses the discretion pursuant to the reclamation laws to enter into a contract or other agreement with the KID, which has assumed operations and maintenance responsibilities over the “transferred works” of the District, including C Canal, for purposes of providing the KID with financial assistance. Such financial assistance is specifically available under Section 9603(c)(3) of the 92 Omnibus Public Land Management Act of March 30, 2009 (Pub. L. 111-11, 123 Stat. 1348-93 1349, 43 U.S.C. §510(b)(c)(3)). It provides that,

“If the Secretary determines that a project facility inspected and maintained pursuant to the guidelines and criteria set forth in Section 9602(a) requires extraordinary operation and maintenance pursuant to paragraph (1), the Secretary may provide Federal funds on a nonreimbursable basis sufficient to cover 35 percent of the cost of the extraordinary operation and maintenance allocable to the transferred works operating entity, *which is needed to minimize the risk of imminent harm*. [...] (emphasis added).”

The BOR’s Reclamation Manual Directives and Standards PEC05-03 defines the term “Emergency Extraordinary Maintenance or EXM” as

“XM [extraordinary maintenance] that Reclamation determines to be *necessary to minimize the risk of imminent harm* to public health or safety, or property” (emphasis added).

Thus, Section 9603(c)(3) of the 2009 Act actually identifies emergency extraordinary maintenance (“EXM”) as *the* trigger authorizing the Secretary to offer the KID financial relief to ensure that it signs the BOR’s proposed C Canal Flume Financing Contract immediately. Such financial relief would assume the form of non-reimbursable financing, and it could potentially

amount to as much as 35 percent of the cost of repairs (e.g., 35% of \$7.45 million or \$2.6 million). Since, however, the current BOR contract does not designate the C flume replacement as an EXM item “necessary to minimize the risk of imminent harm,” the Secretary has not yet chosen to offer the KID such financial assistance.

Acknowledging this, the Merkley/Wyden bill endeavors to facilitate a “horse-trade.” It relates the availability of financial assistance for the C Canal flume replacement project with the KID’s (Project irrigators’) willingness to implement or administer programs developed or endorsed by other local entities (e.g., by the KWUA). Such programs must align water supplies and demands for Project irrigation water users. In particular, the activities and projects envisioned must avoid or mitigate the environmental effects of irrigation activities, or restore Klamath Basin watershed habitats and tribal fishery resources held in trust, and/or limit the net delivered cost of power for covered power uses. Clearly, these are all objectives of and the programs and activities called for, by the Amended KHSA, the now moribund KBRA some provisions of which have been incorporated into the new KPFA, and also by the Upper Klamath Basin Comprehensive Agreement (“UKBCA”).

IV. Conclusion

As the Congressional Record indicates, the Merkley/Wyden bill was introduced in the U.S. Senate on February 4, 2016. It was not until the KPFA was leaked to KID Board and District members during the evening of March 31, 2016, that such parties became aware of the apparent quid-pro-quo the bill’s sponsors and their constituents (e.g., Klamath Water Users Association (“KWUA”)) had been seeking. Until that time, it certainly was not apparent to the KID Board, the District’s members and many non-Project irrigators that the BOR’s proposed C Canal Flume Replacement Financing Contract, the Amended KHSA, the then forthcoming KPFA incorporating portions of the defunct KBRA, or the UKBCA were as intertwined and interlinked as they now are (unless, of course, the bill’s sponsors and constituents, such as KWUA members, had observed or been involved in the “secret” BOR negotiations where consensus on the agreements had been achieved, and had chosen, for strategic reasons, not to reveal these connections).

In sum, the perceived relationship between these otherwise separate and unrelated items have been steadily merging over time, and since March 31, 2016, have become extensively intertwined and interlinked. As a result, any work performed or to be performed on the C Canal Flume Replacement Financing Contract will inevitably impact and be impacted by the work performed or to be performed in connection with the agreements. It is critical, therefore, that the KID Board remains vigilant and able to prevent BOR arbitrage activities aimed at using the contract as leverage to alter the KID’s position on the agreements, and/or using the KID’s position on the agreements as leverage to alter the KID’s negotiating stance on the contract. In other words, it is in the KID’s best interests for the Board to ensure consistency of representation on and between both of these items of KID legal work.