

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 170

In the Matter of the Request of)	UNITED STATES' BUREAU OF
)	RECLAMTION AND U.S. FISH
PACIFIC POWER & LIGHT)	AND WILDLIFE SERVICE
(d/b/a PacifiCorp))	REPLY BRIEF
)	
Klamath Basin Irrigation Rates)	
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I. INTRODUCTION

In accordance with the post hearing briefing schedule established by the Chief Administrative Law Judge (ALJ) in his Corrected Prehearing Conference Memorandum, dated December 2, 2005, the United States Bureau of Reclamation (Reclamation) and the United States Fish and Wildlife Service (Service), collectively, Reclamation/Service, submit their Simultaneous Reply Brief in this docket concerning the rates for Klamath Basin irrigators. In this Reply Brief, Reclamation/Service address issues raised in the Opening Briefs filed by PacifiCorp, Staff, ONRC et al. and the Hoopa Valley Tribe.¹

PacifiCorp, ONRC et al., the Hoopa Valley Tribe and Staff, are clearly opposed to the Klamath Basin irrigators paying anything other than the highest possible rate for power to provide for irrigation and drainage service to agricultural and refuge lands in

¹ On March 1, 2006, ALJ Grant granted KWUA's motion for an extension of time to file the Opening and Reply Briefs in this matter, setting the new date for filing opening briefs as March 6th and reply briefs as March 13, 2006. As noted in the Ruling KWUA contacted PacifiCorp, KOPWU, Water Watch, et. al. and Staff regarding its motion for an extension. Reclamation/Service was not contacted and did not receive KWUA's motion for an extension until March 3, 2006, after filing its Opening Brief in accordance with the original schedule. Counsel for Reclamation/Service did not receive ALJ Grant's Ruling until March 6, 2006. Counsel for Reclamation/Service did not receive the other parties Opening Briefs until March 10, 2006 (Staff's Opening Brief was received on March 9 and KWUA's brief was faxed on March 10, 2006). Counsel for Reclamation/Service attempted to obtain the other parties' Opening Briefs from the OPUC web site, however, the briefs were not posted until March 9, 2006. The parties are aware that counsel for Reclamation/Service does not have internet access, yet no attempt was made to ensure timely receipt of the briefs considering the very limited time available to file reply briefs.

the Klamath Basin. This position is clearly not just and reasonable. These parties do not support their position with other than speculation and subjective statements. They base their unreasonable position on criticism of the clear and substantial evidence of benefits provided to PacifiCorp's power generation by the irrigators. They also raise various arguments that are not relevant to the issue now before the Commission, which is what is the appropriate power rate under Oregon law. Issues concerning water rights, Federal Power Act, Indian trust obligations, endangered species act, and water quality are not relevant to this question.

The Klamath Basin irrigators do not base their case for benefits on any of these concerns and for good reason. They are not relevant. The benefits from the irrigators to PacifiCorp were clearly identified in 1956, which is the relevant baseline (not 1917), and these benefits have not changed since that time.

Of note, it appears that ONRC et al. has as their only purpose in this proceeding to reduce or eliminate irrigation diversions from the Klamath River at any cost, even if that results in cutting off the water supply to the National Wildlife Refuges. See e.g. ONRC Opening Brief, p. 42. The Hoopa Valley Tribe echoes this sentiment. Hoopa Valley Tribe Opening Brief, p. 6. Staff apparently wants the Commission to set higher power costs so that electric energy demand in the Klamath Basin can be reduced. Staff's Opening Brief, p. 4. While it is clear as to motivation for the ONRC and Hoopa Tribe position, it is difficult to justify Staff's motivation. Such positions are not "just and reasonable." Statements based on speculation, inflammatory rhetoric and single-minded punitive goals are not evidence. The irrigators have demonstrated by substantial evidence based on data that the Commission is justified in establishing a separate class of customers with rates lower than those proposed by PacifiCorp.

II. DISCUSSION

A. The Commission has ample evidence to properly establish a separate class of customers for the irrigators

PacifiCorp asserts that all Klamath Basin irrigation customers, except one, have load characteristics similar to those irrigation customers served under Schedule 41. PacifiCorp's Opening Brief, p. 4. To the contrary, PacifiCorp's own evidence belies this fact. The percentage of customers versus annual kWh is markedly different. PPL/1215, Griffith/1. Further, there is significant power use outside of the summer season. PPL/1219. KWUA witness Schoenbeck also notes this difference in customer characteristics. KWUA Opening Brief, p. 5. These, and other, significant differences provide support for the Commission to establish a separate rate class for the irrigators.

B. The benefits provided to PacifiCorp by the irrigators are supported by substantial evidence.

PacifiCorp can only point to minor errors in the calculation of the benefits from the Klamath Project to its power generation. PacifiCorp failed to provide any quantitative evidence of its own in support of its assertion that the Klamath Project does not provide any benefits to its power generation. In its attempts to make up for this lack of evidence to support its case, PacifiCorp looks to issues of water law, authorization of Reclamation Projects to develop power and history and operation of the Klamath Project. Unfortunately, most of these issues are either not relevant or do not support PacifiCorp's case.

1. Reclamation had authority to develop power at the Klamath Project.

PacifiCorp cites to the legal arguments of its witness to support an assertion that "Interior was never authorized to 'allow' PacifiCorp to develop the hydroelectric projects." PacifiCorp's Opening Brief, p. 6. As explained in the Reclamation/Service Opening Brief at p. 12, Reclamation had and still does have the authority to develop power or lease any power privilege or surplus power at the Klamath Project. For example, the Act of April 16, 1906, 34 Stat. 117, provides as follows:

Whenever a development of power is necessary for the irrigation of lands, under any project undertaken under the said reclamation act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the money derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived. (emphasis added.)

This statute was amended by the Reclamation Project Act of 1939 to extend the period to forty years and provided the Secretary with authority to set rates for use of such power or power privileges. 43 U.S.C. § 485h(c). Thus, at all relevant times, Reclamation had the authority to develop its own power in aid of irrigation on the Klamath Project, or to lease power privileges and use the revenue for project purposes. Even though PacifiCorp is wrong in its assertion that Reclamation was never authorized to “allow” PacifiCorp to develop power at the Klamath Project, that issue is not relevant to whether the irrigators are a separate class that provide significant benefits to PacifiCorp’s power generation.

2. The benefits presented by the irrigators in this proceeding are the same benefits that were critically important to PacifiCorp in 1956.

PacifiCorp and Staff attempt to undercut the analysis provided by KWUA and Reclamation/Service that clearly identify the benefits to PacifiCorp’s power generation from Klamath Project operations. For example, PacifiCorp asserts that the analysis by KWUA did not take into account the “natural drainage basin around Keno.” PacifiCorp’s Opening Brief, p. 11. PacifiCorp did not attempt to determine whether any of the water from this and “other sources” was directed to the Klamath River through Klamath Project facilities. Further, PacifiCorp admitted that there was no evidence that the quantity of water from these “other sources” has changed since 1956 when PacifiCorp determined that the flow above Keno contributed by the Klamath Project was critical to its power generation. See Reclamation/Service Opening Brief, p. 15.

PacifiCorp makes other assertions that the calculations by KWUA and Reclamation/Service result in overestimates of the benefit. PacifiCorp’s Opening Brief, p. 12-13. As with its other assertions of error in the benefits calculations by KWUA and

Reclamation/Service, PacifiCorp offers nothing quantitative in support. These assertions should be ignored because they are not supported by substantial evidence.

3. Klamath Project operations result in the availability of stored water and the return of significant amounts of water to the Klamath River that benefit power generation.

The testimony by KWUA and Reclamation/Service established the amount of water made available by the Klamath Project above Keno to PacifiCorp's power generation. ONRC et al. attempts to undercut this testimony by relying on subjective statements of other parties and their own assertions that are not supported by the record.

ONRC et al. states that the water diverted by the Klamath Project is completely consumptively used. ONRC et al. Opening Brief, p. 18. This shows an utter lack of understanding of the operations of the Klamath Project and the testimony submitted by KWUA and Reclamation/Service. First, the KWUA and Reclamation/Service testimony relied on actual data of water flows that reach Keno and are thus physically available to PacifiCorp. See e.g. Reclamation/Service/22 –24. This testimony did not rely on qualitative assumptions or speculation, as do the assertions of ONRC et al. It is the very nature of the Klamath Project operations that provides significant return flows to reach the Klamath River. In the absence of these operations the return flows from project irrigation and the excess flows from the Lost River Basin would not be available to the Klamath River. Reclamation/Service/2, Lesley 5-7.

ONRC et al. attempts to support its assertion that the water diverted by the Klamath Project is mostly consumed with little or no return flow by citing to a study completed in 1905, prior to the development of the Klamath Project infrastructure that makes the return flows possible today, inaccurately attributing statements from a second report, and citing to testimony that only relates to the off-project lands. ONRC et al.

Opening Brief, p. 19. ONRC et al. refers to the testimony of Balance in ONRC et al./204, Balance/13 –14 to support the assertion that the consumptive use is much higher than estimated by KWUA witness Van Camp and thus, the return flow benefit is reduced. The Balance testimony references a report from 1905 by Kent that describes irrigation losses from individual canals prior to the construction of the Klamath Project. ONRC et al./204, Balance 13. This report has no relevance to the Klamath Project. The statements in the Balance testimony that reference the report by Burt and Freeman do not refer to percentage losses as identified by ONRC et al. in their Opening brief. Further, and most telling, the cited testimony only refers to the off-project lands and does not even mention the Klamath Project. ONRC et al./204, Balance/13 –14. In sum, while the assertions of ONRC et al. are not supported by the record, they are also not relevant since the quantification of flows made by KWUA and Reclamation/Service are based on actual measurements of return flows from the Klamath Project.

ONRC et al then resorts to sensationalism to avoid discussing the facts. Without providing any evidence they assert that Reclamation “destroyed natural storage” and want credit for creating artificial storage. ONRC et al. Opening Brief, p. 20-21. The only “evidence” to support this assertion is certain conclusions stated in a report by Balance from 1996 the purpose of which was “to describe the historical nature and quality of instream flows of the Klamath River that sustain (but today sustain only at risk) the anadromous fish species central to the economy and culture of the Yurok people.” ONRC et al./205, Balance/10. In addition to the fact that the purpose of this report is not relevant to the issues before the Commission, the conclusions compare

conditions prior to the development of the Klamath Project to current.² No party has asked the Commission to make such a comparison. It is an undisputed fact that the Klamath Project changed the movement of water in the upper Klamath River Basin. For example, releases of water from Upper Klamath Lake are controlled and can be released at times favorable to power generation, waters of the Lost River are made to flow into the Klamath River instead of evaporating, and return flows from water diverted for irrigation and other uses within the Klamath Project are returned to the Klamath River that also provides benefits to power generation. Reclamation/Service/2, Lesley 6. KWUA and Reclamation/Service based their calculation of benefits to PacifiCorp's generation on actual flows existing today, and that existed in 1956 when the benefits were established through the 1956 contract.

ONRC et al. continue their unsupported assertions when they state that only a fraction of the water diverted by the Klamath Project is physically returned to the river. ONRC et al. Opening Brief, p. 22. ONRC misses the point and shows further their lack of understanding of Klamath Project operations. What ONRC and others fail to understand is that the quantities of water they reference from the Klamath Project annual operations plan are the amounts of water available for delivery or the total water supply available to the Project lands, not the amount consumed. Staff/1502, McNamee/12. The inherent nature of Klamath Project operations results in a highly efficient use of that water. This high efficiency means that the Project does not need to divert as much water from the Klamath River and returns more water to the Klamath River than it would if it

² Relying on the Balance Report for issues concerning the Klamath Project is unwarranted due to inaccuracies contained in the report. For example, the report states that PacifiCorp's hydro dams are part of the Klamath Project that "have significantly altered the natural flow patterns" of the Klamath River. ONRC et al./205, Balance/21. Further, testimony by Balance had to be corrected wherein they asserted that actions related to the Klamath Project after 1905 actually occurred two decades prior. ONRC et al./204, Balance/19.

were not for this high efficiency. ONRC et al. again misunderstands how the Klamath Project operates when they assert that this high efficiency means there is very little return flow. ONRC et al. Opening Brief, p. 24. These incorrect conclusory statements are based on speculation. There is no evidence in the record to support these assertions.³

ONRC et al. asserts that the development of the Klamath Project was not done to benefit PacifiCorp. ONRC et al. Opening Brief, p. 25. This is true since the Klamath Project was authorized in 1905. However, when PacifiCorp's predecessor, Copco, sought a license for its hydroelectric project downstream of the Klamath Project, it had to enter into a contract as a condition of that license. The purpose of the contract was to provide PacifiCorp benefits from the operation of the Klamath Project in exchange for reduced power rates. That the 1956 contract is about to expire does not alter the continued existence of these benefits, only that they will not be provided solely as a function of the contract, but rather through this Commission's rate setting authority.⁴

ONRC et al. assertions regarding certain limitations on Klamath Project operations due to the Endangered Species Act (ESA) and possible future legal constraints are without support in the record, speculative or not relevant. Whether Reclamation must provide certain minimum flows as a result of the ESA has no bearing on the determination of rates in this case. However the flows are described, they have been quantified by the witnesses for KWUA and Reclamation/Service in this proceeding and

³ ONRC et al. states that "water flowed from the Lost River system to the Klamath River system naturally at times prior to BOR's re-engineering its hydrology." ONRC et al. Opening Brief, p. 23. The cited reference does not support this statement. Prior to the Klamath Project, during flood events, the waters of the Klamath River overflowed into the Lost River system until irrigators built a dike along the Klamath River in the years prior to the Klamath Project to stop these floodwaters from entering the Lost River system. Fund for Reclamation of Arid Lands, House Report no. 1262, p. 121, 61st Congress, 3rd Session, 1911.

⁴ For the reasons stated above ONRC et al. references to the Balance report regarding purported effects of the Klamath Project on the Klamath River are suspect and not relevant to this proceeding. ONRC et al. Opening Brief, p. 26.

have been shown to benefit PacifiCorp's power generation. There is no evidence in the record that flows that may be required by application of the ESA to Klamath Project operations are not in fact made available through the operations of the Klamath Project; operations that benefit PacifiCorp. Further, the Commission cannot rely on speculative future legal constraints that are not certain to occur. ONRC et al. Opening Brief, p. 30. This does not meet the substantial evidence test. ONRC et al. are unable to refer to any specific action that is certain to occur from these "future legal constraints" that affect the issues now before the Commission. Unsupported assertions and inflammatory rhetoric is not evidence, yet these form the basis of ONRC's case.

ONRC et al. asserts that the potential increase in power rates in Oregon will not affect the National Wildlife Refuges. ONRC et al. Opening Brief, p. 43. While it is true that a relatively minor component of the power consumption and costs for the refuges is in California and not directly part of this proceeding, the majority of the impact from a dramatic increase in power rates in Oregon will adversely affect the water supply to the refuge as well as increase its costs for power in Oregon. Reclamation/Service/1, Cole/2-3. As explained in the testimony, as water conservation of the irrigators upstream of the refuges increases due to increases in power rates, less water will be available to the refuges and the water it does get will be obtained at a higher cost. This impact is of real concern to the refuges.

C. The only water rights that are relevant to this case are those of the Klamath Project and PacifiCorp.

The only issue of relevance to this proceeding regarding water rights is the relative priority dates between the water rights of the Klamath Project and PacifiCorp. It is undisputed that, except for a minor water right on the Link River, the water rights of

the Klamath Project are superior in priority to those held by PacifiCorp.⁵ Further, for the purpose of this proceeding to determine the benefits of the Klamath Project to PacifiCorp's power generation, the holder of the Klamath Project water rights is not controlling. While certain parties have noted two recent decisions concluding that the water rights of the Klamath Project are held by the United States, the project water users, represented in this case by KWUA, have a beneficial interest in that water through contracts with the United States. See ONRC et al. Opening Brief, p. 17; Hoopa Valley Tribe Opening Brief, p. 7. It is clear from the 1956 contract that the power rates based on the benefits of the Klamath Project to PacifiCorp's power generation are to flow to the irrigators in addition to the United States. Further, any discussion about the unquantified water rights of the various Indian Tribes is not an issue in this proceeding. Even if the rights were relevant to this proceeding, no evidence was presented regarding the nature of these rights. Therefore, they cannot be considered in arriving at a decision in this case.

PacifiCorp, ONRC et al. and the Hoopa Valley Tribe discuss various aspects of Oregon water law and attempt to relate that discussion to the issues in this case. While the issues they raise are largely not relevant to this proceeding, even if they were, these parties clearly do not understand Oregon water law as it relates to the water rights of the Klamath Project.

These parties assert that the return flows are in excess of the Klamath Project's beneficial use, belong to the public and cannot be counted as a benefit to PacifiCorp. PacifiCorp's Opening Brief, p. 15; ONRC et al. Opening Brief, p. 33; Hoopa Valley Tribe Opening Brief, p. 9. Return flows are water that has already been diverted and are truly "owned" by the appropriator as they have been lawfully diverted from the stream

⁵ As noted by the Reclamation witness, there are certain water rights related to the Klamath Project that have priority dates earlier than 1905. TP 173-174 (Lesley).

(or from storage) and are under the control of the appropriator until relinquished back to the stream. See Ide v. United States, 263 U.S. 497 (1924); Jones v. Warm Springs Irrigation District, 162 Or. 186, 91 P.2d 542 (1939); Cleaver v. Judd, 238 Or. 266, 393 P.2d 193 (1964). Until the water passes Keno, the Klamath Project retains its control over that water and it is not available for appropriation by others. Reclamation/Service/2, Lesley 4-6. Thus, this water is being made available to PacifiCorp through the operation of the Klamath Project, which has lawfully stored the water and/or diverted it for beneficial use. Further, the water rights of the Klamath Project are pre-1909 water rights in Oregon. The post 1909 water law cited by these parties does not affect the validity or exercise of these rights. ORS 539.010(4).⁶

D. Water flows provided to PacifiCorp through the operation of the Klamath Project, that includes over 200,000 acres of irrigated farmland and refuge lands, formed the basis of the 1956 contract and the benefit of these flows is required by the Klamath Compact to be considered in determining rates.

PacifiCorp refers to the significant flows provided by the Klamath Project to its power generation as incidental to the normal course of business of the irrigators.

PacifiCorp's Opening Brief, p. 21. The various facilities of the Klamath Project that provide storage and return flows to the benefit of PacifiCorp's power generation were part of the consideration for the 1956 contract between PacifiCorp and the United States.

The Klamath Project is operated in a way that accumulates the benefits of the individual

⁶ ONRC et al. raises several other arguments regarding water rights that do not pertain to the water rights of the Klamath Project. ONRC et al. Opening Brief, p. 34-35. As noted above, the water rights of the Klamath Project are pre-1909 water rights and are not rights obtained under permits or certificates. Thus, ONRC et al. discussion of permits and certificates is not relevant. Further, their discussion regarding beneficial use without waste is not relevant. ONRC et al. cite to no evidence to support their outlandish assertions regarding waste and return flows. The evidence in this proceeding does not support any characterization of the use of water within the Klamath Project as wasteful. In fact, the evidence shows the contrary, that water use is highly efficient. Further, as explained above, the Klamath Project return flows are properly credited to the project and can be reused until control of those return flows is relinquished which is not until those flows pass Keno.

irrigators and the United States and provides those in a deliberate fashion to PacifiCorp. It is this coordinated and deliberate effort that makes the benefits to PacifiCorp possible.

These are not merely incidental benefits of an individual irrigator. From the beginning of the relationship between PacifiCorp and the Klamath Project, mutual benefits have been recognized and memorialized by contract and through PacifiCorp's FERC license. PacifiCorp now wants to accept the benefits from the Klamath Project without providing anything in return. This is unacceptable. There is substantial evidence before the Commission to support the significant benefits to PacifiCorp and its power customers to justify a separate class and rate for the irrigators.

PacifiCorp cites to the Klamath River Basin Compact to support its assertion that the return flows are merely a result of the irrigators' legal obligation and they should not receive compensation for complying with the law. PacifiCorp's Opening Brief, p. 22. PacifiCorp's assertion is baseless as they misunderstand the Compact. PacifiCorp cites to Article III. B in support of this contention. Article III. B. is titled "Acquisition of Future Rights in Upper Klamath River Basin." The lead in phrase of Article III.B. is "[s]ubject to the rights described in subdivision A." The water rights of the Klamath Project are the subject of this subdivision A. These rights pre-date the Compact and are not "future" rights, which are those rights, acquired after the effective date of the Compact.

Next, PacifiCorp attempts to escape without compensating the irrigators for the benefits of the added flow in the Klamath River by asserting that merely because certain irrigators are compensated by Reclamation for pumping groundwater PacifiCorp should be freed from paying for any water associated with those payments. It is not PacifiCorp

that is paying for this groundwater pumping; it is Reclamation. The benefits still flow to PacifiCorp due to the operations of the Klamath Project of which this program is a part.

PacifiCorp lastly attempts to escape without compensating the irrigators by asserting that any payments it must make to FERC as government dam use charges coupled with any compensation ordered by this Commission would result in “double recovery by the government.” PacifiCorp’s Opening Brief, p. 28. First, FERC has not yet acted on this issue. Second, PacifiCorp has expressed its view to FERC that any such charges would only apply to the Eastside and Westside facilities and only for one year. See Exhibit A to KWUA Opening Brief. Instead of a threat of double recovery, PacifiCorp is attempting to limit any recovery to a nominal amount. The Commission should not be swayed by this slight of hand.

This is a common theme in PacifiCorp’s brief. PacifiCorp’s position is that, merely because the 1956 contract will expire in April 2006, it should no longer pay for the benefits it receives from the Klamath Project. While the contract may expire, the benefits continue. PacifiCorp should pay for them. The Klamath River Basin Compact requires that the commission consider these benefits in setting power rates for the irrigators.

III. CONCLUSION

PacifiCorp, ONRC et al., Hoopa Valley Tribe and Staff have attempted to sway the Commission that the significant quantities of return flows and the regulation of storage made possible by the operation of the Klamath Project are inconsequential and PacifiCorp should not have to compensate the irrigators for the benefits it receives from these flows and storage regulation. These assertions are based on subjective statements without quantification or speculation without support in the record. The irrigators on the other hand have demonstrated by substantial evidence that PacifiCorp does benefit from these flows and storage regulation and that these benefits justify the establishment of a

separate class of customers that should pay a rate lower than that requested by PacifiCorp.

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